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Mine Safety and Health Administration

Commission Issues Decision Addressing Flagrant Violation Criteria, Reckless Disregard and Individual

By Sarah Ghiz Korwan, Esq.

On January 21, 2021, the Federal Mine Safety and Review Commission affirmed ALJ Margaret Miller's determination that a citation and an order related to a walkway ramp at taconite plant were unwarrantable failures and constituted reckless disregard of the standard. On review, the Commission (2-1) agreed that the order did not constitute a flagrant violation under section 110(b)(2) of the Mine Act, which the Secretary challenged. However, the Commission reversed the ALJ's decision affirming the penalties assessed against Roger Peterson (Peterson) and Matthew Zimmer (Zimmer).

The case, Sec. of Labor v. Northshore Mining Company, Roger Peterson, and Matthew Zimmer, involved an accident in which a conveyor walkway ramp dislocated at a processing plant owned and operated by Northshore, an iron ore mine. Minor injuries resulted from the incident, and the miner involved submitted a hazard complaint with MSHA. Following its investigation, MSHA issued Northshore a 104(d)(1) order which alleged that the walkway ramp was "not of substantial construction nor maintained in good condition," in violation of 30 CFR § 56.11002 and was a flagrant violation. In addition, a 104(d)(1) citation was issued which alleged that the ramp was "not barricaded or posted to alert miners to the compromised conditions of the floors," allowing miners to access the ramp, in violation of 30 CFR § 56.20011. As noted, individual penalties were also assessed against two members of mine management.

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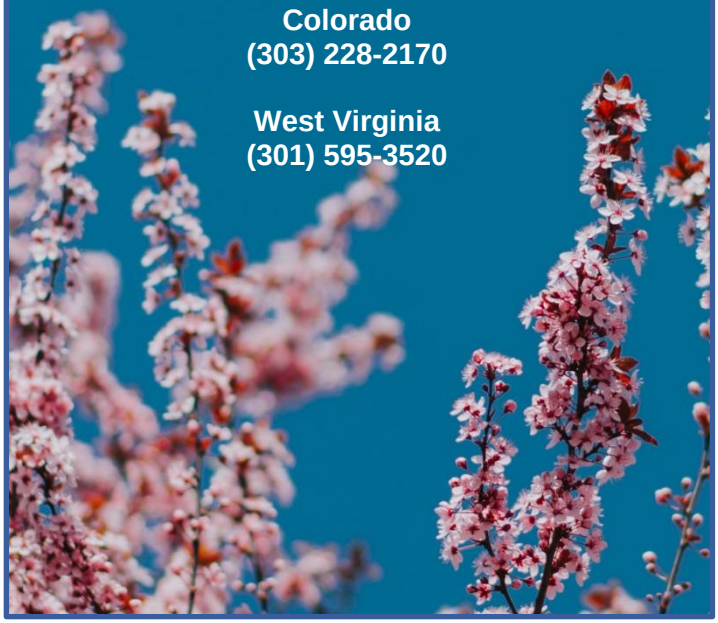

The record showed that in 2013, a work order concerning the need for repairs to the conveyor gallery was submitted, which was put on a "to-do" list, but repairs were never performed. In 2015, Northshore retained Krech & Ojard (KOA), an engineering firm, to evaluate the conveyor gallery, which included the central and side walkways. KOA's report indicated that the outer walkways were not structurally adequate for use and recommend that Northshore "restrict" access to the outer walkways, as they were not safe for personnel to be using until repaired. Northshore neither repaired nor blocked access to the walkway. However, employees were required to wear fall protection when accessing the outer walkways, and employees were instructed on the proper use of fall protection safety meetings and training.

Regarding the 110(c) penalties, the ALJ found that Zimmer and Peterson engaged in a knowing violation of section 56.11002 and assessed a $4,000.00 penalty against each of them. However, the Commission noted that a violation of section 110(c) requires that the agent must be in a position to correct the condition at issue in order for section 110(c) liabilities to attach and found that Zimmer and Peterson were not in the capacity to direct the repairs to the walkway at issue. Specifically, Zimmer was responsible for maintaining the pellet plant and equipment, while Peterson oversaw the equipment operation. In addition, neither Zimmer nor Peterson received the work order which addressed the condition of the walkway. Therefore, the Commission found that substantial evidence did not support the ALJ's findings of individual penalties and vacated the ALJ's section 110(c) findings.

In relation to the 30 U.S.C. § 56.20011 charge, the ALJ concluded that Northshore's failure to barricade the walkway was the result of reckless disregard, and that Northshore knew of the problem but took no steps to limit access, thereby demonstrating an indifference to a known hazard. Because Northshore did not pursue reversal of the 104(d)(1) order on appeal, the Commission found that Northshore waived its request for review and summarily affirmed the ALJ's findings.

Regarding the 104(d)(1) citation, the ALJ similarly found that the operator's violation of 30 C.F.R. § 56.11002 resulted from an unwarrantable failure and reckless disregard. The Commission agreed with the ALJ's findings regarding the aggravating factors, including the length of time that the violation had existed, the extent of the violative condition, the operator's efforts in abating the violative condition, degree of danger posed by the condition, and the operator's knowledge of the condition. The Commission rejected Northshore's argument that the engineer's report was ambiguous and found that they knew the walkways were unsafe. Further, the Commission found substantial evidence supported the ALJ's finding that the violation was an unwarrantable failure and reckless disregard of the standard.

Regarding the "flagrant" designation alleged by the Secretary, the Commission found that the ALJ properly rejected this as it applied to the violation of section 56.11002. Of the factors which constitute a flagrant violation, the ALJ found that Northshore's conduct did not constitute "reckless" within the meaning of 110(b)(2) and the Commission agreed. Notably, Northshore took action to learn about the condition of the walkway by retaining KOA to evaluation the condition, and believed, albeit wrongly, that fall protection would solve the problem of the walkways until repairs could be completed.

The Commission discussed the "flagrant" violation standard at length and proffered that an operator is "reckless" for purposes of a "flagrant" violation when it consciously or deliberately disregards an unjustifiable risk of harm arising from its failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standards. In addition, the Commission affirmed the ALJ's finding that the violation was not "reckless" in the flagrant context since Northshore did not "flout" the Mine Act nor did they consciously or deliberately disregarded an expected risk of death or serious bodily injury.

Commissioner Traynor wrote a lengthy dissent. He disagreed with the majority's position that the violation of section 56.11002 was not "flagrant" within the meaning of 110(b)(2) and that the operator's agents were not individually liable under section 110(c). He argued that the majority incorrectly interpreted the "reckless" standard, but that in any event, the facts of the case were so egregious the majority should have found the violation was flagrant. Regarding the individual penalties assessed against Zimmer and Peterson, Commissioner Traynor disputed the majority's interpretation of the facts and asserted that "aggravated conduct" warranted a finding of liability under section 110(c).

Occupational Safety and Health Administration

Amazon Lawsuits Bring Attention to Covid-19 Regulation and OSHA Preemption

By Gary Visscher, Esq.

Litigation involving Amazon and the Office of the Attorney General of New York is highlighting issues and questions about the scope of federal OSHA preemption regarding workplace regulation to protect workers from Covid-19.

In November 2020, in a lawsuit brought by a number of workers at a New York City warehouse, a federal district judge granted Amazon's motion to dismiss claims brought under New York law, on the basis that the enforcement of those laws with regard to specific protections for workers against Covid-19 is preempted by federal OSHA. The federal court agreed that OSHA has not issued a standard specific to Covid-19, but noted that OSHA had issued guidance and enforced existing standards and the general duty clause, and had conducted inspections and issued citations based on those standards. The court also cited OSHA's determination that "a standard 'is not necessary at this time' to combat this unprecedented pandemic because it has existing regulatory tools at its disposal 'to ensure that employees are maintaining hazard-free work environments." The federal district court's decision dismissing the plaintiff's claims in *Palmer et.al. v. Amazon*, (E.D.N.Y., November 1, 2020) is now on appeal to the Second Circuit, U.S. Court of Appeals.

Meanwhile, the New York Office of the Attorney General (OAG) continued with its investigation of workplace practices at the same Amazon warehouse. The OAG issued a preliminary assessment that Amazon had violated safety and health requirements, as well as retaliated against individual workers who were involved in the district court litigation. The OAG also threatened to bring suit against Amazon if a list of demands were not met.

On February 12, 2021, Amazon filed an unusual suit in the same U.S. District Court for the Eastern District of New York, seeking an injunction and declaratory relief against the OAG, to prevent the OAG from proceeding with an enforcement case against Amazon. In the complaint, Amazon argues that "the OSH Act preempts the OAG's attempt to enforce OSHA standards or its own workplace safety preferences with respect to Amazon's response to the COVID-19 pandemic. As the Palmer court noted, 'New York … cannot enforce state occupational safety and health standards for issues covered by a federal standard."

Generally, under section 18 of the OSH Act, states that do not have approved state OSHA programs are preempted from regulating "any occupational safety or health issue with respect to which no [federal OSHA] standard is in effect." On the other hand, states with approved state OSHA plans (which include Virginia, Michigan, California, Oregon, and other states that have promulgated their own COVID-19 standards) may promulgate their own standards so long as those standards are "at least as effective as" any federal OSHA standards "which relate to the same issues."

New York's state plan covers only public sector places of employment in the state, it is a non-State Plan state for purposes of private sector places of employment.

The issue in both the Palmer appeal and the recently brought Amazon case for injunctive relief against New York is whether federal OSHA's combination of guidance and enforcement and its determination (under the Trump Administration) that "its existing regulatory tools …ensure that employers are maintaining hazard-free work environments" preempt non-State plan states from enforcing their own regulation regarding the same conditions and issues.

Of course, this may become moot if the Biden Administration promulgates its own federal standard on COVID-19. Such a standard would likely preempt non-state plan states from regulating or enforcing their own requirements regarding workplace protections against COVID-19.

COVID-19 Pandemic

Vaccines & Workplace Safety

By Adele L. Abrams, Esq., CMSP

COVID-19 vaccines are here, and while many people have waited impatiently for their turn to get the "jab" of one of the three vaccines now approved by the US Food & Drug Administration under their Emergency Use Authorization (EUA) rules, nearly as many people are resisting getting vaccinated for a variety of reasons: religious, health-related, political, or wariness about the safety of these fast-tracked medications. Some of these vaccine resisters may work for you (or be you)?

What are the employer's rights and responsibilities concerning mandated COVID-19 vaccination programs in the workplace? What rights do employees have if they refuse to undergo vaccinations that may be a term and condition of employment? What does it really mean to be "fully vaccinated"? It's complicated. Moreover, because the three products approved under the EUA rules are "emergency" drugs, employer mandates will likely be found invalid – at least outside of the healthcare and emergency services sectors – and even the military cannot force vaccines due to provisions in the Geneva Convention!

At the present time, there is no federal COVID-19 standard although the Occupational Safety & Health Administration (OSHA) is scheduled to make a decision in March 2021 on whether to proceed with an Emergency Temporary Standard (ETS) that OSHA could enforce and fine employers up to $136,532 per affected employee. Currently four "state plan states" – Virginia, Michigan, Oregon & California – have enforceable COVID-19 ETSs, and Virginia's became permanent in January 2021, with all provisions in place by the end of March.

What are the employer's rights and responsibilities concerning mandated COVID-19 vaccination programs in the workplace? What rights do employees have if they refuse to undergo vaccinations that may be a term and condition of employment? What does it really mean to be "fully vaccinated"?

Absent an enforceable rule, federal OSHA and the remaining state plan states have used the "General Duty Clause" or "GDC" (a gap filler where no standard applies, based on Section 5(a)(1) of the Occupational Safety & Health Act) or PPE/respiratory protection and sanitation standards as the citable regulations applicable to COVID-19 workplace transmission hazards. OSHA is not using the GDC pertaining to any vaccination programs at this point, nor do any of the four state COVID ETS' include any provisions concerning vaccination, even in their "return to work" dictates. Therefore, the issue of mandating worker COVID vaccinations is largely governed by

employment law and worker's compensation considerations at this point – with a side order of tort law possible.

The four state plan states' ETSs were all enacted before there were approved vaccines so this explains their silence on the issue and their focus on social distancing, different levels of face coverings or actual respiratory protection, doing an analysis of the workplace and triaging it into very high, high, medium, and low risk work sectors, and reliance on the hierarchy of engineering controls (ventilation, barriers), work practice and administrative controls such as remote work or staggered workshifts and breaks, worker training, written hazard control programs, and PPE/face coverings where other respirators are not already being worn.

OSHA as well as the Centers for Disease Control (CDC) suggest that employers should encourage worker vaccines and facilitate this where feasible, but they stop short of calling for mandated vaccine programs. Instead, their guidance outlines the potential benefits to both employers and to workers of offering free on-site COVID-19 vaccines at your business locations. While this may not be feasible for smaller employers at the present time, the approval of the Johnson & Johnson "one dose" vaccine – which also has more feasible refrigeration requirements – makes on-site workplace vaccine programs easier, with the potential for mobile medical van administration in the future.

CDC/OSHA stress the following benefits to workplace vaccination programs:

- Potential benefits to employers
- Keep the workforce healthy by preventing employees from getting COVID-19
- Reduce absences due to illness
- Reduce time missed from work to get vaccinated
- Improved productivity
- Improved morale
- Potential benefits to workers
- Prevent COVID-19 illness (and potentially death or serious complications from "Long-COVID")
- Reduce absences and doctor visits due to illness
- Offers convenience
- Improved morale

Where it is not feasible for an employer to offer on-site vaccination clinics, employers can be a vital source of information on where to get free vaccinations for workers, or even offer computer scheduling assistance for workers who may lack those resources at home or who may have language barriers when navigating pharmacy or state websites.

Employers who decide to implement a vaccine program should ensure that they obtain input from legal, HR, labor representatives and management reps (especially where work schedules may be affected either during vaccines or when anticipating possible side effects from the shots), and occupational health providers in the area. In a union workforce, employers cannot unilaterally impose vaccine requirements as these are a term and condition of employment that must be negotiated under the National Labor Relations Act. Other employment issues include payment for the time getting vaccinated, and also potential overtime issues if delays in administration at a public location or pharmacy push a non-exempt worker into more than 40 hours in the workweek.

Worksite vaccine programs should include communication of vaccine information, including a EUA factsheet that CDC provides. Workers must be warned in advance that there may be side effects from the vaccination (especially with the second shot of the two-dose Moderna and Pfizer vaccines), and the importance of actually getting the second shot of the correct product if those vaccines are used – without it, the 90% effectiveness falls to around 50%, and patients should not "Mix and Match" their vaccines in terms of producer.

Ideally paid leave should be offered to workers who opt into vaccine programs but incur side effects that limit their ability to work for a day or two following their shots. This may help overcome resistance that might be wage-based for economically vulnerable workers. Finally, there will be state-by-state decisions as to whether vaccine complications will be compensable under worker's compensation law, and whether third parties (staffing agency temps, subcontractors) who are inoculated under a host employer's program and develop side effects will have tort remedies for personal injury.

In summary, workplace policies and administration of COVID-19 vaccines are complex and will require involvement of the safety officer, HR officer, and in-house or outside legal counsel, at a minimum. As an example, from the OHS professionals' perspective, if a worker objects on safety grounds to getting the vaccine, this may be considered protected activity under section 11C of the OSH Act? Work refusals based on safety concerns are protected, and President Biden's executive order says that if a worker refuses a job due to health concerns (potentially arising from mandatory vaccines?) the worker will be eligible for unemployment insurance, on top of any relief they might obtain through the OSHA complaint process.

From the HR professionals' perspective, the analysis focuses more on the civil rights laws – Title VII (religious protections) and the Americans with Disabilities Act (ADA) concerning disability protections. If workers' genetics put them at greater risk for vaccine complications, then in addition to the ADA, the Genetic Information Nondiscrimination Act could come into play. Both religious refusals as well as those that are disability (or pregnancy) based may trigger "reasonable accommodation" requirements, such as allowing the employee to work remotely until a safe vaccine is available for their needs or a sufficient number of others are vaccinated to achieve "herd immunity" (typically 70-90 percent of the population). Political objections to vaccines are not protected activity in private sector workplaces, where the First Amendment does not apply.

HIPAA issues may also surface if the employer is administering the vaccine on site and doing health screening directly or via a third party who shares the screening criteria with the employer. Currently, the EEOC says that employers can mandate vaccines, but that guidance was issued during the Trump administration and is subject to revision. The EEOC also says that unvaccinated workers are not automatically a "direct threat to safety" to the extent that they could be excluded from the workplace solely on that basis. There also are medical ethics issues concerning "incentivizing" vaccines by paying a bonus or giving a gift card, although some grocery chains and airlines are taking this approach.

The efficacy of the vaccines, long-term, are also unclear give the mutations developing and spreading rapidly in the United States, and on February 8, 2021, the CDC issued guidelines on what fully vaccinated persons should and should not do. Fully vaccinated means both shots of the two-shot vaccines, plus a waiting period of 14 days following the second shot. The CDC guidance states, for non-healthcare settings, that fully vaccinated people can:

- Visit with other fully vaccinated people indoors without wearing masks or physical distancing;
- Visit with unvaccinated people from a single household who are at low risk for severe COVID-19 disease indoors without wearing masks or physical distancing, and
- Can refrain from any quarantine and testing following a known exposure if they are asymptomatic.
- However a vaccine does not confer immunity and so fully vaccinated people should continue to:
- Take precautions in public like wearing a well-fitted mask and physical distancing;
- Wear masks, practice physical distancing, and adhere to other prevention measures when visiting with unvaccinated people who are at increased risk for severe COVID_19 disease or who have an unvaccinated household member

who is at increased risk for severe COVID-19 disease;
- Wear masks, maintain physical distance, and practice other prevention measures when visiting with unvaccinated people from multiple households;
- Avoid medium- and large-sized in-person gatherings;
- Get tested if experiencing COVID-19 symptoms; and,
- Follow guidance issued by their employers

For now, most workplace vaccine programs will remain optional due to the EUA status, but employers can play a vital role in helping to defeat this deadly pandemic.

Employment Law

Labor Department Proposes Rescission of its 2020 Joint Employer Rule

By Diana Schroeher, Esq.

On March 12, 2021, the U.S. Department of Labor (DOL), Wage and Hour Division, published a Notice of Proposed Rulemaking (NPRM) in the Federal Register, to rescind its Trump-Era Final Rule on joint employer status -a Final Rule that just went into effect one year ago - on March 16, 2020 (2020 Rule). Some finality on the joint employer rule would be a welcome result for employers and employees, especially given that the NLRB and the EEOC follow separate joint employer rules.

The DOL's Wage and Hour Division enforces the Fair Labor Standards Act (FLSA), which requires covered employers to pay non-exempt employees at least the federal minimum wage, pay overtime for all hours worked over 40 in a workweek, and maintain certain records. The FLSA does not define "joint employer" or "joint employment", but Section 3 of the FLSA does provide definitions for "employer," "employee" and "employ."

Joint Employer Rule - Background

The joint employment theory of liability has been around since 1939 - the year after the FLSA was enacted. In 1939, DOL's Wage and Hour Division issued Interpretative Bulletin No. 13, which addressed whether two or more companies may be jointly and severally liable for a single employee's hours worked under the FLSA. In 1958, the DOL introduced the Rule at 29 C.F.R. Part 791, which stated that joint employment exists if "employment by one employer is not completely disassociated from employment by the other employer(s) . . . [w]here the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in [certain] situations…" The 1958 Rule provided examples of when a joint employment relationship existed. From 1958 to 2016, the DOL issued numerous opinion letters, fact sheets, and legal briefs which restated the DOL's position on joint employer status.

In 2016, DOL's Wage and Hour Division issued the Joint Employment Administrator's Interpretation (AI), which explained that "the expansive definition of 'employ' as including 'to suffer or permit to work' rejected the common law control standard and ensures that the scope of employment relationships and joint employment under the FLSA . . . is as broad as possible." The 2016 Joint Employment AI explained "Vertical" and "Horizontal" joint employment and provided examples of each scenario. Vertical joint employment existed where the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, or entity that provides contract or temporary workers) and another employer directly benefits from the employee's labor. Here, the FLSA required application of the broader economic

realities analysis, not a common law control analysis, in determining vertical joint employment. Horizonal joint employment existed when an employee was separately employed by more than one employer, and worked separate hours in a workweek for each employer, and the employers were sufficiently "associated with or related to each other with respect to the employee" such that they are joint employers. The 2016 AI provided a far more employee-friendly framework with broader reach.

The March 2020 Joint Employer Rule

The 2020 Rule is considered business-friendly, and effectively serves to limit liability for entities involved with an employment relationship, following the previous administration's goals. Joint employment liability is triggered, in general, only if there exists a degree of "control" over the employee or employee's terms and conditions of employment. The final rule continues to recognize two potential scenarios where an employee may have one or more joint employers.

In the first scenario, or "vertical" joint employment, the employee has an employer who suffers, permits, or otherwise employs the employee to work, but another individual or entity simultaneously benefits from that work. The Rule provides a four-factor test for determining vertical joint employer status in vertical joint employment situations and include whether the potential joint employer: (1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records.

In the second scenario, or "horizontal" joint employment, one employer employs an employee for one set of hours in a workweek, and another employer employs the same employee for a separate set of hours in the same workweek, but the jobs and the hours worked for each employer are separate.

New York Federal Court Vacates the March 2020 Joint Employer Rule

The 2020 Rule became effective on March 16, 2020, and within months, a lawsuit was filed by 17 states and the District of Columbia against the DOL in the U.S. District Court for the Southern District of New York. The International Franchise Association and several other employer groups were granted intervenor-defendant status. The states challenged the 2020 Rule arguing it was contrary to law, and the judge agreed. On September 8, 2020, the Court held that the Rule violated the Administrative Procedure Act because it restricted the Rule to the narrow definition of "employer", when it should have considered the definitions of "employee" and "employ" as defined by the FLSA, and also Supreme Court caselaw interpreting these definitions. The Court found that the DOL failed to adequately justify its departure from its prior interpretations, stating that the DOL's "novel interpretation for vertical joint employer liability conflicts with the FLSA and is arbitrary and capricious. But the Department's non-substantive revisions to horizontal joint employer liability are severable, so 29 C.F.R. § 791.2(e) remains in effect. The Court vacates the rest of the revised 29 C.F.R. § 791.2."

On November 6, 2020, the Trump DOL and Intervenor-Defendants appealed the ruling. *New York, et al. v. Scalia*, No. 1:20-cv-1689-GHW, 2020 U.S. Dist. LEXIS 163498, at *94 (S.D.N.Y. Sept. 8, 2020), appeal pending, *New York, et al. v. Scalia*, No. 20-3806 (2nd Circuit, appeal docketed Nov. 6, 2020).

On March 31, 2021, the DOL under Biden filed a Motion with the Second Circuit Court of Appeals requesting a six-month abeyance of the appeal, to allow the DOL time to complete the rulemaking process. This would avoid the needless confusion and protracted litigation, if the Second Circuit were to reverse the district court, reinstating the March 2020 Rule, and a likely appeal to the Supreme Court.

DOL's 2021 Proposal to Rescind

On March 12, 2021, the DOL proposed to rescind the 2020 Rule and regulations found at 29 C.F.R. Part 791, a decision prompted by the new administration and the New York v. Scalia lawsuit. The DOL now seeks comments on the Proposal to Rescind, which will be considered by DOL while drafting its new Proposed Rule. The DOL hopes to finalize the rulemaking process by the end of 2021. Comments must be submitted by April 12, 2021.

For more information, a copy of any of the documents referenced above, or for assistance preparing and submitting comments by April 12, 2021, please contact Diana Schroeher, at 301-595-3520.

Occupational Safety and Health Administration

OSHA Issues Enhanced Guidance on COVID-19 in the Workplace, Sets Groundwork for ETS

By Josh Schultz, Esq.

Following a directive from President Biden, OSHA released updated guidance and recommendations for employers responding to COVID-19. This updated policy, titled "Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace," was posted January 29, 2021. The bulk of this policy recommends that employers "should implement COVID-19 prevention programs in the workplace," and outlines how employers can such a program.

In one of 10 executive orders signed the day after the Inauguration, President Biden issued "Executive Order on Protecting Worker Health and Safety," which requires OSHA to release revised guidance to employers on workplace safety during the COVID-19 pandemic within two weeks. Additionally, the executive order mandates that OSHA consider emergency temporary standards on COVID-19, and if such standards are determined to be necessary, issue them by March 15, 2021.

OSHA's recommended COVID-19 prevention program outlines several elements which could become part of a future emergency temporary standard. These elements include designating a workplace coordinator who will be responsible for COVID-19 issues on the employer's behalf; a hazard assessment to identify potential workplace hazards related to COVID-19; implementing a hierarchy of controls including engineering controls, workplace administrative policies, and personal protective equipment; guidance on enhanced cleaning and disinfection after people with suspected or confirmed COVID-19 have been in the facility; training on COVID-19 policies and procedures; and protections for workers who voice concerns about COVID-19-related hazards.

The guidance also recommends that employers provide a COVID-19 vaccine at no cost to eligible employees and that they do not distinguish between vaccinated workers and those who are not vaccinated for purposes of implementing safety measures. The guidance also incorporates CDC recommendations to improve ventilation and for isolating workers who have or likely have COVID-19.

While the guidance notes that the "recommendations are advisory in nature," and that the document "creates no new legal obligations," consistent with the Administrative Procedures Act, OSHA may use the guidance in enforcement for the purpose of clarifying ambiguous provisions in existing regulations. The guidance specifically mentions that the General Duty Clause requires employers to provide their workers with a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm. Additionally, the guidance notes that other applicable OSHA standards that apply to protecting workers from infection remain in place. These

standards include: requirements for PPE, respiratory protection, sanitation, protection from bloodborne pathogens and OSHA's requirements for employee access to medical and exposure records.

In September 2020, OSHA issued proposed penalties of $13,494 and $15,615 for alleged violations of the General Duty Clause to two meatpacking plants. In press releases detailing these citations, OSHA cited its own guidance, including recommended measures employers can take to protect workers from the coronavirus, “such as social distancing measures and the use of physical barriers, face shields and face coverings when employees are unable to physically distance at least 6 feet from each other.”

While OSHA’s most likely path to enforcing the recommendations issued in the January 29 guidance is through the General Duty Clause, if the agency issues an emergency temporary standard, they could render the recommendations binding law.

Mine Safety and Health Administration

D.C. Circuit Unanimously Rules for Operator re: Ventilation Plan

By Sarah Ghiz Korwan, Esq.

In a decision issued on March 26, 2021, the D.C. Circuit Court of Appeals vacated a citation issued by MSHA to Knight Hawk Coal LLC (Knight Hawk), and reinstated their previously approved ventilation plan.

Knight Hawk began underground mining at Prairie Eagle Underground Mine (Prairie Eagle) in 2006 with an MSHA-approved ventilation plan. Twelve years later, MSHA conducted a ventilation survey at Prairie Eagle and concluded that the approved ventilation plan did not adequately ventilate the perimeter cuts.

In late 2018, after months of back-and-forth exchanges between MSHA and the operator, federal mine regulators revoked Knight Hawk’s ventilation plan and issued a technical citation for alleged deficiencies in its ventilation processes. Knight Hawk contested the citation and, following a hearing, an administrative law judge (ALJ) found that MSHA’s revocation was arbitrary and capricious, in part, because the chemical smoke test results were unreliable and inconsistent and the Secretary ignored disagreements among the ventilation survey team members regarding results. As noted, the ALJ vacated the citation and reinstated the previously approved ventilation plan.

On July 23, 2020, the Federal Mine Safety and Health Review Commission found that substantial evidence supported the ALJ’s decision and upheld ALJ’s decision to dismiss the citation. The Commission’s majority wrote that any decision not to approve a ventilation plan should show “plausible harm to miners from methane, dust, noxious gases, or some other ventilation-related hazard, which is to say, the denial is not based upon a reasonable fact-based concern for safety.”

As noted above, the D.C. Circuit upheld the Commission’s decision and ruled against MSHA, finding that it wrongly revoked the mine operator’s ventilation plan by relying in part on inconsistent and unreliable chemical smoke tests. The Court found that substantial evidence supported the ALJ’s determination that the Secretary’s revocation of the operator’s MSHA-approved ventilation plan was arbitrary and capricious.

As an initial matter, the Court’s review of the Commission’s decision was a “substantial-evidence” review, which is highly deferential to the agency fact-finder, requiring only “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” The Court even observed that the “reversal of an agency decision under the substantial evidence standard is rare.” Even with the cards

stacked in MSHA's favor, the Court found for the operator.

First, the Court acknowledged that the Secretary may treat ventilation plans for perimeter mining differently from other forms of retreat mining that involve roof collapse. However, a significant problem for the Secretary arose because MSHA improperly relied on inconsistent smoke test results without addressing the differences in the opinions and observations from its own investigation team, which the ALJ found to be the basis for its arbitrary and capricious revocation. Also problematic for MSHA was its exclusive reliance on the survey results, despite the fact that Knight Hawk's ventilation plan was approved and had been in place for 12 years without serious incident. Given the positive history of the mine and its ventilation, MSHA lacked a "rational connection" between the discredited 2018 survey results and revocation of the ventilation plan.

In addition, there was corroborating evidence that the chemical smoke tests performed in the perimeter cuts were unreliable. Specifically, MSHA's lead investigation engineer, Dennis Beiter admitted that the chemical smoke test results "were not always repeatable." Moreover, "[t]he survey team made observations of smoke rising approximately 44-feet away in dimly lit perimeter cuts from areas that miners do not normally work or travel." The Commission noted that it was not surprising that reliable observations in the dark and at that distance created conflicting opinions regarding the results. The Court also noted the ALJ's finding that MSHA's primary witness, Beiter, lacked credibility while the testimony of Knight Hawk's witnesses was more reliable.

Moreover, the Court credited the ALJ's findings that the air purity test results obtained during the ventilation survey did not provide the necessary rational connection between the facts found and the MSHA's decision to revoke the ventilation plan. Specifically, the Secretary relied heavily on his conclusion that "the risk of methane accumulation made the ventilation plan unsuitable", although levels of methane and oxygen were well within the allowable limits.

Finally, the Secretary sought a remand rather than reinstatement of the ventilation plan, in the event the Court affirmed the ALJ's and Commission's decisions regarding revocation. However, because the Secretary did not raise the remand issue before the Commission and offered no "extraordinary circumstances" for such failure, the Court found the failure to request a remand fatal and such request was denied.

Occupational Safety and Health Administration

OSHA Issues Interpretation on Reporting Serious Injuries

By Gary Visscher, Esq.

OSHA's serious injury reporting rule, 29 C.F.R. 1904.39, requires employers to report to OSHA any fatality, in-patient hospitalization, amputation, or loss of an eye caused by a work-related incident. The rule requires fatalities be reported within 8 hours and hospitalizations, amputations, and loss of an eye be reported within 24 hours. Hospitalizations, amputations, and loss of an eye which occur within 24 hours of a work-related incident must be reported. An employee's death must be reported to OSHA if it occurs within 30 days of the work-related incident.

What happens if, after reporting the incident to OSHA on one of the three bases, a second basis for reporting the incident occurs? For example, a worker is initially admitted to a hospital, which the employer reports to OSHA, and subsequently passes away from the injuries suffered. Or, an employee is admitted to the hospital, which the employer reports, and while in the hospital, the employer's arm is amputated due to the

work-related injury. Must the employer submit a second report to OSHA?

That was the question to which OSHA provided a recent Letter of Interpretation. According to the Letter, "[i]t is not OSHA's intention that related events, each of which are reportable under section 1904.39, be reported twice." As long as the initial hospitalization is reported within the 24-hour period, the employer is not required to report the second event to OSHA.

OSHA's Letter of Interpretation also reminds employers that OSHA's Injury and Illness Recordkeeping rule requires that employers record the most serious outcome for any work-related injury. "[E]ven though employers do not have to report the second event, they still need to record the most serious outcome for each case on their OSHA injury and illness records." Thus, for example, an incident which initially results in restricted work but later requires surgery and days away from work must reflect the more severe outcome on the OSHA Form 300.

COVID-19 Pandemic

Virginia Issues Permanent Standard for Prevention of COVID-19

By Michael Peelish, Esq.

Virginia has implemented a Permanent Safety and Health Standard requiring employers to control, prevent, and mitigate the spread of COVID-19, replacing the emergency temporary standard (ETS). The new standard is effective January 27, 2021, although some provisions, as training, kick-in 60-days later. So, what does this mean for employers?

The ETS requirements are for the most part carried over into the Permanent Standard with some important changes that employers need to be aware, including:

- Defines "Face Coverings" as two or more layers of washable, breathable fabric that fits snugly covering the nose and mouth, does not have exhalation valves or vents, and includes neck gaiters. Employees may not use a face shield as a substitute for a face covering, however face shields can be worn only if a face covering cannot be worn due to a medical condition.
- Virginia Department of Health to instead report "outbreaks" of two or more cases of their employer's employees present at the workplace within a 14-day period.
- Clarifies that an employer must notify the Virginia Department of Labor and Industry within 24 hours of the discovery of a single grouping of three or more of the employer's employees present at the workplace within a 14-day period who test positive for COVID-19 during that time.
- Changing the time-based return-to-work requirement from 10-days with three symptom-free days to 10-days with only one symptom-free day, to be consistent with CDC requirements.
- Eliminates test-based return-to-work requirement, leaving employers with a time-based requirement only reducing employer flexibility.
- Removes the ANSI/ASHARE requirements for air handling systems under the employer's control for jobs classified as "very high," "high," or "medium", but recommends other criteria including increasing airflow supply to occupied spaces (provided it does not create a greater hazard), routinely clean and inspect filters (MERV13), and generate "clean-to-less clean" air movements by reevaluating the positioning of supply and exhaust air diffusers and/or dampers.

- Eliminates the requirement for employers to comply with respiratory standards when employees travel together in work vehicles due to shortages of N-95 and other respirators; however, it does provide for other criteria such as ventilation.
- VOSH will not bring an enforcement action against employers making good faith efforts to secure PPE in short supply.
- The Permanent Standard cannot be used to enforce a Governor's executive orders.

The Permanent Standard retains the ETS's "safe harbor" provision if an employer's actions comport with a CDC recommendation, whether mandatory or non-mandatory, to mitigate COVID-19-related hazards, if such recommendation provides equivalent or greater protection than that provided by the Permanent Standard.

Some things that remain problematic include no prohibition of employees from going to work after close contact with a person testing positive for Covid-19; lack of flexibility if CDC guidance lessens obligations on employers; and the ability of employees to raise "reasonable concerns" regarding an employer's Covid-19 infection control to multiple organizations including the public through social and other media in contravention of employer's policies.

The bottom line is that the changes are helpful, except for the removal of the return-to-work testing option, but based on the comments provided by interested parties could have gone further. Whether you like it or not, the Permanent Standard requires Virginia employers to revise their existing infection disease prevention and response plans to incorporate the changes.

Mine Safety and Health Administration

Bill Introduced in Congress to Compel MSHA to Issue Emergency Standard

By Sarah Ghiz Korwan, Esq.

It is axiomatic that the U.S. Department of Labor and its Mine Safety and Health Administration (MSHA) is the agency chiefly responsible for the health of miners, yet MSHA has failed to issue at least a temporary standard related to the coronavirus.

To address this deficiency, on February 1, 2021, West Virginia's two U.S. senators and six members of Congress introduced a bill, the COVID-19 Mine Worker Protection Act, that would add COVID-19 protection for miners.

The COVID-19 Mine Worker Protection Act would compel mine operators to:

- Develop and implement a comprehensive infectious disease exposure control plan, integrating guidelines from the Centers for Disease Control and Prevention, NIOSH and relevant scientific research
- Provide miners with personal protective equipment
- In cooperation with CDC and NIOSH, track, analyze and investigate mine-related COVID-19 infections data to inform recommendations and guidance

President Joe Biden issued an Executive Order on Jan. 21, Protecting Worker Health and Safety, directing OSHA and MSHA to consider Emergency Temporary Standards related to COVID-19. However, the Order was more in the nature of guidance and support for protecting workers' health, and less a specific mandate.

Cecil Roberts, president of the United Mine Workers of America, supports the bill introduced by the bipartisan group and called it "long overdue". Although he applauded the President's executive order, he was not confident that MSHA would act unless required. In a statement regarding the bill COVID-19 bill, Roberts said that, "this legislation will ensure that MSHA will issue such an order, enforce it and then make it permanent."

MSHA said it issued 195 citations for sanitary conditions that could have contributed to coronavirus spread from March 1 to December 31. The Labor Department's Office of the Inspector General in July released a report recommending that MSHA monitor COVID-19 outbreaks at mines and reevaluate its decision not to issue an emergency temporary standard.

Sen. Shelley Moore Capito was the only Republican listed among those introducing the bill in Congress. Joining Manchin and Capito in introducing the bill were: Sen. Dick Durbin, D-IL, Sen. Tim Kaine, D-VA, Sen. Mark Warner, D-VA, Sen, Bob Casey, D-PA; Sen. Sherrod Brown, D-OH; and Rep. Matt Cartwright, D-PA.

Sen. Joe Manchin, D-WV, sponsored a bill with the same purpose in May, but the measure failed to advance out of the Senate Committee on Health, Education, Labor and Pensions.

U.S. Department of Labor

OSHRC Modifies Its Test for Allowing Late Filed Contests

By Gary Visscher, Esq.

Under section 10 of the OSH Act, an employer has only 15 working days to contest a citation and proposed penalty from OSHA. If the Notice of Contest (NOC) is not sent to OSHA within the 15 days, the citation and proposed penalty are automatically "deemed a final order of the Commission."

Using Federal Rule of Civil Procedure (FRCP) 60, the Commission may give relief from such final judgments. FRCP 60 has several bases for relief, but the most commonly asserted in motions to reopen after a late filed NOC is Rule 60 (b)(1), which provides that a final order may be set aside if it was entered due to "mistake, inadvertence, surprise, or excusable neglect."

A 1993 Supreme Court decision (in a non-OSHA case), *Pioneer Investment Services v. Brunswick Assoc*., spelled out 4 factors that courts and agencies should consider when determining whether "excusable neglect" exists for missing a procedural deadline. The so-called "Pioneer factors" are: (1) the danger of prejudice to the opposing party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the moving party acted in good faith. The Supreme Court stated that "excusable neglect" should be based on "all relevant circumstances" and considering all of these factors.

Even though the Commission has long stated that the Pioneer factors apply to late filed NOC cases, it has generally applied a one-factor test, which late NOC filers could rarely meet. Under the Commission's one-factor test, relief was denied if the reason(s) for missing the 15-day time limit for filing the NOC "was within the control of the employer." Under that test, it often required an "act of God" for an employer to be granted relief.

Three U.S. courts of appeals, the 3rd Circuit in George *Harms Construction v. Chao*, 371 F.3d 156 (3d Cir. 2004), the 11th Circuit in *Randall Mechanical v. Sec'y of Labor*, 798 F. App'x 604 (11th Cir. 2020) and the 5th Circuit, in *Coleman Hammons Construction v. Sec'y of Labor*, 942 F.3d 279 (5th Cir. 2019), reversed Commission decisions denying relief because the Commission gave too much weight to the single factor

of whether the reason for delay was "within the control of the employer." The remaining circuits have either not expressly ruled on the appropriate test or deferred to the Commission. As a result, the likelihood of success on a motion to reopen a final order entered due to a late-filed NOC now depends to which circuit the case may be appealed.

The most recent Commission FRCP 60(b) decision somewhat modified the Commission's test and makes it incumbent on employers seeking relief to include a statement and "evidence" that the late filing was a "one off" incident, and not indicative of the business's usual office procedures.

The facts *in Burlington Capital PM Group, d/b/a Post Wosods Apartment Homes*, (Dec. 31, 2020) were as follows: OSHA conducted an inspection in October 2019 at an apartment complex in Ohio. Following the inspection, OSHA's Columbus, Ohio area office issued a single serious citation. OSHA sent the citation to Burlington's corporate office in Omaha, Nebraska. A paralegal at the corporate office prepared a Notice of Contest and gave it to an administrative assistant to send via UPS to the OSHA area office. The administrative assistant mistakenly sent the Notice of Contest to Post Woods Apartment address, rather than to OSHA. In January, 2020, OSHA sent a delinquent payment notice to Burlington. On March 4, 2020, Burlington contacted OSHA, and after being informed that OSHA had not received its NOC, subsequently filed a motion to reopen with OSHRC, along with an affidavit from the administrative assistant stating that she inadvertently shipped the NOC to Post Woods rather than to OSHA.

The Administrative Law Judge to whom the case was assigned denied Burlington's motion for relief, based on the "the reason for delay was within the control of the employer" test. The Commission reversed the ALJ's decision, and remanded the case for proceedings on the citation.

The Commission said that it would distinguish "cases in which an employer's deficient procedures lead to a delay in filing and those in which there is an unforeseeable misunderstanding or miscommunication that results in a delay despite the company's otherwise sufficient procedures."

The Commission then found that in Burlington, the delay was due to "an unforeseen error by the administrative assistant, not the result of a deficient procedure." The evidence cited by the Commission that this was not indicative of deficient procedures was that the NOC of contest had in fact been prepared by the paralegal and given to the administrative assistant to mail. The assistant mailed it to the wrong address.

The Commission's new test makes it incumbent on employers seeking to reopen a final order due to a late-filed NOC to include some type of evidence about its "usual" procedures for handling such mail, to show that it has "sufficient procedures" in place and the failure to handle the NOC was an exception. Indeed, a recent ALJ decision, *L & C General Contractors*, (ALJ, Dec. 31, 2020), found that where the employer did not include evidence specific to how it ordinarily handles such business mail, the employer had failed "to meet its burden to establish that it had orderly procedures" and relief under FRCP 60(b) was denied.

California OSHA

California Establishes Worker Rights and Fair Labor Section within the State Department of Justice

By Josh Schultz, Esq.

California Attorney General Xavier Becerra announced on January 28, 2021 the establishment of a Worker Rights and Fair Labor Section within the California

Department of Justice's Division of Public Rights. In a press release, Attorney General Becerra stated the new section will bring "increased focus and expertise to implement policy and protect against workplace issues."

The state announced three areas where the new section will have a particular impact:

- Wage theft, working with partner agencies to help address systemic deficiencies that result in workers losing out on the wages they are due, including in instances where businesses fail to pay overtime or allow for meal and rest breaks;
- Health and safety violations, stepping up DOJ's ability to tackle current and emerging trends such as those brought on by the coronavirus; and
- Employee misclassification, protecting workers from being inappropriately classified as independent contractors, which can allow companies to evade legal obligations such as minimum wage, sick leave, and overtime.

Attorney General Becerra was a strong proponent of the state's emergency temporary standard regarding the COVID-19 pandemic, and the new section will likely collaborate with CalOSHA in enforcing the ETS.