PUBLIC SUBMISSION

As of: 9/30/16 3:02 PM
Received: September 30, 2016
Status: Posted
Posted: September 30, 2016
Tracking No. 1k0-8s73-k8ck
Comments Due: September 30, 2016
Submission Type: Web

SEP 30 2016

Docket: MSHA-2014-0030
Examinations of Working Places in Metal and Nonmetal Mines. 30 CFR Parts 56 and 57

Comment On: MSHA-2014-0030-0054
Examinations of Working Places in Metal and Nonmetal Mines, Extension of comment period; close of record.

Document: MSHA-2014-0030-0085
Comment from Adele Abrams, Industrial Minerals Association - North America

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General Comment

Please find attached comments submitted on behalf of the Industrial Minerals Association-North America (IMA-NA). This supplements our oral testimony from the July 26, 2016, public hearing, and we also ask that our testimony from that hearing be included as part of the formal rulemaking record.

Thank you.

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AB87-COMM-60

Attachments

Workplace Exam IMA-NA Comments 9-30-16 FINAL

Comments on the Mine Safety and Health Administration

Notice of Proposed Rulemaking on Examinations of Working Places

in Metal and Nonmetal Mines

(Docket No. MSHA-2014-0030)

(RIN 112-AB87)

September 30, 2016

The Industrial Minerals Association - North America (IMA-NA) is pleased to submit the following comments on the Mine Safety & Health Administration's (MSHA) proposed rule to modify its existing metal/nonmetal standards governing workplace examinations at surface and underground mines (30 CFR Parts 56/57.18002). IMA-NA is a nonprofit 501(c)(6) trade association representing North American producers and processors of industrial minerals and associate members that support the industrial minerals industry. Industrial minerals are feed stocks for the manufacturing and agricultural sectors. They are the ingredients for many of the products used in everyday life, such as glass, ceramics, paper, plastics, paints and coatings, cosmetics, pharmaceuticals and laundry detergent.

Our companies and the people they employ are proud of their industry and the socially responsible methods they use to provide these beneficial resources. IMA-NA represents producers and processors of ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, kaolin, soda ash, talc and wollastonite. Our producer members operate both surface and underground mines, while many of our associate members are contractors who provide services to mines and could also be affected by the proposed requirements.

On July 26, 2016, IMA-NA and its panel of member company representatives testified at the public hearing in Arlington, VA, on this proposal. We ask that our testimony, a written copy of which was provided to the hearing recorder, be included in the rulemaking docket for this initiative.

In our final comments, IMA-NA wants to provide feedback on several clarifications and issues noted in MSHA's August 25, 2016, Federal Register notice, which extended the comment deadline. We also recommend modified regulatory text, which would be a preferred substitute if this initiative proceeds to a final rule.

In the August 25, 2016 Federal Register notice, MSHA clarified its intent, concerning a few provisions. The agency clarified that:

- only active mining areas where extraction and production occur would be within the scope of the rule (as opposed to bathrooms, kitchens, administrative offices, inactive storage areas, or roads not involved with the mining process);

• "to promptly notify miners" means any notification that alerts them to adverse conditions in the working place – the notice can be verbal, warning signage, or other written notification – and that "promptly" means before miners are potentially exposed to the condition (before work begins in the area or as soon as possible after work begins if the condition is discovered while miners are already working in an area);

• the proposal will not change existing standards regarding what conditions present an "imminent danger" as that provision is in the existing rule;

• the definition of "working place" has not been altered, and this does not mean the entire mine unless miners will be working in all areas; and,

• "before work begins in an area" does not coincide with any particular shift, but is depending upon when miners actually will be working in a particular working place.

IMA-NA applauds MSHA for making its intentions clear on these issues at this stage in the rulemaking, and believes that these interpretations align well with the testimony that IMA-NA has already submitted on those points.

Issues for Additional Comment Raised by MSHA

In the comment period extension notice, MSHA sought input on several issues. IMA-NA polled its working group to obtain information on the following:

Issue 1: How do you currently notify miners when you identify a hazard?

Response: Our members indicate that, depending upon the nature of the hazard, and its gravity, one or more methods might be used, including verbal communication, signage, distribution of inspection reports, or barriers (tape, fencing etc.). Typically, notification of affected miners in the working place is done immediately if a significant hazard is involved. For less significant hazards, mine operators may use barricading/signage without supplemental verbal communication to miners. In addition, the hazards are noted on the report and the supervisor/leadman notified. A work order written if needed.

Issue 1A: Would a required signature on an exam negatively impact your work place exam program?

Response: Many of our members typically have workplace examination forms signed or initialed by the competent person, and existing rules require that the examiner be identified. However, most members also oppose requiring a physical signature, so that forms can be maintained electronically. Some members also have a supervisor cross-sign examination reports, verifying they have reviewed conditions and the report with the competent person, but this should not be mandatory. Other members are concerned that doing so could result in having such good faith efforts used against them, as a company, or against agents of management if there is a dispute on corrective methods or timing between the company and an inspector.

Issue 2: How have you used records of workplace exams to identify and correct systemic adverse conditions that may contribute to an accident, injury, or fatality?

Response: IMA-NA members report workplace exams can be used to:

- Detect repeat conditions,
- Monitor effectiveness of corrective actions (e.g. dust accumulation reductions),
- Detect patterns in identified conditions (e.g. poor guarding, electrical, housekeeping, etc.),
- Identify areas that require additional hazard recognition training, and/or
- Provide recognition for miners who routinely identify adverse conditions, as part of proactive incentive programs.

Major issues may require more investigation and problem solving. For example, at some companies, items not immediately corrected may have a maintenance work order generated, whereas non-maintenance items might be tracked on a whiteboard or an electronic spreadsheet. Among IMA-NA's concerns about the proposed requirement to include all corrective actions, date of correction and signature of correcting individual on each form is that this would require leaving the mandatory records open indefinitely, allow them to pass through multiple sets of hands, and this raises the potential for records to be misplaced or filed prematurely while corrective items are still open. Each

company should have flexibility in how it tracks and addresses corrective action, without making this part of the mandatory recordkeeping requirement under this standard.

Issue 3: What limitations would be placed on the mine operators' ability to use the examination record to identify and correct systemic adverse conditions if a record of an adverse condition that is immediately corrected is not made?

Response: Regardless of whether it is required by MSHA, most of our members believe they must have records of any adverse conditions in order to manage recurring issues and identify trends. If an adverse condition is immediately corrected, but not recorded:

- The condition may not be reported to all miners in the affected area,
- The mine operator may be unaware of all adverse conditions or have a misrepresentation of how effective their examination process is, and/or
- The mine operator's ability to prevent a recurrence or detect similar conditions may be limited.

It could also reduce the "ownership" of the process by the front line worker, if there is no record they are expected to complete. However, as noted in IMA-NA's testimony, we believe that MSHA should offer a safe harbor so that violative hazardous conditions that are noted but have been corrected in a timely manner would not serve as the basis for citations and penalties, once the examination forms are reviewed by the inspector during subsequent visits within the record retention period. OSHA already has a similar policy, for self-audits, and MSHA should follow suit. *See* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=16434&p_search_type=CLOBTEXTPOLICY&p_search_str=self-audit.

Alternative Regulatory Text

IMA-NA believes MSHA can attain improvements in workplace examinations through modification to the standard, but that it should do so without unnecessarily increasing the paperwork burden on mine operators without a commensurate safety and health benefit. Accordingly, MSHA has indicated it cannot quantify the actual benefits to its proposal, while acknowledging the proposal will impose more costs on an already challenged mining industry.

We maintain that the following model language would be more appropriate if standard 56/57.18002 will be modified. We have included model language along with supporting rationale for your consideration.

30 CFR § 56/57.18002 Examination of working places (REVISED TEXT)

(a) A competent person designated by the operator shall examine each working place at least once each shift, before miners begin work in that place, for conditions that may adversely affect safety or health.

(1) The operator shall promptly notify miners in any affected areas of any adverse conditions found that may adversely affect safety or health and promptly initiate appropriate action to correct such conditions.

(2) Significant hazardous conditions noted by the person conducting the examination that may present an imminent danger shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.

(b) A record of each examination shall be made and the person conducting the examination shall date the record before the end of the shift for which the examination was made.

(1) The record shall include the locations of all areas examined and a description of each condition found that may adversely affect the safety or health of miners.

(2) The operator shall maintain the examination records for at least six months, or since the most recent inspection, whichever is shorter; shall make the records available for inspection by authorized representatives of the Secretary and the representatives of miners; and shall provide these representatives a copy on request.

Rationale

MSHA should eliminate the signature requirement and add that only "<u>significant</u> hazardous conditions" would trigger the miner withdrawal requirement. The modification to the imminent danger provision in paragraph (a)(2) is intended to clarify that MSHA will

not cite this standard simply because all miners were not withdrawn from affected area containing an "unlikely" hazard.

Requiring a physical signature on each working place's examination form each shift is inconsistent with the ability to maintain the requisite records electronically. Electronic recordkeeping, particularly for many months of detailed records, for each shift and active area of the mine, is critical to have as an option.

In addition, miners may feel constrained to sign an examination form if this would subject them to personal civil or criminal prosecution under Section 110 of the Mine Act, particularly if such liability arose because the inspector cited conditions which the agency deemed hazardous but the examiner did not. This could have a chilling effect on listing hazardous conditions, or minimizing hazards, particularly if MSHA can use this as a checklist for issuing citations even after the recorded conditions have been remediated.

Many of the "competent persons" who conduct workplace examinations currently are hourly workers, and their participation is part of employee empowerment and involvement under safety and health management programs. In addition, there is wide concern that MSHA may use their ability to direct the workforce in either withdrawing miners or ordering corrections as an indicia of management agent status. MSHA should clarify in the rule if this will not occur as a matter of agency policy. The agency should not require the competent persons to be salaried miners for purposes of this standard.

As noted in IMA-NA's previous testimony, MSHA should eliminate the requirement to record and describe the corrective action taken, as proposed in (b)(2)(i) (ii) and (iii) (eliminated in IMA-NA's model text). The added requirement to record the corrective action, and its date, is unnecessary, confusing, may overly complicate the recordkeeping, and adds little value in terms of protections. Requiring such information to be recorded may also create a "chilling effect" on the workplace exam process. Individuals conducting a given exam, out of fear of creating a "document trail" to an unsafe condition my simply forego documenting a given hazard and its associated correction if they know that corrective action may be delayed, or perhaps occur during another shift when they are not present to verify the information recorded.

As written, the proposed rule would require potentially multiple corrective action entries on each form, if multiple hazards are listed, over a potentially lengthy timespan (e.g., if parts must be ordered and temporary abatement measures are initially taken, followed by more permanent remediation of hazardous conditions) and increases the potential for forms to be lost or altered without the mine operator's knowledge. This is particularly true for contractors who would be affected by this rule, but might be at the mine site sporadically and unable to complete entries because they are not at the mine when corrections occur in their work are. In addition, there is concern about potential claims of falsification or alteration of these mandatory records, which also has potential for felony criminal prosecution under Section 110(f) of the Mine Act.

IMA-NA's proposed change regarding the record retention period would reduce the paperwork burden of the expanded documentation under this proposal, and would bring the recordkeeping in line with the MSHA Program Policy Manual's statement, which states records need only be maintained since the previous MSHA inspection as long as the operator certifies that a full 12 months of inspections have been completed.

IMA-NA does not oppose the proposed new requirements that the workplace examination records must be made available to authorized representatives of the Secretary and to miners and their representatives when they request a copy.

Conclusion

IMA-NA thanks the agency for its consideration of our position, and we look forward to working proactively and cooperatively with MSHA to further protect the safety and health of miners.