
From: Crystal Schultz [mailto:crystal@azrockproducts.org]
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To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: RIN 1219-AB41

These are the comments from the Arizona Rock Products Association.

Steve Trussell
Arizona Rock Products Association
916 W. Adams
Phoenix, AZ 85007
Office (602) 271-0346
Fax (602) 255-0363
Cell (602) 989-3854

Visit us online www.azrockproducts.org

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

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RE: RIN 1219-AB41 Comments Regarding MSHA Proposed Rule 30 CFR Parts 56, 57 and 66 Alcohol and Drug Free Mines.

The Arizona Rock Products Association (ARPA) respectfully submits the enclosed comments on the proposal of the Mine Safety and Health Administration to approve provisions of the Revised Rule 30 CFR Part 66. ARPA is a not for profit trade association representing a variety of cement and aggregate material producers throughout the State of Arizona.

Generally speaking, ARPA requests that MSHA consider a provision that would allow any company's drug and alcohol related policy that meets the MSHA standard, but is more stringent, to have primacy over the proposed rule. This provision would be especially relevant to a zero tolerance level for test results, control over termination of an employee who has violated that policy and the ability for a company to decide what it to evaluate employees for above the test panel.

Following are comments to various proposed sections MSHA is considering:

66.101 – Prohibited Behaviors

ARPA prefers a no tolerance program, but at the very minimum would request the “bifurcated” system that has been employed by the US Department of Transportation (DOT). The DOT has conducted research on the matter, and concluded that *an individual with a BAC level between .02 and .039 was impaired to the extent they could not perform “safety sensitive” jobs in a safe manner.* ARPA requests that MSHA consider adoption of the DOT thresholds.

66.2 – Applicability

ARPA disagrees with the omission of required testing for *general administrative and clerical personnel* located at the mines. The above characterized personnel have access to the mining operations, are required to complete the same mine training and therefore, should not be exempt.

66.202 – 66.203 Education and awareness program for nonsupervisory and supervisory miners

ARPA requests clarity on the training requirements. This stipulation appears to create additional training costs to the mining companies without clear understanding of the rationale behind it. Could this added training requirement should be incorporated into the annual refresher, Part 46 or Part 48?

66.204 – Miner assistance following admission of use of prohibited substances.

Miners who voluntarily admit to the illegitimate and/or inappropriate use of prohibited substances prior to being tested and seek assistance shall not be considered as having violated the mine operator's policy

The proposed rule does not have a time limit associated with the miner notification; therefore, potentially an employee could inform an employer five minutes before being tested and be protected under this rule. If so, this would severely degrade the intent of the regulation.

66.301 – Substances subject to mandatory testing.

Although additional testing requirements would create a monetary burden on employers, ARPA supports the expansion of the panel of five drugs to ten. Additionally, MSHA's proposed rule would require pre-employment alcohol testing which ARPA member companies also support.

Additionally, if there are existing federal drug-testing standards for barbiturates, benzodiazepines, propoxyphene, methadone, or synthetic/semi-synthetic opioids, which may be legally prescribed. This requirement should be applied only when those thresholds are legally adopted.

66.302 – Additional testing

The proposed rule states *The Secretary of Labor shall be permitted to designate additional substances for which all mine operators must test*. ARPA requests this language be stricken from the Rule. Once again, this requirement should be applied only as applicable, based on predetermined criteria and when federal thresholds for those substances have been legally adopted.

66.302 g. – Additional testing

Under this provision a company would no longer have control of cost or oversight regarding which employees are tested as a result of an investigation. There is currently no existing guidance regarding who must be tested for an investigation, and therefore; ARPA feels this would expose a company to needless violations and testing costs without proper guidance.

66.304 – Pre-employment testing

(d) *The mine operator must not allow a miner to begin performing safety-sensitive job duties if the result of the miner's test indicate a blood alcohol concentration of more than 0.04 percent...*

DOT states that drivers are prohibited from performing safety sensitive jobs *when a driver has an alcohol concentration of 0.04 or greater*. Is MSHA saying that if they have an alcohol concentration of 0.04, they will be allowed to perform a safety-sensitive function? ARPA would prefer MSHA adopt the current DOT language if they want to prevent alcohol related accidents and injuries.

66.305 – Random Testing

(d) The selection of miners for random alcohol and drug testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with miners' payroll identification numbers, or other comparable unique identifying numbers.

ARPA agrees with this selection method; however, it will prohibit employers from choosing site locations, rather than allowing individuals to be randomly selected. The Department of Transportation does allow for random selection of site locations. ARPA suggests that MSHA adopt language similar to the DOT to allow more options for employers.

Additionally, due to the requirements employees who have been on leave will be tested upon return. While ARPA understands the need to do so, the fact that the employee knows they will be tested makes this first test unproductive.

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

(b) "Mine operators shall not terminate miners who violate the mine operator's policy for the first time (e.g., by testing positive for alcohol or drugs). 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."

We highly recommend that MSHA adopt the DOT language in this case due to the fact that employers have the discretion, under DOT rules, to terminate an employee for a first positive result. Many employer's drug and alcohol policies are written such that a first offense is a terminable offense. Mining is a hazardous occupation and ARPA agrees should apply stringent requirements regarding drug and alcohol testing. Even though MSHA requires a return to duty test and testing thereafter, it does not allow an employer the latitude of terminating an employee for a first offense.

Studies from the U. S. Health and Human Services, Substance Abuse & Mental Health Services Administration research notes a high probability of recurring use of drugs and alcohol of an individual who is a first time user. In a National Survey on Drug Use & Health, dated March 2008, *3.2% of first time users of alcohol prior to the survey became dependent on alcohol in the past 12 months; 5.8% of marijuana first time users were dependent in the past 12 months; 9.2% of first time cocaine users were dependent in the past 12 months; and 13.4% of first time heroin users were dependent in the past 12 months.*

These statistics make a compelling case that MSHA should not disregard discretion in disciplinary actions, including termination, of first time use by employees (e.g., positive test results). Additionally, 50% of Substance Abuse Programs are unsuccessful; therefore, if companies are not allowed to terminate employment after a first offense, they are forced to accept the liability.

Finally, ARPA does not believe that MSHA should have access to an employee's personnel records regardless of testing results. We suggest this provision be stricken from the final rule.

Once again than you for allowing ARPA to submit comments on the proposed rules and we look forward to your response.

Sincerely,

Steve Trussell
Executive Director