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Sent: Friday, March 25, 2011 8:27 AM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: RIN 1219-AB75

2011 MAR 25 A 10:08

Attached are the comments of the National Mining Association in response to the notice of proposed rulemaking regarding "Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards," (75 Fed. Reg 81165, Dec. 27, 2010).

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AB75-COMM-13



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February 25, 2011

Mine Safety & Health Administration
Office of Standards, Regulations & Variances
1100 Wilson Boulevard, Room 2350
Arlington, VA 22209-3939

Re: Examinations of Work Areas in Underground Coal Mine for Violations of
Mandatory Health or Safety Standards, RIN 1219-AB75

Dear Ladies and Gentlemen:

Set forth below are the comments of the National Mining Association (NMA) in response to the Notice of Proposed Rulemaking of the Mine Safety and Health Administration (MSHA) regarding examination of work areas in underground coal mines (75 Fed. Reg. 81,165; Dec. 27, 2010). We appreciate the opportunity to comment on this proposal to amend 30 CFR Part 75, Subpart D by imposing expanded examination and reporting requirements on those responsible for executing the requirements of Sections 303(d)(1)(e) and (f) of the Federal Mine Safety and Health Act of 1977. Pursuant to the authority of Section 101 (a)(3) of the Federal Mine Safety and Health Act of 1977 we request the agency conduct a hearing to provide affected parties the opportunity to present testimony on this rulemaking.

General Comments

The changes to part 75 are, as described in the preamble that accompanies the proposed rule, intended to ensure that "required examinations be conducted in an effective and consistent manner..." We share this goal as examinations are an integral component of a risk-based, comprehensive safety and health management system that identifies and remediates conditions that have the potential to place miner's safety or health at risk.

In some respects the proposal brings to mind the phrase "back to the future" as the rule, if finalized as proposed, would revert back to the agency's pre-1996 requirement that examiners note both hazards and violations when conducting

examinations as required under 30 CFR Part 75. Interestingly, the earlier re-write initiated by the agency was justified on the basis that examiners needed to concentrate on conditions that "pose a hazard to miners" (61 Fed. Reg. 9793 March 11, 1996).

In fact, MSHA's justification for the current ventilation standard stated: "MSHA is persuaded that to require examiners to look for violations that might become a hazard could distract examiners from their primary duties. The final rule therefore, does not adopt this aspect of the proposal." The basis for the earlier change was the need for examiners to conduct a more thorough review for hazards, thus transforming the examination into an accident prevention procedure. The same holds true today. Miner's, before and during their shift, are reliant on the receipt of information identifying those conditions that have the potential to create an accident. Such accidents can result from conditions identified as hazardous in the workplace or from a failure to comply with a mandatory safety or health standard. Most importantly, however, is the need for all parties to recognize that conditions, practices or non-compliance events should not reach this level of immediate significance.

The proposed rule is premised upon the agency's review of a series of cited accident reports and fatality information that presumably ties each event to a condition that might have been prevented had the examiner been required to conduct an examination consistent with the proposed rule. Unfortunately, the justification for the proposal, as reflected in the preamble and in the documentation contained on the single source page for this rule, is flawed in that it requires the reader to believe that if the top ten standards had been found by examiners in the accident reports listed, the injuries would not have occurred. It is important to not only note but also to emphasize that this statement is contradictory to the Root Cause Analysis prepared by MSHA in these accident reports.

For instance, in a June 18, 2008 accident report, one of the root causes was the examiner not recognizing a hazardous condition or ignoring it. We are at a loss to understand how looking for a violation would have eliminated any of these events. They are, in large part, behavioral in nature and that should be the focal point of the agency. More examples include:

- In a January 10, 2006 accident report, one of the primary root causes was the failure to recognize a hazardous condition of the roof. No mention of not looking for violations.
- In an April 7, 2006 accident report, a primary root cause was that no pre-shift examination was conducted in the area. No mention of other violations.
- In an April 20, 2006 accident report, a primary root cause was inadequate on-shift examinations which failed to identify hazardous conditions, with no mention of other violations not being found.

- In an October 12, 2006 accident report, again, the roof had deteriorated over time creating a hazardous condition which was not detected. We are at a loss to fathom how issuing a violation will prevent this condition.
- In a March 29, 2005 accident report, a causal factor listed was that mine examinations failed to find hazards in a roadway traveled, not violations.
- In a June 6, 2005 accident report, the primary causal factor was that the victim traveled in by permanent roof support. This is, again, behavioral and related to a violation.

Specific Concerns

We are concerned with the use of the "inadequate examination" standard that is used routinely today. Presently, when a hazard (as determined by an inspector) is not listed in the record book the operator is cited – usually unwarrantable for the condition and an additional order for an inadequate examination. The proposed regulation will exacerbate this situation and has the potential to significantly increase the number and severity of citations issued with no increase in the identification of workplace hazards or reduction in workplace injuries.

Additionally, the proposed rule will impose new requirements on mine foreman, who will be required to prioritize remedial actions with no differentiation permitted based upon consideration of the condition presented. Simply put, the failure of an operator to correct a noted violation in a timely manner – a determination made solely by the inspector – will result in the issuance of additional enforcement actions. We appreciate the agency's recognition of the potential for this situation to arise and the language in the preamble that the proposal will "continue [the current] practice ... that operators prioritize and correct violations based on the seriousness of the hazard." Unfortunately, references in a preamble are of little comfort or consequence where prioritization remains an individual determination and is often viewed quite differently by the inspector and the operator. We encourage the agency to revise the proposed regulation to incorporate this determination as part of the regulation.

As presently written, the proposed regulation makes no distinction between non-S & S type violations and those violations that, if left uncorrected might become a hazard. The proposed regulation will require training for all examiners on all of Parts 75. This can lead to a situation where examiners are spending too much of their examination time looking for non-serious violations and not enough time on those conditions that can eventually lead to a hazard. This was the rationale for the change in the regulation in 1996. If the agency deems it necessary to include non-hazardous conditions in the official examination reports then we suggest that the standards of concern be specifically listed in the regulation. This will allow the operator to conduct more directed training for examiners so that they can conduct their examinations effectively and in a timely manner.

Lastly, the preamble identifies conditions and “repeated violations [that] expose miners to unnecessary safety and health risks...” Indeed, it notes that these are often included in the top ten cited safety standards and account for an inordinate percentage of the total violations issued in underground coal mines. We appreciate and share the agency’s concern with these conditions as they may have the potential to put miner’s safety and health at risk if uncorrected, once identified. In point of fact, however, several of these standards do not logically lend themselves to inclusion in pre-shift examinations. 30CFR 75.1403 is a list of haulage safeguards, many of which will not lend themselves to pre-shift examinations. Similarly 75.1725(a) is an all-inclusive standard. Mobile equipment issues need to be identified by the mobile equipment operator or during weekly inspection, not during pre-shift examinations.

We encourage the agency to include in the proposed rule a listing of those violations that the agency believes an examiner should identify and record. In the absence of this “limiter” there is no doubt that at some point a missing fire extinguisher tag will result in the issuance of an inadequate examination violation – a condition that while a violation of a safety standard, is not an immediate hazard to miner safety and health.

Lastly, the proposed regulation does not address the specifics of recordkeeping compliance with the new provisions and whether the time for correction of a violation is to be designated in the book. We are concerned that while this change is well intentioned and the requirement of violation documentation is meant to focus attention on violations which may not be considered hazardous, the legal ramification for examiners is significant, even for a non-S&S violation. It is unclear from the preamble if these liability concerns were considered by the agency during the drafting of the proposed regulation.

It is unfortunate that the agency is precluded from holding the workforce, as well as management, responsible for their work areas and is instead limiting the legal liability to examiners. The roof bolter that does not install bolts in the proper pattern, or the shuttle car operator that operates a car with an oil leak, or the miner operator that operates a miner with a non-permissible headlight should be held as accountable as the foreman or other examiner. This bottom to top accountability is the way to achieve compliance and, in turn, encourage proactive rather than reactive actions to enhance safety.

Conclusion

The proposed regulation adds a new, additional layer on the process of mine examinations. The longstanding examination requirements were designed to assure that hazardous conditions requiring correction prior to work commencing were addressed (*e.g.*, corrected, removed from service or dangered-off). This is the time-tested practice that has worked so well in the vast majority of

underground coal mines and has resulted in the long-term reduction in injuries that the industry has achieved

In conclusion, we do not believe the proposed rule is warranted and would encourage the agency to reconsider, as it did in 1996, the necessity of and basis for the rule. Should the agency, however, conclude that expansion of the examination requirements is warranted, we strongly encourage that the proposed be modified as proposed in the attached to address industry concerns while meeting the goals listed by the agency in the preamble.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce Watzman". The signature is written in a cursive, flowing style.

Bruce Watzman

Additions or modifications to the proposed rule are italicized

Suggested Revisions to Proposed Rule

PART 75—MANDATORY SAFETY STANDARDS—UNDERGROUND COAL MINES

1. The authority citation for part 75 is revised to read as follows:

Authority: 30 U.S.C. 811, 863.

Subpart D—Ventilation

2. Paragraphs (a)(2), (b) introductory text, (e), and (g) of § 75.360 are revised to read as follows:

§ 75.360 Preshift examination at fixed intervals.

(a) * * *

(2) Preshift examinations of areas where pumpers are scheduled to work or travel shall not be required prior to the pumper entering the areas if the pumper is a certified person and the pumper conducts an examination for hazardous conditions and violations of mandatory health or safety standards, *and conditions that the pumper believes are violations involving accumulations of combustible materials, ventilation and roof control plans maintenance of incombustible content of rock dust, conveyor belt guarding, tests for methane and oxygen deficiency, and determines determining* if the air is moving in its proper direction in the area where the pumper works or travels. The examination of the area must be completed before the pumper performs any other work. A record of all hazardous conditions and violations of mandatory health or safety standards found by the pumper shall be made and retained in accordance with § 75.363 of this part. *A record of conditions that the pumper believes are violations of safety standards involving accumulations of combustible materials, ventilation and roof control plans, maintenance of incombustible content of rock duct and conveyor belt guarding found by the pumper shall also be made and retained in accordance with § 75.353 of this part.*

(b) The person conducting the preshift examination shall examine for hazardous conditions and violations of ~~mandatory health~~ or safety standards *involving, accumulations of combustible materials, ventilation and roof control plans, maintenance of incombustible content of rock duct and conveyor belt guarding, test for methane and oxygen deficiency, and determine determining* if the air is moving in its proper direction at the following locations:

* * * * *

(e) The district manager may require the certified person to examine other areas of the mine or examine for other hazards and violations of mandatory health or safety standards during the preshift examination.

* * * * *

(g) *Recordkeeping.* A record of the results of each preshift examination, including a record of hazardous conditions and violations of ~~mandatory health or safety~~ standards *involving, accumulations of combustible materials, ventilation and roof control plans, maintenance of incombustible content of rock duct and conveyor belt guarding,* and their locations found by the examiner during each examination and of the results and locations of air and methane measurements, shall be made on the surface before any persons, other than certified persons conducting examinations required by this subpart, enter any underground area of the mine. The results of methane tests shall be recorded as the percentage of methane measured by the examiner. The record shall be made by the certified person who made the examination or by a person designated by the operator. If the record is made by someone other than the examiner, the examiner shall verify the record by initials and date by or at the end of the shift for which the examination was made. A record shall also be made by a certified person of the action taken to correct hazardous conditions and violations of mandatory health or safety standards found during the preshift examination. All preshift and corrective action records shall be countersigned by the mine foreman or equivalent mine official by the end of the mine foreman's or equivalent mine official's next regularly scheduled working shift. The records required by this section shall be made in a secure book that is not susceptible to alteration or electronically in a computer system so as to be secure and not susceptible to alteration.

* * * * *

3. Paragraph (a) of § 75.361 is revised to read as follows:

§ 75.361 Supplemental examination.

(a) Except for certified persons conducting examinations required by this subpart, within 3 hours before anyone enters an area in which a preshift examination has not been made for that shift, a certified person shall examine the area for hazardous conditions and violations of ~~mandatory health or safety~~ standards *involving, accumulations of combustible materials, ventilation and roof control plans, maintenance of incombustible content of rock duct and conveyor belt guarding, determine determining* whether the air is traveling in its proper direction and at its normal volume, and test for methane and oxygen deficiency.

* * * * *

4. Paragraphs (a)(1) and (b) of § 75.362 are revised to read as follows:

§ 75.362 On-shift examination.

(a)(1) At least once during each shift, or more often if necessary for safety, a certified person designated by the operator shall conduct an on-shift examination of each section where anyone is assigned to work during the shift and any area where

mechanized mining equipment is being installed or removed during the shift. The certified person shall check for hazardous conditions and violations of ~~mandatory health or~~ safety standards *involving, accumulations of combustible materials, ventilation and roof control plans, maintenance of incombustible content of rock duct and conveyor belt guarding,,* test for methane and oxygen deficiency, and ~~determine-determining~~ if the air is moving in its proper direction.

* * * * *

(b) During each shift that coal is produced, a certified person shall examine for hazardous conditions and violations of ~~mandatory health or~~ safety standards *involving, accumulations of combustible materials, ventilation and roof control plans, maintenance of incombustible content of rock duct and conveyor belt guarding* along each belt conveyor haulageway where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift.

* * * * *

5. In § 75.363, new paragraph (e) is added, and the section heading and paragraphs (a) and (b) are revised to read as follows:

§ 75.363 Hazardous conditions and violations of mandatory health or safety standards; posting, correcting, and recording.

(a) Any hazardous condition found by the mine foreman or equivalent mine official, assistant mine foreman or equivalent mine official, or other certified persons designated by the operator for the purposes of conducting examinations under this subpart D, shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected. If the condition creates an imminent danger, everyone except those persons referred to in section 104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected. Only persons designated by the operator to correct or evaluate the condition may enter the posted area.

Any violation of a ~~mandatory health or~~ *involving, accumulations of combustible materials, ventilation and roof control plans, maintenance of incombustible content of rock duct and conveyor belt guarding* safety standard found during a preshift examination, a supplemental examination, an on-shift examination, or a weekly examination shall be corrected.

(b) A record shall be made of any hazardous condition and any violation of a ~~mandatory health or~~ safety standard *involving, accumulations of combustible materials, ventilation and roof control plans, maintenance of incombustible content of rock duct and conveyor belt guarding* found. This record shall be kept in a book maintained for this purpose on the surface at the mine. The record shall be made by the completion of the shift on which the hazardous condition or violation of a ~~mandatory health or~~ safety standard *involving, accumulations of combustible materials, ventilation and roof control plans, maintenance of incombustible content*

of rock duct and conveyor belt guarding is found and shall include the nature and location of the hazardous condition or violation of ~~the mandatory health or safety~~ standard and the corrective action taken. This record shall not be required for shifts when no hazardous conditions or violations of ~~mandatory health or safety~~ standards *involving, accumulations of combustible materials, ventilation and roof control plans, maintenance of incombustible content of rock duct and conveyor belt guarding* are found, or for hazardous conditions and violations of ~~mandatory health or safety~~ standards *involving, accumulations of combustible materials, ventilation and roof control plans, maintenance of incombustible content of rock duct and conveyor belt guarding* are found during the preshift or weekly examinations inasmuch as these examinations have separate recordkeeping requirements.

* * * * *

(e) *Review of citations and orders.* The mine operator shall review with mine examiners on a quarterly basis citations and orders issued in areas where preshift, supplemental, on-shift, and weekly examinations are required.

6. The introductory text of paragraph (b) and paragraphs (d) and (h) of § 75.364 are revised to read as follows:

§ 75.364 Weekly examination.

* * * * *

(b) *Hazardous conditions and violations of ~~mandatory health or safety~~ standards involving, accumulations of combustible materials, ventilation and roof control plans, maintenance of incombustible content of rock duct and conveyor belt guarding.* At least every 7 days, an examination for hazardous conditions and violations of ~~mandatory health or safety~~ standards *involving, accumulations of combustible materials, ventilation and roof control plans, maintenance of incombustible content of rock duct and conveyor belt guarding* at the following locations shall be made by a certified person designated by the operator:

* * * * *

(d) Hazardous conditions shall be corrected immediately. If the condition creates an imminent danger, everyone except those persons referred to in section 104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected. Any violation of a ~~mandatory health or safety~~ standard *involving, accumulations of combustible materials, ventilation and roof control plans, maintenance of incombustible content of rock duct and conveyor belt guarding* found during a weekly examination shall be corrected.

* * * * *

(h) *Recordkeeping.* At the completion of any shift during which a portion of a weekly examination is conducted, a record of the results of each weekly examination, including a record of hazardous conditions and violations of ~~mandatory health or safety~~ standards *involving, accumulations of combustible materials, ventilation and roof control plans, maintenance of incombustible content of rock duct and conveyor belt guarding* found during each examination and their locations, the corrective action taken, and the results and location of air and methane measurements, shall be made. The results of methane tests shall be recorded as the percentage of methane measured by the examiner. The

record shall be made by the person making the examination or a person designated by the operator. If made by a person other than the examiner, the examiner shall verify the record by initials and date by or at the end of the shift for which the examination was made. The record shall be countersigned by the mine foreman or equivalent mine official by the end of the mine foreman's or equivalent mine official's next regularly scheduled working shift. The records required by this section shall be made in a secure book that is not susceptible to alteration or electronically in a computer system so as to be secure and not susceptible to alteration.