

## MSHA UNDERESTIMATES DRUG RULE COSTS

MSHA overlooked some potentially significant expenses when it calculated the cost of its proposed rule on substance abuse.

In its Preliminary Regulatory Economic Analysis (PREA), Agency economists projected first-year costs to the industry, including contractors, to be \$16 million, with another \$13 million in recurring costs every year thereafter.

With some 10 days left in the comment period, which ends Nov. 10, MSHA has already received over 200 comments on the controversial proposal. Yet few discuss costs, and no one has offered a critical review of the 60-page PREA. A substantial underestimate could form the basis for a legal challenge by those who claim to have been misled on what the rule would cost.

### Reasonable Assumptions, Missing Items

MSHA's assumptions in the PREA largely appear reasonable; the rub, as mentioned, is over what is left out. A case in point is the Agency's estimate of the cost to put in place a written substance abuse policy at mines that now lack one. MSHA figured an hour of a supervisor's time would be needed to review and modify a 10-page written policy template MSHA said it would provide mine operators. Specifically, the Agency estimated the cost at each applicable coal operator and contractor operation to be \$75.02 and \$60.34 at each site run by their metal/non-metal counterparts.

But this scenario is unrealistic. "I doubt a mine supervisor is going to be filling this out," said Chris Upp of Conco Quarries, which has its own drug policy. Upp said the job would probably fall to senior management. Furthermore, he added, "I would assume that it would have to be reviewed by HR and Safety." At sites with collective bargaining agreements, the union would get involved as well, he remarked. It is likely company attorneys may want to weigh in, too.

The underestimate extends to the estimated 4,054 operations with existing policies as well. As numerous commenters to the rulemaking docket have attested, their drug programs differ from the one the Agency proposes. The PREA's neglect of the impact of the rule on mines with an existing program is seen throughout the document and is one of its biggest shortcomings.

MSHA's proposal requires supervisors to receive two hours of initial training. No allowance is made for time needed getting to and from the training site. The same criticism holds for failing to account for travel time for miners subject to random testing or for the time of those who must fill in for them while they are gone. If no substitute can be found on short notice, production might suffer as well.

Moreover, there would be an added cost to companies that prefer to escort the miner to the collection site. "If you simply call over the radio for someone to come and take a test,

AB41-COMM-114

then they have the opportunity to go to their car or possibly prepare a specimen from another employee to try and give a fraudulent sample,” Upp said.

If one assumes the worst for random testing, as Upp does, a miner under reasonable suspicion of drug use almost certainly would require an escort. Those subject the required minimum of six follow-up tests may have to be escorted as well. These individuals may have to be driven to a collection site, since few collectors would be available on short notice and would likely charge a premium for a site visit even if they were. MSHA projected less than half of 1% of miners would fall into the reasonable suspicion category and that one in 10 miners subject to the full array of required tests would be identified as abusers.

Besides requiring supervisor training, the proposal requires miner training, too. Oddly, MSHA also overlooks instructor fees altogether, as though the Agency expects miners will train themselves. Instructor costs could be substantial if a consultant is involved. Upp noted, “Costs for us would probably be \$1,000 for a basic competent person and \$1,500 for a supervisory competent person per year.”

MSHA also assumes there will be no cost for training materials, presumably because it plans to provide some without charge. Upp set \$500 as the annual ballpark figure for training materials for Conco employees.

#### **Labs, MROs, and SAPs**

MSHA’s proposal requires laboratories to be certified by the Department of Health and Human Services (HHS) as well as certified for forensic urine drug testing by the College of American Pathologists (CAP). MSHA incorporates into its drug proposal DOT’s specimen collection, handling and analysis requirements, which include the HHS certification. However, CAP certification is beyond what DOT requires, and could raise costs by as much as \$5 a sample, according to Joseph F. Whelan, Director of DSI Medical Services.

A potentially complicating factor is that, as of Oct. 9, only 37 public laboratories in this country and another three in Canada have HHS certification; of these, just 25 have both. Thus, supply and demand may also push up MSHA’s cost estimate of \$55 for on-site collection and analysis of each urine specimen even beyond the bump Whelan predicted.

In the proposal, Medical Review Officers (MROs) are charged with determining if a positive result for prescription drug use is due to legitimate and appropriate use. MROs are physicians who may work for a service provider or be employed by a mine operator as company physician.

At a hearing on the proposed regulation Oct. 28, union miners raised concerns that some MROs, acting as company physicians, may not hold miners’ medical histories in confidence. Miners fear that information contained in those histories could lead some employers to try and rid themselves of miners with medical problems. That, in turn, could trigger costly anti-discrimination actions under Sec. 105(c) of the Mine Act.

Attorney C. David Morrison of Steptoe & Johnson sees potential 105(c) actions in the proposal's so-called one-strike provision (66.400(b)). "The provision on 'job security' will also likely increase unwarranted Section 105(c) actions," he said in written testimony.

Ted Schults of the American Association of Medical Review Officers fleshes this issue out in greater detail from the MRO perspective. Writing in *MRO Alert*, a trade publication, Schults said the proposal will require "a somewhat expanded MRO verification process" to determine if a prescription drug user is using the medicine as prescribed. Read that to mean higher MRO costs.

Schults, an attorney, adds that even with expanded evaluation, cases will be equivocal. "What is not equivocal is that if an employer terminates an employee for *prescription drug abuse* [author emphasis] based on the level of drug present in the urine and even the sound judgment of an MRO and a qualified examining physician, there is a pretty good chance that action will be legally challenged."

The proposal calls for referral of drug abusers to a Substance Abuse Professional (SAP). However, SAP services are excluded from the PREA, apparently on the assumption operators will make miners pay for them. However, a better assumption might be that a quarter of operators will pick up the tab, which is roughly the percentage of operators subject to DOT rules who now pay for SAP services, according to Dawn Dregier, President and CEO of Maryland-based SAP Referral Services (SAS).

SAS's SAP program fee is \$550, Dregier said, and it excludes treatment or education expenses. Payment sources for these latter services vary. However, they could fall on the miner's health insurer. If his or her employer picks up health care costs, premiums could rise.

Among other potential hidden costs are the following:

- wage adjustments for supervisors and miners who have undergone year-to-year refresher training
- the proposal's overly broad post-accident testing requirements may exceed MSHA's assumption that such testing will involve 2.8% of the workforce
- compliance costs passed on to operators by contractors
- contract development
- increased insurance premiums due to the one-strike provision
- Part 46/48 training plan revisions.

So many hidden costs abound in the drug proposal that the regulated community should not assume MSHA's economic analysis represents the final word. The Agency can do better on this matter – and should.

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**From:** James Sharpe [mailto:grosharp@msn.com]  
**Sent:** Friday, October 31, 2008 3:10 PM  
**To:** zzMSHA-Standards - Comments to Fed Reg Group  
**Subject:** RIN: 1219-AB41: Comments on MSHA's Drug Rule Proposal

Dear Ms. Silvey:

The following article on the costs of MSHA's proposal drug rule appeared in the November issue of *Sharpe's Point*, The Newsletter on Safety & Health in Mining. Since the article pertains directly to MSHA's cost proposal in support of the rule, the article is being submitted to the rulemaking docket. We hope the information proves useful to the Agency as it finalizes the rule.

Kindest regards,

Jim Sharpe

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