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Mine Safety and Health Administration

Commission Holds No MSHA Jurisdiction of Off-Site Facility or Equipment

By Gary Visscher, Esq.

In a decision handed down on April 5, 2022, the Federal Mine Safety and Health Review Commission substantially limited MSHA's jurisdiction over off-site equipment maintenance and storage facilities, as well as over mining equipment and maintenance work being done on that equipment which at the time of the inspection is not located on (or area appurtenant to) a mine.

KC Transport, Inc. involved citations issued by an MSHA inspector against a trucking company which operated as an independent contractor to nearby coal mines as well as other businesses. The trucking company maintained a parking area, which was also used for maintenance work, which was located near several of the mines, but not on mine property.

MSHA did not regularly inspect KC Transport's parking/maintenance facility, though its trucks were inspected when they were present on mine property or mine haul roads during an MSHA inspection. However, in this case, an MSHA inspector traveled to the KC Transport parking/maintenance facility in order to terminate citations that had been issued on two haul trucks during a previous inspection of the mine. While the inspector was at the KC Transport facility, he observed work being done on two other haul trucks. The trucks were not blocked against motion while being raised for repair. The inspector then issued two new citations to KC Transport.

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

Colorado
(303) 228-2170

West Virginia
(301) 595-3520

Both the trucking company and the Secretary of Labor moved for summary judgment. (KC Transport agreed that if MSHA had jurisdiction to issue the citations, there was no issue that the standard was violated.) The ALJ who heard the case found that MSHA had jurisdiction, though on grounds different than what had been argued by the Secretary.

The Review Commission split 2 to 1, with Chairman Traynor dissenting. The Commission majority held that "an independent repair, maintenance, or parking facility not located on or appurtenant to a mine site and not engaged in any extraction, milling, preparation, or other [mining] activities … [nor] tools, equipment, and the like not on a mine site or any appurtenant thereto and not engaged in in any extraction, milling, preparation or other [mining] activities are not mines within the scope of subsection 3(h) of the Mine Act."

In other words, neither KC Transport's facility, nor the trucks or other equipment parked or stored there, were within MSHA's jurisdiction.

The Commission decision followed the Court of Appeals 2017 decision in *Maxxim Rebuild Co. LLC v. FMSHRC*, 848 F.3d 737 (6th Cir. 2017). In that case, the Court of Appeals held that MSHA's jurisdiction did not extend to an off-site maintenance facility which serviced mining equipment. The Court of Appeals said that MSHA's theory that its jurisdiction extended to a facility on the basis that mining equipment was stored or serviced there "would create 'no stopping point.'" Rejecting that argument, the Court of Appeals held that "the power of the Mine Safety and Health Administration extends only to such facilities and equipment if they are in or adjacent to – in essence part of – a working mine."

The Commission majority noted that it was not bound to follow the Court's holding and approach in *Maxxim*, because the KC Transport case arose in the 4th Circuit. The Commission also noted that its holding in this case departs from previous Commission decisions. However, the Commission found that the Sixth Circuit's approach "is consistent with the history, language, statutory framework, legislative intent, and two well-considered federal circuit court of appeals decisions."

Employment Law

CBD Products Triggering Positive Drug Tests: How Recent Decisions Affect Employers

By Sarah Ghiz Korwan, Esq.

Employers who are screening for tetrahydrocannabinol (THC), the psychoactive component in marijuana, are learning that that some cannabidiol (CBD) products contain trace amounts of THC, resulting in a positive test for the substance. Notably, urine drug tests, the kind most commonly used by employers, screen for a compound the body makes when it breaks down THC. The test will not detect this substance solely from the breakdown of CBD. In addition, CBD products typically contain less than 0.3% of THC, but that doesn't preclude positive test results for THC. If a large amount of CBD product is consumed in a short period of time or if a CBD product has concentration greater than 0.3% THC, the test will be positive for THC. In addition, there have been reports that of CBD products tainted with THC.

In the private sector, employers likely will not distinguish CBD use from marijuana when workplace drug policy provides for termination in the event a drug test reflects the presence of THC. A federal court in Indiana dismissed an employee's lawsuit after he tested positive for marijuana due to alleged CBD use and claimed that his termination was discriminatory on the basis of a disability. *Rocchio v. E&B Paving, LLC, and Int'l Union of Operating Engineers Local 103*,

Case No. 1:20-cv-00417 (S.D. Indiana March 31, 2022).

Rocchio was an engineer who was subject to random drug testing under his employer's drug testing policy. The policy required testing for marijuana and provided for termination in the event of a positive drug test result. When he tested positive, he claimed that it was due to his use of CBD oil. Still, he was terminated from his employment in accordance with the Company's policy.

Rocchio alleged that the employer and the union violated the Americans with Disabilities Act by terminating him and failing to rehire him. He alleged that the employer's policy of terminating all employees who test positive "categorically regards" them as abusers of illegal drugs and also regards them as disabled because safety was the rationale for the policy. The court did not agree and noted that "it did not follow" that an employer conducts drug testing believes that everyone who tests positive is disabled under the ADA. Moreover, there was no evidence that the employer believed that Rocchio was disabled, or that he was terminated because of any perceived disability.

At the state level, the West Virginia Supreme Court upheld a coal miner's suspension after use of CBD led to a positive test result for cannabinoids/THC. *W.Va. Office of Miners' Health and Safety & Training v. Beavers*, 2022 W.Va. LEXIS 323, 2022 WL 1223230 (April 5, 2022).

Beavers, a West Virginia coal miner, needed a sleep aid and, was assured by a pharmacist that CBD oil would not result in a positive THC test. However, a day after he took the CBD oil, the miner was required to submit to a random drug test, which came back positive. The Office of Miners' Health and Safety & Training (OMHST) suspended the miner for six months, as required by State code.

The miner appealed the suspension to the Coal Mine Safety Board (the Board), an administrative tribunal. At the hearing, the miner was advised of his option to have the split sample tested at another certified laboratory but declined this option. Dana Carasig, M.D., a medical review officer, testified that the test did not distinguish between THC and CBD. She further testified that the test is a "confirm result used" for detecting the "active THC constant." Following the hearing, the Board reinstated the miner's certifications, finding that he had consumed a CBD product, which is not a controlled substance under the statute. The OMHST appealed the Board's decision to the Circuit Court of Kanawha County, which denied the OMHST's appeal. The OMHST then appealed the Circuit Court's ruling to the State Supreme Court, which upheld the original decision of the OMHST to revoke the Beaver's mining certifications for six months.

The Court found that there is no requirement that the OMHST prove that the person abuses alcohol or drugs, only that they tested positive for the substance. The Court noted that the miner's claim that he used CBD, a legal over-the-counter substance, did not constitute a defense to his positive test, despite the fact that his consumption of CBD unintentionally subjected him to THC. The court also dismissed the argument that the CBD is a legal substance, noting that alcohol is also legal but still on the list of banned substances.

CBD use has also come under review by the federal government, which has issued policy and rules at different agencies. Although Federal Drug Administration does not certify amounts of THC in products, it has issued several warning letters to companies because their products contained more CBD than indicated on the product label. The Department of Defense has outright banned CBD use by military members, noting that CBD can be derived from marijuana or hemp. The Department of Defense has also noted that the use of CBD products, including those derived from hemp, may lead to a positive urinalysis test for THC. The Department of Transportation has issued a notice regarding on product definitions, testing requirements and noting that the use of CBD products can lead to positive drug test results.

Our lawyers have experience and knowledge of the federal and state laws that impact the legality of employment drug screening programs. Feel free to contact us for consultation and/or assistance with employment drug screening issues at The Law Office of Adele L. Abrams, P.C., 301-595-3520.

Occupational Safety and Health Administration

Changes to OSHA's Lead Standard on Horizon

By Adele L. Abrams, Esq., CMSP

While nothing formal has been released, this Spring OSHA sent a preliminary notice to the Office of Management & Budget of its intent to revise portions of medical removal provisions contained in the lead rules for general industry and construction. Current medical information suggests that OSHA's existing triggers for removing a worker from a workplace with occupational lead exposure – 60 micrograms per deciliter (ug/dL) for general industry and 50 ug/dL in construction, with permission to return to work at 40 ug/dL – are not sufficiently protective and those levels were set in 1978 and never strengthened. The changes would also likely impact medical surveillance triggers under OSHA's lead rule as well.

While it is not clear what the new "magic number" will be for either removal or resumption of work, the studies identified by OSHA found that cognitive, renal (kidney) and reproductive adverse effects were found in adults at levels under 40 ug/dL. California's Medical Management has recommended that blood lead levels in adults be reduced to less than 10 ug/dL. The current head of federal OSHA, Doug Parker, is the former head of Cal-OSHA, which places greater emphasis on occupational health issues. The CDC also announced in October 2021 that it was lowering blood lead reference values, used to identify children with high lead exposure, to 3.5 ug/dL. EPA is also involved in the multi-agency effort to reduce lead exposures from drinking water and paint.

OSHA initially put the reduction of lead levels on its regulatory agenda in May 2016, but the effort stalled during the Trump administration. The notice went to OMB in March, and typically takes up to 90 days before clearance is given to the agency to publish the proposal. California and Washington State OSHA agencies are also looking at revisions on lead medical removal, and Michigan (MI-OSHA) already lowered its medical removal point to 30 ug/dL.

While the business community has offered support to some revision of the standard, there are concerns that if a significant reduction is adopted, many new worksites may be covered by the rule arising from incidental lead exposure rather than by participating in lead-intensive tasks such as welding or in workplaces such as foundries, smelters and battery factories.

Rulemaking to add medical removal provisions to OSHA's 2016 respirable crystalline silica standard is also on the agenda, with a proposal expected this summer. OSHA was ordered by the U.S. Court of Appeals to review its decision to omit medical removal in 2017. Unlike lead, removal for silica is complicated by the absence of a biomarker, other than relying on chest X-rays, and once silicosis or other lung damage occurs due to silica, it is irreversible.

For lead and other toxic chemicals with removal provisions in their standards, OSHA views medical removal cases as a "poisoning" recordable on the agency's 300/301 logs, even if the individual continues working in another capacity with the employer because it constitutes a restriction (for lead exposure) and a transfer (from the usual position). If the individual cannot be transferred to a position without exposure to the toxic substance at issue, they would remain off-duty and likely be eligible for worker's compensation wage replacement, subject to individual state laws.

For more information about medical removal provisions or programs, contact Adele Abrams at safetylawyer@gmail.com or call the Law Office at 301-595-3520.

U.S. Department of Labor

US DOL Alleges "Pattern of Failures" for Arizona's State OSHA Plan, Threatens Revocation

By Josh Schultz, Esq.

The U.S. Department of Labor announced a proposal on April 20, 2022 to reconsider and revoke the final approval of Arizona's State OSHA plan, alleging a pattern of failures to adopt and enforce standards and enforcement policies at least as effective as those used by OSHA.

On October 19, 2021, OSHA issued a written notice to the Industrial Commission of Arizona, stating it is "reconsidering" its approval of Arizona's OSHA state plan. This notice was precipitated by Arizona's refusal to fully adopt the Healthcare ETS OSHA issued for healthcare employers or an "at least as effective as" alternative.

State plans are OSHA-approved job safety and health programs operated by individual states rather than federal OSHA. OSHA approves and monitors all state plans and provides up to 50 percent of each program's funding. Section 18(c) of the OSH Act requires that these state plans must maintain standards that are at least as effective as OSHA standards. When OSHA establishes a new standard, state plans typically have six months to adopt the new standard. OSHA state plans may enact standards that are more stringent than the correspondence federal OSHA rule, as frequently occurs in California.

Section 18(f) of the OSH Act governs the agency's ability to revoke approval of state plans. The law allows OSHA to revoke approval of a state plan where "there is a failure to comply substantially with any provision of the State plan." OSHA is required to provide notice - which, in the Arizona OSHA case, OSHA published in the Federal Register on April 21, 2022 - and an opportunity for a hearing. OSHA's deadline for comments on the proposal is May 26, 2022. If necessary, OSHA will hold an online hearing on Aug. 16, 2022 at 10 a.m. EDT. Those interested in testifying or questioning witnesses must submit a notice of their intention by May 11, 2022.

If OSHA does revoke approval of the Arizona state plan, the state may retain jurisdiction in most cases commenced before the withdrawal of the plan.

In a press release announcing the proposed revocation, OSHA specifically noted the state's failure to adopt the COVID-19 Healthcare Emergency Temporary Standard. In the Federal Register notice, OSHA alleged multiple instances in which the Arizona state plan failed to adopt or maintain standards that are at least as effective as OSHA standards. The notice states that in 2012 the Arizona legislature passed a bill which implemented residential construction fall protection requirements that were clearly less effective than the federal requirements. Arizona did not remedy this issue until after OSHA initiated revocation proceedings in 2014 and formally rejected Arizona's fall protection requirements in 2015. Further, OSHA alleges that Arizona has not yet fulfilled its state plan obligation to adopt penalty levels that are at least as effective as those of federal OSHA.

Occupational Safety and Health Administration

OSHA's First Regional Emphasis Program on Silica in Stone Cutting Becomes Effective May 2022

By Michael Peelish, Esq.

On February 8, 2022, OSHA's Region 8 (CO, MT, SD, ND, WY, UT) issued the first Regional Emphasis Program (REP) on silica in cut stone and slab handling. OSHA will begin enforcing this REP on May 17, 2022; it is set to in 2027. On February 4, 2020, OSHA issued a National Emphasis Program (NEP) regarding on Crystalline Silica without any expiration date. While the 2020 NEP addresses the hazards associated with silica, lists the targeted industries, explains the inspection procedures for addressing possible silica exposures, and mandates state plans and local and regional offices comply, the Region 8 REP goes further and includes the handling of slabs, captures establishments with fewer than ten employees, and provides for a noise evaluation by the inspector. All these inspection activities address distinct hazards associated with the industry sector. Region 8 stone cutting employers should conduct an internal assessment and take a snapshot of how they stack up to the silica and beyond as the REP sets forth. It is good preventive medicine.

Stone cutting operations located outside of Region 8 should take heed and do a similar assessment. Even though OSHA may come to your facility as a targeted employer under the NEP, inspectors always manage to find a way to "look around" to see what is in "plain view." It is also good safety practice to step back and take a second look at how tasks are performed.

The other thing to keep in mind when OSHA puts out these NEPs and REPs: affected employees should be made aware of the emphasis being placed on the work that they do. During inspections, inspectors will ask employees if they are aware of specific OSHA programs and when they respond in the negative, it makes the employer look less knowledgeable and caring.

West Virginia Mine Safety

WV Legislator Proposes Major Change to Mine Safety Laws, Fails

By Sarah Ghiz Korwan, Esq.

A common expression in the mining community is that mine safety laws are written in blood. This belief propounded by opponents likely tamped down an attempt by lawmakers, supported by industry, in West Virginia to overhaul the State Office of Miners' Health, Safety and Training.

Under the proposed legislation, mandatory mine inspections would be converted into "visits" and the provision allowing inspectors to visit without advance notice would be removed. In addition, the requirement that governor nominees have experience in "health and safety" would also be eliminated. Further, the bill converted "orders" into "recommendations".

Essentially, the agency would be model for mine safety training and education, not an enforcement agency, and would make visits to find potential safety hazards and provide recommendations to change. The intended goal of the legislation was to shift "the focus of inspectors more toward training than enforcement", according to Del. Adam Burkhammer, a contractor with the West Virginia Miners' Health and Safety Program and a proponent of the legislation.

Backed by the UMWA, a small army of coal miners showed up to oppose the and speak out against the proposed legislation. They reminded legislators that safety laws were written because of prior failures by government to protect miners with adequate safety regulations, which has resulted in an unconscionable number of deaths and injuries. The bill failed this year, but the lead sponsor indicated that he wanted to work on the bill and bring it back next year.

There may be merit to the proposed legislation. West Virginia needs the office of miner health, safety, and training to focus on certification and training and stay away from enforcement because it is an unnecessary burden borne by operators in West Virginia and, in many cases, complicates matters to the point that safety was compromised. Further, as asserted by the sponsor of the bill, that having state mine inspectors is redundant, with 120 state inspectors compared to the approximately 500 federal inspectors both inspecting the 93 active coal mines in the state. West Virginia wouldn't be the first coal producing state to shift focus to training as similar models exist in Kentucky and Illinois, where inspectors help miner operators with compliance with state and federal regulations. The sponsor is not advocating against mine safety enforcement by MSHA. However, an inspectorate group which focuses their efforts on education and safety improvement might have the most impact, not just going through the regulatory mandates, but objectively educating operators on areas where they need improvement, from a nonconfrontational and non-adversarial position. This also might be more efficient and effective.

Until the WV Legislator transforms its mine safety enforcement agency, WV inspectors are still inspecting mine operations, issuing citations, and assessing penalties. We have two attorneys licensed to practice in West Virginia and are available anytime, should you need help with any mine safety issues in the State.

Safety Culture

CPWR Injury Data Show Need for Greater Emphasis on Safety

By Adele L. Abrams, Esq., CMSP

In May 2022, CPWR and the Center for Construction Research & Training released a Data Bulletin summarizing key findings from their review of 2020 injury data (fatal and nonfatal) for the construction industry. The findings again show that construction is one of the most hazardous industries, and workers are significantly overrepresented in fatal injuries. Construction workers are 7.3 percent of the total workforce, but suffered nearly 22 percent of all fatal injuries in 2020. The data utilized were drawn from the most recent Bureau of Labor Statistics reports for private wage-and-salary construction. The CPWR report notes that the data underreport nonfatal injuries overall, but particularly to those incurred by Hispanic construction workers.

The key findings in the report include:

- From 2011 to 2020, there were an annual average of 963 fatal injuries among all construction workers, and 78,000 nonfatal injuries amount private sector construction workers.
- The rate of fatal injuries between 2011 and 2020 increased by 11.1 percent.
- Fatal injury rates (per 100,000 FTEs) increased between 2-11 and 2020 among those under age 55 (rising from 8.1 to 9.0), among Hispanic workers (9.6 to 12.6) and among male workers (9.7 to 10.8).
- Among all construction trades, roofers had the highest fatal injury rate in 2020, with 47 fatalities per 100,000 FTEs.

- Falls, slips and trips were among the leading events/exposures, resulting in 376 fatal and 22,900 nonfatal injuries on average annually from 2018 to 2020.
- COVID-19 did not have a significant impact on the *number* of fatal injuries during 2020, but did result in a higher fatal injury *rate* due to decrease in construction employment during that year.

Overall, by occupation, the highest construction trade fatal injury rates in 2020, per 100,000 FTEs, were:

1. Roofers: 47.0
2. Helpers: 43.3
3. Structural iron and steel workers: 32.5
4. Underground mining machine operators: 21.6
5. Construction laborers: 18.1
6. Construction equipment operators: 17.6
7. First-line supervisors: 11.7
8. Painters and paperhangers: 11.6
9. Electricians: 8.0
10. Carpenters: 7.8
11. Pipelayers, plumbers, pipefitters and steamfitters: 5.2
12. Construction managers: 3.4

For comparison, the overall fatality rate for all workers was 3.4 per 100,000 FTEs, the total private industry sector rate was 3.7, and private industry construction was 10.2

Construction contractors and subcontractors should consider these rates, and increase training as we go into a summer season with booming residential construction as well as infrastructure improvements.

California OSHA

CalOSHA Standard Board Approves Revised COVID-19 ETS

By Josh Schultz, Esq.

On April 21, 2022, the CalOSHA Standards Board approved the Agency's third revised COVID-19 ETS. The ETS now heads to the Office of Administrative Law for review. At the time of this writing, the Office of Administrative Law had not yet approved the ETS, but it is anticipated the ETS will be approved this week, as the second re-adoption of the ETS is set to expire May 6. The ETS will remain in effect through December 31, 2022.

The new ETS will include some substantive changes from the previous version, including the following:

- Amends the definition of "face covering" to delete the "light test" language (requirement that face coverings fabrics "do not let light pass through when held up to a light source")
- Changes the term ""high-risk exposure" to "infectious period"
- Allows use of self-administered and self-read tests for the return to work criteria if another means of independent verification of the results can be provided (e.g., a time-stamped photograph of the results)
- Requires employers to make COVID-19 testing available at no cost to employees with COVID-19 symptoms regardless of vaccination status

CalOSHA has published and updates an FAQ regarding their COVID-19 ETS which provides useful policy information for employers.

Employment Law

Cannabis on the Ballot in 2022

By Adele L. Abrams, Esq., CMSP

While most political attention is focused on the current primary season, one thing that may draw voters to the polls in November 2022 is cannabis. There are now six states that are poised to have residents vote on referenda to legalize recreational cannabis: Maryland, Ohio, Missouri, Arkansas, South Dakota and Oklahoma. Tennessee is also considering a non-binding ballot question asking three questions of voters relating to legalization of marijuana.

The Delaware House has passed legislation to remove all penalties associated with either the possession or the not-for-profit transfer of up to one ounce of marijuana by adults, although possession above this limit and the public consumption of marijuana would still be classified as a misdemeanor. In New Hampshire, political strategy is underway to pass legislation that would eliminate civil fines for minor marijuana possession and legalize the limited home cultivation of cannabis – the bill passed the House but failed in the state Senate, and is now being added to other legislation with a greater chance of passage this term.

South Carolina's proposed legislation, the South Carolina Compassionate Care Act, which would allow qualifying patients to use, purchase, and possess medical cannabis with a physician's recommendation, passed the state Senate but was killed this month on a procedural vote in the SC House. Meanwhile, in some states, medical cannabis laws are being altered. Utah and Ohio are both considering legislation to expand the pool of qualifying conditions to include "acute pain" that would otherwise be treated with opioids (in Utah) and to allow legal use by those diagnosed with an autism spectrum disorder (Ohio). South Dakota is looking to permit qualified medical patients to grow more plants for personal use.

Legislation just passed by the Colorado House and Senate streamlines and expands the record sealing process for those with marijuana-related records, and provides employment and tenant protections for those whose records have been sealed. Illinois is considering legislation to protect cannabis consumers from employment discrimination by limiting employers' ability to either discipline or refuse to hire a worker because of positive drug tests for THC.

Meanwhile, a national survey in April 2022 from New Frontier Data found that 53 percent of Americans over 18 years of age acknowledge having consumed cannabis and 60 percent of active consumers were between 18 and 44 years of age. They were most likely to report consuming cannabis for the purposes of relaxation, reducing anxiety, and managing pain. This is obviously a critical segment of the workforce for construction, mining, and heavy industrial operations that may have many "safety sensitive" tasks that are inconsistent with impairment on the job from drugs, alcohol or other causes such as fatigue and stress.

Relaxation of cannabis laws will likely increase use in those states with more lenient laws. Moreover, federal legalization – which has growing bipartisan support - will require employers to consider accommodation of those who use cannabis medically under the Americans with Disabilities Act and further complicate workplace policies on cannabis use.

The bottom line is that while state legislatures are in season, cannabis legalization bills will be blooming like summer flowers. Employers in a multi-state environment must carefully monitor changes in the jurisdictions where they have worksites, and review any "legacy" policies that may no longer be legally effective in today's changing cannabis world. For assistance with program review, contact Adele Abrams at safetylawyer@gmail.com.