



## Budget Proposal Reduces Safety and Health Funding

By Adele L. Abrams, Esq., CMSP &  
Gary L. Visscher, Esq.

On February 12, 2018, the Trump Administration released its proposed FY 2019 Budget plan for federal operations. While the specific funding levels are not yet apparent for discrete activities within the Occupational Safety & Health Administration (OSHA), the Mine Safety & Health Administration (MSHA), or the National Institute for Occupational Safety & Health (NIOSH), it is clear that priorities will shift away from a more enforcement-based model toward greater funding and emphasis on cooperative programs and compliance assistance.

The narrative for the U.S. Department of Labor's (DOL) overall budget proposal states: "The Budget focuses DOL on its highest priority functions and disinvests in activities that are duplicative, unnecessary, unproven, or ineffective. The Budget also takes steps to reorganize and modernize the Agency's operations so scarce taxpayer dollars are spent well."

Overall, the DOL Budget request is for \$9.4 billion, a \$2.6 billion or 21-percent decrease from the FY 2017 enacted level. That level had remained largely unaltered for FY 2018, because the Labor-HHS Appropriations package was never enacted and therefore OSHA and MSHA have been funded in the current year through a continuing resolution. It is likely that attention will now remain on FY 2019 spending bills, leaving funding for the current fiscal year "as is" for the remainder of FY 2018 which ends on September 30, 2018.

The highlights from the White House FY 2019 Budget include:

OSHA and MSHA: The budget maintains

"targeted investments" in OSHA and MSHA, aimed at preventing fatalities, injuries and illnesses, through enforcement, outreach and compliance assistance. The narrative adds that the budget increases OSHA funding for compliance assistance, to assist employers who want help in protecting workers through cooperative programs.

For FY 2019, OSHA would be funded at \$549 million. This would be a small decrease from the "continuing resolution" funding level in FY 2018 of \$551.74 million. Within the overall funding, the summary information available states that compliance assistance would be increased by \$4 million, presumably transferred from enforcement and/or standard setting functions. Without the more detailed information being available, it is not known which specific programs (state consultation grants, federal compliance assistance) would be increased or reduced.

The summary information states that MSHA would receive a total of \$376 million under the Administration's proposal. This is approximately the same as the FY 2018 continuing resolution level of \$375.172 for the Agency.

NIOSH, currently a part of the Centers for Disease Control (CDC), is a primary source of occupational and mine safety and health research in the United States, both intramural and extramural. NIOSH also oversees activities of educational research centers (ERCs) at universities across the country. The agency conducts research on chemical exposures, sets "recommended exposure levels" (RELs) that are referenced by manufacturers in their safety data sheets for chemical products, conducts surveillance that can spot emergent hazards in areas such as nanomaterials, and performs health hazard evaluations at the request of

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## Budget Proposal, cont.

employers and workers. Its priorities have largely been determined through stakeholder involvement in NIOSH's occupational research agenda in sector-specific councils. NIOSH has no enforcement authority, and is part of the U.S. Department of Health & Human Services (HHS), rather than being situated within the DOL.

Based upon the preview of the President's budget, NIOSH seems to be in peril. The narrative states that NIOSH research will be integrated along with that conducted by the Agency for Healthcare Research, and by the National Institute on Disabilities and Independent Living, into a single agency within the National Institute of Health initially, but the department will assess the feasibility of integrating these activities within existing NIH institutes and centers over time.

According to budget summary documents released for HHS, the Administration plans to transfer ("consolidate") NIOSH funding and administration from the CDC to NIH. There is little additional detail provided at this time. The NIH budget includes \$255 million in additional funding for NIOSH, but that apparently includes \$55 million for the Energy Employees' Occupational Illness Compensation Program. The budget documents also indicate that funding for the World Trade Center Health Program would continue at the level of \$469 million, and that program would continue to be administered by CDC.

Finally, the DOL budget notes that it will fund an investigative task force to look into union activities, such as "flawed officer elections, fraud and embezzlement." This anti-union activity by DOL will likely have a ripple effect on occupational/mine safety as it could curb employee hazard complaints and use of safety and health committees. In 2017, the DOL rescinded a policy that would have allowed non-union workers to designate a union representative to assist with on-site OSHA investigations as the "employee representative" even in the absence of a certifying election.

For more information on funding for the key safety and health agencies, contact the Law Office at 301-595-3520.

## MSHA Addresses Changes in Regulations During Quarterly Training Call

By: Joshua Schultz, Esq., MSP

During a February 12, 2018 Quarterly Training Call, Assistant Secretary of Labor for Mine Safety and Health David Zatezalo discussed the possibility of Mine Safety and Health Administration repealing, replacing or modifying existing regulations. On October 23, 2017, MSHA solicited the regulated community to "provide comments on MSHA regulations to repeal, replace or modify," requesting that stakeholders email comments to MSHA-OSRVRegulatoryReform@dol.gov. During the February 12th call, Mr. Zatezalo said MSHA is reviewing the comments and noted that there have been "several interesting suggestions which need to be evaluated." The Assistant Secretary stated that he is in favor of updating regulations, noting that many regulations are from 1974, and the regulations incorporate the 1968 National Electric Code.

Mr. Zatezalo specifically mentioned backup alarms on mobile equipment as a regulation ripe for an update. Currently, 30 CFR 56/57.14132 and 77.410 require audible reverse-activated signal alarms where the operator has an obstructed view to the rear. Mr. Zatezalo said these backup alarms annoy neighbors and that "we have to find a better means to prevent people from running over each other." Several manufacturers sell "noiseless" or "white sound" backup alarms which are advertised as only audible in the danger zone, thus eliminating noise nuisance for local residents. In a 2004 OSH Administration interpretation letter, MSHA's sister agency addressed these type of alarms, noting that they comply with OSHA's standards if they provide "adequate warning to workers in the path of the vehicle, and to workers walking towards the path of the vehicle in time to avoid contact."

During the call, Mr. Zatezalo also addressed MSHA's pending Workplace Examination Rule, noting that they are addressing the comments from stakeholders and are working on issuing a new final rule. The Assistant Secretary stated he could not provide a date when the new final rule would be issued, but noted that as soon as the rule is finalized MSHA will be out in the field with materials for training of the inspectors and the workforce. Deputy Assistant Secretary for Operations, Patricia W. Silvey, once again noted that the agency would conduct extensive compliance outreach before the new Workplace Examination Rule is implemented. Ms. Silvey promised that there would be at least one stakeholder outreach event in each Metal/Nonmetal district.

## MSHA Addresses Changes in Regulations, cont.

Assistant Secretary Zatezalo further reminded stakeholders of the Final Rule on Proximity Detection Systems for Continuous Mining Machines in Underground Coal Mines. This rule, which was published in January 2015, requires that all continuous mining machines operating in underground coal mines must be equipped with a proximity detection system by March 16, 2018.

Finally, MSHA addressed fatalities which have occurred in the Coal and Metal/Nonmetal sectors in the 4th Quarter of 2017, addressing best practices to prevent future occurrences. There were 15 coal fatalities and 13 fatalities in the Metal/Nonmetal sector in 2017.

### Black Lung Study Points to Respiratory Illness in Mines By Adele L. Abrams, Esq., CMSP

A study by the National Institute for Occupational Safety & Health (NIOSH), published February 6, 2018, by the Journal of the American Medical Association (JAMA), reveals clusters of progressive massive fibrosis (PMF), or complicated black lung disease, in central Appalachia during the period 2013-2017. In all, NIOSH confirmed 416 cases in just three regional clinics, the largest group of such cases ever reported by scientists. The program provides chest X-rays to U.S. coal miners, with the goal of early detection of coal workers' pneumoconiosis to prevent progression to disabling lung disease. The study is part of the Coal Workers' Health Surveillance Program, implemented by NIOSH, and the report is available [here](#).

NIOSH epidemiologist Scott Laney commented: "We've gone from having nearly eradicated PMF in the mid-1990s to the highest concentration of cases that anyone has ever seen." The miners in the study worked in coal mines in Virginia, Kentucky and West Virginia. One of the clinic's directors noted that in the 1990s they would experience five to seven PMF cases in a year but now the clinic documents that many cases every two weeks. That single clinic, Stone Mountain Health Services, reported 154 new diagnoses of the potentially fatal illness just since NIOSH completed its research in 2017.

In another clinic studied, located in Coal Run Village, KY, NIOSH found 60 confirmed diagnoses in a 20-month period, versus 99 cases reported nationwide in the prior five years. A survey by National Public Radio also found that, in 11 clinics in KY, VA, PA and OH, there were 962

black lung cases, or 10 times NIOSH's original count. The ongoing NPR survey has counted 1,000 more cases since 2016.

The NIOSH study observed another trend: miners are dying at younger ages from complicated black lung, with diagnosis occurring among miners in their 30s, 40s and 50s. Historically, most PMF diagnoses involved miners who were nearing or past retirement age, in their 60s, 70s and 80s. This suggests that the severely advanced disease is progressing more rapidly and is being observed in workers with less than 20 years on the job. NIOSH plans to continue its surveillance work on black lung disease.

PMF is caused by the inhalation of coal dust and silica dust in both surface and underground mines. Miners' breathing becomes compromised, and the only cure is a lung transplant, but this is an option limited to miners healthy enough to qualify for the surgery. The "epidemic" of complicated black lung cases may be related to longer workshifts for miners and also mining of thinner coal seams.

The coal mining machines also generate respirable crystalline silica (RCS), which has been linked to a variety of potentially fatal illnesses, including lung cancer, silicosis, pneumoconiosis, chronic obstructive pulmonary disease (COPD), renal disease and certain autoimmune disorders. The Occupational Safety and Health Administration (OSHA) issued a final rule lowering the RCS exposure level to 50 ug/m<sup>3</sup> for an eight-hour period, but the Mine Safety and Health Administration (MSHA) exposure limit remains the equivalent of 100 ug/m<sup>3</sup> in both coal and metal/nonmetal mines.

During a recent MSHA oversight hearing, Assistant Secretary David Zatezalo fielded questions about MSHA's intentions to reduce its exposure limit, which is now double that allowed by OSHA. He responded that what works for OSHA does not necessarily work at mines. In the final months of the Obama administration, respirable coal dust limit reductions were enacted, but MSHA has announced a "retrospective" study of the final rule and listed it as a "deregulatory action." Zatezalo indicated that there might be some easing of requirements, although the final permissible exposure limit would not likely be altered.

The OSHA silica rule is now in effect in the construction sector, and the general industry and maritime rule will be enforced starting June 23, 2018. MSHA has a companion silica standard update on its regulatory agenda, but since the change in administration the rulemaking has been **(cont. on page 8)**

## MSHA's Top 10 Most Cited Standards at Surface Metal and Nonmetal in 2016\*



For the third consecutive year, MSHA reported that the most common violation at surface metal mines in 2016 involved housekeeping in workplaces, passageways, storerooms, and service rooms, or standard 56.20003(a). Prior to its number one ranking, the housekeeping standard was the third most frequently cited standard and violations relating to electrical conductors, 56.12004, was most frequently cited.

At surface nonmetal operations, violations involving guarding for moving machine parts, standard 56.14107(a), was the most cited in 2016. This was the second and third most cited regulation in 2015 and 2014, respectively. A link to the coordinating standard describing the violation can be found [here](#).

Below you will find the top 10 most common cited standards for surface metal and nonmetal mines in 2016. 2017 data has not been released yet.

### Surface Metal

Rank	Number of Violations	Percent*	Standard
1	294	7.89%	56.20003(a)
2	233	6.25%	56.12004
3	194	5.21%	56.14100(b)
4	165	4.43%	56.12028
5	129	3.46%	56.11001
6	114	3.06%	56.14107(a)
7	104	2.79%	56.12032
8	101	2.71%	56.14100(c)
9	91	2.44%	56.4201(a)(2)
10	85	2.28%	56.4102

### Surface Nonmetal

Rank	Number of Violations	Percent*	Standard
1	269	7.06%	56.14107(a)
2	220	5.77%	56.12004
3	178	4.67%	56.20003(a)
4	150	3.94%	56.14100(b)
5	134	3.52%	50.30(a)
6	129	3.39%	56.14132(a)
7	116	3.05%	56.14112(b)
8	110	2.89%	56.12032
9	97	2.55%	56.11001
10	90	2.36%	56.12028

**\*Latest data available**

\*Percent of total violations written at these types of operations.

## Face-Piece Seal vs. Facial Hair: Is there a Compromise under the Respiratory Protection Program?

By Michael R. Peelish, Esq.

Under the Occupational Safety and Health Administration's (OSHA) Respiratory Protection Program standard, 29 CFR 1910.134, the elements of an effective program must include: (1) exposure assessment, (2) written program, (3) respirator selection, (4) type of respirators, (5) medical evaluation, (6) fit-testing, and (7) respirator training and maintenance.

A respiratory protection program applies to all uses of respirators whether in the oil and gas fields or on a construction site. During the OSHA Silica Standard training our firm has been conducting nation-wide, the one question that is asked at every training session is "do my employees have to shave if the respirator is mandated by the OSHA silica standard? The short answer is yes, provided every employee is treated the same. My next response is "it depends on the employer's policy for respirator use."

OSHA will not intervene in the employer's policy making on this issue. They will simply enforce CPL 02-00-158, (Facepiece Seal Protection. Inspection Guidelines) dated June 26, 2014 which states:

The CSHO should be alert for the presence of facial hair (more than one day's growth) that comes between the sealing surface of the respirator and the face as well as other conditions that could result in facepiece seal leakage or interfere with valve function of tight-fitting respirators, such as the presence of facial scars, the wearing of jewelry, or the use of headgear that projects under the facepiece seal. Corrective glasses or goggles or other personal protective equipment (such as faceshields, protective clothing, and helmets) must not interfere with the seal of the facepiece to the face of the user. If employees wear other safety equipment with their respirators, the employees must pass an appropriate fit test while wearing the equipment to determine if it interferes with the seal. Employees should be observed to determine if the seal check procedures are being performed each time the respirator is donned.

Then the next question is- do I have to provide a loose-fitting respirator (Powered Air Purifying

Respirator (PAPR)) to employees that don't want to shave? The use of this respirator does not require an employee to be fit-tested. So, the answer comes back to the employer and how they want to equip its workforce. The difference in pricing of an N-95 particulate filter versus the PAPR is hundreds of dollars.

So, does an employer modify its policy to allow certain mustaches, sideburns, and goatees? OSHA would be fine with some facial hair as the agency wrote in a 2016 letter to an Air Force employee who asked the agency if it would be permitted to sport a "neatly trimmed goatee." Again, OSHA will follow its enforcement guidance and not make the policy decision for the employer. The United States is not the only country facing this dilemma, albeit not a new dilemma. Recently, British companies have been requiring that employees shave if they must don a tight-fitting respirator. As with most issues facing industry, the decision is a monetary decision. Does the employer opt for the more expensive PAPR or does it opt for the shaving cream and razor?

### No Delay for Maryland's Sick Leave Law

Maryland's Healthy Working Families Act (requiring larger employers to provide paid sick leave) became effective on February 11, 2018, despite industry groups' efforts to delay the effective date. The expected House committee vote was 12-11, reflecting the members desires to avoid additional delays. Now that the law is in effect, employers should review their current leave policies to ensure compliance. Employees will begin to accrue leave as of February 11, 2018.

For more detailed information, see the article "Maryland Passes Sick Leave Law" in our January issue. If you would like more information or guidance, please contact the Law Office.

### Department of Justice Acts on Guidance Documents

By Gary Visscher, Esq.

Federal agencies, including OSHA and MSHA, issue a variety of "guidance documents" – statements of "general applicability" which purport to clarify obligations imposed by statutes or regulations, but are not themselves legally binding. Such statements may be styled as "guidance," but also come under a variety of other formats – "policy

## Guidance Documents, cont.

letters,” “opinion letters,” etc.

The Administrative Conference of the United States, which recently issued recommendations on agency guidance documents, noted that policy statements “are of great value to agencies and the public alike” because “they can make agency decision making more predictable and uniform.”

On the other hand, guidance documents can morph into having, or being perceived to have, binding effect, particularly if an agency uses such documents to define legal obligations in enforcement cases.

The U.S. Department of Justice (DOJ) has recently addressed the use of guidance documents. The first memo, issued November 16, 2017 by Attorney General Sessions, directed DOJ staff not to issue guidance documents that “purport to create rights or binding obligations on persons or entities outside the Executive Branch of the government.” The memo set out several drafting rules for guidance documents to prevent such documents from becoming, or being perceived as, binding – for example, not include mandatory language such as “shall” or “required” or “requirement” and include an explicit statement that the document does not have the force or effect of law and is not legally binding on persons outside of government.

More recently, on January 25, 2018, Associate Attorney General Brand issued a memo limiting use by DOJ litigators of other agencies’ guidance documents in “affirmative civil enforcement.” Affirmative Civil Enforcement, or ACE, is when the DOJ, primarily through local U.S. attorneys, file civil enforcement actions on behalf of other agencies of the government. The Brand memo directs that “Department litigators may not use noncompliance with guidance documents as a basis for proving violations of an applicable law in ACE cases.”

The Brand memo is limited to civil, not criminal, enforcement cases brought by DOJ. In addition, the Brand memo states that DOJ attorneys may continue to use guidance documents “for proper purposes.” Specifically, it states, “some guidance documents simply explain or paraphrase legal mandates from existing statutes or regulations.” In addition, “the Department may use evidence that a party read such documents to help prove that the party had the

requisite knowledge of the mandate.” Finally, the memo notes that the memo is itself an internal DOJ policy, and “does not create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.” In other words, the DOJ policy is not itself a defense for a party against whom an enforcement action is taken by DOJ.

How will the DOJ memos affect enforcement in OSHA and MSHA cases? The Brand memo specifically applies only to civil enforcement actions brought by the Department of Justice on behalf of other agencies. OSHA and MSHA are represented by Department of Labor attorneys in civil enforcement cases, both at the administrative level (before the OSHRC and FMSHRC) and on appeals to the U.S. Court of Appeals. DOJ represents the government in criminal cases under the OSH Act, but the Brand memo specifically applies only to civil enforcement cases.

In addition, the drafting rules for guidance documents outlined in the Attorney General’s memo have generally been used by OSHA and MSHA – most if not all guidance documents in recent years have included some type of “disclaimer” language indicating that they are not binding legal obligations. Nonetheless there are still instances where informal guidance is used as a rule in enforcement (MSHA’s 3 to 1 “rule of thumb” on highwalls comes to mind). The DOJ’s effort to limit the binding effect of guidance documents is a helpful corrective and should make other enforcement agencies, including the Department of Labor, more careful about doing so.

## House Holds

### MSHA Oversight Hearing By Adele L. Abrams, Esq., CMSP

On February 6, 2018, the House of Representatives’ subcommittee on workforce protections held an oversight hearing on mine safety and health issues. The star (and only) witness was Assistant Secretary of Labor for Mine Safety & Health, David Zatezalo, a former coal CEO who was confirmed by the Senate in 2017 to head the agency.

The subcommittee chair, Rep. Bradley Byrne (R-AL) made opening remarks that noted the importance of mining to the U.S. economy, and he thanked President Trump – in absentia – for reminding Americans of this. The purpose of the hearing was to learn how the Mine Safety & Health Administration (MSHA) is regulating the industry to ensure high

## MSHA Oversight Hearing, cont.

standards of safety while allowing the industry “to innovate for the benefit of mine workers and the American economy.” Byrne asked Zatezalo to explain how MSHA plans to work with stakeholders to promote policies and practices that protect mine workers and encourage economic growth. Chairman Byrne also urged the agency to hold bad actors accountable, but to adopt a more “collaborative approach” to addressing worker safety.

The subcommittee’s ranking minority member, Rep. Mark Takano (D-CA), also provided an opening statement, pointing out the study released by the Journal of the American Medical Association (JAMA) that found a cluster of advanced black lung cases in certain Appalachian clinics that screen miners. He urged MSHA not to roll back the Obama administration’s respirable coal dust rule, which imposed more stringent control requirements and exposure limits and is now listed as a “deregulatory action” on MSHA’s current agenda. See the related article on the JAMA study.

Rep. Takano also briefly discussed the pending Byrd Mine Safety legislation (HR. 1903 and S. 854) which would amend the Mine Act. The bill is sponsored by full House Education & Workforce Committee ranking member Rep. Bobby Scott (D-VA), along with 14 democratic cosponsors. The Senate version was offered by Sen. Bob Casey (D-PA). No hearings have been scheduled on either measure. Takano said he supported action on the legislation, because it would give MSHA subpoena power, increase criminal penalties to felony status, and improve other protections for miners. Zatezalo did not comment on the legislation.

Takano also discussed the Pattern of Violations (POV) rulemaking, which was published in 2013 to “plug loopholes” in the earlier version (which had never been used in 33 years). Industry groups sued the agency over the rule, and the litigation is poised for settlement discussions. However, Rep. Takano noted, Zatezalo was chairman and/or a board member of both the Ohio Coal Association and the Kentucky Coal Association – who are among the POV litigants. He alleged that it was a conflict of interest for Zatezalo to participate in the discussions, but the agency head disagreed. He added, however, that he would recuse himself if advised to do so by agency counsel. When discussing POV in response to later question from Rep. Carol Shea-Porter (D-NH), Zatezalo said that currently only one mine in the entire United States is on POV status, and called the program an “effective deterrent” but added that the court will

decide whether the POV rule should be overturned.

In his prepared remarks, Zatezalo stressed that mine safety is not a partisan issue, and MSHA’s mission is straightforward: to prevent death, illness, and injury from mining, and to promote safe and healthful workplaces. He said that he is visiting all 15 MSHA district offices as well as its remote program offices across the U.S., to hear the suggestions and concerns of agency personnel on ways to improve MSHA’s operations.

In reviewing 2017, Zatezalo noted that MSHA accomplished all of its mandated “2s and 4s” (the complete inspection of each mine in its entirety pursuant to the Mine Act) at the country’s 13,000 active mines, both coal and metal/nonmetal. There were 105,195 citations and orders issued during 2017, during 42,219 inspections. He said that the 28 mining fatalities in 2017 are 28 too many, but lauded the fact that this was the second lowest number of mining deaths recorded. The leading cause of mine fatalities (43 percent) was powered haulage accidents, and MSHA will emphasize this area going forward.

Zatezalo also updated the subcommittee on MSHA’s initiative to ensure that its own inspectors are physically able to perform regular duties in the mines without posing a direct threat to themselves or others. Last year, it was revealed that 15 percent of MSHA inspectors did not meet the agency’s medical standards, and MSHA has completed individualized assessments of 224 agency employees, was working with the employees’ union, and has resolved all but 10 cases, although he did not say whether these cases were resolved through reasonable accommodation or by termination or retirement.

Other agency initiatives include rollout later this month of a modernized Inspection Application System in the field, to allow inspectors to write their notes and record data on a tablet and use other digital tools to improve data accuracy. Compliance assistance will be emphasized to help MSHA focus resources and provide more assistance to small mine operators through its Educational Field and Small Mine Services department, which has 50 dedicated employees. Zatezalo will continue to review the agency’s current structure, and he recognized that while coal is a significant component of MSHA’s responsibilities, the agency’s mission extends beyond that commodity and it must be responsive to industry trends.

During the questioning period, Rep. Virginia Foxx (R-

## MSHA Oversight Hearing, cont. (2)

VA), chairwoman of the full Education & Workforce Committee, asked Zatezalo how he planned to address the problem of inconsistent enforcement at MSHA. He responded that better communication between districts, inspector training, and advisories on subjects like conveyor guarding, will help apply rules more consistently. Foxx also discussed with the agency head technological improvements in mining, including proximity detection systems, and communications technology. In response to another question, Zatezalo added that MSHA is less coal-centric than it once was, because there are ten times as many metal/nonmetal mines now.

Rep. Takano questioned Zatezalo about the current MSHA criminal penalties and whether misdemeanors were an adequate deterrent for reckless endangerment of miners. He responded “it is not my job to interpret the laws, just to enforce.” When asked for his opinion, he countered, “It’s in the Mine Act. The punishment should fit the crime, but it’s not up to me to decide.” When asked whether the Mine Act should be amended to increase criminal penalties, Zatezalo responded “That’s a good question for Congress.”

Rep. Tom Rooney (R-FL) asked how MSHA can reduce the Obama administration’s “burdensome regulations.” Zatezalo responded that safety will not be shortcut, and MSHA must make sure there are fewer accidents and that people are doing the right thing. He noted there are working groups on deregulation and they are accepting input about outdated regulations, some of which go back to the 1960s, and that the rule should reflect newer technologies.

For more information on the comment process for regulatory reform activities, contact the Law Office.

## Black Lung Study, cont. from page 3

designated as a “long term action” with no further dates listed. Some mining companies have reported a spike in new worker’s compensation claims from miners with silica-related illnesses who have filed actions based on the disease-causation findings in the OSHA final rule (which appears in the March 25, 2016, Federal Register). In December 2017, the U.S. Court of Appeals, DC Circuit, affirmed the scientific basis for the OSHA standard.

For assistance in addressing silica or coal dust issues at your operations, or development of an effective occupational health program, contact the Law Office at 301-595-3520.

## The Opioid Epidemic: The Employers Critical Role in the Solution By Tina M. Stanczewski, Esq., MSP

The Committee on Education and the Workforce held the second joint subcommittee hearing on opioids use on February 15, 2018. Chairman Tim Walberg (R-MI) for the Subcommittee on Health, Employment, Labor, and Pensions and Chairman Bradley Byrne (R-AL) for the Subcommittee on Workforce Protections, heard from four witnesses about the devastating economic impact and effect on businesses. Rep. Walburg summarized the problem: “too many Americans – from all walks of life and from all parts of the country – are facing the terrifying realities of opioid abuse, and far too many are dying from opioid misuse and overdose every day.”

During 2016, it was estimated that 61.8 million patients received opioid prescriptions, or 19.1 percent of the population. In addition, thirty percent of patients taking at least a one-month supply of prescription opioids were still taking them a year later. This use is linked to the heroin epidemic. It is estimated that 75% of heroin addicts start out as prescription opioid users, both legal and illegal.

According to Corwin Rhyan, Senior Analyst of the Altarum Institute and one of the witnesses, “this epidemic impacts all parts of our society, but the combined impacts on households and the private sector account for the largest share of the societal burden and exceeded \$46 billion dollars in 2016. He went on to state: “this finding elevates the importance of *employers both as stakeholders directly impacted by the crisis, but also as potential leaders in preventing its spread and helping support treatment and recovery services.*”

This epidemic is not isolated to inner cities. It is in rural communities, and in wealthier communities. Estimates show 70% of those using opioids are employed. With 42,000 deaths in 2016, the problem is not small and it is on the rise. Studies show that construction, manufacturing, and mining are some of the hardest hit by the epidemic, stated Dr. Andrews, a professor and researcher at the University of South Carolina. Studies also show a link between workplace injuries and prescription opioid use. Since these industries are physically demanding, the types of injuries may often require pain relief.

Reducing injuries may reduce the need for the pain relief. Beyond this, alternative therapies that are offered

## Opioid's and Employers, Con't.

by insurance plans, such as acupuncture or physical therapy instead of prescriptions, may reduce the risk of addiction. The National Safety Council reported that 70 percent of all U.S. companies and 90 percent of Fortune 500 companies have an Employee Assistance Program (EAP) to assist employees struggling with substance abuse and other problems. Other methods suggested that employers may adopt include strong policies and procedures about substance abuse that alert workers to where they can obtain help, ability to take leave of absences, and retracting zero tolerance drug policies.

Dr. Andrews reported that the opioid problem is impairing employer's ability to hire and retain workers. There is strong link between opioids and labor force participation. About 70% of employers report negative consequences of drug use including absenteeism. Further, it is linked to unemployment according to Dr. Andrews. The federal government even lists it as an emerging threat to economic growth. Dr. Andrews noted that addiction is a chronic disease that requires long-term support and funding. Treatment is the best way to address problems in workplace.

For Dr. Andrews and many of the members, the protection of Medicaid funding and the Affordable Care Act were necessary to combat the epidemic. For employers, ensuring that private insurance plans cover treatment and medications for those in need are critical. For Dr. Andrews, drug testing is not effective and Medicaid waivers that impose work requirements only force individuals to choose between treatment and assistance. Discussion concluded that those in "white collar" jobs are more likely to have access to insurance plans that cover treatment, where those in "blue collar jobs" do not have access.

Employers must be aware of legal obligations surrounding workers who face substance issues. Once an employee is on a legal prescription, he or she is considered disabled and the provisions of the Americans with Disabilities Act trigger. It was noted that employers who are drug testing are expanding the tests because many of the opioid drugs are not on the basic panels.

For employers, the panel's recommendations for steps that can be taken to address the problem included:

- Don't be reactive to the problem anymore,

- Train supervisors on drug policies,
- Have clear medical leave policies,
- Consider retracting zero tolerance policies and permit treatment instead,
- Provide employee assistance plans,
- Have strong policies that let employees know they can take a medical leave of absence
- Inform employees of where to get help in their community

One of the companies that is truly leading with a new approach to workforce management is the Ziegenfelder Company, who makes twin pops, a frozen treat. Lisa Allen, President and CEO of Ziegenfelder, represented the Chamber of Commerce, and reflected on how her family-owned company has redesigned its human resources program to assist and include substance abusers and others facing difficult times. The company's approach is to truly care about its employees, their daily lives, their home lives, their families, and their health without judgement.

The company makes 2.5 million twin pops every 24 hours with three distribution centers and over 300 employees. Allen calls her employees tribe members, as each person is linked by "community, culture, and a bright vision." The company's "compassionate" hiring practices, as coined by Allen, include hiring individuals from halfway houses, the homeless and veterans. When workers face substance problems they "work with local counselors, social service agencies, our medical community, law enforcement and Federal and local Parole Officers on a case-by-case basis working to help people get assistance," said Allen. The workers problems are the company's problems in a good way.

The company provides the individuals with a job that "provides them a sense of dignity." The key for the company is working together, believing in close community, observing one another, and intervening if someone needs help. Allen's advice to other company leaders: "leadership is about taking care of the people in your fold, inspiring them to grow." With this epidemic impacting so much of the workforce, all employers, small to large, should consider the serious impact this may have on their business.

## 2018 SPEAKING SCHEDULE

### ADELE ABRAMS

- 02/23/18: Oregon Independent Aggregates Assn., Wilsonville, OR AGC, half-day workshop OSHA's crystalline silica rule compliance
- 02/27/18: Society of Mining Engineers, presentation on OSHA's Crystalline Silica Rule & Impact on Mining, Minneapolis, MN
- 03/02/18, United Group, presentation on Crystalline Silica rule compliance, Fort Worth, TX
- 03/06/18: AGG-1 Conference, presentation on substance abuse programs and medical marijuana, Houston, TX
- 03/12/18-03/13/18: Oregon Independent Aggregates Assn, Part 46 Annual Refresher Training, Roseburg & Albany, OR (Michael Peelish and Josh Schultz)
- 03/13/18: Business 21, webinar on Independent Contractor Safety
- 03/14/18: Indiana Safety Conference, presentation on Safety Documents: Sword or Shield, Indianapolis, IN
- 03/17/18-03/18/18: Environmental Information Association, Workshops on Crystalline Silica (Adele Abrams & Michael Peelish), San Diego, CA
- 03/20/18: IMA-NA Technical Workshop, Orlando, FL, presentation on MSHA's Workplace Examination Standard
- 03/22/18: Energy & Mineral Law Foundation, Mine Safety & Health Law Institute, panel presentation on MSHA Flagrant Violations & Pattern of Violations, Washington, DC
- 03/23/18: ClearLaw Institute, webinar on OSHA Injury/Illness Reporting Requirements
- 03/26/18-03/29/18: South Central Mine Safety & Health Conference, presentation on Crystalline Silica & Mining (Adele Abrams & Josh Schultz)

### MICHAEL PEELISH

- 02/22/18: PACA Safety Conference, Legally Sound Accident Investigation, Penn State, PA
- 02/23/18-02/24/18: The Precast Show, National Precast Concrete Association, Denver, CO
- 02/26/18-02/27/18: North American Frac Sand Conference, OSHA/ MSHA Legislative Update, Houston, TX.
- 03/12/18-03/13/18: Oregon Independent Aggregates Assn, Part 46 Annual Refresher Training, Roseburg & Albany, OR (Michael Peelish and Josh Schultz)
- 03/17/18-03/18/18: Environmental Information Association, Workshops on Crystalline Silica (Adele Abrams & Michael Peelish), San Diego, CA

### JOSHUA SCHULTZ

- 02/27/18 CalCIMA Spring Thaw, Workplace Exams, Ontario, CA
- 03/12/18-03/13/18: Oregon Independent Aggregates Assn, Part 46 Annual Refresher Training, Roseburg & Albany, OR (Michael Peelish and Josh Schultz)
- 03/26/18-03/29/18: South Central Mine Safety & Health Conference, presentation on Crystalline Silica & Mining (Adele Abrams & Josh Schultz)

### TINA STANCZEWSKI

- 05/22/18-05/24/18: N.C. Mine Safety & Health Law School, Morganton, NC
- 09/18-20/18: N.C. Mine Safety & Health Law School, Castle Hayne, NC