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# Memo

**To:** MSHA, Office of Standards, Regulations, and Variances  
**From:** J.S. SMISER  
**CC:** [zzMSHA-comments@dol.gov](mailto:zzMSHA-comments@dol.gov); Fax: 202/693-9441  
**Date:** January 7, 2010  
**Re:** "RIN 1219-AB63" (Fedreg. Doc. E9-30607)

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In response to the final rule set forth in the notice of 12/29/2009, 2009fin/E9-30607.asp, the following objections are put forth:

## SUPPLEMENTARY INFORMATION

### II. DIRECT FINAL RULE AND SIGNIFICANT ADVERSE COMMENTS

**SECOND SENTENCE:** "MSHA does not anticipate that this direct final rule will result in any changes in the way violations for failure to report certain accidents are evaluated or assessed."

**RESPONSE:** This is wishful thinking. The changes that are proposed will change everything dealing with the reporting of accidents. MSHA has now included the statement "ANY OTHER ACCIDENT" under the 15 minute rule. This would mean that any accident, no matter how small, would fall under the 15 minute call rule. This would require that a call log with times and who called must be kept. This would be mandatory to prove to MSHA that the calls were made. Times would be logged in and telephone bills with time stamps shown to prove that the calls were made within the 15 minute limit. We fail to see how this would protect and make the miner safer in his/her job.

**THIRD SENTENCE:** "MSHA expects no opposition to the changes and no significant adverse comments."

**RESPONSE:** This is not realistic thinking. The impact of this rule will change the way that all mining companies are forced to report ALL accidents.

### III. REGULATORY BACKGROUND

**SECOND PARAGRAPH:** "Under existing Sec. 50.10, operators must report accidents within 15 minutes, once the operator knows or should know that the accident has occurred."

**RESPONSE:** The statement "or should know" is problematic. The companies have no guidelines to defend themselves in this action. MSHA was not at the site at the time of the accident and is given the power to say what and when the company "should have known" of the accident in question. This is like using a crystal ball to decide what and when to say "should have known". This kind of action is forcing companies to seek legal action where it is not needed. The courts are over-burdened as it is with unnecessary case loads. This action is nothing more than another revenue source for the federal government, a financial loss to the mining companies, and employment reduction for the miner.

### IV. SECTION-BY-SECTION ANALYSIS

**FIRST PARAGRAPH-SECOND SENTENCE:** "Section 50.10 of this direct rule, therefore, is changed to require that the operator immediately contact MSHA in the event of the following accidents: (1) Death of an individual at the mine; (2) injury of an individual at the mine which has a reasonable potential to cause death; (3) entrapment of an individual at the mine which has a reasonable potential to cause death; or (4) ANY OTHER ACCIDENT."

**RESPONSE:** Number (4) any other accident is a real problem. This opens the door to a full set of compliance problems and MSHA abuse of power in the interpretation of accident. This can be said that any accident, no matter how small, as a first aid case, must be reported within 15 minutes with all the time tracking of a serious accident. A first aid case which requires a band-aid will be reported in 15 minutes and is subject to a penalty of \$5,000.00 to \$60,000.00 is ridiculous. This is out and out legal thief action. To report every first aid case within 15 minutes and keep all the necessary paper work to defend your action will require a whole department. This action does nothing to provide safer workplace for the miner. The cost to the mining companies will be reflected on the pay to the miners and the availability of jobs for the miners.

**SECOND PARAGRAPH-FIRST SENTENCE:** "Under the direct final rule, by changing the immediate notification regulation to separately identify the categories of accidents that require penalties specified in Section 5 of the MINER ACT, MSHA will no longer have to manually review all failure to report violations."

**RESPONSE:** Section 5 of the MINER ACT states "For purposes of the preceding sentence, the notification required shall be provided by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death, has occurred." This does not state "should know". This is a part that you have added as a catch-all for inspector

abuse. You know it and we know it. The statement that this rule will make everything more transparent is just not true. If the transparency is to be, then the proposed Sec. 50.10(d) would be identified by each remaining items of the list of 12 accidents that require the 15 call provision. The use of the item Sec.10(d): Any other accident, is an deliberate attempt to create confusion and vagueness to an already confusing standard. The miner, in the end will pay the price for this action with pay and loss of jobs.

**SECOND PARAGRAPH-THIRD SENTENCE:** "Violations of Sec. 50.10(a), (b), and (c) would automatically receive a proposed penalty of \$5,000 or more, up to \$60,000, under the assessment provision of Sec. 100.4(c)."

**RESPONSE:** At this point, the Sec. 100.4(c) does not exist. MSHA is creating a new provision to cover this action by changing the of the numbering system of 30 CFR Part 100. The proposed penalty of \$5,000 to \$60,000 is unclear. What determines the amount of the penalty? MSHA does not use the 30 CFR Part 100 tables for this. Does this mean that the small mining companies are assessed the \$5,000 penalty and the larger companies are assessed the \$60,000 penalty? This opening in the amount could mean a great deal to the miner in being able to continue to work for a mining company that is already having financial trouble. The rules for this penalty should be placed in the standard. This would be the "transparency" that you state are being accomplished by this new rule.

**THIRD PARAGRAPH-THIRD SENTENCE:** "In addition, automating proposed assessments for most violations for failure to report an accident will improve the efficiency and effectiveness of MSHA's assessment process."

**RESPONSE:** This is just not true. This action will just clog the court system with the additional cases that this will produce. The CLR's will be overloaded with conferences and cases loads. The mining companies will be forced to take legal action on each mandated 15 minute call to MSHA due to the potential penalty that will be assessed. The cost of this will be pasted on to the employees in the lack of jobs and reduction of pay.

## V. REGULATORY ANALYSES

### B. EXECUTIVE ORDER 12866—REGULATORY PLANNING AND REVIEW

**FIRST PARAGRAPH-SECOND SENTENCE:** "MSHA has determined that this direct final rule does not have an annual effect of \$100 million or more on the economy; therefore, the rule is not an economically significant regulatory action under section 3(f)(1) of E.O. 12866." The changes contained in this direct final rule are nonsubstantive and organizational in nature. MSHA does not anticipate that this direct rule will result in any changes in the way violations for failure to

report certain accidents are evaluated or assessed. The changes will facilitate more efficient use of MSHA's resources and administrative processes. The changes neither alter the compliance burden placed on mine operators nor impact the health and safety of miners."

RESPONSE: It will not take very many of the \$60,000.00 penalties to exceed the \$100 million number that is stated in your analysis. The changes will be many in the way that accidents will be evaluated and assessed. The addition of ALL ACCIDENTS will create a whole new set of potential problems for the mining companies. Where you say that "changes neither alter the compliance burden placed on mine operators" is a false statement. The addition of adding ALL ACCIDENTS will place a great deal of additional burden on the mine operator. The part of the statement which you state that "nor impact the health and safety of miners" is true. This final rule does nothing to add to the health and safety of the miner. The final rule will put miners that are working in jeopardy of fewer jobs and less chance for higher pay due to cost of implementation of this rule. The purpose is to add more funds into the coffers of the federal government when the mining companies are in a struggle to stay in business due the poor economy and mismanagement of the government. The cost that will be incurred by the above rule will adversely affect the miners in pay and jobs.

#### PART 50—NOTIFICATION, INVESTIGATION, REPORTS AND RECORDS OF ACCIDENTS, INJURIES, ILLNESSES, EMPLOYMENT, AND COAL PRODUCTION IN MINES

SEC. 50.10 IMMEDIATE NOTIFICATION.: "The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving: (a) A death of an individual at the mine; (b) An injury of an individual at the mine which has a reasonable potential to cause death; (c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or (d) Any other accident."

RESPONSE: The statement "without delay and within 15 minutes" does nothing for the injured person. The person is found and without first aid could die while you are making the all important phone call to the MSHA center. You care nothing for the injured person. You are just interested in trying to hold the mining company responsible for the 15 minute call in an attempt to assess a penalty for not doing so. This is helping the safety and health of the miner? I don't think so. Part (d) "Any other accident" has added the real kicker to the equation. You now are going to hold the mining company responsible for any accident, no matter how small, to the 15 minute rule of call to MSHA, and are subject to the assessment of a penalty for not doing so. How does this add to the safety and health of the miner? The miner may need to have a band-aid placed on a minor cut of a finger, but the company now is mandated to FIRST call MSHA to turn in an accident and to document all the telephone calls, times, and parties talked to, complete an accident report to have the information needed for the 15 minute call, and then maybe have time to treat the injured miner. This is an improvement to the system? This is

going to make the miner safer? This is not going to cost the mining company time and money? This is not going to impact the mining companies? This is going to improve the efficiency and effectiveness of the program? Is this going to improve the safety and health of the miner? The only thing that this will do, is to add more burden, more time needed, and add more cost to the mining companies, which could be used to provide conditions that would be helpful to the working miner and provide additional jobs for miners looking for jobs in this down turned economy. The statement "should know" is deliberately ambiguous to add unnecessary legal actions, to be taken by the mining companies, to avoid the decisions made by the MSHA inspector in the after-the-fact ruling. The inspector was not on the site at the time of the accident in question, but comes in and tells the company when the company knew the accident occurred. This action is adding insult to injury and insinuating that the mining company is not protecting the health and safety of the miner. In the words of an MSHA official, "the company is guilty, give them what they deserve".

J.S. Smiser

Safety Manager

Alamo Cement Company, Ltd.

P.O. Box 34807

San Antonio, Texas 78265

210/208-1920

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