

# TRANSCRIPT OF PROCEEDINGS

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IN THE MATTER OF: )  
 )  
30 C.F.R. PARTS 56, 57 AND 66 )  
ALCOHOL AND DRUG-FREE MINES: )  
POLICY PROHIBITIONS, TESTING, )  
TRAINING AND ASSISTANCE; )  
PROPOSED RULE )

Pages: 1 through 292  
Place: Washington, D.C.  
Date: October 14, 2008

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## HERITAGE REPORTING CORPORATION

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DEPARTMENT OF LABOR  
MINE SAFETY AND HEALTH ADMINISTRATION

IN THE MATTER OF: )  
)  
30 C.F.R. PARTS 56, 57 AND 66 )  
ALCOHOL AND DRUG-FREE MINES: )  
POLICY PROHIBITIONS, TESTING, )  
TRAINING AND ASSISTANCE; )  
PROPOSED RULE )

CISCO Conference #250  
Ronald Reagan Building  
1300 Pennsylvania Avenue, N.W.  
Washington, D.C.

Tuesday,  
October 14, 2008

The parties met, pursuant to the notice, at  
9:08 a.m.

BEFORE: PATRICIA SILVEY, MSHA  
Director

APPEARANCES:

PANEL MEMBERS:

PATRICIA SILVEY, MSHA  
JOHN ARRINGTON, MSHA  
GENE AUTIO, MSHA  
KEVIN BURNS, MSHA  
ELENA CARR, DOL  
SHEILA MCCONNEL, DOL  
LINDA ZEILER, MSHA

SPEAKERS:

ALBERT ALOIA, CONSOL Energy, Inc.  
RICK ALTMAN, United Mine Workers of America  
LEONARD BAILEY, United Mine Workers of America  
LOU BARLETTA, CONSOL Energy, Inc.  
HELEN BLEVINS, CONSOL Energy, Inc.  
RON BOWERSOX, United Mine Workers of America

DALE BYRAM, United Mine Workers of America  
DWIGHT CAGLE, United Mine Workers of America  
UNA CONNOLLY, National Stone Sand & Gravel  
Association

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APPEARANCES: (Cont'd.)

SPEAKERS: (CONT'D)

MIKE CRUM, FMC Green River  
DAWN DREGIER, SRS  
DARYL DEWBERRY, United Mine Workers of America  
ESTITTY, United Mine Workers of America  
BILL FERDINAND, Barrick Gold  
JOHN GALLICK, Foundation Coal  
CHRIS HAMILTON, West Virginia Coal Association  
MARTIN HAUGHT, United Mine Workers of America  
BRIAN HENDRIX, MARG Group  
JENNIFER HERNER, Arch Coal  
MR. HODGEKISON  
SAM HOLLINS, Virginia Transportation  
Construction Alliance  
JENNIFER HONOR, Esquire, MSHA  
TANYA JAMES, United Mine Workers of America  
ANNE KELHART, National Stone Sand & Gravel  
Association  
MAX KENNEDY, United Mine Workers of America  
RAY LEE, United Mine Workers of America  
KEVIN LUKETIC, United Mine Workers of America  
DALE LYDIC, United Mine Workers of America  
TIM MCCREARY, Thunder Basic Coal Co.  
DENNIS O'DELL, United Mine Workers of America  
TONY O'NEAL, United Mine Workers of America  
PRILLAMAN, National Lime Association  
WILLIAM RAYBURN, Iluka Resources, Inc.  
RALPH SANICH, Inter West Mining Co.  
MR. JIM SHARPE  
LARRY SPENCER, United Mine Workers of America  
BRUCE WATZMAN, National Mining Association  
JIM WEEKS, United Mine Workers of America  
THOMAS WILSON, United Mine Workers of America  
MICHAEL WRIGHT, United Steelworkers  
GLEN YOUNG, United Mine Workers of America

P R O C E E D I N G S

(9:08 a.m.)

1  
2  
3 MS. SILVEY: To everybody who can hear me,  
4 please. We're getting ready to start this morning's  
5 hearing. Good morning. My name is Patricia W.  
6 Silvey, and I'm the Director of the Mine Safety and  
7 Health Administration, Office of Standards,  
8 Regulations and Variances. I will be the moderator of  
9 this public hearing on MSHA's proposed rule for  
10 Alcohol and Drug-Free Mine Policy, Prohibitions,  
11 Testing, Training and Assistance.

12 On behalf of Acting Assistant Secretary of  
13 Labor for Mine Safety and Health, Richard E. Stickler,  
14 I want to welcome all of you to this hearing today,  
15 including those of you who are joining us via webcast  
16 and via audiocast. At this time, I will provide the  
17 logistics surrounding today's hearing. As most of you  
18 know by now, the hearing is being held via webcast in  
19 Washington, D.C., Pittsburgh, Pennsylvania and Denver  
20 or Englewood, Colorado.

21 Persons will also be able to make oral  
22 presentations on the proposal in Beckley, West  
23 Virginia, at our mine academy, Madisonville, Kentucky,  
24 and MSHA's co-district office, Birmingham, Alabama,  
25 MSHAS co-district office in Price, Utah, at the local

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1 Holiday Inn.

2           As I am talking about the logistics, the  
3 persons who are making presentations here in  
4 Washington office where we are, as people get ready to  
5 do their presentations I would ask them to come to the  
6 table where we're seated, and the persons who are  
7 speaking, if you have members of your panel, the panel  
8 members can take the end seat, but persons who are  
9 speaking if you would take the seat from the end  
10 because the seat from the end will allow you to be  
11 seen on the webcast.

12           Also, since I'm talking about logistics, I'm  
13 going to do this right now, and I'm going to do this  
14 in some part because I feel sort of for the court  
15 reporter, but as most of you know, we always ask you  
16 to try to call me. We encourage you to do that, and I  
17 think I put in the Federal Register notice that I  
18 strongly encourage people to do that, so I'm going to  
19 take the persons in the order in which they signed up  
20 first, and then I'm going to go to the places where we  
21 have audio cast.

22           First, starting with Beckley, West Virginia.  
23 In a way, I'm sort of giving people notice so you  
24 will be prepared, and I've asked my panel to sort of  
25 remind me. Then I'll go from Beckley to Madisonville,

1 Kentucky, and do all the persons who wish to make  
2 audio presentations there, and then from Madisonville  
3 to Birmingham, Alabama, and from Birmingham to Price,  
4 Utah.

5           We're going to do it in that order so that  
6 people are on notice as to how it's going to go. At  
7 this point, I'd like to introduce the members of the  
8 MSHA panel starting with to my right. To my right, we  
9 have Elena Carr, and Elena is the Department of Labor  
10 Drug Policy Coordinator. To her right is Linda  
11 Zeiler. Linda is the Deputy Director in MSHA's Office  
12 of Technical Support.

13           To Linda's right is Kevin Burns, and Kevin  
14 is in Educational Policy Development, and he is the  
15 Director of the Office of Small Mines. To my left is  
16 Sheila McConnell, and Sheila is with the Office of the  
17 Assistant Secretary for Policy. We have three people  
18 who are members of our panel who are seated behind us.  
19 Because of the logistics here, they had to be seated  
20 behind us. Gene Autio. Gene is with our Office of  
21 Metal/Non-Metal Mine Safety and Health.

22           Next to Gene is John Arrington. John is  
23 with the Office of Coal Mine Safety and Health, and  
24 obviously last but certainly not least is our learned  
25 counsel, our lawyer, Jennifer Honor, so those are the

1 members of the panel. As most of you know, the  
2 comment period for the proposal will close on October  
3 29 at midnight, Eastern Daylight Savings Time, and I  
4 want to reiterate Eastern Daylight Savings Time. You  
5 can view the comments on the Agency's website at  
6 [www.msha.gov](http://www.msha.gov).

7           The rules. The proposal, as many of you  
8 know, would amend the existing metal and non-metal  
9 standards for the possession and use of intoxicating  
10 beverages and narcotics and make a new standard  
11 applicable to all mines. The proposal will designate  
12 the substances that cannot be possessed on mine  
13 property or used while performing safety sensitive job  
14 duties, except when used according to a valid  
15 prescription.

16           Mine operators would be required to  
17 establish an alcohol and drug-free mine program, which  
18 includes a written policy, employee education,  
19 supervisory training, alcohol and drug testing for  
20 miners that perform safety sensitive job duties and  
21 their supervisors and referrals for assistance for  
22 miners and supervisors who violate the policy.

23           The proposal would also require those who  
24 violate the prohibitions to be removed from the  
25 performance of safety sensitive job duties until they

1 successfully complete the recommended treatment and  
2 their alcohol and drug-free status is confirmed by  
3 return-to-duty test.

4           As part of its mission to improve safety and  
5 health conditions in mines, MSHA has proposed this  
6 rule to protect safety of all miners from the dangers  
7 of alcohol or drug use at mines, by prohibiting miners  
8 from using, possessing or being under the influence of  
9 alcohol or drugs while performing safety sensitive job  
10 duties.

11           Before I go further in discussing the  
12 proposals I want to describe the environment of the  
13 Department of Labor, Working Partners for an Alcohol  
14 and Drug-free Workplace, or Working Partners, in the  
15 development of this proposal. Since the late 1980s,  
16 Working Partners has educated businesses about the  
17 impact of workplace substance abuse on productivity  
18 and safety, and equipped them with tools and resources  
19 to address the problem.

20           Working Partners provides consultation and  
21 assistance to all DOL, Department of Labor, programs  
22 since workplace substance abuse affects many of the  
23 department's policies and missions. Working Partners  
24 has expertise in the development of five-step drug-  
25 free workplace programs, and has worked closely with



1 MSHA to develop this proposal.

2           Thus, the proposal represents a coordinated  
3 effort between MSHA and Working Partners that draws up  
4 on their collective expertise and experience in  
5 helping businesses including mine operators to  
6 establish drug-free workplace programs that can reduce  
7 accidents and injuries. Under the proposal, the  
8 possession or use of prohibited substances, except  
9 when are used according to a valid prescription, is  
10 prohibited.

11           The alcohol and drug test provisions will  
12 apply only to mines who perform safety sensitive job  
13 duties. Under the proposal, a safety sensitive  
14 position is defined as a miner, who is required to  
15 have comprehensive training under Parts 46 and 48, as  
16 applicable. Managers who supervise these miners are  
17 also considered to hold safety-sensitive positions  
18 under the proposal. Administrative personnel would be  
19 exempt from the proposal.

20           Under the proposal, mine operators would be  
21 required to establish an alcohol and drug-free mine  
22 program that includes a written policy. A mine's  
23 written policy could be tailored to the specific  
24 conditions at the mine. However, the policy must  
25 address the purpose of the policy. It must contain a

1 clear description of prohibited behavior.

2           It must outline the means, including  
3 testing, for determining if the policy has been  
4 violated, including explanation of the consequences  
5 for violating the policy and include requirements for  
6 training. MSHA intends to assist mine operators in  
7 developing their policy by providing a sample template  
8 that can be used to address all required elements of  
9 the proposal.

10           Operators can tailor the template to the  
11 specific needs and conditions of their mine. A mine  
12 operator must assure that every miner has been  
13 informed of the policy, and the proposal would require  
14 that the policy be reviewed during training and made  
15 available upon request to miners and their  
16 representatives.

17           Each operator would be required to implement  
18 an education and awareness program for nonsupervisory  
19 miners and their supervisors to provide them with the  
20 information they need to fully understand and comply  
21 with the proposal. Miners who are required to take  
22 comprehensive training under existing Parts 46 and 48  
23 would be required to take the training under the  
24 proposal.

25           The proposal would require newly hired

1 miners to receive 60 minutes of training before they  
2 are assigned to safety sensitive job duties and  
3 nonsupervisory miners would be required to receive at  
4 least 30 minutes of annual retraining. The proposal  
5 would require that time allotted to this training be  
6 added to the total number of hours required under the  
7 existing standard so they have sufficient time to  
8 cover all the training topics.

9 Operators would be required to implement  
10 training programs for its supervisors and to make them  
11 aware of their responsibilities for assuring  
12 compliance with the proposal. Under the proposal,  
13 supervisors would have to receive at least two hours  
14 of initial training and one hour of training annually.

15 The proposal would require operators to make  
16 miners who voluntarily admit use of prohibited  
17 substances aware of available assistance through an  
18 employee- or miner-assistance program, a substance  
19 abuse professional and other qualified community-based  
20 resources. Under the proposal, mine operators would  
21 be required to implement an alcohol and drug testing  
22 program that is valid, reliable and protects the  
23 privacy and confidentiality of miners' testing.

24 Mine operators would be required to follow  
25 the U.S. Department of Transportation, or DOT, their

1 drug and alcohol testing requirements in 49 C.F.R.  
2 Part 40, Procedures for Transportation Workplace Drug  
3 Testing Program.

4           Although operators would be responsible for  
5 implementing the testing program and making decisions  
6 as to when to test consistent with the DOT, mine  
7 operators may use qualified service agents to carry  
8 out the collection, laboratory analysis and medical  
9 review and verification of test results.

10           Consistent with the DOT drug and alcohol  
11 procedures, MSHA's proposal would require testing for  
12 alcohol and the following five controlled substances:  
13 amphetamines, including methamphetamines;  
14 cannibinoids, meaning marijuana or THC; cocaine;  
15 opiates and PCP, phencyclidine. The proposal also  
16 includes testing of barbiturates, benzodiazepines,  
17 methadone, propoxyphene and synthetic and semi-  
18 synthetic opioids, specifically hydrocodone,  
19 hydromorphone, oxymorphone and oxycodone.

20           I'm going to write all these names out for  
21 everybody in here and give you a little card with the  
22 names on them. There will be a test at the end of the  
23 comment period, a test for me, too. The proposal  
24 would allow operators to test for additional  
25 substances beyond those in the proposal and would

1 allow the secretary of labor to add to the list of  
2 prohibited substances.

3           Consistent with DOT procedures, testing for  
4 drugs would be done using urine as a specimen and  
5 alcohol testing would be done using breathalyzer.  
6 However, unlike the DOT procedures that have a  
7 bifurcated standard, no actions to remove miners from  
8 work would be required unless the result showed that  
9 the Blood Alcohol Content, or the BAC, level is .04 or  
10 greater and is deemed to be a positive test.

11           Under the proposal, testing would be  
12 conducted in the following circumstances: Pre-  
13 employment, randomly at unannounced times, post-  
14 accident if a miner may have contributed to the  
15 accident based on a reasonable suspicion that a miner  
16 has used a prohibited substance and as part of a  
17 return-to-duty process for miners who have violated  
18 the rules.

19           Under the proposal, miners who fail an  
20 alcohol or drug test would be removed from the  
21 performance of safety-sensitive job duties until they  
22 complete a return-to-duty process. During the time  
23 required to complete the process, the line operator  
24 may, but would not be required to, assign the miner to  
25 non-safety sensitive job duties. A miner found to be

1 in violation of the alcohol and drug-free mine policy  
2 for the first time would be allowed to complete  
3 treatment.

4           If treatment is successfully completed, and  
5 miners comply with the return-to-duty requirements,  
6 they would be allowed to resume safety sensitive job  
7 duties. Operators would address subsequent violations  
8 at their discretion. The proposal would prohibit non-  
9 operators from taking adverse action affecting the  
10 miner's case prior to receiving verified test results.

11 The Medical Review Officer, or MRO, would be  
12 responsible for providing test results to the mine  
13 operator.

14           That MRO process would include determining  
15 whether a miner possesses a valid prescription of any  
16 prohibited substances, and if so, whether the miner is  
17 using the substance in accordance with the  
18 prescription. The proposal would require mine  
19 operators who receive verified positive results to  
20 immediately remove the affected miner from safety  
21 sensitive duties and refer the miner to a Substance  
22 Abuse Professional, or SAP, for assessment.

23           Miners who have failed their test or refuse  
24 to submit to a test would be prohibited from  
25 performing safety-sensitive job duties until they have

1 been evaluated by an SAP and complied with the SAP's  
2 recommendations for education and/or treatment. After  
3 completing the SAP's recommendations, the miner would  
4 be re-evaluated by SAP to determine whether the miner  
5 can return to performance of safety-sensitive duties.

6           The proposal would require that operators  
7 maintain records related to alcohol and drug testing.  
8 DOT regulations require mine operators to use OMB-  
9 approved forms to document the integrity and security  
10 of alcohol and drug tests. These forms are the  
11 alcohol test forms and the control custody forms.  
12 MSHA has estimated the economic impact of the proposal  
13 and included are discussions of the costs and benefits  
14 in the preamble as well as in the preliminary  
15 regulatory economic analysis.

16           In the preamble, MSHA included a complete  
17 discussion of a number of specific requests for  
18 comment. At this point, I would like to briefly  
19 mention some of them. MSHA seeks comments on the  
20 following: The proposed determination of who performs  
21 safety-sensitive job duties. In other words, MSHA's  
22 definition of safety-sensitive job duties in the  
23 proposal; the proposed list of drugs that are  
24 identified as prohibited substances and the need for  
25 flexibility to include additional drugs;

1           Data regarding the specific drug compounds  
2 to be tested, specifically the target, parent drug and  
3 the metabolite to be tested and the quantitative  
4 concentrations of these drugs and/or metabolite to  
5 determine at initial testing presumptive positive  
6 results and a separate confirm test result; removal  
7 from performing safety-sensitive job duties if the  
8 blood alcohol level is .04 percent or higher; proposal  
9 requirements for the type of training for miners and  
10 their supervisors;

11           The proposal to incorporate DOT's alcohol  
12 and drug-testing procedures by reference, the proposal  
13 to use laboratories that have been certified by the  
14 U.S. Department of Health and Human Services and the  
15 College of American Pathologists; the proposal to  
16 allow the use of service agents to perform specimen  
17 collection, testing, medical review officer and  
18 substance abuse professional functions;

19           The proposed circumstance under which  
20 alcohol and drug testing is required; the proposed  
21 rate that MSHA used for random testing; experiences of  
22 operators who already test for a similar panel of  
23 drugs and their experiences, their differentiating  
24 legitimate from unauthorized use; the proposed action  
25 that mine operators must take upon receiving alcohol



1 and drug test results; the proposed requirements for  
2 substance abuse professionals but not proposed  
3 requirements for an employee assistance program;

4           The evaluation and referral process and the  
5 role of the substance abuse professional in  
6 recommending treatment and determining compliance with  
7 the treatment plan; the proposal for return-to-duty  
8 and followup testing; all data and assumptions that  
9 the Agency used to develop the estimates of  
10 information collection burdens and cost estimate and  
11 all other data and assumptions that the Agency used in  
12 the proposal.

13           As you address these provisions, and many of  
14 you have heard me say this many times before, even in  
15 your testimony to us today or in your written  
16 comments, please be as specific as possible and  
17 include in your comments your specific suggested  
18 alternative, if you have any, your suggested  
19 rationale, your suggestions with respect to safety and  
20 health benefits to miners and specific data to support  
21 your comments. Please include any technological and  
22 economic feasibility information as appropriate.

23           The Agency will use this information to help  
24 evaluate the requirements in the proposal. The  
25 hearing, as many of you know, will be conducted in an

1 informal manner. Formal rules of evidence and cross-  
2 examination will not apply. The panel may ask  
3 questions of the witnesses, and the witnesses may ask  
4 questions of the panel. MSHA will make a transcript  
5 of the hearing available on the Agency's website  
6 within one week of the hearing.

7           If you wish to present written statements of  
8 information, please clearly identify your material and  
9 give it to either the court reporter for today's  
10 hearing or a designated Agency representative at one  
11 of the designated locations. You may submit comments  
12 following the hearing by any of the methods identified  
13 in the proposal, and as we stated earlier, that last  
14 day for submitted comments would be October 29.

15           We will now begin today's hearing, and if  
16 you would please begin by clearly stating your name  
17 and organization, and if you would please spell your  
18 name for the court reporter, that will ensure an  
19 accurate record. For you all in the locations where  
20 there's audio only, as you come to the mic, if you  
21 would state your name clearly and spell it for the  
22 reporter, but I'll go over those instructions again.

23           At this point, we will begin today's  
24 hearing, and our first speaker is from our Pittsburgh  
25 location, Michael Wright with the United Steelworkers

1 of America. So we will now begin.

2 MR. WRIGHT: First, can you hear me?

3 MS. SILVEY: Yes, but we need to switch to  
4 our Pittsburgh location. Please bear with us. How  
5 are you, Mike? We can hear you.

6 MR. WRIGHT: Okay. Good to see you, Pat.

7 MS. SILVEY: Yes. I can't see you  
8 unfortunately.

9 MALE VOICE: There we go. We got it.

10 MS. SILVEY: Thank you. Just like that.  
11 That's technology. I can see you now.

12 MALE VOICE: It will do it automatically,  
13 Pat. If you put it into second, it will switch over.

14 MS. SILVEY: Okay. Thank you. Okay. I can  
15 see you now. I can hear you now, too.

16 MR. WRIGHT: Okay. Great. Before we begin,  
17 I sent a copy of the oral statement down for the  
18 convenience of the panel and the court reporter. I  
19 want to make sure that the court reporter has it.

20 MS. SILVEY: Good. Did we get it? I want  
21 to make sure I have it.

22 MR. WRIGHT: It was faxed yesterday from  
23 CISCO.

24 MS. SILVEY: Oh, it was faxed. It's  
25 probably here.

1 MALE VOICE: The first page did not come  
2 through clearly on your report. The second page did,  
3 though.

4 MR. WRIGHT: Okay. Here. Let me get that.  
5 We can get stuff out to Miles electronically if the  
6 last party feeds it.

7 MS. SILVEY: This is the marvels of  
8 technology.

9 MR. WRIGHT: Yes.

10 MS. SILVEY: A little sarcasm.

11 MR. WRIGHT: Okay. Are we okay, Pat?

12 MS. SILVEY: Yes, sir. We're okay.

13 MR. WRIGHT: Okay.

14 MS. SILVEY: Well, no. They're making  
15 another copy. I better give my copy to you, and then  
16 I'll wait so we can go on. We've got a long day here.  
17 Okay. All right.

18 MR. WRIGHT: Do you want me to start?

19 MS. SILVEY: Yes.

20 MR. WRIGHT: Let me get to ask. I may  
21 deviate a little bit from what I sent down, so I'd ask  
22 that my actual oral comment to be on the record and  
23 not the statement as it's written. That was only for  
24 your convenience.

25 MS. SILVEY: Yes. Thank you. That's fine.

1           MR. WRIGHT: Let me start. My name is Mike  
2 Wright. That's spelled W-R-I-G-H-T. I'm the Director  
3 of Health Safety and Environment for the United  
4 Steelworkers, which is a labor union representing  
5 850,000 members in the United States, Canada and the  
6 Caribbean including a majority of organized metal and  
7 non-metal miners under MSHA's jurisdiction.

8           It's polite to begin testimony by thanking  
9 the Agency. Sadly, there's nothing in this proposal  
10 to engender any gratitude on the part of miners.  
11 Therefore, let me thank MSHA for this new method of  
12 appearing by videoconference. It's unfortunate we've  
13 had to have these hearings at all, but at least this  
14 method of holding them saves time and travel expense,  
15 and I'm honored to be the first speaker. I'd be more  
16 honored if this was a proposal worthy of support.

17           As you might expect, the USW is highly  
18 critical of this proposal, but I want to make it clear  
19 that our criticism does not extend to the skilled and  
20 dedicated career staff at MSHA. We respect and admire  
21 your work on behalf of miners. We don't think you are  
22 responsible for the proposed drug testing rules.

23           Rather, we suspect it comes from the  
24 political appointees in the Department of Labor, who  
25 in the waning days of this Administration are

1 determined to inflict their uninformed ideological  
2 view on safety and health regulation in a way that  
3 binds future administrations. In that sense, this  
4 proposal is similar to the policy office's proposed  
5 rule on risk assessment that has garnered such  
6 comment.

7           The view seems to be that despite all the  
8 evidence to the contrary, despite Sago and Crandall  
9 Canyon and all the individual lessor-known accidents  
10 that have taken so many lives, despite the continuing  
11 death toll from silicosis and black lung, it isn't  
12 hazardous conditions that are to blame. It's drunken  
13 and drugged-out miners. However, drugs don't cause  
14 roof falls or rock burst. Alcohol does not cause  
15 methane explosions. Substance abuse is not a factor  
16 in pneumoconiosis.

17           Those are the issues MSHA should be  
18 pursuing, not drug testing. I'll keep these remarks  
19 short. We will comment much more extensively in  
20 writing later in the month. Number one, the proposed  
21 rule is unconstitutional. The Supreme Court has made  
22 it clear that a mandatory drug testing rule imposed by  
23 the Federal Government constitutes a search within the  
24 meaning of the Fourth Amendment. That case is Skinner  
25 v. Railway Labor Executives' Association.

1            Courts have upheld such programs only where  
2 the programs where justified by compelling  
3 governmental interest, national security or public  
4 safety, for example, Harmon v. Thornburg in the D.C.  
5 Circuit. MSHA's proposed program fails this test.  
6 The preamble to the proposed rule identifies no  
7 immediate or direct threat to public safety from  
8 supposed drug or alcohol abuse in mines and certainly  
9 no threat to national security.

10            The Fourth Amendment balancing of privacy  
11 against public safety applies to both random and post-  
12 accident testing. The proposed rule does not require  
13 reasonable suspicion that the miner to be tested was  
14 impaired. Indeed, it does not even require any prior  
15 determination that an action by the miner contributed  
16 to the accident. Instead, it only requires that the  
17 miner be "operating a piece of equipment or performing  
18 a work activity" that causes or contributes to the  
19 accident.

20            For example, if an accident was caused by  
21 defective equipment, let's say brakes on a loader, the  
22 miner operating it would be tested even if he or she  
23 did nothing improper. In contrast, the maintenance  
24 supervisor who allowed the equipment to go into  
25 service might not be tested, and the mine operator who

1 refused to purchase properly functioning equipment  
2 certainly would not be tested under the proposed  
3 rules.

4           Two, MSHA has not shown that the proposed  
5 rule is necessary. At past rulemakings, MSHA has  
6 refused to regulate hazards to miners absent a  
7 substantial body of evidence demonstrating that  
8 existing conditions pose a significant risk. Yet,  
9 even where that evidence is overwhelming as in the  
10 case of silica, the Department of Labor has delayed  
11 regulation for many years.

12           Yet, in this rule MSHA is relying on  
13 limited, anecdotal and sometimes irrelevant  
14 information to justify it's proposal, and we will  
15 comment much more on that in the written comments  
16 later in the month. Between 1989 and 2007, MSHA  
17 investigated more than 1,600 fatalities. The  
18 rulemaking record assembled by the Agency for this  
19 proposal includes only about a dozen investigation  
20 reports out of all that 1,600 over this time.

21           In only five of those reports, 0.7 percent  
22 of the total, was the use of drugs or alcohol  
23 described even as a contributing factor. In the other  
24 cited reports drugs were found at the workplace, that  
25 is the other five or six, there was no cited



1 relationship to the factors responsible for the  
2 accident. The experience of my own union may have  
3 some relevance here.

4           In 2005, we had performed an onsite  
5 investigation of almost every fatal accident and many  
6 serious accidents in the United States. We have, for  
7 example, done more than 60 such investigations so far  
8 this year alone. We did almost 80 last year. We have  
9 yet to investigate an accident that was not fully  
10 explained by workplace hazards as opposed to drugs or  
11 alcohol. In fact, the proposed rule might even harm  
12 the cause of safety.

13           A miner involved in an accident might simply  
14 say on the report either he or she fears the false  
15 positive drug test, and believe me, there are false  
16 positive drug tests, or simply wants to avoid the  
17 hassle and the humiliation of a test. Although the  
18 evidence is anecdotal, I and others in my department  
19 know of numerous cases where workers have not reported  
20 injuries in mining and nonmining environments, not  
21 because they're on drugs, but because they object to  
22 drug testing.

23           Three, there exists constitutionally  
24 permitted alternatives to the proposed rule. MSHA  
25 already prohibits drug and alcohol use or impairment

1 on mine property. If MSHA wishes to increase the  
2 effectiveness of the prohibition, it can promote, even  
3 mandate, drug and alcohol education programs. That is  
4 within the Agency's constitutional powers. The Fourth  
5 Amendment only applies to actions by the government.

6           It does not prohibit a mine operator from  
7 establishing a drug or alcohol testing policy on his  
8 or her own initiative, and many have done so. In  
9 fact, our union has negotiated such policies in the  
10 past. In general, we discuss this pre-employment  
11 testing and testing based on reasonable suspicion  
12 while opposing random testing. We think that's the  
13 place to draw the balance, but I want to emphasize  
14 that that's done by an employer and the union through  
15 negotiation, not by the government.

16           MSHA could publish a model drug and alcohol  
17 program so long as it did not require operators to  
18 adopt it. However, I should say that we have not seen  
19 any positive impact on injury rates attributable to  
20 drug and alcohol testing programs, including those  
21 which allow random testing. Finally, MSHA could deal  
22 seriously with a wider problem this proposal is  
23 intended to address, and that's impairment.

24           We believe impairment is an important issue,  
25 but the most serious causes are not drugs and alcohol.

1 In surveys, meetings and plant visits our members tell  
2 us overwhelmingly that the worse cause of impairment  
3 in their workplace, mining and otherwise, is fatigue  
4 caused by crushing levels of involuntary overtime.

5 Add to that the distraction that comes from being told  
6 at the last minute that you have to work an extra  
7 shift and will miss an important family function.

8           Add to that the excessive and sometimes  
9 conflicting job demands that result from  
10 understaffing. All those factors are in the control  
11 of the mine operator. Yet, the DOL has ignored them,  
12 focusing instead on the alleged sins of miners  
13 themselves. MSHA may claim that it does not have the  
14 authority to regulate hours of work or staffing  
15 levels. If so, that should seek such authority from  
16 Congress.

17           That would be far easier than gaining the  
18 constitutional amendment necessary to implement the  
19 drug testing requirement. In short, we believe that  
20 this proposal is unconstitutional and unnecessary.  
21 It's a distraction from the real work of safety, and  
22 it should be withdrawn. As I said, we'll be  
23 submitting more formal comments in the future by the  
24 end of the month, but I'd be happy to answer questions  
25 now.

1 MS. SILVEY: Thank you, Mike. I really  
2 don't have any questions of you. There was one part  
3 of you to ask we will look forward to and appreciate  
4 receiving your more in-depth comments. I did want to,  
5 for everybody to hear this, just underscore with  
6 respect to your statement on page 2, and you brought  
7 out in talking about the constitutionality of the rule  
8 that the rules does not require any prior  
9 determination that an action by the miner contributed  
10 to the accident.

11 I can't go and find the specific provision  
12 now, but if I'm not mistaken, the rule does say that  
13 it has to be after an accident, a finding that drugs  
14 or alcohol may have contributed. Now, it might say  
15 "may have contributed to an accident," but there has  
16 to be some finding if I'm not mistaken.

17 MS. CARR: That is left to the mine  
18 operator's determination.

19 MS. SILVEY: Let me see.

20 MR. WRIGHT: I believe the right text itself  
21 says that the miner has to be operating a piece of  
22 equipment or performing a work activity that  
23 contributes, and the point I was trying to make is  
24 that a miner might be operating a piece of equipment  
25 that does contribute, for example, defective brakes on

1 a loader.

2 MS. SILVEY: Yes.

3 MR. WRIGHT: But the miner may not be  
4 responsible for those defective brakes if the gear  
5 shift would be tested.

6 MS. SILVEY: No. Yes, I understand that. I  
7 clearly understand that, so we'll look at that, yes.

8 MR. WRIGHT: Whereas the mine operator who  
9 may have been the person really responsible for the  
10 defective equipment would not be tested.

11 MS. SILVEY: Okay. Yes. Okay. Well, no, I  
12 don't have any further comments or questions myself.  
13 I bow to them. Do you all have anything?

14 Thank you very much. And as I said, we'll  
15 look forward to your more in-depth comments before the  
16 comment period closes.

17 MR. WRIGHT: Thank you.

18 MS. SILVEY: Okay. Thank you. Next, we  
19 will have Bruce Watzman with the National Mining  
20 Association from the D.C. location and a panel of  
21 witnesses, so as I explained earlier, if the person  
22 who is speaking can sit in the second chair from the  
23 end, and then just switch off as different people  
24 speak, we would appreciate it.

25 MR. WATZMAN: Thank you. Pat. Good morning.

1 I have copies of our complete submittal, which I will  
2 give to you for your review later, and I've already  
3 provided a copy to the court reporter. My name is  
4 Bruce Watzman, W-A-T-Z-M-A-N, and I'm with the  
5 National Mining Association. On behalf of NMA, we  
6 thank you for providing us the opportunity to appear  
7 before you today to present the views of NMA's members  
8 on the proposed rule for alcohol and drug-free mines.

9           Joining me today representing NMA are Helen  
10 Blevins with CONSOL Energy and Jennifer Herner with  
11 Arch Coal. We applaud MSHA for publishing the  
12 proposed rule for alcohol and drug-free mines. This  
13 is an area that has been and remains a great concern  
14 to our members, and I'm pleased that NMA has been at  
15 the forefront of advocating the need for a federal  
16 regulation to eliminate the gaps that exist across the  
17 patchwork of state programs regulating substance abuse  
18 at our nation's mines.

19           Having taken the important step of  
20 recognizing the existence of a problem in mine safety,  
21 we're disappointed with MSHA's proposed solution. In  
22 fact, we've concluded that adoption of the proposed  
23 rule as published will actually diminish the level of  
24 workplace safety provided by NMA member company  
25 programs already in effect. As such, we cannot

1 support the proposal as published.

2           Absent major modification, we believe the  
3 rule should not be finalized. Let me briefly touch  
4 upon the elements of the proposed rule that are  
5 central to our concern before turning to my  
6 colleagues. First, the proposed rule relies upon, in  
7 fact incorporates the DOT testing program contained in  
8 40 C.F.R. Part 49 and C.F.R. Part 40.

9           While this seems sensible given the DOT's  
10 long history of regulating alcohol and drug testing  
11 for the transportation sector, the wholesale adoption  
12 of DOT's program will, if finalized as proposed,  
13 result in many mine operators having to curtail their  
14 current comprehensive testing regimes and employ the  
15 DOT program. More importantly however, adoption of  
16 the DOT program for MSHA purposes overlooks the  
17 documented shortcomings of the DOT program.

18           Last year, less than a year ago in fact, the  
19 General Accountability Office issued a report  
20 examining the DOT program. They issued a report  
21 entitled Undercover Test Reveal Significant  
22 Vulnerabilities in DOT's Drug-testing Program.  
23 Stuningly, GAO concluded, "DOT's testing program is  
24 vulnerable to manipulation by drug users, especially  
25 given the wide ability of products designed to defeat

1 drug tests."

2           While several factors were identified, we  
3 believe DOT's reliance upon urine samples for testing  
4 is a major flaw that would be repeated in the MSHA  
5 program as proposed. Today, most companies have  
6 advanced well beyond the DOT testing protocols and  
7 include blood and hair sample testing, which have been  
8 proven to be more reliable for identifying long-term  
9 substance abusers. Some also use instant result  
10 tests, which ensure that no one with drugs in their  
11 system is put back to work.

12           The proposed rule would eliminate the  
13 ability for mining companies to use these advance  
14 testing tools and thus would diminish the level of  
15 workplace safety already provided. A second issue  
16 which the proposed rule fails to address because of  
17 its reliance upon the DOT program is the ability of  
18 individuals to hop from employer to employer after  
19 having failed a test.

20           Once again, the GAO in June of last year  
21 issued a report to the Chairman of the Committee on  
22 Transportation and Infrastructure of the U.S. House of  
23 Representatives entitled Examples of Job hopping by  
24 Commercial Drivers after Failing Drug Tests. This  
25 report identified numerous cases of individuals



1 obtaining employment after having tested positive for  
2 prohibited substances in a test administered by a  
3 prior employer.

4           This situation would not be remedied by the  
5 proposed rule, and I would ask that both of these  
6 reports be made a part of the office hearing record.  
7 To address the latter situation, the states of  
8 Kentucky and Virginia, which were prominently and  
9 appropriately recognized in the preamble to the  
10 proposed rule, share the names of miners whose  
11 certification has been revoked by either of the  
12 states.

13           I would note that between July '06 and  
14 October of '08, 633 certifications have been revoked  
15 due to failure to pass a substance abuse test. While  
16 many of these are in various states of appeal, only  
17 five individuals have been recertified for employment  
18 today. Unfortunately, there is no federal  
19 certification process for miners and employers in  
20 states that do not have comparable programs and do not  
21 have access to this data have become the proverbial  
22 home for wayward souls.

23           In the absence of a federal certification  
24 process, mine operators must be provided with the  
25 authority to use the full suite of diagnostic tools

1 currently available. Mine operators must have the  
2 ability to conduct testing that will identify those  
3 who have temporarily come clean merely to pass a pre-  
4 employment test. Limiting testing to only the methods  
5 recognized under the DOT program will deprive mine  
6 operators of this ability, and it's not the solution.

7           Lastly, and most importantly, we believe  
8 that by denying mine operators the ability to exercise  
9 all disciplinary actions for a first offense of the  
10 operator's program, up to and including dismissing the  
11 employee, the proposed rule will diminish rather than  
12 enhance the current level of workplace safety provided  
13 by NMA's members.

14           While we believe the industry would be  
15 served by a federal regulation providing authority and  
16 direction for all operators to govern their substance  
17 abuse program, we cannot support a regulation that  
18 will reduce the protections currently provided in the  
19 absence of a federal regulation. Unfortunately, we  
20 find the proposal is written to be more protective of  
21 substance abusers than miners. This is something no  
22 one in the industry should tolerate.

23           Now let me turn to my two colleagues who  
24 have far more experience in this arena than do I. Our  
25 first speaker will be Helen Blevins with CONSOL

1 Energy. Helen is the Manager of Clinical Occupational  
2 and Non-Occupational Healthcare for CONSOL. She has  
3 extensive experience managing CONSOL's substance abuse  
4 program and is recognized as one of the most  
5 knowledgeable authorities on the problem of substance  
6 abuse in the mining industry.

7           Following Helen will be Jennifer Herner with  
8 Arch Coal. Jennifer is Arch's Assistant General  
9 Counsel responsible for litigation and employment  
10 matters. She's been intimately involved in the  
11 development of Arch's substance abuse program,  
12 particularly the interplay between the various  
13 statutes protecting employee rights.

14           MS. BLEVINS: Members of the panel, my name  
15 is Helen Blevins. That's spelled B-L-E-V-I-N-S. I'm  
16 the Manager of Clinical Occupational and Non-  
17 Occupational Healthcare for CONSOL Energy. I'm here  
18 today on behalf of the National Mining Association to  
19 address the importance of drug and alcohol testing in  
20 the mining industry and how it can impact the safety  
21 and health of those who work in mining.

22           I would like to start by thanking you for  
23 your continuous attention on evaluating areas which  
24 will improve not only safety, but the health of  
25 miners. As stated in the proposed rule, use of drugs

1 or alcohol can severely impact an individual's  
2 judgment and put coworkers and equipment at risk.  
3 Mining is inherently dangerous, and the use or misuse  
4 of alcohol and drugs increases the risks of accident,  
5 injury or death.

6           It is reasonable to suspect that any  
7 decrease of a miner's attentiveness, concentration,  
8 dexterity, balance or reaction time could play a  
9 contributing if not causative role in an accident. No  
10 one can dispute that a miner who is under the  
11 influence of alcohol and/or drugs is an acceptable  
12 situation. It can cause risk for accidents.

13           I have worked in the mining industry for 29  
14 years in various healthcare positions. During this  
15 timeframe, I have been involved in the implementation  
16 of the DOT drug and alcohol testing program as well as  
17 the non-DOT drug and alcohol testing programs for  
18 CONSOL Energy. I had the opportunity to serve on  
19 Kentucky's Mine Substance Abuse Task Force. House  
20 Bill 572 was signed into law and became effective  
21 July 12, 2006.

22           This law incorporated the recommendations of  
23 the Mine Substance Abuse Task Force comprised of 15  
24 representatives from the coal industry, labor, MSHA,  
25 the states of Kentucky, West Virginia, the Kentucky

1 Department of Insurance and the Kentucky Office of  
2 Drug Control Policy. We met in numerous day-long  
3 sessions from March to November of 2005 and produced  
4 the Mine Substance Abuse Task Force Report in December  
5 of 2005.

6           This law became the foundation that sets  
7 standards on substance abuse to the mining industry.  
8 In 2007, Kentucky marked the lowest number of mining  
9 fatalities in their history, and this law is credited  
10 for causing that improvement. As we all know,  
11 Virginia followed and passed a law in April 2007  
12 requiring mine operators to implement a substance  
13 abuse screening policy and program for all miners in  
14 their state.

15           We again commend these two states for their  
16 guidance. We believe one reason why their law has  
17 made an impact is because they had the foresight to  
18 see that if they made the law so stringent it would  
19 prevent them from making future decisions when  
20 allowing changes as they arrive. Here are areas which  
21 became challenging for corporation to implement drug  
22 and alcohol testing programs since 49 C.F.R. Part 40.

23           These are questions, which need to be  
24 addressed with 30 C.F.R. Part 66 proposed rules. When  
25 49 C.F.R. Part 40 was adopted, it addressed the issues

1 for that time. As we can see today, the use and abuse  
2 of different drugs, and the methods available to test  
3 have changed. In the 1980s, it was hard to see the  
4 challenges we would have today such as adulterants as  
5 well as synthetic and semi-synthetic drugs.

6           When the regulation was passed, medical  
7 review officers did not have as many issues as they do  
8 today with verifications for prescribed medications.  
9 Today, industry is focused on education and prevention  
10 and holds all employees accountable to work safety. I  
11 do want to point out that 49 C.F.R. Part 40 does give  
12 employers the ability to follow standards that are  
13 excellent. These areas of excellence are collections,  
14 procedures, drug testing laboratory requirements,  
15 recordkeeping and medical information process.

16           The proposed rule today also addresses these  
17 standards. Substance abuse is an animal which is a  
18 very hard thing to place your arms around. We have  
19 seen with 49 C.F.R. Part 40 that the regulations need  
20 to have larger arms today to address the areas that  
21 prevent safety from being placed first. Many  
22 employers have developed their method for testing  
23 based on their geographic need.

24           In other words, if the closest clinic or  
25 hospital is 60 miles from their location, they need

1 the ability to use a rapid test for drugs and a rapid  
2 saliva test for alcohol. As long as the methodology  
3 has been approved by the FDA, and the employer has the  
4 ability to have confirmation testing completed, we  
5 should place regulation mandating this as well.

6           The members of the National Mining  
7 Association believe the regulation should cover all  
8 employees working on the operator's mine property.  
9 Many employers become overwhelmed with who should be  
10 covered and who is not covered with this type of  
11 language. Health and safety should be all employees  
12 on mine property responsibility. Therefore, everyone  
13 should be covered under this proposed rule.

14           Another concern employers have is  
15 prescription medication use and abuse. Our concern is  
16 that certain prescription medications can also affect  
17 one's ability to perform a job safely. Employers also  
18 feel that physicians need to be educated on the  
19 inherent dangers of certain prescribed medication and  
20 the consequences that medication can have on their  
21 patients and in our industry.

22           They should also understand that it is their  
23 responsibility to keep their patients safe when  
24 prescribing certain medications. If a mine operator  
25 has the need to investigate the use of an employee's

1 prescribed drugs, the prescribing physician must  
2 certify that the prescribed usage of the prohibited  
3 substance is appropriate for use by the employee to  
4 work safely while performing their essential job  
5 functions on mine property.

6           Many employers can show that since they have  
7 implemented a drug and alcohol program they have had a  
8 reduction in accidents as well as absenteeism. I  
9 noted earlier that Kentucky has published data showing  
10 that in 2007 they had the lowest number of non-  
11 fatalities since the implementation of drug and  
12 alcohol testing. Many employers often feel that zero  
13 tolerance is the only way to keep their workforce  
14 safe.

15           Employers recognize that if an employee does  
16 not come forward for help before being faced with a  
17 disciplinary action, the employer wants the ability to  
18 follow their policy for discipline. The reason is  
19 they don't want to place others in harm's way by  
20 giving a second chance. Many employers have  
21 implemented and educated their workers on their  
22 employee assistance programs.

23           They feel that if an employee is mandated  
24 into a program, the program is not as successful, and  
25 the employee has a greater chance for relapse.



1 Employers have stated once the drug and alcohol  
2 program has been implemented, they see an increase in  
3 employee rehab participation, which shows more  
4 successful outcomes.

5           In closing, I would like to ask the question  
6 is it necessary that this proposed rule incorporate  
7 regulations which prevent employers from developing or  
8 having a more stringent company policy, which would  
9 ensure a safe and healthy work environment? No, it is  
10 not necessary. The National Mining Association feels  
11 employers should be permitted to go beyond what the  
12 proposed rule states.

13           If a company has or wants to develop and  
14 implement a more stringent company policy, this can  
15 only help to better ensure a safer workplace for our  
16 employees. Members of the panel, thank you for the  
17 opportunity for allowing me to give my comments on  
18 this very, very important rule.

19           MS. SILVEY: I have a few comments, but  
20 we'll do it at the end.

21           MR. WATZMAN: Okay.

22           MS. HERNER: Members of the panel, good  
23 morning. My name is Jenny Herner. That's spelled  
24 H-E-R-N-E-R. I'm Assistant General Counsel of Arch  
25 Coal, which is headquartered in St. Louis, Missouri.

1 I'm appearing here today on behalf of the National  
2 Mining Association to testify on the important role  
3 drug and alcohol testing has in maintaining safety and  
4 health conditions in the nation's mines.

5           Thank you for your continued interest in  
6 improving miner's safety and health and for the  
7 opportunity to present the mining industry's views on  
8 the proposed rule. As indicated in the introduction  
9 to the proposed rule, using alcohol and/or drugs can  
10 affect a miner's coordination and judgment  
11 significantly at a time when he or she needs to be  
12 alert, aware and capable of performing tasks where  
13 there is substantial risk of injury to oneself or  
14 others.

15           Even prescription medications may affect a  
16 miner's perception and reaction time. Mining is a  
17 complicated and hazardous occupation and clear focus  
18 on the work at hand is a crucial component of mine  
19 safety. Miners under the influence of alcohol and/or  
20 prohibitive drugs endanger themselves as well their  
21 co-workers. This is of particular concern because  
22 many fatal and non-fatal mining accidents involve the  
23 operation of some type of equipment, tool or  
24 machinery.

25           Sharing this concern, the majority of larger

1 mining companies have had drug and alcohol testing  
2 programs in place for some time, and we wholeheartedly  
3 support MSHA's effort to require all mining companies  
4 to implement such programs. Our top priority is to  
5 ensure that every miner return home safely every day.

6           We have some suggestions on the proposed  
7 rulemaking based on our collective experience with  
8 these programs, which we believe will strengthen the  
9 rule's ability to improve safety in our nation's  
10 mines. In general, many of us have drug testing  
11 policies that are more stringent than the proposed  
12 rule, including zero tolerance policies or at least  
13 the option to terminate for a violation. We strongly  
14 suggest that the proposed rules be modified to act as  
15 minimum standards only.

16           We also took the liberty of suggesting  
17 specific changes to the language of the rules, which I  
18 will discuss briefly and which we will submit with our  
19 testimony. In terms of applicability, the rules  
20 restrict testing to a narrowly defined group of  
21 employees that MSHA has determined perform safety-  
22 sensitive job duties. However, we believe that all of  
23 our mine employees' duties are safety sensitive.

24           To quote John Donne, "No man is an island  
25 entire of itself. Every man is a piece of the

1 continent, a part of the main." At coal mines, even  
2 office clerks have to drive onto mine property around  
3 large moving equipment and other dangerous areas on  
4 the way to and from work. Almost every office and  
5 warehouse position involves some kind of travel into  
6 the active mine sites.

7           Our general managers are at active mining  
8 areas daily as part of their jobs as are human  
9 resources manager, safety managers and other office  
10 worker. We all have a role in safety from those who  
11 take comprehensive miner training to those who keep  
12 and file the record of that training to the presidents  
13 of our respective companies. We all have a role, and  
14 for that reason, we are concerned that the definition  
15 of persons performing safety-sensitive job duties is  
16 too narrow.

17           If it is left as it is and a mine operator  
18 terminates someone for testing positive who does not  
19 fall within the proposed rule's definition, we risk  
20 liability for wrongful discharge based on laws that  
21 restrict drug testing to those in safety-sensitive  
22 positions. This is a safety issue for us. In terms  
23 of training, we wholeheartedly support the requirement  
24 of training. Arch's subsidiary operations have  
25 training for their miners.

1           Some also have training for the miner's  
2 families. Some have creative videos to supplement  
3 their one-on-one training. We think that training is  
4 very important. However, we think the requirements on  
5 the amount of time spent on training and where and how  
6 to distribute it are form over substance, particularly  
7 if we use MSHA's nice suggested training in our  
8 program. Again, this should be a minimum standard.

9           With respect to testing, the proposed rules  
10 and the incorporated the DOT regulations appear to  
11 contemplate only urine testing for drugs and breath  
12 testing for alcohol, including blood, saliva and hair  
13 testing, which also should be permitted. We found  
14 hair tests to be effective in eliminating illegal drug  
15 users from the pool job applicants since hair samples  
16 reveal drug use over a longer period of time.

17           Hair and other tests also are useful when  
18 miners are unable to produce the urine samples during  
19 testing. With respect to the tests themselves, some  
20 mine operators use immediate results drug testing  
21 kits, which, as the name suggests, allows them to test  
22 and receive initial results on the spot ensuring the  
23 miners who have illegal drugs in their system are not  
24 put back to work.

25           However, the incorporated DOT regulations do

1 not permit this type of testing, requiring that all  
2 samples be tested offsite in a certified lab. In  
3 addition, there are conflicts between the DOT regs and  
4 the proposed rulemaking. For example, the proposed  
5 rules indicate that an operator may suspend employees  
6 pending for-suspicion and post-accident testing, but  
7 the DOT regs prohibit employers from suspending  
8 employees pending receipt of verified results.

9           We also think the extensive DOT regulations  
10 will be harder for smaller mine operators to comply  
11 with. Therefore, we suggest eliminating the  
12 requirement to follow DOT procedures. Mine operators  
13 should not have to abandon existing successful drug  
14 testing programs simply because they do not follow the  
15 DOT scheme. Requiring the use of SAMHSA certified  
16 labs for confirmation testing of positive results  
17 should address any concerns regarding testing  
18 procedures.

19           Finally, because mine operators would be  
20 relying on approved labs for a confirmation test, and  
21 because this rule is drafted as a mandatory safety  
22 standard, we suggest adding a provision that mine  
23 operators will not be liable for taking action based  
24 on the type of specimen used or invalid test results.  
25 With respect to reasonable suspicion testing, the

1 definition of reasonable suspicion should include  
2 instances in which mine operators are informed of  
3 employee use.

4 I'm aware of at least one instance in which  
5 a spouse informed a mine operator of her husband's  
6 use, presumably out of fear that he would be hurt or  
7 would hurt others in the workplace. I'm also aware of  
8 co-workers reporting drug use out of fear for their  
9 own safety. We should be allowed to test employees  
10 under such circumstances, even if they aren't  
11 exhibiting signs of drug use. For this reason, we  
12 suggest removing the requirement in §66.203 that there  
13 be evidence of reasonable suspicion testing.

14 If there's any reasonable suspicion, we  
15 should be able to test without being concerned about  
16 whether there is sufficient evidence to support it. A  
17 minimum standards rule would address this concern.  
18 Regarding random testing, it was unclear in what  
19 timeframe the 10 percent quota applied, so in our  
20 proposed revisions to the rules, we've suggested that  
21 at a bare minimum this be a yearly quota, although  
22 many of us have much more aggressive testing in place.

23 Regarding post-accident testing, although  
24 any root cause investigation should explore whether  
25 worker impairment played a role in causing an

1 accident, mine operators sometimes find it difficult  
2 to obtain this information, especially in fatality  
3 cases where the victim's family may block such a test.  
4 Therefore, mine operators should not be penalized if  
5 they're unable to obtain this information.

6           With respect to procedures after testing,  
7 since the MRO is the one requesting and receiving  
8 prescription drug information after positive results,  
9 we don't think it makes sense for mine operators to  
10 ensure that employees have the opportunity to provide  
11 this information. Rather, we think the MRO should do  
12 that.

13           We also suggest clarifying that mine  
14 operators have the right to do a direct threat  
15 analysis under the Americans with Disabilities Act, or  
16 ADA, for lawfully prescribed medications of which they  
17 become aware when they believe those medications may  
18 impair a miner's ability to work safely. For any of  
19 you not familiar with this procedure, an employer may  
20 exclude someone from a position if it determines that  
21 he or she would pose a direct threat.

22           In other words, a significant risk of  
23 substantial harm to the health or safety of the  
24 individual or others that cannot be eliminated or  
25 reduced by reasonable accommodation. To determine



1 this, employers consider the duration of the risk, the  
2 nature and severity of the potential harm, the  
3 likelihood that the potential harm will occur and the  
4 imminence of the potential harm.

5           The determination that someone poses a  
6 direct threat under the ADA is based on an  
7 individualized assessment of the employee's current  
8 ability to safely perform their essential job  
9 functions considering available objective evidence.

10           As it is written, the proposed rules could  
11 be read to prohibit mine operators from taking action  
12 and requiring a statement even if considering reasoned  
13 medical judgment it determines that a miner's lawful  
14 prescription drug use poses a direct threat to the  
15 miners or his or her co-workers' health or safety.  
16 This despite MSHA's recognition in the introduction  
17 that even prescription medications may affect a  
18 miner's perception and reaction time.

19           Again, it's our hope to have a minimum  
20 standard that allows us to take all steps necessary to  
21 keep our mines safe. Regarding the amnesty provision,  
22 which many of us already have in place, §66.204 could  
23 be read to allow miners to seek assistance after being  
24 identified for testing. This should be clarified.  
25 Also, the amnesty provisions should have a limit on

1 use to prevent abuse, namely once.

2           Regarding the mandatory referral to Employee  
3 Assistance Programs, or EAP, while this is fine for  
4 someone who takes advantage of the amnesty program,  
5 again we think it should be in the mine operator's  
6 discretion to send someone who violates its policy to  
7 an EAP rather than terminating their employment.  
8 Furthermore, there's no consideration of the fact that  
9 casual drug users are in need of assistance.

10           Referring them to an EAP puts them in a  
11 protected class under the ADA as having a record of  
12 alcohol or drug addiction. There already is an  
13 amnesty provision, and eligible employees who take  
14 leave for drug and alcohol rehab are protected under  
15 the Family and Medical Leave Act, so we think this  
16 provision is unnecessary. In addition, a mandatory  
17 EAP referral may be burdensome to smaller mine  
18 operators that currently do not have EAPs.

19           With respect to the requirement to test an  
20 employee who returns from rehabilitation six times  
21 within 12 months of their return, we don't necessarily  
22 object to a minimum testing for those who return to  
23 work after taking advantage of an amnesty program, but  
24 we are curious as to how MSHA selected this number.  
25 Lastly, and most importantly, mine operators were very

1 concerned over the requirement to put first-time  
2 policy violators back to work.

3           Many mine operators have zero tolerance  
4 policies or exercise discretion to terminate based on  
5 circumstances such as the substance use and the level  
6 of drugs in the employee's system. They consider this  
7 requirement to be a step backwards in safety for them  
8 and an improper intrusion into the day-to-day  
9 management. It diminishes the at-will doctrine.

10           Miners already have the ADA to protect them  
11 from abuses in this regard, although even the ADA  
12 doesn't protect those who engage in casual drug use or  
13 who currently are using illegal drugs, and  
14 respectfully, neither should MSHA. If I were arrested  
15 for driving drunk on the way home from this hearing,  
16 my driver's license would be revoked because I abused  
17 the privilege to drive and put other drivers in  
18 danger.

19           Why then are miners who are driving 240-ton  
20 trucks allowed to return to work and put their co-  
21 worker in danger? As written, even those who are  
22 actively attempting to conceal a drug use by  
23 purchasing and using adulterants, those who have  
24 illegal drugs on mine property and even those who are  
25 dealing drugs on mine property must be put back to

1 work.

2            Mine operators should be given discretion to  
3 terminate for a first offence and at the bare minimum  
4 should be allowed to terminate those adulterate their  
5 samples, have illegal drugs on mine properly or are  
6 dealing drugs. As it is, this mandatory second-chance  
7 provision arguably conflicts with the Safe Explosives  
8 Act, which provides that no one may receive or possess  
9 explosives who is an unlawful user or addicted to any  
10 controlled substance.

11           Mine operators who are federal contractors  
12 also risk debarment under the Drug-Free Workplace  
13 Requirements for Federal Contractors if the number of  
14 employees who have been convicted of violations of  
15 criminal drug statutes is accepted. The second chance  
16 provision also conflicts with some state laws.

17           As recognized in the introduction to the  
18 proposed rules, miners in Kentucky who test positive  
19 for illegal drugs lose their certification, although  
20 they can reapply, which we think is appropriate in the  
21 majority of the circumstances. While the proposed  
22 ruling suggests putting offenders in non-safety  
23 sensitive positions, many mine operators are thinly  
24 staffed, and as we said consider all their positions  
25 to be safety sensitive.

1           Finally, if the mandatory second chance  
2 provision is not struck, the proposed rule puts the  
3 burden on mine operators to decide whether to return  
4 offending miners to safety-sensitive duties. Combined  
5 with the requirement to return them to work, this  
6 exposes mine operators to liability for negligently  
7 returning someone to a safety-sensitive position. We  
8 should not be asked to face liability for putting  
9 safety first.

10           Again, in conclusion, we wholly support  
11 MSHA's effort to require all mine operators to  
12 implement drug and alcohol testing. None of us,  
13 neither the mine operators nor I'm sure MSHA will be  
14 satisfied until every miner returns home safely every  
15 day.

16           We respectfully suggest that our proposed  
17 changes to the rules, and in particular the  
18 elimination of the mandatory return to work provision  
19 will further that goal by allowing those with  
20 successful drug and alcohol testing programs to  
21 continue those programs and by providing minimum  
22 requirements for those who do not.

23           Members of the panel, once again on behalf  
24 of the members of the National Mining Association,  
25 thank you for the opportunity to give our perspective

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1 on this vital public policy. If you or the other  
2 members of the panel require any additional  
3 information, please don't hesitate to contact us.

4 MS. SILVEY: I have a few comments and  
5 questions. Just bear with me a minute. And I don't  
6 know what order these comments are. They may be for  
7 sort of like any of you or all of you.

8 First of all, I see a common thread coming  
9 from, and obviously I'm sure you all knew that. I  
10 looked at some of the comments before today's hearing,  
11 and one of the common threads that I saw through it  
12 was, I don't know how exactly you word it, but having  
13 the option I guess I should put it of getting rid of a  
14 miner at the first offense, however you want to word  
15 that so everybody can understand what I'm saying.

16 I had a question that I wanted to ask. You  
17 know, they say never ask a yes or a no question, so  
18 I'm going to see if I can rephrase it. What do you  
19 view the role of a rehabilitation program to be? I  
20 was going to say you can either talk of it from an  
21 overall conceptual standpoint or from the quantum view  
22 of your company.

23 MS. BLEVINS: I'd like to address both  
24 sides, a small employer and a large employer if that's  
25 okay looking at a rehab program and how you would be

1 able to offer it and what you would be able to have as  
2 outcome. Is that what you're looking for?

3 MS. SILVEY: Well, I guess what I'm  
4 actually -- because it seems to me that that's where a  
5 little bit of the crux of it, of this proposal is in  
6 terms of opposition to the proposal requiring that the  
7 miner be referred to a substance abuse professional  
8 and/or a -- help me with the terminology.

9 FEMALE VOICE: EAP.

10 MS. SILVEY: Employee Assistance Program.  
11 And I'm asking you especially I guess you're right  
12 being a health professional, what do you see as the  
13 role of a rehabilitation or Employee Assistance  
14 Program in an overall substance abuse program, but  
15 when you say you would like to respond to that from a  
16 standpoint of a small employer or a large employer,  
17 but I assume yours is a large company though?

18 MS. BLEVINS: It is. Correct.

19 MS. SILVEY: Okay. Okay.

20 MS. BLEVINS: But as I presented earlier, I  
21 was on the Kentucky Task Force, so I have some ability  
22 to be able to understand both large and small  
23 employers' positions.

24 But to answer I believe your question,  
25 Patricia, is the role of an EAP. The role of an EAP

1 is to allow a work/life balance for an employee  
2 through an Employee Assistance Program by the  
3 employer. What that means is that an employee could  
4 go forth on their own since they've had the training  
5 through regular training, annual refresher, that an  
6 EAP is available or that a number of different EAPs  
7 may be available for that employee to get in touch  
8 with.

9           If they in fact have a substance abuse  
10 problem, they're able to contact that EAP for  
11 assistance. What that means is a lot of times an  
12 employee has reasons to contact an EAP, but they  
13 really don't know the full roots. They know there may  
14 be a shoot, but they don't know the whole reason  
15 behind it.

16           Therefore, the EAP has professional  
17 counselors that can give that employee guidance on  
18 what they need to do next, meaning a person may have  
19 work or family issues that are contributing to. The  
20 goal for an EAP is to identify things early and to  
21 prevent a situation before it goes to the extreme,  
22 such as somebody who needs detox.

23           However, if an employee realizes that they  
24 truly do have a substance problem, they recognize that  
25 they need further medical treatment such as detox,



1 before they can go into the rehab process, the EAP is  
2 able to give them guidance and outline that for them.

3           As an employee goes through the process with  
4 an EAP, they're then able to get the treatment, the  
5 ongoing counseling and be able to be placed in  
6 programs that will allow greater success for sobriety.  
7 Now to answer EAPs from a large or small company's  
8 perspective, many large employers already have EAP  
9 programs in existence, and we do train our employees,  
10 and some of us actually go so far as offering the EAP  
11 family members as well because the theory there is we  
12 want to keep our employees safe.

13           If they have a family member who has an  
14 addiction, that person's mind isn't on the job either  
15 at work, so we expand it to offer it to all employees  
16 and their dependents, okay? With that being said, it  
17 can be very costly. Some rehab programs which are the  
18 most successful will offer not only a detox program  
19 but also an inpatient or extensive outpatient program.  
20 Those programs typically will last anywhere from 28  
21 to 30 days or longer.

22           In saying that, take, for example, the cost  
23 of a 28-day inpatient stay. It could be anywhere from  
24 \$12,000 to \$14,000 for that process. Along with that,  
25 a lot of large companies not only provide full payment

1 for that program, but they also allow the employee to  
2 be eligible for short-term disability. So we are  
3 trying to ensure that our employees receive the proper  
4 care, receive the ongoing care after a program to be  
5 able to come back to a productive life in our industry  
6 because we do value our employees.

7           Smaller companies, a lot of them can't  
8 afford that expense, but what they will do is they  
9 will publish names for resources for people to get in  
10 touch with and they will hold their positions. So you  
11 need to look at that balance, and I'm hoping I'm  
12 answering your question on what an EAP is truly there  
13 for. A true EAP is to help recognize prevention early  
14 for an employee, and then if the process unfolds and  
15 they need more extensive, they can also receive the  
16 more extensive care.

17           MS. SILVEY: And so I guess then now that  
18 you've given -- I appreciate you giving me that full  
19 and thorough explanation, and I don't want to put  
20 words in your mouth, but within the context of your  
21 testimony, and I am going to sort of put words in your  
22 mouth, I take it that you do see value in an EAP  
23 program?

24           MS. BLEVINS: Absolutely.

25           MS. SILVEY: Okay. That's my question.

1 Okay. With respect to your testimony on persons  
2 performing safety-sensitive jobs, and you thought the  
3 proposed definition was too narrow, and I could be  
4 talking to any one of the three of you quite honestly,  
5 that it should cover everybody, and now I'm going to  
6 ask something specifically with respect to the program  
7 that you have now. I assume that your existing  
8 program covers every employee when they come through  
9 the mine gate?

10 MS. BLEVINS: And I can speak for CONSOL  
11 right now with the exception of West Virginia, because  
12 we do have to follow the guidelines applied to safety-  
13 sensitive there.

14 MS. SILVEY: Okay.

15 MS. BLEVINS: Our other locations, yes, we  
16 do have a program in place that will test all  
17 employees.

18 MS. SILVEY: And with West Virginia, what's  
19 the West Virginia state law now?

20 MS. BLEVINS: And I'll defer that to  
21 Jennifer.

22 MS. SILVEY: Yes.

23 MS. HERNER: In West Virginia, you're only  
24 allowed to --

25 MS. SILVEY: Excuse me. If you would give

1 your --

2 MS. HERNER: No, that's all right.

3 MS. SILVEY: And I'm messing the court  
4 reporter up. Yes. It just hit me if everybody would  
5 give their name when they're talking. Right. Speak  
6 into the mic and give your name, yes.

7 MS. HERNER: Yes, ma'am. Jenny Herner,  
8 H-E-R-N-E-R.

9 MS. SILVEY: Yes.

10 MS. HERNER: And the question was the state  
11 law in West Virginia.

12 MS. SILVEY: Yes.

13 MS. HERNER: Prohibits employers from  
14 testing -- and this is common law, this is not  
15 statutory --

16 MS. SILVEY: Okay.

17 MS. HERNER: -- from testing employees who  
18 are not in safety-sensitive positions.

19 MS. SILVEY: Okay. Theirs is tied to  
20 safety-sensitive. And now I'm going to ask you, the  
21 lawyer, one other thing. Do you know how they define  
22 safety-sensitive positions?

23 MS. HERNER: It's very broadly defined in  
24 the case law.

25 MS. SILVEY: It's very broadly defined in

1 the case law. Okay. All right. Thank you.

2 Let's see. I had some more questions here.

3 When you -- I'm looking at Ms. Blevins now -- when  
4 you gave in your testimony that you have been involved  
5 in implementation of DOT drug and alcohol testing as  
6 well as non-DOT for CONSOL, so I suppose the non-DOT  
7 testing programs are the ones that go to the hair  
8 samples? Well, that's the analysis part I guess,  
9 right?

10 MS. HERNER: Corporations typically define  
11 non-DOT as their own policy rather than where a DOT is  
12 obviously following strictly the DOT regulations.

13 MS. SILVEY: Okay. The DOT. Right.

14 MS. HERNER: And our company does have both  
15 because we do have DOT, which takes a Coast  
16 Guard/Highway pipeline as well.

17 MS. SILVEY: Okay. Let's see. Well, with  
18 respect to your comment that you support the proposal,  
19 and obviously I realize all the areas in which you  
20 don't support it, and I'll tell you the truth, and for  
21 everybody else who's listening too, if you wanted to  
22 do this, of course I don't have to since Mr. Wright is  
23 looking on now, I don't even have to ask him that, but  
24 for some people, the fact that people gave alternative  
25 suggested regulatory language. I know what his

1 alternative suggested regulatory language would be, so  
2 I wouldn't ask him that.

3           But one of the things in terms of your  
4 suggested language, in terms of -- and I guess the  
5 initials go to you, Bruce -- in terms of the companies  
6 that have, not necessarily for you to answer right  
7 now, that have programs in place, do you have -- and  
8 they might not want to give them to us anyway -- do  
9 the companies have data which show that their programs  
10 have impacted safety and health privatism?

11           MR. WATZMAN: Pat, if they have the  
12 information, it's not something that we've solicited  
13 from them, nor has it been shared. I know you've  
14 asked those questions in the preamble to accompany the  
15 proposal.

16           MS. SILVEY: Yes.

17           MR. WATZMAN: And companies will  
18 individually decide the degree to which they want to  
19 make that information public.

20           MS. SILVEY: Yes.

21           MR. WATZMAN: Because it is public as soon  
22 as it's provided to you, and that may cause a concern  
23 for individual companies.

24           MS. SILVEY: Did you all have anything? You  
25 all can see this is not -- let's go off the record now.

1 (Whereupon, a short recess was taken.)

2 MS. SILVEY: Excuse me. I guess we did have  
3 one more comment. It seems like I think we probably  
4 could have a lot, but this goes to Ms. Blevins too.  
5 Your comment that says -- I guess this was -- the  
6 statement in your testimony, "If a mine operator has  
7 the need to investigate the use of employees'  
8 prescribed drugs, the prescribing physician must  
9 certify that the prescribed usage of the prohibited  
10 substance is appropriate for use by employee to work  
11 safely while performing their essential mine functions  
12 on job property", is this what you all require in your  
13 program?

14 MS. BLEVINS: What we will do is --

15 MS. SILVEY: And how do you do that?

16 MS. BLEVINS: Right. What we will do is,  
17 and actually Jennifer could explain the ADA side of it  
18 much better than I, but what we will be able to do is  
19 if a medical review officer feels that the employee  
20 has a negative screen, however, that they are on  
21 medication which of course we do not know what it is,  
22 we will have the employee, the medical review officer  
23 as well as our company, will go to the employee, ask  
24 them to sign a medical release in order for us to  
25 understand from their treating physician as well as

1 define to the treating physician the essential job  
2 functions for that person so that that treating  
3 physician truly understands what the employee has to  
4 do on the job as well as take a look at the types of  
5 side effects possibly that could prevent an employee  
6 from having total ability to have dexterity or  
7 awareness, attentiveness involved.

8 MS. SILVEY: So the prescribing physician  
9 does that.

10 MS. BLEVINS: Yes.

11 MS. SILVEY: Not the medical review officer.

12 MS. BLEVINS: It actually comes back to, and  
13 Jennifer, you may want to also explain a little bit  
14 better about the ADA.

15 MS. HERNER: I will if I may. Director,  
16 simply what we proposed in our redraft of this section  
17 is a procedure that we think complies with the  
18 provisions of the ADA with respect to direct threat  
19 analyses. And what we proposed is that the MRO once  
20 it learns that there is a negative screen but there is  
21 a prescription that falls within that list of  
22 prohibited substances is the MRO would then advise the  
23 employer that further inquiry needs to be made to the  
24 physician, again without identifying their particular  
25 prescription because the employer doesn't need to know



1 that information it doesn't want to know.

2           But then the employer would go to the  
3 prescribing physician with a questionnaire that asks  
4 questions, for example, does this medication for this  
5 employee in the amounts prescribed affect their  
6 coordination, balance, concentration and so forth. We  
7 would provide a copy of the job description for that  
8 individual employee as well as any functional capacity  
9 analyses. And then we receive the completed  
10 questionnaire back and we make a decision based on  
11 that, based on the responses received from the  
12 treating physician whether that employee is safe to  
13 perform his or her job functions.

14           MS. SILVEY: Okay.

15           MS. CARR: Just a clarification. I  
16 appreciate the recommendations and the concern about  
17 determining whether or not legitimately prescribed  
18 drugs might also be impairing. Is your analysis such  
19 that you do not currently feel that the proposal  
20 allows for that type of individualized assessment  
21 because there is language that suggests that there is  
22 the prerogative of the MRO to notify the employer?

23           MS. HERNER: We did read it as prohibiting  
24 that, so to the extent that it is allowed and you are  
25 in favor of that, we would suggest clarifying what

1 rights mine operators have.

2 MS. SILVEY: Okay. Anybody --

3 (Whereupon, a short recess was taken.)

4 MS. SILVEY: We are about ready to start,  
5 and as I said, our next speaker is from our  
6 Denver/Englewood office. Mike, we're going to see you  
7 all later. It's taking a little while later for the  
8 screen to come up.

9 (Discussion held off the record.)

10 MS. SILVEY: So our next speaker, we have  
11 Tim McCreary with Thunder Basin Coal Company, and I  
12 gather that you may or may not have somebody with you,  
13 so please --

14 MR. MCCREARY: I am by myself.

15 MS. SILVEY: Okay.

16 MR. MCCREARY: McCreary is M-C-C-R-E-A-R-Y.  
17 I'm the Safety Manager at Thunder Basin Coal Company  
18 in Wright, Wyoming. I want to thank you for the  
19 opportunity to address the panel concerning Thunder  
20 Basin's views on the proposed rules regarding drug and  
21 alcohol testing in mining.

22 Thunder Basin has had a drug and alcohol  
23 testing program since 1985. The program has evolved  
24 over this 32-year period with changes in technology  
25 and successes and failures within the program. We

1 believe through this evolution we now have a very  
2 successful deterrent for the use of drugs and alcohol  
3 in our mining operation.

4           Safety is a core value at Thunder Basin Coal  
5 Company. We view the regulation as written as a step  
6 backwards in our efforts to maintain a drug and  
7 alcohol free workplace. Mine operators must be given  
8 the flexibility to administer these tests with the  
9 best technology available and have the ability to  
10 determine the consequences according to those results.

11           The regulation mentions in many instances  
12 that the testing for drugs will be conducted through  
13 urine sampling. We generally use urine sampling  
14 methods when conducting random sampling. However, we  
15 use hair follicle testing in most cases when  
16 conducting preemployment testing. This gives us the  
17 ability to look further into the past for any drug  
18 use. There may be situations that arise where a blood  
19 test may be the best testing method of choice for  
20 those specific circumstances. Mine operators need the  
21 flexibility to conduct the appropriate test for the  
22 situation at hand.

23           Operators should also be permitted to test  
24 all work positions at the mine as they so desire.  
25 Personnel in non-sensitive, safety-sensitive positions

1 at the mine may have influence on safety-sensitive  
2 position miners.

3           The regulation allows a miner to voluntarily  
4 admit any inappropriate use of drugs or alcohol prior  
5 to testing. As written, miners may never be in  
6 violation of the policy so long as they confess their  
7 inappropriate use each time prior to the test. Our  
8 policy does not excuse a person who self-identifies  
9 once they have been selected for testing.

10           The proposed regulation is also unclear as  
11 to the length of time for the 10 percent quota. We  
12 suggest that a one-year period be used, although  
13 Thunder Basin tests approximately 50 to 60 percent of  
14 our employees each year. The 10 percent per year at a  
15 minimum might be a more workable number for those  
16 contractors and mine operators who will be  
17 implementing new programs.

18           As far as reasonable suspicion testing, mine  
19 operators must be allowed to test based on specific  
20 information given to them by a miner's coworkers. And  
21 in most cases, miners and their coworkers spend much  
22 more time together during the shift than supervisors  
23 and employees do. Coworkers are an important link in  
24 the information chain and should not be removed from  
25 the equation.

1 Supervisors or other company officials'  
2 observations should not be the only method in  
3 identifying drug or alcohol use. Oftentimes, impaired  
4 miners have the ability to straighten up in the  
5 presence of a supervisor. Miners are much more likely  
6 to let down their guard if you will around their  
7 coworkers.

8 And in consequences for miners for failing  
9 or refusing to test, mine operators must have the  
10 ability to terminate employees for first-time  
11 offenses. We should also have the flexibility to  
12 terminate an employee who refuses to participate in  
13 the testing process. Most drug and alcohol programs  
14 look upon a refusal the same as a positive test, and  
15 adulteration is the ultimate form of defiance and  
16 should be considered the same as falsification of a  
17 company document and result in immediate discharge.

18 In summary, Thunder Basin Coal Company's  
19 current policy has been in place since 2002. In that  
20 time period, we have had 99.72 percent of our tests  
21 show no drug or alcohol use. This demonstrates that  
22 our policies and practices have worked well at  
23 establishing and maintaining a drug and alcohol free  
24 workplace.

25 Members of the panel, please give the mine

1 operators the flexibility to use multiple testing  
2 methods, allow us to continue to deal effectively with  
3 first-time offenders through termination. These steps  
4 are necessary for this industry to get to zero injury.  
5 Thank you.

6 MS. SILVEY: Thank you, Mr. McCreary. I  
7 basically just have two comments, one question. I  
8 wrote down -- oh, yes. Now there's so much going on.  
9 Under your program, the one that you have in place  
10 now, who do you test in terms of who's covered?

11 MR. MCCREARY: Everyone at the mine. All  
12 employees are.

13 MS. SILVEY: All employees. Okay.

14 MR. MCCREARY: All employees.

15 MS. SILVEY: That's a simple answer. The  
16 second one, let me see if I can say something to --  
17 (Pause.)

18 MS. SILVEY: Okay. I think I'm right now  
19 here. You know what they say, think you are. Under  
20 the proposal, and I just want to make sure there's no  
21 confusion, you talked in your testimony and I was  
22 trying to write down that people who confess to  
23 inappropriate use, they could do that each time prior  
24 to the test and they could sort of get away, get a  
25 free pass. You seemed to intimate that. But under

1 the proposal, while the agency meant to encourage  
2 people to voluntarily, you know, come forward if there  
3 is an issue, it by no means meant to excuse  
4 inappropriate use.

5           So while the first time would be, you know,  
6 the person would be referred to treatment if the  
7 person voluntarily admitted use, under the proposal,  
8 the second, the third, the fourth, the fifth, which  
9 seems to me I got that from your testimony, the  
10 operator could do what the operator wanted to do under  
11 the proposal, so it was not meant to do anything but  
12 to encourage it as a first time, so I just want to  
13 clarify that. And I thought that was clear in the  
14 preamble, and maybe it wasn't, but we'll look back. I  
15 thought it was pretty clear to me.

16           And that really is all that I have. Does  
17 anybody else have any?

18           (No response.)

19           MS. SILVEY: Okay. Okay. Thank you very  
20 much.

21           MR. MCCREARY: Thank you.

22           MS. SILVEY: Our next speaker will be the  
23 National Stone, Sand & Gravel, right? I'm looking  
24 back to see. Anne Kelhart and Una Connolly with the  
25 National Stone, Sand & Gravel Association.

1 MS. KELHART: You're ready?

2 MS. SILVEY: I'm ready.

3 MS. KELHART: My name is Anne Kelhart. I  
4 manage Safety & Health at the Martin Stone Quarries  
5 Company in Bechtelsville, Pennsylvania, and I  
6 currently serve as Chair for the National Stone, Sand  
7 & Gravel Association. Thank you for allowing us this  
8 opportunity today. Would you like me to spell that  
9 last name? K-E-L-H-A-R-T. Okay. Very good.

10 On behalf of the National Stone, Sand &  
11 Gravel Association, I am pleased to present the  
12 following testimony concerning the Mine Safety &  
13 Health Administration proposed rule to establish  
14 policies, prohibitions, testing and training  
15 requirements to establish alcohol and drug free mines  
16 in the United States as published in the September 8,  
17 2008, *Federal Register*.

18 NSSGA is the world's largest mining  
19 association by product volume. Its member companies  
20 represent approximately 118,000 men and women and more  
21 than 90 percent of the crushed stone and 70 percent of  
22 the sand and gravel produced annually in the U.S.  
23 More than 3 billion tons of aggregates were produced  
24 in 2007, at a value of approximately \$21.5 billion,  
25 contributing nearly \$40 billion to the GDP of the



1 United States. Every \$1 million in aggregate sales  
2 creates 19.5 jobs. Every \$1 of industry output  
3 returns \$1.58 to the economy.

4 Our members operate in every state in the  
5 nation. Of the 23,054 mines in this country, nearly  
6 half of them are in the aggregates industry. So  
7 NSSGA's membership will be heavily impacted by this  
8 proposal. The vast majority of these aggregate mines  
9 are classified as small businesses both by the U.S.  
10 Small Business Administration's definition and by  
11 MSHA's own criteria.

12 NSSGA applauds MSHA for tackling this issue  
13 in a proactive manner and notes that its predecessor  
14 organization, the National Stone Association, served  
15 on a tripartite working group with MSHA, unions and  
16 state government representatives in the early 1990s to  
17 advance substance abuse prevention in mining. We are  
18 pleased to see that MSHA has once again resumed work  
19 in this critical area.

20 This testimony will focus on some of the  
21 main concerns that NSSGA has about the proposal, and  
22 we will submit more detailed written comments covering  
23 these issues and additional matters pertaining to the  
24 rule before the October 29 deadline.

25 Although many of the provisions of this

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1 proposed rule are acceptable, others need major work  
2 because of infeasibility or because they run contrary  
3 to established employment law practices. While many  
4 of our larger corporate members already have substance  
5 abuse prevention programs in place and may utilize  
6 drug and/or alcohol testing under certain  
7 circumstances, many of the smaller companies do not  
8 yet have such a framework in place.

9           Therefore, we believe that MSHA has  
10 considerably underestimated the cost of the proposed  
11 rule, particularly its cost impact on smaller mines.  
12 We urge MSHA to reconfigure its regulatory impact  
13 analysis once more. Cost data on this proposal can be  
14 obtained through the notice and comment process.

15           NSSGA agrees that any proposal should apply  
16 in equal measure to coal and metal, non-metal mines,  
17 both surface and underground. There is no basis for  
18 affording lesser protection to some miners than to  
19 others. Under the substance abuse testing and  
20 training requirements, MSHA would cover all miners who  
21 receive comprehensive training and who perform safety-  
22 sensitive job duties. Comprehensive training is  
23 defined as 24 hours training for surface mines and 48  
24 hours for underground mines.

25           However, the definition in 30 C.F.R. §66.3

1 covers, and I quote, "any type of work activity where  
2 a momentary lapse of critical concentration could  
3 result in an accident, injury or death". For all  
4 practical purposes, this covers virtually everyone at  
5 the mine site, and I've heard this a number of times  
6 already this morning. Mines are a dynamic work  
7 environment where even crossing the road to go to the  
8 parking lot could result in death due to a momentary  
9 lapse of concentration in the midst of heavy  
10 equipment. And by the way, I didn't meet earlier with  
11 the other folks that testified who came up with almost  
12 that exact same scenario. There's no question this is  
13 a problem.

14           If MSHA intends to cover everyone at the  
15 mine who receives comprehensive Part 46 or 48  
16 training, they should simply state that. Introducing  
17 subjective criteria that allows for arbitrary and  
18 capricious after-the-fact interpretation forces an  
19 operator to guess at the correct interpretation. In  
20 general, we have concerns about how this rule will be  
21 enforced as it pertains to independent contractors,  
22 particularly those persons performing work at mines  
23 and whose employees become miners by definition  
24 subject to comprehensive Part 46 or 48 training but  
25 who do not normally work within MSHA jurisdictions.

1           Those contractors are mine operators under  
2 the Mine Act, but too often of late, MSHA has issued  
3 duplicate citations to the production operators for  
4 contractor violations, invoking their unreviewable  
5 discretion under the 2006 Twentymile Coal decision of  
6 the U.S. Court of Appeals D.C. Circuit. It will be  
7 quite problematic for a production operator to verify  
8 compliance with certain provisions of this rule, such  
9 as the drug testing of contractor employees or short-  
10 term contractors whose coverage is triggered by being  
11 at the mine site more than five consecutive days.

12           Privacy issues are just one of the obstacles  
13 faced by mine operators checking contractor  
14 compliance. Although review of substance abuse  
15 programs and training records may be possible, a  
16 larger concern is that mining companies in rural areas  
17 do not have a large number of specialty contractors to  
18 choose from, and if a contractor who is normally under  
19 OSHA jurisdiction will have to put an entire substance  
20 abuse program and testing framework into place just to  
21 perform a couple of weeks' work at a mine, it's likely  
22 to simply decline the work.

23           This will not only create problems for mine  
24 operators in getting quality contract work done by  
25 such specialty sectors as crane companies,

1 electricians, drillers and blasters, but it could  
2 possibly place miners at increased risk having to use  
3 maybe folks with inferior abilities who happen to have  
4 a drug testing program.

5 MSHA needs to reconsider the scope of this  
6 rule as it pertains to contractors and perhaps come up  
7 with a different definition of miner that will exclude  
8 those short-term contract workers whose work may  
9 undoubtedly involve safety-sensitive areas or else  
10 affirm in the final rule that the host mine operator  
11 will not be cited for infractions by independent  
12 contractors who work at their mine sites.

13 As noted, many of NSSGA's member companies  
14 have programs in place, and many of these are modeled  
15 on the U.S. Department of Transportation requirements  
16 for commercial drivers since often it's such CDL  
17 employees are also miners. Quite a few of these  
18 programs, however, include a zero tolerance or one  
19 strike and you're out provision for those who have  
20 positive drug or alcohol tests.

21 Although reinstatement is often made  
22 available to those who self-report a problem and go  
23 through appropriate treatment and counseling, this is  
24 not the choice for those caught as a result of random  
25 or post-accident testing. The majority of states in

1 this country have basic employment at will principles  
2 wherein all employees can be terminated at any time  
3 with or without cause. The exceptions are those  
4 workers subject to an employment contract for a period  
5 of time, subject to a collective bargaining agreement  
6 or subject to other company-specific disciplinary  
7 procedures that preclude termination for certain  
8 offenses. Many companies also have seniority systems  
9 that dictate in the event of layoffs the order in  
10 which workers will be released.

11 Under MSHA's proposed rule, a worker who has  
12 a positive drug test gets preferential status when  
13 compared to workers who have not broken drug or  
14 alcohol rules insofar as the company would be required  
15 to preserve the miner's job while he or she obtains  
16 treatment and to reinstate the miner afterwards. The  
17 proposal is silent on what would happen if layoffs  
18 occur in the interim which might have otherwise  
19 resulted in the layoff of the miner. But the rule  
20 does at least acknowledge that if the miner could be  
21 terminated for a different infraction, the company  
22 could legally take such an action.

23 More significantly, however, we believe that  
24 the mandatory reinstatement provision actually will  
25 weaken existing programs and encourage drug and

1 alcohol use by making mines a safe harbor for users at  
2 least after the first positive test and completion of  
3 treatment. MSHA is we believe without authority to  
4 alter fundamental concepts of employment law that are  
5 well established through case law in every state and  
6 at the federal level. If companies wish to retain a  
7 one strike provision in their programs, they should be  
8 free to do so. Therefore, the provision in 66.400(b)  
9 must be stricken from this rule.

10 MSHA should also permit existing programs  
11 that adhere to DOT five panel criteria to continue  
12 unaltered, including the decision to test for the same  
13 drugs as DOT requires under such programs plus  
14 alcohol. This is also consistent with state mining  
15 laws in Kentucky and Virginia.

16 If mine operators wish to add the other  
17 drugs listed by MSHA, they should be allowed to do so  
18 after acceptable core levels of synthetic opiates have  
19 been determined. But under no circumstances should  
20 mine operators be required to deviate from DOT testing  
21 criteria. The Secretary should not be permitted to  
22 add extra substances to the testing mandates in the  
23 future unless she does so through formal notice and  
24 comment rulemaking.

25 This rule anticipates a high volume of drug

1 tests that will be at the mine operators' expense,  
2 including various prehire, random, post-accident,  
3 return to duty and suspicion or reasonable suspicion  
4 criteria, plus the requirement to test any positive  
5 workers six times in the following 12 months.

6           While we agree that the operator should pay  
7 for most testing, we believe that a positive tested  
8 worker should have to bear the expense for his or her  
9 monitoring if the miner returns to work following  
10 treatment.

11           Moreover, we question whether there are  
12 sufficient testing companies and medical review  
13 officers available in many rural areas to handle the  
14 volume of tests in a timely manner. Most aggregate  
15 operators may not have a current relationship with an  
16 MRO. The rule is also quite burdensome in requiring  
17 an MRO to contact all doctors that may prescribe  
18 medications to each miner at the worksite who is  
19 subject to drug and alcohol testing. The feasibility  
20 of this must be reexamined when finalizing this rule.

21           NSSGA is also concerned that the post-  
22 accident criteria is too broad as it would mandate a  
23 test for any reportable injury regardless of severity  
24 as long as it triggered medical treatment under Part  
25 50. We suggest that this testing trigger be limited



1 to those incidents that are immediately reportable  
2 under 50.10 and which are defined as accidents in Part  
3 50.2(h). Companies should be free of course to  
4 implement more stringent post-incident testing if they  
5 already do so under their existing programs and  
6 consistent with DOT criteria.

7           We also disagree that MSHA should be  
8 authorized if it initiates an accident investigation  
9 in a timely manner to order drug testing of any  
10 persons it believes contributed to the incident or  
11 accident. This is overly broad and interferes with  
12 the employer/employee relationship. As a practical  
13 matter, neither MSHA nor the operator will be able to  
14 complete any type of adequate root cause investigation  
15 in the short window of time when drug and alcohol  
16 testing can be performed. In light of this, MSHA  
17 should defer to the employer's judgment on who must be  
18 tested in the situation.

19           NSSGA also has concerns about worker privacy  
20 issues, particularly since this rule envisions MSHA  
21 inspectors having access to information about positive  
22 tests. We understand that MSHA is exempt from the  
23 Health Insurance Portability and Accountability Act,  
24 also known as the HIPAA requirement. However, there  
25 should still be some assurance that inspectors will

1 not reveal one miner's personal information to others  
2 or through public release and a Freedom of Information  
3 Act request. There should be sanctions available  
4 against inspectors who violate miner privacy  
5 interests.

6 MSHA suggests that supervisors must receive  
7 twice the training both initially and on an annual  
8 basis than other miners receive relevant to substance  
9 abuse prevention and indicates that such training must  
10 be in addition to the normal training required under  
11 Part 46 and 48. Respectively, this increases annual  
12 refresher training from eight hours to eight and a  
13 half hours for miners and to nine hours for  
14 supervisors.

15 There's simply no basis for expanding the  
16 new miner training or annual refresher training  
17 duration requirements. Many companies already cover  
18 substance abuse as part of their initial and refresher  
19 training, and because MSHA acknowledges that this is a  
20 significant safety issue, it is appropriate to include  
21 this with any existing training framework. This  
22 should be clarified in the rule, and the same duration  
23 of training should be provided for both miners and  
24 supervisors so that separate training programs will  
25 not be required relative to substance abuse and

1 changes in the training plans will not be required.  
2 NSSGA agrees that any person training on substance  
3 abuse prevention should be competent to do so.

4           In conclusion, NSSGA supports a drug and  
5 alcohol free workplace in the mining industry, and  
6 many of its members have been proactive in this area  
7 for a very long time. We urge the agency to modify  
8 the proposed rule in a way that existing programs can  
9 continue to be used successfully and that any rule is  
10 consistent with DOT and state law requirements  
11 concerning both substance abuse prevention and basic  
12 concepts of employment at will and that the privacy  
13 rights of all involved are adequately protected.

14           Historically NSSGA has worked with MSHA on a  
15 number of initiatives, including the initial work on  
16 this topic in 1990 and again in the early 2000s during  
17 the promulgation process for Part 46. We look forward  
18 to the opportunity of working with MSHA again to  
19 achieve the goal of a drug and alcohol free workplace.  
20 Thank you for considering our comments today, and we  
21 will be pleased to answer any questions you might  
22 have.

23           (Pause.)

24           MS. SILVEY: Thank you.

25           MS. CONNOLLY: I don't have any testimony

1 today. It was only Anne Kelhart.

2 MS. SILVEY: Oh, okay. I'm sorry. I  
3 thought you were going to -- okay.

4 MS. CONNOLLY: She's representing our  
5 association today.

6 MS. SILVEY: Okay. All right. Well, then I  
7 do have a few comments. I'll go to your testimony,  
8 Ms. Kelhart. First, with respect to your comments to  
9 us on the fact that we have considerably  
10 underestimated the costs, and I would say this both to  
11 Ms. Kelhart and to anybody else who might have the  
12 same comment or have made the same or similar comment.  
13 If you would please, you urged MSHA to reconfigure  
14 its regulatory economic and preliminary regulatory  
15 economic analysis indeed for the proposed rule.  
16 That's what it was, a preliminary analysis.

17 I would ask if you and anybody else who  
18 hears if you could do this. Could you provide  
19 specific data to the contrary? You said that we  
20 underestimated the costs, so with respect to the  
21 various parameters, cost parameters in the preliminary  
22 economic analysis, if you would provide for the record  
23 before the comment period closes on the 29th different  
24 estimates, being that your suggestion is that we  
25 underestimated. We would appreciate that.

1 MS. KELHART: In response to your concern,  
2 you will surely receive more detailed comments prior  
3 to the closing of the comment period, and we will be  
4 glad to include what data we can on the issue.

5 MS. SILVEY: Okay. All right.

6 MS. KELHART: Absolutely.

7 MS. SILVEY: Okay. The next comment I have  
8 is that with respect to the scope of the rule, and  
9 just so this is kind of at least as clear as it can  
10 be, I think the agency did say, and now maybe in one  
11 part of it we will be more, we can be more clarifying  
12 and as we go forward, we will try to be clarifying as  
13 we can, but at this point in the rulemaking process,  
14 we did say that the scope of persons covered by the  
15 proposal would be persons who, and that is indeed how  
16 we defined a safety-sensitive, a person in a safety-  
17 sensitive job was a person who was subject to training  
18 under 30 C.F.R. §48 or Part 46.

19 Now obviously you've heard with, many of you  
20 have heard with me this morning that some programs  
21 cover everybody who comes through the mine door, and  
22 when I say well, mine gate or whatever it is, the  
23 entrance to the mine, but our intent in the proposal  
24 was to cover any miner who received comprehensive  
25 training under Part 46 and Part 48 and their

1 supervisors, and that's just a clarification there.

2 MS. KELHART: But that still excludes other  
3 folks at the mine.

4 MS. SILVEY: I understand. No, I'm just  
5 saying because one of your -- you said if MSHA intends  
6 to cover everyone at the mine who receives Part 46 or  
7 48 training, they should simply state that, and all  
8 I'm saying is we did say that, and so if we were not  
9 totally clear, I'm saying that right now so everybody  
10 hears that.

11 MS. KELHART: I think what was confusing is  
12 there is a phrase in the document that says in some  
13 cases, it may be left to the mine operator's  
14 discretion.

15 MS. SILVEY: Yes. Okay. Yes.

16 MS. KELHART: And that was worrisome.

17 MS. SILVEY: Okay. The next comment I have  
18 is on the drug testing, and maybe I'm confused here,  
19 and maybe somebody, you suggested that MSHA permit  
20 existing programs that adhere to the Department of  
21 Transportation five panel drug criteria. And you said  
22 including the decision to test for the same drug as  
23 DOT requires. That is also consistent with state  
24 mining laws in Kentucky and Virginia. But I thought  
25 that Kentucky had, and somebody, anybody can correct

1 me here because clearly, I thought Kentucky had the 11  
2 panel test.

3 (Multiple voices.)

4 MS. SILVEY: Okay. All right. I just  
5 wanted to make sure. Okay. And then let me see. I  
6 understand and appreciate your comment on the  
7 reporting, I mean, I'm sorry, the testing, post-  
8 accident testing. And the only other thing I would  
9 add is that you can be ensured, and I'm not sure we  
10 said anything about it in the proposal, but that under  
11 Freedom of Information Act requests and/or under  
12 information that our inspectors get in the course of  
13 accident investigations, we as an agency have to  
14 comply with all privacy and confidentiality  
15 information that we get, and under the Freedom of  
16 Information Act, we would be constrained from  
17 releasing that information. So I just wanted to make  
18 sure that I also say that to everybody, but obviously  
19 if we didn't say that in the proposal, we could be  
20 clarifying in that regard because, I mean, that's our  
21 obligation to do that.

22 I don't have any other comments unless some  
23 of my panel members have any comments or questions.

24 (No response.)

25 MS. KELHART: Thank you.

1 MS. SILVEY: Thank you very much.

2 Our next speakers are the speakers from the  
3 United Mine Workers of America, and I know that Mr.  
4 O'Dell is here and Dr. Weeks, and they've got several  
5 other people on their list. Do we have all the  
6 people?

7 (Discussion held off the record.)

8 MS. SILVEY: So we have Dennis O'Dell and  
9 James Weeks with the United Mine Workers of America.

10 MR. O'DELL: Thank you and good morning. As  
11 I look around the table today, I see many friends.  
12 And trust me, I'd like to start out by saying that we  
13 do consider our folks at MSHA our friends and friends  
14 to the miners. But I think this is one case that may  
15 not be any fault of anybody here. My name is Dennis  
16 O'Dell, D-E-N-N-I-S O'D-E-L-L, I apologize, with the  
17 United Mine Workers of America.

18 There's a real problem, and I came here  
19 today fully with intentions to testify to this  
20 proposal, but it appears we have an even bigger  
21 problem than drug and alcohol use in the mines, and  
22 that is MSHA's ability to hold a proper public hearing  
23 where all miners can participate. As we sit here  
24 today, and I sent three letters, Pat, one to you, one  
25 to Richard Stickler and another one specifically



1 requesting that we have public hearings in a field so  
2 that miners can participate, as we sit here today, we  
3 have 250 miners plus in the state of Alabama in a  
4 parking lot wanting to testify, and they are being  
5 denied their right to even sign in on a sheet and been  
6 told that they can't have access, they can only put 50  
7 people in a room.

8           We have miners in Pennsylvania who are  
9 split, part of them in an audio room, part of them in  
10 a video room, and they're not able to get the full  
11 effect such as we are. For the first hour and 45  
12 minutes of this hearing today, I sat outside unable to  
13 get access to the same ability that the people behind  
14 me had to participate in this hearing.

15           So with saying that, I would like to request  
16 that this public hearing be shut down and rescheduled  
17 at another time when miners are accommodated and have  
18 the full ability to participate at a public hearing.  
19 This is clearly an infringement on our rights as given  
20 to us under the Mine Act and as the Congress has  
21 intended. I think it's a fiasco and an embarrassment.  
22 Everybody in this room should be embarrassed.

23           And again, it's not a personal attack to  
24 you, Pat, or anybody on your panel, but whoever came  
25 up with this asinine idea to have a public hearing

1 that is going to deny miners the right to participate  
2 should be here today to answer to those folks that  
3 have to stand in that parking lot without bathroom  
4 facilities or anything else. So with that, I'm asking  
5 you, can you shut this hearing down today right now?

6 MS. SILVEY: I'm going to provide everybody  
7 who wants to have an opportunity to participate at  
8 this hearing, I'm going to allow them the opportunity  
9 to provide their input.

10 MR. O'DELL: But standing in a parking lot  
11 is not participating. And they haven't been able to  
12 hear everything that's been said so far today. I just  
13 want to go on record that miners today have been  
14 denied the right to properly participate in this  
15 public hearing, and we object to this hearing.

16 MS. SILVEY: I appreciate it. I understand.  
17 Thank you.

18 MR. O'DELL: Okay. Well, saying that, I'd  
19 like to give some comments on the proposed rule as it  
20 is, and we have written comments that we'll submit at  
21 a later date.

22 MS. SILVEY: Okay.

23 MR. O'DELL: The United Mine Workers do not  
24 support the agency's actions in proposing a new  
25 regulation to require testing for alcohol and drug use

1 in the mine industry. The mine workers do not want  
2 anyone who is under the influence of drugs or alcohol  
3 working in our mines, nor do our members want to work  
4 next to someone because they know that their  
5 livelihood could be jeopardized.

6           However, we do not believe that this is as  
7 great of a problem as it has been portrayed in MSHA's  
8 comments. And I hear from some of the testimony given  
9 by industry today they reflect the same opinion. I  
10 mean, I heard somebody just say that they prescreened  
11 and did some drug testing at their operation and 97  
12 percent of them were clean. So the problem doesn't  
13 exist as it's being proposed.

14           We personally have worked with dozens of our  
15 members' employers to implement drug and alcohol  
16 testing programs because we do remain committed to  
17 creating the safest and healthiest environments for  
18 our miners, and that can't happen when a coworker is  
19 impaired. These programs have been in place for a  
20 number of years and have been somewhat successful.  
21 Our biggest, what we think is the biggest failure of a  
22 lot of the industry's programs is that people, and you  
23 heard it today, people have to self-report, and one of  
24 the things that people do not understand is that drug  
25 and alcohol addiction is a disease, but it's also a

1 disease of denial.

2           My Grandpa O'Dell, God rest his soul, was an  
3 alcoholic, but he lived to be 93 years old. But to  
4 the day he died, and I'm not proud to say this, but to  
5 the day he died, he did not say he had a problem  
6 drinking, but we saw it growing up. Denial. I've  
7 worked with men in the mines who have had problems,  
8 and thank God we've been able to get them taken care  
9 of and straightened out by working with the operators,  
10 but the problem in the 30 plus years I've been around  
11 the mining industry, the problem does not exist like  
12 we propose it does today. The statistics do not  
13 support the urgent need that is being proposed as a  
14 justification for this rule.

15           Reading the agency commentary on this rule,  
16 one would think that drug and alcohol abuse in our  
17 nation's coal mine is running rampant, but the agency  
18 admits in an internal DOL review accident reports  
19 failed to reveal a significant number of cases where  
20 alcohol or drugs were determined to be a causing  
21 factor. Alcohol and drug use is a complex social and  
22 medical problem that warrants a more compassionate  
23 approach to its resolution than is proposed here.

24           Mine operators, I agree, should be provided  
25 the flexibility to work with miners to find the best

1 programs suited to their specific problems and  
2 worksites, but I think they also, the operators who  
3 are here today, need to add a side of compassion and  
4 true help for those that are in denial and understand  
5 that everybody cannot self-report their problems.

6           A boilerplate standard as proposed does not  
7 provide the people involved in such a complicated  
8 issue the flexibility to design their program to fit  
9 their individual needs, nor does it provide a  
10 compassionate approach to assist recovering addicts on  
11 their long road to recovery. Therefore, we would urge  
12 the agency to let the industry continue to do what  
13 they have been doing to resolve this perceived  
14 problem.

15           Hopefully we can work with some of the folks  
16 in industry to get them beyond the narrow approach of  
17 self-denial and zero tolerance so that we don't put  
18 people out there as a menace to society but help them  
19 be able to contribute back to society by getting them  
20 the proper help that they need. None of the recent  
21 coal mine disasters such as Sago, Aracoma, Darby and  
22 the Crandall Canyon was there any indication that  
23 drugs or alcohol being a contributing factor to those  
24 accidents.

25           Indeed, in each of those tragedies, the

1 actions or inactions of mine management and MSHA  
2 itself were to blame. We can't help but find it more  
3 than coincidental that the agency proposed this rule  
4 in the wake of the devastating report about MSHA's  
5 actions in the Crandall Canyon tragedy. Of course, as  
6 any politician knows, such actions divert attention  
7 act as a distraction from the issue of the day.

8           The union would urge the agency to use its  
9 resources more productively to address issues that are  
10 a genuine threat to coal miners' health and safety,  
11 such as the rise in Black Lung Disease. I could go on  
12 and on in my comments that are in this report today,  
13 but I'm going to let Dr. Weeks talk about -- he's our  
14 industrial hygienist, and he's dealt with drug and  
15 alcohol for a number of years. My point today is that  
16 if there are miners out there that need help, we  
17 should be able to get them the help.

18           And take this to whoever you want to. I am  
19 truly, truly disappointed that we have miners standing  
20 in parking lots today not able to participate, and  
21 Pat, please, I'm not pointing the finger at you, but  
22 whoever your boss is, he ought to be horse-whipped or  
23 whoever made the decision to have these public  
24 hearings where miners cannot participate in these  
25 public hearings as the Mine Act, it's just

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1 unbelievable. People cry about elections and people  
2 not being able to vote and voter fraud and everything.  
3 This is a fraud. This is a fraud. Unless you plan  
4 on shutting down right now and getting four or five  
5 more buildings and putting miners in to where they can  
6 participate, this is a fiasco. It's a hoax. And I am  
7 sorry, but I take this to be very offensive on behalf  
8 of all the miners across this country.

9 Now I'm going to let Dr. Weeks talk to some  
10 of those technical issues.

11 MR. WEEKS: Well, I have to add a little bit  
12 to the objection that Dennis raised. Let me introduce  
13 myself first. My name is Jim Weeks, W-E-E-K-S. I'm  
14 consultant to the United Mine Workers. I've worked  
15 for the union for about 30 years, and I also once  
16 served under miners -- substance abuse.

17 I'd like to say about the venue that the  
18 electronics that make this meeting possible are  
19 impressive, and it allows for people from all over the  
20 country to participate. But I don't think that  
21 miners' rights to participate or anybody else's right  
22 to participate should be subordinated to electronics.  
23 What we need is a bigger room, plain and simple. We  
24 have an overflow room across the hall that's too  
25 small. This room is too small. After people have

1 testified, they have to leave to allow other people to  
2 come in to testify. There's very little opportunity  
3 for interaction and so on. And while the electronics  
4 indeed is impressive, it's more important to give  
5 people input into this whole process, so I associate  
6 myself with Dennis's comments.

7           So let me get on to some comments about the  
8 rule. In order to make my comments, to explain some  
9 of my comments, I want to explain some of what I bring  
10 to the table here. I've been trained as a scientist  
11 in engineering and in public health, and I have a deep  
12 appreciation for understanding problems like before  
13 you said about having solutions to them. It's  
14 boilerplate in engineering and it is in public health  
15 as well.

16           And in particular, my training in public  
17 health, I learned like all public health professionals  
18 do something about epidemiology, which is the study of  
19 disease and injury as it occurs in populations. And  
20 in relation to that, I have a joint faculty  
21 appointment at Johns Hopkins where I teach a course on  
22 occupational injury prevention. So the point is I  
23 bring some expertise to the table here. Other people  
24 bring lots of expertise. There's a lot that can be  
25 brought to bear on this particular problem, and I



1 don't think it's being utilized.

2           Let me say something else also on a kind of  
3 a personal note. Alcohol and drug addictions are not  
4 abstract issues in my family, nor are they in many  
5 families. I bet if you took everybody that's  
6 participating in this hearing today, half of them  
7 could talk about a personal experience that they have  
8 had with people that have genuine addiction problems.

9           I mean, you know from your own experience  
10 how difficult they are to deal with, but you also  
11 know, as I know, and I can talk about the individuals,  
12 that when people overcome these problems, they are  
13 people who demonstrated true character, self-  
14 discipline, facing up to problems, dealing with them,  
15 overcoming, getting on with their life in spite of  
16 difficulties in the past.

17           In my family, alcoholism has accounted for  
18 two deaths, several divorces, many lost jobs, and  
19 many, many difficult hours, as they have in many  
20 families. So this is not an abstract issue to most of  
21 us in this room, and I don't think we should treat it  
22 that way when we assert what we're doing with  
23 addiction. We should take it seriously, not give it  
24 what I think is half-hearted and token attention is  
25 what this rule does. Like Mike Wright and Dennis have

1 said, I don't want anybody in the agency to take this  
2 personally, but we can do better.

3           My basic point about the rule is that it has  
4 some fundamental defects and fundamental and  
5 ultimately fatal defects. Now, as a way of talking  
6 about that, about the same time that this rule was  
7 proposed, MSHA also proposed your risk assessment  
8 rule, which I viewed as totally unnecessary, but  
9 that's beside the point. In the risk assessment rule,  
10 you laid out fairly stringent criteria for what you  
11 have to show in order to set a rule. That applied to  
12 toxic substances, but it's a generic set of criteria  
13 that could apply to any problem.

14           And briefly the criteria are these. First  
15 in order to write a rule, you have to show that a risk  
16 exists at present, in the present circumstances;  
17 second, that that risk is "significant", and there's  
18 lot of pandering about the meaning of that particular  
19 word, it's supposed to be defined by the assistant  
20 secretary, but the risk is significant; and third,  
21 that the proposed rule will alleviate that risk.

22           We don't have to show that if someone is  
23 drunk or under the influence of drugs or whatever that  
24 they ought not to be driving 200-ton trucks. I mean,  
25 that seems like -- to say it's common sense is

1 practically, is totally redundant. So that's not the  
2 problem. The problem is whether or not there are  
3 people in the mining industry that are intoxicated at  
4 work, and there might be, but you simply have not  
5 shown it in any fashion. In fact, you have not  
6 presented any estimate of the prevalence in fact these  
7 are the measures that I looked for. You haven't shown  
8 the prevalence of alcohol or drug abuse amongst  
9 miners, even amongst the mining community. You  
10 haven't shown it in working miners. You haven't shown  
11 it in relation to accidents and injuries. The data  
12 simply is not there in the preamble to this rule.

13           So, on the first, on the threshold issue,  
14 have you shown that there is a level of risk, you  
15 haven't shown it. Now it's genuinely puzzling to me  
16 because MSHA has a first-class data system. You  
17 account for accidents and injuries and fatalities  
18 better than any other agency around. Secondly, mine  
19 operators for decades have been doing drug testing,  
20 thousands and thousands of drug tests, and have had  
21 programs. Where's the data? We've asked for that  
22 from many operators. I don't know whether you've  
23 asked it of operators that have done drug testing.

24           The data was offered a few minutes ago from  
25 Thunder Basin about the percentage of negative tests.

1 Ninety-nine point seven I think was the number that  
2 was out there. That means that maybe two or three or  
3 four people out of the whole population tested  
4 positive. That's it. I don't know over what period  
5 of time, what the circumstances were of that test,  
6 what the circumstances were before that testing was  
7 done. It's literally uninterpretable, that number.

8 Now, second, well, not having shown that a  
9 risk exists, you can't show that the risk is  
10 significant regardless of how you define it. It's a  
11 clear case of, you know, if it ain't broke, don't fix  
12 it.

13 The third test, you've not shown that drug  
14 testing results in a reduction in accident frequency.  
15 In spite of numerous drug testing programs that  
16 operators have had, and there have been a few claims,  
17 you have weird counts for a reduction in accident and  
18 injury rates, I'm not going to take anybody's word for  
19 it. I want to see the data. And it would seem to me  
20 if I were operating a coal company and I were running  
21 a program like this, I would want to know if we're  
22 paying out so many thousands and thousands of dollars  
23 what did we get for it. And I haven't seen any  
24 information like that come out. It's certainly not in  
25 the preamble.

1           Let me explain just a bit, I think there was  
2 an estimate in here that, well, let's suppose say 15  
3 percent of a population of miners would be classified  
4 as abusers. I have no idea whether that's a realistic  
5 number or not. You have a series of accidents. By  
6 chance alone, 15 percent of the people who had those  
7 accidents would be substance abusers also. That  
8 doesn't mean that the substance abuse caused the  
9 accident or that it had anything to do with the  
10 accident. All it means is that they're canceling that  
11 population where there's X percentage -- so that some  
12 kind of analysis needs to be done of the data to see  
13 whether or not it's a real problem.

14           And I can go on to a number of details. I  
15 looked at words like, vague words that were in the  
16 preamble such as there were a number of incidences,  
17 there was some mine operator, there's a number of mine  
18 operators, many reports, several coal mine operators,  
19 et cetera, et cetera, vague and uninformative terms.

20           Now another criteria outlined in the risk  
21 assessment proposal is that MSHA based its rules  
22 governing exposure on the best available evidence.  
23 That's the language of the statute, and it refers to  
24 published papers and the scientific literature. Now,  
25 in thinking about this problem, I searched the

1 biomedical literature for reports on this issue, drug  
2 and alcohol drug testing in relation to occupational  
3 injuries. There may be 100 papers out there that  
4 address this in some organized and systematic way.  
5 They are informative about all of these issues. I'll  
6 make the list available to you in my written comments.  
7 And some of them support the rule. Many don't. But  
8 I'll leave that to you to look at them.

9           Now I think if we had come to you, we, the  
10 United Mine Workers, had come to you 50 years ago and  
11 said we want you to reduce dust, that's it, that's all  
12 we said, you wouldn't do it. I mean, it's not  
13 sufficient information to get you to do anything. You  
14 would say, well, we want some systematic analysis of  
15 the occurrence of lung disease and dust exposure and  
16 so on and so forth, which you should. But that's what  
17 you're asking us to do now is to say we want to test  
18 everybody, but in the preamble, I don't see that it  
19 lays out the basis for why something should be done  
20 about this. It could be true that something may be  
21 done, but you simply haven't shown it.

22           Let me give you one example of the kind of  
23 problem that one can get into with this sort of  
24 approach. I would venture to say that most people who  
25 test positive on drugs are what I guess we would refer

1 to as recreational users. They're not addicted. They  
2 just do whatever they do on the weekend or whenever  
3 they do it, but I wouldn't say that they were addicted  
4 as to most of them. Now these people might get  
5 referred to a program designed to help people with  
6 addiction, but they're not addicted, so the program to  
7 treat addiction for them would be somewhat  
8 superfluous.

9           But if somebody comes up that is truly  
10 addicted, you know that it takes a concerted effort to  
11 help that person overcome it as well as friends,  
12 family, counselors, whoever else can be convened to do  
13 it. It's not an easy thing to overcome and it takes a  
14 while. And yet if the only thing that that person  
15 gets out of this program is a couple of visits to a  
16 drug counselor, not even a professional mental health  
17 person, it's clearly inadequate for them.

18           So you could end up designing a treatment  
19 program that's superfluous to most people who test  
20 positive and totally inadequate for people who have  
21 real problems because you don't have a good  
22 understanding of what the data shows about the scope  
23 and dimension of the problem.

24           Now we'll go into this in our written  
25 comments, but the bottom line is we think you have to

1 withdraw this rule. I'm not even sure you should  
2 start over. I think you should just take a look at  
3 the problem fresh and withdraw the rule. It will  
4 divert limited resources that are needed for mine  
5 safety. And if you want to run drug testing on  
6 someone, maybe you should go to Wall Street and test  
7 the bankers, or there are some operators that could be  
8 tested, but I don't think you've shown a case for  
9 testing miners.

10 MS. SILVEY: Thank you.

11 MR. O'DELL: Pat, if I may, I'd just like to  
12 add a few things as a wrapup to this because I think  
13 it needs to be reiterated. MSHA's commentary presents  
14 this proposed rule as an urgent need, but as Jim has  
15 showed you, there's no statistical data to prove that  
16 alcohol and drug use in the mining industry is a  
17 contributor to accidents and injuries. A Department  
18 of Labor internal review of injury and accident  
19 reports referred to in the preamble of this rule would  
20 only deal with a number of instances where drug and  
21 drug paraphernalia were found. Whether a miner was  
22 impaired and whether drugs or alcohol contributed to  
23 any accident was not addressed. This is not a sound  
24 basis for a new rule.

25 The majority of the coal industry, as you



1 heard, already has drug testing programs and policies  
2 in place. Statistical data for mining accidents and  
3 injuries do not support the need. Drugs nor alcohol  
4 were involved in any of the recent major mine  
5 disasters that occurred. Instead, those miners died  
6 as a result of actions of poor mine management or the  
7 inability to protect miners in a fashion that we need  
8 to protect miners today.

9           The proposal would exclude administrative  
10 and clerical personnel from the drug testing  
11 requirement. As we know, these workers do drive on  
12 mine property and often go underground to deliver  
13 supplies, and they usually purchase supplies when it's  
14 deemed necessary, have an effect actually on  
15 incompatible fittings for fire hoses at Aracoma that  
16 were provided. Why would they be exempt? Miners  
17 would be subject to their comings and goings on mine  
18 property, and that's all miners.

19           The proposal further does not make clear who  
20 will be responsible for testing of contract workers on  
21 mine property or even that contract workers must be  
22 tested. Mine operators have historically taken a  
23 hands off approach to contractors, accepting no  
24 responsibility for their employees. This rule must  
25 make clear that the mine operator is responsible for

1 those employees if they are hired to perform work on  
2 mine property. Eight of the 20 fatal accidents to  
3 date have been employees of contractors.

4           The rule is not even clear on which  
5 supervisors would be included in the testing or how  
6 they would be supervised. So if a miner suspects that  
7 a supervisor is under the influence of drugs or  
8 alcohol, who is he supposed to report this to? Would  
9 the miner have the same right to require that a  
10 supervisor be tested for reasonable suspicion as we're  
11 being scrutinized for? The manner in which the  
12 proposal is written only subjects miners to random and  
13 reasonable suspicion testing when in fact supervisors  
14 are often alcohol and drug users themselves, as we've  
15 seen by some of the reports out of the state of  
16 Kentucky.

17           The union recommends that in lieu of a  
18 substance abuse professional that a licensed mental  
19 health professional be required to evaluate miners who  
20 have violated a mine operator's alcohol and drug  
21 testing program. Alcohol and drug addiction are  
22 recognized mental disorders and should be treated by a  
23 licensed mental health professional. The loyalty of  
24 those providing assistance should be to the miner and  
25 should not be a part of any procedure that could lead

1 to disciplinary action.

2           The term used in the preamble in the  
3 proposal, "under the influence", is defined  
4 incorrectly to include a positive urine test for  
5 drugs. It's well recognized that a positive urine  
6 test for drugs or their metabolics is only an  
7 indicator of previous test use and is not an indicator  
8 of actually being influenced at the time they're being  
9 tested.

10           The proposed rule would incorporate the  
11 alcohol and drug awareness training program into Part  
12 48 training, and the union has always said and  
13 believes that Part 48 training is currently overloaded  
14 with every new training requirement that has been  
15 promulgated in recent years and such training should  
16 not be crammed into the already overcrammed Part 48  
17 training.

18           The agency has proposed that supervisors be  
19 trained to be the front-line levels of detection for  
20 alcohol and drug use among miners. The supervisors  
21 will receive a minimum of two hours of initial  
22 training with an additional one hour annually. The  
23 union questions whether a two-hour canned training  
24 presentation would qualify anyone to recognize and  
25 deal with such a sensitive issue. Further, as raised

1 before, who would be authorized to recognize and deal  
2 with a supervisor who has an alcohol and drug problem  
3 as the proposal was written? That authority is only  
4 granted to the supervisor to test the miners.

5           The union questions the availability of  
6 substance abuse assistance program to the rural coal  
7 fields and those communities. If a miner is to  
8 participate in such a program, in reality, they are  
9 likely going to have to travel many miles to gain  
10 access to get such assistance. If the substance abuse  
11 programs are to be successful, they must be easily  
12 accessible to even the rural mining communities. The  
13 union would ask that the agency take a survey of what  
14 programs are available and their locations to supply  
15 as a resource to the mining community.

16           Further, the rule requires the use of  
17 certified facilities and agents under the HHS and DOT.  
18 When one examines those laboratories certified under  
19 HHS, none are listed as being located in major coal  
20 states such as West Virginia, Illinois or Kentucky.  
21 When test specimens are transported great distances to  
22 other states to reach a certified HHS lab, would  
23 exposure to conditions of transport affect the outcome  
24 of the tests?

25           The union would not object to post-accident

1 survivors being tested for alcohol or drugs. However,  
2 we do not feel it is ethical to test deceased miners  
3 without permission of those next of kin. The UMWA  
4 would question whether anyone should be authorized to  
5 do such an invasive test without the victim's family's  
6 permission. To propose such a thing is unethical and  
7 a moral intrusion at the family's time of grief.

8           Most everyone would agree that testing for  
9 reasonable suspicion is a useful tool. However,  
10 anybody that works in a mine can have problems with  
11 drugs or alcohol, and this includes supervisors as  
12 well as miners. Therefore, anybody should be able to  
13 suggest testing for reasonable suspicion, including  
14 miners. There must be an independent source outside  
15 of their immediate supervisor to raise reasonable  
16 suspicion when their supervisor is suspected of being  
17 under the influence of drugs and alcohol.

18           Bruce Watzman and I have been accused from  
19 time to time of being under the influence, but I don't  
20 think either one of us are users. So you have to have  
21 an outside independent party that has an objective  
22 viewpoint to that who's going to look at that.

23           The UMWA agrees that miners should be  
24 protected. The proposed rule only protects the miners  
25 after the first positive test. Thereafter, his fate

1 is in the hands of his employer. The union would  
2 recommend that any person in recovery from a drug or  
3 alcohol addiction be kept out of harm's way in an  
4 alternate, non-safety-sensitive position until they  
5 are reformed, clean and ready to come back to their  
6 former job.

7           And I don't think it needs to be left up to  
8 the discretion of the operator because it's vague in  
9 the proposed rule as to whether they have to put them  
10 back in the job they were before. I think if you're  
11 going to put the money and time in to rehabilitate a  
12 miner and they show an honest effort to recover that  
13 you should be able to reward them by putting them back  
14 in the job that they had before. A person who is  
15 honestly trying to rehabilitate themselves should be  
16 encouraged, not punished.

17           A person who is in rehabilitation is most  
18 likely in some cases to fall off the wagon in the  
19 initial phase of his or her recovery. Therefore, they  
20 should be provided adequate time and chances to get  
21 their life in order. Addiction is a serious social  
22 and medical problem which will be dealt with and  
23 should be dealt with but dealt with compassionately.

24           And with that, I still recommend that this  
25 hearing be shut down until miners are provided the

1 ability to participate.

2 MS. SILVEY: Okay. Thank you.

3 And as I said before, that everybody at this  
4 hearing today and who can hear me will be provided an  
5 opportunity to participate.

6 MR. O'DELL: That's a problem because they  
7 can't all hear.

8 MS. SILVEY: Well, I'm getting ready to  
9 modify that. And those who may not be able to hear me  
10 because of the capacity of I assume the MSHA District  
11 Office in Birmingham, at the appropriate time, they  
12 will be given the opportunity to speak.

13 With that, I only have a couple of comments,  
14 clarifying comments. I appreciate your comments and  
15 note that and maybe you all noted it too, that in  
16 terms of the fact that the proposal would exclude  
17 administrative or clerical workers and that all  
18 workers either go at various places on the mine site  
19 that other commenters today I think at probably all of  
20 the locations that we heard people from have made that  
21 same comment.

22 With respect to contract workers, and I want  
23 to just say this to everybody, I appreciate people's  
24 comments in terms of places where the proposal might  
25 need clarification, but with respect to contract

1 workers because I've heard this before too, contract  
2 workers who would have to have Part 46 or Part 48  
3 training would be covered by the proposal, and clearly  
4 there are a lot of contract workers who fall into that  
5 category, both miners and supervisors.

6           The other thing that I would say is that  
7 with respect, and you're right, with respect to your  
8 comments on the existing training requirements, Part  
9 46 for some of the non-coal miners and Part 48 for  
10 some of the coal miners and non-coal miners, the  
11 proposal states and I believe clearly that the  
12 training that's required under the proposal would have  
13 to be added to the existing training requirements. So  
14 it says that, but I want to state this for everybody,  
15 and the agency made that decision in recognition of  
16 the fact of the things, the subjects that are included  
17 in Part 46 and Part 48 now. That's all I have.

18           Just for other locations who are listening,  
19 I'm getting ready to mute the button here at the  
20 Washington location, so in case everything goes quiet,  
21 you'll understand why everything is quiet, but so that  
22 you know we'll be back on in a minute. You are not  
23 losing us.

24           (Whereupon, a short recess was taken.)

25           MS. SILVEY: Okay. We are back on.



1 MS. CARR: I appreciate your comments, and I  
2 just wanted to provide one clarification. I heard  
3 your concern about this assessment being done by a  
4 substance abuse professional. If I understood  
5 correctly, you recommended a licensed mental health  
6 professional instead.

7 By incorporating Part 40, there are  
8 specifications that the SAP must be a licensed,  
9 credentialed, mental health professional. It lists  
10 social workers, psychologists, and so forth. It  
11 certainly was our intention to make sure that the  
12 person doing the assessment was qualified.

13 MS. SILVEY: You meant Part 40. Just so  
14 everybody knows, it's the Department of Transportation  
15 Regulation, Part 40. Okay.

16 MR. BURNS: The other issue is that  
17 personally is where they are located, whether the  
18 logistics of the program is conveniently located. We  
19 don't want to have people drive 100 miles. It should  
20 be in close proximity.

21 MR. WEEKS: I just have a question for Jim -  
22 -the articles you cited; they are not all peer-  
23 reviewed articles, are they, or are they all peer  
24 reviewed?

25 A PARTICIPANT: They are all peer reviewed.

1 MS. SILVEY: I don't have any more comments  
2 or questions, so thank you all very much. Dennis, you  
3 did say you will be submitting further comments.  
4 Okay. Thank you.

5 I'm going to take a five-minute break, just  
6 so everybody knows. I'm going to take a five-minute  
7 break, but we'll be back in five minutes, ready to  
8 continue the public hearing on the Mine Safety and  
9 Health Administration's Proposed Rule for Alcohol- and  
10 Drug-free Mines: Policy, Prohibitions, Testing,  
11 Training, and Assistance.

12 (Whereupon, at 11:56 a.m., a short recess  
13 was taken.)

14 MS. SILVEY: Next, we will hear from Albert  
15 Aloia and Lou Barletta with Consol Energy with our  
16 Pittsburgh location.

17 MR. ALOIA: Yes. Good afternoon. My name  
18 is Albert Aloia, A-L-O-I-A. I am the senior vice  
19 president, safety and human resources, for Consol  
20 Energy. On behalf of Consol, I thank you for allowing  
21 me this opportunity to present before you Consol's  
22 views on the Mine Safety and Health Administration's  
23 Proposed Rule for Alcohol- and Drug-free Mines.

24 First, let me state that we, too, at Consol  
25 share the concerns that the use of alcohol and drugs

1 threatens safety in our nation's coal mines and to  
2 compliment the effort of the DOL in introducing such a  
3 proposal.

4           However, as written, Consol cannot support  
5 the proposed rule. I would like to address two  
6 general areas of concern before I get into the  
7 specific areas for comment. I should also note that  
8 if the panel makes a decision I will provide detailed  
9 written comments following the testimony of this  
10 hearing.

11           The rule, in its present form, weakens  
12 existing drug and alcohol programs and lessens safety  
13 in our coal mines. A major concern is that the  
14 proposed rule does not include all employees from the  
15 operator who are working on the property. We have  
16 heard that over and over here a couple of times during  
17 the discussion.

18           This is in direct conflict of all programs  
19 yet applied to our employees. Our plan was developed  
20 recognizing that any employee who is doing work on the  
21 mine property under the influence of alcohol or drugs  
22 would be viewed as a detriment to safety, their safety  
23 and the safety of others.

24           The proposed rule is too prescriptive, and  
25 it's difficult to establish a single rule for such an

1 important issue that we can apply consistently and  
2 effectively at all mine locations across the nation.  
3 Rather, the proposal should be modified to allow the  
4 operators to implement and operate and design drugs-  
5 and alcohol-testing programs in compliance with some  
6 MSHA-established minimum standards. This will allow  
7 operators to develop alcohol and drug programs for  
8 their unique circumstances to ensure the safety of  
9 their employees.

10           This approach would be similar to the  
11 process used for use control programs and ventilation  
12 programs in which many guidelines are set.

13           This approach to drug and alcohol testing  
14 has been taken on by two states, Virginia and  
15 Kentucky, which have established minimum standards.  
16 We have operations in these states, and the testing  
17 programs have worked very well there.

18           Specifically for today's hearing, I would  
19 like to identify several areas in the proposed rules  
20 that prohibit Consol Energy from supporting the rules.

21           Section 66.2 applies to those miners who  
22 perform safety function job duty. Our current alcohol  
23 and drug policy affords all employees, regardless of  
24 their jobs, an alcohol- and drug-free workplace, and  
25 all employees are subject to testing to ensure that

1 this opportunity is provided.

2           What we recommend is that the requirements  
3 of 62.2 be extended to cover all employees or  
4 operators working on mine property. All references  
5 contained within this proposal that only refers to  
6 safety sensitive positions should be modified to  
7 include all employees that would be on mine property.

8           Throughout this proposed rule, the  
9 terminology "on or around mine property" is utilized.  
10 This terminology needs to be modified to reflect "on  
11 mine property." If not modified, this reference may  
12 be subject to include action by MSHA in areas which  
13 are beyond the operator's control, so "around mine  
14 property" but not on the operator's part.

15           Section 66.100(b) provides that a miner who  
16 possesses or has used a prohibited substance will not  
17 be in violation of this part, provided that an MRO has  
18 determined that the miner has a mild prescription  
19 substance and is using it as prescribed.

20           This section should be expanded. Initially,  
21 the operators and MROs should determine that an  
22 employee has a valid prescription and that it is being  
23 used as prescribed. Afterwards, the employee's  
24 physician should be required to certify prescribed  
25 usage of the prohibited substance and that it's

1 appropriate for use by employees on the mine property.

2 The operators and MORs should concur with the  
3 prescribing physician's determination.

4 Section 66.300(b) states that the mine  
5 operator must follow the U.S. Department of  
6 Transportation's requirements found in C.R.F., Part  
7 40. Consol realizes that the 39 -- have new  
8 guidelines and standards for whether the review  
9 officers continue maintenance and records through the  
10 Medical Information System. However, even with these  
11 attributes, we must ask the question, is this the best  
12 standard for drug testing?

13 The EAP standards were adopted only the  
14 urine test for drugs and the breathalyzer test for  
15 alcohol would be utilized. Advances in technology,  
16 including the introduction of DOT standards, should  
17 not be discounted, and alternative testing methods  
18 should be available for use to determine if an  
19 employee is in violation of the alcohol and drug  
20 policy.

21 Many of our plans that are in effect already  
22 utilize additional methods for making these  
23 determinations. On scene, when a doctor addressed the  
24 issues present at that time. As we can see today,  
25 with the use and abuse of different drugs, the methods

1 available for testing changed.

2           In the 1980s, we could not anticipate the  
3 challenges we have today with more -- the introduction  
4 of synthetic and semi-synthetic drugs. As we've seen  
5 from the DOT statements, the need for additional drug  
6 collection and methodology for testing has changed,  
7 and will continue to change, as time goes on.

8           This points to my earlier proposal, that the  
9 plan should set minimum thresholds which would allow  
10 operators to incorporate changes in technology and  
11 testing into alcohol and drug programs.

12           Section 66.306(a)(1): "The operator shall  
13 also be authorized and be required to have a  
14 toxicology test conducted on the deceased employees,  
15 and a minimum test for all substances listed in  
16 66.301." This information is valuable in such a  
17 situation and should be mandatory. Recently, our  
18 Kentucky and Virginia state laws addressed this issue,  
19 but this insistence places an unintended burden on the  
20 operator.

21           Section 66.400(b): "Mine operators shall  
22 not terminate miners who violate the mine operator's  
23 policy for the first time."

24           We are adamantly opposed to this position.  
25 The question must be asked, why would DOT, DOL wish to

1 condition mine employees to violate the safety  
2 standards, and, more importantly, why would DOL limit  
3 the action that companies may take to ensure the  
4 safety of their employees?

5           The Department of Transportation, with their  
6 current drug and alcohol regulations, does not  
7 interject itself into an employer's decision to  
8 discipline an employee for violating drug and alcohol  
9 rules. Similarly, MSHA does not inject itself into an  
10 employer's decision to discipline an MSHA-covered  
11 employee for the violation of a safety standard or an  
12 MSHA regulation.

13           MSHA considered writing a protocol for what  
14 disciplinary action would be taken when an employee  
15 walks or works or travels in the -- everyone realizes  
16 that events -- even on single occasions can have a  
17 catastrophic consequence. This catastrophe is waiting  
18 to happen if being on the mine property while under  
19 the influence of alcohol or drugs -- the operator must  
20 have the discretion to discipline its workforce in  
21 accordance with its policy and its labor agreement.

22           It should not be mandated to establish the  
23 mental attitude that employees are free to violate a  
24 safety standard without consequences on the first  
25 occasion.



1           We, at Consol, have a zero tolerance and  
2 feel that 66.400 is a backwards step in safety. As  
3 written, this states that the operator return to duty  
4 an individual that had made a decision, a conscious  
5 decision, to work while taking a prohibited substance.  
6 MSHA does not approve of the mandatory first offense  
7 rehabilitation, or "Get Out of Jail Free" card,  
8 provision in this regulation.

9           In conclusion, there are two overwhelming  
10 points that I wish to read for the list.

11           First, many companies have established their  
12 own alcohol and drug policy, and any regulations  
13 implemented may not meet the needs of existing  
14 programs. A mandatory second-chance offer for someone  
15 who is unfit for work, using drugs or alcohol,  
16 certainly we can restate it.

17           Two, these regulations should establish a  
18 minimum requirement for all drug and alcohol policies  
19 in the industry. Operators will then use these new  
20 requirements as a basis to develop specific alcohol  
21 and drug programs to ensure the safety of their  
22 employees.

23           We appreciate the time and effort that have  
24 been put forth to address the concern of alcohol and  
25 drugs in the workplace and the opportunity to present

1 our views on the proposed regulation.

2 We strongly urge the panel to consider the  
3 testimony that has been provided today. As previously  
4 stated, I will also submit written comments to be  
5 included in this important issue facing the mining  
6 industry. Thank you.

7 MS. SILVEY: Thank you. I have a question  
8 that I would like to ask you, and maybe, by this time,  
9 at this point in the public hearing, I think I have  
10 refined it enough to be able to articulate it to you,  
11 and you have, and I think you noticed that probably,  
12 you have given some of the same comments that we have  
13 heard so far this morning, so I won't belabor them and  
14 ask you anything else about them, but just suffice it  
15 to say, I recognize that some of your comments are the  
16 same as those that we heard earlier.

17 But on a couple of things we heard earlier,  
18 I would like to refine to see if I could get some  
19 additional information from you.

20 You mentioned Consol's program and the drug  
21 and alcohol testing, according to DOT, but you also  
22 mentioned, as did some other speakers this morning,  
23 other testing methods, according to other procedures  
24 that you have.

25 I would like to know two things. When it

1 comes to other testing methods, which standards are  
2 you using? What testing methods are you using,  
3 according to whose standard? When I say "whose," I  
4 mean what entity. That's the first thing.

5           The second thing is, with respect to these  
6 other testing methods and other standards, which drugs  
7 do you test for?

8           MR. ALOIA: Well, the testing is for the  
9 same drugs that are in the DOT standards, but there's  
10 other methods, like the hair method --

11           MS. SILVEY: Right.

12           MR. ALOIA: -- other methods that are out  
13 there now that currently have 30 years being developed  
14 since the DOT standards were established in the  
15 eighties. Okay? While DOT has no review, they have  
16 been talking about changing some of those testing  
17 methods, but they have not been able to establish that  
18 yet.

19           We use the same criteria that the DOT used,  
20 but we use just a different method to get there.

21           MS. SILVEY: Okay. But whose are they?  
22 Whose standards are these? Which organization? Now,  
23 I think I kind of realize what I meant to say this  
24 morning earlier. By which organization are these  
25 standards? Whose are they?

1           MR. ALOIA: They are still based on the DOT  
2 standards as their requirement; it's just a different  
3 way of testing.

4           MS. SILVEY: I know, but I'm making this up.  
5 Are they the standards of, you know, the National  
6 Institutes of Health or some other organization?

7           MR. ALOIA: I'm sorry.

8           MS. SILVEY: Maybe somebody -- could you  
9 please come to -- Ms. Blevins, can she come to the  
10 mike, and maybe somebody else can help me here? I  
11 would like to get this question answered now. That's  
12 where I sort of wanted to go this morning, but I  
13 hadn't figured it out.

14          MS. BLEVINS: I'm Helen Blevins, and the  
15 question that you asked was, which standards are  
16 presently used for --

17          MS. SILVEY: When you do testing according  
18 to other methods, i.e., PAR and what other methods  
19 now.

20          MS. BLEVINS: What we have incorporated is  
21 the FDA standard.

22          MS. SILVEY: Okay.

23          MS. BLEVINS: And we also are following the  
24 SAMHSA Labs and making sure that anything that is  
25 taken to a lab is through a certified lab, according

1 to HHS.

2 MS. SILVEY: Now, do you test for other  
3 drugs than are covered by DOT?

4 MS. BLEVINS: We do, and everything that is  
5 in the proposed rules right now is where we're at.

6 MS. SILVEY: Okay.

7 MS. BLEVINS: The only section is, a lot of  
8 times when companies are working with the SAMHSA Labs,  
9 the labs already have established certain panels of  
10 drugs, so the only other addition -- we do have one  
11 addition, which is the methyl qualines, and that would  
12 be the only other exception, too.

13 MS. SILVEY: Thank you for being a help. I  
14 could tell when I looked back at her, she knew. It  
15 was unfortunate that I didn't figure it out this  
16 morning, but thank you very much. You answered it.

17 MS. CARR: Just a clarification to make sure  
18 I understand. So both DOT and the SAMHSA guidelines  
19 to laboratories and the whole process apply only to  
20 those five drugs and only to the urine, but you're  
21 basically adapting those, to the extent that they fit,  
22 but realizing that there is certification for the labs  
23 and for the process, either from SAMHSA or DOT. It  
24 really doesn't apply to alternate specimens or --

25 MS. BLEVINS: We do, but it goes back to the

1 FDA.

2 MS. CARR: And the FDA is a medical  
3 certification. That doesn't really speak to the  
4 workplace application of those technologies. So it  
5 seems that we've got kind of a mixed combination of  
6 setting procedures for each company that take the best  
7 from the various standards to come up with a standard  
8 process.

9 MS. BLEVINS: But the guidelines could be  
10 very helpful in order to follow what the DOT has  
11 established, the guidelines for the criteria for the  
12 testing methodology and the types of samples; that is  
13 correct.

14 MS. SILVEY: Okay. I understand.

15 MS. McCONNELL: Do you test the 10 general  
16 drug testing that we're proposing using here or just  
17 the urine?

18 MS. BLEVINS: Let me address that, and I can  
19 state right now, for Consol Energy, Consol is not  
20 presently using hair. What we are trying to establish  
21 is that, going down the road, you want to leave the  
22 types of testing methodology open so employers would  
23 be able to have the ability to use what they would  
24 like. I know that there are other employers today  
25 that are actually using the hair, but I cannot speak

1 for what tests they are actually going to.

2 MS. SILVEY: That's a good segue. So  
3 everybody who is listening now, if other companies are  
4 using hair, then, if you would, when you provide your  
5 comments, if you do use these other methods, to  
6 include other than urine for drugs and breathalyzers  
7 for alcohol, if you're using hair, et cetera, or  
8 whatever, before the record closes, if you're  
9 providing us comments, if you could include that in  
10 your comments, we would be most appreciative, for  
11 other organizations in the room.

12 Okay. I finally think I've got it straight  
13 now. Thank you very much.

14 Does anybody else have anything? Thank you.

15 Our next speaker will be, and as I do this,  
16 I'm going to be open to everybody, so you can hear  
17 what I'm doing. I'm deviating from my own rules that  
18 I gave this morning. I'm deviating from one part of  
19 my rules. I'm being consistent with the other parts.

20 Our next speaker will be Chris Hamilton, who  
21 will be from our Beckley location, by phone only. I  
22 hope you are there, Chris.

23 A PARTICIPANT: The Beckley, West Virginia,  
24 line is open now, so, Beckley, please identify  
25 yourselves.

1 MS. SILVEY: Our next speaker will be Chris  
2 Hamilton from Beckley, West Virginia. Are you there,  
3 Chris?

4 MR. HAMILTON: I am here.

5 MS. SILVEY: Yes, sir. You're next.

6 MR. HAMILTON: Well, good afternoon. My  
7 name is Chris Hamilton, senior vice president with the  
8 West Virginia Coal Association. The West Virginia  
9 Coal Association is a trade association comprised of  
10 coal-producing companies that collectively account for  
11 nearly 80 percent of the states' coal production, both  
12 surface and underground.

13 We also are comprised of a number of  
14 equipment manufacturers, a variety of mine vendors,  
15 supply companies, land companies, mine reclamation,  
16 maintenance, and a number of general service  
17 companies.

18 We appreciate the opportunity to comment on  
19 MSHA's proposed drug-testing rule here in Beckley,  
20 West Virginia, today.

21 I would also like to just say that we  
22 wholeheartedly support and embrace the comments that  
23 have been offered by the national mining association  
24 earlier this morning and by our previous speaker from  
25 Consol Energy from the Pittsburgh site.



1           Allow me to also compliment the agency for  
2 its clear recognition that is intertwined throughout  
3 the preamble from the proposed rule that the use of  
4 alcohol or prohibited drugs should not be permitted  
5 around mining operations and that individuals under  
6 the influence of the same should, likewise, not be  
7 permitted in, near, or around mining operations.

8           Despite a couple of high-profile accidents  
9 that have occurred over the past couple of years, the  
10 industry has made great progress with its overall mine  
11 safety performance. But as we know, mining has its  
12 inherent hazards, hazards which must be averted or  
13 recognized and then managed and controlled.

14           The fact is, the mine environment requires  
15 supreme vigilance, 24/7. Individual attention to  
16 detail and alertness are also essential. We also  
17 observe that MSHA, likewise, recognizes these  
18 principles within the rule preamble.

19           The use of alcohol and drugs within the  
20 mining industry was first observed by MSHA over 25  
21 years ago, when it joined with mining states and, in  
22 particular, the State of West Virginia, to identify  
23 appropriate treatment centers and available programs  
24 for individuals suffering from drug or alcohol use.

25           We do not understand why it has taken a

1 quarter of a century to advance this rulemaking from  
2 the time it first realized that drug and alcohol use  
3 is a problem within the mining sector.

4           But we're here today with a proposed rule  
5 which, we believe, evidences a major step forward  
6 towards making greater improvements in workplace  
7 safety. However, that desired outcome, and our shared  
8 goal of zero accidents, will only be realized if  
9 substantial changes are made to the proposed rule,  
10 which, in its current form, serves to undermine, or  
11 seriously compromise, those drug-testing programs  
12 currently being administered or carried out by a  
13 number of progressive states and companies within the  
14 State of West Virginia and around the country.

15           As you're aware, many companies in West  
16 Virginia and around the country have implemented  
17 mandatory drug-testing programs. Most of these  
18 programs provide for a zero tolerance for drug use and  
19 subject individuals to discharge upon testing  
20 positive.

21           These companies place unlawful drug use  
22 right alongside of smoking in the underground mining  
23 environment, right alongside of working on energized  
24 electrical currents, or going inby supported roof in  
25 an underground mine.

1           A large number of these programs, however,  
2 provide the opportunity for individuals with drug  
3 problems to voluntarily involve or solicit help in  
4 improved employee-assistance programs or other  
5 recognizable medical professionals before they test.

6           MSHA's proposed rule weakens these programs  
7 by allowing individuals who test positive to have  
8 additional chances and possibly subject themselves or  
9 others to potential safety hazards, the hazards that  
10 we're attempting to eradicate from the workplace with  
11 this proposed rule.

12           MSHA's policy sends the message that it is  
13 tolerating illegal drug consumption from miners.  
14 Where a policy is zero tolerance, lives are saved, and  
15 miners know not to use because use will result in a  
16 discharge at a zero-tolerance mine. It fully serves  
17 to change behavior and additionally motivates ones in  
18 need of help to get it. It also has a greater  
19 potential to effectuate a cultural change, the type of  
20 change that's needed to combat this serious problem.

21           We have also heard here today that several  
22 states have reported successes in their overall mine  
23 safety program by implementing mandatory drug-testing  
24 programs. These states permit discharge of first-  
25 positive tests, and you have also heard that MSHA's

1 proposed rule, which prohibits discharge of first-  
2 positives, seriously hampers or guts the successful  
3 state programs in our neighboring States of Kentucky  
4 and Virginia.

5           We are particularly concerned that we do not  
6 have a uniform federal rule because we have reason to  
7 believe that many of the miners who have been  
8 decertified in the States of Kentucky or Virginia are  
9 seeking employment in West Virginia. West Virginia  
10 does not have a mandatory drug-testing program, but  
11 one is being considered at the present time.

12           We also heard today that there have been  
13 over 600 individual certifications revoked in the  
14 State of Kentucky, and I believe there have been  
15 several hundred in the State of Virginia, we think.  
16 Again, without a national, uniform standard of zero  
17 tolerance, we have reason to believe that many of  
18 those miners or individuals are seeking employment  
19 here in West Virginia.

20           Likewise, without any state law mandating  
21 mandatory drug testing, we also have reason to believe  
22 that when an individual is discharged from one mine,  
23 he seeks employment at another mine within the state's  
24 boundaries that does not have a mandatory drug-testing  
25 program.

1           So, on balance, we support the proposed  
2 rules requiring mandatory drug testing. We think it  
3 is seriously flawed, in that it basically condones the  
4 use of alcohol or prohibited substances. It condones  
5 it by, as a previous speaker noted, providing all  
6 miners with a "Get Out of Jail Free" card, and that's  
7 how it's being characterized around the country.

8           The issue of whether or not an individual  
9 should be discharged upon testing positive for known  
10 illegal substances has never been raised until, at  
11 least, around our area here in West Virginia, until  
12 this proposed rule was made public.

13           Miners know not to use drugs. There is no  
14 reason to provide a second opportunity, at this point  
15 in time. There are ample warnings. Our schools,  
16 posters around public places, our mine offices, and  
17 our houses are replete with antidrug, "Say No to  
18 Drugs" posters and other forms of alerts.

19           I dare say that there is not a miner in this  
20 state, or in this country, for that matter, that  
21 doesn't know you're not supposed to use drugs, and if  
22 you use drugs that are illegal or alcohol, and it  
23 potentially shows up at the workplace, your job, your  
24 livelihood, are, indeed, threatened. There is not a  
25 miner that doesn't know that.

1           So we really question the basis, the  
2 rational thinking, behind this particular policy  
3 embedded in MSHA's proposed rules.

4           Now, at some point, it needs to be said, and  
5 so I'll say it, we don't believe that drug use is any  
6 more prevalent around coal mines than anywhere else.  
7 In fact, we truly have an exceptional workforce within  
8 the mining industry, one that possesses an abundance  
9 of skills and confidence and is truly an industrial  
10 professional, but we also know that there is a problem  
11 in society, and it's currently been linked to some of  
12 the incidents and accidents within and around mining  
13 operations.

14           So we do support the proposed drug-testing  
15 rule, again, with modification. We think it's just  
16 absolutely critical that we have a zero tolerance once  
17 an individual is trained and goes through orientation  
18 and employed within the industry.

19           Someone made the comment earlier that it  
20 seems like this rule was more protective of that  
21 minute percentage of workers within the industry who  
22 may be influenced by an illegal substance, not the 90-  
23 plus percent of the professional workers within the  
24 industry who have a zero tolerance for drug use or for  
25 anybody using drugs.

1           So, with that, I'll conclude and wrap up.  
2 We do intend on submitting more detailed comments  
3 before the close of the comment period, and if you  
4 have any questions, we'll try to respond. Thank you.

5           MS. SILVEY: Okay. Thank you. Thank you,  
6 Mr. Hamilton.

7           I don't have any further -- as you noted,  
8 you made some of the same comments as some of the  
9 other people we have heard so far this morning. We  
10 appreciate your comments, and so you said there are  
11 further comments before the record closes on October  
12 29th, so we look forward to your additional comments,  
13 and unless any of my panel members have questions, I  
14 don't have any, but just to say to the people at the  
15 Beckley location, we will get back to you.

16           MR. HAMILTON: We also had another speaker,  
17 Max Kennedy, that was --

18           MS. SILVEY: I understand that. We will get  
19 back to the Beckley location. Okay? Okay. Thank  
20 you.

21           (Discussion held off the record.)

22           MS. SILVEY: Do I still have the Beckley  
23 location?

24           MR. HAMILTON: Yes.

25           MS. SILVEY: I still have the Beckley

1 location?

2 MR. HAMILTON: Yes, we're here.

3 MS. SILVEY: Okay. Max, are you there now?

4 MR. KENNEDY: Yes, ma'am.

5 MS. SILVEY: Okay. You go on and make your  
6 presentation, please. If you would, please spell your  
7 name when you get to the mike.

8 Max, can I ask you, is Edgar Oldham there?

9 MR. KENNEDY: No, ma'am. He is in Kentucky.

10 MS. SILVEY: Okay. All right. Thank you.

11 Okay.

12 MR. KENNEDY: Okay. My name is Max Kennedy,  
13 M-A-X K-E-N-N-E-D-D-Y, with the United Mine Workers  
14 of America.

15 Before I start my comments, I would like to  
16 inform you that the miners that came here to testify  
17 today have walked out in protest of MSHA's conduct in  
18 the State of Alabama. They have yielded their time to  
19 those miners that are waiting there.

20 MS. SILVEY: Okay.

21 MR. KENNEDY: Okay? I want to echo our  
22 comments that were submitted several weeks ago, that  
23 this rule does not address our personnel that come on  
24 mine property that could affect health and safety of  
25 miners working surface and underground.



1           This would include anyone that comes on mine  
2 property that would initially need hazard training for  
3 areas that they will work or travel.

4           So, you know, if you're going to define it,  
5 then it should be anyone that comes on mine property.

6           I don't understand what's driving this  
7 regulation. Apparently, everyone that I've heard  
8 testify today is disappointed with MSHA and the way  
9 that they have written this rule. Apparently, the  
10 operators, the responsible operators, have gone ahead  
11 and dealt with this problem, and we have dealt with  
12 this problem, for over decades, but there is no data  
13 that I've seen that drives this regulation to be  
14 promulgated. We would like to see that data submitted  
15 to us for review.

16           I will yield the rest of my time to the  
17 miners in Alabama that are waiting to speak. Thank  
18 you.

19           MS. SILVEY: Thank you, Max. Max, you said  
20 that Edgar Oldham was in Kentucky.

21           MR. KENNEDY: I think so.

22           MS. SILVEY: Do you know where Jim Lamont  
23 is?

24           MR. KENNEDY: He should be in Pennsylvania,  
25 but I'm not sure of that.

1 MS. SILVEY: And what about Ron Bowersox?

2 MR. KENNEDY: He should be in Pennsylvania.

3 MS. SILVEY: Okay, okay. Thank you. Thank  
4 you very much. We appreciate your comments.

5 A PARTICIPANT: Ron is in Pittsburgh.

6 MS. SILVEY: Okay. Is Ron going to testify?

7 (Pause.)

8 MS. SILVEY: Okay. Next, we will have Bill  
9 Ferdinand from our Denver, Englewood, location. Can  
10 we switch to our Denver, Englewood, location, please?  
11 Okay. Thank you.

12 MR. FERDINAND: Well, good morning or good  
13 afternoon, as it may be. My name is Bill Ferdinand --  
14 Ferdinand is spelled F-E-R-D-I-N-A-N-D -- and I'm here  
15 representing Barrick Gold of North America. I am the  
16 company's director of mine health and safety, located  
17 in Salt Lake City.

18 Presently, Barrick has five operating gold  
19 mines in the western United States that employ  
20 approximately 3,400 people.

21 This oral presentation will touch upon the  
22 major items of concern regarding MSHA's drug and  
23 alcohol abuse program. Our written comments will be  
24 submitted prior to October 29th to discuss a more-in-  
25 depth analysis of the MSHA proposal.

1           Let me start by beginning to say, overall,  
2 we support MSHA's intended outcome; namely, alcohol-  
3 and drug-free mines that allow for a safer and healthy  
4 work environment.

5           Although Barrick is pleased that MSHA is  
6 taking the initiative on this important matter, we  
7 believe that the proposed rule, as currently  
8 published, actually diminishes workplace safety  
9 relative to Barrick's existing drug and alcohol abuse  
10 program and which, if enacted, as presently drafted,  
11 will actually weaken and provide a less-safe working  
12 environment than presently enjoyed by our employees,  
13 contractors, and visitors to our operations.

14           Barrick believes that MSHA should only  
15 propose nonthreshold requirements relative to drug and  
16 alcohol abuse programs that do not preclude an  
17 employer, bargaining unit, state, or other entity from  
18 developing, implementing, and maintaining programs  
19 that exceed the minimum threshold standards.

20           Many mines in the United States, including  
21 Barrick's, have such programs. These programs are  
22 working effectively to combat drug and alcohol abuse.  
23 We do not believe that MSHA should replace effective  
24 drug and alcohol programs with less-effective,  
25 prescriptive programs.

1           Briefly, I would like to provide an overview  
2 of Barrick's drug and alcohol program.

3           Barrick requires prospective employees to  
4 take drug tests prior to employment, during  
5 employment, random drug tests and alcohol tests to  
6 ensure our workplace environment remains a safe place  
7 to work. Employees that refuse, fail, or alter their  
8 tests are subject to disciplinary action, up to and  
9 including termination.

10           However, prior to reaching that point, to  
11 assist our employees and their families, Barrick's  
12 drug and alcohol program encourages its employees to  
13 voluntarily seek help through the treatment counseling  
14 available under our program. Once the employee  
15 satisfactorily completes the substance abuse  
16 rehabilitation program, as provided by professional  
17 healthcare people, they reenter the workforce without  
18 consequence.

19           If an employee does not seek assistance  
20 before a positive drug test or alcohol test under the  
21 program, it is too late for that employee to avoid  
22 disciplinary actions for violating the policy.

23           To further enhance the safety of our work  
24 environment, the policy provides for-cause testing of  
25 drug and alcohol during vehicular accidents and those

1 involved in injuries who are perceived to be under the  
2 influence.

3           These elements and other provisions within  
4 Barrick's policy, including training, contractor  
5 requirements, confidentiality, prescription drugs,  
6 call provisions within Barrick's program, enhance and  
7 improve our work environment.

8           We are very concerned that, under MSHA's  
9 proposal, it will actually weaken our zero-tolerance  
10 program and will, instead, put my miners at risk.

11           In concert with this overarching concern and  
12 MSHA's apparent one-size-fits-all approach, there are  
13 a number of other significant issues which I would  
14 like to briefly address for the record.

15           The first of these concerns is the ability  
16 to use alternate testing methods. Under the  
17 prescriptive proposals, we would be limited by the  
18 methods that we could potentially use to monitor drug  
19 and alcohol abuse.

20           Barrick, as part of this program, uses a  
21 U.S. Food and Drug-approved alternate drug-testing  
22 methods, in collaboration with typical Department of  
23 Transportation urinalysis. For example, as part of  
24 our hiring program, Barrick uses hair testing as an  
25 integral part of our overall drug and alcohol

1 preemployment screening program, and the hair-testing  
2 methodology that is used is approved by FDA. FDA has  
3 a long association with the Substance Abuse and Mental  
4 Health Services Administration, or "SAMHSA."

5 Under the federal testing program for  
6 federal workers, SAMHSA's drug testing requires the  
7 use of products cleared or approved by FDA. The hair  
8 method used by Barrick meets the cutoff levels for  
9 drug screening and confirmation established by SAMHSA.

10 An advantage to using hair testing as a  
11 screening tool is that it detects drug usage over a  
12 longer period of time, generally up to 90 days.

13 Drugs, such as cocaine, methamphetamines, opiates,  
14 phencyclidine, are readily excreted and usually  
15 undetectable in the 72 hours after their use. For  
16 saliva, it's undetectable after 48 hours in urine.

17 The hair test allows the company to make a  
18 more informed decision on hiring prospective  
19 employees. Under MSHA's proposal, it appears to  
20 preclude us from using this method as a  
21 hiring/screening tool.

22 Another alternative method we utilize is due  
23 to the remoteness of some of our mines, is, for  
24 instance, the for-cause testing, such as vehicular  
25 accidents, vehicle incidences, or the suspicion of

1 being under the influence of drugs or alcohol. We use  
2 the ITAP drug-scanning urinalysis method. This method  
3 has FDA clearance also and can cover up to a 13-panel  
4 test, including the 10 items proposed by MSHA.

5           This test is used as a screening tool, in  
6 the event of an accident or when there appears to have  
7 been an individual under the influence. This test  
8 allows for a timely review of an incident within five  
9 to six minutes after submission of a urinalysis.

10           Upon a positive sample, the sample can be  
11 safely utilized as a confirmation sample when sent to  
12 a certified lab for analysis.

13           Once again, we believe and recommend that  
14 MSHA should revise its proposed rule to assure it does  
15 not preclude an entity from having a more robust drug  
16 and alcohol program that enhances the effectiveness of  
17 its program.

18           Secondly, the proposed rule, at 66.100(d),  
19 requires a medical review officer to determine if a  
20 miner has a valid prescription prior to being  
21 permitted or used on or around mine property. This  
22 would infer that individual has a prescription who  
23 tested prior to working at the site. This would  
24 require an individual whose prescription is new or  
25 perhaps changes to be tested again prior to being able

1 to work on site.

2           Barrick does not believe that this should be  
3 the unintended outcome of the proposed rule; rather,  
4 the intent should be to determine, through normal  
5 random drug testing, that the prescription is being  
6 abused.

7           Third, Barrick's drug and alcohol policy  
8 contains provisions that support and encourage  
9 employees to seek voluntary enrollment in a substance  
10 abuse program provided by the company to assist the  
11 individual and continue to provide that need for the  
12 family. It is our belief that such voluntary  
13 acknowledgements cannot be enacted to avoid testing  
14 and disciplinary actions as a result of a potential  
15 positive contributory test.

16           However, various MSHA statements in the  
17 preamble and in the proposal conflict with each other  
18 and effectively negate all voluntary incentives to  
19 seek assistance by an employee.

20           For example, within the preamble discussion,  
21 in regards to 66.204, MSHA specifically states, and I  
22 quote: "It is MSHA's intention to encourage miners to  
23 voluntarily seek assistance but not to allow them to  
24 do so to avoid testing or other requirements under the  
25 proposed rule."



1           Inconsistent with this overarching intent to  
2 help the individuals to seek assistance is MSHA's  
3 proposed rule at 66.403. MSHA's proposal at this  
4 citation states, and I quote: "A mine operator who  
5 verifies a positive drug test result, or verifies an  
6 altered or substitute drug test, must immediately  
7 remove the miner from performing job duties and refer  
8 the miner to a qualified SAP."

9           In essence, the miner's incentive to  
10 voluntarily seek assistance becomes moot as they will  
11 be referred to a substance abuse program, in any  
12 event, whether before a positive drug test or after a  
13 positive drug test, eliminating the incentive to  
14 volunteer yourself to such a program.

15           Contrary to MSHA's underlying intent, mainly  
16 to help the individual, it has the opposite effect  
17 that it will allow the individual if he was to game  
18 the system.

19           As presently proposed, the person could  
20 voluntarily seek assistance, satisfactorily complete  
21 the return-to-duty process, and subsequently fail a  
22 drug and alcohol program, allowing them once again to  
23 be referred to an SAP program for a second time.

24           Finally, MSHA, in its preamble at 66.400,  
25 states, and I quote: "The process for removal and

1 referral of potential return to work has been modeled  
2 after the provisions of the DOT rule." However,  
3 Barrick would like to note that the Department of  
4 Transportation rules do not address employment actions  
5 leading up to the company policy or the bargaining  
6 agreement.

7           The Department of Transportation states, and  
8 I quote: "All employment businesses belong to the  
9 employer. DOT regulations do not address employment  
10 actions, such as hiring, firing, or leaves of absence.  
11 DOT and USGC regulations may prohibit you from  
12 performing your safety-incentive functions after a  
13 positive test result or a refusal to submit to  
14 testing. You should be aware, altered or substitute  
15 DOT drug or alcohol tests may trigger consequences,  
16 based on company policies or employment agreements."

17           MSHA's proposal, however, is divergent  
18 opposite from these DOT regulations, and, I think,  
19 unwisely, interjects itself into labor-management  
20 matters for these proposals.

21           Barrick believes there must be incentives  
22 for individuals to effectively implement a voluntary  
23 assistance program coupled with a drug or alcohol  
24 abuse testing program. This is the purpose of a zero-  
25 tolerance drug and alcohol program. A zero-tolerance

1 program allows individuals to seek voluntary  
2 assistance without any consequence to their  
3 employment, provided they do so not to avoid a  
4 positive drug or alcohol test.

5           We believe MSHA's proposal, in this regard,  
6 is overly flawed, as it is reactive versus being  
7 proactive in addressing initial drug use and those who  
8 abuse drugs.

9           Barrick doesn't believe the intent of this  
10 role should be to punish people, but we do believe  
11 that each individual is responsible or accountable for  
12 the decisions they make. To improve safety in our  
13 nation's mines, we must work proactively to prevent  
14 the use of illegal drugs and abuse of alcohol, and  
15 this is achieved through a zero-incident program.

16           In conclusion, we believe that MSHA should  
17 only set minimum threshold standards for its proposed  
18 drug and alcohol program. We believe this would  
19 eliminate much of the one-size-fits-all approach taken  
20 by this proposal, allows companies the flexibility to  
21 implement more effective drug and alcohol abuse  
22 programs, thereby eliminating or reducing the risk in  
23 our mines by providing for a safer work environment.

24           With that, I would like to say that that  
25 concludes my presentation, and I'll open up any

1 questions. Thank you.

2 MS. SILVEY: Thank you, Mr. Ferdinand. I  
3 just have a couple of comments, and I think most of  
4 them are in the nature of being clarifying, actually  
5 not that many, because now we are seeing a repetitive  
6 theme here.

7 I said "comments," but the first one  
8 actually is a question. With respect to Barrick's  
9 program, on your random testing, what percentage of  
10 employees do you test?

11 MR. FERDINAND: We test all the way from the  
12 president of the company down to the new hire.

13 MS. SILVEY: I meant, for the random, do you  
14 have a percentage that you test?

15 MR. FERDINAND: We sample 20 percent of the  
16 miners, or, I would say, the employment population in  
17 each program.

18 MS. SILVEY: Okay. Thank you. The next  
19 question I have is, and thank you for your comments on  
20 the other methods that you use, your alternate testing  
21 methods. I think I have a fair understanding of your  
22 comments there.

23 But I would like to comment on your  
24 interpretation of the proposal, in that, as you said,  
25 under Barrick's program, you encourage people to seek

1 voluntary enrollment or voluntary assistance, and I  
2 think it was one of the goals of MSHA to structure the  
3 proposal so that it did, indeed, have an element of  
4 encouraging miners to seek, and I mentioned that  
5 earlier, to seek voluntary assistance prior to any  
6 coming under testing under any of the other provisions  
7 of the rule, whether they be random, post-accident,  
8 for-cause, or whatever.

9           Now, you know, if we didn't clarify as  
10 clearly as we could, we did specifically say -- I  
11 thought we fairly clearly stated -- that it was the  
12 intent of the agency to encourage persons to seek  
13 assistance but to not let that get in the way of being  
14 used as a crutch so that they would continue to do it  
15 over and over to get out of any issues that they might  
16 have.

17           MR. FERDINAND: As I remember the proposal,  
18 a person who voluntarily can get themselves through an  
19 EAP or SAP, as their free will, upon successfully  
20 completing rehab, there's no consequences in getting  
21 back into the workforce. However, if that person then  
22 falls off the wagon, he is reenrolled into another SAP  
23 program. So it's, basically, two strikes and you're  
24 out versus the first time where you voluntarily do it,  
25 and that's the difference.

1 MS. SILVEY: Okay, okay. I guess that is  
2 accurate.

3 That's all I have, all of the comments I  
4 have. Does anybody else have any?

5 (No response.)

6 MS. SILVEY: Okay. Thank you very much.

7 Our next speaker is the MARG Group, Brian  
8 Hendrix.

9 MR. HENDRIX: Ms. Silvey, we switched with  
10 Mike Crum.

11 MS. SILVEY: Then you did switch. Okay. So  
12 that's accurate.

13 So next, then, is Mike Crum, so we continue  
14 at the Denver, Englewood, location with FMC Green  
15 River.

16 MR. CRUM: Thank you. This morning, I have  
17 two sets of comments: one on behalf of the Wyoming  
18 Mining Association, as well as the FMC Corporation  
19 comments. I will start with the Wyoming Mining  
20 Association comments. My last name is spelled  
21 C-R-U-M.

22 The Wyoming Mining Association appreciates  
23 the opportunity to provide comments on the proposed  
24 rule regarding alcohol and drug treatment. The  
25 Wyoming Mining Association, or "WMA," is a state-wide

1 trade organization representing 34 mining companies  
2 producing bentonite coal, stroma, and uranium.

3 Wyoming leads the nation in the production  
4 of all four of those minerals. Wyoming mines produce  
5 40 percent of the nation's coal, which is shipped to  
6 38 states, from Washington to New York to Florida and  
7 Minnesota. Wyoming mines also produce 90 percent of  
8 the soda ash used in the United States and ships soda  
9 ash to countries around the world.

10 WMA appreciates the opportunity to comment  
11 on the above-referenced regulations. The WMA, like  
12 MSHA, is genuinely concerned about the safety of our  
13 miners and has a multipronged approach within our  
14 safety program to enhance the safety and health of our  
15 workplace, as well as that of our miners.

16 MSHA is to be commended for understanding  
17 the significance of substance abuse in the workplace  
18 and for providing regulations to help improve the  
19 safety of mines. However, the WMA strongly encourages  
20 MSHA to consider this rulemaking a performance-based  
21 standard and allow mine operators to utilize the  
22 proposed rule as a minimum standard.

23 Operators who currently have a zero-  
24 tolerance policy in effect would be regressing to a  
25 less-rigorous approach to mine safety by being forced

1 to adopt these regulations as written.

2           Operations that have less-stringent  
3 requirements would be substantially improving their  
4 programs with the assistance of this rule.

5           As any mine operator would agree, drugs and  
6 alcohol have no place in mining. As noted,  
7 historically, mining has many inherent risks that can  
8 have drastic impacts on the safety and welfare of  
9 miners and their families.

10           Miners, both surface and underground,  
11 operate large, expensive equipment on a routine basis.  
12 The use of drugs and/or alcohol can severely hinder  
13 an individual's judgment and put the miner, co-  
14 workers, and equipment at risk.

15           Many operators today have some format for  
16 dealing with substance abuse in the workplace. Some  
17 of these operators have a zero-tolerance policy. The  
18 current rulemaking would contradict this policy.

19           MSHA has traditionally had a performance-  
20 based set of standards, where the regulatory  
21 requirement was the minimum. This rule should be  
22 treated no differently and should allow these  
23 operations to continue to perform above the MSHA  
24 standards. For others, this rule is an enhancement to  
25 existing practices and, again, should be considered



1 the minimum requirement.

2           The following comments relate directly to  
3 specific sections of the rule.

4           Section 66.101, "Prohibited Behaviors."  
5 Subparagraph (b) indicates that these rules would  
6 allow for a lower blood alcohol concentration from  
7 what many operators currently have to comply with.

8           The question is, "What is the premise for  
9 using a lower BAC than that already established by the  
10 DOT?"

11           66.200. It would seem appropriate for the  
12 education and awareness program to be directed at all  
13 miners, regardless of their supervisory tasks,  
14 "referrals for assistance for miners who violate this  
15 rule" should be amended to "availability of assistance  
16 for miners who come forward seeking treatment." Many  
17 operators have assistance available; however, after a  
18 drug test, it is too late for the miner, either  
19 salaried or hourly, to ask for assistance.

20           Where a zero-tolerance policy exists and is  
21 well understood by all employees, hourly and salaried  
22 alike, the opportunity for assistance is available  
23 prior to the random substance abuse tests. Section  
24 66.200 should establish this rule as a minimum  
25 standard.

1           Education and awareness program for  
2 nonsupervisory miners; it would appear that these  
3 programs are targeted for hourly or wage owed  
4 personnel. If the education and awareness program is  
5 good for one group, it should be delivered to all  
6 employees, regardless of their supervisory capacity.

7           As this rule is currently written, some  
8 employees could easily be left out of any education  
9 and awareness training. It is not clearly discussed  
10 in this section or in 66.203 whether or not all mine  
11 employees are required to attend the training. The  
12 rule should be rewritten to address all miners.

13           Subpart (e). First, this section would be  
14 less stringent than the policies of many operators.  
15 If MSHA proceeds with the prescriptive conditions  
16 suggested in Subpart (e) and does not allow more  
17 stringent program requirements, many operations would  
18 be forced to revise company-wide programs to a less-  
19 stringent approach for both MSHA and OSHA divisions to  
20 ensure a consistent approach throughout the company.

21           In the past, MSHA's standard-setting process  
22 has been to set performance standards, which operators  
23 have been applauded for exceeding. The current  
24 suggested standards will take many operators' programs  
25 backwards.

1           The standard should allow operators the  
2 ability to maintain a zero-tolerance policy if one is  
3 in place prior to the time of this rulemaking. Areas  
4 of concern for operators with less-stringent programs  
5 include the items as listed.

6           66.400, "Consequences for a Miner Failing an  
7 Alcohol or Drug Test or Refusal to Test." A mine  
8 operator should not be required to follow Sections  
9 66.405 and 66.406 for miners who refuse to submit to  
10 testing or when intentionally adulterate or substitute  
11 a urine specimen.

12           Actions of adulterating or substituting a  
13 sample should constitute falsification of  
14 documentation. In the justice system in the United  
15 States, refusing to take a drug test is the same as  
16 providing a positive sample.

17           This paperwork would be required much in the  
18 same manner as training documentation. In this  
19 instance, falsification should be grounds for  
20 termination, if the operator so chooses, and, at the  
21 very least, penalty -- the miner, instead of the  
22 operator, when violations of this section are cited.

23           66.401, "Operator Actions Pending Receipt of  
24 Test Results." This section regresses current testing  
25 protocol to allow for an instant test to determine if

1 a sample will be negative or positive for substance  
2 abuse. Current technology should be allowed to  
3 determine whether or not suspension from safety-  
4 sensitive duties is warranted. For many of our  
5 members, all jobs, once you step on mine property, are  
6 safety-sensitive jobs.

7 Technological advancements should be  
8 considered since the agency has stated historically  
9 that rulemaking will drive technology. This  
10 technology is already present, and we should never  
11 allow, or put ourselves in a position that would  
12 allow, someone to be placed in jeopardy of injuring  
13 himself or others by neglecting available technology.

14 Paragraph D, under this section, seems to  
15 contradict paragraph C. Is there an explanation in  
16 which such withholding of pay would not adversely  
17 affect a miner's pay and benefits?

18 66.403, "Operator Actions after Received  
19 Verified Test Results." Subpart A not only allows for  
20 miners who most likely have a substance abuse problem  
21 to continue working but also allows for a dishonest  
22 miner who has falsified required regulatory  
23 documentation to remain employed. This section is  
24 also going to cost an operator a significant amount of  
25 money to retain a less-than-desirable employee.

1           66.404, "Evaluation and Referral." This  
2 section is confusing, in that mine operators must, by  
3 the standard, provide applicants a listing of  
4 acceptable substance abuse providers. Does this also  
5 mean that any applicant will be covered under this  
6 standard and subject to employee assistance programs  
7 paid for by the operator?

8           It would stand to reason that the inclusion  
9 of an applicant in paragraph (b) would open up a  
10 significant cost to employers, as many operators  
11 require an applicant to pass a drug screen for a  
12 conditional offer of employment.

13           An applicant offered a conditional offer of  
14 employment would not be hired should they fail a  
15 preemployment drug and/or alcohol test and thus would  
16 not be employees of the operators.

17           However, Section 66.404 of the MSHA proposal  
18 states that mine operators would be required to offer  
19 job security to miners who violate the alcohol- and  
20 drug-free mine policy for the first time. A statement  
21 such as this indicates that there is room for error,  
22 at least once, when, in fact, there is no room for  
23 error.

24           Jobs in the mining industry require focus  
25 and constant concentration. Section 66.404 would be

1 sending a message to an employee that they would have  
2 a free pass on the first failure because the  
3 consequences are not such that they could be  
4 sacrificing their livelihood. This requirement can  
5 only be viewed as a significant step backwards.

6           Again, many of our members have already  
7 instituted zero-tolerance policies. It seems  
8 unreasonable that an operator would not only be  
9 expected to provide job security for someone who  
10 violates their drug and alcohol policy but also to  
11 find a competent, short-term replacement. There is a  
12 large shortage of good, available workers in this  
13 industry.

14           Most people seeking employment want the  
15 security of a long-term position. In the midst of our  
16 current economic hardships in the United States,  
17 companies have a set number of employees that they can  
18 afford to have on the payroll.

19           Subpart F, "Record-keeping and Reporting."  
20 Under Section 66.500, Section (a) and Section (c) are  
21 contradictory when mine operators do not restrict  
22 access to accident reports for the safety committee's  
23 data analysis in operations where employee involvement  
24 in the state's trust requires access to accident  
25 reports by those miners, and thus would be in

1 violation of Section (c). The requirement to include  
2 test results and accident reports should be removed  
3 from the standard to ensure confidentiality.

4 In summary, the Wyoming Mining Association  
5 appreciates the opportunity to provide comments for  
6 MSHA's important rulemaking process. Again, we ask  
7 you to consider how this rulemaking will affect those  
8 operations that already have a zero-tolerance policy  
9 in place for the use of drugs and alcohol in the  
10 workplace. Operations that already have zero-  
11 tolerance policies in place have set the bar for  
12 safety high, and, by doing so, have made it a priority  
13 for employees to be safe by exceeding recommendations,  
14 certainly, as suggested by this rule.

15 Finally, the Wyoming Mining Association will  
16 submit written comments prior to the comment deadline.

17 MS. SILVEY: Are you through?

18 MR. CRUM: I'm through with Wyoming --

19 MS. SILVEY: Indicate that. That was a  
20 little bit of sarcasm, quite honestly. I know that  
21 the whole world is listening to me today, and I can't  
22 be my usual sarcastic self, but, you know, I can't  
23 help it. Go on. Continue.

24 MR. CRUM: I will forego the FMC comments  
25 because they are very similar to what --

1 MS. SILVEY: No, go ahead.

2 MR. CRUM: We will submit comments in  
3 writing.

4 MS. SILVEY: Okay. All right. Thank you.  
5 Before you go, though, since you commented on the  
6 Wyoming Mining Association, I guess you're a member  
7 company, so you are prepared to speak to their  
8 comments. Right?

9 MR. CRUM: Again, to my ability.

10 MS. SILVEY: Okay. Well, several of the  
11 comments, we heard already. The only thing I wanted  
12 to comment on, quite honestly, was the reference to  
13 ignore BAC -- so everybody knows what I'm talking  
14 about "blood alcohol content" -- than DOT. There are  
15 people on the panel who are more qualified than I am  
16 to speak to this, but if I'm not mistaken, under the  
17 DOT regs, there is a bifurcated process, and what we  
18 did, I think, to simplify things is we didn't include  
19 that bifurcated process in the proposal.

20 I think one could say that it's not a, per  
21 se, law never, but if we had wanted to be directly  
22 similar -- not similar -- the same as DOT, we would  
23 have included that bifurcated process, but we didn't.  
24 So, therefore, since we didn't include the bifurcated  
25 process, then we did not, and so people know, this



1 two-step process, if we didn't do that, then we  
2 included one blood alcohol content level, and that one  
3 blood alcohol content level, I believe, is consistent  
4 with DOT.

5           So just so everybody would know that, I did.  
6 I think, in my opening statement, I asked for a list  
7 of things that we asked for further information on,  
8 and that was one of the questions that the agency  
9 asked for further information on. A number of the  
10 things that you all are commenting on, and this goes  
11 out to everybody, a number of the things you all are  
12 commenting on, we asked for additional information on  
13 that.

14           So some of you are providing the additional  
15 information with the specifics. Some of you are  
16 providing the additional information with  
17 generalities. So, to the extent that you can provide  
18 specific comments, even if it's something that you  
19 don't like, specific alternatives, that will be useful  
20 to us after October 29th and after we proceed to  
21 making a decision about what we, as an agency, are  
22 going to do with respect to moving forward, and many  
23 of you have heard me say this in many other MSHA  
24 rulemakings.

25           That's all. I just wanted to kind of

1 clarify that part because I stumbled on it when I  
2 heard it, and I just figured that this probably was  
3 the opportunity to clarify that for everybody.

4 Does anybody else have anything?

5 (No response.)

6 MS. SILVEY: Okay. Thank you very much. So  
7 we look forward to your additional comments before the  
8 comment period closes.

9 MR. CRUM: I just want to thank you.

10 MS. SILVEY: Okay. Thank you. Okay.

11 Our next speaker will be, here at the D.C.  
12 location, Hunter Prillaman, with the National Lime  
13 Association.

14 MR. PRILLAMAN: Thank you. My name is  
15 Hunter Prillaman. That's spelled P-R-I-L-L-A-M-A-N.  
16 I'm the director of government affairs for the  
17 National Lime Association, or "NLA." We represent the  
18 makers of Quick Lime and high-grade lime products.

19 Lime is made from limestone, and so our  
20 members are in the business of mining limestone, so  
21 we're under MSHA's jurisdiction. Lime is produced in  
22 about 33 states, and we employ approximately 5,000  
23 workers in the industry.

24 NLA commends MSHA for addressing the serious  
25 issue of drug and alcohol abuse in the mining

1 industry. Impairment by drugs or alcohol is  
2 absolutely incompatible with the mine environment, and  
3 strong measures are warranted to protect miners from  
4 the dangers posed by impairment.

5 We support many of the elements of MSHA's  
6 proposal. Indeed, most of NLA's members already have  
7 robust drug- and alcohol-testing programs in place.  
8 We do have some concerns, though.

9 Let me just mention, a few years ago, when  
10 MSHA came out with the advanced notice proposed  
11 rulemaking for drug and alcohol testing, we told our  
12 members and said, "What do you think? What do you  
13 think about MSHA having a mandatory program?" The  
14 members all came back, and they said, "Well, we  
15 already have programs in place. What we really mainly  
16 want is for MSHA not to mess them up."

17 So that was the comment that we filed back  
18 then, basically saying, "Well, it's okay, but we  
19 already have programs," and I think what you're  
20 hearing from a lot of people is MSHA has the potential  
21 to disrupt programs that are already in place because  
22 you're going to hear me say some things that a lot of  
23 other people have already said.

24 Our biggest problem with this rule is the  
25 prohibition of the zero-tolerance policy. A lot of

1 our members do have zero-tolerance policies, and they,  
2 therefore, think that this rule would make their mines  
3 less safe rather than safer.

4           Those operators that have chosen a zero-  
5 tolerance policy believe that it's important to make  
6 it clear that miners found to be under the influence  
7 of drugs, as a result of a random or accident-related  
8 test, will be terminated, and that is, in fact, what  
9 they do.

10           They believe that a policy like this sends a  
11 message that no miner can take his chances, or remain  
12 in denial, until a first positive test comes along,  
13 and, in fact, we think that it encourages miners with  
14 a drug or alcohol problem to seek help before failing  
15 the test but can't wait.

16           But as existent in your proposal, the  
17 companies that have a zero-tolerance policy do also  
18 have what some of them call an "amnesty program," in  
19 which if someone voluntarily comes forward with a drug  
20 or alcohol problem, they are referred to treatment,  
21 and there are no negative consequences if they  
22 complete it. Everybody is in favor of that idea  
23 because that's the kind of consensus that we want.

24           Again, the concern is that we think that the  
25 way this rule is set up sets the incentives wrong. It

1 doesn't give a strong enough incentive to seek  
2 voluntarily help because the person knows, "Well, if  
3 the random test happens, and I fail it, well, at least  
4 I'll have a chance to get treatment then." We don't  
5 think that's a strong enough incentive.

6           So that's the concern, and MSHA really  
7 shouldn't require operators who already have a strong  
8 drug and alcohol policy to replace them with less-  
9 stringent rules, and that doesn't enhance safety.

10           The second concern that we have, in general,  
11 is that some of the elements of the proposal unduly  
12 restrict the flexibility of operators to craft a  
13 program that will fit the needs of their own  
14 operations, and we give more examples of these -- some  
15 of them are fairly specific -- in our written comments  
16 that I'll talk about.

17           One that some other people have talked about  
18 also, and that is the use of these instant or  
19 screening drug tests on site. We have a number of  
20 members who are doing this. They use a little cup for  
21 a urine sample or an oral swab, and specifically what  
22 they do, and this is generally in connection with  
23 accident-related testing.

24           So the accident occurs, the workers whose  
25 actions may potentially have caused the accident are

1 brought in and given the screening test. If the test  
2 is negative, then they return to work. If the test is  
3 positive, then they are referred for the comprehensive  
4 testing, according to DOT protocols.

5           For a lot of our members that are in remote  
6 locations, that involves sending the person to an off-  
7 site location for drug testing or to a hospital, maybe  
8 a medical facility. A lot of them are relatively  
9 small, and they don't have that kind of operations on  
10 site. So they have to send the person off, and the  
11 disruption in work, of course, is significant.

12           If a negative test can be obtained quickly,  
13 then there is no onus on the worker anymore, and there  
14 is no more disruption of work.

15           That's something that, at least, MSHA ought  
16 to be looking at, looking at the efficacy of those  
17 kinds of tests, to see what makes sense.

18           Those that are doing random drug testing,  
19 usually they have some outside entity come and perform  
20 those, so the sort of type of testing that they do for  
21 random drug test, they don't have the capacity to do  
22 that for accident related. They would have to go to  
23 someplace also.

24           So, again, other people have mentioned other  
25 types of testing as well. We think MSHA should take a

1 look at those and see whether they can fit into an  
2 effective program.

3           One last thing that I'll mention that a  
4 couple of other people have talked about is the  
5 question of contractor employees. This is always a  
6 difficult issue, and I don't think it's currently  
7 addressed accurately in the rule. I think it's been  
8 made clear that contractor employees who are miners  
9 who require comprehensive miner training are covered  
10 by the rule, but it's still not clear exactly who has  
11 to do what when.

12           For example, if the contractor employees are  
13 on a mine site doing work on a day that the random  
14 drug testing for the facility is done, may they be  
15 included in that random testing, or must they be  
16 randomly tested by their own employers, and if they  
17 are randomly tested by their own employers, what can  
18 the mine operator do to ensure that this has been  
19 done. Is it enough to have a contract or a statement  
20 from the contractor employer?

21           This is a constant issue, and I think it's a  
22 more difficult one here because we're talking about  
23 actions that might have occurred off this mine  
24 operator's site. So, obviously, the concern is that  
25 the mine operator doesn't want to have a problem with

1 a positive drug test of somebody else's employee.

2           So, again, that's something that needs to be  
3 clarified as to who has these responsibilities, and  
4 when do they kick in?

5           As I mentioned, we'll also submit detailed  
6 written comments, but I would be happy to answer any  
7 questions that you might have.

8           MS. SILVEY: I just have a couple, and the  
9 first one is, your program that you all have for your  
10 member companies -- I'm now talking about for the  
11 member companies -- generally speaking, what types of  
12 testing do they have? I know that they are probably  
13 not all the same.

14           MR. PRILLAMAN: Some of them are doing a  
15 panel, which is basically the same as what you have.  
16 Generally, what they are doing is they are either  
17 doing the DOT panels of five panels, or they are doing  
18 a broader panel that's offered by some testing entity.  
19 It's probably generally more or less the same as the  
20 one that you have here, but, basically, they are  
21 hiring outside testing companies, and some of them  
22 offer a slightly different panel.

23           MS. SILVEY: That shows you how terminology  
24 is here. It's so important with terminology. Thank  
25 you. I appreciate you saying that because what I was



1 getting at was, when do they test? Let me rephrase  
2 it, then. That's really what I was getting at.

3 MR. PRILLAMAN: Again, that varies --

4 MS. SILVEY: That probably varies, too.

5 MR. PRILLAMAN: Several of the companies  
6 have random testing, and I can't quote you the  
7 percentages, but 10 percent of those that are doing  
8 random testing. They virtually all are doing prehire  
9 testing, and a lot of them are doing -- I think just  
10 about all of them are doing -- accident testing, and  
11 that also varies. Some of them do it only for more  
12 serious accidents, and others do it very broad. They  
13 are doing drug testing for near misses and things like  
14 that.

15 So that's another example where we wouldn't  
16 want you to put out a rule that would restrict what  
17 people are doing in that regard. If somebody wants to  
18 go do incident-related testing for near misses, we  
19 think that they should be allowed to do that.

20 MS. SILVEY: Well, you said you were going  
21 to provide your comments before the comment period  
22 closed, so I would encourage you to be as specific in  
23 your comments with respect to areas where they  
24 disagree with the proposed rule.

25 Does anybody else have comments? Does

1 anybody have comments?

2 (No response.)

3 MS. SILVEY: Our next speaker will be Ralph  
4 Sanich, who is with Inter West Mining Company, and  
5 that's here in the DC location.

6 MR. SANICH: Good afternoon, my name is  
7 Ralph Sanich, S-A-N-I-C-H, I'm the Health and Safety  
8 manager for Inter West Mining Company located in Salt  
9 Lake City. Ladies and gentlemen, Inter West Mining  
10 Company appreciates the opportunity to comment on this  
11 proposed rule.

12 The company firmly believes that if this  
13 rule goes into effect as written it will result in a  
14 reduction of safety. Many coal companies, including  
15 Inter West Mining Company and its subsidiaries, have  
16 comprehensive substance abuse programs already in  
17 place. Other companies, including our company, have  
18 established programs developed in conjunction with  
19 their individual organized workforce, which in some  
20 cases may include the United Mine Workers, Operating  
21 Engineers, et cetera.

22 Our program covers all employees who are  
23 involved in accidents, property damage, et cetera, and  
24 it does not discriminate by using wording like safety  
25 sensitive job duties. The company believes that all

1 jobs involved with mining are safety sensitive.

2           It is hoped that the Mine Safety and Health  
3 Administration would view mining companies with  
4 programs currently in place to be in compliance with  
5 the proposed alcohol and drug free mines  
6 policy/proposed rule and allow us to follow our  
7 program guidelines rather than take a step backwards  
8 and weaken our existing drug and alcohol programs.

9           The company would like to stress to MSHA  
10 that in the preamble under Subpart C, Section 66.200,  
11 Purpose and Scope, it states: "Require each mine  
12 operator to implement the following five elements of  
13 an alcohol and drug free program: a written policy,  
14 employee education, supervisory training, alcohol and  
15 drug testing for miners that perform safety sensitive  
16 job duties (we would suggest substituting that that is  
17 all employees and remove, "that perform safety  
18 sensitive jobs") and their supervisors and referrals  
19 to assistance for miners who violate the policy."

20           This is simple, and companies that have  
21 these elements in place as part of their existing  
22 substance abuse program should be considered compliant  
23 and allowed to administer their existing program. The  
24 following are questions specifically requested by MSHA  
25 that we've addressed.

1 MSHA requests comments about the  
2 determination of who performs safety sensitive job  
3 duties. Inter West Mining Company believes that all  
4 jobs on mine sites are safety sensitive jobs, which is  
5 why all employees are required to undergo safety  
6 training. The proposed rule states that safety  
7 sensitive job duties are any type of work activity  
8 where a momentary lapse of critical concentration  
9 could result in an incident, injury or death.

10 Mine accident history would suggest that all  
11 jobs are not immune from an accident. It is the  
12 company's position that substance abuse programs  
13 should apply to all employees and not a subset of  
14 employees. Applying the substance abuse testing  
15 across the board is a more consistent approach to  
16 ensuring a drug free, alcohol free work environment.

17 MSHA requests comments about experiences and  
18 concerns about the use of such substances as  
19 prescribed medications in mining. Inter West Mining  
20 Company believes that abuse of prescription medication  
21 is a big problem throughout the country and not just  
22 in mining. A doctor should verify that a miner  
23 utilizing prescription medications can engage in  
24 normal, safe work activity while taking the prescribed  
25 medications.

1           The company should be notified by the  
2 employee that he or she is taking prescribed  
3 medication prior to starting work duty. There should  
4 also be a statement from the company about abuse of  
5 prescribed medications, i.e., taking more than the  
6 prescribed dosage. If a dosage is exceeded, the  
7 employee should be subject to the same criteria as  
8 positive tests for substance abuse outlined in the  
9 policy.

10           MSHA seeks comments on the list of drugs  
11 specifically identified as prohibited substances.  
12 Inter West Mining Company believes that the drugs of  
13 concern have been identified; however, the company  
14 recommends that companies have flexibility to adjust  
15 or add additional drugs to their programs if they  
16 could be subject to abuse.

17           It is critical that a qualified medical  
18 review officer review screens and has the opportunity  
19 to contact individuals and ask questions regarding the  
20 use of certain drugs, including prescription  
21 medication.

22           MSHA invites comments on written policy, how  
23 it should be provided to miners. Again, Inter West  
24 Mining Company believes that this communication of the  
25 substance abuse program should be left up to the

1 employers or the individual mining companies. They  
2 may choose to send it to their employees in the mail,  
3 they could hand it out during training sessions, they  
4 could post it on official bulletin boards, et cetera.

5 MSHA invites comments about the amount and  
6 type of training for nonsupervisory miners. Inter  
7 West Mining Company believes that the training for  
8 nonsupervisory miners can be conducted in several  
9 ways. For example, human resource personnel familiar  
10 with the policy could conduct training for  
11 nonsupervisory employees during normal work hours and  
12 at scheduled safety meetings.

13 Training could also be performed by offering  
14 online courses, holding training sessions conducted by  
15 a knowledgeable supervisor or contract employees such  
16 as a medical review officer or a substance abuse  
17 professional. This training would consist of teaching  
18 employees how to recognize and apply certain  
19 behaviors, the effects of drugs in the workplace and  
20 how to follow the policy as is most appropriate for  
21 employees and circumstances.

22 MSHA seeks comments on who should receive  
23 reasonable suspicion training. Inter West Mining  
24 Company believes all management employees and working  
25 foremen/supervisors who supervise employees (hourly

1 and management) should receive reasonable suspicion  
2 training.

3 MSHA seeks comments on the provision to  
4 encourage, but not require, miners to voluntarily seek  
5 assistance. Inter West Mining Company agrees that it  
6 is appropriate to encourage assistance for substance  
7 abuse. Those companies that have substance abuse  
8 programs in place should be allowed to follow their  
9 processes so long as the programs meet and contain the  
10 fundamental elements proposed by MSHA.

11 If an employee voluntarily seeks assistance,  
12 this would allow them to qualify for a one time  
13 rehabilitation program. The very best incentive for  
14 the individuals to complete rehabilitation is having  
15 their job on the line.

16 MSHA seeks comments about the extent of  
17 third-party health benefits. Inter West Mining  
18 Company believes that providing healthcare coverage to  
19 cover costs of substance abuse treatment for employees  
20 is appropriate and the right response.

21 MSHA invites comments about the  
22 circumstances under which testing is warranted. We  
23 believe that mandatory substance abuse testing is  
24 appropriate for the following circumstances:  
25 preemployment; postaccident; reasonable suspicion; and

1 random testing. We've suggested and in our case one  
2 of our properties has a minimum of 33 percent of its  
3 workforce annually.

4 MSHA invites comments about proposed  
5 preemployment alcohol and drug testing provisions.  
6 Inter West Mining Company agrees that preemployment  
7 alcohol and drug testing should be mandatory. If a  
8 person has a positive test result, this would  
9 eliminate the person from consideration for  
10 employment.

11 MSHA invites comments about the floor rate  
12 at which random testing would be conducted. As stated  
13 earlier, Inter West Mining believes that that rate  
14 should be a minimum of 33 percent. It is also  
15 recommended that an outside third party make the  
16 selection rather than completing them internally to  
17 insure credibility of the random process.

18 MSHA welcomes comments on how the drug and  
19 alcohol testing results should be documented in  
20 accident reports. Inter West Mining Company believes  
21 that all injury accidents require substance testing  
22 along with a recommendation that there be an  
23 indication on the accident report that the drug screen  
24 was completed.

25 MSHA invites comments as to the appropriate



1 means for enforcing the provisions of this proposed  
2 rule. Inter West Mining Company disagrees that it is  
3 necessary for MSHA to enforce its drug and alcohol  
4 program on mining companies. Companies that have been  
5 proactive and have programs in place already have  
6 consequences for failure to comply with the program  
7 provisions built into their programs.

8 MSHA is interested in learning about mine  
9 operators who already test for additional substances  
10 about their experiences differentiating legitimate  
11 from unauthorized use and for detail with discovery of  
12 use of substances. Inter West Mining Company believes  
13 the key to this determination is having qualified and  
14 certified medical review officers that can  
15 independently talk with the employees and ask the  
16 questions needed to determine the authorized or  
17 unauthorized use of substances.

18 MSHA invites comments about the provisions  
19 of what action the mine operators must take upon  
20 receiving alcohol and drug test results. We believe  
21 that two areas need to be addressed. First, the  
22 process needs to be treated confidentially and only  
23 necessary individuals involved. This would help to  
24 ensure employee confidentiality is maintained.  
25 Secondly, actions, if any, also need to occur as

1 quickly as possible.

2 MSHA invites comments on inclusion of SAP  
3 functions with EAPs. Inter West Mining Company feels  
4 that the substance abuse program cannot properly  
5 function without an employee assistance program in  
6 place.

7 MSHA invites comments about the consequences  
8 that would be imposed upon miners by the proposed  
9 rule. MSHA also invites comments about the evaluation  
10 and referral process and the role of a SAP in  
11 recommending treatment. Inter West Mining Company  
12 believes that the key element is providing all  
13 employees a safe work environment.

14 If someone is impaired or unable to perform  
15 work safely, they need to be removed from the work  
16 environment. Consequences beyond removal would be  
17 determined by the company's alcohol and drug program.

18 MSHA invites comments about the provision of  
19 returning to duty and follow-up testing. Inter West  
20 Mining believes that follow-up testing should be  
21 mandatory and a key component to a successful  
22 substance abuse program. A person who has tested  
23 positive for a tested substance and has violated the  
24 substance abuse policy must be held to a higher  
25 standard of performance and expectations to justify

1 their return to work.

2           With the individual's job on the line, this  
3 is the very best deterrent. The employee needs to  
4 understand that there are consequences to every future  
5 violation.

6           The agency solicits comments about what  
7 records would need to be kept and for how long a  
8 period of time. Inter West Mining believes that  
9 positive substance test results should be kept in the  
10 employee's personnel file for the length of time  
11 identified in the existing substance abuse program.

12           Some companies will have programs that were  
13 developed as part of the labor agreement. The company  
14 believes these records should not be open to  
15 inspectors during quarterly inspections if they are to  
16 be kept by the mine operators. MSHA must remember  
17 that these files are sensitive and restricted.

18           MSHA invites comments about how best to  
19 reflect postaccident test results in required reports  
20 following both fatal and nonfatal accidents. Inter  
21 West Mining Company believes this should be handled  
22 through the company's human resources department. Any  
23 public accident investigation results should be  
24 communicated through the company's legal department.

25           A company's legal department can best

1 determine how to reflect postaccident test results for  
2 serious injury accidents and protect the company from  
3 potential legal challenges.

4           Again, on behalf of Inter West Mining  
5 Company, I'd like to thank MSHA for consideration of  
6 our comments.

7           MS. SILVEY: Anybody have any comments or  
8 questions? Okay. Thank you.

9           MS. CARR: Appreciate your comments. Just  
10 want to make one clarifying statement. One of your  
11 suggestions to Comment No. 3 was that there should be  
12 flexibility to add or adjust additional drugs to the  
13 program. Although it wasn't specified in the rule  
14 text, in the preamble we did clearly state that  
15 nothing in this rule prohibits employers from testing  
16 for additional drugs and even using the same sample.

17           MS. SILVEY: Thank you.

18           MR. SANICH: Thank you.

19           MS. SILVEY: Next we will have William  
20 Rayburn with Iluka Resources Inc.

21           MR. RAYBURN: Go here?

22           MS. SILVEY: Yes.

23           MR. RAYBURN: Thank you.

24           MS. SILVEY: Is that you?

25           MR. RAYBURN: Yes, ma'am.

1 MS. SILVEY: Okay. Is that right, Iluka?

2 MR. RAYBURN: Iluka Resources.

3 MS. SILVEY: Iluka Resources Inc. Okay.

4 MR. RAYBURN: My name is William Rayburn.  
5 I'm the EHS Supervisor with Iluka Resources, the  
6 Mineral Sands Mining Company operations in Virginia  
7 and Florida. I'm also the Chairman of the Safety and  
8 Health Committee for the Virginia Transportation and  
9 Construction Alliance. It's an industry trade  
10 association representing 350 construction companies  
11 and mining companies in Virginia.

12 Iluka wishes to thank MSHA for the  
13 opportunity to be here today and to speak on this. We  
14 support the intent of the proposed rule, which is to  
15 make the mining environment a safer environment. We  
16 agree that there is a problem with alcohol and drugs  
17 in America. It's unrealistic to think that that  
18 doesn't happen on mine property also.

19 However, we feel the rule should be all  
20 inclusive for the United States Department of Labor  
21 and not only mining. Contractors frequently travel  
22 between OSHA and MSHA sites. Construction companies,  
23 especially contractors, crane companies. It's  
24 unrealistic to think that a company that's doing a DOT  
25 required testing now, if your proposed rule is

1 implemented, they wouldn't be in compliance because  
2 they'd have to do different testing.

3           That's undue burden from on those companies.  
4 It should include all contractors under service text  
5 and anybody else working and providing services in the  
6 United States. As written, the proposed rule is  
7 contrary to common sense, heavy industry standard  
8 safety practices. It is unattainable, unrealistic,  
9 intrusive, burdensome.

10           It will compromise safety by allowing people  
11 who are under the influence to have a get out of jail  
12 free card. Iluka has an effective program in place.  
13 We have for 10 years. We test 10 percent of our  
14 employees monthly. We were doing quarterly. Our  
15 employees wanted to go to monthly. It was a  
16 recommendation from our employee safety committee.

17           We provide an EAP where any employee can  
18 voluntarily enter into a program. The rule is you  
19 have to tell me that you have a problem and you want  
20 to enter that program before I tell you you need to  
21 go. Our policy is .02 BAC, zero tolerance, including  
22 refusal to test and result alteration and we reserve  
23 the right to terminate any employee for any reason,  
24 including failing a drug test, refusing to take a drug  
25 test, falsifying a drug test.

1           We do random testing, for cause testing,  
2 preplacement testing and postaccident testing.  
3 Postaccident testing would include any property damage  
4 incident greater than \$500 damage to the company  
5 property. Any person who requires off site medical  
6 evaluation and treatment must have an alcohol and drug  
7 test. Any for cause or suspicion, including gross  
8 negligence.

9           Everyone at Iluka is considered a miner and  
10 is integral to the safety of our operation, including  
11 the secretary, the receptionist, the housekeeping  
12 staff. Anybody employed by our company is included in  
13 that testing program.

14           We do on site saliva testing, both  
15 prescreening, postaccident. Due to the proximity of  
16 our mine site being 35 minutes away from hospitals,  
17 middle of the night, weekends, holidays, there isn't a  
18 doctor's office that's open that's available to us to  
19 do DOT testing. We do the saliva testing as a  
20 prescreening to rule them out as a negative  
21 postaccident.

22           If they go to the hospital for medical  
23 treatment, then they obviously get a test there.  
24 There are some specific concerns Iluka has with the  
25 proposed rule. It doesn't really define what the

1 liability of the mine operator is or the supervisor  
2 who is going to be making the for cause or suspicion  
3 assessment of that individual.

4           Is he negligent if he didn't see or  
5 recognize the person who may turn out to cause the  
6 fatality and they test positive? Was he negligent  
7 because he didn't recognize that? What's the mine  
8 operator's responsibility when it comes to testing of  
9 people when they have an accident? The fact that they  
10 had an accident, they test positive, is the mine  
11 operator then negligent?

12           There's significant problems with access to  
13 the proposed testing methodology due to location, time  
14 of day or week. The emergency room is our only place  
15 to get testing done. We all know that there's a  
16 problem with healthcare in America and having an  
17 emergency room clogged up with people getting their  
18 drug tests because they had an accident but weren't  
19 hurt. Kind of ridiculous.

20           Applicability between contractors and  
21 vendors on mine property, whether they need Part 46 or  
22 Part 48 training or not. A one time specialty  
23 contractor is frequently doing high risk work on the  
24 mine site. He exposes my employees to hazards, but  
25 yet, he's not covered in this rule.



1           Training some of the supervisors is  
2 difficult with human resources issues to begin with.  
3 There are people who have trouble handling the  
4 personnel side of being a supervisor of people. Some  
5 people simply can't do it. This is an increased  
6 ability on those individuals when they're struggling  
7 with the comfortability level.

8           They're good at their job, they know what  
9 they're doing and they can help their people, but now  
10 they're going to be expected to recognize these  
11 situations with two hours of training. A police  
12 officer who does field sobriety tests goes through an  
13 extensive training program. Two hours is unrealistic  
14 to think somebody's going to be able to do that.

15           Contractor employees test positive. Can the  
16 mine operator ban them from the site under the  
17 proposed rule? If he tests positive, he gets his  
18 rehabilitation, is the mine operator allowed to ban  
19 him from the property? Our current rule is anybody  
20 who tests positive is gone.

21           The liability on the mine operator for the  
22 contractor compliance. We have a process that every  
23 contractor who works on our property must do an EHS  
24 prequalification package. It's reviewed by myself and  
25 my staff, including our purchasing people. We review

1 their OSHA record, their MSHA record, the Department  
2 of Mines, Mineral and Energy record for the State of  
3 Virginia, DEQ, EPA records.

4           We don't want unfit contractors working on  
5 our site. We want to verify that they have the  
6 correct insurance. I already have to take care of  
7 their training. If we do training to make sure  
8 they're taking care of the training that's required  
9 for hazards they're going to be exposed to, now do I  
10 have to review their drug and alcohol program and  
11 ensure they're enforcing it and complying it?

12           In their noncompliance if I know we got a  
13 problem. Do I have to take them off site now? MSHA  
14 frequently writes dual citations to mine operation  
15 contractors. That's the situation if this would  
16 occur. MSHA can't say they won't write the operator a  
17 citation if they have knowledge or don't do due  
18 diligence for a rule that's proposed and implemented.

19           It's not company notice if they're not doing  
20 the drug and alcohol testing. We're talking small mom  
21 and pop companies having to do all this. Iluka also  
22 feels that MSHA has drastically underestimated the  
23 cost of implementation and maintenance of this rule.  
24 Just sitting here today listening to people talk I  
25 came up with quite a few things that are going to add

1 significant costs to our operation.

2           Cost of the mandatory rehabilitation born by  
3 the company under the proposed rule. Training: two  
4 hours supervisors initially, one hour for supervisors  
5 annually, one hour for all other employees, a half  
6 hour for refresher. The number of tests to be  
7 conducted for the proposed rules. Somebody tests  
8 positive, you bring them back, you've got a  
9 significant increased number of tests.

10           We've already discussed the problem with  
11 having access to appropriate testing facilities. Type  
12 of test. We currently do a five panel. Proposed rule  
13 is a 10 panel. We use saliva. The proposed rule is  
14 based on the DOT. Our random testing is DOT approved  
15 urine and breath alcohol. That's done through a  
16 third-party consultant providing the services. It's  
17 not cheap because we're a long way away from them.

18           Mandated labs for the urine instead of the  
19 on site rapid testing draw. That includes the postage  
20 to get stuff to the lab. Mandated miner removal from  
21 work. Somebody's got to transport him if he has to go  
22 get a DOT test. He's got to be transported by a  
23 company employee who is then left aside.

24           We frequently have four or five people on a  
25 shift. Nights and weekends, two of the people leave,

1 that would compromise production and safety of the  
2 other people there. Increased costs passed on to the  
3 mine operators when hiring contractors because the  
4 contractors are going to directly pass this cost on to  
5 the mine operator, so our cost of hiring contractors  
6 just went up.

7           Logistics and requirements for paperwork,  
8 data management, recordkeeping; lost time while  
9 conducting the testing; increased time required by the  
10 operator and the medical review officer verifying  
11 prescriptions; putting miners in alternative jobs. We  
12 have to pay them and then pay someone else to do their  
13 regular production work.

14           Suppose an operator doesn't have alternative  
15 duty? Some places don't have light-duty for medical  
16 injuries, but yet, we're going to have create a job  
17 for them and pay them to do it. Contracting is SAP,  
18 additional nonoperative costs. We already have a EAP,  
19 but if the EAP doesn't perform the functions of the  
20 SAP, that's an additional cost.

21           Those are just the ones I've come up with  
22 sitting here today. So Iluka supports MSHA's intent  
23 and its efforts, and we thank you for allowing us to  
24 speak today. If you have any questions about our  
25 testing program and what we do, I'd be happy to answer

1 them.

2 MS. SILVEY: Thank you. I assume, and I'm  
3 making an assumption here, that your program that you  
4 have when you talk about the on site saliva testing  
5 that you're probably using, you did say you did it as  
6 a screen, but are you using the FDA test method, too?

7 MR. RAYBURN: Yes, ma'am. It's also  
8 approved by our medical review officer who is a Board  
9 certified occupational physician.

10 MS. SILVEY: Okay. Right. Okay. The only  
11 other comment I have is with respect to the places  
12 where you said we underestimated the cost and you  
13 talked about six areas I think. Are you going to  
14 provide additional comments?

15 MR. RAYBURN: Yes, ma'am.

16 MS. SILVEY: Well, I can ask you to anyway.  
17 I was going to say, if you would in your additional  
18 comments provide specifics in the area to the extent  
19 that you can. I say this for everybody. When we ask  
20 you if you would provide statistics, that's obviously  
21 always limited by your ability to do so.

22 If you can, when you say that we  
23 underestimated the cost, if you would provide specific  
24 information in the areas where you think we  
25 underestimated the cost, and by how much that we

1 underestimated costs, of you can do that.

2 MR. RAYBURN: Well, I can tell you that our  
3 saliva drug test of drug and alcohol is \$26.

4 MS. SILVEY: Yes. So that's what I'm  
5 talking about. If you can provide specific data, we'd  
6 appreciate that.

7 MR. RAYBURN: Okay.

8 MS. SILVEY: Just let me go off the record  
9 here one minute.

10 (Discussion held off the record.)

11 MS. SILVEY: Anybody else have any comment  
12 for Mr. Rayburn? Okay. Thank you. We look forward  
13 to your additional comments. We will now have Sam  
14 Hollins with the Virginia Transportation Construction  
15 Alliance.

16 MR. HOLLINS: Appreciate your letting us  
17 bump me up a little bit there.

18 MS. SILVEY: Okay.

19 MR. HOLLINS: Good afternoon, panel. As she  
20 mentioned, I am Sam Hollins, H-O-L-L-I-N-S, and I do  
21 work with Virginia Transportation Construction  
22 Alliance, a state trade association that represents  
23 the interests of the mining industry, metal and  
24 nonmetal. I do appreciate the opportunity to speak  
25 today.

1           I would like to say that members of the VTCA  
2 do support obviously an alcohol and drug free  
3 workplace, and we applaud MSHA's attempt to craft a  
4 plan to achieve that end. However, as we exist right  
5 now, the majority of the companies that are members in  
6 Virginia do have comprehensive plans in place that we  
7 feel were under risk of being undermined if the  
8 current proposal passes and moves forward in its  
9 current state.

10           Therefore, as it stands right now, we cannot  
11 afford to support the proposed rule. I would like to  
12 take just a moment or two to reiterate, and I  
13 apologize for reiterating many of the comments that  
14 have been made today already, but I feel that on  
15 behalf of our members in Virginia we need to go on  
16 record and share in some of that concern as well.

17           Jack voiced some of those concerns just now  
18 with Iluka, but I would like just to mention a few, if  
19 I could. One of them, in the area of training we have  
20 questions regarding training in a couple of different  
21 areas, obviously one of them being the amount of  
22 initial training, as well as annual refresher  
23 training, that is involved. That's been noted a  
24 number of times today.

25           We also have concerns regarding the role of

1 the supervisor, certainly concerning reasonable  
2 suspicion testing. We question that with the training  
3 that would be implemented for supervisors, we question  
4 whether they would be readily able to identify who is  
5 under the influence of drugs.

6           As was mentioned earlier, I think this  
7 carries with it as well the risk of liability when you  
8 have a work environment where persons may be operating  
9 under the influence of alcohol or drugs not detected  
10 by supervisors. I think there would be quite a bit of  
11 consternation on the part of the supervisory personnel  
12 that are placed in that position to carry that burden  
13 and the potential risk of personal liability if  
14 something is to happen.

15           In the area of testing I'd like to make just  
16 a few comments, if I could. There are concerns we  
17 have, one of which is regarding the postaccident  
18 testing. I believe now they call for the eight hour  
19 window for alcohol testing. I believe following that  
20 eight hour rule that would bring into question the  
21 validity of those results.

22           I'm also in law enforcement and I know that  
23 the essence is always on time when you're trying to  
24 get your testing done with regard to alcohol testing,  
25 but that the values can change significantly over an



1 eight hour period, so it may be a point that we may  
2 need to reconsider the eight hour period.

3           Also, we obviously would like to see it  
4 modified to the extent where we could utilize the  
5 various methods of testing -- again, I know that's  
6 been mentioned earlier today as well -- beyond the  
7 kinds of testing that's stated in the rules as they  
8 stand right now. We agree with but question the  
9 frequency of follow-up testing. We certainly agree  
10 with when employees come back into the workforce that  
11 follow-up testing is necessary.

12           We're just not sure that the six and 12  
13 month is the adequate way to go. I don't have an  
14 adequate number right now. We're just not sure that  
15 six and 12 months is the way that we would need to go  
16 with that.

17           Finally, regarding testing, again, as has  
18 been shared many times today, we feel that the testing  
19 should be applicable to employees, miners of the  
20 operation, as anyone at a mining site can be  
21 subjected, either themselves or others, to significant  
22 risk of accidents or hazards. So we feel that  
23 everyone should be able to be tested.

24           Next point, regarding 66400, consequences to  
25 miners for failing an alcohol or drug test. It

1 appears in the way it's written right now that, as we  
2 stated, the burden in a way seems to fall mostly, if  
3 not completely, on the company and really not on the  
4 miner themselves.

5           We're feeling that there should be some  
6 consequence or penalty attached to the individual  
7 miner as well, whether it be in the form of some type  
8 of monetary assessment for failing, including the  
9 possibility of being responsible for the cost of the  
10 follow-up testing as well.

11           If you think about it, the logic of this, if  
12 you're Johnny in school and you get caught cheating  
13 and the teacher gets expelled from school, I don't  
14 know that that makes a lot of sense. I don't know  
15 that the student has much of an incentive to worry  
16 about getting caught cheating. So I do believe that  
17 we need to consider putting more of the burden or some  
18 of the burden on to the individual as well.

19           I believe the more buy in that you have,  
20 more consequences you attach to that, the better  
21 chance of success you'll have if that person is held  
22 more accountable. Then finally, and probably the  
23 biggest cause for concern, and again, this has been  
24 shared many times today, would be 66405 where it  
25 states to the return to duty.

1 I believe it states that offenders may not  
2 be discharged for the first offense. I'd like to say  
3 along those lines that the majority of our companies  
4 currently have excellent EAP, employee assistance  
5 programs, that offer full assistance for those who  
6 come forth prior to being caught, if you will.

7 I've spoken with many of our members and  
8 they all echo the same concerns and policy statements  
9 that they have, and that is that they offer that  
10 assistance whole-heartedly to those who will come  
11 forward and ask for that help. However, as it's  
12 written now, we do believe that it handcuffs the  
13 operators with respect to their current disciplinary  
14 policies of which most of them follow zero tolerance  
15 policies.

16 If I could borrow from the preamble, that  
17 entry as posted, I believe it speaks at one point to  
18 one of the commenters that had stated that in these  
19 operations they operate expensive equipment and  
20 dangerous equipment on a routine basis and the use of  
21 drugs and alcohol can severely impact an individual's  
22 judgment and put coworkers and equipment at risk.

23 We couldn't agree more with that statement,  
24 and in fact believe that statement points directly to  
25 our contention that we do need to be allowed to

1 implement the policies that we see as fit to  
2 successfully implement a drug free and alcohol free  
3 environment.

4           If we have a drunk driver that goes down the  
5 highway and kills someone, I would suspect we would  
6 all be appalled if we decided just to send that person  
7 to a driving school and then put him back out on the  
8 road and have him drive again with no consequences to  
9 him.

10           So I think that we're in a serious  
11 environment and a dangerous environment, and I think  
12 we need to be able to have that carrot and stick, if  
13 you will, that puts that consequence out there  
14 initially for the miners to be concerned with.

15           I'd have to ask you, madam, if we have a  
16 speed limit and we tell you to post a speed limit of  
17 65 but if you get caught speeding over that first time  
18 we're just going to, you know, we'll let you go, maybe  
19 send you to driving school, I question him if he would  
20 abide by the 65 mile an hour speed limit. So it's of  
21 great concern that we think that our policies are  
22 being undermined if this moves forward.

23           So in conclusion, I would just like to again  
24 commend MSHA and Department of Labor for the work that  
25 they're trying to do to create an alcohol and drug

1 free workplace. We do support that cause. We will be  
2 following up with comments prior to the October 29  
3 deadline, our association will be.

4 MS. SILVEY: Okay. We appreciate that,  
5 particularly in the areas where you said you didn't  
6 have a definitive, like number or something or  
7 whatever for something we proposed, so before the  
8 record closes, if you would share it with us.

9 MR. HOLLINS: We'll try to share that with  
10 you.

11 MS. SILVEY: One of the things I do want to,  
12 one comment that I would say to you and to everybody  
13 who is listening with respect to, you said most of the  
14 burden falls on the company and that, you know, your  
15 recommendation is that it should be some  
16 consequential, I wrote down, penalty for the miner,  
17 one of the things I would say to everybody, and I know  
18 people who have been working in the mining industry  
19 now for, clearly the ones who have been working for as  
20 long as I have in the mining industry, know that they  
21 are very familiar with the construct of the Miner Act.

22 The Miner Act provides the responsibility on  
23 the mine operator when it comes to the penalty.  
24 There's only one exception to that and that's with  
25 respect to the smoking penalty.

1 MR. HOLLINS: Correct.

2 MS. SILVEY: That's a shorthand way of my  
3 saying to you that the way the Miner Act is presently  
4 structured, the agency couldn't do that. So I can say  
5 that to you right now and for everybody else who is  
6 within the sound of my voice.

7 MR. HOLLINS: Thanks for sharing that.

8 MS. SILVEY: Okay. All right. Thank you  
9 very much.

10 MR. HOLLINS: Thank you.

11 MS. SILVEY: Did you all have anything?  
12 Okay. We need to switch to our Pittsburgh location  
13 now, please. Our next speaker is John Gallick with  
14 Foundation Coal.

15 MR. GALLICK: I'm actually back here.

16 MS. SILVEY: Yes. I saw you. I'm sorry. I  
17 did. I knew I saw you. I'm sorry.

18 MR. GALLICK: I can go on the record and say  
19 I wish I was in Pittsburgh.

20 MS. SILVEY: I know, I know. John Gallick,  
21 Foundation Coal.

22 MR. GALLICK: Hello, my name is John M.  
23 Gallick, G-A-L-L-I-C-K, I'm Vice President of Safety  
24 and Health, Foundation Coal Corporation. Foundation  
25 Coal and its affiliates operate mines in Pennsylvania,

1 West Virginia and Wyoming. Affiliates involved  
2 include smaller underground operations, large, long  
3 wall operations, small surface operations and large  
4 surface operations.

5           Based on production, Foundation Coal and its  
6 affiliates are ranked as the fourth largest coal  
7 mining operator in the country. First, as a member of  
8 the National Mining Association, Foundation Coal  
9 supports NMA's earlier testimony. Let me commend the  
10 agency for attempting to go forward with the proposed  
11 rules to address the issue of drugs and alcohol in the  
12 mining industry.

13           This issue has been a concern to me and  
14 others. Drug and alcohol testing is simply another  
15 tool for the industry's safety toolbox. Let me also  
16 state that all of our affiliates have drug and alcohol  
17 testing policies in place. Some of the policies have  
18 been in effect for a long period of time and others  
19 have been relatively recently implemented.

20           Enforcing a drug and alcohol program has, in  
21 my opinion, added another tool to the safety toolbox  
22 with these operations. Each of these tools in these  
23 toolboxes make each of these operations safer. Like  
24 all proposed rules, I have some issues with specific  
25 language that I would like to discuss further with

1 you.

2           Before I detail these concerns I'd like to  
3 quote from part of my public testimony on October 26,  
4 2005 in St. Louis. This is a quote. "Those of you  
5 who know me know that I am not a believer in excessive  
6 regulations. I've testified numerous times in public  
7 hearings and this is the first time that I've actually  
8 requested a regulation."

9           "I do think this issue requires a simply  
10 stated regulation. I believe the regulation should  
11 simply require each operator and each contractor doing  
12 mining business to establish a drug and alcohol  
13 testing program that includes preemployment testing  
14 and random testing following nationally accepted  
15 protocol guidelines."

16           "The regulations should not detail the types  
17 of testing, assumptions to be tested or actions to be  
18 taken on positive tests. The operator should be  
19 responsible to develop the plan and the action to be  
20 taken on positive tests."

21           "MSHA's role in this regulation would be  
22 threefold. First, to ensure that a testing program is  
23 in place; second, to provide training and education  
24 materials; and third, to provide an updated drug  
25 testing website that will provide information to the



1 operators on the latest testing systems, adulterants  
2 being used and the results of the data collected on  
3 testing programs and outcomes."

4 "If the successes and failures are not  
5 tracked and reported to the industry, then the value  
6 of the program and the need to modify it over time  
7 will not be clear." I'd further commented that,  
8 "Clearly, any attempt to develop a regulation with  
9 prescriptive requirements would actually hinder drug  
10 and alcohol programs that have been developed by  
11 companies."

12 "The basic goal in developing a regulation  
13 should be to bring at least a minimum testing program  
14 and all reparations and for all contractors." Nothing  
15 in the intervening years has changed much of my  
16 opinion on the subject.

17 I still believe that a regulation requiring  
18 drug and alcohol testing is needed, I still believe  
19 that a program needs to be performance driven, and I  
20 still believe that MSHA should not be involved in  
21 prescriptively regulating an operator's actions after  
22 a positive test. For the record, I will submit  
23 additional written comments, including answering your  
24 questions, and I will include my 2005 comments as an  
25 attachment to that record.

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1           I will now address some of the specifics in  
2 the proposed rule. Alcohol in an unopened container  
3 in a personal vehicle should not be considered a  
4 violation. Further, "on and around mine property"  
5 should be marked by the state, "on mine property".  
6 66.200. The final portion of this section needs  
7 omitted, and this part is what I'm referring to, "and  
8 referrals for assistance for miners who violate this  
9 rule".

10           The Agency should not insert oneself into a  
11 labor relations issue. I will discuss this in more  
12 detail in my comments under Section E of this proposed  
13 regulation. Both 66.202 and 66.203, my comments.

14           While I do not object to training, I  
15 question the need for prescriptive time limits listed  
16 in these sections of Part 66. The rules should be  
17 performance oriented and not list artificial classroom  
18 time limits. I believe Ms. Silvey and I agree on  
19 that, that it should be performance related rather  
20 than prescriptive, although this rule, for some  
21 reason, has prescriptive standards in it.

22           66.204. This section of the proposed  
23 regulation is a powerful driver for the drug-and-  
24 alcohol-free workplace. Foundation Coal and its  
25 affiliates provide a comprehensive employee-assistance

1 program to help support employees and their eligible  
2 dependents who seek help.

3           Clearly, a person who voluntary seeks help  
4 for a problem has an appropriate motivation. Seeking  
5 help before running afoul of the company's drug and  
6 alcohol policy should be encouraged by all parties.  
7 Unfortunately, Section E, as it is now written,  
8 interferes with plans that are designed to reward  
9 voluntary requests for assistance.

10           66.400(b). This subsection should be  
11 deleted entirely, as it is a clear interference in the  
12 operator's rights to manage a mine and establish labor  
13 relations provisions.

14           Further, eliminating the operator's right to  
15 terminate an employee who violates a company drug and  
16 alcohol policy potentially creates an unsafe work  
17 environment. Where there is no incentive to seek  
18 treatment voluntary, an employee will likely continue  
19 working, recognizing that the system is now minus a  
20 first-strike penalty.

21           First, I would like to reemphasize the  
22 comments I made concerning 66.204. Foundation Coal  
23 and its affiliates will, and do, provide EAP services  
24 to any employee who voluntarily seeks help. The  
25 problem with the rule, as written, is that rather than

1 reward an employee who seeks help voluntarily, the  
2 rule provides for a guaranteed second chance. The  
3 employee who voluntarily seeks help, knowing that no  
4 penalty is forthcoming, will be rare. Sometimes the  
5 threat of potential punishment is enough for a person  
6 to ask for help.

7           A problem worker will recognize that there  
8 is no advantage for him to seek help voluntarily since  
9 the first strike drug or alcohol test failure, whether  
10 it be a for-cause test, a random test, or as a result  
11 of testing during a first accident, will not result in  
12 his potential job loss or any other punishment, for  
13 that matter.

14           Second, each operator has his own  
15 disciplinary programs. These programs are more  
16 encompassing than just drug and alcohol abuse. It is  
17 inappropriate for the agency to insert itself into any  
18 portion of management-worker labor relations. It is  
19 the responsibility of each operation to set up its  
20 policies, including discipline.

21           Thirdly, page 52142 in the third column of  
22 the preamble, restates a position well known to all of  
23 us and one that you just quoted, and I quote: "MSHA  
24 recognizes that the overall responsibility for mine  
25 safety rests with the mine operators."

1           It is illogical for MSHA to interfere with  
2 the level of discipline that an operator deems  
3 appropriate for an offense. The operator-MSHA  
4 relationship has always been one where noncertified  
5 employee disciplinary action for safety and regulatory  
6 compliance actions were strictly under the purview of  
7 the operator. This system has worked, and this  
8 regulation interferes with that system.

9           If MSHA's proposed rule were implemented, it  
10 would render ineffective every substance abuse program  
11 Foundation Coal and its affiliates currently have in  
12 place.

13           Finally, I would like to thank the agency  
14 for addressing this serious issue. I may sound as if  
15 I oppose your efforts, but I truly applaud them.

16           What I ask is for the agency to review the  
17 National Mining association's rewrite of Section 66.  
18 This rewrite provides specific changes to the proposed  
19 rule. Most of the rewrite supports the intent of the  
20 agency's proposed rule. Thank you for your time  
21 today.

22           MS. SILVEY: Thank you. I only have one  
23 comment here, and it's not a question. As I've said  
24 to other people, if you feel like adding specific  
25 comments to us before the record closes on the 29th,

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1 feel free to do so.

2 I have one comment for everybody who can  
3 hear me, and, again this goes to everybody, because I  
4 probably should have said it earlier.

5 The phrase that's in the preamble, and I  
6 would like to tell people I have my learned counsel  
7 back here to keep me straight, so she can kick me if  
8 I'm saying the wrong thing, but the phrase in the  
9 preamble, and wherever else it is, that says "on or  
10 around mine property," I would like to clarify for  
11 everybody because, again, those of you who have been  
12 working in the mining industry know that MSHA's  
13 jurisdiction goes to all mine properties. I don't  
14 think that's me saying anything that I can't say to  
15 you.

16 MS. HONOR: That's correct, and I think that  
17 that language came from the existing rule, and it's  
18 one of the provisions that we know requires some  
19 clarification.

20 MS. SILVEY: Some clarification. That's a  
21 good point. I almost forgot that, Jennifer. The --  
22 standard probably says that, but, clearly, we all know  
23 that MSHA's jurisdiction is on mine property, just so  
24 everybody knows that.

25 Okay. Next, we -- I'm sorry. I didn't ask

1 my panel here, did they have any comments. You can  
2 tell, we've got a lot of people left here today.

3 MS. CARR: You used the term that you  
4 thought mine operators should be left to have their  
5 programs use nationally accepted protocols and  
6 guidelines. Are you talking about any specific  
7 guidelines and protocols, given that the Department of  
8 Transportation and SAMHSA guidelines only apply to the  
9 five drugs for which they test and for urine testing?

10 MR. GALLICK: That little quote was from my  
11 2005 testimony, and, at that time, I wasn't sure if  
12 there was a notice of policy from MSHA just to discuss  
13 in general the need for a proposed rule.

14 So what I was saying in that quote from 2005  
15 was MSHA should limit itself to establishing whatever  
16 the proposed protocol is. It should limit itself and  
17 stay out of how we handle positive samples, stay out  
18 of the labor relations side, and make it simple,  
19 basically, just requiring us to do -- every operator  
20 and contractor have a program.

21 I only said, actually, two parts of that  
22 program, preemployment and random, and I said, at that  
23 time, I'll worry about the accident stuff myself --  
24 it's my own company -- rather than getting into a  
25 dispute with every inspector on how I handle that side

1 of the business.

2           Obviously, that's been added to this  
3 program, and we will support it, and we will comply  
4 with it, but whatever the protocols that I was  
5 referring to was just a general statement.

6           MS. CARR: General. So you weren't talking  
7 specifically about drug testing protocols and  
8 guidelines.

9           MR. GALLICK: No. Like everyone else, we do  
10 10 different drugs, and we have, in our programs,  
11 urine, saliva, and hair. I don't believe we're doing  
12 any hair testing at this point, although we have some  
13 standards for it.

14           MS. SILVEY: But if you do saliva -- excuse  
15 me for interrupting -- if you do saliva, I assume  
16 you'll do it in accordance with FDA, just like -- now  
17 I'm getting the picture.

18           MR. GALLICK: That's right.

19           MS. SILVEY: Okay. All right. And I assume  
20 that if you did hair also, it would be FDA.

21           MR. GALLICK: Right. I don't believe we're  
22 doing any now.

23           MS. SILVEY: Okay.

24           MR. GALLICK: When I say that, we did have  
25 it in for potential preemployment for a longer-term



1 look at the drug and alcohol problem.

2 MS. SILVEY: Okay. Anybody else? Okay.  
3 I'm asking everybody who can hear me, if you would  
4 please bear with me. I'm going to take about a five-  
5 minute break. I would say "five minutes," but the  
6 next couple of people I have might take longer than  
7 five minutes, so I can't say. But in a few minutes,  
8 I'm going to take a small break.

9 We do have to continue, and so I'm just  
10 asking everybody to please bear with us.

11 The next speaker we have is Dawn Dregier  
12 with SAP Referral Services.

13 MS. DREGIER: Thank you. Again, my name is  
14 Dawn Dregier, D-R-E-G-I-E-R, and I represent a company  
15 by the name of SRS. SRS is a national network of  
16 substance abuse professionals who specialize in  
17 performing evaluations and case-management services  
18 currently for the Department of Transportation's  
19 mandated employees.

20 Today, I'm here to speak about SAP  
21 credentials and SAP versus EAP, as addressed in  
22 Section 66.404 of the proposed rules.

23 We would like to encourage MSHA to review  
24 and adopt for the mining industry the same credential  
25 requirements that the Department of Transportation set

1 forth. These requirements specify that a clinician be  
2 licensed as a psychologist, a social worker, a  
3 marriage-and-family therapist, a SEEP, or a drug and  
4 alcohol counselor with international certification.

5           The DOT also requires that clinicians  
6 undergo specific training testing that outlines rules  
7 for performing assessments, making recommendations for  
8 treatment, compliance monitoring, employer reporting,  
9 return to duty, and follow-up testing.

10           As mentioned earlier today, an EAP program  
11 is compiled of clinicians who are not necessarily  
12 skilled in the area of performing substance abuse  
13 evaluations and making recommendations for treatment  
14 or return to duty for safety-sensitive employees, and  
15 that's a concern of ours.

16           The SAP program, however, is a program that  
17 is compiled solely of substance abuse professionals,  
18 and these individuals specialize in performing these  
19 evaluations, making the recommendations. They are  
20 utilized primarily by companies who have employees who  
21 have either self-disclosed a substance abuse problem  
22 or have tested positive for drugs and alcohol.

23           I'm here today, once again, to strongly  
24 recommend that MSHA review the recommended credentials  
25 that DOT is currently utilizing and consider mirroring

1 those credentials because these are individuals that  
2 are releasing these employees to return to safety-  
3 sensitive employment.

4 MS. SILVEY: So, if I gather, just kind of  
5 in a nutshell, you recommend that we use SAPs,  
6 substance abuse professionals.

7 MS. DREGIER: Substance abuse professionals  
8 versus EAPs, which tend to be generalists.

9 MS. SILVEY: But, of course, you represent,  
10 and I'm not putting you on the spot or anything, but  
11 you represent substance abuse professionals.

12 MS. DREGIER: That's correct. That's  
13 correct.

14 MS. SILVEY: Okay. I just wanted to get it  
15 straight.

16 MS. DREGIER: Absolutely.

17 MS. SILVEY: Right.

18 MS. CARR: That is consistent with the  
19 incorporation of Part 40 into the current rules that  
20 we require SAP. EAP is offered in the preamble as an  
21 element that can be included, but, in terms of the  
22 return to duty, only the SAP is qualified to make that  
23 recommendation for return to duty.

24 MS. SILVEY: Because we incorporated the DOT  
25 Part 40. Okay.

1 MS. DREGIER: Now, in 66.404, I think it  
2 stated that they strongly recommended -- I believe  
3 that's the language, and I didn't bring it in with me  
4 to hand it out to you --

5 MS. SILVEY: I believe I've got it.

6 (Discussion held off the record.)

7 MS. DREGIER: But just wanting to really  
8 bring home the difference between the EAP and the SAP  
9 because of safety-incentive employees, we really need  
10 someone who is qualified to make a determination  
11 whether they are eligible to return to duty.

12 MS. CARR: Just to clarify, we did recognize  
13 that, although it's important to note that EAP can  
14 perform functions, the drug-testing and reliance-  
15 monitoring function, of SAPs, it falls outside of the  
16 scope of typical EAP practice.

17 MS. DREGIER: Okay.

18 MS. CARR: I appreciate the clarification.

19 MS. DREGIER: Certainly.

20 MS. CARR: It certainly is consistent with  
21 our intent.

22 MS. DREGIER: Okay.

23 MS. SILVEY: Thank you.

24 MS. DREGIER: Thank you.

25 MS. SILVEY: Next, can we have our Beckley

1 location? Beckley is on now? Is Ben Hart there to  
2 speak in Beckley?

3 A PARTICIPANT: No. Ben is not here.

4 MS. SILVEY: Okay. Fine. Thank you very  
5 much.

6 Moving right on, our next speaker, then, is  
7 Brian Hendrix with MARG Group.

8 MR. HENDRIX: Good afternoon. My name is  
9 Brian Hendrix, H-E-N-D-R-I-X. I'm here to testify on  
10 behalf of the Mining Awareness and Resources Group, or  
11 "MARG." MARG is a coalition of metal and nonmetal  
12 companies that have long been advocates for the safety  
13 and health of their employees.

14 MARG promotes regulations and policies that  
15 protect the safety and health of the workforce and the  
16 environment and enhance the viability of the mining  
17 industry.

18 MARG appreciates the opportunity to comment  
19 on the proposed drug and alcohol policy ruling. MARG  
20 endorses the overall concept of the rule. It condemns  
21 the abuse of drugs and alcohol in the workplace while,  
22 at the same time, promoting and encouraging MSHA to  
23 promulgate a rule that addresses this very serious  
24 problem.

25 Not only does drug and alcohol abuse

1 adversely impact the lives of the users and their  
2 families; drug and alcohol abuse in the workplace puts  
3 miners at risk, reduces productivity, and is a  
4 criminal act.

5 MSHA encourages the improvement of federal  
6 policy to address this problem, and MARG endorses an  
7 MSHA substance abuse regulation that does a few  
8 things.

9 First, it prohibits the use of illegal drugs  
10 and alcohol in mines and is enforced across the board  
11 against all individuals who violate the rule.

12 Second, we would like to see a substance  
13 abuse regulation that requires mine operators to  
14 develop a written policy on drug and alcohol abuse.

15 Third, we hope that MSHA would promulgate a  
16 rule that requires mine operators to train all miners  
17 on that policy.

18 MARG also endorses a rule that would provide  
19 for preemployment drug and alcohol testing for all  
20 miners broadly and random drug testing and alcohol  
21 testing for all miners, again, very broadly.

22 For-cause drug and alcohol testing for all  
23 miners who are really suspected of violating the  
24 operator's policy or federal regulations.

25 Post-event drug and alcohol testing for

1 every reportable MSHA accident, injury, or illness.

2           Finally, MARG endorses a rule that would  
3 require mine operators to provide information about  
4 the assistance available from substance abuse and  
5 employee-assistance programs, the EAPs and  
6 professionals, SAPs.

7           However, MARG is very concerned that the  
8 text of the MSHA-proposed rule is too detailed and  
9 will interfere and conflict with the existing and  
10 highly successful programs that the MARG member  
11 companies already have in place.

12           As a result, MARG suggests that MSHA adopt  
13 an alternative, performance-based rule that would  
14 allow mine operators to implement the program that  
15 works best for their workforce, community, and  
16 resources.

17           MARG is particularly concerned and opposed  
18 to any regulatory provision that inhibits or  
19 interferes with an employer's right, authority, and  
20 duty to discipline an employee for violations of law  
21 or company safety and health rules, up to and  
22 including termination of employment.

23           Any regulation that interferes with an  
24 employer's right, authority, and duty to discipline  
25 employees for substance abuse would undermine safety

1 and health of this nation's miners. As such, it would  
2 violate the Federal Mine Safety and Health Act.

3 MARG's objection to mandatory second-chance  
4 rules does not imply opposition to voluntary programs  
5 that encourage confidential self-reporting of abuse  
6 problems and treatment by EAPs.

7 MARG members, like many other mine  
8 operators, have such rules and programs in place and  
9 encourage employees to seek help without any adverse  
10 consequences if they successfully complete the  
11 programs.

12 MARG endorses and encourages these employee-  
13 assistance programs, some of which provide for a  
14 second chance, even after a failure to self-report by  
15 the miner. Indeed, MARG believes that they can play a  
16 vital role in providing drug and alcohol abuse.  
17 However, MARG emphasizes that these voluntarily  
18 adopted programs vary from operator to operator and  
19 must not be mandated by MSHA.

20 Moreover, no regulation should even imply,  
21 as Section 66.400(b) does, that a second chance be  
22 mandated for an employee whose alcohol or drug abuse  
23 causes an accident, injury, or fatality. Such a  
24 provision clearly contradicts the Mine Act and other  
25 laws, and it would be challenged by the regulatory



1 community.

2           We realize that the present rule includes a  
3 provision that allows termination for some other  
4 separable, terminable events; however, this provision  
5 stands alongside other provisions that bar termination  
6 for substance abuse violations. As such, the proposed  
7 rule leaves far too much room for interpretation and  
8 litigation, should an employer decide to terminate an  
9 employee following an accident involving substance  
10 abuse.

11           MARG also endorses effective training for  
12 all miners and supervisors on substance abuse policies  
13 and regulations. All miners who receive safety and  
14 health training, under Part 46 or Part 48, are, by  
15 definition, in safety-sensitive jobs, regularly  
16 exposed to hazards, and must be covered by substance  
17 abuse prevention rules and policies.

18           MARG does oppose, however, the imposition of  
19 additional and specific testing, training  
20 requirements, in addition to the extensive training  
21 required under Parts 46 and 48.

22           MARG also opposes the proposed rules  
23 provisions that mandate limits to specific types of  
24 drug and alcohol testing, such as DOT testing.

25           We encourage MSHA to require operators to

1 select testing methods that have been proven  
2 effective. However, DOT testing has been criticized  
3 and is limited to the extent that it causes problems  
4 for technological advancement and the development of  
5 more effective testing methods.

6 Similarly, MARG opposes specific, detailed  
7 mandates for policy content, training content, EAP  
8 content, return-to-duty policies, testing  
9 circumstances, and restraints on permissible operator  
10 disciplinary actions.

11 MSHA has neither the expertise to evaluate  
12 compliance with, and the effectiveness of, these  
13 detailed requirements and lacks the authority to  
14 interfere with the operator's right to manage its  
15 workforce.

16 Thank you again for the opportunity to  
17 comment on this proposed rule. We encourage the  
18 speedy adoption of a performance-based standard  
19 consistent with our comments and suggestions.

20 MARG agrees that MSHA needs to address drug  
21 and alcohol abuse in order to improve the safety and  
22 health of our most valuable resource, the American  
23 miner.

24 MS. SILVEY: Thank you, Mr. Hendrix.

25 At this point, we have Jim Sharpe with

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1 Sharpe Media.

2 (Discussion held off the record.)

3 MS. SILVEY: Excuse me. Next, we will go to  
4 the Price, Utah, location, and we will have Leonard  
5 Bailey with the United Mine Workers of America. Do we  
6 have Price, Utah?

7 MR. BAILEY: Yes.

8 MS. SILVEY: Okay. Mr. Bailey, United Mine  
9 Workers of America, if you would just come to the  
10 phone and make your presentation.

11 MR. BAILEY: Okay. This is Leonard Bailey  
12 from the Utah Mine, Peabody Coal Company, and I'm an  
13 employee there, and United Mine Workers, as the local  
14 union president.

15 On behalf of the local -- our native members  
16 that utilize peyote as a sacrament in their recognized  
17 religious practice and our traditional lore that  
18 practice and religion, I am concerned about the terms  
19 "illegal or illicit drugs" and "controlled substance"  
20 as used in the context of the Federal Controlled  
21 Substance Act, 21 U.S.C. §812, and that MSHA might use  
22 this to formulate the use of, or impairment from,  
23 alcohol and other drugs on mine property, obviously,  
24 on the Navajo Reservation.

25 As you know, this mine has resided on the

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1 Navajo Reservation, in the midst of it, so, therefore,  
2 this company that we're working for is just a visitor,  
3 and we have laws of the Navajo Nation pertaining to  
4 certain alcohol use. So some of these substances, the  
5 employees practiced before that, and then, after the  
6 origination of the Federal Controlled Substance Act,  
7 21 U.S.C. § 812, and then the problem that MSHA  
8 perceives with the use of, or impairment from, alcohol  
9 and other drugs on the mine property, obviously,  
10 utilizes the Federal Controlled Substance Act, 21  
11 U.S.C. § 812, and without making any concession to the  
12 Act here on the Navajo Nation, it will be dwelling  
13 upon Native American religion, which is protected by  
14 these Acts.

15           There's four of them: So, (1) Religious  
16 Freedom Restoration Act of 1993; (2) Public Law 103-  
17 344, American Indian Religious Freedom Act Amendments  
18 of 1994; (3) Navajo Nation Code 17 N.N.C. 394 § C; (4)  
19 also adjudication was made on April 17, 1990 by the  
20 Supreme Court of the United States called Employment  
21 Division of Oregon v. Smith relating to the usage of  
22 peyote as a sacrament.

23           Consequently, about 80 to 90 percent of our  
24 members exercise these rights at one time or another  
25 to realign their mental and physical well-being.

1 There is a lack of substantial evidence that would  
2 indicate that a particular accident was caused by a  
3 person under the influence of peyote or a natural  
4 herb, as investigated by the Public Safety Department  
5 and also Peabody Coal Company, that were conducted.  
6 The use of these substances is restricted to  
7 ceremonial proceedings.

8           The solution: We strongly advise MSHA to  
9 make exception to, or exclude, 21 U.S.C. §812,  
10 Schedule 1, Section (c)(12) from the Federal  
11 Controlled Substance Act when the use of, or  
12 impairment from, alcohol and other drugs on mine  
13 property, obviously, is being formulated for  
14 application here on the Navajo Nation.

15           MSHA would have reassured our members that  
16 they are earnest about their objectives of  
17 implementing their alcohol and drug policy without  
18 prejudice.

19           In conclusion: We understand the  
20 substantial concern of the risk and hazard to our  
21 miners' safety, and, hopefully, we can forge ahead  
22 into developing a harmonious policy that we can use to  
23 strive against alcohol and drugs on mine property.

24           Also, we have some federal workers here that  
25 are with me at present who can make a statement on

1 some of the statements that I made as part of the  
2 religious practitioner users, and also I would like to  
3 make a small comment pertaining to the same alcohol in  
4 the workplace.

5 MS. SILVEY: Okay. Thank you.

6 MR. BAILEY: I'm right here.

7 MS. SILVEY: Yes. Is there a different  
8 speaker?

9 MR. BAILEY: The mine operators, pertaining  
10 to the mine operators, the drug users on the other  
11 sites, the sites of religious practice, which the mine  
12 operators have reduced their workforce just for saving  
13 and profit-making. That's why they reduced their  
14 workforce. The longer work hours, which pertains to  
15 overtime, and the seven-day-a-week work, which affects  
16 the users of over-the-counter drugs to keep themselves  
17 working, to keep the long hours, which affects their  
18 health, but these drugs that they use are over the  
19 counter. So, therefore, it affects the health hazard  
20 and also the profit-making by the coal operators.

21 I would like to hand this over to my fellow  
22 worker, Glenn Young.

23 MS. SILVEY: Okay. All right. Mr. Young?  
24 Mr. Young?

25 MR. YOUNG: Yes.

1 MS. SILVEY: Okay.

2 MR. YOUNG: This is Glenn Young of the UMWA  
3 1924 Unit. I would just like to make a small comment  
4 on what my friend just said.

5 I'm personally a contractor, and I'm working  
6 with 1924. In the proposal, MSHA is proposing to use  
7 the Department of Transportation stuff, policies, even  
8 though MSHA didn't come out and say that they were  
9 going to test for these drugs. We understand that the  
10 Department of Transportation has a guideline that says  
11 that they are going to use the United States Code to  
12 consider it illegal. That's why we're concerned.

13 Me and my fellow members are practitioners  
14 of these rituals which have been handed down from our  
15 culture to us. Some of my members are really  
16 concerned about this. So that's why we're questioning  
17 them.

18 MS. SILVEY: Okay.

19 MR. YOUNG: All of the data that were  
20 accumulated from West Virginia, Virginia, Kentucky,  
21 other places other than where we're working. Some of  
22 the methods for testing go against our tradition and  
23 our religion.

24 We believe that they have to revisit Number  
25 8, at Part G, where it says, Executive Order 13.175,

1 where it deals with Native Americans.

2           Then on top -- running the business on  
3 Native American -- our tribe is a thorough -- and they  
4 tell businesses that are running on their land that  
5 they have their own laws that they have to follow and  
6 abide by, some of the federal laws and some of the  
7 laws that they made there.

8           Therefore, with my business, I can't just  
9 jump around to other entities to formulate a rule for  
10 me. I have to go back to the tribe and say, "Hey,  
11 help me out with this. We might have to get together  
12 with other entities and then formulate the rules."

13           So I feel that by not taking Executive Order  
14 13.175, MSHA just overlooked the tribe's position with  
15 our employees.

16           Then, other than that, where we work, the  
17 way we look at this is that 95 percent of the workers  
18 are Native American, and five percent of the  
19 Caucasians are in the general administrative and  
20 secretarial positions.

21           Therefore, we're looking at this as kind of  
22 bordering on racial discrimination because MSHA is  
23 saying that frontline, not the general administrators,  
24 people who are doing secretarial work.

25           So we're viewing this as pushing on or



1 bordering on the policies of the proposal that they  
2 are making, bordering on discriminating.

3           So that's the only thing that I would like  
4 to say, from my representatives, the way my members  
5 told me to bring up at this meeting.

6           MS. SILVEY: Okay, okay. Thank you.

7           MR. YOUNG: Thank you.

8           MS. SILVEY: I would like to make a couple  
9 of comments right now, and, first of all, so that  
10 everybody hears this, the agency, MSHA, is only  
11 regulating the ten-panel test that's in the proposed  
12 rule, and those are the listed drugs in the proposed  
13 rule which do not cover peyote. Hopefully, I'm  
14 pronouncing it right.

15           I did get your letter into us in our  
16 national office, but those 10 panels; there may be a  
17 reference in the preamble to whatever it is -- the  
18 Controlled Substance Act, but the reference is only to  
19 the Controlled Substance Act as it relates to the 10  
20 drugs that are listed in the preamble. So I want to  
21 make that clear.

22           And then, Mr. Young, your reference to the  
23 executive order relating to tribal nations or tribal  
24 lands; we do have an obligation to address the impact  
25 on that, so I appreciate your comment in that area,

1 but I did want to state that we are only regulating  
2 the 10-panel drug test and the 10 drugs that are  
3 listed in the rule before we leave here today, so that  
4 you know that.

5 Now, is Mr. Estitty there, E-S-T-I-T-T-Y?

6 MR. ESTITTY: Yes, I'm here.

7 MS. SILVEY: Do you want to make a  
8 statement, sir?

9 MR. ESTITTY: Yes.

10 MS. SILVEY: Okay.

11 MR. ESTITTY: I agree with my two fellow co-  
12 workers here to recognize our herbs that we use for  
13 our rituals, not only peyote. There are a lot of  
14 natural herbs that we use, and they are prescribed as  
15 medicines, religious rituals.

16 I would like to turn to testing on 306. On  
17 those accidents, it's only relating back to employees,  
18 mining employees. Coal operators should be tested at  
19 the same time, too. The supervisors are who I'm  
20 referring to. A lot of times, when we're working --  
21 working by the -- by the mine operators. We work  
22 directly under the mine operators, and they should be  
23 tested at the same time, too, along with the mine  
24 workers; not only the employees -- so related back to  
25 employees working in the --

1 MS. SILVEY: Okay.

2 MR. ESTITTY: -- employees working in  
3 sensitive job duties. They should be identified  
4 properly which kind of employees that you're talking  
5 to. My co-worker, Mr. Young, is saying that it's the  
6 borderline of discrimination, your comments precluding  
7 the mine operators from being tested, where they  
8 should be tested as well as the hourly employees. I  
9 fully agree with my co-workers -- they are both here -  
10 - that it's on the borderline of discrimination. With  
11 that, I thank you.

12 MS. SILVEY: Okay. Thank you, sir. Okay.  
13 Thank you very much.

14 I just want to make one last statement so  
15 that everybody could hear that, that the proposal only  
16 covers the drugs that are listed in the rule itself.  
17 So if the drug is not listed, the proposal does not  
18 address it.

19 At this point, we will take a five-minute  
20 break, and, when I come back, we will pick up with our  
21 Birmingham location.

22 (Whereupon, at 3:01 p.m., a short recess was  
23 taken.)

24 We will now reconvene the Mine Safety and  
25 Health Administration's Public Hearing on the Proposed

1 Rule on Alcohol-and-Drug-free Mines: Policy,  
2 Prohibitions, Testing, Training, and Assistance.

3 We will now go to our Birmingham location,  
4 and, in our Birmingham location, next on the list we  
5 have Daryl Dewberry. Mr. Dewberry?

6 MR. DEWBERRY: Yes, ma'am. Thank you,  
7 Madam.

8 My name is Daryl Dewberry -- D-A-R-Y-L  
9 D-E-W-B-E-R-R-Y. I'm an international vice president  
10 of the United Mine Workers here in District 20.

11 Let me say, first, that I am deeply saddened  
12 that you've chosen to basically eliminate the Alabama  
13 coal miners from these public hearings today. We had  
14 some concerned miners who wanted to participate in  
15 this hearing. In excess of, I understand, over 300  
16 miners were out in the parking lot. There was no  
17 consideration for their participation in this so-  
18 called "public hearing."

19 This is not the way we've done it in the  
20 past. I've been in this industry for 33 years, and  
21 this is the first time that we've ever done anything  
22 of this nature which is exclusive in nature. It  
23 excluded the miners that had to stand out in the  
24 parking lot without bathroom facilities, and, in due  
25 respect to the agency here, they couldn't allow more

1 than 54 people to come in and sit in. We had over 155  
2 to sign up, and out of frustration.

3           Let me say that, as a sign of courtesy, I  
4 made it a point to notify, prior to today's hearing,  
5 that we probably have -- I anticipated 100 miners  
6 would be in attendance today. However, as I say, we  
7 had over 300 show up, and we had only 54 to be seated  
8 at one time.

9           Out of frustration, the rest of them did  
10 leave, and I appreciate your consideration of allowing  
11 them to come back at a later date and give testimony.

12          However, as I looked around outside today, I saw  
13 employer and employee alike that was prohibited from  
14 hearing the other comments. I was fortunate that I  
15 was afforded the opportunity to come in and sit down  
16 and listen to a great deal of testimony, although I  
17 was in and out.

18           However, a lot of people weren't privy to do  
19 that; they were excluded, and, rightfully so, that was  
20 because, unlike our past practice or custom where  
21 we've rented either a civic center or a conference  
22 room at one of the larger hotels that accommodated  
23 those numbers of people, this format, or this form of  
24 public hearing, in my opinion, is meant to prohibit  
25 miners and employers both from having their day to

1 submit their comments in support or in rejecting any  
2 proposed rules.

3           As I stated, they were in the parking lot.  
4 It's hot out there. They got tired, frustrated, and  
5 left, so they are not available now. There is just a  
6 handful of us that stuck it out today, but we  
7 appreciate you getting back and seeing if we can  
8 accommodate their testimony, as required by the 1977  
9 Act.

10           Let me say that the majority of those miners  
11 that I spoke with are opposed to your proposed rules.

12           Let me go to some of the practice. We have  
13 here, in Alabama, I guess, every coal operator, and  
14 I've been a union advocate for 25 years, from a  
15 district rep. to the international vice president.  
16 I've handled the administrative process of the  
17 grievance procedure. I've handled negotiations.

18           I guess I'll deal with General Resources  
19 first. They were one of the first ones to have an  
20 employee-assistance program, as well as a drug policy  
21 at their mine. That policy gives them one shot. It  
22 is not punitive in nature. They have generally had  
23 consistent application of their policy, and we  
24 actually support it. We don't want drugs in the  
25 workplace either.

1           We feel that it is a mandatory subject of  
2 bargaining. We feel like that it is the relationship  
3 between the employer and the union to negotiate those  
4 conditions of employment and not for the government to  
5 come in and try to regulate. We've got it all said.

6           We've been doing this for two decades,  
7 possibly, and if it ain't broke, you all are a little  
8 late in the game to try to propose rules to govern us  
9 when we've been doing it and taking care of our  
10 business for years.

11           With that said, I'll go on to the -- they  
12 have a program which is basically a random test that  
13 is consistent in the application. All of our  
14 companies here in Alabama do test for all of the known  
15 drugs as they come up. We may have to tweak it  
16 because there's additional drugs that come up every  
17 day, but, in general, they have a confirmation test,  
18 in the event that they have a positive. They go to  
19 the expense of using a GC mass spectrometer to confirm  
20 that it was a valid test.

21           So they give the employees, and I guess I  
22 sound like an employer, at this stage -- I feel like  
23 I've been a part of coming to the end results with the  
24 drug programs that work, and we've also discussed it -  
25 - Jim Walters and other places -- maybe going to

1 random testing, to go a step further. I know we have  
2 random tests at the P&M Coal Company. We have random  
3 testing that was negotiated by the parties. We have  
4 random testing at the Drummond Coal Company which was  
5 negotiated by the parties.

6           We've got an excellent, I would say,  
7 deterrent against drug abuse here in these mines, and  
8 for MSHA to come in with these proposed regs to, I  
9 guess, sort of interfere with what we've already had  
10 established for decades is somewhat concerning to me.

11           Let me get back to my notes here. I have a  
12 few other things.

13           Let me say that, you know, as a result, I  
14 guess the next thing that we would come up with would  
15 be -- I think I heard someone else discuss this or  
16 bring this up -- our miners are on up in age, and the  
17 biggest safety hazard that we have is overwork. Our  
18 people work six days a week, 10 hours a day, and  
19 fatigue happens to be the biggest concern of mine than  
20 does drugs.

21           If you're going to regulate anything, maybe  
22 we should go back and regulate the no mandatory  
23 overtime over 40 hours, or no mandatory overtime over  
24 eight hours a day. I think that you would find a  
25 better safety record and have a more viable, alert



1 workforce with a lot less accidents.

2           Of course, in this day and age, we're  
3 probably a generation and a half between the senior  
4 miners and the younger miners in these coal mines. I  
5 don't know where we would find them, and that's why  
6 our people are worked to the point of exhaustion,  
7 simply because experienced miners are hard to find in  
8 this day and age.

9           With that said, I'm not going to get into  
10 the mechanics of the proposed rules, other than just  
11 to leave you with a feeling that if it ain't broke,  
12 don't fix it, and if it is broke, we've been  
13 successful in sitting down in good-faith bargaining  
14 and coming up with a solution to it.

15           So, with that said, I'll yield any other  
16 time or answer any questions that I may have. Let me  
17 say, throughout the industry, that I've probably  
18 handled more drug cases and arbitration than any other  
19 advocate that I know of; my record stands better.

20           The union don't want the drug abuse or  
21 anyone impaired working in the mines no more than the  
22 employer. We don't want our people exposed to any  
23 undue hazards, and that includes working to the point  
24 of fatigue, where that causes an unsafe condition in  
25 the mines. Thank you.

1 MS. SILVEY: Okay. Thank you, Mr. Dewberry.  
2 I only want to add two comments, and I appreciate  
3 your comments and hope that, indeed, we can work  
4 something out with respect to the rest of your  
5 members' testimony.

6 I am glad that you were able to listen to  
7 most of the testimony this morning, and I would like  
8 to say, on behalf of the panel here and the agency,  
9 that doing it in this format -- you know what they say  
10 about the best-laid plans -- was clearly, and, as you  
11 noted, you have been with us many times in the past  
12 with respect to our public hearings. So doing it in  
13 this format was not meant to preclude anybody from  
14 participating in the public hearing, and that tells  
15 you how sometimes you can have a laudable purpose, and  
16 things come out the other way.

17 But it was, indeed, meant to allow the  
18 greatest and the broadest participation that we could  
19 allow. So I would like to say that to you, and then  
20 we'll just figure out if there is a way we can try to  
21 make sure, if people want another opportunity, they  
22 can have that opportunity.

23 I don't have any questions or anything or  
24 comments -- I don't know whether the panel members do  
25 -- of you. I don't know how you have the people there

1 in Birmingham, but next on my list, I have Dale Byram.

2 Is Dale there?

3 MR. DEWBERRY: Yes, he is.

4 MS. SILVEY: Are you speaking, Dale?

5 MR. BYRAM: Yes, I am. This is Dale.

6 MS. SILVEY: How are you doing?

7 MR. BYRAM: I'm good. How are you, Ms.

8 Silvey?

9 MS. SILVEY: I'm good, too, Mr. Byram. I've  
10 got to laugh, I'm so pleased, people. Bear with me.

11 Okay. You can go ahead.

12 MR. BYRAM: Okay. My name is Dale Byram,  
13 and I work with Jim Walter Resources in Brookwood,  
14 Alabama.

15 Jim Walter Resources, Inc., supports an  
16 alcohol and drug-free workplace. For over 20 years,  
17 we have had in place an extensive employee-assistance  
18 program available for both our employees and their  
19 dependents. Our program's initial focus was substance  
20 abuse, yet, as needs were identified, we expanded  
21 support for medical issues, anger management, and much  
22 more.

23 Certain aspects of MSHA's proposed  
24 regulation could enhance our existing program while  
25 other sections would decrease its effectiveness.

1 I would like to make specific comments to  
2 the following sections of the proposed regulation, and  
3 I know that, as we have an opportunity to comment  
4 today, being later in the day, a lot of people have  
5 made similar comments through the day, but I would  
6 appreciate your patience because we feel it's  
7 important to be able to say these things.

8 Under "Definitions," 66.3, "Persons  
9 Performing Safety-sensitive Job Duties," and then  
10 "Safety-sensitive Job Duties," we recognize that all  
11 job duties on a mine site have the potential to be  
12 safety-sensitive, even if they are not continuous or  
13 reoccurring.

14 From our perspective, the regulations should  
15 be inclusive of all mine employees. The proposed  
16 regulation's definition for "safety-sensitive job  
17 duties" state that "the type of work activity where a  
18 momentary lapse of critical concentration could result  
19 in an accident, injury, or death, those job duties in  
20 a mine that are removed from such potential. This  
21 includes everyone from administration to the miners at  
22 the site."

23 Under "Substance Abuse Professional (SAP)":  
24 "A SAP is a specially trained and qualified person.  
25 It is our experience and understanding that there is a

1 limited number of substance abuse professionals, as  
2 compared to employee-assistance professionals, in the  
3 State of Alabama. As outlined in the proposed  
4 regulation, the SAP has specific duties and  
5 responsibilities. Their involvement with the patient  
6 is limited to an initial visit, a written education  
7 and treatment plan, reevaluation or return to duty,  
8 and then determining follow-up testing requirements.

9           "An SAP differs from an EAP. Except as  
10 outlined, they have no continuous patient contact, as  
11 does an EAP, who, we believe, has the opportunity to  
12 be more successful in rehabbing a person.

13           "We recommend that the mine operator have  
14 the option to either use an SAP or an EAP for the  
15 responsibilities listed in the proposed regulation."

16           Under 66.100, "We support the 10-panel drug  
17 test."

18           Under 66.101, "We support the directive of  
19 this section where it talks about prohibited  
20 behaviors."

21           Under 66.203, "Training for Supervisors,"  
22 "(a) (1) (v) trains them to make post-accident  
23 determinations and what procedures to follow when such  
24 determinations are made."

25           This needs further explanation. We need to

1 know what they are referring to, as far as  
2 determinations and procedures.

3           66.204, "Miner Assistance Following  
4 Admission of Use of a Prohibited Substance": "(b)  
5 Miners who voluntarily admit to the illegitimate or  
6 inappropriate use of prohibited substances prior to  
7 being tested who seek assistance shall not be  
8 considered as having violated the mine operator's  
9 policy but shall be subject to the return-to-duty  
10 process specified in Subpart A.66.405 and 406.  
11 However, a positive test result during the return-to-  
12 duty process will be considered as a violation of the  
13 mine operator's policy."

14           "Our concerns: The regulation should limit  
15 self-admission to a single event. As it is currently  
16 written, a miner has unlimited opportunities to  
17 disclose what their problem might be. Without limits,  
18 the mine operator would be unable to prevent an  
19 activity that fails to facilitate the miner's  
20 responsibility to stay alcohol and drug free.

21           "We have seen the value in a program that  
22 provides a vehicle for miners to self-admit. However,  
23 66.204 leaves this opportunity open ended, providing a  
24 last-minute out for a miner to ask for assistance  
25 rather than to be found positive on a drug test.

1           "The proposed regulation should identify  
2 that the miner forfeits the opportunity to self-admit  
3 once notified to report for testing."

4           66.300. It reads, under (a): "The mine  
5 operator must implement an alcohol- and drug-testing  
6 program that is valid, reliable, and protects the  
7 privacy and confidentiality of the individuals to be  
8 tested."

9           Several areas of the proposed regulation  
10 jeopardize this requirement, and I'll address those as  
11 we get to them.

12           66.301, "Substances Subject to Mandatory  
13 Testing." I may have said this earlier: "We agree  
14 with the 10-panel drug test."

15           66.304, for the "Preemployment Testing":  
16 "We believe that the mine operator should have the  
17 sole discretion and the right to refuse or withdraw an  
18 offer of employment to any applicant who fails a  
19 preemployment alcohol and/or drug test, and I'm not  
20 sure if the reg. is clear in that."

21           66.306. "Earlier commenters talked about  
22 their concern about the test being given within an  
23 eight-hour period following an accident. For this to  
24 happen, there is a potential that many care-providing  
25 facilities could possibly be involved. HIPPA is

1 extremely strong within these facilities, and  
2 additional work and education would be required, I  
3 believe, by the government to help them understand if  
4 this aspect of the regulation were to be approved."

5           56.403, "Operator's Actions after Receiving  
6 Verified Test Result." "Their actions after receiving  
7 verified test results, once notified of a positive  
8 result verbally, the mine operator must immediately  
9 remove the miner from safety-sensitive jobs and refer  
10 him to an SAP. This action must be done before  
11 receiving the written report."

12           "Once the miner has been removed from the  
13 job, or any mine job, the regulation should mandate a  
14 specific timeframe for the miner to contact the SAP or  
15 the ESA, if it's allowed. The current proposed  
16 regulation fails to address this need. Failure to  
17 contact an SAP within the designated timeframe could  
18 result in the same actions as outlined in 66.400."

19           66.500(a) makes reference again to "the  
20 confidentiality of the communications between the mine  
21 operator and the miner."

22           "This, again, was referenced earlier in the  
23 reg., and we have concerns because, in four, where it  
24 says, 'records of which miners were tested, the test  
25 results, return to duty, and follow-up test results



1 will be kept separate from the aggregate data.' When  
2 you begin to maintain multiple files, it has the  
3 potential to lose confidentiality.

4 (c)(1), "Post-accident test results, whether  
5 positive or negative, must be kept with accident  
6 files."

7 "This, again, has the potential to break  
8 down confidentiality."

9 2(d)(2), "Again, any and all alcohol and  
10 drug test results will remain available upon request  
11 of MSHA inspectors or investigators and will be used  
12 in assessing the overall compliance with safety  
13 regulations, as well as in determining the cause of  
14 the accident."

15 "Again, multiple persons have access to  
16 these confidential files and this confidential  
17 information."

18 I would like to thank the panel for this  
19 opportunity to share our thoughts and concerns. Jim  
20 Walter Resources, Inc., is committed to the safety of  
21 our miners and supports and alcohol- and drug-free  
22 workplace. Even though our particular program is  
23 designed to give an employee a second chance, we have  
24 talked with many mine operators who have zero-  
25 tolerance programs that are in place and functioning.

1           We are members of the Alabama Coal  
2 Association, and most of our members have programs  
3 that have zero tolerance. Even though it differs from  
4 the design of our particular program, we respect their  
5 position, and we support this change if it were to be  
6 placed in a regulation.

7           That's the end of my comments, and I'm  
8 available if you have any questions.

9           MS. SILVEY: Okay. I just have a few  
10 comments, Mr. Byram.

11           First of all, I would like to say, and  
12 especially in light of the fact that Mr. Dewberry  
13 spoke before you, that we, as an agency, appreciate  
14 the fact that both you, the laborer, and the industry,  
15 the employer, that you are there, and you have a  
16 program, and, with both of you being there and having  
17 talked about it, and the fact that you've had one in  
18 place, and it, indeed, does work. So I would like to  
19 say that at the outset.

20           MR. BYRAM: Thank you.

21           MS. SILVEY: Second, I would like to say  
22 that the comment earlier, and I'm saying this just as  
23 a clarification because we appreciate all of the  
24 comments you've made, but when we were going through  
25 your list of comments on 66.203, that was talking

1 about the training program for supervisors, and it was  
2 (a)(1)(iv). It said, "Trains them to make reasonable-  
3 suspicion determinations and what procedures to follow  
4 when such determinations are made."

5           That was really training them how to make  
6 determinations when it got to reasonable-suspicion  
7 testing. That had to do with training them about what  
8 to look for when carrying out Section 66.307, which is  
9 "Reasonable-suspicion Testing." "An operator's  
10 determination that reasonable suspicion exists," and  
11 this provision has in it that that should be based on  
12 certain things, and part of that training is to train  
13 persons and supervisors in making that determination.

14           MR. BYRAM: Okay.

15           MS. SILVEY: The comment you made about  
16 HIPAA, the Privacy Health -- I forget exactly what it  
17 stands for, but it's talking about keeping information  
18 with respect to a person's healthcare private, and I  
19 made this comment earlier today, that we clearly  
20 recognize the privacy issues involved here, and we  
21 want everybody to be assured that the agency clearly  
22 understands the implications of the HIPAA.

23           I don't know whether we specifically refer  
24 to HIPAA in the proposal or not, but I do want people  
25 to understand that we appreciate that, and we

1 appreciate your comment in that regard.

2           On your comment on the SAP, I guess I need  
3 to stop saying these acronyms -- the substance abuse  
4 professionals and the employee assistance program are  
5 professionals --

6           MR. BYRAM: Yes, ma'am.

7           MS. SILVEY: -- you said that your  
8 suggestion was that operators have the option to use  
9 either.

10          MR. BYRAM: Yes, ma'am.

11          MS. SILVEY: Who do you all use in your  
12 programs now?

13          MR. BYRAM: We use an employee-assistance  
14 professional, but she is also an SAP, and if we had  
15 the need for an SAP, and they could provide that  
16 service, one of the things that we have found is that  
17 if you have a program that invests in the recovery of  
18 the patient, the professionals have to have continued  
19 contact to help guide these people through some  
20 changing of behaviors, for lack of a better way to say  
21 it.

22          MS. SILVEY: Yes. Okay.

23          MR. BYRAM: The SAP's contact with the  
24 patient is not as continuous -- the norm -- is not as  
25 continuous and supportive as is the EAP. So we felt

1 like having the EAP, with the easier access -- if  
2 there's only, say, 25 or 30 SAPs in Alabama, and you  
3 have to provide a list of the SAPs for the employee to  
4 contact, you may have situations where people will be  
5 required to drive some distances, and this could even  
6 be more extreme in some other states around the  
7 country. But EAPs are more readily available and  
8 have, from my experience, the ability to help  
9 facilitate care for a patient.

10 MS. SILVEY: Okay. I don't have any other  
11 comments. Does anybody else have other comments?

12 (No response.)

13 MS. SILVEY: Okay. Thank you.

14 Next on our list, we have Dwight Cagle in  
15 Birmingham.

16 MR. CAGLE: Good morning, Madam Chair.

17 MS. SILVEY: Good afternoon.

18 MR. CAGLE: Dwight Cagle, D-W-I-G-H-T  
19 C-A-G-L-E, on the UMWA Safety Committee at one of Jim  
20 Walter's mines.

21 MS. SILVEY: Okay.

22 MR. CAGLE: I would like to touch on a few  
23 items that were brought up.

24 MSHA presented this proposed rule as an  
25 urgent need, but provided no data to prove that

1 alcohol and drug use in the mining industry  
2 contributes to accidents and injuries.

3           The UMWA fails to see the urgent need for  
4 these regulations because, at this time, just like Mr.  
5 Dewberry and Mr. Byram testified, the majority of all  
6 of the coal industry around our area already have a  
7 drug- and alcohol-testing program in place that works.  
8 They have been in use since the early eighties.

9           MS. SILVEY: Okay.

10          MR. CAGLE: I'll turn the page here, and  
11 excuse me a minute there.

12          MS. SILVEY: That's all right.

13          MR. CAGLE: Another thing I would like to  
14 touch on, the two hours' training for supervisors. I  
15 don't think that that would be sufficient training  
16 that they can identify anyone on drugs or alcohol. If  
17 this is going to be enforced, they need more training  
18 for that.

19                 Were drugs and alcohol involved in any  
20 recent major disasters? None that I know of.

21                 Data from mine accidents and injuries do not  
22 state either.

23                 Where there is a documented problem, the  
24 agency should be using our taxpayers' dollars to  
25 promote and improve those control standards. The data

1 that are put out by mines show that black lung is once  
2 again on the rise, and I believe we could spend the  
3 taxpayers' money more wisely trying to care of this.  
4 There is also a need to do some more study on diesel  
5 particulate in the mines; cancer, that is, being  
6 exposed to diesel particulate. That's all I have at  
7 this time.

8 MS. SILVEY: Okay. Thank you very much. We  
9 appreciate your comments. I don't have any questions  
10 or further comments.

11 Next, we have Mr. Ledlow. Is he there, Dale  
12 Ledlow?

13 A PARTICIPANT: Not on this list.

14 MS. SILVEY: Okay. All right. I'll just  
15 keep going down the list, then.

16 Next, we have -- you are next, Tom.

17 MR. WILSON: Yes, ma'am.

18 MS. SILVEY: Mr. Wilson.

19 MR. WILSON: Thomas Wilson of the UMWA  
20 International, and it's my understanding that, as  
21 originally sent to you, the list had 154 names of  
22 persons that had signed up to testify today, and --

23 MS. SILVEY: That's correct.

24 MR. WILSON: Yes, ma'am. Okay. I know you  
25 stated earlier that you were having a bad day. I

1 cannot even begin to describe how bad of a day this  
2 has been.

3 MS. SILVEY: Did I state that? I don't  
4 think I stated that. I don't think I said that,  
5 rather. We'll have to ask the reporter to go -- I  
6 don't think the reporter can read that.

7 But let's go on. Okay. You might can read  
8 into things.

9 MR. WILSON: I arrived at the MSHA District  
10 Office, rang the doorbell, and was promptly told that  
11 nobody could come into the building until 7:45 a.m.

12 I went and stood in the parking lot with  
13 UMWA District 20 Vice President Daryl Dewberry. After  
14 standing in the parking lot for approximately 10  
15 minutes, we observed Tommy McKnighter of Jim Walter  
16 Resources leaving the MSHA Building.

17 The miners and miners' representatives do  
18 not deserve the same consideration as coal operators  
19 at an MSHA office.

20 I have been participating in public hearings  
21 since the early eighties. I have never, never, never  
22 seen anything as disrespectful as what I observed  
23 today.

24 The miners in Alabama were treated far less  
25 than our nation's most precious resource. Zero



1 respect was shown to the Alabama miners.

2           Not affording miners at a facility to attend  
3 a public hearing is not respectful. Not having  
4 restroom facilities is not respectful. Leaving miners  
5 in the hot Alabama sun is not respectful.

6           I, personally, do not believe that I can  
7 effectively describe how MSHA's actions today have  
8 discriminated against the miners, how MSHA's actions  
9 today have demonstrated MSHA's total disregard for the  
10 miners' comment, and how MSHA's actions today have  
11 placed miners at a distinct disadvantage with the rest  
12 of the stakeholders.

13           Other stakeholders were allowed and afforded  
14 the opportunity to hear today's discussions and to  
15 understand this record. We were not. This, in  
16 itself, puts miners with a distinct disadvantage  
17 concerning this proposed rule, especially with the  
18 current short comment period.

19           I do not believe that I, myself, can recover  
20 from this disadvantage, and I also believe that MSHA  
21 has harmed the public-comment process. It is  
22 important that your Committee understand these  
23 comments because you will not be able to address a  
24 solution to today's mess if you're not willing to  
25 admit the mess.

1           Prior to today's mess, MSHA District 11 was  
2 notified that miners' turnout for the public hearing  
3 was expected to be heavy. MSHA either didn't believe  
4 this or simply didn't care. MSHA just realize that  
5 250-plus miners in a parking lot under the hot Alabama  
6 sun is not a public hearing. Two-hundred-and-fifty-  
7 plus miners without restrooms is not a public hearing.

8           Expecting miners to work midnight shifts,  
9 standing in a parking lot without restrooms, and stay  
10 awake while the rest of the country testifies is not a  
11 public hearing.

12           Shuttling miners in and out of a conference  
13 room is not a public hearing.

14           With all of that said, I must repeat Dennis  
15 O'Dell's earlier request to suspend this rulemaking  
16 process. Don't pass go. Start over. That's the end  
17 of my comments.

18           MS. SILVEY: Yes. Okay. Thank you, Tom.

19           I would just say that, and I know that you  
20 have participated in MSHA public hearings for a long  
21 time, and we appreciate your participation, and, as I  
22 stated earlier, we will see if there can be some type  
23 of accommodation made to hear the miners who came  
24 today and were not able to get into the building. So  
25 we appreciate your comment.

1 I have one more person on the list from  
2 Birmingham, and that's Ray Lee. Okay.

3 MR. LEE: Okay. My name is Ray Lee. It's  
4 R-A-Y L-E-E. I'm the local president of 2397, which  
5 represents about the main majority of the people that  
6 was here at this meeting this morning. They have all  
7 went home, but it was a majority of our local that was  
8 here.

9 MS. SILVEY: Okay.

10 MR. LEE: Okay. The purpose of this hearing  
11 is to allow concerns to be heard from the public  
12 concerning the proposed changes in the existing  
13 standards for the possession and use of intoxicating  
14 beverages and narcotics and make the new standards  
15 applicable to all mines.

16 According to the Act, the first priority and  
17 concern involving the coal or other mining industries  
18 must be the health and safety of its most precious  
19 resource: the miner. It is further defined in the  
20 Act that the miner is an individual working in a coal  
21 mine or other mine.

22 It is further stated that the purpose of  
23 this Act is to establish interim mandatory health and  
24 safety standards and to direct the Secretary of  
25 Health, Education and Welfare and the Secretary of

1 Labor to develop and promulgate improved health and  
2 safety of the nation's coal or other mines.

3           Let's look at the word "improved."  
4 "Improved" means to make or become better. In war,  
5 when a segment of the military gets camped in a  
6 certain location with hostile forces roundabout,  
7 sentries are placed to guard against sneak attacks by  
8 the enemy. All possible points of entry into the camp  
9 are guarded in order to secure the safety of all  
10 inside the camp. If just one of these points of entry  
11 is left unguarded, there exists an opportunity for the  
12 enemy to exploit this and enter the camp, thus  
13 reducing the safety of those inside.

14           To allow the exclusion of one sector of  
15 miners, the supervisory employees, from the new  
16 standard is like leaving the one entry to the camp  
17 unguarded. Two groups of miners will suffer loss of  
18 protection and a safer and healthier workplace.

19           Supervisors who are engaged in the  
20 consumption of intoxicating substances who come to the  
21 workplace under the influence of such substances, or  
22 who provide these substances to others in the  
23 workplace, put other persons at risk. Not only are  
24 other supervisors endangered, but the nonsupervisory  
25 workers also.

1           We all have the right, mandated by the Act,  
2 to have as safe and healthy a workplace as is  
3 possible. This proposed change will not improve the  
4 health and safety of the miners. In fact, it leaves  
5 open the opportunity for miners in an unstable  
6 condition to work without fear of being detected.

7           Would you like to come to work knowing that  
8 there exists the possibility that a fellow worker  
9 could be at work while under the influence of such  
10 substances?

11           The Act is to protect the miner, now protect  
12 us all. Thank you.

13           MS. SILVEY: Thank you, Mr. Lee.

14           Next, I have a few more people on my list at  
15 Birmingham, but if they are not there -- Larry  
16 Spencer. Is he there?

17           MR. SPENCER: I'm here, but I decline.

18           MS. SILVEY: You decline? Okay. Is there  
19 anybody else in Birmingham who wishes to present  
20 testimony?

21           MR. LEE: No, ma'am. That's it.

22           MS. SILVEY: That's it? Okay. Thank you  
23 all very much.

24           I'm going to now go to Pittsburgh. Can we  
25 go to Pittsburgh, please?

1 I have a number of people from Pittsburgh.

2 MR. BOWERSOX: I'll start off. I'm Ron  
3 Bowersox, B-O-W-E-R-S-O-X. I'm the UMWA International  
4 representative.

5 First of all, I would like to go on record  
6 agreeing with Dennis O'Dell, Jim Weeks, Daryl  
7 Dewberry, and Tom Wilson. The way these hearings were  
8 handled today; I agree, they should have been stopped  
9 and further planning.

10 In Pittsburgh, we're in two separate rooms.  
11 We have an audio room and a video room. Now we're in  
12 the video room that's probably 15-by-20, and if you're  
13 far left, you can't even see the speakers all day who  
14 spoke. Three videos and two audios is just too much  
15 for one day.

16 We have miners that traveled here today from  
17 below Fairmont, got here at 8 o'clock this morning. I  
18 don't know what time we're going to leave here today.  
19 You're talking about miners' safety. There's people  
20 that have to go to work the midnight shift tonight.  
21 It's just not right.

22 In the new proposal, existing policies at  
23 different companies; we have a major issue with  
24 contractors. What policy do contractors fall under  
25 and under what kind of a mine study? Is it the policy

1 that that person is employed by, or is it the policy  
2 at the mine he is working at? And how is random  
3 testing done for contractors?

4           From what I have here, I have an average  
5 number of contractors working at mine properties per  
6 day at several locations, and they are going to call  
7 me, because I have a backup here, to let you know that  
8 I'm not just pulling these numbers out of the air.

9           Homer City Coal Processing; we have 11 full-  
10 time workers, UMWA workers, and we have 15 contractors  
11 per day at work.

12           Keystone Brick Plant; we have seven full-  
13 time workers, and on almost a day-to-day basis, you've  
14 got at least three contractors there.

15           Federal No. 2, Patriot Coal Company; eight  
16 to 10 contractors per day.

17           McElroy; 30 to 40 contractors underground,  
18 30 or 40 on surface.

19           Dennis O'Dell and Jim Weeks both covered all  
20 of our issues. I agree with all of the issues, such  
21 as we would like to see more backup data that shows  
22 alcohol and drug use as a contributing factor.

23           We're talking about drug and alcohol  
24 involved in accidents, but I think MSHA should take a  
25 real hard look at some of these mining plans that have

1 been approved, like the Sago, the Aracoma, the Darby,  
2 Crandall Canyon. Those are the mines that are killing  
3 miners.

4 I also agree that the administrative and  
5 clerical personnel should not be left out of the pool  
6 of testing.

7 There is no real means if a miner supervisor  
8 comes to work, and we feel he is under the influence,  
9 how does that miner handle that situation? Who does  
10 he report that to?

11 I guess you could cover that -- I was really  
12 concerned about Part 48 and all of that extra training  
13 being added to that.

14 So I would like to have a few of the miners  
15 who will just comment on the numbers that I talked  
16 about of contractors.

17 MR. LYDIC: My name is Dale Lydic,  
18 L-Y-D-I-C. I work at the Homer City Coal Processing  
19 Corporation that you referred to. I'm a member of the  
20 United Mine Workers and president of my local.

21 Contractors. As Ron stated, we have an  
22 average of 15 contractors on our property every day,  
23 most of them in hauling. So my members are subject to  
24 the random -- we don't have a drug and alcohol test  
25 now, but if MSHA were to pass that, we're subject to



1 the drug and alcohol random testing.

2           If I'm driving a haulage truck down the  
3 road, and I am under the influence of drugs or  
4 alcohol, I endanger myself and fellow employees. The  
5 contractor that is driving a 40- or 50-ton Uke using  
6 the same haul road who is not subject to drug and  
7 alcohol testing; doesn't he endanger myself and my  
8 other employees that I work with?

9           If I'm working in the plant -- I work at a  
10 surface facility, a prep plant -- and there's  
11 contractors working on the same floor as me or above  
12 me, and they are not subject to the random drug and  
13 alcohol testing, why not? They are working right  
14 beside me. It's no different than if one of my fellow  
15 employees is randomly tested.

16           Safety is safety, no matter who I work with.  
17 They should be safe, too. If they are on the site,  
18 they need to be safe, and they need to be under the  
19 same regulations. Thank you.

20           MS. SILVEY: Could I ask you a question, Mr.  
21 Lydic?

22           MR. LYDIC: Lydic.

23           MS. SILVEY: Lydic. Thank you. Really, I  
24 guess I probably should have said it to Mr. Bowersox  
25 because you gave me that list of Homer City, Keystone,

1 Patriot, McElroy. The haulage contractors that you  
2 spoke of, specifically, Mr. Lydic; are they required  
3 to have Part 48 training?

4 MR. LYDIC: The MSHA training, yes.

5 MS. SILVEY: They are, aren't they?

6 MR. LYDIC: Yes.

7 MS. SILVEY: So they would be covered by the  
8 proposed rule.

9 MR. LYDIC: Even though they are contractors  
10 on and off our property.

11 MS. SILVEY: Yes, sir. Right.

12 MR. BOWERSOX: Can I ask you a question?

13 MS. SILVEY: Yes.

14 MR. BOWERSOX: Okay. You say the McElroy  
15 mine has got 40 contractors. How are they randomly  
16 picked if they are for one week, and the next week  
17 that they are back again may be not for a month? How  
18 is that name sorted under random picking? How is  
19 there name thrown into a hat?

20 MS. SILVEY: All that the proposed rule set  
21 out was that it had to be 10 percent random. So the  
22 workers who were on that property; they have to have  
23 10 percent of the workers. Under the proposal, that  
24 was the percentage.

25 You know, I heard companies today tell me

1 they had up to 33 percent, some said 20 percent, so  
2 however the final rule came out on the percentage, it  
3 would have to be 10 percent or 20 percent or whatever  
4 it would be of the workers on that property that would  
5 have to be subject to random testing.

6 MR. BOWERSOX: So could 10 contractors on  
7 any given day, those names would have to be given  
8 somehow, through a computer?

9 MS. SILVEY: Not all. However that random  
10 program would be set up. I can't tell you right now  
11 how they would set it up. The only thing the proposed  
12 rule said about it -- it didn't say specifically how  
13 they it had to be set up, except that it had to cover  
14 10 percent of the workforce, and I think that was an  
15 annual -- it was 10 percent annually, 10 percent of  
16 the workforce.

17 MR. BOWERSOX: So if I'm a contract company,  
18 and I have contractors working at a given mine, my  
19 policy is going to be equal to that mine that my  
20 employee is working at, can be no different.

21 MS. SILVEY: I'm not following you there  
22 now.

23 MR. BOWERSOX: Okay. I have a company that  
24 has contractors. I'm going to send one of my  
25 employees to a coal mine. That coal mine already has

1 a drug policy in place. Does that person working at  
2 that mine fall under the policy at the mine he is  
3 working at?

4 MS. SILVEY: Go on. I'm sorry. I'm sorry.

5 MR. BOWERSOX: No, go ahead.

6 MS. SILVEY: No, go on. Go on.

7 MR. BOWERSOX: Okay. You have a contract  
8 miner working at McElroy. I'm a company. I have a  
9 contractor working there. What policy does that  
10 person fall under while he is working there, the mine  
11 I'm working at, or does my company have their own  
12 policy?

13 MS. SILVEY: Okay. I just want you to know,  
14 you can see, it takes more minds than one. But one of  
15 the things I started off saying, and I'm back where I  
16 started, that's why I asked you, Mr. Lydic, did they  
17 have to have Part 48 training? I had a reason for  
18 asking you that.

19 They have to have Part 48 training. The way  
20 the rule is constructed now, you know, we got a lot of  
21 comments saying we ought to do it differently and just  
22 cover everybody, but the way it is now, if they have  
23 to have Part 48 training, then they would be subject  
24 to the drug-testing requirements in the rule.

25 Now, to get to your specific questions, and

1 we all know how the mining industry operates, if a  
2 contractor comes on a mine property from ABC  
3 Contracting Company -- I'm making that up -- okay? --  
4 they know that they have got to train that person  
5 under Part 48. They have got to train him, or the  
6 mine operator has got to train him, and I know, a lot  
7 of times, the contractors provide the training.

8           So then, if the drug rule passed, then that  
9 person, whoever that person is, does come under the  
10 rubric of this rule, has got to be subject to the  
11 requirements of this rule.

12           I'm just saying to you, I don't know how  
13 it's going to work exactly, and I appreciate your  
14 question, and maybe those are things we need to  
15 specifically clarify. My guess to you is, most  
16 likely, the contractor would have a drug-testing  
17 program, but the drug-testing program would have to be  
18 the same as this one.

19           Now, I'm just saying that. I don't know  
20 exactly how -- part of it -- I'm saying this to you,  
21 but I could be dead wrong. Part of it could depend on  
22 the contract that the contractor has with the mine  
23 operator, in terms of what the mine operator provides,  
24 in terms of compliance with the MSHA standards. But  
25 suffice it to say, for me to answer your question,

1 that person would have to fall under the requirements  
2 of the proposed rule, the way it is structured now.

3 A PARTICIPANT: That doesn't answer your  
4 question. That really doesn't answer your question.

5 MS. SILVEY: Well, what's the question,  
6 then? I missed it, then.

7 MR. ALTMAN: My name is Rick Altman,  
8 A-L-T-M-A-N.

9 MS. SILVEY: Okay.

10 MR. ALTMAN: I'm vice president of Local  
11 Union 1638, United Mine Workers.

12 The dilemma at our complex, okay, everybody  
13 that's been drug tested at our complex so far has been  
14 clean, no rampant use of drugs. I don't really think  
15 we need a hearing.

16 Here is what we had proposed at one time  
17 with mine management, that if a contractor comes on  
18 the property, and we have a 25-percent rule at our  
19 mine that management and union gets the test, as the  
20 contractor comes on, if we are going to be tested, the  
21 same contractors, individual-wise, pretty much are  
22 there every day. You have the same individuals  
23 coming. That individual would also have to, and I'll  
24 be honest with you, I've heard comments today about  
25 all of the expense. The expense comes to you and I.

1           Eventually, it's the consumer, regardless of  
2 whether it's robbing Peter to pay Paul, the dime comes  
3 out of our pocket. But they need to be tested at that  
4 mine site also because what they do, at the -- they  
5 directly work with the individuals that are union-  
6 paying members.

7           Underground, what they do, even if we are  
8 not around, if they do something, and they are  
9 impaired, they have the lives of 702 people because,  
10 at this point in time, we are the largest union mine  
11 in the United States, and what we would like is that  
12 if they are going to come onto the property, they then  
13 fall under the same parameters, and they are tested in  
14 the same way.

15           Now, it's not necessarily that the numbers  
16 fall under the 25 percent, but their numbers are also  
17 randomly selected and tested at the mine. I also know  
18 that those individuals are not impaired and are not  
19 going to put anybody at that coal plant in harm's way.

20           I would like to touch on one more thing  
21 because I know -- you know what? My heart goes out to  
22 you. You've had one heck of a day. You know,  
23 everybody is either a drug addict or an alcoholic. To  
24 use this term that I think a little umbrage to, "Joe  
25 Six-Pack." All right? We're saying Joe Six-Pack has

1 one more step. Now, he is not an abuser. He is just  
2 a guy or a woman who maybe just stayed out an hour too  
3 late.

4           Consol's goal is zero tolerance. Now, we  
5 have a term called "capital punishment." "Capital  
6 punishment," in the industry, means you're terminated.  
7 So does Joe Six-Pack-plus-one deserve to be  
8 terminated just because of a slight indiscretion? He  
9 is not an alcoholic. He is not a drug addict. He is  
10 just somebody that stayed out just a tad too late.  
11 Now, does that warrant capital punishment?

12           I think those are issues -- if you take what  
13 you have written down, and you take some of the other  
14 programs that are out there, squash them together,  
15 toss out the good, toss out the bad, and mix it  
16 together, then I think we would have something. But I  
17 think when people are talking about zero tolerance,  
18 you're talking about livelihoods, especially of people  
19 who are not abusers, just somebody who made an  
20 accident, I think those are issues that need to be  
21 addressed and looked at.

22           MS. SILVEY: Okay. I appreciate your  
23 comments. I understand what you are saying. You are  
24 saying that when that contractor comes on, because a  
25 lot of times the contractors are on the mine property



1 with the same frequency as the mine employee, that  
2 they -- I beg your pardon?

3 MR. ALTMAN: We know some of them by their  
4 first names. That's how frequently --

5 MS. SILVEY: I understand. You're saying  
6 they should fall under the same requirements of the  
7 rule as the mine operator's requirement on that  
8 property. So even if, hypothetically, I were to say  
9 to you, "I can tell you right now, they would come  
10 under the requirements of this proposal," you're  
11 saying that the testing procedures, everything, it  
12 ought to all be the same for all workers on that --

13 A PARTICIPANT: It's not a double-standard.

14 MR. ALTMAN: Because then we know -- is  
15 anybody going to be honest? No. If everybody is  
16 right there, then we're equal. It's just the way it  
17 is.

18 One more comment, and I'm shutting up, is on  
19 when the supervisors are trained, if they really want  
20 to do that, then every individual should be trained  
21 because not only can the employee be impaired; the  
22 supervisor can be impaired. So if you're going to  
23 train, then everybody should be trained so that we all  
24 understand, and maybe we can see the foreman who is  
25 impaired. But I think there has to be equality along

1 the line, and I appreciate your time.

2 MS. SILVEY: Okay. I understand that.

3 Okay. Thank you.

4 MS. SILVEY: Do you have some more of your  
5 members, Mr. Bowersox?

6 MR. BOWERSOX: Yes. Just from what Rick is  
7 saying, right now, at the present time, you're hit in  
8 the head with a double-standard, and we agree that  
9 that can't happen.

10 MR. HAUGHT: My name is Martin Haught,  
11 ma'am. I work at the Federal Two Mine, and I'm a  
12 safety committeeman. I haven't been on the committee  
13 too long, but I've worked over there now for a couple  
14 of years, and I'm a union member, 1670.

15 I feel that this thing with these  
16 contractors coming into these coal mines and working  
17 with these union people -- men and women, they come in  
18 there, and they work alongside of us -- they should be  
19 given the same rules we go by. I feel it's  
20 discriminate, really, toward us that they don't have  
21 to go through a drug test and the same tests that we  
22 do.

23 There is no reason for me to go in there and  
24 put my life on the line working with a man like that.  
25 Maybe he don't have a family, but I do, and I know

1 these other people do, and I don't think that that's  
2 fair to me and my family.

3 I feel that it's completely unfair, and I  
4 don't think it's right for me to go in there and work  
5 for a boss who might be impaired because if he is, he  
6 could cost me my life just as well, and I just don't  
7 think that that's right for me to have to do that,  
8 being a union member. I don't think any of these  
9 other people should have to do it. That's all I have.

10 MS. SILVEY: Thank you.

11 MR. BOWERSOX: One more person, please?

12 MR. LUKETIC: I'm Kevin Luketic. I'm the  
13 chairman of the Safety Committee at Federal Two.

14 We were talking about a double standard. I  
15 can give you a good example.

16 What happened is they random picked 15  
17 percent, approximately 500 union members who work here  
18 at this mine. They had done about probably 40 union  
19 men before they called one boss. When they called  
20 this boss, all of the union men were clean. When they  
21 called this boss, I think a Caucasian that says,  
22 "Somehow we asked for the test, the UMWA asked for the  
23 test. We couldn't offer you a result from this test.  
24 It's all confidential," and so forth. The boss  
25 admitted, "I had to be gone for a month to go to rehab

1 because I had cocaine in my system."

2 Well, meanwhile, not long after that, they  
3 fire a union man because he came to work, and he had  
4 something in his system that he took about a couple of  
5 weeks before his test. This man wasn't given a  
6 chance. He was fired.

7 We had a contractor that came to the mine.  
8 Alcohol was on his breath. They talked to the  
9 company. The union man talked to the company. Their  
10 answer was, Well, next time he comes, we'll just have  
11 him taken off the property, but yet he might go to  
12 another mine. So he is taken off Federal Two  
13 property, but what's keeping him from going to another  
14 mine under the influence?

15 So there is double standards, and what Mr.  
16 Bowersox said, you know, and what Dennis O'Dell said  
17 today; I hope that people were listening to them.  
18 Thank you.

19 MS. SILVEY: Okay. Thank you.

20 Anybody else in Pittsburgh?

21 MS. JAMES: I would like to make a comment.  
22 My name is Tanya James, T-A-N-Y-A J-A-M-E-S. I'm a  
23 union member, and I'm also the chairman of our safety  
24 committee at -- Mine.

25 We pretty much have our hands full, as is,

1 with the conditions and stuff that we face every day  
2 in the mine, and if there is something new -- we  
3 already had a drug policy and alcohol policy up there.  
4 I don't agree with it, but it's better than -- I  
5 agree with the others. I think things need to kind of  
6 coming together here, and I believe something good  
7 will come out of this.

8 I would also like to say that I do support  
9 our director of safety, Dennis O'Dell, and the fact  
10 that the theory was not brought up properly, and they  
11 do not allow all of our brothers and sisters to voice  
12 their concerns and comment, and they have to stand out  
13 in the parking lot, and that's very disgraceful.

14 I hope that this comes about at the end that  
15 the conditions and stuff for our members is fair, and  
16 they can voice their concerns.

17 We do have a lot of contractors. I work  
18 underground. We have a few underground, but most of  
19 our contractors are outside on our prep. plant, and  
20 there's probably approximately 30 to 40 daily there  
21 that come and go. They might be there two days, be  
22 gone a couple of weeks, and come back another couple  
23 of days. So it would be hard for any random drug  
24 testing to be performed on these people. They are  
25 coming in more and more every day. There is a total

1 of, like, 17 different contracting companies that come  
2 in and out of the property.

3 I also feel that the drug policy should also  
4 be put in effect for the supervisory right up to the  
5 head man because he makes decisions on a daily basis  
6 that can affect our safety and health in that mine.  
7 He is responsible for all of us and all of our safety,  
8 and I feel that if he would be under the influence and  
9 not be thinking clearly, he could make a very, very  
10 disastrous decision that could affect us.

11 I don't agree with the two hours of training  
12 for a supervisor, to let them make the call on whether  
13 a person shows signs of being under the influence. I  
14 think this should be left up to a professional. If we  
15 do have somebody staggering around, falling into the  
16 line of machinery, that's a little different, but I  
17 don't think a supervisor with two hours of training  
18 should be qualified to make this decision.

19 To me, that would be like giving a person a  
20 two-hour crash course in surgery with a hand on the  
21 scalpel. It's no different.

22 I suggest that we concentrate on the hazards  
23 that do exist in the mines and have existed in the  
24 mines and that's led up to disasters like Sago and  
25 Aracoma, and the number of contractors that work side

1 by side with us in these mines.

2 I think that's all I have. I thank you very  
3 much for your time.

4 MS. SILVEY: Thank you, Ms. James.

5 Anybody else there in Pittsburgh? Since  
6 we're in Pittsburgh now, we may as well take --

7 MR. BOWERSOX: I believe that's it. I  
8 appreciate your time.

9 MS. SILVEY: Anybody else in Pittsburgh who  
10 wishes to comment?

11 (Discussion held off the record.)

12 MS. SILVEY: Okay. I just wanted to make  
13 sure.

14 (Discussion held off the record.)

15 MS. SILVEY: Okay. Thank you all very much.  
16 We appreciate your comments.

17 We will now go to Madisonville, Kentucky.  
18 Do we have Madisonville?

19 MR. O'NEAL: Hello?

20 MS. SILVEY: Yes. Is this Madisonville?

21 MR. O'NEAL: Yes.

22 MS. SILVEY: Please do.

23 MR. O'NEAL: Okay. My name is Tony O'Neal.  
24 That's O'-N-E-A-L. I would like to start out by  
25 saying we stand with our brother, Dennis O'Dell, and,

1 here in Kentucky, we're appalled by the way that our  
2 brothers and sisters in the State of Alabama have been  
3 treated today, and I'll go on.

4 I'm here today representing the United Mine  
5 Workers of America to talk about the proposed rule for  
6 alcohol-free and drug-free mines.

7 Through our representatives on the Kentucky  
8 State Mining Board, the United Mine Workers helped to  
9 get a very effective drug-testing program in our mines  
10 in Kentucky. We are not opposed to drug testing or  
11 doing whatever needs to be done to help keep all  
12 miners safe.

13 We just do not think this proposal is needed  
14 at this time. We feel it is a repetition or  
15 regulations that are already in effect in most mining  
16 operations and, as it is written, will not best serve  
17 miners, as a whole.

18 First, MSHA's introduction presents  
19 statistics about drug and alcohol use but not all of  
20 the facts about linkage of abuse to mining accidents.  
21 Although no one condones any drug and/or alcohol use  
22 by miners, there is no hard evidence that the  
23 preemployment and random-testing procedures that 80  
24 percent of the coal industry has currently in place  
25 are not working to keep that abuse out of the



1 workplace.

2           Second, the rule would apply to those miners  
3 who perform safety-sensitive job duties and their  
4 supervisors. There are several problems with this.

5           First, why target specific jobs? Every  
6 person that drives onto the parking lot performs  
7 safety-sensitive job duties. It is important that the  
8 person that orders the supplies is as clear headed as  
9 the miner man himself.

10           Next, according to the rule, supervisors  
11 themselves would be the ones in charge of detecting  
12 when a reasonable suspicion occurs and requesting for  
13 a miner to be tested. The rule does not outline  
14 clearly enough the training required for that  
15 supervisor. It speaks of a two-hour training, most  
16 likely a videotape, and we do not feel that this will  
17 qualify them to make this determination.

18           This real clearly includes the supervisors  
19 to be subjected to the testing also but makes no  
20 provisions as to how that will take place. It does  
21 not provide for a third-party referral to which a mine  
22 could refer a supervisor who has demonstrated a  
23 reasonable suspicion of being under the influence.

24           Since Section 66.307 clearly states that the  
25 rule leaves it to the mine operator's discretion to

1 determine who should be trained and authorized as a  
2 supervisor to make the determination, that leads you  
3 to believe that no miner would have the right to make  
4 that determination about a supervisor.

5           In the State of Kentucky, 40 certified mine  
6 foremen were reported for drug and/or alcohol policy  
7 violations. Of the 40, four of their certificates  
8 were rescinded, and 36 were suspended. It is clear  
9 that people in a supervisory position are not exempt  
10 from this type of abuse.

11           Another problem with this rule is in the  
12 testing after an accident. No one wants to know the  
13 cause of an accident more than the United Mine  
14 Workers. In Section 66.306, this rule states: "The  
15 proposed rule leaves the decision about who must be  
16 tested to the mine operators. This is clearly  
17 unacceptable."

18           As I stated earlier, there have been no hard  
19 facts to link alcohol and drug abuse to accidents, but  
20 there has been evidence of mine operator neglect as a  
21 direct cause of accidents. With that in mind, why  
22 would we allow a rule to be put in place that would  
23 give the operators the sole decision in this  
24 situation? It makes no sense.

25           It does go on to say that MSHA may give its

1 investigators the authority to test others after they  
2 arrive on the scene, but will that be too late? Will  
3 suspicion already be cast on others, maybe even the  
4 deceased, causing undue additional grief?

5           Follow-up is also a problem with the rule.  
6 The rule does not discuss what would happen after the  
7 first positive test. It does require each mine to  
8 implement an alcohol- and drug-free program. However,  
9 this program, in itself, does little to ensure that  
10 each individual miner that may have a drug and/or  
11 alcohol problem gets the medical and mental health  
12 care they need to fully recover, nor does it do  
13 anything to ensure their job during their recovery,  
14 even if they follow a prescribed plan.

15           With all of that said, one of the major  
16 problems with the rule is that too many resources,  
17 time, and money have been spent, and will be spent, on  
18 it when it could be better spent in areas in the  
19 mining industry that need more attention; namely,  
20 black lung.

21           Again, no one is burying their head in the  
22 sand and saying alcohol and drug use doesn't happen.  
23 There just isn't enough data to support spending  
24 government resources to duplicate what has already  
25 been done to address the problem.

1           Data, however, published by NIOSH does show  
2 that black lung is on the rise, and the use of  
3 government resources for improving problem areas would  
4 be more productive and save more lives. Thank you for  
5 your time.

6           MS. SILVEY: Thank you. I don't have any  
7 questions, Mr. O'Neal.

8           MR. O'NEAL: Thank you.

9           MS. SILVEY: Is there anybody else in  
10 Madisonville who wishes to make comments? I'm sorry.  
11 Did anybody else here have any questions or comments?

12          MR. O'NEAL: We don't have anybody else.

13          MS. SILVEY: Nobody else in Madisonville?

14          MR. O'NEAL: No, ma'am.

15          MS. SILVEY: Okay. If nobody else is in  
16 Madisonville, we'll go to Beckley. Beckley?

17          MR. HOSKINSON: Yes, ma'am.

18          MS. SILVEY: Okay. I have Beckley. Is  
19 Steve Hedgekison there?

20          MR. HOSKINSON: Yes.

21          MS. SILVEY: Okay.

22          MR. HOSKINSON: I would like to start off by  
23 saying that I don't nearly have the credentials of the  
24 speakers before me. I'm nothing but a safety trainer.  
25 I was operating through a community college for 10

1 years doing mining safety training for surface and  
2 underground. The majority of the people we deal with  
3 are metal/nonmetal; they are not coal.

4 MS. SILVEY: Okay.

5 MR. HOSKINSON: I have since then opened my  
6 own company up and have gotten led a little bit toward  
7 the oil and gas industry, but I want to keep up my  
8 mining credentials, and I thought this comment thing  
9 was pretty interesting.

10 I, actually, was brought here by some  
11 people, and this is the side of the story that nobody  
12 has told or talked about, who actually are in the  
13 drug-testing industry, and when they saw this  
14 proposal, what they might have thought of it.

15 First of all, I would like to comment and  
16 say that I've probably trained -- I don't know --  
17 1,000 to 1,500 people last year, and this has been a  
18 topic that's been tossed in metal/nonmetal for quite  
19 some time, and the general feeling there is, "Why do  
20 we have to do this because we already do?"

21 A lot of these facilities have truck drivers  
22 that are already doing DOT drug testing, and, as a  
23 result, if they make anybody do it, they make the  
24 entire facility do it. It's been working, and they  
25 feel that they have done a pretty good job with it.

1           So, at least on the metal/nonmetal side, a  
2 lot of these people are trying to figure out why we  
3 have to do this now, and are they going to have to  
4 change their policies, depending on whatever MSHA  
5 should come up with, as far as the ruling?

6           As far as the DOT stuff, DOT is yet another  
7 organization of the government, and they seem to have  
8 established a pretty good plan for drug testing, and  
9 that is, anybody doing DOT work -- now I'm not just  
10 talking about truck drivers here because DOT has  
11 authority over the entire oil and gas industry as  
12 well, which represents a sizable amount of workers in  
13 the United States, and their basic policy is a 50-  
14 percent test done random during the course of the year  
15 with a zero-percent-tolerance policy, and that's  
16 tough, but it's worked for oil and gas industry pretty  
17 well.

18           The people who approached me are actually  
19 one of the larger drug-testing consortiums in the  
20 United States for that industry and have their  
21 concerns about what they feel that this rule needs to  
22 do and what they might want to change at it. Their  
23 biggest concern is that they can expand the panel to  
24 include all of the drugs that are listed that MSHA  
25 wants to test for. That's not an issue.

1           What they have an issue for is the  
2 responsibility that's being put on a medical review  
3 officer, and that is that it's up to that medical  
4 review officer, if we're dealing with prescription  
5 drugs, and this individual has a valid prescription,  
6 and he can show that he is on a doctor's care for it,  
7 their question is that at what point does that person  
8 become impaired, according to the law, and under what  
9 authority would a medical review officer be able to  
10 make that determination because he is not a  
11 toxicologist?

12           What they want to see is they want that  
13 determination made by the family doctor of the person  
14 who is under the care. There is a point given.

15           I'm a guy that's about 250 pounds. We have  
16 a guy over here who is maybe 150 pounds. We both have  
17 a back injury. We take the same drugs, the same  
18 prescription strength. They may or may not work. My  
19 doctor decides that, because I'm a bigger guy, I need  
20 to take three pills a day instead of two. Now, does  
21 that make me drug impaired over him or not? I don't  
22 think even a medical review officer can tell that.

23           The next thing is, what about the small guy  
24 over there? He has had a back problem for 10 or 12  
25 years, and he has had to continually take something in

1 order to be able to work. Maybe he is up to 10 or 12  
2 pills a day, and he can function just fine under that  
3 particular level of medication. But you see, as long  
4 as it's being closely monitored by the doctors that he  
5 deals with, you know, it's up to them.

6           It's kind of unfair to put the  
7 responsibility or the legal liability, not even  
8 counting the HIPAA regulations, on a medical review  
9 officer because they don't have the firsthand  
10 authority or the closeness that a doctor does.

11           So those are some of the concerns, I guess,  
12 that they had. They felt that the DOT is an  
13 organization of the government that has a well-proven  
14 plan, and why hasn't MSHA taken more of a view of what  
15 they are doing? And the history and the overall  
16 record of the oil and gas industry has been proven to  
17 have come from a very dreary start to a very good  
18 finish, as of right now, and they are doing pretty  
19 good with it.

20           One other thing that I had absolutely no  
21 idea about talking about but was something that I've  
22 heard repeatedly is contractors, and just like any  
23 other place in the metal/nonmetal mines in our state,  
24 especially in big things like cement plants, in  
25 particular, we're seeing that, because of employee



1 benefits being so expensive, that they utilize outside  
2 contractors to come in and do the work that they used  
3 to have employees doing.

4           We're talking both union facilities and  
5 nonunion facilities here, both having the issue of  
6 contractors coming in.

7           I was talking to an individual the other day  
8 with a large cement company, and he says, "You know, I  
9 just can't keep track of these guys anymore." Well,  
10 now there is the issue about drug testing that  
11 complicates the point even further because, if I have  
12 a contractor out, has he been tested? Do I have the  
13 right to even ask it? It brings up a lot of  
14 questions.

15           The oil and gas industry, to combat that,  
16 they have come up with something, and this is but one  
17 of several organizations, but one of them is called IS  
18 Net Rule, and basically what they are is they are a  
19 clearinghouse for contractors, and the people say, "If  
20 you want to do work for us, you have to go through  
21 these things being set by them."

22           Basically, at IS Net Rule, they say that you  
23 have to answer a lot of questions about your company,  
24 including what your current drug-testing policies are,  
25 whether you're doing DOT or non-DOT drug testing, and

1 it's not a choice; it's mandatory that you be able to  
2 show that.

3           The next thing is they will ask about  
4 accident logs and records, whether they are MSHA or  
5 OSHA logs, and they want to know what your mod. rates  
6 are, your employee modification for your insurance  
7 rate. In other words, "Are you over one? Are you .8,  
8 or whatever?" because that gives them an overall view  
9 of the safeness of your company.

10           If they were to start utilizing things like  
11 this a little more, these guys wouldn't have to have  
12 all of that burden on their shoulders, and that's  
13 going to be voluntary for the industry to do that.

14           From MSHA's standpoint, I guess my final  
15 thing is that a lot of guys don't feel that it's  
16 broke. If MSHA thinks that it is, that it needs to be  
17 fixed, maybe they need to take a little closer look at  
18 what the DOT has done because a good majority of the  
19 people out here are already doing work under DOT  
20 already. I guess that's all I have to say.

21           MS. SILVEY: Okay. Thank you, Mr.  
22 Hoskinson.

23           Does anybody have any comments?

24           (Discussion held off the record.)

25           MS. CARR: Mr. Hoskinson?

1 MR. HOSKINSON: Yes.

2 MS. CARR: This is Elena Carr from the  
3 Department of Labor. Just one clarification.

4 You were describing the burden that would be  
5 on the MRO to make determinations of impairment --

6 MR. HOSKINSON: Yes.

7 MS. CARR: -- and suggesting that we follow  
8 more closely the DOT regulations in that area. The  
9 rules does follow the DOT regulation and does not  
10 require the MRO to make actually a rule of impairment  
11 but, rather, just to verify that that individual is  
12 using the drug according to prescription.

13 I agree, there is a burden there because  
14 there are more drugs that they are required to do that  
15 for, but I just wanted to clarify that the role of the  
16 MRO is not one of determining impairment.

17 MR. HOSKINSON: Okay. I think it was the  
18 level of impairment that they were worried about.  
19 They still have to put that on the doctor.

20 MS. CARR: That is a thing that a personal  
21 physician might do, but it's not a requirement that  
22 the MRO make that determination. He is allowed, just  
23 as in DOT, if he takes note that the individual is  
24 taking no prescription drug that could cause  
25 impairment, he is allowed to notify someone, who would

1 then make a fitness-for-duty determination separately,  
2 but it is not the responsibility of the MRO to do  
3 that.

4 MR. HOSKINSON: Okay.

5 MS. SILVEY: I don't think we have any more  
6 comments.

7 Is Mr. Miller in Beckley, Bill Miller?

8 MR. HOSKINSON: He left.

9 MS. SILVEY: He left? Is there anybody else  
10 in Beckley who wishes to make comment? Nobody else?

11 A PARTICIPANT: I think we're good here.

12 MS. SILVEY: Okay. Thank you.

13 We'll now go to -- I think I finished Price.  
14 Is anybody still in Price, Utah? Is anybody in any  
15 of the locations that are online now? Is anybody  
16 left? I'm looking at Pittsburgh. Not in Pittsburgh?  
17 Nobody in Birmingham. Right? Okay. Nobody in  
18 Birmingham, I take it. Nobody in Price, Utah. Nobody  
19 in Denver. Is anybody in Denver?

20 A PARTICIPANT: We're here, but there is no  
21 comment.

22 MS. SILVEY: No comments. Right. No  
23 comments. It seems like I hear noise from somewhere,  
24 but I assume that wherever I hear the noise from,  
25 nobody wishes to make any additional comment or

1 testimony.

2 Does anybody else here? Oh, I'm sorry. I  
3 am so sorry. Jim wishes to make testimony. Please,  
4 Jim, come forward. Thank you. Jim Sharpe from Sharpe  
5 Media, Inc.

6 MR. SHARPE: Yes. I'm from Safety, Health  
7 in Mining called "Sharpe's Point," and I'm sure  
8 everybody is delighted to see me, since I guess I'm  
9 the last of the last. Right?

10 If I would have started first, then we could  
11 have left a lot earlier.

12 I am not testifying here, either pro or con,  
13 for or against, this rule. My comments, I would like  
14 to limit to the 49 C.F.R., Part 40, the Department of  
15 Transportation regulation, which has been incorporated  
16 into the rule.

17 I just want to say that the rule itself is  
18 six and a half pages, but this Part 40 runs for about  
19 a hundred, single spaced, and I swear it's 10-point  
20 font.

21 I decided to devote all of yesterday to get  
22 through it to prepare for the hearing today, and I  
23 only got halfway through it. It's a formidable  
24 document, and it certainly will scare away a lot of  
25 folks, and some of what I heard here today indicates

1 that those people who say they follow Part 40 don't  
2 really know some of what Part 40 says, and I can  
3 understand that because it's so prescriptive and so  
4 long and detailed.

5           So the fact that you're incorporating it by  
6 reference, I think, it's not a smooth transition, and  
7 I just want to explain why I say that. My comment  
8 earlier about only getting halfway through means that  
9 what I'm about to say only covers the first half of it  
10 so that the comments would probably be twice as long,  
11 had I been able to get through the whole thing, which  
12 I'm sure you're glad I didn't.

13           First of all, there is a tremendous number  
14 of acronyms in this Part 40, and it seems like maybe  
15 half of them were all thrown together in one sentence  
16 on page 54, which reads as follows: "As an ASD  
17 manufacturer, you must submit for NHTSA approval a QAP  
18 of your ASD before NHTSA places the ASD on the CPL."

19           MS. SILVEY: Were you doing this for  
20 "Saturday Night Live"?

21           MR. SHARPE: That's under Part 40.235, just  
22 an example of some of the problem here, but let me get  
23 more specific.

24           "Regarding Subpart R --" I'm going to go  
25 through this as a series of questions to you and to

1 the record "-- does MSHA have the authority to  
2 initiate public-interest exclusions?" That's the  
3 "PIE" acronym. If not, consider deleting this  
4 subpart. I would recommend that you consider deleting  
5 it.

6 "If Part 40 is to become an MSHA rule, what  
7 is the purpose of including references to DOT's  
8 ODAPC?" which stands, I think, for "Office of Drug and  
9 Alcohol Policy and Compliance." You might consider  
10 deleting that to minimize confusion because you say  
11 change "DOT" to "MSHA," but you don't say anything  
12 about ODAPC, and I'll be referencing this a couple of  
13 more times as we go through.

14 40.7 is confusing because it says:  
15 "Exemptions are to go through the Office of the  
16 Secretary of Transportation under a separate Part 5."  
17 Well, of course, the Secretary of Transportation  
18 reference is irrelevant for purposes of MSHA  
19 rulemaking, and now does this mean that this separate  
20 Part 5 is also incorporated by reference? Again, it's  
21 something that should be addressed.

22 "Under 40.21, which refers to 'standing down  
23 an employee before the MRO has completed the  
24 verification process,' if an operator seeks an  
25 exemption, to whom is that exemption to be addressed,

1 and to whom does 'an administrator' refer to in this  
2 provision?"

3           Question No. 5: "Must the employer use the  
4 form and instructions in Appendix H to report MIS data  
5 to MSHA, as 40.26 requires?" That form, by the way,  
6 is one page long with six and a half pages of  
7 instructions, and OMB says it will take an hour and a  
8 half, on average, to complete it. I think it took an  
9 hour and a half alone just to read the instructions.  
10 If not, the final rule should address this.

11           Question 6: "If one substitutes the word  
12 'MSHA' for 'DOT' in 40.33(a), it reads that 'MSHA has  
13 published urine specimen collection procedures  
14 guidelines which are available at,' and then it gives  
15 the website." But when I substitute "MSHA" for "DOT"  
16 in the website, there is no such website.

17           Number 7: "40.33 requires maintenance of an  
18 extensive set of documentation pertaining to collector  
19 training, yet no mention of this is made in MSHA's  
20 proposed rule. If an operator chooses to assign an  
21 employee as collector, will the operator be cited if  
22 this information is not available, even though the  
23 record-keeping requirements, under Subpart F of MSHA's  
24 proposal, doesn't mention it?"

25           Number 8: "As in Question 6, there is no



1 CCF form at --" and then there is a website given  
2 again "-- if you substitute 'MSHA' for 'DOT,' it  
3 doesn't exist." So there is no CCF form there. So if  
4 somebody is referencing Part 40, they are just  
5 unnecessarily confused.

6 "In at least one place, 40.81(d), reference  
7 is made to 'the department.' Again, is that MSHA?"

8 Question 10: "40.103 says, 'an employer'  
9 with an aggregate of 2,000 or more covered employees  
10 must participate in a blind specimen program. In this  
11 context, how does MSHA define 'employer'?"

12 Question 11: "40.105 requires the employer  
13 to notify ODAPC if the lab reports a false positive,  
14 adulterated, or substituted result for a blind  
15 specimen. Phone number and website address are  
16 provided. Is it your intent to change that to an MSHA  
17 location, and, if not, what authority would ODAPC have  
18 over an MSHA-covered mine operator?"

19 Question 12: "40.107. If you do not plan  
20 to inspect laboratories, you may wish to delete this  
21 provision or modify it. ODAPC is mentioned in it as  
22 well."

23 "40.111. Is it your intent for laboratories  
24 to send you aggregate data on a semi-annual basis, as  
25 40.111(d) requires? If so, what if what they report

1 differs from what you require in Subpart F?" again  
2 referencing 40.111.

3 "The aggregate statistical summary required  
4 to be sent to employers by the laboratory differs from  
5 what you require. You would do a service to operators  
6 to amend this section to include what you require."

7 Question No. 15, or Concern No. 15 involves  
8 40.121(a)(3), where it talks about "MSHA MRO  
9 guidelines and where they can be obtained; that is,  
10 from ODAPC. If there are no MSHA MRO guidelines, this  
11 provision should be amended."

12 "40.121 requires the MRO to take a  
13 qualifications exam after being given training on  
14 MSHA's drug program. How do you plan to accomplish  
15 this?"

16 "40.123. The MRO has responsibility to  
17 consult with MSHA to resolve a program issue. Who  
18 would MSHA need to consult with, and how is this  
19 contact to be provided them?"

20 "40.127 suggests you will review CCFs kept  
21 by MROs for compliance with Part 40. Do you really  
22 plan to do that?"

23 "40.145(g)(5) requires the MRO to notify  
24 ODAPC in writing. This pertains to the MROs verifying  
25 test results involving adulteration or substitution.

1 If this is not who you want notified, you should amend  
2 the provision accordingly."

3 "40.213. Several references to ODAPC should  
4 be addressed "ODAPC" referenced in 40.225, and 40.281  
5 also should be addressed."

6 "40.283, pertaining to the SAP-certifying  
7 organizations, appears to be inapplicable."

8 And, last: "The MIS Data Collection Form  
9 lists DOT agencies, not MSHA, and thus should be  
10 amended." Thank you.

11 MS. SILVEY: Okay. Thank you, Jim. We  
12 appreciate your comments.

13 At this point, is there anybody else in this  
14 room who wishes to make testimony?

15 (No response.)

16 MS. SILVEY: If there is nobody else in this  
17 room or at any of the locations who wishes to provide  
18 comment or testimony, I would like to say that we, the  
19 Mine Safety and Health Administration, appreciate your  
20 input in this rulemaking. We appreciate people who  
21 came today and provided testimony. We appreciate  
22 people who came and did not provide testimony but were  
23 in attendance because that shows their interest in the  
24 rulemaking.

25 And, more significantly, we appreciate the

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1 people who came and were not able to get into our  
2 facility in Birmingham, and we are trying to determine  
3 a way that we can get testimony from the members who  
4 would like to do so.

5           At the beginning of the opening statement, I  
6 informed everybody that the comment period is  
7 scheduled to close on October 29th, and for people who  
8 are intending to get in more comment prior to that  
9 time, 12:00 midnight, Eastern Daylight Savings Time,  
10 we would encourage you to do so.

11           At this time, the Mine Safety and Health  
12 Administration's public hearing on "The Proposed Rule  
13 on Alcohol- and Drug-free Mines: Policy,  
14 Prohibitions, Testing, Training, and Assistance," is  
15 now closed. Thank you.

16           (Whereupon, at 5:02 p.m., the hearing in the  
17 above-entitled matter was concluded.)

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REPORTER'S CERTIFICATE

DOCKET NO.: --

CASE TITLE: 30 C.F.R. PARTS 56, 57 AND 66  
ALCOHOL AND DRUG-FREE MINES:  
POLICY PROHIBITIONS, TESTING,  
TRAINING AND ASSISTANCE  
PROPOSED RULE

HEARING DATE: October 14, 2008

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Department of Labor, Mine Safety and Health Administration.

Date: October 14, 2008

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