

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #3

Do Not Mark In This Box

2019 MAR 05 PM 4:01

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: WV Office of Miners' Health, Safety and Training TITLE NUMBER: 56

CITE AUTHORITY: W. Va. Code § § 22A-1A-1 et seq. and 22A-6-14

AMENDMENT TO AN EXISTING RULE: YES _____ NO x

IF YES, SERIES NUMBER OF RULE BEING AMENDED: n/a

TITLE OF RULE BEING AMENDED: n/a

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 19

TITLE OF RULE BEING PROPOSED: Rules Governing Substance Abuse Screening, Standards and Procedure

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.


Authorized Signature

**BRIEF SUMMARY OF THE PROPOSED RULE
AND
STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE**

The legislature passed House Bill (H. B.) 4351 during the 2012 legislative session. Among other things, H. B. 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 employ 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 temporarily suspend that person's certificate pending a hearing before the Board of Appeals.

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

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

Statement of circumstances which require the proposed rule.

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 H. B. 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.

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

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rules Governing Substance Abuse Screening, Standards and Procedure

Rule Title: _____

Type of Rule: Legislative Interpretive Procedural

Agency: WV Office of Miners' Health, Safety and Training

Address: 7 Players Club Drive, Suite 2
Charleston, WV 25311

Phone Number: (304 558-1425 Email: blk@wvago.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

OMHST does not anticipate that this proposed rule will have any fiscal impact on the costs or revenues of this agency.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rules Governing Substance Abuse Screening, Standards and Procedure

Rule Title: _____

Rule Title: _____

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

OMHST does not anticipate that this proposed rule will have any fiscal impact on the costs or revenues of this agency.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

None.

Date: 12-26-13

Signature of Agency Head or Authorized Representative

C.A. Phillips

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: March 26, 2013

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) WV Office of Miners' Health, Safety and Training
7 Players Club Drive, Suite 2
Charleston, WV 25311
(304) 558-1425

LEGISLATIVE RULE TITLE: Rules Governing Substance Abuse Screening, Standards and Procedure

1. Authorizing statute(s) citation W. Va. Code §§ 22A-1A-1 et seq. and 22A-6-14

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
December 27, 2012

b. What other notice, including advertising, did you give of the hearing?
It was posted on the OMHST website.

c. Date of Public Hearing(s) or Public Comment Period ended:
January 28, 2013

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached x No comments received

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

March 26, 2013

- f. Name, title, address and phone/fax/e-mail numbers of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Eugene White, Director
7 Players Club Drive, Suite 2
Charleston, WV 25311
Phone - (304) 558-1425
Fax - (304) 558-1282
eugene.e.white@wv.gov

- g. **IF DIFFERENT FROM ITEM 'f'**, please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

Barry L. Koerber, Assistant Attorney General
7 Players Club Drive, Suite 2
Charleston, WV 25311
Phone - (304) 558-1425
Fax - (304) 558-1282
blk@wvago.gov

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

n/a

b. Date of hearing or comment period:

n/a

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

n/a

d. Attach findings and determinations and reasons:

Attached n/a

**Comments To The Proposed Rule
Of The WV Office Of Miners' Health, Safety and Training (OMHST)
To Title 56 Related To West Virginia Code §22A-1A-1 *Et Seq.*
Rules Governing Substance Abuse Screening, Standards & Procedure**

The following West Virginia companies submit the attached **Comments to the Proposed Rules Governing Substance Abuse Screening, Standards and Procedure for West Virginia Mines and Miners:**

Mingo Logan Coal Company	ICG Beckley, LLC
Coal-Mac, Inc.	Vindex Energy Corporation
Wolf Run Mining Company	ICG Tygart Valley, LLC
ICG Eastern, LLC	Patriot Mining Company, Inc.

These Companies are all affiliated with Arch Coal, Inc. which, together with its various affiliated companies, represents approximately 15% of America's coal supply.

These Companies are strongly committed to maintaining a safe and drug-free workplace for our nation's coal miners - the people who produce one of our nation's critical sources of energy. We are gratified that the West Virginia Legislature finally passed a Drug-Free Workplace Act to protect all of our state's miners. However, we offer these comments because the Proposed Rules designed to implement that law both needs modification in order to achieve the goals of the legislation and clarification in other areas.

Our comments are discussed in more detail below:

- 1. The Rule Should Have Made It A Requirement To Also Test For Alcohol And Adopt The .04% BAC Limit Similar To Kentucky's Requirement For Its Drug-Free Coal Mines**

The Proposed Rule at 5.3¹ makes no provision for alcohol testing nor does it set a limit for what will be considered a positive alcohol test under the law. The purpose of the law is to

¹ Bolded numbers refer to the individual rule numbers found at §56-19-1 *et seq.*

provide workplaces free from substance abuse that can endanger employees' lives. We have all seen the deadly effects of drunk driving. Someone's ingestion of alcohol while at work or immediately before proceeding to work just as clearly endangers the lives of co-workers. Persons testing positive for a blood alcohol level of .04% or higher while at work are not only being irresponsible, they are endangering the lives of themselves and their co-workers as they transit mine property or operate mining equipment. In such situations, their miner's certificate or safety-sensitive certification should be subject to revocation just as it would had the employee taken a controlled substance to get high.

This is not clear however. Rule 5.11 allows the Employer to adopt a substance abuse policy that limits alcohol use at work (and therefore set its own acceptable limits) and Rule 5.12 requires Employers to maintain records of these positive alcohol test results. However, with no mandate in Rule 5.3 that requires testing for alcohol, or setting a threshold for what constitutes a positive alcohol result, this difference between Rules 5.3 and 5.10 and 5.11 is confusing for employers and the agency alike.

If the OMHST has set a threshold for its own purposes as to what is an unacceptable blood alcohol level, Employers could still be more stringent. For example, a .08% BAC is considered drunk driving in West Virginia. §17C-5-2. In Kentucky, the %BAC standard used in its substance abuse policy for the safety of its miners is .04% BAC. Other safety-agencies such as the FAA use an even lower threshold (.02% BAC) since the person is still under the influence of alcohol and that agency does not want pilots to be under the influence of alcohol as opposed to the greater threshold of .04% BAC. We recommend at least the .04% BAC level as the threshold for the OMHST to determine someone is under the influence of alcohol.

Mandating an alcohol test and having such a defined threshold will provide much guidance to employers and employees alike as to what are the expectations of the OMHST on this issue.

2. **The Term *Serious Accident* in Rule 5.14 Should Be Defined In Order To Prevent Confusion With Other Definitions of What Is A Serious Accident**

Proposed Rule 5.14 provides that “[e]very employer shall require any person involved in a serious or fatal accident to be drug tested immediately after the accident.” While the Proposed Rule requires testing immediately after a serious accident or fatality, it does not define the term “serious accident” or refer to any other provision in West Virginia’s Mine Safety rules. The Companies suggest that the Rule either use the same definition used elsewhere in the West Virginia’s mine safety law or refer to the rule that defines serious accident. This would prevent confusion as to what is meant by this rule and ensure it is no different than the other mine laws defining serious accidents.

Specifically, WVCSR §36-19-3.3 defines “serious personal injury” as “[a]n event at a mine which causes bodily injury to an individual which requires such individual to be admitted to a medical facility overnight for reasons other than strains, sprains or observation as determined by a physician.” This is the definition that the Companies recommend be adopted.

3. **While The Statute Requires Urine Tests For Pre-employment Testing (§56-19-5), Urine Testing Is Not Similarly Required When an Employer Random Tests Or Tests For Cause, Therefore, the OMHST Should Permit Other Reliable Testing Methodologies Where The Statute Does Not Require a Urine Test**

Section 22-1A-1(a)(1) of the code specifically states that a “pre-employment ten-panel urine test” is required for all pre-employment testing. While Section 22-1A-1(a)(2) requires random testing for substances set forth in 22-1A-1(a)(i), it does not require urine tests nor does it

specify any particular required testing method. Nor is urine testing required for instances of reasonable suspicion or post-accident. Therefore, the OMHST has the ability to adopt other scientifically reliable and cost-efficient testing methodologies, so long as the test results can be verified through split samples by laboratories certified by SAMHSA. (§22A-1A-1(a)(i))

Because West Virginia Code §22A-1A-1(a)(2) does not require urine tests, this gives the OMHST a window of opportunity to allow, at a minimum, other types of drug testing such as oral fluids or hair testing for random and reasonable suspicion tests. OMHST is urged to adopt testing methods which have proven themselves less invasive, more reliable and less costly as discussed above.

a. Oral Fluids Testing

There is considerable scientific support for the use of FDA-approved oral or saliva fluids testing when test results can be verified through split samples by SAMHSA certified labs. Oral fluids testing is preferable for many reasons: 1) there is far less opportunity to dilute, substitute and adulterate a sample; 2) test results are scientifically reliable, especially when a split-sample specimen is taken and can be provided for SAMHSA-certified confirmatory testing using gas chromatographic/mass spectrometry or other comparably reliable analytical method; 3) oral fluids tests are easier to administer, and therefore less costly, for the kind of remote locations where coal mining occurs; 4) collection of an oral fluid sample is far less invasive than an "observed urine test;" and 5) such oral fluids tests have been ruled legally defensible in the courts. Because the window of detection on oral fluids sampling is shorter than for urine, test results show more recent use of the tested-for drugs. Drugs are detected immediately after their use making oral fluids tests an excellent indicator of someone currently "under the influence," especially for drugs like cannabinoids and THC.

Finally, the United States Department of Transportation (DOT) is in the process of considering allowing lab-based oral fluids testing for DOT-mandated tests as a result of their increased reliability, less invasive method and reduced opportunity to dilute or adulterate. The Companies believe that the OMHST rules should recognize the future of drug testing rather than close the door on this methodology through rules that do not specifically allow, in addition to urine tests, any FDA-approved oral fluids tests, with confirmatory samples tested according to SAMHSA standards on all reasonable suspicion and random testing done by employers.

b. Hair Testing

There also is considerable support for the use of hair testing. Hair testing is also relatively non-invasive and has the ability to detect illicit drug use over a longer period (roughly 90 days) than is available with urine testing. While the longer window of detection makes hair testing particularly desirable for **pre-employment testing**, several states have approved hair testing and have endorsed its accuracy for all substance abuse testing. The Companies believe that the OMHST should not automatically preclude this testing methodology for reasonable suspicion and random testing.

It is further noted that neighboring mining states Kentucky and Maryland permit both oral fluids and hair testing when conducted through verified SAMHSA certified labs for their various drug-free workplace statutes, rules or programs.

4. **The Proposed Rule Fails To Establish Any Guidance As To Thresholds For A Positive Drug Test**

Rule 7.1.1 provides that only drug testing vendors who follow all standards, procedures, and protocols set forth by the United States Department of Transportation for the collection of urine samples will be allowed. Proposed Rule 7.1.2 also provides that collected samples must 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. Although these rules adopt SAMHSA methodology and even specify the substances to be tested for, the Proposed Rules are devoid of any threshold levels for a determination of what constitutes a positive test.

These Companies encourage the OMHST to implement a rule that does set specific standards, setting a threshold for what constitutes a positive drug test for purposes of the OMHST. We believe that the Proposed Rule is more likely to be successful at creating safe workplaces if it establishes such parameters.

Otherwise, the industry – which is miners, certified persons, employers, companies and the OMHST – can find itself grappling with whether a discharge for the smallest amount of a drug identified in the Rule would also result in a certificate revocation proceeding; or worse, grappling with companies that evade compliance with the law by setting their own thresholds at unacceptably high levels, thereby undermining the legislation and its purpose.

Perhaps most critical, the Board of Appeals itself will have no guidelines to apply as it grapples with issues of revocation and what thresholds cannot be exceeded for its own re-licensing decisions. Now is the time to set such thresholds so as to provide important guidance to all and to not compromise the legislation or the procedures for re-licensing decisions.

5. Pre-Employment Testing Timeframes Should Be Adopted

Proposed Rule 3.12 defines “pre-employment testing” as “the substance abuse testing of any certified person or safety-sensitive person upon hiring by a new operator or new independent contractor, rehiring of any certified person or safety-sensitive person by an operator or independent contractor following a termination of the employment relationship, or transferring to a West Virginia mine from an employer’s out-of-state mine to the extent that the 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 rule.” While the Proposed Rule defines “pre-employment testing,” the Companies suggest that the Rule also establish timeframes for pre-employment testing. For example, the West Virginia Alcohol and Drug-Free Workplace Act applicable to public improvement construction projects defines “preemployment drug test” as a “drug test taken within the preceding twelve months from employment or seven days after hire.”

6. There Are Serious Privacy Issues Involved With OMHST’s Current Implementation Of The Rule

For persons with miner certificates, the OMHST already has on file the home address of these miners. Ordinarily, miners would expect their home addresses to be treated with some level of privacy by the agency. However, for purposes of a potential revocation proceeding, an old address provided years’-ago to the OMHST does not provide the OMHST with a way to reliably communicate with a miner if the agency is pursuing revocation. In short, many miners may have moved to a new address since first receiving their initial miner certificates.

However, a newly compiled list provided today by Employers and mailed to the OMHST on one readily accessible form will not result in OMHST having reliable addresses some years in the future. Rather, such a list of names and addresses for everyone working at a particular mine creates serious concerns for employees about the privacy of their addresses.²

These Companies and their employees have a legitimate concern that such a list can be the source of mischief and create a serious potential for the invasion of their privacy. Nothing prevents a competitor from trying to secure the name and address of all persons working at the

² Such a list could serve to provide a third party door-to-door solicitor with the name and address of all of an Employer’s employees in one handy document.

mine next door and paying visits to their homes or sending unsolicited letters to their homes having obtained somehow the names and addresses on the form submitted to the OMHST.

We recommend that to solve the OMHST's legitimate concern and our employees' genuine privacy interests, that Employers be required to submit to the OMHST any current and/or last known addresses of any and all persons it reports to the OMHST for: a) a positive drug test; b) a discharge as the result of a positive drug test; c) any employees refusing to take a pre-employment, random or reasonable suspicion test; and d) any employees whose drug test procedures or results showed evidence of dilution, substitution or adulteration.

7. By Not Requiring Reports To The OMHST Regarding Who Has Tested Positive, The Proposed Rule Fails To Ensure Drug-Free Workplaces As Contemplated By The Statute

As written, the Proposed Rule does not require Employers to report to the OMHST positive drug tests unless and until that certified person is actually discharged by the Employer. There are a number of deficiencies with this proposed reporting scheme:

a) West Virginia Code 22A-1A-1(c) specifically states that the Employer shall notify the Director at least quarterly the number of tests they have administered and the number of positive test results associated with this testing. But there is no requirement under the rule to also identify who these persons are that tested positive. This shortfall in the rule greatly impedes the OMHST's ability to determine the certificate-holders who engaged in substance abuse.

b) As the rule is now written, a certified person who knows he or she will test positive can quit before the Employer receives their positive test results. As in the past, prior to the change in the law, it encourages an employee who knows they will have a positive test result to quit before being discharged, apparently avoiding potential revocation of their certification

since the OMHST will not receive their names and results of their test. This does little to protect our miners from the dangers created by a substance abuser and puts our mines back to pre-legislation times, when drug users simply quit and moved to a new mine. The legislation was passed in part to stop this conduct.

c) An operator/employer who, for whatever reason is intent on employing a **repeat** substance abuser, even though the substance abuser could endanger co-workers or subordinates as a result of this regular substance abuse, can also evade the purpose of the legislation. Thus, while an operator/employer is required to maintain a random drug testing program and report sheer numbers, there is no mechanism to ensure that the persons who have had positive drug tests are reported to the OMHST. In fact, the only time the certification of the person testing positive may be potentially revoked is when and if an Employer successfully discharges an employee.

The problem regarding this deficiency is also highlighted in two legal decisions that started in West Virginia mines – *State ex rel. Wooten v. Coal Mine Safety Bd. of Appeals and William Coulson* (226 W. Va. 508, 703 S.E.2d 280 (2010)) and *Eastern Assoc. Coal Corp. (EACC) v. United Mine Workers of America* (531 U.S. 57 (2000)). These cases are described in more detail in Attachment A so the OMHST will better understand our concerns.

As a result, we recommend that Employers be required to report the names of any certified persons who have been discharged as well as any person who has had two instances in a two year period of confirmed positive drug and alcohol test where a Medical Review Officer has confirmed one of the following: a) illegal drugs in a person's sample; b) blood alcohol over .04% BAC; or c) prescribed drugs listed on the panel, where test results show in excess of therapeutic levels, in the event the miner has a prescription. This would ensure the OMHST can

take its own actions regarding certificates of substance abusers, regardless of an Employer's decision.

d) Employers will still have to grapple with their own decisions regarding discharge, arbitration decisions, rehabilitation, potential use of a "last chance agreements" and whether the Employer can safely accommodate the employee taking a prescribed drug that may render the person unable to perform their safety-sensitive duties, either temporarily or permanently. These decisions implicate a myriad of labor, employment and health care laws that the Employer must consider and apply. Therefore, these Companies are not suggesting that the OMHST take a position or role in these employment decisions. Rather, the OMHST should be sent the appropriate information it needs to make its own decisions with regard to possible revocation of a certification.

By being informed of positive tests as suggested above, the OMHST would have the information to exercise its own discretion on revocation proceedings when positive results are compromising the safety of miners.

e) Such a change in the Proposed Rule would also align West Virginia with its neighboring coal mining states that do have the ability to suspend or revoke miner certificates following a report of a "positive test result" instead of only "at discharge." This is important since West Virginia Code §22A-1A-1(e) recognizes that neighboring mining states have substance abuse statutes and contemplates reciprocity on licensing decisions. However, if the only time West Virginia receives the name of a person with substance abuse issues is after a successful discharge, West Virginia's law will indeed be very different, and potentially less safe, than the procedures in Kentucky and Virginia.


Right now, several of the Companies commenting here have operations that cross the borders of two states. They assume that if someone has tested positive for illegal substances such is reported to the state safety agency for the state where the employee was working that day. The Proposed Rule obviously changes what is reported if the person was working in Kentucky (a positive test) than if he was working in West Virginia that day (a discharge only). This result does not lead to safer drug-free workplaces.

Conclusion

The Companies support the implementation of the Proposed Rules, subject to the comments and proposed changes presented herein. Since it is difficult to foresee all issues and complexities involved in establishing and operating a new substance abuse program, it is recommended that this Rule be revisited no later than two years after its adoption to evaluate any changes that should be undertaken to improve the Rule and its operation. Again, we are grateful to the West Virginia Office of Miners' Health, Safety and Training for developing the Proposed Rules and for the opportunity to comment on them.

Thank you for your consideration of these comments. Please do not hesitate to contact me if you have any questions.

Sincerely,



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ATTACHMENT A

1. *State ex rel. Wooten v. Coal Mine Safety Bd. of Appeals and William Coulson*
226 W. Va. 508, 703 S.E.2d 280 (2010)

In *Coulson*, a fatal underground mine accident occurred in a West Virginia underground mine when a coal miner (Coulson) operating a locomotive collided with a trip of dollies, causing another miner to be caught between the locomotive and another rail car. Shortly after the accident, Coulson's employer required him to submit to a drug test. The results of the drug test revealed the presence of both oxycodone and hydrocodone. While Coulson had a prescription for hydrocodone he had no prescription for the narcotic oxycodone and therefore his drug use was illegal.

Approximately two weeks later, Coulson was notified he would be discharged. Two days later, the Union filed a grievance regarding the discharge on Coulson's behalf. Meanwhile, after learning of Coulson's drug test results, the OMHST filed a petition with the Board of Appeals seeking to permanently revoke all miner certificates held by Coulson.

Coulson was charged under a West Virginia statute (West Virginia Code of State Rule §36-22-4.3) which provided that "no person shall at any time enter any mine while under the influence of intoxicants." The statute went on to say that "an operator shall refuse entry into a mine or remove from the mine any person whom the operator has reasonable cause to believe is under the influence of intoxicants. Reasonable cause shall be determined by the existence of one or more of the following conditions:"

- (1) Odor of alcohol or other intoxicant about the individual or on his breath.
- (2) Abnormally slurred speech, stammering, stumbling, weaving or other loss of motor control.

(3) Unexplained animated signs of intoxication or influence of drugs on the individual.

(4) Other discernable signs of intoxication or influence of drugs on the individual.

The Board and the circuit court dismissed the intoxicant charge, finding that the OMHST did not carry its burden and that the evidence simply showed that Coulson had ingested an unprescribed drug at some time in the recent past and no co-worker testified that they believed Coulson was impaired at the time he was working underground.

The case went to the West Virginia Supreme Court of Appeals, where the OMHST argued that the evidence which showed Coulson had ingested measurable amounts of both oxycodone and hydrocodone prior to the accident demonstrated that Coulson was under the influence of intoxicants, including one for which he had no prescription.

Fortunately, the Supreme Court ruled that the positive drug test results combined with the fact Coulson could not explain where he was in the mine at the time of the accident and he did not slow down when signaled to stop by the victim, the OMHST had sufficient evidence to seek revocation of Coulson's miner certificate.

2. ***Eastern Assoc. Coal Corp. (EACC) v. United Mine Workers of America***
531 U.S. 57 (2000)

In the *EACC* case, a truck driver employee, covered by a collective bargaining agreement between his employer and the UMWA, was subject to Department of Transportation regulations, which required random drug testing of workers engaged in "safety sensitive" tasks. The collective bargaining agreement specified that the company had to prove in binding arbitration that it had "just cause" to discharge an employee, or else the arbitrator could, at his discretion, order the employee reinstated. On two separate occasions eleven months apart, the employee tested positive for illegal drugs.

After each occasion, the employer sought to discharge the employee. Each time, the UMWA took the discharge decision to an arbitrator. On the first occasion, the arbitrator ordered reinstatement with a "last chance agreement." When the employee tested positive again in less than one year, the employer discharged again under the last chance agreement. Nevertheless, the UMWA took the case to a new arbitrator who ignored the terms of the "last chance agreement" reinstating the substance abuser because the arbitrator had the discretion to do so.

EACC filed suit in the federal court to vacate the arbitration award, arguing that the award contravened a public policy against the operation of dangerous machinery by workers who test positive for drugs. The District Court concluded that sanctity of the arbitration process was more important than the public policy against drug use by persons driving on the roads under the influence of illegal drugs.

The case finally went to the U.S. Supreme Court. It too ruled that the sanctity of the arbitration process where the employer-union contract gave the arbitrator that discretion trumped whatever public policy concerns existed.

How are these cases relevant? Had these two situations occurred in 2013, following passage in 2012 of West Virginia's drug-free workplace legislation at coal mines, one could expect these miners' certification could be revoked regardless of their employment status. Our families in the future would know that their loved one could not be exposed to a substance abuser at work when there is uncontroverted evidence through a positive drug test using illegal drugs at work.

If these Rules are implemented as is without having to report positive test results, and a situation like *Coulson* or *EACC* arises again, the company still would have no requirement to report persons with a uncontroverted positive drug tests since there was ultimately no discharge.

Without a discharge, there is simply little mechanism under the proposed rules for the OMHST to proceed, independent of an employment decision, with revocation of the substance abuser's certification. This is not what the legislation intended.



West Virginia Coal Association

PO Box 3923, Charleston, WV 25339 ■ (304) 342-4153 ■ Fax 342-7651 ■ www.wvcoal.com

January 28, 2013

**Director Eugene White
W V Office of Miners' Health Safety & Training
#7 Player's Club Drive, Suite 2
Charleston, WV 25311-1626**

Re: Mandatory Drug Testing Emergency Rule

Dear Director White:

Please accept the following comments on behalf of the West Virginia Coal Association to the Emergency and Legislative Rules Governing Substance Abuse Screening, Standards and Procedures under Title 56, Series 19. We are wholeheartedly supportive of mandatory drug testing and removal of drug and alcohol use from within the industry. Our comments are intended to strengthen the proposed rules and prevent abuses or unintended consequences that would serve to impact the integrity of the program objectives abuses.

1. We support the 25% annual random sampling contained in section 3.13 of the rule. This is a major component of the rule and will result in an effective testing standard. We believe this could be more clearly stated in the rule by deleting the word "sample" within the next to last sentence. This section of the rule will likely be challenged by interests who have been on record as submitting to a higher percentage of the workforce that should be tested on an annual basis. Clarification of this standard is necessary.

2. Incorporate alcohol testing into the rule for cause, random and post-accident testing. The use of illegal, non-prescribed, drugs, or other substances that impair behavior and alcohol use are known safety concerns in safety sensitive work environments. We understand the omission of alcohol testing within this emergency rule is based on alcohol use being silent within the statute which authorized the rule. We would point out that other provisions of state law strictly preclude the use of alcohol and directs mine operators to remove individuals from mine sites who may be under the influence of its use.

2/1/13 10:40 AM

Drugs and alcohol are both prohibited under state mining law and mine operators are required to enforce programs to deter usage. Including alcohol within this rule and subjecting miners who use alcohol at the workplace to severe sanctions and potential loss of mining privileges would be consistent with the state mine act.

3. Require mine operators and independent contractors to report failed tests or incidents of testing positive for drug use or incidents of testing positive for one or more of the items contained under section 5.3 of the rule. Failing a drug test should also constitute immediate and temporary suspension of certificates or safety sensitive cards and not merely those incidents of drug use that result in discharge. Any individual who fails a drug test should be subject to decertification by the state under section 6.1 and 6.4 of the proposed rules and not just those who are discharged. The current draft emergency rule as written will result in widespread inconsistencies and a considerable loophole in the mandatory program. One individual potentially loses his or her mining certification at one mine for one positive test and another individual, at a mine that does not have a discharge policy, may fail multiple times and never have his or her certification affected.

4. Allow for other types of testing (non-urine tests) i.e. oral, hair particle, swaps, etc., etc., to be used in random or post-accident testing. The statute only requires urine testing for pre-employment tests and does not preclude the use of other methods of testing in other applications, i.e., random, or post-accident. This emergency rule should not disallow other test methods and technologies which are accepted for other application and are proven in popularity and reliability. Conversely, the rule should encourage the use of other tests to foster more frequent sampling and a greater number of individuals sampled. (See below comment #5)

5. Samples that result in negative should be conclusive and not sent for further analysis. Oral testing, instant cups or strips for random drug tests are routinely used today. This is a proven reliable and efficient method of drug testing which could result in a greater sample of workers tested and more frequent testing. In other words, only the samples that are "Non-Negative" are sent to the lab for confirmation. Instant and oral tests that are negative should not be required to be submitted to a lab only to confirm a negative.

January 28, 2013

Page 3

As written, the emergency rule will likely have the unintended consequence of discouraging mines that have required all employees to participate in random sampling to continue to sample all employees if every sample collected is required to be submitted for confirmation. Only non-negative tests should be forwarded to labs under section 3.15, 5.4, 5.5 and 5.6 of the rules.

6. Section 4.5 should be revised to eliminate the opportunity for certified individuals to obtain safety sensitive certification. The rule as written serves no purpose and eventually will result in confusion over who needs a safety sensitive certificate and why, along with generally adding to the administrative demands of this program.

7. The rule should require reporting and decertification action upon failure of a pre-employment testing. As currently written, the rule would simply allow individuals testing positive for drugs during pre-employment testing to be shielded and permitted to reenter the state's workforce or masked his or her condition and better prepare for a subsequent test(s). This would result in gross inconsistencies and serve to undermine the intent of this important safety program.

We welcome the opportunity to provide these comments to this important state safety program. If you need more information or have questions, please give me a call at 304/342-4153.

Sincerely,



**Chris R. Hamilton
Senior Vice President**

RESPONSE TO COMMENTS
TITLE 56 SERIES 19
RULES GOVERNING SUBSTANCE ABUSE SCREENING,
STANDARDS AND PROCEDURE

The West Virginia Office of Miners' Health, Safety and Training (OMHST) responds to the comments received as follows:

COMMENTS RECEIVED FROM DINSMORE AND SHOHL, LLP

Comment 1: The Rule should have made it a requirement to also test for alcohol and adopt the .04% BAC limit similar to Kentucky's Requirement for its drug-free coal mines.

Response: OMHST accepts this comment and has modified the Rule by adding section 5.4 and modifying 6.1 to include a breathalyzer test for alcohol at .04% blood alcohol content.

Comment 2: The term "Serious Accident" in Rule 5.14 should be defined in order to prevent confusion with other definitions of what is a serious accident.

Response: OMHST accepts this comment and has defined the term "serious accident" at section 3.15 to mean an event at a mine which causes a fatality or an injury to an individual requiring such individual to be taken to a medical facility for reasons other than strains, sprains or observation as determined by a physician.

Comment 3: While the statute requires urine tests for pre-employment testing (§56-19-5), urine testing is not similarly required when an employer random tests or tests for cause, therefore, the OMHST should permit other reliable testing methodologies where the statute does not require a urine test.

Response: OMHST rejects this comment. OMHST interprets W. Va. Code § 22A-1A-1 *et. seq.* as requiring a urine test, that conforms with DOT requirements for collection and SAMSHA requirements for testing, for both pre-employment drug tests and random drug tests.

Comment 4: The proposed rule fails to establish any guidance as to thresholds for a positive drug test.

Response: OMHST rejects this comment. OMHST interprets W. Va. Code § 22A-1A-1 *et. seq.* to mean any level of the ten listed drugs that a medical review officer finds to be a positive test subjects a person to temporary suspension or revocation so long as that person was discharged as a result of the positive test.

Comment 5: Pre-employment testing timeframes should be incorporated into the rule.

Response: OMHST rejects this comment. OMHST interprets W.Va. Code § 22A-1A-1 *et. seq.* as requiring that pre-employment testing must occur prior to extending an employment relationship to a prospective certified person; however, the code is silent with respect to the timeframe within which the pre-employment testing must occur. Absent a specific statutorily defined timeframe, it is the OMHST's position that the Legislature did not wish to impose a timeframe on employers subject to House Bill 4351. Further, it is the OMHST's position that the employers can elect the particular period of time during which it would consider a pre-employment drug screening for purposes of a hiring decision.

Comment 6: There are serious privacy issues involved with OMHST's current implementation of the Rule.

Response: OMHST does not clearly understand this comment. OMHST does not require the employer to submit a master list of employee names and addresses. What the rule requires is for the employer to submit a form within seven days of discharging an individual for failing a drug test. That form contains a place where the employer will fill in the employees last known address.

Comment 7: By not requiring reports to the OMHST regarding who has tested positive, the proposed rule fails to ensure drug-free workplaces as contemplated by the statute.

Response: OMHST interprets W. Va. Code § 22A-1A-1 *et seq.* to only allow decertification proceedings when an employee is discharged for failing a random test. OMHST has modified the rule to provide for decertification proceedings for those individuals who fail a pre-employment test (see § 5.11 and 6.1).

COMMENTS RECEIVED FROM THE WEST VIRGINIA COAL ASSOCIATION

Comment 1: We support the 25% annual random sampling contained in section 3.13 of the rule. This is a major component of the rule and will result in an effective testing standard. We believe this could be more clearly stated in the rule by deleting the word "sample" within the next to last sentence. This section of the rule will likely be challenged by interests who have been on record as submitting to a higher percentage of the workforce that should be tested on an annual basis. Clarification of this standard is necessary.

Response: OMHST accepts this comment and has deleted the word "sample" from the next to the last sentence of section 3.13.

Comment 2: Incorporate alcohol testing into the rule for cause, random and post accident testing. The use of illegal, non-prescribed, drugs, or other substances that impair behavior and alcohol use are known safety concerns in safety sensitive work environments. We understand the omission of alcohol testing within this emergency rule is based on alcohol use being silent within the statute which authorized the rule. We would point out that other provisions of state law strictly preclude the use of alcohol and directs mine operators to remove individuals from mine sites who may be under the influence of its use.

Response: OMHST accepts this comment and has modified the Rule by adding section 5.4 and modifying 6.1 to include a breathalyzer test for alcohol at .04% blood alcohol content.

Comment 3: Require mine operators and independent contractors to report failed tests or incidents of testing positive for drug use or incidents of testing positive for one or more of the items contained under section 5.3 of the rule. Failing a drug test should also constitute immediate and temporary suspension of certificates or safety sensitive cards and not merely those incidents of drug use that result in discharge. Any individual who fails a drug test should be subject to decertification by the state under section 6.1 and 6.4 of the proposed rules and not just those who are discharged. The current draft emergency rule as written will result in widespread inconsistencies and a considerable loophole in the mandatory program. One individual potentially loses his or her mining certification at one mine for one positive test and another individual, at a mine that does not have a discharge policy, may fail multiple times and never have his or her certification affected.

Response: OMHST interprets W. Va. Code § 22A-1A-1 *et seq.* to only allow decertification proceedings when an employee is discharged for failing a random test. OMHST has modified

the rule to provide for decertification proceedings for those individuals who fail a pre-employment test (see § 5.11 and 6.1).

Comment 4: Allow for other types of testing (non-urine tests) i.e. oral, hair particle, swaps, etc., to be used in random or post-accident testing. The statute only requires urine testing for pre-employment tests and does not preclude the use of other methods of testing in other applications, i.e. random, or post-accident. This emergency rule should not disallow other test methods and technologies which are accepted for other application and are proven in popularity and reliability. Conversely, the rule should encourage the use of other tests to foster more frequent sampling and a greater number of individuals sampled. (See below comment #5)

Response: OMHST rejects this comment. OMHST interprets W. Va. Code § 22A-1A-1 *et seq.* as requiring a urine test, that conforms with DOT requirements for collection and SAMSHA requirements for testing, for both pre-employment drug tests and random drug tests.

Comment 5: Samples that result in negative should be conclusive and not sent for further analysis. Oral testing, instant cups or strips for random drug tests are routinely used today. This is a proven reliable and efficient method of drug testing which could result in a greater sample of workers tested and more frequent testing. In other words, only the samples that are "Non-Negative" are sent to the lab for confirmation. Instant and oral tests that are negative should not be required to be submitted to a lab only to confirm a negative.

As written, the emergency rule will likely have the unintended consequence of discouraging mines that have required all employees to participate in random sampling to continue to sample all employees if every sample collected is required to be submitted for confirmation. Only non-negative tests should be forwarded to labs under section 3.15, 5.4, 5.5 and 5.6 of the rules.

Response: OMHST rejects this comment. OMHST interprets W. Va. Code § 22A-1A-1 *et seq.* as requiring that all employers conduct a split sample urine test collected by providers who are certified as complying with DOT requirements for collection and with all collected samples tested by laboratories certified by SAMSHA for collection and testing, for both pre-employment drug tests and random drug tests.

Comment 6: Section 4.5 should be revised to eliminate the opportunity for certified individuals to obtain safety sensitive certification. The rule as written serves no purpose and eventually will result in confusion over who needs a safety sensitive certification and why, along with generally adding to the administrative demands of this program.

Response: OMHST rejects this comment. None of the several mining certifications the OMHST is currently authorized to issue are mutually exclusive, meaning that if an individual demonstrates the mandatory qualifications and/or experience necessary he/she can apply for and potentially receive any or all of the several mining certifications issued by OMHST notwithstanding the fact that he/she has already received a prior OMHST issued certification. OMHST can identify no reason to deviate from this practice with respect to safety-sensitive certification especially given the absence of any specific prohibition against continuing the practice of allowing an individual to hold a safety-sensitive certification as well as any other OMHST issued certification.

Comment 7: The rules should require reporting and decertification action upon failure of a pre-employment testing. As currently written, the rule would simply allow individuals testing positive for drugs during pre-employment testing to be shielded and permitted to reenter the state's workforce or masked as his or her condition and better prepare for a subsequent test(s).

This would result in gross inconsistencies and serve to undermine the intent of this important safety program.

Response: OMHST adopts this comment. See response to Comment 3 above and the amendments to section 5.11 and 6.1 of the rule.

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**TITLE 56
LEGISLATIVE RULE
OFFICE OF MINERS' HEALTH, SAFETY AND TRAINING**

STATE

**SERIES 19
RULES GOVERNING SUBSTANCE ABUSE SCREENING,
STANDARDS AND PROCEDURES.**

§56-19-1. General.

1.1 Scope. This rule applies to every employer of "certified persons," as that term is defined in W. Va. Code § 22A-1-2(d)(3), and to every employer of employees who as part of their employment are regularly present at a mine and who are employed in a "safety-sensitive position," as that term is defined in W. Va. Code § 22A-1-2(f).

1.2 Authority. W.Va. Code § § 22A-1A-1 *et. seq.* and 22A-6-14.

1.3 Filing Date.

1.4 Effective Date.

§56-19-2. Purpose.

2.1 Purpose -- The purpose of this rule is to implement the mandate of W. Va. Code § 22A-1A-1 *et. seq.*

§56-19-3. Definitions.

3.1 Unless the context in which a word or phrase appears clearly requires a different meaning, all terms used in this rule that are not defined herein shall have the meanings set forth in W. Va. Code § 22A-1-2.

3.2 Adulterated Specimen. The term "adulterated specimen" shall mean a specimen that has been altered as evidenced by test results showing that the specimen contains a substance that is not a normal constituent or containing an endogenous substance at a concentration that is not a normal physiological concentration.

3.3 Certified Person. The term “certified person” shall have the meaning set forth in W. Va. Code § 22A-1-2(d)(3).

3.4 Code. The term “code” shall mean the West Virginia Code of 1931, as amended.

3.5 Director. The term “director” shall mean the Director of the Office of Miners’ Health, Safety and Training, and shall include his authorized representatives where applicable.

3.6 Employer. The term “employer” shall mean all operators, independent contractors, subcontractors, or otherwise that employ certified persons who work in mines, or employees who as part of their employment are regularly present at a mine and who are employed in a safety-sensitive position.

3.7 Illicit Substances. The term “illicit substances” shall mean illegal drugs and substances, as well as prescription drugs used illegally or in excess of therapeutic levels.

3.8 Independent contractor. The term “independent contractor” shall mean any firm, corporation, partnership, or individual that contracts to engage in the extraction, production, hauling, loading, processing or preparation activities associated with a mine as defined in section 3.10 of this rule.

3.9 Medical Review Officer. The term “medical review officer” shall mean a licensed physician with knowledge of substance abuse disorders, laboratory testing, chain of custody, collection procedures, and the ability to verify positive, confirmed test results. The medical review officer shall possess the necessary medical training to interpret and

evaluate a positive test result in relation to the person's medical history or any other relevant biomedical information.

3.10 Mine. The term "mine" shall have the meaning set forth in W. Va. Code § 22A-1-2(a)(6) and shall include any underground coal mine, surface coal mine, coal preparation plant, coal loadout, or river coal loadout.

3.11 Operator. The term "operator" means any firm, corporation, partnership, or individual operating any mine or part thereof, as defined in section 3.10 of this rule, or engaged in construction at any mine, as defined in section 3.10 of this rule.

3.12 Pre-employment Testing. The term "pre-employment testing" shall mean the substance abuse testing of any certified person or safety-sensitive person upon hiring by a new operator or new independent contractor, rehiring of any certified person or safety-sensitive person by an operator or independent contractor following a termination of the employment relationship, or transferring to a West Virginia mine from an employer's out-of-state mine to the extent that the 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 rule.

3.13 Random Testing. The term "random testing" shall mean 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 person's social security numbers, payroll identification numbers, or other comparable identifying numbers. A random test sample

shall be at least twenty-five per cent (25%) of the employees working at a mine or facility annually. Random testing shall be conducted at least four (4) times annually.

3.14 Safety-Sensitive Position. The term "safety-sensitive position" shall mean 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 the mine.

3.15 Serious Accident. The term "serious accident" shall mean an event at a mine which causes a fatality or an injury to an individual requiring such individual to be taken to a medical facility for reasons other than strains, sprains or observation as determined by a physician.

3.16~~5~~ Split Sample. The term "split sample" shall mean a part of the urine specimen that is sent to a first laboratory and retained unopened, and which is transported to a second laboratory in the event that the employee requests that it be tested following a verified positive test of the primary specimen or a verified adulterated or substituted test result. Said testing shall be conducted in accordance with the standards and procedures of the United States Department of Transportation's rule, 49 CFR Part 40, which may be amended from time to time by the Office of Miners' Health, Safety, and Training through legislative rule.

3.17~~6~~ Substance Abuse Policy and Testing Program. The term "substance abuse policy and testing program" shall include, at a minimum, a breath test for the presence of alcohol and the ten-panel urine test required by W. Va. Code § 22A-1A-1(a)(1) and established for the purpose of detecting the illicit substances identified therein.

3.18~~7~~ Surface Coal Mine. The term "surface coal mine" shall mean a surface area of land, and all structures, facilities, machinery, tools, equipment, excavations, and

other property, real or personal, placed upon or above the surface of such land by any person, which are used in, or to be used in, or resulting from the work of extracting coal from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

3.198 Underground Coal Mine. The term "underground coal mine" shall mean a mine as defined in Section 2(a)(6), Article 1, Chapter 22A of the Code.

§56-19-4. Certification of Employees in Safety-Sensitive Positions.

4.1 No employee of an employer working in a safety-sensitive position shall work or be employed unless he or she possesses a safety-sensitive certification issued by the West Virginia Office of Miners' Health, Safety and Training.

4.2 Every employer of an employee who works in a safety-sensitive position shall ensure that the employee has obtained the safety-sensitive certification issued by the West Virginia Office of Miners' Health, Safety and Training. Any employee who currently possesses a certification issued by the West Virginia Office of Miners' Health, Safety and Training shall not be required to also obtain a safety-sensitive certification.

4.3 A safety-sensitive certification shall be issued to any person who has received the twenty-four (24) hour MSHA training and completes an application as prescribed by the director. Any administrative personnel employed by an operator or independent contractor shall be eligible to receive a safety-sensitive certification by making application and showing proof that he or she has successfully completed hazard training.

4.4 The director may charge a ten dollar (\$10.00) fee for the issuance of a safety-sensitive certification.

4.5 All persons currently having a certification issued by the West Virginia Office of Miners' Health, Safety and Training who wish to receive a safety-sensitive certification may receive such certification by completing the safety-sensitive certification application and paying the \$10.00 fee identified in Subsection 4.4 of this rule.

4.6 Any employee who does not currently have a certification issued by the West Virginia Office of Miners' Health, Safety and Training and who is employed in a safety-sensitive position shall request a safety-sensitive certification from the West Virginia Office of Miners' Health, Safety and Training by no later than June 1, 2013. Every applicant for a safety-sensitive certification shall demonstrate eligibility for issuance of said certification through completion of the training program detailed in Subsection 4.3 of this rule.

4.7 Every employer shall submit to the director by no later than March 1, 2013 and by the 1st day of January each year thereafter a list of all employees occupying safety-sensitive positions. Further, every employer shall keep a current list of all employees occupying safety-sensitive positions available for review by the director or his authorized representative.

4.8 The director may exempt any person responding to a mine emergency or providing rescue services from the requirement that he or she shall have a safety-sensitive certification prior to performing any mine emergency or rescue services.

§56-19-5. Duties of Employers.

5.1 Every employer shall implement a substance abuse policy and testing program which shall be administered to its certified and safety-sensitive employees.

5.2 Every employer shall provide its substance abuse policy and testing program to the director for approval as part of its comprehensive mine safety program. Every employer shall provide any revision to its substance abuse policy and testing program to the director for approval.

5.3 Every employer shall have a pre-employment and random substance abuse policy and testing program which shall, at a minimum, include a ten (10) panel urine test for the following substances:

- 5.3.1 amphetamines,
- 5.3.2 cannabinoids/thc,
- 5.3.3 cocaine,
- 5.3.4 opiates,
- 5.3.5 phencyclidine (pcp),
- 5.3.6 benzodiazepines,
- 5.3.7 propoxyphene,
- 5.3.8 methadone,
- 5.3.9 barbiturates, and
- 5.3.10 synthetic narcotics.

5.4 In addition, every employer shall include, as part of its substance abuse screening policy and program, a breath test for alcohol.

5.4 5.5 The substance abuse policy and testing program shall require that split samples be collected by providers who are certified as complying with standards and procedures set forth in the United States Department of Transportation's rule found at 49 CFR Part 40.

~~5.5~~ 5.6 Initial and split 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.

~~5.6~~ 5.7 In the event a person desires to challenge the results of his or her initial sample test result, that person shall have the right to have the split sample tested by another laboratory certified by the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA). The cost associated with the testing of the split sample shall be the responsibility of the person challenging the initial sample test results.

~~5.7~~ 5.8 Every employer shall review its substance abuse testing program with all persons required to be tested at the time of employment, upon a change in the program, and annually thereafter.

~~5.8~~ 5.9 Every employer shall provide new and current employees with information about the mandatory substance abuse policy and testing program and inform each employee of his or her rights and responsibilities under the program and that refusal to comply with the testing shall constitute grounds for discharge from employment and shall result in the employer notifying the director of said discharge in accordance with Subsection 5.110 of this Rule.

~~5.9~~ 5.10 Every employer 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 preceding calendar quarter and the number of positive test results.

~~5.10~~ 5.11 Every employer shall notify the director, on a form prescribed by the director, within seven (7) days of having discharged any employee for violation of the employer's substance abuse screening policy and program or when an individual fails a pre-employment drug test. With respect to those employees subject to a collective bargaining agreement, the employer shall notify the director, on a form prescribed by the director, within seven (7) days of having discharged that employee for violation of the employer's substance abuse screening policy and testing program following the completion of an arbitration conducted pursuant to a collective bargaining agreement applicable to the employee.

~~5.11~~ 5.12 Any employer may develop or maintain a drug and alcohol abuse policy, testing program or substance abuse program that exceeds the minimum requirements set forth in subsection 5.3 and 5.4 of this rule. The provisions of this rule shall 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 rule.

~~5.12~~ 5.13 Every employer shall maintain a record of substance abuse testing results for each person tested which shall be kept confidential, except that the records shall be open to inspection by the director or when compelled by a court of competent jurisdiction. Each employer shall maintain records of verified positive drug or alcohol test results and employee refusals to take mandatory tests for a minimum of five (5) years.

~~5.13~~ 5.14 No part of this rule is intended to prohibit an employer from implementing a policy requiring a certified person or a person in a safety-sensitive

position to take a substance abuse test if the employer has a reasonable suspicion that the person is under the influence of a controlled substance.

~~5.14~~—5.15 Every employer shall require any person involved in a serious or fatal accident to be drug tested immediately after the accident.

§56-19-6. Responsibilities of the Director.

6.1 Upon receipt of a notice as required by subsection ~~5.11~~6 of this Rule and upon verification that the pre-employment applicant or the employee discharged pursuant to that subsection tested positive for at least one (1) of the ten (10) substances identified therein or had a blood alcohol level at or in excess of four tenths (4/10ths) of one percent (.04) concentration at the time of testing, the director shall issue an immediate temporary suspension of all certificates held by the person pending a hearing before the board of appeals pursuant to W. Va. Code § 22A-1A-2. The director shall mail, by certified mail, to the person notice of the temporary suspension and that he or she has the right to pursue one (1) of the following options:

6.1.1 Appeal the suspension to the Board of Appeals within thirty (30) days, or

6.1.2 Notify the director within thirty (30) days that the temporarily suspended person intends to be evaluated by a medical professional trained in substance abuse treatment, to complete any prescribed treatment, and to submit an acceptable test result from a SAMSHA approved drug and alcohol test facility as required by Section ~~5.7~~6 of this Rule. Costs of the evaluation, treatment and drug and alcohol tests shall be the responsibility of the temporarily suspended person.

6.2 The certified mailing shall also inform the individual that failure to file an appeal pursuant to Subsection 6.1.1 or failure to notify the director of that individual's intent to comply with Subsection 6.1.2 of this rule within thirty (30) days shall result in the revocation of all certificates issued by the Office of Miners' Health, Safety and Training for a period of not less than three (3) years and that the individual shall remain ineligible for any other certification issued by the Office of Miners' Health, Safety and Training during the revocation period. At the end of the three (3) year revocation period, the individual's certificate may only be reinstated if the individual submits to the Office of Miners' Health, Safety and Training proof that he or she has been evaluated by a medical professional trained in substance abuse treatment, completed any prescribed treatment, and submitted an acceptable test result from a drug and alcohol test as required by Section 5.76 of this Rule.

6.3 The director shall immediately and temporarily suspend any certification issued by the Office of Miners' Health, Safety and Training or any safety-sensitive certification upon receipt of a 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. The immediate and temporary suspension shall remain in effect until such time as the certified person's certification is reinstated in the other jurisdiction or modified by the Board of Appeals pursuant to W. Va. Code § 22A-1A-2.

6.4 The director shall issue an immediate temporary suspension or notice of revocation of a certified person's West Virginia certificate, including any safety-sensitive certification, under the following circumstances:

~~6.4.1~~ 6.4.1—The person is discharged because of a positive test for any of the ten (10) substances identified in Subsection 5.3 of this rule and is deemed to have failed the test by the medical review officer.

~~6.4.2~~ 6.4.2 The person is discharged because breath test for alcohol showed a blood alcohol level at or in excess of four tenths (4/10ths) of one percent (.04) concentration at the time of testing.

~~6.4.16.4.3~~ 6.4.3 The person is discharged because the drug test results demonstrate the submission of an adulterated specimen.

~~6.4.26.4.4~~ 6.4.4 The person is discharged because the drug test results demonstrate the submission of a substituted test result.

~~6.4.36.4.5~~ 6.4.5 The person is discharged for refusing to submit to a drug test as required by Section 5.98 of this Rule.

6.5 Any person who has his or her certification temporarily suspended or revoked due to the results of any drug test required by this Rule may file an appeal of the temporary suspension or revocation with the Board of Appeals. The notice of appeal shall be filed with the Board of Appeals within thirty (30) days of issuance of the notice of suspension or revocation.

6.6 No certification may be revoked until such time as the individual has been granted adequate opportunity for a hearing before the Board of Appeals conducted in accordance with W. Va. Code § 22A-1A-2. The notice of appeal shall be initiated by the filing of a notice of appeal by the person whose certification was suspended by the director.

6.7 Upon receipt of a notice as required by subsection 5.11~~0~~ of this rule of a person having failed an employer's random substance abuse test for a second time, the director shall issue an immediate temporary suspension of all certificates held by the person who failed the random substance abuse screening policy and shall immediately initiate proceedings for the permanent revocation of all certificates held by the person pending a hearing before the Board of Appeals pursuant to W. Va. Code § 22A-1A-2.

6.8 Records of substance abuse and drug testing, written or otherwise, received by the Office of Miners' Health, Safety and Training, its employees, agents and representatives are confidential communications and exempt from disclosure under W. Va. Code § 29B-1-1, except where disclosure is authorized pursuant to § 22A-1A-3.

§56-19-7. Drug Testing Standards.

7.1 Each drug testing vendor shall comply with the following standards for collection and testing of samples:

7.1.1 The drug testing vendor shall follow all standards, procedures, and protocols set forth by the United States Department of Transportation's rule, 49 CFR Part 40 for the collection of urine samples.

7.1.2 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 (SAMSHA) for collection and testing.

7.1.3 The drug testing vendor's drug testing protocol shall be a ten (10) panel urine test containing the substances identified in section 5.3. of this Rule and a breath test for alcohol as identified in section 5.4 of this rule.

7.1.4 The drug testing vendor shall provide a medical review officer who shall possess the ability and medical training necessary to verify positive confirmed test results and evaluate those results in relation to a certified person's medical history or other biomedical information and follow all procedures outlined in the SAMSHA medical review officer manual.

§56-19-8. Board of Appeals Hearing Procedures.

8.1 Any hearing conducted after the temporary suspension of a person's certificate pursuant to this rule, shall be conducted within sixty (60) days of the temporary suspension. The Board of Appeals shall make every effort to hold the hearing within forty (40) days of the temporary suspension.

8.2 Any hearing conducted pursuant to this rule shall be conducted in accordance with the provisions of W. Va. Code § 22A-1-31(c), unless the parties agree to informal proceedings.

8.3 The provisions of Sections 1.13 and 1.14, Series 1, Title 37 of the Code of State Rules notwithstanding, any hearing conducted pursuant to this rule shall not be open to the public. All Board records relating to reviewing charges to withdraw certification, review of alleged violations of an employer's substance abuse policy and testing program and all final orders, decisions and opinions in the adjudication of cases under the provisions of this Rule shall not be open for public inspection, nor subject to W. Va. Code § 29B-1-1.

8.4 The Board of Appeals shall suspend all certificates possessed by a person who is found, by a preponderance of the evidence, to have failed a drug test under this rule. In addition, the Board of Appeals shall order that the person be placed on probation.

Terms of the probation shall include: substance abuse counseling; in-patient or out-patient substance abuse treatment; or periodic additional drug tests. The costs of any substance abuse counseling, in-patient or out-patient treatment or additional drug tests shall be the sole responsibility of the person found to have failed a drug test.

8.5 Any person who is found, by a preponderance of the evidence, to have refused a drug test provided under this rule shall be suspended for a minimum of one (1) year.

8.6 The Board of Appeals shall permanently revoke all certifications issued by the West Virginia Office of Miners' Health, Safety and Training when the Board finds, by a preponderance of the evidence, that any person has failed a drug test for the second time.

8.7 No person whose certification is suspended or revoked under this rule may perform any duties under any other certification issued pursuant to Chapter 22A of the Code during the period of suspension imposed by the Board of Appeals. Furthermore, no person whose certification is suspended or revoked under this rule may apply for or obtain any other certification issued pursuant to Chapter 22A of the Code during the period of suspension imposed by the Board of Appeals or after his or her certification is revoked.

8.8 Any person adversely affected by a final order or decision issued by the Board of Appeals is entitled to judicial review thereof pursuant to W. Va. Code § 29A-5-4.