PUBLIC SUBMISSION

As of: October 30, 2008
Received date: Not specified
Status: Pending_Post
Tracking No. 80783956
Comments Due:
Submission Type: Web

Docket: MSHA-2008-0014
Alcohol-and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance

Comment On: MSHA-2008-0014-0001
Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance

Document: MSHA-2008-0014-DRAFT-0084
Comment from Mark Compton, Northwest Mining Association

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General Comment

Atttached please find the comments of the Northwest Mining Association regarding the Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance proposed rule (RIN 1219-AB41).

Thank you,

Mark Compton

Attachments

MSHA-2008-0014-DRAFT-0084.1: Comment from Mark Compton, Northwest Mining Association

AB41-COMM-109

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October 29, 2008

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

Attention: **RIN 1219-AB41**

Re: Alcohol- and Drug-free Mines: Policy, Prohibitions, Testing, Training, and Assistance

The Northwest Mining Association (NWMA) is submitting this letter on behalf of its members regarding the Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance proposed rule covering 30 CFR Parts 56, 57, and 66.

NWMA is a 113 year old non-profit, non-partisan trade association based in Spokane, Washington with 1,700 members residing in 36 states. Our membership represents every facet of the mining industry, including geology, exploration, mining, engineering, equipment manufacturing, technical services, legal services, and sales of equipment and supplies. The health and safety of their employees is the top priority for our members.

The proposed rule is redundant for Surface and Underground Metal and Non-metal mines. Current law states that "Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol and narcotics should not be permitted around mines." (30 CFR Parts 56.20001 and 57.20001) MSHA has a clear record of enforcing this rule over the last thirty years, and mine operators have developed programs to implement and effectively enforce this rule.

Many companies have long had a zero tolerance policy in place for drug and alcohol offenders. The proposed rule would not make our members' mining operations any safer. In fact, many of the provisions contained in the proposal could actually decrease the level of safety at mining operations.

The following points illustrate our concerns with the proposed rule.

- Definition of "Safety-Sensitive Job"

  The proposed policy is designated only for employees that perform "safety-sensitive jobs." For our members, all jobs on a mine property are safety-sensitive, and all employees are trained with safety as their top priority. Anyone on a mine's property can create a safety hazard if they have a lapse in concentration. Defining only certain jobs as safety-sensitive would diminish a safety-first culture and send the wrong message to our members' workforce.

- Allowing for Job Security Following a Failed Drug Test

  As stated earlier, many companies have instituted a zero tolerance policy for drug and alcohol offenders. However, Section 66.404 of MSHA's proposed rule states that mine operators would be "required to offer job security to miners who violate the alcohol-and drug-free mine policy the first time." This policy undermines the whole purpose of having a zero tolerance drug and alcohol policy, and can only be viewed as a significant step backwards for mine safety. Mine operators would be forced to move from a zero tolerance policy to a 100% tolerance policy for first-time offenders. Everyone gets one free pass. Unfortunately, many workers might take advantage of that free pass, thus reducing safety for themselves and their fellow workers. In fact, if only one worker took advantage of that "free pass," mine safety would be compromised at that mine.

  Particularly troubling is Section 66.204 (b) of the proposed rule which states "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." This would appear to give a miner unlimited opportunities to escape being terminated. As long as they admit they have a problem and request assistance, prior to testing, they are not in violation. This provision would allow an "out" for the miner to escape punishment for his illegal behavior. We highly recommend that Section 66.204 (b) be struck from the final rule.

  Some companies have policies in place which allows employees to willingly come forward, receive help for drug and alcohol abuse problems, and remain employed. This proactive policy gives employees ample opportunity to seek help. However, under such a policy, if an employee chooses not to seek help and fails a test, the employee would be terminated. In summary, companies have instituted drug and alcohol policies that are effective, and should be allowed to continue to do so.

- Liability Concerns

  To mandate by government policy that companies follow a first-time offender-100% tolerance policy for drug and alcohol use is irresponsible and intolerable. Such a policy will subject our members, and the U.S. Government, to legal challenge and liability for an accident caused due to consciously escalating the danger, i.e. allowing an individual

who has shown a history of risking their lives and the lives of their coworkers to receive what amounts to a "get out of jail free" card.

The proposed rule leaves too many unanswered questions as to where and when a mine operator would be liable for violations. For example, with regard to contractors and subcontractors who perform work on a mine property, the proposed rule provides that they must be informed of the "requirements under this rule." (Section 66.2) Following the notification of the rules, would this end the operator's liability for the contractor or their employees/subcontractors?

- DOT Requirements v. MSHA

There must be some clarification as to how an operator would reconcile the discrepancies between the Department of Transportation (DOT) drug and alcohol testing procedures and MSHA's proposed rule. There will be several occasions where the jurisdiction will be covered by both the DOT and MSHA, and the clear discrepancies in how the tests should be completed for each agency will lead to confusion in training procedures. Mine operators are going to be forced to get an employee to submit to two different specimens for these tests, and will be forced to deal with two conflicting drug and alcohol testing policies. This discrepancy with DOT testing procedures must be addressed between the two agencies before the rule is enacted.

- Costs and Feasibility

We believe the cost estimates provided by MSHA to be woefully underestimated, especially when it comes to the smaller and more remote mine operations. For example, Section 66.300 (f) states "Only laboratories certified by CAP as well as by HHS/SAMHSA shall be used to collect samples." However, some facilities may be a several hour drive from a testing lab. These remote operations should be permitted to continue to utilize cheaper alternatives such as over-the-counter screening tools that are more readily available, and in which the results can be read by a supervisor at the operation.

Sections 66.401 (c) and 66.403 (d)(2) deal with the wages of a miner who is suspended from performing his "safety-sensitive" job while awaiting the results of an alcohol or drug test. The rules state that "no action adversely affecting the miner's pay and benefits shall be taken." This rule seems to prevent an operator from suspending a miner without pay for violating a company policy or safety rules and thus contributing to an accident, if there is a drug test required for the incident. Many operators have policies in place that address violations of safety provisions with suspensions as a deterrent, and this proposed rule again preempts existing and effective company policies and lowers the standard of safety at a mine operation.

- Conclusion

NWMA respectfully requests that this proposed rule be rescinded. Safety is the top priority of our members, and many of our members have expressed the view that this proposal would be taking a backwards leap in terms of ensuring the safety and welfare of everyone at their mining operations.

If the Department of Labor does move forward with this rulemaking, abrogating existing programs should not be permitted under this proposal. If a company can document an existing program that is as strong, if not stronger, than the MSHA proposal, they should be exempt from the proposed rule. Furthermore, we request that the Department of Labor recalculate their projected costs to take into account the small and remote mines. We also request that the Department of Labor and the Department of Transportation address the serious conflict between the two agencies' rules.

MSHA's proposed rule is not so much a second chance for an employee who fails a test to get back to work, but rather a second chance for that employee to endanger lives and compromise the safety of the mines. We cannot claim to offer a safe work environment if we allow known drug and/or alcohol violators back to work.

The mining industry and MSHA are already under immense scrutiny by the public and the media for unsafe work practices. We do not care to so tarnish our reputation, nor should MSHA force us into such a position as a matter of public policy.

Thank you for the opportunity to comment.

Respectfully submitted,

Laura Skaer

Laura Skaer
Executive Director