



MSHA Holds Stakeholders' Meetings on Workplace Examinations

By Adele Abrams, Esq., CMSP, and Joshua Schultz, Esq., MSP

This fall, MSHA conducted stakeholder meetings regarding the revision and implementation of its workplace examination standard for metal/non-metal mines, 30 CFR Part 56/57.18002. The standard applies to both mine operators and contractors working at MSHA-regulated properties.

MSHA's new wave of stakeholder meetings comes in the wake of a September 30, 2019, *Federal Register* notice regarding the reinstatement of the original 2017 provisions of the workplace examination standard. That final rule was originally published on January 23, 2017, but was immediately stayed by the incoming Trump administration. The rule was subsequently reopened to reduce documentation requirements and allow work to begin in a working place concurrent with the initiation of the examination. The 2017 rule was ordered reinstated by the U.S. Court of Appeals for the District of Columbia, which invalidated the 2018 Trump revision of the rule and held that it impermissibly reduced protections for miners, in violation of the 1977 Mine Act.

MSHA held stakeholder meetings in Dallas, Tx.; Birmingham, Al; Bloomington, Ill.; Denver, Co.; and Pittsburgh, Pa. During the November 14, 2019, meeting in Denver, MSHA representatives noted that although the revised rule went into effect on September 30th, MSHA is allowing a 90-day grace period to fully implement the rule. Thus, enforcement of the revised rule will begin in earnest on December 30, 2019. In the interim, if mine operators and contractors fail to comply with at least the 2018 revised rule, they can be subject to penalties of more than

INSIDE THIS ISSUE

- **Keeping Your Workplace Drug-Free** [Page 4]
- **5th Circuit Rejects OSHRC Position on Late Filed Contests** [Page 6]
- **Update on Risk Management Program Rules** [Page 7]
- **Construction Company Owner Convicted in Death of Workers** [Page 8]
- **MSHA Determines That No Mines Meet Pattern of Violations Criteria During 2019 Fiscal Year** [Page 8]
- **Survey Shows Link Between Medical Cannabis and Decreased Opioid Use** [Page 9]
- **Court Holds Presence (of Marijuana) Does Not Equal Impairment Under Oklahoma Workers Compensation Law** [Page 11]
- **Law Office of Adele L. Abrams, P.C. Speaking Schedule** [Page 12]



Law Office of Adele L. Abrams, P.C.
Abrams Safety & Health
www.safety-law.com

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

Colorado
(303) 228-2170

West Virginia
(301) 595-3520



\$266,000 per violation. Individuals who conduct examinations inadequately, and are deemed “agents of management,” can be personally fined up to \$72,000 under Section 110(C) of the Mine Act, or even be subject to criminal prosecution.

During the stakeholder meetings in Denver and Birmingham, MSHA representatives focused on the two substantive revisions to the rule:

(1) Operators must perform workplace exams “at least once each shift before miners begin work in that place for conditions that may adversely affect safety or health.” This eliminates the clause allowing exams to occur either at the beginning of the shift or as miners began work.

(2) Any and all conditions that may adversely affect safety and health found during the examination must be recorded in the examination record, including those that have been immediately corrected. This is a change from the 2018 rule, which required a record only of those conditions which were not correctly immediately.

Additionally, MSHA representatives fielded questions regarding the revised rule. When asked about MSHA’s preferred medium for notifying miners of adverse conditions which may affect health or safety, MSHA stated that notification can “take any form.” Agency representatives also noted that they worked with operators to create templates for workplace examination records, but there is no official form that is required. Whatever form is utilized, whether a separate workplace exam form or checklist, or inclusion of the information on a production or other reporting form, the record must be retained for 12 months and made available for review by MSHA and miners.

MSHA has also issued a revised FAQ regarding the implementation of the workplace examination rule. This FAQ hints that MSHA will issue task training citations if they determine that workplace examiner is not competent – likely if an inspection reveals multiple citations which should have been noted on the

workplace examination. The FAQ notes that “The mine operator is responsible for designating competent persons to conduct working place examinations after determining that they have the required experience and ability to perform such duties. Task training on the task of conducting examinations would be an appropriate part of that.”

MSHA’s FAQ also notes that the agency will accept electronic examination records. The Agency states that electronic workplace examination records “must be made available for inspection at the mine and include all required information.” While there remains some flexibility about when the exam can be performed, including at the end of the preceding shift, the information concerning hazards must be available to incoming miners, and the exam must be performed close enough in time to the beginning of the next shift so that conditions would not be expected to change.

The records must include the following information: Name of examiner, date of examination, location of all areas examined, description of each condition found that may adversely affect the safety or health of miners. The record must be supplemented to include the date that each hazardous condition was corrected, but that entry does not need to be made by the same person who performed the initial examination. The examiner must notify miners of hazardous conditions that have not been immediately remediated, and must promptly initiate corrective action. If the condition presents an imminent danger, the competent person performing the exam must have authority to withdraw all miners from the affected working place.

While at the stakeholder meeting, the MSHA representatives indicated that one examination of a working place might be sufficient even if a contractor arrives and performs work in the area, but the information would need to be relayed to all affected workers. In some cases, a contractor would have to conduct the examination because they control the work area, while in others the host mine operator may



be better situated to perform such exams, checking roadways or highwall conditions before the areas are entered by a contractor. However, the 2016 Federal Mine Safety and Health Review Commission decision in *Sunbelt Rentals* makes it clear that MSHA has discretion to cite the host mine operator as well as contractors if the contractor fails to conduct an adequate exam of its work area.

MSHA does not have a self-audit “safe harbor” comparable to the OSHA policy, and due to strict liability, MSHA can technically issue citations based on the recording of violative conditions. During the stakeholder meeting, MSHA representatives said they could not adopt a similar policy due to the constraints of the Mine Act’s statutory language, but that it was not MSHA’s intention to use the examination forms as a blueprint for citation issuance. However, repeated entries of the same or similar condition could lead to heightened liability and negligence if the condition is also present at the time of the MSHA inspection, as it could create the “pattern or practice” that supports issuance of Section 104(d) unwarrantable failure citations/orders.

The 2017 version of the rule, which is now back in effect, is still subject to a pending legal challenge in the US Court of Appeals, 11th Circuit, brought by several mining associations. If that rule is invalidated, it is possible that the original 1970s-vintage rule could be reinstated. Stay tuned!

MSHA plans to make all inspector training materials available on its website for review by the regulated community. It will also offer templates, the revised FAQs, pocket cards, a powerpoint overview used at the stakeholder meetings, inspector training and more. These items are available at:

<https://www.msha.gov/regulations/rulemaking/examinations-working-places-metal-and-nonmetal-mines>



§ 56/57.18002 Examination of working places.

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

(1) The operator shall promptly notify miners in any affected areas of any conditions found that may adversely affect safety or health and promptly initiate appropriate action to correct such conditions.

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

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

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

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



Keeping Your Workplace Drug-Free

By **Diana R. Schroeher, Esq.**

Many employers are finding it more and more challenging to maintain a drug-free workplace. Keeping up with the ever-changing list of states that now permit use of recreational and medical marijuana, and the laws protecting employees who possess a valid medical marijuana card, can be overwhelming. What about drug testing? Whether your employees work in an office setting, or your employees work in safety-sensitive positions, or your employees are covered by the DOT regulations, a Drug-free Workplace Policy that includes drug and alcohol testing is essential.

As we go to press, 34 states and the District of Columbia have passed medical marijuana statutes. Recreational marijuana is now legal in 11 states and the District of Columbia (Illinois's law will become effective on January 1, 2020). Thirteen other states have approved limited "low-THC"- high cannabidiol (CBD) products for medical conditions, although these low-THC programs are not considered comprehensive medical marijuana programs.

The federal government has been unwavering – marijuana is still considered a Schedule I substance under the federal Controlled Substances Act. It is not recognized for medical purposes despite the tidal wave of support in the majority of states.

A majority of Americans support marijuana legalization, according to two recent surveys from major polling organizations. The newest poll, from the Pew Research Center, found that 67 percent of Americans now back marijuana legalization, up from 62 percent in 2018. Americans who oppose legalization also dropped to 32 percent, down from 34 percent last year. Pew found that 55 percent of Republicans support legalizing pot, while 78 percent of Democrats favor legalization. A Gallup poll found that 66 percent of Americans support marijuana

legalization, unchanged from 2018. Gallup found that a majority of both Republicans and Democrats support legalization.

Maintaining a current and effective Drug-Free Workplace Policy that includes drug and alcohol testing is essential. If your workers fall under the DOT regulations and perform safety-sensitive jobs such as operators of commercial motor vehicles, air traffic controllers, pilots and aircraft maintenance crew, train engineers, conductors and signalmen, pipeline operations and maintenance crew, and maritime crewmembers operating a commercial vessel, among other jobs, employers must follow the DOT's industry-specific drug and alcohol testing regulations. For example, under the DOT's federal motor carrier safety regulations, employers must drug-test drivers at the following intervals: 1) pre-employment; 2) on random basis; 3) post-accident; 4) if a reasonable suspicion; 5) return-to-duty and 6) post-treatment follow-up testing.

DOT employers must have policies and procedures in place for all drug testing intervals, and for "reasonable suspicion" testing, an employer must have the required supervisor training, and a solid program in place to support a reasonable suspicion determination. DOT requires 2 hours of training for supervisors who may be making a "reasonable suspicion" determination. The employer's program should consist of the following components: 1) Observation – the trained supervisor should personally observe the unusual or out of character behavior; 2) Confirmation – the supervisor should confirm the employee's appearance, speech, behavior, and/or odors are consistent with drug and/or alcohol use; 3) Documentation – directly after confirming reasonable suspicion, the supervisor should document what they have observed; 4) Confrontation – the supervisor (and depending on the circumstances, another manager), should then confront the employee in a private location, explaining the basis for the reasonable suspicion; and 5) Testing – the supervisor should then direct the employee to proceed with drug and/or alcohol testing, providing specific instructions. DOT employers must follow the specific regulations for drug



testing, but many other employers are choosing to adopt or modify the DOT “reasonable suspicion” drug testing procedures.

Is it permissible for employers in non-DOT industries, who do not have jobs that are considered safety-sensitive, to require drug testing at all of the same DOT testing intervals? It depends! Given that many states have legalized marijuana use, the legal landscape is thorny at best. It depends on whether state laws permit certain drug testing, or limit the actions an employer can take if a test is positive, particularly for marijuana.

State laws may prohibit disability discrimination or retaliation against employees who may possess a valid medical marijuana card. Several states have now passed laws prohibiting pre-employment testing or limiting the actions an employer can take if the drug test is positive for marijuana. For example, Connecticut passed a law which prohibits employers from refusing to hire or discharging an employee solely on the basis of the person’s status as a “qualified” medical marijuana user. However, the Connecticut law explicitly states that the law does not restrict an employer’s ability to prohibit the use of intoxicating substances during work hours, or restrict an employer’s ability to discipline an employee for being intoxicated or impaired while working. The Connecticut statute was tested in court, and the federal court found that the state law was not preempted by the federal Drug-Free Workplace Act. The court held that the employer’s actions were discriminatory, when refusing to hire an applicant who tested positive for marijuana, but who was a qualified medical marijuana user protected by the state law.

Employers need to heed to OSHA’s stance on drug testing, particularly in post-accident cases. OSHA believes that if an employee knows they will be drug-tested following an accident, that the employee may not want to report the accident or injury. The employer’s blanket post-accident drug testing policy may have a chilling effect on the reporting rules, and may run afoul of OSHA 11(c)’s whistleblower protections. However, OSHA issued guidance in

October 2018 which clarified when drug-testing is appropriate, including random drug testing, drug testing which is unrelated to the reporting of a workplace accident or injury, drug-testing pursuant to state workers’ compensation laws, and drug testing to get to the root cause of an incident that injured, or could have injured, employees.

Other federal and state laws and regulations to be considered include the Americans with Disabilities Act, Privacy laws, and state Workers’ Compensation Laws. (See related article this issue on Oklahoma’s workers’ compensation law, and employee’s positive drug test for marijuana.)

Leaving all the challenges for employers aside, employers do still have the ability to place controls on their worksites with the goal of maintaining a safe and drug-free workplace. Employers may still prohibit employees who are impaired during work hours. A clear and effective policy, which includes detailed procedures, training for employees and supervisors, testing policies and procedures, options (which may include an employee assistance program), and monitoring the legal landscape, are the most useful tools an employer can maintain.

For assistance with developing or auditing your drug and alcohol policy, please contact the Law Firm.



Shark Alert! Adele Abrams, Esq., CMSP, and Wyatt Bradbury, ASP, CHST, CIT were spotted swimming in the waters of Western PA ASSP Chapter at their PDC hosted by Indiana University of Pennsylvania.



5th Circuit Rejects OSHRC Position on Late Filed Contests

By Gary Visscher, Esq.

In an important decision for employers, the U.S. Court of Appeals for the Fifth Circuit rejected the rationale that the Occupational Safety and Health Review Commission has used in recent years to reject most late filed notices of contest to OSHA citations. The case is *Coleman Hammons Construction Company*, decided November 6, 2019. Under the OSH Act, an employer is allowed only 15 working days in which to file a notice of contest to a citation; failure to file the contest within the 15 working days results in the citation becoming a final order. However, the Review Commission may re-open such final orders under Rule 60 of the Federal Rules of Civil Procedure.

Rule 60 allows courts (and the Commission) to reopen final orders entered due to “excusable neglect.” In a 1993 decision, *Pioneer Investment Services v. Brunswick Assoc.*, the U.S. Supreme Court interpreted “excusable neglect” (under a different statute, but applicable to Rule 60 cases) to apply to situations where the failure to file timely was for reasons within the control of the late filing party. The Court listed four factors that should be considered to determine if the “neglect” was excusable: the danger of prejudice to the opposing party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

However, OSHRC has misinterpreted Rule 60 and the *Pioneer* decision, and held that relief from a late filed notice of contest is not available “if the reason for the delay was within the [employer’s] control.” Under that test, OSHRC seldom grants relief from a late filed notice of contest. (a rare exception was where an

office was flooded and the OSHA citation was later found among ruined papers).

In *Coleman Hammons*, the Court of Appeals rejected OSHRC’s “if within the control of the employer, no relief” test. The Court found that OSHRC’s test is inconsistent with the test set by the Supreme Court in *Pioneer*, which requires evaluation of all four factors stated by the Supreme Court.

The facts in *Coleman Hammons* are similar to those presented in other petitions to re-open final orders entered because of a late filed notice of contest. OSHA sent citations resulting from an inspection at a job site in Madison, Mississippi to Coleman’s office in Pearl, Mississippi. The citations were sent by certified mail. The return receipt was signed for on March 15, 2017. The receipt was signed by the company secretary/treasurer because the person who normally handled mail was out of the office. The secretary/treasurer put the envelope on the desk of the project officer for the Madison project. However, the project supervisor was away from the office, working at the Madison jobsite, until he returned on April 24. When he returned, he discovered the citations and immediately contacted OSHA. He subsequently mailed a notice of contest, which OSHA received on May 1, past the 15 working days from receipt of the citations.

The Court of Appeals disagreed with OSHRC’s finding that the single instance showed that Coleman Hammons lacked adequate procedures for handling important mail. “Contrary to the Commission’s finding of inadequate procedures, the company showed that all mail is ordinarily received, opened and distributed by the office manager or the company controller. Far from being inadequate, the procedures enabled the company to handle seven previous OSHA citations.” The Court said the missed deadline in this case “was attributable to a single instance of unforeseen human error.”

The Court of Appeals also reviewed the other “*Pioneer* factors” – good faith by the movant, lack of prejudice to judicial proceedings, length of the delay –



and found they all weighed in favor of granting relief. The Court also observed that other equities weighed in favor of allowing Coleman Hammon's contest to the citations— particularly the fact that the citations included one issued for a "willful" violation with a \$70,000 penalty, and on which the company had raised a "meritorious defense."

In a separate opinion, Judge Edith Jones (who also authored the main decision), wrote, "The Commission, in my view, misapplied *Pioneer* and Rule 60(b) not only by placing undue emphasis on one factor out of a set of non-exclusive factors, but also by failing to follow long-established case law concerning the equities due to defendants in default judgment situations."

The Fifth Circuit noted that its decision was consistent with earlier decisions by the Third Circuit Court of Appeals. The Court of Appeals noted that the DC Circuit's recent decision in *David E. Harvey Builders* which allowed OSHRC's test was specifically designated by the DC Circuit as not being precedential.



Update on Risk Management Program Rules

By Gary Visscher, Esq.

In April 2013, an explosion occurred at a fertilizer storage facility in West, Texas, which resulted in the deaths of 15 people. Most of the deaths were firefighters and emergency responders who responded to the initial fire at the facility and were unaware of the potential for explosion from a quantity of ammonium nitrate being stored at the facility.

In aftermath of the explosion, the Obama Administration established an interagency work group

to improve coordination among local, state, and federal agencies, and to review federal regulations on chemical facilities' safety. One result was OSHA's December 2013 initiation of rulemaking on updating and expanding its Process Safety Management (PSM) Standard. Simultaneously, EPA undertook rulemaking to revise the Risk Management Program (RMP) rules. In this case, EPA was expected to revise the RMP rule first, with OSHA's PSM amendments to follow.

EPA issued a final rule with revisions to RMP in January 2017, just days before the change in administrations. The Trump Administration subsequently delayed the effective date of the new rules, however, a decision by the U.S. Court of Appeals held that the delay was not permitted under the Clean Air Act. EPA then proposed a new rule, revising and repealing many of the provisions of the 2017 rule. The final rule undoing many of the changes made by the 2017 final rule is currently under final review by the Office of Management and Budget (OMB), and is expected to be issued before the end of 2019.

While the administrative and legal deliberations over the RMP rules continue, the U.S. Chemical Safety Board's preliminary report on the June 21, 2019 explosion and fire at the Philadelphia Energy Solutions (PES) refinery was cited by 13 state attorneys general as evidence against undoing the 2017 RMP rule.

The fire and explosion at the PES refinery, which is located in an industrial area not far from downtown Philadelphia, resulted from the release of hydrocarbons caused by a rupture in a pipe elbow in the alkylation unit. CSB's investigation found that the pipe elbow had corroded to about "half the thickness of a credit card." Although there were no serious injuries or fatalities from the explosion, the explosion blew apart a fuel tank and launched a 38,000 pound "fragment" of the tank across the Schuylkill River, as well as damage within the refinery.

The explosion also resulted in release of about 5000 pounds of highly toxic hydrofluoric acid (HF). The main tank containing a much larger amount of HF at the refinery was not breached. The continued use of



HF instead of possibly safer alternatives has been cited in several CSB reports on major incidents at refineries. One provision in the 2017 RMP rule which the rule currently under final review would remove would require chemical plants and refineries to evaluate “safer technology and alternatives” as part of RMP compliance.



Construction Company Owner Convicted in Death of Workers

By Adele L. Abrams, Esq., CMSP

A Massachusetts construction company owner, whose business was involved in a deadly trench collapse in 2016, has been convicted on two counts of manslaughter in connection with the tragedy that killed two workers. The company, Atlantic Drain Service, and its owner Kevin Otto, were found guilty in the Suffolk County (Massachusetts) Superior Court. The case was heard before a judge, after the defendants waived the right to a jury trial. Sentencing is set for December 2019.

The accident involved the deaths of two workers, Robert Higgins and Kelvin Mattocks, who died when the trench in which they worked collapsed and filled with water from a fire hydrant supply line. The men drowned in the ditch. The employer had argued that the city failed to maintain the fire hydrant. However, the prosecutors noted the company’s poor history of OSHA compliance and asked the judge to “send a signal” to other contractors working in Boston and elsewhere that they have a responsibility to take measures to ensure the safety of workers.

In 2017, the company was fined \$1.48 million for 18 willful, repeat, serious and other-than-serious OSHA violations. The company violations include lack of

oversight and training deficiencies, lack of a support system to protect a cave-in, and failure to provide a ladder in the trench.

The prosecution was brought under state manslaughter laws, which carry substantially higher penalties than could be imposed for similar cases prosecuted under the Occupational Safety and Health Act. Under federal OSHA laws, a willful violation resulting in the death of a worker carries sanctions of up to 6 months imprisonment and a federal criminal fine, in addition to OSHA civil penalties of up to \$132,598 per affected worker. Federal OSHA cases are investigated by that agency, but are prosecuted by the US Department of Justice.

Pending legislation, the Protecting America’s Workers Act, would hike federal OSHA penalties to 10 years for “knowing” violations resulting in the death of a worker, and would also criminalize violations resulting in serious bodily injury to workers. So far, the legislation has only Democratic co-sponsors.



MSHA Determines That No Mines Meet Pattern of Violations Criteria During 2019 Fiscal Year

By Josh Schultz, Esq.,

On November 7th, MSHA announced that none of the nation’s more than 13,000 mining operations met the criteria for a Pattern of Violations (POV) for their screening period between September 1, 2018 and August 31, 2019. This the fifth consecutive year the agency has made such an announcement.

In accordance with 30 CFR section 104.2, MSHA reviews the violation and injury history of each mine



under their jurisdiction to identify those that are eligible for a POV designation. The Mine Act allows MSHA to issue POV notices to operators that “demonstrate a disregard for the health and safety of miners through a pattern of significant and substantial violations.” Although the Mine Act was passed in 1977, MSHA did not place a mine in POV status until 2011.

In January 2013, MSHA issued a final rule allowing the agency to issue a POV notice without first issuing a “potential” POV notice and removing the requirement that only final orders be considered during a POV review. This allows MSHA to put a mine in POV status before contested citations are resolved. Additionally, under the 2013 rule, MSHA may consider mitigating circumstances before issuing a POV notice and encourages mine operators to implement a corrective action program if they are approaching POV status. This corrective action plan can be considered a mitigating circumstance which may prevent classification under POV status.

To determine if a pattern of violation exists, MSHA reviews the injury and citation history of every mine under its jurisdiction at least once a year. A mine will be considered for a POV status if it meets either of MSHA’s two sets of categories in the initial screening:

Set 1

- 50 or more citations for “significant and substantial” (S&S) violations were issued in the last 12 months.
- The rate of S&S citations/orders issued per 100 hours of inspection is 8 or more during the last 12 months. Or the degree of negligence is considered “high or reckless disregard” for at least 25 percent of all the S&S citations issued in the past 12 months.
- The elevated citations and orders issued per 100 hours of inspection is at least 0.5 during the last 12 months.
- The injury severity measure for the mine (in the last 12 months) exceeds the most recent 5-year industry severity measure for its corresponding mine type and classification.

Set 2

- 100 or more S&S citations were issued in the last 12 months.
- A minimum of 40 elevated citations and orders were issued during the last 12 months.

A Pattern of Violations Notice shall be terminated if MSHA finds no S&S violations or withdrawal orders within 90 days of the POV Notice. If MSHA finds at least one S&S violation in that 90-day period, the mine will remain in POV status thereafter until an inspection of the entire mine finds no S&S violation of a mandatory health or safety standard.

We encourage operators to monitor their POV status using MSHA’s POV Monitoring Tool available at <https://www.msha.gov/compliance-enforcement/pattern-violations-pov>



Survey Shows Link Between Medical Cannabis and Decreased Opioid Use

By Adele L. Abrams, Esq., CMSP

A recent survey published in the journal PLOS One reveals that 41 percent of the adults who reported using both marijuana (cannabis) and opioids within the past year indicated they either decreased or ceased using opioids as a result of substituting cannabis. About 20 percent of the dual-substance users studied reported discontinuation of opioid use as the result of using cannabis. The team of investigators were affiliated with the San Francisco Veterans Affairs Medical Center, and sought to assess the prevalence of self-reported cannabis substitution in a nationally representative sample of over 9,000 responding pain



patients – a response rate of 55 percent. The study, “Substitution of marijuana for opioids in a national survey of US adults,” is online at <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0222577>.

Of the 41 percent of respondents who acknowledged decreased use or elimination of opioids, the most common reasons reported for substituting cannabis were for “better pain management” (36 percent) and “fewer side effects” (32 percent). Over a quarter of the US adults responding indicated that lack of withdrawal symptoms was the motivation for substituting marijuana for opioids. Interestingly, the substitution decisions appeared not to be influenced by the legal status of cannabis in the respondent’s state, or by any particular socio-demographics. The mean age in the study was 48.

More than half of all Americans live in states where medical cannabis is legal in some way (34 states plus DC). Currently 11 states plus DC also legalize recreational cannabis, and a number of other states have pending ballot measures for 2020 or state legislation. Some state medical cannabis laws offer protections against discrimination for patients (applicants or employees), while others simply prevent the patient from being criminally charged for possession, due to its illegality at the federal level.

While the federal Americans with Disabilities Act does not require accommodation of medical cannabis, some states have included such protections in their medical cannabis laws, or under state anti-discrimination laws that protect persons with disabilities. This is a rapidly changing area of law and employers are advised to review their current policies on hiring, drug testing, and fitness for duty, especially if they operate in multiple jurisdictions that may have conflicting laws. For assistance, contact the Law Office at 301-595-3520.



Marijuana Legalization and Impact on the Workplace

By Adele L. Abrams, Esq., CMSP

As cannabis legalization becomes more prevalent, more studies have been conducted to evaluate the impact of medical marijuana use on workplace safety and productivity. The results may surprise you. Among recent findings:

Legalizing medical marijuana was associated with a 19.5 percent reduction in the expected number of workplace fatalities among workers 25-44. The association grew stronger over time, and five years after coming in effect, medical marijuana laws were associated with a 33.7 percent reduction in the expected number of workplace fatalities, with state laws listing pain as a qualifying condition for obtaining a medical card being associated with the larger reductions in fatalities. (International Journal of Drug Policy)

Employees who test positive for marijuana in workplace drug tests are no more likely to be involved in occupational accidents than those who test negative. The study fell short of finding an association between cannabis use and involvement in workplace accidents, although it cannot be construed as definitive evidence of a lack of association. (Journal of Addictive Diseases)

Utilization of the Current Population Survey revealed that absences due to sickness decline following the legalization of medical marijuana, suggesting that legalization may decrease costs for employers due to illness/medical issues of workers. (Health Economics)

The enactment of medical marijuana laws is associated with a 9.4 percent increase in the probability of employment, and a 4.6 percent increase in hours worked per week. African American males experienced the greatest average wage increase. The data suggest that marijuana decriminalization laws improve extrinsic labor market outcomes, with black adults benefitting the most from removing these penalties. (Economic Self-Sufficiency Policy Research Institute, University of California Irvine).



Court Holds Presence (of Marijuana) Does Not Equal Impairment Under Oklahoma Workers Compensation Law

By Gary Visscher, Esq.

A recent decision by a state court in Oklahoma highlights the distinction between “testing positive” for marijuana and proof that the employee involved was “impaired” or “under the influence” of marijuana.

In *Rose v. Berry Plastics Corp.*, Ok.Ct.Civ.App., (10/16/2019), a machine operator employee suffered serious injuries to his hand and wrist when he placed his hand inside a “guillotine” machine and a co-worker pushed buttons to allow the machine to operate, while the two tried to clear a jam in the machine. A post-accident drug test found the injured employee tested positive for marijuana, and the employee admitted to smoking marijuana the previous night, about 10 hours before the accident occurred. The post-accident test did not quantify the amount of THC found.

Under Oklahoma’s workers compensation law, an accident “caused by” use of alcohol or illegal drugs is not compensable. If an employee is tested post-accident and tests positive for “intoxication, an illegal controlled substance, or a legal controlled substance used in contravention of a treating physician’s orders, or refuses to undergo drug or alcohol testing,” there is a rebuttable presumption that the injury was caused by the use of alcohol, illegal drugs, or misuse of prescription drugs. “This presumption may only be overcome if the employee proves by clear and convincing evidence that his or her state of intoxication had no causal relationship to the injury.

In the *Rose* case, an ALJ ruled that “while the Claimant and his co-workers exercised extremely poor judgment in the way they tried to fix the machine, there

is no evidence that the Claimant’s use of marijuana the night before the accident caused the accident.” The ALJ cited the Claimant’s testimony describing his activities during the workday, prior to the accident occurring, and the lack of any evidence that the employee had acted impaired prior to the accident. The claimant began his shift at a safety meeting and had met with his supervisor earlier in the workday. The ALJ observed that “it is likely that if the Claimant were intoxicated it would have been noted at the safety meeting that morning.”

The state Workers Compensation Commission reversed the ALJ’s ruling, but on appeal, the court of appeals sided with the ALJ. The court held that the Claimant’s evidence rebutted the presumption that the positive test for presence of marijuana meant the employee’s use of marijuana caused the accident. The evidence rebutting “intoxication” included the employee’s own testimony that he “was clear headed” and knew what he was doing when he put his hand into the machine, the employee’s attendance at the safety meeting and meeting with his supervisor at the beginning of the shift, operating his machine without incident for several hours, and taking a lunch break during which he talked with co-workers and his supervisor, prior to the accident. “None of his supervisors testified, and there is no evidence that any supervisors had remarked that Claimant was having any problems associated with intoxication” according to the hearing testimony.

The distinction between a “positive test” for marijuana and “impairment” is important not only in the context of workers compensation, but also as more states enact measures to protect employees who legally use marijuana during non-work hours. It is important that company substance abuse policies reflect the changing state laws, and that supervisors at all levels be trained in identifying signs of impairment, document evidence, and the actions to take should impairment be suspected. If you would like assistance in reviewing your policy, please contact our office.





2019 SPEAKING SCHEDULE

ADELE ABRAMS:

- November 22: Chesapeake Region Safety Council, Baltimore, MD, Workshop on Workplace Violence Prevention
- December 2: Society of Mining Engineers, Webinar, Legal & Ethical Considerations for EHS Professionals
- December 4: ASSP Genesee Valley Conference, Rochester, NY, Presentation on Medical Marijuana & Safety

JOSH SCHULTZ

- November 22: CRMCA/CSSGA 2019 Annual Conference, Colorado Springs, Co., Respirable Silica Regulation: On the Horizon for Mine Operators