

San Juan Coal Company

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October 22, 2008

Patricia Silvey
Acting Director, Office of Standards, Variance & Regulations
Mine Safety & Health Administration
1100 Wilson Boulevard
Room 2350
Arlington, VA 22209-3939
Attn:

Dear Ms. Silvey,

San Juan Coal Company
San Juan Mine 1, MSHA I.D. No. 29-02170
Comments Re:

San Juan Coal Company is pleased to have the opportunity to present our comments regarding the following proposed rule; 30 CFR Parts 56, 57, and 66, 1219-AB41, Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance.

Our general comments are included below along with answers to those MSHA specific requests for comments. San Juan Coal Company strongly supports promulgation of a rule that enables mine operators to establish drug and alcohol testing programs. It is an essential component to ensuring that all miners are fit for duty in the mines. If miners are not fit for duty, they present a significant risk to themselves and their co-workers. Numerous accident investigations have revealed the impairment of a miner was a contributing factor to the accident occurring. Sadly, it is our view that the proposed rule will actually weaken the ability of mine operators to develop such programs and will significantly reduce the effectiveness of many programs that are already in place.

We also believe that the attempt to incorporate so much specificity in the rule will actually undermine its effectiveness and ability to evolve to meet changes in the future. Such an approach was taken in 1992 when MSHA established specific rules regarding the testing and certification of diesel engines. In the engine testing procedures, the Agency included requirements to use diesel fuel that contained specific sulphur content. Over the next few years other regulatory developments resulted in this particular fuel being unavailable because the newer products all contained less sulphur than this rule required and prevented new engines from going through the approval process.

MSHA should learn from this experience and as this particular Final Rule is developed, avoid establishing such prescriptive requirements. A better approach would be to design the rule as a set

of minimum standards and allow for development of the specific measures to be implemented at the mine site level. This would allow for those regulated entities to propose specific requirements, as has occurred in many organizations throughout the country today.

It is our opinion that the proposed rule does not establish a sufficient deterrent to substance abuse and in some respects will in fact serve to actually enable non-compliant miners to continue to abuse without real consequences. Debate about how big this problem is within the mining industry has been going on for some time.

A recent article in Industrial Hygiene News helps put this debate in perspective, stating:

“At Risk Industries; Employers in certain industries are more at risk for employee substance use and abuse, including alcohol. The major industry groups with the highest prevalence of heavy alcohol use were construction, arts, entertainment and recreation, and mining. Those with the lowest were health care and social assistance and educational services.

“An estimated 3.1 percent of employed adults used illicit drugs before reporting to work or during work hours at least once in the past year, with about 2.9 percent working while under the influence of an illicit drug, according to the report, "Prevalence and distribution of illicit drug use in the workforce and in the workplace: Findings and implications from a U.S. national survey," published in 2006 in the *Journal of Applied Psychology*.

“An estimated 1.8 percent of employed adults consumed alcohol before coming to work, and 7.1 percent drank alcohol during the workday, according to the study, "Prevalence and distribution of alcohol use and impairment in the workplace: A U.S. national survey," published in 2006 in the *Journal of Studies on Alcohol*.

“An estimated 1.7 percent of employed adults worked while under the influence of alcohol, and 9.2 percent worked with a hangover in the past year.”

MSHA also welcomes comments from those that already perform post-accident tests regarding the number of cases where alcohol or drugs were determined to be a contributing or root cause of all accidents/injuries where tests reveal some alcohol or drug involvement.

One may question exactly what the impact of substance abuse has been with regard to injuries and fatalities within the mining industry. San Juan Coal Company believes the following question is relevant, “What is an acceptable number of injuries or fatalities caused or contributed to by an impaired miner?” We believe the only acceptable number is zero. While we understand that MSHA may be attempting to build a statistical case supporting the implementation of enhanced programs addressing substance abuse and impairment, we are not prepared to offer specific statistical data beyond our general comment.

MSHA seeks comments on the list of drugs that are specifically identified as prohibited substances and the means for maintaining flexibility to include additional drugs as need arises. San Juan Coal Company supports of the prohibition of the use, sale or possession of prohibited substances on and around mine property as set forth in the proposal. Additionally, we believe that the regulation must retain the flexibility to allow additional substances to be included in the future.

MSHA requests comments about the determination of who performs safety sensitive job duties and is therefore required to be tested and trained.

Safety-sensitive positions and Prohibited Behaviors – This is one of the areas where the proposed rule can weaken existing programs. It is our opinion that any person on the mine site or who is involved in directing the activities at a mine site, should be subject to these prohibitions. This would also include administrative employees if they work or travel on the mine site. Even an administrative employee walking or driving on the mine site, during a momentary lapse of critical concentration, could potentially contribute to an accident, injury, or death. The final rule should not retain the narrow definition contained in the proposed rule.

San Juan Coal Company is in support of a requirement for the program to contain the Five Elements identified in the DOT rules.

1. The policy should be in writing.
2. Employee education is required.
3. Supervisory training is required.
4. Alcohol and drug testing for miners who perform safety-sensitive job duties and supervisors. (Provided the rule allows for testing of all personnel working on the mine site).
5. Referrals for assistance for miners who violate the policy. (Provided the rule allows for a company to establish consequences for repeat offenses up to and including termination and does not require immunity for a miner who admits use of drugs, after being selected for a test. The admission of drug use, after being selected for a test, under any part of this program is too late.) The specifics of these elements should not be included in the Final Rule beyond establishing minimum standards

MSHA invites comments on how the [written policy] should be provided to miners. San Juan Coal Company believes this information can be delivered during orientation to the work site, such as during their new miner training. A copy of the policy could be provided and the miner could sign off on having received their copy. Further education should occur if there are changes made to the policy. The training could be effectively delivered by members of the Human Resources group, the Safety or Training groups or by representatives of the Medical Review Officer.

MSHA invites comments about the amount and type of training for non-supervisory miners and about the methods appropriate for delivering this training and also about the best means for assuring that training is delivered by qualified personnel. San Juan Coal Company believes this information can be delivered during orientation to the work site such as during their new miner training. A copy could be provided and the miner could sign off on having received their copy. Further education should occur if there are changes made to the policy. The training could be effectively delivered by members of the Human Resources group, the Safety or Training groups or by representatives of the Employee Assistance Provider or Medical Review Officer.

MSHA invites comments about the amount and type of training for supervisors and about the methods appropriate for delivering this training and also about the best means for assuring that training is delivered by qualified personnel. Supervisors need to understand these requirements just as they do other regulations. They also need training on how to recognize when an employee might be impaired. Tools can be provided to assist with making that determination. A copy of a checklist used here at San Juan Coal Company is attached to these comments as an example of such tools.

MSHA seeks comment on [the provision to encourage but not require miners to voluntarily seek assistance]. This is another area where the proposed rule would weaken the existing program here at San Juan Coal Company. Our program allows miners to voluntarily seek assistance and in the case of a first positive test, requires such assistance in order to return to work. Such specifics should not be included in the Final Rule other than to allow them to occur.

MSHA seeks comments about the extent to which third party health benefits are available to cover the cost of SAP and treatment services for miners covered by the rule. MSHA also seeks comments on all aspects of the miner's assistance provisions required by this rule. MSHA should not attempt to regulate health benefits or treatment services. These programs are part of the individual benefits packages developed or negotiated at a given operation. Establishing regulations concerning such benefits could result in a Federal requirement to alter components of a Collective Bargaining Agreement. The Final Rule should not attempt to make such requirements.

San Juan Coal Company also supports the proposal to require Five Types of Alcohol and Drug Testing. The existing program in place at San Juan Coal Company contains these requirements. These elements are part of an overall Fitness for Duty Policy and Memorandum of Agreement with the International Union of Operating Engineers, Local 953.

The Final Rule should not attempt to spell out the specifics of how this testing is done. The Final Rule should be written to enable operators to have such programs and require that said program will meet or exceed the requirements of DOT or FDA rules. This incorporation of the DOT or FDA standards should be the extent of the Final Rule with regard to what and how to test. That would allow the programs to evolve in the future and remain in concert with other Federal D&A testing programs as they are modified or improved.

MSHA seeks comments about the required panel of drugs subject to mandatory testing. The testing section of the Final Rule should allow an operator to test for substances other than those identified in the proposed rule. The Final Rule should provide the DOT list as an example or minimum, not as a specific rule.

The Final Rule should not attempt to identify the specifics of how samples are collected or how testing is conducted. The Final Rule should simply require that all sampling and testing will be conducted in accordance with the standards established by such organizations as DOT, FDA or

others having expertise or oversight of such processes. Such an approach would build in the ability to use improved methods as they are developed in the future.

San Juan Coal Company believes that a reasonable testing regime could include testing at the following stages:

1. Pre-employment;
2. Random and unannounced;
3. Post-accident testing (provided the rule allows for testing of non-fatal accidents such as first aid, property damage or even near miss events).
4. Reasonable Suspicion testing; and
5. Return-to-duty testing for miners found in violation.

MSHA invites comments as to the appropriate means for enforcing the provisions of the proposed rule.

The proposed rule includes a collection of operator responsibilities, required actions and limited consequences. The final rule should not attempt to be so specific in these areas. The rule could be used to establish a set minimum standard but should not prohibit an operator and associated labor groups from negotiating something more stringent. These specifics are already included in most drug and alcohol programs and are another area that the proposed rule stands to weaken existing programs. The same can be said for the specifics of actions pending receipt of results, actions after receiving verified test results, evaluation, referral and the return to duty process, including return to duty follow up testing.

The section on consequences for a positive test or a refusal to test needs to be revised. We believe the Final Rule should address Section 2, (g) (2) of the Mine Act which states the purpose of the Act is ***“to require that each operator of a coal mine or other mine and every miner in such mine comply with such standards.”*** Since the statutory requirements exist for both operators and miners, consequences for non-compliance with this Final Rule should include both, as it does for smoking articles in underground mines. Failing to include these consequences makes it possible that an operator would receive the consequences for actions taken off the job and decisions made by the employee off the job. The Final Rule should include a provision for individual consequences to be administered by MSHA. Use of prohibited substances prior to reporting for work, possession, use or sale of prohibited substances while at work would have the same potential to do harm to others as does a miner smoking in an underground coal mine.

Substance abuse produces an unnecessary and very preventable risk from an individual making a personal choice. The mine operator and miner should be accountable for that choice.

The Final Rule should also include consequences for those who adulterate, falsify or wilfully contaminate a drug sample. These consequences should also be applied to both mine operators as well as miners.

In the areas of Return to Duty and Follow up Testing we believe the proposed rule would cause some significant issues with regard to the requirements spelled out in HIPPA rules. In order to avoid this, the Final Rule should not attempt to address the specificity of these record keeping

requirements or should be carefully reviewed to ensure there are no conflicts created by the Final Rule.

MSHA welcomes comments on how the alcohol and drug testing results should be documented in accident reports as well as how they should be evaluated during an accident investigation to help determine the cause of the accident.

Accident records are regularly reviewed as safety meetings. Including test results in these records could result in labor issues. Test records should not be included in such reports.

Records of drug test results and evaluations are best handled by the Substance Abuse Professional (SAP) and the Medical Review Officer (MRO). The records associated with all testing should be maintained in a secure Human Resources file. We agree that such records are confidential between the miner and the mine operator. Again, the requirements of HIPPA should be taken into account in formulating this rule.

MSHA invites comments about the floor rate at which [random] testing would be conducted and what options, including joining consortia, are viable for small mines operators to fulfil the random testing requirements of the proposal.

Is drug and alcohol abuse a problem for all sizes of organizations? We think the following information suggests that it is. According to the Bureau of Labor Statistics, about half of all U.S. workers work for small and medium-sized businesses (those with fewer than 500 employees). But about nine in ten currently employed illicit drug users and almost nine in ten employed heavy drinkers work for small and medium sized firms. That finding comes from "Worker Substance Use and Workplace Policies and Programs," published in 2007 by the Department of Health and Human Services. This suggests that a small operator program would be appropriate. San Juan Coal Company believes that the specific rates should not be included in the Final Rule. A better approach would be to have those rates indexed to the percentage of positive test results. Higher rates of positive tests should drive increased frequency in sampling.

San Juan Coal Company appreciates the opportunity to provide these comments concerning this important regulatory proposal. Please give these comments serious consideration in development of the Final Rule.

Yours sincerely,

David Hales

David C. Hales CMSP
Health & Safety Superintendent
San Juan Coal Company

Guideline for FFD I, Drug & Alcohol (D&A) Checklist

1. Ensure that any possible medical condition is addressed prior to evaluation for D & A.
2. Document the observed behavior using the Fitness for Duty I Checklist, preferably with another supervisor.
3. In private, discuss with the individual about the observed behavior. Relay your concerns that the individual seems impaired.
4. Allow the individual representation:
 - a. All employees will have a right to have another employee present at the reasonable suspicion discussion if they so desire. (see 1.4.1 a.3) A union representative shall be deemed to be a union steward. If a steward is not on shift, a designated union representative shall be a member of the JSC, a Miners Rep., or a union officer. If none of these people are available on shift, then another union member will be provided.
 - b. Time frame to test refer to Testing Circumstances Subpart2, 2.2.1 B & D
5. If it is determined the individual needs to be tested, and the results are confirmed positive, refer to 1.3.2 of the Fitness for Duty I policy.
6. If the test is negative, refer to 1.3.2 #6 of the Fitness for Duty I policy.

Trained supervisors are responsible for taking appropriate action when an employee demonstrates unusual behavior. Training should be up-dated annually. Only trained supervisors are allowed to fill out the checklist.

November 6, 2001

Fitness for Duty I Underground D & A Checklist

Employee: _____
Supervisor: _____
2nd Supervisor: _____

Date ____/____/____ Time _____
Department: _____
Union/employee Rep: _____

NOTE: Ensure that any possible medical condition is addressed prior to evaluation for Drug & Alcohol.

I. Are concerns about the individual's behavior based on (check those that apply):

____ Reasonable suspicion

____ Post-accident based on reasonable suspicion:

-in accordance to 1.4.1 A & B of the Fitness for Duty Drug & Alcohol Policy

II. Employee Behavior: (If- 2 or more "Yes" responses...administer test)

1. Does individual seem dazed, confused or disoriented?

Yes _____ No _____ Describe _____

2. Have you observed the individual to have difficulty with movement, balance or coordination (loss of balance, stumbling or staggering, jerky movement, lean on objects for balance)?

Yes _____ No _____ Describe _____

3. Is there a concern about the individual's speech, content of speech, pace of speech or slurring of words?

Yes _____ No _____ Describe _____

4. Is there any concern about a change in physical appearance (e.g.- eyes red, glossy, or unkempt)?

Yes _____ No _____ Describe _____

5. Have there been concerns/reports about this individual in regards to any unusual behavior today?

Yes _____ No _____ Describe _____

6. Has this individual made a "judgment error" and/or deviated from operating rules and procedures?

Yes _____ No _____ Describe _____

III. Evidence of possible alcohol/drug use at work: (If- "Yes" to any...administer test)

1. Is there odor of alcohol on individual's breath?

Yes _____ No _____

2. Have you observed or discovered the individual to have any possession of alcohol, possession of other drugs, or paraphernalia on the job?

Yes _____ No _____

3. Have you witnessed this individual's consumption of alcohol or other drug today?

Yes _____ No _____

4. Has someone else reported this individual's consumption of alcohol or other drug today?

Yes _____ No _____

IV. Test: Was the test result? (Check one) Positive _____ Negative _____ *Not Given _____

If the result is positive- this document will only be placed in a confidential folder by the Medical Review Officer (MRO) in accordance with 2.5.1 of FFD I Policy.

If the result is negative, this document will not be copied or filed, but will be given to the individual at their own discretion.

*If test was not given describe why _____

V. Signature: _____ Supervisor (submitting report)