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239 DLR C-1

**Drug & Alcohol Testing
Union, Mine Operators Blast Proposed Rule,
Citing Lack of Need, Privacy, Conflicting Laws**

Mine operators, the United Mine Workers, and laboratory professionals blasted the Mine Safety and Health Administration's drug and alcohol testing rule as a flawed proposal that should be rescinded or at least substantially reworked, according to comments filed with the agency.

BNA's review of the 169 comments, which were due Nov. 10, revealed widespread criticisms of MSHA's proposal on several grounds, including that the agency lacks authority to promulgate the rule, that the rule is unnecessary, that the rule would violate mine workers' privacy, and that the rule conflicts with federal and state statutes.

The rule, which MSHA proposed Sept. 8 (73 Fed. Reg. 52136), would prohibit the possession or consumption of alcohol and drugs on mine property and would prohibit workers from being under the influence of alcohol, illegal drugs, and unprescribed controlled substances while performing safety-sensitive job duties.

Mine operators would be required to conduct mandatory training programs, perform drug tests, and make referrals to employee assistance programs. Miners who test positive for alcohol or drugs would be removed from safety-sensitive job duties until they complete a treatment program and pass a return-to-duty drug and alcohol test. A mine operator could not terminate a miner for a first offense, but would determine the appropriate penalty for any subsequent violations, which could include termination (206 DLR A-4, 10/24/08, 173 DLR A-9, 9/8/08).

Testing would be required before a job is offered, randomly, after an accident occurs, when there is reasonable suspicion of drug or alcohol impairment, and when a miner who previously failed a test returns to duty after undergoing treatment.

UMW: 'Numerous Problems.'

In lengthy comments, the UMW cited "numerous problems" with the proposed rule and urged MSHA to withdraw it "in favor of more compelling health and safety hazards" confronting miners.

In fact, the union questioned the very need for a federal rule governing drug and alcohol testing of miners. The UMW pointed out that MSHA's own analysis showed that only 2.4 percent (24 of 978) of fatal mining accidents from 1975 to 2007 involved alcohol or drugs, and that only 0.009 percent (56 of 593,047) of nonfatal accidents from 1983 through 2007 possibly involved alcohol or drugs. It added that 80 percent of mines already have drug testing programs and that Virginia and Kentucky have state regulations on the subject. "There is not a significant problem in this area to justify spending government resources to duplicate what the industry is already doing," the UMW said.

"Our tax dollars would be better spent developing rules to protect miners from hazards that actually are killing them," like black lung and respirable coal and silica dust, the union said. It suggested the agency initiated the rulemaking "to divert attention" from "devastating reports about MSHA's actions in the Crandall Canyon tragedy." The union added, "MSHA has made no effort to demonstrate a scientifically valid basis for believing that miner impairment is a widespread safety issue in mines."

"The only high-profile accidents in the mining industry resulted from operator misconduct and a lax agency, not impaired employees," the union asserted. "In fact, in none of the recent major coal mine disasters—Sago, Aracoma, Darby and Crandall Canyon—was there any indication of drugs or alcohol being contributing factors to those accidents." Instead, the union said, "the actions or inactions of mine management and MSHA itself were to blame" in each incident.

"If miners must be tested, then so should everybody else who enters the mine property," the union contended, adding that "members of mine management *and* MSHA should be subject to post-accident testing." The UMW specifically questioned the agency's exclusion of many clerical and supervisory personnel from alcohol and drug testing, pointing out that clerical personnel often deliver supplies and equipment inside mines and that supervisors' decisions could cause accidents.

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actually are killing them," the UMW said. "MSHA has made no effort to demonstrate a scientifically valid basis for believing that miner impairment is a widespread safety issue in mines."

The union also advocated widening the scope of authority for conducting testing based on a reasonable suspicion of drug or alcohol use. "The proposed rule gives to supervisors, and *only* to supervisors, the authority to require testing for reasonable suspicion. Not only does this exempt supervisors from reasonable suspicion testing, it provides for no oversight of the supervisors' judgment."

The union suggested instead that any person, not just supervisors, should be able to report signs of possible drug or alcohol use and urged the addition of procedures "that will allow non-supervisory miners to accomplish testing of supervisors." The union also recommended that at least two persons be required to confirm objective bases for reasonable suspicion testing.

Medical Review Officers and Substance Abuse Professionals.

The union also criticized specific provisions of the proposed rule, especially those relating to the medical review officer. According to the union, the medical review officer should not be an employee of the mine operator because his loyalty would be to the employer, which could result in "discriminatory disciplinary actions." The union also argued that a medical review officer should be allowed to consult a miner's doctor only after obtaining the miner's written permission, and that the miner's refusal to grant such permission should not be deemed a breach of the rule. Additionally, the UMW's comments questioned the medical review officer's authority to determine whether a miner is misusing prescription drugs.

The union also expressed concern about the lack of a confidentiality provision regarding a miner's use of prescription drugs. "This is a serious shortcoming that MSHA should address," the union said. The union pointed out that many miners use prescription painkillers because of past work-related injuries and that revelation of their condition could hinder their chances of obtaining future employment.

Similarly, the union disagreed with the proposal's provisions about the substance abuse professional to whom a miner is referred after testing positive for drugs or alcohol. "The rule inappropriately allows the mine operator to select the SAP to whom a miner will be referred and then prohibits any other health care professional from questioning the SAP's recommended treatment," the UMW said. "It is improper to prohibit a miner's physician from opining that treatment is not necessary or that another type of treatment is equally or more appropriate."

The union recommended that once a miner has been referred to a substance abuse professional, the SAP should not participate in any disciplinary proceeding against the miner. The UMW cited potential conflicts between the proposed rule and confidentiality protections found in the Health Insurance Portability and Accountability Act, collective bargaining agreements, and state laws.

Scarcity of Programs and Labs.

Furthermore, the union expressed concern "that there are few Substance Abuse Assistance Programs in rural Appalachian areas where miners live and work" and urged that the substance abuse professional be available at a convenient time and location to the miners. It also urged the agency to add language specifying that the employer must pay for the substance abuse personnel.

Laboratories certified to perform the testing also are scarce in major coal states like West Virginia, Illinois, and Kentucky, the UMW pointed out. "If specimens must be transported great distances to other states, there is an increased possibility of tainted specimens due to exposure to heat and conditions of transport," they said.

Moreover, the union strenuously objected to testing of the bodies of miners killed in accidents. It called such testing "an unethical and immoral intrusion at the family's time of grief" and questioned MSHA's legal authority to do so without the family's authorization.

The union also disliked the proposed rule's provisions for dealing with positive test results. The union suggested that, while recovering after a first offense, addicted miners should be permitted to continue working "out of harm's way in other job duties" until they are ready to return to their former job. The union said a miner who tests positive during his 24-month recovery period should be returned to the rehabilitative process and provided alternative work.

"Allowing the mine operator complete discretion" after a miner's second offense "leaves the door wide open for abuse," the union said. Experienced miners are in demand because the coal industry is experiencing a "coal boom" after many slow years during which few miners were hired, the union said, so some coal operators might allow an offending miner to continue working in his regular job while undergoing rehabilitation. "The rule must require uniform treatment," the union said.

Comments from mine operators indicated that they also dislike the proposal. They resent the intrusion into their ability to fire workers at will, their possible obligation to continue providing medical insurance to workers they cannot fire,

and their potential liability for violating conflicting laws.

MSHA's Authority.

On behalf of coal producers Alliance Coal, BHP Billiton's Navajo Coal Co. and San Juan Coal Co., Interwest Mining Co., and Peabody Energy, three lawyers from the Crowell & Moring law firm in Washington, D.C., filed comments urging MSHA to withdraw the rule. The lawyers, Edward M. Green, Daniel W. Wolff, and Thomas P. Gies, asserted that MSHA lacks authority to promulgate this rule.

"Much of the Rule is aimed at the conduct of individual miners, and not the conduct of mine operators. The Mine Act is aimed at a different purpose, however—it promotes miner safety by imposing mandatory obligations on mine operators," they said. Therefore, they reasoned, MSHA's rulemaking authority "must have a nexus to the *conduct of mine operators* dealing with technology and mining conditions and systems — and not the non-mining-related conduct of miners."

Not only does this rule attempt to regulate the conduct of miners, but it "makes operators responsible" for "the private conduct of individual miners that occurs off mine property on the individual miner's private time," Green said. "MSHA must recognize that operators are not their miners' parents. MSHA cannot force operators to control their miners' off-mine conduct, nor can MSHA mandate that mine operators be held responsible for such off-mine conduct."

Green also criticized the proposed rule's prohibition on terminating a miner for a first offense. He said it undermines the employment-at-will doctrine, recognized by a majority of states, which permits an employer to fire an employee for any reason that is not barred by statute, contract, or other legal restriction. The rule also "convolutes an operator's discretion to take disciplinary action for violations that are part of the operator's program but not prescribed by MSHA in the Rule," such as a prohibition on drinking alcohol before a work-shift, Green said. Violation of such an employment policy, even though not a violation of the agency's proposed rule, could "be properly regarded as an act of insubordination" subject to the "disciplinary choices" that "should remain an operator's prerogative," he said. Green also pointed out that "the rule appears to prohibit an operator from establishing a lower BAC [Blood Alcohol Content] cut-off level" than the proposed rule's 0.04 percent level.

Creates Potential Conflict with Disabilities Act.

Green and his colleagues also identified a potential conflict between the proposal and the Americans with Disabilities Act. They noted that under the ADA, before a job offer is made, a job candidate may be subjected to tests for illegal drug use but an employer may not seek information about prescription drug use if such information could reveal a disability. MSHA's proposed rule, which would mandate testing for some prescription drugs, could "lead mine operators to unwittingly violate the ADA and leave them exposed to liability," they predicted.

Yet another ADA pitfall of the rule, according to Green, is its failure "to address how operators may treat an employee who appropriately takes a prescription drug which nonetheless may affect his ability to perform his job safely." The lawyers said that under their clients' existing programs, "if a miner cannot safely perform his or her job while taking a medical prescription, he or she is either placed in another position or directed to take leave." They added that the rule was unclear as to whether it "permits these existing, commonsense policies" for circumstances where "proper use of a prescription nonetheless impairs the miner's ability to perform his or her job."

The Family and Medical Leave Act also may come into play because of the proposed rule, Green warned. Section 66.400 of the proposed rule, which requires mine operators to provide job security to first offenders, "could trigger FMLA obligations" if a substance abuse professional recommends in-patient treatment for a drug- or alcohol-addicted miner, he said. In that situation, the miner probably could take FMLA leave, which would force the mine operator to "continue to pay health insurance premiums for a miner whom it would have otherwise discharged," Green said.

Mine Operators' Concerns.

The National Mining Association, which represents more than 325 mining companies, filed comments saying that it is "troubled" that the proposed rule could "disturb" mine operators' "existing comprehensive substance abuse programs," including those that "are the product of collective bargaining." The National Mining Association also said MSHA "failed to provide a satisfactory explanation of its basis" for promulgating the rule, as required by the Administrative Procedure Act, and NMA worried that the proposed rule would "displace the employment-at-will doctrine."

Those sentiments were echoed by comments from Hunter Moore, safety director of Boxley Materials Co. in Roanoke, Va. He wrote that "any miner who willfully violates this standard should not be given a guaranteed second chance" because a guaranteed second chance "can significantly reduce the safety of any operation." Boxley said, "MSHA is a Safety Administration and not a Human Resources administration and should not control any company's disciplinary policies."

Comments from the Mining Awareness and Resource Group also indicated disapproval of the proposed rule's mandatory second chance provision. Pointing out that the Mine Safety and Health Act prohibits the adoption of rules that reduce safety, MARG argued that the rule could reduce safety at mines with zero tolerance policies. MARG warned that the proposal's implication, at Section 66.400(b), that an employee whose alcohol or drug abuse caused an accident must receive a second chance, "clearly contradicts the Mine Act" and "will be challenged by the regulated

community.”

Increased Operator Liability Predicted.

Laura Skaer, executive director of the Northwest Mining Association, a Spokane, Wash.-based trade association with 1,700 members in 36 states, raised liability issues. She expressed concern that the “100 percent tolerance policy” for first-time offenders would subject mine operators, as well as the federal government, to liability for accidents. She also wondered whether mine operators would be liable for accidents caused by their contractors’ and subcontractors’ employees or whether their responsibility would end once they informed the contractors of the rule’s requirements.

“MSHA is a Safety Administration and not a Human Resources administration and should not control any company’s disciplinary policies,” said Hunter Moore, safety director of Boxley Materials Co. in Roanoke, Va.

Skaer said the rule would force many mine operators “to move from a zero tolerance policy to a 100 percent tolerance policy for first-time offenders,” adding that “if only one worker took advantage of that ‘free pass,’ mine safety would be compromised at that mine.” Section 66.204(b) particularly troubled her, because it “would appear to give a miner unlimited opportunities to escape being terminated,” she said, “as long as they admit they have a problem and request assistance, prior to testing.” She said this provision seems to provide “an ‘out’ for the miner to escape punishment for his illegal behavior” and recommended that the section be stricken from the final rule.

She also faulted MSHA for providing “woefully underestimated” cost projections for the drug testing. She said “remote operations should be permitted to continue to utilize cheaper alternatives such as over-the-counter screening tools that are more readily available, and in which the results can be read by a supervisor at the operation” rather than being required to use only certified laboratories.

Laboratory Certification.

A contrary view on laboratories was expressed by Gary Carmack, the laboratory director at Southwest Laboratories in Phoenix, which provides drug testing services for employers. He said that while Southwest Laboratories “would strongly support the requirement that a laboratory performing the testing be Federally certified, the additional requirement for College of American Pathologies (CAP) certification is, in our opinion, ill-advised.” He pointed out that the CAP is not a governmental agency and therefore “would not convey any special regulatory authority to a laboratory” and pointed out that its certification process does not cover some drugs, such as anabolic steroids and synthetic amphetamines, that have “a high abuse potential.” Carmack suggested instead that “if the highest level of quality testing is the goal of MSHA then what is needed is for the laboratory to be SAMHSA certified with the added requirement that the same degree of reliable testing be undertaken no matter the drug being tested.” SAMHSA is the Substance Abuse and Mental Health Services Administration of the U.S. Health and Human Services Department.

Dr. Robert Swotinsky, a physician at the Fallon Clinic in Sudbury, Mass., recommended against testing for prescription drug use. “Workplace testing for alcohol and illegal drugs is complex enough,” he said. “Put these programs into place first, and explore prescription drug testing as a potential expansion of the program for implementation at a later time.” He downplayed the risk of miners’ using prescription drugs, saying, “Prescription painkiller use does not necessarily make a miner impaired or pose a safety risk. It may instead *enhance* safety by controlling pain so that the miner can better function and concentrate on the job.”

By Gayle Cinquegrani

The text of the proposed rule may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=gcii-7lzt52>.

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