



# Scalia Nominated for Labor Secretary

By Adele L. Abrams, Esq., CMSP

President Donald Trump has officially nominated Eugene Scalia, son of the late Supreme Court Justice Antonin Scalia, to be the new Secretary of the US Department of Labor. The official nomination on August 27, 2019, comes after an unofficial announcement via Twitter on July 18<sup>th</sup>.

If confirmed, Scalia would replace R. Alexander Acosta, who was forced into resignation in July, after heightened controversy over his involvement in convicted sex offender Jeffrey Epstein's 2008 plea deal, when Acosta was the US Attorney handling the federal case in Florida.

Scalia, a DC attorney, argued on the management side of some high-profile cases, including the OSHA matter against Sea World of Florida LLC involving the death of killer whale trainer Dawn Brancheau in February 2010. Scalia and Sea World ultimately lost that case, 2-1, in the U.S. Court of Appeals for the District of Columbia Circuit, with current Supreme Court Justice Brett Kavanaugh as the dissenting vote.

Scalia has also publicly criticized OSHA's former ergonomics regulation, which was rescinded in 2001 by Congress under the Congressional Review Act shortly after its "midnight" enactment at the end of the Clinton administration. Writing for the Cato Institute in 2000, Scalia said the ergonomics rule "would afford little benefit to workers because it is based on thoroughly unreliable science." It is anticipated that, if confirmed, Scalia will be more enthusiastic in his deregulatory activities at OSHA and MSHA

## INSIDE THIS ISSUE

- **Department of Labor is Busy on Silica** [Page 2]
- **No Connection Between Fines and Mine Safety, Federal Audit Says** [Page 4]
- **OSHA Whistleblower Case Results in \$1M+ Fines** [Page 5]
- **Bill Would Require OSHA Issue a Heat Stress Standard** [Page 7]
- **OSHA Citation After Communications Tower Accident Vacated** [Page 8]
- **OSHA Advisory Committee on Construction Safety and Health Meets** [Page 9]
- **MD. Health Dept. Investigating Lung Illness and E-Cigarettes** [Page 10]
- **FMSHRC: Deadline to Report Applies to Death by Natural Cause** [Page 11]
- **MSHA Seeks Comments Regarding Escapeways Policy** [Page 12]
- **MD High Court Rules On Cannabis Search** [Page 13]

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than was his predecessor Acosta, who largely left those agencies intact during his tenure.

In announcing the nomination, President Trump stated: “Gene has led a life of great success in the legal and labor field and is highly respected not only as a lawyer, but as a lawyer with great experience.” However, Scalia’s nomination is already drawing opposition from labor groups, and others advocating for workers’ rights. The National Employment Law Project commented: “Mr. Scalia has spent his entire career fighting for big businesses and against working people . . . He is a frequent opponent of the Department of Labor and its initiatives to try to improve the lives of the country’s workforce. As his nomination is considered, the Senate should hold Mr. Scalia to the same standard we would any other nominee for this post – will he make it his mission to be a champion of the country’s workforce?”

Scalia was the DOL’s solicitor of labor in 2002 after a recess appointment. He served as special assistant to current Attorney General William Barr from 1992 to 1993, during Barr’s first stint in that role. Under Senate confirmation rules, even if all Democratic members oppose Scalia, the nomination can be confirmed by party line vote. However, it is unclear whether Senate Majority Leader will make this a priority matter for the Senate before adjournment this fall. If so, Scalia would need to be renominated.

At present, OSHA also lacks a chief. President Trump nominated former FedEx safety executive Scott Mugno for the position in 2017, 2018 and 2019 but after repeated failures to have the nomination brought to a vote (after committee clearance), Mugno withdrew from the position. It is not expected that any new nominee will be announced during the remainder of this term. Loren Sweatt, Deputy Assistant Secretary, continues to lead the agency in an acting role.

## Department of Labor is Busy on Silica

By Michael Peelish, Esq.

### OSHA’s Request for Information Regarding Expanding Construction Standard’s Table 1 and Incorporating Table 1 Tasks into General Industry

When conducting training for Competent Persons under Table 1 of the Construction Standard, I tell participants that Table 1 is their friend. Now, according to OSHA, their “Table 1 friend” may be expanded and incorporated in part into the General Industry Standard. The reason Table 1 is effective for employers is that compliance is made easier. Yes, I said easier. No more monitoring or guessing at what engineering controls are acceptable for Table 1 tasks. It clearly tells an employer what it needs to do to “fully and properly implement” Table 1 thus complying with the permissible exposure limit.

Having conducted many dozens of exposure assessments under the Construction Standard, I recommend several changes to Table 1: Add the tasks of drywall and abrasive blasting. My monitoring results of multiple samples of the drywall task has never produced an exposure close to the action level. On the other hand, sampling abrasive blasters is pointless and thus a perfect task to include in Table 1 along with the required respiratory protection. Also, there is confusion over how grinders are contemplated being used under Table 1 (flat on surface or on an edge) for tasks other than mortar removal. This needs to be made clear. Additionally, the Frequently Asked Questions have added clarity to the housekeeping obligations which has made compliance more attainable. Codifying the



housekeeping changes will avoid future agency actions to back track.

As far as I can tell from the several thousand persons who have gone through my silica training, the real bugaboo has been in the cost to purchase new tools and dust collection systems and retrofitting older equipment with integrated water suppression systems. The initial push to purchase equipment to comply with Table 1 is now followed up by the need to continue to purchase this equipment as it gets worn out and breaks. A standard hand tool with dust collection system costs around \$700. However, nothing OSHA will do in the regulatory arena will change that cost of doing business.

As for General Industry, our clients have always been bewildered why the same task at a construction site is any different than at a general industry site. The answer is the task is not different, but the current regulatory scheme is different. I have monitored Table 1 tasks at general industry facilities, and you know what, Table 1 works. So, OSHA should expand Table 1 and incorporate it for the same tasks performed at General Industry facilities. It made sense before the rule was promulgated, and it makes sense now.

With a couple of years of compliance under our belts, the industry has discovered that equipment costs are the most significant immediate and ongoing costs associated with both standards. The more burdensome aspects of the Standards are the recordkeeping (monitoring, respirator use) and medical surveillance. On the other hand, the employers may never really know whether OSHA's rule as stated in the preamble will save the billions of dollars anticipated from less healthcare costs. Now, that would be a great thesis project for an economics student, "Do Regulations Actually Save Money?"

## MSHA Has No Choice But to do Something About Silica

It is now official. MSHA is addressing the silica issue by issuing its Request for Information ("RFI") on August 29, 2019. The RFI provides a short history lesson on the application of the silica standard in coal mining and dismisses any approach that would allow respiratory protection as a means of compliance. This is not surprising since MSHA falls back on several sections of the Mine Act to support this position, however, the provisions cited fall under Title II - Interim Mandatory Health Standards which may provide an avenue to allow for the hierarchy of controls to be fully applicable. By doing so, MSHA will be applying proper industrial hygiene practices, just like OSHA's silica standard.

Regarding the metal/nonmetal side of the industry, the specific language MSHA relies upon to push back the proper application of the hierarchy of controls for coal does not apply to metal/nonmetal. Thus, MSHA has more lead way on how to manage miners' exposure to respirable crystalline silica. The focus of MSHA's RFI questions is primarily on "new or developing

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protective technologies,” i.e., engineering controls. While MSHA pays lip service to administrative controls, it has essentially outlawed the use of operator rotation. Perhaps MSHA could see the light by incorporating time-tested means of controlling air contaminants using administrative controls. What is missing from the RFI are specific questions concerning the permissible exposure limit for respirable silica. Not sure why? Is MSHA accepting OSHA’s silica standard and not telling anyone or does MSHA believe the engineering controls alone are the answer? Or does MSHA believe the permissible respirable dust formula for coal is fine as is? And what about the metal/nonmetal industry? Is MSHA considering a different permissible exposure limit or a different compliance scheme? From the wording used in the RFI, it is difficult to discern where MSHA is going with this effort.

However, as MSHA addresses the respirable silica issue, one simple fact must be considered. While the silica standard has remained the same over the years, production volumes have continued to increase dramatically. So, what was feasible years ago may not be acceptable today. Whatever MSHA does with the silica standard for the coal and metal/nonmetal mining sectors, it should adhere to several simple principles: define “feasible technology” in realistic terms; allow for the use of operator rotation otherwise MSHA is taking an area sample; and continue to work with operators on acceptable uses of respiratory protection. Look at it this way, if you believe the most recent reports from the coal industry about large clusters of coal miners contracting Black Lung due to silica exposure, then what MSHA is doing today is not working. Simply lowering the silica standard and issuing closure orders is not the answer. MSHA must be constructive in its approach with operators so that they can meet the permissible exposure limit, whatever it is. Tying one arm behind the back of the operator by not affording the use of all tools in the tool bag or by

### California nominates new CalOSHA Chief

California Governor Gavin Newsom nominated Douglas Parker as chief of the Division of Occupational Safety and Health at the California Labor and Workforce Development Agency. Mr. Parker has been executive director of California Worksafe, a labor-side advocacy group, since 2016. He was deputy assistant secretary of labor at MSHA from 2014 to 2015 and senior policy advisor and special assistant at the U.S. Department of Labor from 2009 to 2014. The California Senate must still vote to confirm Mr. Parker.

defining feasible unreasonably will not solve the issue of silicosis in miners, regardless of the industry they work in.



## No Connection Between Fines and Mine Safety, Federal Audit Says

By Sarah Ghiz Korwan, Esq.

The Labor Department’s Office of Inspector General (OIG), Office of Audit recently conducted an audit to determine to what extent MSHA’s Civil Monetary Penalties (CMP) program deterred unsafe mine operations. To answer this question, the OIG analyzed information from CY 2000 through CY 2017, to identify trends regarding



safety violations, penalties assessed and penalty payment statuses, as they related to mine conditions.

Based on their analysis, the OIG reported that MSHA's penalties did not deter unsafe mine operations. Specifically, "the data revealed that most fatal or permanent injury accidents occurred at mines where operators generally paid their penalties in full." In addition, the OIG found no correlation between the percentage of penalties paid and the average number of fatal or permanent injury accidents. Further, "the frequency of severe violation recurrence was very similar whether or not violation penalties were paid."

Although the OIG reported that MSHA collected 90 percent of all violation penalties (\$900 million) during the 18-year review period, significantly, MSHA does not prevent mine operators delinquent in paying their penalties from commencing operations in a new mine without consequence. However, the report noted that in 2018, MSHA adopted a new enhanced enforcement approach to the Scofflaw program which promotes more frequent use of mine closure citations for non-payment under CMP.

The OIG recommended that MSHA develop metrics to review how its fine structure changes operator behavior to prevent unsafe mine operations. The report noted that violation penalties should serve as a financial deterrent to neglect a safety hazard in the future. While MSHA effectively assessed and collected the monies associated with violation penalties, the agency did not establish a metric to ensure the purpose of the program – deterring future safety issues – was met.

In response to the audit, MSHA indicated that measuring the effectiveness of penalties is difficult because fines are "one of many variables"

used to make mines safe. MSHA further indicated that it does not have the legal authority to implement necessary controls or even prevent mine operators who were delinquent from opening new mines. OIG, for its part, offered to work with MSHA on identifying ways to correct these issues.



## OSHA Whistleblower Case Results in \$1M+ Fines

By Adele L. Abrams, Esq., CMSP

A Pennsylvania employer recently found out the hard way that federal safety whistleblower protection laws have real teeth. In an August 2019 decision, a federal judge awarded two former employees significant judgments as a result of their wrongful and retaliatory termination, related to an amputation accident involving a third worker.

The U.S. District Court for the Eastern District of Pennsylvania found that Lloyd Industries Inc. – a manufacturing company based in Montgomeryville, Pennsylvania – and its owner William P. Lloyd, unlawfully terminated two employees because of their involvement in a safety investigation conducted by the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA). An OSHA whistleblower investigation determined that Lloyd Industries Inc. and Lloyd unlawfully fired the two employees in retaliation for engaging in protected activities under Section 11(c) of the Occupational Safety and Health Act (OSH Act). The verdict follows a lawsuit filed by the Department in March 2016.



Lloyd Industries was designated a “Severe Violator” by OSHA – with 40 serious injuries over almost 20 years -- and was fined \$822,000 for safety violations in 2015. Now their problems have been magnified by even higher penalties for an associated Section 11(c) whistleblower action. In addition to the penalties, the employer was ordered by the court to post an anti-retaliatory notice in the 60-employee plant for two months.

The matter started with an accident in which a worker lost his fingers in an accident. He was fired as were two other workers who spoke with OSHA about the incident. One worker, the plant manager, spoke with OSHA investigators (with the employer’s knowledge) and was fired on the same day that the citations were received. In his retaliation claim, the manager was awarded \$829,689, \$400,000 of which was for punitive damages and the remainder was “make whole” relief of back wages.

The other complainant was an hourly worker who had photographed the subject equipment with his mobile phone and gave the photos to the injured worker for his worker’s compensation claim, who then in turn provided the photos to OSHA. The “photographer” was publicly fired in the workplace as a result. The court awarded him \$217,710, with \$100,000 of that designated for punitive damages.

In announcing the award, Philadelphia Regional Solicitor for the US Department of Labor Oscar Hampton III said, “The significant punitive damages send a strong message to this employer and others that deliberately violating these laws will not be tolerated.”

Section 11(c) of the Occupational Safety & Health Act of 1970 protects workers from retaliation for protected safety-related activities, such as raising safety concerns internally, filing a hazard complaint with OSHA, speaking privately

to inspectors, furnishing evidence, or testifying against the employer. It also protects workers who engage in good faith work refusals where the employer fails to abate a safety or health hazard.

There is only a 30-day statute of limitations for Section 11(c) claims – the shortest of any federal whistleblower statute. By comparison, the Mine Act has a 60-day statute for filing retaliation claims under its comparable provision (Section 105(c)), while environmental and transportation statutes typically have a 180-day period to file complaints with the appropriate agency. However, under OSHA’s 2016 E-Recordkeeping rule, protections against retaliation were embedded in 29 C.F.R. Part 1904, which effectively extends the statute to align with OSHA’s normal 180 day limitations period.

Employees who have been retaliated against, but miss the Section 11(c) deadline, can now file a complaint with OSHA under Part 1904 and trigger a record audit and investigation. If OSHA finds that retaliation has occurred, it can fine the employer up to \$132,000 per affected worker for willful violations. However, there would not be personal damage awards granted to the affected worker, unless it was negotiated as part of a settlement with OSHA.

For more information on whistleblower protections and designing programs to help avoid discrimination claims, contact the Law Office at 301-595-3520 (eastern) or 303-228-2170 (western).





# Congress Introduces Bill Which Would Require OSHA Issue a Heat Stress Standard

By Joshua Schultz, Esq.

On July 10, 2019 Rep. Judy Chu, (D-CA) and 27 cosponsors, introduced the “Asunción Valdivia Heat Illness and Fatality Prevention Act” (H.R. 3668), which would require OSHA to enact a federal heat stress standard. If enacted, the bill would mandate that OSHA create standards establishing exposure limits that trigger action to protect covered employees from heat-related illness. Additionally, OSHA would set specific requirements for hydration, scheduled and paid rest breaks in shaded or climate-controlled spaces, acclimatization plans, exposure monitoring, employee and supervisor training, hazard notification, an emergency medical response plan, heat-related surveillance, recordkeeping, and procedures for compensating piece-rate workers for required heat-related rest breaks.

This bill is in the first stage of the legislative process. It will likely be considered by committee before it is possibly sent on to the House or Senate as a whole. The bill was named for a worker who died from heatstroke after working for 10 hours straight in 105-degree Fahrenheit temperatures. Although the bill has just a 3% chance of being enacted, according to Skopos Labs, it continues a call for a federal heat stress standard by some elected officials and public interest groups. NIOSH has long issued a formal recommendation for a standard and labor and

union groups have petitioned the agency for a standard.

The proposed law would require OSHA regulations for heat illness prevention plans. OSHA regulations would compel these heat prevention plans to meet discrete requirements, including engineering controls, administrative controls that limit exposure to a hazard by adjustment of work procedures or work schedules, and personal protective equipment. Further, employers would be required to provide specific training to employees and supervisors, and maintain records related to heat illness risk and hazard assessments, as well as identification, evaluation, correction, and training procedures.

Additionally, the proposed law would require OSHA to promulgate whistleblower protections. Employees would be protected from discrimination for reporting a heat-illness-related concern or seeking assistance or intervention with respect to heat-related health symptoms from their employer, local emergency services, or a local, State, or Federal government. Under this provision, an employee asking the employer to provide specific beverages could be a protected activity which would trigger the whistleblower protections.

California OSHA currently maintains a heat illness prevention standard which covers outdoor exposures. California’s employers are required to take four steps to prevent heat illness: train all employees and supervisors about heat illness prevention; provide enough fresh water so that each employee can drink at least 1 quart per hour; provide access to shade and encourage employees to take a cool-down rest in the shade for at least 5 minutes; and develop and implement written procedures for complying with the regulations.



# OSHA Citation After Communications Tower Accident Vacated

By Gary Visscher, Esq.

An ALJ vacated a General Duty Clause citation, noting that OSHA failed to prove that the identified hazard – performing the work without having a complete rigging plan – was a “recognized hazard” under section 5 (a)(1). The case involved a citation issued to Tower King II, Inc., after an OSHA investigation of a September 2017 accident in which three workers died while they were working on a 1,000 foot high communications tower for a TV station in Miami, Florida.

The work involved replacing the pedestals and antennas at the top of the tower. In order to lower the old equipment and raise new equipment, a lifting device called a “gin pole” was attached to the tower. The gin pole and the mechanisms used to attach it to the tower were referred to as the rigging system. OSHA’s investigation found that the accident occurred when the connectors between the gin pole and tower became overloaded. The overloading, OSHA concluded, occurred because an engineer (who was not employed by Tower King) miscalculated the loads that would be imposed on the rigging system during the operation. Tower King selected and used equipment in the rigging system that was based on the engineer’s miscalculation. According to the administrative law judge, “Tower King used rigging components sufficient ‘to carry those predicted loads’ but insufficient to carry the actual load.”

OSHA cited Tower King under section 5 (a)(1) for “performing work on a communication tower

without a complete rigging plan and exceeded the capacity of the rigging attachments.”

Thus, the issue as the ALJ addressed it, was, what is “a complete rigging plan” and what was Tower King’s responsibility in terms of its contents. The ALJ referred to two industry consensus safety standards for communications tower construction, ANSI/ASSE A10.48-2016 and the ANSI/TIA-322-2016, which put the responsibility for developing the rigging plan on the contractor (Tower King), but specify that “a qualified engineer shall perform the analysis of structures and components” based on information provided in the rigging plan.

The ALJ found that the Secretary did not prove that “deficiencies in the rigging plan created a hazard.” Although OSHA’s witness pointed to several “deficiencies” in the rigging plan, the ALJ found that the Secretary did not establish that any of those deficiencies “could have resulted in a miscalculation sufficient to pose an overloading risk.”

The ALJ also said that OSHA had failed to prove that the identified hazard – performing the work without having a complete rigging plan – was a “recognized hazard” under section 5 (a)(1). A finding of a “recognized hazard” may be based on either evidence that the employer recognized the hazard, or that it was a recognized hazard in the industry. The ALJ said the Secretary provided no evidence that Tower King recognized the deficiencies in its rigging plan. The Secretary’s witness also provided no testimony regarding what is generally understood to constitute a “complete rigging plan.” Testifying on behalf of Tower King, an expert witness, who was a member of both the ASSE and TIA standards committees, attested that the rigging plan which Tower King submitted to the engineer was consistent with industry custom and practice.



How OSHA wrote the citation proved decisive in this case. The citation only alleged that Tower King did not have a complete rigging plan. The ALJ found that not only did the engineer, who was not an employee of Tower King, miscalculate the load, but workers at the job site used a longer and heavier gin pole than was described in the rigging plan. However, the ALJ said it was not the contents of the rigging plan that posed the hazard, but the deviation from the plan in the field after the engineer had certified the plan, and “[t]he citation does not address deviations from the plan, but the contents of the plan.”

The ALJ’s decision became a final order of the Commission on August 29. The OSH Review Commission currently has only one member, Chairman Sullivan, and thus lacks a quorum to issue decisions, though a single member can direct cases for review. The Secretary has 60 days to appeal the decision to the 11th Circuit Court of Appeals.

There is currently no OSHA standard on Communications Tower construction. In 2015 OSHA published a Request for Information to initiate a rulemaking on a standard and completed a SBREFA panel in 2018. OSHA’s Spring 2019 Regulatory Agenda does not project a timeline for regulatory action beyond completion of the SBREFA panel report.



## OSHA Advisory Committee on Construction Safety and Health Meets

By Gary Visscher, Esq.

OSHA’s Advisory Committee on Construction Safety and Health (ACCSH) met on July 17 and 18, 2019. It was the first meeting since ACCSH’s membership was reconstituted in May 2019, and the first ACCSH meeting since June 2017.

ACCSH was created by section 107 of the Contract Work Hours and Safety Standards Act. OSHA regulations provide that “whenever occupational safety or health standards for construction activities are proposed, the Assistant Secretary shall consult the Advisory Committee.” 29 C.F.R. 1912.3 (emphasis added). Thus, despite the current Administration’s general aversion to advisory committees, ACCSH meetings are necessary before OSHA may issue or propose any OSHA construction standards.

The July meeting of ACCSH provided an opportunity for OSHA to receive ACCSH’s recommendation regarding two soon-to-be proposed construction standards.

One is a proposed rule to add a requirement to the construction PPE standard, that PPE must have “proper fit.” The proposal was initially included in OSHA’s Standards Improvement Project – IV (SIP-IV). It was dropped in the final rule after OSHA received two comments expressing concerns with the change, and OSHA is now planning a standalone rulemaking on a “proper fit” requirement. OSHA’s general industry standard on Personal Protective Equipment, 29 CFR 1910.132, includes a requirement that the employer “select PPE that properly fits each affected employee.” At its July meeting ACCSH voted to recommend the proposed addition to the construction PPE standard.

ACCSH also considered and recommended a proposed rule to clarify the definition of confined space in the Welding and Cutting standard. The



rule responds to perceived ambiguity between the Welding standard and the more recent Confined Spaces in Construction standard.

OSHA recently announced that ACCSH will hold another meeting on September 9, 2019. This meeting will be by teleconference, solely to consider a construction standard on occupational exposure to beryllium and beryllium compounds in the construction industry. OSHA previously issued a proposed rule to apply the same PEL as the general industry standard, (0.2 µg/m<sup>3</sup> and a STEL of 2.0 µg/m<sup>3</sup>) to construction and shipyards, but to delete “ancillary provisions” applicable to general industry from the construction and shipyards standards. Additional information on how to attend and/or participate in the teleconference meeting is available in the August 20 Federal Register notice and on OSHA’s website.

In addition to reviewing and providing recommendations on proposed rules, at the July meeting ACCSH also received reports from the various directorates within OSHA.



## Maryland Health Dept. Investigating Lung Illness and E-Cigarettes

By Adele L. Abrams, Esq., CMSP

The Maryland Medical Cannabis Commission (MMCC) announced in late August that it is working with the Maryland Department of Health (MDH) to investigate several reported cases of severe lung illness in people using electronic cigarettes, also commonly referred to as vapes.

MDH identified five individuals who in the last two months developed severe lung illness after using electronic cigarettes or vapes. At this time, none of the reported cases involve Maryland medical cannabis patients.

According to MDH, the cause of these illnesses is not yet known and has not been linked to any particular vape device, brand, or substance. People who became ill reported using a variety of vaping products, including those containing cannabis or THC. If any individual experiences trouble breathing, the Maryland Poison Center recommends seeking immediate medical attention.

Medical cannabis patients who use vape products are encouraged to report any unexplained serious respiratory illness to the MMCC and their certifying provider. Patients and certifying providers may report suspected cases to MMCC via email at [reporting.mmcc@maryland.gov](mailto:reporting.mmcc@maryland.gov). In addition, patients and providers are encouraged to report suspected cases to their local health department. Any medical cannabis licensee who receives a report of a vaping-related illness must promptly report the incident to the MMCC.

The investigation in Maryland follows reports of vaping-related illness in at least 22 states, including one death. The Centers for Disease Control and Prevention warns that vapes, whether containing nicotine or cannabis, may contain potentially harmful substances. There have also been reports in Maryland and other states about lead contamination of cannabis liquids in vape cartridges. Following the advisory, the MMCC instituted enhanced laboratory testing requirements to further investigate the potential presence of lead and other heavy metals in vape cartridges.



Employers should also be aware of this as a potential complication for medical evaluations and surveillance programs, including those required in workplaces where exposure to respirable crystalline silica is present (primarily construction and concrete manufacturing). Employees should be screened by the licensed health care professional for vape or e-cigarette usage where chest x-rays or pulmonary function tests reveal problems, before making determinations on work-relatedness for compensation or OSHA/MSHA reporting purposes.

For more information, contact Adele Abrams, Esq., CMSP, at [safetylawyer@gmail.com](mailto:safetylawyer@gmail.com)



## Mine Commission: Deadline to Report Applies to Death by Natural Cause

By Gary Visscher, Esq.

MSHA's regulation, 30 C.F.R. § 50.10(a) requires that mine operators notify MSHA within 15 minutes of an "accident." The term "accident" is defined in § 50.2 (h), and includes "(1) A death of an individual at a mine ..."

At issue in *Richmond Sand & Stone* (Aug. 13, 2019) was whether the 15-minute reporting requirement for "accidents" applies where a miner suffered a fatal heart attack unrelated to work activities. The Commission unanimously held that it does.

In the case, co-workers found the excavator operator slumped over his controls and immediately called 911 and attempted resuscitation. An ambulance squad arrived within about 5 minutes of being called, and also attempted resuscitation both at the mine and in route to the hospital. The miner was pronounced dead by a physician at the hospital, just over an hour after the miner was first discovered. The parties stipulated that the miner died of a heart attack not related to any work activity.

The operator contacted MSHA the following day. The operator was subsequently cited for violating 30 C.F.R. § 50.10(a), and issued the statutory minimum penalty of \$5000.

An administrative law judge upheld the citation and penalty, and the operator petitioned for review by the Commission. The mine operator argued that the Mine Act and Part 50 should not apply to deaths from natural causes, because there was no "accident," as the word is ordinarily defined and understood, and therefore no immediate reporting of the death was required.

The Commission upheld the citation and penalty, holding that even if the definition of "accident" in the regulation is inconsistent with ordinary usage, "the express definition in the regulation takes precedence." The Commission also said the language of the regulation was clear, and so there was no argument over whether it should defer to MSHA's interpretation. The decision states, "It is difficult to imagine a stronger case for plain meaning than where the regulation itself provides and then uses the definition."

Although several previous ALJ decisions have interpreted § 50.10(a) as applying to a non-work related death at a mine, this is the first time that the Commission has held that it does.



Although the definition of accident in § 50.2 states that the term accident includes death of any individual at a mine, the Commission did not address (apparently because Richmond Sand and Stone did not raise the issue) whether the excavator operator's death occurred "at the mine." The ALJ's opinion in the case cites the following evidence from the record: the excavator operator was discovered slumped over the controls at 2:19 pm, and co-workers began CPR and called 911; an ambulance squad arrived at 2:24 pm and applied CPR and defibrillation; the ambulance left the mine at 2:56 pm, and efforts to revive the miner continued; the ambulance arrived at the hospital at 3:19 pm; the miner was pronounced dead at the hospital at 3:35 pm. The ALJ noted that the miner was defibrillated 12 times, six times at the mine and six times en route to the hospital. "The report generated by the defibrillator indicated that there were moments of ventricular fibrillation and pulseless electrical activity, but there was no detectible blood pressure or pulse following any of the 12 defibrillations."

The ALJ concluded that the miner's "apparent death" occurred "by 2:56 p.m. at the very latest, the time at which the ambulance squad left the mine...at that time, the 15-minute reporting interval began to run." Whether the Commission will have to wade into the troublesome question usually reserved for hospital ethics boards, of "when death occurs," will have to wait for another case.



## MSHA Seeks Comments Regarding Escapeways Policy

By Sarah Ghiz Korwan, Esq.

The Mine Safety and Health Administration (MSHA) recently announced it would be accepting public comment until September 27, 2019, on the Program Policy Letter (PPL) regarding escapeways and refuges used in underground metal and nonmetal mines where miners may need to shelter in place during an emergency.

MSHA notes that the PPL is not considered a formal rulemaking, but believes it is necessary to address "significant safety issues regarding the placement of a refuge in a location that provides miners access if they cannot escape." Apparently, this comes in response to questions raised by underground Metal-Nonmetal (MNM) operators regarding the placement of refuges required by 30 CFR 57.11050(a). MSHA further anticipates that the guidance is significant because it may reasonably be anticipated to raise novel legal or policy issues.

Title 30 CFR 11050, Escapeways and Refuges, requires two or more separate, properly-maintained escapeways in underground MNM mines to enable miners to shelter safely in place until they can be rescued. The PPL attempts to clarify this the placement of refuges required by the standard. MSHA states in the letter that the standard recognizes two exceptions to the requirement that underground miners be provided at least two separate escapeways from their working places to the surfaces. First, miners must be provided a method of refuge while a second escapeways is recommended but not required. Second, during exploration or development of an ore body, the second escapeways is recommended but not required. MSHA interprets these two exceptions to both to mean that, if in either of these situations, miners



have only one escapeways from their working place, then they also must have access to a refuge.

This refuge should be located near the miners so that they promptly and reliably can enter the refuge if they cannot escape. In determining an appropriate distance, MSHA considers mine-specific factors in each case. MSHA recognizes that it may not be practicable for most working places near the portal (within 300 feet) in a horizontal configuration to have a refuge. However, MSHA believes that, in most cases where a refuge is located, for example 1,500 feet from miners on a relatively level surface, it would be close enough to provide the protection the standard intends.



## MD High Court Rules On Cannabis Search

Adele L. Abrams, Esq., CMSP

In August 2019, Maryland's Court of Appeals issued a significant decision, holding 7-0 that police are not justified in searching a person based solely off of the smell of marijuana. The decision involved a challenge to a search triggered after police smelled pot near his car. The driver was parked behind a laundromat while two officers were on foot patrol, and they became suspicious because the person was sitting inside his car rather than in the laundromat, so they approached the vehicle. They testified that they smelled "fresh burnt" marijuana and saw a joint in the vehicle console.

The officers acknowledged that the visible pot was less than 10 grams in weight. In Maryland, marijuana was decriminalized in 2014 as far as possession of up to 10 grams. Maryland also has

legalized medical marijuana and sells in through dispensaries throughout the state.

The police ordered the driver to exit the vehicle and searched him, finding cocaine in one of his pockets. They also searched the vehicle and found a marijuana stem and some rolling papers. He was issued a citation for possession of less than 10 grams of marijuana, but also charged with possession of cocaine with intent to distribute.

The decision came on a motion to suppress the evidence of cocaine as the product of an improper warrantless search, where it was alleged that the officers lacked "probable cause" to believe he possessed more than 10 grams, which might have justified the search. While the state argued that the odor of marijuana provided sufficient probable cause to search both the vehicle and the individual, the appeals court wrote: "In the post-decriminalization era, the mere odor of marijuana coupled with possession of what is clearly less than 10 grams of marijuana, absent other circumstances, does not grant officers probable cause to effectuate an arrest and conduct a search incident thereto." It was stressed that there is a higher expectation of privacy in one's person as compared to one's automobile, and the probable cause analysis can differ accordingly.

For more information on cannabis law, contact Adele Abrams at [safetylawyer@gmail.com](mailto:safetylawyer@gmail.com).



## 2019 SPEAKING SCHEDULE

### ADELE ABRAMS:

- September 4: ClearLaw Webinar, Legally Effective Job Descriptions for Safety
- September 7: National Safety Council, San Diego, Full Day Workshop on Workplace Violence, Sexual Harassment and Workplace Safety
- September 10: National Safety Council Annual Congress, San Diego, Presentation on Joint Employer Safety
- September 19: Minnesota Concrete Council, Minneapolis, Training on OSHA Silica Standard
- September 20: South Dakota Safety Conference, Sioux Falls, SD, Training on Opioids, Medical Marijuana & Workplace Safety
- September 25: Industrial Mineral Association- North America, Presentation on Silica IH Issues and MSHA, Skamania, WA
- September 30: ClearLaw Webinar, OSHA's Crystalline Silica Standard & Enforcement Trends
- October 1: National Electrical Contractors Assn., DC Chapter, Presentatio on Opioids, Medical Marijuana & Workplace Safety
- October 2: Clearlaw Webinar, Avoiding Whistleblower Protection Claims under OSHA/MSHA Law
- October 8: ClearLaw Webinar, Legally Effective Incident Investigations
- October 9: Chesapeake Region Safety Council Annual Conference, Panel on Medical Cannabis & Safety, Laurel, MD
- October 10: Michigan Holmes Safety Association, Update on MSHA Law, Gaylord, MI
- October 22: BLR, Master Class on OSHA Recordkeeping, Dallas, TX
- October 24: ASSP Hudson Valley NY PDC, Presentation on Safety in the Age of Trump
- October 29 - 30: National Business Institute workshop on Employment Law, Baltimore MD
- November 5: Southeast Mine Safety & Health Conference, Presentation on Silica & MSHA Update, Birmingham, AL
- November 8: ASSP Ft. Wayne Chapter, Ft. Wayne, IN, Presentation on OSHA Issues
- November 13: ASSP Western PA PDC, Indiana, PA, Keynote Address
- November 15: Penn State Drilling & Blasting Conference, State College, PA, Presentation on OSHA/MSHA Legal Developments
- November 20: SafePro Mine Safety Law Institute, Savannah, GA, Presentation on MSHA law and inspection management
- 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

### MICHAEL PEELISH

- September 18: Penn State University's Miner Training Program
- September 26-27: National Drillers Association 2019 convention at the Hyatt Regency Dulles
- November 5: PA Rural Electric Cooperative Assoc., Inc meeting.

### DIANA SCHROEHER

- September 17-19: N.C. Mine Safety & Health Law School, NCDOL, Castle Hayne, NC