



**AMERICAN SOCIETY  
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November 10, 2008

Ms. Patricia W. Silvey  
Director, Office of Standards  
Mine Safety & Health Administration  
U.S. Department of Labor  
1100 Wilson Blvd.  
Arlington, VA 22209

By e-mail: [zzMSHA-comments@dol.gov](mailto:zzMSHA-comments@dol.gov)

RE: Comment on MSHA Proposed Rule  
*Alcohol- and Drug-Free Mines:  
Policy, Prohibitions, Testing,  
Training, and Assistance on Alcohol  
and Drug-Free Mines (RIN 1219-  
AB41)*

Dear Ms. Silvey:

The American Society of Safety Engineers (ASSE) is pleased to submit the following statement concerning the Mine Safety and Health Administration's proposed rule *Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance on Alcohol and Drug-Free Mines*, which was published in the September 8, 2008, Federal Register (73 Fed. Reg. 52136). This is a significant safety and health issue for our nation's mines and ASSE commends MSHA for addressing this through rulemaking in an effort to further reduce accidents and injuries at mine sites, as well as to improve the health of miners in our country.

AB41-COMM-141

ASSE is the oldest and largest society of safety professionals in the world. Founded in 1911, ASSE represents over 30,000 dedicated safety, health, and environmental (SHE) professionals. ASSE has fourteen practice specialties, including one dedicated to mine safety and health. Our members are committed to excellence and dedicated to the protection of people, property, and the environment worldwide. ASSE's members are leaders in their fields with the knowledge and experience needed to advance occupational safety and health on a global level. On behalf of our members we request that this statement be included in the public comments for MSHA's proposed rule for alcohol and drug free mines.

ASSE applauds MSHA for attacking this issue in a proactive manner, for drug or alcohol abuse in mines is a safety hazard for any person on a mine site, and attempting to eradicate that hazard is something ASSE's members support. However, we do have concerns about some provisions of the proposed rule and urge the agency to further improve its regulatory approach so that effective substance abuse prevention programs that already are in place in the mining industry will not be undermined.

ASSE agrees that any proposal should apply in equal measure to coal and metal/nonmetal mines, both surface and underground. There is no basis for affording lesser protection to some miners than to others. MSHA would cover, under the substance abuse testing/training requirements, all "miners" who must receive comprehensive training (24 hours surface/40 hours underground for new miners) and who perform "safety-sensitive job duties." However, the definition in 30 CFR 66.3 covers "any type of work activity where a momentary lapse of critical concentration could result in an accident, injury, or death." For practical purposes, this covers everyone at the mine site since mines present a dynamic work environment where even crossing the road to go to the parking lot could result in death due to heavy equipment's presence, if someone had a "lapse" of concentration. If MSHA intends to cover everyone at the mine who receives comprehensive Part 46 or 48 training, then they should simply state that and not introduce subjective criteria that cries out for arbitrary and capricious "after the fact" interpretation by MSHA if an operator "guesses wrong" and someone outside the program framework gets injured on the job.

MSHA also needs to clarify its intention concerning independent contractors who perform work at mine sites unrelated to extraction or production of minerals (e.g., construction, crane, or electrical work) but whose work is safety-sensitive, even if of relatively short duration. If such companies – normally regulated by OSHA – are subject to the requirement to implement written programs, extensive substance abuse training, and drug and alcohol testing schemes for their workers simply because they perform occasional work at mine sites, this may make it extremely difficult for mine operators to locate contractors willing to perform work at their mine facilities. This could inadvertently cause mine operators to have its personnel perform tasks that could more safely be handled by specialty contractors, with the result being detrimental to safety.

ASSE is concerned that the proposed rule requires mine operators to provide "job security" and retain/reinstate workers who test positive for drugs or alcohol on the job for

the first violation following their completion of rehabilitation programs. Many mine operators with safety and health programs have a “zero tolerance” rule already in place, and such a regulatory requirement would weaken these programs as well as subjecting mine operators to MSHA citations and penalties for what is – in essence – a human relations and employment law matter. This also is contrary to the established common law principle of “employment at will,” would interfere with some seniority systems in the event that reductions-in-force were to occur while a miner was out completing rehab by giving the drug-using miner heightened job protections that were not available to non-offending employees, and would require drastic revision of most companies’ progressive discipline programs.

The fact that MSHA’s proposed rule is less stringent than what currently exists in many mines could actually increase the potential for future serious accidents, because everyone would be aware that they could get at least one positive test without consequences for their employment. At the very least, mines with more rigorous drug and alcohol programs – including “zero tolerance” for positive testing employees -- should be allowed to maintain those programs, rather than having to compromise on safety and health with a mandatory reinstatement provision that weakens an existing program. Moreover, because many mine operators already follow DOT testing criteria and have programs oriented to DOT guidelines, due to having “CDL” drivers within their workforce, MSHA should make it clear that any tests meeting DOT five-panel test criteria will satisfy MSHA’s new regulations.

MSHA would mandate that supervisors must receive twice the training – both initially and on an annual basis – that other miners receive relevant to substance abuse prevention, and states in the proposal that such training must be in addition to the normal training required under Parts 46 and 48. Effectively, this increases annual refresher training from 8 hours to 8.5 hours for miners and to 9 hours for supervisors, and also increases the duration of new miner training beyond 24 hours (surface) and 40 hours (underground). There is no basis for expanding the new miner training or annual refresher training duration requirements because most companies already cover substance abuse as part of their initial and refresher training. Because MSHA acknowledges that this is a significant safety issue, it is appropriate to continue addressing the revised regulation within the mines’ existing training framework. This should be clarified in the rule, and the same duration of training should be provided for both miners and supervisors so that separate training programs will not be required relative to substance abuse, as well as changes to the training plans. ASSE agrees that any person training on substance abuse prevention should be competent to do so, and trainers who would be accepted under existing Part 46 or 48 requirements should be accepted for this purpose.

As it is written, ASSE is concerned that this proposed rule will create a “law of unintended consequences,” with the potential for miners to underreport injuries because they want to avoid a post-accident drug or alcohol test. This will have a negative impact on mine safety overall, and could lead to under-reportage of near-miss accidents as well. ASSE is also concerned that the “post accident” criteria is too broad, as it would mandate a test for any reportable injury, regardless of severity, as long as it triggered “medical

treatment” under Part 50. This would include injuries arising from ergonomic causes, hernias, and other conditions that are not caused by “accidents” but would nevertheless be reportable due to the need for medical treatment. We suggest, as a more reasonable alternative, that the post-accident testing trigger be limited to those incidents that are “immediately reportable” under 50.10 and which are defined as “accidents” in 50.2(h) – fatalities and injuries with a reasonable potential to result in death. Companies should be free, of course, to implement more stringent post-incident testing if they already do so under their existing programs and consistent with DOT criteria

ASSE supports a drug/alcohol free workplace in the mining industry and many of its members have been proactive in this area. We look forward to working with MSHA to achieve this goal and urge the agency to modify the proposed rule in a way that existing programs can continue to be used successfully and that any rule is consistent with DOT and state law requirements concerning substance abuse prevention.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Warren K. Brown', written in a cursive style.

Warren K. Brown, CSP, ARM, CSHM  
President