



Power to Cite for Retaliation Upheld By Adele L. Abrams, Esq., CMSP

A recent ruling by OSHRC Administrative Law Judge Coleman has upheld OSHA’s power to issue citations and impose civil penalties against an employer who suspended an employee who reported an injury. The decision in *Secretary of Labor v. US Postal Service*, ruled in favor of the government’s motion for summary judgment. It rejected the USPS theory that the 2016 regulation under 29 CFR Part 1904 was duplicative of protections in the statutory provision, Section 11(c) of the OSH Act, and was therefore ultra vires. The court further held that OSHA’s promulgation of the whistleblower provisions of Part 1904, as part of the 2016 Electronic Recordkeeping Rule, was not done in an arbitrary and capricious manner.

In 2018, OSHA cited USPS for one “other than serious” violation of Part 1904.35(b)(1)(iv), which provides that an employer “must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness.” OSHA proposed a \$5,543 penalty for the alleged violation, which was the issuance of a seven day suspension to a mail carrier because he reported a work related injury.

USPS argued that Section 11(c) provided an exclusive remedy (reinstatement, back pay, for the affected worker) and that it was not Congress’ intent to allow the agency to separately fine the employer and require abatement under a codified regulation. It also argued that OSHA’s promulgation of the standard was arbitrary and capricious, and that “Chevron deference” to the agency’s position was not warranted.

In upholding OSHA’s ability to issue

citations under Part 1904.35 for retaliation, ALJ Coleman noted that the original 1970 OSH Act directed the agency to compile accurate statistics on work injuries and illnesses and to prescribe regulations requiring employers to maintain accurate injury and illness records. Examining subsequent regulations and policies of the agency, he found that nothing indicated the intent of Congress or OSHA to make Section 11(c) an exclusive remedy for redressing unlawful retaliation, and he observed that the provision itself contains no limiting language of any kind.

Part 1904.35 requires employers to have a reasonable procedure for employees to report injuries and illnesses “promptly and accurately.” A procedure violates this regulation “if it would deter or discourage a reasonable employee from accurately reporting” an injury or illness. The rule also requires employers to inform workers of their right to report injuries and illnesses, and to tell them that employers are prohibited from discharging or in any manner discriminating against workers for reporting their conditions. Finally, the provision cited against USPS prohibits such retaliation and makes it a citable offense.

Prior to promulgating the regulation, OSHA’s National Emphasis Program on Recordkeeping found that over 50 percent of audited employers were underreporting injuries, and that employees refrained from reporting due to fear of discipline, drug testing, or loss of incentive program bonuses and awards. This evidence that retaliation was, in fact, suppressing injury reports was the underpinning for the 2016 final rule. The ALJ found that the primary motivation for the OSHA regulation was to advance its responsibility to collect accurate data rather than to redress existing Section, *con’t page 9*

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Operator's Desire to Take Duplicate Samples

By Michael Peelish, Esq.

We have been made aware that some MSHA inspectors are not allowing operators to take a sample on the same miner while MSHA is sampling under the metal/non-metal regulations §56/57.5001 and §56/57.5002. The specific question is whether an MSHA inspector can prohibit an operator from taking what are called "duplicate samples". These samples are taken by the operator alongside the MSHA inspector's sampling devices. What makes the situation more difficult is that MSHA many times will take two (2) samples, one for dust and one for noise. If the operator wants to take "duplicate samples", this means the employee will have to wear four (4) sampling devices.

MSHA's Inspection Procedures do not address MSHA's refusal to allow an operator to take "duplicate samples" nor do these procedures address MSHA's right to take multiple samples on the same miner. They do address a Refusal of the "Miner to be Sampled" under Section III, Sampling Protocol, Section D:

Refusal of the Miner to be Sampled. "If a miner objects to wearing the sampling device, determine the reasons for the objection. Explain the need for the sampling. If you cannot obtain the cooperation of the miner and another miner performing the same job at the same location is available and cooperative, sample the cooperative miner. If the refusal is an attempt to impede or prevent an inspection, the inspector should attempt to complete any parts of the inspection that do not involve sampling, then contact his/her supervisor. In such cases, the supervisor is responsible for collecting all the facts, reducing them to writing, and contacting the district or assistant district manager. Consult the Program Policy Manual, Volume I, I.103-1, Assaulting, Intimidating or Impeding Inspectors, for current policy on actions to be taken in such circumstances."

A contact was made with MSHA regarding a recent incident whereby an inspector did not allow a "duplicate sample". According to MSHA, there has not been a change in policy to prohibit "duplicate samples". MSHA is concerned with a miner having too many devices attached that can make it difficult for them to work or create a safety hazard. MSHA went on to say that MSHA would not allow an instantaneous sampling device to operate beside an MSHA sampling pump since it could

affect the work behaviors of the employee being sampled. This is a reasonable position for MSHA to take on the instantaneous monitor. If an operator insists on taking "duplicate samples", MSHA could make an allegation under Section 103(a) of the Mine Act which addresses impeding an inspection.

Our recommendations for managing this situation include:

- The operator should ask MSHA to sample two miners donning only one sampling device each thereby reducing the number of sampling devices on each miner. These miners would have to be performing the same or similar task that MSHA wanted to monitor. This approach may provide for a reasonable compromise.
- This could become a fact specific determination based on the number of devices (2 versus 4) and the tasks being performed (mobile equipment operator or bagging and shipping or plant labor). The operator could make legitimate claims that the miner's work will not be altered by the presence of these sampling devices. If the MSHA Inspector continues to not allow "duplicate samples" whether on a fact specific basis or as an across the board policy by that inspector or district, then the operator should document the specific conditions present during the MSHA sampling, i.e., the task(s) being performed, tools or equipment used or operated, production data, weather/environmental conditions, etc. In this situation, the operator should take a representative sample if possible, of another miner performing the same or similar tasks. Likewise, the operator should ensure that its representative sampling is well-documented for comparison purposes, especially if the MSHA exposure monitoring data indicates an overexposure.
- The operator always has the right to take "representative or objective samples" which are samples collected on the next scheduled shift of the same miner or samples collected from other miners on the same shift performing the same or similar tasks. This sample would serve as the "duplicate sample". Again, if an operator is not able to take a "duplicate sample" on the miner MSHA is sampling, then ensure that each sampling event is well-documented since the burden of proof will be on the operator to show the samples represent the same exposures as the miner sampled by MSHA.
- The operator has a good faith argument that it has a competing interest of due process to ensure the proper sampling process is followed by MSHA increasing the likelihood of accurate and precise results.

For more information or assistance, contact the Law Office.

How to Calculate Hours Worked

By Michael Peelish, Esq.

Regarding an operator's efforts to ensure accuracy in the hours worked that are reported to MSHA on its quarterly 7000-2 reports, there are simple processes for operators to follow. The resources considered included the MSHA regulation, the MSHA Yellow Jacket (December 1986), instructor's training manuals, and the Federal Mine Safety and Health Review Commission Decisions. There were no more recent interpretations.

Regarding the "total actual hours worked" for hourly employees, record the "total actual hours worked" per the time capture system in use at your location. This system should capture days off which should not be included in the total hours worked. Do not include extra time for bathhouse or parking lot based on the 1986 Yellow Jacket and current Review Commission precedent guidance.

Regarding the "total actual hours worked" for salaried employees, a time-study is a reasonable and effective means to determine the average actual hours worked. A reasonable period is to conduct a time study over a typical 2-week pay period, or if paid monthly, over a 4-week pay period. Then add up the hours worked and divide by the days worked and that is a representative number of hours worked per day for each supervisor. If a supervisor takes a day off during the time study, then don't count that day when you divide the total hours worked during the period. Then going forward, apply the average hours worked per day to all days worked during the quarter. If extra hours are worked on mine property on a nonscheduled work day, then keep a record of those hours during the quarter. Indeed, all hours for days off including vacation, sick leave, personal leave or days away from work due to work-related injuries must not be counted.

Corporate employees (e.g. logistics function, sales function) that work daily at the mine/plant site should be reported on the plant site's 7000-2 report since these employees are exposed to mine hazards once on mine property. However, only persons who "work at a mine and are engaged in mining operations" have to receive new miner, experienced miner or annual refresher training. Provided the corporate workers do not meet this definition, they do not have to receive the new miner, experienced miner or annual refresher training. Even if these same corporate employees occasionally visit an area of the mine for review or information gathering, they still do not have to be trained as miners. They do however need to receive the site-

specific hazard awareness training which must be documented.

Regarding the hours worked for remote employees that work for mine operators, they do not have to be reported on the 7000-2 report since they are not working on mine property. However, these office facilities are subject to OSHA regulations. OSHA does not have an explicit regulation or interpretation under 29 CFR §1904 on how to capture employees' hours who work from home all the time or occasionally. The recommendation is to report these hours under the establishment or base to which they report.

2020 Budget Proposal and Workplace Safety Agencies

By Gary Visscher, Esq.

For the first time since August 2016, the Federal Mine Safety and Health Review Commission has all five of its seats filled. On March 14, 2019 the U.S. Senate confirmed three nominees for FMSHRC, William Althen, Marco Rajkovich, Jr., and Arthur Traynor III. They join current commissioners Mary Lou Jordan and Michael Young. Mr. Rajkovich was nominated by President Trump to serve as chair of the FMSHRC.

The FMSHRC has been down to 2 members since August 2018, meaning that while new cases could be accepted for review (if both commissioners agreed), the Commission could not issue any new decisions. The commission has granted review in only five cases since the end of August 2018. For two years prior to the end of August 2018, FMSHRC was at 4 members, which resulted in several 2-2 decisions. In those cases, the ALJ's decision stands as a non-precedential decision.

Meanwhile, the Occupational Safety and Health Review Commission, which has been at full membership with 3 members since August 2017, will apparently soon be down to a single member. Current Chair Heather McDougall recently announced that she plans to leave OSHRC, and Commission member Cynthia Attwood's term expires at the end of April. During the period of full membership OSHRC has been able to reduce its backlog and decide many of its oldest cases. OSHRC currently has 19 pending cases for which it has granted discretionary review.

The Trump Administration released its 2020 proposed budget on March 11, 2019. The release of the Administration's budget proposal marks the beginning of Congress' work on passing appropriations for FY 2020, which begins on October 1, 2019. Reaching agreement on the 2020 appropriations may be particularly difficult this year because of differences in spending priorities between

2020 Budget Proposal, con't

the House and Senate, and likely efforts to include a variety of policy issues in the “must pass” appropriations bills.

The Trump Administration proposal would increase spending on defense and homeland security, while reducing appropriations for some domestic policy programs and agencies. The Environmental Protection Agency would have its discretionary spending reduced by 31%, compared to 2019 funding.

The Department of Labor’s overall discretionary spending would be reduced by 9.7%, compared to 2019. However, within DOL’s overall amount, the Administration would increase OSHA by \$300,000, and increase MSHA by \$2.2 million, over their respective 2019 appropriations.

For OSHA, the two areas specified for increases are federal enforcement and safety and health statistics. The latter is targeted for data “CLOUD migration” and “IT modernization.” Federal enforcement would receive a \$3.7 million increase in spending, which includes funding for 26 additional CSHOs. Whistleblower enforcement and investigations would also receive an additional 5 investigators. The budget proposal calls for eliminating the Susan Harwood training grants program. That proposal has been made in past years but not agreed to by Congress.

MSHA’s budget proposal pushes an initiative by Assistant Secretary Zatezalo to administratively merge coal and metal/nonmetal enforcement: previous years’ proposed budgets listed separate budgeted amounts for coal and metal/nonmetal enforcement. The proposed 2020 budget combines the two and lists a single amount for “Mine Safety and Health Enforcement.” The single enforcement budget is about \$300,000 less than the combined total for the two separate enforcement budgets in 2019. All of MSHA’s budget increase would be used to support DOL-wide “Worker Protection Agencies’ IT Modernization efforts.”

The Bureau of Labor Statistics is the primary source of information on workplace deaths, injuries and illnesses. Last summer the Trump Administration proposed to merge BLS with two statistical agencies in the Commerce Department, the Census Bureau and the Bureau of Economic Analysis. The proposed budget for 2020 reiterates that proposal, but also includes funding for a planned future move from BLS’ current headquarters in

downtown Washington DC to a federal office complex in Maryland.

The National Institute on Occupational Safety and Health (NIOSH) is funded through the Department of Health and Human Services. Last year, in its 2019 budget proposal, the Trump Administration proposed to transfer NIOSH from the Centers for Disease Control (CDC) to the National Institutes of Health (NIH), as well as reduce its funding. Nothing came of the proposed transfer, and the 2020 budget proposal does not repeat it. The proposed budget would however, reduce NIOSH’s funding from \$336 million to \$190 million; in addition, NIOSH would continue to oversee spending for victims of the World Trade Center attack.

The 2020 budget proposal repeats a recommendation by the Trump Administration to eliminate the U.S. Chemical Safety Board, though the proposed budget includes \$10 million for 2020, for expenses related to closing down the agency. The Trump Administration made a similar proposal in last year’s budget but did not submit or push actual legislation. In 2019 Congress funded the CSB at \$12 million. The CSB, which is unusual in that by statute it submits a budget request directly to Congress, requested \$12.45 million for 2020 in its budget request.



Joshua Schultz conducting Annual Refresher Training at OIAAA

When Is “Heat Stress” A Recognized Hazard For Purposes Of OSHA’s General Duty Clause?

By Brian S. Yellin, Esq, CIH, CSP

In a February 28, 2019 decision, Secretary of Labor v. A.H. Sturgill Roofing, Inc., OSHRC Docket No. 13-0224, the Occupational Safety and Health Review Commission (“OSHRC”) brought into question whether “heat stress” is a recognized hazard for purposes of OSHA’s General Duty Clause.

On August 1, 2012, A.H. Sturgill Roofing, Inc. (“Sturgill”) was engaged in the replacement of a large, flat roof of a bank. Sturgill’s roof replacement crew included both employees and temporary workers. One of the temporary workers, a 60-year-old male, MR, who purportedly had several significant pre-existing conditions that were unknown to Sturgill, started his first day of work by transferring roofing scraps and debris from the roof’s edge to a dumpster below.

When work started at 6:30 a.m. the air temperature was reportedly 72 degrees Fahrenheit with 84% relative humidity. At approximately 11:40 a.m., Sturgill’s foreman and work crew became concerned when MR collapsed and began shaking. The air temperature was 82 degrees Fahrenheit with 51% relative humidity at the time MR collapsed.

Emergency services were summoned and MR was transported to the hospital where his core temperature was 105.4 degrees Fahrenheit. MR was diagnosed with heat stroke and died three (3) weeks later.

OSHA investigated this work-related fatality and upon the investigation’s conclusion, issues two (2) Serious citations. The first Serious citation alleged a violation of the General Duty Clause (Section 5(a)(1) of the OSH Act) for exposing employees to the hazard of “excessive heat from working on a commercial roof in the direct sun during the performance of their duties which included removal of roofing material...and installation of new roofing materials.”

The second “Serious” alleged a violation of 29 C.F.R. 1926.21(b)(2) for failing to provide training to its employees on the recognition and avoidance of “risk factors related to the development of heat-related illnesses.” 29 C.F.R. 1926.21(b)(2) provides: “The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.”

The general duty clause requires employers to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

In order to sustain a violation of the general duty clause, OSHA must prove the following elements by a preponderance of the evidence: 1) a condition or activity in the workplace presented a hazard; 2) the employer (or its industry) recognized the hazard; 3) the hazard was likely to cause death or serious physical harm; and 4) a feasible and effective means existed to eliminate or materially reduce the hazard.

In order to prove that work-related condition or activity presents a hazard for purposes of the general duty clause, OSHA must show that the employer exposed its employees to a “significant risk of harm.” Moreover, the work-related hazard must have sufficient severity to cause death or serious physical harm.

OSHA was unable to determine the exact atmospheric conditions, i.e. temperature, humidity, air velocity, etc., existent at Sturgill’s worksite on the day MR collapsed. Rather, OSHA relied on weather data measured at an airport located approximately two (2) miles from the worksite. The airport’s weather data indicated temperatures ranging between 72 degrees Fahrenheit and 83 degrees Fahrenheit with relative humidity levels ranging between 51% to 87%.

At the time MR collapsed, the temperature was 83 degrees Fahrenheit with 55% relative humidity with a combined heat index of 85 degrees Fahrenheit. The heat index (also known as the “apparent temperature”) is a measure of comfort and the body’s ability to dissipate heat.

Because OSHA has not adopted a “heat stress” standard, it relied on the National Weather Service’s (NWS) heat index to establish Sturgill’s employees, including MR, were exposed to “excessive heat.”

According to NWS’ heat index matrix, a heat index of 85 degrees Fahrenheit falls within the “caution” zone, which may result in “possible fatigue with prolonged exposure and/or physical activity.”)

However, OSHA alleged in its citation that the heat index was fifteen (15) degrees Fahrenheit higher because it was “sunny” at Sturgill’s worksite (NWS allows for the heat index to be increased up to 15 degrees Fahrenheit).

Thus, instead of a heat index of 85 degrees Fahrenheit, OSHA alleged the heat index was approximately 100

Sturgill, con't

degrees Fahrenheit thereby placing Sturgill's workers in the "danger zone," which can make "heat cramps or heat exhaustion likely, or heat stroke possible with prolonged exposure and/or physical activity."

The OSHRC ruled that OSHA had not established that Sturgill's workers had "prolonged exposure" to heat index values that fell within the "danger" zone of NWS' heat index matrix or that the work being performed involved "strenuous activity."

OSHRC's decision was based in large part on its determination that OSHA had not established the basis for its increase of the heat index by 15 degrees Fahrenheit, particularly in light of the fact that NWS' heat index matrix does not specify the factors that should be considered when determining how much of an increase (up to 15 degrees Fahrenheit) to apply.

As a result, the OSHRC ruled that the evidence presented could only establish that Sturgill employees were exposed to a heat index of 85 degrees Fahrenheit.

Ultimately, the OSHRC determined heat index exposures falling within the "caution zone" of the NWS heat index matrix does not "connote a significant risk of harm" for purposes of establishing general duty clause violation.

The OSHRC vacated the general duty clause citation. It also vacated the "heat stress" related training citation cited under 1926.21(b)(2) holding that Sturgill's training adequately instructed its employees on the recognition and avoidance of heat-related illness.

NWS' heat index matrix is an easy-to-use guide for employers and employees to apply when determining whether a potential heat-related hazard exists. OSHA's heat index application is interactive and enables users to determine the relative level of heat risk (i.e. lower, moderate, high, very high to extreme) based on the user's location and time of day. The heat index application provides heat risk-specific information and guidance, including work-rest periods, signs and symptoms of heat-related illness, water intake recommendations and other recommended precautions.

More complex tools exist for measuring workers' actual exposure to heat stress, including Wet Bulb Globe Thermometer (WBGT), which is used to estimate the effect of temperature, humidity, wind speed (wind chill), and visible and infrared radiation (sunlight) on humans.

The heat index readings using the WBGT in combination with work type/rate can be used to determine whether workers are exposed to dangerous levels of heat stress. In this regard, the National Institute for Occupational Safety and Health (NIOSH) has established recommended alert limits (RAL's) and recommended exposure limits (REL's), which specify specific precautions that should be taken to protect workers against heat stress based on WBGT and work type/rate. See Recommendations for an Exposure Standard for Workers Exposed to Heat and Hot Environments - <https://www.cdc.gov/niosh/docs/2016-106/pdfs/2016-106.pdf?id=10.26616/NIOSH PUB2016106>

NIOSH Seeks Input of Mine Automation and Safety Research By Michael Peelish, Esq.

NIOSH has issued a Request for Information dated March 18, 2019 (84 FR 9798) seeking input on priority gaps in knowledge regarding the safety and health implications of humans working with automated equipment and associated technologies in mining, with an emphasis on worker safety and health research. On June 26, 2018, MSHA issued a Request for Information (83 FR 29718) regarding the use of technology to improve mine safety with comments due by December 24, 2018. These RFIs are connected insofar as the agencies are seeking comments from interested parties regarding automation technology in the mining industry and how such automation may affect mine safety and health.

A review of the comments filed under the MSHA RFI pointed out the work that NIOSH, the Mine Safety and Health Research Advisory Committee ("MSHRAC"), and others have done in the realm of automation regarding surface haulage and conveyor safety. It also identified gaps or incomplete work in several areas including timing of implementation of technology and the human factors affecting implementation such as miner training. Through this recent NIOSH RFI, these gaps are the focus of how to ensure that automation implementation is done in a way that protects the most important asset – the miner.

Comments to the NIOSH RFI are due by May 17, 2019. This is a tight timeframe which bodes well for the agency's focus on setting priorities so that these valuable technologies can be implemented in an effective manner.

Bipartisan Legislation Protects Federal Worker Marijuana Use

By Adele L., Esq., CMSP

On March 12, 2019, bipartisan legislation (HR 1687) was introduced in the US House of Representatives by Reps. Charlie Crist (D-FL) and Don Young (R-AK), along with eight other cosponsors. The measure, aimed at protecting federal workers who consume cannabis in compliance with state law, has united as co-sponsors such disparate members as far left Rep. Jaime Raskin (D-MD) and far right Rep. Matt Gaetz (R-FL). Under current law, federal employees can be terminated—or not even hired in the first place—over marijuana, regardless of state law.

Much of the motivation for this legislation is the disproportionate impact on veterans of keeping marijuana classified as illegal at the federal level. Many veterans have turned to medical cannabis to treat pain and symptoms of post-traumatic stress disorder, and they represent about one-third of the federal workforce. “For our veterans, cannabis has been shown to address chronic pain and PTSD, often replacing addictive and harmful opioids. At the same time, the federal government is the largest employer of our veterans’ community. This conflict, between medical care and maintaining employment, needs to be resolved,” Crist said in a press release. “For federal employees complying with state cannabis law, they shouldn’t have to choose between a proven treatment and their job.”

The legislation, Fairness in Federal Drug Testing Under State Laws Act, does not yet have a Senate companion measure. It would not bar employers from conducting probable cause drug testing when a worker is suspected of being intoxicated on the job, and it also has exemptions for employees and applicants whose positions require a top-secret clearance. The measure also extends the employment protections to people who use cannabis in accordance with policies of Indian tribes and lands under free association with the U.S.

HR 1687 specifies that employees who test positive for THC metabolites could not be “subject to any adverse personnel action.” The word “personnel” was likely added because its exclusion might have been construed to inadvertently shield federal workers from criminal punishments, given that cannabis remains illegal under federal law. Marijuana is legal in Washington, DC, both recreationally and medically, and this is where many federal employees are based.

Rep. Young, the lead Republican co-sponsor, noted: “This bill would protect federal workers, including veterans, from discrimination should they be participating in activities compliant with state-level cannabis laws on their personal time. The last thing we need is to drive talented workers away from these employment opportunities.” Young is Co-Chair of the Congressional Cannabis Caucus. To date, there have been two dozen separate pieces of legislation introduced addressing marijuana legalization, decriminalization, or the tax and banking issues associated with the cannabis industry.

The Good News/Bad News about Medical Marijuana Legislation in West Virginia

By Sarah Ghiz Korwan, Esq.

In 2017, West Virginia enacted the Medical Cannabis Act which permits patients suffering from serious medical conditions to use marijuana for medical use. Although most provisions of the law took effect immediately upon passage, the regulatory framework required development and the law did not allow for the issuance of identification cards to patients until July 1, 2019. In addition, financial institutions were not protected from federal prosecution, which prevented the West Virginia Department of Health and Human Resources, Bureau for Public Health from accepting and disbursing funds related to applications for permits and fees associated with the implementation of the Act.

The good news is that during this year’s legislative term, a bill was passed by the WV House of Delegates and approved by the Senate, which provides state protections for banks that deal with medical marijuana revenue, and which the governor approved. The legislation authorizes the state treasurer to open a bidding process for banks and other financial institutions that are willing to process the “fees, penalties and taxes collected under” the state’s medical cannabis program.

It also provides that the state government may not “prohibit, penalize, incentivize, or otherwise impair” financial institutions that accept accounts for medical cannabis businesses operating in compliance with state law. In addition, if state employees face penalization by the federal government or otherwise for being involved with marijuana-related banking, the bill stipulates that the government will do everything “permitted by law” to defend them and will cover “payment of the amount of any judgment obtained, damages, legal fees and expenses, and any other expenses incurred.”

Among other changes, the bill removes a provision from the 2017 law that states a grower or processor may not also

Marijuana Legislation, WV, con't

be a marijuana dispensary. The bill allows the state Department of Health and Human Resources to begin pre-registering patients. Finally, the legislation was amended to eliminate a line that said physicians and pharmacists must be on site during all open hours at dispensaries.

However, the bad news is that the governor vetoed a bill which would have allowed medical cannabis businesses to vertically integrate and obtain permits to operate as any combination of growers, processors, and sellers. The bill would also have eased certain other regulations within the industry and would have allowed cannabis businesses to claim the same tax deductions as other businesses. One of the main sponsors of the bill, Mike Pushkin, D-Kanawha, said that, "without the ability to make the same type of deductions that other businesses are allowed, it's doubtful that any cannabis business in West Virginia could exist."

Reportedly, the vertical integration is just as important to establishing medical marijuana sales in WV as the banking fix was because it is central to profitability for businesses willing to invest. Yet, without it, the medical marijuana program could well sit idle for another year, unless something can be worked out to allow the vertical integration during one of the legislature's special sessions. In any event, it appears that original July 1 date for the distribution of identification cards is dead.

OSHRC Affirms Workplace Violence Citation Under GDC By Adele L. Abrams, Esq., CMSP

On March 4, 2019, a unanimous Occupational Safety & Health Review Commission affirmed a serious citation against Integra Health Management Inc., issued under the "General Duty Clause" (GDC, Section 5(a)(1) of the Occupational Safety & Health Act of 1970) arising from the death of an employee in a workplace violence incident. Two Commissioners wrote concurring opinions to highlight different aspects of the associated legal issues. The high-profile litigation also involved amicus curie participation by the US Chamber of Commerce (supporting the employer), and by organizations and unions (supporting OSHA's position) including the AFL-CIO, National Nurses United, and the National Association of Social Workers.

Integra employs "service coordinators" who visit "members" concerning their medical care, treatment, and medications. Many of the members have mental

illness and a history of criminal and/or violent behavior. Service coordinators received initial online training on "In-Home and Community Safety" and on "Screening the Dangerous Member." In-person training was also provided, along with weekly conference calls that included safety discussions. Integra also had a written workplace violence prevention policy, requiring employees to report threatening communications to supervisors, under threat of disciplinary action. A voluntary "buddy system" was purportedly available if a worker did not feel "comfortable" to allow another service coordinator to accompany them to the member's home.

In the case at hand, the service coordinator was assigned to a schizophrenic member and had reported concerns about his behavior in her reports over several visits but no action was taken or recommended to her. On her final home visit, the member stabbed the service coordinator repeatedly, resulting in her death.

OSHA cited Integra under the GDC as serious, and also issued a separate Citation for failing to report the fatality to OSHA (which was affirmed by the trial judge, and not appealed). The OSHA Citation accused the employer of exposing employees "to the hazard of being physically assaulted by members with a history of violent behavior."

The General Duty Clause provides that "each employer ... shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 USC Sec. 654(a)(1). OSHA has the burden of proving the elements of a GDC Citation: (1) that a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious injury; and (4) a feasible and effective means exists to materially reduce the hazard.

The GDC has historically been used by OSHA as a "gap filler," where there is no codified standard that OSHA can cite in situations presenting a serious hazard that should be known to the employer. Knowledge may be actual, or imputed, through a variety of methods, including the employer's own documents, training, or abatement actions, imputation of supervisor knowledge to the employer, industry recognition, or common sense recognition. The maximum penalty can reach \$132,598 for a willful or repeated violation, per affected worker. In the 2019 Integra case, despite the death of a worker, the OSHRC affirmed a penalty of \$7,000.

Integra initially defended by claiming OSHA lacked jurisdiction over hazards involving the risk of criminal

OSHR Affirms Workplace Violence, con't

assault upon employees by third parties. OSHRC quickly disposed of that defense. It held there was a direct nexus between the work being performed for Integra by employees and the alleged risk of workplace violence, given that they had to meet face-to-face with members diagnosed with mental illness, with criminal backgrounds and a history of violence and volatility. Integra's own training advised workers to "know what you're getting involved in ... don't take chances, take precautions."

Amicus US Chamber of Commerce argued that "the normal activities of a business do not represent the types of hazards that the general duty clause was intended to regulate." OSHRC responded that this case went beyond a "background risk of violence" and was an "enhanced risk" due to the nature of the work with a high-risk group, and conditions and practices over which Integra had control.

OSHR found that workplace violence was a recognized hazard for Integra based on its own work rules, training, handbook, and existing policies. The materials showed the hazard of a service coordinator being physically assaulted during a meeting with a member who had a history of violent behavior was "clearly recognized" by Integra.

Integra also argued that it should not be prosecuted because of "public policy" – that this would result in denial of services to "uniquely vulnerable persons" with a history of violence. It also claimed that racial disparities in criminal prosecution would lead to screening out individuals based on their histories, resulting in discrimination. OSHRC noted that the solution is not to refuse to serve certain individuals, and that OSHA had not required this. OSHA sought for the employer to adopt abatement measures to make sure interactions safer.

While Integra argued that abatement was infeasible, the court noted that the items suggested by OSHA to abate the hazard had already been largely adopted by Integra (performing a background check on members before assigning them to service coordinators, initiating "red flags" on members with criminal histories, and instituting a written workplace violence prevention program with mandatory reporting requirements). In rebuttal, Integra argued that OSHA failed to show that the proposed abatement measures would "materially reduce the incidence of the workplace violence hazard." OSHRC credited the trial testimony of OSHA's expert that indicated that the likelihood of violence was less with a

two-person team, and that appropriate safety training would help workers better assess red flags.

In his concurring opinion, Commission Sullivan stressed that this decision should not support a broad reading of the GDC that would make an employer liable for "every violent act committed against the employer's employees" and that only "foreseeable" hazardous conditions or practices should be citable under the GDC, where based on the facts, a "reasonable employer" would conclude that a violent incident could occur in its workplace. Here, he concurred that a recognized hazard existed and that Integra ignored several warning signs in the deceased employer's earlier reports, and allowed her to continue the visits alone in violation of the law.

Power to Cite Upheld, con't

11(c) rights. An employee can still invoke his or her statutory protections, regardless of whether OSHA issues a Part 1904 citation to the employer. Conversely, OSHA can proceed against the employer for up to six months under Part 1904, even if the employee never files a Section 11(c) complaint and does not seek reinstatement or back pay.

But the ability to sanction employers for whistleblower violations against injured workers or others who have engaged in protected activity (filing hazards complaints, speaking to OSHA investigators, work refusals etc.) under Section 11(c) is limited in comparison with other types of enforcement actions. OSHA penalties can now reach \$132,598 per affected worker, and OSHA has a six month statute of limitations to issue citations for such violations. The USPS ruling pointed to an earlier case (*USWA v. St. Joe Resources*, 5th Cir. 1990), involving retaliation under the lead standard medical removal position, to support the OSHRC position that "abatement" in this case could require provision of back pay to the worker in addition to the proposed OSHA fine, and that Section 11(c) does not provide an exclusive remedy for retaliation claims.

There is no private right of action for employees in Section 11(c) cases, in the event that OSHA decides not to pursue a federal action. Statutory protections would be enhanced, however, if the now-pending Protecting America's Workers Act (HR 1074) becomes law. Currently, a worker only has 30 days to file a complaint with OSHA under Section 11(c) and this is the shortest statute of limitations of any federal whistleblower laws (by comparison, most environmental and DOT statutes provide for 180 days). If OSHA's Section 11(c) investigation reveals retaliation, it can seek make-whole relief for the aggrieved worker in US District Court but cannot otherwise penalize the employer. Another key distinction is that citations issued by OSHA for violations of regulations or

standards appear on the employer's publicly searchable history on OSHA's website, whereas Section 11(c) allegations or rulings do not.

In January 2019, OSHA issued a final rule amending some of the data submission provisions of the E-Recordkeeping regulation, eliminating the need for worksites with 250 or more workers to electronically file their OSHA Forms 300 and 301 starting with FY 2018 data. Going forward, effective February 25, 2019, any employers who must submit their injury and illness data under the rule (High Hazard worksites with 20-249 workers, as defined by NAICS code in Appendix A of the rule, or any worksites with 250+ employees) need only file their 300A forms online. The 2019 final rule did not amend any of the anti-retaliation provisions, although in October 2018, OSHA did issue a policy clarifying its intentions with respect to incentive and discipline programs, and drug testing of injured workers.

Employers must still maintain all of the mandated OSHA injury and illness forms at the worksite for five years and make them available to employees, their personal and authorized representatives, and to OSHA upon request. The 300A form must also be signed by the highest ranking official at the worksite, under penalty of criminal prosecution, and posted in the workplace from February 1-April 30. As of 2019, all e-filings are now due on March 2nd of the next year for the previous year's data. There is still a pending legal challenge to the promulgation of the original rule, attacking both the data submission and anti-retaliation provisions, in federal court but the judge allowed the rule to take effect while the case is unresolved.

For more information, contact the Law Office.

2019 SPEAKING SCHEDULE

ADELE ABRAMS

2019 Speaking

April 8: BLR Master Class on OSHA Recordkeeping, Austin, TX

April 9: BLR Safety Summit, Austin, TX, presentation on Joint Employer Laws & Safety

April 11: ASSP Conference, Grapevine, TX, presentation on Medical Marijuana & Safety

April 16-17: South Central Mine Safety Conference, Dallas, TX, presentation on Workplace Exams

2019 Webinars

April 12: ClearLaw, Joint Employers & Safety

MICHAEL PEELISH

4/19 – Silica Competent Person Training – Langley Air Force Base, Virginia