From: Mike Stevinson [mailto:mstevinson@waynebsmithinc.com]
Sent: Monday, October 06, 2008 12:48 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: Drug and Alcohol Modifictions: RIN 1219- AB41

10-6-08
Comments of Proposed Rule Regarding Drug Testing

RE: RIN 1219-AB41

Please accept the following comments regarding the proposed Part 66 Alcohol and Drug Free Mines: Policy, Prohibitions, Testing, Training, and Assistance

In general, all mine operators want to provide a safe working environment for their employees. The proposed rule intends to protect the health and safety of the worker by implementing precise requirements that the operator must follow. In proposing these rules MSHA has opted to follow closely other existing rules promulgated by Federal Agencies, which also results in adopting the failings of the other rules. Please accept the following rule specific comments as well as general comments regarding DOT testing and procedures.

Additionally, by MSHA's records there have been 270 citations over a 30 year period (9 per year) for violating the current policy, with 78 (15.6 per year) of those occurring between 2000 and 2005. From this information, MSHA has determined, by their own accounting methods, that it is justifiable for the industry to incur a cost of 16 million dollars in the first year and 13 million dollars annually in order to meet the requirements of the proposed rule. Since new and unusual programs typically incur a greater cost than first projected, the real numbers could be as high as to 20 million for the first year and 15 million for every year thereafter. Even at the higher violation rate observed from 2000 to 2005 of 15 violations per year, the industry would incur an initial cost of over one million dollars per historical violation. Though a problem may exist in the industry with illicit drug and alcohol use, a more sensible solution would be to expand the existing regulations in Part 56.2001 to include the coal industry and grant operators the flexibility to write their own policies that can be used to enforce the existing regulations in a manner that was consistent with their local needs. A one size fits all approach that this rule supports cannot be realistically implemented at all mine sites that fall under MSHA's jurisdiction.

Comments Regarding:

66.1: *" programs established prior to the effective date of this rule that include consistent policies, and alcohol and drug testing programs, and provide at least*

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the same level of protection as these requirements, are in compliance with this standard"

Who determines if the existing policy is acceptable? Is MSHA going to review every drug and alcohol policy in spite of the 66.500 (d)(1) which states that the rule does not require routine review of an operator's policy? Of particular concern is whether or not a company's existing zero tolerance policy will be accepted as providing "at least the same level of protection". Furthermore, is the "protection" clause referring to general miner's safety, or does it also include protection of the miner's job as guaranteed in several portions of the proposed rule?

66.2: (a) *"prohibited for all persons on and around mine property"*

The requirement that only those who have safety sensitive jobs are required to be tested sends a mixed message that addicts are acceptable for hire and use in certain jobs on the property. Secondly, even though a job may seem trivial, such as janitorial work, that person has a great influence on safety of a property, such as having the responsibility to keep an area neat to avoid slips or trips etc. which directly affects safety. It could be argued that virtually all jobs, not just operator positions, are safety sensitive. How will MSHA allow the operators to make our own determinations for "safety sensitive" job duties, especially if an operator subjects their entire workforce to refresher training?

66.101 (b) "Specifically, *miners must not report for duty or remain on duty if they: ...."*

A quick review of this portion of the rule places the responsibility of reporting to work without being under the influence of drugs or alcohol directly upon the miner. It implies that if the miner is not on the operator's property, thus not under the operator's supervision, the miner who reports to work under the influence has made a willful decision to break the new rule. As a result, if a miner reports to work and has an accident that is determined to be directly affected by their being under the influence of illicit narcotics or alcohol, will this reduce the mine operator's liabilities under this rule? Will MSHA hold the individual miner responsible for their own willful neglect or will MSHA continue to hold the operator accountable for the miner's irresponsible actions?

66.202 (3) (b) *"Videos.....cannot serve as the sole means of training"*

If a video is purposely made to convey the information intended to be covered by this rule, there is no reason that the video should not be able to serve as the sole means of training.

66.204 (b) *"Miners who voluntarily admit to the illegitimate and/or inappropriate use of prohibited substances prior to being testing and seek assistance shall not be considered as having violated the mine operator's policy but shall be subject to the return to duty process... "*

The way this portion of the rule is worded, continues to undermine operators who currently have zero-tolerance tolerance policy. Additionally, the language leaves open the possibility that a miner could be selected for a random test, declare his desire at the last minute to seek assistance for an abuse problem, and then the miner would then be considered not to have violated the policy, and would benefit from the return to duty process.

66.300 (c) *" ...and agents in carrying out these requirements"*

This portion of the rule implies that the mine operator will be responsible for the actions of third parties such as contracted collection centers, laboratories, MROs, and SAPs. This is an unfair assignment of responsibility on an operator that would not have direct control over the agent's employees. Furthermore, these agents are not likely to be familiar with the mining environment, nor may they be readily accessible to all mine locations.

66.300 (e) *"A mine operator may use service agents....but may not designate or use a service agent to make drug testing decisions or to receive alcohol or drug test results on behalf of the mine operator"*

The scope and intent of the last portion of this paragraph needs clarification. The definition of a service agent includes collectors and laboratories SAPs and MROs. In many cases the collecting agent, such as a local hospital or clinic will receive laboratory results and forward them to the mine operator. This portion of the rule seems to imply that the facility that conducts the analysis must submit the laboratory results directly to the mine operator and the collection agent or MRO cannot be used as an intermediary. If the previous interpretation is correct, it would impact the typical chain of custody many laboratories and collection centers follow, possibly resulting in the operator not being able to utilize their services. Also, this portion of the rule seems to be in direct conflict with 66.402 which states in part, *"mine operators shall not receive test results until after and MRO has verified them."* If an agent, which by definition includes MROs, may not receive test results on behalf of the operator, how can the MRO verify and review the results before they are made available to the operator? Please clarify this portion of the rule? Finally, some operations supply identification numbers to a service agent so that the service agent can utilize random number analysis in order to select which employees are randomly tested. This portion of the rule appears to make it illegal for an operator to use a service agent to randomly select miners from an anonymous pool for testing. Please clarify this portion of the rule.

66.300 (f) *"Only laboratories certified by CAP as well as by HHS/SAAMHSA shall be used to test collected samples."*

On the surface this portion of the rule makes sense, but it may have untold effects on small and/or remote operators. In many instances small companies use readily available over the counter screening tools to detect the presence of alcohol or drugs.

These tools are typically utilized on site. In a remote mine where it may be an hour or more to a testing lab these tools are the only practical means to subject a miner to a test. This rule will likely have inordinate financial impact on small and remote mines who don't have easy access to approved collection sites and laboratories, and who don't have the funds to build these laboratories and hire personnel qualified to operate them.

66.304 (e) *"Any incumbent miner who is to be transferred to a position involving the performance of safety sensitive job duties must be tested for the presence of alcohol or drugs prior to beginning the performance of safety sensitive job duties and must receive negative test results."*

This portion of the rule was likely intended only to apply in circumstances where someone is initially transferred from a non-safety sensitive job, to a safety sensitive position. However, it does not discount the possibility that an operator can require pre employment testing every time a miner is transferred within the operator's facility. For example, in a large mine, if a person was transferred from being a truck driver to a dozer operator, then two months later transferred to a drill position, this portion of the rule does not exclude the possibility, actually it appears to require, pre-employment testing before each job transfer. Thus the miner would be subjected to pre-employment testing two times in two months. Please provide clarification on this portion of the proposed rule.

66.305 (b) *"Miners who are on leave or otherwise absent from the workplace will be tested at the next available opportunity, that is, immediately upon their return to work."*

This portion of the proposed rule presents an opportunity for a miner to find out from his fellow miners that drug tests were administered and allow a miner to prepare methods to mask the results of the urine drug test. Having the random selection process designate testing alternates would insure that the minimum 10% of the workforce are tested as required by this proposed rule.

66.306 (1) *"The mine operator shall also be authorized and required to have a toxicology test conducted on the deceased……."*

By what authority can the operator require that a dead miner be tested for toxicology, since the miner is no longer able to give their authorization post mortem, if the family members of the deceased oppose the testing? Even with MSHA authorization, it is doubtful if the testing facility would waive the concerns of the family.

66.401 (c) *"All miners suspended from performing safety sensitive job duties should be treated in the same manner with respect to this rule and no action adversely affecting the miner's pay and benefits shall be taken pending the verified outcome of the testing process."*

And

66.403 (d) (2) *"The miner will suffer no adverse personnel consequences or loss in pay"*

If a miner is transferred to a position that is not safety sensitive, and continues to work, but is performing a job that is classified at a much lower wage rate, does the rule require that the miner be paid at his regular position's wage rate, or can the miner be paid the rate for the newly assigned non safety sensitive job? Secondly, in the case where the miner had an accident, the rule appears to imply that the operator must pay the miner wages during a suspension period. Does this portion of the rule also limit the operator from suspending a miner without pay for violating company policy that may have contributed to the accident, if the miner is subjected to a drug test in the course of the accident investigation, even if the drug test is returned as a negative? Many operators have, as a matter of company policy, punishments of unpaid suspensions for equipment damage and/or violating safety rules or other company policy, this portion of the proposed rule would appear to override those policies if the operator administers a drug and/or alcohol test after an incident and the miner passes the test. Finally, with regards to prescription drug use. If an MRO reviews a test result and determines that the miner has likely used a prohibited substance which is available by prescription, what is the time limit for the miner to provide the MRO the requested documentation? The way this portion of the rule is written, the miner in question could continue to work under suspicious circumstances for quite some time as long as the miner could postpone the MROs decision making process.

66.404 Evaluation and Referral, 66.405 Return to Duty, 66.406 Return to Duty and follow up testing.

The entire process suggested by the proposed rule places a burden and responsibility on third party SAPs who may or may not be familiar with the mining industry, and reduces the operator's control over their workforce.

General Questions and Comments:

How does a company that currently operates with employees who are both subject to DOT requirements and work in a mine handle the testing of its dual use workforce? Under the proposed rule there are several additional narcotic elements that must be tested for in the sample specimens, however, the DOT rules state that, "*you must not perform any tests on DOT urine or breath specimens other than those specifically authorized by this part or DOT agency regulations*". Does this mean that companies which have workers that may fall under dual use standards will have to, at a minimum, double sample its personnel? Or in a worse case scenario have to maintain two conflicting drug and alcohol testing policies?

This rule ***must*** leave open the possibility to operators to employ methods other than urine drug testing as its sole means of testing. Pre-employment urine drug tests can be faked with the use of readily available chemical masking and cleansing agents. The internet provides users with a wide variety of choice in masking agents. For example, please research the following website www.passyourdrugtest.com on the current availability of masking agents. Operators must have the ability to utilize methods that can not be easily masked.

The proposed rule will also place the MRO into a service agent role where they must attempt to verify the validity of prescription narcotic use. MROs familiar with DOT testing will now be asked to make decisions about the validity of the use of prescription drugs where the *"possession of a valid prescription from a medical professional in and of itself may not constitute sufficient proof of legitimate and appropriate use."* It is possible that some MROs will not be comfortable with making this type of determination, and may result in it being difficult for mine operators to find a MRO who will accept the requirements of the proposed rule. In fact, given the reporting requirements of the rule, it may be impossible to determine whether or not the miner was taking the medicine in accordance with the prescription, because there may not be an established correlation between dosages and metabolite concentrations that would stand scrutiny in a court of law if legal proceedings were initiated as a result of the MRO's judgment.

In summary, this rule, intended to promote health and safety in the workforce, and to standardize chemical testing requirements among mines, if enacted in its current form, will do little to deter the illicit use of drugs and alcohol. It will place an inordinate burden on small and remote mine operators both from an administrative and financial perspective. It will punish mines that currently utilize a zero tolerance policy, and will burden all mines by mandating an overly complicated drug and alcohol testing, review, and return to work policy that places all burdens and operational aspects on the operator while requiring multiple agents which undermine an operator's authority to handle workplace drug and alcohol use in the manner that they best see fit. We look forward to MSHA's review and consideration of all submitted comments before acting on this proposed rule.

Sincerely,

Mike Stevinson
Safety Director/Mine Engineer
WBS Inc. /SSS Inc. /HEX Inc.