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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

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Comment from John Heard, The Virginia Coal Association, Inc.

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General Comment

See attached file(s)

Attachments

VCACommentsMSHADustRule062011

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Ms. Roslyn Fontaine
Acting Director
Office of Standards, Regulations, and Variances
Mine Safety and Health Administration
Office of Standards, Regulations, and Variances
1100 Wilson Boulevard, Room 2350
Arlington, Virginia 22209-3939

Re: RIN 1219-AB64; Comments on MSHA Proposed Rule for Lowering Miners Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors

Dear Ms. Fontaine:

The Virginia Coal Association (VCA) appreciates this opportunity to offer comments on the Mine Safety and Health Administration's (MSHA) proposed rule entitled Lowering Miners' Exposure to Respirable Coal Mine Dust, 75 Fed. Reg. 64,412 (Oct. 19, 2010).

The VCA represents coal companies that produce approximately 90% of the coal mined annually in Virginia. We support efforts to reduce and eliminate incidents of coal workers pneumoconiosis and stand willing to work with MSHA and others to examine new technologies and techniques of protecting miners' health. Unfortunately, we do not believe that the proposed rule will improve miners' health. We also do not believe that the proposed rule is based on sound, current, transparent science that has been subjected to independent peer-review. Finally, we do not believe that the proposed rule's provisions will restore confidence in the dust sampling program. Consequently, the VCA urges MSHA to withdraw the proposed rule and develop a new proposed rule which:

- Relies on a transparent review of the current science on miners' health;
- Directly addresses the health concerns illuminated in that science; and
- Utilizes a comprehensive approach to improving worker health.

Our detailed comments follow.

Health Protection and the Proposed Rule

The provisions of the proposed rule would be counter-productive for miners' health for several reasons. First, MSHA's proposal to expand the coal miners' medical surveillance program to include spirometry testing, while worthwhile, fails to protect miners because of the agency's decision not to impose a mandatory X-Ray surveillance program for all workers. Early diagnosis is the best tool to prevent disease progression. This is the foundation upon which the 30 CFR Part 90 protection program is premised. Excluding current workers from mandatory participation in the medical surveillance program eliminates the opportunity for them, and their medical providers, to work with mine operators to implement intervention measures. Furthermore, excluding current workers violates Section 101(a)(6)(A) of the Mine Act which requires MSHA to set standards "which most adequately assure...that no miner will suffer material impairment of health or functional capacity even if such miner has regular exposure to the hazards dealt with by such standard for the period of his working life." The failure to impose such a requirement completely undermines efforts to understand and address this problem.

Secondly, the "hierarchy of controls" is an accepted industrial hygiene concept and an accepted safety and health practice, previously adopted by MSHA and OSHA in other regulations. The protection strategy prefers engineering controls, if feasible, but recognizes administrative controls as acceptable, and reserves the use of respirators for circumstances where engineering and administrative controls are not feasible or able to provide the desired level of protection. The strategy's purpose is to produce health protection in a feasible and effective manner. MSHA's rejection of this time-tested strategy (except for permitting administrative controls for an unnecessarily limited period of time) is counterproductive to miners' health and should be revised to permit operators to utilize the entire suite of controls to protect miners' health.

Finally, the proposed rule's rejection of the safe, effective use of modern personal engineering controls (PECs) such as filtered air helmets as a primary protective tool for compliance with dust limits is also counterproductive to miners' health. The prohibition on the use of filtered air helmets as a primary compliance method stems from older, full face-sealed, respirator technology, considered uncomfortable and thereby unreliable. Not considering advanced, comfortable PECs as "respirators" and denying their effective role as primary compliance controls, is illogical, arbitrary, and violates MSHA's statutory duty to set standards that most adequately assure protection against material impairment of health. Furthermore, rejecting these engineering controls as a means of compliance also violates the Act's mandates to use the latest scientific evidence and technologically feasible controls. These advanced, comfortable and effective personal engineering controls provide clean air curtains over the person's breathing zone, and substitute an integrated multiple protective device for the hard hat, cap light, battery and safety glasses. PECs have been proven fully effective for health protection. As engineered today, PEC technology can be far more effective in many mining applications than continuing decades of costly experiments with attempted mining engineering controls in ever changing mining conditions, as mandated by this proposed rule.

By rejecting PECs as primary controls, the proposed rule utilizes the same approach that led to the health issues which MSHA believes necessitates the proposed rule. MSHA's own data analysis of current compliance with existing exposure limits in longwall mines demonstrates that even the most advanced engineering on some of the latest, safest and most productive equipment, when combined with maximum ventilation, cannot achieve compliance under current rules.

Wearable engineering controls achieve protection and maintain the viability of mines challenged by dust control. Where these PECs can be used, they represent the latest, best and most cost effective protection methods. MSHA's rejection of these advanced devices is counterproductive to achieving the goal of protecting miners. MSHA should reevaluate its position on this issue and include, as part of a new rule, provisions that recognize and encourage PECs whenever these devices are feasible.

The Latest Science and the Proposed Rule

The VCA believes that National Institute for Occupational Safety and Health (NIOSH) disease prevalence data, MSHA exposure monitoring data, and evidence previously presented by witnesses on behalf of the National Mining Association clearly establishes that nationally, under current conditions and standards, the incidence of CWP is declining dramatically and approaching the background rate of the non-exposed, general population. Analysis of all available NIOSH data demonstrates that MSHA's contrary position is based on selective, interpreted data and that the Agency's regulatory conclusion is incorrect. MSHA's proposal to universally lower the coal mine dust exposure limit by 50 percent (and more for extended shifts) is not justified by the science as needed to reduce health risk or to provide health benefits.

Additionally, there must be recognition that some level of CWP not attributable to workplace exposures will likely be incorrectly deemed such. Per 2009 CWHSP data, the prevalence of lung disease in miners was below 2.0% while the "background prevalence" of opacities in non-exposed populations is 0.21 to 11.7% with an overall pooled prevalence (non-exposed) of 5.3%. This raises legitimate questions regarding the scientific basis for and expected benefit of the Proposed Rule.

Dust Sampling Must be Accurate

The VCA believes that accurate sampling is critical to the success of the program and necessary to comply with statutory law. Under the proposed rule, accurate sampling will not occur. MSHA's coal dust limits are based on British research that measured the effect of "respirable" dust on lung disease risk. Respirable dust is dust of a particular size that can enter the lungs and cause harm. Gaining the ability to measure that dust, and thereby design methods to limit its adverse impact on miners, has been one of the great success stories in the field of occupational health. For that reason, Congress mandated that MSHA's coal dust limits and enforcement be based on "accurate" coal dust sampling. The proposed rule mandates dust sampling procedures that will increase errors in sampling results and sacrifice "accurate" results for the sake of administrative convenience. The testimony of witnesses for the National Mining Association demonstrated that the mandated new sampling device, while perhaps helpful to provide an instantaneous indicator of relative dust levels, needs additional development and improvement to provide accurate results. Side-by-side samples collected by these personal dust monitors (PDM) in coal mines have varied greatly. The VCA supports more field-testing of the PDM and further performance improvements before adopting this device as the industry compliance tool. In addition, the PDM was never intended to be used as a single-shift compliance device and all provisions of the proposed rule relating to this should be eliminated. The VCA believes that the proposed rule's sampling mandates will create an enormous false enforcement problem with substantial adverse impacts on underground coal mining and no attendant benefits.

The Proposed Rule Makes the Currently Flawed MSHA Dust Program Worse

In the past, MSHA's controversial dust sampling and analysis system has been repeatedly criticized by the mining industry, the judiciary, advisory committees, and Congress. From its failed, court-rejected assault on the industry in the All White Center consolidated litigation (involving 5000+ invalid citations), to its court-rejected attempts to bypass statutory rulemaking requirements, this program has suffered continual rebuffs. Restoring confidence in the MSHA dust-sampling program cannot be achieved with rules that ignore the latest and best science, technology, research and accepted risk assessment and medical practice.

Preventive surveillance, new technology and the best available science must be used to reformulate a new proposal so that the goal of ending all lung disease in the coal industry can be accomplished. Achievement of this requires all parties to have confidence in the agency dust control program. The proposed rule cannot achieve this because it is not focused on identified risk. Instead, it would implement massive, complex changes based on unproven technology and procedures that will create hundreds of thousands of inaccurate results and unjustified enforcement actions where no health risks exist.

In public hearing testimony, both the United Mine Workers of America (UMWA) and the National Mining Association suggested that the new sampling technology (CPDM) be tested extensively in the mines before developing a proposal for its use for enforcement. Specifically, the UMWA suggested that "MSHA move forward with the use of the CPDM to gather true sample readings of what miners are being exposed to today with the current extended work shifts and various coal seams before we actually determine what is protective and what can be realistically achieved." MSHA must withdraw the proposal, and re-propose a new rule, after widespread testing of the CPDM is conducted.

Other Substantive and Procedural Flaws of the Proposed Rule

The VCA believes that there are numerous substantive and procedural flaws which must be addressed by MSHA before a proposed rule can be developed that will truly serve the goal of protecting miners' health. These flaws, as listed below, necessitate that the proposed rule be withdrawn:

- The failure to conduct Congressionally-mandated joint rulemaking with NIOSH to support a finding that single-shift samples provide accurate results;
- The failure to realistically evaluate the technological and economic feasibility of the new exposure limits, the new sampler, single-shift sampling, and other proposals such as those that will prohibit the continued use of accepted and safe mining/ventilation practices,(i.e. eliminating "super sections");
- The failure to determine the true costs and benefits of the proposed rule and the incorrect certification of its lack of a significant impact; and
- The failure to identify and address shortcomings of the existing program and consider alternatives that will improve miners' health while reducing burdens.

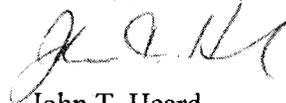
Suggested Alternatives to the Proposed Rule

The VCA requests that MSHA revoke the proposed rule and develop a rule that includes:

- Mandates for X-Ray surveillance for all current miners;
- Acceptance of the hierarchy of controls concept, permitting the use of administrative controls to protect miners' health;
- Recognition, acceptance and encouragement of personal engineering controls, like clean air helmets for protection and compliance;
- Further testing, development, and improvement of the new instantaneous dust sampler, before its use in a weekly dose-based compliance scheme is mandated; and
- Changes to existing sampling procedures to ensure that samples better represent individual miner's personal exposures.

In conclusion, the VCA believes that the proposed rule does not comply with MSHA's statutory mandates, will not restore confidence in coal mine dust sampling, does not follow sound science, is not technologically or economically feasible, will not improve miners' health, and will cause coal industry job losses by creating hundreds of thousands of new violations, fines and paperwork plan approval mandates and production cessations where no health risks exist. For these reasons, the VCA urges MSHA to withdraw the proposed rule, enter into a dialogue with all stakeholders involved, and, after addressing the flaws identified herein, re-propose a rule which addresses all the aforementioned issues in a feasible and logical manner that is based upon sound science.

Sincerely,



John T. Heard
Legislative Counsel