



Pennsylvania Coal Association

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November 27, 2005

Mine Safety and Health Association
Office of Standards, Regulations and Variances
1100 Wilson Blvd.
Room 2350
Arlington, VA 22209-3939
Re: RIN 1219-AB41

Dear Director:

In response to the Advance Notice of Proposed Rulemaking published in the Federal Register on September 26, 2005, soliciting comments concerning MSHA's advance notice of proposed rulemaking in the use of or impairment from alcohol and other drugs on mine property, the Pennsylvania Coal Association (PCA) submits the following comments.

PCA is an association that represents the majority of underground and surface coal mine operators in Pennsylvania. It represents large underground mines that use the longwall method of mining and produce in excess of five million tons of coal a year. It also represents smaller underground mines that use

only continuous miners. It represents surface operators who have operations of various sizes, producing approximately 16,000,000 tons in total. PCA's members operate both unionized and non-union mines.

Various of PCA's members have drug testing programs. Such programs include combinations of pre-employment testing, "for cause" testing and random testing. Such programs have evolved over time and continue to do so. They may include Employee Assistance Programs as well as discipline procedures, if positive test results are obtained. There is substantial variability across the programs depending upon any number of factors such as collective bargaining agreements as well as the law in states where member companies may have operations.

PCA has substantial concerns about any regulatory approach to address the hazards to mine safety from impairment from alcohol or drugs. While PCA supports drug and alcohol testing, the issue is complex and development of any regulations pertaining to such issue must be done with extreme care to permit operators maximum flexibility to develop their own programs. This is particularly true for "for cause" testing because of the potential for subjectivity in determining what is the appropriate "cause" that triggers a test, as well for the actions to be taken based on the results of the testing. It is also true with respect to defining impairment from a regulatory perspective. Because of the potential problems with "for cause" testing from a regulatory standpoint and because "for cause" testing is

generally not preventative, we would suggest that any regulatory approach only address pre-employment and random testing, which are more directly preventative. Similarly, we do not believe that the agency should seek to define impairment. We would also suggest that no regulatory effort specify the actions to be taken once positive results are obtained.

A. Nature and Extent of the Problem

The issue of drug and alcohol abuse in the mining industry is not new but there is an absence of data specific to the mining industry as to the role drug or alcohol impairment has in work-related mining injuries, including fatalities.

The statistics for the general population and specific non-mining industries certainly are indicative of a problem. For example, a Health and Human Services Survey in 2003 found:

- 16.7 million illicit drug users over 18 years old.
- 12.4 million or 75% of these drug users are [cut off on fax]
- Almost 1 in 5 of the national workforce who die on the job tested positive for alcohol or other drugs.

There are some statistics in this study for a subgroup of Mining and Construction Industry. These include:

- 15% of this subgroup admits to alcohol abuse.
- 15.7% of this subgroup admits to heavy alcohol abuse within a month of the survey.

- 12.9% admit to illicit drug use within a month of the survey.
- 10.9% admit to alcohol dependency within a year of the survey.

The difficulty with such surveys, of course, is that they contain an element of subjectivity and they are not based on specific correlations of test results and the causation of accidents. MSHA has never, even in fatality investigations, tracked whether drug or alcohol use was a factor or potential factor in a serious accident. That information is often available to MSHA in fatality investigations because autopsies are often performed under local or state statutes and such autopsies can include drug and alcohol tests. There are some states where such tests are not performed if requested by a decedent's next of kin. Despite the availability in many instances, PCA is aware of no MSHA fatality report that has noted positive drug or alcohol tests. While it generally takes some period of time to obtain such toxicology results, MSHA fatality reports normally are prepared sufficiently after the accident to obtain such results.

Our concern and that of the industry about the risk of drugs to miner's safety cannot be understated, but there is an absence of "hard" data in the industry. There can be a direct link between the impairment of an employee and an accident, either an injury or non-injury event. There also can be the subtler indirect affect of drug

and alcohol abuse, ranging from absenteeism to simply failing to stay focused on the assigned tasks. But it is difficult to provide substantive data on these issues.

B. Types of Testing

Tests for alcohol and drugs can be broadly categorized as: 1) pre-employment testing to keep someone out of the workforce who cannot test clean when a known test date is scheduled; 2) “for cause” testing which is reactive testing and 3) random testing.

Pre-employment testing is preventative in that it precludes the employment of persons who cannot even pass a scheduled drug screen. The current difficulty with it is that a person who fails or refuses a pre-employment drug and alcohol screen may well be hired at a mine site where drug and alcohol screening is not occurring. The imposition of a requirement for a plan that requires pre-employment testing would reduce the potential for the situation where a production operator utilizes contractors who may not have programs and thus might have, in a period where there is a shortage of qualified miners, persons who would not be willing to take a pre-employment drug and alcohol test.

PCA’s members’ experience with drug and alcohol testing, especially pre-employment and random testing, is that once the programs are established, the number of positive test results decline significantly, suggesting it does have an effect on the presence of potentially impaired individuals in the work force.

Random testing has an even more significant preventative effect because the employees do not know when they will be selected on testing. Most programs use some computer-based selection process that eliminates the potential for subjectivity in the selection of persons to be tested. Random testing can also include follow-up miner-specific testing in a program which provides for employee assistance or graduated discipline after a positive test.

The problem arises in “for cause” testing. That, in fact, is one of the more common types of testing in the industry and the experience has demonstrated that it would not be appropriate to impose a regulatory requirement for such testing.

For example, a “for cause” might require testing whenever an employee has an injury that requires him or her to be sent off-site for medical treatment. In those circumstances, the employee must be accompanied by someone from management to ensure that the employee does not do anything that might affect the test. In addition, the use of this sort of criteria results in unnecessary tests because there are circumstances where there is no likelihood that drugs or alcohol were a factor in an injury.

Criteria that would require testing where an injury is reportable under Part 50 would be unworkable. Often it is not immediately clear that an injury is reportable under Part 50. In some instances, as with the most common injuries, sprains and strains, the injury does not fully manifest itself until the employee has

gone home. Also, MSHA policy requires the reporting of such injuries, such as back strains, that result from mundane events such as sneezing or putting on work boots. See Report in 30 C.F.R. Part 50, MSHA Question 3, (December 1986 (sneeze)); Freeman United Coal Co., 6 FMSHRC 1572 (Rev. Comm. July 1987) (putting on boots).

The difficulty with some types of “for cause” testing is that testing should be performed as soon as possible and in no case longer than eight hours. Other than pure post-accident testing “for cause” criteria can create difficulties in achieving this goal.

In other types of “for cause” testing, there is an attempt to establish criteria that would require testing if there was a “reasonable suspicion” the employee was under the influence of drugs or alcohol. Such criteria normally requires training to recognize the signs of drug or alcohol use but this interjects an element of subjectivity into the selection process that is difficult to enforce through regulatory means.

C. Prohibited Substances

In testing programs that currently exist, operators have detected a wide variety of drugs. It appears that controlled substances are being used and abused in the workplace as well as the illicit drugs that initiated most testing programs.

The experience of PCA members that have operations in other regions of the company suggest the extent of abuse and the types of drugs used is more regional. It also appears to be dependent on such factors as the age of the workforce or the regional culture.

Any regulation should not attempt to detail the testing protocols, drugs to be tested, etc. Drugs, drug adulterations and drug testing systems are constantly evolving. Regulations such as those developed in the Omnibus Transportation Employee Testing Act specify the type of tests and what are to be tested for. For example, it requires urine testing with only a 5-drug strip. This is too inflexible. But there are other tests that might be utilized, such as blood tests, saliva tests, breathalyzers and hair testing. Since operators use saliva testing as a screening device. For example, testing can be done underground without a privacy issue and adulterants are not yet known for saliva testing.

Just as important is that the drugs to be tested must change to adapt to the drugs of choice in a region or in society. Oxycodone and other drugs now commonly abused were not on the “radar screen” when the Omnibus Transportation Employee Testing Act was instituted. Any regulation must be broadly and flexibly written to adapt to such changing conditions. Even if a minimum panel of drugs are included within a regulatory protocol, it should not limit the drugs to be tested beyond those listed in the protocol.

D. Response to Positive Tests

It is critical that any rulemaking not dictate how an operator responds to positive tests. Operators currently address the issue of positive tests in a variety of ways: discipline short of discharge, discharge, enrollment in employee assistance programs, “last chance” agreements. The Agency’s goal in developing a regulation should be to bring at least at minimum a testing program forward at all operations and mine contractors but it should not be directed to how an operator will manage its workforce. PCA believes that many companies have a variety of approaches and that companies have been able to “rehabilitate” workers who had positive test results through mechanisms such as “last chance” agreement, treatment, counseling and similar approaches.

If a regulatory approach addressed refusals to submit to tests or test results that show the presents of masking agents, it again should not define exactly what the operator’s response would be. Again, operators must be given the flexibility to implement a program that they believe will achieve the results.

Any regulatory approach must also reasonably address the issue of the confidentiality of drug test results. With the exemption of post-accident results, it will seem appropriate to include provisions that permit an operator to maintain the confidentiality of test results. Currently in the industry, positive test results are

normally treated confidentially to the extent possible within the context of a program. This issue needs to be addressed with great care.

E. Training

PCA's members who have drug and alcohol testing programs conduct training on drug and alcohol abuse as part of their wellness programs or as part of a general safety topic for group safety contacts. Prior to implementing drug testing employees are normally given training on both drug and alcohol abuse and on the EAP programs. This provides employees an opportunity to understand the issue of drug and alcohol abuse, recognize the testing would be done and be provided an avenue to seek help for themselves or someone else through EAP.

There is not need to modify Part 46 or 48 to address this issue. To make drug and alcohol education another mandatory portion of annual refresher training, for example, is to further restrict a training period already overburdened by inflexible requirements. If MSHA is going to re-open Part 48 for re-write, there are other issues that would have a bigger safety impact. Further, it must be recognized that drug and alcohol education is pervasive, especially among the younger workforce. Miners in their 20's often have received drug and alcohol education since grade school. At this point, it is the incentive of a random testing program that will impact use, rather than drug and alcohol education.

F. Inquiries Following Accidents

While PCA does not believe that MSHA should impose a “for cause” testing requirement in any rulemaking, many operators will have such programs. MSHA should gather the data whenever there is a fatal accident where an autopsy is done. It should be noted, however, that any regulatory approach should give MSHA accident investigation teams the authority to require toxicological tests after a fatality. This would address the issue where a decedent’s next-of-kin do not want tests performed. Such approach also should require the inclusion in MSHA fatal accident reports the results of such tests as they pertain to any substance that might have impaired the miner’s performance.

The routine gathering of test results by MSHA from non-fatal accidents raises medical confidentiality and potential criminal liability issues that suggest the routine gathering of “for cause” results would present a problem. In non-fatal accidents, MSHA would need to address the medical confidentiality barriers created by HIPPA in any rulemaking. We do not believe that the Part 50 reporting regulations should be changed to require a drug and alcohol test for each reportable injury. We believe that it should be permissible to report the potential effect of drug or alcohol use but the confidentiality issues must be resolved.

G. Possible Regulation

The metal/non-metal standard reads as follows:

§ 56.20001 Intoxicating beverages and narcotics.

Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job.

We do not believe that this existing regulation is appropriate. PCA believes that a new regulation should simply require each operator, and contractor doing business in mining, to establish a drug and alcohol testing program that includes: pre-employment testing and random testing. The regulation should not detail types of testing, substances to be tested for or action to be taken. The operator should be responsible to develop the plan and actions to be taken on positive testing. The regulation should be flexible enough for operators to adopt programs that include “for cause” testing without requiring it.

The metal/non-metal standard should be eliminated. It places an impossible burden on operators. As written, it would mean that every positive drug or alcohol test would result in a citation under the Mine Act’s strict liability enforcement scheme. That is wholly unacceptable if drug and alcohol testing is to be required.

No operator should be discouraged from developing a more comprehensive program but any program elements in a program that are above the basic minimum required by the regulation would not be subject to MSHA oversight and enforcement.

Thank you for your consideration of these comments. If you have any questions or desire additional information, please contact me.

Sincerely,

George L. Ellis

President, Pennsylvania Coal Association