



**Un/Leaded – Secretary of Labor v. Pennsy Supply, Inc.**

By Brian Yellin, Esq., CIH, CSP, Of Counsel

In *Secretary of Labor v. Pennsy Supply, Inc.*, FMSHRC, Docket No. YORK 2018-004, an Administrative Law Judge (“ALJ”) struck down five (5) citations for alleged violations of MSHA standards related to miner exposure to lead. [Section 3(g) of the Mine Safety and Health Act broadly defines “miners” as “any individual working in a coal or other mine.”]

The federal Mine Safety and Health Administration (“MSHA”) inspected Pennsy Supply, Inc.’s (“Pennsy”) small construction sand and gravel plant following a formal complaint made by an employee to the Occupational Safety and Health Administration (“OSHA”) that alleged worker exposure to lead.

In response, OSHA conducted a preliminary inspection and determined that it lacked jurisdiction over Pennsy’s worksite because it constituted a mine as defined under Section 3(h)(1) of the Mine Safety and Health Act.

MSHA assumed jurisdiction and investigated the task that was allegedly exposing Pennsy’s workers to lead. More specifically, Pennsy employees (including the complainant) were engaged in maintenance activities involving a “sand screw” (a conveyer-like device) that required them to remove “shoes” that were held in place by bolts, nuts and washers. The complainant alleged that the washers contained lead and their removal over-exposed them to lead dusts and fumes.

Initially the “shoe” removal process involved the mechanical grinding away of the bolts without directly impacting the lead-containing washers. However, the

complainant (a purported welder) modified the bolt removal process by “burning” the back end of the bolts where the nut and washer were located.

During the course of the “shoe” removal process, the complainant burned-off between 400 and 450 bolts causing the lead-containing washers to heat up releasing lead-containing fumes and dusts that both he and at least one other co-worker were exposed.

During the course of MSHA’s inspection, the complainant applied for a position with a car battery manufacturer and his pre-employment screening revealed that he had a “high blood lead level.” There is no indication in the record that MSHA obtained the complainant’s medical records, including blood lead test results, to confirm the complainant’s allegation.

Based on the initial complaint to OSHA, the complainant’s alleged elevated blood lead levels, and the allegation that the subject washers contained lead, MSHA issued five citations to Pennsy for alleged violations of the following MSHA standards:

- 1) 30 C.F.R. §50.20(a), which requires the mine operator to report a diagnosed occupational illness to MSHA within ten working days after the diagnosis is made;
- 2) 30 C.F.R. §47.51, which requires the mine operator to maintain a material safety data sheet (MSDS) for each chemical produced or used at the mine, or brought onto the mine by a contractor;
- 3) 30 C.F.R. §47.2(b), which requires the mine operator to provide information and training to miners regarding the physical and health hazards of the chemicals in the miner’s work area;

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## Un/Leaded, con't

- 4) 30 C.F.R. §56.15006, which requires the mine operator to provide personal protective equipment to miners exposed to chemical hazards;
- 5) 30 C.F.R. §56.5002, which requires the mine operator to conduct “dust, gas, mist, and fume surveys to determine the adequacy of control measures.

However, MSHA’s inspector failed to conduct any personal air or wipe sampling to confirm the complainant’s allegations that workers were exposed to lead dust and fumes without adequate protection.

Instead, MSHA’s inspector took wipe samples of various surfaces in common areas (i.e. break room, kitchen) and outdoor work areas, and bulk samples from a drain near where the maintenance work had been performed weeks earlier.

Despite having taken wipe and bulk samples from various surfaces and substrates at Pennsy’s worksite, the Secretary did not attempt to introduce the sample results into evidence.

Rather, MSHA’s inspector testified that some of the test results were “positive” and some were “negative” without quantifying the “positive” lead test results. Furthermore, the inspector was unable to link the presence of lead to any potential worker exposures.

Moreover, the Secretary did not attempt to introduce into evidence the complainant’s alleged elevated blood lead results or any other competent medical evidence related to lead exposure.

Rather, the Secretary’s case against Pennsy was solely based on the presence of lead-containing washers at its worksite and the complainant’s claim of having an elevated blood lead level.

The lack of any credible evidence offered by the Secretary so frustrated the ALJ that she stated in her opinion: “[ ] the record is utterly void of any credible evidence, either documentary or testimonial, from a credible medical source that supports any claim of lead poisoning, much less establishes by a preponderance of the evidence that such poisoning occurred or may have been caused by lead exposure at the Pennsy work site.”

The ALJ vacated all five citations because the Secretary failed to present any credible evidence that Pennsy workers were exposed to lead.

It is important to note that in rendering its judgment with respect to the first citation (which alleged that

Pennsy failed to notify MSHA of the alleged lead poisoning case), the court took judicial notice of OSHA’s Lead standard, 29 C.F.R. 1910.1025 and OSHA’s corresponding guidance documents, regarding acute and chronic exposure to lead. In this respect, the ALJ observed that not only did the Secretary fail to offer any evidence that Pennsy employees suffered any “serious symptoms consistent with lead poisoning, acute or otherwise,” the Secretary failed to “introduce any evidence of how many of the washers that [were] torched were actually lead.”

## **CSB Investigation Leads to Recommendation for OSHA Regulation of On-Shore Oil and Gas Drilling By Gary Visscher, Esq.**

Last month the U.S. Chemical Safety Board (CSB) released its report on the January 22, 2018 gas well blowout and fire at Pryor Trust Well, located in Pittsburgh County, Oklahoma. The blowout and fire resulted in the deaths of five workers, the deadliest U.S. accident in oil and gas drilling since the 2010 Deepwater Horizon blowout in the Gulf of Mexico.

The U.S. CSB is an independent government agency charged with investigating serious accidental chemical releases and fires, making public the conclusions regarding the cause or causes, and issuing recommendations to prevent such accidents from occurring.

CSB’s 150-plus page report on the incident reveals a series of miscalculations in the drilling process, miscommunications, gaps in work safety procedures, equipment failures, disabled alarms, and lack of exits and fire protection for the control room, where the five workers perished.

CSB placed much of the responsibility on gaps in industry standards and the lack of government regulation of on-shore oil and gas drilling. The CSB report notes that after the Deepwater Horizon rig blowout, the American Petroleum Institute adopted guidance (API Bulletin 97) aimed at insuring that there is “communication between the lease operator and drilling contractor regarding well construction work.” However, CSB states that API Bulletin 97 applies “solely to the offshore drilling industry, not the onshore drilling industry. Application and implementation of API Bulletin 97 guidance could have helped to prevent the incident.”

The CSB report is also critical of the lack of federal

## CSB, con't

(OSHA) regulation and oversight of onshore oil and gas drilling operations. After Deepwater Horizon, the Bureau of Safety and Environmental Enforcement (BSEE) was created to establish and enforce safety regulations for off-shore oil and gas drilling. The CSB points out that on-shore drilling is not similarly regulated with regard to safety of drilling operations.

OSHA proposed a health and safety standard specific to oil and gas drilling and servicing in 1983, but took no final action on the proposal. In 1992 OSHA adopted the Process Safety Management (PSM) standard, but excluded oil and gas drilling and servicing from PSM coverage because, OSHA stated, it was working on a separate rulemaking on oil and gas drilling and servicing. The exemption from coverage under PSM was raised again in 2013, when OSHA initiated rulemaking, with a Request for Information, on amendments to the PSM standard. The RFI listed several issues OSHA was considering in amending PSM, including coverage of oil and gas drilling and servicing. The "PSM update" rulemaking has since been "delisted" from OSHA's regulatory agenda.

The CSB report notes that the fatality rate in the on-shore oil and gas drilling and servicing industry is 2.5 times higher than that of construction, and 7 times higher than general industry. CSB's report includes recommendations to OSHA, to apply the PSM standard to oil and gas drilling or develop a new standard similar to PSM but specific to the oil and gas drilling and servicing industries.

The CSB also made recommendations to API, to issue guidance and recommended practices for on-shore drilling operations, and to the state of Oklahoma. CSB recommended that in the absence of federal regulations, Oklahoma adopt safety regulations for those who design and perform drilling operations in the state.

Departing from previous practice, CSB's report identified the five dead workers by their job descriptions and the location where their bodies were found, but did not include the workers' names. Responding to criticism for not including the workers' names, a statement from CSB said that the decision to withhold individual names was to avoid "infer[ring] culpability on the part of the entity responsible for the operation of the facility where the incident occurred."

## MSHA Announces Changes to Online Data Retrieval System

By Joshua Schultz, Esq.

On June 12, 2019, MSHA issued a press release announcing an update to its online data system – the Mine Data Retrieval System (MDRS). Although the former platform is still available on MSHA's website, they have announced that the agency will phase out the older platform.

MSHA notes that all of the standard reports previously provided by the former platform are still available, but now MSHA-wide statistical reports providing real-time data are also tied to the MDRS. Additionally, the agency noted that the new system provides "advanced search capabilities where users can select entire industries, multiple mines, and ownership groups. The platform also allows users to export datasets into either Excel or PDF for further analysis."

The MRDS is an excellent tool for mine operators to monitor their violation history, potential for POV status, violations per inspection day, and other tools which may assist operators in determining whether to contest citations. Mine operators can also determine whether their mine is under a "104d chain" by reviewing their violation history. A mine is considered on the "104(d) chain" after receiving a 104(d)(1) order. During the next inspection, MSHA may issue a 104(d)(2) order, with a minimum \$4,000 penalty, if they find that management had knowledge of a safety violation, even if it is not an S&S violation. The mine remains on this 104(d) chain until they receive a "clean" inspection - an inspection resulting in no issuances that rise to the level of 104(d).

The gateway to the MRDS is the most visited page on the agency's website, [www.msha.gov](http://www.msha.gov). MSHA directs any questions about the new platform to [oppedatarequestgroup@dol.gov](mailto:oppedatarequestgroup@dol.gov).



*Adele Abrams was a panelist at the American Society of Safety Professionals' Safety 2019 Conference and Exposition. Ms. Abrams described the state medical marijuana laws as a "crazy quilt."*

## OSHA Audit Changing/Creating Rules

By Sarah Ghiz Korwan, Esq.

It is axiomatic that OSHA issues “rules”, which can be standards or regulations, and “guidance documents” that explain the rules. Both are intended to help reduce hazards and protect 121 million workers at 9 million worksites. However, in recent years, industry stakeholders and congressional members have raised concerns with Department of Labor Office of Inspector General (DOL IOG) regarding the use of guidance documents, instead of rules. In addition, there have been concerns that OSHA was creating new rules without going through the proper rulemaking process.

Accordingly, the DOL IOG conducted an internal audit into OSHA’s procedures for issuing guidance documents and found that often it has not followed its own procedures. Specifically, DOL IOG sampled 57 of 296 guidance documents issued between October 1, 2013, and March 18, 2016, and found that 80% of the time, OSHA did not follow protocol.

Notably, the IOG found that OSHA did not establish adequate procedures for issuing guidance, and those procedures that were established were mostly not followed. The audit states that, “(w)hile OSHA developed its procedures to provide reasonable assurance that guidance accurately reflected its rules and policies, it lacked a procedure to determine the appropriateness of issuing a document as guidance, rather than as a rule. Issuing as guidance is appropriate if the document is interpretative or a general statement of policy, and does not create, modify, or revoke a standard.”

The report further stated that, “(p)rocedures it usually did not follow included: (1) determining if guidance was consistent with OSHA rules; (2) considering the anticipated reception of the guidance by significant stakeholders; and (3) obtaining official approval to issue the guidance.”

Those actions left OSHA at risk for issuing guidance that may have changed or created existing rules in violation of notice-and-comment rulemaking, and “contained inaccurate information that, if relied upon by OSHA staff and stakeholders, would impact the efficiency and effectiveness of programs to protect the safety, health and whistleblower rights of American workers,” the report adds.

On May 2, 2019, Secretary of Labor R. Alexander Acosta testified before a Senate appropriations subcommittee and said that the Department of Labor will review all guidance documents issued by its agencies – including

OSHA – to determine whether they require formal rulemaking. Acosta testified that DOL is performing an internal review on how a rule is developed. The secretary later added, “We’re developing our own internal mechanism that will look at all guidance documents and will determine whether this is something that should appropriately be a guidance document or whether this would require rulemaking.”

## Review Commission Takes

### Up Test to Apply in “Interference” Claims

By Gary Visscher, Esq.

Section 105 (c) of the Mine Act declares it illegal to “discharge, or in any manner discriminate ... or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners, or applicant ... because such [person] has filed or made a complaint under or related to this Act.”

The question that has been left unresolved after several cases before the Federal Mine Safety and Health Review Commission, and the U.S. courts of appeals, is whether claims of “interference” by miners and miners representatives should be reviewed under the same legal test and framework as “discrimination” claims under 105 (c), or, if a different test is called for, what that test should be.

The administrative law judges have developed and applied two different legal tests. One is a 2-part test: (1) whether the alleged interference with miners’ rights would be viewed, from the perspective of the “reasonable miner” and “under the totality of the circumstances,” as tending to interfere with protected rights, and (2) if so, whether the operator can show a legitimate reason which outweighs the harm to the exercise of protected rights.

The second test adds a third element: whether the alleged interference was motivated by the exercise of protected rights. Two previous cases that were accepted for review by the Commission resulted in a 2-2 split among the commissioners as to the analysis to use in interference cases. The Court of Appeals for the D.C. Circuit, in *Wilson v. Armstrong Coal*, affirmed an ALJ decision which applied the two-part test, without deciding whether that was the only test to apply in interference cases.

With the Commission now at 5 members, a case before the Commission, *McNary v. Alcoa World Alumina*, presents an opportunity for the Commission to resolve, at least for now, which test applies. The Commission held oral argument and a public meeting to discuss the case in early June. Since it appeared from the argument and discussion that no commission members would find interference

## Interference, con't

occurred in the case, the Commission may again not decide which test to apply in future interference cases.

The ALJ in *McNary* applied the two-part test described above. McNary's interference claim grew out of a momentary confrontation between McNary, who was both an "area operator" and the "number 2" miners' rep, and a plant supervisor. The confrontation occurred in the midst of an emergency situation at the plant due to a leaking valve, and as supervisors, operators, miners reps, and even an MSHA inspector, were trying to determine how best to respond to the problem.

The alleged interference consisted of statements by the supervisor, Emig, to McNary that "he was done with him for now" after McNary challenged actions that had been taken by Emig in the midst of the emergency situation caused by the leaking valve.

After "close analysis of those events," the ALJ concluded that under the "totality of the circumstances," Emig's statements did not constitute unlawful interference. McNary continued as the number 2 miners rep.

Deciding whether Emig's words and actions constituted unlawful interference, however, meant that the ALJ had to deconstruct and analyze everything that was said and done by McNary and by Emig during an emergency situation. Even though the ALJ found that McNary was not interfered with in this case, given the lack of clear definition as to what constitutes "interference," and the need to consider every word, gesture, tone of voice, etc. under the "totality of the circumstances" test, the case leaves operators with little certainty as to when the interference line may be crossed.

The discussion by the commissioners indicated continued disagreement as to the test to apply in interference cases. Two commissioners indicated their belief that, even if resolving the applicable test may not be necessary in the facts of this case, the issue should be resolved for future cases. The question of what constitutes unlawful interference is also pending before the U.S. Court of Appeals for the D.C. Circuit, in *Secretary of Labor obo Greathouse v. Monongalia County Coal*.

Please contact us with any question about these cases, or if you would like more information regarding interference claims under section 105 (c).

## Suicide in the Construction and Mining Industries on the Rise

By Sarah Ghiz Korwan, Esq.

In January of this year, we reported that suicide in the workplace is on the rise. The construction industry, in particular, is somewhat of a "perfect storm" of all the risk factors that contribute to suicide risk, according to Sally Spencer-Thomas, lead of the Workplace Task Force within the National Action Alliance for Suicide Prevention. Demographically, the construction industry is predominantly middle-aged white males. Culturally, there is a stigma to the appearance of anything not stoic, and self-reliant, which deters a help-seeking mentality.

The construction industry also tends to be transient in nature, so a workplace community is frequently lacking. Finally, opioid abuse is a crisis in all industries, and no stranger to construction workers using the drugs as a means of pain management. Opioid abuse is associated with a 75 percent increased likelihood of a suicide attempt. Consequently, an event such as an injury or lay-off is, too often, a trigger for suicide.

It may seem illogical to require reporting a suicide or suicide attempt to OSHA or MSHA, since it didn't stem from any actual job responsibilities. OSHA applies the "geographic presumption," meaning incidents that occur in the work environment are work-related unless a specific exemption applies. OSHA requires a report within 24 hours of a hospitalization, amputation or eye loss, and a report within 8 hours to report a fatal event.

Pursuant to MSHA's reporting requirements, the agency must be notified within 15 minutes of the hospitalization under the same circumstances. There are mandatory minimum penalties of over \$5000 for failure to report from both agencies.

OSHA has a page on its website, Preventing Suicides, which contains telephone numbers, in English and Spanish, for suicide prevention hotlines and chatlines. Also, there are links to websites related to suicide prevention, in general, and for specific groups and needs, such as veteran's, the construction industry and opioid addiction.

## **Supreme Court Curtails Employer Defense to EEOC Complaints**

**By Diana R. Schroeder, Esq.**

On June 3, 2019, the Supreme Court, in resolving a conflict among the circuits, ruled that an employee's requirement to first file a charge with the EEOC is not a jurisdictional requirement, but is a "claim-processing rule". The difference is critical when it comes to preserving an employer's defense to the employee's failure to timely file a charge with the EEOC. In *Fort Bend County v. Davis*, No. 18-525, the plaintiff filed an EEOC charge alleging retaliation and harassment, but not religious discrimination, against Fort Bend County, her employer. Instead, the employee waited to raise the discrimination claim until she filed in federal district court.

Davis filed suit in federal district court, pursuing her claims of retaliation and harassment, and also adding a religious discrimination claim. Fort Bend County moved for summary judgment on the substantive allegations, seeking a dismissal of those claims. The Fifth Circuit Court of Appeals affirmed her harassment claims, but reversed on the discrimination claim and remanded back to the district court. The employer moved to dismiss, arguing that Davis failed to exhaust her administrative remedy by failing to file a charge with the EEOC on the discrimination claim. The employer did not raise this issue until the case was on remand.

The district court granted the employer's motion to dismiss, but the Fifth Circuit reversed, holding that the employer did not timely raise the administrative exhaustion defense. The Fifth Circuit held that filing a charge with the EEOC is not jurisdictional but a procedural prerequisite to filing a lawsuit.

The Supreme Court agreed with the Fifth Circuit, holding that filing a charge with EEOC is a complainant's procedural requirement, but is not a jurisdictional requirement. A challenge to a jurisdictional requirement could have been raised at any stage of the litigation. Employers must raise the procedural defense of failure to exhaust at the earliest possible point during litigation, and seek to dismiss the case on this basis, or risk losing the opportunity to raise the defense.

This ruling does not disturb the long-standing requirement that an employee must first file a timely charge of discrimination with the EEOC, before proceeding to court.

## **House Hearing Targets Accelerated Lung Disease in Miners**

**By Adele L. Abrams, Esq., CMSP**

On June 20, 2019, the House Education & Labor committee's subcommittee on Workforce Protections heard testimony at a hearing titled "Breathless and Betrayed: What is MSHA Doing to Protect Miners from the Resurgence of Black Lung Disease?" that included witnesses from MSHA, NIOSH, the UMWA, industry representatives and researchers.

While the focus was on recent research showing a spike in accelerated black lung disease in younger, Appalachian region, coal miners, much of the discussion focused on respirable crystalline silica (RCS), to which metal/nonmetal miners are also exposed. The current MSHA exposure limit for RCS equates to 100 ug/m<sup>3</sup> for an eight-hour time-weighted-average period, which is twice the amount to which construction, maritime and general industry workers regulated by OSHA can legally be exposed. NIOSH also has supported a Recommended Exposure Limit of 50 ug/m<sup>3</sup> (the current OSHA limit) since 1974.

Subcommittee Chair Alma Adams (D-NC) opened the hearing by noting that black lung disease has killed 78,000 miners since 1977, when the Mine Act became law and MSHA was created. Although rates of black lung had declined in the 1970s, 80s and 90s, it has returned "with a vengeance," Rep. Adams said. Nearly 20 percent of long-term miners in Appalachia have black lung diagnoses, and the disease is incurable. This is also four times the illness rate in other coal mining areas. In particular, these Appalachian miners (KY, VA, WV) have a marked increase in the most severe form of the illness, Progressive Massive Fibrosis (PMF), at far earlier ages than was previously found.

Most witnesses concurred that the problem centers around the mined out coal seams in this region, which results in mining seams that are embedded in quartz-bearing rock (quartz is the mineral analyzed for silica exposure). The continuous mining machines grind through this combination of coal and quartz, and limestone dusting can add more quartz to the mix. RCS is 20 times more toxic than coal dust alone, and is present in most construction aggregates, such as stone, sand, gravel and cement, and in manufactured products such as concrete, brick, slate, paint, mortar, and drywall.

Dr. Robert Cohen, from the University of Illinois' Mining Education & Research Center, called Appalachia the "epicenter of severe resurgent disease" and noted that the proportional mortality of younger miners (<65 years old)

## House Hearing, con't

from pneumoconiosis has also increased significantly in recent years, in addition to the spike in PMF cases, at a time when decreases should have been observed. Dr. Cohen attributed this to freshly fractured silica in the coal mining process, which causes significantly more lung scarring than coal dust.

One recommendation supported by Dr. Cohen and other panelists was use of better technology, including an in-mine silica analyzer developed by NIOSH. Daily silica monitoring could better inform inspectors on implementation of ventilation plans, for example. The technology could be useful in disease prevention for miners working in mine development, and in occupations associated with the most severe disease: roof bolters, continuous miner operator helpers, and long wall operators.

Several witnesses supported reducing MSHA's silica permissible exposure limit (PEL) to align with that of OSHA and the recommendation of NIOSH. NIOSH director Dr. John Howard also testified at the hearing and discussed his agency's mine research and technology development. Additional medical surveillance of miners in these "hot spots" was also urged, including more frequent screenings, chest x-rays and spirometry testing, every 2-3 years (rather than every 5 years, as is the current practice). The OSHA silica standard requires most workers exposed to silica above the 25 ug/m<sup>3</sup> "action level" to undergo medical surveillance every 3 years.

MSHA Assistant Secretary David Zatezalo appeared at the hearing, but most of his formal testimony addressed the "one MSHA" initiative of having a consolidated management of coal and metal/nonmetal mines at the headquarters level, with cross-inspection by compliance officers depending largely on their geographical proximity to an MSHA office (regardless of commodity). Zatezalo also addressed his agency's powered haulage initiative.

Although MSHA has indicated on its regulatory agenda that it will accept comments as part of a request for information on the issue of respirable crystalline silica, neither Zatezalo or other industry witnesses supported lowering the exposure limit to be consistent with OSHA. The MSHA chief did note that they are paying more attention to the "H" in MSHA (Health) and "aggressively enforc[ing] existing standards to ensure that operators protect miners from exposure to respirable dust and

quartz. He added that MSHA samples indicate average quartz exposure 75 percent below the PEL, on average. He supported use of real-time quartz monitoring – similar to Continuous Personal Dust Monitor (CPDM) technology that NIOSH and MSHA developed collaboratively. MSHA can also issue Section 104(b) withdrawal orders if needed to protect miners.

Although the hearing focused on the development of lung disease and the latest research, witnesses also commented on the solvency of the Black Lung Disability Trust Fund, which supports claims by miners who are disabled but worked for a mine that is now bankrupt. The Trust Fund has been financed by a small tax on coal tonnage, but that amount of tax provided by mine operators was allowed by Congress to expire in December 2018, and this resulted in a 55 percent decrease in funding.

Miners with black lung will also be affected by the lawsuit seeking to invalidate the Affordable Care Act. The Texas action struck down the ACA law (an appeal is pending). If the original ruling prevails, black lung can be excluded from medical insurance as a preexisting condition, and the "Byrd Amendments" to the ACA would also be repealed. These had restored eligibility criteria that enabled miners and their families to be compensated through the Black Lung Benefits Act. The House majority called on the Administration to take action to defend these threatened health benefits for coal miners.

## Cannabis Corner: Developments on Marijuana Laws By Adele L. Abrams, Esq., CMSP

This spring and summer has yielded a bumper crop of new laws affecting the use of marijuana (cannabis) legally in the US, and the rights of medical cannabis workers as well. The following are new legal developments to be aware of in order to effectively design and administer substance abuse prevention programs.

- **Arizona:** Although Walmart was the employer whose case at the federal level created favorable precedent for firing a medical cannabis patient who tested positive, because the court held this use was not protected under the federal Americans with Disabilities Act (ADA), the retail giant recently lost a major case in AZ. This year, in *Whittier v. Walmart*, the court ruled for the employee who was fired after testing positive in a post-accident drug test. The court held Walmart did not provide proper expert testimony to show that the worker had a sufficient amount of THC in his system to support termination. AZ has one of the country's

## Cannabis Corner, con't

most liberal medical cannabis laws, in terms of protecting workers' rights.

- Illinois:** Illinois became the latest state to legalize recreational marijuana. Its law includes broad employer protections to restrict on the job cannabis use, to discipline workers who violate "reasonable" policies that govern use, and storage and smoking of cannabis in the workplace. Recreational cannabis will go on sale there in January 2020, and residents over age 21 can legally possess up to an ounce of flower or 5 grams of concentrate, but it will only be legal to smoke in one's home or onsite at some cannabis-related businesses. Use is prohibited in public, including in motor vehicles. Medical patients can continue to grow plants at home, but recreational users cannot. The legislation also provides for expungement of old criminal convictions for possession unrelated to any violent crime. Current Illinois Law considers drivers with 5 nanograms or more THC blood concentration guilty of driving while impaired, but a DUI Task Force is considering best methods for roadside testing.

- New York:** While legislation to legalize recreational marijuana statewide never made it to the finish line this year, Gov. Andrew Cuomo is a strong supporter, and this will no doubt re-emerge in the next session. The proposed 2019 recreational pot measure would also place the burden on employers to establish that a worker was "impaired" on the job. Cannabis can stay in the system and trigger a positive test days or even weeks after it was consumed. At the municipal level, New York City enacted an ordinance banning employers from conducting pre-employment tests for medical marijuana.

- Nevada:** In May, legislation was enacted to bar employers from rejecting a job candidate for testing positive for marijuana. The law does not apply to firefighters, EMTs, employees who operate a motor vehicle, or those who (in the determination of the employer) could adversely affect the safety of others. Both medical and recreational cannabis are legal now in this state.

In federal news, the Congressional Research Service (CRS) has issued a report showing that the presence of THC in the blood is not a consistent predictor of either driver impairment or performance. Researchers wrote: "Studies have been unable to consistently correlate levels of marijuana consumption, or THC in a person's body, and levels of impairment. Thus some researchers,

and the National Highway Traffic Safety Administration, have observed that using a measure of THC as evidence of a driver's impairment is not supported by scientific evidence to date." CRS further stated that data are conflicting as to whether cannabis use plays a role in traffic accidents, consistent with prior NHTSA studies.

Six states now impose various per se THC limits (IL, MT, NV, OH, PA and WA) for impaired driving, while 10 states impose zero tolerance per se standards (AZ, DE, GA, IN, IA, MI, OK, RI, SD, UT). Colorado infers impairment at 5 ng/ml.

Employers with multi-state operations would be well served to review their policies on this subject and related drug testing programs, in light of this evolving area of employment law. For assistance, contact Adele Abrams or Diana Schroeder at 301-595-3520.

### NIOSH Reopens Comment Period on Mining Automation & Safety Research By Adele L. Abrams, Esq., CMSP

The National Institute for Occupational Safety & Health (NIOSH) has reopened the comment period on its request for information (RFI) concerning its research program addressing automation and associated technologies in mining. NIOSH also seeks suggestions on the prioritization of its Mine Safety research programs. NIOSH was given authority in the 1977 Mine Act to conduct research on Mine safety and health, to inform MSHA's regulatory process. MSHA last year conducted its own RFI on powered haulage safety that includes examination of automated solutions.

The revised comment deadline is August 23, 2019, and comments should be submitted online at [www.regulations.gov](http://www.regulations.gov) through the portal for Docket CDC-2019-0016-0005. The original Federal Register notice seeking comment was published March 18, 2019, but no comments were submitted by the initial deadline. An earlier article on this initiative appears in the Law Office's April 2019 Newsletter.

The mining industry has increasingly adopted automation technologies, which can decrease cost and improve efficiency and safety. Some of these technologies include robotics, automated mobile equipment, teleoperation, wireless communications, wearable sensors, and virtual reality. While much of this technology is being used in foreign mining operations, the US has begun using it at processing and drilling operations, underground coal longwall machines, and even automated hauling and loading.

## NIOSH, con't

NIOSH seeks input to proactively address worker safety and health issues that may relate to these emergent technologies. The questions posed by NIOSH in their request include:

- To what extent will automation and associated technologies be implemented in mining, and in what timeframe?
- What are the related safety and health concerns associated with technologies in mining?
- What gaps exist in OSH research related to automation?
- What are the main safety concerns for humans working near or interfacing with automated mining equipment?
- What sensor technology improvements are needed to ensure the safety of humans working on or near automated equipment?
- Are there any needed improvements for standards, guidelines, training materials or protocols related to automated mining systems?

For assistance in developing comments or for help identifying proactive Mine safety solutions, contact Adele Abrams at [safetylawyer@gmail.com](mailto:safetylawyer@gmail.com).



*Adele Abrams speaks at the AGC Safety Conference, Seattle, on Opiates, Medical Marijuana & Safety*

## Federal Court Reinstates Workplace Exam Requirements

By Joshua Schultz, Esq., MSP

In a June 11, 2019 ruling, the U.S. Court of Appeals for the District of Columbia Circuit vacated MSHA's 2018 amendment to the workplace exam rule and ordered the reinstatement of MSHA's original 2017 version of the rule. This ruling presents two major changes to the existing workplace exam rule. First, the ruling will require operators to conduct an examination of each working place before miners begin work in that place; the current rule requires the examination take place before or as miners begin work in a particular working place. Second, the ruling will require that operators record a description of each condition found during the workplace examination that may adversely affect safety or health and be supplemented with the date of corrective actions when necessary; the current rule requires that operators record only adverse conditions that are not promptly corrected.

In this case, *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union v. Mine Safety and Health Administration*, counsel for mining and steelworkers unions challenged MSHA's 2018 amendment to the original workplace examination rule issued in 2017 on the basis that it violated the Mine Act and the Administrative Procedure Act. The Mine Act has a unique provision which requires that any new regulation afford the same or greater protection to miners as any existing regulations. The unions contended that MSHA did not demonstrate that the changes to the workplace provided the same or greater protection to miners when the agency issued the 2018 amended rule. Two of the three judges on the panel agreed with the unions, enough to invalidate MSHA's 2018 amended rule.

MSHA released a final rule on January 16, 2017 (published in the Federal Register January 23, 2017), revising the previous workplace examination standard at 30 CFR § 56.18002. This rule was announced just four days before the Inauguration of Donald Trump, one of the last regulatory actions of the outgoing administration. The initial final rule was effective on May 23, 2017, but MSHA repeatedly delayed the effective date. In October 2017, MSHA temporarily withdrew the initial rule and in April 2018, MSHA issued a final rule amending the requirements of the 2017 Standard. Under the 2018 Amendment, a competent person must "examine each working place at least once each shift before work begins or as miners begin

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work in that place for conditions that may adversely affect safety or health.” The 2018 Amendment gave mine operators the option to conduct examinations as miners begin work in an area; the 2017 rule required operators conduct the examination before work begins in an area. The 2018 Amendment also modified the recordkeeping requirement, mandating that a “record shall contain the . . . description of each condition found that may adversely affect the safety or health of miners and is not corrected promptly.” This new language allows a mine operator to omit from its records promptly corrected adverse conditions.

The court used MSHA’s own reasoning in the preamble to the 2017 rule to determine that the 2018 amended rule did not afford the same or greater protection to miners. Regarding the timing of the examinations, the court’s opinion notes MSHA’s statement that if “the examination is performed after miners begin work, miners may be exposed to conditions that may adversely affect their safety and health.” In invalidating the 2018 change to the recordkeeping provision, the court noted that in the preamble to the 2017 Standard, MSHA determined that “recording all adverse conditions, even those that are corrected immediately, will be useful as a means of identifying trends,” which “should help inform mine management regarding areas or subjects that may benefit from increased safety emphasis.” Thus, they did not credit MSHA’s explanation for why the 2018 amendment did not reduce the protection afforded to miners.

The court vacated the 2018 amended rule and ordered the initial 2017 standard reinstated. This ruling does not become final until the court issues a formal mandate after the time to petition for an appeal or re-hearing expires. MSHA has not yet announced what course of action the agency will take. The 2017 standard reads as follows:

Examination of working places.

*(a) A competent person designated by the operator shall examine each working place at least once each shift before miners begin work in that place, for conditions that may adversely affect safety or health.*

*(1) The operator shall promptly notify miners in any affected areas of any conditions found that may adversely affect safety or health and*

*promptly initiate appropriate action to correct such conditions.*

*(2) Conditions noted by the person conducting the examination that may present an imminent danger shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.*

*(b) A record of each examination shall be made before the end of the shift for which the examination was conducted. The record shall contain the name of the person conducting the examination; date of the examination; location of all areas examined; and description of each condition found that may adversely affect the safety or health of miners.*

*(c) When a condition that may adversely affect safety or health is corrected, the examination record shall include, or be supplemented to include, the date of the corrective action.*

*(d) The operator shall maintain the examination records for at least one year, make the records available for inspection by authorized representatives of the Secretary and the representatives of miners, and provide these representatives a copy on request.*

For assistance with developing a compliant workplace exam program, auditing, or training, contact the Law Office.

**2019 SPEAKING SCHEDULE****ADELE ABRAMS**

## 2019 Speaking

August 12: Southeast Workers Compensation conference, Orlando, Presentation on OSHA in the Age of Trump

September 7: National Safety Council, San Diego, Full Day Workshop on Workplace Violence, Sexual Harassment and Workplace Safety

September 10: National Safety Council Annual Congress, San Diego, Presentation on Joint Employer Safety

September 19: Minnesota Concrete Council, Minneapolis, Training on OSHA Silica Standard

September 20: South Dakota Safety Conference, Sioux Falls, SD

September 25: Industrial Mineral Association- North America, Presentation on Silica IH Issues and MSHA, Skamania, WA

September 27: National Drilling Association, Presentation on OSHA Silica Rule, Herndon, VA

October 9: Chesapeake Region Safety Council Annual Conference, Panel on Medical Cannabis & Safety, Laurel, MD

October 10: Michigan Holmes Safety Association, Update on MSHA Law, Gaylord, MI

October 11: Chesapeake Region Safety Council, Workshop on Workplace Violence, Sexual Harassment & Workplace Safety, Baltimore, MD

October 22: BLR, Master Class on OSHA Recordkeeping, Dallas, TX

October 24: ASSP Hudson Valley NY PDC, Presentation on Safety in the Age of Trump

October 29 - 30: National Business Institute Workshop on Employment Law, Baltimore MD

November 5: Southeast Mine Safety & Health Conference, Presentation on Silica & MSHA Update, Birmingham, AL

## 2019 Webinars

July 31: Clearlaw Webinar on Workplace Violence and OSHA

August 14: BLR Webinar, OSHA E-Recordkeeping Rule

August 20: BLR/Avetta Webinar, What to Do When OSHA Knocks

August 21: ClearLaw Webinar, Opiates, Medical Marijuana & Workplace Safety

August 22: ClearLaw Webinar, Legal & Ethical Considerations for EHS Professionals

September 4: ClearLaw Webinar, Legally Effective Job Descriptions for Safety

September 30: ClearLaw Webinar, OSHA's Crystalline Silica Standard & Enforcement Trends

October 2: Clearlaw Webinar, Avoiding Whistleblower Protection Claims under OSHA/MSHA Law

October 8: ClearLaw Webinar, Legally Effective Incident Investigations