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**From:** Anthony Whitworth, CMSP [mailto:[awhitworth@mine-safety.com](mailto:awhitworth@mine-safety.com)]  
**Sent:** Monday, November 10, 2008 10:18 AM  
**To:** zzMSHA-Standards - Comments to Fed Reg Group  
**Cc:**  
**Subject:** RIN 1219- AB41

Please find the attached comments for RIN 1219- AB41

November 5, 2008

Patricia W. Silvey  
 Director, Office of Standards, Regulations & Variances  
 U.S. Department of Labor  
 Mine Safety and Health Administration  
 Arlington, VA 22209-3939

**Re: Comments on Proposed Rules on Alcohol and Drug Testing at Mines**

The International Society of Mine Safety Professionals ("ISMSP") is pleased to offer the following comments to the Mine Safety and Health Administration ("MSHA") concerning its proposed rule to establish a standard for the possession and use intoxicating beverages and narcotics for all mines. The proposed rule would identify substances that cannot be used on mine property while performing "safety-sensitive" job duties, establish an alcohol- and drug-free mine program, and would require individuals removed for violating the alcohol- and drug-free policy to be removed from the job until completion of a treatment program.

ISMSP's core mission is to promote the development of health and safety professionals throughout the international mining community. ISMSP strives to save lives and reduce injuries in the international mining community. To achieve this end, ISMSP offers networking opportunities for health and safety professionals to discuss the overwhelming amount of federal and state regulations. These networking opportunities allow safety professionals to discuss strategies for addressing health and safety issues and regulations. ISMSP's knowledge and experience offer MSHA a unique perspective into the proposed rulemaking.

ISMSP understands and supports MSHA's goal to provide a safe and healthy workplace. The safety and health of mine employees is ISMSP's primary concern. Alcohol and drug abuse are serious problems, deserving serious attention. MSHA's proposed rule on drug and alcohol testing in its current state, however, does not lead to greater safety or health for mine employees. ISMSP provides these comments to MSHA in order to develop a rule that better addresses the health and safety of all mine employees.

**A. The Proposed Rule Should Reflect Minimum Standards**

ISMSP believes that the proposed rule should represent the minimum requirements to be followed, rather than providing guidelines that an operator must follow. In other words, ISMSP believes that the proposed rule should represent the regulatory floor rather than the regulatory ceiling. Operators should remain free to develop more stringent drug and alcohol policies. Indeed, many operators already have more stringent policies in place. There is no reason that these policies should be abandoned in favor of less restrictive requirements. Abandoning these more stringent and proven policies unnecessarily restricts mine operator's ability to control the safety and health in their mines and may put mine employees in harm's way.

ISMSP recommends that MSHA revise the proposed rule to reflect that it establishes a minimum set of requirements. Operators should be free to establish more stringent requirements for the health and safety of all mine employees.

#### **B. Safety-Sensitive Job Duties**

ISMSP believes that MSHA should eliminate the distinction between safety-sensitive jobs and non-safety-sensitive jobs. Each employee at a mine site affects the safety and health of all employees at a site. Even administrative staff at mine sites encounter mine hazards and are often tasked with maintaining critical information. An accident affecting many may be caused by a single employee, despite the classification. ISMSP sees no reason to draw such an arbitrary line describing some employees as performing safety-sensitive job duties, while classifying other employees as not. The simpler and safer solution is to require all employees to comply and be subject to the alcohol- and drug-free policy.

ISMSP recommends that MSHA discard its arbitrary distinction between safety-sensitive jobs and non-safety-sensitive jobs in the final rule. The distinction is unnecessary, creates ambiguity, will result in arbitrary distinctions, and subjects all employees to the risks of drug and alcohol abuse.

#### **C. Testing Procedures**

ISMSP believes that operators should be free to adapt testing procedures to their own unique needs. Testing procedures that are more accurate or provide more information should be acceptable under the proposed rule. For example, an operator should remain free to utilize hair testing, which allows an operator to identify drug use for a longer period of time. There is no reason for MSHA to restrict an operator's testing methods when it can provide more information to the operator.

ISMSP recommends that MSHA allow operators to use alternative testing methods, provided that the testing measures provide at least as much information.

#### **D. MSHA's First Offense Policy**

ISMSP strongly opposes MSHA's first offense policy found in § 66.400. In its present form, § 66.400(b) states:

Mine operators shall not terminate miners who violate the mine operator's policy for the first time (e.g., by testing positive for alcohol or drugs). Rather, those miners testing positive for the first time, who have not committed some other separate terminable offense, shall be provided job security while the miner seeks appropriate evaluation and treatment. The miner will be able to be reinstated and allowed to resume performance of safety-sensitive job duties provided the miner complies with return-to-duty requirements outlined in §§ 66.405 and 66.406.

ISMSP believes that this provision is unacceptable for several reasons. First, mine operators must have the authority to remove employees that present a danger and a hazard to others. While ISMSP shares MSHA's passion to treat individuals with substance abuse problems, placing mine employees' safety at risk does not present a viable solution. Rates of successful treatment and recidivism may be debated, but any injury resulting from a mandatory first offense policy is one injury too many.

Second, many operators already allow employees to enter treatment programs, without negative recourse, prior to a positive alcohol or drug screen. These employees are given the opportunity to voluntarily enter treatment programs before any testing takes place. If an employee tests positive for a banned substance, however, voluntary treatment and returning to work is no longer an option. Operators should be able to maintain zero tolerance policies for the safety of all mine employees. A consistent, uniformly enforced zero tolerance policy sends a clear message to mine employees that substance abuse will not be tolerated. Indeed, a zero tolerance policy encourages employees to seek treatment before testing because of the significant risk of losing their job.

Third, ISMSP encourages MSHA to consider the plight of smaller operators under the proposed rule. Many small operators do not have the resources to hold jobs open for first time offenders undergoing treatment. Treatment may be lengthy, and it will be difficult to ensure that safety-sensitive job duties remain for offenders returning from treatment. The costs in many circumstances will prove to be significant.

ISMSP recommends that MSHA remove the first offense policy from the rule. Mine operators must be given discretion to terminate employees that violate the substance abuse policy. An operator's zero tolerance policy represents a valid solution to alcohol and drug use by mine employees. Safety of all employees is of paramount importance.

ISMSP appreciates this opportunity to provide its comments on the proposed rule. ISMSP shares MSHA's passion for creating a safer workplace for all mine employees. The proposed rule, however, in its present state does not enhance the safety of mine employees. To the contrary, the proposed rule risks employee safety by limiting operators' abilities to set more stringent standards and by eliminating zero tolerance policies. ISMSP believes that the proposed rule should be modified to reflect the changes recommended in these comments.