



FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Feb 6, 2013
ADMINISTRATIVE LAW DIVISION

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February 6, 2013

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Miners' Health, Safety and Training

RULE: 56CSR19, Rules Governing Substance Abuse Screening, Standards and Procedures

DATE FILED AS AN EMERGENCY RULE: December 27, 2012

DECISION NO. 1-13

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.

A handwritten signature in cursive script that reads "Natalie E. Tennant".

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 1-13)

AGENCY: Miners' Health, Safety and Training
RULE: 56CSR19, Rules Governing Substance Abuse Screening, Standards and Procedure

FILED AS AN EMERGENCY RULE: December 27, 2012

- par. 1 The WV Office of Miners' Health, Safety and Training has filed the above new rule as an emergency rule.
- par. 2 W. Va. Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Office filed this emergency rule with supporting documents with the Secretary of State December 27, 2012 and with the LRMRC December 27, 2012.
- par. 7 It is the determination of the Secretary of State that the Office has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority -- W. Va. Codes §22A-6-14 and 22A-1A-1 read:

§22A-6-14. Study of mandatory substance abuse program.

The Board of Coal Mine Health and Safety is directed to study the mandatory substance abuse screening policy and program requirements of article one-a of this chapter and make recommendations to the director regarding: (a) Establishment of guidelines to be employed by the Board of Appeals when administering disciplinary actions to certified persons pursuant to article one-a of this chapter; (b) requiring certification by the Office of Miners' Health, Safety and Training of

persons who regularly work at mines who are not presently required to obtain certification; and (c) establishment of additional minimum requirements, parameters, methodologies and protocols to be integrated into the substance abuse screening policy and program requirements of article one-a of this chapter. By August 31, 2012, the board shall submit its report to the director. The director is authorized to propose for legislative promulgation, legislative rules pursuant to article three, chapter twenty-nine-a of this code regarding the implementation of the findings of this study. These rules shall be initially promulgated as emergency rules by the director pursuant to the provisions of section fifteen, article three, chapter twenty-nine-a of the code by December 31, 2012, and shall include the establishment of certification requirements recommended by the board for persons who regularly work at mines that are not presently required to obtain certification and establishment of guidelines to be employed by the Board of Appeals when administering disciplinary actions to certified persons pursuant to article one-a of this chapter.

§22A-1A-1. Substance abuse screening; minimum requirements; standards and procedures for screening.

(a) Every employer of certified persons, as defined in section two, article one of this chapter, shall implement a substance abuse screening policy and program that shall, at a minimum, include:

(1) A preemployment, ten-panel urine test for the following and any other substances as set out in rules adopted by the Office of Miners' Health, Safety and Training:

(A) Amphetamines,

(B) Cannabinoids/THC,

(C) Cocaine,

(D) Opiates,

(E) Phencyclidine (PCP),

(F) Benzodiazepines,

(G) Propoxyphene,

(H) Methadone,

(I) Barbiturates, and

(J) Synthetic narcotics.

Split samples shall be collected by providers who are certified as complying with standards and procedures set out in the United States Department of Transportation's rule, 49 CFR Part 40, which may be amended from time to time by legislative rule of the Office of Miners' Health, Safety and Training. Collected samples shall be tested by laboratories certified by the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA) for collection and testing. Notwithstanding the provisions of this subdivision, the mine operator may implement a more stringent substance abuse screening policy and program;

(2) A random substance abuse testing program covering the substances referenced in subdivision (1)

of this subsection. "Random testing" means that each person subject to testing has a statistically equal chance of being selected for testing at random and at unscheduled times. The selection of persons for random 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 the persons' social security numbers, payroll identification numbers, or other comparable identifying numbers; and

(3) Review of the substance abuse screening program with all persons required to be tested at the time of employment, upon a change in the program and annually thereafter.

(b) For purposes of this subsection, preemployment testing shall be required upon hiring by a new employer, rehiring by a former employer following a termination of the employer/employee relationship, or transferring to a West Virginia mine from an employer's out-of-state mine to the extent that any substance abuse test required by the employer in the other jurisdiction does not comply with the minimum standards for substance abuse testing required by this article. Furthermore, the provisions of this section apply to all employers that employ certified persons who work in mines, regardless of whether that employer is an operator, contractor, subcontractor or otherwise.

(c) The employer or his or her agent shall notify the director at least quarterly, on a form prescribed by the director, of the number of pre-employment substance abuse screening tests administered during the prior calendar quarter and the number of positive test results associated with the substance abuse screening tests administered.

(d) The employer or his or her agent shall notify the director, on a form prescribed by the director, within seven days following completion of an arbitration conducted pursuant to a collective bargaining agreement applicable to the certified person, if any, of discharging a certified person for violation of the employer's substance abuse screening policy and program. The notification shall be accompanied by a record of the test showing positive results or other violation. Notice shall result in the immediate temporary suspension of all certificates held by the certified person who failed the screening, pending a hearing before the board of appeals pursuant to section two of this article.

(e) Suspension or revocation of a certified person's certificate as a miner or other miner specialty in another jurisdiction by the applicable regulatory or licensing authority for substance abuse-related matters shall result in the director immediately and temporarily suspending the certified person's West Virginia certificate until such time as the certified person's certification is reinstated in the other jurisdiction.

(f) The provisions of this article shall not be construed to preclude an employer from developing or maintaining a drug and alcohol abuse policy, testing program or substance abuse program that exceeds the minimum requirements set forth in this section. The provisions of this article shall also not be construed to require an employer to alter, amend, revise or otherwise change, in any respect, a previously established substance abuse screening policy and program that meets or exceeds the minimum requirements set forth in this section. The provisions of this article shall require an employer to subject its employees who as part of their employment are regularly present at a mine and who are employed in a safety-sensitive position to preemployment and random substance abuse tests: Provided, That each employer shall retain the discretion to establish the parameters of its substance abuse screening policy and program so long as it meets the minimum requirements of this article.

For purposes of this section, a "safety-sensitive position" means an employment position where the employee's job responsibilities include duties and activities that involve the personal safety of the employee or others working at a mine.

par. 9 It is the determination of the Secretary of State that the Office has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- W. Va. Code §29A-3-15(f) defines "emergency" as follows:

(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the are as follows:

The legislature passed House Bill (HB) 4351 during the 2012 legislative session. Among other things, HB 4351 created a new article 1A in Chapter 22A. This new article created a mandatory substance abuse screening policy and program for all coal operators and independent contractors who employs certified persons as defined in W. VA. Code §22A-1-2. These mandatory substance abuse screening policies and programs require both pre-employment substance abuse tests and random substance abuse testing of current employees who are certified persons or who work in a safety sensitive position.

The new article also requires coal operators and independent contractors to notify the Director of the Office of Miners' Health, Safety and Training (Director) when a person is discharged for failing a random substance abuse test. When the director receives notification that a person was discharged for failing a random substance abuse test, the Director must temporary suspend that persons certificates pending a hearing before the Board of Appeals.

The new article also imposes certain confidentiality requirements regarding the substance abuse test results.

This emergency rule clarifies and implements the above mentioned legislative mandates.

Circumstances Constituting the Emergency.

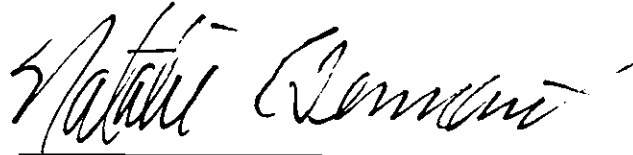
A problem has developed in the mining industry where individuals are working in mines while under the influence of an illicit substance. Those individuals are a safety risk both to themselves and others working in the mine. This Rule,

together with HB 4351, is designed to identify and remove those individuals from the mines. Removing these individuals from the mines will reduce accidents and fatalities and prevent substantial harm to the public interest.

HB 4351 also mandates that the Director file this rule as an emergency before December 31, 2012. W. VA. Code §22A-6-14.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "immediate preservation of public peace, health, safety or welfare" and "prevent substantial harm to the public interest"

par. 14 This decision shall be cited as Emergency Rule Decision 1-13 or ERD 1-13 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the WV Office of Miners' Health, Safety and Training, the Attorney General and the Legislative Rule Making Review Committee.



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