

From: Jonathan Brown [<mailto:jbrown@nevadamining.org>]
Sent: Monday, November 28, 2005 7:08 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: MSHA Use of or Impairment From Alcohol and Other Drugs on Mine Property
Advance Notice of Rule Making - Comments

RIN 1219-AB41

Attached please find a copy of the comments submitted by the National Mining Association regarding the subject matter above. The Nevada Mining Association would like to submit them for the record as "me too" comments in lieu of any additional comments as we concur completely with them.

Thank you,

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November 28, 2005

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

RE: RIN 1219-AB41

Dear Director:

These comments are submitted on behalf of the National Mining Association (NMA) in response to the Advance Notice of Proposed Rulemaking (ANPRM) that was published on October 4, 2005, 70 FR 57808, which solicits information on regulatory and non-regulatory approaches to address the risks of impairment from alcohol and drugs in the workplace. We appreciate having the opportunity to comment on this most important and over-due initiative that recognizes the increasing safety and health risks which miners and mine operators are encountering due to the escalating use of illegal substances and abuse of legal substances in the workplace.

GENERAL COMMENTS

At the outset let us commend the agency for opening a dialogue on this subject. Regrettably, as we have discovered, the mining industry is not immune from the societal problems arising from the use and abuse of legal and illegal substances that have plagued other industries. We know that arriving at a solution to this problem will not be easy, but it is something that we must strive to achieve. Miner's safety and health has been put in jeopardy by those who choose to violate the law and their employer's policies. While a solution to this would on its face seem apparent, the patchwork of state laws and regulatory requirements has hindered efforts to eliminate this problem from the workplace.

The ANPRM presents a series of enlightening questions and it's our hope that mine operators throughout the industry will share their experiences as well as the programs and policies implemented to address this problem. We encouraged the members of NMA to participate during the comment period and we also canvassed our members to gain insight into the programs they've implemented. We have included examples of some of the programs currently in place.

It should come as no surprise that NMA's members, who are some of the largest and most advanced mining companies in terms of safety and health have, to

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differing degrees, sought to address this problem. This arises from the provisions and limitations contained in collective bargaining agreements and the constraints contained in state law and regulation and the case law that has evolved in those jurisdictions.

Regardless the differences there are certain common elements among the programs. All of the companies that responded to our inquiry have implemented a pre-employment testing program. Similarly, all have testing provisions for cause, reasonable suspicion or suspicious behavior. While some programs have implemented random testing others have been limited due to the constraints mentioned above. All of the programs have some elements of an Employee Assistance Program but there exist differences as to when employees are enrolled in the program. Some are dependent upon the employee seeking assistance prior to their being subjected to testing while others provide for employee enrollment based upon the results of substance abuse screening. All of the programs provide for disciplinary action, up to and including employment termination.

As the agency is well aware, the remote location of many mining operations means that EAP counseling or related facilities are not always available and thereby limit the employer's ability to make available an extensive EAP. As a result, EAP programs must be structured to best meet the workforce needs taking into consideration geographic or other limitations.

In framing a solution to this problem it is important for the agency to ensure that any regulatory approach is both transparent and enforceable. Transparent so that all parties will understand what will be expected of them and the consequences of their actions and enforceable so that all operators are required to meet the same minimum standards. While these appear conceptually simple their development and implementation may well prove to be difficult.

In the absence of a federal regulatory requirement, mining company substance abuse programs are governed by state law and regulation. The lack of consistency across states has often hindered company efforts to eliminate substance abuse or resulted in their having to construct different programs depending upon the particular jurisdiction in which their operations are located. Of equal concern, the historic system in the coal sector for the issuance of state certification papers has thwarted efforts to remove from the industry those who have violated a company's drug and alcohol policy. This system should be reviewed to see if an industry-wide system could be developed to remove from the industry those who abused legal or illegal substances.

Today's workforce is extremely mobile and it is possible for an individual to voluntarily terminate their employment before being subjected to a substance test only to reappear at another mining operation within the same or another state. Moreover, the worker shortage confronting the industry might well cause some, in the absence of a federal regulatory requirement, to overlook current or past substance abuse practices among employees. These situations cannot and should not be tolerated.

As noted previously, publication of the ANPRM opens the opportunity for an important dialogue with the agency's stakeholders. No one individual or group has all the answers to the complexity of the problem that forms the basis for the ANPRM. We would recommend the agency convene a summit of representatives of the miners, mine operators, state officials and federal officials knowledgeable about all aspects of alcohol and substance abuse, education, testing and employee intervention programs to provide guidance as the agency's regulatory framework evolves.

Again, thank you for this opportunity to provide comments on this most important regulatory initiative.

Sincerely,

Bruce Watzman
Vice President
Safety, Health & Human Resources

Attachments (5)

SPECIFIC COMMENTS IN RESPONSE TO ANPRM

Nature, Extent, and Impact of the Problem

A1. We would refer the agency to the numerous news reports and accidents investigations conducted to ascertain the extent of the problem. Additionally, the agency should review the study results published by the National Institute of Health, Survey on Drug Use and Health and the National Epidemiologic Survey.

A2. Same as above

A3. The severity of the risk imposed by a miner impaired due to alcohol or substance abuse cannot be overstated. Not only does that individual place themselves in harms way they also do so for all those working within their vicinity. The potential hazards associated with mining are known and well documented. Permitting an impaired individual to work in an environment where, for example, methane gas is liberated or on or around machinery capable of causing bodily harm cannot be tolerated.

A4. We have no specific information to share in response to this question.

Prohibited Substances and Impaired Miners

B1. Before asking the question of whether the existing requirement contained in 30 CFR 56/57.20001 should be extended to coal it would be more appropriate to ask

what effect this provision has had in curbing and/or eliminating alcohol and substance abuse in the metal and nonmetal sector of the industry. Moreover, we believe this question should be considered within the context of personal responsibility. As the agency is well aware, the only context within which individuals are currently held accountable under the Mine Act involves carrying smoking materials into an underground coal mine. In framing this prohibition, it was recognized that the potential consequences for such actions were so catastrophic as to require that the individual responsible be held liable for their actions. We believe that working under the influence of an illegal substance or abusing a legally prescribed medication presents potential hazards comparable to those envisioned by the smoking materials prohibition. Individuals must, when taking action that potentially threatens the lives of their fellow workers, be held accountable for their actions.

In response to the specific question posed, we do not think the metal/nonmetal regulatory template is proper for that industry sector and it should not be extended to coal. It is wholly inappropriate to penalize, through the issuance of a citation, a mine operator for a condition where the miner actively attempts to conceal their prohibited and/or illegal activity. Merely extending the reach of what is an ineffective regulation will do little to this problem. Alcohol and substance abuse is a societal problem and the belief that the issuance of a citation to a responsible mine operator is without foundation and misguided.

B2. It is our understanding that each company has, in consultation with their program administrator, developed a list of prohibited substances and that these vary across the industry. At a minimum the list should include alcohol, controlled substances or illegal drugs, or the metabolites of any controlled substance or illegal drug. We are also aware that some companies have established threshold levels for classes of prescribed medications such as: amphetamines, barbiturates, opiates, oxycodone, etc. It is imperative that each program be afforded the flexibility to modify its program requirements to accommodate changed testing procedures and detection levels.

Many companies have implemented programs consistent with the requirements contained in the Omnibus Transportation Employee Testing Act of 1991 and implementing regulations in 49 CFR Part 40. These regulations are specific and prescriptive as to how tests will be conducted and for what substances. Testing technology and the substance of concern have changed significantly since promulgation of the DOT regulations. Saliva testing and the recent introduction of hair testing, neither envisioned under the DOT program, afford employers increased flexibility in the administration of their programs. Moreover, they permit program administrators to test for substances not originally envisioned with greater accuracy and at reduced cost.

B3. The programs in use today employ a variety of approaches regarding the administration of substance abuse programs and impairment determinations. In some instances the programs are administered by licensed third-party administrators while in others administration of the program comes under the

direction of a licensed medical professional. In all instances that we are aware of the impairment determination is made by the assigned medical professional in consultation with the testing laboratory to ensure the accuracy of the determination and to ensure that individual privacy rights are protected within applicable legal requirements.

B4. As noted earlier, employer actions when an impaired miner is identified are quite varied ranging from referral to an EAP or SAP to termination.

B5. We have no information on this as it varies from company-to-company.

Training

C1. Many companies currently address prevention of alcohol and other drug misuse in their existing training programs. As the recognition and understanding of this problem increases more companies who had not included this as a component of their training programs are doing so.

C2. Today the provisions for training are quite varied. While some companies provide substance abuse training at all levels of their organizations others are more limited providing the training only to those required to undergo Part 46 training or supervisory training.

C4. See response to B5.

Inquiries Following Accidents

D1. While we are not prepared to suggest specific regulatory language, we believe the authority provided in 30 CFR 50.11 should be expanded to provide operators the specific authority to include, as a part of their investigation, the contribution of alcohol and/or drug use in the accident. It is vitally important that care be given to carefully construct the circumstances where consideration of such factors is appropriate.

D2. Decisions as to the level of inquiry of alcohol and/or drug use following an accident are variable and must be made based upon the circumstances presented. To do otherwise might result in some being unnecessarily subjected to such inquiries with others avoiding such scrutiny.

It is important that the agency examine carefully the legal ramifications of not only privacy laws but especially the application of HIPPA in the context of development of a regulation. These are critically important considerations that today plague employers when considering disciplinary actions resulting from alcohol and/or drug use in the workplace.

D3. We believe programs should be structured so that operators are afforded flexibility to determine, on a case-by-case basis, the necessity to conduct a substance abuse inquiry.

D4. Privacy concerns necessitate that the information be limited to only those authorized within the company to maintain such information and to the authorized representative of the Secretary, if requested.

D5. Existing programs provide for varying levels of disciplinary action depending upon the situation encountered. As noted previously, disciplinary action up to and including termination are included in most if not all existing programs.

Drug-Free Workplace Programs

E1-5. Information relative to this series of questions is contained in the attachments that accompany this filing.

Costs and Benefits

F1-3 We have no information as this relate to company specific programs.