From: bobfcohen@gmail.com
To: zzMSHA-Standards - Comments to Fed Reg Group
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Chris Williamson
Assistant Secretary of Labor for Mine Safety and Health
Washington, D.C.

Dear Mr. Williamson,

I am writing to comment on MSHA's proposed rule "Lowering Miners' Exposure to Respirable Silica and Improving Respiratory Protection. In general, I support the proposed rule. However, I am concerned that as written, it is susceptible to being abused by mine operators who seek to evade it. I am submitting these comments based on nearly 50 years of experience with legal issues involving occupationally-related lung diseases of miners.

From 1974 to 2008, as a lawyer in private practice in the northern West Virginia coalfields, I represented many hundreds of coal miners, widows and dependent children in black lung compensation cases. Some of my work was described at length in the book by Chris Hamby, *Soul Full of Coal Dust: A Fight for Breath and Justice in Appalachia*, and in Mr. Hamby's Pulitzer Prize-winning articles which underly the book. Over the years, I litigated numerous significant black lung appeals in federal courts, including such cases as *Lisa Lee Mines v. Director, OWCP [Rutter],* 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) rev'g en banc *Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), cert. denied, 117 S.Ct. 763 (1997), the case which established the standard for deciding duplicate black lung claims under 20 C.F.R. § 725.309(d).

In addition to the representation of black lung claimants. I participated in

Department of Labor black lung rulemakings in 1978, 1980 and – most significantly – the 1996 to 2000 rulemaking which significantly amended Parts 718 and 725. *See*, 65 Fed. Reg. 79,919 *et seq*. (December 20, 2000). Together with attorney Thomas E. Johnson, I represented the National Black Lung Association as an intervenor in the National Mining Association's unsuccessful challenge to the amendments to Parts 718 and 725. *National Mining Association v. Director, OWCP*, 292 F. 3d 849 (D.C. Cir. 2002). (My name does not appear in the published decision because I had not been admitted to practice in the D.C. Circuit.)

In my representation of coal miners, I heard innumerable stories of miners being instructed to do things with their dust monitors in order to falsely avoid violations of the dust standards, such as leaving the monitors in the dinner hole. It was clear that at least some operators had little interest in protecting their miners from the dust hazards which cause pneumoconiosis.

From 2008 to 2018 I served as a Commissioner on the Federal Mine Safety and Health Review Commission, being first appointed by President Bush and then by President Obama. While on the Commission, I was particularly concerned about cases of ventilation violations under 30 C.F.R. § 75.300 *et seq*., and cases arising under section 105(c) of the Mine Act, where a miner incurs retaliation after asserting rights that are protected under the Mine Act.

The need for a regulation setting a limit to miners' exposure to respirable silica dust is clear. For over 20 years it has been known that, in terms of the prevalence and severity if pneumoconiosis, the gains resulting from the Coal Mine Health and Safety Act of 1969 were being erased because of increasing use of mining methods which involved going through rock containing crystalline silica. This increased risk to miners is vividly illustrated by the autopsies of miners killed in the 2010 explosion at Massey Energy's Upper Big Branch Mine. The West Virginia state Medical Examiner found that of the 24 victims of the explosion, where there was sufficient lung tissue for examination, 17 -- fully 71% -- had coal workers' pneumoconiosis and another four had what was characterized as "anthracosis". Even more alarming, of the 17 Upper Big Branch victims with clear evidence of pneumoconiosis, five of

them had less than 10 years of experience as coal miners. All but one of the 17 miners with CWP had begun working in the mines after the 2.0 milligram coal mine dust limit was put in effect in 1973. *See*, Report of the Governor's Independent Investigation Panel, "Upper Big Branch, The April 5, 2010 explosion: a failure of basic coal mine safety practices", at page32. The incredibly high incidence of CWP in the Upper Big Branch miners reported by the state Medical Examiner was confirmed by three expert occupational lung pathologists who reviewed the lung tissue of seven of these miners. *See*, Cohen, *et al*., "Coal Mine Dust Lung Disease Among Miners Killed in the Upper Big Branch Disaster – A Systematic Review of Lung Pathology", *American Journal of Respiratory and Critical Care Medicine*, 187:A6063 (2013). Respirable crystalline silica has been established as a major cause of the increase in prevalence and severity of CWP in American coal miners. *See, e.g.,* Cohen, et al., "Pathology and Minerology Demonstrate Respirable Crystalline Silica is a Major Cause of Severe Pneumoconiosis in U.S. Coal Miners", *Annals of the American Thoracic Society*, 19, pp. 1469-1478 (Sept. 2022).

Too many miners have gotten sick and died as a result of exposure to respirable crystalline dust. It is urgent that MSHA issue a final rule limiting exposure, without delay. Construction workers are protected from respirable crystalline silica by virtue of OSHA regulations. Since mining is a notoriously dusty occupation, and one which is known to cause pneumoconiosis, miners, including metal and nonmetal miners, should have equivalent protection under MSHA regulations.

That being said, I am very concerned that the proposed rule leaves implementation far too much in the hands of mine operators, without adequate oversight by MSHA.

Under proposed section 60.12(a), mine operators are to perform "baseline sampling" one time. No further sampling is required if the baseline sampling indicates that miners' exposures are below the "action level" of 25 micrograms of silica per cubic meter of air and either (a) sample data by MSHA or the operator in the preceding 12 months also shows exposures below the "action level", (2) "objective data" shows that miners' exposure levels will remain

below the "action level" or (3) another sample taken within three months shows exposure below the "action level". If the mine operator can meet these criteria, it will never again be required to test for the quantity of respirable crystalline silica in its mine.

There are at least five inadequacies in this provision. **First**, it does not specify that the samples obtained for all miners who are or may reasonably be expected to be exposed to respirable crystalline silica must be below the "action level". If any of the miners sampled are exposed above 25 microns of silica per cubic meter of air, the mine operator should be required to do periodic sampling going forward. **Second**, the definition of "objective data" in section 60.2 is so broad that a mine operator will be easily able to assert that it fits within this criterion. **Third**, the requirement that the data be retained has a time period which is too short. Section 60.12(h) provides that records of the baseline sampling be posted for a period of 31 days. Section 60.16(a)(2) provides that records under section 60.12(h) shall be retained for only two years. This is too short of a period of time given that an operator may be able to obtain exemption from any sampling requirement after the baseline sampling. In view of the potential for exemption from sampling requirements, the baseline sampling records should be required to be preserved for the life of the mine. **Fourth**, the results of the baseline sampling should not only be retained. The rule should provide that both the baseline sampling and any data supporting an operator's claim that it is exempt from further sampling must be furnished to MSHA and to any authorized representative of miners at the mine**. Fifth** – and most important – the rule should provide that MSHA shall, on an inspection of the mine, do its own sampling to verify the mine operator's respirable crystalline dust sampling. The absence of any means to verify the baseline sampling by mine operators and claims by operators that they are exempt from any additional sampling is – simply put – appalling.

Under proposed section 60.12(b), where the most recent sampling indicates miner exposures are above the "action level" but below the permissible exposure limit (PEL) of 50 micrograms of silica per cubic meter of air, the mine operator must take periodic samples every three months until two consecutive samples show miner exposures below the "action level". Inasmuch as this

provision will also lead to mines having an exemption from future sampling after its requirements are met, it suffers from the same five inadequacies identified in connection with section 60.12(a).

Sections 60.12(c) and 60.13 address situations where the sampling shows exposure levels above the PEL of 50 micrograms of silica per cubic meter of air. These sections provide that mine operators must provide approved respirators to affected miners, "immediately" take corrective action to lower the concentration of respirable crystalline silica to at or below the PEL, and then conduct sampling pursuant to section 60.12(c) until exposures or at or below the PEL. Additionally, section 60.13(b) provides that the mine operator must make a record of the corrective actions.

In addition to the absence of provision for monitoring of the sampling by MSHA (as stated above), these provisions contain at least three inadequacies. **First**, although the Preamble states that corrective actions are required when "any sampling shows exposures above the proposed PEL", this is not spelled out in section 60.12(c) itself (although it is spelled out in section 60.13(a)). Section 60.12(c) should be revised to explicitly require corrective action when "any sampling" shows exposures above the PEL. **Second**, the allowance of respirators until exposure is reduced to the PEL is very poor policy and should be removed. The use of respirators by miners in the course of mining is very difficult and prevents communication among miners, thereby posing additional dangers. MSHA has wisely proposed, in section 60.11(a) that compliance with the PEL shall be accomplished by "feasible engineering controls, supplemented by administrative controls when necessary." The Preamble to section 60.11 rejects the wearing of respirators as a method of compliance. This being the case, it is inconsistent for MSHA to permit the use of respirators in those situations where the exposure is above the PEL. Although section 60.13(a)(e) requires that corrective actions be taken "immediately", this is wishful thinking. Given what I have seen as a Commissioner of FMSHRC, it is clear that some mine operators do not move quickly to abate violations of other health and safety standards. Since abatement is can be slow when MSHA inspectors are at the mine overseeing the abatement, it is foolish to believe that correction of respirable crystalline silica above the PEL will be accomplished

simply because the rule says "immediately" but MSHA inspectors are not at the mine. I would suggest the following approach: Where exposure is above the PEL, this should constitute an imminent danger as provided in section 107(a) of the Mine Act. Production work should stop and miners – other than those required to carry out the corrective actions – should be removed from the area. The miners taking corrective action in the area of the excessive silica dust will have to wear respirators, but the use of respirators will be limited to remedial work. Thus, proposed section 60.14(a)(1) would be removed. Section 14(a) would provide that respirators would be worn only "if necessary by the nature of the work involved", as presently provided in section 60(a)(2). **Third**, it is not sufficient to provide that the records of corrective action be retained for two years as provided in sections 60.13(b) and 60.16(a)(3). These records, like the sampling records themselves, should be required to be furnished to MSHA and to the representatives of miners without the need for a request.

Sections 60.12(d) provides that every six months, mine operators must evaluate any changes in production, processes, engineering or administrative controls, or other factors "that may reasonably be expected to result in new or increased respirable crystalline silica exposures." Section 60.12(e) provides that if the mine operator determines as a result of the semi-annual evaluation that miners may be exposed to respirable crystalline silica at or above the action level, the operator shall perform sampling.

In the absence of mandated MSHA oversight, sections 60.12(d) and (e) amount to the fox guarding the henhouse. An operator which seeks to skirt these regulations can simply determine that there are no changes which "may reasonably be expected" to result in increased exposures. Likewise, such an operator will simply conclude that no miners "may" be exposed to silica dust levels above the action level. If an operator somehow is caught, its lawyers will forcefully argue before FMSHRC that the spongy "may reasonably be expected" standard was not reached. To have any effectiveness with recalcitrant mine operators, the provisions for semi-annual qualitative evaluations must provide **first**, that reports of the evaluations must specify all changes in production, processes, engineering or administrative controls as well as other factors that could affect respirable crystalline silica exposures, and state why or why not

such changes could have an effect on silica dust exposures, **second**, that the evaluations be provided to MSHA and to representatives of miners without the need to make a request, and **third**, that MSHA inspectors routinely review such the reports of evaluations as part of their inspections of mines. Unless the operators know that the semi-annual evaluations will be verified by MSHA and miners, there is no incentive to make thorough and accurate evaluations.

Section 60.12(f) provides that sampling shall be provided "during typical mining activities". I suggest that this section be revised to explicitly provide that mine construction is a "typical mining activity".

I am very much in favor of section 60.15, providing for medical surveillance for metal and nonmetal workers.

In conclusion, I am not suggesting that all mine operators will seek to evade rules that limit miners' exposures to respirable crystalline silica. But certainly there are some that will be tempted to falsify sampling and/or evaluations of changes, and these are the same operators who likely are exposing their miners to excessive levels of silica dust. At many mines, particularly at those without a labor union, miners are so intimidated by mine management that they will not report violations even though they are aware of them. The successful evasion of the PEL standard by unscrupulous mine operators will give these operators a competitive advantage over those operators who conscientiously follow the rule. This, in turn, will lead to a "race to the bottom" in the observance of the rule.

In essence, the monitoring and enforcement provisions of the proposed rule assume that mine operators will voluntarily comply, or perhaps that miners will force compliance where an operator fails to do so. Neither assumption is warranted.

MSHA, unfortunately, has a history of inadequate enforcement of health and safety protections which Congress mandated in the Mine Act. A case in point is the implementation of section 104(e) of the Mine Act, 30 U.S.C. § 814(e), providing significant sanctions where a mine operator has a "pattern of

violations" of mandatory health or safety standards. Although section 104(e) was created in the Mine Act's original passage in 1977, MSHA did not promulgate regulations implementing it until 1990. These regulations were so porous that no mines were cited with a pattern of violations. After the disasters at the Sago, Darby and Aracoma Mines in early 2006, issued Screening Criteria, which were still ineffective as evidenced by the fact that in 2010 the Office of Inspector General issued an audit report entitled "In 32 Years MSHA Has Never Successfully Exercised its Pattern of Violations Authority". Report No. 05-10-005-06-001 (Sept. 29, 2010). In 2013 MSHA at last issued regulations to put adequate teeth in section 104(e). 78 Fed. Reg. 5056-74 (Jan. 23, 2013). The Upper Big Branch explosion occurred on April 5, 2010, killing 29 miners. In the three years before the explosion, the pattern of violations sanction should have been imposed on Massey Energy, but the company used the porous regulations to evade enforcement. As Commissioner Michael G. Young and I stated in *Secretary of Labor v. Brody Mining, LLC*, 36 FMSHRC 2027, 2040-41 (Aug. 2014), at footnote 11, "If the . . . rule [issued January 23, 2013] had been in effect, the Upper Big Branch disaster might have been averted." Similarly, if the PEL standard of 50 micrograms of respirable crystalline silica per cubic meter of air is promulgated with the proposed inadequate monitoring and enforcement mechanisms, more miners will unnecessarily get sick and die.

In the Preamble, MSHA promulgated a series of questions for commentators. While my comments are not structured around the questions, I believe that these comments are relevant to question Nos. 12, 16, 17, 23, 25, 26, 37 and 40.

Thank you for your consideration of these comments.

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