United Mine Workers of America

TELEPHONE
(703) 208-7200

UNITED MINE WORKERS' HEADQUARTERS
8315 LEE HIGHWAY
Fairfax, VA
22031-2215

November 10, 2008

Ms. Patricia Silvey
Office of Standards, Regulations, and Variances
Mine Safety and Health Administration
1100 Wilson Blvd., Room 2350
Arlington, VA 22209-3939

Dear Ms. Silvey,

Attached are the comments of the United Mine Workers of America on the Proposed Rule for Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance. As pointed out in our earlier comments, MSHA has not determined there is a significant problem with improper drug and alcohol use in the coal mining industry and provides no statistical data to prove this need is as great as suggested in the proposal commentary. Consequently, the UMWA would once again urge that the Proposed Rule be withdrawn. However, being that it is unlikely MSHA will do so, we are attaching the UMWA's comments on this proposed rule for the record.

The UMWA ask that you forward our comments to the appropriate person(s) in the Agency for consideration.

Sincerely,

Dennis O'Dell

Dennis O'Dell, Administrator
UMWA Department of Occupational
Health and Safety

AB41-COMM-140

Comments of the United Mine Workers of America On The Proposed Rule For Alcohol – and Drug-Free Mines: Policy, Prohibitions, Testing, Training and Assistance

Introduction

The UMWA does not support the Agency's actions in proposing a new regulation to require testing for Alcohol and Drug use in the mining industry. The UMWA does not want anyone who is under the influence of drugs or alcohol working in our mines, nor do our members want to work next to them because lives are jeopardized when a worker's judgment is impaired. However, we do not believe that this is as great a problem as it has been portrayed in MSHA comments. We have worked with dozens of our members' employers to implement drug and alcohol testing programs because we remain committed to creating the safest and healthiest environments for our miners and that cannot happen when a coworker is impaired. These programs have been in place for a number of years and have been successful in providing the assistance needed when a miner has an addiction problem. If the problem is already being addressed by the industry through its own programs and policies, why does MSHA see a need to act on this issue that in reality presents minimal risks in an industry still plagued by compelling and well-documented health hazards the Agency refuses to address?

The majority of the industry (80%) already has drug-testing programs in place. Further, some states (Virginia and Kentucky) also have regulations governing alcohol/ drug testing. The Agency indicates that within the mining industry, nearly four out of five workers report that companies perform alcohol and drug test on a pre-employment basis, which is nearly double the reported all-industry average. Similarly, nearly three-quarters of those working in the mining industry report random testing, which is more than double the reported all industry average (of nearly 30 percent). If the industry already has in place alcohol and drug testing programs which far exceed any other industry, why has MSHA chosen to pursue this rule with such vigilance when many other legitimate health and safety issues in the industry are neglected? The Union contends there is not a significant problem in this area to justify spending government resources to duplicate what the industry is already doing.

Further, statistics do not support the urgent need that is being proposed as the justification for this rule. Reading the Agency commentary on this rule, one would think that drug and alcohol abuse in our nation's coal mines is running rampant. The Agency admits that an internal DOL review of accident reports failed to reveal a significant number of cases where alcohol or drugs were determined to be causative factors. Alcohol and drug use is a complex social and medical problem that warrants a more compassionate approach than is proposed here. Mine operators should be provided the flexibility to work with miners to find the best programs suited to their specific problems, work sites and communities. A boilerplate standard, as proposed, does not provide the people involved in such a complicated issue the flexibility to design their program to fit

their individual needs. Therefore, we would urge the Agency to let the industry continue to do what it has been doing to resolve this "perceived problem."

The information that MSHA has disseminated in support of the proposed rule on substance abuse[1] does not meet the requirements of the Information Quality Act[2] or of the guidelines developed by the Department of Labor[3] as required by the Office of Management and Budget and by the Information Quality Act. It is completely devoid of any quantitative measure of the prevalence of substance abuse among miners, in mining communities, among miners involved in accidents, and among prospective miners. With information of such fundamental utility absent in any form, it is impossible to allocate resources in a rational manner, to evaluate program effectiveness, or to develop or implement policy. In a word, it lacks utility. Such data being non-existent, evaluating its quality, integrity, and objectivity as required by the Act is likewise impossible. It lacks any reference to scientific findings concerning the relationship of substance abuse and the occurrence of occupational accidents and injuries in spite of numerous pertinent peer-reviewed publications in the scientific literature.

66.1 Purpose

This proposed rule establishes the requirements for mine operators to develop an alcohol- and drug-free mine program to prevent accidents, injuries and fatalities resulting from the misuse of prohibited substances by miners performing safety-sensitive job duties.

As the comments above point out, the Union does not think there is sufficient evidence to warrant the use of government resources to develop and enforce rules on alcohol and drug testing. The Agency's own analysis of fatal accidents from 1975 to 2007 revealed that 24 of 978 reported deaths involved alcohol or drugs and it is unknown whether alcohol or drugs were contributing causes. This equates to 2.4% of the total fatals over a thirty-two year period. From 1983 through 2007 there were 593,047 non-fatal accident reported, with 56 possibly involving alcohol or drugs. This equals 0.009% of total accidents over a twenty-four year period. There is no evidence showing that alcohol and drugs make a significant contribution to fatalities and injuries in the industry. Factor in that the majority of the industry (80%) already has drug and alcohol

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[1] U.S. Department of Labor, Mine Safety and Health Administration. Alcohol and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance, Proposed Rule. September 8, 2008. 73 FR (174): 52136-63.

[2] U.S. Congress. Treasury and General Government Appropriations Act for Fiscal Year 2001, PL 106-554, Sec. 515. December 21, 2000.

[3] U.S. Department of Labor. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Department of Labor. October 1, 2002. URL:
November 7, 2008.

programs in place, we do not understand why the Agency sees an urgent need to pursue these standards. The Union feels our tax dollars would be better spent developing rules to protect miners from hazards that actually are killing them. For example, for a number of years the UMWA has aggressively sought actions from MSHA to protect miners from respirable coal and silica dust, yet nothing has happened. Data published by the National Institute for Occupational Safety and Health show that black lung is once again on the rise, afflicting thousands of miners, even younger ones who have been working in the industry only a short time. Actions in this area would save far more lives in our industry and would be a more productive use of government resources and taxpayer dollars.

In fact, in none of the recent major coal mine disasters - Sago, Aracoma, Darby and Crandall Canyon- was there any indication of drugs or alcohol being contributing factors to those accidents. Indeed, in each of those tragedies, the actions or inactions of mine management and MSHA itself were to blame. Following the reasoning of this proposed rule, members of mine management and MSHA should be subject to post-accident testing. We can't help but find it more than coincidental that the Agency proposed this rule in the wake of devastating reports about MSHA's actions in the Crandall Canyon tragedy. We suggest the timing serves to divert attention from the important health and safety issues of the day. The Union would urge the Agency to use its resources more productively to address issues that are genuine threats to coal miners' health and safety.

66.2 Applicability

This proposal would require that alcohol and drug testing only for those who may be required to perform safety-sensitive job duties. Management and administrative personnel who supervise the performance of safety-sensitive positions are also considered to hold safety-sensitive positions. The proposed rule indicates that "safety-sensitive jobs" would include anyone who must take comprehensive miner training under 30CFR parts 46 and 48. The proposal indicated that this standard would include contractors. General administrative and clerical personnel would be excluded from the rule. MSHA seeks comments about the determination of who performs safety-sensitive job duties and is, therefore, required to be tested and trained.

MSHA has indicated that a "safety-sensitive job" would be one performed by miners who are required to take training under Part 48. However, MSHA has chosen to exclude administrative and clerical personnel from the drug testing requirements. The proposed rule is additionally not clear on which supervisors would be included in the alcohol and drug testing. The Union would question the Agency's rationale for these exclusions. The Superintendent of the mine does not normally supervise persons in a safety-sensitive job on a regular basis, but he is responsible for miner and supervisor training, for maintenance policy, and for mine design and operation. Insofar as the rule proposes that any "miner involved in any work activity that could have contributed..." shall be tested ..., we submit that the mine superintendent should be subjected to post

accident testing following every accident at that mine. (The only reason he probably would escape is that upper management has discretion to decide who "could have contributed", presenting an inherent conflict of interest.)

In addition, administrative and clerical personnel are often used to run errands, driving vehicles to and from suppliers, etc. They often also deliver supplies or parts for equipment repair into the mine. Excluding them from testing exposes miners to the effects of their job performance; if they are impaired miners could be adversely affected. Often we hear that "safety is everybody's responsibility." Unless this is idle rhetoric, everybody should be covered under this rule. If miners must be tested, then so should everybody else who enters the mine property. Anyone working on mine property would be exposed to the hazards of the surface area of the mine site. Often this includes the use of heavy equipment such as end loader and dozers; the movement of track vehicles and motor vehicles used for transport and supply purposes. Those doing these jobs as well as those exposed to these hazards should be tested for alcohol and drugs like the underground miners. We agree with the proposal to include all operations regardless of size.

66.3 Definitions

This section of the proposed rule defines the terms used in the context of this rule.

Breath Alcohol Technician (BAT). Under this proposed definition, the Breath Alcohol Technician (BAT) can be an employee of the mine operator. The BAT, MRO or SAP must not be employees of the mine operator. If these individuals, who are supposed to be professionals are employees of the mine operator no one will believe that they will conduct themselves in a fair and impartial manner. Their loyalty will clearly lie with their employer and not with the miner being tested which opens the door to discrimination and the use of these rules for unjustified and discriminatory disciplinary actions.

Medical Review Officer. Under this proposed definition, the Medical Review Officer (MRO) can be an employee of the mine operator or a service agent. The MRO must not be an employee of the mine operator. The loyalty of that licensed professional will be questioned if he/she is an employee of the mine operator. Doing so harkens back memories of abuses of the "Company Doctors" employed throughout the coal fields in years gone by. If this process is to be fair and impartial, the MRO must be an independent source and not employed by the mine operator. To permit otherwise will create unnecessary distrust of the miners and a possible subterfuge for discriminatory treatment.

Prohibited substances.

Comment: Nowhere in this rule is there a definition of what constitutes a valid prescription, leaving this issue up to the discretion of the mine operator or a medical professional. A simple definition already exists, and it can be readily evaluated by anyone, and should be added: "A valid prescription consists of a controlled substance in an appropriately labeled container."

A problem, however, not addressed by this rule is one of medical confidentiality. Many medications that could fall under this rule are treatments for conditions that miners would rather keep confidential, yet there is no provision whatsoever here or elsewhere that would protect a miner's privacy. This is a serious shortcoming that MSHA should address. Another problem is the unfettered discretion left to the Secretary to expand the list of covered substances, and the failure to address how any changes to the list of prohibited substances would be handled (notice, training, test procedures, etc.)

Reasonable suspicion testing. (We recommend replacing the proposed definition with the following: Testing for alcohol or drugs conducted when any person observes possible signs and symptoms of any other person on mine property that suggest alcohol or drug use in violation of the alcohol- and drug-free workplace policy, and the person who suspects such use receives confirmation of possible violation by bringing this problem to the attention of his superior(s) for confirmation.

Comment: Any person on mine property can violate the policy. The proposed rule gives to supervisors, and only to supervisors, the authority to require testing for reasonable suspicion. Not only does this exempt supervisors' from reasonable suspicion testing, it provides for no oversight of the supervisors judgment. The suggested replacement allows any person to "reasonably suspect" drug or alcohol use and provides for oversight in the form of a second opinion.

Substance Abuse Professional (SAP). The UMWA recommends replacing the existing proposal with the following: A licensed mental health professional who can evaluate miners who have violated a mine operator's alcohol- and drug-free workplace policy and makes recommendations concerning education, treatment, and aftercare.

Comment: Alcohol and drug addiction are recognized mental disorders (See the Diagnostic and Statistical Manual, version IV) and should be treated by a licensed mental health professional. Such problems should not be "treated" by people that are not recognized (i.e., licensed) as such. Furthermore, once a miner has been referred to an SAP, the loyalty of that professional should be to the miner and consequently, he or she should not be a part of any procedure (such as a schedule of drug or alcohol testing) that could lead to disciplinary action. The SAP could order tests by himself but only for use in treatment.

Substituted Specimen. The UMWA recommends modifying it to read as follows (changes are underlined). A specimen with creatinine and specific gravity values that are so diminished that they are not consistent with human urine from a healthy person.

Comment: Abnormal values of creatinine and specific gravity can both be indicators of underlying disease and a miner with an alleged substituted specimen should first be referred to his own physician.

66.100 Prohibited substances

This proposal requires that prohibited substances not be permitted or used on or around mine property. Paragraph (b) would exempt those who have a valid prescription for the substance and are using it as prescribed. The Medical Review Officer would verify that the miner has a valid prescription and is using it as prescribed.

MSHA indicates that the most prevalent drugs of concern in the mining industry include alcohol, marijuana, cocaine, opiates, methamphetamines and prescription painkillers, most notably methadone and oxycodone. The Agency cites National statistics on the use of prescription drug misuse as the second-ranking drug threat in terms of prevalence, and findings of the Mine Substance Abuse Task Force that rates of prescription drug misuse in the Appalachian mining region may be higher than the national findings. Neither of these sources reveal anything about such use or mis-use among miners at work. Thus, they do not serve to support the proposed rule. Moreover, testimony during the Task Force investigation indicated that much drug dependency among miners can develop from the legitimate use of prescribed painkillers. This is not surprising because miners work in one of the most hazardous industries in the United States. One could expect miners, who have been injured, would be prescribed pain-relieving medications by their physicians in the process of recovery. Some of these medications such as oxycodone are known to be highly addictive. When one looks at the overall picture, it is not surprising that the Task Force would make such a conclusion. The Union does not deny that some of these problems exist in the industry, however we do not agree that drug-abuse among miners is as wide-spread as MSHA suggests. When one considers that Virginia and Kentucky have drug testing requirements and most operators have had their own drug and alcohol testing programs in place for many years, it is hard to imagine how so many have been able to slip through the system to create as great a problem as MSHA suggests. Furthermore, given the existence of these programs, it is astounding how little data there is revealing any significant problem. The UMWA is not aware of any objective data linking alcohol and substance abuse to mining accidents. Most data used as justification for this rulemaking is anecdotal, or tied to use among the general population, not miners' much less miners at work..

The UMWA is also concerned about potential conflicts of interest between provisions of this proposed rule and HIPPA laws, such as regarding the MRO's role in validating a miner's prescription. The miner's physician might be limited under HIPPA as to how much information he/she could divulge regarding the miner's illness or

treatment. Before such a proposal is put into place, research should be done to make sure there is no conflict in regulations and that miners' confidentiality is protected without placing them at risk of discipline pursuant to this rule. The UMWA also is concerned that provisions of this proposed rule will implicate the ADA, and perhaps the FMLA. If an employee tests positive under this rule ADA protections may conflict with what is proposed here. Finally, collectively bargained protections cannot be forfeited by operation of this rule and may present conflicts.

66.101 Prohibited behaviors

This proposal requires that miners who have been identified as being under the influence of a prohibited substance shall not be allowed to perform safety-sensitive job duties. If identified as being under the influence of alcohol or a drug, they must be removed from their job duties. If the miner refuses to submit to a drug or alcohol test or has an adulterated or substituted specimen, he also must be removed from his job duties.

The rule references 66.3(p) but there is no such designation in the proposed rule; we treat the proposal as referring to the definition of "prohibited substances." The UMWA's Native American Members have indicated that in most instances, drug testing of the miners at mines located on their reservations is prohibited due to conflicts with their religious beliefs. Any rule that may be put forth must take such conflicts with one's religious beliefs into consideration and make allowances. "Under the influence" is treated as including a positive urine test for drug metabolites. This is a distortion of the plain meaning of the word, "influence," which means ". . the act or power of producing an effect." (Webster's 9th Collegiate Dictionary). It is well recognized that a positive urine test for drugs or their metabolites is only an indicator of previous (to the test) use and is not an indicator of being "influenced" or impaired by the drug.

Further, as noted in the preamble but not set forth in the proposed rule, MSHA is adopting the cut-off levels used by DOT. By relying on DOT, MSHA imposes on the mining community a different industry set of procedures. If DOT later changes its procedures the mining industry would also be affected, likely without the kind of notice/comment required by the Administrative Procedures Act. Finally, we note that DOT's drug testing resulted from high profile accidents where drug and alcohol had contributed; Congress required changes to DOT's scheme pursuant to needs of the transportation industry. This is factually different from actual experience in the mining industry. Not only have the high-profile multi-fatal accidents of recent history in the coal industry been devoid of drug/alcohol problems, but Congress enacted the MINERAct in 2006. At that time it considered and rejected imposing drug testing for the coal mining industry, and chose not to change these practices within metal/non-metal. For this reason the DOT model should not serve as a model for the mining industry. It is arbitrary to adopt a different (transportation) industry's format and make that protocol affective on an ongoing basis in the mining industry.

66.200 Purpose and scope

This proposal requires the mine operator to establish a written alcohol and drug-free program which includes an education and awareness program for non-supervisory miners, a training program for supervisors and a testing procedure and referrals to assistance for those who violate the rule.

Like the National Mining Association, the Union would question whether the proposed rule would create confusion or conflict with state laws already in place. We agree with the NMA that the proposed changes may cause enormous confusion and pose severe implementation problems where such state laws exist. Furthermore, how would the proposal accommodate voluntary programs that some employers already have adopted? These are all issues that must be taken into account and sufficient time permitted for the mining community to assess the affect the rules will have on all of these issues. For that reason, we agree that more time is needed for those who will be affected by this rule to properly evaluate the rule's impact.

Everybody covered by this rule should receive the same training -- education and awareness and whatever training is developed for supervisors. The plain reason is that everybody covered by this rule should be treated the same. The rule makes the false and insulting assumption that the problem of drug and alcohol abuse is a problem among miners and not among supervisors. This comment also applies to Part 66.202 and 66.203 below.

66.201 Written policy

This proposal would require each mine operator to develop a written policy and provide it to all miners covered by the rule.

The proposed rule would require that a copy of the written policy be provided to the miners' representative or posted on a bulletin board in a common area where the miners do not have a representative. The proposal provides the option to the operators to distribute the policy during the alcohol and drug-free awareness training sessions or to be distributed in an electronic format. The Union insists that a copy of the policy be provided to the miners' representative and would further suggest that the operator be required to distribute a paper copy to all individual miners. It would not be fair to permit this distribution electronically because some miners are not computer users and would not be properly notified.

66.202 Education and awareness program for nonsupervisory miners.

This proposed rule would require the alcohol and drug awareness training program be incorporated into Part 48 training. The training for new hires would be 60 minutes and 30 minutes annually for all non-supervisory miners.

The Union questions how much more training is the Agency going to require to be incorporated into the Part 48 Training Program? The Union insists that these training classes are not included in the already over crammed Part 48 annual retraining classes. Part 48 training has had many additional requirements added through other rulemaking. Even though the Agency has proposed that the additional time be added to the Part 48 training program to accommodate this training, miners are bombarded with so many issues in the Part 48 training that adding one more is too much. This reduces the effectiveness of all the required training and should not be even further affected with the new training requirements of this rule. The Union believes that this training should be a separate and distinct training class for the purposes of the drug and alcohol awareness training. The operator should be required to furnish to the representative of the miners a copy of the training plan fourteen (14) working days prior to its implementation. The miners should also be provided the opportunity to submit comments regarding this plan. A copy of the approved plan should be required to posted on the mine bulletin board for access to all parties.

The rule as proposed requires the training to be provided by a "competent person..." The UMWA submits that an objective standard be set that includes educational and training requirements. Reviewing MSHA's prepared materials should <u>not</u> suffice for one providing such training. We suggest MSHA certify individuals who will be "competent persons."

66.203 <u>Training program for supervisors</u>

This proposal establishes the guidelines for training for supervisors. The rule focuses on the supervisors' ability to recognize signs of alcohol and drug use; to understand how to refer miners to assistance; and know how to make a determination for requiring a reasonable suspicion or post-accident test.

The Agency is proposing that supervisors be trained to be the front line level of detection for alcohol and drug use among miners. These supervisors will receive a minimum of two hours of initial training with an additional one hour annually thereafter. The Union questions whether two hours worth of training would qualify a person for such a responsibility? Further, the Agency comments that MSHA has already developed materials that can be used to fulfill this required training. Would a two-hour canned presentation available through the Agency be adequate training for supervisors to recognize and deal with such a sensitive issue? We say "No". The Agency also questioned whether it would be wise to spread the authority to initiate such tests too broadly. This leaves the door open to the operators to determine who will be delegated this responsibility and who must receive this training. The Union is concerned that such a broad distribution of authority could be used as a form of harassment in disputes on the working section. This responsibility must be placed with a competent person who is knowledgeable about workplace substance abuse and trained to recognize those signs, <u>not</u> with the section foreman. (Also see comments to 66.202 for this section too.)

The Union also suggests there be a system whereby miners can identify and report supervisors showing indicia of impairment. Miners are not the only ones who may have a substance abuse problem. Supervisors are charged with the many responsibilities in the day-to-day operation of the mine. Many have turned to substance abuse as a means of dealing with those stresses. So we ask who will be charged with observation of supervisors for substance abuse and whether this rule would include them in such observations? We urge the answer to be "Yes" and suggest procedures be added that will allow non-supervisory miners to accomplish testing of supervisors.

66.204 Miner assistance following admission of use of prohibited substances.

This proposal specifies the actions that must be taken by mine operators following the admission of use of prohibited substances by miners. It would require operators to make such miners aware of available assistance through an employee or miner assistance program, a Substance Abuse Professional (SAP), and/or other qualified community-based resources.

This section requires the operator to refer miners who admit to having an addiction problem for assistance through Substance Abuse Professionals (SAP), and/or other qualified community-based resources. The Union agrees that such assistance should be provided to the miner and would support and advocate that they get assistance when needed. We are concerned that there are few Substance Abuse Assistance Programs in rural Appalachian areas where miners live and work. If the miner is to participate in such a program, he likely would have to travel many miles from home to the nearest city to gain access to such programs. If Substance Abuse Programs are to be successful, they must be easily accessible to rural mining communities. The Union would ask that the Agency take a survey of what programs are available and their locations to supply as a resource to the mining community. This part of the proposal can only be meaningful if such resources are readily available, both geographically and economically. We agree that it is important that any miner who admits to use of prohibited substance not be deemed tob e in violation of the program, and maintain job security and not be disciplined for the self-reporting.

Furthermore, the SAP should be "conveniently located," and available at a convenient time, following the same general rules that cover the location of certified facilities for chest x-ray surveillance purposes. (42 CFR 37.2 (d))

66.300 Purpose and scope

Under this proposal MSHA proposes to incorporate the Department of Transportation Part 40 alcohol and drug-testing procedures. MSHA proposes testing for ten substances as opposed to the five tested under DOT. Mine operators would be offered the option to use service agents to perform the functions required by this proposal

including services for collection of urine specimens, a certified Breath Alcohol Technician (BAT), a laboratory, Medical Review Officer (MRO), and a Substance Abuse Professional (SAP). Because the Agency has required testing for ten substances, MSHA requires that laboratories that conduct testing under this rule be certified by the College of American Pathology (CAP) to perform Forensic Urine Drug Testing for the additional substances specified by this rule. Although MSHA proposes to adopt DOT part 40 requirements, it does not propose to monitor or review the performance of service agents, including laboratories used by mine operators to comply with the proposal's requirement.

The Union generally does not oppose operator use of certified facilities and agents under the HHS and DOT, however once again we question the availability of such facilities in rural communities both in Appalachia and the West where a number of mines are located. An examination of the State List of HHS Certified Laboratories indicates that no HHS Laboratories are located in major coal states such as West Virginia, Illinois or Kentucky. If specimens must be transported great distances to other states, there is an increased possibility of tainted specimens due to exposure to heat and conditions of transport. If drug and alcohol testing is to be conducted in the mining community, the rules must require that the laboratories doing the testing be at least as reliable. We further object to relying on DOT testing programs, especially when they could be changed for issues that may arise in the transportation industry as opposed to the mining industry.

66.301 Substances subject to mandatory testing.

This proposal lists substances for which testing will be conducted, which includes alcohol and ten drugs.

The UMWA offers no comment on this proposal.

66.302 Additional testing.

This proposal provides that the Secretary of Labor shall be permitted to designate additional substances for which mine operators must test.

The Union opposes the provision that would allow the Secretary complete discretion to add additional items to the list of prohibited substances. Rather any such designation shall be considered a rule-making and shall be governed by the same procedures that cover other rule-makings. We also object to the rule's failure to require any later-added substances to be referenced in any employer's written program. As written this section would violate due process. Before any changes are made to this list, the operator must meet with the Representative of the Miners to allow their input. Before an updated list is implemented all miners must be made aware of any changes through additional training sessions.

66.303 Circumstances under which testing will be required.

This proposal would follow DOT part 40 guidelines and require testing in the following circumstances: Pre-employment testing, random testing, post-accident testing, reasonable suspicion testing, and as a part of a return-to-duty and follow-up process for miners found to be in violation of the alcohol and drug prohibitions.

The Union points out that most of our members' employers already have drug-testing programs in place and have had them for many years. Our members have been tested under these circumstances, so this will be nothing new to the UMWA. Nevertheless, making this mandatory is offensive, especially since it will require limited Agency resources to be focused on a relatively insignificant issue.

66.304 Pre-employment testing

This proposal requires operators to require a pre-employment test before hiring new miners, or having them perform safety-sensitive jobs.

Once again, our members have been subjected to pre-employment alcohol and drug screening for many years, so this is nothing new to the UMWA.

66.305 Random testing.

This proposal would require random, unannounced testing on miners who perform safety-sensitive job duties.

UMWA miners who work at our larger employers have been subject to alcohol and drug testing since the 1980's. The UMWA has worked with mine management to resolve whatever issues regarding these programs we may have had disagreement about and most miners have been subject to alcohol and drug testing for twenty years or more. Random testing has always been a part of those programs.

"Random" should be defined in sufficient and better detail so that anyone in the industry can understand what it means and so that it does not come to mean "arbitrary." All personal on mine property are subject to random-testing.

66.306 Post-accident testing.

The proposed rule would require that post-accident tests be conducted of miners involved in the accident whenever an accident or occupational injury must be reported to MSHA. MSHA also proposes to require toxicology tests of the fatal victims.

The Union is not generally opposed to post-accident testing of surviving miners if/when that maybe warranted, however we feel it is not ethical to test deceased miners. The UMWA questions whether the Agency has authority to do such invasive tests without the victim's family's consent. To propose such a thing is an unethical and immoral intrusion at the family's time of grief. The Union would oppose testing of the deceased and questions MSHA's legal authority to do so without the family's authorization.

Furthermore, if miners "involved in the accident" will be tested, then those tested should include anyone whose actions could have contributed to the accident, which could include the maintenance supervisor who put a vehicle into service without adequately checking it for safety features, and anybody who altered ventilation to allow gas to accumulate, and/ anybody who conducted training that failed to cover all relevant hazards, and the section boss who did not check roof bolting, etc. We do not assume, as this rule does, that accidents are caused by miner's behavior and only by miner's behavior. We believe the proposed rule contains a conflict of interest insofar as mine operators are primarily responsible for determining who will be tested in the post-accident setting. There must be a means by which high-level supervisory personnel will also be tested. We support the requirement that all testing be at the Employer's expense.

66.307 Reasonable suspicion testing.

Under this proposal reasonable suspicion testing is conducted when a supervisor documents observable signs and symptoms that lead him or her to suspect alcohol or drug use.

In MSHA's commentary, it points out that most agreed that reasonable suspicion testing was a useful tool, however several who commented expressed their reservations about whether supervisors, even with considerable training, can readily identify when someone is impaired by drugs. The Union would echo that sentiment. As pointed out in comments on 66.203, supervisors are required to receive a total of two hours of training and one hour refresher annually. Two hours of training would not qualify anyone to identify the signs of someone impaired by drugs. Further as the Union pointed out before, using the section foreman to initiate reasonable suspicion testing would open the door to abuse of this privilege. Whenever there is a dispute on the working section, those in disagreement could easily become targets for such testing because of a grudge. The person charged with this responsibility must be independent and well trained to recognize the signs of drug use. The foreman may suggest to the person in charge that he suspects a miner may be impaired. However, the decision as to what action taken, and whether any miners should be tested for "reasonable suspicion" should not be left to the section foreman. We suggest that a minimum of two persons be required to confirm objective bases for any testing under this section.

See our comments above concerning the definition of reasonable suspicion. Anybody that works in a mine can have problems with drugs or alcohol and this includes

supervisors as well as miners. Therefore, anybody should be able to suggest testing for reasonable suspicion and that opinion should be reviewed by some other person, specifically, another supervisor.

66.400 Consequences to miner or supervisor for failing an alcohol-or drug-test or refusal to test.

This proposal would require the mine operator remove a miner or supervisor with a positive alcohol or drug test from safety-sensitive job duties. The miner could not be terminated for the first offense and would be provided job security while the miner seeks appropriate evaluation and treatment. For subsequent violations, it would be up to the mine operator to specify appropriate disciplinary steps, up to and including termination.

The Union believes that those who have alcohol or drug additions should be given ample opportunity to rehabilitate themselves. Subjecting that person to possible termination after the first offense would not provide such an opportunity. We also recognize that there may be those who are beyond rehabilitation and offering those people multiple chances to recover would not work. However, the rules must provide compassion for those who are struggling with addiction, but trying to recover. Twenty chances would be too extreme, but one chance would be the extreme of the opposite. A compromise must be struck somewhere in the middle. If a recovering addict falls off the wagon just once after his first offense, he could be subject to termination under this proposal. The loss of employment to a person in such a vulnerable state would be devastating and they likely would take a downward turn back to the addiction to deal with such a life challenge. Addicts most often struggle all of their life with their addiction, even after they have recovered. Ask any person associated with rehabilitation programs such as Alcoholics Anonymous and they will tell you that a recovering addict continues to struggle with their addiction even after they are clean and often do fall off the wagon. If a person is honestly trying to recover, has asked for the opportunity to continue treatment and is showing an honest effort to reform themselves, this effort must be acknowledged and encouraged, not punished. This is no way to make policy. It reveals a peculiarly American fetish for reductionist technical solutions – quick fixes – to complex social (and medical) problems. For the person dependent on drugs, the slogan, "just say no" has about as much positive effect as telling a person who is clinically depressed to "just cheer up." Drug and alcohol addiction is a much more complicated social and medical issue that should be dealt with compassionately. Moreover, the ADA requires certain accommodations for covered persons.

Consequently, the Union urges the Agency to develop a rule that provides guidance in dealing with an addicted person beyond the first offense and provide job protection while they are recovering. Providing a rule to govern the actions taken past the first offense also puts everyone on a level playing field in dealing with addicted employees. However, one offense and your fired is too harsh. Even the "Three Strikes and Your Out" law passed under President Clinton proposed three offenses for those who commit violent crimes repeatedly before they were dealt serious punishment. A

person with an addiction problem should be provided at least as much consideration as a violent criminal. Therefore, the Union urges the Agency to reconsider the rule to provide additional measures for addicts to rehabilitate themselves.

As the Agency points out, rehabilitated miners are often an improvement to safety and provide a positive role model to others. A rehabilitated miner also assists the mine operator in retaining valuable employees. There is a benefit to all when these miners are provided the support and encouragement they need to rehabilitate themselves while maintaining employment and a productive life.

66.401 Operator actions pending receipt of test results

This proposal would require that a miner or supervisor be removed from a safety-sensitive job while awaiting the outcome of an alcohol or drug test when performed for "reasonable suspicion" or their role in an accident. The proposal would require that no action adversely affecting the miner's or supervisor's pay and benefits be taken while in wait of pending test results.

The Union would support this proposal. If a person is suspected of alcohol or drug abuse, they should be placed out of harm's way to themselves and others. Placing them in alternate work is the best solution while test results are pending for cause-related testing. The Union would agree that the miner's pay and benefits must be protected.

66.402 Substantiating legitimate use of otherwise prohibited substances.

This proposal provides the miner with an opportunity to demonstrate that the use of prohibited substances has been authorized by a physician. It further specifies that the possession of a valid prescription alone is not sufficient proof of legitimate use. Under this proposal, the MRO may conduct a medical interview with the miner, review his/her medical history up to and including contacting the miner's physician.

The Union would question the authority of the MRO to consult with anyone's physician. HIPPA regulations may conflict with this proposal. The Union asks for more information about how this proposal will protect miners' bonafide interest in maximizing the privacy of their medical records.. The proposal indicates that even when the miner has provided proof of a valid prescription, the MRO can still determine that the prescription is not being taken as directed or that unauthorized use has occurred. The miner's primary physician's assurance that the medication has been prescribed, is being used as prescribed and will not interfere with the miner's job performance is all the assurance one should need. The MRO is being put in the position of making a judgment as to whether the miner is under proper care by their physician and should not have that authority. For this reason, the Union would oppose any attempt by an MRO to challenge a miner's prescribed treatment by a physician. If the MRO is to consult with the miner's

physician, he should do so only with the miner's written permission. Failure of the miner to grant this permission shall not constitute a breach of this rule.

66.403 Operator actions after receiving verified test results.

This section specifies the actions mine operators must take upon receiving a positive alcohol or drug-test result. The miner must be immediately removed from performance of safety-sensitive job duties and referred to a substance abuse professional.

As the Union has pointed out throughout its comments, we agree that anyone found to be under the influence of alcohol or drugs must be removed from a job that could put themselves or others in danger. However, this proposal does not protect the miner from retaliation for subsequent offenses. As we have repeated throughout our comments, we believe that alcohol and drug addiction is a serious illness and must be treated as such. A recovering addict must be provided patience and time in overcoming an addiction. Recovery does not happen overnight as this rule suggests. The miner must be provided enough assistance and encouragement to insure they have sufficiently overcome their addition before being placed in a safety-sensitive job, but they should be permitted to continue to work, out of harms way in other job duties until they are reformed, clean and ready to come back to their former job. This provides the miner an opportunity to maintain some self respect and his/her dignity while on the road to recovery. An experienced miner is a valuable asset to the mining community and the operator. He/She should be provided a compassionate means of dealing with a complicated social problem.

Section 66. 404 Evaluation and referral

The proposed rule would require the operators to offer job security to those miners who are first-time offenders provided they follow the SAP treatment recommendations and required return-to-duty procedures. For subsequent offenses, mine operators would have the discretion to specify disciplinary consequences, up to and including termination.

The Union would reiterate its comments on section 66.400 here. Furthermore, allowing the mine operator complete discretion as to what actions are taken if a second offense is detected leaves the door wide open for abuse. The industry is currently experiencing its latest "coal boom." The coal industry was depressed for nearly thirty years starting around 1980 until now. During that time, operators did not hire many young miners and the workforce they had was aging. Most of those experienced, aging miners are now ready for retirement, leaving the industry to compete for what experienced miners are out there looking for work. Most of those who are experienced manage to gain employment with the larger coal operators, where there is more job security. What miners are left, go to work for small operators who struggle to maintain an adequate workforce to operate their mine. If those small operators are left with the

choice of whether they have enough employees on hand to operate their mine, or if a miner is found to be a second offender what do you think the operator will do? Do you think they would choose not to operate the mine for a while until the offending miner is rehabilitated or they find a replacement for him? We think not. When such a situation is presented, that operator is going to choose to produce coal regardless of the circumstances. Consequently, this standard will not be enforced the same at all operations if such decision-making is left to the mine operator. To the extent the purpose of this rule is to insure working miners are not impaired, then the rule must require uniform treatment. Otherwise, there will be unequal application of this rule. Everyone must be required to play by the same rules on all levels. Also, we are concerned about whether appropriate and affordable programs are available for miners needing help. The proposed rule does not require an employert o pay for an SAP or other treatment; we suggest this be changed so miners will be more likely to get help when needed.

66.405 Return-to-duty process

This proposal of the rule specifies that prior to returning to performing safety-sensitive job duties, miners must follow the treatment recommendations of the SAP, be re-evaluated by the SAP, and comply with the testing requirements established by the SAP. The proposed rule points out that although the SAP verifies compliance with the recommended treatment, it is the mine operator who decides whether the miner will return to work performing safety-sensitive job duties.

Once again the rule leaves the door wide open for abuse. The decision as to whether a person returns to "safety-sensitive" job duties must not be left to the mine operator. As pointed out in our comments on 66.404, if a small operator is faced with making a decision that could determine whether his mine operates for the day or not, he is likely going to opt to produce coal. The rule must require the returning miner be placed in alternate work until he has been given adequate time to prove that he/she has successfully completed the recommended treatment; has passed the return-to-work tests and is well on the road to recovery. If an addict is going to "fall off the wagon" it is going to most likely be in the short term after completing the program. The proposed rule subjects the rehabilitated miner to unannounced tests in the first 12-months following his return to work and continuing for a maximum of 24 months. If an addict is going to return to using prohibited substances, that 24 months should be used as a trial period to make sure the miner remains alcohol /drug free. Should the miner test positive during their 24- month recovery period, he should be placed back into rehab and provided alternative work. The rehabilitation of a person addicted to alcohol or drugs does not occur overnight. This rule treats a serious illness as one that can be cured overnight. The addicted miner must be provided sufficient time to recover. Any ADA accommodations must be factored in, too.

66.406 Return-to-duty and follow-up testing.

Return -to-duty testing is a one-time announced test that is required when a miner who tested positive in the past has completed required treatment and is ready to return to a position that involves performing safety-sensitive job duties. Follow-up testing is conducted with a minimum of six unannounced tests in the first 12 months following return to work and continuing for a maximum of 24 months.

As the Union pointed out in comments on 66.405, we feel that 12-24 month follow-up period should be used as a "recovery period" for the miner to make sure he/she has overcome their addition. During the 12 – 24 months the miner should not be placed in a "safety-sensitive" position. They should be provided alternative work and tested during that period to make sure they are well on the road to recovery.

66.500 Recordkeeping requirements.

This proposal specifies that records of alcohol and drug-test would be protected as confidential communication between the mine operator and the miner. The proposal also prohibits sharing such records with others and requires secure storage so the records cannot be accessed by unauthorized individuals.

The Union would agree with this proposal in spirit. However, the proposal fails to provide adequate safeguards. It is important that the miner's privacy be protected. Greater specificity is required. The rule should specifically limit who can have access to records and the operator should face sanction if the miners' confidentiality is breached.

MSHA states in the preamble to this proposed rule the following commitment to developing an understanding of the extent of drug and alcohol use among miners:

> "MSHA, the mining industry, and individual mine operators can all benefit from establishing an accurate quantifiable baseline of alcohol and drug problems, and tracking trends over time that result from the proposed rule. Consequently, the proposed rule would require mine operators to keep records on the number of miners in safety-sensitive job positions that are covered by the rule and results from the various types of tests performed. . . Under the proposal, MSHA would be able to analyze the information, which would add to an understanding of the extent of alcohol and drug abuse among miners and to what degree such use contributes to accidents and injuries." p 52151

We agree that it is important to gain an accurate understanding of the extent of drug and alcohol use among miners. But we raise two concerns. First, many mine operators have substance abuse programs in place now that are very similar to the program in this proposed rule – pre-employment testing, post accident testing, random testing, testing on suspicion, and return to work testing. Many programs have been in place for decades. Doubtless, miner operators already have an abundance of data on such problems and the

extent to which they are associated with accidents and injuries. MSHA is not the first to address this problem. Did MSHA request this information from mine operators prior to drafting this proposed rule. Did MSHA take advantage of these data " . . to analyze the information, which would add to an understanding of the extent of alcohol and drug abuse among miners and to what degree such use contributes to accidents and injuries."? It appears not only that they did not but that they do not recognize this shortcoming as a significant weakness in this proposed rule.

Our second concern is this: MSHA states that information acquired according to this rule would be valuable and made available to MSHA and to "the industry." The industry includes, or should include, the unions that represent miners. If the unions are to fulfill their responsibilities of fairly representing miners for purposes of collective bargaining and for other purposes, it is essential that the union be well informed and, in particular, should be able to obtain the same information as is made available to MSHA and to "the industry." Confidentiality, as stated, of these records is essential. Therefore, for these records to made available to the industry, including unions, the names and any other information that would identify individual miners should be purged prior to their being made available to anybody – MSHA or the industry or unions. If a list with names is made available to "the industry," it could easily become a black list for denying employment to miners.

Additional Concerns

Both as a matter of policy and as a matter of law, the UMWA suggests the proposed rule is ill-advised and should be withdrawn. Insofar as the U.S. Supreme Court has determined that mandatory drug testing programs that require private sector employers to test their employees for drugs implicate the Fourth Amendment protection against illegal "searches," Skinner v. Railway Labor Executives Assoc., 489 U.S. 602, 617 (1989), the UMWA contends this proposed rule, on its face, is unconstitutional. While some drug testing programs have been deemed lawful, that is only when the particular testing programs were reasonable and justified by "compelling governmental interests in public safety or national security," Id. at 620. Here, the Agency has not suggested there exists, much less provided, any objective evidence of a compelling government interest to support drug testing of miners who work for private industry employers operating on private property. Likewise, MSHA has not shown that impaired coal miners in any way jeopardize the public safety. Instead, it simply suggests that drug/alcohol problems in the mining industry reflect what is happening in society, generally. 73 FR 52139.

Even the experience with high-profile accidents is markedly different between the mining industry and the transportation industry (the latter for which testing has been upheld.) Congress mandated drug testing in the transportation industry after the conduct of impaired employees was found to have caused multiple high-fatal accidents. In stark contrast, the only high-profile accidents in the mining industry resulted from operator misconduct and a lax Agency, not impaired employees. As recently as its 2006

legislation, the MINER Act, Congress considered, but decided against adding drug/alcohol testing requirements.

Even if MSHA could show some compelling government interest, such testing still would be balanced against the miners' reasonable expectation of privacy before it could satisfy a Fourth Amendment challenge. See, Harmon v. Thornburgh, 878 F.2d 484, 488 (D.C. Cir. 1989). In any event, this proposed testing program fails the Constitutional standard. The Agency relies on anecdotal reports (as opposed to objective evidence) of improper drug usage, and fails to establish there is any immediate and direct threat to public safety against which the rule would protect. United Teachers of New Orleans v. Orleans Parish School Board, 142 F. 3d 853 (5th Cir. 1998).

Further, the proposed rule is too broad. It intrudes on miners' rights and expectations of privacy. Never before has the government used the bodies of miners as part of its enforcement scheme. The proposed rule also is inconsistent with many collectively bargained programs that are already in place at coal mines. MSHA has offered no evidence that the existing programs do not work well or leave miners at risk. The proposed rule is also too broad insofar as it covers too many miners, instead of only any whose jobs have a direct and immediate relationship to public safety. The Supreme Court's decision in National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) suggests that there must be a "clear, direct nexus . . . between the nature of the employee's duty and the nature of the feared violation" for random drug testing to pass constitutional muster. See, Harmon v. Thornburgh, 878 F.2d at 490. MSHA does not claim that all miners pose a threat to public safety though all who are subject to Part 46 and 48 training would be covered by these testing programs. MSHA must identify which job functions it contends pose a direct threat to public safety, and we must have a chance to comment, before MSHA could advance such a rule. It is improper to rely on the training provisions (which serve a different purpose) to determine which miners hold jobs that arguably could threaten public safety. The proposed rule is also too broad insofar as it requires many kinds of testing. At a minimum, the random testing provisions on virtually all mine employees should be struck as too broad. Transportation Institute v. U.S. Coast Guard, 727 F. Supp. 648 (D.C. D.C. 1989). And failing to limit post-accident testing to those reasonably deemed to be at fault is overbroad. United Teachers of New Orleans v. Orleans Parish School Board, 142 F. 3d 853, 857 (5th Cir. 1998).

MSHA has previously refused to regulate hazards to miners without a substantial body of scientific evidence demonstrating that existing conditions in mines pose a risk to their health. MSHA has stated that it will not regulate unless it can show a significant risk from exposure in mines. The level of scientific information MSHA requires before regulating known toxic hazards to workers is rigorous. Yet, this record contains nothing objective to suggest that the mining industry has any more, or a different kind, of problem with impairment than any other industry; certainly the kind of evidence that MSHA requires for the health hazards we have separately urged it to regulate is absent from this proposed rule. The showing required by MSHA to establish a "compelling governmental need" under the Fourth Amendment must be at least as rigorous as that required by Section 101 of the Mine Act. MSHA has made no

effort to demonstrate a scientifically valid basis for believing that miner impairment is a widespread safety issue in mines.

The proposed post-accident testing program is also unconstitutional because it does not require a reasonable basis to believe the employee to be tested was impaired, or that his conduct may have contributed to the accident, or that the employee otherwise violated the proposed regulation. For such a search without a warrant, more is required to pass Constitutional scrutiny. Moreover, the proposed rule is too broad insofar as it would require testing for <u>every</u> incident involving a reportable injury or illness, not just those that involve a threat to public safety. Because protecting public safety is the only way MSHA can claim a compelling need for a drug testing program, there must be some connection to either that compelling need or a reasonable basis for believing that a miner violated MSHA rules before post-accident testing can occur. Being in the wrong place at the wrong time should not be enough to subject a miner to such testing, especially in the private sector. Finally, not only it would be morally wrong, but there is no basis offered for post-mortem testing of deceased miners – irrespective of whether the family might object, or if testing might conflict with the deceased miner's religious beliefs - unless MSHA would have reasonable grounds to believe that the miner's impairment was related to a violation of Mine Act rules.

MSHA's proposal for treatment is also offensive. First, a single, positive drug test may not reveal a miner has a disease warranting treatment. Second, even if a miner does have a substance abuse problem, that problem likely results from conditions outside the mine and, therefore, is outside MSHA's regulatory jurisdiction. MSHA's only interest is in ensuring that miners are not impaired while performing safety-sensitive mine duties. Further, there is no basis for mandating treatment for substance abuse when neither MSHA nor OSHA mandate treatment for any other work-related health effect. Miners with excessive exposure to coal dust who are at risk of fatal illness get medical surveillance, but are not required to seek treatment. There is no reason to think that a positive drug test places a miner at greater risk of disabling illness than does exposure to coal dust or other toxins. Further, treatment for a positive drug test may conflict with miner privacy and religious freedom. Mandating treatment reaches far beyond any legitimate interest MSHA may have in drug-free/alcohol-free mines.

Second, there is no evidence that recommended treatment will be effective in improving health and safety at mines. In all prior standards, MSHA has demonstrated that its proposed method of compliance will be effective in meeting health and safety goals. For example, MSHA could not require mine operators to purchase and install equipment that is ineffective at reducing the risk posed by a regulated hazard. Likewise, MSHA may not mandate treatment methods for which there is no evidence of effectiveness. Here, MSHA has made no showing that the required compliance will meet its stated health and safety goals. MSHA must also demonstrate that mandatory treatment is economically feasible. Further, the proposed rule contains no requirement that the SAP recommend appropriate treatment or that miners have an opportunity to question whether another treatment would be equally as good. The rule inappropriately allows the mine operator to select the SAP to whom a miner will be referred and then prohibits any

other health care professional from questioning the SAP's recommended treatment. It is improper to prohibit a miner's physician from opining that treatment is not necessary or that another type of treatment is equally or more appropriate.

MSHA should also ensure that an SAP does not have any proprietary or other interest in the treatment programs the SAP recommends. For example, it would be improper for MSHA to prohibit the second-guessing of a recommendation made by the only SAP in town when a miner must attend that SAP's expensive rehabilitation program before he could return to work. Miners also must be able to obtain treatment consistent with their religious beliefs, and not be forced to attend a program that would be incompatible with their beliefs. Miners should be able to select treatment options consistent with their health insurance coverage, if any.

Nothing in the Act mandates treatment of medical conditions. The Act requires that miners who are removed from exposure to mine-related hazards should suffer no loss of pay as a result. This proposed rule is incompatible with these provisions, especially with regard to miners who are prescribed pain medication to treat a work-related injury and are then removed from work because the medication made necessary by their work-related injury effectively removes them from work.

The Administrative Procedure Act requires MSHA publicly to disclose any significant data or analysis on which its proposed rule is based so that interested parties may comment on that data. See Portland Cement Ass'n v. Ruckleshaus, 486 F.2d 375 (D.C. Cir. 1973). MSHA's failure to do so is grounds for invalidating any rule it may promulgate. Here, we have been unable to obtain data on which MSHA relied to support this proposed rule.

Although MSHA claims it is partly relying on existing DOT regulations, it fails to identify upon which of the lengthy regulations it plans to rely; without such a designation, it is impossible to comment about how those rules may/not pertain to the coal mine industry. By failing to identify exactly which provisions it plans to include in its own rule, MSHA has deprived us of the chance to fully comment. We are entitled to more specificity before we can complete our comments on this matter. Moreover, if the DOT regulations would change, there would be no opportunity for this regulated community to influence those changes; it is impossible to comment now about how any such adjustments might affect the mining industry, yet it would be immediately impacted.

This proposed rule contains numerous problems. Now this rulemaking process, and later any related enforcement expenditures, represent a waste of valuable Agency resources. We suggest this effort be scrapped in favor of far more compelling health and safety hazards.