AUGUST 15, 2016 | MSHA INSPECTIONS, CITATIONS & ENFORCEMENT

MSHA Touts Mines' High Compliance Rates With Respirable Dust Limits As Last Phase Goes Into Effect

By: Nicholas W. Scala

In what is clearly an effort to nudge mining operators into increased compliance and to show evidence backing tighter limits on toxic dust exposures, MSHA recently reported that nearly all dust samples taken under its new coal dust rule so far complied with the Agency's new standards adopted two years ago that had taken effect.

Agency officials suggest the sampling results rebut industry's earlier legal arguments against the 2014 coal dust rule – including on feasibility grounds – which the Court of Appeals rejected by throwing out a challenge to the rule earlier this year.

MSHA issued the report as it began implementing the third and final phase of its major rule to reduce respirable dust exposures and resulting "black lung" risks in coal mining. August 1st marked the implementation date for reducing the overall respirable dust standard in coal mines from 2.0 to 1.5 milligrams per cubic meter of air.

Along with that key reduction, MSHA's 2014 rule also further reduces concentration limits from 1.0 to 0.5 milligrams per cubic meter of air for both ventilation air and miners previously diagnosed with black lung.

MSHA's respirable coal dust rule takes full effect as the Agency simultaneously looks into the likelihood of adopting tighter restrictions on crystalline silica dust to which mine workers can be exposed. That rulemaking dovetails with the Occupational Safety and Health Administration earlier this year adopting a landmark but contentious rule that lowers limits on respirable silica dust for workers in general industry and construction. OSHA's rule means that almost as a matter of course, MSHA will follow suit to similarly reduce mine workers' silica exposures.

MSHA believes recent data shore up evidence of the feasibility of reaching lower coal dust limits as set forth in the 2014 rule. Agency officials reported in July that about 99 percent of the respirable coal mine dust samples collected from April 1, 2016 through June 30, 2016, complied with coal mine dust standards. Agency personnel analyzed more than 20,000 underground coal mine operator samples using the new, "cutting-edge" continuous personal dust monitor that provides miners with dust results in real time during the working shift, MSHA said.

Joseph Main, MSHA administrator, characterized the success rate this way:

"The positive sampling results are due to the extraordinary efforts of MSHA and industry working to clean up the air that miners breathe and successfully implement the respirable dust rule. … The nation's coal miners are better protected from debilitating and deadly disease than ever before, but we still have much more work to do to prevent black lung. Miners deserve to work their shift each day and return home healthy and safe."

Since the final rule went into effect on Aug. 1, 2014, MSHA and mine operators have collected more than 122,000 respirable dust samples and more than 99 percent of those samples met compliance levels, according to Agency figures.

It is noteworthy, however, that the sampling data upon which MSHA relies were collected during the first two phases of implementation, and we have yet to see how closely MSHA's feasibility estimates can be reached through the third and final phase of this far-reaching standard.

Industry has had plenty to be concerned about, as expressed in litigation that followed MSHA's issuance of the rule two years ago.

In January, the U.S. Court of Appeals for the 11th Circuit denied a challenge to the respirable coal dust (RCD) rule brought by two separate groups representing the coal industry, finding that MSHA acted within its statutory authority in promulgating the dust rule, and that MSHA's dust rule reflected reasonable agency decision-making based on the record.

The industry had argued that MSHA exceeded its statutory authority by not gathering more scientific data and failed to demonstrate the rule's feasibility when it was issued – in particular opposed to MSHA codifying its long-disputed position on the feasibility of single-shift sampling for RCD.

In the final phase of MSHA's rule, which began in August, the maximum acceptable concentration limit of RCD reduces to 1.5 milligrams per cubic meter (mg/m^3). The rule also changed the method of calculating the lower RCD values applicable to any mining operation where respirable silica dust is present, although it maintained absolute limits of 0.1 mg/m^3 of respirable silica.

Parties against the coal dust rule challenged whether MSHA demonstrated the feasibility of what they claimed are new silica PEL and silica-based, reduced RCD limits, but the Agency claimed that the new rule does not establish any new silica PEL.

The legal challenge further objected to the silica standard on feasibility, given that the new Continuous Personal Dust Monitor does not measure silica; but the Court noted that without an existing device capable of direct, real-time measurement of silica content in RCD, the Agency had elected to use a "proxy measure" of collecting samples itself and determining a percentage of silica specific to a mine's atmosphere.

In its conclusion throwing out the overall challenge, the 11th Circuit found that MSHA "acted consistently" with its statutory authority and that substantively, "MSHA's decisions comport with the requirements of the statute and are not otherwise arbitrary, capricious, or an abuse of discretion."

MSHA in its recent update included NIOSH data estimating that black lung has caused or contributed to the deaths of 76,000 coal miners since 1968, saying that since the late 1990s, the percentage of miners identified with black lung has increased from 5 to 10 percent among long-tenured workers. More than $45 billion in compensation benefits have been paid out to coal miners disabled by black lung and their survivors, the agency noted.

With the backing of the 11th Circuit decision and now with the Agency touting data that at least so far demonstrate high levels of mine operator compliance with the new rule, we can expect MSHA to continue focusing squarely on the issue of respirable coal dust – and to pursue tighter regulations on silica exposure in the near future.