ALABAMA COAL ASSOCIATION

November 10, 2008

The Honorable Richard E. Stickler
Acting Assistant Secretary of Labor
Mine Safety and Health Administration
1100 Wilson Blvd., 21st Floor
Arlington, Virginia 22209-3939

RE: RIN 1219-AB41
Proposed regulations regarding Alcohol and Drug Free Mines

Dear Mr. Assistant Secretary:

On behalf of the Alabama Coal Association, please allow me to commend MSHA's efforts to assist coal mine operators with one of the most serious safety problems plaguing our industry: the use of drugs that inhibit a miner's ability to perform safe and effective work. As your agency has found through investigations and hearings in our State and throughout the nation, the lives and safety of miners are being compromised by the use of impairing drugs and alcohol in the workplace. Many operators have taken steps to abate this danger, and the members of this Association believe that the safety of all the miners and the interests of the industry will be served by setting minimum standards for the entire industry in this regard.

Our Association applauds MSHA's efforts to provide coal operators with the tools to abate this danger. For the most part, the proposed MSHA regulations move toward the goal of making mines safer places. Unfortunately, as written, the proposed Regulations could serve actually to decrease the level of safety that some of the miners in the industry have come to expect. With a few revisions, however, the proposed regulations could be turned around to effectively further the goals of the industry, government and ultimately the miners and their families. We urge MSHA to seriously consider and adopt the amendments we propose. In this letter we address a few major policy issues. Attached to and submitted with this letter as Exhibit A is a section-by-section analysis that identifies and addresses drafting ambiguities and errors as well as other policy issues of concern to our members.

THE REGULATIONS PROMOTE UNSAFE PRACTICES.

The Alabama Coal Association is primarily concerned that the proposed regulation would allow drug and alcohol abusers to manipulate the testing and rehabilitation system to remain employed in safety sensitive positions even after the employer gives fair notice that work-affecting drug and alcohol abuse is prohibited, and even after the employee has violated criminal laws.

Section 66.400 mandates that an operator must continue to employ a miner who tests positive for drugs or alcohol in the workplace. This mandate applies regardless of the kind of testing that reveals the illicit drug or alcohol use. That means the employee must be retained even if the employee tests positive in a round of random testing, or if the employee has been observed drinking whiskey on the way

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to work (reasonable suspicion testing), or even if the employee's drug use was discovered after an accident that was fatal to another employee (post-accident testing). **We are not aware of any other federal law or regulation that requires an employer to employ a person who knowingly violated the employer's legitimate policies and the criminal laws after the employee receives notice of the rules.**

Moreover, Section 66.204(b) is written in an ambiguous manner that may allow a clever employee to avoid being fired even after repeated violations. That section provides that miners who "voluntarily admit to the illegitimate and/or inappropriate use of prohibited substances *prior to being tested* and seek assistance shall not be considered as having violated the mine operator's policy . . . ." (emphasis added). This allows a drug-using miner to avoid violating the drug policy by admitting illicit drug use *after* he has been identified or selected for testing, and *after* he has been notified to report to the testing location, but *before* the test is actually administered. This loophole turns what has been described as a 'two-strike" policy, into a policy allowing an indefinite number of strikes as long as the employee yells "you got me" before urinating.

The phenomenon of employees continuing to use drugs after warning and even knowing that testing is imminent is not a phantom concern, but one which operators face regularly. Our members report such scenarios as an employee shaving his head before reaching the hair-testing site, and other employees suddenly becoming "ill" in the parking lot and not reporting to work upon recognizing the testing agency's vehicle on premises.

We respectfully submit that MSHA should not allow its regulations to be used to hide illicit drug and alcohol use and to protect those who are deliberately attempting to beat the system.

On the other hand, the Alabama Coal Association agrees with MSHA that legitimate and voluntary self-referral to treatment for drug and alcohol dependence should not be met with punishment. Furthermore, consistent with MSHA's over-arching policy of promoting safety by voluntary disclosure of unsafe conditions and voluntary remediation of remedial action, employees should be encouraged to report their own unsafe conditions without fear of reprisal.

To balance these concerns, therefore, the Alabama Coal Association urges MSHA to revise Section 66.400 to prohibit an employer from firing an employee if he or she has voluntarily reported a drug or alcohol dependency and asks for assistance before being identified or selected for testing, but to *allow* the employer to take adverse job action if the employee fails to disclose the unsafe condition and is discovered through the testing process. The Association further requests MSHA to close the loophole of Section 66.204(b) to prohibit repeat "you got me" escapes by changing it to read: "prior to being identified or selected for testing by the employer."

Many of our members have "zero-tolerance" or "one-strike" drug and alcohol policies that allow miners to self-identify their drug and alcohol dependence and receive assistance without fear of adverse employment action, but suffer adverse job action if they fail to disclose voluntarily before testing. Other policies allow the violator one reprieve after testing positive on a random test, but not after reasonable suspicion or post-accident testing. Still other policies allow one round of rehabilitation and re-employment after any positive test, as the current regulations mandate. Employers should be allowed to establish, and subsequently refine, a policy that works under the particular circumstances of the mine. We respectfully submit that MSHA should set minimum standards for drug testing, but should not require an operator to continue to employ a person whom the operator knows has deliberately disregarded the criminal laws and the employer's work rules.

THE REGULATIONS DO NOT PROVIDE ANY GUIDANCE OR ALLOW ANY DISCRETION WITH RESPECT TO PRESCRIPTION DRUGS.

The proposed regulations are dangerously ambiguous with respect to the use of prescription drugs that may affect an employee's ability to perform job functions safely and effectively. The proposed regulations clearly recognize that certain drugs, such as opiates, benzodiazepines, synthetic opiods, and other drugs which *may* be obtained by prescription can affect a miner's ability to work safely; otherwise, why would those drugs even be listed in the required testing panel (Section 66.3, "Prohibited Substances")? The preamble to the proposed regulations mentions that, "[e]ven prescription medications may affect a miner's perception and reaction time." 73 Fed. Reg. 52137.

Unfortunately, the regulations go on to take an unwarranted and unsubstantiated logical leap to the conclusion that a drug prescription alone signifies that a miner is able safely to perform job functions while using the otherwise-prohibited substance. Section 66.101(2) equates a "valid prescription" to a negative drug test. Thus, the regulations equate a prescription with a determination the employee can safely and productively work in a coal mine. A prescription, however, is not the equivalent of a fitness-for-duty certification. A prescription merely signifies that a physician believes the miner to need the medication as treatment; it says absolutely nothing about the ability of the miner to perform safely.

After declaring by implication that any substance used consistently with a "valid prescription" is not a prohibited substance, the regulations themselves do not provide any guidance to mine operators and do not explicitly authorize an employer to use discretion in handling prescription drug use that affects the miner's ability to work safely.

The preamble to the regulations, however, provides that "whether the use of a given substance is compatible with the performance of safety-sensitive job duties . . . is a determination that is best made by the miner's physician." The Alabama Coal Association respectfully submits that statement is incorrect and not supported by any evidence. Only a person who is indeed familiar with the nature of the safety sensitive duties in question could possibly make an informed and reliable determination whether a miner using a particular substance is capable. There has been no evidence presented to MSHA, and indeed no finding, that the average miner's physician is qualified to make that safety-based determination. Even under neutral circumstances, a miner's physician could rarely be expected to be sufficiently informed of the job functions and safety-sensitive environment in a coal mine in order to assess the risk of a prescription drug's detrimental effects on safe performance.

But we do not perceive even neutral circumstances. Our members perceive a problem with over-prescription of drugs which would otherwise be "prohibited substances" within the meaning of Section 66.3. In the center of our members' coal mining geographic region, this perception is backed up by facts. Walker County's Coroner reported that deaths from overdoses of prescription painkillers has recently increased from one or two a month to three or four a week. (See Exhibit "B" – Elane Jones, *Overdoses Leave Officials Fuming*, Daily Mountain Eagle, Feb. 26, 2008) The physicians prescribing the drugs to these fatal overdosers are some of the same physicians who are prescribing otherwise prohibited substances to our members' employees. MSHA should not require an operator to blindly accept a prescription from a physician who may have considered neither the employee's health nor the safety ramifications of scores of other affected co-workers.

The regulations could be interpreted to mean that the mine operator is required to abdicate its authority to ensure workplace safety by blindly and unquestioningly accepting the opinion of the miner's prescribing physician as to whether the miner can safely perform safety-sensitive job functions.

The "valid prescription" rule also fails to take into account that certain drugs, when used in accordance with other valid prescription drugs, can be combined into "cocktails" which can be at best significantly impairing, and at worst, immediately fatal. The regulations could be interpreted as requiring the operator to continue to employ a miner who endangers others by taking a cocktail of medications that were obtained from different physicians by "valid prescription."

Section 66.402 as interpreted in the preamble is inconsistent with Section III(j) of the National Bituminous Coal Wage Agreement, which allows an employer to challenge an employee's ability safely to perform the duties of the job, and allows the determination to be made by a panel of three physicians appointed by the operator, the miner and jointly by both. Section 66.402 is also inconsistent with the Americans With Disabilities Act, which allows the employer to require that an individual not pose a direct threat to the health or safety of himself or other individuals. 29 U.S.C. § 12113; 29 CFR § 1630.2(r). Under the ADA, the determination must *not* be delegated to the miner's physician alone, but must be based on the employer's individualized assessment of the individual's present ability to safely perform the essential functions of the job, including such factors as the duration of the risk, the nature and severity of potential harm and the imminence of harm.

For all these reasons, we propose that MSHA clarify that an employer is granted authority to prohibit a miner from performing in a safety-sensitive job when the employer reasonably believes that the miner is not able to safely and effectively perform the functions of the job because of the presence of alcohol or any drug, regardless of whether the employee has a valid prescription for a drug.

THE PRESCRIBED METHOD OF DRUG TESTING IS TOO RESTRICTIVE.

The proposed regulations require that operators follow the Department of Transportation ("DOT") requirements for drug testing. While this is a convenient and expeditious method of incorporating detailed procedural and technical requirements into regulations which do not have their own, it is ambiguous and might be read to mandate urine testing exclusively and to exclude more technologically advanced, sound and reliable drug testing such as hair testing. Some of our members have successfully implemented and maintained drug testing programs using hair and other testing methods that have been developed and proven since the DOT regulations were implemented. The Alabama Coal Association submits that its members should not be required to reduce the rigorousness or effectiveness of their testing programs by "downgrading" to older and less effective technology. We propose that MSHA revise Section 66.300(b) to read as follows: "Mine operators must use the methods of specimen collection, handling and testing required by the Department of Transportation and found in 49 CFR Part 40, in which references to 'DOT' shall be read as 'MSHA' with the following exceptions: the split sample method of collection shall be used, and use of 'bifurcated' alcohol level for testing is excluded. In the alternative, mine operators may use any method of specimen collection, handling and testing generally accepted in the industry."

DRAFTING ERRORS, AMBIGUITIES AND INCONSISTENCIES MAKE TESTING PROGRAMS TOO COSTLY AND LESS EFFECTIVE.

The members of the Alabama Coal Association are eager to abide by the eventual MSHA regulations concerning drug and alcohol testing, but are reluctant to commit support to those rules without knowing that they may be clearly, consistently and predictably interpreted. In other words, ACA members desire to abide by the rules as long as everyone knows what the rules are. Unfortunately, there are a number of drafting issues in the proposed regulations that prevent a mine operator from knowing how to

tailor its actions to conform with the rules. We have set forth a number of those ambiguities and inconsistencies (as well as a few perceived inconsistencies with other laws and obligations) on the chart enclosed as Exhibit A. We respectfully request that MSHA give attention to these details because the failure to remove those problems will cause unintentional violation of the rules. Ambiguity and lack of clarity will also cause unnecessary conflict and strife between operators on one hand, and employees and their representatives on the other hand. The same drafting issues will lead to unnecessary enforcement disputes between MSHA's agents and mine operators. We therefore urge the Administration to clear up these problems before promulgating the final rule.

Sincerely,

David Roberson

David Roberson
President

EXHIBIT A

COMMENTS ON DRAFTING ISSUES WITH PROPOSED REGULATIONS

30 CFR SUBCHAPTER N—UNIFORM MINE SAFETY REGULATIONSPART 66—Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training and Assistance

Proposed Regulation	*Comments / Issues*
Subpart A — General	
§ 66.1 Purpose. This part 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 and their supervisors. Alcohol- and drug-free mine programs established prior to the effective date of this rule that include consistent policies, and alcohol- and drug-testing programs, and provide at least the same level of protection as these requirements, are in compliance with this standard.	
§ 66.2 Applicability.	
(a) The possession or misuse of prohibited substances, except when used according to a valid prescription, is prohibited for all persons on and around mine property.	
(b) The alcohol- and drug-testing provisions in subpart D apply only to those miners who perform safety-sensitive job duties. Management and administrative personnel who supervise the performance of safety-sensitive job duties are also considered to hold safety-sensitive positions; however, general administrative and clerical personnel are not. Such determinations shall be made consistent with the requirements of 30 CFR parts 46 and 48 for who must take comprehensive miner training.	This provision is not clear. See Footnote [1]

[1] For non-underground miners, the term miner means: "(i) Any person, including any operator or supervisor, who works at a mine and who is engaged in mining operations. This definition includes independent contractors and employees of independent contractors who are engaged in mining operations; and (ii) Any construction worker who is exposed to hazards of mining operations. (2) The definition of "miner" does not include scientific workers; delivery workers; customers (including commercial over-the-road truck drivers); vendors; or visitors. This definition also does not include maintenance or service workers who do not work at a mine site for frequent or extended periods. 30 CFR § 46.2(g)(1)."

For underground miners, the term miner is defined, for those who require comprehensive training, as opposed to mere hazard training, as follows: "any person working in an underground mine and who is engaged in the extraction and production process, or engaged in shaft or slope construction, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or a maintenance or

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(c) Mine operators must inform all miners and contractors who perform work on their mine property of the requirements under this rule.	
§ 66.3 Definitions. As used in this part:	
Adulterated specimen. A specimen that contains a substance that is not expected to be present in human urine, or contains a substance expected to be present but is at a concentration so high that it is not consistent with human urine.	
Alcohol. The intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl and isopropyl alcohol.	
Alcohol concentration. The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test under this part. This provides an indication of the blood alcohol concentration (BAC) level which is equated with impairment levels.	
Breath Alcohol Technician (BAT). A person who instructs and assists miners in the alcohol-testing process and operates an evidential breath testing device. A BAT can be an employee of the mine operator. A BAT must have received a qualification training that includes training in alcohol-testing procedures and the operation of alcohol testing devices.	
Confirmed drug test. A confirmation test result received by a Medical Review Officer (MRO) from a laboratory.	
Cut-off levels. The cut-off concentration of drug	

service worker contracted by the operator to work at the mine for frequent or extended periods. This definition shall include the operator if the operator works underground on a continuing, even if irregular basis. Short-term, specialized contract workers, such as drillers and blasters, who are engaged in the extraction and production process or engaged in shaft or slope construction and who have received training under §48.6 (Experienced miner training) of this subpart A may, in lieu of subsequent training under that section for each new employment, receive training under §48.11 (Hazard training) of this subpart A." Section 48.2(a)(2) contains the definition of "miner" for the purpose of requiring hazard training, which does not appear to constitute "comprehensive training" within the meaning of § 66.2(b), as follows: "any person working in an underground mine, including any delivery, office, or scientific worker or occasional, short-term maintenance or service worker contracted by the operator, and any student engaged in academic projects involving his or her extended presence at the mine." Therefore, it appears that testing is not required for those defined in § 48.2(a)(2). Since § 66.2(b) specifically excludes "general administrative and clerical personnel," the only practical effect of the incorporation of § 48.2 is to also exclude "scientific workers" and students.

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metabolite that is used for each drug class to call a urine specimen negative or positive. Based on the cut-off concentration used for each different drug class, a negative specimen is any specimen that contains no drug or whose apparent concentration of drug or drug metabolite is less than the cut-off concentration used for that drug or drug class.	
Drug-free workplace program. A program that prohibits the possession or misuse of prohibited substances while working and includes five elements (written policy, education, training, testing, and referrals for assistance) designed to prevent impairing effects that can compromise workplace safety. This term is used interchangeably with an "alcohol- and drug-free workplace program" and "drug free mine program."	
Employee Assistance Program (EAP). A worksite-focused program designed to assist in the identification and resolution of problems associated with personal problems, such as alcohol and/or drug abuse.	
Follow-up testing. A minimum of six unannounced tests performed in the first 12 months on any miner who returns to safety-sensitive job duties after violating the alcohol and drug-free workplace policy.	
Initial drug test. The test used to differentiate a negative specimen from one that requires further testing for drugs or drug metabolites.	
Laboratory. A U.S. laboratory certified by the U. S. Department of Health and Human Services (HHS), Substance Abuse and Mental Health Services Administration (SAMHSA) as meeting the minimum standards of subpart C of the HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs and which is also certified by the College of American Pathologists (CAP) to perform Forensic Urine Drug Testing (FUDT).	
Medical Review Officer (MRO). A licensed physician who is responsible for receiving and reviewing laboratory results generated by a mine operator's drug-testing program and evaluating medical explanations for certain drug test results. An MRO can be an employee of the mine operator or a service agent.	
Persons performing safety-sensitive job duties. Those who perform job activities that are inherently	

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dangerous on a regular and/or recurring basis and are required under 30 CFR parts 46 and 48 to take comprehensive miner training. Management and administrative personnel who supervise persons performing safety-sensitive job duties are also considered to perform safety-sensitive job duties. Therefore, throughout the rest of this part, the term "miner" is used to include such supervisors. General administrative and clerical personnel are not considered to perform safety-sensitive job duties.	
Post-accident testing. Testing for the misuse of alcohol or drugs that is triggered either by an occupational injury or an accident that is done to help determine whether alcohol and/or drugs were a factor in the injury or accident.	
Pre-employment testing. For alcohol: Testing of applicants after a conditional offer of employment has been made but prior to the first performance of safety-sensitive job duties. For drugs: Testing of applicants prior to the first performance of safety-sensitive job duties, irrespective of whether a conditional offer of employment has been made.	This provision could lead an operator to misunderstand its obligations under the Americans with Disabilities Act ("ADA"). This provision requires testing "irrespective of whether a conditional offer of employment has been made." The ADA, on the other hand, explicitly prohibits an employer from requiring drug testing prior to extending a conditional offer of employment. Thus, to comply with the ADA and this regulation, an employer *must* require testing of an applicant before the person performs a safety sensitive position, and therefore the employer *must* make a conditional offer to an applicant before allowing the employee, for example, to demonstrate how the employee can step in and perform a job. This makes it impossible for an employer to allow several applicants to compete for a position based upon their relative performance of a particular duty. Instead, the operator must make a selection based on factors other than demonstrated competence lest it be required to make a Hobson's choice between compliance with the ADA and this regulation. This regulation should be amended to allow an operator to require an applicant to demonstrate competence prior to making a conditional offer of employment.
Prohibited substances. Alcohol, and the following controlled substances, except when used according to a valid prescription: amphetamines (including methamphetamines), barbiturates, benzodiazepines (e.g., Valium, Librium, Xanax), Cannibinoids (marijuana/THC),cocaine, methadone, opiates (e.g., heroin, opium, codeine, morphine), phencyclidine (PCP), propoxyphene (e.g.,Darvon), synthetic/semi-synthetic opioids (i.e.,hydrocodone, hydromorphone,	This provision should be revised to make it clear that employers are allowed to define prohibited substances to include prescription drugs (or over-the –counter drugs such as diphenhydramine) if the employer reasonably believes that the medication would impair the miner and cause the miner to be a direct threat to the safety and health of himself or other miners. *See also* note to Section 66.402.

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oxymorphone, oxycodone) and any other controlled substances designated by the Secretary.	
Random testing. Unannounced testing of miners assigned to safety-sensitive job duties for use of alcohol or drugs selected through a scientifically arbitrary process without regard to personal identifying information.	
Reasonable suspicion testing. Testing for alcohol or drugs conducted when a supervisor documents observable signs and symptoms that lead the supervisor to suspect alcohol or drug use in violation of the alcohol- and drug-free workplace policy.	
Return-to-duty testing. Testing performed on any miner before resuming safety-sensitive job duties after having failed to test negative for alcohol or drugs, or following admission of alcohol or drug use and after satisfactory completion of education and/or treatment prescribed by a Substance Abuse Professional (SAP).	The term "admission of alcohol and drug use" is ambiguous and is inconsistent with other provisions of the regulations. See Sections 66.204(a) and (b).
Safety-sensitive job duties. Any type of work activity where a momentary lapse of critical concentration could result in an accident, injury, or death.	
Service agent. 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.	
Split specimen. In drug-testing, a part of the urine specimen that is sent to the laboratory but not analyzed. Rather, it is retained unopened so that it can be sent to a second laboratory in the event that a miner requests that it be tested because he or she disputes the results reported by the first laboratory and verified by the MRO.	
Substance Abuse Professional (SAP). A specially trained and qualified person who evaluates miners who have violated a mine operator's alcohol- and drug-free workplace policy and makes recommendations concerning education, treatment, follow-up testing, and aftercare.	
Substituted specimen. A specimen with creatinine and specific gravity values that are so diminished that they are not consistent with human urine.	

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Verified test. A drug-test result or validity testing result from a laboratory that has undergone review and final determination by an MRO.	
Subpart B—Prohibitions	
§ 66.100 Prohibited substances.	
(a) Prohibited substances, except when conditions of paragraph (b) are met, shall not be permitted or used on or around mine property.	
(b) Miners who possess or have used a prohibited substance will not be in violation of this part provided that an MRO has determined that the miner has a valid prescription for the substance and is using it as prescribed.	This provision does not specify how an MRO is to determine whether a miner is using a substance "as prescribed." Most MROs inform us that the results of a drug test performed in accordance with DOT rules does not provide sufficient information to determine whether usage is consistent with the prescription. The science is simply not sufficiently developed to determine usage levels accurately through a urine test. This regulation should provide that the MRO and the employer are permitted to investigate further to determine prescription-consistent usage.
§ 66.101 Prohibited behaviors.	
(a) Miners determined to have used a prohibited substance and/or to be under the influence of a prohibited substance as defined by § 66.3 (p) shall not be allowed to perform safety-sensitive job duties. (b) Specifically, miners must not report for duty or remain on duty if they:	
(1) Are under the influence or impaired by alcohol as verifiable by a Blood Alcohol Concentration (BAC) of 0.04 percent or greater; or	This level of alcohol concentration, if it is to be construed as the minimum level that an operator is authorized to prohibit, is too high. This provision should be clarified to make clear that an operator is allowed to prohibit a lower level of BAC if it determines that its particular circumstances warrant it. For example, alcohol metabolizes over time. If a mine is located in a very remote location and transportation of the miner to the collection site (or transportation of the collector to the mine site) would take enough time for a significant amount of alcohol to metabolize, the operator should be allowed to consider the rate at which the alcohol metabolized over time into is determination of whether the miner violated its policy.
(2) Have used a prohibited substance as verifiable by a positive drug test, unless a MRO has determined that the miner has a valid prescription for the prohibited substance and is using it as prescribed; or	SEE note to 66.100(b)

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(3) Have refused to submit to a drug or alcohol test or have adulterated or substituted his/her specimen in any such test.	
Subpart C—Alcohol- and Drug-Free Mine Program Requirement	
§ 66.200 Purpose and scope. The mine operator shall establish a written alcohol- and drug-free mine program that includes a written policy, an education and awareness program for nonsupervisory miners, a training program for supervisors, alcohol- and drug-testing, and referrals for assistance for miners who violate this rule.	
§ 66.201 Written policy.	
(a) The alcohol- and drug-free mine program shall contain a written policy statement that shall be provided to all employees/miners and will inform them of the purpose of the policy; the prohibitions against the possession or use of prohibited substances; alcohol- and drug-testing requirements; the consequences of policy violations; and training requirements. The policy will also reference these regulations and identify which miners are subject to the alcohol- and drug-testing provisions.	
(b) A mine operator must ensure that every miner has been informed of the policy. The proposed rule requires that a mine operator must provide a copy of the written policy to the miners' representative or post the policy on a bulletin board in a common area in the event that the miners do not have a representative. Mine operators may also choose to distribute the policy during the alcohol and drug-free awareness training sessions or distribute the policy in an electronic format; however, these additional means of distribution are not required.	
(c) Mine operators may use the sample model policy statement available from MSHA or from the web site at www.msha.gov.	
§ 66.202 Education and awareness program for nonsupervisory miners.	
(a) Mine operators are required to provide education and awareness programs for nonsupervisory miners that meet the following requirements:	
(1) Each newly hired miner must receive a minimum of 60 minutes of training before such miner is assigned to safety-sensitive job duties. The training	

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must inform them of:	
(i) The mine's alcohol- and drug-free mine policy, including alcohol- and drug-testing requirements;	
(ii) The dangers of alcohol and drug use and the impact of such use on safety in the mine;	
(iii) Actions to take when others are suspected of violating the policy; and	
(iv) Information about any available drug counseling, rehabilitation, and employee assistance programs (EAPs).	
(2) All nonsupervisory miners, on an annual basis, will receive a minimum of 30 minutes of training to review the elements in paragraph (a)(1) of this section. (3) Training must be delivered by a competent person knowledgeable about workplace substance abuse, these regulatory requirements, and the mine operator's policy. Mine operators may use the training materials available from MSHA or the web site at www.msha.gov.	
(b) Training may be supplemented by written informational materials, including a list of company or community resources that miners can contact for assistance. Videos or other audio-visual materials may be used to supplement interactive training but cannot serve as the sole means of training.	
(c) The training requirements in this part can be delivered as part of other new miner and annual nonsupervisory miner refresher training required under parts 46 and 48 of this chapter but must be delivered in addition to the other topics required and cannot displace other existing requirements of parts 46 and 48 of this chapter.	
§ 66.203 Training program for supervisors.	
(a) A training program for supervisors is required and must meet the following requirements:	
(1) Every supervisor authorized by the mine operator to make reasonable suspicion and post-accident testing determinations shall receive an initial two hours of training and one hour annually, that, at a minimum:	
(i) Reviews the topics covered in the nonsupervisory miner training described in § 66.202 (a)(1)(i) through (iv);	
(ii) Makes them aware of their role in enforcing the	

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alcohol- and drug-free workplace policy;	
(iii) Reviews the physical, behavioral, and performance indicators of probable drug use or alcohol misuse and prepares them to recognize and adequately document their observation of these signs of alcohol or drug impairment;	
(iv) Trains them to make reasonable suspicion determinations and what procedures to follow when such determinations are made;	
(v) Trains them to make post-accident determinations and what procedures to follow when such determinations are made;	
(vi) Trains them to make referrals to Substance Abuse Professionals or Employee Assistance Professionals and/or to community resources if they suspect a miner has an alcohol or drug problem but there has not been a known violation of the policy and there is insufficient evidence to warrant a reasonable suspicion test; and	
(vii) Trains them on what constitutes safety-sensitive job duties so that they understand who is subject to drug testing.	
(2) All supervisors, on a annual basis, will receive a minimum of 60 minutes of training to review the elements in paragraph (a)(1) of this section.	This appears to be for all supervisors, not just those who "authorized by the mine operator to make reasonable suspicion and post-accident testing determinations." Since it refers back to Section (a)(1), what is the difference for authorized supervisors and non-authorized supervisors?
(3) Training must be delivered by a competent person knowledgeable about workplace substance abuse, these regulatory requirements, and the mine operator's policy. Mine operators may use the training materials available from MSHA or the web site at www.msha.gov.	
(b) Training may be supplemented by written informational materials, including a list of company or community resources that miners can contact for assistance. Videos or other audio-visual materials may be used to supplement interactive training but cannot serve as the sole means of training.	
§ 66.204 Miner assistance following admission of use of prohibited substances.	
(a) Mine operators shall make miners and other employees who admit to the illegitimate and/or inappropriate use of prohibited substances aware of	Does the term "admit" in this section mean the same thing as "voluntarily admit to the illegitimate and/or inappropriate use of prohibited substances prior to

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available assistance through an employee or miner assistance program, a Substance Abuse Professional (SAP), and/or other qualified community-based resources.	being tested and seek assistance" as used in subsection 66.204(b)? If it means the same thing, it should use the same language. If it does not mean the same thing, then it should be clarified. As written, it is ambiguous, raising questions such as: admit to whom?; admitting in what manner?; admit before or after testing positive?
(b) Miners who voluntarily admit to the illegitimate and/or inappropriate use of prohibited substances prior to being testing [sic] and seek assistance shall not be considered as having violated the mine operator's policy but shall be subject to the return-to-duty process specified in subpart E, § 66.405-406. However, a positive test result during the return-to-duty process will be considered as a violation of the mine operator's policy.	What does "illegitimate and/or inappropriate use" mean? Does it mean unlawful? If it means in violation of the operator's policy, then it should say so. The phrase "prior to being testing" appears to be a typographical error. This provision, as written, should be known as the "indefinite strike" rule. This would allow an employee who is selected for testing to escape operation of the policy by "admitting" to illegitimate and/or inappropriate use of prohibited substances after he has been selected for testing but before the test is actually administered. This does not discourage immediate discontinuance of drug use, but actually encourages a miner to continue to use illegal drugs until after he has been selected for testing. This, combined with the Regulations' elimination of the zero-tolerance policies, makes this a three-strike rule. For example, a miner can continue to use illegal drugs until he has been selected for testing, but before the testing is administered. Under this provision, the miner "shall not be considered as having violated the operator's policy" because he preempted the testing by admitting to use of prohibited substances before testing. The miner must seek assistance and be subjected to a return-to-duty process. After returning to work, the miner is selected for return-to-duty testing (or even random or post-accident testing), and tests positive. Since the first instance (in which the employee "voluntarily admitted to the illegitimate and/or inappropriate use of prohibited substances" after selection but before testing) was not a violation of the employer's policy at all because the regulation says it is not, then this second positive drug test is really the first violation of the employer's policy. Section 66.405 says that the employee may not be terminated for the first violation of the employer's policy. Therefore, this employee may not be terminated for this "first violation," even

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	though it is a second positive test. The problem with this section can be eliminated by substituting the words: "prior to being identified or selected for testing . . ."
Subpart D — Alcohol- and Drug-Testing Requirements	
§ 66.300 Purpose and scope.	
(a) Mine operators shall implement an alcohol- and drug-testing program that is valid, reliable, and protects the privacy and confidentiality of the individual to be tested.	
(b) Mine operators must follow the U.S. Department of Transportation's (DOT) requirements found in 49 CFR part 40, Procedures for Transportation Workplace Drug Testing Programs, in which references to "DOT" shall be read as "MSHA" with the following exceptions: the split sample method of collection shall be used, and use of "bifurcated" alcohol level for testing is excluded.	
(c) Mine operators are subject to all the requirements and procedures incorporated by part 66 and are responsible for the actions of their officials and representatives, and agents in carrying out these requirements.	
(d) Mine operators shall designate those who will be responsible for receiving test results and other communications from the MRO or BAT consistent with the requirements of this part. This designee will also be authorized by the mine operator to take immediate action(s) to remove miners from safety-sensitive job duties, or cause miners to be removed from these covered duties, and to make required decisions in the testing and evaluation processes. Mine operators cannot use contracted service agents to perform these functions.	
(e) A mine operator may use service agents to perform any of the other functions required in this rule but may not designate or use a service agent to make drug-testing decisions or to receive alcohol- or drug test results on behalf of the mine operator.	
(f) A mine operator that uses a service agent is responsible for ensuring that service agents meet all requirements and procedures set forth in DOT's requirements found in 49 CFR part 40, except as	

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modified by paragraph (b) of this section. Only laboratories certified by CAP as well as by HHS/SA MHSA shall be used to test collected samples.	
§ 66.301 Substances subject to mandatory testing. Tests will be conducted for the drugs listed below:	
(a) Alcohol,	
(b) Amphetamines (including methamphetamines),	
(c) Barbiturates,	
(d) Benzodiazepines (e.g., Valium, Librium, Xanax),	
(e) Cannabinoids (THC/marijuana),	The parenthetical list following the item does not contain "e.g." as do the lists in subsection (d) and (j). Is this, therefore, intended to be an exhaustive list?
(f) Cocaine,	
(g) Methadone,	
(h) Opiates (heroin, opium, codeine, morphine),	The parenthetical list following the item does not contain "e.g." as do the lists in subsection (d) and (j). Is this, therefore, intended to be an exhaustive list?
(i) Phencyclidine (PCP),	
(j) Propoxyphene (e.g., Darvon), and	
(k) Synthetic/Semi-synthetic Opioids (oxymorphone, oxycodone, hydromorphone, hydrocodone).	
§ 66.302 Additional testing. The Secretary of Labor shall be permitted to designate additional substances for which all mine operators must test.	
§ 66.303 Circumstances under which testing will be required. Testing will be conducted in the following circumstances: pre-employment; randomly at unannounced times; post accident if the miner may have contributed to the accident; based on reasonable suspicion that a miner has used a prohibited substance; and as part of a return-to-duty process for miners who have violated the rule.	The term "may have contributed to the accident" is not consistent with subsequent language of Section 66.306(a). Consistent and clear language should be used to avoid ambiguity and confusion.
§ 66.304 Pre-employment testing.	
(a) Any applicant for a safety-sensitive position must be tested for the presence of drugs before performing safety-sensitive job duties.	The term "applicant" is not clear. Does it apply to miners who are on long-term sick and injured status or returning from an extended layoff or who are being recalled to a mine other than the mine from which the miner was laid off? This provision should be written to make clear that it does not require the testing of any person to whom a conditional offer of employment has not been made. To do otherwise would encourage operators to violate

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	the ADA. *See* note to Section 66.3 – Definition of Pre-employment testing.
(b) Any applicant for a safety-sensitive position must receive an alcohol test after a conditional offer of employment has been made and before performing safety sensitive job duties.	
(c) The mine operator must treat all miners performing safety-sensitive job duties the same for the purpose of pre-employment alcohol- and drug-testing (i.e., mine operators must not test some miners and not others). If it is unclear whether an applicant will be assigned to such duties, it is at the mine operator's discretion to test all applicants; or test only when it is known that the applicant will be assigned to perform safety-sensitive job duties.	
(d) The mine operator must not allow a miner to begin performing safety-sensitive job duties if the result of the miner's test indicates a blood alcohol concentration of more than 0.04 percent or if he/she has used a prohibited substance without a valid prescription.	
(e) Any incumbent miner who is to be transferred to a position involving the performance of safety-sensitive job duties must be tested for the presence of alcohol or drugs prior to beginning the performance of safety sensitive job duties and must receive negative test results.	
(f) An incumbent miner that has failed or refused a pre employment alcohol- and drug-test administered under this part, shall not perform safety-sensitive job duties until that miner provides the mine operator proof of having successfully completed a referral, evaluation, and treatment plan, and tested negative on return-to-duty testing as described in subpart E, § 66.405-66.406.	
(g) A mine operator shall have the discretion to conduct such testing on incumbent miners who are performing safety-sensitive job duties as of the effective date of this rule as long as all such miners are tested.	
§ 66.305 Random testing. Mine operators must randomly conduct unannounced alcohol and drug tests of their miners as described in paragraphs (a) through (e) of this section:	
(a) A mine operator shall use random testing rates for alcohol and drugs of 10 percent. The random pool for	No time period for the rate is specified, which confers ambiguity. Does this mean 10 percent per year, per

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unannounced alcohol- and drug-testing during each calendar year shall consist of miners who perform safety-sensitive job duties and their supervisors.	month, or an average over the entire period of testing? If the proposal is 10 percent per month, that means 100% annually, which is twice the frequency required in the nuclear industry. Ten percent per year is too low. This should be set as a minimum of 10 percent per annum, and an employer should be allowed to specify a more frequent rate if the employer deems it necessary and feasible. If the second sentence's use of the phrase "testing during each calendar year" is intended to convey the idea that the rate of selection specified in the first sentence is 10 percent per annum, it would better be inserted in the first sentence than in the second (although 10% per annum is too low).
(b) Miners who are on leave or otherwise absent from the workplace will be tested at the next available opportunity, that is, immediately upon their return to work.	This section is ambiguous. Does this include all employees who return from leave, no matter the duration of the leave, or does it include only those employees who were selected for testing, but were not actually tested, because they were on leave? If the latter, does this mean that the operator must include all those persons who return from layoff or sickness and accident leave on its list of employees from which the random sample is drawn each month? If so, do the absent employees randomly selected but not tested count toward the operator's 10 percent monthly quota?
(c) Each mine operator shall ensure that random alcohol and drug tests conducted under this part are unannounced and unpredictable. The dates for administering random tests must be periodic and irregularly scheduled throughout the calendar year. The mine operator has the discretion to determine how frequently testing will occur but it must, at a minimum, meet the 10 percent floor established by this part.	
(d) The selection of miners for random alcohol- and drug-testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with miners' payroll identification numbers, or other comparable unique identifying numbers. Under the selection process used, each miner shall have an equal chance of being tested each time selections are made.	
(e) Each mine operator shall ensure that any miner	

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performing a safety-sensitive duty at the time of the notification ceases to perform the safety-sensitive duty and proceeds to the testing site immediately.	
§ 66.306 Post-accident testing.	
(a) A mine operator is required to conduct alcohol- and drug-testing of certain miners after certain accidents or workplace injuries occur. Accidents and injuries requiring post-accident testing include occupational injuries requiring medical treatment beyond first aid and accidents that occur while a miner is operating a piece of equipment or performing a work activity that causes or contributes to an accident, injury, or death. Nothing in this section shall be construed to require the delay of necessary medical attention for the injured following an accident or to prohibit a miner from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.	Is the word "include" in the second sentence intended to suggest that the list of accidents and injuries requiring post-accident testing is not exhaustive? May the employer test in other circumstances? This provision does not specify how an employer may require drug testing if the employee is not competent to consent to the testing. A medical provider is unlikely to take, retain or test a sample without the consent of the employee or a direction of law enforcement personnel. If the employee is not competent to consent, and law enforcement does not require it, the employer has no method of complying. Clearly the requirement to document the reason for failure to test (subsection 306 (b) and (c)) would apply here, but in order to effectuate the purposes of this regulation, this provision should give the employer the right to require the health care provider to at least take and retain a sample.
(1) Fatal accidents. As soon as is practicable following an accident involving the loss of human life, a mine operator shall conduct alcohol and drug tests on each surviving miner involved in any work activity that could have contributed to the accident, injury, or death as determined by the mine operator, using the best information available at the time of the decision. The mine operator shall also be authorized and required to have a toxicology test conducted on the deceased that at a minimum tests for all the substances listed in § 66.301.	The term "could have contributed" is ambiguous. One might argue that it includes every person who conceivably, possibly, or theoretically "could" have contributed to the accident. It also might mean anyone who was in a position in which conferred the employee the power to contribute to other accident, regardless of whether the employee was even present at the time. It might mean any employee who had the physical capability of contributing to the accident. It might mean everyone whom the employer reasonably believes "might" have contributed to the accident. As written, this standard is very ambiguous and will result in a lot of unnecessary arbitrations and potential liability. It is so vague as to be unconstitutional. The statement of the standard "could have contributed" is inconsistent with the standard articulated in other sections, such as 306(g) ("may have contributed to the accident") and 401(b) (the mine operator has determined that they may have contributed to an accident . . .")
(2) Nonfatal accidents. As soon as is practicable following an accident or occupational injury not involving the loss of human life, the mine operator	

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shall conduct alcohol and drug tests on each miner involved in any work activity that could have contributed to the accident or injury, as determined by the mine operator, using the best information available at the time of the decision.	
(b) A mine operator shall ensure that a miner required to be tested for alcohol under this section is tested as soon as is practical but within eight hours of the accident or injury. If an alcohol test is not administered within eight hours following the accident or injury, the mine operator shall cease attempts to conduct the test and prepare and maintain on file a record stating the reasons that the test was not promptly administered.	The operator should not be precluded from continuing to seek an alcohol test more than 8 hours afterwards, particularly if the employee has taken any action to hide himself or otherwise impede the employer's efforts to require testing. This section should give the operator the discretion to cease attempts to conduct testing after 8 hours. It should use the word "may" rather than the word "should." It certainly makes sense to allow the operator not to continue efforts to test after most tests would lose effectiveness, but if the employer believes it has reason to continue efforts to test, particularly if it has reasonable suspicion that the employee's BAC was very elevated at the time of the accident, then the employer should not be precluded from testing.
(c) A mine operator shall ensure that a miner required to be drug tested under this section is tested as soon as is practical but within 32 hours of the accident or injury. If a drug test is not administered within 32 hours following the accident or injury, the mine operator shall cease attempts to conduct the test and prepare and maintain on file a record stating the reasons that the test was not promptly administered.	
(d) A miner who is subject to post-accident testing who fails to remain readily available for such testing, including notifying the mine operator of his or her location if he or she leaves the scene of the accident prior to submission to such test, must be deemed by the employer to have refused to submit to testing.	The employer should not be required to deem the employee's unavailability to be a refusal **if** the employer determined that the employee's failure was not willful or was caused by the employee's inability or incapacity to remain available for testing. This provision should either provide an option to the employer to make the determination or should provide appropriate exceptions.
(e) The results of blood, urine, or breath tests for the use of prohibited substances conducted by federal, state, or local officials having independent authority for the test, shall be considered to meet the requirements of this section provided such tests conform to the applicable federal, state, or local testing requirements, and that the test results are obtained by the mine operator. Such test results may be used only when the tests have been performed within the applicable time limits (eight hours for alcohol and 32 hours for drugs) and the mine operator	

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has been unable to perform separate post-accident tests within those time periods.	
(f) Mine operators shall determine when post-accident testing will be ordered and which miners will be tested. Those making such determinations must have received the necessary training (as specified in subpart C) needed to make such determinations prior to doing so.	
(g) If MSHA investigators arrive at the scene of an accident within the 32-hour window and determine that miners not originally given a post-accident test may have contributed to the accident, the MSHA investigator can so order the mine operator to have such testing done at the mine operator's expense.	If additional testing is to be done at the employer's expense, there should be a provision through which the operator can challenge the MSHA investigator's determination that the employee "may have contributed to the accident." To do otherwise would violate the operator's right to due process.
§ 66.307 Reasonable suspicion testing.	
(a) A mine operator shall conduct an alcohol- and/or drug test when the mine operator has reasonable suspicion to believe that the miner has misused a prohibited substance.	
(b) A mine operator's determination that reasonable suspicion exists shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the miner. A supervisor, or other company official who is trained in detecting the signs and symptoms of the misuse of alcohol and/or drugs, must make the required observations.	
(c) Testing is authorized under this section only if the observations required by paragraph (b) of this section are made during, immediately preceding, or just after the shift. A mine operator may direct a miner to undergo reasonable suspicion testing immediately before, during, or after the miner is to perform safety-sensitive job duties.	This provision is ambiguous and unwise. It is ambiguous because the terms "immediately preceding" and "just after" are not parallel, and imply different, but unspecified, periods before and after the shift during which observations are valid. This provision is unwise because, as written, it arguably would preclude an operator from testing an employee when a supervisor reasonably believes he saw the employee smoking crack on the side of the road 3 hours before the beginning of the shift. An employer's observations should not be discounted merely because they were made perhaps 3 hours before, rather than 30 minutes before, a shift begins.
(d) A mine operator shall ensure that a miner required to be tested for alcohol under this section is tested as soon as is practical but within eight hours of the mine operator's determination that reasonable suspicion exists. If an alcohol test is not administered within	The operator should not be precluded from continuing to seek an alcohol test more than 8 hours afterwards, particularly if the employee has taken any action to hide himself or otherwise impede the employer's efforts to require testing. This section should give the

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eight hours, the mine operator shall cease attempts to conduct the test and prepare and maintain on file a record stating the reasons that the test was not promptly administered.	operator the option to cease attempts to conduct testing. It should use the word "may" rather than the word "should." It certainly makes sense to allow the operator not to continue efforts to test after most tests would lose effectiveness, but if the employer believes it has reason to continue effects to test, particularly if it has reasonable suspicion that the employee's BAC was very elevated at the time of the accident, then the employer should not be precluded from testing.
(e) A mine operator shall ensure that a miner required to be tested for drugs under this section is tested as soon as is practical but within 32 hours of the mine operator's determination that reasonable suspicion exists. If a drug test is not administered within 32 hours, the mine operator shall cease attempts to conduct the test and prepare and maintain on file a record stating the reasons that the test was not promptly administered.	The operator should not be precluded from continuing to seek an alcohol test more than 32 hours afterwards if is has a reasonable believe based on medical information that the test would be valid.
(f) Those authorized to make decisions on behalf of the mine operator as to when reasonable suspicion testing will be ordered and which miners will be tested will receive the necessary training needed to make such determinations prior to doing so as specified in subpart C. The mine operator will determine who is authorized to make these decisions.	
(g) If the collection site is not on the mine property, miners being tested because of reasonable suspicion should not be allowed to drive themselves to the site, but rather shall be accompanied by authorized mine personnel.	This provision should apply to post-accident testing as well as reasonable suspicion testing.
Subpart E—Operator Responsibilities, Actions, and Consequences	
§ 66.400 Consequences to miner for failing an alcohol- or drug-test or refusal to test.	
(a) A mine operator, upon a miner's verified positive drug test result, an alcohol test with a result indicating a blood alcohol concentration of 0.04 percent or greater, a refusal to test (including by adulterating or substituting a urine specimen), or any other violation of the mine operator's policy prohibiting possession, impairment from or use of alcohol or drugs must not return the miner to the performance of safety-sensitive job duties until or unless the miner successfully completes the return-to-duty process of § 66.405 and 66.406 of this part. The miner may be assigned to duties that are not safety-sensitive at the mine	

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operator's discretion.	
(b) Mine operators shall not terminate miners who violate the mine operator's policy for the first time (e.g., by testing positive for alcohol or drugs). Rather, those miners testing positive for the first time, who have not committed some other separate terminable offense, shall be provided job security while the miner seeks appropriate evaluation and treatment. The miner will be able to be reinstated and allowed to resume performance of safety sensitive job duties provided the miner complies with return-to-duty requirements outlined in § 66.405 and66.406.	The regulation should not prohibit an employer from discharging a miner who violates the policy for the first time. As written, this provision would require an employer to return to duty any miner who tests positive under any circumstances, whether the employee tests positive on a random test or the employee has caused catastrophic injury to fellow miners. Many operators have "zero-tolerance" or "one strike" policies and believe that those policies are the most effective method of eliminating illegal drug and alcohol use in the mines. Many of those employers have diminishing positive tests results over time, tending to prove that those zero-tolerance policies are effective. MSHA has not cited to any statistical evidence or even anecdotal evidence showing that multi-strike policies such as this one are as effective at eliminating illegal drug and alcohol use, or indeed effective at all. Correct by deleting this section entirely. The first sentence is ambiguous, particularly the "e.g." parenthetical. If MSHA determines that the "one free positive test" rule remains, the "e.g." in the parenthetical phrase in the first sentence should be removed to make clearer that an employee may be discharged on the first offense for drug-related offenses *other than* testing positive. For example, the policies of many operators prohibit not only being under the influence of illegal drugs or alcohol on premises, but also prohibit the sale, use, possession and distribution of drugs on premises and while on employer business. As written, the regulation would prohibit the discharge of an employee who possesses or sells illegal drugs on the mine property, as long as it is the first violation of the employer's policy. Clearly that is not what is contemplated because the following sentence appears to except employees who have "committed some other separate terminable offense" from the operation of this rule. These provisions are inconsistent and should be cleared up.
(c) For subsequent violations of the mine operator's alcohol- and drug-free mine policy, the mine operator	

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shall specify appropriate disciplinary steps, up to and including termination. At a minimum, miners shall not be allowed to perform safety-sensitive job duties until such time that they have satisfactorily complied with the return-to-duty process as specified in § 66.405 and 66.406 of this rule.	
§ 66.401 Operator actions pending receipt of test results. (a) Miners who have been selected for random testing shall be returned to duty immediately following the test and while awaiting the results.	
(b) Miners who have been tested for alcohol and/or drugs based on reasonable suspicion or because the mine operator has determined that they may have contributed to an accident may be suspended from performance of safety sensitive job duties until the verified test results have been received.	"May have contributed to an accident" is an entirely different standard from the standard for post-accident testing found in Section 306(a)(1) and (2).
(c) All miners suspended from performing safety-sensitive job duties pending results should be treated in the same manner with respect to this rule and no action adversely affecting the miner's pay and benefits shall be taken pending the verified outcome of the testing process.	
(d) In the event that a miner does not work at all during the suspension period (i.e., the miner is not assigned non safety-sensitive job duties) and the test result is verified positive, mine operators may choose to withhold pay for the suspension period in accordance with mine operator policy and/or any existing labor-management agreement.	
§ 66.402 Substantiating legitimate use of otherwise prohibited substances.	
Although mine operators shall not receive test results until after an MRO has verified them, mine operators must ensure miners have adequate opportunity to demonstrate that their use of prescription drugs is legitimately authorized. However, possession of a valid prescription from a medical professional in and of itself may not constitute sufficient proof of legitimate and appropriate use. It is the responsibility of the MRO to make this determination. If the miner asserts that the presence of a drug or drug metabolite in his/her specimen results from taking prescription medication, the MRO must review and take all reasonable and necessary steps to verify the authenticity of all medical records the miner provides. The MRO may contact the miner's physician or other	The Preamble to the Regulations provides that the determination of whether "use of a given substance is compatible with the performance of safety-sensitive job duties" is "best made by the miner's physician." The miner's physician may not be the best person to make that determination for a number of reasons. It is universally recognized that a physician may act as an advocate on behalf of the patient. An advocate for the patient may not be able to deliver an unbiased opinion on whether the employee is or is not capable of performing safety sensitive jobs while using a particular medication prescribed by that physician himself. Furthermore, the physician may have inadequate or imperfect information about the safety-sensitive nature of the duties to be performed by the

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relevant medical personnel and/or direct the miner to undergo further medical evaluation.	miner. An employer should not be required to base the decision whether use of a prescribed medication creates a safety risk solely on the opinion of an uninformed decisionmaker who has no responsibility or accountability to the operator or to the other miners whose lives and safety may be put at risk. This provision (as interpreted according to the Preamble) is inconsistent with Section III(j) of the National Bituminous Coal Wage Agreement, which allows an employer to challenge an employee's ability to safely perform the duties of the job. That provision allows the determination to be made by a panel of three physicians (one chosen by the employer, one chosen by the employee and a third physician agreed to by the employer and employee). This provision (as interpreted according to the Preamble) is also inconsistent with the Americans with Disabilities Act, which allows the *employer* to require that an individual not pose a direct threat to the health or safety of other individuals in the workplace. (29 U.S.C. § 12113; 29 CFR § 1630.2(r)) The employer's determination under that statute may not be delegated to the employee's physician alone, but must be based on "an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm.
§ 66.403 Operator actions after receiving verified test results.	
(a) A mine operator who receives a verified positive drug test result or a verified adulterated or substituted drug test result must immediately remove the miner involved from performing safety-sensitive job duties and refer the miner to a qualified SAP. Action must be taken upon receiving the initial report of the verified test result. A mine operator must not wait to receive the written report or the result of a split specimen test.	
(b) A mine operator who receives a blood alcohol	

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concentration test result of 0.04 percent or higher must immediately remove the miner involved from performing safety-sensitive job duties and refer the miner to a qualified SAP. A miner operator must not wait to receive the written report of the result of the test.	
(c) A mine operator must not alter an alcohol or drug test result transmitted by a MRO or BAT.	
(d) In the event that the MRO verifies that a test is negative or cancels the test:	
(1) The miner will be immediately returned to the performance of safety-sensitive job duties if he/she has been removed based on reasonable suspicion;	
(2) The miner will suffer no adverse personnel consequences or loss in pay; and (3) No individually identifiable record that the employee had a confirmed laboratory positive, adulterated; or substituted test result will be retained. The record of the test will reflect that it was a negative test.	
§ 66.404 Evaluation and referral.	
(a) A miner who has failed a test for prohibited substances or refused or adulterated a test cannot perform safety-sensitive job duties until a SAP evaluation has been completed and the miner successfully complies with the SAP's recommendations for education and/or treatment.	
(b) Mine operators must provide to each such miner(including an applicant or new miner) a listing of Saps available to the miner and acceptable to the mine operator. This listing should include the names, addresses, and telephone numbers of the available SAPs. The miner may avail himself or herself of the services of the SAP to receive an evaluation and referral for treatment. The miner shall be allowed to return to performance of safety sensitive job duties following a first-violation violation and provided the miner complies with the return-to-duty and follow-up testing provisions found in § 66.405 and 66.406.	
(c) The SAP's recommendation for assistance will serve as a referral source to assist the miner's entry into an education and/or treatment program.	
(d) Miners who have failed or refused an alcohol or drug test may not seek a second SAP's evaluation in order to obtain a different recommendation, nor may a mine operator do so if the miner has already been	

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evaluated by a qualified SAP. If the miner, contrary to this paragraph, has obtained a second SAP evaluation, mine operators may not rely on it for any purpose under this part. Only the SAP who made the initial evaluation may modify his or her initial evaluation and recommendations based on new or additional information (e.g., from an education or treatment program).	
(e) While the SAP's referral shall always be made at the miner's first offense, employers may choose to offer additional opportunities for treatment and return-to-work, but must do so in a way that is uniform and consistent.	
§ 66.405 Return-to-duty process.	
(a) After miners testing positive for alcohol or drugs are assessed by a SAP and follow that SAP's educational or treatment recommendations, they may return to safety-sensitive job duties upon submitting to return-to-duty and follow-up testing as described in §66.406.	
(b) SAPs must re-evaluate the miner to determine if the miner has successfully carried out the recommended education and/or treatment so that the mine operator can decide whether to return the miner to safety-sensitive job duties.	
(c) Should a SAP provide written notice that the miner has not successfully complied with the SAP's recommendations, the mine operator must not return the miner to the performance of safety-sensitive job duties and may take action consistent with company policy and/or labor management agreements.	
(d) Although the SAP can verify completion of or compliance with recommended treatment, it is the mine operator who decides whether to put the miner back to work in a safety-sensitive position. However a miner who has successfully completed the recommended treatment and passed the return to-duty tests may not be discharged for his/her first offense.	Placing the burden of the mine operator to determine whether an employee may return to work in a safety-sensitive position is inconsistent with prohibiting the employer in Section 66.400(b) from discharging an employee for the first offense. If the employer reasonably believes that the employee is not safe to return to work in a safety-sensitive position, but is not allowed to discharge the employee, the operator's only choice is to place the employee in a non-safety sensitive position. We submit that there are no non-safety-sensitive positions in a coal mine, and particularly underground. The mine operator should be absolved of liability for returning a miner to work whom the operator believes

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	to be incapable of performing in a safety-sensitive position but whom this regulation does not allow the operator to discharge.
§ 66.406 Return-to-duty and follow-up testing.	
(a) Miners must have an alcohol test with a blood alcohol concentration of less than 0.04 percent and a negative return-to-duty drug-test result before resuming performance of safety-sensitive job duties.	
(b) A mine operator shall conduct follow-up testing of each miner who returns to duty, as follows:	
(1) A SAP is the sole determiner of the number and frequency of follow-up tests needed for a particular miner and whether these tests will be for alcohol, drugs, or both. If the miner had a positive drug test, but the SAP evaluation or the treatment program professional determines that the miner also has an alcohol problem, a SAP shall require that the miner have follow-up tests for both alcohol and drugs.	
(2) A SAP must establish a written follow-up testing plan for each miner who has committed a violation of this rule, and who seeks to resume the performance of safety-sensitive job duties only after the miner has successfully complied with recommendations for education and/or treatment.	
(3) At a minimum, a miner will be subject to six unannounced follow-up tests in the first 12 months of resuming safety-sensitive job duties. It is possible, however, that the SAP may require more than six unannounced follow-up tests, and that the testing be continued for up to 24 months after the miner resumed his/her safety sensitive job duties.	
(4) The mine operator may not impose additional testing requirements (e.g., under company authority) on the miner that go beyond the SAP's follow-up testing plan.	
(5) The mine operator must carry out the SAP's follow-up testing requirements and may not allow the miner to continue to perform safety-sensitive job duties unless follow-up testing is conducted as directed by the SAP. Mine operators failing to do so will be in violation of this rule.	
(6) Mine operators have discretion in scheduling follow-up tests but must ensure that the tests are unannounced with no discernable pattern as to their timing, and that the miner is given no advance notice.	

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(7) Other tests conducted (e.g., those carried out under the random testing program) cannot substitute for this follow-up testing requirement.	
Subpart F—Recordkeeping and Reporting	
§ 66.500 Recordkeeping requirements.	
(a) Protection of employee records	
(1) Records of drug- or alcohol-test results received are confidential communications between the mine operator and the miner.	
(2) If records are stored electronically, a mine operator must ensure that the records are secured.	
(b) Mine operators must keep and retain the following test records for at least three years:	
(1) The number of workers in safety-sensitive positions;	
(2) The total number tested;	
(3) The number of positive alcohol and drug tests for each substance; and	
(4) A record of which miners were tested, the dates of their tests, their test results, and return-to- duty and follow-up test results; these records should be retained separately from aggregate data on violations and violation rates.	
(c) In addition, mine operators are required to: (1) Include post-accident test results in accident reports regardless of whether the test(s) are positive or negative.	This provision requires the operator to violate the Equal Employment Opportunity Commission's regulations implementing the Americans With Disabilities Act ("ADA"). With respect to alcohol tests and negative drug tests, this information can be disclosed only to supervisors and managers concerning work restrictions and accommodations, first aid and safety employees when a disability might require emergency treatment, and to government officials investigating compliance with the ADA regulations. Presumably accident reports would be disclosed to other people. Alcohol test results and negative drug test results may not be disclosed to others. 29 CFR §§ 1631.16(c)(3), 630.14(b)(2).
(2) Annually compute and retain records of the percentage of positive random alcohol- and drug-tests.	
(d) MSHA inspections:	
(1) Mine operators' alcohol- and drug-free workplace policies and program descriptions should be made	

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available to MSHA inspectors upon their request; however, this rule does not require routine review of alcohol- and drug-free workplace programs by MSHA inspectors.	
(2) Any and all alcohol- or drug-test results will be made available upon request of MSHA inspectors or investigators and will be used in assessing overall compliance with safety regulations as well as in determining the cause of accidents.	This provision could potentially cause a violation of the Americans With Disabilities Act ("ADA") and the regulations of the Equal Employment Opportunity Commission. Alcohol testing may be considered a medical examination, and the results may not be disclosed to government officials except "Government officials investigating compliance with [the regulations implementing the ADA]." 29 CFR § 1630.14(c)(1)(iii). The ADA regulations would prohibit an operator from disclosing information concerning an alcohol test to an MSHA inspector or investigator. Although testing for illegal drugs is not a medical examination under the ADA, 29 CFR § 1630.16(c), medical information concerning an employee of applicant that is obtained from a drug test (other than the fact of the illegal use of drugs) may not be used inconsistently with the ADA regulations. 29 CFR §§ 1631.16(c)(3), 630.14(b)(2). The ADA regulations would prohibit the operator from disclosing any records from a drug test to the extent that the results revealed anything about an employee or applicant's medical condition. The test results could be disclosed to an MSHA inspector only to the extent the test results did not reveal anything about a person's medical condition other than the fact of the positive test for illegal drugs.

JASPER, ALABAMA

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ONLINE EDITION

Overdoses leave officials fuming

ELANE JONES
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Three weekend deaths believed to be caused by overdoses of prescription pain medication have officials in Walker County speaking out against some members of the medical community they believe are abusing their privilege to write prescriptions. Although they didn't name any names, Jasper Police Chief Bobby Cain and Chief of Investigators Capt. Larry Cantrell, Walker County Coroner Joey Vick and Jasper Mayor Sonny Posey were upset Monday following the deaths of three young people in Jasper over the weekend who were all seeing the same doctor.

All three victims reportedly died within an eight hour period, from Friday night to Saturday morning, of overdoses from a combination of two or more of the prescription medications Lortabs, Methadone and Xanax.

Jasper Mayor Sonny Posey said the past several days have been a difficult time for many and something must be done.

"This past weekend three families in Jasper lost the lives of their loved ones due to overdoses of prescription painkillers. All three fatalities had prescriptions from the same doctor," Posey said. "We've seen a dramatic increase in this type of drug abuse in our young people in the Jasper area. This is a great concern for our police department, our council members and myself. Of course, I know every citizen in Jasper shares this concern as well."

Walker County Coroner Joey Vick said since he took over as coroner five years ago, overdose deaths in Walker County, especially among individuals under the age of 50, have gone from a couple a month to three or four a week.

"At first I thought the majority of the victims had drug problems and had just probably gotten a hold of some bad drugs or something. I didn't know," Vick said. "But it finally dawned on me that wasn't always the case. Some of these folks were taking a combination of

prescription pain medications which had been prescribed to them by a doctor."

But Vick said that fact didn't fully register with him until after he had four consecutive deaths in one week from overdoses on painkillers, and a pathologist friend of his asked about the number of methadone deaths that had occurred in Walker County.

"All four victims were seeing the same doctor and were taking the same prescription pain medications. That's when I knew we had a problem," Vick said. "I saw the doctor of all four victims a few weeks later on an unrelated matter and I questioned him about it. He flew off the handle and had me escorted out of his office."

Vick said he doesn't care if nothing else comes from this outcry by local officials, because at least the general public will know what's happening.

"I have been informed by the police officers that the victims who overdosed this weekend had prescriptions for a large number of pain killers," Posey said. "I have to wonder if the outcome for these victims would be the same if they had not been prescribed painkillers in large quantities."

Abuse of prescription painkillers is not a new problem in the Jasper area, however, three deaths in one weekend is startling, Posey said.

"The Jasper Police officers and I struggle in regard to what we can do to help prevent such needless loss of life in the future," Posey said. "The solution to drug abuse goes far beyond my abilities and responsibility as mayor. However, I do feel that I should inform the public that police department records indicate that three local doctors are issuing prescription painkillers in large quantities."

Many of the prescriptions written by these same three doctors relate to painkiller overdoses, Posey said, and he vows to take whatever steps he legally can in stopping the practice of over-prescribing pain medication.

"Our city is declaring war against these three members of our medical community or any physicians we feel are abusing his or her privilege to write prescriptions," Posey said. "This practice must stop now before more loss of life occurs. Jasper is fortunate to have many doctors that carefully evaluate their patients in the treatment of pain, and I appreciate all those health professionals who struggle to provide safe methods of pain relief."

Local law enforcement officials have even gone so far as to meet with the members of the Alabama Board of Medical Examiners regarding the doctors in question.

"We felt it was time we did something and the only thing we knew to do was file a complaint with the state Board of Medical Examiners," Cain said. "But so far, to the best of my knowledge,

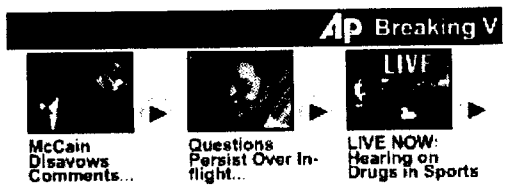
nothing has been done."

Cantrell said he didn't understand why nothing had been done, especially since one of the victims who died recently had been written a prescription for 360 painkillers at one time by one of the doctors who was reported.

"He'd gotten the pills from the doctor the day before he died. The bottle was nearly empty when we found it," Cantrell said. "Why would anyone need that many pain pills at one time? Why can't these doctors just give their patients enough pills to last a week or two? Then if they're still in pain have them come back and re-evaluate their pain to see if there's something else that can be done."

Cain said doctors take an oath of office, just like law enforcement officers do, and he believes these doctors know their patients are abusing the drugs they're being given.

"We know when we go to the scene of a drug overdose the doctor listed on the prescription is probably going to be one of the ones we reported," Cain said. "Someway, somehow this has got to stop. Those doctors are sworn not to do any harm, and they're killing people. They're not just harming people. They're killing people."



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