UNITED STATES OF AMERICA

DEPARTMENT OF LABOR

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)

+ + + + +

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

HELD OCTOBER 26, 2005
At The Hyatt Regency Hotel
1 St. Louis Union Station
St. Louis, Missouri

9:10 a.m.

PRESENT:

BECKI SMITH, Acting Director, Office of Standards, Regulations and Variances, MSHA

EDWARD SEXAUER, Chief, Regulatory Branch, Office of Standards, Regulations and Variances

TOM McCLOUD, Training Policy Organization, MSHA

GENE AUDIO, Metal and Non-metal Division, MSHA

MARCUS SMITH, Coal Mine Safety and Health, MSHA

PRESENTERS PAGE

P R O C E E D I N G

(9:10 a.m.)

MS. SMITH: Good morning. My name is Becki Smith. I am the Acting Director of the Office of Standards, Regulations and Variances for the Mine Safety and Health Administration. On behalf of David Dye, who is the Acting Assistant Secretary for Mine Safety and Health, I would like to welcome all of you to this public meeting this morning.

Also with me are other MSHA folks this morning. On my left, -- on my right, I guess, you moved on me, is Ed Sexauer. Ed is the Chief of our Regulatory Division, and he is heading up this Agency effort as we look into this issue. Marcus Smith is from our Coal Mine Safety and Health office, in MSHA; Arlington. Tom MacLeod is from our Educational organization within MSHA and Gene Autio is from our Metal and Non-Metal organization within MSHA. Also in the audience is Elena Carr. Elena is from the Department of Laborers Working Partners Program. And I think some of you will want to chat with Elena about resources available from the Department's perspective, if you care to.

As you know, the purpose of this meeting this morning, is to talk about the Advanced Notice of

Proposed Rule Making on the Use of or Impairment From Alcohol and Other Drugs on Mine Property. This is one of seven meetings that we are having on this issue. We held our first meeting in Salt Lake City on this past Monday, and the other meetings that we will be holding after today, will be in Birmingham, Alabama, Lexington, Kentucky, Charleston, West Virginia, Pittsburgh, Pennsylvania and Arlington, Virginia. The Federal Register document lists the dates and exact locations for the remaining meetings, and there are copies at the back table if you would care to pick up a copy.

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 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 are seeking information relating to both regulatory and non-regulatory solutions.

The data and factual information we obtain

from these public meetings and 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 or other drugs or drug paraphernalia were found or reported, or in which the post-accident toxicology screen reveled 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 our investigations.

Because we are 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. 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 the 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 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 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 assists 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're 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. The rule language states, 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 of 2005, we issued 75 violations of the metal, non-metal surface rule, and 3 violations of the metal and non-metal underground rule. We do not have a similar regulatory requirement 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 are seeking data and information about six general topics that are outlined in the Federal Register Notice. They 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 substances 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 work 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 are encouraged to respond to these questions specifically as they relate to the mining industry.

The procedure for each of our public meetings is the same. Those who have notified us in advance of their intent to speak or have signed up today to speak, will make their presentation 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 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 you must submit them by November

27th, 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 web site within several days. If you want a personal copy of this transcript, you can make arrangements with the court reporter.

Thank you for your attention and patience to these introductory remarks and we will now begin with the first speaker. We would like to get an accurate record, so if you could state your name and your organization clearly, and then spell your name for the record. Our first speaker is John Gallick. Good morning.

MR. GALLICK: Good morning. My name is John M. Gallick; G-A-L-L-I-C-K. I'm here today representing Foundation Coal Corporation; F-O-U-N-D-A-T-I-O-N, Coal Corporation. I'm here today to discuss the Advanced Notice of Proposed Rule Making concerning impairment from alcohol and other drugs on mine property.

For the record, I am the Director of Safety for Foundation Coal Corporation. Foundation Coal Corporation is the fifth largest coal company in

the United States. Its affiliates operate both surface and underground mines in West Virginia, Pennsylvania, Illinois and Wyoming. These operations include relatively small continuous miner operations, larger size continuous miner operations, large wall well mines, smaller surface operations and large oak pit mines. The demographics of the employees at these various operations vary, but they pretty much mirror much of the overall industry, that is a workforce of approximately fifty years old, a newer, younger replacement workforce coming into the operations. Some of the mines are represented by UMWA and others are not represented.

I would like to give first, a broad overall statement concerning this issue, and then some specific information directed to your questions. I would then like to ask the panel some questions for my own clarification, and finally, I'll try to answer any questions that you have of me.

The issue of drug alcohol abuse in the mining industry is not new. The statistics for the general population and specific non-mining industry certainly are vindicative of a problem. The Health and Human Service Survey of 2003 found 16.7 million illicit drug users over the age of eighteen, 12.4

million or 75 percent of these drug users are employed in some kind of occupation, and probably most disturbing of all, one in five people in the national workforce who died on the job have tested positive for drugs or alcohol.

There are some statistics in this study for a subgroup of mining and construction industry and these statistics may be even more telling. Fifteen percent of this group admit to alcohol abuse, 15.7 percent of this subgroup admit to heavy alcohol abuse within the last month of the survey, 12.9 percent admit to illicit drug use within a month of the survey and 10.9 percent admit to alcohol dependency within a year of the survey. Other studies have shown that drug testing has found 4 to 5 percent of all tests test positive. So, whatever number we use there is a significant percentage of issues of drug and alcohol abuse in work places.

These statistics and our own observations, have led our affiliated operations to implement drug and alcohol testing programs at their operations. Not discussing specifics of each plan in place, which do vary, in general, all the operations conduct pre-employment testing, all operations have a for cause standard in their plans and some have random sampling.

All these operations have an Employee Assistance Program or EAP available to the workforce. The specific operations continue to evaluate their programs and to modify and adapt them when appropriate.

Each operation's testing protocols are somewhat different. Some require urine tests at an off-site location, usually a hospital. Some use on-site saliva testing with an off-site visit only required if there are positive test results from the on-site saliva test. And some testing in between.

Tests for alcohol and drugs can be broadly categorized as pre-employment testing, to keep someone out of the workplace that cannot test clean on a known scheduled test. Two, for cause testing, which is a reactive test in my mind, since most for cause testing that we have found has been post-accident. Although, for cause testing can be suspicious or unusual behavior. And three, random testing, which in my opinion is pro-active and conducted to try to ascertain a problem before an accident occurs.

Ironically, it has been proactive testing or random testing, that has been the hardest to implement in organized labor organization operations. Yet, it is the random testing that is the best

deterrent for reducing drug and alcohol abuse in the industry. It is our opinion that random testing is the best method for preventing or at least minimizing drug and alcohol abuse in any operation.

Drug testing protocols now, are well established in a lot of other industries. All the urban legends such as fake positives due to parties where someone smoked marijuana, the famous poppy seeded bagel, should no longer be used as a reason for not conducting testing. We need to look at drug testing as another tool in the toolbox of accident prevention.

I'll now try to move on and answer some of your specific questions you posed in your Advanced Notice. (A). The nature and extent and impact of the following: The question you posed as such, are difficult to answer with specificity or with any certainty. In the testing implemented at Foundation Coal's affiliated operations a potpourri of drugs have been detected. Anecdotally it appears that the controlled substances are being used and abused in the workplace as well as illicit drugs that originally initiated most of our drug testing protocols. Abuse of prescription drugs appears to be on the increase, relative to illicit drugs. And drugs used appear to

be as much regional and age-related as anything else. Testing protocols need to be flexible and proactive enough to adjust to the changing drug abuse climate. For this reason all operations test for a range of drugs that will also include many prescription drugs involvement.

The misuse or abuse of alcohol and drugs is a societal problem. There is no reason to believe that mining would escape this issue. I can state that where random testing is a part of the drug testing protocol there have been numerous instances where employees either tested positive or chose to quit prior to being tested. I can also state that where random testing has been in affect for a period of time, no employees have failed recent random planned or for cause testing. I can further state though, that few reasonable suspicion or for cause testing, except for those that are used for post-accidents, are completed at any of our affiliates. It's difficult to detect these problems using a suspicion or unusual behavior.

The concern should include both the people who quit rather than take a drug test, and those operations that have not yet implemented a random testing program. People who quit may end up being

another employer's problem as they have not yet been terminated for failing a drug test. Experience with random testing with our organizations lead us to believe that random testing will over a period of time, be the most effective deterrent to drug use and abuse in the workplace.

The risk of drugs to miners safety cannot be easily quantified. There can be a direct link of an impaired employee causing an accident, either an injury or a non-injury event, but the data on this is not readily available. MSHA has never, for example, indicated in any fatality report that I am aware of, the possible impact that drug or alcohol impairment, despite normally, I would assume, obtaining autopsies of fatal accidents. I don't know, what does your data show? I have never seen the details on an MSHA web page about the relationship of fatal accidents and drug usage, except for anecdotal comments made at various conferences.

I believe there is also a subtler, indirect effect of drug and alcohol abuse. Indirect affects range from absenteeism to simply failing to stay focused on your assigned tasks. Whether these tasks are installing roof bolts, taking methane tests or repairing equipment, does anyone really want those

tasks assigned to someone who is impaired? Again, I don't believe there is any quantitative viable data available for the mining industry other than extrapolating data such as those surveys done by Health and Human Service.

(B). Prohibited substances and impaired miners. Although I have no experience with the metal, non-metal standard, the present metal and non-metal standard is not appropriate in my opinion. I do not think it is appropriate to use as a template a standard that would permit the citation of an operator where a positive test was obtained. Further, given the fact that MSHA and the Commission interpret the Act as imposing strict liability, this sort of regulation is wholly inappropriate to address a condition that a miner would actively try to conceal.

Those of you who know me know that I am not a believer in excess regulations. I've testified numerous times in public hearings and this is the first time that I have actually requested a regulation. I do think this issue requires a simple stated regulation, but not the one used in metal and non-metal. I believe the regulation should simply require each operator and each contractor doing mining business, to establish a drug and alcohol testing

program that includes pre-employment testing and random testing following the nationally accepted protocol guidelines. The regulation should not detail the types of testing, assumptions to be tested, or action to be taken on positive tests. The operator should be responsible to develop the plan and action to be taken on positive testing.

MSHA's role in this regulation would be three-fold. First, to ensure that a testing program is in place. Second, to provide training and education materials. And third, to provide an updated drug testing web site that will provide information to the operators on the latest testing systems, adulterants being used and the results of the data collected on testing programs and outcomes. If the successes and failures are not tracked and reported to the industry then the value of the program and the need to modify it over time will not be clear. If a drug testing program has been a benefit in other industries, such as transportation, then we need to have MSHA assess the data and tell us if we are doing a good job or a poor job in its implementation.

One fear I have of a regulation is that the regulation will attempt to detail the testing protocols, drugs to be tested and action to be taken.

Drugs, drug adulteration and drug testing systems are constantly evolving. Regulations such as those developed in the Omnibus Transportation Employee Testing Act are specific and prescriptive as to how the test will be conducted and for what substances.

For example, you're testing using a five drug test that tests for THC, cocaine, amphetamines, opiates and PCP, are the only accepted methods of testing. Today, saliva testing is commonly beginning to be used as an alternative. Also hair testing is being used in some instances. As important, the drugs to be tested must change to adapt to the drugs of choice in a region or in our society. Oxycodone and other drugs not normally abused were not on the radar screen when the Omnibus Transportation Employee Testing Act was instituted. Also, the saliva testing not yet accepted under the Omnibus Transportation Employee Testing Act, offers a number of benefits to an operator.

For example, testing can be done underground without a privacy issue. And adulterants are not yet known for saliva testing. Yet, the Omnibus Transportation Employee Testing Act is not flexible enough to make these types of changes. In fact, the draft protocol changing some of these dotted

lines was proposed in 2001. Yet, to my knowledge, has never been finalized. Every regulation MSHA develops must be developed and written to avoid this type of mistake.

The questions asked in Part B indicate to me a wish to detail a company's response to positive tests. Sort of the cookbook approach. Clearly any attempt to develop a regulation with prescriptive requirements would actually hinder drug and alcohol programs that have been developed by companies. The basic goal in developing a regulation should be to bring at least a minimum testing program at all operations and for all mine contractors.

That said, the general position of Foundation Coal's affiliates is that EAP Programs are in place to provide help to any employee who voluntarily seeks help for a problem. Once an employee tests positive on a random test or for cause test, that employee's issue is handled through the appropriate corrective system used at the mine. All positive tests subject that employee to face corrective actions, frankly, up to and including discharge.

Training. Training on the issue of drug use at our affiliates is also a tool. Most operations

conduct training on drug and alcohol abuse as part of their wellness programs. Alternatively, and usually in conjunction with these wellness programs, drug abuse literature is given to employees as a general safety topic for group safety discussions.

Prior to implementing drug testing employees were given training on both drug and alcohol abuse and our EAP Programs. This provided employees an opportunity, sort of a window, to understand the issue of drug and alcohol abuse, to recognize the testing that we were going to be implementing and to explain the avenues to seek out for themselves or someone else, through the EAP Program. In short, use the implementation of the testing to give people plenty of time to step forward, seek help, get help, and avoid adverse impacts to the employee and their family.

I personally do not see a need for the Agency to modify Part 46 or Part 48 to address this issue. There are enough topics already listed for training and retraining, and frankly, if you are going to reopen (48) for a rewrite there are plenty of other issues involving training that I believe would have a bigger safety impact.

(D). Inquiries following accidents. As I

have stated previously, a basic drug and alcohol testing program will include a provision for cause testing, which would include post-accident. Again, it is my contention that each operation in its program should identify the level of event that triggers a for cause test. Frankly, sometimes method of testing and the personnel available to conduct the test determine that level.

For example, a surface operation with a full twenty-four hour, seven day a week staffing may conduct drug and alcohol testing for any equipment damage, up to a serious accident and from a broken headlight, without disrupting its operation. Whereas an underground mine with a minimal staff may only do a post-accident test if an injured employee is transferred to the hospital, since the hospital would be the conductor of the test. Obviously, someone's suspected impairment would also be subject for any for cause testing in any case.

As saliva testing becomes more accepted, some of the destruction issues and concerns may be reduced. My concern with the question is that the goal of establishing a drug and alcohol testing program is to reduce and hopefully eliminate the use of drugs and alcohol in the workplace. I do not want

to be subjected to a violation because an accident occurred and a drug test was not conducted, or the test itself was botched by somebody on the property. That said, I do not believe that for cause testing should be any part of a regulation imposed by the Agency.

In your Notice you stated that the previous five year period, -- in the previous five year period 78 violations were issued in metal and non-metal under Sections 56.20001 and 57.20001. My question to you is what is the analysis of these violations? For example, was a company cited after an accident where post-accident drug testing revealed drug/alcohol? Or are these violations where an inspector identified someone on the property obviously impaired? I don't know the information about metal and non-metal.

I do not want to implement drug and alcohol testing regulations where we spend our resources debating whether this or that event should have required a test, or whether a botched chain of custody test constitutes a violation. I just don't see how a for cause test standard can be developed that is not going to become a legal nightmare.

You're looking at someone who has heard

the infamous statement, "It's your plan," from inspectors as they proceeded to interpret my plan in their own way and write a citation based on that interpretation through a lot of my years. That has happened enough times for me to be weary of endorsing any regulation that details how a company's drug and alcohol testing plan should work. Random and pre-employment are relatively simple for both the industry to comply with and for MSHA to enforce. Stay in that area, that's my suggestion.

That said, clearly if Part 50 were to require reported drug results the only actions that should be included would be those actions that are MSHA reportable. However, as you know, many reportable accidents are not done until well after the work shift on which the accident occurrence has ended. MSHA needs to stay away from for cause testing. Otherwise, you encourage operators possibly to test much more than may actually be needed just to avoid additional citations based on subjective assessments of an inspector well after the fact.

Part E, drug-free workplace programs. All of Foundation Coal's affiliated operations employ most or all the components of the Drug-Free Workplace Program. As I have previously stated, each plan is

different and location management decides what is best for them. I believe that any program must contain education, an EAP pathway, a testing protocol and consequences for failing to adhere to the drug-free workplace. I believe that any program that incorporates all of the above elements will be the most successful. Whereas programs omitting one or more of these above-stated elements will have a less successful program.

Part F, cost and benefits. I am not in a position to really discuss the costs in any detail. Obviously, there is a cost for training and education, a cost for an EAP Program, a cost for drug testing kits, et cetera. The cost to initiate a program would basically be a one-time cost. I include in the one-time cost, training materials, program development, literature, et cetera. Ongoing costs would be associated with the sampling actually being done in the mines. Again, each type of testing system, saliva, urine samples, on-site persons, hospital testing, et cetera, will affect the total cost of the program.

In summary, Foundation Coal Corporation supports a basic MSHA regulation that would require all operators and contractors to develop a drug and

alcohol testing program that would include random testing and pre-employment. The details of the program would be up to the operator to develop. MSHA's Education and Training Unit could develop training and educational materials to help the programs. No operator should be discouraged from developing a more comprehensive program, but any program element in a program that are above the basic minimum required by the regulation, which should not and would not be subject to MSHA oversight and enforcement.

Finally, I would like to ask the panel a question or two about how the metal and non-metal rule has been enforced. Do operators of metal and non-metal need a sampling plant? Are employees involved and accidents required to be drug tested? I am not familiar with the implementation standard and I am certainly curious about it.

Thank you for your time and I will try to answer any questions you may have of me.

MS. SMITH: Thank you, Mr. Gallick. Before we get to your questions, I would like to ask you, you mentioned that you do not have with you today, cost information about the components of the plan. But if you do have those costs that you could

submit for the record, you know, if you have information about the first one-time cost for training, et cetera, or the regular and routine and recurring costs for sampling, those kinds of things, those would be helpful to us. If you choose to submit those for the record.

MR. GALLICK: Okay. I obviously can gather the information on what it costs us to do a pre-employment test, a for cause test, a random test, for the cost. I can do that. And obviously, the literature and materials, I can do that. I would be reluctant to try to calculate how many minutes or hours of time has been used for wellness training, et cetera. Our EAP Program I would not be able to tell you how many people, or how much it has cost us for rehab or whatever. But I can do that for you.

MS. SMITH: Well, if you do have, and wish to submit that information, we would appreciate it.

MR. GALLICK: Okay. Thank you.

MR. SEXAUER: If I may, if you wouldn't mind elaborating for us. You had said that random drug testing is the hardest to implement, but it's the best method.

MR. GALLICK: Yes.

MR. SEXAUER: In your experiences why is it hard to implement?

MR. GALLICK: Probably being very specific, it's been hard to implement at our Union affiliated operations. We have had to negotiate that and it's been a not well accepted, and it has not been easily accepted. At this point our Union affiliated, -- our affiliates that have Union workers have not implemented random. We have been working on that subject, but at this point in time, curbed.

Also, let me follow that up with one further point. Those operations that are doing random I think you will find a very, -- what we have seen was that whatever we saw initially as a problem, whatever initial number of people that failed or quit, once the testing goes through a couple of cycles the number of positive tests drops to almost zero. People either work through the EAP Program, leave the payroll or in some fashion get themselves properly clean.

MR. SEXAUER: Well, I appreciate that comment, that was going to be my next question to you, if you would amply on that. But, one other thing. Is there any reason to think that a regulation that would require random drug testing could not or would not apply to a small mine? We have operations with just a

few people.

MR. GALLICK: That's why I think random is the easiest to implement with a regulation. Where we have implemented random, most, -- well all of our operations, we do some of it, -- we use a third party, -- let me start again. If you're a small operation, and we have small operations, we're a larger parent company, but the individual companies are smaller. Random is a scheduled event. I mean not scheduled that the employees know, but scheduled on-site. The number of who needs to be tested is scheduled by someone, typically a third-party person. So there is no issues over always picking you type of thing. And on-site with only confirmatory tests sent to a lab if you test positive; the on-site test is positive, that is the least intrusive, even to a small operator. Obviously, if you are only operating a one or two unit operation your random system could be set up a couple of times a year and the percentages would be relatively small. I don't believe it would be an overburden. I'm sure that some of the other smaller operators will disagree with me, but I don't see it as being a burden.

MR. SEXAUER: Do you see any complications in applying the program to independent

contractors?

MR. GALLICK: I would think the contractors will be the most difficult. But frankly, a lot of contractors are already doing it. We use many contractors that do pre-employment, for cause and random. They do it much like the CDL(s) with respect that they pull people and have them tested. And getting back to what I said earlier about salvia, that's what makes salvia so much simpler to use. Most people's issues with drug testing, other than, -- I'm not really saying employees' issues, most operators issues are the inconvenience of a urine sample. (A), somebody has to observe the sample. (B), you have to have the facilities to go with that person. You know, all those issues. Saliva testing is much easier, you can do it out in the open, you know, not in a public forum, but in an office. You can pull somebody into a room and have that done. I think that it would work with contractors as well. It would be a much simpler system to use.

I believe you can probably go without a third-party, if you're small enough. The third-party just telling you, -- kicking out this is the name and this is the date that you ought to do the test and the saliva test being conducted by somebody who had been

trained in taking the test. If it's a close call for positive, then that person obviously, has to go off to a site, off-site to get a follow up test to confirm it is a positive test.

Would it be a burden? Yes. But, I don't see anyway around it. And I'm sure the trucking companies that went through it probably argued the same issues.

MR. SEXAUER: I want you to know that we appreciate your thoughtful comments.

MR. GALLICK: Thank you.

MR. MACLEOD: I have a question. You had mentioned that the regulations ought not to define possibly, what drug you need to test for, for all sorts of good reasons; that variations of the universe are of course, different, you know, cultural needs and usage of drugs. Also, with random drug testing what is random? I mean random can be once every twenty years, once every week, you know. My question is do you think the federal government in writing a regulation should have maybe a basic minimum standard of let's say, things to test for, as just a baseline, and maybe some notion as to what random might be? Because I can see leaving it wide open, you know, random becomes just that.

MR. GALLICK: That's a good point. My assumption when I said random testing was a percentage of people, -- a percentage of your employment, tested each year, and a number of tests per year, sort of being divided out by the number of people you would have. So, random would be annual with some number percentage based on your total employment.

As far as the drugs, my concern there any regulation could say at a minimum, these are the drugs tested. But, what I saw on the CDL, and I read a lot about it, was that for instance, there's only the five drugs. And frankly, when we put our first programs in we followed the CDL and we found out from some people at Gambit (phonetic) Labs, you know, the people that do the testing, that gee, you're missing the drugs of choice. And we said, no, no, we're doing CDL. And they said well, they don't cover it. We're miners, we're not as knowledgeable. And so that's my only caveat there, is if you put any minimums in do not let us slide where that's the only program that's acceptable.

One of the concerns of a lot of our affiliates was we are testing at a high level program, don't let us water it down below where we're at. So, we want to lift the ship up a little bit, but not pull

this end of the ship down. That's my only concern, -- or one of my concerns.

MR. MACLEOD: Do you require the contractors who work on your property to have programs such as your own?

MR. GALLICK: Each affiliate operates differently. Each one of our affiliates have different rules. I am not sure any of them require the contractors. I do know that contractors do do the testing. I would have to check to see if anyone has a, -- in the contract they sign with contractors, a requirement for drug testing. I'm not totally sure of that.

MR. MACLEOD: Thank you.

MS. SMITH: Any more questions of Mr. Gallick? Elena.

MS. CARR: You made a case for why you felt like probable cause defined as post-accident, reasonable suspicion, does not work very well. You spoke more about the post-accident, given that the window of being able to determine what's a reportable accident sometimes make the drug testing moot. What is your experience with reasonable suspicion, and what gets in the way of that being an effective approach? Particularly, does training feed into that?

MR. GALLICK: For the purpose of my discussion I put for cause testing both as reasonable suspicion and post-accident. Some people would divide them out and say there are six different ways of drug testing, pre-employment, reasonable suspicion, post-accident, random, return to work, -- and I'm missing one other one, poor performance, you know, the absenteeism and whatnot. My concern was two-fold. What I've seen on reasonable suspicion, speaking of only that, is

that, -- as a practical matter I'll speak first, and then a regulatory matter.

As a practical matter it is difficult, no matter training you get; and we have given our foremen training, I have gone to training, and I'm sure all you people have had at least some training on recognizing impairment behavior or recognizing poor performance as possibly drug use and all that. But yet, I have seen time and again, where we have missed that and we are surprised when an employee was positive in some manner. We find out later anecdotally, either they've quit, they've been discharged for other reasons, whatever, and you say I never thought that he had a problem. It's very difficult for a supervisor to recognize anything but

the real obvious, very obvious impairment.

I believe when alcohol was a major, -- as you can tell by my age, I went through the '70(s) and '80(s) as a mining person, and when alcohol was a driver, most of the impaired people who came in with alcohol, you could smell it. You had some fairly simple testing mechanism to say boy, he smells like he's been drinking and whatever, and you could react to it. Those reasonable suspicions were fairly easy to do. In today's world, or at least from what I see, our foremen are not, -- no matter how many classes we give them, they are not going to see somebody who's marginally at issue.

From a regulatory standpoint my concern is once we start saying reasonable suspicion is part of the testing protocol every failure to identify somebody, becomes an argument between us and the Agency. "How could you not have noticed this? Well, he looked okay to me. Well, you know, obviously, we did a post-accident test and he tested at da, da, da, for cocaine." You know, that type of thing. That's my concern.

I would rather not get wrapped around the actual debate on who should be tested. And that's why I thought random and pre-employment, -- pre-employment

is real plain, before you start work you get a drug test. If you can't pass that one, you're probably the worst employee. Random lets everybody know that there will be tests done and it will be done across the board. And it can be done very mechanically so that it makes it somewhat cookbook for both you as a regulatory agency, us as the implementors, and the workers knowing what is going to happen. It's a simple system.

For cause, we have had numerous debates over for cause, where somebody, as I said, -- I used the term botched, or in hindsight after an event someone says gee, we should have tested that. Well, we didn't think of it at the time. Okay, you know, that concern.

I believe every internal program should have for cause, reasonable suspicion, all those terms should be in your internal program. Your regulatory programs should just include random and pre-employment. Did I answer that?

MS. CARR: Yes.

MS. SMITH: Mr. Gallic, as a follow up, earlier in your remarks you talked about random testing and your evaluation seemed to be that its benefits did shows folks either quit or they self-

identify to the EAP they have a problem, or they got clean. Do you have some analysis information or data on that, which sounds like a very positive trend, that you could share with us for the record? Maybe not today, but something you could provide to us. Because it sounds like a positive kind of reaction that you're getting from this program.

MR. GALLICK: I'll follow up with our affiliates that have the random testing. In our discussions about the issue I was told by them that the, -- I call it the class of the good programs, where you did the education and followed up with a random system, we had a very low positive. Other systems where we've had the random we've had, I'll say several or a number of people failed their test, but at each subsequent sequence it dropped until we were down to zero or near zero. And I think that's a success. I'll look for those numbers. I'm sure they have the numbers, I don't have them.

MS. SMITH: That would be helpful information for us. Thank you.

MR. AUTIO: You had some question on the metal and non-metal?

MR. GALLICK: Yes. I was really curious about the 78 violations.

MR. AUTIO: I think one of the questions about do we have a testing requirement in metal and non-metal. We don't.

MR. GALLICK: Okay. Do you require a plan?

MR. AUTIO: No sir.

MR. GALLICK: Okay. I thought maybe that's where the violations came from?

MR. AUTIO: Most of the violations would be observations. And in my experience most of them are alcohol-related.

MR. GALLICK: How many people would be observed?

MR. AUTIO: Well, it's usually finding alcoholic beverages on the mine site is probably most of the violations.

MR. GALLICK: Okay.

MR. SEXAUER: As we proceed, -- assuming we will proceed with some kind of a proposed rule, we'll probably elaborate on that information, do a little more detailed presentation, or add information as we proceed.

MR. GALLICK: Okay.

MR. SMITH: I had a question about the for cause testing, when you were stating some of the

pitfalls we want to be aware of, in your opinion. What if the rule required that for fatal accidents?

MR. GALLICK: I've always assumed that MSHA got an autopsy report which would include toxicology results. I have never seen them, -- let me rephrase that. Fortunately, we have not had, -- well, let me rephrase that. Over my lifetime of work I have had a number of fatal accidents in some relationship to where I've worked and we've always had an autopsy of some sort done by a coroner. Generally directed not by us, but by the organization, the county organization, and those results, you know, although they were long after the 7000-1 Report was completed by us, the results did come forward. I assumed that MSHA would get this. Have the same access and same ability to get that information without a new regulation. Am I incorrect?

MR. SMITH: Those tests are not always performed in every situation. It depends on the location, the state, the county. But that's not always performed. If it's done we are able to get it.

MR. GALLICK: Okay.

MR. SMITH: But I was just wondering what your thoughts were in terms of the fatal accident situation, whether that would be in your opinion, a

good provision to place in the rule?

MR. GALLICK: Well, I wouldn't have a problem with that, I guess.

MR. SMITH: Okay.

MR. GALLICK: You know, I guess that's one that we all ought to know what the situation is. The more information we have on that accident the better off we are. So, I wouldn't have a problem with that. I just assumed you all got it.

MR. SMITH: Okay.

MS. SMITH: Any other questions for Mr. Gallick? Elena.

MS. CARR: One more. You mentioned that all of your affiliates have Employee Assistance Programs, which is commendable. Does that go for the smallest, as well as the largest? And if the smallest have them, I often hear that for small operators it is a financial burden to have the EAP, so many chose not to. How do your affiliates normally handle that? Do they just pay for it or do they group together to purchase services?

MR. GALLICK: Each EAP Program is handled by the individual affiliates or some of them are combined together. Some of the smaller operations report to one organizational group. Not necessarily

Foundation Coal, but some other intermediate grouping.

The type of EAP Program varies. Some of the operations have, -- they all have a confidential thought, obviously, EAP driven. And some of the initial visits are covered through the EAP Program, and then follow up visits are covered, at some point, through your health coverage or whatever type coverages you have in your system. Those require some expense by the employee as well as the employer. Some of our operations have several visits, -- the first several visits are paid for by the company in an anonymous type of way. We have just always believed that EAP Programs are raking up a basic service that you need to have as an operator.

MS. SMITH: Mr. Gallick, thank you very much for your comments this morning. And if you do have additional follow up written comments we would like to have them and November 27th will be our deadline for those.

MR. GALLICK: We intend to submit brief comments as well as today's work. Thank you very much.

MS. SMITH: Thank you. We don't have anyone else signed up to give official comments at this point in time, but is there anyone in the

audience who would like to make comments now? Yes sir.

MR. OWEN: Good morning.

MS. SMITH: Good morning.

MR. OWEN: David R. Owen, representing the UMWA. I would like to say first of all, that the UMWA, -- the United Mine Workers are well aware of the problem. We have no problem with drug testing, we want to make sure that it is done above board. The testing needs to be across the board.

The random testing, the National Labor Relations Board has ruled that that is a negotiable item. And we do have a problem with implementing, in the middle of a contract, a policy that has not been addressed, and our questions and our concerns have not been answered. Some of our concerns are that if you implement a drug policy and you really and truly want a drug-free workplace, it's going to have to include legal drugs as well as illegal drugs.

There's a policy out there where they have a tendency they want to cut down on our Workmen's Comp and everything else, they send you to their doctor, they send you back to work automatically. It does not matter what you're on. It does not matter what your aliment is. We've had people sent back to work in the

mines with casts all the way up to their groin. And the same underground, we've had people underground with crutches. Now, they didn't last long, we got them out of there, but they are abusing the Workmen's Comp. They are abusing the drugs in order to save on their Workmen's Comp.

We are looking for you to regulate, but we want it across the board. And it's very imperative that the treating physician that issues those drugs, has the say whether they hinder your ability to perform the work. You've got to stop the practice of sending them to their doctor, which overrides yours, and sends you back to work.

We have people that are out there right now that are wearing, -- one individual anyhow, wearing a morphine patch and taking Vicodin on a daily basis.

Now, I have concerns over this. It's not going to matter to my wife or my family, whether the person that runs over me or cripples or maims me, it's not going to make any difference at all whether he was on legal drugs or illegal drugs. If he's on drugs he does not need to be there. And this is our main concern, that everything is on the up and up and that it's done properly.

As far as the random testing we do have a problem with that, because it does not give us a chance to negotiate and get in there with the protection we need. What do you do in the case of a false positive? What alternatives do you have? You need on-site testing to where it gives you an immediate reading, whereas if you know that you haven't had a problem, -- and you do talk, because there's a lot of over-the-counter drugs out there that will give false positive readings. We need the opportunity to counterfeit (sic) their initial test. But, if this is sent to the lab and we don't know about for three or four days later, or three or four weeks later, we do not have that opportunity. And this is some of our concerns, and they need to be addressed.

MS. SMITH: Thank you, Mr. Owen.

THE COURT REPORTER: Could you spell your last name, please?

MR. OWEN: Owen; O-W-E-N.

THE COURT REPORTER: Thank you.

MS. SMITH: Questions of Mr. Owen?

MR. SEXAUER: Just a simple fact question. Typically, if there is a drug test conducted, let's just say a random drug test or

whatever, and initially there is some indication that there might be some drugs in them, what typically happens at that point? The miner is then not permitted to work until there is confirmation?

MR. OWEN: At our facility they just implemented a plan. First of all, -- and this is some of our concerns also. The random testing, they call it random testing and it will be ran twice a year. It could be two months, it could be January, February, or it could be July, somewhere in that period. They are only allowed twice a year. But, they start out by excluding a big percentage of their employees. If it's going to be random, and truly random, it's all employees, salaried as well as hourly. It has to be. They want to exclude their supervision, -- supervisors, their management team. These people, -- and they name these as credible people, but they want to exclude them. They want to give them once a year, with a two month notice. This is not right. This is some of our concerns, and this is why the UMWA is against random testing.

We need something that's uniform. We need something that's going to address all employees and all drugs, legal as well as illegal. Did that answer your question?

MR. SEXAUER: That's good.

MS. SMITH: I have a follow up, Mr. Owen. You indicated you had a problem with random testing because it does not offer you the opportunity to build in the kind of protection that you would view necessary if there was a random testing program. What are some of the examples of those kinds of protection and criteria you envision?

MR. OWEN: Well, take a false positive. And it does happen, Ibuprofen sometimes gives you a false positive. There are several over-the-counter drugs that are out there, -- say I've got a headache and I

don't, you know, I don't get them very often, but say I have one on Sunday night and I went in Monday morning. I got up that morning and I took that Ibuprofen and they randomly select me. They give me a test, they send it off and three weeks later it comes back. Well, it's out of my system by now, and this is the problem that I've got. It's out of my system by now, but how do I counteract this? I know I haven't been doing any drugs, so what safeguard have I got?

We need a test that is done on-site to where it will show you immediately whether you're either positive or not positive. Now, if you're

positive, then that gives you the opportunity to go to your own doctor and have whatever test done that's necessary to counteract this. With the policy they have in effect you have none of that. You have nothing whatsoever. If you test false positive you get thirty days off, automatically, with random testing, at they're every whim, whenever, for three years. No ifs, ands or buts. If it happens again, -- we can see this being used as a tool to target employees. And this is something that we are looking for you people to regulate and help us.

MR. SEXAUER: Would it be helpful if a third party conducted the random drug testing?

MR. OWEN: It would be helpful, yes. But, another concern of ours with the plan that has just been implemented, is the same doctors that they are using to circumvent the Workmen's Comp issue, is in charge for the drug testing. This, we have concerns with. We have great concerns. We have asked for them to use someone else, an independent, and we have been refused.

MS. SMITH: Other questions of Mr. Owen?

[No Verbal Response]

MS. SMITH: Mr. Owen, thank you very much. We appreciate your comments.

MR. OWEN: Thank you.

MR. SEXAUER: Mr. Owen, I'm sorry, did we get the mine that you work at?

MR. OWEN: Freeman United.

MR. SEXAUER: Freeman United. Thank you.

MS. SMITH: Anyone else like to offer remarks this morning?

MR. SCHWARZ: My name is Leonard Schwarz. I am the Safety Director and Drug-Free Workplace Coordinator for Fred Weber, Incorporated.

We started our drug-free Workplace program for our materials personnel in 2001. We started with a pre-employment, even though they were employed at the time. We had a few people who failed; of the 116 who did the pre-employment, there were a number that failed.

We do not have a substance abuse program for people who test positive, but we give them referrals. In most cases whatever system they need is provided through the Union or their, -- if they have medical insurance if they are non-union employees. We include supervisory as well as non-supervisory people in our program.

We do a quarterly random. We do post-accident, post-incident drug testing, -- drug and

alcohol. We do pre-employment. We also do a reasonable suspicion and a promotion drug test. If one person is going from one level to the next, they are drug tested.

Of the positives we have had in the company two no longer work for us, at their choice. The remaining people went through a program, completed it, came back to work and are still working for us. And everyone of those individuals approached me, representing the company, and thanked me for the drug program. The fact that they knew they had a problem and in some cases family members had encouraged them to do something, but when they were faced with the reality of losing their job they knew that it was time to do something to enhance their lifestyle.

We feel we have a very successful program. In fact, the six personnel in our Safety Department are all certified and trained drug collectors. We do our own randoms. We do our own pre-employment. We do our own reasonable suspicion, in the field. We cannot have a positive test in the field. We can have a negative, as you know, which everyone wants a negative drug test, or we can come up with an inconclusive. If we have an inconclusive in the field we run a second test to document that our device that we did the

testing with was not flawed. And if we get a second inconclusive then we offer the employee the option of going to a third person and submit another drug test, or we can send the specimen into a certified lab for assessment. And in most cases they opt with the latter, where we seal the split specimen under their observation and send it into a certified lab for documentation of the test, whether it is negative or positive.

We feel that it has been very successful in the fact that if we do field testing the person goes back to work immediately if it's a negative. If it's an inconclusive and we send the specimen to a lab, of course the employee is off work until we get the results back. If the results come back positive then we give them a resource to get into a program which they must do and complete, to be eligible to come back to work for us, or they go about their way.

The drug test results that we administer and send into the lab we normally have about a two day turnaround. And if that drug test is sent in and it comes back positive, then the employee is paid for that time when he's off work.

The only time we may have a four or five day delay in getting the results back is if the lab

has to advance the specimen to an MRO, Medical Review Officer, and that MRO has to call the employee, due to the fact that the employee may be on some type of medication or verification why the test is inconclusive. We don't know that is happening. We do not communicate with the lab or the MRO until we get our results. And that's because of the privacy of the employee and the Medical Review Officer.

We haven't had any problems from any of the Unions. They all have a copy of our program. It costs us quite a bit of money to administer this type of program, but we feel it's necessary if you're going to have a drug and alcohol free workplace.

I see the only problem, and if I can inject my thoughts, is if MSHA would decide to, -- or the Department of Labor would decide to administer a, -- or mandate a program for all employers, would be the administration of the enforcement. How do you enforce something like this?

We are going to continue with our program irregardless of what comes out of this hearing.

MS. SMITH: Do you have a regular evaluation of your program results that you do on a yearly or some other cycle basis?

MR. SCHWARZ: We have an on-site

administrator out of Southern Missouri. Our training personnel in our Safety Department do not do DOT because of the federal standards, the regulations imposed in that. So, they come in and do our DOT drug testing. We review our program quarterly with this service and we found that we've had quite a bit of drop in our positives over the years.

Each quarter we do 12.5 percent of the employees who are working for drugs. And we do 2.5 percent for alcohol. We've mirrored our program after the Department of Transportation. The randoms are selected by a third party. We submit a list of present employees who are working, send it away, and they send us back a selection for the random; 12.5 percent for drugs and 2.5 percent for alcohol.

MR. SEXAUER: May I ask you do you have any data that you could share with us that would indicate a measurable improvement as a result of your program?

MR. SCHWARZ: I can tell you that our numbers are below the national standard for positives. Quite a bit lower.

MR. SEXAUER: The company that you're with, Fred Weber, Inc., that is a mining, --

MR. SCHWARZ: Part of the, -- we have

over a hundred employees, -- I'm sorry, over a thousand employees, approximately three hundred and fifty are in the mining industry.

MR. SEXAUER: Okay. If there was one thing that you would recommend to us, something we could do to help the situation out there, would you have any specific suggestions for us?

MR. SCHWARZ: If you are going to implement a regulation saying that every employer in the mining industry has to have a drug-free workplace policy, I think it's going to be necessary for some type of follow up to ensure that that's being adhered to. And I would say that's where your, -- in my opinion, that's where your problem is going to be.

As I said, we have our program and we are going to continue it because we think it's something we believe in, something our employees believe in, because they want to make sure that they have a drug-free workplace to work at. I think there's a need for some type of regulation in the mining industry. I'm not sure what it is. I think the biggest problem is to make sure that people are doing what the regulation calls for.

MR. SMITH: You mentioned that you have a post-accident/incident testing program.

MR. SCHWARZ: Correct.

MR. SMITH: I would like for you to elaborate on that and how that works. Who gets tested and what type of accidents?

MR. SCHWARZ: Anytime an employee is injured and they need outside medical care, we do a drug and alcohol test. Ninety percent of the time it's administered by the trained certified personnel in the Safety Department. And the reason we do that is because of the cost incurred with doing it at a facility or us doing it in the field. Our policy also says that if an employee reports an injury and they decline medical attention, it's classified as a significant injury, being a back strain, sprain or something like that, where they don't necessarily need outside medical care at that time, we also do a post-accident drug test.

We have found or suspect, that people are reporting accidents as they should be and decline medical attention until the time is good for them to go, because they know they are going to be drug tested when they get to the facility. So, we wrote into our program that if you're reporting what we classify as a significant injury, you know, sufficient amount of blood loss, sprain, strain, you will be tested at the

time you report it.

Post-incident, if we have property damage to some of our equipment or someone else's equipment on the site, or in the case of our construction where we do heavy highway construction, we damage somebody's automobile that's driving by, the participants in that, our employees who are involved in it, get what we call a post-incident drug test. And we tell our employees that it is for their protection as well as the company's, due to the fact that the environment nowadays where everybody seems to be suing everybody. And I've been in quite a few court cases where the issue of the employee being drug-free at the time of the incident becomes a question. If we can lay that question to rest, then it goes away. If we can't positively respond to that question, then it remains a question, and doubt sometimes in the jury or the judge's mind. So that's why we do that.

MR. SMITH: Thank you.

MR. AUTIO: Are you using a screening test or saliva?

MR. SCHWARZ: No. We use the urine specimen for drugs. There's quite a few on the market nowadays. We've got what they call an eye cup, we've got them down to about 550 per, so we are trying to

control the cost. Our major cost is the involvement by the Safety Department personnel who administers the test. And of course, the employee who is not working at the time the test is administered. It gives you a reading of temperature, as well as a reading of the five drugs that we check for, whether it's negative or inconclusive.

When we administer a test we ensure that we get enough quantity so if it is inconclusive we can send it into a lab for a split specimen. The need for the split specimen is if I have a inconclusive and I send the specimen into a lab, if the first specimen, which is a half of the old specimen tests positive, then the employee has 72 hours to request that that second half of the specimen be retested or sent to another lab of their choosing to confirm the first positive. And no one has ever done that since 2001.

MS. SMITH: Elena, you had a question?

MS. CARR: Yes. You mentioned that you test for five drugs.

MR. SCHWARZ: Yes ma'am.

MS. CARR: Do you follow the DOT type protocol?

MR. SCHWARZ: Yes ma'am.

MS. CARR: And secondly, just as a

clarification. When you were saying that individuals whose tests was inconclusive in the field and you send them for further review, perhaps, with the Medical Review Officer for a confirmation test, and they test positive, do you pay them for the time off if they test positive?

MR. SCHWARZ: No ma'am.

MS. CARR: If they test negative?

MR. SCHWARZ: If they test negative we pay them for the time they were off. If they test positive then we give them a resource to go to, in case they want to become eligible to return to work.

MS. CARR: And you do allow them the option not only of the retest of the split sample, but also to go to a separate facility to get their own drug test?

MR. SCHWARZ: Once the original specimen is drawn that is the specimen we work off of. The only option is if we have a specimen in the field and it's inconclusive, the employee has the option to go to a third party and present another test, but that has to be done within three hours.

MS. CARR: Okay.

MR. SCHWARZ: The DOT guidelines. In other words, if I test a person at 1:30 in the

afternoon, it's inconclusive, they have until 4:30 to submit another specimen at the lab, -- or not the lab, the facility, SSM or whoever.

MS. CARR: Within three hours?

MR. SCHWARZ: Yes ma'am.

MS. SMITH: I just had a final question, Mr. Schwarz. You mentioned that your costs for your program administration are relatively high, but believe that it's worth the cost. If there is any information that specifically you could provide to us, maybe for the written record afterwards, and you care to provide how your costs breakdown, that would be helpful.

MR. SCHWARZ: I could do that.

MS. SMITH: Okay. That would be helpful. We appreciate that.

MR. SMITH: I would like to ask you about the, -- once again, going back to the post-accident incident testing. What have your results been in terms of accidents, incidents and percentage of those that tested positive?

MR. SCHWARZ: We did ninety-seven of what we call post-accident, post-incident tests this past year, January through the end of September, of those ninety-seven we have had one positive.

MR. SMITH: One?

MR. SCHWARZ: Yes sir.

MR. SMITH: Thank you.

MS. CARR: One more. I'm sorry.

MR. SCHWARZ: That's all right.

MS. CARR: Again, in terms of your measuring the success of your program, I was just wondering since 2001 when you implemented have you seen any corresponding improvement or decrease in accidents or injuries on the job?

MR. SCHWARZ: Well, it's kind of hard to measure because the company has grown. You know, we have more equipment, we have more employees. Again, our average is below the national average. Our positives are below the national average.

I think our employees are more open about drugs now. You know, when we first implemented in 2001 it was kind of a, -- I mean it wasn't what's going on? How come they are doing it? I think the fact that it was a topic nationwide, drugs and alcohol in the workplace. But when you come around to do a random now, it's not why do I have to do this? It's done, and that's it. And in most cases they don't mind because they know that they don't do drugs or alcohol.

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

MR. SCHWARZ: Thank you.

MS. SMITH: Anyone else like to offer comments?

MR. CAMPBELL: My name is Wesley, T is the middle initial, the last name is Campbell; C-A-M-P-B-E-L-L. I am the Human Resource Specialist for Monteray Coal Company.

Monteray Coal Company is a subsidiary of Exxon Mobil Corporation. We are located in south central Illinois. We have about 270 wage employees that are represented by the United Mine Workers, plus 70 salaried employees. As you are probably aware, when the Exxon Valdez ran a ground in late 1989, that was the beginning of Exxon Mobil's drug and alcohol policy. We adopted it at the Monteray Coal Company immediately. The Union really had a lot of opposition in the beginning, but basically Exxon Mobil said if you work for us, this is our property and this is a condition of employment.

Currently we have pre-employment testing. We have random testing for salaried employees in designated positions. We have post-incident testing for all employees and we have for cause testing or the

reasonable suspicion testing for all employees. We have a contractor alcohol and drug program for contractors that are performing safety sensitive work at our site.

We have an Employee Health Assistance Program called Rehab, which is available to all employees regardless of wage or salary. People can use that program ahead of time as they seek help for drug dependency, alcohol problems. They cannot use that as a crutch if we test them and they turn up positive, they can't come back and say well I need help. At that point it's too late.

As Mr. Gallick spoke, the average age at our mine is about fifty-two years old. The history back in the '70(s) would indicate that probably the most likely problem that mining had then was alcohol. Today, I believe it's more prescription drugs. It's drugs that people are taking for pain that they've developed over thirty years of heavy work. And oftentimes you cannot detect that either by odor or by a person's actions.

We conduct unannounced searches for contraband material like weapons, knives, alcohol, drugs, prescription drugs, that are not issued to the employee. Those are usually done once or twice every

two years.

And personally, I believe a company should be allowed to have testing in the workplace, because today there is just too much liability at stake. And statistics do show that people are taking more and more over-the-counter drugs, drugs that are questionable as to how they affect a person in the workplace. The mining industry is a dangerous place to begin with. Not only do people take prescriptive drugs that they have to take at certain times, but because mining requires a twenty-four hour operation oftentimes people miss the time they are suppose to take the dosage, because of the shift work, they're working ten, twelve hours a day, seven days a week. Without some type of controls in place to test people companies run a big risk of catastrophic events, fatalities, injuries.

We take our employees to a local facility for post-incident testing or for cause. The test is administered by the lab department at the local hospitals. We have a company representative meet them there to identify who they are, because oftentimes they don't have a driver's license with them if they were underground and they were injured. And a company person also ensures that all the steps of their drug

test has been followed; that the employee signs and initials all the steps of the drug tests, and witnesses everything up to the point that it is sealed and boxed up for shipment. If it's a post-incident test and we do not suspect alcohol or drug use, that employee is allowed to return to work, if they are released. However, if it's a for cause test or reasonable suspicion, and we do suspect that their behavior was apparent, they remain off work pending the results of the test. The test could be three to five days. And at that point, once we are notified, then they're notified.

This policy, like I say, has been in effect since 1989. Since then we've had three positive post-incident tests, we've had two positive for cause tests, and two positive randoms. So, it does indicate that in the workforce there are issues and without the drug test in place we probably would not have identified these folks. Questions?

MS. SMITH: What do you think MSHA could do to help the mining industry with this problem?

MR. CAMPBELL: That's a good question. I was going to ask a question of Mr. Autio. The metal and non-metal industry has a regulation, and I think you said there were 78 violations of that. And I

guess one of the things that struck me was were all those citations issued to the operator?

MR. AUTIO: Yes.

MR. CAMPBELL: Which I suspect they were. But I guess that until we reach a point that we hold the employee accountable, I don't think we're going to have a lot of progress. And I don't know how you do that. I mean right now if you found alcohol in an employee's vehicle and cited me as the operator, I don't know how that is going to change his behavior, unless I know it ahead of time and I discharge him. But, that's after the fact. I mean we need to do something pro-actively and until we hold them accountable I don't know how we do that.

MR. SEXAUER: So, what I'm hearing is that if we were to, let's say scuttle that regulation and replace it with another regulation that says random drug testing in some form, that would not reduce protection to the miners, but actually could increase protection at the workplace? I'm not saying we're going to do that, I'm just saying hypothetically.

MR. CAMPBELL: I think it would probably have more of a positive effect than just a regulation that penalizes companies.

MR. SEXAUER: Can you recap for me, -- let's see, your drug program has been in place, --

MR. CAMPBELL: Since 1989.

MR. SEXAUER: -- since 1989. And since 1989 you've had a total of how many positives?

MR. CAMPBELL: We've had three positive post-incident tests, two positive for cause and two positive randoms. And bear in mind randoms for salaried people too. We don't do random testing for wage employees.

MR. SEXAUER: Okay.

MS. SMITH: And that's because of your Union contract?

MR. CAMPBELL: It probably has a lot to do with it. There is a lot of resistance.

MS. SMITH: Okay.

MR. SEXAUER: We are interested in hearing more about this issue of prescription drugs and the impact in the mining industry. I don't have a specific question, but if there's anything you can elaborate on.

MR. CAMPBELL: Well, that's a difficult situation. Like I said, our wage force the average age is about fifty-two. In the last five years we've seen a big increase of carpal tunnel surgery, torn

rotator cuffs, knees and backs. And most often doctors try and treat those first without basic surgery. And they will do that with medication and therapy. What's hard is to know what people are taking, unless they come forward and tell you. And then the other part of that is are they taking it as prescribed, at the right time?

What we try to do, if we have employees who seek treatment or has surgery, and the doctor has prescribed Hydrocodone or Oxycontin; usually they will prescribe two, they'll do a narcotic medication for pain and they'll do a non-narcotic. And apparently what they do, -- what we find, is they will say take the non-narcotic to drive to work, to work on, and take the narcotic when you're sleep, when you're at home. But, what we've found is that a lot of people have so much pain that the non-narcotic doesn't do it for them. And we've had cases where guys have showed up for work and they've said, oh by the way, I took Hydrocodone this morning before I came to work. That employee would not be allowed to work, unless he went through our Case Manager, who is in Houston. We would link that person up with them or their doctor, and come to an agreement about what type of work that person could do. They definitely could not do safety

sensitive work, which would be any work underground, around heavy equipment, machinery.

We have had occasions where they've been instructed to take the non-narcotic to get to work, and then once they get to work they can take the narcotic pain medicine, provided that they are given desk duty or sedentary duty. And then there's a period of time that they cannot take it before they leave and drive home. But those cases are all managed through our Health Department.

MS. SMITH: Is this Case Management concept part of your program?

MR. CAMPBELL: It is. And it's an Exxon Mobil medical staff person that we call and get involved. We do not have an on-site case manager. We did up until about a year and a half ago, but now we refer everything to Exxon Mobil's Case Management.

MS. SMITH: Does Exxon Mobil have sort of an over-arching criteria for the program, and then subsidiary companies tailor as they choose to, or is it mandated by the parent company?

MR. CAMPBELL: Yeah, it's mandated.

MS. SMITH: If you would care to share that program with us, we would like to take a look at it, if it's possible.

MR. CAMPBELL: I would have to see what I can share.

MS. SMITH: Sure.

MR. SEXAUER: You could also, -- if you care to, you could also submit documents and indicate they are proprietary, and then we would not disclose those or put them in the record.

MR. CAMPBELL: Okay.

MS. CARR: You indicated that you do probable cause and reasonable suspicion.

MR. CAMPBELL: Yes, we do.

MS. CARR: And we've heard some concerns about those protocols. What is your experience with reasonable suspicion? Have you had, --

MR. CAMPBELL: The way our reasonable suspicion works if somebody suspects that a person is impaired, either through smelling alcohol or behavior they cannot explain, or behavior that is out of the ordinary, they are instructed to get a second opinion of a person, and have that person observe the employee. And if those two agree that yeah, we think something is suspicious, then we approach the person and say is there an explanation for his behavior or if we smell alcohol on their breath we will submit them for a for cause test. And at that point, we remove

them from the workplace. We do not allow them to drive. We escort them to the medical facility and remain with them for the test.

We use a saliva test to screen for alcohol. If the salvia test is positive then we also do the urine test. If they are positive, -- well, in either case, if it's for cause, they are off work until we get the results. If the results are negative, we're paying them. If it's positive, then they are terminated.

MS. CARR: And your supervisors have had two positives, so you don't have as much resistance to actually making that reasonable suspicion call?

MR. CAMPBELL: Well, it's met with resistance, but there's really no choice. They are entitled to Union representation, we don't escort them. If the Union rep chooses to go to the facility their pay stops when they leave the property and at that point they are on Union business.

MS. CARR: I asked you about the contractor resistance, -- the employees, but sometimes supervisors themselves, are reluctant to make those determinations and need obviously, a lot of training. Do you do training?

MR. CAMPBELL: We do regular training

with both salaried and wage employees, a review of the alcohol and drug program. With every new supervisor we review the program, the for cause testing and the procedures they should go through, and remind them that it is their obligation to tell it to their employees, and come forward if they suspect something out of the ordinary. And oftentimes they don't. I mean, I think, like Mr. Gallick said, the use of alcohol really in the eight years that we've had it, we don't see it that often. But that's the most obvious one and that's pretty easy to detect. It's the other drugs that you can't detect. And oftentimes you can't see a behavior that would indicate a person is over-medicated or if they are medicated. You know, there is just as much danger with a person who should be taking medication, who is not taking their medication, as there is a person who is over-medicated. So, you know, I support random testing for everybody.

MS. SMITH: Thank you Mr. Campbell. We appreciate your comments. Anyone else?

[No Verbal Response]

MS. SMITH: Since we have no other indicated speakers at this point in time, I think we will go off the record for about an hour, and then we

will come back on the record and see if we have anyone to come in late that would want to offer some remarks. So, we will be back in about an hour. Thank you.

[Whereupon, at 10:52 a.m. the hearing was recessed, to reconvene this same day at 10:54 a.m.]

MS. EMERSON: My name is Betty Emerson and I'm here representing SAPA, that is the Substance Abuse Program Administrator's Association. I am the President of that organization. We are a group of industry people, that would be medical review officers, collectors, third party administrators, in-house administrators, substance abuse professionals. We are represented in all fifty states and Canada.

We have a formal answer to your Advance Notice, which is in draft form. But basically, our suggestions will be to follow the Part 40, which is the Department of Transportation rule, obviously, amended to what the mining industry is. But having the mandated types of testing, the methodology to mirror what the Department of Transportation has done, and has worked. I think with a medical review officer and a substance abuse professional, which is someone who can either provide the treatment or send someone to get treatment that they need, being it in-house or, -- I started to say outhouse.

MS. SMITH: That's okay.

MS. EMERSON: But, at any rate, I think the Department of Transportation if you look at their statistics when they started testing of all the modes, being it the railroad, the transit, the pipeline, which is now a different MSHA, the travel motor carrier, and the FAA, the Coast Guard, all of them started testing at 50 percent drug and 10 percent alcohol, other than the pipeline and the Coast Guard, they don't do alcohol at random. And how the rule is written is if your positive range is below 1 percent for two years, then the rates drop. And I think the deterrent factors around the testing is clear. The airlines, -- the only two that are still at 50 percent are transit and the Motor Carrier and I believe the Coast Guard, because they aren't doing the alcohol. Everyone else has dropped to 25 percent. It doesn't mean, -- they still have the same amount of employees, the railroad and FAA, it's just the deterrent fact of the random testing has worked, because their positive rates have dropped low enough that they can then lower their testing percentage. So, I think that as far as random testing I agree with the gentlemen who believes in random testing. I think it works as a deterrent.

So, from SAPA's position we're going to

recommend following a basic Part 40 outline, and then adhering that their operations.

MS. CARR: One of the issues that was brought up about the Department of Transportation reg is the inflexibility of what drugs are tested for. As administrators of these programs what is your experience? Are those five drugs sufficient?

MS. EMERSON: What we hear at meetings is that there's a few, the Oxycodone or the Oxycontin and Ecstasy are huge issues. And I believe they are issues that DOT is looking at. But I think the people who have talked about the mysteries of prescription drugs, that's huge. And in Part 40 there is the provision that if you are on a drug you are to tell your employer, and then that can be, -- if the prescription can affect your ability to work safely, then the medical review officer or the physician, can try to have that drug changed so that you still can perform your duties. But, we know that there are issues of prescription medicine problems. Did I answer that?

MS. CARR: Yes. So SAPA may support following Part 40, even to the extent, --

MS. EMERSON: I think the basics of Part 40; that you're going to do your tests and you're

going to use urine or salvia, that type of methodology; that you're going to use certified laboratories; that you're going to have medical review officers talk to someone who has a presumptive positive or has refused a test, and that you're going to have some type of a treatment. Even if you terminate the person Part 40 says that you are suppose to give them a list of substance abuse professionals, so that you build that return to duty process in there, so that someone that has tested positive and is hopping from mine, to mine, to mine, without the new employer knowing. That's another part of Part 40 that is very efficient, in that going back two years in someone's history as a miner, being allowed to do that to the previous company. Perhaps they had a positive and just blew it off and left, if you put into your rule that checking previous employers for drug or alcohol violations helps you as a new employer manage that employee and keeps that hopping around where the drug results are not following that person. A big one is an intelligence test, anyone can clean up their act and go right back to drugging. If you know that they've had a positive, left someone, and you have that as a history, as the Department of Transportation does, that helps you better manager that employee and

make sure that they are getting the help that they need. Did I answer your question?

MS. CARR: Yes.

MS. EMERSON: So, we will be submitting a formal response in just a draft. Any questions?

MS. SMITH: Thank you Ms. Emerson. We appreciate your comments. Other second thoughts before we go off the record for about an hour?

[No Verbal Response]

MS. SMITH: Okay. Thank you.

[Whereupon, at 11:00 a.m. the hearing was recessed, to reconvene this same day at 12:00 p.m.]

MS. SMITH: We are going to go back on the record. I would like to ask if there is anyone in the audience who would like to give any remarks for the record at this point in time?

[No Verbal Response]

MS. SMITH: All right. In that case then, we will close the record on this public meeting and thank you all for coming.

[Whereupon, at 12:10 p.m. the hearing was concluded.]