From: Patrick Jacomet <patj@oaima.org>
Sent: Tuesday, April 25, 2017 3:34 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Cc: 'Pat Jacomet '
Subject: RIN 1219-AB87
Attachments: OAIMA - Comments MSHA Workplace Exam Proposed Rules.pdf

Patrick A. Jacomet
Executive Director
Ohio Aggregates & Industrial Minerals Association
162 N. Hamilton Road
Gahanna, Ohio 43230
1-800 OH ROCKS or 614-428-7954
Cell 614-325-8739
fax 614-428-7919
patj@oaima.org

"It is hard to fail, but it is worse never to have tried to succeed."
— Theodore Roosevelt

If it Can't Be Grown, It has to be Mined!
Visit: www.oaima.org

AB87-COMM-107

OHIO AGGREGATES & INDUSTRIAL MINERALS ASSOCIATION

162 N. HAMILTON ROAD • GAHANNA, OHIO 43230
(614) 428-7954 • 800 OH ROCKS (647-6257) • FAX (614) 428-7919
WEBSITE: WWW.OAIMA.ORG

April 25, 2017

Shelia McConnell
Director
Office of Standards, Regulations, and Variances
Mine Safety and Health Administration

Re: **Workplace Examination Rule Comments**

Dear Director McConnell:

The Ohio Aggregates & Industrial Minerals Association ("OAIMA") submits the following comments to the Mine Safety and Health Administration's final proposed rule addressing examinations of working places in metal and nonmetal mines.

OAIMA is a trade association representing the State of Ohio's mining operations, except coal. Currently, 100 Ohio mining operators are members of OAIMA. Ohio is the seventh largest aggregate producing state in the United States with more than 450 aggregate operations. The Ohio aggregates industry employs nearly 5,000 people with another 40,000-people employed indirectly in the industry as truck drivers, electricians, mechanics, and other supporting professions. OAIMA is a leading voice and advocate for the Ohio aggregates industry. All of the mining operators represented by OAIMA are subject to the Mine Safety and Health Act and will be required to comply with changes made by the final workplace examination rule. OAIMA offers the following comments to the final proposed rule:

A. The effective date of the final rule should be indefinitely delayed.

As a preliminary matter, OAIMA would like to respond to MSHA's request for comments regarding the effective date of the final rule. On March 27, 2017, MSHA proposed to delay the effective date from May 23, 2017 until July 24, 2017. OAIMA maintains this two-month period is inadequate. Rather, OAIMA asserts the effective date of the rule should be indefinitely delayed for a variety of reasons.

First, as set forth below, the rule is still vague. MSHA seemingly agrees and has asserted it will "develop outreach and compliance assistance materials related to the final rule and will include these materials in stakeholder seminars to be held in public locations accessible to the mining public. As part of this process, MSHA will identify best practices that can be shared with the mining community." 82 FR 7684. The final rule should not become effective until MSHA has completed the outreach and compliance assistance materials and educated the industry on those materials.

Moreover, on February 22, 2017, MSHA notified the industry and Congress it intended to pause implementation of the new rule pending further policy review by the new administration. To date, that review has yet to be completed and should not be done until the Trump Administration appoints the next assistant secretary of labor to administer MSHA. Finally, the final rule is already under judicial review. In mid-March 2017, a number of industry associations filed a petition with the Eleventh Circuit Court of Appeals to challenge the final rule.

For all the foregoing reasons, the effective date of the final rule should be indefinitely delayed.

B. The definition of "working place" is still vague and needs further clarification.

With regard to substance, the final rule fails to sufficiently clarify the definition of "working place." Specifically, the final rule requires a competent person to examine each "working place at least once each shift before miners begin work in that area." 30 CFR §56.18002. MSHA did not amend the definition of "working place" which is currently broadly defined as "any place in or about a mine where work is being performed." 30 CFR §56/57.2. Rather, in the preamble to the final rule, MSHA clarified that consistent with the existing definition, "working place" includes "roads traveled to and from a work area," however, would not include "roads not directly involved in the mining process, administrative office buildings, parking lots, lunchrooms, toilet facilities, or inactive storage areas." 82 FR 7684. MSHA furthered that "working place" "applies to all locations at a mine where miners work in the extraction or milling processes." While the clarification is helpful, without amending the codified definition of "working place" there is sufficient ambiguity leaving mine operators uncertain as to their obligations in performing workplace examinations.

C. "May adversely affect safety or health" is still vague and needs clarification.

The language proposed in 30 CFR §56.18002(a) and §57.18002(a) require operators to examine each workplace for conditions that "may adversely affect safety or health." The term "may adversely affect safety or health" is similarly ambiguous, overly broad, and is ripe for vastly different interpretations. Without clarification, mine operators will be subject to ever-changing interpretations when MSHA inspects the mine. Indeed, the lack of clarification assures the variability in inspector judgment as to what "may adversely affect safety or health."

In its commentary to the final rule, the Administration seems to acknowledge the inherent variability of judgment in defining "may adversely affect safety or health" yet attempts to quell this concern by asserting it "regularly trains its inspectors and managers" and will "develop outreach and compliance assistance materials related to the final rule." 82 Fed. Reg. 7684. OAIMA agrees "may adversely affect safety or health" warrants further clarification, however, maintains such clarification should be through the formal rule making process with an opportunity of notice and comment to the public, most specifically, from the affected industry.

D. The new recordkeeping requirements are too expansive.

The final rule establishes recordkeeping and reporting requirements that impose significant burdens on mine operators. Specifically, the final rule requires mine operators to create and maintain a record of each workplace examination which includes: name of the examiner; date of exam; location of areas examined; description of each condition that may adversely affect the safety and health of miners; and date of corrective action.

The proposed rule included a requirement that the competent person sign the record. OAIMA appreciates MSHA's response to the overwhelming comments from the industry that requiring the competent person to sign the record would result in the competent person having an increased potential for: liability under Section 110(c) of the Mine Act; civil penalties; and criminal prosecution for knowing and willful violations. Moreover, requiring the competent person to sign the record would discourage miners from conducting workplace examinations. That said, removing the signature requirement does not alleviate these concerns. In fact, MSHA explicitly noted it "believes that the single act of signing one's name adds no more and no less to the substantive duties and qualifications of the person who conducts the examination." 82 FR 7686. MSHA furthered "it is the *identity* of the examiner, rather than the signature, that is important to the record." 82 FR 7686. (Emphasis added.) Accordingly, the final rule does not alleviate the industry's concerns regarding requiring disclosure of the competent person's identity. For example, with regard to potential Section 110 liability, the relevant analysis is whether MSHA believes an identified agent of the mine committed a knowing or willful violation of a mandatory safety and health standard. The potential for this liability remains if the record identifies the competent person. Accordingly, it is the identity of the competent person requirement not his or her signature that is problematic in the new workplace examination rule.

Moreover, the final rule maintains the vague requirement from the proposed rule that the record contain a "description of each condition found that may adversely affect the safety or health of miners." 57.18002(b). Again, the industry submitted numerous comments during the initial comment period requesting clarification on the amount of specificity MSHA will require in the description of condition. In response, MSHA "clarified that the description should provide sufficient information which allows mine operators to notify miners of the condition and to take prompt corrective action." 82 FR 7686. This response is unsatisfactory. Without any clarity, the specificity requirement will be inconsistently applied throughout the industry by MSHA investigators.

Finally, during the initial comment period, the industry questioned the intent of the expansive recordkeeping requirements and noted they seemingly did little to advance MSHA's stated goal of ensuring that conditions which adversely affect the safety and health of miners are found and fixed. Rather, the new requirements appear to provide MSHA investigators more basis upon which to issue citations. Presumably, under this new rule, mine operators will be exposed to a minimum of two-citations: one for failing to complete any of the recordkeeping requirements; and another for the underlying adverse condition identified in the record.

E. MSHA has created confusion over who qualifies as a "competent person."

The final rule, like the existing standard, requires the workplace examination to be completed by a "competent person." After notice and comment, MSHA decided not to modify the definition of "competent person" which is currently defined as "a person having abilities and experience that fully qualify him to perform the duty to which he is assigned." §§56/57.2. Accordingly, under the existing definition and rule, "the competent person is designed by the mine operator." 82 FR 7684.

The problem, however, is that MSHA nonetheless seemingly usurps the mine operator's determination of who qualifies as a "competent person" and provides "a best practice is for a foreman or other supervisor to conduct the examination" and a requirement that the "competent person" have "the experience and training to be able to perform the examination and identify safety and health hazards." 82 FR 7684. If MSHA intends to require a "competent person" to be a foreman or supervisor and/or to have a minimal level of experience and training then those requirements need to be codified in the definition of "competent person." Otherwise, investigators are apt to second guess mine operator's business determinations regarding who qualifies as a competent person further exposing mine operators to risks of unnecessary citations.

F. The final rule will be expensive for mining operators and will not have any effect in making the mining workplace safer.

MSHA estimates compliance with the proposed rule will cost metal/non-metal operators upwards of $34.5 million annually, $10.6 million of which will affect mines with one to 19 employees. A hefty cost for which MSHA admits it is "unable to quantify the benefits." 82 FR 7689. More concerning, MSHA expressly acknowledged that it is "unable to separate the benefits of the new requirements under the final rule from those benefits attributable to conducting a workplace examination under the existing standards." 82 FR 7689. It nonetheless maintains that "[w]hile unable to quantify the benefits, the Agency has concluded the final rule will have benefits." 82 FR 7689.

MSHA likely is unable to quantify the benefits of the final rule because the data evidences a steep decline in fatalities and workplace injuries under the current workplace examination rule. In fact, in 2016 the fatal injury and all injury rates for every 200,000 hours worked in metal/non-metal mines were .0088 and 1.92, respectively, compared to 0.134 and 2.37, respectively, just six years prior. Moreover, there is no evidence that a more detailed approach to addressing workplace conditions will prevent future actions where safety professionals agree a majority of accidents are caused by human behavior. Accordingly, the final rule is unwarranted as MSHA cannot articulate how the changes will save more lives or prevent more injuries than the existing rule, and the cost of compliance to mine operators is significant.

For all the reasons stated above, OAIMA respectfully requests the effective date of the final rule be indefinitely delayed. Thank you for the opportunity to comment. Please do not hesitate to contact me with any questions or concerns.

Very truly yours,

Patrick A. Jacomet
Executive Director