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Mine Safety and Health Administration
Office of Standards, Regulations and Variances
1100 Wilson Boulevard, Room 2350
Arlington, VA 22209-3939

Via electronic mail zzMSHA-comments@dol.gov

Re: Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance; Proposed Rule (RIN 1219-AB41); 73 Fed. Reg. 52136 (Sept. 8, 2008)

The Institute of Makers of Explosives (“IME”) appreciates the opportunity to submit these comments on the above-captioned proposed rule.

IME is the safety and security institute of the commercial explosives industry. Our mission is to promote safety and the protection of employees, users, the public and the environment; and to encourage the adoption of uniform rules and regulations in the manufacture, transportation, storage, handling, use and disposal of explosive materials used in blasting and other essential operations.

IME represents U.S. manufacturers and distributors of commercial explosive materials and oxidizers as well as other companies that provide related services. Over 2.5 million metric tons of high explosives, blasting agents, and oxidizers are consumed annually in the U.S. Of this, IME member companies produce over 98 percent of the high explosives and a great majority of the blasting agents and oxidizers. These products are used in every state of the Union and are distributed worldwide.

Approximately 86% of commercial explosives products consumed in the U.S. are used in mining. Accordingly, IME has a strong interest in MSHA’s proposed Drug and Alcohol-Free Mines proposed rule.

Our comments are as follows:

“First Offense Protection Provision” (73 Fed. Reg. 52150; Proposed Section 66.403)

AB41-COMM-142

We strongly object to the provision in MSHA's proposal that would prohibit affected mining companies from terminating a worker upon a first offense violation of an employer's Alcohol and Drug-Free Mine Program.

As MSHA states in the preamble to the proposed rule, "[t]he Mine Act expressly states that the health and safety of the miner is the first priority and concern of all in the coal or other mining industry. The prevention of deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines continues to be one of the priorities of the Act."¹

We believe that this principal tenet of the Mine Act would be substantially undermined by the "first offense" protection included in Section 66.403 of the proposed rule. Miners engaged in "safety-sensitive job duties," have a particular responsibility to their co-workers to perform their duties safely, competently, and free from any external influences having the potential to compromise their performance and/or judgment. Concomitantly, every worker at a mine site is entitled to have confidence that persons engaged in safety-sensitive duties are competent to perform those functions. Such confidence would be eviscerated by MSHA's allowing violators of its drug and alcohol policy to return to performing jobs where safety is paramount.

MSHA recognizes in the proposal that the performance of safety-sensitive job duties in an impaired condition is unacceptable. MSHA should similarly recognize as unacceptable, the guarantee of a regulatory "second chance" for miners who have already demonstrated a willing disregard for the safety of their co-workers. We strongly recommend that MSHA eliminate this "First Offense Protection Provision."

In addition, MSHA should be aware that most (if not all) employers in the commercial explosives industry have "zero tolerance" drug and alcohol policies currently in effect. Typically under these policies, employees having a confirmed positive drug test, an adulterated drug test, or who refuse to submit to drug testing are subject to immediate dismissal. Some policies may allow employees who voluntarily disclose a drug or alcohol issue before being subjected to random or reasonable suspicion drug tests, to seek appropriate treatment without threat of dismissal.

Rather than attempting to dictate specific disciplinary actions to employers, MSHA should allow employers to determine what actions and employment decisions are appropriate to their particular company. The individual employer has a much firmer grasp on employee responsibilities and is in a much better position to craft and proper response to a perceived or actual drug and/or alcohol issue.

Prohibited Substances (73 Fed. Reg. 52143; proposed Section 66.100)

IME does not wholly support MSHA's proposal to allow use of certain otherwise prohibited substances if taken in accordance with a valid prescription.

¹ 73 Fed. Reg. 52137 (2008).

November 10, 2008

Specifically, we believe that employers must have the authority to approve, allow or disallow the use of certain medications or controlled substances by its employees. As currently drafted, the proposed provision could be interpreted to limit or deny this authority.

It is our experience that certain medications – even when taken in accordance with a legitimate medical prescription – may impair an employee’s ability to safely handle and use explosives. Accordingly, we recommend that MSHA allow the use of prescribed medications only if the substance is approved by the employer’s medical policies. The employer is in a superior position to MSHA to determine how the use of certain medications may impact the performance of safety-sensitive job duties.

We appreciate the opportunity to submit these comments.

If you have any questions, please contact me at sjflanagan@ime.org or via telephone at 202.266.4315.

Sincerely,

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