
From: Hales, David DC [mailto:David.DC.Hales@bhpbilliton.com] 2011 AUG -1 A 9:33
Sent: Friday, July 29, 2011 7:28 PM
To: zzMSHA-Standards - Comments to Fed Reg Group; Jones, Scott JS; Benally, Norman ND
Cc: Fontaine, Roslyn B - MSHA; Silvey, Patricia - MSHA; egreen@crowell.com;
bwatzman@nma.org
Subject: Supplemental Comments to Proposed Rule- RIN 1219-AB75"

AB75-COMM-26

New Mexico Coal
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July 29, 2011

Roslyn B. Fontaine
Acting Director, Office of Standards, Variance & Regulations
Mine Safety & Health Administration
1100 Wilson Boulevard
Room 2350
Arlington, VA 22209-3939

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

Dear Ms. Fontaine,

In response to the re-opening of the record concerning the referenced regulatory action, San Juan Coal Company provides the following supplemental comments addressing the proposed rules regarding Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards.

During the recent public hearings that were conducted concerning this rule some concerns and questions were expressed. Our supplemental comments are directed to these concerns and questions.

Almost every commenter was asked to express what the difference is between 1992 and the present. The question was based on the fact that prior to 1992, examiners were required to record all violations, hazards and unsatisfactory conditions into their examination records. Panel members wondered why going back to that standard would be difficult.

In response to that question San Juan Coal Company offers this response; in the period of time between 1992 and 2011 there have been literally thousands of new regulatory requirements that have been introduced. The sheer volume of those new standards is mind boggling. Consider this list beginning in 1990:
1990- Roof Control Standards, bearing in mind the additional rules that spilled in to each mine's roof control plan. The rules in Part 75 are just the tip of the iceberg.
1992 -Ventilation Standards - bearing in mind the additional rules that spilled in to each mine's Ventilaton Plan. The rules in Part 75 are just the tip of the iceberg.

1996 – Ventilation Standards Revised

1997- Diesel regulations – added a completely new section to Part 75 and impacted many existing ones. Also produced changes in other parts of the CFR and required a new Diesel Maintenance Training program with accompanying required training.

1998- Experienced Miner and Supervisor Training regulations.

1999- Noise Regulations established – added Part 62, changed other existing parts.

1999 - Calibration and Maintenance Procedures for Coal Mine Respirable Dust Samplers.

2000 – Interim Final Rule for Haz Com – added Part 47 changed other existing parts.

2001 – Diesel Particulate Matter Exposure – Underground Coal Miners – added Part 72.

2002 – High voltage longwall standards established.

2002 – Emergency Temporary Standard for Mine Evacuations – also impacted each mine's SCSR storage plans and Emergency Evacuations and Program of Instruction for Firefighting. Impacts included additions and revisions to the plans, it also impacted specific standards in Part 75.

2003 – Standards for Sanitary Toilets in Coal Mines

2003 – Emergency Evacuations rule changes.

2004 – Underground Coal Mine Ventilation Safety Standards for use of belt air. Caused impacts and changes to ventilation plans and existing petitions for modification.

2005 - Low- and Medium-Voltage Diesel-Powered Electrical Generators; Final Rule

2006 – Impacts of the MINER Act begin to be felt. Issues of emergency notification and response, post-accident breathable-air, communications and tracking all begin to take shape.

2006 – Emergency Mine Evacuation rules change again. Established requirement for an additional mine plan with many hundreds of individual requirements incorporated there.

2006 – Emergency Temporary Standard for mine seals. This impacted existing ventilation plan requirements as well.

2007 – Sealing of Abandoned Areas, Final Rule. This impacted existing ventilation plan requirements as well.

2007 – Criteria and Procedures for Proposed Assessment of Civil Penalties; Final Rule.

2008 – Mine Rescue Teams; Final Rule – Extensive changes to mine rescue team requirements.

2008 – Flame resistant conveyor belt, final rule. This rule impacted various sections of Part 75 and also caused substantial additions and changes to the Mine Emergency Evacuation and Program of Instruction for firefighting plans.

2008 – Refuge Alternatives for Underground Coal Mines; Final Rule – this also impacted mine emergency response plans, ventilation plans, roof control plans and training plans.

2009 – Various revisions and corrections to rules such as mine rescue, flame resistant conveyor belts and use of belt air, and an additional revision to Criteria and Procedures for Proposed Assessment of Civil Penalties/ Reporting and Recordkeeping: Immediate Notification of Accidents; Final Rule and Proposed Rule.

2010 – High-Voltage Continuous Mining Machine Standards, final rule.

2010 – Emergency Temporary Standard for the Incombustible Dust Content.

The foregoing is a long and far from complete list of regulatory changes that miners, mine operators and even mine inspectors have had to try and understand and implement. The sheer volume of these actions definitely illustrates a major difference between now and 1992. It also illustrates the major concern that has been expressed about the proposed rule resulting in thousands of unwarranted violations when inspectors find violations and issue citations for inadequate examinations. Inspectors are already taking this step without this new rule. Therefore the unintended consequence of this proposal is

guaranteed to result in an increase in citations not the intended decrease unless the issue of inadequate examinations is specifically excluded from the final rule.

During the public hearing MSHA panelists remarked that the objective is to establish a "culture of safety" at all mines. Achieving a culture of safety means that workers do the right things the right way, even when they think no one is watching. Dr. E. Scott Geller recently taught a webinar titled; 'When No One's Watching: The Psychology of Self-Motivation'. During this webinar Dr. Geller discussed the ways that an organization can drive or increase that type of behavior. Ironically the methods that were identified as the least effective are those involving negative consequences such as penalties and punishments. These are the classic tools used by the Mine Safety and Health Administration and according to behavioral experts such as Dr. Geller, these are the least effective. Others such as Thomas Krause and Dan Petersen share in these views. This raises one question. Are the current approaches that MSHA uses with regard to its activities at the mines actually fostering the wrong culture? It may very well be.

In this same webinar Dr. Geller discussed that the use of positive feedback or positive consequences are far more effective in developing that culture of safety, where workers do the right thing for themselves, not because it's a rule or that someone is watching. This prompts another question. What positive feedback or consequences does the Mine Safety and Health provide to those operators who they recognize have developed a "culture of safety"? The answer to that one is easy. The agency does not provide such positive consequences. In fact my experience is that when a mine operator goes above and beyond what is called for in the standards they can actually receive punitive treatment for doing so. The current practices of the Agency serve to influence a culture of doing exactly what is in the standard and no more.

Dr. Geller also discusses the shortcomings of the enforcement approach in his book "The Participation Factor". Dr. Geller points out that "the biggest problem with the enforcement approach is that it can stifle participation ". In Chapter 4 of this same book he explains that "the more external control people experience, the less internal control (self-control) they develop. This then fosters an attitude that there is compliance only when someone is watching vs developing safety as a value which is performed when no one is looking because the actions are internalized and being performed for themselves.

Another issue that impacts an examiner's ability to identify all violations can be very clearly demonstrated. Psychologists use a video presentation to illustrate how the human brain can be manipulated by external factors.

One method is to utilize what is referred to as the Gorilla Video. In the video two groups of basketball players are passing the ball. Part of the group passes the ball by bouncing it on the floor and the other part pass the ball without letting it touch the floor. Persons viewing the video are divided into two groups. One group is asked to count the number of passes made where the ball does not hit the floor, the other half counts the passes in which the ball is bounced. The groups are promised a prize for the winners.

The video runs for about a minute and a half. It can be found at <http://www.youtube.com/watch?v=vJG698U2Mvo>

At the end of the video each group reports their results. In most cases the numbers of passes are accurately identified although not 100% of the time. After reporting their results

the groups are asked if they saw anything unusual during the video. They're asked how many observed any animals. Almost 100% of the time no one saw anything. Occasionally someone will have picked up on a very interesting thing. During the basketball passing exercise, a person dressed in a gorilla suit walks through the players and even turns directly to the camera and waves. Because the observers have been told what to look for, their conscious brain is focused on the ball and the subconscious brain has been hijacked as well because it has been told that the ballgame and the specific type of pass is the most important thing.

These external mechanisms impact all humans on a daily basis. It's one of the reasons why eyewitness testimonies of events can vary so widely. It contributes to how someone conducting an inspection or examination might not notice a non-hazardous condition or practice, or even not notice more serious conditions.

When considering this phenomenon and the concepts taught by Dr. Geller. It would appear that a better way of developing more effective examiners and furthering that culture of safety would be to devise ways of recognizing miners for quality examinations rather than punishing for errors or omissions. Perhaps a standard requiring operators to develop a means of communicating the results of inspections on an ongoing basis so that all miners can be more aware of what constitutes a violation, what hazard does the condition contribute to and what does it look like when it's right. Many prudent operators have already developed such communications processes.

During the public hearing one commenter raised a question about what he called "two sets of books". He was referring to the practice of recording hazards in the preshift/onshift and weekly books and recording violations and unsatisfactory conditions in some other book.

The commenter implied that this was a bad thing. We strongly disagree with that view. After the changes in the Ventilation Regulations in 1992 some MSHA inspectors chastised examiners for recording conditions that were not really hazards in the required books, many mine operators established another means to capture those issues and maintain a record of what actions were taken to correct them. That is a far better practice than not recording anything and hoping someone will remember the issue is there and that it will get corrected.

This practice of maintaining another record book was an almost immediate response to the revisions in the ventilation standards back in 1992. Examiners may not be able to identify all violations during their 3 hour examination window but the ones they do identify can get recorded and the corrective actions tracked to ensure the condition is resolved. The use of a second recordkeeping system for this purpose should not be deemed a "bad thing". Intentionally not recording hazardous conditions in official record books is a completely different situation altogether.

The proposal talks about the importance of having examiners who are to be held accountable for their work. It is our understanding that examiners are performing duties as agents of the operator and due to the strict liability of the Mine Act, would be subject to the same penalties as any other agent. That raised a serious concern on the part of at least one hourly examiner who participated in the hearing I attended. Examiners feared the likely application of disciplinary actions if an inspector were to find a violation in an area they had recently examined.

It was suggested in the public hearing that certain examinations were being done by hourly examiners and that others were strictly being performed by salaried examiners. There was a statement made that preshift/onshift examinations were being done by salaried and that examinations in the outby areas were the responsibility of hourly examiners.

It is extremely important to define this examination requirement given the indications that examiners will be facing a heightened level of accountability or negative consequences. Whatever that accountability or consequence is, it must be applied uniformly to any examiner whether that examiner is an hourly employee or a salaried employee.

All types of examinations under the Mine Act are currently being performed by both hourly and salaried examiners at San Juan Coal Company and we feel all of those examiners are accountable for the quality of their examination.

Given the example of the gorilla video and adding in the built in time/pressure factor for completion of the preshift examinations within a specific timeframe, it is inevitable that an examiner will miss something. This can happen to MSHA inspectors just as easily.

San Juan Coal Company appreciates the opportunity to participate in this rule and comment process and request that these supplemental comments be given serious consideration in the development of the final rule if it is promulgated.

Sincerely

A handwritten signature in black ink that reads "David Hales". The signature is written in a cursive style with a horizontal line underneath.

David Hales
Manager, Safety and Regulatory Compliance
San Juan Coal Company