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**From:** VARAK, MARY BETH [mailto:mbv@THELENSG.com]  
**Sent:** Tuesday, October 07, 2008 4:57 PM  
**To:** zzMSHA-Standards - Comments to Fed Reg Group  
**Cc:** Iaap@hansoninfo.sys.com  
**Subject:** RIN 1219-AB41 MSHA Drug & Alcohol Policy Proposed Rule

## MSHA Drug & Alcohol Policy

I am very happy to know that MSHA is creating a Drug & Alcohol Free Policy. "The health and safety of the miner is the first priority and concern of all in the coal and other mining industry". Our Company has had an established Drug & Alcohol Policy for many years. I am in favor of MSHA implementing a Drug and Alcohol Policy to create a safe work environment across the industry. Below are my comments about the proposed policy.

**No discharge for first offense** I find the proposed requirement that mine operators provide one opportunity for those violating the rule to retain their job to be unacceptable. The decision to terminate an employee for violating a company rule and an MSHA policy must remain with the mine operator. Our policy was established many years ago. It is not OK to change the policy to allow everyone a pass until they get caught a second time. We live in a very litigious society and if we are required to retain an employee who willfully violates an established policy and subsequently causes injury to another party we could be held liable for negligent retention. We make the decision to retain an employee after a violation of the company drug & alcohol policy on a case by case basis. We would not retain an employee who was still in their probationary period of employment. We would not retain an employee who had several previous violations of company policy and had a written last chance employment agreement. We would not retain an employee who violated our long established Drug & Alcohol Policy the second time, even if it was the first time that person violated the MSHA Drug & Alcohol policy.

**Post accident testing.** The proposed policy does not allow the miner to return to work until we receive the results of the drug test, and we must pay the employee while they are off work. The DOT policy only requires the person to remain off work until the results are known if they are tested for reasonable suspicion. The results of the drug test generally are available within 24 to 48 hours, but it may take more than a week to receive the results of a drug test. Testing laboratories are not local and the specimens are shipped subject to weather conditions which could cause a delay. The employer will not be given the results of a positive test until the MRO talks to the individual and in the event a prescription medication causes a false positive there can be a delay in making the final determination. The employer should not have to leave the person off work waiting for the results. It may be a safety hazard if 2 or more people normally work together and one of them is involved in an accident that requires drug testing, and has to be off work,

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causing the work crew to be short a person. If no one is allowed to work alone does the 2<sup>nd</sup> crew member also have to be off work wait for the results? Does the second crew member get paid waiting for the test result? It's an unfair burden to loose production waiting for test results. It should be at the discretion of the employer to allow the person to return to work after post accident testing. If there are observable articulable observations the employer should be testing for reasonable suspicion, which would require the person to be off work waiting for test results.

**DOT testing different from MSHA testing.** Many miners fall under the regulations of DOT and MSHA. DOT requires testing for 5 substances and MSHA will require testing for 10 substances. The companies will need to maintain 2 sets of random pools. Some employees will be included in both random pools. It will be possible for one person to be picked in both pools at once. Separate forms and separate specimens will need to be sent to the lab. How much time will be allowed to collect 2 specimens? When Post Accident testing or Reasonable Suspicion testing is required which rules will govern the testing process MSHA or DOT? Are the threshold limits the same for the 5 common drugs? The alcohol cut off level for MSHA is .04, even for follow-up testing. Follow-up testing is required after someone has tested positive. The requirement for alcohol test for follow-up should have a lower tolerance level. It is my understanding the Substance Abuse Professionals will require the person to remain drug & alcohol FREE. Follow-up testing should be zero tolerance for the presence of alcohol. DOT allows for follow-up testing for a period of 60 months, we find the longer someone is subject to follow-up testing the greater the success rate is to remain drug & alcohol free in the long run. It's a constant reminder that they must comply with company policy for the safety of themselves and other people who work with them.

Substances for testing. Several of the drugs scheduled for testing are prescription drugs. The employees subject to testing are working in safety sensitive areas. Is it safe to operate heavy equipment while using the listed prescription drugs, even with a prescription? Is there a safe level of use for the listed prescriptions or should the employee discuss the use of alternate drugs based on the type of work to be performed? DOT does not test for prescription drugs, but that does not make them safe. Hopefully DOT will expand the list of prohibited substances.

Payment for SAP. MSHA is suggesting that the employer should pay for the SAP and treatment services. It should be left to the discretion of the employer to determine who is responsible for the cost of the SAP.

Thank You for considering my comments on the proposed Drug & Alcohol rule.

Sincerely,

Mary Beth Varak  
Thelen Sand & Gravel