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Sent: Monday, September 08, 2008 2:44 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
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Subject: Mine Safety - MSHA - Newly Proposed Workplace Drug Testing Regulations

The proposed MSHA (Mine Safety and Health Administration)regulations appear to be the result of extreme compromise vs. objective investigation of existing information relative to workplace drug and alcohol abuse / misuse.

Basing the MSHA program upon DOT part 40 procedures renders the proposal regulations relatively powerless to manage drug abuse / misuse in the mining industry. The Federal GAO has already clearly demonstrated the problems associated with DOT part 40 procedures which specifically require urine-based testing.
Any effective drug-free workplace testing must leverage observed specimen collection (only feasible with oral fluids). Clearly better programs are required in the mining sector, as well as DOT, FFA, and other areas. Unfortunately, the regulations proposed by MSHA will do little, it anything to mitigate workplace risk due to substance abuse.

Key specific issues are noted below.

1. Relative to: "At a minimum, testing would be performed for the following: Alcohol, amphetamines (including methamphetamines), barbiturates, benzodiazepines (e.g., Valium, Librium, Xanax), cannabinoids (THC/marijuana), cocaine, methadone, opiates (heroin, opium, codeine, morphine), phencyclidine (PCP), propoxyphene (e.g., Darvon), and synthetic and semi-synthetic opioids (hydrocodone, hydromorphine, oxymorphone, and oxycodone)."

- To my knowledge there is little information to support the selection of the indicated test regiment. The associated costs and methods of implementation recommended will neuter effective implementation.
- The following are the recommended minimums relative to drugs / drug classes:

  Methamphetamines, including Ecstasy
  THC/marijuana)
  Cocaine
  Opiates (heroin, opium, codeine, morphine and synthetic and semi-synthetic opioids
  (hydrocodone, hydromorphine, oxymorphone, and oxycodone).

AB 41 - COMM - 1

Note: PCP is rarely if ever encountered, and Methamphetamine represents a significant safety hazard vs. Amphetamines.

2. Relative to: " Alcohol- and drug-testing would need to be conducted consistently with procedures incorporated by reference from DOT part 40, except in those places where specifically modified by this rule."

- The only significant modification to DOT part 40, appears to be expanding the drug classes to be tested. Urine is still the required specimen type. The requirement to use DOT part 40 standards renders this newly proposed regulation virtually worthless for the following reasons

1. Testing with urine has proven to be ineffective due to the invasive nature, inability to prevent adulteration and substitution.
2. The DOT part 40 regulation has an excessively high cut-off level for opiates, making it very ineffective in detecting opiate abuse. Opiate abuse, specifically prescription pain relievers is the most serious drug affecting the workplace and our schools today.

Alternative specimen types, especially oral fluid, should be allowed in addition to urine. At a minimum 50% of all testing should be oral fluid to assure sample validity and to circumvent specimen adulteration and substitution.

3. Relative to: " After considering the broad spectrum of experiences with random testing, including those of DOT and the federal agency programs, MSHA is proposing to include it as a required element of the alcohol- and drug-testing rule and proposes to require that a minimum of 10 percent of miners that perform safety-sensitive job duties and their supervisors be randomly tested each year.

- Provided Item #2 above is address, the minimum testing requirement should begin at 50% and subsequently reduced based upon results accumulated over the first year of implementation. If Item #2 is not address, then the random testing level is irrelevant as the drug testing program will be largely ineffective.

In summary, how can MSHA model their drug testing program after the DOT's when experts know the following?

"Here in the United States of America, we have no meaningful program of drug testing for commercial truck drivers, none."
- Rep. Peter A. DeFazio of Oregon, Chairman of the House Subcommittee on Highways and Transit

It is estimated that somewhere between 1 percent and 10 percent of drivers of commercial or "big rig" trucks are operating under the influence of drugs or alcohol on any given day.

The American Trucking Associations (ATA) believes the "positive" rate among truck drivers tested for drugs is about 2 percent to 2.5 percent. The National Highway Transportation Safety Administration's National Center for Statistics and Analysis says the number is a little more than 1 percent. The state of Oregon, however, which has been conducting random tests of drivers on that state's road since 1998, puts the figure at nearly 10 percent. The problem is no one really knows how big the problem really is, because effective testing modalities such as oral fluid technology are being circumvented by private interests such as large urine testing laboratories and TPAs (third party administrators).

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"You can't manage what you don't measure"

GAO Report (s)

GAO Investigation Finds Numerous Problems with DOT Drug Screening

[Posted 11/06/07] In testimony before the Congressional Subcommittee on Highways and Transit on November 1, 2007, the United States Government Accountability Office (GAO) reported that "DOT's drug testing program is vulnerable to manipulation by drug users."

GAO's undercover operation investigated 24 drug test collection sites in four large metropolitan areas across the country to determine if sites collecting urine samples were adhering to DOT collection protocols and whether commercially available products could be used to defeat drug tests. To conduct the investigation, GAO created two fictitious trucking companies with investigators posing as drivers.

Twenty-four publicly-advertised urine collection sites were investigated. Sixteen DOT protocols deemed to be the most critical for foiling an employee attempt to defeat a drug test were examined at each location. The GAO investigation revealed an alarming number of vulnerabilities.

Investigators successfully used bogus driver's licenses to gain access to all 24 sites—demonstrating that a drug user could send someone else to take a drug test in his/her place using fake identification.

Most collection sites failed to comply with all DOT protocols. Twenty-two of the 24 collection sites inadequately followed DOT protocols. Deficiencies included:

- failing to restrict access to materials (water, soap, bleach, air fresheners, etc.) that could be used to adulterate or dilute samples (75%);

- failing to secure sources of water in the restroom (67%);
- failing to have test subjects empty pockets to ensure there were no materials that could adulterate the specimen (42%);
- failing to check the temperature of the specimen (19%);
- failing to secure the toilet with tape or bluing agent (17%).

Commercially-available products can defeat drug tests. Synthetic urine and other adulterants readily available online can be used to tamper with samples. Companies that sell drug-masking products can access regulatory details on testing and validating urine specimens and use the information to ensure their products are not detected by laboratories.

Adulterants and synthetic urine were used at eight of the 24 collection sites. Investigators found it was easy to take drug-masking or substitution products into a collection room at each of the eight collection sites tested with such products. They were successful at every attempt to adulterate or substitute a urine sample.

Adulterants and substitutes were not detected by drug testing laboratories. Every drug-masking product tested went undetected by the drug screening labs—suggesting a drug user could receive a passing result on his/her test.

GAO investigators concluded that "a drug user could easily pass a DOT drug test and continue to work in his or her safety-sensitive commercial transportation job—driving children to school or transporting hazardous materials, for example." They went on to say "improvements will need to be made in both the design of the entire process and the ability of collection site employees to adhere to current protocols."

GAO will investigate options for improving DOT drug testing and report to the Subcommittee on Highways and Transit in May 2008.

Rep. Jim Oberstar, D-Minnesota, chairman of the House Transportation and Infrastructure Committee, said the report was "frankly astonishing and shocking and dismaying. You can manipulate the tests, you can mask substance abuse and go undetected on the roadways." He noted that the drug-testing system was broken and was placing other drivers in danger.