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October 7, 2008

MSHA
Office of Standards, Regulations, and Variances
1100 Wilson Boulevard,
Room 2350, Arlington, Virginia 22209-3939

Re: Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance
Part 66

RIN 1219-AB41

Federal Register Number E8-20561

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To Whom It May Concern,

Let this letter be the commentary for the Proposed Drug and Alcohol Regulations 30CFR Part 66. My overall objection to the new regulations is that you have not provided the public and the affected industries with enough time to review the proposal and help guide the process. I know that there has been a mandate not to linger on new regulations but to present a regulation that hasn't been very well thought out makes me wonder why this was presented so quickly and with only a month of commentary and no public meetings. As I explain below, a more sensible approach would be for the new standard to be incorporated into 30 CFR 56.2001 and 57.2001 with adding the statement that the drug and alcohol testing be the same as required under DOT 30 CFR part 40 and part 382. The manipulation of the standard has caused me to have great concern on how this new

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regulation could be nothing but a vehicle for paperwork violation that would be categorized as “SS” to your inspectors because of the consequences of potential serious if not fatal ramifications if not handled according to your specifications.

The following is a list of concerns and potential problems with the way this proposed standard is currently written.

- 66.2 Management and supervisors are part of the drug and alcohol pool? Who manages the drug and alcohol program--the same manager or supervisor that is to be tested? There are a multitude of mining operations that have less than 10 employees overall. To have a person from the testing pool receive or create the testing data makes no sense. Added to that you are expecting the same individuals to have special training over and above the rest of the miners for the purpose of reasonable suspicion (for example) but make them subject to the same criteria. Who assesses a manager for potential drug or alcohol problems? With small operations where five or six are the entire operation this problem arises. There is no statement on who or what groups can be part of a testing consortium.
- 66.2 (c) “Everyone” is to be made aware of the program including contractors but there nothing in the proposed regulations that says “contractors” have to comply with the regulations. Where in Part 66 do trained independent truck drivers fall in these regulations or are they just subject to DOT regulations?
- 66.100 (b) A miner who is using a prohibited substance is okay if that miner has a prescription and their prohibited substance has been reviewed by an MRO? If a miner walks in to see their supervisor or manager with a prescription, we should not have to contact an MRO to review the drug. My “DOT” MRO is in Maryland and I work in Colorado. Rarely do I communicate to my MRO other than through email or faxes. How does this MRO question a miner and what is the time limit? I assume this poor miner will have to wait before starting his safety sensitive function until the MRO can find the time to contact them. Right now for me that is a day or two. Did anyone contact an MRO to ensure that this is physically possible?
- 66.202 (a)(2) and 66.202 (c) Annual training on a regular basis for a miner has to be 30 minutes and it cannot be incorporated into the regular annual refresher training. That means we are doing 8 hours plus 30 minutes for annual meetings. Why can't they be incorporated? Right now, drug and alcohol abuse is already incorporated. Why is this to be special and separated? Hazcom was included without a problem. Added to that why 1/2 hour? All other training is not specified as to time so why does this have to be?
- 66.203 (a) (2) and 66.203 (c) Annual training on a regular basis for a miner has to be (1) hour and it cannot be incorporated into the regular annual refresher training. That means we are doing 8 hours plus 1 hour for annual meetings. Why can't they be incorporated? Right now, drug and alcohol abuse is already incorporated. Why is it to be special and separated? Hazcom was included without a problem. Added to that why an hour? All other training is not specified as to time so why does this have to be?

- 66.204 This mandatory miner assistance program flies in the face of not only our current program of zero tolerance on drugs or alcohol but also that of everyone else in our industry. A zero tolerance is the rule not the exception. This would be taking a step backward. Most people in the “DOT” and other industry trades already know that the SAP programs have not been successful. I can only assume that the author(s) of this regulation would have a problem complying with them and would like to have their job back if it were to happen to them.
- 66.300 Again this whole regulation should be the same as DOT 30 CFR part 40 and part 382. I can understand minor changes to fit the type of employee involved but what you want creates a rift in a proven set of regulation that I and others have to comply with and what you want. Can the federal government be consistent for once in their existence?
- 66.301 and 66.302 Again, my comment here is that you should strive for consistency for the types of drugs tested. “DOT”’s approach is a reasonable approach to the chosen drugs to be tested. The shotgun approach of listing everything is the lazy man’s approach to drug testing. There is no one or even two standard drug testing panels that that I know of that would hit everything that you have listed. If there are, the cost of doing those tests would be prohibitive. Even using a seven panel drug test or the DOT 5 panel drug test seems to be the drugs of choice.
- 66.304 (b) An alcohol test after a job offer has been given sounds like a great idea, but is a waste of time. By the time a miner comes in for such a test or is sent to conduct a test, they won’t be positive or over the testing criteria if even they were in the first place. I don’t know of any applicant that comes to a business with booze on their breath looking for a job. I don’t know of any HR professional that would hire someone with booze on their breath. DOT has already figured this out and does not require this testing.
- 66.304 (d) Are we testing for blood alcohol or breath alcohol? Do we use Breath Alcohol Technicians or Phlebotomists?
- 66.304 (f) Why is the employer required to keep testing an incumbent miner until they get it right, referral or no referral? Here again we as well as most others have a zero tolerance program. If a potential employee is positive the regulations should either require that the person not be hired, or should allow the employer the flexibility to create their own plan, which might include permitting the employer to make the decision not to hire.
- 66.305 (b) Waiting for a drug test to be conducted on a miner who may or may not return to work doesn’t address one problem. What if they don’t come back, or he comes back in 6 months or maybe a year because of work comp. Or, maybe they just flat out quit and didn’t tell anyone? The test should go back into the pool for the next testing after verifying the inability to test.
- 66.306 (a) Drug and alcohol tests after an injury or an accident

1. "Injuries requiring medical attention beyond first aid?" We need a clear definition of "first aid" if you want to use this standard. An injured worker can go to a medical provider and depending on procedures is what you, MSHA, consider a first aid injury. This can be long after the injury occurred. Or, I could be drug testing someone who ultimately has an injury that is considered a first aid incident. Either way, I could be performing or not performing a test, drug or alcohol, that puts me out of compliance or in trouble with an employee for testing them against regulations.
 2. "Accidents require a drug and alcohol test " What constitutes an accident? DOT has a stylized list of criteria for "DOT" accident to make sure testing hits the right level of exposure. I could be drug and alcohol testing a miner if they put a dent on a vehicle, shut off a belt in the winter and the conveyor falls over, forget to put oil in a motor and damages the engine or better yet the plant operator makes their inspection, says it is okay and the belt breaks. What is considered an accident?
- 66.306 (a)(1) We are "required" to drug and alcohol test a deceased miner if that were to occur? Are all the state, local and medical officials who will respond to this fatality also going to be aware of your mandate and if a toxicology test is finally conducted, is the responding MSHA inspector informing the deceased family of the results of said testing?
 - 66.306 (e) How is the mine operator going to know if the state, local and medical officials have conducted blood, urine or alcohol samples within the allotted time on a severely injured miner or a deceased miner. Drug or alcohol testing needs to have the permission of the miner in question to conduct the test. If someone is unconscious, I legally cannot use or perform the test. There is no right of refusal.

Also, if a drug or alcohol test is not accomplished in your allotted time sanctioned by MSHA and it is duly noted, is that going to be considered a citable offense in the eyes of MSHA?

- 66.400 (b) I wrote this before but it bears repeating. This mandatory miner assistance program flies in the face of not only our current program of zero tolerance on drugs or alcohol but also the zero tolerance policy of everyone else in our industry. A zero tolerance is the rule not the exception. This would be taking a step backward. Most people in the "DOT" industry trades already know that the SAP programs have not been successful. If the program was an option and a more stringent program could be allowed up to and including termination for a first offense things would be right with the world.
- 66.402 Qualify this section to be a required drug test results under this program or are the mine operators going to police medications daily? Doesn't the attending physician have the right to prescribe medications without being second guessed by an MRO? What needs to be done by this program is to limit or ban the use of drugs that impair the user to perform a safety sensitive function such as operating heavy equipment. There is no directive anywhere in the proposed regulations that reflect this. The mine operator needs to be aware of what the miner is using and determine whether the miner can perform the job safely. Any

physician prescribing medications must be made aware by the miner of the type of work they perform.

- 66.403 (b) Are we just looking at blood alcohol again or is it a typo?
- 66.404 (a) We have to send an individual who refuses or alters a drug test to a SAP? Even if the mandatory use of a SAP stays why are we allowing those miners to get off basically scot free for intentional non compliance and evasive activities? The fact that a miner refuses to submit or alters a drug test should show just cause to terminate without exception.

Is there a time limit anywhere that states how long a miner has to see a SAP and return? I haven't seen it anywhere. The miner could go to a SAP forever until they pass a SAPs analysis? Is there a category for the type of groups that constitutes a SAP?

- 66.406(a) Again, is it blood alcohol concentration or breath alcohol concentration? DOT requires breath alcohol concentrations. We would have to go to two separate providers to do blood alcohol and then drug.
- 66.406 (b)(2) I have gotten letters from SAPs saying they have seen a few of our DOT applicants and have released them from further therapy but there has never been a written plan for a employee or employer to follow. Who is going to train the SAPs on your new regulations?
- 66.500 (a)(4) Recordkeeping is required but there is nothing out there that indicates how much money MSHA stands to gain for all the paperwork violations the mine inspector will be able to find.

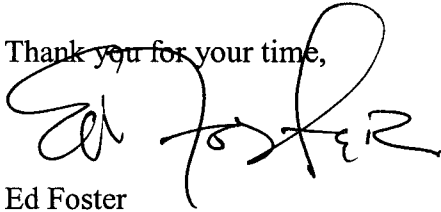
In conclusion, I can see this regulation refined quite a bit more that is by far more workable and more consistent to current well established drug and alcohol programs. A new program does not have to be different to be better. The DOT regulations I've identified work and all those working under those guideline have a good working knowledge of what is fair and right. I do not know of any one in the industry that doesn't do drug and alcohol testing on their employees. In my case, I have miners that are also DOT regulated. What you have chosen to do is put those miners under not two but three drug testing programs, DOT, non DOT and now your new MSHA testing program. There must be a huge number of accidents and/or fatalities that are drug or alcohol related over and above the 270 citations issued over a 30 year period because this program doesn't appear to be a major issue in this area of the nation.

I would appreciate your consideration on what I have written and adjust this regulation to be a more workable solution to your problem.

- I have one last suggestion and that is to have MSHA internally impose what is written to their employees and figure out if what they wrote truly works. Then after all the

problems are resolved with your own resolutions to errors then present them to the industry.

Thank you for your time,

A handwritten signature in black ink, appearing to read 'Ed Foster', written over the text 'Thank you for your time,'.

Ed Foster
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