Comments of the
United Steelworkers
on
Alcohol and Drug-Free Mines: Policy, Prohibitions, Testing, Training and Assistance

RIN 1219-AB41

November 10, 2008

On September 8, 2008, MSHA published a proposed rule which would require pre-employment, random, post-accident and other drug and alcohol tests of miners. This is the first, new mandatory health and safety standard MSHA has proposed over the past 8 years, despite the fact that MSHA lacks evidence that drug and alcohol use pose a safety risk at mines. The USW believes the proposal is unconstitutional and regulates social and economic conditions outside MSHA's regulatory jurisdiction. USW also believes, that in its haste to publish this proposal before the end of the Bush Administration, MSHA has failed to adequately explain why the rule is necessary, to include in the rulemaking record scientific evidence to show the existence of a significant risk to the safety and health of miners from drug and alcohol use at mines, and has failed adequately to explain how the rule would work and be enforced, particularly in relationship to drug testing rules of the Department of Transportation. For these and other reasons explained more fully below, USW urges MSHA to withdraw the proposal.

II. MSHA's Random Drug Testing Proposal Is Unconstitutional.

The Supreme Court has made clear that a mandatory program imposed by the Federal government which requires private employers to conduct drug testing among their employees constitutes a search within the meaning of the Fourth Amendment to the U.S. Constitution. *Skinner v. Railway Labor Executives Assoc.*, 489 U.S. 602, 617 (1989). Courts have upheld such warrantless drug testing programs against Fourth Amendment challenges by affected employees only when the programs were justified by "compelling governmental interests in public safety or national security," *id.* at 620, and are reasonable. If the Court agrees that a proposed drug testing program serves compelling government needs, it will balance the government's need against the affected employees reasonable expectation of privacy to determine whether the program comports with the Fourth Amendment. *Harmon v. Thornburgh,* 878 F.2d 484, 488 (D.C. Cir. 1989).

MSHA's proposed random drug testing program fails this constitutional test. MSHA has not identified any immediate and direct threat to public safety which the rule is designed to protect against. The proposed rule is too broad and unnecessary an intrusion on miner's rights. Instead, MSHA should leave in place the existing prohibition on drug or alcohol use in metal and

nonmetal mines. MSHA has no evidence the existing prohibition has failed or leaves miners at risk. It gives effect to MSHA's interest in mine safety while respecting miner's privacy rights and preserving the role of collective bargaining in fashioning workplace drug testing programs.

A. MSHA Has Not Demonstrated A Compelling Need For Random Drug Testing In Metal and Nonmetal Mines.

MSHA has not demonstrated a compelling need for random drug testing in metal and nonmetal mines among all miners in so called safety sensitive jobs for several reasons.

First, courts have upheld government mandated drug testing of private employees only when it was justified by a compelling interest in protecting public safety. See *Harmon*. MSHA may establish a compelling government need for drug testing by demonstrating a direct, immediate threat to public safety posed by impaired miners who are subject to random testing. *Transportation Institute v. Coast Guard*, 727 F.Supp. 648, 657-59 (D.D.C. 1989). Here, MSHA does not suggest that its rule is justified by any need to protect against immediate, direct threats to public safety. To the contrary, MSHA notes that to the extent a drug or alcohol problem exists in mines it mirrors the problem in society generally. 73 FR 52139. MSHA's statutory mandate to improve mine safety does not create a compelling need for it to fix the problems of drug and alcohol abuse in mining communities generally. MSHA cites a general agreement among mine operators that drug testing programs are "desireable." 73 FR 52140. MSHA asserts that drug and alcohol use are known to be incompatible with safe working conditions. 73 FR 52144. It also claims that mining is inherently dangerous and that drug and alcohol use might make it more so. 73 FR 52141. This explanation is not a constitutionally adequate explanation of the compelling mine safety problem MSHA's rule seeks to address.

Second, MSHA's proposed random testing program is too broad because it covers virtually all miners not just those 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. *Harmon v. Thornburgh*, 878 F.2d at 490.

MSHA has failed to narrowly limit the random drug testing program to miners whose jobs pose a direct threat to public safety. MSHA's Part 46 and Part 48 training regulations apply broadly to all individuals working at a coal, metal or nonmetal mine. The requirements for 8 hours of annual refresher training, for example, pertains to all experienced miners, not just those involved in specific jobs (e.g., roof bolter) or assigned to certain tasks (e.g., blasting). MSHA cannot reasonably claim that every miner who falls within this broad group performs tasks affecting public safety, as required by the Fourth Amendment. As the District Court observed when invalidating a similar random drug testing program for private employees on commercial vessels regulated by the Coast Guard:

> The Court has not been shown that the governmental interest [in] randomly testing all crew members for drugs in the interest of safety outweighs the crew members

privacy interests. The regulations providing for random testing, as currently drawn, cannot be sustained under the Fourth Amendment.

Transportation Institute v. Coast Guard, 727 F. Supp. 648, 659 (D.D.C. 1989). USW doubts that MSHA has the authority to regulate the social conditions which contribute to addiction among miners. But even if MSHA has authority to protect miners from the consequences of addiction (in the absence of a direct threat to public safety), the Fourth Amendment requires that it do so carefully. MSHA must identify which job functions truly pose a direct threat to public safety before finalizing the proposals and limit its random drug testing program only to those miners. Otherwise the program violates the constitutional rights of miners. Using the training regulations as a basis for assuming that virtually all miners hold safety sensitive jobs is not adequate.

Finally, USW believes the Mine Act imposes on MSHA an additional burden before it may require all mine operators to implement a broad drug testing program. In past standard setting proceedings, MSHA has refused to regulate hazards to miners absent a substantial body of scientific evidence demonstrating that existing conditions in mines pose a risk to their health. Although it is not clear MSHA is required to do so, *see National Mining Assoc. v. MSHA*, 116 F. 3d 520 (D.C. Cir. 1997), 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 has insisted upon before regulating known toxic hazards to workers is substantially more rigorous than the limited, sometimes irrelevant, anectodal information MSHA relies upon to support the drug testing proposal. USW believes that, at a minimum, 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 miner impairment is a widespread safety issue in mines.

For the 18-year period 1989-2007, more than 1,600 workers died from mining-related fatal injuries.[i] MSHA investigated all of these fatalities. The rulemaking record assembled for this proposed rule includes about a dozen fatality investigation reports from this time period in which alcohol or drugs are mentioned in the report. In only five of the reports (i.e., 0.7 percent of all fatal injuries) the victim's use of alcohol or drugs is described as a likely contributing factor to the fatal incident. A number of other reports indicate that prohibited substances were found during the investigation, for example, marijuana found at the scene[ii] or methamphetamines in the victim's wallet.[iii] In these instances, no associations are made concerning this physical evidence and the fatal injuries. This anecdotal information contained in the agency's fatal investigation reports does not establish that existing conditions pose a risk, and certainly not a significant risk, to miner health.

The data cited by MSHA to demonstrate the nature and extent of the substance abuse problem in the mining industry also is not convincing. The agency relies primarily on the results of the "National Survey on Drug Use and Health" which estimates alcohol and illegal drug use in the civilian, non-institutionalized U.S. population aged 12 years and older. Of the approximate 67,000 respondents, about half were employed and another half of these were male. The reports provide aggregate data on reported substance abuse and addiction, but none is specific enough to

estimate alcohol or substance abuse issues among workers in the mining industry. For example, in "Results from the 2006 National Survey on Drug Use and Health: National Findings" (MSHA Ref. 3) the employment data is simply stratified by Full-time, Part-Time, Unemployed or Other. The report provides no industry-specific data. In "Worker Substance use and Workplace Policies and Programs" (MSHA Ref. 9), for example, the report provides estimates of "past month heavy alcohol use" among full-time workers dividing into 19 industry categories including "Mining." Nothing in the survey question or reported findings, however, imply that this alcohol consumption occurred in the workplace.

B. MSHA's Proposal Gives Too Little Weight to Miner's Expectation of Privacy

If MSHA can show an interest in protecting miners from immediate and direct threats to public safety posed by drug or alcohol impairment in mines – and USW believes MSHA has not yet done so – that interest must be balanced against miners' reasonable expectation of privacy. *Harmon.* Although the Supreme Court has ruled that mine operators have no expectation of privacy in their commercial, mine property, *Donovan v. Dewey*, 452 U.S. 594 (1981), miners clearly have an expectation of privacy against intrusions into their bodily functions. *Harmon* 878 F.2d at 489. The drug testing proposal would represent an unprecedented intrusion on miner privacy. Never before have either MSHA or OSHA shifted the burden of compliance with a health and safety standard onto the bodies of workers and until now medical testing under both statutes has been voluntary, not mandatory. MSHA's proposal ignores miner's right to privacy.

C. MSHA's Existing Rules Better Balance the Government's Interest in Public Safety and Miner's Privacy Rights than Does the Proposal.

MSHA regulations currently prohibit drug or alcohol use by miners in metal and nonmetal mines. These regulations give full effect to the government's interest in protecting the public safety. Under this policy, employers have flexibility to adopt drug testing or other programs carefully tailored to their workplaces. Relying on collective bargaining, employee representatives participate in crafting these policies. No constitutional issues are raised when a private employer chooses to adopt a drug testing program without government mandate. There is no evidence that MSHA's current prohibition on drug or alcohol use at mines has not worked or that it poses a risk to public safety. MSHA's desire to gain greater access to data on the effectiveness of drug testing programs or to promote consistency among programs is not a compelling reason to justify further intrusions into miner's protected privacy interests.

MSHA should retain its current policy without change. The existing rule protects miner's privacy interests. By leaving it to the discretion of the mine operator who must develop policies with the employee's collective bargaining representative, the existing rule ensures there is no governmentally mandated intrusion into employee privacy. Further, the existing rule is more consistent with past MSHA and OSHA policy, which has never imposed a mandatory testing requirement on employees. Finally, the Mine Act expresses a preference that a standard be written in objective terms and state the performance desired. The existing rule does just that. It states unequivocally that drug and alcohol use or impairment on mine property is prohibited.

There is no evidence the existing rules in metal and nonmetal mines leave miners exposed to risks. MSHA concedes that information on the effectiveness of drug-testing and anti-drug education activities is sparse. (73 FR 52140) USW concurs. USW attempted, but found very little empirical data in the published literature which evaluates the impact of random drug testing on occupational injury rates.[iv,v] A report by the National Research Council/Institute of Medicine observes, "the preventive effects of drug-testing programs have never been adequately demonstrated. Although, there are some suggestive data that allude to the deterrent effect of employment drug-testing programs, there is as yet no conclusive scientific evidence from properly controlled studies that employment drug-testing programs widely discourage drug use or encourage rehabilitation."[vi]

III. MSHA's Proposed Post-Accident Testing Program is Unconstitutional.

Under the Fourth Amendment, post - accident testing must be based on reasonable, grounds to suspect that the employee to be tested committed a regulatory violation. *Ford v. Down*, 931 F.2d 1286 (8th Cir. 1991). Violations of employee privacy are not justified for every possible accident, but only *serious* accidents that affect public safety.

MSHA's post-accident testing proposal sweeps far too broadly. First, it requires testing of "all surviving miners involved in any work activity that could have contributed to the accident." 73 FR 52148. The rule does not require a reasonable suspicion that the miner to be tested was impaired or that the conduct which may have contributed to the accident violate MSHA rules. Both are required before warrantless testing of every miner near any accident can be required. Second, post-accident testing sweeps too broadly because it applies to every incident involving a reportable injury or illness. In *Skinner*, the Supreme Court approved post-accident testing for *serious* accidents (which involved the traveling public). The proposal to test everybody nearby when any reportable incident occurs does not distinguish between those incidents which genuinely posed a threat to public safety and those that did not. Since protecting public safety is the only basis on which MSHA could 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. Finally, there is no basis for post-mortem testing of deceased miners over the objection of their families and possibly against the miner's religious beliefs unless MSHA has reasonable grounds to believe that the miner's impairment was related to a violation of Mine Act rules.

IV. The Mine Act Does Not Give MSHA Authority to Regulate Alcohol and Drug Use Off Mine Property.

The Mine Act authorizes MSHA to regulate "unsafe and unhealthful conditions" at mines. Drug or alcohol use which occurs off mine property and which "grows out of economic and social factors which operate primarily outside the workplace," *OCAW v. American Cyanimid*, 741 F.2d 444, 449 (D.C. Cir. 1984), is outside MSHA's regulatory jurisdiction. As the D.C. Circuit observed when it held that OSHA lacked jurisdiction to regulate fetal protection policies, the types of working conditions which OSHA, and presumably MSHA as well, may regulate

> "ecompasses two subfactors: 'surroundings' measures the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity, and their frequency. 'Hazard' takes into account the physical hazards regularly encountered, their frequency, and the severity of injury they can cause. This definition of working conditions is well accepted across a wide range of American industry.

Id., at 448. The Court went on to observe that "Congress conceived of occupational hazards in terms of processes and materials which cause injury or disease by operating directly upon employees as they engage in work or work-related activities. *Id.* at 449. The issue of alcohol and drug use in mining communities is a public health problem usually attributed to social and economic conditions. It is not a mine safety problem. There is no reason to believe the Mine Act authorizes MSHA to regulate social and economic conditions that OSHA lacks authority to regulate.

In metal and nonmetal mines, MSHA already enforces regulations which protect employees from any safety threat posed by working with others who are impaired. This proposed drug testing rule would impermissibly extend MSHA's jurisdiction far beyond the mine by impermissibly regulating miner conduct, not working conditions in the mine. The reasoning of *OCAW v. American Cyanimid* bars MSHA from doing so.

V. MSHA's Proposal To Require Mandatory Treatment of Miner's Who Test Positive Is Improper.

Several provisions of the proposed rule require that a mine operator refer a miner who tests positive for prohibited drugs to a Substance Abuse Professional (SAP) who is to recommend treatment. Treatment recommendations are mandatory because a miner who does not follow them has no right to get his or her job back. Nobody may override an SAP's treatment recommendation, not even the miner's personal physician. These provisions are objectionable for several reasons.

First, MSHA has no compelling interest in mandating treatment after a positive drug test. MSHA's only interest, if any, is ensuring that an impaired miner does not return to safety sensitive duties at the mine. MSHA's proposal presumes that a single, positive drug test indicates a miner has a disease warranting treatment. Such an assumption is unwarranted. Even if the miner does have a substance abuse problem, such a problem results from conditions outside the mine and, therefore, is not within MSHA's regulatory jurisdiction. 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 asbestos 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 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 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 which 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. MSHA has made no such showing.

USW attempted to find evidence on the effectiveness of drug treatment programs. It reviewed analyses prepared by The Cochrane Collaboration. The Cochrane Collaborative is an international not-for-profit organization which assembles, analyzes and disseminates systematic reviews of clinical trials and other healthcare interventions in order to promote evidence-based decision-making. The Cochrane Collaborative has published more than 40 systematic reviews related to alcohol and substance abuse and dependence. Some of their comprehensive reviews are cohort specific (e.g., opiate dependent pregnant women) but none to-date have focused exclusively on workplace-based intervention programs. These reviews have examined Alcoholics Anonymous (AA), other "Twelve Step Facilitation" (TSF) approaches, cognitive-behavioral therapy, motivational interventions, social support, and pharmaceutical interventions.[vii,viii,ix] In all cases, the reviews highlight the complexity of designing effective substance abuse and addiction treatment programs for individual patients. A program which works for some may not work for others. The key U.S. health agency on substance abuse, the Substance Abuse and Mental Health Service Administration (SAMHSA) and its Center for Substance Abuse Treatment (CSAT) emphasizes this fact in their treatment guidelines. CSAT notes: "...it is important to know that no single treatment approach is appropriate for all individuals. Finding the right treatment program involves careful consideration of such things as the setting, length of care, philosophical approach and your or your loved one's needs."[x] CSAT specifically recommends that individuals seeking treatment for substance dependence or abuse problems consider 12 specific issues when selecting a treatment program. CSAT recognizes that many individuals may need to consult with several SAPs before identifying a treatment approach that will have the highest likelihood of succeeding.

These findings suggest that MSHA's proposal is flawed because it presumes that after one visit, an employer selected SAP has adequate information to design an effective treatment program for an affected miner. (Section 66.404) No record evidence supports this key assumption.

The proposed rule contains no requirement that the SAP recommend appropriate treatment or that miner's have an opportunity to question whether another treatment would be equally as good. Health care professionals can reasonably disagree about appropriate treatment. The proposed 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 treatment recommendation. It is improper to prohibit a miner's physician from opining that treatment is not necessary or that another type of treatment is appropriate. MSHA should also ensure that an SAP does not have any proprietary or other interest in the treatment programs the SAP recommends. It would be entirely improper for MSHA to prohibit second-guessing the

recommendation of the only SAP in town that a miner must attend that SAP's expensive rehab program before being able to resume work at the mine. And, miners must be able to obtain treatment consistent with their religious belief and not be forced to attend a program not compatible with those beliefs. Finally, miners should be able to select treatment options which are affordable and consistent with their health insurance coverage, if any.

MSHA must also demonstrate that mandatory treatment is economically feasible. MSHA's assessment of the costs of compliance with the proposed rule is incomplete and unrealistically low.

The difficulties of crafting a treatment program compatible with miner privacy rights and religious freedoms, available in the local community and affordable to the average miner highlights how incompatible the proposed drug testing rule is with the structure and purpose of the Mine Act. The Act requires that mine operators bear compliance burdens. 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. The drug testing rule is obviously incompatible with these provisions. This is particularly true in the case of 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 is impairing.

VI. MSHA Lacks Adequate Evidence To Support the Proposal

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. USW has been unable to obtain data on which MSHA relied to support its proposed rule. Here are just a few examples:

MSHA states "many communities hard-hit by drugs are those where mining is the main industry." [73 *Fed Reg* 52139] This suggests that MSHA had access to and analyzed data at the county-level or zip code-level in mining communities. The SAMSHA data cited by MSHA, however, is only classified by State or region (i.e., Northeast, Midwest, South and West), and these are the only SAMSHA reports contained in MSHA's docket. There are no data or analyses in MSHA's docket to support its claim that mining is the main industry in communities "hard-hit by drugs." Besides, data showing that a mining community has a serious problem with drugs or alcohol does not establish that miners are exposed to a hazard while on-the-job.

MSHA refers to 270 citations issued since 1978 for violations of the 30 CFR 56.20001 and 57.20001 (prohibition against intoxicating beverages and narcotics on MNM mine property.) [73 *Fed Reg* 52138] The information related to these 270 citations consists of an uninformative three-column spreadsheet showing a year, standard violated and violation number. There is no information on the types of mines, the States or MSHA districts where these violations occurred, let alone any analysis on how this data demonstrates the prevalence of substance-abuse at mining operations, or how the proposed rule would address the alleged problem. The data fails to offer any information on the circumstances of the violations, such as whether they were identified

during regular inspections or employee complaints, whether the citation was a repeat violation, and any procedures implemented by the mine operator to demonstrate abatement. Since this seems to be the only actual evidence of a health and safety problem at mines, MSHA's failure to include the data on which its three column spreadsheet was based is a fatal procedural flaw of this rulemaking.

MSHA states "an analysis of fatal accidents from 1975 to 2007 revealed that 24 of 978 reported deaths involved alcohol or drugs." There are no records in MSHA's rulemaking docket which represents an analysis of "978 reported deaths." When USW reviewed the record on September 30, 2009, it contained 17 not 24 individual fatality investigation reports for the period September 1989 through July 2006. Moreover, the number of fatal mining injuries for the period 1975-2007 totals more than 4,400 making the reference to "978 reported deaths" more perplexing.

MSHA also states that it examined records for "593,047 non-fatal accidents" and identified "56 possibly involving alcohol or drugs." [73 *Fed. Reg.* 52153]
When USW reviewed the record on September 30, 2009, we could not find this data, or any assessment or written description of it.

MSHA mentions the Drug-Free Workplace grant program and the Department of Labor's Working Partners program [73 *Fed. Reg.* 52137] as evidence to support its proposal, but there is no significant data or analysis in the rulemaking docket to describe how these programs relate to MSHA's proposal. There are no records in the rulemaking docket showing that a single mine operator applied for a Drug-Free Workplace grants in order to address a substance abuse problem at their mine. More remarkable, the Department's Working Partners program has developed nine industry-specific factsheets (e.g., high-tech industry, health care industry) but it does not have one for the mining industry. If the Department of Labor and MSHA actually had evidence demonstrating a unique substance abuse problem among mine workers, it would have developed a mining industry factsheet.

VII. Other Objections to the Proposed Rule.

A. MSHA Has Not Adequately Explained the Relationship Between Its Proposal and DOT's Rules

MSHA's proposal requires mine operators to follow DOT's drug testing regulations with minor exceptions. 73 *Fed. Reg.* 52146. Unfortunately, because MSHA's proposal was published at the last minute, in a rush to get it out the door before the end of the Bush Administration, the Agency has not adequately explained how MSHA's rules would interrelate with DOT's. In other parts of the preamble, MSHA implies that certain provisions of DOT's part 40 are not part of the MSHA proposed rule. MSHA states, for example, "it does not propose to monitor or review the performance of service agents, including laboratories." [73 *Fed. Reg.* 52146] USW believes MSHA must provide adequate notice of which parts of the DOT rules apply under the Mine Act, how MSHA intends to enforce DOT's requirements, and what MSHA intends to do if DOT changes its rules.

For example, in Section 66.1 (Purpose), MSHA proposes that it will view an existing alcohol- and drug-testing program which is place that is at least as protective as the MSHA rule as compliance with the proposed rule. This section contradicts, however, Section 66.300 of the proposal which explicitly requires mine operator to "follow the U.S. Department of Transportation's (DOT) requirements found in 49 CFR part 40." There are numerous examples in which key definitions in MSHA's proposed rule are inconsistent with the DOT's part 40 definitions. The regulatory text as proposed provides multiple and conflicting definitions for key terms, for example:

Under the MSHA proposal, a "service agent" is "any person or entity possessing the required qualifications and/or certifications, other than an employee of the mine operator, who provides services specified under this part to mine operators in connection with MSHA alcohol- and drug-testing requirements, including but not limited to collectors, laboratories, MROs, Substance Abuse Professionals, or BATs." DOT uses a different definition. Which applies?

DOT rules contain specific qualifications for substance abuse professionals. Must a mine operator verify the credential of the SAP it uses to comply with MSHA's proposal. If not, will MSHA cite the mine operator if the SAP lacks appropriate credentials? How will MSHA check SAP credentials? Is verifying the credentials of an SAP a good use of the agency's limited resources?

B. MSHA's Proposal Improperly Allows Non-medical Personnel to Make Medical Decisions

Section 66.307 of the proposal requires a mine operator to conduct a drug or alcohol test when the operator has reasonable suspicion to believe that the miner has misused a prohibited substance. Reasonable suspicion must be based observations concerning the miner's appearance, behavior, speech or body odor. The observations must be made by a "trained" supervisor.

Many medical conditions mimic intoxication by drugs or alcohol. Among them are apoplectic stroke, heat stroke, hypoglycemic attack, insulin shock, seizure disorders, transient ischemic attack, adverse side effects of prescribed drugs and poisoning by workplace chemicals. Many of these conditions are life-threatening. Yet the MSHA proposal requires the supervisor to send a miner who appears to be impaired for a drug and alcohol test, rather than for a medical evaluation. Diagnoses should be made by medical professionals, not by supervisors and certainly not by government regulation.

This aspect of the proposal could prove deadly. The USW is aware of one case where a foundry worker who appeared intoxicated was sent by a supervisor to the personnel office for a drug and alcohol test. While he was waiting, an emergency medical technician stopped by the office for an unrelated reason. He quickly realized that the worker was suffering from heat stroke, and would die without immediate medical attention. The worker lived, but only because the EMT happened to be in the area.

Of course, the required observations must be made by a supervisor "who is trained in detecting the signs and symptoms of the misuse of alcohol and/or drugs..." However, it is laughable to think that such training can equip a supervisor to engage in differential diagnosis. That takes four years of medical school and several years of residency. Steve Narhi, a certified EMT and member of USW Local Union 4974, testified in the October 28 Minnesota hearings that EMTs need extensive training to make a proper referral, let alone a diagnosis:

> "I have my serious doubts that you are going to be able to train a supervisor in a short period of time to make an educated guess...as to whether this person has been drinking or if they have a serious medical problem." (TR 10/28/08 pg. 155)

In the words of Ron Lovell of USW Local Union 4950:

> "But when you look at reasonable suspicion testing, I mean there are medical personnel, highly trained out there, police officers, EMTs, and even they would have difficulty determining someone's specific problem when they're looking at them at a scene of an accident or whatever. Is this person having an insulin reaction? Are they diabetic? Are they under the influence of drugs, narcotics? And these are people that are highly trained. They're not getting a two-hour training period subsequently followed by one hour annual..." (TR 10/28/08 pg. 145-6)

MSHA must not permit – much less require – non-medical personnel to make medical decisions.

C. MSHA Should Not Second Guess Miner's Prescriptions.

Under the rule an employer or his agent (Medical Review Officer) can second guess whether an employee who takes prescription drugs is nevertheless considered impaired because the prescription is inappropriate. Employer designated MROs should not be allowed to invade an employee's medical privacy and second-guess the treatment decisions of the employee's physician. Miners may be forced to reveal private medical information to MROs to satisfy their questioning. This is too great an intrusion on miner privacy rights.

VIII. Conclusion.

Miners themselves have the most to gain from a new protective standard, and the most to lose from one which is useless or harmful. At the MSHA hearings on October 14 and 28, miners delivered their own verdict on the proposal:

> "Personally I find it to be substandard conditions, fatigue, equipment not being maintained properly, corporate procedures or training that turns out to be a root cause. It has never been impaired employees." John Tasson, USW Safety Representative, Local Union 4974 (TR 10/28/08 pg. 151)

"The accidents that we have in our plants aren't because of drugs or alcohol. They're because there are hazards there." Mike Woods, President, USW Local Union 1938 (TR 10/28/08 pg. 159)

Miners and their representatives support regulations which improve their safety. They do not support this proposal. In fact, no working miner or miner's representative spoke in its favor. The Department of Labor's proposed drug and alcohol regulation would divert resources from serious safety and health issues. It is not supported by any meaningful evidence in the record. It would impermissibly expand MSHA's reach outside the workplace. It would damage drug and alcohol programs already in place. It is unconstitutional. It should be withdrawn by the Agency.

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[i] Mine Safety and Health Administration. Mining Fatality Data 1900-2006. Available at: http://www.msha.gov/stats/charts/chartshome.htm

[ii] Mine ID: 15-17373, Cody #1 Mine, KY (June 13, 2003)

[iii] Mine ID: 34-00410, Bellco Materials, OK (March 24, 2004)

[iv] Larson SL, Eyerman J, Foster MS, Gfroerer JC. Worker Substance Use and Workplace Policies and Programs. DHHS Pub No. SMA 07-4273, June 2007.

[v] Kraus JF. The effects of certain drug-testing programs on injury reduction in the workplace: an evidence-based review. Intl J Occup Environ Health. 2001; 7(2):101-108.

[vi] Normand J, Lempert RO, O'Brien CP. Under the Influence?: Drugs and the American Workforce. Washington DC: National Academy Press, 1994.

[vii] Ferri MMF, Amato L, Davoli M. Alcoholics Anonymous and other 12-step programmes for alcohol dependence (Review). Cochrane Database of Systematic Reviews 2006, Issue 3.

[viii] Denis C, Lavie E, Fatseas M, Auriacombe M. Psychotherapeutic interventions for cannabis abuse and/or dependence in outpatient settings. Cochrane Database of Systematic Reviews 2008, Issue 3.

[ix] Mayet S, Farrell M, Ferri MMF, Amato L, Davoli M. Psychosocial treatment for opiate abuse and dependence. Cochrane Database of Systematic Reviews 2004, Issue 4.

[x] HHS, SAMSHA, Center for Substance Abuse Treatment. "Guide to Finding Effective Alcohol and Drug Addiction Treatment," available at: http://csat.samhsa.gov/faqs.aspx

From: Randy Rabinowitz [mailto:randy@rsrabinowitz.net]
Sent: Monday, November 10, 2008 10:57 AM
To: zzMSHA-Standards - Comments to Fed Reg Group
Cc: 'Wright, Mike'
Subject: RIN 1219-AB41

Attached for filing are the comments of the United Steelworkers in response to MSHA's proposed rule on Alcohol and Drug-Free Mines.

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