October 8, 2008

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

Re: RIN 1219-AB41

Dear Sir/Madam:

This letter responds to your request for comments on, *Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance; Proposed Rule.*

Section 66.202 Education and Awareness Program for Nonsupervisory Miners

We object to a specified time period required for training. This presumes that MSHA knows more about how our organizations work than we do and demeans our ability to recognize adequate training provided to our employees. We prefer something similar to 30 CFR 46.6 that does not specify a required time. We recommend that the regulation specify what must be covered in the training – then allow the operator to determine how best to accomplish that training and what the duration of the training should be. This should be a performance based standard, not one that specifies the duration of training.

Section 66.203 Training Program for Supervisors

We have the same objection to specifying the duration of training as discussed above and have the same recommendation.

Section 66.304 Pre-employment Testing

We are concerned that the proposal does not discuss who pays to pre-employment or post-offer testing. We suggest that language should be incorporated that allows the employer flexibility in this area. For example, we require the prospective employee to pay for the cost of testing and reimburse him/her upon hire. Clearly, if the applicant "fails" a pre-employment or post-offer drug/alcohol test the job offer would be withdrawn and the company should not be required to pay the expense of the testing.

Section 66.400 Consequences to miner for failing an alcohol or drug test or refusal to test

This section specifies that the employer "shall not terminate miners who violate the mine operator's policy for the first time". We strongly object to this mandate. The employer should be free to determine any disciplinary action to be taken while considering existing labor laws and company policy. There are already existing laws that provide adequate protections to employees to ensure they are treated fairly. This mandate may also conflict with existing state laws.

We can envision a scenario that would illustrate how this requirement might play out in the workplace: Employee "A" comes to work high on illegal substances or drunk according to state law and runs over fellow employee "B" resulting in life threatening injuries. After a prolonged and painful stay in the hospital employee "B" succumbs to his injuries and dies. Employee "B" has a brother that works in the same mine. The brother and the family demand to know why employee "A" is not fired for killing his brother while high or drunk on the job. The response to his question

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would have to be, "MSHA regulations prohibit the company from firing him because it's the first time he's done it – we promise to fire him next time". Obviously the company could state other reasons for firing employee "A" but then he can file suit claiming he was fired for using drugs when MSHA prohibits it – after all, it was just his first offense. We urge you to delete this mandate and allow the employer discretion exercise existing disciplinary policies.

Many employers have different classifications of employees that are covered by various federal laws. In our case we have employees that are covered by DOT drug and alcohol regulations, we have construction employees that are not governed by DOT or MSHA and we have employees that work in mining and processing. Each Federal Agency (DOT, MSHA, OSHA) has different requirements for drug testing. When one (MSHA) specifies that we discipline employees differently than the others it forces us to treat employees differently and unfairly.

Section 66.404 Evaluation and Referral

The discussion provided regarding this section indicates that, "it is left up to the mine operator's discretion and collective bargaining agreements" to determine who pays for SAP and treatment services. The language in the proposed regulation does not provide this level of clarity. In addition, it is not clear if there is a difference with regard to payment if the is the first offense or a second offense. The language in the regulation needs to provide additional clarity and specificity.

We feel strongly that all expenses associated with SAP services, treatment and followup testing should be borne exclusively by the employee who tests positive for drug and/or alcohol use on the job assuming that the employer has done an adequate job of informing and training the employee about the company's drug and alcohol program. We draw up an "agreement" with the employee that specifies that they must meet with the SAP and follow all their recommendations as part of the consideration for them to return to work. Another part of the agreement is that they will pay the expenses for the SAP, recommended treatment and any required followup testing. Our health insurance does cover some of these expenses once any deductible is met.

Sincerely,

Mitchel W. Little, CIH, CSP
ESH Manager