LMC

OSRV-
2008 OCT -7 P 12: 22

October 1, 2008

**VIA FIRST CLASS MAIL**
Mrs. Patricia W. Silvey
Director, Office of Standards, Regulations & Variances
U.S. Department of Labor
Mine Safety and Health Administration
1100 Wilson Boulevard
Arlington, VA 22209-3939

*Re:* Proposed Rules on Alcohol- and Drug-Free Mines, 73 Fed. Reg. 52,136.

Dear Ms. Silvey:

On behalf of Lattimore Materials Company, L.P. ("LMC"), a mine operator, and pursuant to Section 101 of the Federal Mine Safety and Health Act of 1977, we request that the Secretary of Labor stay implementation and modify various provisions outlined in the Notice of Proposed Rulemaking amending 30 C.F.R. Parts 56, 57, and adding a new Part 66, which was published in the Federal Register, 73 Fed. Reg. 52,136, on September 8, 2008.

Although LMC has discovered significant problems with several provisions in its initial review of the proposed rule, we nevertheless believe that one merits comment here. LMC believes that, *inter alia*, Section 66.400(b)[1] under Subpart E of the proposed rule will result in a diminution of safety to miners; and, furthermore, an alternative method exists that will guarantee no less protection for miners than that provided by the proposed rule, which is to terminate a miner's employment for a positive drug or alcohol test.

In her proposed rule, the Secretary expended much effort to state its purpose, which is to create and maintain a work environment as free as possible from hazards to the safety and health of our miners by eliminating or limiting the use and effects of drugs and alcohol in the mine.[2] However, the provision mentioned above appears to promote the opposite effect, thereby deteriorating the importance of the overall goal of the proposed rule, curtailing deterrence of prohibited drug and alcohol use, and conflicting with LMC's well-established drug and alcohol program.

**DFW Division – Headquarters**
P.O. Box 556 · McKinney, TX 75070-0556
(972) 221-4646 · (972) 221-4100 fax
www.lmctx.com

**San Antonio Division**
19347 IH 35 North · New Braunfels, TX 78132
(830) 609-0072 office · (830) 609-3393 fax

AB41-COMM-52

Moreover, MSHA's requirement that mine workers shall not be terminated upon a first offense of a mine operator's drug and alcohol policy is an unnecessarily narrow rule that protects drug and alcohol users who are, frankly, no longer qualified to work for LMC. We may assume not only that this requirement is incorrect, but also that it is unwise for an employer such as LMC to rely on a general rule instead of individualized safety considerations of every mine position. These assumptions concern matters of personnel policy that do not implicate the principles safeguarded by the Equal Protection Clause of our Constitution, which we believe motivated the Secretary to protect this class of employees—on the job users of drugs and alcohol. The special classification created by LMC's policy furthers the general objectives of safety and efficiency.

Additionally, the exclusionary line challenged here is not one directed against any individual or category of persons, but rather it represents a policy choice made by a mine operator entitled to make such choices. Because our policy does not circumscribe a class of persons characterized by some unpopular trait or affiliation, it does not create or reflect any special likelihood of bias on the part of the mine operator. Therefore, no matter how unwise the Secretary may believe it is for a mine operator to terminate a miner's employment simply because he or she tests positive for alcohol or drugs, the Constitution does not authorize the federal government to interfere in that policy decision.[3]

In sum, whatever its merits, the proposed rule extends only as far as the reasons which justify its existence. LMC believes that the provision mentioned herein fails to exercise reason, and thus, we vehemently oppose this and other provisions of the Secretary's proposed rule. Accordingly, we are asking the Secretary to reconsider and stay implementation of the requirement that those employees who received an initial positive test result for a banned drug or alcohol, as defined in the new regulation, shall not be terminated by the mine operator. Furthermore, LMC believes that MSHA has failed to afford the industry proper notice and an opportunity to thoughtfully comment on this new rule, which LMC regards as exceedingly invasive.

Respectfully Yours,

Mark Clark,
Vice-President of Aggregate Operations

Rich Szecsy,
Vice-President of NPD and Risk Management

---

[1] This provision of the proposed rule states that a "[m]ine operator shall not terminate miners who violate the mine operator's [drug and alcohol] policy for the first time."

[2] Please see the Supplemental Information accompanying the Notice of Proposed Rulemaking published in the Federal Register, 73 Fed. Reg. 52,136, on September 8, 2008.

[3] *See, e.g., New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979).