MINE SAFETY AND HEALTH ADMINISTRATION

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USE OF OR IMPAIRMENT FROM ALCOHOL
AND OTHER DRUGS ON MINE PROPERTY

PUBLIC HEARING

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TUESDAY,
NOVEMBER 8, 2005

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The public hearing was held in Conference Room H, 25th Floor, 1100 Wilson Boulevard, Arlington, Virginia, at 9:00 a.m., Ed Sexauer presiding.

PRESENT:

ED SEXAUERChief of the Regulation Development Division in the Office of Standards, Regulations, and Variances, MSHA

TOM MACLEODTraining, Policy and Regulations, Office of the Directorate of Educational Policy and Development, MSHA

ELENA CARRU.S. Department of Labor Drug Policy Coordinator

JENNIFER HONORAttorney of the Solicitors Office, Department of Labor

GENE AUTIOIndustrial Hygienist in the Metal and Nonmetal Health Division, MSHA

WILLIAM BAUGHMANRegulatory Specialist, Regulation Development Division in the Office of Standards, Regulations, and Variances, MSHA

A-G-E-N-D-A

P-R-O-C-E-E-D-I-N-G-S

9:03 a.m.

MR. SEXAUER: Good morning. My name is Ed Sexauer. I am the Chief of the Regulatory Development Division of the Office of Standards, Regulations, and Variances for the Mine Safety and Health Administration. On behalf of David Dye, the Acting Assistant Secretary of Labor for Mine Safety and Health, I welcome you to this public meeting. This meeting provides an opportunity for you to comment on the topic of the use or impairment from alcohol and other drugs on mine property.

Also with me this morning are other individuals from the Labor Department.

On my immediate right is Elena Carr who is the United States Department of Labor Drug Policy Coordinator and directs the DOL Working Partners for an Alcohol and Drug Free Workplace Program.

On her right is Bill Baughman who is a Regulatory Specialist with the Office of Standards and Mine Safety Health Administration.

And Jennifer Honor on the far right who is an attorney with the Solicitors Office, Department of Labor.

On my immediate left is Tom MacLeod who is representing our Training, Policy and Regulations of the Office of the Directorate of Educational Policy and Development.

And on his left is Gene Autio who is an Industrial Hygienist in the Metal and Nonmetal Health Division.

This is the last meeting of seven scheduled public meetings. These meetings were announced in an Advance Notice of Proposed Rulemaking or ANPRM published in the *Federal Register* on August 4, 2005.

We held other public meetings the week of October 23rd in Salt Lake City, Utah, St. Louis, Missouri and Birmingham, Alabama. And the week of October 3st in Lexington, Kentucky, Charleston, West Virginia and Pittsburgh, Pennsylvania.

The purpose of these meetings is to obtain information about the use of or impairment from alcohol and other drugs on mine property. We will use the information from your comments at these meetings and from written comments to help us make decisions about whether we need to change our existing rules, develop new rules, or provide training or other

assistance to the mining community. Because there may a variety of approaches to address the problems of alcohol and other drugs, we are seeking information relating to both regulatory and non-regulatory solutions.

The information from these public meetings and written comments, will help us develop a more informed understanding of the problem and its solution. Our preliminary review of our fatal and non-fatal mine accident records revealed a number of instances in which alcohol or other drugs, or drug paraphernalia, were found or reported, or in which the post-accident toxicology screen revealed the presence of alcohol or other drugs. However, our accident investigations do not routinely include an inquiry into the use of alcohol or other drugs as a contributing factor. There may be many instances in which alcohol or other drugs were involved in accidents and either are not reported to us, or we do not uncover them during investigations.

Because we're concerned that alcohol and other drugs can create risks to miner safety, we have initiated a number of education and outreach efforts to raise awareness in the mining industry of the

safety hazards stemming from the use of alcohol and other drugs. They include alliances with four international labor unions, monetary grants to states to provide substance abuse training, production of awareness videos on the hazards of alcohol and other drugs, and stakeholder meetings at the local level to discuss these issues and raise awareness of the problems. Additionally, during a one-day summit conducted with the states of Kentucky, Virginia and West Virginia in 2004, several coal mine operators described the effectiveness of their drug-free workplace programs and expressed their concern that such programs were not universal in the industry.

The significance of the problem of alcohol and other drugs in the workplace has been recognized by the Federal Government and a number of programs have been implemented, and various statutes enacted with the goal of reducing the use of alcohol and other drugs in the workplace. For example:

The Anti-Drug Abuse Act of 1986 allows the Secretary of Labor to initiate efforts to address the issue;

The Omnibus Transportation Employee Testing Act of 1991 requires the transportation

industry employers to conduct drug and alcohol testing for employees in "safety-sensitive" positions;

The Drug-Free Workplace Act of 1998 establishes grant programs that assist small businesses in developing drug-free workplace programs, and;

DOL's Working Partners for an Alcohol and Drug-Free Workplace, of which we are a partner, is a public outreach campaign raising awareness in assisting employers to implement these programs.

On the regulatory side of this issue, we currently have a safety regulation for metal and nonmetal mines that addresses the use of alcohol and narcotics at these mines. The rule language is the same for both surface and underground metal and nonmetal mines. The language simply states: "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."

Between January 1, 2000 and June 30, 2005, we issued 75 citations for violations of the metal and nonmetal surface rule and 3 citations for violation of the metal and nonmetal underground rule. We do not

have a similar standard for coal mines.

Using drugs or alcohol at a mine site can impair a miner's judgment significantly at a time when a miner needs to be alert and aware. Even prescription medications can affect a worker's perception and reaction time. Mining is a complicated and hazardous occupation, and a clear focus on the work at hand is a critical component of workplace safety.

Therefore, through these public meetings and written comments we receive we are seeking data and information about six general topics that we've outlined in the *Federal Register* notice. They are as follows:

A. The nature, extent and impact of substance abuse at the workplace, including how to measure the extent of the problem;

B. The types of prohibited substances in use and the problems they present;

C. The impact of effective training to address substance abuse;

D. How our investigation of accidents could address alcohol and other drugs.

E. The aspects of a Drug-Free Workplace Program and how well they work, and;

F. The costs and benefits of addressing substance abuse in mines.

Our *Federal Register* document poses several questions about each one of these issues and we encouraged you to take a look at these and respond to these questions specifically either now or later in writing.

The procedure for each of our public meetings is the same. Those who have notified us in advance of their intent to speak or who have signed up today will make their presentations first. After all scheduled speakers have finished, others are free to speak. We will conclude this public meeting when the last speaker has finished.

This meeting will be conducted in an informal manner and rules of evidence will not apply.

The MSHA panel may ask questions to clarify statements for the record, but there will be no cross examination of the speaker.

If you wish to present written statements or information today, please clearly identify your material, and give to me before the conclusion of this meeting, and I will identify the material for the record.

You may also submit comments following this meeting. But you submit them by November 27, which is the close of the comment period. You may submit comments to us by electronic mail, fax or regular mail at the addresses listed in the *Federal Register* notice.

A transcript of this meeting will be made available on our website within several days.

Thank you for your patience and attention to these introductory remarks.

We will now begin with persons who have requested to speak. To ensure an accurate record when you come forward to the microphone, please state your name and organization clearly and then spell your name.

Our first speaker is Eric Goplerud.

DR. GOPLERUD: Good morning.

MR. SEXAUER: Good morning.

DR. GOPLERUD: I'm Eric Goplerud with George Washington University. That's spelled, G-O-P-L-E-R-U-D. And I have submitted written testimony. I think Bill Baughman has it.

Mr. Sexauer, MSHA colleagues, my name is Eric Goplerud. I am a research scientist at George

Washington University Medical Center and Director of Ensuring Solutions to Alcohol Problems, a research and education project based at George Washington University. We help business leaders, policymakers and physicians develop solutions to alcohol problems.

First, let me thank this Committee for having the foresight and wisdom to focus on an issue that is one of the most critical problems effecting American employers, the negative impact of alcohol on workplace safety and productivity.

About nine percent of working adults suffer from alcohol problems. Their employers and colleagues suffer, too. Employees with alcohol problems are likely to miss more days of work, have lower productivity and have higher medical costs than employees without alcohol problems.

In addition, there is clear evidence that alcohol misuse, even outside of working hours, increases the risk of workplace accidents, injuries and fatalities.

In preparation for this hearing my colleagues and I have conducted a detailed analysis of existing data sources to determine the scope of alcohol problems in the mining industry. We looked at

the National Epidemiological Survey on Alcohol and Related Conditions, the NESARC, which was produced by the National Institute for Alcoholism and Alcohol Abuse which interviewed more than 42,000 Americans about drinking and health. And the 2002 and 2003 National Survey on Drug Use and Health which interviews more than 70,000 people annually. This was done by the Substance Abuse and Mental Health Services Administration.

Without question, the mining industry faces a significant problem. Compared to other industries mining has a prevalence of alcohol problems that is more than 60 percent higher than average. Why is this? Because occupations with a higher proportion of male employees have higher rates of alcohol problems. Nearly nine out of ten miners are men.

Our analysis of the National Epidemiological Survey on Alcohol and Related Conditions finds that miners are 70 percent more likely to drive drunk than the average employee and significantly more likely to binge drink.

Mining can be a dangerous industry with heavy machinery, explosives, uncertain footing and difficult work requiring careful concentrations. These

things do not go well with alcohol.

I've studied alcohol in the workplace for a long time, but it doesn't take a Ph.D. to know that drinking and dynamite don't mix.

Based on what I have read about these hearings before today, I know that the industry is interested in federal drug-free workplace guidelines and drug testing. Implementing drug-free workplace policies is worthwhile for any industry. And drug testing, both prior and during employment has been shown to reduce the use of illicit drugs. But these steps are not sufficient for the prevention and treatment of alcohol problems. Alcohol is a legal drug. Alcohol use is embedded in our culture. From big time sports to family meals, alcohol is used by the majority of adult Americans. Testing for alcohol may help prevent intoxicated workers from operating a backhoe, but it will not help identify workers with off duty alcohol problems. It will not prevent the development of alcohol problems. And it will not help to rehabilitate a valuable employee who succumbs to an alcohol problem.

There are three key components to dealing with alcohol problem. First, we need to do a better

job finding workers with alcohol problems; not to punish them but to help identify problems before they affect safety. Safety is a function of having a good safety system in place. With an effective approach to screening and treating employees with alcohol problems, mines can support safety by providing access to treatment.

To give you some idea of where American employers are with identifying alcohol problems, Ensuring Solutions research shows that most health plans are finding less than ten percent of people with alcohol problems. With other chronic diseases such as heart disease, diabetes or depression, health plans identify more than 60 percent.

Second, we need to provide the employees with an alcohol problem a way to get help. The help available shouldn't be any different than the help available to other health concerns. An employee with an alcohol problem should not have to pay a higher deductible or wait on a waiting list for treatment. Again, access to treatment is essential for safety. With a way to resolve an alcohol problem most employees will hide their problem and increase the likelihood of an accident.

Third, we need to provide workplace policies that support treatment and recovery for alcohol problems. Every employer should have clear policies regarding alcohol use and how to address problems. Rules and consequences for breaking them are an important part of such policies. But unclear or unnecessarily punitive policies may discourage employees from seeking treatment. The goal is to strike a balance between the safety needs of the employer and the health and well being of employees.

The mine industry resource manual on alcohol and drug abuse already recommends the use of employee assistance programs which link the workplace with professional resources to help employees with drug and alcohol problems. This is an excellent recommendation. In general, employees helped by an employee assistance program report fewer substance use and mental health problems, fewer symptoms of poor health, better job attendance and greater job satisfaction. An EAP can also help create a health promotion strategy to teach employees about safe alcohol use, prevent problems before they develop and identify problems before they become severe.

In addition, an EAP provider could also

help establish a program of routine screening and brief intervention. This is a promising approach that involves regular screening of patients and early intervention if alcohol problems are identified. Mines with on-site occupational health clinics could easily implement this procedure and there is evidence that doing so would save more than $2 in health care costs for every $1 invested in treatment.

Thank you very much for your time. I would be happy to entertain any questions. And we have submitted a chart with results from the Epidemiological Survey to Bill Baughman.

MR. SEXAUER: Any questions?

MS. CARR: Thank you, Eric.

Could you talk a little more about the analysis of data that you mentioned in terms of -- I was struck by the assessment that miners are 70 percent more likely to drive drunk.

And also, although I know that your Institute focused on alcohol issues, I'd be interested if you know of any additional analysis that could be done on drugs as well as alcohol?

DR. GOPLERUD: Sure. The chart which is in the materials, and I would be happy to share

additional copies, shows that using the data from the National Epidemiological Survey on Alcohol and Related Conditions, NESARC, that 39.7 percent of workers in the mining industry report at least having once in the last year driven drunk. This compares with 23 percent of employees in other industries. So you've got 40 percent of people in the mining industry who report drinking and driving.

In addition, 15 percent report having legal problems or being arrested because of their drinking. This is nearly twice the rate, 9 percent in other industries.

We found the same pattern. We're reporting the NESARC data because there are sufficient number of people in the mining industry who were asked to participate in the study that you can do reliable statistical tests. We found the same patterns in the National Survey on Drug Use and Health for 2002 and 2003, but because they didn't ask enough people in the industry, we didn't feel we could make reliable estimates.

Similarly, because each one of these surveys has taken a look at the overall U.S. population, there were not enough people who were in

the mining industry who reported illicit drug use to be able to make statistically meaningful comparisons. I think probably required of any academic is the recommendation that additional study is needed. But in this area it would be reasonable to consider a survey using the methodologies of NESARC or the National Survey on Drug Use and Health that might more investigate these issues in more detail. Clearly what we have found are consistent patterns of greater alcohol problems and likely illicit drugs, but we can't say for sure.

MS. CARR: On the National Survey on Drug Use data, I know it's been reported that construction and mining are among the highest that have alcohol problems and drug use. My understanding is that those industries were bundled, they weren't looked at independently. If I understand correctly, you're saying that for the NESARC data on alcohol there was the ability to look specifically at miners, is that correct on both counts?

DR. GOPLERUD: The way that the data are sliced, it is possible in the National Survey on Drug Use and Health to separate the mining industry from construction industry. It is not possible to separate

people whose occupation is miners from people who are in the construction trades.

So, yes, we were able to distinguish mining as an industry in the National Survey on Drug Use and Health. And the patterns that we found there are consistent with the patterns of the NESARC.

MS. CARR: Okay. Thank you.

In terms of your discussion of the value of treatment, one of the things that we've heard at some of these meetings is data suggesting that treatment effectiveness, and this is for alcohol or other drugs, is low. Do you have any data showing the effectiveness of treatment for alcohol and do you know of similar data to show how effective it is for other drugs?

DR. GOPLERUD: There is a very important study that was released in *The Journal of the American Medical Association* that Tom McCellan and others wrote. I believe it was in 2002 which compared the treatment effectiveness for substance dependence with other chronic conditions and finds that it's comparable, which is that with treatment you get reasonable abatement of symptoms for between 40 and 50 percent of people who are engaged in treatment. You

get complete or almost complete remission, which is comparable to the rates you get for depression, cardiovascular disorders or diabetes. However, like these other conditions when a person drops out of treatment or disconnects or is disconnected from the treatment system, their rates of relapse are not a whole lot different than taking a person with diabetes off insulin. Yes, with diet, exercise, careful monitoring they can remain in control or with self help they can remain in control. However, many people relapse, the same with alcohol.

And we'd be happy to provide you with more information about that.

MR. SEXAUER: Can I expand on that question just a bit? In terms of what works, we're interested in other areas. Training, perhaps. You mentioned testing has been demonstrated to work to some extent. Can you elaborate on either of those two? We're particularly interested in specific data.

DR. GOPLERUD: I came primarily to talk about alcohol issues, and one of the challenges of alcohol, as you're aware, is that at best you can pick up current intoxication. And there is clearly a hang over effect where a person may not have currently

alcohol in their system, but are hang over and have inhibited reaction times or poor judgment. Testing is not particularly effective for that and certainly you can't do preemployment drug testing for alcohol because of the short periods of metabolism.

One of the things that we are working with several large employee assistance programs is to use the same kind of marketing techniques that are currently used to figure out where to put a Starbucks or which catalogues to send into your or my mailbox to develop EAP promotional materials that will appeal to, in this case, to young workers who use alcohol a lot and who would never think of using an employee assistance program. And so we are using the same kind of market segmentation software to develop materials that say an EAP is a reasonable thing for you to use. It is something that engages you at the same level as the beer advertisements that they see in their favorite magazine.

So as far as directly responding to your question, I'd be happy to send you additional materials that we have developed about the effectiveness of EAP and promotional materials.

MR. SEXAUER: I appreciate that. Can you

talk about a screening just a little bit more? For example, what would be a typical screening program?

DR. GOPLERUD: What is increasingly being used are structured questionnaires. One of the best and probably most useful for an industry that is attempting to identify people who use alcohol in hazardous and harmful ways is not the four question cage that folks are familiar with, but rather a ten question instrument called The Audit, A-U-D-I-T. And what the National Institute for Alcoholism and Alcohol Abuse is suggesting is one question in particular that is sensitive to identifying problematic or hazardous use. That one question is: How many times in the last year have you on a single occasion drunk five or more drinks if you're a male or four or more drinks as a female? That one question and then with two question follow-ups: One average how many days a week do you drink, and on an average occasion how many drinks do you drink? Is successful in about 80 percent of the time in identifying workers who have a problematic alcohol use.

What has been found is that asking these very simple straightforward questions is far more successful at identifying alcohol problems than the

sniff test; can you smell alcohol on somebody's breath, or the question of "You don't drink a lot, do you?" Much more successful is use of these instruments. And the National Institute for Alcoholism and Alcohol Abuse has just put out a clinician's guide, which is a very brief guide on how to use these screening instruments. And it's the sort of thing that can be done easily in an occupational health clinic, in an employee assistance program, in health fairs. And Boston University, for example, has it online as a computerize self-assessment using The Audit. It's at alcoholscreening.org. And a very reliable instrument and, again, anonymous and could be easily used by the mining industry.

MR. SEXAUER: Any questions?

MR. BAUGHMAN: Hi. I'm Bill Baughman.

In an earlier email that you sent requesting to speak you mentioned a couple of internet websites, one of which was a connection to a calculator, so to speak. It was a return on investment, I think is the word, that you used. Can you describe a little bit about what went into that, the background of the papers? It looks like something from maybe SAMSHA.

DR. GOPLERUD: Yes. Sure. Be happy to.

MR. BAUGHMAN: Sure.

DR. GOPLERUD: The product or the project is the Alcohol Cost Calculator for Business. And it's something that, in fact, Department of Labor has had a link to for two years, at least. It's a project that was developed by Insurance Solutions to Alcohol Problems at George Washington University. Parenthetically, I should state that Insurance Solutions is funded by grants from the few charitable trusts. So the work that we do is all in the public domain, including the Alcohol Cost Calculation.

The calculator is based on our analysis of the National Survey on Drug Use and Health and other big federal epidemiological surveys.

What it does is provide a very powerful but simple to use tool that businesses can use to look at what is the cost and consequences of alcohol problems to their employees and the family members of their employees. And then also what would the return on investment be to them, to their company, if they increased the rates of screening and brief treatment for alcohol problems.

What we were very clear about is that most

of the world doesn't care a whole lot about alcohol problems, per se. But they do care a lot as a business about selling cars or producing construction or new houses. And what we developed was using the National Survey on Drug Use and Health and other research is a way to put into their hands a tool that can say based on what state they're in, the industry that they're in and the size of their company how many people are likely to have alcohol problems in their workforce and the families of their workforce, what it's costing them in extra days of work missed and unnecessary excess health care costs, extra emergency of hospital use, extra hospital days. And perhaps more importantly, and this is the new part that we've just released two weeks ago, if you increase the rates of screening and treatment to something comparable to what we currently do for depression, which is now about 40 to 50 percent of people with depression. Or for cardiovascular disorders or diabetes, which is currently between 65 and 70 percent, what would cost you and what would you expect in terms of reduced health care costs within one year? And those we have up on our website.

That website is alcoholcostcalculator.org.

And it's available, as I said, in the public domain and it's all completely anonymous, free.

MR. BAUGHMAN: Do you have any practical experience in the application of this calculator? Do you have any idea how accurate it might be? I think there were some references given underlying the data, but there weren't really any confidence intervals, so to speak. There was some statistical information in there. But can you speak to how reliable this instrument might be?

DR. GOPLERUD: Well, perhaps one of the best ways of showing whether it's reliable or not is a presentation that we have given and work we have been doing with the U.S. Postal Service. For the last three years we've been working with the U.S. Postal Service to increase their rates of detection and treatment of alcohol problems among their employee.

When we presented to their Health and Safety Director and their Executive Vice President for Human Resources the results of the Alcohol Cost Calculator, we showed a number of missed days of work, the excess costs. We actually got some push back from them saying "Now the problem's even greater." In some ways I think that's the best that you can get, is

that you have companies arguing with you that the problem is even bigger than what you say it is.

So, yes, we have done studies with the Postal Service and we have been working with big health care companies. And we now are working with a coalition of businesses, the National Business Coalition on Health, which represents more than 70 state and regional coalitions around the country representing about 7,000 companies and more than 35 million employees to look at the quality of the alcohol treatment that's offered to their employees. So it's a place that we're looking at also for validation of our report.

MR. AUTIO: Many of the metal/nonmetal operations are small and in the rural areas. In your comments did you address anything for smaller operators and what they can do as far as programs or have any suggestions that some of the mine operators maybe for EAP programs and others?

DR. GOPLERUD: I think there are several things which are more challenges for small companies than for rural areas. Many of the large employee assistance programs work with nationally diverse populations. So one that we're working with works with

railroad. And railroad workers are all across the country. What they've done is development of materials, a lot of web-based materials. And then looking for promotional materials would be placed in the worksite or on bulletin boards.

The Small Business Administration for quite a few years has had a program that has worked with trying to bundle small employers so that EAPs can be provided to their work sites. And I think the Small Business Administration would be a place to go to look for what their successes have been.

MR. SEXAUER: Any other questions?

Thank you very much. I appreciate your coming.

Our next speaker will be Joe Isgro.

MR. ISGRO: Hello. My name is Biagio, middle name is Joe, last name is Isgro.

My title is Vice President of Operations for Safe Systems Corporation. We are based out of Albany, New York. We are a third party administrator and drug and alcohol testing program development company.

I find that MSHA is coming into this in the same light as SAMSHA and DOT did years back in '95

and '96. We have several companies that we deal with that currently fall under MSHA regulations. We manage programs for some of these, some are large, some are small.

As far as a problem, is there a large problem in the mining industry? Well, I think we really don't have enough data to go through and find out whether it is in fact a large problem or a problem that we can probably nip in the bud right now before it does becomes a large problem.

I really didn't have a lot of time to prepare for this meeting because I was out of town and I wasn't able to attend your other ones. But I did do some brief data and I did do some brief numbers out of the companies that we currently deal with.

In the mining industry and ancillary services such as trucking and people that work in and around mines, we have roughly about a 20,000 employee base in our database.

From year 2000 to 2005 out of doing either pre-employment post-accident, random, reasonable suspicion testing we've come up with 852 positive, dilute and refusal of tests out of that database of 20,000 people. Those numbers are very high. When

some of the companies that we were dealing with that did mining, we approached them about their program, approached them about their numbers being alarming, I got a phone call and a letter saying well we're going to stop our program. We can't go any further. We can't afford to lose people. And that's what I'm getting from the industry.

A lot of people out there would rather circumvent the program than spend the costs. And I tried to make these costs analysis to these companies regarding the benefits of cost wise, one worker's comp injury basically pays for a company's entirely yearly or biyearly program. Just one comp claim. We're averaging in New York state comp claim is roughly about $7500 to start.

As we go forward we're educating people. And I think hearing the speaker here from Georgetown, I do agree with a lot of things he does say. Education is of utmost importance at this point. What we find out, though, that the educational process sometimes goes to the wrong people. And one of the obstacles, I would say, that we have run into over the past years in implementing programs for MSHA regulated companies is the operating engineers and other unions

that have either boiler makers or steam fitters or someone that they operate on there as their local and within these mines.

It's not on a national level. I know that the national level, the operating engineers and the boiler makers and steam fitters and the amalgamated unions all are for these programs. But we find as we go into the local regions you have these smaller locals that really aren't educated to how programs work. Some don't want be educated. Some are skeptical. And some are the old good ol' boy networks where they're looking out for their people.

Again, I'm not speaking out against of these people. I've met with several union leaders on local basis. I've been invited to some of their meetings and some of their negotiations.

The proper way I think, myself personally, the proper way of doing this is to identify the problem through training, education and minimally some type of testing whether it be onsite testing, whether it be clinical testing. Testing is going to be your tool to get raw data as to what the problem really is. I think the problem is a lot bigger than we think it is, but we don't have access to these organizations

because it's not a regulatory demand. Companies that are nonregulated have taken initiative on their own to implement these programs. And most of the companies that fall under MSHA regulations that have implemented programs have followed the guidelines of 382, which is the DOT regulations and 49 C.F.R. for the alcohol and drug testing actual collection procedures and testing procedures. Most of them use a five panel drug test. We find out that marijuana and cocaine are more prevalent than any of the other illicit drugs. Alcohol, we really don't have a large database of alcohol testing, but we do have positive results that have come back on alcohol. I think alcohol is a problem, but unfortunately what has happened is our hands pretty much got tied as far as being able to ascertain the problem's extent due to the regulations changing their numbers.

When we first implemented this program back in '95 and DOT decided they wanted to have all people that were safety sensitive and CDL drivers that drove vehicles over 26,001 pounds that they'd be tested for drugs at 50 percent and alcohol at 25. They kept those numbers in place for 22 years. And then changed regulations to include 50 percent for

drug. They dropped their alcohol testing down to 10 percent, because that was an industry standard. They found out that the transportation industry did not have a prevalent rate of alcoholism amongst the professional drivers that have CDL licenses.

Does that mean that this is not a prevalent problem in MSHA in the mining industry? I think according to some of the documentation that was made by the gentleman here from Georgetown, alcoholism is a disease, you know, and people are affected by it. And whether it's more in the mining industry or whether it's more in the general workforce, I mean we test companies that are either manufacturing federal grant customers, people that do federal work, people that do start work. It's not just one set industry that we find that there's a prevalent rate of drug and alcohol. But we haven't been able to get a foothold on this mining industry or on any of these gravel or sand pits or even so me construction companies, you know. Some have voluntarily started programs.

Most companies that we deal with fall under MSHA and OSHA and under DOT the primary companies what they do is they test mostly for their drivers, their DOT people. But they do have programs

in place for their non-DOTs. "Non-safety sensitive," but from what I'm getting out of a lot of this paperwork that I'm reading, we really should be considering these people safety sensitive. They're driving big dump trucks, drilling machines, they're using backhoes, blasting with dynamite. It just doesn't involve people that are driving vehicles on the roads. It does involve people in these pits.

It's very alarming that I had a large employer with over 300 employees decide to stop this program. That's alarming. I don't know, really, how to go about even making sense of it. Why would --

MR. SEXAUER: Well, the reason was, the reason they gave me for stopping the program was?

MR. ISGRO: The reason was that was he getting too many positives and he had some key employees that came back positive that were also related to some of the higher ups in the business and they didn't want to shake any of the leaders anywhere. So they didn't want to knock these people out of the box. But in doing so, what you're doing is you're protecting a handful of people. You know, for the five or six people that you're protecting, you're jeopardizing the safety and the welfare of the other

300 on the site. Does it make sense? No, it doesn't make sense. But, again, those are some of the things that I've been coming against that I've seen as being a third party administrator.

There are companies that do have a lot of diligence. They do have, you know, the willingness to go through and start these programs, make sure that they have a safe work environment. Again not being able to really totally prepare for this meeting in the last minute, but in speaking to some of the employers who have implemented drug testing, either pre-employment, random or otherwise for their mining companies or gravel or sand pits or companies that are regulated by MSHA, their worker's comp rates have gone down. Their rates of injuries have gone down. Less on the job absenteeism, less absenteeism in general. I mean, people are comfortable.

And it's not like the workforce is saying well we are against this type of program. The workforce is for it. It's just a handful of people that grumble about it.

Again, getting back to education, getting back to training. When I speak to a lot of these companies, what I do say to them is make sure that the

local unions are involved and they do have an understanding of how this program should work. Let them give you some input as to what they would like to see done, EAP program, SAP program, you know training for the employees, the written safety meetings. I think if there's more education and more of these companies understand that it's going to be beneficial to them to have this type of program, and if the unions understand that no, it's not a program that we're placing into effect to say we're trying to give you a hard time. We're not trying to go against anybody. We're not trying to force this down your throat. This is a safety issue. And you as a local should be understanding and not fight this. And I guess that's where the problem lies. We really don't have a lot of education for these people.

So I've done several training seminars. I trained for supervisor training for reasonable suspicion. I've developed several policies for companies for their drug and alcohol.

In setting up programs for these companies, if you have a written statement or a written policy for the general workforce in, like say, a mining company or construction company and you hand

out these policies to each individual employee, at that point the employee either has the ability of reviewing it or not. You can't force it down anybody's throat. But you do have the availability of giving it to them to say this is what our company is going to proceed with and here are your options.

Now, I mean, I'm looking at some of the footnotes here that you have as far as the training and the inquires for after accidents. But part of an employee's training is reading that policy. In that policy is information regarding the relevancy of what the drugs will do to you. I mean, there's educational materials. This is what marijuana does to you; it affects your driving, it affects your thinking ability, it's long turn. The more abuse you have with it, the more it's going to stay in your system. And these are all in these programs and then these policies are handed out to the employees along with the alcohol portion of it also.

So if an employee comes up to you, and I think a lot of employees don't understand that if they do come to an employer and say, "Look, I have a problem with drugs. I have a problem with alcohol." Employees are fearful of going and approaching their

supervisors or their superiors because of he fact that they might get fired or they might get laid off or they might just be told not to come back. And what they fail to understand is they are covered under ADA. Okay. Under the American Disabilities Act if they approached the employer previous to being tested. So, in other words, if your employee has a problem and you want to get help and you go to your employer, you're going to get help and they're not going to fire you. But they will probably have you sign some type of form saying that you're going to have to go into a treatment program. They give you X number of days to a treatment program. And then possibly in conjunction with that treatment, come back and sign a paper saying that we can test you on a follow-up basis over the next two years at our discretion. Okay. And this gives these employees a chance to seek help. And it doesn't just come for drugs and alcohol. It could also be for marital issues, it could be for monetary issues. You know, you can always go and approach your employer.

But employees are not educated in that portion. They don't knew to do that. So I think that in a policy, a written policy, everything is stated in

there. It tells you exactly what is expected of you as an employee of the company, what type of medications you can take either prescription or nonprescription. Prescription medications also come down positive. And if they're not described to an individual that's being tested, it's considered a positive.

MR. SEXAUER: How do you handle reasonable suspicion in a policy?

MR. ISGRO: Well, reasonable suspicion in a policy basically is each company designate certain liaison or certain supervisors, or certain managers that will be trained in the behavioral aspects or how to go through and ascertain whether an individual might be possibly under the influence of drugs and alcohol. So we leave that up to the employer to have individuals trained in that. We say you usually have multiple people. You know, if it's a smaller company, at least a minimum of two. If we go into a larger company where there are 300 or 400 employees and you're running three shifts a day and you've got multiple superintendents, then you have at least three or four for each shift. And there is a specific form and a specific guideline that needs to be met. A form, you know, that they show you that you have to

keep an eye on this person for the behavior, you know, whether they're tenacious to the job, if they become an absenteeism problem, if they come to work disheveled everyday. You know, you smell alcohol on their breath, you smell marijuana in their clothes or acting irregular at the job, their work patterns have changed. I mean, it's a punch list of what an employer or supervisor would see. And they wold keep tabs on these people, and not approach them, but take -- you know, you might want to test somebody on reasonable suspicion just on one specific incident if it's something that you feel might exasperate the situation. If there's true alcohol on someone's breath. But if you see that there's a change in a person's work pattern or there's a change in the person's attendance, you know, you start keeping tabs on these, keep them in a locked file which is basically just one or two people have access to it. Because it is confidential information. You just don't want this floating around to every Tom, Dick and Harry out in the plant.

And then if you start seeing a decline over a period of time, you've got several documents. And these are written documents that are signed by the

supervisor, time dated incident numbers and different comments that are on them. So if you have a stack of these things together, once you've accumulated a certain portion of problems now you can approach that individual and say we would like to test you under a reasonable suspicion.

Does it work? Sometimes it does and sometimes it doesn't. And the reason it doesn't work is because these supervisors or superintendents are not willing to place their neck on the line to approach an individual or to start this action because of repercussions. You know, so that again is another thing that's a continuing education problem for the employer.

MR. SEXAUER: Can I ask you another question? We've heard at other meetings that the cost for these tests are anywhere from $35 or $40 to $400 a test. And that's quite a discrepancy.

MR. ISGRO: Yes.

MR. SEXAUER: Can you explain what the general cost would be involved in getting drugs tested, testing for drugs?

MR. ISGRO: To implement the program, basically I guess the first action would be to

promulgated a policy. And that would be sitting down with the management and the owners of the company. Starting the policy development and having input as to what the consequences are going to be.

Policy development, depending on the size of the company could be anywhere from $450 to $1500. It goes according to company size. It goes according to how much material is in the body of the policy. Whereas a small company might not need a lot of verbiage in that policy compared to a larger company that has to deal with multiple unions or multiple facilities that have to be incorporated into that.

As far as the meat and potatoes of the policy, they stay the same. It's just putting the additional addendums into it. A policy could range anywhere from 15 to 26 pages depending on how much material goes into it.

We also when we develop our policies, we also place the educational aspect in there for the employee, you know, as far as the signs and symptoms and what the behavioral problems would be with all these different drugs and alcohol is.

MR. SEXAUER: To do natural tests. Someone's exposed or someone tests positive for drugs.

What would that cost to do an initial test?

MR. ISGRO: To do the initial test? There are different factors that come into that also, and it also depends whether you want to do a five panel, an eight panel or a ten panel test. If we stayed with the five panel tests, which is the standard for the DOT industry right now that they're utilizing, tests can range anywhere from $45 to I'd say about $110 depending on whether it's onsite, offsite, clinical, hair testing. I mean, if you're going into hair testing, hair testing is definitely going to be a lot more expensive. It's more time consuming. It takes a longer time to get results back, you know, whereas there are tests that can be done on site where they have litnus paper tests, you know, testing cubs that they sell. Accuracy wise, I don't think they're quite as accurate as sending them to a natural lab. You know, if you're going to send them to like a SAMSHA lab that's regulated, then you're going to get the obvious 100 percent result on that, or 99.99999. Nothing is going to be 100 percent and nobody's willing to stick their neck on the line.

But the test itself if you were to send, go to a clinical setting, it depends. It could be a

mom and pop shop that's going to charge you $45 to process the whole thing or you might have a company that has to jump through a bunch hoops and send it to a couple of different places, and they might charge you $125.

As a rule like with my company we do onsite testing and we also have clinical. We have a nationwide network that we deal with. So, we predominately cover the northeastern part of the United States when we go on site. So an onsite test, you know, would range anywhere from $65 to $75 depending on travel time. But that includes the processing of the specimen. That includes the medical review officer, which all our results are reviewed by a medical review officer. They're not just given to the employer without a review, and that's the lab costs and the collection costs.

You know, if you were to get a company, say, a base company of 100 employees and say you were going to implement this program. And I'm just using these figures off the top of my head because I don't have anything written down here. But implementation of a program for 100 based company employee, saying you're implementing a drug testing program, your

policy would run you roughly about $750 to draft the policy. Depending on whether you want to do baseline testing to get everybody on a even keel to start off with. I mean, baseline testing some companies will come through, such as mine, and will give like a lower rate to test everybody once to get a baseline and then generate a random program from there. The numbers don't necessarily have to meet the same as the DOT.

I mean, currently some of the numbers that we generate are 50 percent for some companies, other companies have gone down to 25 percent. You know, so let's say on a -- you're going to go through and test these individuals on a random basis and using the DOT regulations as a landmark to work off of, you're doing 50 percent. So that's 50 tests. I'd say $75, you're looking at roughly $4,000 there. You'll get another 750 to start a policy. You're at 4750. And then management of the program is like $15 per employee per year. So it's another $1500. So I'm saying roughly to implement a program for a company with a 100 employees and do all their testing for one year would be less than $10,000, which is almost the cost of one comp claim.

So, I mean, ratio costs versus benefits,

there's no comparison. I mean, most insurance companies now what they're doing is because the insurance industry has become so competitive, is they have gone through and given discounts to a lot of companies that are nonregulated regarding their worker's comp. And some, like I think Travelers at one point and Utica General was giving it, they were giving like 2 percent or 3 percent off on their worker's comp rate. And in the same sense what they've done is a lot of these companies when they've done that, have given themselves the drug free workplace logo on their letterhead. Have considered themselves a drug-free workplace, which it's a trickle down effect. A lot of contracts and you're dealing with federal, state and local government contracts, they do most times require that companies that work on their sites have a drug testing program in place or drug test their employees. So when it comes to a bidding or when it comes to a contract for bids, there might be some verbiage in the actual body of the RIP that says this bid would be considered for companies that have drug-free workplace or drug testing programs in place. So it does show some benefit. It's not just benefit of eliminating a problem, but it's eliminating

a long term problem.

MR. SEXAUER: It probably would be helpful to us and in our analysis of the cost and benefits of this rule if it's possible for you to submit some written analysis maybe showing some cost for different size operations.

MR. ISGRO: Right.

MR. SEXAUER: You mentioned a 100 employees and maybe a small number.

MR. ISGRO: Yes. And some of the -- I mean, I guess if you were --

MR. SEXAUER: And particularly in the mining industry of the 20,000 employees in your database or tests on your database, I'd be interested to know how many of those were in the mining industry. And if it's possible to submit any kind of analysis that really is limited to the mining industry.

MR. ISGRO: Now mining industry, I mean are we also go to include sand and gravel pits in that?

MR. SEXAUER: Yes.

MR. ISGRO: And does that include the transport of that material or just strictly the people that are actually working in the pit?

MR. SEXAUER: When you say transport, what--

MR. ISGRO: Well, there's transport within the mine and there's also transport of that material outside of the facility. Now, of those individuals that are taking that material off their pit site to an offsite location, will they also fall under dual regulations?

MS. HONOR: I would say it's probably better to be more inclusive in what you provide us than not. And if it's something that is not useful to us, then we'll determine it once we start going through the information.

MR. ISGRO: The numbers that I did generate out of that 20,000 roughly out of that 20,000 about 75 percent of it has in some way or fashion involvement with mining whether it be in the general production of the product, whether it be in in-house transportation, whether it be over the road transportation or in management.

See, what we've done is we've educated a lot of these companies that are nonregulated that if they're going to implement a program for drug testing, they should it across the board for everyone. And

that includes from management, ownership right down to the janitor that's mopping the floor. You know, this way there's nobody that's going to come back to you and say "Well, why are you picking on me and not on them? Just because I'm working in a mine doesn't mean that this person that's sweeping the floor or the mopping the floor doesn't have the same problems that I do." So a lot of these companies that we deal with have implemented the non DOT program to test all their employees.

In some cases we do have certain companies that just strictly do preemployments. Now, that's great. We do testing for Wal-Marts, we do testing for Target, we do testing for Sears. All these companies have preemployment tests.

If you go to any of these individual companies and you look at their doors when you first walk into the store, there's a big sign that says "We preemployment drug screen all of our applicants." I don't know if you've seen that before. They have these signs right on the front of the door.

Preemployment drug screening is great. But unless you have something that can reenforce that preemployment testing phase, you might as well save

your money for preemployment testing. Don't even bother spending the money. And the reason being is you have so many individuals out there that know about these tests, know that they're going to be preemployment tested and what they going to do? They're either going to abstain from their use or they're going to try to flush out their systems. And we see a high rate of that now because a good amount of our preemployment tests that we're having coming through are coming back dilute, diluted samples. Does that necessarily mean that they're purposely trying to flush their systems out? No. Could it be that they drink a lot of water? Who knows? I mean, I can't tell you exactly. But if I was a betting man, I would say that they're probably trying to flush their system.

You know, you got GNC stores, you go to the Internet, if you punch in drug testing on the Internet, the first thing that's going to pop up is not how to start a program, not how to alleviate a problem that you have in your household or in your business, but how do we clean our systems out for the test that we got to take. I mean, it's pitiful.

So preemployment drug screening is great,

but it does have to have some type of reenforcement behind it, whether it be a random program that mirrors DOT or a random program, some type of random program to bolster that preemployment phase.

MR. SEXAUER: You mentioned meth and cocaine? I'm sorry. Not meth.

MR. ISGRO: Marijuana and cocaine.

MR. SEXAUER: Marijuana and cocaine as being the two principle drugs --

MR. ISGRO: The two principle drugs that we're getting right now.

MR. SEXAUER: What about meth and any others?

MR. ISGRO: On occasion we'll get some methamphetamines. The problem that we run into with cocaine, methamphetamine, codeines, a lot of these water-based substances is they don't stay in your system that long. They're easily diluted and flushed by your system. They're not long term substances that stay in your system, such as marijuana. Marijuana can stay in your system 30 or 45, 60 days depending on use and how often you use it in quantities. Whereas, methamphetamine or ice, codeine, amphetamine; these specific drugs if you don't test them within a 48 to

72 hour window and there isn't recurrent use of that substance, you might not be able to detect it. So it's a hit or miss kind of thing. But cocaine, like I said, for being a drug that doesn't stay in your system for a long period of time unless you have continual use, we're showing a lot of cocaine positives, which is scary.

Years ago cocaine was the drug of the rich and people couldn't afford. Now what they've done is they've got it in crack form, they've got in liquid form, they've got in powder form. You can smoke it. There is so much of it out in the market, and so many people that have access to it that the pricing on this stuff has dropped. So now the common person, even the street people, can afford this stuff. I mean, cocaine years ago was very expensive and now anybody can afford it, whereas marijuana pretty much is marijuana. I mean, you can't get around marijuana. It'll stay in your system for 30 days.

MR. SEXAUER: Do you have any experience with reduction in accident rates as a result of testing programs?

MR. ISGRO: I have two large employers that are in particular MSHA regulated. Without

specifically naming these companies, but they are large employers in the northwest. What they've done since they've implemented these programs they've had fewer accidents. These are documented. Fewer documented accidents. Fewer on the job injuries, fewer fatalities.

One company in particular, again not mentioning a name, we did do a post-accident test after a fatality. It did come back positive.

So, yes, there is a problem in the industry. I mean, I come out straight and forward and say that. It's just we don't have access to getting into that industry right now. Worker's comp claims have dropped. In particular in Pennsylvania if -- and I don't know if they've changed this recently, but as of last year if you got hurt on the job and tested positive, worker's comp could deny your claim. Now unless they've changed that.

I mean, each state has a different aspect of it. I know New York state was looking to enact such a regulation inside their worker's comp law. But does it mean that they're going to go through and do it? They could give you a prorated portion. Worker's comp is funny how the states deal with it. You know,

each state has it's own little program. But I do know that Pennsylvania at one point and they might still, I'm not positive, but I think they might be able to deny your claim totally if you tested positive after an injury on the job, which is huge. That is huge for a company.

Implementation of these programs is not something that has to be difficult. It's a very simple process, you know. And we look at all the paperwork that we're dealing with here and all these different questions and inquiries and this and that. Well, yes, a lot of them are going to be in the dark until you actually say I'm going to put my foot down, I'm going to implement this program, I'm going to make it a regulation. Then you're going to find numbers.

Does it mean that you have to keep these numbers? No. DOT already showed you past practice that if the numbers don't meet what they want as far as percentages, they'll change their regulations, as they did with the alcohol portion. They went from 50 percent drug, 25 percent alcohol to 50 percent drug to 10 percent alcohol. But this is all regulated I mean on results, feedback that they get either from testing laboratories or companies such as mine that report

data back to DOT.

Now, unless you have some type of baseline to generate those numbers, you're never going to know what the problem is. And that's where the first initial step, the implementation of that program in some fashion or another. And I would highly recommend following the initial regulations and the initial program setup of DOT because it does show that it has in fact worked in the DOT and non-DOT industry across the board, as it has done for transport. You know, the railroad was the first organization to jump on this drug testing band wagon and then everybody else followed suit with buses and public transportation and now trucking industry. Anybody that's doing over the road CDL work. Next is this. And I can go ahead and probably foresee that it's going to go into other forms of trades; construction, electrical, carpentry.

We do have companies right now that we have this type of testing program in place that are under no federal regulations, no state mandates, that have voluntarily set up these programs for their companies. They have the insight of promoting a safe workplace and they're probably on the bottom of the list as far a potential for an accident compared to

somebody that's in a higher area such as a mining or a gravel or sand pits or heavy construction or road.

Just off the record, I'll give you an instance. Back in 1997 before they were just about ready to change regulations for alcohol testing for CDL people. We were testing a company that works on bridges and there was an individual that was operating a 300 ton crane that was swinging 120 foot I-beams to build a bridge over an interstate.

At 6:30 in the morning my driver went up with a van, because we have a motor home that we test in. We brought the individual into the van at 6:30 in the morning. He blew in a .47. That's five times the legal limits for a DWI. He was operating that crane over a work crew of 15 people. No slurred speech. Nobody even do anything because he was inside that little bucket, inside his little cab on that crane at 6:30 in the morning. Confirmation test, we did it 15 later, was .46 which tells us that it wasn't mouthwash. And he could possibly have been drinking while he was in that vehicle, while he was on the job at 6:30. That's scary knowing that this heavy machinery does not just exist on our interstates, it's all over the place.

I am open to questions. I'll answer any questions you have, make suggestions. I mean, there's a ton of things. I could talk all day long here about this. I've been doing this thing for 11 years. And I've seen them come and go.

MR. MacLEOD: You talked quite a bit about training. Could you expand a little bit on what your program entails? And I have just as a sidebar question you talked about conducting a seminar or training on reasonable suspicion.

MR. ISGRO: Right.

MR. MacLEOD: Interested in what the supervisors feel about that responsibility of having to identify reasonable suspicion and what feedback you may have received.

MR. ISGRO: Well, it's funny that you're asking. I mentioned that earlier in what I was saying as far as the training aspect of who gets trained and to what extent these people have a responsibility. And, yes, we train supervisors and we train them everything from the type of regulatory demand that is required by their company to implementation of the drug testing program, to review of their policy, to review of symptoms, behavior. You know, signs and

symptoms. Things to look for. You know, how to document.

And, you know, I get a good response. People come into these training seminars, they're all gong ho and oh, yes, yes, we're going to back. And I usually pose a question to these supervisors as to well just for a second all the scenarios that I have lead across these meetings and showing you in these meetings or this seminar, can you pick one or two individual out within your organization that might fall under that now that I've opened your eyes to this. And the light bulb goes on. And a lot of these supervisors will, oh, yes, Johnny Jones, you know, I really never even understood that and I never noticed it. But now that you've clarified all this and you made it simpler, yes, maybe Johnny does have a problem. You know, he's been coming in late on Mondays after Monday night football. He's been laying around doing nothing at work. And we go and look for him, Johnny's gone. On the job absenteeism, where is he? I ask him to do something, and he got right in my face and started screaming at me and yelling at me, and his eyes are blood shot and his skin was all red and his nose is all whiskey looking and everything.

Yes, I think Johnny has a problem and I think you've made it clearer to me now by showing me these aspects of your training. You've made it clear.

Part two of that, though, is trying to get these supervisors to implement this reasonable suspicion testing. And that goes back, again, to whether it's a larger facility or a smaller facility. If you're going to run into a larger facility, yes, the supervisors or the superintendents or the manager personnel are going to be a little bit more competent, they got a larger workforce, they're more management trained whereas they're not as close to the individual that might be under suspicion. Whereas, a smaller operation where you only have 10 or 15 guys and you start taking this guy out, now you're going to say to yourself "well, I'm going to feel like a heel because I picked the guy out." Now what happens if he comes back positive? I know him, I've known him for years, I know his family, went to his house for picnics. You know, we have outings together, family holidays together. All of a sudden this guy comes back positive and my policy says we got to terminate him. How do I face that individual?

You know, so that's where you're running

into a problem as far as the supervisors implementing that. But if you were to show them the good side of it, and that's what I normally do on my training, is that you're not doing this reasonable suspicion to fire this individual. You're not trying to fire that individual. What you're trying to do is you're trying to get help for that person.

And, you know, there's a certain amount of common sense that flows into this whole picture. And the common sense is approaching that individual prior to when he gets into a larger scale of a problem and saying "Listen, Johnny, between you and me you got a problem. Do you need help? If you need help, we'll give you help." And that's what we try to instruct these supervisors. Is not to be gestapo. Not to come in with these hard tactics to try to get these people -- what they're do is they'll revert. They'll shut down on you.

If you approach somebody and you place them on the spot, a little bit of sugar goes a long way. If you try to place them in a situation that they feel they cannot get out of, they'll shut down on you. Become more aggressive and possibly become physically abusive. So you got to use a little bit of

tact. Does everybody in those role have tact or professionalism? No. But you have to exhibit some.

So in the training aspect, yes. In our seminars that we do we go over the whole ball of wax to make sure that what happens on confrontation, how to approach an individual, how to quell the problem if it becomes unstable.

But even with all that education and all that training, still there is hesitancy with the supervisors conducting this type of testing. So, we're working on it with a lot of companies.

MS. CARR: In terms of specific substances, I wanted to ask you a particular question. The current existing regulation in mining that's on the books prohibits intoxicating beverages and narcotics.

MR. ISGRO: Right.

MS. CARR: The Department of Transportation addresses five drugs plus alcohol, and yet you've mentioned seven panel and ten panel. In your opinion what is the existing intoxicating beverage and narcotics, is that inclusive enough? What specific drugs would you recommend addressing in order to impact and improve safety?

MR. ISGRO: Marijuana, cocaine, amphetamines, opiates and PCP.

MS. CARR: And no alcohol.

MR. ISGRO: Well, those are drugs.

MS. CARR: Okay.

MR. ISGRO: And then you have the other aspect, which is the alcohol aspect of it.

MS. CARR: Okay. So you wouldn't recommend covering methamphetamine -- or methamphetamine is covered --

MR. ISGRO: That's all under amphetamines.

MS. CARR: What are the other drugs in the nine to ten panel --

MR. ISGRO: The other panels are more for, they're more advanced testing that you would do with someone, say, like if you're going to get a job with NSA or get a job with the Federal Government where you're going to be in a classified situation. They want to really go into depth and really if you're going to go into like methadone, methaqualone, barbiturates. I'm trying to think.

MS. CARR: But does the five panel over oxycodone?

MR. ISGRO: Yes.

MS. CARR: Okay.

MR. ISGRO: Yes. That's going to fall under codeine.

MS. CARR: Okay.

MR. ISGRO: The five panel is a stringent enough test. When you get into those drugs anything other than marijuana and cocaine, you're going to fall into a secondary aspect. Well, PCP, you might throw that out with cocaine and marijuana. Those are definitives. There's no ifs/ands or buts. You don't get around those. When you get into the opiates and you get into the amphetamines this is where there's an area of controversy. Because if you come back positive for opiates, it'll come back as a morphine. Does it necessarily mean you're taking morphine or you're doing heroin? No. There is a 6 a.m. test, they call it, which is a more definitive test that breaks down that morphine the heroin use itself.

Can people have prescription drugs? Yes. Amphetamines, there's a lot of people that are on amphetamines. If you take Ritalin or Adderal for ADHD, those are amphetamine based. You know, codeine, oxycodone, those are all pain killers but they're prescription medications.

Can you be terminated for taking those prescription medications? No. That' where the MRO comes in. So there is no chance of a person being terminated without justification. So in other words if a test comes back to our facility and MRO reviews the result, and it came back positive for codeine, we're going to contact that individual and say well, your test came back positive for codeine. Do you have an explanation for it? And they can, yes, we do. We have prescription from the doctor because I hurt my shoulder last week and I've been taking it for pain medication or pain management. Can we contact your physician and can you show us a copy of your prescription? Well, once that prescription is verified, that test is no longer positive. It's reported as a negative unless it meets or supersedes the cut offs for abuse.

Now, some people can be on prescription medications like oxycodone or codeine and can go through and abuse them. We can also find that out according to the levels and the limits that come back.

So it's a pretty safeguarded test all the way around.

MR. SEXAUER: With those limits do you

mean therapeutic limits?

MR. ISGRO: Right. Therapeutic limits, right. So if you're on a 1,000 milligrams a day, you know, and you metabolize, I don't have the exact numbers. I'm not a doctor. But the doctor has the exact cutoffs of where if you're going to take six tablets a day and a 1,000 milligrams and it metabolizes to X nanagrams over a period of 24 hours. Let's say, I'm using a hypothetical figure of 500 nanagrams would be a therapeutic dose and all of a sudden we're getting back a dosage of, say, 5,000 nanagrams. Well, that's prescription medication abuse. That's positive. It's no longer covered under that prescription regulation. All right. So these are the safeguards that we also have in place.

MR. SEXAUER: Any other questions?

MS. HONOR: Yes. I have a question for you. You spoke some about the DOT rule. You said that you believe that it's been successful. We had some previous testimony on it at some of our hearings, and not everybody came out on that side. They thought that maybe particular elements needed to be updated or the like. What do you think has made the DOT program successful and what components do you believe have

been successful? And conversely, do you believe any of the components of that rule have not been quite as helpful to creating the success in your words of that program or that rule?

MR. ISGRO: You gave me too much at one shot. Okay. I'll answer the first one for you.

MS. HONOR: Okay.

MR. ISGRO: And then maybe you can help me along. I'm getting old and my memory isn't that great.

The DOT success rate, what has really played a role in that is the preemployment testing deterrence, education and ongoing testing of individuals. You know, as a safety factor. Do we have anybody that gives us any negative feedback from the DOT regulated companies? Yes. I get a lot of bellyaching about why do we have to expend this extra cost, why is the Federal Government making me do this? And you have to go through and you basically have to instruct them on the reasons and educate them ont he reasons as to the factors that this program is in place for a certain reason. I mean, DOT didn't just come up with this off the top of their head and say well we're just going to do this because we want to do it.

MS. HONOR: Right.

MR. ISGRO: There was materials out there that substantiated implementation of these programs, as you are getting now for the mining industry. See, back in '95 and '94 DOT was getting this for their trucking companies, anybody with 50 or more starting in 1995 and then in 1996 implementing a program for all CDL users of vehicles over 26,001 pounds or above.

So there are still a lot of people out there that don't even have programs in place for DOT, and I'll give you one of the reasons behind that is information. These companies that are small don't have access to these regulatory demands.

You know, Johnny Jones that has four triaxle dump trucks that operates six months out of the year doesn't have anybody but him and his brother operating with three other guys. How are they going to find out about these regulations? The Federal Government doesn't send anything to them, right? Unless they belong to a trucking association or some type organization or if they just happen to read the newspaper one day or getting a trucking magazine. And look at it and go, "Oh, this drug and alcohol testing is supposed to be -- no, that's for big companies.

That's not for us."

You'd be surprised how many companies to date, 30 employees or less, that don't even know about these regulations. Scary.

Here's your other attack. How are you going to inform your smaller mines, your smaller sand and gravel companies of this implementation? I would like to see something a little bit more substantiated than when the DOT regulations went in. Because people did not have information enough to get this type of program in place. And what has happened is over the years auditors both on the federal and state level have come into these facilities and have audited their books to see if they have a policy in place, if they're doing preemployment testing, if they're doing random testing. And it's all generated -- like in New York state it generated according to your accident rate and violations over the road. Because when you're going through these stops, these DOT road checks, you know every time there's a violation with your vehicle or an out of service tag gets placed on your vehicle, New York state has implemented a CAD system where they place those violations into a system and DOT can review them. And I'm sure there are other states that

probably have followed suit in that same fashion.

And what happens is, is they go through and they take a company that is in that high risk area because of violations, accidents or out of services and say well we're going to do a spot check on this company. And they walk into that company and they find there's no records in place, and they fine them. And some of the fines are, you know according to size they might give them a small fine. Some might give them a warning. On a state level you might get a warning. On a federal level you might get a fine, or vice versa. It all depends on what the mood the auditor is in I guess that day when they come in to do the audit.

But there is where the problem lies. How do you inform this smaller employer, this smaller mine? How do they gain access to this information? Do we have a database of these people? Do they have through permits? You know, do we have blasting permits? Do we know how to identify these people?

Once we have identified these people, let's spend the .37 cents and sent them a letter saying this is what's going to happen as of this date and you need to get this program in place.

MR. SEXAUER: Thank you. Joe, thank you very much. And I'll remind you, if it's possible, to give us a breakdown on cost for different, particularly in the mining industry.

MR. ISGRO: Thank you.

MR. SEXAUER: We have one speaker left that's scheduled to speak and then we'll open it up to speakers in the audience.

What I'd like to do now before we call the next speaker is take a ten minute recess and we'll reconvene at 10:45.

(Whereupon, at 10:36 a.m. a recess until 10:48 a.m.)

MR. SEXAUER: The next person's name, so if I get it wrong, please excuse me, is it Reginald Geer? Is it Universal Services.

MS. CARR: No, it's Benjamin Gersons.

MR. SEXAUER: Oh, excuse me.

MS. CARR: That's who signed up on the speaker list.

MR. SEXAUER: Oh, okay. Not a problem. Okay. We have you signing up on the wrong list. Not a problem. We would be happy to receive any written comments from you if you like, as with everyone else.

The next speaker Adele Abrams.

MS. ABRAMS: Good morning. My name is Adele Abrams, and I'm a certified mine safety professional and also a practicing attorney and President of the law office of Adele L. Abrams, P.C. in Beltsville, Maryland.

In my firm I represent mine operators, mine supervisors and I also deal with construction companies in activities involving MSHA and OSHA. I also am a MSHA approved trainer and under Part 48 and do perform Part 46 and Part 48 training for companies. And I also have completed the OSHA training course to do the 10 and 30 hours construction training.

I wanted to speak today because this is an extremely important subject. Back in the early 1990s when I was on staff with the National Stone Association I was a member of the tripartite group that MSHA had convened on substance abuse prevention in the mining industry. And that group was able to produce a number of work products that I think have been beneficial in spreading the message throughout the mining industry.

I also recently in October 2005 gave a

presentation at MSHA's TRAM conference at the Mine Academy on substance abuse prevention in the mining industry. And I'll be pleased to submit a copy of that for the record if it would be beneficial.

MR. SEXAUER: We would like that. Thank you.

MS. ABRAMS: Yes. I had not intended to give a statement today and I want to make it clear, though, though I am a member of a number of mining and professional associations, I'm speaking in my personal capacity today. But there are a few things that I wanted to touch on that I think are relevant to this.

The first has to do with the issue of training. I am a trainer and already I have included substance abuse information in the training that I do for annual refresher as well as new miner training. This falls within the other subject section. And I cover that just as I cover issues of worker fatigue, distraction and other things that can impair behavior on the job and safe performance. And even absent a rulemaking, I certainly would encourage MSHA to recognize that this is a safety related subject and to permit trainers to include that in the curriculum to satisfy the 24/40 new miner training requirements and

as part of the annual refresher training. Because it is a very important subject and it can save lives.

I also want to put on the record that I represent a number of very small mines in activities involving MSHA. And some of these are really small. We're talking a one person operation or a couple. I've represented a number of farmers who are in New York state and Pennsylvania who extract some blue field from their fields. And because they sell that blue stone into commerce they are considered mines are regulated by MSHA.

It is going to be extremely difficult for these companies, arguably companies, mines that only employ family members or literally are selling material out of their backyards to put a formal program in place. And I'm not suggesting that there should be a double standard, but I am suggesting that there's going to be a lot of work ahead for MSHA Small Mines office in order to assist such companies in putting programs in place, especially if MSHA elects to mandate drug testing. Because effectively you're going to have a husband and wife eventually testing each other. It is going to come down to that level.

Another thing that I wanted to bring up is

the conflict of law issue. Many companies, as you've already heard, do testing under the DOT programs. And I would hope that anything MSHA might put into place will harmonize with that so you don't create a bureaucratic nightmare where companies are having to administer two programs where they may only have, you know, 15 employees to begin with.

In addition, I do employment law. And there are a number of federal statutes, the Americans With Disabilities Act, the Family and Medical Leave Act for starters that have some implications with respect to drug and alcohol testing. The issue of pulling people out and taking adverse employment action against them because they are regarded as addicts, they are regarded as alcoholics; whether or not that suspicion proves to be true or false. And so I would hope that again there could be some harmonization in the information that is presented to the mining industry to make sure that by trying to comply with an MSHA requirement these companies are not inadvertently running afoul of these other statutes and finding themselves in legal trouble.

We've heard testimony about formal EAPs, which I think are an excellent idea. But, again, when

we're dealing with small companies I think it's important to not overlook the free resources that are out there. In particular, the programs with Alcoholics Anonymous and Narcotics Anonymous and for family members the program of Al-Anon. There is no charge for these programs. They are extremely effective. The judges in the states that I practice law in routinely "sentence" drug drivers and people even in domestic violence cases to attend AA meetings as an alternative to incarceration. And I think the medical community would verify that people who regularly attend AA meetings or NA meetings after they've perhaps completed an in-patient or an out-patient formal program have a much grater rate of maintaining sobriety or abstinence from drugs.

There are websites that list meetings for these organizations all over the country, and perhaps MSHA could consider putting links to those websites on the MSHA website.

The other thing that those programs offer is the complete anonymity, as is inherent in its name. It does not require an employee to self disclose to an employer in order to get some help. So that can be part of the education function here.

I wanted to also address the issue of the accident investigations as asked for in your rulemaking, whether or not the findings concerning alcohol impairment or drug impairment should have to be determined by the employer and included in the reports that are required under 50.11. I think any root cause investigation, and I'm putting my safety professional's hat on now, does certainly require an inquiry into all causes both approximate and indirect for an accident. But you need to understand that it is very difficult at times for the employer to get that information. And the previous speaker mentioned the fact that worker's compensation schemes often will bar an employee or their estate from coverage if the worker is found to be impaired. And this is a very state-by-state specific analysis. Because each state administers its own worker's compensation programs.

But I would submit that a family who knows that their beloved, who has now died in a mining accident, was impaired is going to, perhaps, withhold that information from the employer in order not to have the benefits disqualified. Workers themselves might be quite resistance to voluntarily undergoing testing if they know that they're going to be

disqualified from worker's comp benefits.

As a practical matter, even aside from those worker's comp consideration, families may have religious or other considerations why they do not want autopsies performed. Sometimes the state will mandate autopsies, other times it does not. And I have had a number of cases where it has taken forever to get autopsy reports.

I had a construction fatality case last year, and it did turn out that the victim in that case was under the influence of methamphetamine at the time of the accident. But it took many letters, it took subpoenas and a whole lot of work to finally get the autopsy report. And given the turnaround that MSHA expects the employer or the mine operator to prepare these accident reports, it may be a practical impossibility to always include that information. So while companies should be encouraged to include that, I would hope that a company would not be penalized if that information is difficult for them to get because of the legal reasons that I've just mentioned.

The other thing is, of course, under Section 104 of the Mine Act MSHA can issue a citation if they believe that a violation has occurred. And by

self reporting in an accident investigation report that it was found that an employee was under the influence of alcohol or under the influence of drugs, that effectively is a disclosure that could itself get the employer cited under 56.20001 or analogous standard if you created a new one for coal. I would hope that MSHA would exercise prosecutorial discretion in those circumstances and not penalize a company that has taken all appropriate steps to implement programs and to monitor its employee simply because somebody on an autopsy report does turn out to have been under the influence.

The last thing I will say is that there were no questions asked in your advance notice of proposed rulemaking concerning contractor issues. And I think this is a very big consideration, and I would certainly urge you to solicit comment on this in any proposed rule. There are models, of course, under Part 48 and Part 46 that tend to hold the mine operator primarily responsible for safety at the mine and for ensuring that anybody coming on site has received training. And it does, of course, require contractors as mine operators to have the training for their own employees.

This is new waters that we're diving into here. And an employer, a mine operator is not going to be able to perform drug testing on someone else's worker. It's going to be a practical impossibility. So there needs to be some way to reconcile, you know, perhaps through prequalification of contractors to the extent that that is feasible to ensure that contractors are held responsible for their own programs, mine operators are held responsible for their own programs. Otherwise, you're going to again be creating a contractual nightmare.

Just in closing, I want to say that I've handled far too many fatality cases and investigations in the 15 years or so that I've been involved with the mining industry. And although I would almost think I'm unshockable at this point, I continue to be shocked by the high incident rate that I see of alcohol and drugs being factors in these fatal accidents. And what is perhaps even more alarming is that there have been times when this has been disclosed to MSHA and there have even been companies that have urged MSHA to issue a citation under the applicable standards so that they could go back and use this for enforcement and disciplinary reasons at

their mines and also in their training to show what the consequences are.

Of the statistic that you put in your rulemaking proposal that there have been 75 citations issued in about five years shows, I think, that there has been a certain laxity in enforcement of this. You know, I probably have clients who would want to beat me up for suggesting that MSHA write more citations, but what I'm trying to say is that there are rules already on the books that are perhaps are not thoroughly enforced and that might be something to consider before adding yet another layer of requirements to the existing regulations.

So those conclude my comments, which were not prepared, but I will submit a copy of the presentation that I did for the TRAM conference, especially because that does get into some of the other federal statutes that could be implicated in setting up programs. And I would ask, would you like the paper copy now or would you prefer for me to submit that electronically to you?

MR. SEXAUER: Your pleasure.

MS. ABRAMS: Okay. I'll go ahead and submit it electronically then. I think that will be

easiest.

So I'll be happy to answer any questions you might have at this time, and thank you for your consideration.

MR. SEXAUER: Thank you, Adele.

I can appreciate your concern about small mine operators and the costs that are involved. Do you see any advantage or possibility in the consortium of small mines getting together to handle drug testing that may be required?

MS. ABRAMS: I think that would be an excellent idea. And, in fact, that is something that I have suggested to some of the mining organizations that I'm involved with. It may be possible for some of the state mining associations to set that up. Because, frankly, the little guys that I'm talking about probably do not have the resources to belong to the larger associations like the National Stone, Sand and Gravel Association or Industrial Minerals Association of North America or National Mining Association. Just because of those dues levels. They may be able to do it, though, through a state organization or even something regional. And I would also put a challenge back to MSHA to perhaps raise

this idea through some of the local home safety association chapters and gauge what interest there might be to see what might b e able to be put together on a regional basis.

MR. SEXAUER: With respect to contractors, we have that testimony in several of the meetings on the issue of contractors. But we would certainly welcome any additional comments you might have in that area.

MS. ABRAMS: Sure.

MS. CARR: I just have a question about the contractors. You mentioned that it was a practical impossibility for operators to perform drug testing on contractors. And if I'm not mistaken, it seems like we have had folks reporting that they do in fact do that. Could you describe what the practical impracticalities are or if there are any legal issues?

MS. ABRAMS: And I think I will respond to this, and I want to clarify that I think there are different classes of contractors. We have some mines, especially in the coal industry where you have absentee owners and effectively contractors are running those mines. Then on the other side of the equation you have specialty contractors who may come

in and they're only going to be present at a mine once a month where they might come in and be there for two or three days total, perhaps they're doing some electrical repair work. They do not normally work within the mining industry. They are not performing mining extraction and production functions. They are doing the same type of work that they would do in a general industry facility, you know, a manufacturing plant or whatever.

You might have somebody who is coming very briefly to put a roof on a scale house or to calibrate the scales periodically. And when those people are coming you don't really know who they're going to bring in advance and they're going to be there for just a brief moment in time. And to try to set something up when your power has gone out that before they came on site you have to get a mobile unit there and who is going to pay to test these electricians before they can perform the rewiring that's necessary to get your crusher working again. Those are the type of impracticalities I'm talking about.

And, you know, we have had attention even in the training requirements on this. If you're in a rural area and there's only one plumber and you need a

plumber to come in and they say well heck no, I'm not going to put my people through new miner training so I can come and work at your site for a day, you know, you're then without a plumber who can do this work.

So I think to the extent that you are going to look at applying this rule to contractors, it may be useful to at least narrow the scope of it to those individuals whose workers are considered miners who are subject to the new miner training who are going to have a lengthier or more substantive presence on the site. And then, again, I encourage my operators to include in their prequalification of contractors questions like do you do drug testing, do you have a program and request copies of those programs. I think, you know, contractors are always going to be the weakest link in your safety change, and so you would want to exercise due diligence in the substance abuse presentation area just as you would in other areas of safety in terms of knowing who is coming onto your site. But for these short term emergency type projects, it may be a practical impossibility especially with regard to do any kind of testing prior to somebody's entry into the mine site.

MR. MacLEOD: Adele, just keeping your

training hat on for the moment and going back to what you talked about in terms of Part 46 and Part 48, do you think there's any need for MSHA to include additional regulatory language that would address the issue of drugs and alcohol abuse or do you think the existing framework is adequate to cover necessary training?

MS. ABRAMS: And again, let me remind you that I am testifying in my personal capacity and not on behalf of any of your organizations that I belong to.

Personally, I think that there's no need to change the existing regulatory language in Part 48 and Part 46 because the framework already provides for other subjects that deal with safety and health at the mine. And I think that is a broad enough tent that substance abuse and alcohol abuse prevention and identified in terms of the supervisor training, which is extremely important, can be worked into that. And I think that MSHA could very easily put out something through its policy and guidance mechanism to explain to trainers that they can credit that information when it is included as long as it is counted toward the time in those other subjects and not through the other

seven or eight statutorily required subjects.

MR. AUTIO: You've worked with some of the small mine operators. Have had any of them had drug or alcohol programs that you've worked with, and if so, have worked at all been effective?

MS. ABRAMS: The small mining companies that I'm talking about, and now I'm talking about five or fewer employees which is how MSHA defines them, I'm not aware of any of them having programs. I'm also not aware of any of them having problems, you know, which is not to say that none of their workers or family members drink. But drugs, at least, do not seem to be an issue with these operations. And they're mostly in the rural areas and, as I said, many of them are farms are just people who are selling some sand out of their backyard and happen to have bought a screen. So that has morphed them into a mine. They generally also are not being reached by homes and some of these other groups. I mean, they are periodically inspected by MSHA, usually they're considered intermittent operations and maybe are inspected once a year. And so it may be that MSHA can do some outreach in terms of education in that regard since they may be the only contact that they have. But it is going to be

very difficult for these companies to get something in place if it is mandated as a matter of fact.

MR. AUTIO: Thank you.

MS. HONOR: Yes, I have a question. We received some testimony, I think it was in Birmingham, where an individual spoke and said that in some respects implementing the actual paper for a drug-free workplace program may be as easy as going onto a computer and going through a module where, you know, you put in some specifics that relate to your operation that are unique to your operation and you come out with a program.

There was also some testimony about having SAP professions instead of having EAP programs. A few acronyms for you there. And I can't quite remember what SAP stands for.

MS. ABRAMS: Substance Abuse Professional, it's a term in the Department of Transportation.

MS. CARR: Okay. Where the cost of rehabilitation is essentially passed on to an individual as opposed as to having a small operator pay for the cost of rehabilitation. Do you have any specific thoughts on either one of those?

MS. ABRAMS: Well, the first thing, I

would absolutely recommend that MSHA is they're going to go down this road put some kind of model program together, just as they have for HAZCOM, for example in Part 46. On their website. That can be downloaded by these smaller companies and then customized. But don't lose sight of the fact that there are still a whole lot of mines out there that do not have the computer capabilities.

I have clients that have to drive 20 miles to fax me something, you know. I have clients that don't have indoor plumbing at their facilities. So to assume, as many of us do because computers are a part of our everyday life and we can email from our cell phones, that everybody has this access. I think it's still premature for at least parts of the mining industry.

In terms of passing the costs along to workers or to the individuals receiving treatment, which I think is what you're asking about with the SAPs.

MS. CARR: Right.

MS. ABRAMS: That's attractive in one regard, but I think you have to look at the totality of this. Are you mandating that an employee go

through this and say and we're going to charge you for the pleasure, but in return you'll get to keep your job. I mean, that may be a trade off that an employee is willing to take.

And, you know, there may be some situations where in-patient is not going to be required. Often the model, for example, for marijuana users is not to use in-patient, it's to use out-patient treatment followed by going to CDA, which is kind of a sister organization of Narcotics Anonymous, but is more for the "recreational" drugs.

You know, even with alcohol although people who are daily users may have to go in-patient for detox because it can be life threatening. People who are binge drinkers may be able to just do out-patient treatment. And insurance often will cover that. The problem is there are a whole lot of uninsured workers out there. And the cost of these things can be extremely expensive. So if told well you can keep your job but since we don't have insurance on you, you're gong to have be paying $15,000 for this program, I think many workers will walk rather than try to keep their jobs and then be in that level of debt in order to go through a mandated rehab program.

It would be useful, though, and this may not be something MSHA can embark on, but many counties do offer free programs for people who are in economic need. Montgomery County Maryland, for example, has an institution called Avery Road Treatment Center which is a 100 percent free for people who are employed who are minimally employed and who do not have insurance. The problem is there can be a waiting list of anywhere of three weeks to three months to get into one of these programs. And I'm sure there are other counties throughout the country that have similar things. But, you know, if there's a way for either Department of Labor, because this obviously is mine specific but for DOL to put some kind of clearinghouse together that would identify these low cost or no cost programs for uninsured workers, that might be something that would be a great utility.

MR. SEXAUER: Any other questions?

Adele, thank you.

MS. ABRAMS: Thank you very much.

MR. SEXAUER: Okay. We have no other -- yes, Joe?

MR. ISGRO: Can I just expand a little bit on what Adele just said?

MR. SEXAUER: Sure. Come on up. Would you state your name again for the record, please.

MR. ISGRO: Yes. Biagio Joe Isgro.

In expanding on what Adele said here regarding the smaller mines and the little mom and pop facilities. There are programs already in place currently under the DOT regulations for consortiums. And what we do is we as a company and other TPAs such as ours have consortiums that deal with smaller organizations. And that's from the owner/operator all the way up to companies that have either five to ten employees.

So this would be a cost efficient program for a smaller company that could not afford to put a full blown program in place. And what you would do is you would get all companies of like size and by region and just incorporate them into one set pool and charge them a flat rate for the year. And then promulgate a policy for that consortium that all the people in the consortium will go along with and give them a couple of options to either buy out or not. And that buy out option will be, as Adele was saying, regarding SAP services.

Now in some of the policies that we

developed for companies where there is specific verbiage in there regarding who pays for substance abuse programs, who pays for following up testing, who pays for return of duty testing, so and so forth or any ancillary services that go with that. And as a rule most of the companies that we deal with as a company pass the SAP cost on to the employee. And I guess you did the crime, and now you're going to do the time. And that's part of your keeping your position with the company is now we're going to allow you to keep your job, but as part of keeping your job, you're going to have to go through and take up the cost of this program to keep your job.

But then there are, again, other organizations out there. In most cases SAP services, there's a list of them on the left that are approved by the Department of Transportation. There is also local organizations that fall under Office of Substance Abuse and Alcoholism under all different states. Each state has their own OASA office, which is Office of Alcohol Substance Abuse. They have a list of providers, either public providers or private providers.

On the public levels there are Alenons,

there's certain charity organizations that give these substance abuse professional evaluations and out-patient services granted. If you have to go into an in-patient services, most employers have insurance that the employee has with them. If they don't have insurance, they could possibly get into like a deferment program with some other organization.

But as a rule most health insurances will pay for substance abuse evaluations and for treatment. It's all a matter of what insurance you have and it's all a matter of how the provider writes up the criteria for it. Because an insurance company will kick something back if it just doesn't have the right letter dotted or cross the Ts or something. But most SAPs know how to deal with that.

In regards to what Adele had said about contractors. We currently and in the DOT regulations it also states that any employer that has individuals that come onto their property that fall under those regulations must make sure that those companies have a program in place prior to coming onto their facility. I would say the same would go for any MSHA regulated facilities. If you're a contractor that goes on that site that is regulated or should be regulated, i.e.,

whether they're transporting materials or whether they're working in a safety sensitive position. Safety sensitive, i.e., if I got an electrician working on my conveyer belt that could possibly have a problem with it and it's a person that we use. I mean, most companies if they use an electrician, they use a person to do their maintenance for their facility that could possibly be in an area that could affect someone's safety, they usually use the same people. So they could say in this case all right if you're going to have X number of people that are coming on my site to work on our machinery whether you work on our trucks, our bulldozers, our drilling machines, our conveyer belts so and so forth, or silos, then we can either put that employee, that specialist in our program with us or you're going to have to show us proof that you have a program in place. Now, nine times out of ten that contractor you're using for a safety sensitive emergency situation will be the same contractor used on an ongoing basis. All right.

So do you have to pass that cost on to the contractor? No. But if you have a set number of individuals, say that company has four or five

electricians or four or five welders that come into your facility, take those four or five people and put them in your program. And this way you're guaranteed that those people in a program, either that or show written proof.

In a DOT case right now we have companies that we manage that we request paperwork from, they're contractors. So if they're hauling materials for X,Y,Z gravel pit and you have triaxle trucks coming in, you're going to show us a copy that you -- there's a form we have that you have to fill out this form saying that you're with a drug testing company, you've done drug testing over the past six months, positive rate so and so forth, and you meet the specifications in the 382. And then that sheet comes back to us, we put that in a file folder and this is the company's insurance that should something happen, they're going to say well X,Y,Z contractor gave me a copy saying that he has a drug testing or she has a drug testing program in place. That suffices to have that person come on site.

So you have a couple of different options. Either place a contractor in a small cases basis into your program, or have a contractor submit proof that

they have a program in place.

MR. SEXAUER: Thank you.

If there's no other speaker signed up, would anyone in the audience care to address the group?

MR. BAKER: I guess I'll go first.

My name is Tim Baker. I am the Deputy Administrator for Occupational Health and Safety for the United Mine Workers.

I am pleased to be able to testify here today and give you the perspective of the United Mine Workers.

MR. SEXAUER: Excuse me, Tim. I'm sorry.

Can the people in the audience hear what he's saying. Okay. Go ahead.

MR. BAKER: Like I say, I'm pleased to be here. And I think to a certain extent clarify the position of the mine workers. I think that there have been some published reports from different areas in the country where we have either had some minors or some representatives giving their feelings on what MSHA should and shouldn't regulate. But clearly at the international level and through our regions and districts, we're looking at the situation carefully

and kind of reviewing introspectively how we look at this situation.

And United Mine Workers of America do not believe that anyone who is impaired, whether it's alcohol or drugs, should be working in any mining operation nor should anybody be subject to work with an individual who is possibly impaired by alcohol or drugs.

Having said that, and I think that's pretty straightforward and pretty simple. There's not a tolerance there. But having said that, I think we must be very careful about what kind of programs or what kind of regulation we are going to implement here.

This is, in my estimation, come on rather quickly and from pretty much nowhere, this particular regulation. Or I guess it's not a regulation. I guess it's a questions and answers session on whether or not you need to have a regulation, which is a unique situation I think from many respects. You know, normally we wait for the regulation to come out and either go we agree with you or don't agree with you. But this extremely unique situation trying to gather the data. And I got to tell you, unless you know

something more than I do, I don't think you're going to gather much data at these things.

I do not see, and I heard Adele speak earlier that she amazed by the amount of accidents and fatalities that are somehow connected to drugs or alcohol. If she has that data, I'd like to see it. Because even when you issued your call for comments, this agency said we really have insufficient data to know whether we should do anything or not.

So if somebody has that information, we would certainly like to see that. We would like to get a glimpse of what that is.

And not downplaying issue. I think this is a social issue that we have attacked for years and years and years in this country and not very successfully, I might add. To suddenly have an epiphany that the mining industry is unique or different than others and suddenly needs a regulation to control this, needs more than just somebody saying we need to deal with this, we need to look at it. We need to have the data that says where the problems are, how they exist and what we should do from there.

The mine workers have a lot of experience with dealing with drug and alcohol programs at

different facilities. And quite frankly, you know, each one takes a different twist and sometimes these things can get extremely complicated depending on whether you're dealing with five people or 50 people or 300 or 600. So these things can become extremely difficult.

From our perspective we're a little concerned that as with most regulations, you have good guys and bad guys. You have good guys that say well we got a regulation here and we've got to follow it. That's what we got to do. And there are a lot of operators out there that do that. And then you have the other group that says well it's hit and miss, they may show up today and they may not. We can get away with not doing that.

I would submit to you that when you deal with a substance abuse regulation what you're going to have is the operators who currently test, will read the regulations, adhere to the rule and test and do those things that are in that rule.

I would also suggest that those operators who aren't currently testing today are those ones who are eliminating their plan, are going to say we're not going to do it. And you can play whatever game you

want to in your own mind and say well we've done something good here, you haven't impacted in my estimation those operations that may need the regulation the most. They're simply not going to do it. And I think that if you had been at any of the task force hearings, whether it was in Kentucky or Virginia, you would have heard very much the same thing from operators saying I am not going to test my workforce. I cannot afford to lose the employees I have and if I test, I'm going to lose them. It's as simple as that. And we heard that time and time again.

Now, what we do with this problem is I'm not sure. As the coal industry continues to heat up and the larger employers continue to search for qualified miners, I think we see some of those operators who are hiring from the smaller operators, and they're going to prescreen and they're going to pretest, and they're going to take those employees who generally speaking don't have a drug or alcohol problem. Now who fills in for those individuals at the other operations where there's no screening can be a very scary thing. But I will go back again to what I said, they're not going to screen them on the way in and they're not going to screen them while they're

there. They want that coal in the ground and what happens in between time is not going to be their concern. It should be a concern for us, but what I'm saying is I don't know how we deal with this.

I don't know how you create a regulation and say here's what it is whenever there is no reasonable likelihood that they're going to abide by it.

I think that, you know, when we look at these things, and unfortunately we've just had a case where it was clearly demonstrated that regulations that are out there that aren't enforced or can't be enforced, create a problem for the agency in the end. And I think that very unfortunately the recent decision by the judge in the *JWR* case clearly showed a pattern that there was regulations out there that weren't enforced for years and years and years and now you have a major disaster or a major problem. And MSHA runs in and says you didn't do this and you didn't do that and you should have done this and you should have done that. And here's your fines. And the judge says where did that come from? Why weren't you enforcing regulations prior to? Why didn't you do these things before? And I think we fall into that

problem.

This is almost in my estimation unenforceable. I don't know how you get your hands around this regulation. I don't know how you touch every operator and say you have to, you have to follow this regulation. How are you going to monitor those? How are you going to monitor the 600 person operation let alone the ten person operation. That will be, I would assume, your responsibility.

I mean, you don't just throw regulation out and say there it is, abide by it. And a paper trail or a paper check is just not going to make it. I think we've seen that in the past. I think we've clearly seen that in the past.

So how we deal with it, I don't know. I'd be happy to sit down after we get some data and some details and where the problems are and how severe they are to look at it.

The other thing that is of great concern is, and we've heard some discussions about EAPs and SAPs and, you know, we have employers that had zero tolerance and you know, you get caught, you're fired and that's the end of it. And we've heard some discussion about well if the employee approaches prior

to being tested, you know, then we can put them in an assistance program and get it from there. But if you rationalize this thing out a little bit, I guess, you know most alcoholics don't believe they're alcoholics, don't believe they have a problem. And if this individual gets tested, now that individual has the death sentence.

There's got to be some way if we're going to run a program that says you cannot just up and terminate the individual. You've got to give this individual a chance to be rehabilitated to find their way out of the problem that they have. Because, obviously, this is a problem. This is an issue that discharge, certainly, is not going to help. Because now we've not only taken an individual who has a drug or alcohol problem and said you're fired, we've actually affected his family and his children and his wife and everybody else severely. So have we done anything but create a more severe problem and then moved that person out into society with no hopes of a future, possibly. So we need to be very careful about where we're going to push people.

We've got to draw the differences, too. You know, we have an alcohol problem, that's one

thing. Alcohol is legal. So you've got to deal with that on one respect. You have an illegal drug problem or an illicit drug problem, that's a center issue. But now we're also going to deal with prescription drugs.

I heard somebody say earlier well, you know, if you pulled a shoulder and you're on a medication and you test positive for that medication, we found out you have a prescription. I want everyone in the room to think whenever you went to the doctor two years ago because you had a muscle pulled or whatever and they gave you Tylenol with codeine and you took half of them, and six months later it started bothering you again. Now the prescription is not there anymore, right? I mean, you haven't gone back to the see the doctor. Six, eight months, nine months, ten months later it hurts, you take the pill, you get tested. Where we at now? Okay. I mean now I've tested positive for codeine. Now am I subject to this charge?

I would think based on the thought process of many people, yes you are. You're done. Prescription drug or not, you're done. I mean, obviously there's going to be some problems there. So we need to look very carefully at what we do with

people.

I've heard a lot of conversation about -- also, some conversation about local union input and of course, we encourage our local unions to participate in the discussions. But quite frankly, these discussions whether they're on a local level or a national level are contentious issues to begin with. People are very conscious of the down side of what could happen here and how severely we could impact people. So we do encourage that. But when you get larger operations that create policies across 15 or 20,000 workers in some areas they may apply well, in some areas may not apply. But as you get larger operations as they tend to apply them broadly across the board and it can impact operations differently. So if there's some way you can encourage some of the employers to sit down with our locals and deal with it, we would be happy to look at that.

The other thing is I think there's some confusion about whether or not we're creating a policy or regulation. I mean, obviously this can't be considered a policy. If you're going to create something, you got to create a regulation. So I think that that suggestions well that the policy should say

this or we should look at that, I mean when this get done, if everybody here decides they're going to do something, this is going to be regulation that's enforceable as any other on the books. And I'm not saying that's a bad thing. I'm just saying I think we need to know more about where it's headed before we can endorse whatever may be out there. And it's got to be enforceable across the Board.

If there is data out there that would demonstrate to me that drug and alcohol abuse in the coal mine has directly impacted accidents, other than some of those that some of those that you cited, I'd be interested to see that. I know that you have issued in your preamble, I believe it was, made many statements about how many accidents were out there and how many people had tested. I have not had an opportunity to read very deeply the latest critique of that by the Mine Safety and Health Review. But I would suggest that from my overview of it, most of that information if I were you, I don't think I would put it back out again until I checked closer. Because most of those things were dispelled. Most of that information that was put out about the 12 or 16 accidents that occurred were not as accurate as they

would appear on the face. And I think that we need to be a little bit more accurate about what we're putting out there. But if there's data out there, we'd be happy to look at it and deal with the issue on that level.

The training issue I need to touch on because we're talking Part 46 and Part 48 training. I don't know how much more stuff we're going to put in that. How many more mandatory items can we stuff in Part 48 training? And I've been saying this for quite some time. Give me eight more hours, maybe we can work it out. But currently under eight hours every time there's a petition for multiplication, every time there's a policy or program at the mine that is affected in a plan, an event plan or whatever,all the mandatory stuff you have in there already nobody can sit here and convince me that we're hitting the issues we're required to hit adequately in the annual refresher training at this point, and yet we continue to pile and more and more information into that. I think we need to look at what we're doing here.

If you're going to have a regulation that personally impacts individuals to the degree this could, a cursory hey don't take drugs and alcohol in

Part 48 training ain't going to get it. We need to be just a little bit more articulate than that and we need to make it clear what we're dealing with here. Training is going to be extremely important, and to stuff it into Part 48 I think is inappropriate.

And I think what else it does, I think if we put it into Part 48 it has a tendency to indicate to the individuals at the mine site whether that's management level or employee level, now that this isn't really a serious issue that MSHA is looking at, it's just another thing they dumped in Part 48. I mean, that's the reality of it. I mean, I can remember going through Part 48 training every year thinking if they just say a couple of words different this year than they did last year, it would be great. It's just a canned program. And by the way, we have this modification, and by the way we have that. So we need to look at that.

We also need to look at the extent of the testing because I heard a five panel test and an eight panel test and a ten panel test. And I think those things go over the board. But most of the policies that I'm familiar with at the mines that we represent are ten panel tests, anyhow, which is ever expansion.

And in my opinion, in some cases very intrusive and need not go to that extent. But, you know, you deal with those things as they arise. But at any point where you begin to pry beyond what would be absolutely necessary to make sure that that individual is not taking drugs or alcohol while on the job and whether there's impairment or those kinds of things, once it goes beyond there I think we must be very careful. There are issues of privacy here that we have to look at.

Contractor issues. Boy, if you can figure that out, you know, that would be great. That is a tough issue. I think that, and I will MSHA a lot of credit on trying to deal with contractors. I think that's as difficult issue as is out there. You've made some headway and done some good things in the last couple of years. But that is an animal that we obviously wish we could get our hands around better, and I'm sure you do, too.

I think the suggestion that you could include contract employees in an operator's plant is not a viable or a possible effort. And I'll tell you why I believe that is because most operators when they hire a contractor don't want to have any liability for

that individual outside of what is already regulated. We've seen that in court cases. We've seen in the *Blacksville* case and several others.

I hired the contractor. They have an employer, they got to train them, they got to take care of the gas test, they got to take care of those things. I don't want to have the liability for that. I don't see employers running around or running to this issue and say well if you want to be in our drug testing program, you can. I just don't see that. Because they're going to assume a liability. At some point in time there will be a liability or they'll believe there'll be a liability that they're going to have to assume, if they go that route. What you do and how you require the testing is going to be extremely difficult. Especially, you know small mines are one thing, small contractors are certainly another. So how we deal with that is going to be tough.

I've raised a lot of issues. Haven't given you a whole lot of solutions. But, you know, I guess part of my job is to look at this thing from maybe a little different perspective and, hopefully, we can get to where we need to be without throwing

anybody under the bus, so to speak. But at the same time looking at it from a practical aspect that this thing is running -- these requests are running about as fast as anything I've ever seen since I've been dealing with the agency for the past 15 years from the office. I mean, I have never seen anything move down the track this fast. I mean, we can do something with roof control, which has killed a lot of miners in the last five years or we can do something with better rock dusting. I'd like to see it move that fast down the track, too. But I think we just need to just take a breath and see where we're at.

I'll at this point try to be as quite as I can. I'll let Dr. Weeks here give his testimony, and then I'll be happy to take any questions that you might have.

DR. WEEKS: Good morning. My name is Jim Weeks. I'm an industrial hygienist. I work for the United Mine Workers on a consultant basis.

I'm also trained as an epidemiologist, so I look at data and analyze data often.

In the mid to late 1980s I was also a member of the Mining Industry Committee on Substance Abuse, which was a joint labor/management committee

that met for a few years. The principle aim of that committee was to promote awareness of the drug and alcohol problem in the industry. There were a couple of other conclusions that came out of that committee that I think are important to note.

One of them is that alcohol is the most common drug of abuse. I think that was validated by Dr. Goplerud who spoke earlier and by some other speakers who spoke earlier today.

The paper that you included from the Bureau of Labor Statistic by Chris Webber, about half of the people that they found in those autopsies were affected by alcohol, clearly the most common drug of abuse. And that was found by the Mining Industry Committee as well. I think it's still the case.

Secondly, the conclusion that wasn't unanimous on the committee but it certainly was an area of lively discussion was that employee assistance programs or some access to treatment was an essential part of any program to deal with the program of drugs and alcohol in the industry. I think it's been mentioned by others this morning, and we certainly support that, that that is a really essentially part. Otherwise, the problem just gets driven under ground

and doesn't get solved. It gets passed on to someone else or to people's families.

A third common issue that was part of the committee's discussion and hasn't been mentioned here today is that drug testing for either prescription drugs or illegal drugs or any drugs, unlike testing for blood alcohol level, does not detect impairment. What it is does detect is the presence of drug metabolites so that if someone comes up positive for a drug test for marijuana, cocaine or something of that sort, it merely indicates that that person was using that substance at some previous time. Unlike I said for the testing of alcohol, the drug testing itself is not a measure of impairment.

Now let me go on to more or less prepared testimony. And I apologize for having it on the screen instead of on a page here in front of me.

MR. SEXAUER: Just to clarify for the record, on the screen you mean on your laptop computer?

DR. WEEKS: On my laptop, yes. Right. Sorry about that.

Clearly, there's a substance abuse problem in our country. It's big, it's complicated. It

involves issues of safety, of health, of law and order, international politics, economics and so on and so forth. It's a very complicated problem. And dealing with it is complex as well. The treatment facilities are notoriously underfunded in this country so that people have limited access to treatment. That should be expanded in my opinion, but it is a complicated problem.

So that's one thing about which there is absolutely no dispute whatsoever.

The other is that mining is a dangerous industry. It continues to have the highest fatality rate of any industry in the country. And the fatality rate in mining in the United States is generally higher than the fatality of mining in other advanced industrial countries. So there's lot of room for improvement and improving the fatality rate in the industry.

Clearly, these two do not mix. We do not want people impaired or intoxicated or under the influence working in mining. There's no question about that. It's bad for them. It's bad for the people we work with. The problem is what do you do about it and how big is the problem.

I set out trying to find out how big the problem was by looking at fatality reports. So I've read all the fatality reports for 2004 and 2005 in both coal and metal and nonmetal. It's about 50 fatals. About twice the number of people in this room right here that were killed in that year and a half period.

And I looked for any mention of drugs or alcohol or drug paraphernalia or whiskey bottles, beer cans, pipes; anything. It's not there. It's simply not in these fatality reports. So the question is why is that the case? Is it because people didn't look? Is it because it's not there? I don't know the answer to that.

What I did find was something else. One of them is that I think these fatality reports are exceptionally well done. There's an extended narrative, there's analysis, there root cause analysis, there's a number of people that have been interviewed to prepare these reports, there's a very consistent vocabulary in these reports so that when they say this in one report, it means the same as it means in another report, and so on.

I have colleagues who study occupational

injuries and they get excited about one sentence of narrative when they look at fatality reports and no analysis and so on and so forth. So these reports are the best there is. And I think it's a long period of evolution to where these reports have come from.

Now, when I combined the quality of these reports and the absence of any reference to drugs or alcohol, including the quality of the reports including the analysis, it leads me to the conclusion that drugs or alcohol were not an issue or it just wasn't a topic of discussion in any of these fatalities. I don't know that to be the case, because it's hard to prove a negative. But that's the conclusion that it leads me to.

What I did find was, frankly, rather discouraging. It was the sort of usual array of thoughtless and dangerous things that people do in the industry. And I want to go over some of those what they were.

Another thing I did not find is that the proportion of fatalities in coal mining, particularly, from roof falls and from fires and explosions was very, very low. In the past, you know, roof falls was the number one cause of fatality injury. Prior to that

it was fires and explosions. That's no longer the case.

And we didn't get there by accident. We got there by looking at data, identifying hazards, conducting analysis and developing some intervention to prevent those kinds of fatalities. And it has worked. And it's a very useful formula. And it's a formula I think the agency should continue to use. And if we apply it to this problem, there's not a whole lot to work with in terms of estimating the magnitude of the problem of drugs and alcohol and injuries in the mining industry.

Some of things that I did find that are current are that the fatality rate over the past ten years across the board has not changed. There's been really no progress in reducing the risk of fatal injuries over the past ten years in this industry. I could go into detail on that issue on another occasion. But that's the case. So there's room for improvement there.

I also found that there are a lot of fatalities associated with machine maintenance. And they came up, and this is not really a category of analysis, but if you just lump a bunch of things

together; brakes are not maintained, the wrong part was put onto a machine that caused a fatality, jerry maintenance, there was failure to lock out and tag out equipment so people were either electrocuted or pinched against the wall and so on and so forth. And I think maintenance is an issue that the agency should spend some time looking at in terms of trying to prevent fatal injuries. And with that as your mission, and I think you should look at your data. That's one thing that I found.

Management failures were also common. They were in the form of the failure to identify hazards, failure to develop procedures designed to prevent injury, failure to task train, poor communications. This is language taken directly from the fatality reports.

In the metal/nonmetal sector the word "procedure" occurred in 18 of the 22 fatalities. And in every instance it was either the absence of a procedure, an inadequate procedure or failure to follow a procedure of controlling a hazard that lead to those fatalities. Was that due to drugs and alcohol? I have no idea. But we do know that there are things going on in the industry that leads to

fatal injuries, and I think that those are the things that you really need to be paying attention to.

We talked about contract workers, and so I looked at fatality rate amongst contract workers. In 2004 in coal mining the rate of fatal injuries in contract workers in mines was almost exactly the same, and very high, .027 or .028 deaths per 100 workers.

In the metal/nonmetal sector the rate of fatality injuries amongst contract workers is more than three times that for miners. So that's an issue that's just crying out to be addressed in one fashion or another.

Now it's entirely conceivable that some of the people who died were impaired. But the fact of the matter is, based on your own fatality reports, there's no evidence to support that.

Now one would think that after -- see, the Mining Industry Committee did our work in the late 1980s, that was like 20 years ago. And there's been a recent concern over drugs and alcohol in the industry. And I would think that given the concern that somebody would instruct the people who were investigating fatalities to say "Look for drugs and see if there's anything there." You don't have to do drug testing on

people. You can look for any evidence of drugs. You know, like I said, beer cans, whiskey bottles, drug paraphernalia and prescription jars, etcetera, etcetera, etcetera. So you don't have to do drug testing to find out some evidence of that.

And I would hope that you may have instructed people to do that. Maybe they did, and they didn't find anything. But there are ways of dealing wit this problem short of drug testing.

There are other agencies in the government that have expertise to address the drug problem. The NIAAA probably, the most prominent. I think their expertise, their data, their insight is really essential to putting together some kind of program so that it's well informed by the people that have been at this for a long time. And you can come up with a policy that that might work.

Now, just a couple of comments in concluding. I think there's some essential features for any regulation that MSHA puts together. One is that alcohol is at the top of the list as far as a drug of impairment. It affects not only people's safety performance, but affects health care costs as well. The amount of money devoted to health care

directly related to alcohol is really astounding. It involves gastrointestinal disorders, dementia, liver problems and so on which drives up health care costs. So there's a lot of reasons to address some attention to alcohol.

Secondly, access to treatment is essential. I think if there's no access to treatment, then you just drive the program underground.

And third is having small mines that have to be included. There have been a number of suggestions on how to do that. But I don't see any reason that they should be exempt. They have the highest fatality rates. They have a lot of dust exposure, high rates of black lung and so on. These are the problem child of the industry, particularly in coal. So there's no reason why they should be exempt from any regulation of this sort.

Anyway, I'll send in some more coherent written comments at a later time. But if you have any questions, we'd be glad to speak to them.

MR. SEXAUER: Let me ask a question of Tim. I don't know if you're prepared to answer this or will answer it. But I was curious, do you have any drug-free workplace programs in any of your mines?

MR. BAKER: I believe that there are a few in northern West Virginia that are drug-free. Western Pennsylvania has, and I believe that's Foundation, a drug-free workplace.

When you look at it, and you kind of looked at that objectively, that's obviously a good thing to have. You want to have a drug-free workplace, but I think some of the response for a drug-free workplace are post a sign that says this is a drug-free workplace, don't bring any here and you get your discount on your worker's comp. And we do have some. But I'll be honest with you, those are generally local unions that interact with management on site with those things and try to build those programs, whatever they may be. However, because some of them as basic. Some of them are just post a sign. Others of them are, we have locals that work very actively with drug policies, drug programs and dealing with our members or management members or individuals that may or may not have problems.

MR. SEXAUER: We've heard at a couple of meetings that random drug testing is an effective way to reduce the incident of drug problems at mines. And I'd be interested in hearing what your major concerns

would be with the random drug testing programs?

MR. BAKER: And I'll let Jim speak to this also. But I think initially I think part of the problem is when you begin to discuss random drug testing, I think you begin to look very quickly, at least it's been my experience, to see who is exempt from that random drug testing. I'm not sure that random drug testing points or indicates if you do that random drug testing, that there's any indication that it reduces accidents. I don't see that data supporting that. I don't see a drastic drop in operations that do random drug testing. And so that's one concern I have.

The another concern that mostly our folks on the ground deal with is who gets to be exempt, who doesn't have to participate. Special job classifications. Mine rescue team, supervisors who are considered critical jobs. We actually have a program out there where those two groups, which are management groups, are exempt from the random testing and they get tested annually. They must be tested annually after a 30 day notice. It doesn't add much credence to the program.

But my biggest concern, and I've talked

with Him on this on occasion, he can be very articulate about it, is I don't see data that says if you do random testing where on the back side of that you see a drastic or even a major reduction in accidents. I don't see that data. So, I'm not sure it's effective. And I don't know why that is. But if you want to --

DR. WEEKS: Let me say just a couple of things about random testing. First of all, I don't think there's any -- focus any attention on one aspect of a program without placing it in some sort of a context is -- it's very difficult to speak to that. Because it really depends on the whole context. If there's a coherent program together with objectives and measurement, so and so forth, then it's reasonable to ask the question well what does random testing get you and why do you do it. So I think the context is important.

The second thing is that there are a number of operators that have had drug testing programs, random testing and otherwise, for many years. Ten or 15 years and they've tested thousands of people. What have they found out from all that? Where is that data? What is the prevalence and how

many people have they found that test positive for what? Do they test for alcohol or is it just drugs? And what have they gotten from all this investment?

I mean, I think as a reasonable way to run a business if you're going to spend a lot of money in a program, a reasonable question is what do you get for that? Have they achieved a reduction in accident rates, for example? Has that been identified? And I don't mean anecdotes. There are a lot of anecdotes about this. I don't think it's responsible to build policy on anecdotes. They get a critical insight into what's going on, but they don't give us the information that we need to build rational policy. And I think the companies that have done drug testing should bring that data forward and so we can take a look at it and see what have they found out and what are the benefits of doing it and trying to analyze that data. Otherwise it's just a shot in the dark.

MS. CARR: I guess following up on Ed's line of questioning, you know I'm hearing that clearly recognize that substance abuse is a hazard. There may not be the data that shows the pervasiveness in the mining industry per se. And you know, I'm quite frankly new to the mining industry or to working with

MSHA, so I don't know that this is faster in terms of a process. But it seems like this is a real opportunity to get information about what might work. So I would be interested in knowing from you of the elements of a drug-free workplace programs that you're familiar with in the mining industry, I've heard that EAPs and treatment are particularly essential. But are there any other specific things that you've seen that really work and from MSHA role do you think that MSHA could do to help make sure that more mines have the essential elements of a program that protect miner safety?

MR. BAKER: Well, when you begin to talk about EAPs, you know of course we see that in intervention and any assistance we can get as a key aspect of any program that you have out there, a drug-free program or whatever the workplace, or whatever they want to call it to cite, whether that's the federal designation, state designation. But, you know, in our estimation if you're going to effectively help individuals, first of all, those EAPs have got to be built into the system. You can't create a regulation basically for some individuals hangs them out to dry, in essence, saying that listen you have a problem.

And they may not recognize they have that problem. And it may be an alcohol problem, it may be a prescription drug dependency. But there's got to be a support system on the front side of that thing that says if in fact you do have a problem, you know, we're not going to cast to the wolves and be done with you. And now you're getting into -- I mean, you want to see a real problem. Wait until you put that one out there and the companies say now you're regulating how I do my health care system, how I do all these. Because it's going to impact those things. So I think you're going to have a struggle there.

But, you know, what we're looking at I think is we have a lot of long term employees out there. And this, I guess, to a certain extent is not surprising. We haven't had new hired miners in the industry for years and years and years. And maybe that's where some of this excitement or some of this rapid move to judgment comes from. You know, we're now bringing the 18, 19, 20 year old miners in and, if I'm not mistaken, I was the last group of those that come in 30 years ago. So I think that that may be some of the concerns. The workforce in general that I see from an historical standpoint up until the last few years

has been very stable.

But if you do a regulation, you need to look at a couple of things. And that is the assistance program. And I don't know how you do this, this is where I get real concerned. Because now we're going to talk budgetary problems. Because, you know, we have heard for a while now that, you know, there could be budgetary problems within the agency year. The budget's not going to get any bigger, we're going to hold the line and possibly reductions.

If you are going to have a regulation that actually impacts every operation out there, you'd be willing to spend a lot of money and hire a lot of miners. Because if you do not administer the drug testing, if you -- and I mean the agency does not administer those drug tests at those places where you have major problems and they are not drug testing today, the problems are going to grow and they're not going to drug test tomorrow or the day after you do the regulation.

So I think the challenge is huge for you folks, because if you just kick out a regulation and say there it is and there's no money for inspectors and for laboratories to do the testing and that, and

you're not going to do it, you're going to have no impact on the worst part of the industry. This agency will have absolutely no impact where it needs to.

MS. CARR: What about in the nonregulatory route? I mean the Department of Labor already has an education and outreach initiative which is what I've been involved in. Are there any things that MSHA and the Department of Labor can do to help encourage? Because one of the things I'm hearing is that there a lot of programs, some are good, some are bad. And one of the concerns that I've heard is how do we make sure that more mines have more good programs, however you define that? Are there any nonregulatory avenues that you believe are worth pursuing?

MR. BAKER: And I think in a lot of instances, and it's isolated from place-to-place and some are more successful than others. But you know the inspectors currently do walk and talks. And I think in many instances those things are very helpful.

You know, information that comes on drug and alcohol abuse from the Department of Labor or MSHA that can be left at the mine, you will have a certainly have an impact with some miners. And it's an education process. How much of an impact that has,

I don't know. But, you know, I'm not sure how that information or that education process would exactly work. I mean, it's nice to pass information along, it's nice to have those walk and talks.

Will it impact some folks? Yes, I'm sure it will. Will it impact everybody and what will the extent of the impact be? I'm not certain. I'm not certain. I would hope that, you know, when people understand the problems that can be created or the hazards that already exist can be made that much more, they would change their attitude or change their behavior. But that's not always the case. So I think it's a very difficult situation. And I think that that's something that you have to look at, and maybe that should be the focus of this rather than how we're going to write a regulation that not enforceable? Because that's what you're going to do. I hate to be so blunt and so cruel. You're going to write a regulation that is not enforceable. So maybe we should focus on how we touch people in an educative way to educate them about the problems without a threat. Because you do know that the regulation will also been deemed as threatening to many miners. They're going to see you now again as a threat. You have created a

regulation that could cost me my job. And whether you like it or not, that's how some are going to look at.

If they have a problem or not, oh could I get caught in a prescription with that. Or in this instance, you know, you're going to be perceived by many miners as a threat. And I'm sure your inspectors on the ground see that in many operations today. But it worsens the problem. Maybe we need more education rather than regulation. Because it's not going to be enforceable unless you're hiring inspectors and testers.

MS. CARR: Thank you.

MR. SEXAUER: Any other questions?

MR. MacLEOD: I have a question.

Tim, you talked a little bit about what we euphemistically call the eight pound bag, referring to annual refresher training and it being filled and maybe even a little too fill from time-to-time. Certainly up for debate. But you also talked about receiving the same training as I hear from a lot of people year in and year out the same repetitious stuff. Would it be in your thinking okay from time-to-time for somebody to adopt a program to incorporate -- and I'll just use the annual refresher for our

discussion, to incorporate a program maybe under the topic of health as an example or health and safety aspects to talk about availability of drug programs, the hazards of impairment, so and so forth, related to drugs or alcohol abuse as part of an eight hour annual refresher training to maybe add a little diversity in the program and then use something not so repetitive that we all hear miners complain about.

MR. SEXAUER: I'm sorry. Excuse me, Tim. Would you mind speaking at the microphone, please?

MR. BAKER: Yes. And I would suggest that there are a number of things that can be done when it comes to the refresher training course. Our belief is that currently that eight hours is certainly not enough time to get this information. And generally speaking a lot of it is relevant information. Some of it is painfully repetitive. But would a health segment on the impacts of drug and alcohol be good? Yes, I think it would.

I think, however, if you want to clearly-- if this is the issue of the decade that we're talking about, if this is the major issue that we have to deal with, then I think that in order to really emphasize the problem that exists and if you believe this to be

true, that the problem that exists and the concerns that are out there and the hazards that it creates, then it should be something out of that eight hours. that places emphasis on the situation. It says this is how severe we believe it to be.

Generally what I'm hearing from some folks is this a horrible, terrible problem within the industry. It's huge, and there are problems within the industry in a lot of aspects. I don't maybe see this as much different than the societal problem we have with drugs. But if you want to emphasize it, I would say yank it out of the eight hour. Don't put it in the eight hour. You want to have something set aside if it's that important to say "Operator, large and small, for two hours or an hour or four hours, you'd better talk to these folks about the hazards of drugs and alcohol and the impact, because that is a major impact on your operation. You need to talk about it outside of that other stuff." I mean, I would think that would be the biggest bang for the buck.

MR. MacLEOD: Thanks.

MR. SEXAUER: Any other questions?

MS. CARR: I have on more. This is for Mr. Weeks. You described your analysis of the accident

investigation. So those were fatalities only?

DR. WEEKS: Yes, those are only fatalities.

MS. CARR: And you concluded that if drug and alcohol was an issue, you didn't see it on there. You also said is that matter of not looking for it during the investigations. And my question to you is how do we find out whether or not it's a matter that alcohol and drugs are not a factor or just those questions haven't been asked?

DR. WEEKS: Well, I think you could probably find out whether those questions have been asked by asking the people who wrote the reports and see whether or not they looked. That's one way.

As far as answering the question, I think short of drug -- obviously, one could do drug or alcohol testing physically. There may be a variety of constraints why that's not possible to do that. But there's other kinds of evidence. There's physical evidence that one could look for. Drug paraphernalia, prescription jars, bottles of whisky, beer what have you that's possible to get some indication that there was an issue there. So it is possible to look for physical evidence in those instances. But, you know

the evidence, it's just not mentioned in these reports.

Typically these reports are about seven or eight pages of one single spaced narrative and maybe some drawings and photographs and so on. As fatality reports go, they're exceptional.

MR. BAKER: And if I could just comment briefly. Because there was a mention about, I think it was Pennsylvania not paying worker's compensation benefits. And we had an analysis done, and I'll send it over. That's clearly true with almost every state. West Virginia is the same way. Kentucky is the same way. Ohio, Alabama. But we also need to be a little cautious here because let's honestly take the worst case scenario where for whatever reason an individual is working in a mine and he's impaired. And that individual becomes involved in an accident and it's a fatal accident and he or she is killed. There's a family still out there somewhere. And while we can say we can be hard and we can be harsh and say shouldn't have been in the mine impaired, the family there's going to be a very, very detrimental impact to that family whenever there's no benefits paid.

He's on drugs, too bad. Now, he's gone or

she's gone. There's a family that's still left that's going to need some assistance along the way. So we want to be very careful about that information.

And there are instances where individuals don't have autopsies simply because if it's found out, the family loses the benefit. And that's very clear in Kentucky that that does occur. It may or may not be a real substance abuse issue, but if there's a question in your mind and an autopsy is going to prove it, you're certainly not going to send that individual or allow that autopsy to occur.

MS. CARR: Okay. But you're talking about autopsies only. Is there a concern about family members about fatalities on the job and someone else that might have been impaired causing that fatality? Is that a concern of the mining industry?

MR. BAKER: Oh, absolutely. And that's what I said in the opening statement. We do not believe that there is a place for anyone who is impaired to be working in the mines. And nobody certainly -- I don't want to work by somebody that's impaired. And we don't believe anybody should have to. Those are delicate issues also, and I realize that.

And, you know, I wish I had the answer. I

think that it is more education than regulation. But for this discussion, you know, we're going to deal with what potentially will be a regulation. And I think that there are more problems with trying to do that than solutions we're going to come up when the regulation is done. And maybe what we do need to do is back off and have a discussion on how do we educate people rather than how we regulate people. Because, by in large, people don't take well to be regulated. Because this is kind of a personal regulation. People don't take well to be regulated. Maybe we should educate. Maybe we should move in that direction. How we do that, I suppose we all have some ideas. Maybe we ought to sit in a room and discuss those things.

MR. SEXAUER: Okay. Thank you very much.

Do we have any other speakers in the room?

MR. SCHLESINGER: Good morning.

MR. SEXAUER: Good morning.

MR. SCHLESINGER: My name is Ben Schlesinger. I'm from Circadian Technologies, a research and consulting firm that specializes in helping companies to manage the costs, risks and liabilities of running extended hours operations.

I just wanted to talk briefly about an

annual that hasn't yet been discussed directly. Early on Dr. Goplerud mentioned the challenge of workers who have been drinking off duty, that they may arrive at work impaired due what we refer to as a hangover, but that the worker would clear an alcohol screening because the majority of the alcohol had left his system. Dr. Weeks also mentioned the dissidents between drug and alcohol testing that shows only the presence of metabolites without indicating any actual impairment int he subject. Clearly we would wish to reduce the incidents of people arriving at work in any impaired condition through preemptive measures, but there are also tools available that can reduce the immediate risk posed by people who do arrive at work impaired.

At Circadian, we have validated a number of ocular motor testing instruments. Simply put, a worker looks into this testing machine and is presented with a series of visual stimuli. The machine then measures the reaction of the worker's eyes to the stimuli to determine whether the worker is impaired by judging whether or not the reaction of the eyes are prompt and accurate.

The results do not tell us why a worker is

impaired, it's simply that he poses a substantially increased risk if he is allowed to continued working. These devices are capable of detecting not only impairment caused by substances such as alcohol or other drugs, but also impairment causes by fatigue, illness or hangovers.

My colleague, Bill Sirois spoke to an MSHA gathering in Nevada last week about, among other things, the risks of fatigue in mining.

One great advantage of the ocular motor testing devices is that they screen for fatigue impairment at the same time that they screen for alcohol, illicit drugs, prescription drugs. And I'll tell you, I've had a lot of managers complain to me that their protocols only test for illegal drugs and not the prescription drugs that their employees abusing, as well as other forms of impairment.

The cost can be as low as $3 per test.

There are any number of ways these devices could be put to use, and we're currently researching options that would be preferable to employers. Preshift screening is one option, but the natural fear is that employee might be unimpaired when he reports to work, but grow increasingly impaired over the next

few hours.

Random mid-shift screening may be a more effective option, though I understand the break time necessary may present operational challenges in some mines.

I don't run a mine, so I don't think it would be appropriate for me to introduce a comprehensive plan for the introduction of ocular motor testing in all mines in the country, but I'd be happy to contribute to the discussion of such a plan.

In any event, I think it's important that we acknowledge that these tools are out there and that they are effective. And it's important that the merits of impairment testing devices be considered for the safety benefits of keeping miners out of the mines when preemptive programs have failed and miners arrive to work impaired.

Thank you.

MR. SEXAUER: Any questions?

MS. CARR: I just have one. In your experience is this technology used in place of or instead of drug and alcohol testing or is it used in conjunction with in your experience?

MR. SCHLESINGER: It's largely used by law

enforcement right now, comparable to a breathalizer in the scenario post-accident. We have seen some companies that have been using it along with drug and alcohol testing. I don't know that I'm aware of anybody using it in replacement of it, because most people want to know what is impairing their workers.

One scenario could be to use this as the first screening. And if somebody falls this, then you say all right let's go do a drug screening to figure out what's wrong. Or maybe the employee can say, "Listen, I was up all night. I didn't get any sleep and I know that's why I failed the test." Employers would have to figure out how to respond to the different situations that could arise. But I think that there could be alternatives that would use it either way, either by itself independently or along with other drug and alcohol screening.

MR. SEXAUER: Thank you.

MR. SCHLESINGER: Thank you.

MR. SEXAUER: Would anyone else care to address the group?

MR. GERRINGER: Good afternoon. My name is William Gerringer. I'm with the North Carolina Department of Labor Mine and Quarry Bureau. And in

North Carolina our emphasis is basically on education and training. . We do have some enforcement authority, but for the purpose of this meeting there are a couple of things I'd like to say where it's more relevant to training and education.

As far as the mines in North Carolina, we are finding that just about all of our large operations already have a drug-free workplace, you know, implemented. I just want to reemphasize from a training agency, I think our biggest concern is going to be, again, the small guy and how would they fairly implement a program as far drug-free implementing random drug testing.

Also another question or issue we would have, too, would be testing immediately following an accident. How you want to define an accident as far as drug testing and would it be paint to paint or, you know, maybe a falling off a scaffolding screen, you know something of that nature.

Those issues there are basically our main concern. We have already began using substance abuse programs. We presented in the spring thaw workshop this last spring down in Sanford at the spring thaw workshop that was conducted there. And, you know, as

requested by mine operations we're more than grateful to provide that training for them. But, again, briefly, I just wanted to bring those couple of comments.

Thanks for your time.

MR. SEXAUER: Thank you. Anyone else?

Tim Baker, would you be agreeable to a follow-up questions?

MR. BAKER: Sure.

MS. HONOR: Thank you for coming back up here. I thought of it after you sat down. But you said that you thought any type of regulation would be unenforceable. Can I get you to direct your comments a little bit more about what exactly you think might be unenforceable. Because there is a wide range of if MSHA were to do a regulation, there's a wide range of regulations, you know the possibilities are very wide.

MR. BAKER: And if you're going to do a regulation that just basically requires submission of the paper, then I guess you could claim that would be enforceable because you'll get the paper that you want. I would suggest to you that you won't necessarily get an accurate paper but you'll get a paper that says here what we did and here's what we

found. But if you are looking at a situation were you are saying we are going to actually regulate this to reduce and eliminate drug abuse alcohol abuse in the mining industry then what you are in essence saying is you're going to police these problems. The only effective way to do that is if this agency hires the labs, hires the inspectors to go and the samples and actually runs that program. Because you will not from a standpoint of saying okay, if you put into a -- and I'll give I'll use a for instance.

If you put in a regulation that says you'll randomly drug test X amount of the workforce every year and you'll spot check this many individuals every year, you'll get data back that says that that was done. But just because you get data back on paper doesn't necessarily mean you've effectively accomplished anything.

It's a lot like the critical jobs that I mentioned previously. As individuals we were given a 30 day notice prior to a drug test. Now how effective is that? Or if you have, and we have heard people -- I'm sure you've heard horror stories about mine operators not wanting to test their workers because they're afraid of what they're going to find.

If I have a workforce that is productive and on drugs and I'm not going to test them and you implement a regulation, are they going to be tested or aren't they? I would submit to you that probably those individuals who have a problem that are very productive for that current employer aren't going to be the ones tested. So you really have not solved any problem. You've created a new regulation, but you haven't solved the problem if you understand what I'm saying.

MS. HONOR: Yes.

MR. BAKER: I just don't see it -- I see this unless you're going to run the program, I don't see this as a regulation that you can enforce.

MS. HONOR: Yes. And I asked the question because in looking at the metal/nonmetal standard it doesn't have testing. And I'm not aware that MSHA's having any problem enforcing that. And so I was trying to get you to focus your comment a little bit more is it the testing that is unenforceable?

MR. BAKER: Yes. Well, no. I guess then the question in my mind then becomes with the regulation that you currently have in metal/nonmetal, do you believe that that's had an impact on drug and

alcohol abuse if there anything to any major extent in metal/nonmetal? Has there been a major impact there? I would suggest to you that there hasn't been.

If you're going to get a bang for your buck, I don't think we're going to get it this way. I think education, helping people that need assistance and doing those kind of things not only will they get a bang out of, but we'll get a bang for the buck of being able to assist people. I think the regulation is not going to do that unless -- and we've suggested this because the state of Kentucky of also looking at this. And we've suggested that the state of Kentucky fund that program, hire inspectors, hire laboratories, run the program because if you don't, you're not going to get a bang for your buck.

If you are saying there is a major problem and you want to help people, that's the only way you're going to solve it. By saying file some papers, let us know if you have a drug-free workplace and do those kind of things, that won't assist those people who have problems. And that's from our perspective.

But we'll be happy to work with you on an education program or however you want to do that. But

that's kind of where we're at.

MS. HONOR: Thank you.

MR. BAKER: Thank you.

MR. SEXAUER: Okay. Anyone else?

Okay. If there's no one else, then this meeting is adjourned.

Thank you very much.

(Whereupon, at 12:28 p.m. the meeting was adjourned.)