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ISO-9001

MGMT. SYS. RvA C 074

November 7, 2008

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

Via e-mail: zzMSHAcomments@dol.gov

RE: RIN 1219-AB41 Alcohol and Drug Free Mines: Policy, Prohibitions, Testing, Training, and Assistance 30 CFR Parts 56, 57, and 66

To Whom It May Concern:

MSHA's thoughts and actions in the promulgation of this regulation are laudable. However, the scope and breadth of this regulation is far and above what is necessary. A general standard as is currently used in 30 CFR 56.20001 and 30 CFR 57.20001 would be sufficient for enforcement in the coal industry.

Determination of whether these standards have been violated should be limited to specific testing language only. This would simply provide MSHA with the needed information sufficient to determine in accident investigations whether substance abuse had been causative to the accident, or not. This method would still permit the individual States to provide specific regulatory programs which are/have been tailored to meet the specific needs of the industry within individual states as is the with Kentucky and Virginia in the mining industry and Tennessee's program which covers all industry operating in the state.

Parts of this proposed regulation oversteps the control and management of the workforce by the companies by dictating that companies ***can not limit*** their employees' exposure to the dangers of employees on the job under the influence. Many companies take a "Zero Tolerance" stance on substance abuse, and rightly so. MSHA mistakenly reads into the requirements of the Mine Act, in this standard, the right to impose management directives on companies. The Mine Act specifically states, "The first priority and concern of *all* in the industry must be the health and safety of its most precious resource – the miner". All companies must continue to maintain the ability to set policy and discipline according to company policy to ensure that the mandate of the Act is met.

Companies must maintain the ability to discipline miners who intentionally come to work impaired by substance abuse according to the situation and the specific employee, in accordance with company policies, labor agreements, and existing state and federal laws and regulations

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AB41-COMM-130(a)

pertaining to workplace rules. This is the standard used to protect the public from drivers under the influence and must remain the same for companies mining coal, rock, or ore.

We agree that miners should be made aware of resources for treatment of substance abuse problems, as all current TECO Coal Corporation operations do. This is offered in order that rehabilitation can be made available to those miners who understand they may have a problem and take initiative to get help. However, miners that do not take the initiative to gain help should not be given a free-pass for endangering themselves and their co-workers by intentionally placing themselves in a area while under the influence of illegal or illicit substances.

Miners that do not avail themselves voluntarily to treatment prior to discovery during a post-accident, reasonable suspicion, or other drug test have violated the safe working environment of all around them. In the same manner as an individual who drives under the influence on our nation's highways they should be placed within the boundaries of a companies disciplinary procedures.

This proposed regulation, as written, would usurp the authority of states such as Kentucky which has laid out actions to be taken in the event a decision has been made by a company to terminate employment due to an MRO (Medical Review Officer) reviewed positive substance test.

Kentucky, in its wisdom, did not attempt to micromanage the workforce of the companies. Kentucky simply made a requirement to determine if substance abuse was causative to the occurrence of an accident by mandating a post-accident test requirement and by limiting the presence of substance abusers in the mines by requiring a pre-certification test. This permits them to gather important investigative information during accident investigations which had been previously unavailable and prevent the occurrence of accidents by keeping the workforce free of individuals who would possibly be at work under the influence. Kentucky's program has exhibited the ability to limit the exposure of miners to miners working under the influence. At the same time the Kentucky system gives incentive to the miners as well as mining companies, especially small coal operators, to get help for substance abuse problems.

This is accomplished by providing incentives to companies to provide quality programs within their financial reach without burdensome regulations. Miners whose certifications are revoked, due to substance abuse, are directed into a multitude of programs for rehabilitation. This is the initial pathway to acquiring the ability to become certified once again and hopefully maintain a life free of substance abuse.

The Drug-Free Workplace regulations in the State of Tennessee are very similar to the Kentucky regulations, The Tennessee regulations were made to apply to all industries, including the mining industry. This program, by accounts from various state officials, has met with great success. This success was achieved without imposing rules which limited companies ability to manage the workforce.

We believe this onerous and burdensome standard MSHA wishes to impose will only result in a work environment which is"***less safe than today's mining environment"*** by allowing persons to

be present in the workplace who may be under the influence of alcohol or other substances. Our comments on specific parts of the proposed standard follow:

Page #52157, 30 CFR Part 66.2(b):

Comment: The exception of coverage for general administrative and clerical personnel and non-safety sensitive positions should not be part of this proposed regulation. All employees of the operator who are on-site must be subject to the testing requirements of the standard. A miner can be just a seriously injured by an administrative person operating a vehicle on the mine site as a miner operating a piece of mining equipment. All persons on the mine site should be subject to the same testing requirements, to include regulatory personnel.

Page #52157, 30 CFR Part 66.3:

Comment: The period of time and frequency of testing for *"follow-up testing"* must be left to the operator and any 3rd party entity which operates, manages, or implements any part of the treatment process.

The definition of *"safety-sensitive job duties"* as well as the term *"safety-sensitive job duties"* should be struck from this proposed standard. We feel all duties and positions while on an active mine site are safety sensitive.

Page #52158, 30 CFR Part 66.200:

Comment: Many companies currently have in place policies, plans, and programs which exceed the "*minimum standard*" as proposed in this standard. Should there be additional components, other than the minimum required components MSHA should not mandate that components in excess of the minimum required by the proposed standard become inspectable and verifiable as part of "the written policy, education and awareness program, training program, alcohol- and drug testing program, or referral for assistance program should this proposed rule become a final rule.

Page #52159, 30 CFR Part 66.204(a):

Comment: This paragraph should be struck. Proposed 30 CFR 66.202 and 30 CFR 66.203 requires operators to make all miners aware of information concerning available counseling, rehabilitation programs, and EAP programs, if available during the training of non-supervisory and supervisory personnel. This paragraph is redundant and can only lead to confusion.

Page #52159, 30 CFR Part 66.204(b):

Comment: Miners who voluntarily admit to substance abuse at companies who have established EAP programs as part of their employee benefit packages will be covered by the requirements of HIPAA (Health Insurance Portability and Accountability Act). The operator must meet the requirements of HIPAA

HIPAA (Health Insurance Portability and Accountability Act) rules in many cases preclude knowledge of who has taken advantage of this benefit. This would specifically prohibit release of that information to anyone without specific written permission of the affected person.

These plans generally do not discern between the use of the EAP for emotional, mental, substance abuse or in some cases whether it is a miner or a member of the miner's family.

The disposition of a miner identified as having completed a treatment regimen, after self-reporting, and fails a follow-up or return to work test must be left to the discretion of the mine operator. The mine operator has to retain the flexibility to manage the workforce as that mine operator deems appropriate and in accordance with the appropriate company policies.

Page #52159, 30 CFR Part 66.300(f):

Comment: The requirement that laboratories be certified by CAP (College of American Pathologists) is unnecessary. Cap (College of American Pathologists) does not actually certify laboratories but is a professional organization which grants accreditation to an entity. CLIA-88 should be the minimum certification requirement (Clinical Lab Improvement Amendments of 1988) for the laboratories providing service to meet the requirements of this regulation.

Page #52160, 30 CFR Part 66.303:

Comment: Pre-employment testing should not be a part of the MSHA rulemaking. Given the language of the existing rule it is conceivable that a miner applying for a position may fail a pre-employment screen, fail to obtain a position, and yet attempt to gain access to benefits or services provided through company sponsored SAP or EAP program as is referred to in proposed 30 CFR 66.404.

In no way should this proposed regulation preclude a company from installing other types of testing for substance abuse than those circumstances prescribed in this or other parts of this proposed regulation.

Page #52160, 30 CFR Part 66.304(b):

Comment: This paragraph should be removed. Proposed 30 CFR 66.303 would require pre-employment testing be performed. Any person who is awarded a position requiring a test would have already been tested either prior to the miner being hired or being assigned to a previous safety sensitive position.

Page #52160, 30 CFR Part 66.304(c):

Comment: This paragraph is redundant and should be removed. There are anti-discrimination rules covering the hiring process currently in effect on both the state and federal levels. MSHA is not equipped nor trained to assume those duties from those agencies and it would be duplication of regulation as well as a waste of resources.

Page #52160, 30 CFR Part 66.304(e):

Comment: Does this section require that a current miner who is operating a piece of equipment in a safety sensitive job, and was tested prior to assuming those responsibilities, would have to be tested again should he switch to another safety sensitive job in the same mine? If so, this section is much too burdensome and would dramatically increase testing expenses without any realistic gain in safety should this proposed standard become a final rule.

Page #52160, 30 CFR Part 66.304(f):

Comment: What status would a miner be placed in, under this section of the proposed regulation, if he did not enter consultation or treatment on referral?

What would the miner's status be if the company did not offer consultation (SAP) or treatment but simply made the miner aware of what kind of community support was available for assistance, as is the case with many small companies?

How long would the operator have to carry the miner as an employee on his payroll?

What precautions are in place to prevent the miner from going to another company's mine down the road and going to work (providing the miner can get a non-negative test result on the pre-employment drug test) while still on the payroll of the original company?

How much time must be afforded the miner for successful completion of referral, evaluation, treatment, etc?

Page #52160, 30 CFR Part 66.304(g):

Comment: Does this mean that all miners that are currently working in safety sensitive positions would be required to be tested?

Page #52160, 30 CFR Part 66.305: What category of "miner" will contractors be placed in? Will contract coal haulers, supply haulers, and construction/maintenance type contractors be required to have their own drug testing programs for compliance purposes?

Page #52160, 30 CFR Part 66.305(a):

Comment: Our company uses a random test ratio of 33% of workforce each calendar quarter. This would exceed the 10% annual rate mandated in this section of the proposed regulation. Would this constitute a violation of this section of the proposed standard or other MSHA standards or any section of the Act simply by *exceeding the minimum requirement* of the standard?

Page #52160, 30 CFR Part 66.305(b):

Comment: Many times the person responsible for performing the sample collection or the contracted service may not be available "immediately" upon the return of a miner that has been on "...leave or otherwise absent..." If that sample can not be suitably collected until perhaps 48 hours after the return of the miner would that be deemed a violation of proposed 30 CFR 66.305 or would that be observed as the "...next available opportunity..."?

Page #52160, 30 CFR Part 66.305(d):

Comment: Current random drug testing at our operations is performed by random work group rather than random individuals. Will this remain permissible as an acceptable random sample methodology under the proposed 30 CFR Part 66.305(d)?

Page #52160, 30 CFR Part 66.305(e):

Comment: The use of the word "immediately" will be extremely difficult in some cases to comply with, in accordance with the language of this section, as written. Acceptable language would be *"without unnecessary delay"* or other similar language.

Page #52160, 30 CFR Part 66.306(a):

Comment: Will proposed 30 CFR Part 306(a) require affected regulatory agency personnel (i.e. MSHA, state safety and environmental personnel), which fall within the definition of "certain miners", due to involvement or potential involvement in accidents be required to submit to alcohol and drug testing?

Page #52160, 30 CFR Part 66.306(a) (2):

Comment: This section should apply only to reportable accidents as defined by 30 CFR Part 50.2 and 50.20-3.

Page #52161, 30 CFR Part 66.306(e):

Comment: Remove the requirement for the operator to perform separate post-accident tests. The operator should have the *option* to take separate testing or have the option to accept the tests performed by a state agency or MSHA as valid sample results. Likewise, these agencies should have the option to use the samples collected by the operator to meet the standard. This section of regulation must address that results of testing must be sent to the MRO of the operator for review, if the operator has an MRO. Results of all testing must be provided to the operator of all regulatory collected samples.

Page #52161, 30 CFR Part 66.307(b):

Comment: Credible information received by the operator from other miners, law enforcement, agency personnel, and other credible sources should be included as acceptable causation for reasonable suspicion testing.

Page #52161, 30 CFR Part 66.400(b):

Comment: Companies must be able to discipline miners that do not avail themselves of treatment programs available through community based sources or internally offered company programs. This discipline must be carried as the operator deems necessary within the scope of the company policies and procedures. There is a distinct difference in employees that understand they have a problem, and seek help, and those that continue to abuse substances and mingle with their co-workers daily.

Miners working while under the influence of alcohol or drugs can be and have been "deadly threats" to others and themselves. Companies must maintain the ability to look at all relevant facts concerning an employee's actions and take appropriate disciplinary action. MSHA should not be permitted to carte blanche require operators

to maintain miners employment simply because a miner has violated another of the operator's policies, the substance abuse policy, and placed other miners in harms way.

Page #52161, 30 CFR Part 66.400(c):

Comment: Nothing in the Mine Act grants the authority to MSHA to require a company to explain or submit their Human Resource policies for disciplinary actions to them. Unless the company is discriminating against a miner, as directed in the Mine Act, MSHA can not require a company to continue the employment of any miner.

Employees that violate internal safety and/or other policies must remain within the scope of company policies and programs to include current and future discipline policies and programs applied in a non-discriminatory manner. Many companies, organizations, and governmental agencies have a "Zero Tolerance" policy for substance abuse, *especially in safety sensitive positions*.

Page #52161, 30 CFR Part 66.401(b):

Comment: This subsection should be rewritten as follows: *"Miners who have been tested for alcohol and/or drugs based on reasonable suspicion ~~or because the mine operator has determined that they may have contributed to an accident may~~ shall be suspended from performance of ~~safety-sensitive~~ job duties until the verified test results have been received.*

Page #52161, 30 CFR Part 66.401(c):

Comment: This subsection should be deleted with the exception for proposed 30 CFR Part 66.401(b). Individuals found to be at work under the influence should not be compensated for endangering others by being at work impaired. The exception to this rule should be only in reference to miners tested under proposed 30 CFR Part 66.401(b) above. In those cases those affected miners should be compensated for lost wages if the test results are reported back from the MRO as negative.

Page #52161, 30 CFR Part 66.402:

Comment: Under all known substance abuse programs known to this company, to include programs mandated by regulatory agencies such as the DOT (Department of Transportation), no results of testing is reported as positive until the MRO reports it as such. MROs must ascertain through information gathering when analyzing a "non-negative" test result whether or not legitimate use of prescription medications was involved. Should he find that prescription medications were used and used in accordance with therapeutic levels that result is reported as a negative result to the mine operator. Mine operators have no authority in the decision making process of the

MRO since the MROs are governed by MRO rules and regulations which govern their actions. This section should be deleted from the proposed regulation.

Page #52162, 30 CFR Part 66.403(a):

Comment: This subsection should be rewritten as follows: *"A mine operator who receives a verified positive drug test result or a verified adulterated sample, ~~or~~ substituted drug test result, or substituted drug sample must immediately remove the miner involved from performing ~~safety sensitive~~ job duties ~~and refer the miner to a qualified SAP. A mine operator must not wait to receive the written report or the result of a split specimen test.~~. Mine operators should provide each miner who has failed a drug test a listing of SAPs available in the community.*

Page #52162, 30 CFR Part 66.403(b):

Comment: This subsection should be rewritten as follows: *"A mine operator who receives a blood alcohol concentration test result of 0.04 percent of higher must immediately remove the miner involved from performing ~~safety sensitive~~ job duties ~~and refer the miner to a qualified SAP. A mine operator must not wait to receive the written report or the result of this test.~~. Mine operators should provide each miner who has failed an alcohol test a listing of SAPs available in the community.*

Page #52162, 30 CFR Part 66.403(d):

Comment: Companies must be able to discipline miners that do not avail themselves of treatment programs available through community based sources or internally company offered programs as they deem necessary within the scope of their policies and procedures. There is a distinct difference in employees that understand they have a problem and seek help and those that continue to abuse substances and mingle with their co-workers daily. Miners working while under the influence of alcohol or drugs can be and have been "deadly threats" to others and themselves. Companies must maintain the ability to look at all relevant facts concerning an employee's actions and take appropriate disciplinary action. MSHA should not be permitted to carte blanche require operators to maintain miners employment simply because a miner has violated another of the operator's policies, the substance abuse policy.

MSHA does not know whether or not this miner has other issues with which the operator has been dealing with involving the particular miner. This additional incident of violating company policy may be the proverbial last straw. The company must maintain the right and ability to manage the workforce.

Page #52162, 30 CFR Part 66.405(d):

Comment: Companies must be able to discipline miners that do not avail themselves of treatment programs available through community based sources or internally company offered programs as they deem necessary within the scope of their policies and procedures. There is a distinct difference in employees that understand they have a problem and seek help and those that continue to abuse substances and mingle with their co-workers daily. Miners working while under the influence of alcohol or drugs can be and have been "deadly threats" to others and themselves. Companies must maintain the ability to look at all relevant facts concerning an employee's actions and take appropriate disciplinary action. MSHA should not be permitted to carte blanche require operators to maintain miners employment simply because a miner has violated another of the operator's policies, the substance abuse policy.

MSHA does not know whether or not this miner has other issues with which the operator has been dealing with involving the particular miner. This additional incident of violating company policy may be the proverbial last straw. The company must maintain the right and ability to manage the workforce.

Page #52162, 30 CFR Part 66.406(a):

Comment: This subsection should be rewritten as follows: *"Miners must have an alcohol test with a blood alcohol concentration of less than 0.04 percent and a negative return-to-duty drug-test result before resuming ~~safety sensitive~~ job duties. ~~and refer the miner to a qualified SAP. A mine operator must not wait to receive the written report or the result of this test.~~ Mine operators should provide each miner who has failed an alcohol test a listing of SAPs available in the community.*

Page #52162, 30 CFR Part 66.406(b)(1):

Comment: This subsection should be rewritten as follows: *"~~A~~The mine operator, or in the event the mine operator has an EAP program, the EAP Plan Coordinator or the SAP will determine ~~is the sole determiner of~~ the number and frequency of follow-up tests needed for a particular miner. ~~and whether these tests will be for alcohol, drugs, or both. If the miner had a positive drug test, but the SAP evaluation or the treatment program professional determines that the miner also has an alcohol problem, a SAP shall require that the miner have follow-up tests for both alcohol and drugs.~~ ~~safety sensitive~~ job duties. ~~and refer the miner to a qualified SAP. A mine operator must not wait to receive the written report or the result of this test.~~*

Page #52162, 30 CFR Part 66.406(b)(4 and 5):

Comment: These subsections should be deleted. The operator or if the operator has an EAP program or the SAP should be sufficient to determine the needs of additional follow-up testing and should not fall under the authority of MSHA jurisdiction for enforcement.

Page #52162, 30 CFR Part 66.500

Comment: This company does not believe the information and records of individual miners will be permitted to be used, discussed, or otherwise disseminated to MSHA, especially if the information has been obtained using an EAP program offered to employees and their dependents as a benefit of employment due to HIPAA restrictions and limitations. To determine the cause of accidents and the impact of substance abuse in relation to mine accidents we believe the agency would be better served to draft a proposed general standard similar to the current 30 CFR 57.20001 and 30 CFR 56.20001. With this general policy in place MSHA could, by use of policy and procedures, require the post-accident collection of necessary samples to determine if the presence of drugs and/or alcohol were causative in the accident.

Thank you,

Dave Blankenship

Dave Blankenship
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TECO Coal Corporation

JDB/cc: File