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November 10, 2008

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

Re: Regulation Identifier Number (RIN) 1219-AB41 Proposed Rules on Alcohol and Drug Testing at Mines

Ladies and Gentlemen:

Our company truly appreciates the opportunity to comment on the proposed rules on Alcohol and Drug Testing at Mines.

Our company supports MSHA in its efforts to improve the health and safety of the nation's miners. We also support MSHA's intended reduction and elimination of drugs and alcohol abuse in all mining activities. However, we vigorously oppose the MSHA proposal as written.

One of our companies, Dominion Coal Corporation, operates 5 underground mines in southwest Virginia. We have 6 active small contract mines in Southwest Virginia and Southern West Virginia. Two of our company mines and all of our contract mines employ less than 20 employees.

We at Jewell Resources Corporation take the safety of our employees very seriously. Our company has not had a single MSHA reportable injury since September 2007. We presently employ 194 underground miners and 60 surface miners.

Our company has had a zero tolerance policy for drug and alcohol abuse in place for several years. We perform a pre-employment, post accident, and reasonable suspicion testing for both drugs and alcohol at this time. We presently do not do random testing. Our testing for drugs includes a 15 panel test and includes urine and hair follicle. We feel the most effective way to protect miners for alcohol and drug related accidents is to develop and promote a drug free, alcohol free workplace with a zero tolerance policy such as ours.

As stated, MSHA's purpose is to promote health and safety in the nation's mines and associated properties. It is our belief that the implementation of mandatory testing for drug and alcohol use/abuse as written in the proposal is not consistent with the intent of the act nor will it achieve the anticipated or desired outcome. We must all agree that drug and alcohol use/abuse cannot be tolerated in the work environment as it creates undue risk to the user and to his fellow workers. The hazard created by this use or abuse is not a risk specifically associated with the mining industry nor caused or influenced by the mining operator. Enacting regulations that create strict guidelines by which operators will now be judged is unfair due to an employer's limited ability to affect change in the employee. Virginia's Department of Mines Minerals and Energy (DMME) has a strict zero tolerance for drug and alcohol abuse but there is still 40-50 names listed on each monthly meeting of the Board of Coal Mining Examiners (BCME)

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of which I am a member. Those miners who choose not to comply with the regulations are still an issue we face each month.

Our company again has a zero tolerance for drug and alcohol use/abuse. In regards to that, the proposed regulation would require operators to provide job security to employees and or prevents termination of employees for first time violations of drug and alcohol policies. This is unacceptable to use in so many ways. We feel it sends the wrong message to miners, especially those that are drug and alcohol free while on the job. Why should we invest time and money at an increased cost to wait for a person to go through a SAP or EAP while other miners have to cover that person's duties. MSHA should not be telling operators how to discipline individuals that violate company policy. All of our employees are very aware of company drug and alcohol policies. The policies are just as stringent as machine guarding, smoking underground, lock out tag out, or roof control. A violation of such a policy can lead to termination and this must be so to be a proper deterrent. A worker who violates a drug and alcohol policy that he/she is fully aware of has demonstrated a pattern of choice that will step around other company policies. Being required to maintain such a worker defies good safety sense and weakens an otherwise strong deterrent. An operator should be able to review each violation on a case-by-case basis and make the appropriate disciplinary choices according to the merits of the case. Furthermore, a violation of one of the company policies mentioned above or even an accident with injury would be cited against the operator under the strict liability rule of MSHA. Would a violation of the drug and alcohol policy by an employee who violated the policy for a second time, which results in an injury or accident, be sited against the employer who was forced to retain the worker? In Virginia, the results of any employee who tested positive under our company program would be reportable to the Virginia DMME under the states regulations. All coal miners in the state must hold at least a general underground coal miner or general surface coal miner certification. That employee would have all of his certifications suspended pending an appearance before the BCME to show cause why their certifications should not be revoked. The suspension or revocation is also reported to Kentucky. If they hold certification in Kentucky, their certifications are also suspended until resolution of the cause of suspension has been cleared in Virginia. As a member of the Virginia BCME, I believe the Virginia DMME regulations are beginning to have an impact on drug and alcohol abuse in the mining industry in Virginia.

Our company has drug testing policies that are more stringent than the proposed rules, including zero tolerance policies or at least the option to terminate for violation. We are sympathetic to those who have problems with drug or alcohol dependence and for this reason have programs that allow miners to seek help under Employee Assistance Programs with out repercussion before being identified for testing. However, we are opposed to a rule that requires us to put policy violators back to work. We consider this requirement to be a step backwards in safety and an improper intrusion into day-to-day management. As written, the rule would require us to retain even those employees who actively are attempting to conceal their drug use by purchasing and using adulterants, those who have illegal drugs on mine property and those who are dealing drugs on mine property. This does not promote safety.

We do not believe MSHA should be dictating to employers the appropriate discipline for violation of drug and alcohol testing policies. To do so interferes with the labor relations policies of employers. Our company discharges employees for confirmed positive drug or alcohol tests, adulterated drug tests and refusals to take drug tests. We do allow

employees to step forward before being told to submit to a reasonable suspicion or post accident drug and or alcohol test and are given an opportunity to recover from substance or alcohol abuse without discharge in such cases. MSHA should leave the decisions on employment status or discipline to employers.

The intent of the proposed rule is to identify employees using or abusing alcohol or drugs while in the work environment with a goal of reducing risk. It is questionable if the proposed training and the threat of testing is going to persuade a sufficient number of users/abusers to refrain from utilizing these substances in the work environment. We question this logic based on the premise that most casual users, in Virginia, are already wary of getting caught and some chose to continue to use or abuse those substances. This is evident by the number of persons reported for testing positive for drug and or alcohol use or abuse and scheduled to come before the BCME each month. It is our belief that the number of persons affected positively by this rule would be minimal at best and yet the financial cost to the operator and the industry would be substantial.

If the proposed regulation becomes a mandatory safety standard, operators could be held liable for personal actions taken by an individual miner. Could operators be cited for an employee's possession and or use of drugs or alcohol on company property by an individual miner. In this case should operators start searches of personal vehicles on company property for the contraband to reduce citations? We think not. Unopened containers of alcohol are legal in most states and should not be referenced in the regulations. Prescription medication is also allowable in most states and could be construed to be a violation of the regulation as is presently written.

Again mine operators should be the ones specifying actions to be taken on any violation of the drug and alcohol policy, including first time violations. Requiring mine operators to retain personnel that have violated such policies is contradictory to well established corrective action policies. Violations of the drug and alcohol policy should be considered as serious as other significant safety infractions where termination is justified on the first offense. MSHA should not overrule the operator's right to establish and enforce corrective action policies. Adulterating a specimen is equivalent to falsification of records, which in many cases can be a federal offense, punishable by a fine and imprisonment. A refusal to test is of equal justification to terminate on the first offense. By refusing to test the chances of the test results being negative after a delayed period of hours or days are significantly increased. This results in a diminution of safety to all miners working with or around a person under the influence of drugs or alcohol. Due to the limited number of SAPs, especially in our area, would significantly hinder us to comply with the proposed requirements if it stands as is. In addition, miners may be required to drive significant distances to meet with the SAP for evaluation purposes. Allowing evaluation by either an SAP or EAP, of which there is one in each of the six surrounding counties in southwest Virginia, would reduce the potential conflict of availability and travel distances. Operators should not be required to provide a listing of SAPs or EAPs to applicants. This type of information is applicable to employees whereas applicants are still in the pre-employment phase. Operator should not be forced to hire applicants that fail pre-employment testing. Mine operators should have the right to withdraw an offer of employment to any applicant that tests positive for drugs or alcohol on the pre-employment screening.

We are concerned about the requirements to follow DOT testing regulations because they would exclude newer and more effective testing methods and newer drugs on the market. In terms of minimum standards, we think it is sufficient to use FDA approved tests and, for confirmation testing, SAMSHA certified labs. Our suggestion is that the

proposed rules be modified to act as minimum standards only. We believe this would address the majority of comments that expressed concern about having to modify current successful testing programs.

MSHA should not require operators to include post accident test results in accident reports due to the potential release of confidential information. Accident reports are public record which can easily be obtained. In smaller communities like ours, an injured miner may be well known. Any reference to a positive drug or alcohol test could be easily traced to the injured miner, even if his name is redacted from the injury report that is readily obtainable. Test records should not be included in any accident report.

Records of drug test results and evaluations are best handled by the Medical Review Officer (MRO). The records associated with all testing should be maintained in a secure Human Resources file. Such records are confidential between the miner and the mine operator.

Most would agree any standard with regard to substance abuse should be zero tolerance. Legally sound drug screening methodologies include "cut off levels" for detectable prohibited substances.

Should a standard be enacted for coal mines, its enforcement ramifications should remain under the direction and discretion of the employer. Prohibited substances should include alcohol, illegal or controlled drugs, and the illegal use of prescription medications. Impairment is vague and difficult to determine and nearly impossible to substantiate legally. The standard and legally accepted methodology for substance screening is the detectable presence of a substance that is above an established cutoff level, which for most substances is expressed as "nanograms per milliliter".

We are not in favor of employer liability in the event a worker, especially one who is involved in an accident, tests positive for alcohol or a controlled substance. Any liability should rest strictly on the offending individual(s). 1) Individuals abusing drugs and/or alcohol do so independently and against the best interests of safe and efficient production of the operator and the safety of their co-workers, and 2) persons who abuse drugs and alcohol can be difficult to detect. An employer should not be held liable in the event an individual tests positive for the detectable presence of a prohibited substance when suspicious behaviors are absent. As stated previously, existing technology can detect the presence of a substance, but not when the substance was utilized nor the degree of impairment elicited by it.

The proposed rule is designated only for employees that perform so called safety-sensitive jobs. We believe a safety policy that designates only some jobs as safety sensitive provides safety policy wiggle room in practice and creates two classes of employees when it comes to safety. Numerous jobs might not be designated as safety sensitive but those filling them could in practice be underground or near machinery and equipment where their potential use of drugs or alcohol puts all employees in danger. All employees on our mine property must be considered in safety sensitive jobs. To suggest otherwise would diminish a safety first culture and send the wrong message to our workforce.

An effective independently administered, legally defensible drug and alcohol policy should be maintained to provide suitable latitude for an operator to act as it deems appropriate in the interest of safe and efficient business operations.

We believe that MSHA should propose minimum threshold requirements relative to drug and alcohol abuse programs that do not preclude an employer, a state or other entity from developing, implementing and maintaining a program that enhances its programs that are effectively working to combat drug and alcohol abuses, and MSHA should not

replace effective drug and alcohol programs with mandatory less effective prescriptive programs.

The proposed regulation would require random testing and in this regard the proposal should be modified to require that mine operators “ use reasonable efforts” to ensure that random testing is unannounced and unpredictable, rather than stating that “each mine operator shall ensure” such unpredictability, which may be beyond the mine operator’s ability to control.

Section 66.305(e) should be deleted from the proposed regulation because being selected for random testing does not indicate that a miner is impaired or otherwise unable to safely perform safety sensitive duties. In fact, if done correctly, random selection for testing is completely consistent with and is done solely to confirm a miner’s fitness to perform a safety sensitive job.

Proposed Section 66.306(a)(1) should be modified to require the mine operator to conduct testing on each miner, who based on the mine operator’s judgment, exercising reasonable discretion, is determined to have probably been involved in the accident or any activity that was the proximate cause of the accident. As proposed, the regulation is overly broad and vague because all miners at work in the mine when an accident occurs are arguably involved in work activity that “could have” contributed to the accident.

Proposed Section 66.307(a) should be modified to require testing when the mine operator has a reasonable suspicion that a miner is impaired or under the influence of drugs or alcohol while on mine property. The term “misused” is not defined and is subject to conflicting interpretations. Misuse that does not occur on mine property and that does not result in the miner having in his or her system while on duty any of the regulated substances, at prohibited levels, is beyond MSHA’s jurisdiction and the mine operator’s ability to detect.

Our company fully supports a drug and alcohol free workplace. We encourage MSHA to revise the proposed regulation to outline a basic drug and alcohol program that can be tailored to each mine’s unique circumstances while still allowing a zero tolerance policy. We also encourage MSHA to allow states with an alcohol and drug free regulation to have primacy and be allowed to continue their present program.

Again I would like to take this opportunity to thank you for the opportunity to comment on these proposed regulations and encourage MSHA to revisit the proposal for an extended comment period.

Sincerely,

Gerald Kendrick,  
Manager of Health and Safety for  
Jewell Resources Corporation