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EDITORIAL

We started a discussion topic on four safety related LinkedIn Groups. These topics were related to the management function of EHS. Of course that is the focus of ISHM and the organization promotes safety management as an integral function in any organization.

The discussions have been illuminating and enlightening. It seems we can all learn more every day when professionals share their thoughts and suggestions.

Yours truly really like to keep things simple (KISS) and seems that all the discussions about big companies vs. small companies, enlightened leadership, and onward can be easily dissolved into one easy concept.

EXPECTATIONS!!! If a company’s senior managers EXPECT that everyone in the organization will adhere to best business practices involving safety that the compliance issue will quickly resolve itself.

This would allow the professional safety manager the ability to participate in decision processes for acquiring new equipment, estimating projects, developing new work procedures and on and on.

RAISE THE COMPANY EXPECTATIONS
Give safety a seat at the table with a line item in the budget. Demand that the safety manager provide financial data to support the profitability of safety.

To those who say with no incidents there is no need for safety managers. Phooey,,,,,safety managers are the reason for no incidents.

We are surprised that there have not been more “Ask the Lawyer” questions. Hopefully you find this segment interesting and informative.

Meet the ISHM Board of Directors, this month Thomas J. Slavin, MS, MBA, CSP, CIH, CSHM, CPEA

Tom Slavin is President of Slavin OSH Group, LLC where he works with clients to improve occupational safety and health (OSH) management systems, assure compliance and solve problems. Tom brings over 30 years of experience in managing OSH, retiring as Global Safety and Health Director from Navistar, Inc., where he worked with leaders at all levels to establish OSH vision, set goals, define metrics and assure compliance and enhance performance. He helped reduce injuries and lost time by more than 85% and helped turn a contentious labor relationship into a model of trust and cooperation on safety which set the tone for other areas of the business.

Tom is a recognized leader in the OSH profession and has shared his knowledge and expertise through associations, publications and presentations. He chairs the ASTM E34 Occupational Safety and Health Committee and the 10Q Safety and Health Committee of the American Foundry Society (AFS). He is past board chair of the Institute for Safety and Health Management and past chair of the National Association of Manufacturers Safety and Health committee. He currently serves on the ANSI Z10 safety and health management systems committee and the NIOSH National Occupational Research Agenda manufacturing sector team. He is a recipient of the AFS Childress-Loebler lifetime achievement award and the ASTM award of merit.

Tom has authored or co-authored more than 20 book chapters and peer reviewed journal articles on a variety of topics including sustainability, combustible dust, fine particles, overtime, diesel health, human capital, ergonomics, silica, audits and workplace violence. He has delivered more than 100 lectures and presentations to university and national audiences.

Ask the Lawyer

Question: OSHA has recently announced that union representatives may participate in walkaround inspections in non-union facilities. What are the
ground rules for selecting an employee representative and what options does an employer have?

Answer: This is an excellent question, as this topic has received quite a bit of attention since OSHA released an Interpretation Letter on February 21, 2013 regarding walkaround rights during inspections. Before answering this question, it is helpful to provide background and context. The OSHA statute and regulations specifically address walkaround rights. Under section 8(e) of the Occupational Safety and Health Act, a representative of the employer and a representative “authorized by the employees” shall be given the right to accompany the OSHA inspector during the physical inspection of the workplace.

In accordance with the statute, OSHA promulgated regulations, set forth in section 1903.8, defining the scope and parameters of walkaround rights. Section 1903.8(a) provides that the compliance officer shall be in charge of the inspection, and that a representative of the employer and a representative authorized by the employees have the right to accompany the compliance officer for the purpose of aiding the inspection. Under section 1903.8(b), the compliance officer has the authority to resolve any disputes as to who will serve as the representative of the employer and the employees. Section 1903.8(c) provides that the representative authorized by the employees shall be an employee of the employer, unless good cause is shown in the judgment of the compliance officer that accompaniment by a non-employee of the employer, who is authorized by the employees, is reasonably necessary to conduct an effective and thorough physical inspection of the workplace. Section 1903.8(d) provides that the compliance officer has the authority to deny the accompaniment of any third party who may interfere with a fair and orderly inspection. Finally, section 1903.9(d) allows the employer to protect any trade secrets during the inspection. This section provides that any authorized representative of the employees who accompanies the compliance officer in an area of the facility that contains trade secrets must be either an employee who works in that area or an employee who is approved by the employer.

On February 21, 2013, OSHA issued an Interpretation Letter that confirms the basic principles set forth in section 8(e) of the Act and section 1903.8 of the regulations, namely, that the representative authorized by the employees to accompany the compliance officer during the physical inspection may be a non-employee of the employer, subject to the approval of the compliance officer. Of note, in section 1903.8(c), OSHA identified an “industrial hygienist or a safety engineer” as examples of the type of non-employee who may serve as the authorized representative of the employees. In the Interpretation Letter, however, OSHA went further than the express language of section 1903.8(c), by stating that at an employer’s facility where there is no collective bargaining agreement, the authorized representative of the employees may be a person affiliated with a union or a community organization.

This is an enormous enlargement of what was previously allowed for walkaround rights. While a person affiliated with a union or community organization may contribute to the inspection by virtue of having a safety background, that person may also serve the dual purpose of assisting the employees to organize at the facility. As a result, this Interpretation Letter has received the attention of both management and unions throughout the country.

As to the specific question raised – what are the ground rules for selecting an employee representative and what options does the employer have – we must look to the express language of section 1903.8 of the regulations. That section provides that the compliance officer has the authority to resolve disputes regarding who will serve as the employee representative during the inspection of the facility. If the person authorized by the employees is not employed by the employer, the compliance officer must consider whether the employees have shown good cause that it is reasonably necessary to have a non-employee accompany the compliance
officer in order to conduct an effective and thorough physical inspection, whether the non-employee will aid the inspection, and whether the third party will interfere with a fair and orderly inspection. This is the standard set forth in section 1903.8 and, therefore, these are the factors the compliance officer must consider.

If the employer objects to the non-employee being present for the physical inspection of the workplace, the first option the employer has is to appeal directly to the compliance officer. If that is unsuccessful, the next step is to appeal to the area director. The employer also has the option to refuse to allow the non-employee representative into the facility and require OSHA to obtain a warrant. That option should only be used if the employer believes there are strong grounds under section 1903.8 that the employees have not shown good cause to identify a non-employee representative.

Given the implications of allowing a union representative to serve as the authorized representative of the employees at a non-union facility, I suspect that OSHA may issue a follow-up Interpretation Letter or a Guidance Document providing further clarification of the ground rules for walkaround rights by a non-employee.

Darren Hunter is a partner and an experienced OSHA practitioner in the Chicago law firm of Rooney Rippie & Ratnaswamy LLP. This column does not constitute legal advice or the formation or proposal of an attorney-client relationship to or with any person or entity. In addition, this column should not be understood to represent the views of ISHM, the law firm, the individual attorneys at the firm, or of any of the firm’s clients or former clients.