



Effective 11/15/84
(remove old ones on this date)

State of West Virginia

Department of Mines

Charleston 25305

JOHN D. ROCKEFELLER, IV.
Governor

WALTER N. MILLER
Director

December 8, 1983

The Honorable A. James Manchin
Secretary of the State of West
Virginia
State Capitol Building
Charleston, West Virginia 25305

Dear Secretary Manchin:

Enclosed are revised rules and regulations promulgated by the Board of Coal Mine Health and Safety governing No Act Permitted Endangering Security of Mine; Search for Intoxicants, Matches, Etc. These regulations were promulgated by the Board pursuant to Chapter 22, Article 2A, Section 4 and 4(a) of the Code of West Virginia, and become effective January 15, 1984.

These regulations will replace the existing Series 35 Administrative regulations now in effect.

Please be advised that these rules and regulations promulgated by the Board of Coal Mine Health and Safety are exempted by West Virginia Code 22-2A-4(a) from the Legislative Rule-Making Review Committee.

Please file these rules and regulations in the appropriate State register.

Yours for Mine Safety,

Walter N. Miller, Director
West Virginia Department of Mines

WNM:te

Enclosures

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE Dec. 8, 1983
Administrative Law Division



State of West Virginia

Department of Mines

Charleston 25305

JOHN D. ROCKEFELLER, IV.
Governor

WALTER N. MILLER
Director

TO: All Persons Interested in the Rules and Regulations Constructed by the Board of Coal Mine Health and Safety

FROM: Mark A. Scott, Health and Safety Administrator

SUBJECT: Rules and Regulations Governing No Act Permitted Endangering Security of Mine; Search for Intoxicants, Matches, Etc.

DATE: December 12, 1983

ACTION: Final rule.

AUTHORITY: These amendments are promulgated in accordance with Chapter 22, Article 2A, Section 4 of the West Virginia Code.

SUMMARY

These amendments revise the existing Series 35 Administrative regulations of the West Virginia Department of Mines governing an operator's responsibility to prevent acts endangering the mine and to search for intoxicants and smoking materials.

The Board has found that:

1. Alcohol and drug abuse problems are prevalent in society, and are found throughout the nation's work force. It is recognized that the mining industry experiences the same exposure to these problems as other industries; however, their existence poses a particular safety hazard because of the unique conditions found in mining.
2. State law (Code 22-2-57) places responsibility for removing such persons from the mines with the operator. Department of Mines Administrative Regulation Series 35 provides the means by which an operator can require an appropriate medical examination of any person whom the operator suspects is under the influence, for purposes of justifying removing that person from the mines.
3. There is a need to prevent the use of these regulatory provisions by the operator to harass or otherwise discriminate against any miner.

4. There is also a need to insure that any medical examination used to determine if a person is under the influence is conducted in a timely manner, in order to provide as true a reading as possible of the person's condition at the time he is removed from the mine.
5. There is also a need to enable operators to make the most reasoned judgments possible concerning when to remove a person from the mines.
6. The provisions in Series 35 as originally promulgated do not adequately protect miners from harassment and discrimination because (a) the operator may require a medical examination, rather than making it optional for the employee; and (b) the miner is not provided the opportunity to have a representative notified when he is removed from the mines.
7. The provisions in Series 35 as originally promulgated do not enable the operator to make the most reasoned judgments about removing a person from the mines, because there are no standards which an operator can use to establish reasonable cause for removing that person.

Therefore, the Board has made several changes to Series 35 to address these findings. The intent of these changes is (1) to address concerns raised by the West Virginia Department of Health relating to the absence of approved medical tests for controlled substances; (2) provide additional protection of the individual miner's rights against unreasonable searches; (3) provide a stronger basis for the operator's decision to remove from the mine a person whom the operator suspects is under the influence of intoxicants; and (4) enable an evaluation to be made of the effectiveness of this regulation in reducing the safety hazards associated with persons being in mines under the influence of intoxicants.

The specific changes proposed to Series 35 are:

1. Amend Section 4(d) to clearly identify the operator's responsibility to remove from the mines any person whom the operator suspects is under the influence of intoxicants.
2. Amend Section 4(d) to include provisions which require reasonable cause to be established before such action is taken, and which establish the conditions by which reasonable cause may be determined.
3. Add a new Section 4(e), previously designated as Section 4(d), to include provisions which make the medical examination of a person suspected of being under the influence optional for the person being questioned rather than mandatory.
4. Add provisions in 4(d) and (e) to provide notification to the miner's representative when such action has been taken.
5. Add a provision in Section 4(e) to require operators to annually submit information to the Department of Mines to enable an evaluation of the effectiveness of this regulation to be made.

DISCUSSION OF MAJOR COMMENTS RECEIVED

On August 5, 1983, the proposed amendments were mailed to interested persons for comment. On August 30 a public hearing was held in Charleston to receive additional comments on the proposal.

The following is a section-by-section discussion of the major comments received:

Section 1 - General: No major comments received.

Section 2 - Effect and Purpose: No major comments received.

Section 3 - Definitions: No major comments received.

Section 4 - No Act Permitted Endangering Security of Mine; Search for Intoxicants, Matches, Etc.

1. The majority of the comments received on this proposal related to various provisions spelling out the role of the miner representative in this regulation. A few commenters recommended that the operator wait until the miner's representative arrives before removing a person from the mine, or at least wait a "reasonable" period of time before removing the person. The Board disagreed because if a person chooses to have a medical examination, that examination must be administered promptly to provide as accurate a reading as possible of the person's condition at the time he is removed from the mine. Therefore, any time spent waiting for the miner's representative will jeopardize the accuracy of such exam. It was further felt that notification of the representative fulfills the need established by the Board for the representative to be aware of such action.

A few commenters recommended removing all references to notification to the miner's representative of a person being removed. The Board disagreed because it previously determined that it is important for the representative to be aware of such action to protect the person from harassment and discrimination. The Board felt that involvement of the representative to the extent provided in the regulation is necessary to meet this objective. A few commenters also recommended removing the provisions requiring that the miner's representative be afforded the opportunity to participate with the operator during administration of the medical examination. The Board disagreed because the need has been established to allow miner representative involvement to prevent against harassment and discrimination. However, the Board recognized that such involvement could jeopardize the timeliness of the examination if it took much time for the representative to arrive where the examination is being performed. Therefore, the Board amended the regulation by providing that the medical examination shall not be delayed by the absence of the miner representative.

2. A few commenters suggested changes to insure that persons with physical ailments are not presumed to be intoxicated because of the reasonable cause conditions established by this regulation. The Board felt that, although this is a legitimate concern, the likelihood of such a person being misdiagnosed as intoxicated is limited because (a) persons with such medical conditions will be known to others at the mine; and (b) such persons can request a medical examination to prove the symptoms are not due to intoxication. One commenter further recommended that before any person is presumed to be intoxicated, that such person be examined by a certified EMT employed on such shift. The Board disagreed because of the reasons cited above and because such examination is not part of an EMT's duties and thus cannot be regulated as such.
3. A few commenters recommended that the regulations specify that any level of blood alcohol constitutes "under the influence." The Board disagreed because although evidence suggests that any level of blood alcohol may impair performance in some persons, there is no established justification for establishing a threshold limit other than that already provided in the State drunk driving law.
4. One commenter recommended that any miner who refuses a medical examination be presumed to be "under the influence" by the operator. The Board disagreed because the purpose of the regulation -- to remove persons in such condition from the mine -- has been met by the operator's right to remove that person, regardless of whether the person has taken a medical examination or not.
5. A few commenters recommended eliminating the record keeping requirements in the regulation. The Board disagreed because such records have been deemed necessary to evaluate the effectiveness of the regulation, and further because such records will not reveal the names of any persons or the mines where they are employed, thereby eliminating any undue burden on any operator or individual.

OTHER

1. One commenter recommended requiring that the miner's representatives be identified to the operator at each mine, for purposes of notification under this regulation. The Board agreed and felt that if such information were made available, it would help minimize the delay involved in the operator notifying the representative when removing a person from the mine site.

ADDITIONAL INFORMATION

Questions and requests for copies of this regulation should be addressed to:

Mark A. Scott, Health and Safety Administrator
Board of Coal Mine Health and Safety
West Virginia Department of Mines
Rm. E-153, State Capitol Building
Charleston, West Virginia 25305

MAS:te

Attachment

WEST VIRGINIA ADMINISTRATIVE REGULATIONS

DEPARTMENT OF MINES

CHAPTER 22-4

SERIES 35

(1983)

SUBJECT: RULES AND REGULATIONS GOVERNING NO ACT PERMITTED ENDANGERING SECURITY
OF MINE; SEARCH FOR INTOXICANTS, MATCHES, ETC.

PROMULGATED
REGULATION

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE 12-8-83
Administrative Law Division

FINAL
REGULATION

I N D E X

SUBJECT: Rules and Regulations Governing No Act Permitted Endangering Security
of Mine; Search for Intoxicants, Matches, Etc.

General	Section 1
Authority	Section 1.01
Effective Date	Section 1.02
Effect and Purpose of Regulations	Section 2
Definitions	Section 3
No Act Permitted Endangering Security of Mine; Search for Intoxicants, Matches, Etc.	Section 4

WEST VIRGINIA ADMINISTRATIVE REGULATIONS

DEPARTMENT OF MINES

CHAPTER 22-4

SERIES 35

SUBJECT: Rules and Regulations Governing No Act Permitted Endangering Security of Mine; Search for Intoxicants, Matches, Etc.

Section 1. General

1.01 Authority - These rules and regulations are issued under authority of Chapter 22, Article 2A, Section 4 of the West Virginia Code.

1.02 Effective Date - These rules and regulations were promulgated on the 1st day of December, 1983, and become effective on the 15th day of January, 1984.

Section 2. Effect and Purpose of Regulations

2.01 These rules and regulations shall have the effect of law and violations shall be deemed a violation of law and so cited with the same effect as law. All provisions of Article 1, Chapter 22 of the Code relative to enforcement are applicable to the enforcement of these rules and regulations.

2.02 The purpose of this section is to prevent persons from acting in such a manner as to endanger persons working in or at a mine and to establish guidelines to prevent hazardous articles and intoxicants from being carried into and utilized by persons working in or at a mine.

Section 3. Definitions

3.01 All terms used in these rules and regulations, not defined herein, shall have the meanings set forth in Chapter 22, Article 1, Section 1 of the Code.

Section 4. No Act Permitted Endangering Security of Mine; Search for Intoxicants, Matches, Etc.

4.01 No miner, workman or other person shall knowingly damage any shaft, lamp, instrument, or machinery. No person shall alter or obstruct any air course or ventilating devices unless instructed by a certified person, or enter any part of a mine against caution, or disobey any order of any mine foreman or assistant mine foreman given in carrying out any of the provision of this section.

4.02 Open lights, smoking, and smokers' articles, including matches, are prohibited in all mines. No person shall at any time enter mines with or carry therein any matches, pipes, cigars, cigarettes, or any device for making lights or fire not authorized or approved. The operator shall at frequent intervals, search or cause to be searched, any person, including his clothing and material belongings, entering or about to enter the mine, or inside the mine, to prevent such person from taking or carrying therein any of the above mentioned articles or intoxicants.

Any search of a person for purposes of enforcement of this paragraph, may be required of persons entering a mine or work area of a mine. If any person refuses to submit to a search, that person shall not be permitted to enter the mine or work area of a mine until such time as a personal search is conducted. Searches of persons may be conducted in a mine or work area of a mine. If any person refuses to submit to a search, that person shall be required to leave such mine or work area of a mine until such time as a personal search is conducted.

4.03 No person shall at any time carry into any mine or work area of any mine any intoxicant or enter any mine or work area of any mine while under the influence of intoxicants. For the purposes of enforcement of this paragraph the word "intoxicant" shall mean alcoholic liquor as defined in West Virginia Code Chapter 60, Article 1, Section 5, or a controlled substance as defined in West Virginia Code Chapter 60A, Article 1, Section 101(d) not specifically prescribed by a physician who is fully aware of and has taken into account the job duties the person is expected to perform.

4.04 For purposes of enforcement of Section 4.03 of these regulations, an operator shall refuse entry into a mine or remove from the mine any person whom the operator has a reasonable cause to believe is under the influence of intoxicants. The operator shall immediately notify a miner's representative employed on such shift that such action has been taken. The names and telephone numbers of the miner's representatives shall be provided to the mine operator and posted on the mine bulletin board. Reasonable cause shall be determined by the existence of one or more of the following conditions:

- (1) Odor of alcohol or other intoxicant about the individual or on his breath;
- (2) Abnormally slurred speech, stammering, stumbling, weaving, or other loss of motor coordination;
- (3) Unexplained animated signs of intoxication or influence drugs on the individual;
- (4) Other discernable signs of intoxication or influence drugs on the individual.

4.05 Any miner who has been denied entry or removed from the mine pursuant to Section 4.04 of these regulations shall be afforded the opportunity to receive

a timely and appropriate medical examination to be provided by the operator. The operator shall afford the miner the opportunity for transportation to the medical facility where the examination will be performed. Such medical examination may include administration by a physician of tests prescribed and approved by the Department of Health of the State of West Virginia for the determination of a base of a controlled substance or alcohol pursuant to Chapter 17C, Article 5 of the West Virginia Code. If the results of any such tests demonstrates a blood alcohol level of one tenth (.10) of one percent (1%) or more by volume, or the presence of controlled substances to a degree which renders such person incapable of performing safely, such tests shall be determinative that a person is "under the influence" for purposes of this section.

The designated miner's representative shall be provided the opportunity to participate with the operator or his authorized representative during the administration of the appropriate medical examination; however, the medical examination shall not be delayed by the absence of the miner representative. The representative shall be compensated by the operator until such time that the representative leaves the mine site.

Each operator shall provide to the Director of the Department of Mines by June 1st of each year, on a form provided by the Director, a list of any such tests required during the previous twelve (12) months and the results of such tests. The information shall be used by the Department to evaluate the effectiveness of the regulation, and shall in no way identify the name of the employee required to take the test or the mine where that person is employed.