UNITED STATES DEPARTMENT OF LABOR

MINE SAFETY AND HEALTH ADMINISTRATION

(MSHA)

PUBLIC MEETING

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

FRIDAY, OCTOBER 28, 2005

Medical Forum Room B

Sheraton Birmingham

2101 Richard Arrington Jr. Blvd. North

Birmingham, Alabama

BEFORE: BECKI SMITH, Acting Director,
Office of Standards, MSHA

PANEL MEMBERS:

ED SEXAUER, Chief, Regulatory Branch, MSHA

MARCUS SMITH, Coal Mine Safety and Health, MSHA

ELENA CARR, Department of Labor

TOM MacLEOD, Educational Policy, MSHA

GENE AUTIO, Metal/Non-Metal, MSHA

JENNIFER HONOR, Solicitor's Office, MSHA

P R O C E E D I N G S

MS. SMITH: Good morning. My name is Becki Smith. I am the acting director of the Office of Standards for the Mine Safety and Health Administration, and on behalf of David Dye, who is the Acting Assistant Secretary for Mine Safety and Health, MSHA, I'd like to welcome all of you to this public meeting this morning. This meeting, of course, is on the topic of use of or impairment from alcohol and other drugs on mine property.

I'd also like to introduce the others here with me this morning. On my right is Ed Sexauer. Mr. Sexauer is chairing this effort on behalf of MSHA and he is the chief of our Regulatory Development Division.

Marcus Smith is also from Arlington MSHA, he is with our Coal Mine Safety and Health organization.

Elena Carr is from the Department of Labor, and she is in charge of the department's Working Partners Program.

Tom MacLeod on my left is also from MSHA Arlington and he is with our Educational Policy organization.

Gene Autio is from our Metal/Non-Metal organization, MSHA headquarters.

And Jennifer Honor is from our Solicitor's Office for Mine Safety and Health.

This is one of seven meetings that we're having on this topic. We've held two already, one in Salt Lake earlier this week on Monday, and in St. Louis on Wednesday. These meetings were announced in the Federal Register in an advance notice of proposed rule-making which was published on October 4.

The other meetings that we're going to be holding are in Lexington, Kentucky, Charleston, West Virginia, Pittsburgh, Pennsylvania, and Arlington, Virginia. The Federal Register document -- which there are extra copies at the table -- lists the specific information about the times and the location of these other hearings, if you care to attend them.

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 these public meetings and from the 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 on these issues.

Because we believe there may be a variety of approaches to address the problems of alcohol and other drugs on mine property, we're seeking information relating to both regulatory and non-regulatory solutions. The data

and factual information we obtain from these public meetings and from written comments will help us to develop a more informed understanding of the problem and its solutions.

Our preliminary review of our fatal and non-fatal mine accident records revealed a number of instances in which alcohol and other drugs or drug paraphernalia were found or reported, or in which the post-accident toxicology screen revealed a 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 our investigations.

Because we are concerned that alcohol and other drugs can create a risk 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. These efforts include alliances with four international labor unions, production of awareness videos on the hazards of alcohol and other drugs, monetary grants to states to provide substance abuse training, and stakeholder meetings

at the local level to discuss these issues and raise awareness of these problems.

Additionally, during a one-day summit we 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 concerns that such programs were not more widespread 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 these issues; 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 the Department of Labor's Working Partners for an Alcohol- and Drug-Free Workplace -- of which we are a partner -- is a public outreach campaign raising

awareness and assisting employers to implement these programs.

On the regulatory side of this issue, we currently have a safety standard for metal and non-metal 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 non-metal mines, and the rule language states as follows, and I quote:

"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 of 2000 and June 2005, we issued 75 violations of the metal and non-metal surface rule and three violations of the metal and non-metal underground rule, but as you may know, we have no similar rule for coal mines.

Using drugs or alcohol at the 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 a 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 are seeking data and information about six general topics that are outlined in the Federal Register notice, and these six are as follows:

1. The nature, extent and the impact of substance abuse at the workplace, including how to measure the extent of the problem.
2. The types of prohibited substance in use and the problems they present.
3. The impact of effective training to address substance abuse.

4. How our investigation of accidents could address alcohol and other drugs.
5. The components of a drug-free workplace program and how well they work.
6. The costs and benefits of addressing substance abuse at mines.

The Federal Register document poses several questions about each of these six issues, and you're encouraged to respond to these issues specifically ads they relate to the mining community.

The procedure for each of our public meetings is the same, and those of you who have notified us in advance of your intent to speak or have signed up today will make their presentations first. After all the schedule 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 formal 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 any written statements or information today, please clearly identify your material and give it to me before the conclusion of this meeting. I will identify the material for the record by the title as you have submitted it.

You may also submit comments following this meeting, but those comments need to be submitted by November 27 which is the close of the comment period. You may submit those comments to us by electronic mail, by fax, by regular mail, and the addresses are listed in the Federal Register notice.

A transcript is being made of this meeting and will be available on our web site several days after this

meeting, and if you want a personal copy of the transcript, you can get in contact with the court reporter directly.

Thank you for your patience and attention to these opening remarks. We'll now start with those who have indicated a desire to speak, and if you would come forward and give your name, spell your name, and you organization for the court reporter, please.

Our first speaker will be Dr. Thuss.

DR. THUSS: And thank you for inviting us for this opportunity.

I was not really aware of the format we would be taking, so I won't say that I'm particularly prepared for what you need. I would like to address a couple of the issues.

First off, I'm in total agreement with drug testing in the mining industry. I currently am a medical review officer and have been reviewing drug testing results since 1989. I've been a certified MRO since 1992, was one of the first certified MROs in the country. And most of our experience has been with the Federal Motor Carrier Division, DOT, but we have now noticed more and more of the private industry getting into drug testing.

What we've run into also under workers' comp and unemployment issues are the drug testing effects, and

as your own statement brings out, that over 70 percent of people that are using drugs are employed, then we have the issue of drug use in the workplace. When it becomes a public safety issue, then it becomes everyone's issue.

What we have as, I think, currently an issue with workers' comp in the state of Alabama, at least with unemployment and workers' comp, that we have to have a certified review of drug tests, and we've noticed that even though the state law looks at a positive drug test as a presumption of impairment, we've had to go one step further and do what we call a due diligence review and show the impairing effects of the drug were proximately related to that. And that may get back into your issues of how to investigate an accident as to whether or not drugs are involved.

The impairing effects, I'm sure many of you, if not all of you, are aware of the impairing effects of these drugs that we're talking about, and I think at least we would be talking about the five-panel drug test that the Department of Transportation uses. I would even suggest the possibility of increasing that to a wider panel, perhaps a ten-panel drug test, because of the prescription drug use that we're seeing, particularly with hydrocodone and oxycontin or oxycodone.

Just in the case of marijuana, the impairing

effects can be as simple as a lackadaisical attitude, a non-caring attitude, but it can be loss of balance and spatial distortion, and in a mine, particularly in an underground mine, we're already in that kind of environment. We're in a darkened environment, specifically lit only in the areas where the miners are. Any exaggeration of this spatial disorientation is certainly not in the best interest of the miner or the other people around, the coworkers.

Cocaine, amphetamines, other stimulants which we also see, although initially may increase productivity because of the stimulatory effects, eventually lead to paranoia, feelings of superiority -- in other words, ignorance of a supervisor's cautions and safety concerns. They also lead to exhaustion and collapse, and obviously this is not something you want someone to do is to collapse somewhere deep in a mine and non one know where they are.

I think what I would like to see in the drug testing aspect is that the mining industry accept, as a minimal basis, the Federal Motor Carriers regulations as far as pre-employment, post-accident, random, reasonable suspicion testing, and as a minimum, the five-panel drug test which would be marijuana, cocaine, amphetamines, the opiates. PCP, although it's not being seen very

frequently, it is included in most drug panels that the labs have, and we're actually seeing a resurgence of it because people are expecting it to be dropped, and so we're seeing it show up in some areas now.

As far as training goes, I would like to make sure that there is the ability for the mining industry to make sure that their supervisors are trained, that the employees are made aware of drug testing and the effects of drugs, and perhaps the training of eh DER, the designated employer representative, who is going to get this information from the medical review officer that a positive test has been reported.

I'm not sure that I have too much more to offer you. I just basically would like to see the safety issues addressed through a more intense drug testing program. There are some companies that currently are doing drug testing, as you're aware, in the mining industry, and I'm certainly not looking for increased regulatory effects on industry to increase costs. I think in light of the accidents and the possibility of an accident, I would put it much the same as an airline pilot who is now in control of 200 to 300 lives on his plane, and if he's using drugs, he can take them all out. A miner can do the same thing with very little effort if they're under the influence of drugs.

That's about all I have.

MS. SMITH: Dr. Thuss, I'm sorry, could you spell your name and your affiliation for the reporter before we ask questions?

DR. THUSS: It's T-H-U-S-S, C.B. Thuss, Jr., and I'm with Thuss Medical Group and Absolute Drug Detection Services.

MS. SMITH: Thank you.

DR. THUSS: Would the panel members have any questions for Dr. Thuss?

MR. SEXAUER: I have one. Doctor, you were talking about the extent of the problem. In your experience, are you able to quantify for us the prevalence, the extent of the problem in the industries that you're familiar with?

DR. THUSS: Well, I can't give you exact numbers, I can give you ballpark figures. And we actually are not very involved in the mining industry right now, one, because it is just something that they're just now addressing.

In the state of Alabama there are probably 3,800 to 4,000 mining employees, but probably less than half currently are under some kind of drug testing program and we're not currently involved with those.

In industry in general, in the Department of

Transportation Federal Motor Carrier, probably the ballpark would have been 2 to 3 percent on a positive rate for that entire industry. I believe it's now closer to 5 percent, particularly because of the methamphetamine issues that we've run into, truck drivers using this to actually exceed the regulations concerning rest and alertness.

In the construction industry we actually see a much higher rate, actually somewhere between 8 and 10 percent, and some of this is because there's a lot of transient work that's provided to them.

We actually don't see all the positives, we wouldn't have the recordability of all the positives in the construction industry because they actually have utilized point-of-collection devices, instant tests, and because of this, in a pre-employment issue, you would not see those positives necessarily. They're not all run through the laboratory for confirmation or medical review. So whatever there is that's presented to you from the laboratories, we actually don't see those numbers, they're actually low because we're not seeing the point-of-collection device results.

MR. SEXAUER: We've heard at previous meetings that random drug testing is effective as long as it's done in a, quote, fair manner. Do you see random drug testing

as being appropriate?

DR. THUSS: Absolutely. The companies that perform just pre-employment testing, it surprises me, banks -- which you assume would be looking after your money -- they're actually performing pre-employment testing and then don't test any further. It's pretty much an IQ test. The people that you're catching on a pre-employment test only are the ones that either didn't know you do testing or couldn't wait long enough for the drug to get out of their system because they're addicted to it.

Random testing helps to prevent that accident that's going to happen. Post-accident testing tells you why you had an accident oftentimes, but it doesn't prevent it. Random testing does to the point that it keeps everyone aware that they are going to have to present to testing. It doesn't stop everyone from using drugs, obviously, and it depends on what rates you use, the percentages that you choose and the frequency that you choose those.

Department of Transportation, for example, would require 50 percent of the driver pool be tested. It doesn't mean 50 percent of all the drivers are going to be tested, it just means some people may be chosen two or three times. That's truly a random. If it's done in a statistically valid method or scientifically valid method,

truly random testing is worthwhile.

MR. SEXAUER: Could you talk for just a bit about impairment and some issues that you may be familiar with on impairment?

DR. THUSS: Well, impairment, as I touched on briefly, let's say marijuana, cocaine and amphetamines, those are going to be your top three drugs that we're seeing.

MR. SEXAUER: Let me just say when I talk about issues with impairment, I'm talking about what is impairment in terms of being able to clearly identify it from an enforcement standpoint.

DR. THUSS: Well, this gets into some of your questions on one of your categories as far as training goes, I would think.

On impairment, any drug that's foreign to the body has an impairing effect, has an effect on the body. Now, stimulants such as amphetamines, cocaine, methamphetamine initially are not impairing in that they are actually enhancing, increased concentration.

We see this with attention deficit disorder, we provide stimulants, we provide amphetamines as a stimulant to focus the attention. These are low-dose medications. Typically a drug-user is not using low-dose or maintenance medications, they're using it to get the stimulant

exaggerated effect.

Now, impairment can be any number of things, it can be just in the way the person thinks. In other words, I didn't understand what you said; even though I heard everything you said, I'm hallucinating and what you said is something different than I perceive that you said.

The other impairing effects may be slowed reflexes, may be decreased vision, may be paranoia, could be the hearing voices, schizophrenia. It just depends on the dose of the drug that's taken, the frequency, and the type of drug.

So impairment varies widely between the industry and between individuals. That's why we have different doses for different people even on prescription medications.

So I don't know if that answered your question, but if I need to explain it better, ask it a different way.

MS. CARR: I have a follow-up on that. I guess what I'd be interested in hearing you expand upon in terms of impairment is the ability of the drug testing technology itself to identify impairment. And as I understand it, the drug test shows the recent use of drug. Is that sufficient to connote or to assume impairment, or what needs to happen to make the connection that the drug

may have been an impairing cause?

DR. THUSS: As far as the technology goes, and let's look at some of the drugs as well, and alcohol as one of your drugs. Alcohol, it used to be we didn't know the results for three days because we'd do a blood alcohol test. And the impairing effects were something that was trained, say to a police officer and a person driving a car, if you were weaving that was thought to be an impairment, and then if they went through the whole steps of testing to see whether they thought you were impaired, driving under the influence, that would be one thing. And then they would draw blood and we wouldn't know those results for three days.

We now have breath alcohol and saliva testing which can tell you instantly what the amount of drug is in the body at that time, and those are well correlated with impairing effects, depending on what levels of alcohol are present.

As far as drug testing goes, you're absolutely correct, the collection of a sample, say, of hair or urine will tell of the past use of the drug. Hair, in particular, can go back 90 days, 90 to 100 days, but that wouldn't tell you that someone is currently impaired, it just shows that they used the drug in that past period.

Urine is a little better with a smaller window

of detection, better being that you're now looking at more recent use. The problems are you still are at the issue of: Well, if they used the drug last weekend and it's showing up now, are they impaired?

An attorney that's also here, Tom Eden, and I worked together on several cases which we call due diligence review for companies, and as I noted earlier, this has to do with workers' comp, and it would be looking at the impairing effects of the drug versus the cause of the accident.

If we can show that there's a proximate relation, in other words, a loss of balance and the cause of the accident was a loss of balance, and there's marijuana use and one of its impairing effects is loss of balance, then I can then proximately relate those two. I cannot tell you at that point in time that he had marijuana and was smoking it and that's why he had the accident, but I can look at the impairing effects.

If someone still shows up positive, then it means that the drug is still in the system, and as I pointed out also earlier, any drug that's in the system that's not normally in the system, any component that's in the body that's in the body that it doesn't normally manufacture or produce on its own is foreign, and therefore has an effect on the body. So the inference

could be that if you can detect the drug, then it is having an impairing effect.

Now, to take it one step further, though, is we now have the ability to do, again, saliva testing, and in saliva we can actually look for what the levels of the drug are or if the drug is present through a saliva test. Now, that is the exact same as if we had a blood test which is now something you can relate to current impairing effects through toxicology.

So depending on the type of test you perform and the cause or the reason for the test, there are different methods. Random testing, if you're going to do randoms and you want to just know what you have a drug-free workplace and you've already tested this person and they've come up negative before, I would go with hair testing because I can test four times a year and cover the whole year.

If I wanted to show recent use, then I would go with urine testing. If I want to show current impairment, I would probably go with salivary testing as opposed to blood because it's not invasive and actually gives me the same results of what drug is in the system at that point in time.

As far as alcohol, I would go with breath alcohol because the salivary testing, although it's a

useful device, it still would need to be confirmed, and that's why breath alcohol testing can be confirmed within 20 minutes of the initial test.

MS. CARR: I have a follow-up to that, not so much on impairment but on the various different technologies. We've heard recommendations that Department of Transportation Part 40 is a good existing regulation to consider modeling, and we've also heard concerns, though, that it's not flexible enough. And as I hear you talking about the various different technologies, saliva, hair and such, as well as the five drugs that it covers, I'm hearing some sense that maybe that's not sufficient.

What is your sense in terms of the flexibility and the appropriateness of those regulations to actually deal with the drugs that are most likely to be causing risk to safety in the mines?

DR. THUSS: I think using Part 40 or the regulations, the drug testing that is described as Part 40, while it may not be exactly flexible at this time, it is the gold standard, it's the best we've got that's been out there the longest, it's tried and true.

The new technologies, again, offer increased flexibility, increased detection, increased abilities to monitor basically your drug testing program, but they also offer the potential for abuse. The instant test, again,

an employer or supervisor can possibly use this test and there's no written record, there's no laboratory record, there's no chain of custody necessarily.

And as a result, as I pointed out earlier, we don't know the exact figures of positive drug use in the workplace because when point-of-collection devices are utilized and not confirmed through a lab, then we really have no information, that information literally evaporates or it goes out with the trash.

I think it would benefit the industry to look at expanded testing as a whole, in other words, to consider or at least leave open the opportunity for later introduction alternative specimen testing and/or point-of-collection device testing.

I think I the initial stages I would agree that Part 40 is a good starting point, that it is something that's tried and true and has been defended in the courts and would offer the industry at least a beginning on their drug testing. It's something new for mining and I don't think that's something you want to throw in too many changes at once.

The training is going to be a key issue there because if you throw in saying that people can do hair testing or employers can do point-of-collection device testing, can do alternative specimens in general, and

widen your panel too large, you're going to get a new learning curve because there are many groups that will say they can perform these tests for you but may not be experienced in doing that.

MR. MacLEOD: Good morning, Doctor.

DR. THUSS: Good morning.

MR. MacLEOD: You talked a little bit about training and I believe your notion in talking about it was focused on making people aware of the aspects of we have a testing policy, we have random, so on and so forth.

In your experience, how effective is training and discussing with employees the effects of impairment or the effects of taking drugs, just in general, not getting into we have a policy of random drug testing, but just that we think it's deleterious to your livelihood and certainly possibly socially?

Has that proven to be useful that you're aware of?

DR. THUSS: I would say that it's probably better than nothing, but I think there should be more focus, rather than just talking about how bad drugs are -- I mean, we see the commercials. And people, unfortunately, have been given opportunities oftentimes for their training: Here's a videotape, go watch this in the break room. They stick in the tape and eat their lunch and talk about the recent ball games, and when the

tape is over, they can come out and say they did their hour of training. I think there's a lot of abuse of the training, and therefore, ineffectiveness in that.

I think training would be better served in focusing on the employees understanding the safety issues to themselves as well as others. In other words, understanding that it doesn't do any good to look the other way if your coworker is using drugs because that may be the person that causes the accident that either maims you, kills you, causes you to lose your job, or traps you, in this case, in a mine.

The safety issues regarding drugs and drug abuse are not covered as much, in my own opinion, as they should be, as opposed to just talking about drugs and how bad they are. I think we've been told this for so many years that it's becoming old hat: Oh, yeah, I know they're bad for you.

It's like hearing the drug-abuser uses 300 percent more health benefits. I mean, we could be saying spiels to companies over and over and throw out the statistics, and eventually people just gloss over them.

I think the real issues are life-and-death issues, they are letting the employee know that their coworker is actually responsible for their life.

MR. MacLEOD: Thank you.

MR. AUTIO: Doctor, in your experience, what is the percentage of false positives for saliva tests? Is there a problem with that?

DR. THUSS: Well, I don't think there's a large percentage of false positives in any of the drug testing modalities or devices that we use, and the issues of false positives are always brought up, particularly by the people that test positive, that they want to infer that it is a false positive.

If it's sent to a laboratory for confirmation testing, then I would say your rate is minimal, and when I say minimal, I mean less than 1 percent and probably much less than that. In, gosh, I guess, 13-14 years of reviewing drug tests, I've had two results come back to me that was different than the first lab, in other words, having been sent to an alternate lab for retesting, in other words, someone concerned about a false positive.

And the first one came back that the second lab actually had the made the error, calling it a negative when it should have been a positive. This was after an investigation through Washington when we called, at that time NITA, to report a failure to confirm between two laboratories.

The second time, actually the first lab did make the mistake. It was not under regulated testing and

for some reason they followed different guidelines in reviewing non-regulated and regulated testing. They changed that right after that one test which made me feel more comfortable, but I was a little uncomfortable with the fact that the a laboratory had different guidelines, a quality assurance program, because one was regulated and one was not.

False positives in saliva would be no different than false positives in urine. In other words, if there is one, the only way to prove it is to have it confirmed with a laboratory and/or reconfirmed through a second laboratory. And I would certainly suggest that that would be something that we would offer as an MRO, as a medical review officer, to that employee, that if they tested positive and felt that it was a false negative, it could be retested at an alternate lab.

I have no numbers for you on the actual numbers of false positives, again, because many of the point-of-collection devices such as this, once you get a result, then many times they're acted on at that point in time and nothing else is done. The person may be discharged or taken out of service, whatever happens from it, and they don't argue the point, they may just move on to another job. So we don't see those actual numbers.

I think if we involve the medical review

officers in the drug testing process, what it does allow is what's not really a false positive which may be an industry misnomer because if you tested positive for amphetamines and you said that's a false positive, I'm on Aderol, Aderol is going to make you test positive for amphetamines, it's a true positive. It may be that is should be called a negative because you have a valid medical excuse, but the industry doesn't always look at it that way, and that's why the review process, I think, is so important.

MR. AUTIO: So are most people using a follow-up urine test if they're using the saliva test?

DR. THUSS: Well, the employers that we work with do. I can't say for the industry on the whole, I don't have that information.

MR. AUTIO: Thank you.

MR. SEXAUER: I just have one more question. If a miner tests positive for a drug, based on your experience, what should be done? Should be give another opportunity to work, or should there be, you know, that's it, that's the end?

DR. THUSS: My experience with mining is basically related to the last probably five years and dealing with workers' comp injuries and dealing with the mines on some safety issues, they've had health fairs and

all, and inspections, I've actually been in strip mines and underground. And it seems to me that what you see in the mining community are long-term employees, it's not like construction where people move on and they work for construction for six months and then move on to something else. In the mining industry, these are families, some of them multi-generations going into the mine.

I also believe that salvaging an employee that has a problem with drug abuse is a worthwhile and cost-saving method that an employer should consider. We have seen this in the trucking industry, although most of what they do is they terminate due to the extreme liability issues.

In mining -- and I certainly am not minimizing their liability issues -- these people have been well-trained and are used to what they do and have been with the companies for a long time, and I think that if you can salvage them, it would be worthwhile. Whereas, I would say the person that tested positive should be offered the opportunity of a substance abuse professional review, a SAP review, such as is stated in Part 40, under 49 CFR, Part 40.

If they have an EAP program, an employee assistance program, I think it's worthwhile, it gives them the opportunity to come forward before being caught, as

well.

I think last-chance agreements are also valid in that an employee that's been caught and has been trained or counseled and gone through rehab and signs a last-chance agreement, the employer is giving them the opportunity to show that, I think you generate some loyalty between your employee. This may have been the first negative consequence they've ever had with drug use is being caught, and having that first consequence being that you lose your job you've had for ten years and that your family has been involved with for generations is, to me, sometimes more than -- it's not going to be beneficial, it's more punishment both to the company and the employee. If the company can salvage that employee and keep them there, I think you do increase the loyalty as well.

I do think that there are opportunities to step up th random and/or follow-up drug testing for that employee to make sure that they don't sway back toward the drugs, but I think it's worthwhile trying to offer some kind of rehabilitation.

MS. SMITH: Dr. Thuss, finally, if you do have data on the positive effects we're seeing in testing in any of the industries you work with, we would appreciate that for the record. If you have that information and

would like to submit it to us after the fact, that would be very helpful.

Because we have heard in other meetings, positive statements that a testing program does improve safety, and we're looking for that kind of data, and if it doesn't relate to the mining industry, that's okay, it still shows us a pattern. If you have that and would be willing to submit that, we would be very happy to have that.

DR. THUSS: I'd be happy to.

MS. SMITH: Thank you.

DR. THUSS: And who would I submit that to in general?

MS. SMITH: We'll give that to you afterwards. It's in the Federal Register notice.

DR. THUSS: Okay, I have it then.

MS. SMITH: Okay, great. Thank you very much. We appreciate it.

DR. THUSS: Thank you.

MS. SMITH: Our next speaker is Eric Reed. He's not going to be here? Okay.

Our next speaker, then, is Tom Eden.

MR. EDEN: Good morning.

MS. SMITH: Good morning.

MR. EDEN: My name is Tom Eden, and I serve as

counsel for the Substance Abuse Program Administrators. I'm an attorney with the law firm of Wallis, Jordan, Ratliff and Brandt here in Birmingham, and have been working in this industry for probably the last 12 years. Elena and I have seen each other at a number of meetings over the years.

I write the "It's The Law" column for the Drug and Alcohol Testing Industry Association as well, and have developed policies for well over 500 employers across the country that are doing drug and alcohol testing in regulated and non-regulated industries.

I've also developed for SAPAA -- and I'm going to leave you with a copy of some of this -- a DER training program for all the modals, whether they are FMCS, FAA, Coast Guard, pipeline, all the modals that SAPAA has developed training programs, both online and live training programs for them.

SAPAA has also commissioned me to develop a resource that includes all the regulations for all the modals and all the federal testing regulations, and so I'm going to leave you with a copy of this disk as well. It's HTML formatted with all the regulations hyperlinked.

So I've had a good deal of experience, and also Dr. Thuss, your last person up here, gave a good rendition of what he and I have done in the construction industry

for the last six years. We were retained by a large third-party administrator which ran a workers' compensation trust. This was approximately five or six years ago, and they were having a tremendous problem with drug use in the construction industry, and they were having a number of positive post-accident drug tests.

When we started the program, we evaluated over 70 positive drug tests to determine if these people could be disqualified under Alabama's workers' compensation statute which in Alabama we have a statute that says if you are impaired at a DOT level, if you are deemed to have tested above a level, you are deemed, as a matter of law in the state of Alabama, to be impaired on the drug. There's not a separate analysis to determine whether or not there's impairment in the moment, there's impairment as a matter of law or as a matter of regulation in the state of Alabama if you test positive.

But the other piece of the component that he and I -- actually our law firm developed and then Dr. Thuss has worked with me, is trying to determine if the impaired drug was the proximate cause of the accident. Typically, Dr. Thuss would supply me with a list of the impairing effects of the particular five-panel drugs.

We would then take those and we would determine things, like in our evaluation, whether or not the person

was actively in control of the instrumentality that caused the injury, rather than being a bystander in the event, such as a passenger in a car that would be a bystander. And then we looked at whether there was a failure of instrumentality or equipment that could have caused the accident that may have been a reason that the drug impairment didn't cause the accident.

And then we would look at the impairing effects and the manner in which the accident occurred, and Dr. Thuss gave a good analogy of somebody that loses their balance in the accident and the impairing effect of the drug was imbalance which was usually a marijuana effect.

We've evaluated well over 200 cases in that, and I can tell you that the effects of drugs have been horrendous for many of the families who the main breadwinner in the home has been injured on the job, many of them died on the job.

The experience has been dramatic for that industry. When we started, as I mentioned, we had 71 active cases to review and that was in one quarter. Typically in a quarter now, we will have three. Because the word has gotten back to the workforce that if you do drugs, you're not going to get any workers' compensation benefits, and it has dramatically reduced the number of accidents in that entire drug testing pool of employers

that are part of this workers' compensation fund.

In fact, it's a trust fund rather than being an insured program. During the length of the time that we've worked for the program they have returned over $20 million in workers' comp dues and premiums back to their members. It has been one of the most highly successful programs in workers' comp in the state.

So it is one example of a large number of employers who had a tremendous drug problem in their industry that took steps to do it fairly, to do it with a due diligence review program, and now the word has gotten back that don't do drugs here because if you get hurt, you won't get any benefits.

What has happened in all the industries and all the modals in my experience is that until you institute mandatory testing, until you have time period, whether it's random testing, whether it's mandatory post-accident testing, you are never going to get a true reduction.

I take it that the reason that you were commissioned is to think about will a drug testing program serve as a deterrent effect in the mine industry, because that's what you want to accomplish. You don't want to accomplish a program where you're out there just trying to catch people, you want to accomplish a program where we're going to take five or so steps in the program and we want

to deter people from using drugs in this industry because it now has consequences. And if you look at your program like that, like what is going to give me the highest level of deterrence, then random testing, you really just can't ignore random testing.

As Dr. Thuss mentioned, pre-employment testing is nothing but an IQ test. If you can't avoid a pre-employment test, then you haven't read the internet. There are thousands and thousands of internet sites on how to beat a drug test.

We had one of the representatives from SAPAA testify in Congress this summer. One of the committees in Congress is considering some kind of bill to legislate stopping this internet distribution of all types of things, whether it be dried urine or all types of ways they beat drug tests.

But until you put in a random program which is truly random which doesn't mean they get a call the day before and say, Oh, by the way, you have a drug test at eight o'clock tomorrow, would you please report to duty? A truly random drug test is when they get no more than two hours' notice that they are to report for testing.

I firmly believe that the DOT Part 40 program is what needs to be your foundation for the program. If you start from scratch, it will take you years to

implement and develop a program; if you start with Part 40 as your foundation and act like what's called a modal under Part 40, FMCS/FAA, and then develop your implementing regulations to complement Part 40, you have a huge body of regulatory experience, of laboratory experience, of SAPAA experience, of MRO experience that you're able to call upon without a completely new educational program.

And I am also here to say that SAPAA would be more than happy to work with your committee in developing a training program for the designated employer representatives for all these mine operators around the country, just like we've done for the other modals as well. The group has been extremely open to offering that.

And I would also offer, Elena has one of the best videos in the industry on "Young America in Jeopardy". I've used it, I buy it from her office consistently, and every time I develop a drug testing program, I provide her video. It is one of the most impactful videos. Clearly, you could take the video that Elena's department has done, "Young America in Jeopardy" and clip in some mine operators or mine employees giving their personal testimony of why they don't do drugs, and you could have a resource to put out there in a matter of weeks that would be just high quality resources.

The FTA, Federal Transit Administration, recently did a video and did a video training -- in fact, it is on the disk and you can view it in a Microsoft Media Player format -- and it is online so you can put it up. So what we did is we downloaded it on the disk so anybody that's training can pull the video up on a power point presentation and show it with little or no preparation, and it's fabulous. But Elena really has one of the top videos in the industry and I use it over and over.

There was a couple of other topics that you brought up. There's another study. Have you looked at the Cornell study out of Cornell about three years ago? Elena, you may know about that. It showed a 70 percent drug reduction in the construction industry, great study, and I'll be glad to provide that to you afterwards as well.

If you don't have a copy of the United States Post Office study done in 1991, great study because for three years -- and only our post office could do this -- for three years they gathered and took pre-employment drug testing specimens, for three years they held the results, didn't release them, didn't tell anybody positive/negative/anything. And three years later they looked at the whole category of absenteeism, of accidents on the job, of disruptions in the workplace, and they were

able to categorize each one of those and every one of the statistics showed a two to three times higher cost -- they were able to associate a cost factor for workers' comp, for absenteeism -- every one of the factors came back with two to three times the cost of the drug abuser versus the person that tested negative coming into the workplace.

It's never been repeated and probably never will be repeated, so it's a great study that's still out there. I've got the study, I'll be glad to share that with you as well. But a wonderful study of three years, and I think it involved 2,500 employees, so a fairly large study.

A couple of the other issues that you brought up was fairness in the program. If you will implement and follow the DOT regulations for fairness, it has a split specimen program where if you can test the results of a specimen, you're able to send it to a second laboratory and have it tested; it forces the MRO to conduct a face-to-face telephone interview before the results are reported to disclose any usage of other prescription medications that can be cross-reacted; it requires referral to a SAP if you get a positive test so that they can get help.

I mean, I just can't tell you how well I think the regulation was drafted. It's a Q&A regulation so you

can look at a question and find an answer easy, and the way that SAPAA developed it, with this resource, you can word-search it in a few minutes. Literally, Dr. Thuss and I can find an answer to any question in the regulations in probably about 20 to 30 seconds using a resource like this.

So there's some great resources already out there, and I would encourage you to build on that resource rather than kind of creating a new one.

I have worked with a number of unions in programs, I'm a management-labor attorney by training, and the unions I've worked with, my findings are that, first of all, if you mandate a program, the union will adopt it, they will not quarrel about it, they will not fight about it, they won't contest it with the employer.

What they want to know is: are you going to fully educate my membership on what the program is, what your requirements are, what the consequences are; second, are you going to train them on the bad effects of drugs -- and just like Dr. Thuss said, the safety concerns are wonderful, and that's the reason I like Elena's video because the safety concerns are brought up over and over and over; third, how am I going to get help, if I've got a problem, how do I get help and how do I get it without a consequence, how can I come up and ask for help and get it

and not be ostracized or not be treated differently than other employees; if I do test, am I going to be tested in a fair manner am I going to have the right to an MRO interview, am I going to have the right to a retest if I want it, how is the fairness going to be executed.

I can tell you I have not got a single union that has ever said that Part 40 is not fair, so that's the reason I say go with Part 40.

The last one, if I test positive, are you going to give me a second chance to clean up, are you going to give me the opportunity to go through a SAP evaluation, are you going to give me the opportunity to come back, maybe under a last-chance agreement; what are you going to do to give me a chance to clean my life up and turn it around?

And I agree with Dr. Thuss's comment, these are generational people. I only have one client that's a large quarry operation, but I know even in that industry many of these people have worked for years and years and family and things like that. So I think you're going to have a huge desire for these people not just to walk away but actually to get help and turn their life around.

Let me see if there's anything else you had in your issues that I was going to address.

Typically in all the drug testing programs I've

implemented for employers with mandated testing, the workers' comp costs drop by 70 percent, and that's in usually a one-year period of time. And you may equate it to dollars, I equate it to lives and I equate it to people that are fully engaged in working rather than being hospitalized or being maimed by their injury.

So that was what I wanted to leave you with and offer you the help of -- I think you had Betty Emerson on Wednesday, Betty is the president of SAPAA, and SAPAA has a board meeting comint up in a couple of weeks and I'm sure she's going to bring this topic up as well. But it's a great organization to funnel your message through, to set up training programs and really to get a lot of help. They represent probably, I'd say, 90 percent of the Fortune 500 companies around the country in drug testing administration.

MS. SMITH: Any questions of Mr. Eden?

MR. SEXAUER: Are you able to share with us the names of some of the unions that have accepted drug programs?

MR. EDEN: If I can do that later on, let me just get permission, and I'd be glad to do that, but let me just get permission from the client before I do that.

MS. SMITH: Any other questions?

MR. SMITH: In the cases that you discussed

that you evaluated, were you able to make any determinations in the cases where there were drugs or alcohol present that the presence of that impaired and/or contributed to the accident?

MR. EDEN: Yes, and I know this is one of the areas that you work in. The way that we do it is we have a questionnaire and we go through a ten-part questionnaire. The first is what did they test positive for; did they test within 32 hours. Under the DOT regulations, you've got to do your drug testing within 32 hours, alcohol testing within eight hours, so I'm looking at did they administer the test within the time frame, what did it come back positive for.

I next look at what is their job. I'm next analyzing how did the accident occur. You know, give me enough details to figure out exactly how this accident occurred. What were their job duties, how did it occur, what was the nature of the injury they sustained. And then I'm looking at -- and I'm getting this from Dr. Thuss -- what's the impairing effects of the drugs that I have listed at the top, and I may have two drugs, sometimes I may have three drugs they test positive for. Marijuana, cocaine, and methamphetamine is not an unheard of threesome.

And then I'm asking Dr. Thuss to take his

medical knowledge and connect the proximate cause, the way the accident happened with that particular impairing effect of the drug. And so I've got a medical opinion making the proximate cause determination for me.

I'm then looking at was he in control of the instrumentality, was he running the jackhammer, was he operating the truck or the equipment or what was he doing, or was he a bystander. Because if it's a bystander, then I'm typically going to say it wouldn't have mattered, except when a bystander cannot react to an emergency situation, and one of the impairing effects of the drugs, marijuana principally, is inability to act in an emergency situation, they basically become paralyzed when somebody that was fully engaged would have gotten out of the way.

And then I'm looking for is there machinery that broke. I'm typically getting a safety report done by the safety manager: the ladder they fell off of, did it have a broken rung, the machine, was it missing a guard or something like that. So I'm getting a safety evaluation if there's equipment involved, and then I'm taking all that together and we're making a determination as to whether they're disqualified from workers' compensation benefits. The analysis wouldn't be too much different than you would make but you've got a little bit different criteria you're looking at.

But again, the deterrent effect has been unbelievable in that particular industry. In the construction industry, post-accident is the ultimate random test because you just never know when you're going to be injured. But in Alabama it is pretty much mandatory that when you go to the doctor for treatment, then they're going to take a urine sample at the same time.

MR. SMITH: Thank you. Another question, from your discussion about union concerns about the drug testing process, have you dealt with any union concerns about their employees treated differently in terms of testing, or after maybe a positive test came about, than non-union employees? Have you ever dealt with that concern?

MR. EDEN: I have, because typically in a company I'll have some union and some non-union people, and we've agreed with most of the unions to follow the Part 40 formula and they've agreed with that. And what we find is that we have to be very specific on what the consequences of the test are; otherwise, we wind up in a grievance or an arbitration proceeding over it.

And typically my clients have decided to adopt that anybody who tests positive is treated in the same fashion, whether they be union or non-union, whether it be the president of the company or somebody on the shipping

dock, that everybody is treated the same.

So I would encourage you to adopt the same type of regulation in the mine industry that whether it be unionized or non-unionized, they be treated the same as far as the consequences of positive testing.

MR. SMITH: And also, the union and non-union employers also tested the same in terms of frequency and all of that?

MR. EDEN: Yes. Now, Part 40 right now doesn't provide for saliva drug testing. I think there's a very good usage, and Elena was asking a good question before, about the impairing effects or how do you measure if somebody is impaired. And again, I don't think you ought to go there.

I think you ought to deem impairment as a matter of regulation if you test above the cutoff level, because I can tell you can find two toxicologists or 20 toxicologists and you can get them in a room and none of them will agree whether somebody is impaired or not impaired. It is not that exact type of science like blood testing is.

So you've really got to come down to if I want to make it a deterrent effect -- which is what your aim is -- I've got to make a decision how do I objectively measure without having an expert witness every time I've

got to figure it out.

Now, I do say the saliva testing, or something called oral fluids, is very valuable on return to duty. Typically on urine sample, you're not going to get a result right away, you don't know, but if somebody has had an accident, they go to the doc, they get treated, they give a urine specimen, it goes to the lab, you may know two days later or seven days later if they're positive and the MRO has got to interview them.

Most of my clients I set up to use saliva drug testing to return them to duty before I send them back on the job site. It's a very easy thing to do, you can do it point-of-collection device, but it's a really easy way to make sure that that person isn't impaired that I'm sending back out to the work site.

And I agree with Dr. Thuss that oral fluid testing has come a long way in the last few years, and you probably know this, but HHS has under consideration alternative specimen regulation testing for federal employees. So that's under consideration right now, but until HHS comes out with the guidelines, I wouldn't touch it. I would let them come out with their guidelines and evaluate those and then make that decision on alternative specimen testing.

You don't need to go out on any brave new

venture in your program, you need to take the tried and true and follow FMCS as much as you can, change your definitional sections, change what is an accident, and then get ready to go, and SAPAA will be glad to help you with that analysis if you'd like to.

MR. SMITH: I'm glad you stated that. That's why I was asking the question about what your experience was in terms of saying it actually contributed to the accident and how you said different professionals may view it differently.

MR. EDEN: I mean, if you don't come out with this is a bright line in the stand, if you test over this cutoff level at DOT levels, you're going to end up with experts all over the place saying well, you can't tell impairment and I can't tell impairment.

And Dr. Thuss, I think, would agree with me on that, because we've dealt with those issues too. Sometimes we've had to test or take specimens from unconscious people, not as part of the DOT regulation, DOT prohibits that, but just as part of this post-accident testing under the workers' comp statute, and it's just a battle of the experts, so it's not a good thing.

MR. SMITH: Thank you.

MS. CARR: In terms of determining who gets tested following an accident, could you clarify for us, to

your knowledge, what the Department of Transportation requires? Your analysis of determining impairment is very good, but if you only test the victim, does that give you enough information? I can't personally recall how that determination is made, and whether it's feasible in the mines.

MR. EDEN: First of all, you look at each one of the modals has a definition for accident, you know, what's an accident. In the FMCS mode is it a disabled vehicle, did somebody require medical treatment off of the scene, was there a fatality at the scene. They have a little box you go through to determine whether somebody is subject to post-accident testing.

So in yours, you would look at many of the same criteria: did somebody require medical treatment off of the scene; did it involve machinery; you know, damage in excess of $5,000. You figure out what the measure is: did the accident occur deep in the mine. But typically once you get past that analysis of is it an accident, then you look at who's safety-sensitive.

The definition typically across all the modals, if you'll think about this, is even a momentary lapse of concentration can result in a disastrous consequence. If you use that as basically who's safety-sensitive, even a momentary lapse of concentration can result in some kind

of injury, accident, fatality, that's usually a fairly good definition that most of the courts and also DOT has adopted.

Does that answer your question?

MS. CARR: Yes. I guess what I'm getting at, though, in a particular scene there may be the injured person, then there may be someone operating equipment, there may be, as you mentioned, people in the vicinity. Do all those folks get tested?

MR. EDEN: So I'm looking at this is part of the investigation. That's a great question.

MS. CARR: So can that determination be made quickly enough to make the drug tests then relevant?

MR. EDEN: First of all, if you do the drug test in 32 hours, so you've got enough of a window to do a preliminary investigation. Typically, if there is an injured worker and a machine-operator and the injured worker on the ground, the machine-operator up, doesn't see him, hits him, I will have both of them tested because I don't know who's impaired in the accident.

Now, the bad thing is what happens when I get both of them impaired in the accident -- which I had the other day -- what do you do? So you've got to discipline one and disqualify the other one but you don't know who caused the injury in that case, but our determination was

it was kind of both of them.

But typically you set up in the regulations exactly how the designated employer representative or safety or supervisor is going to make that call and that determination of who to test. I'm using this example: who was actively engaged in the activity which resulted in an injury, versus a bystander miner sitting there beating on the wall, picking a pickaxe on the wall that was just there. But who was actively engaged in the activity that resulted in an injury or an accident.

MS. CARR: And that determination is typically made by the designated employer representative or a supervisor?

MR. EDEN: It can be, it can be made by the supervisor on duty. And you've got a lot of the same determinations under Coast Guard regulations that are in here as to what's an accident and who makes the determinations and how they're made. And sometimes if they can't be discounted as involved in the accident, sometimes you test them.

MS. SMITH: Thank you very much, Mr. Eden. We appreciate your comments.

MR. EDEN: You're very welcome. Who do I need to leave this with?

MS. SMITH: I'll take it. Thank you very much.

We appreciate those materials.

We have no other speakers at this point signed up to give official remarks. Can I ask the audience if there is someone who has second thoughts and would like to offer some comments at this point?

Can we go off the record a minute?

(Off the record.)

MS. SMITH: So we're back on the record. I'd like to offer is there anyone in the audience who has comments they'd like to make at this point?

(Inaudible speaker from audience.)

MS. SMITH: Can I ask you to come up? The court reporter does need the microphone for her purposes. Can you again say your name, spell your name and your affiliation?

MR. DOOLEY: My name is Gary Dooley, G-A-R-Y, D-O-O-L-E-Y, Taft Coal Sales & Service.

Mr. Eden made the reference to a 70 percent reduction in workman's compensation claims, but my question was does that correlate with the drug use or is it a total reduction in workman's comp costs?

MS. SMITH: The answer is total reduction.

MR. BYRAM: I did not plan any comments so I'm going to talk off the cuff on a couple of things.

MS. SMITH: That's fine.

MR. BYRAM: My name is Dale Byram.

MS. SMITH: Spell the name for the reporter and your affiliation.

MR. BYRAM: Okay. Dale, D-A-L-E, Byram, B-Y-R-A-M. I'm safety with Jim Walter Resources Mining Division.

This is a little unorthodox, but I was curious as to how many coal companies are represented here today.

(A show of hands.)

MR. BYRAM: Of the coal companies that's represented, how many have some form of a drug program?

MR. SEXAUER: Can I just say for the record that there was a show of hands and it looks like there was probably six or eight coal companies represented.

MR. BYRAM: Okay. And how many have in place some form of drug testing program?

(A show of hands.)

MR. SEXAUER: And the same hands went up.

MR. BYRAM: This is something that's not new to us in Alabama, we've been dealing with substance abuse and the effects of substance abuse within any workforce for years.

We personally have had a substance abuse program in place for well over 15 years at Jim Walter Resources, and much like the doctors have spoken earlier

today, a successful program is very much like a jigsaw program: there's a lot of different pieces that play into this thing.

We choose to educate our employees about substance abuse, and not only how it affects the individual but how it translates into the family as well. I think you can't just specifically address cocaine use or alcohol abuse, you have to educate your employees, and again, this facilitates planting seeds to their children and their families.

We do post-accident drug testing, we do random drug testing of our salaried employees, we do drug testing for causation for our employees, and much like recommended -- and we were glad to hear this -- we have in place many of the systems that you two were recommending, and we see benefits in this. If you look at the records from the early years when our programs began and you compare them to today, we have made significant progress.

And speaking from the coal industry's perspective, one of the things that several of the people here and I have talked about, and we have questions when it comes down to the agency enforcing such a regulation, there's concern on the operator's part in that if a company -- and you saw the show of hands -- if a company has in place a program that is functioning, that is

successful, and then for some reason an employee is found to be positive within that workforce, how can the agency justify a violation issued to the operator when the operator has done everything he can to try and educate and prevent substance abuse within their workforce? That's a concern to us.

We also feel like that for this type of effort to be successful, for us to try and affect the person who is using or abusing alcohol or drugs, that the responsibility has to be placed on that individual. If not, we become enablers to help them continue using or abusing if all they do is just get confronted and the operator gets the violation associated with that.

I don't have any answers to that, but we feel that is something that the agency must pursue.

MS. SMITH: We, in fact, have heard that same concern at these other hearings, so we appreciate your comments on that.

MR. BYRAM: We encourage this. Again, we're fortunate in Alabama that the majority of our operators do believe in substance abuse training for their employees and substance abuse programs. We hope that this effort will help encourage other operators within the country, if they don't have that, to put something like that in place. Thank you.

MS. SMITH: Let me ask a question before you leave. What do you believe that Mine Safety and Health Administration could do to further help the industry? You have policies and programs in place, but is there something else that we could do to assist you?

MR. BYRAM: I think at this point in time you're doing the right thing in trying to increase your understanding of the problem within the industry. Again, I don't know how you're going to be able to accomplish this task without -- there's a lot of little pieces again -- without involving the confidentiality that's so important when you are dealing with someone in an attempt to help them recover. I don't know how you can work the enforcement side of this into where it complements the efforts that he companies are doing trying to reduce substance abuse beyond, I guess, helping to ensure that companies have in place some form of substance abuse program.

MR. SEXAUER: Mr. Byram, how do you deal with independent contractors at your facility as far as a drug problem or drug program?

MR. BYRAM: Well, the way we conduct our business, if an independent contractor comes on our property and they show some form of effects, then we'll treat them just like we would one of our employees. We

don't contract miners like many other coal companies do, the majority of the contractors that we will have will be some form of construction, not coal runners.

MR. SEXAUER: So you don't necessarily require them to have a program in place such as you do at your mine?

MR. BYRAM: I can't speak to that, I really can't, but I can respond in writing on that.

MR. SEXAUER: Thank you.

MR. BYRAM: We have disciplined contractors in the past where causation was identified and then testing followed.

MR. AUTIO: You said your program has been successful. Can you give us maybe some ballpark numbers on any increases in productivity or decrease in absenteeism, or anything like that?

MR. BYRAM: We would probably be able to respond in writing on that. I don't think it would be accurate if I just gave them to you off the top of my head.

MR. AUTIO: Thank you.

MR. SMITH: Dale, could you describe your program, how it works?

MR. BYRAM: Okay. We test, like many companies, for pre-employment physicals. Once a person is

within our workforce, again, we do random testing for our salaried workforce, we do causation for all employees, including the salaried workforce.

If a person is found to be positive, the medical review officer will contact the designated person at Jim Walter Resources after the do the second testing and the communications with the individual. They then are offered an opportunity to enter our program. If they enter the program, they will make an assessment, whether it be inpatient or outpatient, and they will go through this process, and they will then be randomly tested for a year after that. If they're found positive within that random testing period, then they'll be discharged.

If an employee decides that they have a problem and comes forward and asks for help, then they're offered the opportunity, they'll be evaluated, they will either be inpatient or outpatient, depending on the situation. They too will be randomly tested within a year after that.

We believe that you invest in your employee.

MR. SMITH: Do you do post-accident testing?

MR. BYRAM: Yes, we do. And they contact the same representative at Jim Walter Resources for a positive on post-accident. We have a very limited number of people within our company who will actually know the name of the employee involved in any of these programs.

Confidentiality is pretty much the heartbeat of a program like that.

MR. SMITH: In the post-accident situations, are you testing, as an example was given before, like an equipment operator and also the one who was maybe struck by a piece of equipment?

MR. BYRAM: That would be causation and that would have to be determined at the scene. You can't go bak and take two or three days to determine that and get an accurate drug test.

MR. SMITH: Thank you.

MS. CARR: Do you have any experience with folks who test positive but don't meet the clinical criteria for needing treatment? I mean, if the drug test doesn't necessarily show a diagnosis of substance use disorder, do you have a mechanism for getting them some lower level kind of help and returning them to work.

MR. BYRAM: If a person tests positive under our program, that's positive. The people at our employee assistance will then determine whether their degree of rehab or training is inpatient or outpatient, and they have to follow those mandates to be able to return to the workforce.

I heard the gentleman speak earlier about the in-depth investigations that they do to determine if it

actually was involved in the causation of the accident. We're a little bit more simple than that. If it's a positive, then we deal with that.

And I think I heard the doctor say that when you test, if it's in the system that there is a potential for some level of impairment. If someone has positive at the workplace, their body is just like their lunch bucket: they brought it into the workplace.

MS. CARR: I really wasn't getting so much at the impairment issue but it's my understanding and belief that a positive drug test does not a diagnosis make. I mean, there are other things that go into a diagnosis as to whether someone actually needs treatment which is what the EAP does, and although it's a fairly good indicator that if someone comes to work using drugs that they maybe haven't been able to make a rational choice not to use, so that might indicate the need for treatment, but not everyone necessarily needs treatment.

I'm particularly familiar with some union programs that provide some educational opportunities that are not actually inpatient or outpatient treatment, so to speak, and then subject them to follow-on testing.

I was just wondering whether or not your program had any experience with that, or pretty much everyone that tests positive goes through some form of

treatment, and it sounds like the latter.

MR. BYRAM: Well, everyone that tests positive will go through speaking with the medical review officer, and then an evaluation if necessary is done through the EAP.

And again, we do extensive training for all of our employees. We do poster campaigns, hotline card numbers, and it's been established within our company for so long, we take for granted some of these things because it's accepted and understood.

There is another thing I'd like to bring up, if you don't mind, and I heard someone spoke about this earlier. There is an issue within all industry, not just the coal industry, that has to be addressed, and that's prescription meds. If we're made aware that a person is on any med that has a warning label that it could affect response times, we can't let them work. If I knowingly let a person go underground like that, then I've subjected him and myself to unnecessary liability.

And you can have a workman's comp situation where a person sustained an injury and he was prescribed Lortab. We cannot let that person come back in our workforce. Now, they can prescribe other type of analgesics that doesn't suppress any response time, and our physicians that treat our patients are aware of that

and they work with the patient and the company and when that's possible, they do that.

But you can have a guy that played softball this weekend and sprained his ankle and his doc gave him Lortab, and if we don't know it, he's working side-by-side with his coworkers and potentially under the influence.

MS. CARR: Appreciate it.

MR. BYRAM: Thank you.

MS. SMITH: Mr. Byram, we appreciate it. Thank you for your comments.

MR. BYRAM: Thank you.

MR. ORICK: My name is Billy Orick, B-I-L-L-Y, O-R-I-C-K. I work for Twin Pines Coal, and I'm also the president of the Alabama Surface Safety Association.

One concern that we have is the requirement of an EAP and the cost effect on us as small surface miners, that's a big concern for us. Because our company has a zero tolerance policy, we have a drug-free work environment, and we have mandatory random drug tests, we pre-employment test, we post-accident test, and we have random drug testing. And if you're on my site, you're considered part of our workforce, vendors, contractors, whatever all fall under that.

But the required EAP would be of concern to us and some of the people that are in the membership of our

group because of the small size. You know, you have 20 employees and you have two employees that are on EAP, you can't afford that. And that's something that is a concern to our people in our association, and I just wanted to make that point.

MS. SMITH: And what do you think that MSHA could do to help you in that regard?

MR. ORICK: What would an EAP program cost? For people like Jim Walters and all, it's expensive to them because they have a lot larger workforce, but sometimes they can absorb better than a smaller coal company that has 15-20 employees. It would just be almost impossible for a company like that to absorb one or two people off work in an EAP program and having to hold their job open and things like that. So a required EAP program would limit these companies.

MS. SMITH: If this is something that we were going to propose, your concern would be how we structure it, the requirements of that, and the cost on the small operators.

MR. ORICK: Right, that's correct.

MR. SEXAUER: Can I ask Mr. Eden if he has any comments on that?

MR. EDEN: Typically, my recommendation would be for your group to consider levels of employer size as a

basis for differentiation of benefit programs, so that if you have an employer that employs, say, more than 100 employees, then you may have a mandatory EAP program, but if you have an employer less than 100 -- and I'm not setting an arbitrary number here, but it's very much like FMLA coverage. FMLA only covers employers of 50 and more within a 75-mile radius. So you can set up, typically, those types of differentiations on those.

I will tell you that none of the modals really mandate EAP, there are some states that mandate EAP, but none of them typically mandate. All they do is they typically mandate if you have a positive test, before that worker can be put back to work, they've got to go through an SAP program and they've got to complete that program, at least the part of the program.

So none of the other modals have a mandatory you've got to go through an SAP program. Typically, in a union contract that's an issue to be negotiated, and again, you can differentiate based on employer size too.

Does that help?

MS. SMITH: Thank you.

Thank you, Mr. Orick. We appreciate that comment.

Yes, Mr. Dooley.

MR. DOOLEY: Yes. My name is Gary Dooley,

again. I represent Taft Coal Sales and Service.

My concern would be also that there be a division possibly to allow us to have the zero tolerance as a beginning. In other words, if there's two or three stipulations, at least give the small operators an opportunity to have zero tolerance.

The training, yes, we agree with that. We train our employees, do pre-employment drug testing, do the post-accident, do a probable cause test. We have no objection to that. We welcome any help we can get to try to determine if our employees are involved in either illegal or abusive drug use. To me it is very critical.

We like the zero tolerance approach. Then you have no arguing as to whether he's impaired, not impaired, or whatever. To me, it's fair if I look you in the eye as a new employee and you've been tested clean, and I tell you that we have a zero tolerance for drugs and alcohol use on mine property, if you choose a different path to that, you know what the outcome is going to be. To me, that's a reasonable approach to reasonable individuals, properly cautioned, properly trained, and properly told what the outcome will be if they violate that.

Now, does that solve all of our problems? It doesn't, obviously. And I'll send you some facts later on for the comments, but we have pre-employment testing and I

would somewhat disagree that it's just a IQ test because we do have a few that we set up for pre-employment testing that never show up. We have about 6 percent -- and evidently that runs about industry-wide -- ratio of positive tests on pre-employment drug testing.

We can, I think, naturally assume -- and I don't have the data to back this up -- probably that there is an equivalent to that in the workforce that we're not aware of, somewhere out there, just based on discussions that I've had with other operators. Maybe some of these gentlemen could maybe give us some statistics on that.

After you go through all this, even the random testing, I'd be interested to know what percentage. We call them drug-free, but if it's as big a problem as we think it is, I mean, how do we know? If you don't know, what's the speculation on what are the statistics that will even get by us after we try harder? Will it be 5 percent, 10 percent of the workforce, whatever that number might be, that we could reasonably assume will be out there in the workforce beyond anybody's knowledge, on a day-to-day basis?

That's all I have.

MS. CARR: I appreciate your comments and just wanted to clarify that your concern and your desire to have a zero tolerance policy available is the cost to

small operators of having to retain employees that might test positive?

MR. DOOLEY: That would be partially but not totally, if we could be guaranteed that that would correct us, but I think if we could go further and see the results of some of the programs like that, you'll find that the success rate is probably going to be very low. I don't have any statistics to back that up, but maybe these guys could tell you. The people that enter the employee assistance program, I can't imagine that that would be foolproof. You still have a wide spectrum of not solving our problem, in other words.

MS. CARR: I personally have some qualms about the definition of zero tolerance because it can mean different things for different folks. I personally believe that you can have zero tolerance for drug abuse in the workplace and still have the opportunity for treatment and return to work and still have zero tolerance. But your definition is you get warned, you test positive, and you are removed from the workplace.

MR. DOOLEY: I would think there's a lot of people that are helped with programs and maybe clean up and go their entire life, but to me, you're starting behind the eight-ball. If I come to you and ask you for employment, I should be clean when I get there, not expect

you to give me an outing to do whatever I want to do and then expect you to clean me up. I do not think that's a reasonable approach. For me to clean up, yes, and for me to give you an opportunity after you cleaned up, yes. So we agree, basically.

MS. CARR: My point being that I think it helps to clarify what is meant by zero tolerance because it does mean different things, but I think we're all looking for the same result: that we have safe and drug-free workplace.

MR. DOOLEY: To us, always after the fact it's too late.

MS. SMITH: Okay, thank you very much, Mr. Dooley.

MS. ROSS: My name is Vivian Ross, V-I-V-I-A-N, R-O-S-S. And I'm the clinical coordinator for Gulf Medical, and I just wanted to talk a little bit about the EAP program for the smaller companies. And what some of our companies do that are smaller and cannot afford an EAP program, they use a SAP professional, and if that employee tested positive, then they give them the opportunity to pay out of their pocket to go to a SAP professional, go through the counseling, go through the teaching, the training, and then once the SAP professional gives his recommendation to the company, then it's up to them to

rehire him.

But you can give them the responsibility of going through the program and paying themselves out of pocket and still be tested for a year of follow-up visits, and then after that time, being on probation, going through the program, and at the end of the program get the recommendation. And then the cost is not on the smaller company, you put the responsibility back on the employee that has tested positive and does have a problem.

So that is one way for smaller companies, you know, somebody that's been with the company, something happened in their lives that kind of turned and they started doing drugs, and you want to kind of help them come out of the situation, that is a possibility, and that is one of the alternatives than just saying okay, that's it.

MS. SMITH: Is it your experience that small companies -- do you have experience with small mine companies that have put programs in place that have that ability for the offsite or off-company, if you will, use of other resources?

MS. ROSS: Yes, and most of the time if they already have a drug program or MRO in place, nine times out of ten, the MRO has a person that works with him that is a SAP person, a substance abuse person, that can come

in and then just say okay, we've got this, sit down with the MRO, the designated employee representative and the employee and say, okay, we can offer you this service. So a lot of companies are doing it that don't have that many employees, does not have the resources to implement an EAP program.

MS. SMITH: I think for the record if you could provide us some cost information later about these kind of services for the small employers, because in the mining industry there are a large number of mines that are considered small, under 20 employees. So costs related to those kinds of companies using these kinds of services would be helpful if you could provide that.

MR. ROSS: Eric Reed which is our SAP professional was supposed to come and he did have somebody who was in crisis, so he could not come. So we will get that together and get you that information. Thank you.

MS. SMITH: We appreciate that. Questions?

MR. SMITH: You stated already, but could you go over again the end of the process after the person has paid for that, they've gone through and they have basically stopped the drug use?

MS. ROSS: Yes. Once they've gone through the program and the SAP professional will do a written evaluation to the company, and at that time he will sit

down with the company and the designated employee representative and the employee, and they will talk and go over everything, the results of the evaluation, and give his recommendations whether he's able to go back to work, should be allowed to go back to work, or needs further testing. If he needs to go into an inpatient situation, then he would make that recommendation to the company.

And then he will sit down and sign an agreement to be tested for up to a year in follow-up visits, and anything that's deterrent from that, then it's an automatic termination of that employee.

MR. SMITH: Thank you.

MR. SEXAUER: I would just like to ask if anyone in the audience who is basically a no-tolerance advocate, if they have any reaction to the idea of employees paying out of their own pocket for this sort of program.

MS. SMITH: What we'd like to do at this time is we are going to go off the record -- no, we're not, we have another speaker.

MR. TURNER: My name is Larry Turner, L-A-R-R-Y, T-U-R-N-E-R. I am with Local 2245 that's at Jim Walters Mine Number 4.

I couldn't sit there and let just companies speak, so I think we needed a union. But some questions

that have come up. At Jim Walters, we have an excellent drug program. There are some questions though, however.

And we as the union all advocate a zero tolerance in our workplace. I do not want to work in a mine with someone that is under the influence. It's hard enough, difficult enough and dangerous enough without adding any other difficulties in the mines, so I think I speak for most all of us in the union.

Some questions that have come up in our meetings and such as the random drug testing program we do not have now, we have word and indication that that may be taking place, but we have a problem with maybe how random, how is it implemented, how does Jim Walter, in my particular situation, implement that program, how confidential the results are.

A man or a woman getting drug tested and that getting into our community and the talk in the community that Larry was drug tested at the mines, and those sorts of things are a real concern for us in the union.

At this time we don't know how they would do random drug testing, it's just in the murmuring at the mines that this may become a problem. I don't see that necessarily as a problem, random drug testing, I would just like to know the facts.

The gentleman referred to the DOT program. I'd

like to have copies of that just to find out what those programs are and maybe, as suggested to you, that there would be guidelines that you may use in those programs. So that's a concern.

And another concern is I get nervous any time the government gets involved in my personal duties, in my personal workplace, in my personal things. The government has a lot of charge in my life that I don't necessarily agree with, so it makes me nervous -- this is just a personal statement -- that the government would get more involved in me personally. Although I do advocate a drug-free workplace, it just makes me nervous that they have more charge of my life than I want to render.

I'm not sure about the interpretation that the company has of random, the proof of what random is as a union. We've heard at some other mines in our area that do currently have a random drug testing, is it truly random. How are they picking these people; how are they picking the union versus the company?

You know, in our situation in mining, and most of you probably well know if you've been involved in mining, there seems to be sometimes this struggle between the union and the company and for and against, and this sort of thing.

So it's a concern of ours how that random would

be implemented and who's in charge of this so-called random testing and whose names are picked and those sorts of things, and how often would a person be picked within a year's period and those sorts of things. Those are just topics that have come up as we have spoke about this in our union meetings or in other meetings, whether it be the local union or international union.

So that's just my comment for your use and my own use of you hearing this.

MS. SMITH: Your comments pose a little bit of an opposite in terms of us and what we're trying to do, because on one hand I'm not sure if I hear you suggesting, we the Mine Safety and Health Administration Look at the definition of random in some way, help identify this or set some guidelines for identification of random, and on the other hand you express your concern about the government's involvement in this issue. That's a little bit opposite issue there of how and what our role should be as the federal government.

Because at this point in this effort, this agency is not clear in terms of the balance of where our involvement will and will not be. We have limited regulatory requirements, as you know, right now in this area. We have the ability to do the training, the outreach, the guidance and that kind of assistance.

So what we're trying to get from these meetings are these kinds of issues, these kinds of concerns to help us come up with a game plan for what is our role going to be in providing assistance, providing a regulatory scheme, or a combination of that.

But with raising this kind of concern, then, of course, it gives us one more thing to kind of think in terms of what is our proper role in terms of helping companies identify, providing guidance, providing tried and true programs already. So it kind of gives us someplace to go, but you're raising a little bit of an opposition in terms of your issues, and we appreciate that.

Questions for Mr. Turner?

MR. SEXAUER: Can I just say that in the course of our reviewing the testimony at the hearings and deciding how we're going to proceed, one of the things that we're going to do is take a look at the DOT program, just in the normal course of review.

If it would be helpful to you, you indicated you'd like to see the program, we could post it on our web page as a source for you to go ahead and make it a little more accessible. If you go into the comments section, it will probably be posted there. If you go into the current rule-making and then go into comments, we'll somehow

attach it in that section.

MS. SMITH: Thank you, Mr. Turner. We appreciate it.

Any others?

(No response.)

MS. SMITH: What I think we'll do is we'll go off the record for about an hour and if someone comes during that time and wants to speak and signs up, we'll of course be here. About twelve o'clock we'll come back on the record, ask again if there are second thoughts about comments that anyone in the audience would like to make, and then we'll open back up the record for those comments. If we have no other interested comments when we come back on the record, then we'll officially close this meeting.

So we'll go off the record for a while. Thank you.

(Off the record.)

MR. SEXAUER: Back on the record. We received at the meeting this morning a disk entitled "Complete Federal Drug and Alcohol Testing Regulatory Compliance Resources" by the Substance Abuse Program Administrators Association. And we also received a document from SAPAA Worldwide entitled "Welcome to the SAPAA Designated Employer Representative (DER) Training Course and Certification".

We'll go back off the record.

(Whereupon, at 11:05 a.m., the meeting was recessed, to reconvene this same day, Friday, October 28, 2005, at 12:00 p.m.)

MS. SMITH: We are back on the record. Did we have anybody that came that would like to say a few words as we're back on the record?

(No response.)

MS. SMITH: In that case, then we are going to close out this public meeting and we appreciate you all coming. Thank you very much.

(Whereupon, at 12:00 p.m., the public meeting was concluded.)