
From: E-Rulemaking - MSHA
Subject: FW: Comments on the Proposed Revisions Work Place Exam Proposed Rules
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Sent: Friday, September 30, 2016 4:32 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Cc: 'Travis Deti'; jdowning; Heidi Peterson
Subject: Comments on the Proposed Revisions Work Place Exam Proposed Rules

SEP 30 2016

Please find the attached comments submitted on behalf of the Wyoming Mining Association membership.

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September 30, 2016

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Sent via E-mail to: zzMSHA-comments@dol.gov

**Re: Comments on the Proposed Revisions Work Place Exam Proposed Rules
Docket No. MSHA-2014-0030 and RIN 1219-AB87**

Dear Sir or Madam:

The Wyoming Mining Association (WMA) appreciates the opportunity to submit comments on the Mine Safety and Health Administration (MSHA) proposed rule concerning Examination of Working Places in Metal and Nonmetal Mines, published on June 8, 2016.

WMA members own and operate underground trona mines near Green River, Wyoming, as well as surface processing plants which refine the trona ore to produce natural soda ash. WMA members are some of the largest employers in the state of Wyoming. Our products are sold domestically in the United States and exported globally, where we compete against synthetic soda ash produced largely by Chinese producers, whose production is subsidized through export tax credits among other means.

Safety is a core value for WMA members and we share MSHA's goals of preventing injuries. We continue on our journey towards an injury-free work place and each year formulate additional efforts to engage our employees in reducing injuries; reducing our risk tolerance; and training and developing our employees to improve skills and execution of safe work practices.

WMA believes that Work Place Exams (WPE) play an important role in efforts to mitigate work place conditions which may cause injury. WPEs however must complement equally important efforts to eliminate unsafe behaviors and nurture systems which support safety programs.

In the pre-ambble to the June 8 rule, MSHA specifically requests comments on specific elements of the WPE program as well as the proposed revisions to the existing rules at 30 CFR 56.18002 (surface mines) and 30 CFR 57.18002 (underground mines). The comments below are responsive to those notices.

1. MSHA requests comments on whether the Agency should require that examinations be conducted within a specific time period, e.g., 2 hours before miners start work in an area.

Comment: MSHA should not specify a specific time period. The current regulatory language “at least once each shift” should remain unchanged, or if MSHA has sufficient justification to modify, consider the alternative “before work commences each shift.” At least two reasons support this. First, as MSHA notes, there are operating areas where work is not conducted every shift, and a WPE is only required for shifts when work will be conducted in that area. Frequently, this would apply to an area which would not be a work place save for an unexpected equipment malfunction. It is not practicable or feasible to ‘pre-inspect’ the area, prior to troubleshooting the malfunction, which would unreasonably delay the work. Rather, the WPE should occur simultaneously with visiting the area to begin work there (although as MSHA notes, documentation is not required until the end of the shift). Inserting a temporal disconnect between entering the area and working in the area is not justified and represents a significant operating inefficiency. Second, conditions change throughout the shift, and limiting WPEs to a specific round potentially results in failure to observe and correct a hazard which manifests itself during the shift.

WMA believes that the crew most recently working in an area is best able to report on the conditions in that area and thus conducting a WPE during the shift, and having it documented by the end of the shift, best captures the conditions of which the oncoming crew should be aware. A requirement for miners to review the WPE conducted on the prior shift at the start of the shift the perceived deficiency in awareness for miners beginning work in the area.

2. MSHA requests comments on whether the Agency should require that the competent person conducting working place examination have a minimum level of experience or particular training or knowledge to identify work place hazards. The Agency requests information on whether a competent person should have a certain ability, experience, knowledge or training that would enable the person to recognize conditions that could adversely affect safety or health.

Comment: MSHA should not alter the existing definition of a competent person. At least two reasons support this. This term is already well defined and used in various contexts within the body of MSHA regulations. There does not appear to be a justification to modify the definition of competent person for WPE, and not for other requirements which require a competent person be assigned. A situation where multiple versions of a definitions for a single term will undoubtedly lead to confusion on the part of the operators as well as the inspectors. Second, the existing requirements and definition puts the burden on the mine operator to designate a person who is able to recognize hazards and adverse conditions that are expected or

known to occur in a specific work area or that are predictable to someone familiar with the mining industry. At many mines, the range of conditions and potential hazards is broad and it would not be feasible for MSHA to develop a single concise set of pre-defined competencies and skills which would allow a person to perform WPEs. Rather, requiring the operator to incorporate those competencies into its process to designate a competent person allows for differentiation across the range of complexities and nature of hazards at the site. For example, the competencies needed to conduct a WPE in a gassy underground mine are different from those needed to conduct WPE in the boiler house supporting surface processing operations. Any attempts at developing a single prescriptive definition would be without merit, and in fact diminish, the performance based definition which exists currently, putting the burden on the operator.

Additionally, while current MSHA guidance states that a best practice is for a foreman or other supervisor to conduct the examination. WMA disagrees. While this may be appropriate in some circumstances or organizations, it suggests that safety is management's responsibility versus everyone's responsibility. Rather, when an experienced, lead operator conducts the WPE (and implements corrective action), it is clear that safety is a shared responsibility and a key skill/competency required, along with competencies in other tasks, to become a lead operator.

Furthermore, when the employees doing the actual work are the individuals that are doing the work place examination, there is an argument that would say that these individuals are more in tune with the safety aspects of their jobs, thereby, helping to minimize (or eliminate) the potential for injury.

3. The proposed rule would add new requirements that the [required] record also be made available to miners and their representatives and that a copy be provided to the Secretary of his authorized representative or a miners' representative when they request a copy. MSHA solicits comments on these proposed requirements.

Comment: MSHA provides no rationale for this proposed change. At WMA sites, the miners working in the area where the WPE has been conducted already have access to the records, kept most commonly in control rooms, and MSHA inspectors routinely review WPEs as part of their inspection. There is no justification provided on adding additional burdens to make and provide copies. Rather, this potentially creates useless work should some unrelated dispute trigger frivolous requests for documents without any limitations. This represents a new, unnecessary and potentially extremely burdensome requirement without any enumerated benefit.

4. MSHA proposes that Parts 56 and 57.18002(a)(1) be revised to require that the ‘operator shall promptly notify miners in any affected areas of any adverse conditions found that may adversely affect safety or health.’

Comment: The proposed language is overly broad and subject to vastly different interpretations and make it impracticable to implement. “Any adverse conditions” could be interpreted to include such conditions as thunderstorms in the area; to a hose left across a walkway (tripping hazard); or to a co-worker with a child with the chicken pox. MSHA provides no justification or rationale for the insertion of “any adverse” into the current language, e.g., to examine the work place for “conditions which may adversely affect safety or health.” MSHA would need to clarify what would be excluded from current language but captured in proposed revised language if this proposed change were to be implemented.

Also, the proposed addition of a requirement for notification should be limited to notification to “conditions which may adversely affect safety or health.” If a tripping hazard is identified, and removed contemporaneous with the WPE, the notification, as well as the requirement to create a record, serves little purpose beyond adding additional administrative burdens to the United States mining industry.

It should be noted that it would appear that the circumstances which prevent a miner from working alone at 30 CFR 56.18020, e.g., “where hazardous conditions exist that would endanger his safety” would be conditions that would require prompt initiation of appropriate action to correct such conditions under the proposed rule. MSHA should clarify that assigning a work partner would be considered “appropriate action to correct such conditions;” specifically stating that implementing safe work practices or other mitigation are acceptable means of compliance. Similarly, barricade tapes, signage or other posted warnings, as well as verbal review in pre-shift meetings, should be explicitly listed as acceptable means of compliance.

5. MSHA proposes that Parts 56 and 57.18002(b) be revised to add new requirements including: (1) the record of the WPE shall be signed by person making the examination; (2) the record include a description of each condition found that may adversely affect the safety and health of miners; (3) the description of corrective actions take, (4) the date the corrective action was taken, (5) the name of the person who made the corrective action, and (6) the date the record of the corrective action was made.

Comment: The current requirements simply specify that a record that a WPE was conducted be maintained, without specifying contents. WMA agrees that the WPE standard can be improved by specifying contents for the record, but believes that those improvements can be captured more efficiently. First, require the name of the person conducting the WPE, not the signature. Many records are maintained electronically and a signature is not feasible. Additionally, if someone were to have question for the person conducting the WPE, a name is clear, versus a signature which may or may not be legible.

Second, there is little value to recording conditions which have already been corrected by the time the record is made, e.g., trip hazards removed, guards reattached contemporaneous with, or immediately following the observation, and no later than the end of the shift. Recording conditions which no longer exist is not a good use of resources, and worse, it creates a significant potential for distraction and/or dilutes the focus on unmitigated hazards. For example, if five items were found in the WPE, and only one remains unmitigated at the end of the shift, wouldn't the intent of the standard be better served having miners focus on the one which remains unmitigated? Third, as above, taking the time to write – "9/9/16 - hose across walkway" - "9/9/16 - hose removed by John Doe" - "John Doe recorded hose was removed on 9/9/16" – times the number of hazards found – times the number of work areas inspected - then sign each form would clearly add far more than 5 minutes per WPE, as MSHA estimates. Furthermore, it is unclear whether this level of detail in the record would be considered sufficient. Would one MSHA inspector determine that the exact location of the hose should be noted? Or the type of hose? Or where the hose was relocated to? The adequacy of the record will be very subjective as the rule is currently proposed and will lead to unnecessary dispute in practice. Fourth, in practice, hazards which cannot be immediately abated generally require some sort of maintenance work order, and in 2016, most plants manage work orders in an electronic system. The rule as it reads, would require records that are generated, completed and maintained in an electronic work order system, be separately transcribed onto a WPE record. This represents a significant amount of non-value-adding work.

MSHA should look to the existing mobile equipment standard which only requires maintain the record be maintained until the problem is corrected.

6. General Comments

- A. If MSHA wants to improve the quality of WPE training program as a special focus initiative rather than implement changes to the current requirements which provide adequate and sufficient regulatory framework for the program. MSHA clearly believes there is some deficiency in the program, although the nexus to accidents is not clear. Use MSHA's resources to develop training materials and programs, example WPE records, and provide these resources to miners. Attempts to change to the requirements – especially those which introduce a new term "any adverse condition" – would be most effective with examples. If MSHA were to provide training materials, suggest they be covered with the designated competent persons at each mine – as well as MSHA inspectors - and then solicit feedback, far greater improvements could be attained in far shorter amount of time. A cooperative approach to improve the program, rather than one that is rife with opportunity for disparate interpretations among operators and inspectors, would be a more effective means to improve the WPE program.
- B. While the current rules require maintaining the records for a calendar year, the requirement should be modified to state that they are only required to be kept for the

preceding calendar quarter, e.g., after MSHA had completed its 2nd quarter 2016 E01 inspection for the mine, all records prior to the 2nd quarter could be discarded.

- C. At most large mines each day, over dozen of competent persons are conducting work place exams in the areas they work, as part of their normal assigned duties. MSHA cannot judge the quality of the findings of those WPEs versus the findings of a MSHA quarterly inspection – conducted by multiple inspectors inspecting seven hours per day for a three, four, or five week period. The WPEs being conducted by operator-designated competent persons can best be aligned with MSHA’s inspectors by MSHA implementing a training program.

Unfortunately, even a perfect WPE program will not prevent accidents. Our experience in recent years – and we believe that of industry as a whole – is that more accidents are caused by unsafe behaviors, an employee disregarding a rule, practice or instruction, or simply being distracted, than by conditions. That is because the existing WPE regulations – along with improvements in industry’s safety programs, have made great strides in reducing unsafe conditions (which would be identified in WPEs). Commensurate progress in programs to correct unsafe behaviors will be thwarted if resources are diverted to implement programs which do not contribute to safer work places.

We appreciate the opportunity to provide these comments. If you would like to discuss any of the comments in more detail please do not hesitate to reach out to the Trona Industry.

Sincerely yours,

Wyoming Mining Association, Ciner, Solvay, TATA and Tronox

Note: Contact Joe Vasco for further questions or clarifications at joe.vasco@tronox.com or 1-307-389-0078.