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From: Steve Lewis [mailto:Steve.Lewis@OXBOW.COM]
Sent: Tuesday, October 28, 2008 1:07 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Cc: Steve Lewis
Subject: RIN 1219-AB41

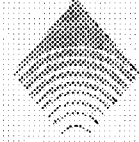
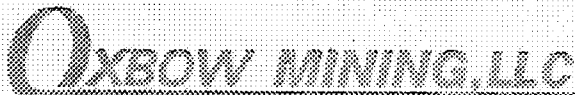
Ladies and Gentlemen:

Please accept this electronic submittal for consideration. Hard copy to follow.

Sincerely,
Steve Lewis
Manager of Human Resources
(970) 929-6031

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AB41-COMM - 104



October 28, 2008

Attn: RIN 1219-AB41
Mine Safety & Health Administration
Office of Standards, Regulations, and Variances
1100 Wilson Blvd., Room 2350
Arlington, VA 22209-3939

RE: Regulation Identification Number 1219-AB41

Ladies and Gentlemen:

The following comprises commentary from Oxbow Mining, LLC ("OMLLC") brought forth by proposed rulemaking RIN 1219-AB41: **Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training and Assistance.**

OMLLC vigorously opposes this Mine Safety and Health Administration regulatory approach to the use and abuse of alcohol and other drugs as detailed in the following rationale:

OMLLC recognizes that improper drug use and alcohol use present safety hazards in any workplace, especially those which are safety-sensitive. It is OMLLC's position that the most viable option to eliminate the use of or impairment from alcohol and other drugs on mine property is for each operator to take independent ownership of the issue and manage drug and alcohol abuse to optimize safe and efficient operations.

Proposed rulemaking argues inherently that many miners, particularly those working in small mines are not likely to have access to (substance testing) programs. Drug and alcohol testing technology has advanced to provide means by which testing can be administered expediently, independently, and at relatively low cost.

OMLLC recognizes the need to include a Drug and Alcohol Policy as an integral element of the way we commit to do good business. Our independently developed and implemented policy encompasses OMLLC's ability and commitment to conduct drug and alcohol testing for pre-employment, reasonable suspicion, post accident, random, and follow-up testing.

Legally sound and sensible policy language is widely available at little to no cost. Likewise, legally sound testing devices are widely available at a cost of about \$15 per test kit. While urinalysis is still the most common testing method, other acceptable means are widely available (e.g. saliva and hair sample analysis).

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Based on experience and contemporary society, the substances that are probably most prevalent are THC and methamphetamines. Since October, 2003, OMLLC has experienced a low number of positive screening results. In each positive screening result, the prohibited substance was THC (marijuana). ***OMLLC has historically terminated, for a first offense, the employment of persons with a confirmed positive test.***

Based on experience and knowledge of the industry, the use or misuse of alcohol or other drugs in the mining workplace is present, but screening results indicate a relatively low proportion of users. Additionally, THC (generating few positive results) is a substance that is known to metabolize very slowly out of the body. While it is the opinion of the author of this letter that those persons testing positive for THC were not ***impaired*** at the time the test samples were taken, THC was detectable above a legally-accepted cutoff level; therefore, the persons tested out of compliance with our policy.

Any drug- and alcohol-related risks to miners' safety is compelling for us to ***independently and without regulatory intervention*** maintain an effective alcohol and substance abuse policy with serious consequences for breaking it. These consequences should remain the domain of the operator, as with any other employment relationship matter.

In our few experiences with positive test results, THC has been the prevalent substance abused. It was *not* thought at the time of testing that the persons were displaying behavior that would lead an objective observer to think they were ***impaired***. THC is known to have a relatively short-term physio-psychological effect, yet metabolize slowly from the body. ***In each case, however, the employees in violation were terminated from OMLLC employment.*** It is noteworthy that there are current OMLLC employees who had been terminated for violating the drug and alcohol policy were rehired after providing documented substantiation they received treatment and do not have a substance abuse problem. These employees are subject to periodic unannounced drug testing as a condition of their re-employment.

Most would agree any standard with regard to substance abuse should be *zero tolerance*. Legally sound drug screening methodologies include "cutoff levels" for detectable prohibited substances.

Should a standard be enacted for coal mines, its enforcement ramifications should remain under the direction and discretion of the employer. Prohibited substances should include alcohol, illegal or controlled drugs, and the illegal use of legal drugs.

Because every person will be psycho-physiologically affected uniquely by a given substance, ***impairment*** is vague, difficult to determine, and nearly impossible to substantiate legally. The standard and legally accepted methodology for substance screening is the detectable presence of a substance that is above an established cutoff level, which for most substances is expressed as "nanograms per milliliter".

An effective independently administered, legally defensible drug and alcohol policy should be maintained to provide suitable latitude for an operator to act as it deems appropriate in the interest of safe and efficient business operations. In the event a miner reports to work and is behaving *as though impaired*, that miner should be tested on the basis of reasonable suspicion. The operator should have the latitude, *without regulatory intervention*, to act as it deems appropriate regardless of the test results (bearing in mind the miner in this instance exhibited behaviors suggesting impairment).

Employees who are utilizing legally and properly prescribed drugs that may cause impairment are required to self-report such that a conscious and proper decision may be made as to whether that individual should be allowed to work, and in what capacity, while taking such medication.

Drug and Alcohol Abuse testing should not be a regulatory issue; therefore training should not be part of the proposed regulation. Should the Mine Safety & Health Administration prepare and make available training and educational materials regarding alcohol and substance abuse, such materials would quite probably be helpful and would likely be utilized voluntarily. **A rule is not required here.**

While Drug and Alcohol Abuse training should not be a regulatory issue, we have educated all exempt personnel at our mine site and may work that education throughout the workforce.

While Drug and Alcohol Abuse training should not be a regulatory issue, any educational materials provided should be comprehensive and delineate suspect behavior patterns, methods and signs of use, and psycho-physiological effects of impaired persons. This education should be coupled with training on how to approach a miner who, by his/her behavior, draws reasonable suspicion that he/she may be under the influence of alcohol or drugs.

30 CFR 50.11 should not be revised to address alcohol and other drug use inquiries by mine operators during accident investigations because drug and alcohol abuse should not be an MSHA regulatory issue. Any suitable drug and alcohol policy should include a post-accident drug-screening requirement, as does OMLLC's policy.

Analytical drug screening and inquiries regarding any unusual behavior should be made after most accidents, and in some cases *before* accidents at the independent discretion of the operator.

The degree of accident or injury that would trigger an independent inquiry would be at the discretion of the operator. At OMLLC, the degree of such an event is generally but not limited to a medical reportable incident, a lost time accident, or equipment damage of significant value. OMLLC does not require regulation to ensure this happens.

Operators should have the independent discretion to determine what levels of inquiry and consequence are appropriate for safe and efficient business operations.

Operators should independently and without regulation perform inquiries as necessary for safe and efficient business operations. In general, management and safety departments would collect inquiry information and utilize/disseminate it as appropriate in the interest of safe and efficient business operations.

In the event a miner reports to work and is behaving as though impaired, that miner should be tested on the basis of reasonable suspicion. The operator should have the latitude to act as it deems appropriate regardless of the test results (bearing in mind that alcohol or other drugs were a contributing factor or cause of an accident).

Many operators, independently and without intervention, recognize that drug and alcohol usage, no matter how prevalent, would only serve to make dangerous an environment that is already hazardous.

The most critical element of OMLLC's drug and alcohol policy is that OMLLC possesses the latitude to administer the policy *without government intervention* in the interest of safe and efficient mine operations.

Improvements at OMLLC may not necessarily be correlated with the existence of a drug and alcohol policy. Statistically only a small percentage of employees have tested positive for a prohibited substance. Perhaps coincidentally, OMLLC's safety performance continues to improve since the inception of its drug and alcohol policy. Actions taken in response to situations in which the OMLLC drug and alcohol policy has been violated provide suitable latitude for proper decision making. OMLLC did not have a drug and alcohol policy prior to the current policy, which was independently and without regulatory intervention put into place.

OMLLC has access to EAP services. Use of the EAP is strictly confidential; therefore detailed statistical information is not available. It is suspected that, while OMLLC offers EAP services, the services are not widely sought for drug and alcohol abuse issues.

Benefits derived from OMLLC's efforts to reduce or eliminate alcohol and drugs from the workplace are difficult to quantify. Workers' compensation costs and the NFDL incidence rates are demonstrably lower since implementing the drug and alcohol policy, however, other indicators (absenteeism, morale, turnover) do not readily lend toward any such conclusion. OMLLC's compelling interest in developing and implementing its drug and alcohol policy without government intervention is to optimize safe and efficient business operations.

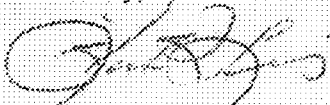
In summary, OMLLC is in favor of maintaining its drug and alcohol policy independently and without regulatory intervention. It is believed government intervention is the method favored primarily by represented organizations that otherwise may be under-powered to independently implement and maintain effective drug and alcohol policies without regulatory intervention. Regardless of whether this is true, the burden of regulatory intervention should not be shifted to operators who do not need it to function in the best interests of safe and efficient business operations.

A further item of express concern regards liability. OMLLC is not in favor of employer liability in the event a worker, especially one who is involved in an accident, tests positive for alcohol or a controlled substance. Any liability should rest strictly on the offending individual(s). The rationale for this position is two-fold: (1) individuals abusing drugs and/or alcohol do so independently and against the best interests of safe and efficient production of the operator and the safety of their co-workers, and (2) persons who abuse drugs and alcohol can be difficult to detect. An employer should not be held liable in the event an individual tests positive for the *detectable* presence of a prohibited substance when suspicious behaviors are absent (the individual does not seem to be *impaired*). As stated previously, existing technology can detect the *presence* of a substance, but not *when* the substance was utilized, nor the *degree of impairment* elicited by it.

As previously expressed, OMLLC vigorously opposes this Mine Safety and Health Administration regulatory approach to the use and abuse of alcohol and drugs. Finally, we note that drug and alcohol regulations are already addressed and enforced by national, state, and local law. Law enforcement agencies, including the DEA, FBI, CIA, ATF, and state and local authorities, exist and are already tasked with the enforcement of said laws, including coal mining communities. Mining companies should utilize drug and alcohol abuse programs and, more importantly, participate proactively against drug and alcohol in local communities where present and future miners live.

Because of the inherent dangers present in all mining environments, OMLLC urges the Mine Safety and Health Administration to focus on non-regulatory approaches to address the risks and hazards to miner safety from the use or impairment from alcohol and other drugs.

Sincerely,



Steven R. Lewis
Manager of Human Resources