
From: E-Rulemaking - MSHA
Subject: FW: NSSGA Comments / RIN 1219-AB87
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From: Casper, Joseph S. [<mailto:jcasper@nssga.org>]
Sent: Friday, September 30, 2016 4:26 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: NSSGA Comments / RIN 1219-AB87

SEP 30 2016

Please accept these comments from NSSGA on the proposed workplace exams rule / RIN 1219-AB87. Thank you for the opportunity to comment. Joseph Casper (703) 526-1074

Sept. 30, 2016

The Honorable Joseph Main
c/o Office of Standards, Regulations and Variances
U.S. Mine Safety and Health Administration
201 12th Street South
Arlington, VA 22202-5452

Dear Mr. Secretary:

The National Stone, Sand and Gravel Association (NSSGA) appreciates the opportunity to comment on the Mine Safety and Health Administration's proposed revision to the workplaces examination standard, 30 C.F.R. § 56/57.18002.

NSSGA is the leading voice and advocate for the aggregates industry. NSSGA members are stone, sand and gravel producers and the equipment manufacturers and service providers who support them. Our members are responsible for producing the essential raw materials found in every home, building, road, bridge and public works project and represent more than 90 percent of the crushed stone and 70 percent of the sand and gravel produced annually in the United States. Production of aggregates in the U.S. in 2015 was more than 2.25 billion metric tons at a value of \$21 billion. The aggregates industry employs approximately 100,000 highly-skilled men and women.

NSSGA acknowledges the collaborative work undertaken by MSHA's professionals and public servants in recent years to help operators improve safety and health. NSSGA also appreciates the agency's collaboration through the MSHA-NSSGA Alliance.

Indeed, NSSGA is very proud that the stone, sand and gravel sector has attained its lowest injury rate in history, just 2.0 injuries per 200,000 hours worked in 2015. Last year was the 15th consecutive year in which the injury rate dropped from the previous year and, as MSHA has frequently said, compliance with MSHA standards is better throughout the industry now more than ever before. NSSGA believes that MSHA should also be proud of these accomplishments made by industry collaborating with MSHA. NSSGA's members are committed to continuing their vigilance and drive toward ever-safer operations, but new MSHA regulations are not necessarily the right approach to achieving greater results. Though it may be intended to improve safety, the workplaces examination proposal is unwarranted and ill-advised.

The proposed rule violates the spirit and principles of Executive Orders 12866 and 13563, supported by President Obama, which encourage agencies consider regulatory approaches that reduce the burden of regulation while maintaining flexibility and freedom of choice.

The increased costs to comply with the workplace exam proposal would risk increasing the price of stone, sand and gravel needed for construction and public works projects on which private, public, industrial and commercial sectors are reliant for our nation's growth and

competitiveness. And it will do so at a time during which the aggregates industry is still trying to recover from the effects of the Great Recession. U.S. Geologic Survey data show that, after the drop in production of more than 1 billion metric tons from its 2006 high of 3 billion tons, aggregates producers have regained only one-fourth of the pre-recession production level.

The proposed rule is focused on workplace conditions, but not the behavior of workers.

The proposal targets a false problem. The historically low injury rates achieved by industry demonstrate a collective commitment to safe practices. These rates are not achieved by luck or by fluke: aggregates operators take their safety responsibilities seriously, including the identification of hazards and unsafe conditions. What MSHA is overlooking is that the overwhelming majority of injuries and accidents are functions not of inherently unsafe conditions but of unsafe behavior of either management or workers. MSHA's proposed workplaces examination rule will laden operators with costly additional administrative burdens while doing nothing about the predominant source of workplace injuries – the carelessness by some in the workplace. **We have seen in recent years that safety improvements focused on improving behaviors of workers are more effective at reducing injuries than ones focused on workplace conditions.**

Key provisions of the proposal demonstrate regulatory over-reach that risk impeding the cause for safety.

We do not question the importance of workplace examinations generally. We do, however, strongly question the merits of the proposed revision to the existing standard. For the reasons stated below, NSSGA respectfully requests that MSHA withdraw the proposal.

I. The metal/non-metal industry, led by stone, sand and gravel operators, is safer than it ever has been.

Because the proposed rule purports to take aim at reducing injuries on the job, we think it is important to emphasize just how successful the M/NM industry as a whole has been at reducing injuries and fatalities. In 2015¹:

- the “All Injury Rate” for the industry was an all-time low of 2.02 for every 200,000 hours worked;
- the “Lost-Time Injury Rate” was at an all-time low of 1.36 for every 200,000 hours worked;
- the “Non-Fatal Lost-Time Injury Rate” was at the same all-time low of 1.36 for every 200,000 hours worked;
- the “Fatal Injury Rate” was very near its all-time low (2012), at .0085 for every 200,000 hours worked;

¹ For all statistics cited here, see <https://www.msha.gov/data-reports/statistics/mine-safety-and-health-glance>.

NSSGA is proud of these positive trends, which are the result of collaboration between the agency and the industry.

Additionally, the overall injury rate for 2016 is trending toward a figure below 2.0 for the first time in history, and the M/NM industry appears poised to have its fewest-ever fatalities in 2016, barring any aberrant accidents over the next three months.² These statistics demonstrate the industry's commitment to safety and that companies are effectively doing all they can to make certain that every miner goes home safely after every shift.

This record of safety is also translating into a better record of compliance, with fewer MSHA enforcement actions and smaller civil penalties. Again looking at 2015:

- total citations and orders issued was 58,635, the fewest amount issued for any year over the past seven years other than 2013; and
- total assessments were \$26.5 million, the lowest yearly total over the same seven-year period;
- meanwhile, "elevated enforcement" actions were also very low, at 2,154, the second lowest total of the last seven years after 2013; and
- Significant and Substantial (S&S) citations and orders in particular made up only 26 percent of the overall total of enforcement actions, consistent with the positive trend of the past several years.

Not surprisingly, MSHA leadership has proudly lauded these accomplishments on multiple occasions over the past year. At NSSGA's Annual Conference and AGG1 Academy & Expo in Nashville in March 2016, you remarked on the "many actions MSHA and the mining community have taken since 2010 and the resulting significant safety and health improvements in the nation's mines." In that address, you noted that since 2010, "mining deaths and injuries have been at historic lows," that "the number of mines with chronic violation records identified in MSHA's Pattern of Violations (POV) screenings has dramatically fallen," that "operators' compliance with safety and health standards has improved with fewer violations cited by MSHA and fewer penalties being assessed," that S&S violations "have dropped significantly," and that "communication and collaboration between MSHA and industry stakeholders have greatly improved."³

On June 15, 2016, commemorating the 10th anniversary of the passage of the MINER Act, you again stressed that 2015 was the safest year in the history of mining in this country, "with the

² See <http://arlweb.msha.gov/stats/charts/MNMBystates.pdf>.

³ See <https://www.msha.gov/news-media/speeches-testimony/public/2016/03/22/remarks-joseph-main-assistant-secretary-labor-mine>.

fewest mining deaths and lowest fatal and injury rates ever recorded.”⁴ Later that month, you remarked on how no operation anywhere triggered the POV screening criteria.⁵

Given this record of accomplishment, the underlying premise for the proposed rule does not hold up. NSSGA contends that the proposal is a solution in search of a problem.

MSHA cites several fatalities over the past five years as evidence that a revised workplaces examination rule is necessary, but the opinion is not supported by the record. Even a cursory reading of the summary descriptions of those accidents, which are provided in the preamble to the proposed revisions, shows that revisions to workplace examinations rule would not have prevented those accidents.

There is a paucity of data that justifies the proposed rule changes. As noted next, moving forward with the proposed rulemaking on the marginal factual records assembled by the agency would do injustice to principles of good governance laid down by multiple presidents, including President Obama.

II. The proposed rule violates the spirit and principles of Executive Orders 12866 and 13563.

Executive Order 12866 (1993), as reaffirmed in the current Administration by Executive Order 13563 (2011), champions the idea of responsible governance. Among other things, EO 12866 espouses the idea of a “regulatory system that works” for the American people through regulations “that are effective, consistent, sensible and understandable.” The order says that federal agencies “should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to help or improve ... health and safety.” President Obama’s EO 13563 states that the regulatory system “must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends,” as the first principle of regulation and it builds on the positive ideals of regulatory flexibility established by EO 12866. The proposed revisions flunk the regulatory litmus test laid out in these two executive orders. In light of the safety and health data described above, there is simply no justification for a new workplaces examination rule.

NSSGA also has serious concerns about the timing of this rulemaking being made late in the final term of an outgoing Administration. As mentioned above, MSHA has publicly commended the industry for working to improve the safety and health of the workforce. It appears unnecessary to create additional rules or revise regulations so late in the Administration’s remaining term when existing ones are working well to achieve safety and health goals.

The legacy of this MSHA administration should be the impressive record of safety improvement. NSSGA is more than happy to give MSHA its due credit on achievement, but

⁴ See <https://www.msha.gov/news-media/assistant-secretary/2016/06/15/10-year-anniversary-miner-act-2006>.

⁵ See <https://www.msha.gov/news-media/assistant-secretary/2016/06/29/no-mines-eligible-pattern-violations-%E2%80%93-law-works>.

MSHA should not be creating regulation for regulation's sake. Such practices would run directly counter to the spirit and purpose of EOs 12866 and 13563.

Federal agencies are required to estimate the costs and benefits of proposed regulations and alternatives, and MSHA has admitted that it cannot fairly quantify the net value of the proposed rule. MSHA explicitly states in the proposal that it "is unable to quantify the benefits from this proposed rulemaking."⁶ It then estimates that the costs associated with both examining each working place before work commences and notifying miners of any adverse conditions found "would be de minimis." Assigning a cost to the proposed revisions is not an easy calculation, but MSHA's initial estimations are wildly unrealistic. The agency is assuming that the only additional costs for operators would come from the expanded recordkeeping requirement, and that new requirements would add just "5 additional minutes" of paid time (id). Estimates from NSSGA members on the added costs of compliance with the pre-shift examination requirement in addition to the recordkeeping requirements vary, but they consistently place the figure in the tens of thousands of dollars in additional wages paid or resulting downtime per year. As it stands, MSHA has not failed to identify a factual justification for the proposed rule, but it has also failed to estimate the impact of the revisions on the hard working people of the aggregates industry. NSSGA believes MSHA has significantly underestimated the costs associated with compliance with what amounts to a "back-of-the-envelope" economic analysis set forth in the proposed rule. It would be improvident and at odds with EO 12866 to promulgate a rule based on the paucity of reliable economic data and analysis.

III. The proposed rule would increase costs of aggregates to end users – taxpayers.

Simply put, stone, sand and gravel producers provide affordable and essential raw materials to construct homes, buildings, roads, bridges and to manufacture every day consumer products. Yet, if producers are forced to contest unjust and unreasonable citations, pay fines from revised regulations, or incur heightened compliance costs, then the prices of their operations increase. That means that the operation would reasonably have to increase the cost of their products to cover higher operational costs.

Over 2 billion tons of aggregates are used annually, and that equates to just over 15,575 lbs. for every man, woman and child in America per year. Public works projects paid by municipalities, counties, states and the federal government would be more expensive if the raw materials costs increased. It is reasonable to assert that taxes on individuals increase to accommodate higher prices for the essential materials to construct, maintain and improve America's roads, highways and bridges.

IV. The proposed rule would do nothing about human behavior.

The stated premise for the proposed rule is MSHA's belief that operators are not conducting effective examinations, and that if they did so at the time and in the manner prescribed by

⁶ See 81 Fed. Reg. 36823

MSHA, it would lead to fewer accidents and injuries⁷. The premise is mistaken. Most reputable safety professionals today recognize that the overwhelming majority of accidents are functions of worker or management behavior rather than conditions at the workplace. Case and point is MSHA's safety alert just released this morning on the use of seat belts. The alert estimates that approximately three miners are killed annually because either they don't wear a belt or they do not use it properly. Further, there's been no demonstration of problems associated with the current workplace exams standard, and the proposed modifications will do nothing to get at the heart of the behavioral issues that are the root cause of many fatal accidents, including the failure to wear seat belts.

Regarding the several accidents that MSHA cites to justify the proposed rule, MSHA essentially relies on the fact that an accident occurred as conclusive proof that an adequate workplace exam was not performed and that MSHA's existing workplace exam standard for M/NM mines is inadequate. This is of course a loaded proposition: there is no actual evidence of an inadequate examination in the cited examples. MSHA is just seeing what it wants to see, adhering to the faulty logic that the secret to better regulation is more regulations which is a logic that Presidents Clinton and Obama rejected in EOs 12866 and 13563 as noted above.

There is also no empirical evidence that the proposed revisions would have prevented those accidents. The common element throughout the cited accidents is human error, something no amount of additional examination requirements will fix.

It is well and good for MSHA to be vigilant and encourage industry to be vigilant as well. As MSHA knows, NSSGA and its members take great strides to meet and work with MSHA on a regular basis in furtherance of improving safety on the job. Such a collaborative relationship has been the hallmark of the MSHA-NSSGA Alliance. NSSGA believes whole-heartedly in improving safety through vigilance in worker training, vigilance on the job and vigilance during workplace examinations. But additional vigilance does not mean *additional regulations*.

V. Key provisions of the rule demonstrate regulatory overreach.

Not only is the proposed rule unjustified, but the merits of the proposed revisions are not reasonable. We address the problematic provisions below.

1. In regard to conducting exams before the beginning of a shift:

As MSHA has been told by NSSGA and numerous witnesses at various public hearings, the current workplaces examination rule is effective because of its flexibility in timing and the manner of the examination to be conducted. The current standard gives an operator the flexibility and responsibility to establish examinations that work effectively for a particular workplace. The standard also allows operators to train workers to properly handle examinations and tasks. All employees are charged with taking ownership of the safety of their own work areas, which in turn encourages constant vigilance throughout a shift. NSSGA

⁷ See 81 Fed. Reg. 36820 (June 8, 2016)

appreciates MSHA's attempt to clarify in its Federal Register notice of Aug. 25 that MSHA did not intend in the proposed revision to require operators to examine the "entire mine" prior to commencing work, and that the obligation to conduct an examination of each working place before work begins implicates only those specific "areas where work will be performed."⁸ Nevertheless, there remain several significant problems with the provision.

The language MSHA uses in its clarifying notice of Aug. 25 did not accurately reflect the text of the proposed rule. In the notice, MSHA used the phrase "before work begins in an *area*" to describe the text of the proposed rule. However, the proposed rule reads, in relevant part, that "a competent person designated by the operator shall examine each working place at least once each shift, *before miners begin work in that place.*" Thus, the regulatory text does not speak in terms of an "area." It refers to "that place," which is a reference to "working place," which in turn is defined to mean "any place in or about a mine where work is being performed."⁹ MSHA has taken the position in prior guidance that, for enforcement purposes, it construes the term "working place" to include "areas where work is performed on an infrequent basis ... if miners will be performing work in these areas during the shift."¹⁰

Read literally, therefore, the proposed rule does effectively require the entire quarry to be inspected before any person begins work, or at least those portions of the quarry where the operator reasonably anticipates an employee will need to work during the course of an upcoming shift. This is a broad definition when MSHA's interpretative guidance is factored in.

Accordingly, while NSSGA appreciates MSHA's comment in the Aug. 25 notice that the pre-shift examination requirement is not intended to be so onerous as to require an examination of an entire quarry, the fact remains that, prospectively, it will be the proposed regulatory text that will be codified in the Code of Federal Regulations (CFR). It will be the CFR that will be enforced by the MSHA inspectorate. Thus, our members would rather avoid interpretative disputes with MSHA inspectors in the field and before Commission administrative law judges over the precise scope of the "place" or "area" that was required to be examined before anyone commenced work in that place or area. As a practical matter, therefore, the proposed revision does seem to require an entire mine inspection prior to the commencement of work, at least if an operator wants to safeguard against subjective judgments by MSHA inspectors in the field.

Assuming the proposed rule can and should be read more narrowly to require examination only in specific "areas" where work is about to be performed, the term "area" is not defined. It might reasonably apply to a physical space that is greater than the specific location where one or more workers would be expected to work at any given moment. At several public hearings, MSHA heard from many witnesses that it is customary in many occupations to examine the workplace as one progresses through his or her assigned tasks. On a task-by-task basis, or location-by-location basis, this means that the physical place immediately about to be worked is customarily examined prior to it being worked (i.e., the examination coincides with the arrival

⁸ See 81 Fed. Reg. 58423

⁹ 30 C.F.R. § 56/57.2

¹⁰ 81 Fed. Reg. 36821

of the workers and commencement of work there). That makes sense logistically and it also accomplishes MSHA's objective of examining a particular work location prior to the commencement of work. The difference between this customary timing of examination and what MSHA is proposing appears to be the scale or dimension of the "place" or "area" that MSHA is proposing be examined. MSHA would require an entire "working place" to be examined before work commences, whereas many of our members examine the entire working place during shifts as employees come to work at specific locations within that working place.

Frankly, we think that the current rule works well and that MSHA's proposal would be less safe and therefore at odds with Mine Act § 101(a)(9). The proposed rule risks giving employees the misimpression that safety is just a function of conditions at the beginning of a shift. The reality is that the mining process is dynamic and hazards don't just present themselves at the shift's beginning. So, while operators have endeavored to fully empower all to work safely, this proposal risks reversing that critical achievement. Examining the conditions of a specific location when the employee or crew gets to that location is more prudent and safety-conscious. Under the existing standard, the competent person responsible for making the examination is constantly on the watch for hazards; the examination standard is always in the "on" position, in other words. The proposal risks converting the examination to a "one-and-done" concept, where the switch gets turned off once the examination is completed and work commences.

At many operations, there are practical challenges to requiring an examination of the entire working place prior to the commencement of work. One raised by many witnesses at MSHA public hearings is the lack of illumination at surface mines in the early morning hours, before first shift. Requiring a pre-shift examination of all working places that could be worked for the entire shift without sufficient sunlight would be impracticable. It may not be possible or it may be cost-prohibitive when factoring in delayed downtime of operations, additional personnel or overtime resulting from the pre-shift exam requirement and associated record maintenance.

NSSGA believes that MSHA has greatly underestimated the associated costs of inspecting all workplaces that could be used during a shift. Especially at facilities that operate three shifts, our members say that a required examination of these places before a shift will lead to costly work stoppages. This effect would be far greater than the "de minimis" cost that MSHA attributes to the proposed rule in the preamble. In fact, one operator estimated that this provision at his facility would impose a cost of approximately \$25,000.

2. In regard to the call to notify all employees of hazards found:

We are not sure what MSHA aims to accomplish through this requirement, which we think is poorly conceived. Under the current standard and existing case law, when a hazard is found, it is the operator's obligation to remedy the hazard promptly. As a practical matter, affected employees are already made aware of this. Notifying others on the shift in the "affected area" but who are not truly affected by the hazard carries no safety benefit, and will only serve to distract otherwise unconcerned workers and risk employee confusion, not to mention

unnecessary work slowdowns, as a result. The existing standard already requires operators to withdraw workers from the affected area in the event of an imminent danger, and this proposed new provision for lesser hazards will only sow confusion.

The proposal also gives rise to administrative confusion. Resources that would otherwise be put to remedying the hazard will now be diverted to identifying the affected area, identifying and notifying workers in the affected area, informing those workers about the nature of the hazard (*something less than an imminent danger*) and how it is being addressed before finally documenting all of this in order to avoid citation by MSHA for failing to communicate the hazard. This is akin to making a mountain out of a molehill, especially at small operations, and a poor use of time and resources.

3. In regard to the call to document hazards and fixes:

We fear that greater documentation of hazards risks bureaucratizing the management of safety.

The goal of an examination program is to find and correct hazards. Documenting that a task has been accomplished is already required by the existing rule, and additional extensive documentation is neither necessary nor helpful. For one thing, it can never illustrate the precise cause of the hazard identified. Yet, an inspector, perhaps perceiving a particular violative condition that had occurred months earlier, might take the documented information as grounds for writing a citation without any idea of what actually transpired at the facility or of any actual hazard posed to workers. An inspector might also draw inferences on account of the examination record and then go into his next inspection with preconceived notions about problems at the operation without having the benefit of context and issue unfounded citations.

Also, operators will now inevitably be judged by MSHA (i.e., cited) on the level of detail needed and included in the exam records. The proposal will give rise to enforcement disputes over paperwork. That is not a good use of resources for either our members or MSHA.

These concerns are not new ones. In fact, when MSHA re-codified the examination standard as a mandatory standard in 1979, as required by the Mine Act, it proposed a rule quite similar to the current proposal. Then, as now, operators objected on grounds that the record-keeping proposal was both unnecessarily burdensome and potentially self-incriminating. As MSHA recounted in the preamble to the 1979 rulemaking:

Numerous comments and objections were received, raising several important issues. These included ... the recordkeeping requirements were burdensome and possibly self-incriminating; ... and the standard could be used to cite operators for violations covered by existing standards that would result in multiple citations for a single violation.¹¹

¹¹ 44 Fed. Reg. 48505 (Aug. 17, 1979).

To its credit, MSHA heeded the concerns raised and pared back the text to what is found in the existing standard. MSHA stated on this point:

In response to the comments regarding recordkeeping, the recordkeeping requirements have been significantly reduced to include those records which are essential and necessary to the enforcement of the standard. The agency believes that by requiring regular close examination of the total mining environment, the final standard will better promote safety and health of affected miners.

The intention of both the [prior] advisory and proposed standards was to require, as part of a continually functioning and effective safety program, that the operator perform a regular examination of working areas and installations for hazards. Through the conduct of a such a program, miners will be assured of a safety, and more healthful mine environment.

Id. (emphasis added).

We believe MSHA got it right when it looked at this issue in those early years of the Mine Act. The existing standard captures the elements that “are essential and necessary” to an effective workplaces examination program. Operators are familiar with the requirements and appreciate not only the flexibility but the responsibility that the existing standard gives them to do their jobs well. The safety data summarized above reflects that they are doing a great job.

There is no safety benefit to requiring descriptions of locations and conditions. MSHA has asked for feedback on how operators use examination records to identify and correct “systemic adverse conditions,” and what limitations would be imposed on operators if this were not a requirement.¹² The fact of the matter is that our members use all tools and information available to them – not only examination records, but feedback from their miners and managers and regular safety meetings and walk-arounds. The business of producing aggregates includes at its core knowing the quarry well and its operations intimately. Our members’ managers and their staff are constantly observing, constantly communicating and constantly correcting hazards in order to have safe operations. It is the inculcation of a workplace safety ethic that promotes safer workplaces and not more robust recordkeeping. Continuing under the existing rule, which is the same standard that MSHA recognized in 1979 includes everything that is “essential and necessary” to an effective examination program, will not impose any limitations on operators.

Let’s be clear: These additional recordkeeping requirements will not be for the benefit of operators. The requirements will merely make it easier for MSHA to nitpick and question judgments properly made by mine management. MSHA has identified no safety benefit that will be created by the proposed additional requirements. Even under the MSHA mobile equipment standard, a record of the defect is maintained only until the defect has been

¹² 81 Fed. Reg. 58424

corrected.¹³ At the end of the day, a provision such as this would merely further bureaucratize the examination process and spawn lots of needless paperwork. Bureaucracy and needless paperwork come at the expense of valuable time that otherwise could be put toward actual safety management, e.g., doing root cause analysis, behavior observations, coaching, training, etc.

Additionally, the proposal does not mention how the records would influence the "negligence" and "likelihood of occurrence" judgments of inspectors in the Gravity section and how this, along with additional "history" points, could escalate the overall penalty points. For example, spillage has a number of causes, many of which could be the result of parts wearing out or failing. If there is a spill of material from line C-7, but C-7 is 250 feet long, the spill could be anywhere along the belt and caused by several different components failing. If a record of each occurrence is kept, an inspector could "reason" that there has been a pattern of "spillage" in the last several weeks, and it has occurred again and again because "management failed" to prevent spillage from C-7. The operator would know the truth of how each occurrence was different, but examination of record books could lead an inspector to believe that there is a recurring problem with C-7. However, the reality might well have been that on one occasion spillage was the result of failure of the skirt boards at the tail pulley; a second spillage was the result of a clogged chute at the head pulley; a third spillage was the result of failure of a troughing roller and materials spilled off the side of the belt just after the gravity take-up pulley in the center of the belt. So, here is an example of three separate spills caused by three separate issues and yet listed in the citation as "'This standard has been cited three times in the last year.'"

4. In regard to requiring a signature:

We do not understand MSHA's desire for the workplace exam record to be signed by an individual. Nowhere in the proposed rule or MSHA's clarifying comments from Aug. 25 does MSHA provide a safety-based rationale for why the exam record should be signed by the individual examiner. If the objective is a thorough examination, how is the examiner's identity relevant? MSHA does not give any safety-based reason for this requirement. It appears, rather, that it is simply an expedient for MSHA to identify individuals for potential individual liability under Section 110(c).

We understand MSHA's point in the Aug. 25 notice that the proposed rule does not add or subtract from the existing 110(c) determination made by MSHA on a case-by-case basis, as the facts warrant.¹⁴ But the proposal does have a psychological effect that MSHA fails to understand. By requiring an individual's signature, the proposed rule seems to be singling out the competent person for heightened scrutiny in case of a violation or accident. This has the effect of setting up an easy scapegoat and in turn intimidating competent miners from wanting to undertake the duty in the first place. Individual liability for "knowing" violations is one thing as Section 110(c) plays an important role in the statutory and enforcement scheme. If the facts

¹³ See 30 C.F.R. § 56/57.14100(d).

¹⁴ 81 Fed. Reg. 58424

support such a charge in a given case, MSHA has the investigatory and prosecutorial tools necessary to pursue it. But, the purpose of a workplace examination, should remain focused on creating a safer workplace. It should not be co-opted by MSHA to serve as an investigative expedient for a charge of individual liability.

Our concern about the intimidation factor cannot be overstated. Our members' employees are aware of this proposal and there is a real trepidation on the part of individuals to take on any responsibility that would so readily make them a target for MSHA enforcement. Because it has no safety enhancing value, this proposal is a bad idea and we strenuously oppose it.

5. In regard to the call to make records available to inspectors and representatives of miners and to provide copies upon request:

Again, this proposal would in no way benefit safety. MSHA is already entitled to review examination records upon inspection. Obligating an operator to make its examination records available to the miners' representatives and even provide copies of those records upon request is a bad idea. Review by MSHA at the operation to confirm compliance is one thing, but forcing operators to make books and records available to its rank-and-file personnel is wrong-headed, shows a lack of respect by MSHA for the integrity of the management of our members' facilities and would risk fomenting discontent between management and workers by possibly encouraging "vigilante" employee representatives to conduct their own investigations and second guess management. MSHA is not the mine operator. Deciding which personnel should be privy to mine records is a management decision. MSHA should not meddle in relationships between management and workers beyond those areas in which it is properly authorized to impose bona fide safety and health standards.

Moreover, the proposed requirement to make "copies" available to miners' representatives upon request is a recipe for disaster. What would stop disgruntled employees in possession of examination records from posting them on social media, entirely out of context, in attempts to embarrass or shame their employers? We shudder to think of the mischievous consequences should this proposed provision take effect, on top of the inherent administrative burden. And it is also an added administrative burden to make copies for MSHA upon request. MSHA has the right to review the exam records at the operation as part of an inspection. MSHA should not saddle operators with additional administrative costs and burdens, especially when no justification has been given for the proposal.

6. In regard to whether MSHA should require minimum experience, ability or knowledge level to be a competent person:

The answer is No. Leave the definition of "competent person" as is and continue to allow the operators, who know their operations and workforce far better than MSHA, to determine who is competent for purposes of conducting examinations.

7. In regard whether the agency should allow an exam to be conducted, if not before shift, then within two hours of shift's beginning:

As noted above, the operator knows best when an exam should be conducted. It may be before the shift, toward the beginning or throughout a shift. The objective for all is safety, but how a facility manages itself should be left to the operator.

8. In regard to the rule's anticipated impact on small operators:

It goes without saying that small operators are the least likely to have the resources to comply with this proposal. MSHA has said that it does not believe the proposal will have a significant economic impact on a substantial number of small entities, and thus does not believe a regulatory flexibility analysis is required under the Regulatory Flexibility Act, as amended.¹⁵ However, NSSGA does not believe that MSHA has adequately supported its conclusion.

Conclusion

For the reasons stated above, NSSGA does not believe MSHA has adequately considered and compared the benefits and costs of the proposed rule as a general matter, and that MSHA does not have an adequate understanding of how this will impact production and jobs operators of any size. For obvious reasons, the burdens will fall even harder on small producers' operations.

NSSGA reiterates that it appreciates the good work of MSHA and the opportunity to collaborate through the MSHA-NSSGA Alliance partnership and elsewhere. NSSGA also appreciates the opportunity to comment on the proposed revisions to the workplaces examination standard. However well-intentioned they might be, the proposed revisions should be put aside for the reasons explained above because the proposed revisions are unnecessary, burdensome and simply bad policy.

Of course, please contact me if I can provide further information. I can be reached at 703-526-1074 or jcasper@nssga.org.

Sincerely,



Joseph Casper
Vice President, Safety

¹⁵ 81 Fed. Reg. 36824