National Lime Association

LIME

The Versatile Chemical

November 10, 2008

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

RE: Proposed Rule, Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance (RIN 1219-AB41)

The National Lime Association (NLA) is pleased to present its comments on the proposed rule on the use of or impairment from alcohol and other drugs on mine property. NLA is the trade association for manufacturers of calcium oxide and calcium hydroxide, collectively referred to as "lime." NLA's members operate both surface and underground mines under the jurisdiction of MSHA.

NLA strongly agrees that substance abuse among employees in the mine environment can create serious safety hazards to workers and others. Unfortunately, the proposed rule, if finalized without significant changes, will disrupt drug and alcohol testing programs already being administered by companies in the lime industry and in other mining industries, and will reduce miner safety at mines that currently have effective testing programs. As will be explained below, NLA's greatest concern with the proposed rule is that it would prohibit mine operators from choosing to terminate miners who fail a random or incident-related drug test for the first time. This alone makes the rule unacceptable, because it would roll back safety at all mines that currently have a zero tolerance policy for improper drug and alcohol use. In addition, this job security provision is not within MSHA's authority, and should not be part of a safety regulation.

The rule has several other serious shortcomings. It does not allow for alternative testing methods, such as instant screening methods. It does not adequately address how it applies to contractors working at mine sites. It also contains numerous other points that require correction or clarification.

NLA believes that the rule, as proposed, is not ready to be finalized. The changes needed to make the rule workable are so significant that the rule should be re-proposed for further comment and hearings.

General Comments

The Rule Should Not Prohibit "Zero Tolerance" Policies

The proposed rule provides in section 66.404(b) that a miner failing a drug test "shall be allowed to return to performance of safety-sensitive job duties following a first-violation violation" provided the miner complies with return-to-duty and follow-up testing requirements. Section 66.405(d) provides that "a miner who has successfully completed the recommended treatment and passed the return-to-duty tests may not be discharged for his/her first offense." This "job security" protection is also outlined in section 66.400(b).

NLA strongly opposes these provisions, and urges MSHA to delete them.

Many of NLA's members enforce a zero tolerance substance abuse policy, and therefore believe that the new rule would make their mines less safe, rather than safer. These operators believe that it is important to make it clear that miners found to be under the influence of drugs as a result of a random or accident-related test will be terminated. Such a policy sends the message that no miner can just take his chances until a first positive test, and in fact encourages miners with a drug or alcohol problem to seek help before failing a test. MSHA should not require operators with strong drug and alcohol policies to replace them with less stringent rules. That will not enhance safety.

Furthermore, it is not within MSHA's authority and mission to impose limits of this kind on mine operators' personnel decisions. The Federal Mine Safety and Health Act of 1977 provides, in Section 2, that the basic purpose of the Act is "to establish interim mandatory health and safety standards and to direct the Secretary of Health, Education, and Welfare and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners." The only provision of the Act related to employment protection is Section 111, which provides that compensation must be paid to miners idled by safety-related closures. The prohibition of zero tolerance policies is not a safety standard, because it reduces, rather than enhances, safety. Rather, this provision is a job security measure, and is thus outside MSHA's purview.

MSHA's justification for this provision in the proposed rule preamble demonstrates that MSHA was considering factors other than safety:

> Many mine operators who responded to the ANPRM said they find offering assistance to those with alcohol and drug problems, most commonly through an Employee Assistance Program (EAP), a successful avenue for returning miners to work and assisting mine operators in retaining valued employees.

73 Fed. Reg. 52150. While NLA agrees that EAPs can be effective in assisting miners, and that it is appropriate to seek to rehabilitate a miner who voluntarily seeks help, the goal of "retaining valued employees" is not part of the task that Congress has assigned to MSHA. MSHA also states in the Preliminary Regulatory Economic Analysis for the proposed rule that "[m]iners

would benefit by having job security in the event that they ... seek treatment upon their first positive alcohol or drug test." However, this is not a safety-related benefit.

MSHA only cites one safety-related reason for its prohibition of zero-tolerance policies:

> In addition, one commenter expressed the opinion that rehabilitated miners are often an improvement to safety and a positive model to others.

73 Fed. Reg. 52150. MSHA has already heard from numerous mine operators, including NLA's members, that they believe that a miner who has failed a random or incident-related drug test poses too much of a danger to other miners to justify his or her retention as a mine employee. Again, the considerations are different for a miner who voluntarily seeks help. This is a behavior that should be encouraged, and such a person, if successfully rehabilitated, really is a model for others. The person who fails a random test, and then who successfully retains his or her job, on the other hand, is a model for risk-taking behavior.

NLA recognizes that some mine operators may choose to retain some persons who have failed random or incident-related drug or alcohol tests after rehabilitation. These operators, however, should be able to take into account individualized factors, such as the drug of abuse, the work history of the miner, and the availability of ongoing support, in determining whether to retain or terminate such a miner. NLA is not suggesting that MSHA should impose a zero-tolerance policy on all operators, but rather that operators should have the flexibility to determine what level of response is appropriate under the circumstances of the particular mine.

The proposed rule includes no limit on how long a mine operator must provide job security for a miner who is pursuing evaluation and treatment. In some cases, treatment may take many months, or more. This places an extremely difficult burden on an operator, especially a small business, who must replace the miner in the interim.

NLA notes that some persons failing drug tests may not have a serious addiction problem. They may be only casual and occasional users of illegal drugs. These individuals will not need extensive drug rehabilitation treatment, so the recommendations of a Substance Abuse Professional (SAP) will most likely be limited to training and education about the dangers of illegal drug use. Many mine operators do not believe that this provides any certainty that such an individual will refrain from future drug use. This is another reason mine operators should have the authority to impose a "zero tolerance" policy.

In sum, the prohibition of zero tolerance policies is a fatal flaw in the Proposed Rule as currently drafted, and should not be included in a Final Rule.

The Rule Should Allow Alternative Testing Methods, Including Screening Tests

The rule unduly restricts the flexibility of mine operators to craft drug and alcohol programs that fit the needs of their operations. For example, several NLA members currently use onsite drug testing methods that provide quick positive or negative readings, especially with respect to accident-related testing. Typically, their practice is that if the onsite testing is negative, the

miner returns to work, and if the test is positive, the worker is referred for further testing consistent with DOT protocols. There are several forms of these onsite screening tests, including both urine and saliva tests. The proposed rule does not authorize this practice, and thus all miners requiring accident-related drug testing would have to be sent for comprehensive testing. This poses a significant practical challenge for mines in remote locations especially, and also means that all these miners will have to be restricted from safety-sensitive work until the comprehensive results come back. This restriction from work can be extremely burdensome, especially for a small mine, and should not be required if screening tests render it unnecessary.

There is little in the proposed rule preamble to indicate if MSHA has done a thorough evaluation of whether these screening tests can be an effective part of a drug and alcohol testing program. MSHA should consider the experience of mines that have included screening tests in their existing plans. In addition, MSHA's assumption that many mine operators will already have testing programs that meet the general requirements of the rule, and thus will not incur substantial additional testing costs, ignores the possibility that many of these operators may be using screening tests that significantly reduce testing costs.

NLA also agrees with other commenters that mine operators should be permitted to use other appropriate testing methods, including hair and blood sampling where appropriate.

The Proposed Rule Does Not Adequately Explain How It Applies To Contractors

The proposed rule does not adequately address how the rule's requirements would apply to contractor employees who are "miners" subject to MSHA jurisdiction. The rule does not clearly specify when and by whom they must be tested, and what the consequences are when a contractor employee fails a drug or alcohol test. NLA believes that each miner's employer should be responsible for maintaining its own drug and alcohol testing program, and thus that contractors should be responsible for pre-employment and random testing of their own employees. Indeed, it would be impossible for mine operators to include contractors in all elements of the mine operators' testing plan, since many of the provisions apply only to employees of the mine operator.

Furthermore, subjecting contractor employees to a comprehensive drug and alcohol testing program presents many practical difficulties and imposes costs that do not appear to have been considered by MSHA in the development of this rule.

First, while there are some contractors whose employees work solely or predominantly at mine sites, many other contractors have employees who spend limited time at mine locations. While these workers may be present at mine sites enough to trigger the requirements for comprehensive Part 46 or Part 48 training, many of these workers spend the bulk of their time at OSHA-regulated locations. Many of these contractors currently do not have drug and alcohol testing programs. It appears that MSHA's proposed rule would require these contractors to create drug and alcohol testing programs for these workers, including annual random testing. The cost of such a program could be disproportionate to the amount of work the contractors do at mine sites, and thus could lead them to decline to perform this work. This, in turn, would impose hardship

and costs on mine operators, especially those in remote locations, as contract services becomes more difficult and costly to obtain.

Second, it is not clear how the requirement to perform post-accident testing applies with respect to contractor employees. The rule, as drafted, requires the "mine operator" to conduct testing on "each miner" involved in certain work activity. It is not clear if this requires—or even authorizes—mine operators to require samples from contractor employees working at the mine site. NLA believes that where possible, contractors should be responsible for post-accident testing of their own employees, but mine operators must have the authority to collect or require such sampling if circumstances render this necessary.

Similarly, it is unclear whether the rule requires—or even authorizes—mine operators to include contractor employees in random drug tests performed at a particular mine site? The rule refers to mine operators testing "their" miners, which suggests that contractor employees are not included. MSHA should make it clear that mine operators are not required to include contractor employees in random drug testing.

NLA is also concerned about the potential for liability to mine operators if contractors should fail to properly conduct drug and alcohol testing. This is unlike other work safety requirements, in that the required actions may be performed entirely off of the mine operator's site. The rule should make it clear that if the contractor confirms to the mine operator that the contractor has in place and is carrying out a proper drug and alcohol testing program, that the mine operator should not be cited for a violation of the rule if the contractor, in fact, has failed to fulfill the requirements of the rule.

Section 66.500 of the proposed rule provides that records of test results "are confidential communications between the mine operator and the miner." This provision also must be clarified in terms of how it applies to contractor employees. Mine site operators should be authorized to audit the testing records of contractors, including test results, and confidentiality requirements should not preclude the mine operator from requiring samples (and results) from contractor employees through post-accident testing.

The implications of the proposed rule for contractors and their employees, and the resulting impact on mine operators, has not been adequately considered by MSHA. For this reason alone, the rule should be re-proposed, and particular effort should be made to engage contractors, including those that do not perform exclusively mining-related services.

The Rule Does Not Adequately Address Impairment

The principal reason for a drug and alcohol testing requirement is to prevent injuries and deaths that could result from a miner impaired by the effects of drugs or alcohol. However, the proposed rule addresses only impairment resulting from drugs that are being abused. It does not address the possibility—well known—that a person's judgment and actions may be impaired by legally prescribed drugs or even by over-the-counter medications. Other regulatory schemes, such as the Nuclear Regulatory Commission's fitness for duty requirements, address this concern as well. The NRC states that one of the purposes of its program is to "[p]rovide reasonable

assurance that individuals are not under the influence of any substance, legal or illegal, or mentally or physically impaired from any cause, which in any way adversely affects their ability to safely and competently perform their duties." 10 CFR 26.23. NRC rules require fitness for duty plans to include measures to address all types of impairment. 10 CFR 26.27(b)(6).

MSHA should include similar provisions in the final rule, and at the very least, section 66.101 should be amended to prohibit any miner from performing safety-sensitive work while impaired by any drugs or alcohol, whether legal or illegal.

Adulteration or Refusal Should Not Be Treated As Test Failure

Section 66.400(a) states that a miner failing a drug test, refusing to take a test, or adulterating a specimen, must not be returned to safety-sensitive work until completing the prescribed return-to-duty process. Subsection (b) provides that "[m]ine 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)." This language at least implies that persons who either refuse testing, or who adulterate a specimen, may not be terminated, at least the first time this occurs.

A mine operator should have no obligation to provide job security to a person who adulterates a drug or alcohol test, or who refuses such a test. This behavior cannot be tolerated, and the strongest possible disincentives should be authorized, including termination for a first offense if the mine operator chooses such a policy.

As noted above, NLA strongly opposes the mandatory provision of any job security to those failing drug or alcohol tests, but if such a provision is to be retained, at the very least, subsection (b) should be revised to read: "Mine operators shall not terminate miners who test positive for alcohol or drugs for the first time. Rather, those miners testing positive for the first time, who have not committed some other separate terminable offense (such as refusing to test or adulterating or substituting a specimen), shall be provided job security while the miner seeks appropriate evaluation and treatment."

Section-By-Section Comments

Section 66.1: Purpose

This section provides that existing drug and alcohol programs that contain "consistent policies" and that "provide at least the same level of protection as these requirements, are in compliance with this standard." This language is unduly vague, and does not give a mine operator adequate notice of whether an existing program is in compliance with the rule. For example, MSHA should clarify that a program that is identical with the proposed rule, except that it enforces "zero tolerance" for a first positive drug test, is in compliance with the rule. Such a program would have consistent policies, and would provide a greater level of protection than the requirements of the proposed rule. If MSHA intends to "grandfather" such programs, it must be more explicit about what elements of the rule must be incorporated. MSHA should add an additional sentence to section 66.1 that reads: "A plan established prior to the effective date of this rule shall be not

considered out of compliance with this standard because it does not provide for job security as provided in sections 66.400(b) and 66.405(d)."

Section 66.1: Applicability

Subsection (a) includes a prohibition on the possession or misuse of prohibited substances on and around mine property. First, MSHA should make it clear that possession or misuse of a prohibited substance by a miner does not constitute a violation by the mine operator of this requirement. Second, NLA believes that the term "around" is unclear with respect to mine property. This term could involve MSHA asserting its authority at locations governed by OSHA or by other authorities, and could conceivably extend to locations where the use of certain prohibited substances (most notably, alcohol), might be legal and appropriate. NLA suggests that if "around" cannot be defined more clearly, it should be deleted.

Subsection (b) provides that the rule applies only to those miners "who perform safety-sensitive job duties" and certain supervisors. Mine operators should have the discretion to determine the scope of the drug and alcohol testing program, to a *minimum* to include those performing safety-sensitive job duties. The rule should make it clear, however, that mine operators are authorized to broaden coverage to others working at the mine, up to and including all personnel at the site. The rule should provide that this authorization supersedes any state law to the contrary. As MSHA heard at the first hearing on this proposal, many mine operators already administer drug testing programs to all personnel at the mine site, including general administrative and clerical personnel. It should be made clear that this rule does not restrict such broader programs.

Accordingly, section 66.2(b) should be revised to read: "The alcohol-and drug-testing provisions in subpart D apply, at a minimum, to those miners who perform safety-sensitive job duties. Management and administrative personnel who supervise the performance of safety-sensitive job duties are also considered to hold safety-sensitive positions; however, general and clerical personnel are not. Mine operators may extend coverage of the testing provisions to any mine site personnel, including persons who do not perform safety-sensitive job duties, notwithstanding any state or local laws or regulations to the contrary."

Section 66.3: Definitions

Definitions of "Persons performing safety-sensitive job duties" and "safety-sensitive job duties"

The definition of "safety-sensitive job duty" needs clarification, since it essentially requires cross-referencing of section 66.2(b) and two different definitions in section 66.3. MSHA should define safety-sensitive job duties as any job duty requiring comprehensive miner training under Parts 46 or 48. This could be accomplished with clarity by (1) making the amendment to section 66.2(b) above; (2) deleting the definition of "persons performing safety-sensitive job duties," and amending the definition of "safety-sensitive job duties to read: "Job duties requiring comprehensive miner training under Parts 46 or 48."

Definition of "Prohibited substances."

The proposed rule defines "prohibited substances" to mean ten specified controlled substances (five more than are covered by the Department of Transportation), plus alcohol. In addition, however, the definition includes "any other controlled substances designated by the Secretary." The addition of further items to the list of prohibited substances should be subject to notice and comment rulemaking. Among other reasons, the addition of more substances to required testing could substantially increase the cost of compliance with the rule, which should be subject to comment.

Section 66.202: Education and awareness program for nonsupervisory miners

The proposed rule includes new drug and alcohol related safety training requirements in Part 66. All health and safety training requirements should be contained, or at least referenced, in Part 46 and Part 48. This would improve clarity with respect to what training must be delivered at what time, and for how long.

Section 66.204: Miner assistance following admission of use of prohibited substances

NLA's members generally follow the policy that a miner who voluntarily admits use of prohibited substances should not be terminated, but should be encouraged to pursue rehabilitation. However, contrary to the proposed rule's provisions, NLA does not believe that MSHA should mandate that all such persons be retained as employees, even if they successfully complete rehabilitation. A mine operator may reasonably conclude that it is unwise to return such a person to a safety-sensitive job, and there may not be other jobs available.

Furthermore, NLA is concerned that the proposed rule contains unintended "loopholes" that would require mine operators to provide job security to persons multiple times, contrary to the intent of this section and the intent of section 66.400(b). Thus, it appears that the rule would permit a miner to voluntarily admit substance abuse multiple times, and would require the mine operator to return him or her to work after completion of rehabilitation more than once. Similarly, the rule would allow a miner to voluntarily admit substance abuse and return to work after rehabilitation, and then proceed to fail a "first" random drug test without fear of termination. If MSHA includes a provision requiring that miners voluntarily admitting substance abuse be returned to work after rehabilitation, it should state that the mine operator is not required to return that miner to work after any later positive drug test or voluntary admission of substance abuse. This could be accomplished by adding the following: "No miner is entitled to the return-to-duty process more than once, although a mine operator may exercise its discretion to permit a miner to pursue the process more than once."

Section 66.300: Purpose and scope (testing requirements)

The proposed rule provides that mine operators must follow the Department of Transportation's drug and alcohol testing requirements found in 40 CFR Part 40. However, there are a number of problems with this incorporation, as outlined below:

Custody and Control Form. DOT's regulations require the use of a prescribed Federal Drug Testing Custody and Control Form (CCF). 49 CFR 40.45. The rule prohibits changes to the form. However, the current form only reflects the five drugs covered under DOT rules, and not the additional five included in the proposed rule. MSHA must provide a new form, which should be subject to notice and comment as was the current CCF when it was last modified.

Training of Specimen Collectors. The proposed rule does not address training required for specimen collection personnel, other than to reference 49 CFR Part 40. Will the same training requirements found in 49 CFR 40.33 be applied in the MSHA setting? Will these training requirements apply to mine operators who already have a drug and alcohol testing program in place? What training records will be sufficient to demonstrate that current specimen collection personnel have been adequately trained? MSHA should provide flexibility for mine operators with existing plans to continue their practices without duplicative training requirements.

Employment of Specimen Collectors. The proposed rule provides in section 66.3 that a Breath Alcohol Technician may be an employee of the mine operator. There is no provision, however, indicating whether a drug specimen collector may be an employee of the mine operator. 49 CFR 40.31(c) provides that "As the immediate supervisor of an employee being tested, you may not act as the collector when that employee is being tested, unless no other collector is available and you are permitted to do so under DOT agency drug and alcohol regulations." Many mines are located in remote locations, and it is highly likely that mine site supervisors will be required to act as specimen collectors, especially for incident-related testing. MSHA should clarify who may collect these specimens, and what training they are required to receive.

Alternatives for Alcohol Testing. Can a Screening Test Technician (*STT*) and an Alcohol Screening Device (ASD) be used in place of a Breath Alcohol Technician (BAT) and an Evidential Breath Testing Device (EBT)? This substitution is allowed in 49 CFR Part 40 but is not addressed in the proposed rule. BAT is defined in the proposed rule, but STT is not. This should be clarified.

List of Evidential Breath Testing Devices. 49 CFR 40.229 refers to a list of Evidential Breath Testing Devices (EBT) testing devices and Alcohol Screening Devices (ASD). Is the list used by DOT incorporated as well into MSHA's rule?

Employment of Medical Review Officer (MRO). NLA supports MSHA's proposal to allow an employee of the mine operator to serve as an MRO. It is not clearly stated in 49 CFR Part 40 that this is permissible, so NLA suggests that this point of difference be explicitly stated in the final rule.

Interpretations and Guidance. Will interpretations and guidance published by DOT with respect to 49 CFR Part 40 be equally applicable to testing procedures under the proposed rule? What measures will MSHA and DOT take to ensure that those interpretations remain consistent?

Split samples. The proposed rule provides in section 66.300(b) that the procedures in 49 CFR Part 40 shall be followed "with the following exceptions: the split sample method of collection shall be used, and use of 'bifurcated' alcohol level for testing is excluded." NLA requests

clarification of what the reference to the split sample method means. 49 CFR 40.71 requires that all drug testing samples under DOT procedures be split samples. It is unclear what difference, if any, the proposed rule contemplates from the DOT procedures.

Records from prior employment. 49 CFR 40.25 requires an employer to seek information about drug and alcohol testing at prior places of employment before the new employee may perform safety-sensitive duties. Is this requirement also incorporated into the proposed rule? This needs to be clarified, since this provision does not relate directly to testing procedures, and is not mentioned in the pre-employment testing provisions of the proposed rule.

Section 66.302: Additional Testing

This section provides that the Secretary "shall be permitted to designate additional substances for which all mine operators must test." As noted above with respect to the definition of "prohibited substances," the addition of further items to the list of prohibited substances should be subject to notice and comment rulemaking. Accordingly, the language quoted should either be deleted, or amended to include "subject to notice and comment rulemaking."

In addition, the rule should state: "Mine operators may test for additional substances under the provisions of this rule, as long as consistent procedures are followed." In this age of "designer drugs," the rule should be clear that operators are free to address "new" substances of abuse that may appear in the future.

Section 66.304: Pre-employment testing

The rule should explicitly state that "the mine operator has no obligation of any kind to an individual who fails or refuses a pre-employment drug or alcohol test."

Subsection (e) should be clarified to indicate that it applies only to an incumbent miner "not previously subject to the drug and alcohol testing program."

Section 66.305: Random testing

In the preamble, MSHA indicates that it "would allow mine operators to fulfill the random testing requirements by forming or joining consortia for that purpose." 73 Fed. Reg. 52148. The proposed rule language should explicitly authorize such consortia. In addition, mine operators with more than one mine location should be authorized to include all miners at all locations in a single pool for purposes of random testing. A new subsection (f) should be added, to read: "In determining the pool of miners to be subjected to random testing, a mine operator may join or form a consortium with other mine operators and/or contractors to form a consolidated pool. The pool may include miners working at more than one mine site."

Section 66.306: Post-accident testing

NLA is concerned that the proposed rule may require post-accident testing for very minor accidents unlikely to have been affected by substance abuse. Subsection (a) provides that:

"Accidents and injuries requiring post-accident testing include occupational injuries requiring medical treatment beyond first aid..." This provision is apparently modified by the provision of (a)(2) which provides that for non-fatal accidents, "the mine operator shall conduct alcohol and drug tests on each miner involved in any work activity that could have contributed to the accident or injury."

In the lime industry, certain injuries occur with some regularity that require medical treatment beyond first aid, but which are highly unlikely to be related to substance abuse. For example, lime (calcium oxide) is irritating to the eyes, and if lime bypasses eye protection and gets into a miner's eyes, in many cases medical care beyond first aid is required. However, even lime companies with current drug and alcohol testing programs would generally not require testing in this situation. Similarly, miners sometimes require medical treatment for injuries related to repetitive stress, and these also are highly unlikely to relate to substance abuse. NLA suggests that the language in (a)(2) be modified to "the mine operator shall conduct alcohol and drug tests on each miner involved in any work activity that could reasonably be deemed to have contributed to the accident or injury as a result of impairment by prohibited substances."

Without such a provision, or some other discretion granted to the mine operator, miners will have to be restricted from safety-sensitive job duties even for minor injuries highly unlikely to be related to substance abuse. This can be very burdensome, especially for a small mine, because test results often take several days to return. This problem would be mitigated to some extent if MSHA permits screening tests as discussed above.

Subsection (e) provides that drug and alcohol tests performed by others may be used only when the mine operator "has been unable to perform" separate post-accident tests within the required time periods. While NLA does not object to the requirement that the mine operator perform required tests, it believes that the tests performed by third parties (if reliable) should be able to be used even if the mine operator simply fails to perform the test. The purpose of the test is to protect miners from impaired workers. A miner abusing prohibited substances should not be protected from consequences by the mine operator's failure to perform a timely test. The words "has been unable to perform" should be replaced with "did not perform."

Subsections (f) and (g) provide that the mine operator, through a properly trained individual, determines who should be subject to post-accident testing, but that MSHA investigators may require that additional persons should be tested. NLA does not disagree with this approach, but it should be clarified that a reasonable difference of opinion over which miners may have contributed to the accident does not constitute a citable violation of the rule.

Section 66.307: Reasonable suspicion testing

This section focuses unduly on outward signs of impairment, and neglects other important sources of reasonable suspicion of illegal drug use, including off-duty observation of illegal drug use, verifiable reports of drug-related arrests or convictions, and statements by the miner. Subsection (b) should be revised to read: "A mine operator's determination that reasonable suspicion exists shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the miner, or on other credible

information including but not limited to statements by the miner, verifiable reports of drug-related arrests or convictions, or reported observations of illegal drug use by the miner on or off duty. A supervisor, or other company official who is trained in detecting the signs and symptoms of the misuse of alcohol and/or drugs, must make the required observations and assess the available information."

MSHA should clarify that a reasonable difference of opinion between a trained supervisor and an MSHA inspector over whether there was reasonable suspicion to test does not constitute a citable violation of the rule. Indeed, the issue of whether there was reasonable cause to test a particular worker is a matter of personnel management and labor law, and should not be adjudicated by MSHA representatives.

Section 66.404: Evaluation and referral

No mine operator should ever be mandated by MSHA to place a miner in a safety-sensitive position if the operator does not have confidence in that miner's ability to work safely. The propose rule is inconsistent as currently drafted on this point. Section 404(b) provides that a worker "shall" be allowed to return to safety-sensitive job duties after complying with return-to-duty requirements, while section 405(d) provides that while the miner cannot be discharged, "it is the mine operator who determines whether to put the miner back to work in a safety-sensitive position." The word "shall" in section 404(b) should be changed to "may."

MSHA should clarify that the rule does not require the mine operator to provide or fund a Substance Abuse Professional (SAP), nor to ensure that an SAP is conveniently located. NLA believes that it is the primary responsibility of the miner to seek and obtain evaluation and treatment for a substance abuse problem, and the mine operator should not be required to do more than use best efforts to identify acceptable SAPs as conveniently located as possible.

Section 66.406: Return-to-duty and follow-up testing

A person with a serious drug or alcohol problem may require more than 24 months of follow-up tests. MSHA should not restrict the discretion of the SAP in this respect.

Conclusion

The problems and uncertainties associated with this rule are so significant that MSHA should not proceed to a final rule, but should issue a new proposed rule that explains how MSHA would address the issues already raised in comments and hearings.

NLA appreciates the opportunity to comment on these important issues.

Very truly yours,

/s/

Hunter L. Prillaman
Director, Government Affairs
National Lime Association
200 N. Glebe Road
Arlington, VA 22203
703-908-0748
hprillaman@lime.org