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Sent: Friday, October 24, 2008 10:31 AM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: RIN 1219-AB41 30CFR66 Comments

Please find attached, comments related to RIN 1219-AB41 for 30 CFR 66

RIN 1219-AB41

**Comments regarding MSHA's proposed rulemaking 30CFR 66: Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance
Dated September 8, 2008**

1) General

MSHA is attempting to regulate the employment relationship under the banner of Safety and Health. We believe MSHA is exceeding the authority granted under the Miners Act.

We agree that MSHA has the authority to regulate drug and alcohol program needs but do not agree with MSHA's proposal to regulate an operators business by mandating internal employment processes.

Operators of mines and owners of businesses have adopted Zero Tolerance for drug and alcohol use. The process posed by MSHA will be a step backwards for those with an existing program. It is not clear why MSHA would force a program that increases risk to the miners.

Miners need to be held responsible for their individual actions. MSHA's proposal coddles those that cannot abide by rules and places those who are attentive to additional risk.

2) Subpart A – General

§66.2(a) Applicability

“...on and around mine....”; What is the definition of around mine property? ‘Around’ should be deleted from the sentence since it could refer to property that is not within the jurisdiction of the operator.

3) Subpart B – Prohibitions

§66.101 (b)(1) Prohibited behaviors

The prohibited behavior identified in 66.101(b)(1) is a Blood Alcohol Concentration (BAC) of 0.04 percent or greater. It is understood that a limit needs to be set for determination of compliance, but the reasoning for using .04 percent is not congruent with the intent of establishing a substance free workplace. MSHA's background discussion states that this program is

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largely based on the DOT regulations, but in the case of BAC determination MSHA chose to be more lenient and .04 percent is “sufficiently protective”. At 0.04 percent most people will start to feel relaxed, mildly euphoric and have some minor impairment in reasoning. Employees that show up to work with any alcohol in there system have less focus and become a safety hazard to themselves and other miners.

The limit should be set lower (.02%) or a statement that Operators may set a lower limit should be inserted into the paragraph.

4) Subpart D – Alcohol and Drug Testing Requirements

§66.301 Substances subject to mandatory testing.

Revise the text to state that the list provided is the minimum list. Operators need the ability to adjust with changing conditions (e.g. designer drugs) and these changes may need to be more rapid then the regulatory process.

§66.304(b) Pre Employment Testing

“...an alcohol test after a conditional offer of employment...”; Current employment laws allow the testing for substance abuse prior to the offer of a position. MSHA is exceeding the authority granted under the Miners Act by relating testing to an employment offer.

Change the proposed regulation to only require testing at a minimum, have operators test prior to assignment to a safety-sensitive job.

§66.305 (b)

The requirement to test a miner (that has been randomly selected but was absent or on leave) immediately upon return to work causes an undue burden on the operator. The ability to have a qualified sample collector on site for a late night shift start would be cost prohibitive and may not be reasonably feasible.

The random testing requirements should allow for the Operators to choose when tests are conducted.

§66.305(d)

Scientific based random testing allows the possibility of an individual not being selected for the term of his/her employment or at least not for several years.

Keeping with MSHA’s stated intent, of protecting miners in safety-sensitive jobs, it is not logical to allow the potential of a miner not being tested for years and thus leaving potentially impaired miners in the workplace. The behavioral observation clause partially addresses the issue but is subjective in nature and is not as reliable as hard evidence.

Random testing selection needs to allow up to 100 percent testing. One method is that the crew and time is random but all miners are tested at least once a year.

5) Subpart E – Operator Responsibilities, Actions, and Consequences

§66.400(a) Consequences to miner for failing an alcohol or drug test or refusal to test.

“...or any violation of the mine operator’s policy...”; This statement is within the referenced section yet the section also states that the miner can return to work after completing the return-to-duty process. MSHA states both that the operator may have it’s own policy (implying that the operator may be stricter) but the policy must allow for referral to a program (which is mandating a less strict policy).

MSHA has overstepped it’s authority granted by the Miners Act. The operator should retain the authority to establish employment practices and policies. Zero tolerance programs should be allowed.

§66.404 Evaluation and referral

The mandatory referral identified places an unnecessary burden on the operator. Miners who use controlled substances outside the bounds of medically prescribed controls willfully place their lives and the lives of their coworkers at risk. This behavior should be dealt with as a severe safety violation.

The referral process has historically demonstrated that individuals who are forced to seek treatment usually revert to use within a year. Forcing operators to return these workers to the mining environment distracts non-using miner’s with concern for their safety. The necessary trust amongst the workforce is lost. The potential for accidents, due to a miner’s focus being redirected, has been increased. The number one concern should be for the safety of all miners not the miner who willfully jeopardizes his and others safety.

The referral process is a large expense to the operators and the process of rehabilitation and verification can take thirty to ninety days. Besides the ten thousand dollar (\$10,000) program cost, there are additional overtime, insurance rate increase, and administrative and retesting costs associated with referring an employee to a rehabilitation program. With an occurrence rate of twelve to fifteen miners per year the cost to the operator could exceed two hundred fifty thousand dollars (\$250,000) a year.

If MSHA is concerned about the safety of the miners, the mandatory referral of first time offenders should be removed from the regulatory process. Operators should be allowed to make the determination of when miners are referred and should be in control of employment policies, not MSHA. Mandatory referral should not be part of the regulation. Zero tolerance programs should be allowed.

6) Subpart F – Recordkeeping and Reporting

§66.500 Recordkeeping requirements

Paragraph (a)(1) states that results are to be kept confidential however, paragraph (c)(1) states you have to include results with accident reports and paragraph (d)(2) states you have to make records available to MSHA inspectors or investigators. Both (c)(1) and (d)(2) contradict (a)(1) and potentially violate an employees right to confidentiality of medical records.

These paragraphs need to be modified to allow for statements that testing was performed within an investigation report.

Additional paragraphs should be added that define the access to records submitted or copied by MSHA by other than MSHA. Controls need to be identified that limit access to what are considered medical records. Current proposed wording indicates that records could be accessed by individuals that do not have a need-to-know or the right to know.

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