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**From:** Samuel Petsonk [mailto:petsonk.s@law.wlu.edu]

**Sent:** Monday, August 01, 2011 12:35 PM

**To:** Silvey, Patricia - MSHA; Fontaine, Roslyn B - MSHA; zzMSHA-Standards Comments to Fed Reg Group; Davis, Leah - MSHA

**Cc:** Wes Addington (wes@appalachianlawcenter.org); Tony Opegard; Steve Sanders (steve@appalachianlawcenter.org)

**Subject:** Written comments for Hazard, KY field hearing on RIN 1219—AB75 (mine exam)

Ms. Silvey,

Please find attached my written comments to accompany the oral testimony that I gave at the MSHA Field Hearing in Hazard, Kentucky, regarding MSHA's proposed rule on mine examinations (RIN 1219—AB75).

I have attached identical materials in both Word and PDF formats. I have also copied Leah Davis, with whom I spoke on the phone about submitting my comments electronically.

As I indicated at the hearing, my principal recommendation is that MSHA require mine examiners to orally communicate to miners the hazards and violations identified during a mine examination.

Please let me know if you need any additional information from me.

Regards,

Sam B. Petsonk

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AB75-COMM-27

Testimony of Sam Brown Petsonk

On a rule proposed by the U.S. Department of Labor, Mine Safety and Health Administration (MSHA)  
RIN 1219—AB75

Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards

MSHA Field Hearing in Hazard, Kentucky

July 12, 2011

## **The Right to Work –Safely and Healthily:**

### **Updating Mine Examination Procedures to Benefit Underground Coal Miners**

I am strongly supportive of improving the process of mine examination in underground coal mines. I am a law student at the Washington & Lee University School of Law in Lexington, Virginia. For five years prior to law school, I advocated for coal miners' safety and health at the local, regional, and national levels, by working at West Virginia community centers, health clinics, non-profit organizations, and the U.S. Senate.

My principal recommendation is that MSHA require mine examiners to orally communicate to miners the hazards and violations identified during an examination. The absence of such a requirement is a serious flaw in the proposed rule –and it represents a departure from the current mine examination process, which requires that hazards not merely be identified, recorded, and abated, but that they be “posted with a conspicuous danger sign where anyone entering the areas would pass.” Currently, the proposed rule contains no comparable posting or communication requirement for violations identified by mine examiners.

I offer these specific recommendations and comments concerning the proposed rule.

- 1) Oral communication of hazards and violations.** MSHA's proposal would require correction and recording of violations, similar to the current requirements for correction and recording of hazards (§ 75.363). However, unlike the current “posting” requirements for hazards, the rule as proposed does not require examiners to post or communicate to miners the existence of the violations. Although not all violations may be physically conducive to posting, nonetheless the information may still be conveyed to miners by alternate means (such as oral communication). MSHA's failure to require this critical communication in its proposed rule appears to undermine the efficacy of the proposal.

#### **Recommendation**

§ 75.363 should require mine examiners to orally communicate the identified violations and hazards to all miners who are working, or who are scheduled or designated to work, in or around an affected section.

Benefits of an oral communication requirement include:

1. *Make miners safer by providing them with better knowledge of risks.* Oral communication would provide a follow-up process so that the examination leads to miners' awareness and avoidance of the risks identified (similar to the current "posting" requirement for hazards).
2. *Facilitate the anonymous reporting of violations.* If all miners on a working section were apprised of all the hazards or violations, it would be more difficult for an operator to determine the source of a complaint. If MSHA's final rule only requires oral communication of hazards and violations to the miners who are most directly affected, then it may be relatively easy for an operator to surmise the identity of a miner who files an anonymous complaint when there are only one or two miners working in an affected area on a section.
3. *Aid MSHA's enforcement of the Mine Act.* MSHA could identify an operator's non-compliance with an oral communication requirement simply by asking miners which hazards or violations they were told about by the mine examiner. If a miner does not mention a hazard or violation that the MSHA inspector determined to have been extant at the time of the relevant mine examination, then this would become evidence of non-compliance with the mine examination rules. Additionally, if all miners were orally notified of hazards and violations, MSHA would have multiple sources of testimony to support an inspector's assessments of gravity and negligence—which could begin to make it easier to for MSHA to defend its citations before administrative law judges. MSHA should cite operators for violating § 75.363 whenever any miner on an affected section testifies that he was not told of a hazard or violation that had existed during an examination.

Suggested language for final rule

The operator must ensure that each miner is orally briefed on, and made aware of, prior to traveling to or arriving at the miner's work area and commencing the miner's assigned tasks--

- (i) any conditions that are hazardous, or that violate a mandatory health or safety standard or a plan approved under the Act, where the miner may reasonably be expected to work or travel; and
- (ii) the general conditions of that miner's assigned working section or other area where the miner may reasonably be expected to work or travel.

- 2) **Quarterly reviews between management and mine examiners.** The proposed rule calls for quarterly reviews between management and mine examiners, which would cover the recent MSHA enforcement history – i.e. all citations and orders issued in areas where examinations are required. However, the proposed rule omits a requirement that miners’ representatives be included in these quarterly reviews. This is another apparent deficiency in the proposed rule.

**Recommendations**

- i. § 75.363 should require that a miners’ representative participate in the quarterly reviews with upper management. Miners’ representatives should be permitted immediate and unlimited access, upon request, to the “secure book” or “computer system” that the proposed rule requires for the recording the “results of each examination.”
- ii. § 75.1504 should require a similar review of the mine’s enforcement history to be conducted with all miners (not merely the miners’ representatives) as part of the mine’s quarterly fire drills and emergency training. Inadequate and ineffective quarterly fire drills have been continually associated with numerous multiple-fatality disasters and injuries.

**Background on the Importance of an Oral Communication Requirement**

Communication between examiners and miners has been an essential component of firebossing and mine examinations dating back at least as far as the mid-1800s when firebosses would use “danger marks” to communicate to miners about hazards to avoid. Tragically, the West Virginia Governor’s Independent Investigation Panel found that a foreman at Massey Energy’s Upper Big Branch Mine failed to conduct an adequate pre-shift examination on the day of the Upper Big Branch Mine Disaster (April 5, 2010).<sup>1</sup> Similarly, serious failures to conduct pre-shift examinations and to test for methane were identified in recent years at numerous other mines –including significant numbers of violations of Part 75.360 et seq. at major underground mines (e.g. nearly 40 violations over the past 20 months at Consol’s Robinson Run No. 95 Mine (WV); nearly 40 during the same period at Arch Coal’s Mingo Logan Mountaineer II Mine (WV); nearly 30 during the same period at American Coal Company’s New Era Mine (Galatia, IL), controlled by Bob Murray; etc.), and at least one high-profile case that raised allegations of criminal conduct at Massey Energy subsidiary White Buck’s Grassy Creek No. 1 Mine near Leivasy, West Virginia. Moreover, a string of recent mine disasters at many different coal operations demonstrates that tragic consequences continue to arise when mine operators frequently fail to comply with the *current* requirements for mine examinations.<sup>2</sup>

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<sup>1</sup> Testimony collected by the West Virginia Governor’s Independent Investigation Panel indicated that Massey Energy subsidiary Performance Coal failed to conduct an adequate pre-shift examination on the longwall panel on the day of the Upper Big Branch Mine Disaster (See GIIP Report, Ch. 1, “Events Leading Up to the Explosion”).

<sup>2</sup> Inadequate pre-shift examinations have contributed to the multiple-fatality disasters at the Aracoma Mine No. 1 (Stollings, West Virginia, 2006), Jim Walter No. 5 Mine (Brookwood, Alabama, 2001), William Station No. 9 Mine (Sullivan, Kentucky, 1989), and others. Additionally, inadequate 90-day fire drills were “contributing violations” in

Members of Congress have repeatedly proposed legislation that would require mine examiners to identify violations, however these proposals have also included an oral communication requirement. Legislation including such a requirement has garnered numerous cosponsors in the House and the Senate in the 111th and 112th Congresses, and such a bill was reported by the House Committee on Education and Labor in 2010.<sup>3</sup> MSHA has not explained why it neglected to include this requirement in its proposed rule, or whether perhaps the omission was simply an oversight.

In sum, the existing system is clearly not working –and the problem is far greater than the lack of a requirement for examiners to identify violations. I suggest that MSHA must do more than merely require that examiners identify additional information during their exams. Instead, MSHA must make an effort to improve the *process* by which the examinations are conducted –otherwise, the agency will essentially be “moving the bar” without equipping miners and MSHA inspectors with additional tools to ensure compliance. An oral communication requirement would improve the examination process by giving miners and MSHA inspectors better information and a simpler, tamper-resistant method for verifying compliance with MSHA’s mine examination rules.

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mining disasters at the Aracoma Mine No. 1 (Stollings, West Virginia, 2006), the Jim Walter No. 5 Mine (Brookwood, Alabama, 2001), Darby Mine No. 1 (Holmes Mill, Kentucky, 2006), Wilberg Mine (Utah, 1984).

<sup>3</sup> H.R. 6495, H.R. 5663, and S. 3671 in the 111th Congress; H.R. 1579 and S. 153 in the 112th Congress.