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WHAT'S HAPPENING

E.W. Ensroth Decision: 90-Day Issuance Rule

On May 3, 2011, the **Construction Safety and Health Division** issued a citation against E.W. Ensroth Company (Ensroth) following a fatality and spinoff investigation conducted by a General Industry Safety and Health Division compliance officer. The company timely contested the citation to the formal hearing step. The company then filed a motion to dismiss the citation on the grounds that MIOSHA issued the citation beyond 90 days from the completion of the inspection or investigation.

The Michigan Occupational Safety and Health Act (MIOSH Act) requires MIOSHA to issue a citation "within 90 days **after the completion of the physical inspection or investigation.**"

Ensroth asserted that the inspection or investigation was actually completed on January 24, 2011, the last date information from the company was provided to the compliance officer. Ensroth asserted that based upon the January 24 date, the 90-day timeline for citation issuance expired on April 24, 2011, and thus the May 3, 2011, citation was untimely issued.

MIOSHA contended, among other things, that the inspection or investigation was completed on the date the compliance officer conducted the closing conference. Using the closing conference date, MIOSHA contended the 90-day timeline to issue citations expired May 9, 2011; therefore, the May 3, 2011, citation was timely.

Earlier this month, the judge concluded the citation was timely issued and denied the company's motion to dismiss. The Administrative Law Judge (ALJ) ruled that closing conferences are required by law under Section 29(8) of the MIOSH Act and by the administrative rules which govern the inspection and citation issuance processes. The ALJ found:

...since the closing conference is mandatory it must be considered to be part of the inspection. No inspection is complete without a closing conference either happening or being declined.

The judge also agreed with MIOSHA that the usage of the closing conference date to signify the completion of the inspection or investigation is the most practical manner to determine when the clock for citation issuance begins to run. "Under the rule proposed by Ensroth, the point at which an investigation ends and the clock starts running would be very hard to determine."

Since the closing conference held with the company on February 8, 2011, marked the end of the inspection, the citation was issued within the 90-day deadline.

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Tipped Employees

In addition to Act 390, *Michigan Payment of Wages and Fringe Benefits*, the Wage and Hour Division also enforces **Act 154, Michigan Minimum Wage and Overtime law**. This Act applies to employers in the State of Michigan that have two or more employees age 16 or older. Michigan's Minimum wage is \$7.40 per hour, which began July 1, 2008. The federal minimum wage is \$7.25 per hour. When an employee is subject to both the state and federal minimum wage laws, the employee is entitled to the higher of the two minimum wage rates.

Under Act 154 employers are allowed to pay tipped employees \$2.65 per hour as long as the tipped employee receives at least \$4.75 per hour in tips to bring them up to the Michigan minimum wage of \$7.40. A tipped employee is someone who customarily and regularly receives tips or gratuities from patrons or customers for services in the course of their employment. Tipped income is reported as indicated by the employee's declaration for tax purposes. In addition, it is required that the employer inform the employee of this tip credit allowance before the credit is utilized. Tips received are verified by tip statements signed by the employee or an electronic tip report signed by the employee. The employer must maintain a record of the tips received for each pay period, i.e., weekly, bi-weekly, semimonthly, or monthly.

The tip statement is maintained in the employment record. The combined total of tips received, cash wages paid, and employer's required contribution must not be less than the applicable minimum hourly rate.

When tips are charged on a credit card the employer must pay the credit card company a percentage rate for its collection services. The employer may pay the employee the amount of the tip indicated, less the percentage rate. The amount actually received by the employee shall be used in determining whether the employee was paid at the prescribed minimum wage.

Anyone who believes they are not being paid at least minimum wage of \$7.40 per hour has three years from the date of the violation to file a claim. Questions regarding the Michigan Minimum Wage law should be directed to the Wage and Hour Division at 517-322-1825 or 313-456-4906.

Michigan Industrial Ventilation Conference

Industrial ventilation experts from across the United States and Canada will provide instruction and lectures on the design, construction, operation, maintenance, and testing of ventilation systems. The Conference offers three levels of system design classes (Phase I, Phase II, and Nonstandard Air) as well as an Operations & Maintenance class. There are also two optional workshops: Troubleshooting Workshop and Combustible Dust Workshop.

February 4-7, 2013: Ventilation Conference

February 8, 2013: Combustible Dust Workshop (3/4 day w/lunch)

February 8, 2013: Troubleshooting Workshop (3/4 day w/ lunch)

MEDIA

September 10, 2012 – [Cintas Macomb Facility Receives State Award for Outstanding Safety and Health Record](#)

All MIOSHA Press Releases can be viewed on our [website](#).

CALENDAR OF EVENTS

October 17, 2012 – Occupational Health Standards Commission Meeting @ 9:30 am – State Secondary Complex, General Office Building, 7150 Harris Drive, Lansing – Conference Room B

November 7, 2012 – Construction Safety Standards Commission Meeting @ 9:30 am – State Secondary Complex, General Office Building, 7150 Harris Drive, Lansing – Conference Room B

December 12, 2012 – General Industry Safety and Health Standards Commission Meeting @ 9:30 am – State Secondary Complex, General Office Building, 7150 Harris Drive, Lansing – Conference Room B

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