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Sent: Monday, November 10, 2008 2:24 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: RIN 1219-AB41

November 10, 2008

MSHA
Office of Standards, Regulations, and Variances
1100 Wilson Blvd.
Room 2350
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Via e-mail: zzMSHA-comments@dol.gov

SUBJECT: RIN 1219-AB41
Comments on September 8, 2008 proposed regulation on Alcohol and drug-free mines: Policy, Prohibitions, Testing, Training, and Assistance as published in the September 8, 2008 Federal Register.

Dear Sir/Madam:

The Kentucky Coal Association would like to take this opportunity to comment on the September 8, 2008 proposed regulation on Alcohol and drug-free mines: Policy, Prohibitions, Testing, Training, and Assistance as published in the September 8, 2008 Federal Register. The Kentucky Coal Association represents large and small, surface and underground operators in both the eastern and western Kentucky coal fields. Our member mine a major portion of Kentucky's coal.

Our primary concern regarding this proposed drug testing program is that it supersedes drug testing programs that coal states may have adopted. Kentucky was the first coal state to adopt drug testing legislation and this proposal will nullify key provisions of Kentucky's law. Two key provisions which supersede Kentucky's law are the prohibition on terminating miners who violate the company's drug policy for the first time and the requirement to provide job security when the miner seeks appropriate evaluation and treatment. These prohibitions undermine safety and should be stricken from the final rule.

MSHA's intent behind this regulation is very positive. However, this regulation goes beyond what is necessary. MSHA should recognize what Kentucky has done by prescribing procedures on how to ascertain this standard

AB41-COMM-137

has been met such as post-accident drug testing, reasonable suspicion testing, etc.

Many Kentucky companies take a "zero tolerance" approach on substance abuse. MSHA ignores the provision of the Mine Act that 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". It is imperative that coal companies maintain the ability to set policy and discipline according to company policy. Discipline for persons who intentionally come to work impaired by drugs or alcohol must be left to the companies to work out, according to the situation and the specific employee. This is the standard used to protect the public from drivers under the influence and must remain the same for companies.

MSHA's new regulation should not be used as a tool to give a free-pass for miners who endanger themselves and co-workers intentionally by placing themselves in the work areas while under the influence of drugs or alcohol. MSHA may be inadvertently setting a national policy where drug use is acceptable. Miners will continue using drugs or alcohol until after they are caught the first time under this draft regulation. This draft regulation is a situation where industry finds fault with MSHA for not being strong enough for miner safety. Miner safety means we can't tolerate anyone who is impaired.

Companies must be able to determine the appropriate punishment for its personnel as is necessary. This regulation will bypass existing company policies.

Kentucky's approach did not micromanage drug policies of coal companies. Kentucky's system gives incentive to the miners to get help for substance abuse problems and provides additional incentives to coal companies to provide quality programs within their financial reach without burdensome regulations.

The following are specific comments:

Page 52157, Part 66.2(b):

Comment: We strongly object to the exemption of coverage for general administrative and clerical personnel and non-safety sensitive positions as 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 as seriously injured by an administrative person operating a vehicle on the mine site as a miner operating a piece of equipment on the mine site, and should be subject to the same testing requirements.

Page 52157, 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 stricken as all duties while on an active mine site are safety sensitive job duties. If these terms are used, they should be defined to include all jobs at the active mine site.

Page 52157, Part 66.3:

Comment: The definition of "drug-free workplace program" should contain an addition element "or availability of assistance." Kentucky allows a company to refer miners to clinics where their drug dependency can be treated.

Page 52157, Part 66.3:

Comment: The "Follow-up testing" definition should not preempt company policy.

Page 52158, Part 66.3:

Comment: The "Reasonable suspicion testing" should be modified to include credible information received by the operator from other miners, law enforcement, agency personnel, and other credible sources.

Page 52158, Part 66.3:

Comment: The "Return to duty testing" definition should be deleted. Companies must be able to determine the appropriate punishment for its personnel as is necessary. This regulation will bypass existing company policies and possibly interfere with EAP programs which some companies may have. Studies show a low cure rate for drug abusers. MSHA shouldn't tolerate the return to work of a drug or alcohol abuser who has not voluntarily sought help for an addiction problem which can and will jeopardize the safety of other miners in the future.

Page 52158, Part 66.3:

Comment: The "safety-sensitive job duties" definition should be deleted or it should refer to all persons at an active mine. We strongly object to the exemption of coverage for general administrative and clerical personnel and non-safety sensitive positions as part of this proposed regulation. <u>All</u> 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 equipment on the mine site and should be subject to the same testing requirements.

Page 52158, Part 66.100(b):

Comment: We object to exempting a miner who has a valid prescription. If this prescription is over-used or if this prescription causes the miner to be

impaired, this miner is endangering the lives of his fellow miners and his life as well. Existing company policy should govern this conduct. If a prescription is issued, MSHA should require the doctor to specifically state that the mine can operate mining machinery.

Page 52158, Part 66.200:

Comment: This part should not preempt existing company drug policies. The ability to give the miner information where he can obtain assistance should not be precluded. The operator should not be forced to pay for drug treatment.

Page 52158, Part 66.201(a):

Comment: The following sentence in this subsection should be modified to read, "The policy will also reference these regulations ~~and identify which miners are subject to the alcohol and drug testing provisions~~." Operators should not be forced to pay for drug treatment.

Page 52159, Part 66.202(a)(1)(iv):

Comment: This sentence in this subsection should be changed to read "Information about any available drug counseling, rehabilitation, and **if offered** employee assistance programs (EAPs)." This change will clarify that the coal operator does not have to have an EAP.

Page 52159, Part 66.203(a)(1)(vi) and (vii):

Comment: These subsections should be deleted. These decisions should be company decisions versus mine foreman decisions. The Human Resources Department should be responsible for doing this, not the supervisor.

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, which, in many cases, may 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.

Those 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 operator. The operator has to retain the flexibility to manage the workforce as that operator deems appropriate.

It should be emphasized that the miner will be on unpaid leave while seeking drug treatment.

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

Comment: This subsection should be deleted. This should be left to company policy. MSHA shouldn't get into this.

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

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

Page 52160, Part 66.302:

Comment: This section should be deleted. It should be the companies policy or listed through the regulatory process.

Page 52160, 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, such as hair test, blood tests, etc.

Page 52160, Part 66.304(a):

Comment: This subsection should be rewritten to read "Any applicant for ~~a safety-sensitive~~ **any** position must be tested for the presence of drugs before performing ~~safety-sensitive~~ **any** job duties." All workers must fall under the company's drug testing program.

Page 52160, 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, 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. These rules are in place on both the state and federal level. 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, Part 66.304(e):

Comment: This subsection should be deleted. 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.

Page 52160, Part 66.304(f):

Comment: The first sentence should be rewritten as follows: An incumbent miner that has failed or refused a ~~pre-employment~~ alcohol and drug test administered for the re-assignment to new job duties under this part shall not perform ~~safety sensitive~~ job ~~duties until the miner provides the mine operator proof of having successfully completed a referral, evaluation, and treatment plan, and tested negative on return-to-duty testing as described in Subpart E- 66.405-66.406~~.

In the alternative, this subsection should be deleted. 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 around the pre-employment 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, Part 66.304(g):

Comment: This subsection should be deleted. Does this mean that all miners that are currently working in safety sensitive positions would be required to be tested? A miner that has been tested for his initial assignment should not be required to be retested; the mine operator should have discretion to require a retest if there had been significant time between tests.

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

Page 52160, Part 66.305(a):

Comment: The 10% annual rate mandated in this section of the proposed regulation should be a minimum. Would this constitute a violation of any section of this or other MSHA standards or any section of the Act simply by exceeding the requirement of the standard?

Page 52160, Part 66.305(b):

Comment: This sentence should be amended to read "Miners who are on leave or otherwise absent from the workplace will be tested at the next available opportunity, ~~that is, immediately~~ upon their return to work." 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, Part 66.305(c):

Comment: The first sentence should be amended to read "Each mine operator shall use **reasonable efforts to** ensure that random alcohol and drug tests conducted under this part are unannounced and unpredictable."

Page 52160, Part 66.305(d):

Comment: Current random drug testing at some 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, 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, 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, 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, Part 66.306(d):

Comment: This subsection should be deleted. After 32 hours, the testing is irrelevant because the drugs may be out of the miner's system. Most drugs will pass through a person's system within 24 hours.

Page 52161, 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. This section of regulation must address that the results of the testing must be sent to the MRO of the operator for review, if the operator has an MRO. Results of the testing must be provided to the operator of all regulatory collected samples.

The use of hair samples, blood samples, other bodily fluids, and breathalyzers for alcohol should also be allowed.

Page 52161, 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, Part 66.400:

Comment: This entire section should be deleted. 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 which the operator has been dealing with on this particular miner and this is the proverbial last straw. The company must maintain the right and ability to manage the workforce.

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. If a company feels that an employee has violated internal safety and/or other policies and those are applied to all in a don-discriminatory manner that should be the company's prerogative. Many companies and even governmental agencies have a "Zero Tolerance" policy for substance abuse, especially in safety sensitive positions.

Additionally, other federal and state agencies monitor discrimination and have enforcement authority over those areas which are non-safety related and out of the purview of MSHA.

Page 52161, 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, Part 66.401(c):

Comment: This subsection should be deleted. Companies should not be required to pay impaired coal miners.

Page 52161, Part 66.402:

Comment: The second sentence should be rewritten as follows, "**In the event of a drug test** ~~However~~, possession of a valid prescription from a medical professional in and of itself may not constitute sufficient proof of legitimate and appropriate use."

Page 52162, 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, a substitiuted drug sample,** or substituted drug test result must immediately remove the miner involved from performing ~~safety-sensitive~~ job duties ~~and refer the miner to a qualified SAP~~. Action must be taken

upon receiving the initial report of the verified test result. ~~A mine operator must not wait to receive the written report or the result of a split specimen test~~. **Mine operators must provide to each miner who has failed or refused or adulterated a test (including an applicant or new miner) a listing of SAPs available to the miner within the community.**

Page 52162, 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 or 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 of the result of this test~~. **Mine operators must provide to each miner who has failed or refused or adulterated a test (including an applicant or new miner) a listing of SAPs available to the miner within the community.**

Page 52162, Part 66.403(d):

Comment: This subsection should be deleted. 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, Part 66.404(a):

Comment: This subsection should be deleted.

Page 52162, Part 66.404(b):

Comment: This subsection should be rewritten as follows:

"Mine operators must provide to each ~~such~~ miner **who has failed or refused or adulterated a test** (including an applicant or new miner) a listing of SAPs available to the miner **within the community** ~~and acceptable to the mine operator~~. This listing should include the names, addresses, and telephone numbers of the available SAPs. The miner may avail himself or herself of the services of the SAP to receive an evaluation and referral for treatment. ~~The~~

~~miner shall be allowed to return to performance of safety-sensitive job duties following a first violation violation and provided the miner complies with the return to duty and follow-up testing provisions found in section 66.405 and 66.406~~.

Page 52162, Part 66.404(c), (d) and (e):

Comment: These subsections should be deleted.

Page 52162, Part 66.405:

Comment: This entire section should be deleted. This should be left to company policy.

Page 52162, Part 66.406:

Comment: This entire section should be deleted. Return to duty and follow-up testing should be set forth by company policy.

Page 52163, Part 66.500(b)

Comment: This subsection should be rewritten to read:

"Mine operators must keep and retain the following test records for at least **one** ~~three~~ years:" This change will be consistent with other sections of MSHA regulations.

Page 52163, Part 66.500(c)(1)

Comment: This subsection should be deleted. This should be confidential. These post-accident reports are public information.

Page 52163, Part 66.500(d)(2)

Comment: This subsection should be deleted. This information should remain confidential. HIPPA prohibits the release of this information. MSHA is infringing on HIPPA and other regulations by requiring this information. This subsection even conflicts with 66.500 (a)(1) which requires test records to be treated as confidential communications between the mine operator and the miner.

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.

Please contact KCA if you have any questions on our comments.

Sincerely,

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President

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