From: Jerry Neels [mailto:jneels@deltacos.com]
Sent: Tuesday, October 14, 2008 10:50 AM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: Commnets: RIN 1218-AB41

Please find comments attached.

Jerry Neels
Safety/Environmental Manager
Delta Companies, Inc.

AB41-COMM-71

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

Re: Public Comment
RIN 1218-AB41

October 14, 2008

Dear Sir/Madam,

Please find my comments listed below regarding the above proposed rule for Drug and Alcohol Testing.

Section 66.304 (b) Although we strongly support alcohol testing for reasonable suspicion and random; post accident and pre-employment testing for alcohol is of little value and is not necessary. The reasonable suspicion provisions that require alcohol and illegal drug use training for supervisors already allow the employer to test for alcohol any time there is evidence to support the use of alcohol in violation of the policy. For the sake of consistency with DOT, MSHA should adopt the same pre-employment alcohol standard in that it is left as an option for the employer rather than a mandate.

Section 66.305(a) reads as follows: "A mine operator shall use random testing rates for alcohol and drugs of 10 percent." MSHA has historically defined the word "shall" as a mandate with no option or variable allowed. Then in the last sentence in section (c), the 10% threshold is referred to as a "floor" which would imply the operator has an option to test at a higher rate. This would appear to conflict with the language in section (a). Mine operators must be allowed to test at a much higher rate than 10% if random testing is to be effective as a prevention tool.

DOT requires that all drivers subject to their regulations be kept in a separate random pool from other non DOT employees. The MSHA standard does not address this issue. This must be clarified. Companies that already have random drug testing programs in place for all company employees should be allowed to leave their miners in the same pool with their other company employees. Properly administered random testing selection processes guarantee that all employees have an equal and consistent chance of being selected for random testing. If companies are allowed to leave their miners in their overall company pool, the minimum number selected (i.e. 10%) out of the overall company pool should be deemed in compliance with this regulation since all employees have an equal chance of being selected. The only way to guarantee that 10% of just the "mining" work force be tested annually will be to put them in a separate pool. In some cases, this would require companies to be forced to operate three separate pools, one for DOT, one for MSHA and one for the remainder of their workforce.

Section 66.306 (1) Fatal Accidents: The proposed rule as written requires that the mine operator have a toxicology test conducted on the deceased accident victim. Although we support this idea, there are legal questions in some jurisdictions as to whether or not an employer has the right to order toxicology tests over the objection of family members or local authorities. If MSHA believes that it has the legal authority to require a toxicology test on a deceased victim of a mining accident, then the on scene MSHA investigator should order the toxicology test from the family, the coroner or whoever is appropriate. The rule as written seems to allow MSHA to cite the mine operator for failing to obtain a toxicology test when the mine operator may not have the legal authority under state law to require the test. The rule should be modified to require that the mine operator "request" that the toxicology test be performed. However mine operators should not be subject to enforcement once the request has been made if other legal authority prevents the test from taking place.

Subpart E

Section 66.400 (b) All decisions concerning the appropriate disciplinary process for violating any provision of this rule including those for first time offenders should be at the sole discretion of the mine operator and/or where applicable, the collective bargaining agreement. The language contained in paragraphs (b) and (c) of this section essentially provide permission and a "license" to violate the substance abuse policy. The stakes are way too high and the degree of risk much too great to allow miners to use illegal substances or alcohol in a mining environment. The language in this part would force many companies to regress from their current policies and/or have different policies for different classes of employees. It seems rather ironic that MSHA is proposing a rule that essentially gives permission for a miner to use illegal substances or alcohol and risk the safety of every employee at the mine under the protection of job security for a first offense. People who have a substance abuse problem are generally more than willing to risk detection especially if they have one free chip in their pocket that they can play the first time they get caught. Mine operators must be allowed to continue with current zero tolerance policies that many already have in place for violating substance abuse policies should they chose to do so.

Section 66.401 The language in paragraph (a) is good language and provides for common sense practice of allowing miners selected for random testing to immediately return to work pending results. This is because random testing is "automatic" testing required even when the mine operator has no reason to believe that the selected employee has violated the policy. Likewise, post accident testing is automatic testing even when the mine operator has no reason to believe that the selected employee has violated the policy. If there is a reason to believe that an employees(s) involved in an accident has also violated the substance abuse policy, they should be tested for drugs and alcohol under the reasonable suspicion clause and not under the post accident clause. However, it should be mandatory that employees tested under the reasonable suspicion clause be suspended pending results and consequently made whole if the results are negative. The current language does not make it mandatory. In the case of post accident testing, if there is no reason to believe that the employee(s) being tested have been

using drugs or alcohol, the decision to immediately return them to work should be at the discretion of the employer. The language in 66.401 (b) should be changed to reflect this.

In summary, we strongly support drug and alcohol testing as a tool to help maintain a safe work environment. Our company has been testing all of our employees for many years. In principle, we support the intent of the rule but oppose it in its current form. We are adamant that the all disciplinary and employment decisions made as a result of a violation of any provision of the Substance Abuse Policy continue to be left to the sole discretion of the employer. Any regulation that mandates job security for an employee who has jeopardized the safety of himself or herself as well as the safety of every other employee, is completely contrary to the language and intent of the Federal Mine Safety and Health Act.

Sincerely,
Jerry Neels
Safety/Environmental Manager
Delta Companies, Inc.