LAW OFFICE OF
ADELE L. ABRAMS P.C.

ISSUE #5
September 1, 2022

Occupational Safety and Health Administration

Commission Finds Failure to Inspect Bolts Is a Hazard under General Duty Clause

By Gary Visscher, Esq.

The elements of a general duty clause violation are well established: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; (4) a feasible and effective means existed to eliminate or materially reduce the hazard; (5) the employer knew or could have known with the exercise of reasonable diligence of the hazardous condition.

A recent Review Commission decision addressed the first element: what is a hazard for purposes of an alleged general duty clause violation? In many cases, the alleged hazard is the condition or activity that caused or was a factor in an accident or injury.

But not always. In *Henkels & McCoy* (July 21, 2022), the Commission said, “it is the hazard, not the specific incident that resulted in injury or might have resulted in injury, that is the relevant consideration in determining the existence of a recognized hazard.” But may the hazard be the failure to follow a safety procedure, regardless of whether there is evidence that the failure resulted in a physical defect?

The case resulted from a fatal injury to a crew leader who was operating a digger derrick to remove a utility pole. Quoting the Commission decision, “When the incident occurred, the crew leader was seated in the digger derrick’s operator’s chair and the apprentice was working from the ground. After they both heard a ‘creak,’ the crew leader immediately stopped operating the digger derrick and instructed the apprentice to investigate. He discovered that one of the flange’s

INSIDE THIS ISSUE

D.C. Metro
(301) 595-3520
(301) 595-3525 fax

Colorado
(303) 228-2170

West Virginia
(301) 595-3520

eighteen bolts had 'sheared' off and was on the bed of the truck. The apprentice then checked the other bolts and informed the crew leader they were tight. When the crew leader resumed moving the boom, the apprentice again heard sounds and jumped off the truck. He then turned, at which point he saw the boom falling and the crew leader being ejected from the operator's chair to the pavement below."

What caused the boom to fall was not established, at least not in the context of the OSHA case. OSHA cited Henkels & McCoy (H & M) under the general duty clause, alleging that the company had failed to properly maintain the digger derrick bolts by not testing the bolts to ensure that the bolts were properly torqued. However, there was no evidence that that the bolts had come loose, or that not torque-testing the bolts was a factor in the bolts shearing. Complicating matters, several months after the accident, the manufacturer of the digger derrick, Altec, issued a recall notice because of a discovered design defect in the bolts.

The administrative law judge who conducted a hearing in the case determined that the hazard was the design defect, and since the design defect was not known or "recognized" at the time of the accident, he vacated the citation.

On review, the Commission said the ALJ had erred in redefining the hazard as the design defect. The Commission said that the design defect and the cause of the fatal accident were not relevant to the general duty clause violation alleged by OSHA, which alleged that the violation was H & M's failure to check the bolts and ensure they were properly torqued.

The Commission credited testimony by the Secretary's expert, who testified that not having the bolts properly torqued "could" cause the bolts to 'back out and fall out' of the flange-to-gear-ring connection and eventually cause the digger derrick to collapse." The Commission also noted that the manufacturer, Alltec, had placed a warning decal on the digger derrick, warning of the need to inspect and properly torque the mounting bolts.

Together, the Commission said. this evidence showed that not torque-testing the bolts increased the risk of harm, and therefore met the definition of a "hazard," despite there being no evidence that the bolts were in fact loose at the time of the accident.

Having found that H & M's failure to torque test the bolts constituted a hazard, the Commission found that the "manufacturer's decal, which plainly warns that failure to torque the bolts properly can cause a 'structural failure' … constitutes industry recognition." The Commission also found that the remaining elements of a general duty violation were satisfied.

The Commission also denied H & M's affirmative defenses. First, H & M raised an affirmative defense of "reasonable reliance" on a specialty contractor, Diversified Inspections, which H & M hired to provide semi-annual inspections of H & M's digger derricks. The Commission found that Diversified's inspection reports indicated that its inspections did not include torque testing, and H & M's own mechanics exercised day-to-day control over the machines.

H & M also raised an affirmative defense of unpreventable employee misconduct. The Commission said that, in raising the defense, "the company focuses on the cause of the incident" rather than on the basis of the violation, the failure to torque test the bolts. In addition, the Commission noted, H & M had provided no evidence establishing that it monitored compliance and enforced work rules relevant to the violation.

MSHA Releases New Mobile App

On August 31, MSHA launched an app for use on iPhone and Android devices. The app is divided into five main sections: Safety Topics, Health Topics, Miners' Rights, About MSHA, and a "Contact Us" section. The app will also send users notifications of mining accidents and how to prevent them.

Occupational Safety and Health Administration

OSHA Updates Whistleblower Investigation Protocols

By Adele L. Abrams, Esq., CMSP

As prosecutions against employers for violating workers' rights under the Occupational Safety & Health Act have ramped up, OSHA has released a new 168-page manual updating its Whistleblower Investigations procedures. The document, CPL 02-03-011, is dated April 29, 2022, but was announced on August 11th. It is the first update since 2016, at the end of the Obama Administration, when OSHA launched a whistleblower advisory committee. That committee was disbanded under the Trump Administration, and prosecutions dropped off during that period.

In addition to enforcing the whistleblower protections under Section 11(c) of the OSH Act, and the related standard 29 CFR 1904.36, OSHA also has jurisdiction over whistleblower complaints filed concerning over a dozen environmental laws, the Surface Transportation Assistance Act (covering CDL drivers, rail and aviation workers), and the Sarbanes-Oxley Act (protecting employees of publicly traded companies with respect to information disseminated to shareholders and the public). The Mine Safety & Health Administration (MSHA) runs its own whistleblower protection program under Section 105(c) of the Mine Act, and that also covers contractors performing work at workplaces under MSHA jurisdiction. Therefore, the new manual does not impact MSHA investigation protocols.

The comprehensive overhaul sets new procedural requirements for steps in the OSHA process, and also requires the 22 state-run OSHA programs (plus those in the territories) to adopt their own version of the manual within 60 days. However, state-plan OSHA agencies are not responsible for investigating claims arising under other statutes, unlike federal OSHA, so the manual provides information on when such matters should be referred to the federal government for investigation and prosecution. The CPL incorporates 11 policy members issued between 2016-2022 and also requires OSHA officials to consult with a representative of the Department of Labor's regional solicitor's office before deferring to any outside agency or tribunal's final determination of an issue.

Adele Abrams will present a pre-conference seminar on whistleblower protections at the ASSP Region 6 Professional Development Conference (and virtually) on September 13, 2022. For more information, contact Adele at safetylawyer@gmail.com.

Equal Employment Opportunity Commission

EEOC Updates

By Diana Schroeher, Esq.

Recent EEOC Initiatives

Federal Agencies: The EEOC issued a report on July 27, 2022 detailing compliance with the 2020 law (Elijah E. Cummings Federal Employee Antidiscrimination Act), the first law mandating a direct reporting structure, whereby federal agency EEO directors must report directly to the head of the agency. The Cummings law was passed in part to help ensure that day-to-day control be established to maintain effective and compliant EEO programs within the federal government. The report revealed that small agencies achieved the greatest levels of success with a direct-reporting structure, and that mid-sized, large and Cabinet-level agencies reported only moderate success. The EEOC expects that, given the mandate of the Cummings law, and the clear benefits of the direct-report structure, many more agencies will comply with the law.

Tribal Nations: On July 25, 2022, the EEOC announced initiatives that will serve to strengthen the Commission's partnership with the Tribal Employment

Rights Offices (TEROs), which serve as an essential liaison between tribes and the EEOC, and assist the EEOC in carrying out the Commission's anti-discrimination enforcement efforts. New TEROs Initiatives include formation of a new EEOC-TERO joint committee to promote the common goals of addressing and eliminating employment discrimination within and surrounding tribal communities. The EEOC also established a new programs webpage which can be viewed at this link.

Pay Data Collection: On August 2, 2022, the EEOC hosted a webinar summarizing the findings of a study that examined the pay data collected from employers through the EEO-1 Component-2 data for FY 2017 and 2018. Private employers with 100 or more employees and federal contractors with 50 or more employees must annually submit demographic workforce data, including data by race/ethnicity, by sex and job categories, to the EEOC. The study confirmed that collection of the information is critical to the EEOC's efforts to prevent and enforce federal laws prohibiting pay discrimination. The 2022 EEO-1 website for data collection is tentatively scheduled to open in **April 2023**. Updates regarding the 2022 EEO-1 Component 1 data collection, including the opening date, will be posted to www.eeocdata.org/eeo1 as updates become available.

EEOC Lawsuits

Waterway Gas and Wash: On July 1, 2022, the EEOC announced a settlement with the Waterway Gas and Wash Company, a national provider of car wash services, after filing suit against the company for violations of the Americans with Disabilities Act (ADA). The settlement included a $70,000 payment and other relief to an employee who suffered a seizure on the job, had requested accommodation for his epilepsy, was denied accommodation without discussion, and was later fired in retaliation. The ADA requires employers to engage with employees when a reasonable accommodation is requested. The EEOC maintains that, since employees with epilepsy face higher rates of unemployment, the EEOC will remain vigilant in its efforts to protect workers who face discrimination in employment.

Hobby Lobby: The EEOC filed suit against Hobby Lobby, according to a July 1, 2022 press release, a company that employs over 43,000 employees nationwide. The EEOC alleges that Hobby Lobby violated the ADA when it discriminated against a disabled employee when it refused to allow the employee to bring her service dog to work to assist her with PTSD symptoms as a reasonable accommodation. Hobby Lobby stated safety concerns over bringing the dog to work, but permitted customers to bring their pet and service dogs into their stores. The EEOC is seeking backpay, compensatory and punitive damages and reinstatement for the employee. The ADA was enacted to protect individuals with disabilities, including those who are assisted by service animals.

Aspire Nursing Homes: An August 9, 2022 EEOC press release announced the filing of a lawsuit against Aspire Regional Partners, Inc., a group of nursing homes known as "Aspire", for allegedly violating Title VII on the basis of sex discrimination, which includes sexual orientation discrimination, when it falsely accused an employee of performance problems, then firing him. The EEOC is "committed to enforcing Title VII's prohibition against discrimination on the basis of sex in all forms, including discrimination based on sexual orientation." The EEOC is seeking permanent injunctive relief preventing Aspire from future violations, lost wages, compensatory and punitive damages, and other relief for the employee.

Occupational Safety and Health Administration

Will OSHA Regulate Monkeypox in the Workplace?

By Adele L. Abrams, Esq., CMSP

COVID-19 is not yet behind us, although many of the federal and state OSHA restrictions in public and in (non-healthcare) workplaces have been relaxed based on updated CDC guidance on distancing, masking and quarantining of "close contacts." Is Monkeypox going to be the next hybrid public health/workplace health issue that OSHA must tackle? The odds are good.

OSHA has historically placed employers on notice that they have responsibility legally if transmissible diseases spread through a workplace and the employer fails to implement protective measures that are suggested by OSHA and NIOSH. Even before COVID-19, OSHA issued bulletins to guide employers on preventing the spread of the H1N1 influenza, and more recently alerted employers of outdoor workers about precautions needed to prevent transmission of the Zika virus by mosquitoes in some areas.

Now, indications are that OSHA is indeed developing Monkeypox guidance for employers, with release expected sometime in September 2022, even as existing COVID-19 guidance has been superseded by medical information and transmission trends. OSHA retains authority under Section 5(a)(1) of the Occupational Safety & Health Act of 1970 – the "General Duty Clause" (GDC) – to issue citations to employers who fail to protect exposed workers from any "recognized" workplace health or safety hazards that pose a risk of death or serious illness/injury, for which there is feasible mitigation, and where no other standards already apply. In addition to citations of up to $145,027 per exposed worker under the GDC, OSHA can also use existing standards such as recordkeeping, sanitation and respiratory protection to supplement worker protections.

The Biden Administration declared Monkeypox to be a public health emergency on August 4, 2022, which followed a similar declaration on July 23rd by the World Health Organization. New York, Illinois and California have also declared the illness to be an emergency at the state level. Monkey pox can be transmitted through skin-to-skin contact (including during sex), but also by breathing infectious respiratory droplets, or handling materials that have been contaminated with fluid from the pustules.

Monkeypox is not presently viewed by the Centers for Disease Control as being "an airborne transmissible disease," unlike COVID-19. It is believed that Monkeypox patients are only contagious when symptomatic (not pre-symptomatic, as with COVID-19), but they may need up to four weeks out of the workplace to completely recover, as during that time they would be considered contagious unless their blisters are completely healed. This may lead to more business and school disruptions if spread continues unabated in the US, as well as employer obligations under the Americans with Disabilities Act and the Family and Medical Leave Act – both of which provide protections for patients as well as for family members who are caregivers.

The United States now leads the world in the number of Monkeypox cases (17,000 as of August 2022), and while the WHO noted that transmission rates globally are down 21 percent in August, rates in the United States continue to climb. In the United States, Monkeypox cases have now been identified in schools, daycare facilities and among hotel workers, who became infected from changing contaminated linens. As with COVID-19, the frontline health care workers have regular exposure warranting protection.

A OSHA spokesperson said that the agency is monitoring the situation, and urges employers to evaluate and follow current CDC guidance about precautions, treatment and vaccines. The agency anticipates that there will be fewer work-transmitted cases but that, in addition to the GDC citation exposure, employers must still record Monkeypox as an occupational illness if there is workplace

transmission. The spokesperson added, "There is nothing inherent about Monkeypox that would exclude it from OSHA illness and injury reporting." OSHA has indicated that Monkeypox cases would likely meet the criteria to be included on the employer's "Privacy Log" which shields the identity of the sick worker from others, while still reflecting that the case occurred for OSHA purposes.

Adele Abrams will present a webinar on COVID-19, Monkeypox and infectious disease prevention in the workplace at 1pm ET on September 28th for Premier Learning Solutions. For more information, contact Adele at safetylawyer@gmail.com.

Occupational Safety and Health Administration

Crane Case Moves to Court of Appeals

By Gary Visscher, Esq.

To sustain a citation, OSHA must prove four elements: (1) the cited standard applies, (2) there was a failure to comply with the standard, (3) employees had access to the violative condition, and (4) the employer knew or could have, with the exercise of reasonable diligence, known of the condition.

In *TNT Crane & Rigging*, the employer challenged two of the four elements on each of the two citation items OSHA charged after an accident in which an employee was seriously injured from contact with a high voltage electric line. The administrative law judge who initially heard the case agreed with TNT that the cited standard did not apply. The Commission reversed the judge and sent the case back for hearing. The ALJ subsequently found that TNT lacked knowledge of the violative condition. On appeal the Commission again disagreed with the judge. The Commission also found that TNT had failed to sustain an affirmative defense of unpreventable employee misconduct.

The case has now been appealed to the U.S. Court of Appeals for the Fifth Circuit. The case raises several interesting and important OSHA law issues.

First, on the issue of applicability of the cited standard, TNT argued that the cited standards are found in a paragraph of the construction crane standard (29 C.F.R. 1926.1407) which addresses precautions during crane assembly and disassembly, and that TNT's crew was not disassembling the crane when the accident occurred.

At the time of the accident, the 4-person crew was lowering the boom of a mobile crane which had been used for installing new antennas on a communications tower. The boom was being lowered in order to lay on a flat-bed trailer, prior to removing extensions. While the boom was being lowered, one of the crew members was assigned to keep the hoist line taught. He was seriously injured when the hoist line contacted a 14,400 volt power line during the operation.

TNT argued that that operation involved was not disassembly, because the accident occurred while the boom was being lowered and before the crew had begun to physically disassemble the crane. The Commission disagreed, finding that the "text and structure of the crane standard makes clear that the meaning of disassembly is not limited to the time during which crane components are being physically separated." Even if the standard was ambiguous, the Commission wrote, the Secretary's interpretation was reasonable and entitled to deference.

The Commission also reversed the administrative law judge on the issue of employer knowledge. Proof of employer knowledge may, in general, be shown by the knowledge of a supervisor, whose knowledge and/or involvement in the violation is imputed to the employer as the employer's agent. However, a few courts of appeals, notably the 5th Circuit and the 11th Circuit, have made an exception to the general rule that a supervisor's knowledge is imputed to the employer where the supervisor himself or herself is the employee involved in the violative activity or conduct. In a situation of such "supervisor misconduct," these

courts have said, to use the supervisor's misconduct to prove employer knowledge would essentially create a strict liability regime. Thus, in supervisor misconduct cases, these courts of appeals have required OSHA to show that the supervisor's misconduct was "reasonably foreseeable" due to the employer's inadequate work rules, training, or enforcement.

But there is an exception to the exception. If the supervisor is acting as a supervisor, that is, the supervisor knows of or directs or authorizes a subordinate in the violative actions, or working in violative conditions, both the 5th Circuit and 11th Circuit have held that the supervisor's knowledge may be imputed to the employer without the need for OSHA to show that the supervisor's actions were reasonably foreseeable.

In *TNT,* the supervisor was part of the 4-person crew involved in lowering, and ultimately removing the crane from the worksite. The plan for breaking the crane down was decided upon and agreed upon and executed by all four crew members. The Commission found that the violation was the result of "collective failures" by the crew. "Because we find that TNT's entire crew collectively engaged in the violative conduct alleged in each citation item, the supervisor's knowledge of the other crew members' conduct is imputed to TNT without a showing of foreseeability."

TNT also argued that the violations were the result of the crew's unpreventable employee misconduct. In order to prove the defense of unpreventable employee misconduct, the employer must establish that (1) it had work rules in place to prevent the violative conditions, (2) it adequately communicated the rules to its employees, (3) it took steps to discover violations of the work rules, and (4) effectively enforced the rules when violations were discovered.

The Commission rejected TNT's defense, and its discussion and reasons for rejecting TNT's argument of unpreventable employee misconduct is instructive in terms of the documentation and records employers should maintain in order to be able to support the defense. The Commission evaluated each of the two citation items separately against the four factors needed to support the defense. Regarding the first citation item, the Commission found that TNT's work rules were not sufficiently specific to the requirements of the standard, and therefore were inadequate. Regarding the second citation item, the Commission said the work rules were sufficient, but TNT did not show that it sufficiently monitored for compliance or effectively enforced the work rules. After the accident TNT had disciplined the supervisor on site, but it did not have record of any previous discipline for violating its power line safety rules. The Commission said it was unlikely, given TNT's size and number of employees, that there had not been any previous violation of the rules.

COVID-19

CDC Updates COVID-19 Guidance

By Josh Schultz, Esq.

In an August 11, 2022 press release, the Centers for Disease Control and Prevention ("CDC") announced that the agency is "streamlining" its COVID-19 guidance. Most notably, the new guidelines recommend that persons exposed to COVID-19 do not need to quarantine, but should wear a high-quality mask for 10 days and get tested on day five. The new guidance also removes previous recommendations that people stay six feet away from others.

The CDC guidance recommends that persons isolate if they are sick and suspect that they have COVID-19 but do not yet have test results. If a person tests positive for COVID-19, the CDC recommends they stay home for at least five days and isolate from others in the home. If after five days, the person is fever-free for 24 hours without the use of medication, and

symptoms are improving, or the person never had symptoms, they may end isolation after day five.

Although the CDC guidance is not enforceable law, many states have incorporated the guidance into their COVID-19 workplace standards. Further, employers can use compliance with CDC guidance to show they are furnishing a workplace that is free from recognized hazards and avoid citations under federal OSHA's General Duty Clause.

Employers in California must still follow the CDPH Isolation & Quarantine guidance, as incorporated by CalOSHA's COVID-19 Prevention Emergency Temporary Standards, which require persons who test positive for COVID-19 to stay home for at least five days after start of symptoms (or after date of first positive test if no symptoms). Isolation can end after day five if symptoms are not present or are resolving and a the person tests negative. If the infected person does not take a COVID-19 test, isolation can end after day 10 if fever-free for 24 hours without the use of fever-reducing medications.

National Institute for Occupational Safety & Health

New NIOSH Temporary Worker Safety Toolkit

By Adele L. Abrams, Esq., CMSP

The National Institute for Occupational Safety and Health (NIOSH), working with the NORA Services Sector Council, has released a toolkit to help agencies and host employers improve protections for temporary workers. Such workers often get inferior training and workplace protections, because of the transient nature of their relationship with the host employer, and are injured at higher rates than permanent employees when working in high hazard sectors.

NIOSH estimates that there are as many as 16 million temporary workers (i.e., those who are paid by a staffing company and assigned to work for a host employer company) in the U.S. during a year. In 2013, OSHA launched its Temporary Worker Initiative in response to increasing reports of temporary workers suffering serious or fatal injuries, some even in their first days on the job. The OSHA Temporary Worker Initiative has issued numerous guidance documents outlining the joint safety and health responsibilities of staffing companies and host employers.

This new resource builds on this work by providing an in-depth set of best practices for host employers to follow and supporting materials to facilitate their implementation. The Mine Safety & Health Administration (MSHA) also has a contractor safety outreach and enforcement initiative underway, and the materials in the OSHA toolkit will have utility at mines and construction aggregate operations as well as at OSHA-regulated worksites.

The new resource provides detailed best practices for host employers of temporary workers that are applicable across industries and occupations, and is organized into three areas:

1) How to evaluate and address workplace safety and health in a written contract;

2) Training for temporary workers and their worksite supervisors; and,

3) Injury and illness reporting, response, and recordkeeping.

The document also includes scenarios of how host employers can implement the best practices, checklists, and even a free set of training slides for staffing companies to use when informing their host employer clients about the best practices. The toolkit was developed in partnership with the American Society of Safety Professionals, the American Staffing Association, and representatives from Washington State's SHARP program. The compendium of best practices, Protecting Temporary Workers: Best Practices for Host Employers, will help host employers

better protect the safety and health of temporary workers.

NIOSH and the NORA Services Sector Council are hosting a release webinar on August 30th at 11am ET to introduce this new resource and answer questions. For more information, on this program contact the NORA Coordinator at NORACoordinator@cdc.gov.

Occupational Safety and Health Administration

OSHA Announces 'Weekend Work' Initiative Focused on Fall Protection at Construction Sites in West

By Josh Schultz, Esq.

The U.S. Department of Labor announced a new enforcement initiative in July targeting the construction industry on weekends in select counties in Colorado, Montana, and South Dakota. The program, dubbed the "Weekend Work Initiative," will involve workplace inspections on weekends at construction sites focused on fall protection.

OSHA area offices in Denver and Englewood, Colorado; Billings, Montana; and Sioux Falls, South Dakota will conduct the initiative. Compliance officers will open workplace safety and health inspections on weekends in Arapahoe, Douglas, Jefferson, El Paso, Adams, Boulder, Broomfield, Denver, Larimer and Weld counties in Colorado; Yellowstone, Carbon and Stillwater counties in Montana; and Minnehaha, Lincoln, Brookings, Pennington and Union counties in South Dakota.

In announcing the initiative, OSHA noted that since 2017, OSHA has investigated 10 fatalities and numerous serious construction-related fall injuries in the geographic area targeted. In 2021, the Bureau of Labor Statistics reported that falls from elevation led to 351 of the 1,008 deaths among construction workers.

OSHA's fall protection standard for construction is codified in Subpart M - 29 CFR 1926.500. Subpart M requires the use of fall protection when construction workers are working at heights of 6 feet or greater above a lower level. It applies at heights of less than 6 feet when working near dangerous equipment, for example, working over machinery with open drive belts, pulleys or gears or open vats of degreasing agents or acid. It also covers protection from falling objects, falls from tripping over or falling through holes, and protection when walking and working around dangerous equipment without regard to height. Subpart M provisions do not apply, however, to workers inspecting, investigating, or assessing workplace conditions prior to the actual start of work or after all construction work has been completed.

Generally, OSHA approves conventional fall protection systems such as guardrail systems, safety net systems, or personal fall arrest systems. The regulations do provide allowances for other systems and methods of fall protection when performing certain activities, such as a positioning device system when working on formwork.

Employment Law

Warning: CBD Products May Have Heavy Metal Contaminants

By Adele L. Abrams, Esq., CMSP

CBD-infused products have proliferated in recent years, used by consumers legally in all 50 states in a variety of forms – pills, tinctures, candies, beverages, and lotions – despite legally having up to 0.3 percent THC (the active ingredient in cannabis). CBD is used for pain relief, insomnia, relaxation and other conditions but it not yet approved by the Food & Drug Administration (FDA) for human consumption. During a 2019 hearing before the FDA concerning regulation of the substance, researchers from NC posited that of 24 products they tested, only one was correctly labeled and some had more than the legal amount of THC – placing users at risk for positive drug tests in the workplace.

Now a new study, appearing in the journal Science of the Total Environment, shows more risks associated with over-the-counter purchase of CBD in an unregulated environment. Researchers at University of Miami's School of Medicine assessed 516 CBD products, 121 of which were intended for oral consumption, and the results were disturbing.

The study found that 42 percent of products tested positive for the presence of lead, 37 percent were positive for mercury, 28 percent were positive for arsenic, and 8 percent were positive for cadmium! Moreover, over 40 percent of the products they tested had lower percentages of CBD than were advertised on the product labels, including lower levels in 29 percent of edible products tested. The article notes that heavy metal contamination has also been identified in unregulated delta-8 THC vape pens.

The authors concluded: "There is substantial discrepancy between the product label claims for CBD potency and the amount measured in both edible and topical products, underscoring the need for tight regulations for CBD product label integrity to protect consumers." They warned that lack of regulation could give both consumers and medical providers hesitation about the benefits and potential uses of CBD.

CBD products sold in legal cannabis dispensaries are generally subject to the same rigorous testing requirements as cannabis products, including screening for contaminants such as heavy metals, pesticides, and mold. They also are more likely to be properly labeled as to THC content, as some products sold in dispensaries are a mix of THC/CBD ingredients. However, consumers should be aware that even at the maximum legal 0.3 percent THC content, heavy use could still trigger a positive marijuana drug test depending on what nanogram cutoff value is selected by the employer or agency performing screening.

For more information on cannabis law, drug testing and workplace safety, contact Adele Abrams at safetylawyer@gmail.com.