From: Michael Herges [mailto:mherges@Graniterock.com]
Sent: Monday, November 10, 2008 9:55 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: RIN 1219-AB41 "Alcohol- and Drug-Free Mines"

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VIA E-MAIL: zzMSHA-comments@dol.gov

Dear Ms. Silvey:

Graniterock appreciates the opportunity to submit comments for the record regarding the Mine Safety and Health Administration's (MSHA) proposed rule "Alcohol- and Drug- Free Mines: Policy, Prohibitions, Testing, Training and Assistance" that was published in the Federal Register on September 8, 2008.

Graniterock is a building materials supplier and engineering contractor based in Watsonville, California. Overall, we think the proposed rule makes sense. The inherent hazardous nature of mining puts any person impaired by alcohol or drug use, and those working with or around that person, at risk of an incident with the potential for catastrophic consequences. We do, however, have some concerns regarding the following:

1) Returning the miner to duty following a positive test should always be at the discretion of the miner operator.

Section 66.400(b) Consequences states that a mine operator shall not terminate miners who violate the mine operator's policy for the first time. 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.

This should not state that the miner should not be terminated. Graniterock's current drug and alcohol policy provides for termination in the event of a positive test. The decision to retain or terminate should be left to the mine operator. MSHA could imagine a gross misjudgment made by a miner who tests positive and yet could not be terminated because he had tested positive. In other words, every miner who violates a serious safety rule could keep his or her job simply because he or she was "high". The proposed rule should not excuse the conduct of any miner.

Section 66.404(e) While the SAP's referral shall always be made at the miner's first offense, employers may choose to offer additional opportunities for treatment and return-to-work but must do so in a way that is uniform and consistent. This

makes sense but the employer should have the right to decide to no longer retain someone in their employment.

Section 66.405(d) Although the SAP can verify completion of or compliance with recommended treatment, it is the mine operator who decides whether to put the miner back to work in a safety-sensitive position. However, a miner who has successfully completed the recommended treatment and passed the return-to-duty tests shall not be discharged for his/her first offense.

This makes no sense. There are many situations in which the employer could decide that it is not responsible conduct to return the employee to work after an accident, and yet the employee would have a "second chance" simply because there was drugs/alcohol in his or her blood. There would be no way to decide if the accident was caused by a lapse of judgment or from drug/alcohol use. Regulations that excuse conduct (poor judgment) simply because someone is impaired by drugs or alcohol are not consistent with the employer making the decision to return someone to work.

With methamphetamine use being a huge problem in the United States and treatment unsuccessful in more than 90% of the cases, MSHA should be less protective of drug and alcohol users and allow the employer to follow the mine operators policy.

We see this as a giant step backwards for discipline occurring after accidents, and with a sample rate at only 10%, we see MSHA requiring testing in most accident cases. The standard for deciding whether to ask for a test will be based on was the accident preventable. If it was preventable, then the miner who contributed to the accident, in even a small way, would be tested. The end result will be that miners that test positive will have their violations of safety policy, etc. waived because they tested positive, or at least this will be argued because the language in the proposed rule states "However, a miner who has successfully completed the recommended treatment and passed the return-to-work test shall not be discharged for his/her first offense". We don't see why MSHA needs to get involved in what is the employers responsibility to apply judgment before putting someone back to work as is provided for in 66.405(d).

Finally, giving miners a "second chance" by seeking treatment after a positive test undermines the policy which says the drug and alcohol use are prohibited.

2) The proposed rule has little direction with regard to prescription drug use.

This is a larger area of abuse than illegal drugs. The proposed rule should contain a provision that requires miners to inform their employer if they are using a prescription or over-the-counter drug that may interfere with their work duties.

The proposed rule only requires that the MRO confirm that a prescription drug is the reason for a positive test result. This makes it possible for a miner who is

addicted to a prescription drug to test positive without providing the employer with information about the lawful drug use affecting their work performance.

3) The proposed rule requirement for a random test rate of 10 percent is too low.

The Department of Transportation started random testing at the rate of 50 percent. This rate was used to determine a baseline for testing. MSHA should consider doing the same. If there is no problem, as some opponents of the proposed rule claim, the random testing rate can be reviewed annually and adjusted to reflect the actual extent of the problem.

4) The proposed rule should apply to all employees at a mine.

The proposed rule only covers those it has defined as those engaged in safety-sensitive functions. Those who are actively engaged in hazardous work and those who supervise them are not the only ones who can cause an incident.

Persons who have not had the comprehensive training can stray into areas of the mine that can be hazardous. Even if they are accompanied by an experienced miner, they could expose themselves, and/or others, to hazards while impaired by drugs or alcohol. A miscommunication in an emergency, or just in the normal course of business, by an impaired person who is not in a safety-sensitive position could put miners at risk.

Finally, if everyone at the mine is included in the alcohol and drug program, the chance that someone who should have been tested, but was not, would be eliminated.

5) No clear guidance is given for contractors.

Clear guidance should be provided in the proposed rule for contractors. What a contractor, especially those contractors that will be on mine property for short periods of time, or possibly for one project, are required to do to comply with this rule will reduce the need for interpretation of the rule after it goes into effect. It is understandable that the same requirements should apply to a contractor who will be on mine property for an extended period of time. However, if the contractor performs work intermittently, or for one week, should they be required to implement a full drug and alcohol program.

A drug and alcohol test should be required for all contractor employees before they are permitted to perform work on mine property. However, what if the contractor only performs work on mine property once a year? Are they still required to conduct random testing? What if they are not certain that they will perform work at a MSHA regulated location after their initial project? Clear guidance as part of the proposed rule would be invaluable to mine operators who will be required to ensure that contractors comply with the proposed rule when it becomes final.

6) The proposed rule does not address situations where a miner would be impaired but not over the 0.04 percent blood alcohol concentration limit.

The proposed rule only addresses impairment from failing an alcohol test with a result indicating a blood alcohol concentration of 0.04 percent or greater. It is known that a blood alcohol concentration from 0.02 to 0.04 percent can cause impairment. The Department of Transportation recognizes impairment at those levels and provides for the removal of the individual for that shift when testing indicates results in that range. The addition of this requirement would reduce the risk of an accident due to impairment from alcohol use to miners in a safety-sensitive function. Perhaps as a compromise with the proponents of giving miners who fail an alcohol or drug test protection from being terminated, MSHA should consider the individuals who test between 0.02 and 0.04 percent blood alcohol concentration for a mandated "second chance".

In conclusion, Graniterock believes that the proposed rule will reduce the risk of accidents in the mining industry. We strongly encourage MSHA to allow mine operators discretion in the retention or termination of miners who fail a drug or alcohol test. Thank you for the opportunity to make additional comments regarding the proposed rule.

Sincerely,

Michael Herges
Safety & Health Services Manager
Granite Rock Company