

# PUBLIC SUBMISSION

2011 APR 15 A 10:33

As of: April 15, 2011

Comments Due May 02, 2011  
Submission Type: Web

**Docket:** MSHA-2010-0007

Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors

**Comment On:** MSHA-2010-0007-0001

Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors

**Document:** MSHA-2010-0007-DRAFT-0222

Comment from Beau Zoeller, Indiana University School of Law - Indianapolis

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## General Comment

See attached file(s)

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## Attachments

**MSHA-2010-0007-DRAFT-0222.1:** Comment from Beau Zoeller, Indiana University School of Law - Indianapolis

*AB64-COMM-24*

April 12, 2011

DEPARTMENT OF LABOR  
Mine Health and Safety Administration  
75 Fed. Reg. 64412

To whom it may concern,

“If the people cannot trust their government to do the job which it exists – to protect them and promote their common welfare – all else is lost.” ~Barack Obama

Regulations should never remain totally static; especially those that protect the health and welfare of the citizens because the nature and circumstances that served as the reasoning for the initial regulation may be volatile. For example, land use regulations (though more at the local level) are employed for the health, safety, and welfare of the community, but they typically do not remain static in nature. When times change so do the regulations in order to promote safer and healthier communities.

The Mine Safety and Health Administration’s (MSHA) current regulatory standard were implemented in 1980.<sup>1</sup> During this thirty-one year period there have been many advances in science and technology. Not only have the advances discovered more about the disease known as black lung, but technology allows for safer working conditions for coal miners. Recommendations to attack the issue of black lung were set forth back in 1995 by the National Institute of Occupational Safety and Health (NIOSH) and the Secretary of Labor. It is time to employ these recommendations. In essence, an up-to-date standard is needed to comport with modern understanding and circumstances. Any progressive movement in improving a coal miner’s working environment is better than continuing under the outdated standard. This is a prime example when doing something is better than doing nothing.

Black lung has become a very concerning lung disease. “In the last decade, over 10,000 miners have died of . . . what is commonly known as black lung disease.”<sup>2</sup> The number of black lung cases has been on the rise since the late 1990s,

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<sup>1</sup> Lowering Miners’ Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors, 75 Fed. Reg. 64412 (proposed Oct. 19, 2010) (to be codified at 30 CFR prts. 70, 71, 72, 75, and 90).

<sup>2</sup> DEP’T OF HEALTH AND HUMAN SERVICE, Centers for Disease Control and Prevention, NIOSH Science Blog, *Faces of Black Lung*, available at [http://www.cdc.gov/niosh/blog/nsb081808\\_blacklung.html](http://www.cdc.gov/niosh/blog/nsb081808_blacklung.html)

particularly in hot spots, such as West Virginia and Eastern Kentucky.<sup>3</sup> It is time to address the issue with health and technology based standards.

The proposed rule rightly attacks the current allowable concentration of respirable coal dust. The current allowable concentration is 2.0 mg/cubic meter of air, which would be lessened by the proposed rule to 1.0 mg/cubic meter.<sup>4</sup> However, this is to be done over a twenty-four month phase period. This is much too long of a period to implement such a vital standard to miner health. A two year period under the current standard and slowly decreasing the allowable amount may still subject miners to black lung. The health of the miners' is at stake, and this new standard should be expeditiously employed, in order to ensure that the miners are subjected to less respirable coal dust. It is understandable that a phase period is necessary for the mines to get in compliance, however, this can be done in a twelve to eighteen month period. The agency includes this phase-in period to allow ample time for adaptation to the new standards, but twenty-four months is too long for a rule that is supposed to decrease miner health risks to black lung. Two years is a long time, one in which many new cases will likely spring up. Twelve to eighteen months provides more than enough time to provide adequate training and time to install new technology. As mentioned before, this is a pressing issue of miner health, and the sooner the concentration amount is at 1.0 mg/cubic meter, the better for miners, their families, and the United States as a whole.

The proposed rule also seeks to have new dust sampling technology (CPDM) phased in over a twelve to eighteen month period. However, this should be expedited as well. Under the current technology, the samples may take a few days or weeks to produce the results of the miner's exposure. Implementation of a new system would be more appropriate in a six to eight month range. This provides the mine adequate time to prepare of the new technology, while allowing the mine to monitor the decreasing respirable coal dust. The agency has not provided sufficient information to put people on notice of how long such a system would take to properly implement. Nonetheless, the new technology produces real time results,<sup>5</sup> which instantly allows for healthier working conditions because mining administrators (and even the miners themselves) can monitor the coal dust levels more accurately and limit the miners' exposure. The proposed rule provides no real justification for the lag in implementation time for the new technology.

Additionally, this proposed rule should provide "whistleblower" protection provisions for miners who monitor the coal dust and refuse to work in conditions

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<sup>3</sup> Dave Jamieson, Huffington Post, *Rand Paul: Regulating Black Lung Could be too Pricey for Big Coal*, last accessed on Apr. 7, 2011.

<sup>4</sup> Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors, 75 Fed. Reg. at 64413.

<sup>5</sup> *Id.* at 64415.

that are not copasetic with other provisions under MSHA. A miner who is exposed to conditions in non-compliance of the statute should not suffer any adverse consequences for his refusal to subject himself to such unhealthy air. A provision should also be included that protects whistleblowers that report mining companies complete disregard for miner safety and the provisions under these proposed regulations. These are necessary safeguards in order to ensure that the miners are truly accorded fair conditions, and the agency needs to address these.

One feature of the new technology and proposed rule, which is a significant fix from the old rule is the consideration of overtime or extended work shifts. The current system samples respirable coal dust for a maximum of eight hours, but the new system and rule would require sampling for the full shift. Let's face it, mining is a blue-collar job, which requires harsh treatment of the body. The miners rarely work only their normal shift. Overtime is an extremely common occurrence in the mining field. Currently miners are working under unmonitored conditions, therefore the implementation of the new technology in that six to eight month period (rather than twelve to eighteen) would avoid these unmonitored times, and work to better the conditions.

An expansion of medical monitoring is also addressed under this proposed rule. The addition of spirometry,<sup>6</sup> occupational history, and symptom assessment techniques will assist in mitigating the harm by providing early diagnosis and treatment. If the condition is caught early on, further complications associated with the disease can be inhibited. In addition, early diagnosis and treatment can reduce healthcare costs because the time the patient spends in the hospital will be reduced, and early treatment prevent further regression.<sup>7</sup> These three proposed monitoring processes move towards providing better care and health for the miners.

The benefits of this proposed rule far outweigh the alleged costs. The most obvious and important benefit is the health of the miners. This is a top priority, in part because of the lack of attention they have been given in regard to their health. Black lung is a very painful disease, but it is preventable. The time to act is now; before there are more ramifications. The agency estimates that the annualized benefits will be \$99.1-196.8 million compared to the estimated costs of \$40.4-44.5 million. These estimates provide a directed verdict – implementation of this rule is essential and financially sound because the benefits severely outweigh the costs.

However, the National Mining Association has claimed that the new regulations would cost their industry \$1.8 billion in revenues, but has not provided itemized estimations. This seems to be exaggerated. The new technology would undoubtedly cost a significant amount. However, this rule does not limit miner

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<sup>6</sup> The Mayo Clinic defines "spirometry" is a common office test used to diagnose asthma, COPD and certain other conditions that affect breathing.

<sup>7</sup> Patricia A. Potter & Anne Perry, *Fundamentals of Nursing* – 7th Ed., 2009.

work ability or impose any time restraints on hours. It merely monitors coal dust. If anything this system will prove to ensure healthier employees and less health insurance costs to the mining companies. Healthier employees mean higher productivity “[M]aking wellness a priority in the workplace boosts their [businesses] bottomlines.”<sup>8</sup> Health and wellness of employees can reduce medical and disability expenditures, and decrease absenteeism and increase mental capacity.<sup>9</sup>

Kentucky US Senator Rand Paul has been on the record as saying “[e]very regulation doesn’t save lives,” and that the current out-of-date regulations have done a “pretty good job” of reducing black lung disease.<sup>10</sup> Though every regulation may not save lives, this proposed regulation will most certainly reduce black lung cases and ultimately reduce mortality rates. A “pretty good job” is not good enough for an issue of human health, especially a disease such as black lung. Additionally, these current regulations are out of touch with modern science and technology, if the mining industry is to ever progress with other industries, it is time that the mining industry moves into the 21<sup>st</sup> century.

Despite Senator Paul’s stand, other US senators, such as Jay Rockefeller (WV), have voiced their concern with black lung (West Virginia – a state with a very large coal industry). Senator Rockefeller has stated that “this fight (black lung) means doing right by our miners” and it “should be met with the best support we can possibly provide.”<sup>11</sup> Black lung undoubtedly thrusts enormous burdens (emotionally, physically, and financially) upon the families as well. This proposed rule is not just for the miner, but for their families as well.

Health, safety, and welfare have always been a top priority of the US government. Many regulations have been justified by the health, safety, and welfare of the citizens. This should be no different. Miners have historically been subjected to poor working conditions, and a lack of new regulation (no new standards since 1980) have made conditions worse when you look at the circumstances (namely the advances in technology and science, which have given us a better understanding of black lung). Since we have this technology and knowledge we must put it to use, rather than neglect miner health. The mining industry has been largely ignored since the early 1980s until recent mining accidents. MSHA must make haste with

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<sup>8</sup> Rob Kurtz, BLOOMBERG BUSINESSWEEK, *Healthy Employees Cut Business Costs*, Jan. 24, 2008.

<sup>9</sup> *Id.*

<sup>10</sup> Dave Jamieson, Huffington Post, *Rand Paul: Regulating Black Lung Could be too Pricey for Big Coal*, last accessed on Apr. 7, 2011.

<sup>11</sup> Press Release, United States Senator Jay Rockefeller, “Senator Rockefeller Delivers Message at National Roll-Out of ‘End Black Lung Campaign’ in Beaver, WV,” Dec. 3, 2009.

the implementation of the technology, as well as the standards. The outdated regulations need to be phased-out as soon as possible (on an even more stringent timeline than provided by the proposed rule), in order to ensure healthier miners.

Sincerely,

/s/ Beau F. Zoeller

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