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October 2, 2008

Mine Safety and Health Administration
Office of Standards, Regulations and Variances
1100 Wilson Boulevard, Room 2350
Arlington, VA 22209-3939

Re: Comments On Proposed Regulation Concerning Drug Testing

Dear Sir or Madam:

These are my comments to the proposed MSHA regulation on drug testing.

I do not believe that MSHA should be dictating to employers the appropriate discipline for violation of drug testing policies. To do so interferes with the labor relations policies of employers and with some collective bargaining agreements already in place. Many employers currently discharge employees for confirmed positive drug tests, adulterated drug tests and refusals to take drug tests. Most of these same employers do allow employees to step forward before being told to submit to a reasonable suspicion or random drug test and are given an opportunity to recover from substance abuse without discharge in such cases. Many employers also use last chance agreements. MSHA, like the DOT, should leave the decisions on employment status or discipline to employers.

MSHA's policy also sends a message that it is tolerating illegal drug consumption for miners, while many employers have a zero tolerance policy against endangering the lives of miners. Where a company has a "zero tolerance" policy, studies show that lives are saved because miners know not to use drugs. If they do, they know that they may very well be discharged.

Additionally, prohibiting the discharge of first time positive drug tests eviscerates the Kentucky and Virginia miner safety laws regarding drug testing, which are "zero tolerance" policies. Kentucky passed drug testing legislation in July 2006. As of January 1, 2008, 443 certified miners had their mining licenses suspended. Meanwhile, Kentucky had its safest year ever in 2007 with no underground fatalities. Miners can get their certification back after proving that they are drug free. There is no obligation on the part of an operator to keep a deep-certified miner's job secure. MSHA's proposed regulations undercut these laws by making Kentucky and Virginia mines less safe than they are today.

Equally disturbing is the fact that MSHA's "job security" protection for first time positive results appears to extend to persons who adulterate test specimen (a crime in many states) or who refuse to take drug tests altogether. Both are acts of insubordination and should be

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dischargeable offenses, not an opportunity to gain job security while one goes through rehabilitation.

Speaking of "job security," the regulation has no explanation of what that term means. There are no time limits for how long a job must be held while someone is recovering in rehabilitation. There is no explanation of any replacement rights of employers to secure someone who can do the job while the employee is absent for sixty (60) days or more. There is no mention of who pays for family health benefits which may run as much as \$1,000.00 per month in premiums while the employee is absent from work and in treatment. There is no mention of coordination with the Americans with Disabilities Act, the Family Medical Leave Act, or any of the state laws that govern these issues. The provision on "job security," will also likely increase unwarranted Section 105(c) actions.

As you know, the ADA recognizes the difference between alcoholism, which is an addiction caused by a legal substance, and illegal drug use. Moreover, MSHA is treating illegal drug use the same as alcoholism. I believe that there should be a "zero tolerance" policy for illegal drug use. Once again, the drug use is "illegal," and can land someone in jail for engaging in that conduct.

Further, many mines do not use urine testing and use more reliable testing, such as hair testing. MSHA's drug regulations should set minimum allowable standards and let the states, operators and the market place determine if they want to follow a more stringent standard for testing. The GAO has reports on the reliability of urine tests.

It is also disturbing that the regulations do not discuss what an operator can or should do if someone who is taking a prescribed drug is still unsafe to himself or others. Such situations occur with some regularity, and the operator must determine if the person can safely perform the essential functions of his or her job while taking the medication.

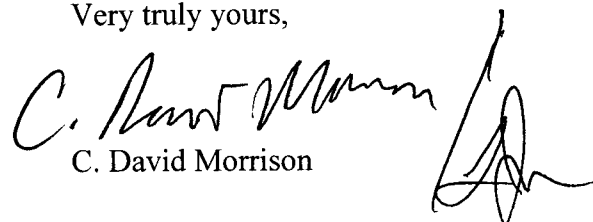
Please note that there is no similar OSHA regulation. Simply stated, the MSHA regulation is discriminatory to miners, who need to be better protected from illegal drug use because of their working conditions than most employees who are covered by OSHA.

The regulation also seems to ignore the increased cost to employers for detoxification and rehabilitation expenses for persons who may very well have been discharged in the past.

In short, I think that the regulation is not a good one. I am opposed, and I am happy to answer any questions that you may have.

Thank you for your attention to this matter.

Very truly yours,


C. David Morrison