

IN THE MATTER OF:)
)
EXAMINATIONS OF WORKING PLACES)
IN METAL AND NONMETAL MINES)

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BEFORE THE U.S. DEPARTMENT OF LABOR
MINE SAFETY AND HEALTH ADMINISTRATION

IN THE MATTER OF:)
)
EXAMINATIONS OF WORKING PLACES)
IN METAL AND NONMETAL MINES)

201 12th Street South
Suite 401
Arlington, Virginia

Tuesday,
July 26, 2016

The parties convened, pursuant to the notice, at
8:34 a.m.

APPEARING:

SHEILA McCONNELL, Director
Office of Standards, Regulations and Variances

LARRY TRAINOR
MSHA Metal & Nonmetal Mine Safety & Health

ALFRED DuCHARME
Office of the Solicitor, Department of Labor

LARRY DAVEY
MSHA Office of Standards

PAMELA KING
MSHA Office of Standards

ANN KELHART
Martin Stone Quarry, Incorporated

Henry Chajet,
Husch Blackwell LLC.
Representing the Mining Coalition

APPEARING (cont.):

BRETT SMITH
American Iron and Steel Institute

TODD OHLHEISER
Colorado Stone Sand and Gravel Association

MARK ELLIS
Industrial Minerals Association North America

MATT STEWART
R. T. Vanderbilt

ROBERT CARLSON
Fairmount Santrol

ADELE ABRAMS
Law Office of Adele Abrams, PC

JOSEPH CASPER
National Stone, Sand, and Gravel Association

JOSH ROBERTS
United Mine Workers

JAMES FREDERICK
United Steelworkers

HUNTER PRILLAMAN
National Lime Association

P R O C E E D I N G S

(8:34 a.m.)

MS. MCCONNELL: Good morning. My name is Sheila McConnell, and I am the Director of Office of Standards, Regulations and Variances for the Mine Safety and Health Administration.

I am the moderator for this public hearing on MSHA's Proposed Rule on Examinations of Working Places in Metal and Nonmetal Mines. The proposed rule was published in the Federal Register on June 8, 2016. On behalf of Assistant Secretary, Joseph Main, I want to welcome all of you here today and thank you for your attendance and participation.

First, I'd like to introduce the members of our panel. We have Larry Trainor from Metal and Nonmetal Mine Safety and Health; Alfred DuCharme from the Office of the Solicitor; and Larry Davey from the Office of Standards. We also have Pamela King from the Office of Standards here as well.

This is the third of four public hearings on the proposed rule for examinations of working places in metal and nonmetal mines. The first two took place on July 19th in Salt Lake City, Utah; on July 21st in Pittsburgh, Pennsylvania; and the last hearing will take place on August 4th in Birmingham, Alabama.

1 Immediately following today's hearing and the
2 one remaining hearing on the proposed examinations
3 rule, we will hold public meetings on MSHA's Request
4 for Information on Exposures of Underground Miners to
5 Diesel Exhaust.

6 We are holding these meetings in response to
7 requests from stakeholders. And in the interest of
8 efficiency, we decided to hold the public hearings for
9 the proposed rule and the public meetings for the
10 request for information consecutively.

11 The purpose of this hearing is to receive
12 information from the public that will help MSHA
13 evaluate the proposed requirements and produce a final
14 rule that will improve safety and health for miners at
15 metal/ nonmetal mines. The hearings are conducted in
16 an informal manner. Formal rules of evidence do not
17 apply.

18 The hearing panel may ask questions of the
19 speakers, and the speakers may ask questions of the
20 panel. Speakers and other attendees may present
21 information to our court reporter for the rulemaking
22 record. MSHA will accept comments and other
23 information for the record from any interested party,
24 including those not presenting oral statements. We ask
25 everyone in attendance to sign the attendance sheet.

1 Before we discuss specific issues and hear
2 from you, I want to reiterate why we are proposing this
3 rule. MSHA is proposing to amend the Agency's existing
4 standards on examinations of working places to ensure
5 that mine operators identify and correct adverse
6 conditions that may affect miners' safety or health.

7 The proposed rule would strengthen and
8 improve MSHA's existing requirements for metal and
9 nonmetal examinations of working places. The proposed
10 rule would require that:

11 A competent person designated by the mine
12 operator examine each working place at least once each
13 shift before miners begin work in that workplace for
14 conditions that may adversely affect safety or health;

15 The mine operator promptly notify miners in
16 any affected areas of any adverse conditions found that
17 may adversely affect their safety or health and
18 promptly initiate appropriate action to correct the
19 adverse conditions.

20 Conditions noted by the competent person
21 conducting the examination that may present an imminent
22 danger be brought to the immediate attention of the
23 operator who must withdraw all persons in the area
24 affected until the danger is abated.

25 A record of the examination made and the

1 competent person conducting the examination sign and
2 date the record before the end of each shift for which
3 the record was made.

4 The examination record include the locations
5 of all areas examined and a description of each
6 condition found that may adversely affect the safety or
7 health of miners.

8 The examination record also include a
9 description of the corrective action taken, the date
10 that the corrective action was taken, the name of the
11 person who made the record of the corrective action,
12 and the date the record of the corrective action was
13 taken.

14 The mine operator maintain the examination
15 record for at least a year, make the records available
16 for inspection by MSHA and the miners' representative
17 and provide these representatives a copy upon request.

18 The proposed rule would build on existing
19 concepts, definitions and responsibilities so that the
20 new notification and record keeping requirements can be
21 easily adopted by mine operators.

22 The proposed rule would not change the
23 existing definition of competent person and working
24 place used in Sections 56/ 57.18002 and defined in
25 Sections 56/ 57.2.

1 The existing definition of a competent person
2 is a person having abilities and experience that fully
3 qualify him to perform the duty to which he is
4 assigned.

5 The existing definition of a working place is
6 any place in or about a mine where work is being
7 performed.

8 Before we discuss specific issues and hear
9 from you, I want to reiterate why we are proposing this
10 rule. Recent fatalities and previous fatalities and
11 serious accidents in metal and nonmetal mines indicate
12 that miners would benefit from more rigorous workplace
13 examinations conducted by a competent person. From
14 January 2010 through mid-December 2015, 122 miners were
15 killed in 110 accidents in metal and nonmetal mines.
16 MSHA investigated each of these 110 fatal accidents and
17 issued 252 citations and orders for violations of 95
18 different mandatory safety and health standards.

19 Under MSHA's existing examinations and
20 working place standards for metal and nonmetal mines, a
21 working place examination can be conducted at any time
22 during the shift. The existing standards do not
23 require that the examination be conducted before miners
24 begin work. The existing standards do not require:

25 That the examination record include the

1 locations of the areas examined and a description of
2 the adverse conditions found and the corrective action
3 taken;

4 The existing standards do not require that
5 mine operators promptly notify miners when adverse
6 conditions are found.

7 And the existing standards do not require
8 that operators make the examination records available
9 to miners' representatives.

10 Under the Mine Act, mine operators with the
11 assistance of miners have the primary responsibility to
12 prevent the existence of unsafe and unhealthful
13 conditions and practices.

14 MSHA's best practices include describing
15 adverse conditions in the examination record to
16 facilitate correction of the condition and to alert
17 others at the mine of an adverse condition that may
18 affect them. Making and maintaining a record of
19 adverse conditions found and the corrective actions
20 taken to correct the adverse conditions would help mine
21 operators and miners and their representatives become
22 more aware of dangerous and unhealthful conditions and
23 become more proactive in correcting these hazards
24 before an accident, injury, or fatality occurs.

25 The proposed requirements are a common-sense

1 approach and consistent with the remedial purpose of
2 the Mine Act and MSHA's existing mandatory safety and
3 health standards. Over the years, MSHA has issued
4 Program Policy Letters regarding working place
5 examinations, and has taken the position that a
6 meaningful record of an examination should contain the
7 following:

8 The date the examination was made; the
9 examiner's name; the working places examined; and a
10 description of the conditions found that adversely
11 affect safety or health.

12 We are requesting comments from the mining
13 community on all aspects of the proposed rule. I would
14 now like to go over some of the specific requests for
15 comments and information we included in the preamble to
16 the proposed rule.

17 In the preamble to the proposed rule, we
18 stated that we are interested in comments on whether
19 the Agency should require that examinations be
20 conducted in an area within a specific time period, for
21 example, two hours, before miners begin work in that
22 area.

23 We are also interested in comments on who
24 should conduct the working place examination. MSHA
25 believes that, to be effective, working place

1 examinations must be conducted by a competent person
2 designated by a mine operator. MSHA has emphasized
3 that a competent person is a person who should be able
4 to recognize hazards and adverse conditions that are
5 expected or known to occur in a specific work area, or
6 that are predictable by someone familiar with the
7 mining industry.

8 MSHA has stated in previous Program Policy
9 Letters that although the best practice is for a
10 foreman or other supervisors to conduct the
11 examination, in most cases, an experienced non-
12 supervisory person may also be competent to conduct a
13 working place examination.

14 MSHA has also stated that a competent person
15 designated by the operator must have the experience and
16 training to be able to perform the examination and
17 identify safety and health hazards. We request
18 comments on whether MSHA should require that the
19 competent person conducting a working place examination
20 have a minimum level of experience or particular
21 training or knowledge to identify workplace hazards.

22 We also request comments on all the costs and
23 benefit estimates presented in the preamble and on the
24 data and the assumptions the Agency used to develop
25 these estimates.

1 Please provide any other data or information
2 and the rationale and sufficient detail in your
3 comments to enable MSHA to review and consider. Where
4 possible include specific examples to support the
5 rationale and other relevant information, including
6 past practice, past experiences, studies and articles,
7 and standard professional practices. Include any
8 related cost and benefit data with your submission.

9 As you address the proposed provision, either
10 in your testimony or in your written comments, please
11 be specific. Specific information helps MSHA produce a
12 final rule that is responsive to the needs and the
13 concerns of the mining public.

14 MSHA will make available a verbatim
15 transcript of this public hearing approximately two
16 weeks from the completion of the hearing. You may
17 review the transcripts of all public hearings and
18 comments on our website at msha.gov and on
19 regulations.gov.

20 If you have a copy of your testimony, please
21 give submissions to the court reporter so that they can
22 be appended to the hearing transcript. Following this
23 public hearing, you may submit additional comments
24 using one of the methods identified in the address
25 section of the proposed rule.

1 Comments must be received by September 6.
2 However, please note we have received several requests
3 for an extension of the comment period and we are
4 considering these requests.

5 Again, if you haven't signed in on the
6 attendance sheet, please do so.

7 Before we start hearing testimony for the
8 proposed rule, I'd like to encourage those of you who
9 have interests in approaches on diesel -- monitoring
10 miners' exposures to diesel exhaust to attend our
11 public meeting today. As I stated earlier, that public
12 meeting will begin immediately following the conclusion
13 of all testimony on the proposed rule.

14 I would like to ask, can you hear me without
15 this? Oh, thank God.

16 You can't hear me? Not without this? Oh,
17 okay. Well, no, it's just holding -- it's got to hold
18 it. It's like -- let me see that.

19 Can you hear me?

20 Well, as we fiddle with this, I believe Anne
21 Kelhart from Martin Stone Quarry, Incorporated is our
22 first speaker. Anne, do you have any slides?

23 MS. KELHART: No, I don't have a visual.

24 MS. MCCONNELL: Okay.

25 MS. KELHART: Is this position sustainable?

1 MS. MCCONNELL: That's fine. Did you get a
2 copy of her presentation? Okay.

3 MS. KELHART: I believe I gave all five of
4 you a copy.

5 MS. MCCONNELL: Okay. That's fine.

6 MS. KELHART: Testing. Am I blowing
7 anybody's doors off?

8 MS. MCCONNELL: I hear you. Can you hear
9 her?

10 THE REPORTER: Yes.

11 MS. KELHART: All right.

12 MS. MCCONNELL: We're good to go. Good
13 morning, Anne.

14 MS. KELHART: Good morning, ladies and
15 gentlemen, my name is Anne Kelhart. I'm past Chair of
16 the National Stone, Sand and Gravel Association Health
17 and Safety Committee. I'm 2003 recipient of the
18 National Stone, Sand and Gravel Association, James A.
19 Christie Health and Safety Pro of the Year Award. I'm
20 current and longtime Chair of the Pennsylvania
21 Aggregates and Concrete Association Health and Safety
22 Committee.

23 I'm also the current Director of Safety and
24 Human Resources from Martin Stone Quarries in
25 Bechtelsville, Pennsylvania, about 45 miles north of

1 Philly, and I have held that position for about 27
2 years. We're located in Eastern, PA; we're a small
3 organization with an employee population of about 54,
4 give or take, depending on the season. We produce 1-
5 1/2 to 2 million tons of product a year.

6 All but two of our employees work the
7 dayshift. Martin Stone Quarries is representative of
8 many smaller operations all the way down to the mom and
9 pop mines. These are the folks that I'm here to
10 represent today, particularly our miners.

11 In my 27 years working in mine safety, I've
12 seen MSHA and industry work together to significantly
13 reduce fatalities and injuries. I understand there's
14 more to be done.

15 As always, reflective dialogue from all
16 perspectives is important to ensure the greatest
17 potential for a positive result. I thank you all for
18 this opportunity to contribute to this ongoing
19 dialogue.

20 The sad duties of issuing citations and
21 investigating serious incidents and fatalities has led
22 MSHA to believe that some mine operators need to
23 improve on mine site exams. I'm not here to dispute
24 your findings.

25 How we improve these exams needs very careful

1 consideration, warranting input from all perspectives,
2 in order to achieve the highest potential for
3 improvement. With this in mind, I offer the following
4 thoughts:

5 You propose that inspections of the mine site
6 will occur before the beginning of each shift. While
7 this may appear logical, please consider the following:

8 All miners are currently required to examine
9 their equipment and immediate work area prior to
10 beginning any task regardless of the time of day.
11 That's the basic key to resolving immediate hazards
12 that may have appeared since the previous day or shift.
13 Examination of the entire mine site is completely
14 different, and should be performed in full daylight.

15 Surface mines can be vast and complex, both
16 mechanically and geographically. Most surface mines
17 begin operations long before daylight for the majority
18 of the year, and are impossible to illuminate to a
19 level equal to that of daylight in those pre-dawn
20 hours.

21 Mine examiners must be competent. We all
22 agree on that. And they carry a great responsibility
23 both legally and morally to ensure a safe workplace for
24 all their fellow miners.

25 Your proposal will require these miners to do

1 their best work in the dark. The most competent person
2 in the world could miss hazards before dawn that would
3 never be missed in full daylight. Therefore, this
4 proposal is just too much to expect from anyone,
5 regardless of their level of competency.

6 It has been suggested that the timing of the
7 exam could occur within two hours of the beginning of
8 the shift. Again, this may not provide the adequate
9 daylight that competent examiners deserve. Remember
10 their immediate areas are illuminated, but the entire
11 mine site, not so.

12 In our operation it takes about two hours to
13 do a mine site exam. This includes walking the plants,
14 the conveyor systems as well as examining walls,
15 benches, piles and all manner of ground control.

16 The alternative -- one of the alternatives to
17 performing exams in the dark would require operators to
18 begin production well after daylight, after the mine
19 site exam has been successfully completed. This will
20 have a direct and negative impact on our miners.

21 Number 1, miners would have to work later in
22 the day, exposing them to the very insidious but often
23 serious and even fatal problems related to heat stroke
24 for at least three months of the year in the northern
25 states and for longer periods in the southern states.

1 Now, I realize that cabs are air-conditioned these days
2 but we've got a lot of foot soldiers out there that
3 don't have that luxury.

4 Number 2, currently and whenever possible our
5 miners work on a four day, 10 hour schedule. They love
6 it. It gives them more time with their families, they
7 get more rest, they save money on gas, and that savings
8 is also good for the environment.

9 With a full daylight schedule, if we have to
10 move that, we would likely have to return to a five
11 day, or even a six day workweek in order to maintain
12 current levels of production and keep them out of the
13 heat.

14 And last but not least, it is also important
15 to remember that in this scenario miners would have to
16 work much later in the day, perhaps well into evening.
17 This may not seem like much, but miners are safer and
18 healthier when they're at home for dinner. Stronger
19 relationships at home give miners great reasons for
20 getting home safe after every shift.

21 Ladies and gentlemen, perhaps it makes more
22 sense to continue with the current rule, but gear up on
23 education.

24 Ground control examination is difficult.
25 There's no question about that. But it's difficult

1 because problems can be subtle and/or subjective. This
2 is not the first challenge of this type that has been
3 successfully improved. Inspecting guards is a huge
4 part of workplace examination.

5 I'm reminded of the tremendous numbers of
6 guarding citations that were issued each and every
7 year, prior to MSHA issuing Harvey Kirk's outstanding
8 Guarding PowerPoint DVD. And I'm sure we're all
9 familiar with that one. That educational piece took
10 all of the subjectivity out of what is and what is not
11 a proper guard. Because it is self-explanatory and
12 extraordinarily portable, it has been seen by an
13 unprecedented number of miners, and a very dramatic
14 reduction in guarding citations was a direct result.

15 Nobody likes citations, but subjectivity is
16 tough, and ground control is tough. As an alternative
17 to your proposal, I suggest that we need a similar
18 project on ground control, just like the one on
19 guarding.

20 I'm willing to bet that there are
21 associations and mine operators in this room that would
22 volunteer to assist with this endeavor. I know I
23 would. I think the results would amaze you.

24 Another question has been raised as to the
25 relative burden or safety benefit to mandate that

1 operators promptly notify miners of any conditions that
2 may adversely affect safety.

3 Well, immediate notification of adverse
4 conditions to involve miners has always made sense.
5 Notification to others is traditionally accomplished
6 with berms, signage or other means of access
7 prevention.

8 Distracting uninvolved miners with unneeded
9 information may have negative consequences. It is
10 better to inform them of changes or adverse conditions
11 at a time that does not create a distraction.
12 Historically this is done at the safety meeting before
13 the start of their next shift; long after the condition
14 has either been corrected or contained with berms,
15 signage or other means of access prevention.

16 The question has also been raised as to the
17 relative burden or safety benefit to mandate that the
18 exam record must include a description of locations
19 examined, conditions found, and corrective actions
20 taken. In addition, it is proposed to mandate that
21 records must be available for inspection by MSHA and
22 miners' representatives.

23 Ladies and gentlemen, I understand Section
24 104 of the Mine Act. I also understand that MSHA can
25 work interpretively within this section and still be

1 respectful of the law.

2 In all fairness, ladies and gentlemen, and I
3 mean no disrespect, but MSHA may have created
4 significant resistance to this proposal in and of and
5 by themselves.

6 MSHA has a history of imposing punitive
7 enforcement, even when a potential violation has been
8 discovered long after corrective abatement is achieved.

9 This whole concept is counterproductive to
10 the progress of mine safety. I personally, personally
11 have been advised by both senior MSHA personnel and our
12 counsel not to post best practices that have been
13 produced by my safety committee as a training tool to
14 avoid another near miss. Why? Because I could be
15 cited after the fact for the underlying incident.
16 Ladies and gentlemen, how does that make sense?
17 Seriously?

18 Ladies and gentlemen, if our positions were
19 reversed, I'm inclined to believe that you would agree
20 with me on this, but I'm certainly not going to ask for
21 a vote at this point.

22 At our operation, anything that needs
23 immediate attention is conveyed to the mine manager via
24 telephone at time of discovery, whether it's the main
25 mine exam or after that, in order that prompt response

1 is implemented.

2 Other less pressing issues are prioritized,
3 added to a general list of tasks and scheduled
4 accordingly, and it works well for us. Our safety
5 record pretty much speaks for itself.

6 Another question has been raised as to
7 whether the Agency should perform -- should require,
8 I'm sorry, minimum experience, ability or knowledge
9 level to be seen as a competent person. We're not
10 changing the definition, but how we view that
11 definition, is my understanding of what's being
12 proposed.

13 My answer to that question is, no. Though
14 all surface mines have some common hazards, each mine
15 is complexly unique in its own right. What equals
16 competent at one surface mine may not be so at a
17 different mine.

18 Changing the criteria for competent persons
19 opens a huge door. It's important to remember that the
20 term "competent person" applies to everything, not just
21 workplace exams. Mandatory definitions will drive
22 everybody crazy, even MSHA.

23 A miner can often be declared competent with
24 a specific task in a very short time. Overall
25 competence to exam the complexity of a surface mine

1 site can take a very long time, depending upon the
2 miner. And a textbook and a certification test is
3 probably not going to do much to change that.

4 If you persist in this endeavor, the overall
5 impact could be significant. To that, I offer the
6 following:

7 I'm familiar with the MSHA System for
8 Certification of Competency in Underground Mining. It
9 is complex. It requires passing written tests for each
10 level after completing classes developed at the
11 National Mine Academy. Successful completion grants
12 miners something called mining papers at a given level.
13 This is a long-standing and time-consuming program.

14 There is no such program for surface mining
15 at this time. If MSHA were to mandate a similar
16 program for surface mining, there would be significant
17 cost. While a price cannot be put on safety, we are
18 asked by Congress to report the anticipated cost of new
19 regs.

20 As you know, all miner training is paid at
21 the miners' regular rate. While training the miner is
22 also not contributing to production, there's a cost to
23 that. The cost of the instructor must also be
24 considered.

25 Considering some of the workbooks for MSHA

1 classes that I have personally taken, the time spent
2 for each class will be considerable. This number
3 multiplied by the number of affected miners will likely
4 skyrocket the overall economic impact. And I will
5 leave it to the accountants to give you that number,
6 but it will be high.

7 It might be worth the cost, if statistics
8 prove that underground mining performs better than
9 surface mining specifically because of the differences
10 in training methods.

11 I have serious doubts that there is a
12 significant difference in miner performance between
13 surface and underground mining that is specifically the
14 result of methods used in safety training.

15 Again, the current rule works. We need
16 better training on how to do really good workplace
17 exams.

18 That completes my testimony on this proposal.

19 Thank you so much for your ears and your time.

20 MS. MCCONNELL: I also want to thank you for
21 coming today, and providing your testimony. I just
22 have just one, just to understand your comment and your
23 concerns.

24 MS. KELHART: Sure.

25 MS. MCCONNELL: If you could give me a little

1 bit more. I just want to understand how your work is
2 organized? You were saying, "All but two of our
3 employees work the dayshift," so that means that the
4 remaining shifts are occurring after 5:00 through the
5 night into the morning?

6 MS. KELHART: No.

7 MS. MCCONNELL: Okay.

8 MS. KELHART: No, we run a dayshift that can
9 start as early as 3:30 in the morning.

10 MS. MCCONNELL: Okay.

11 MS. KELHART: And the second shift actually
12 overlaps the first. Those two folks are essentially
13 maintenance, and they usually come in about 3:00 in the
14 afternoon, 4:00. After the majority of the heat has
15 died down.

16 MS. MCCONNELL: So the shift that begins at
17 3:30 --

18 MS. KELHART: 3:30 to 4:30, depending on the
19 task.

20 MS. MCCONNELL: Right. And they end and --
21 I'm just -- sorry, when does that shift end?

22 MS. KELHART: If they're working four tens?

23 MS. MCCONNELL: Right.

24 MS. KELHART: 10-1/2 hours later.

25 MS. MCCONNELL: 10-1/2 hours later, so --

1 MS. KELHART: And, if indeed, there is a
2 requirement for overtime, sometimes that takes place
3 earlier in the morning to prevent adverse weather. And
4 yet in the winter, depending upon adverse weather, we
5 may, we may flip that around.

6 MS. MCCONNELL: Right.

7 MS. KELHART: To find out what pattern works
8 best for our miners.

9 MS. MCCONNELL: So, I ask these to get a kind
10 of visual in my head about how your operation is
11 currently being conducted and then to also get a sense
12 of under the existing standard to conduct a workplace
13 examination, that shift that began at 3 or 4:00 in the
14 morning: when would the, the workplace examination
15 have been conducted under the existing standard?

16 MS. KELHART: Usually it begins around
17 daybreak --

18 MS. MCCONNELL: Daybreak, okay.

19 MS. KELHART: -- whenever that happens to
20 occur. And just, just for your general information,
21 we're a privately held company and we are non-union, so
22 we do have some flexibility that others may not. And
23 we are really a miner-oriented company, and so we will
24 adjust our shift to best suit the needs of our miners
25 based on conditions.

1 MS. MCCONNELL: Okay. Al, do you have
2 anything?

3 MR. DUCHARME: NO.

4 MS. MCCONNELL: Okay. Larry, do you have
5 anything?

6 MR. TRAINOR: No, I'm good.

7 MS. MCCONNELL: Okay. I think that's all I
8 have. I want to thank you again for coming and for
9 your testimony.

10 MS. KELHART: Thanks for having me.

11 MS. MCCONNELL: Our next speaker is Mr. Henry
12 Chajet.

13 (Pause.)

14 MS. MCCONNELL: Mr. Chajet, this is a
15 pleasant surprise.

16 MR. CHAJET: It is a pleasant surprise.

17 MS. MCCONNELL: I know. Deja vu all over
18 again.

19 MR. CHAJET: It's good to be here.

20 MS. MCCONNELL: It's good to see you.

21 MR. CHAJET: Where's my good friend, Pat
22 Silvey, she's not making an appearance today?

23 MS. MCCONNELL: Not today.

24 MR. CHAJET: Good morning.

25 MS. MCCONNELL: She gives you, she gives you

1 her warmest, her warmest wishes.

2 MR. CHAJET: And mine to her.

3 MS. MCCONNELL: I will relay those back to
4 her.

5 MR. CHAJET: Good morning. Thank you for the
6 opportunity to be here today, to comment on your
7 proposed rule. For the record, my name is Henry
8 Chajet. My law firm is Husch Blackwell. We represent
9 a group called the Mining Coalition.

10 The coalition is dedicated to the pursuit of
11 further safety improvements, and we share that goal
12 with the Agency, and we applaud your efforts to make
13 safety improvements. But we don't think this proposed
14 rule is going to achieve that goal.

15 The first issue that we want to address with
16 you, is the issue of data. We asked for a postponement
17 of this rulemaking and an extension of time, and you
18 mentioned it's under consideration.

19 MS. MCCONNELL: Yes.

20 MR. CHAJET: We would suggest that you
21 respond quickly.

22 MS. MCCONNELL: Okay.

23 MR. CHAJET: Because we'd like to be able to
24 analyze the data that we've asked for in our previous
25 comments, and which we'll ask for in a more formal

1 manner when we submit written comments.

2 The first issue is the current rule. I'm not
3 sure whether you realize how successful that rule has
4 been, given what you've proposed. I would suggest to
5 you that there are millions of workplace examinations
6 that are taking place under the current rule and have
7 taken place, and that they've been very successful in
8 preventing hazards and in creating safety.

9 This was a rule that was adopted following
10 extensive Advisory Committee discussions in the 1970's.
11 This was perhaps the most debated rule, as described by
12 MSHA, in its Federal Register in, I think, 1978, that
13 came out of the Advisory Committee.

14 It provided for the flexibility to address
15 varying conditions at different mines, which your
16 Assistant Secretary has commented upon. How different
17 mines are from place to place. And your Assistant
18 Secretary has also acknowledged how those conditions
19 change continuously during the mining cycle.

20 So you have to have a rule for examination
21 that addresses the need for flexibility. To the extent
22 you change that flexibility, you make the rule less
23 safe, which is prohibited by the Mine Act.

24 If you require an examination in the dark,
25 which is what the prior witness just described to you.

1 If you just require an examination at a time when the
2 area has not yet begun to be mined; you produce less
3 safety than if you allow the flexibility to conduct
4 that examination when the experienced miner, the
5 competent person believes it's most appropriate for the
6 job.

7 So, we urge you to look at the successful
8 implementation, the millions of work area examinations
9 that have been successful and continue with that
10 process.

11 In terms of your own proposal, the data
12 underlying it is simply nonexistent. We have looked at
13 the underlying materials that were put into the record:
14 a number of accident reports. Those accident reports
15 do not describe the work area examination procedure in
16 use by the operators involved in those accident
17 reports.

18 The accident reports do not include the time
19 that the area examination was conducted during the
20 shift. The accident reports do not include important
21 details about how that process was taking place. So,
22 we don't think you can conclude that they support any
23 change whatsoever, because you haven't put forth a data
24 analysis of those reports.

25 Now, you have a lot of those files in your

1 possession, because each one is accompanied by
2 inspector files and investigation files, and you should
3 review them and place them into the record so that
4 individuals can judge from the actual facts whether
5 there's any evidence to support the conclusion that the
6 Agency has reached.

7 The Federal Register is filled with the terms
8 "MSHA believes." "MSHA believes," without evidence, is
9 not enough to sustain and, and justify rulemaking;
10 particularly where you have a potential for decreasing
11 safety.

12 We would like to see you put into the record
13 the number of inspector shifts and hours recorded for
14 the conduct of MSHA inspections; because you have
15 experience and data about how long it takes for your
16 inspectors to inspect work areas, and how many work
17 areas they inspect per shift, and what time and when
18 they conduct those inspections, and whether those
19 inspections are more productive or less productive
20 depending on the time when they're conducted. That
21 information is not in the record.

22 We would like to see you put into the record
23 the amount of data, pages of forms, notes, and other
24 documentation that results from an MSHA inspector
25 workplace inspection, so that you can get a better

1 estimate for how much time and effort is included and
2 results from your proposal.

3 We'd like to know what MSHA expenditures are
4 for per-shift costs, for inspections of areas by
5 inspectors. Again, so that you can take a look at that
6 and the industry and interested parties can comment on
7 your suggested cost for this rule.

8 There are a number of data requests that we
9 will be making that we think you have to put into the
10 rulemaking record before you can proceed.

11 We're also concerned about the number of
12 .18002 violations issued per year in situations where
13 you're also citing another standard.

14 MSHA itself, in its Program Policy Manual
15 from the 1980's, indicated that the rule was never
16 intended to be used to double up on citations; or to
17 issue citations when another rule covers that
18 condition; or for a doubling up with another general
19 duty-type standard like safe access.

20 So, we'd like to know, and we think it would
21 be appropriate for you to put in the record, that
22 analysis of how many 18002 citations are being issued,
23 how many of them are being doubled up with other
24 standards.

25 You also have a significant problem with your

1 causation analysis that's implied throughout the
2 proposed rule. This is a rule that concerns
3 inspections of areas, or work areas, for suspected
4 hazards, yet we know that the leading causes of
5 accidents are human factor-related.

6 When you generalize from your accident
7 reports and your data to say that area inspections have
8 an impact on all of these accidents that you cite, you
9 don't take into consideration the fact that human
10 factors are often not cited by MSHA as a cause.

11 The one that disturbs me the most is the lack
12 of inclusion by MSHA in the accident investigation
13 process of drugs and alcohol impairment; right.

14 I've never seen an MSHA report that talks
15 about impairment. We know this is a terrible problem
16 in our country that we have to address if we want to
17 improve safety, and yet we've not been able to get the
18 Agency to, as a routine, order tests for impairment
19 when they investigate accidents. And we certainly
20 can't tell from your reports the extent to which a drug
21 and alcohol impairment, or other human causes, was a
22 major cause of the event you're investigating.

23 There are estimates that more than 80 percent
24 of all accidents are caused by human causes. Your
25 rule, and your analysis, and what you suggest supports

1 the proposed rule; completely ignores this problem.

2 It is troubling that MSHA itself in its
3 proposed rule states that, "The Agency is unable to
4 quantify the benefits." That's a quote from your
5 preamble. Not being able to quantify the benefits,
6 tells us that you have not done the homework for this
7 rule. That's not surprising given the expedited
8 timeframe with which you're trying to conduct
9 rulemaking.

10 This is the first time in my 37 years of
11 doing mine, safety and health work that I've seen a
12 rulemaking last for a few months, rather than the few
13 years which you normally take to thoroughly consider
14 rulemaking.

15 It's also alarming that you're combining this
16 rulemaking with a diesel exhaust request for
17 information, even within the same hearing day. We
18 suggested in our written request for extension that you
19 separate these rulemakings and come back and address
20 them independently.

21 In the Federal Register of August 17th, 1979,
22 MSHA described the current rule, and the result of the
23 Advisory Committee that debated this rule. And MSHA
24 said that there were numerous comments and objections
25 received including that the rule was beyond the scope

1 of the advisory standard, that the term "hazardous
2 conditions" was vague, that the recordkeeping
3 requirements were burdensome and possibly self-
4 incriminating and that the proposal represented a
5 general duty standard that could be used to cite
6 operations for violations covered by existing
7 standards. The changes made to those proposed rule
8 resulted in the current standard.

9 You have re-proposed the problems that the
10 Advisory Committee saw in the original MSHA proposal
11 from 1978-79. You have re-proposed the burdens that
12 didn't serve the safety purpose, and you're looking at
13 imposing them now.

14 You carry a heavy burden, when you're going
15 to change a rule that's been in place for 37 years
16 successfully for millions upon millions of inspections
17 that was the result of an expert Advisory Committee and
18 a rulemaking.

19 One of the coalition members estimated that
20 they would have over 1,000 area inspections performed
21 per day. 365,000 records, at least, over the course of
22 the year. That's without having to create records for
23 corrective actions, protections, communications,
24 warnings, abatement, and all of the other things you've
25 proposed to add to this rule.

1 This rule would create full-time
2 recordkeeping jobs and burdens for mine operators that
3 are not necessary and don't add to safety. The current
4 system of having competent personnel inspect work areas
5 during the shift; take action to correct potential
6 problems, if they can do so safely; or report the need
7 to management for them to institute corrective actions,
8 and if necessary barricade; rope off or provide a
9 warning in that area -- is very successful.

10 The proposed rule complicates that process
11 with more vague terms about who do you communicate
12 with, when do you communicate, what type of action has
13 to be recorded. You make it much harder for the job to
14 get done under this proposed rule.

15 And one of the biggest problems in this
16 proposed rule is the specter of 110(c), Mine Act,
17 Section 110(c): individual, criminal and civil
18 liability.

19 Under the Mine Act, that is a feared
20 enforcement tool. You will disincentivize individuals
21 from conducting workplace examinations. Miners will
22 not want to do this and sign those cards or forms, the
23 way you're requiring.

24 They will be disencouraged from taking
25 safety action, from taking the responsibility. That's

1 perhaps one of the worst results of this rule.

2 We know from prior rule makings -- POV, for
3 example, that MSHA has an error rate for its citations
4 that approaches around 33 percent. In other words, 33
5 percent of the citations issued are either changed or
6 deleted. And yet if that effort increases the
7 potential for individual miners to have 110 (c)'s
8 issued against them or criminal investigations
9 conducted by your Special Investigation Branch; you're
10 not going to advance safety, you're going to decrease
11 safety.

12 We believe any restrictions on competent
13 personnel are counterproductive. By the very
14 definition, personnel that are competent can do
15 workplace examinations for safety, so we don't think
16 you should do anything else to restrict their ability
17 to do so or their willingness to do so.

18 And we again say, there's no evidence in the
19 record to support these restrictions. There are MSHA
20 beliefs, but that's not enough. And, in fact, the MSHA
21 beliefs are wrong.

22 For all of these reasons, the Mining
23 Coalition opposes this proposed rule. And we will be
24 providing you with more thorough comments as the
25 process continues, but we note that the timeframe does

1 not allow for the consideration and evaluation that
2 this rule requires. Thank you very much.

3 MS. MCCONNELL: Thank you very much, Mr.
4 Chajet. And, also your testimony in Pittsburgh.

5 So I may have asked this question of you in
6 Pittsburgh, but I don't have the answer -- your answer
7 or your thoughts on this. I don't fully understand.

8 So, the issue that I think I need to have
9 more clarity on is your estimate that record keeping, a
10 number of records would increase by a significant
11 margin. And, in particular, you're looking at the
12 proposed requirement that the record shall include all
13 locations of all areas examined in the, in the
14 description of the conditions.

15 So, I guess my question is: when you
16 calculated your estimate, how does this change differ
17 from the existing standard that we currently have that
18 examine each working place; in terms of, what is the
19 record that is currently being maintained by your
20 membership and how does, how did you arrive at your
21 estimate of the increased records?

22 MR. CHAJET: Well, first, we have not created
23 an estimate yet because we haven't had the time or the
24 information or the data from MSHA to try to create an
25 estimate.

1 MS. MCCONNELL: Okay.

2 MR. CHAJET: We gave you an example of one
3 operator's understanding of what the result would be,
4 in terms of the number of inspections per day and the
5 record-keeping burden that would result from those
6 inspections.

7 You are asking in your proposed rule for more
8 records, and for different records, and those more and
9 different records will increase the burden.

10 One of the problems in this rulemaking is, I
11 don't think MSHA has analyzed for itself what the
12 current practices are. You've done no survey of your
13 inspectors to determine what they've learned from
14 inspecting the mines, how long it takes, how the mines
15 are currently doing inspections: whether they're in
16 the middle of the shift in some cases that are
17 underground; whether they're throughout the shift,
18 because conditions are changing so rapidly; whether
19 they're at the end of the shift.

20 There's been no analysis by the Agency of the
21 current practices, even though the Agency has that
22 information at its fingertips for the entire industry
23 by your large number of inspectors who travel those
24 mines every day.

25 So, we don't think the data is there to

1 prepare the estimate, and we don't think your estimate
2 currently reflects the actual conditions and practices
3 at the mines.

4 MS. MCCONNELL: Okay.

5 Do you have any follow-up questions?

6 MR. TRAINOR: No.

7 MS. MCCONNELL: Do you have any follow-up
8 questions?

9 MR. DAVEY: No.

10 MS. MCCONNELL: So it's not safe to assume
11 that the existing record under the existing rule would
12 have, by your membership, all locations of area
13 examined?

14 MR. CHAJET: It's safe to assume that the
15 Mining Coalition and the rest of the industry complies
16 with the current regulation, which says there will be a
17 workplace examination of work areas, and that there
18 will be a record of those examinations.

19 It's very safe to assume that, and if you do
20 an analysis of your data of how many workplaces are out
21 there that your inspectors evaluate, an analysis of how
22 long it takes them, and an analysis of when those
23 inspections are done; you'll get a lot better database
24 to understand the meaning of the proposed rule.

25 MS. MCCONNELL: Thank you, Mr. Chajet.

1 MR. CHAJET: Let me just add that, again,
2 there are millions of work area examinations done, and
3 MSHA doesn't issue millions of citations. In fact, I
4 would venture to say that under the current rule less
5 than 0.1% of the workplace area inspections are cited
6 for inadequacy or bad timing, or not catching a
7 problem. So we have an extraordinarily successful
8 current rule.

9 Thank you.

10 MS. MCCONNELL: You're welcome. Thank you.

11 Our next speaker is Brett Smith, American
12 Iron and Steel Institute.

13 MR. SMITH: Good morning.

14 MS. MCCONNELL: Good morning, sir.

15 MR. SMITH: I thank you for holding this
16 hearing this morning. I am Brett Smith, Senior
17 Director of Government Relations for the American Iron
18 and Steel Institute, or AISI.

19 AISI serves as the voice of the North
20 American steel industry in the public policy arena and
21 advances the case for steel in the marketplace as the
22 preferred material of choice.

23 AISI is comprised of 19 member companies
24 including integrated and electric arc furnace
25 steelmakers and approximately 124 associate members who

1 are suppliers to or customers of the steel industry.

2 The U.S. Steel Industry operates more than
3 100 steelmaking and production facilities, producing 98
4 million tons of steel, shipments valued at 75 billion
5 dollars in 2014, the latest year in which all that data
6 was available.

7 Steel production facilities directly employ
8 about 142,000 people in the United States, and they
9 directly or indirectly support over almost one million
10 U.S. jobs.

11 An integral part of our AISI membership are
12 the three companies who mine iron ore in the United
13 States: Arcelor Mittal, Cliffs Natural Resources and
14 the United States Steel Corporation.

15 AISI's member companies maintain the eight
16 large active iron ore mining and processing facilities
17 in the United States, located in northeast Minnesota
18 and Michigan's Upper Peninsula.

19 In aggregate, these facilities directly
20 employ nearly five thousand workers when in full
21 production, and play an outsized role in supporting the
22 regional economies of those areas.

23 Iron ore is the critical raw material needed
24 for the production of steel. These facilities provide
25 the bulk of the iron ore consumed in the United States.

1 Integrated steel industry in the United States is a net
2 exporter of iron ore. Excuse me.

3 The domestic steel industry is presently
4 combating a steel import crisis. Due to the surge in
5 dumped and subsidized steel from China and many other
6 countries, finished steel imports took a record 29% of
7 the U.S. market in 2015. Domestic steel shipments
8 declined by over 12% and capacity utilization averaged
9 just 70% for the year.

10 American steel producers were forced to lay
11 off nearly 14,000 workers since January 2015. Though
12 import market share year-to-date is 24 percent and
13 capacity utilization has risen slightly to 72.8 percent
14 through last week, the fundamental challenges to the
15 industry remain.

16 Foreign government subsidies and other market
17 distorting policies have fueled the massive global
18 overcapacity in steel, which is estimated by the OACD
19 to be about 700 million metric tons today. More than
20 half of that, 425 million metric tons, is located in
21 China. China represents over half of all global steel
22 production, and the Chinese steel industry is
23 overwhelmingly government owned, controlled and
24 subsidized.

25 The U.S. Iron Ore Industry has been

1 particularly hard-hit by the steel import crisis, and
2 companies were forced to idol facilities and lay off
3 nearly 2,000 workers in 2015 alone. While industry
4 conditions have stabilized and nearly 1,000 miners have
5 been called back to work in recent months, market
6 conditions remain very challenging for both the iron
7 ore sector and the downstream steel industry.

8 The AISI member companies have made
9 substantial efforts to decrease the number and
10 frequency of workplace incidents and continue to work
11 through AISI to share information, best practices to
12 meet their shared goal of improving occupational safety
13 and health.

14 Our experience has demonstrated the
15 cooperative efforts among company management,
16 employees, and government, can help maximize safety and
17 health.

18 The North American Steel Industry is
19 committed to the highest safety and health standards.
20 Since 2005, U.S. steel producers have achieved the
21 reduction in 50 percent in both the total OSHA
22 recordable injury and illnesses and loss workday case
23 rates.

24 All of our member companies, whether they be
25 regulated by OSHA or MSHA are committed to making

1 continuous improvements so that our employees return
2 home safely each day.

3 After reviewing the MSHA proposed examination
4 rule for metal and nonmetal mines, AISI members have a
5 number of concerns and questions that need further
6 explanation. I will address a few of those in my
7 statement this morning and we will provide more detail
8 in our formal written comments to the proposal that we
9 will submit to the docket in September.

10 Of particular note is the concern from our
11 member companies that full compliance with the proposed
12 rule will require substantially more commitment than
13 the additional five minutes forecast in the proposal.

14 Iron ore mines are vast operations, with
15 footprints encompassing tens of square miles. Mine
16 operations in the U.S. range from 12 to over 50 square
17 miles wide, consisting of multiple buildings and varied
18 operations. These mine sites include multiple
19 employees and jobs operating simultaneously.

20 For instance, an average-size building at one
21 of our member company mines has over
22 150,000 square feet and five different floors.
23 Compliance with all the various diverse functions
24 across a broad mine operation will certainly be
25 challenging and will require more than the limited time

1 MSHA foresees. The Agency should reevaluate that
2 estimate.

3 The industry is also concerned about the
4 potential impact of the proposed rule on hourly
5 employees. Our member companies believe that all
6 employees, from membership down to the shop or mine
7 floor, must share in a commitment to safety at every
8 moment of the work period, identifying only one or a
9 few employees to have the responsibilities for safety,
10 as this proposal appears to do; will counteract that
11 shared commitment to safety that all of our employees
12 consistently must have.

13 Furthermore, the provisions in the proposal
14 to include adverse conditions and corrective actions on
15 the examination records raise the concern that MSHA
16 will cite operators for violations it finds in records,
17 even if operators are in the process of abating or
18 already have abated those concerns.

19 What does MSHA foresee as the remedy if the
20 corrective action the operator has chosen is not what
21 the inspector would like done? In addition, will the
22 final rule include a safe harbor provision, so that
23 MSHA does not issue citations based on what is found in
24 the records?

25 There are also several additional terms used

1 in the proposed rule that we believe require more
2 detailed explanation. In particular, is the travelway
3 at a mine operation considered a working place in the
4 regulation? Additionally, under the rule does MSHA
5 intend competent persons to be considered agents of the
6 operator? Providing clarity to these and other terms
7 in the final rule are critical to ensure compliance
8 ability and the rule's eventual success.

9 AISI and its member companies urge MSHA to
10 reevaluate existing workplace examination practices
11 currently in place within the iron ore mining sector.
12 In particular, the Agency should ensure that the
13 expected compliance costs to the employer are
14 adequately balanced with the foreseen benefits of the
15 proposal. Furthermore, we request that MSHA further
16 define and provide clarity to several of the key
17 terminologies under the proposed rule.

18 AISI and its members truly stand at a
19 crossroads for our industry in the United States moving
20 forward. We face a surge of foreign imports, often
21 from areas of the world where steel production is
22 heavily subsidized and undertaken with little or no
23 commitment to workplace safety and health. Nowhere in
24 our industry have these challenges been more accurately
25 felt than in the iron ore production sector.

1 As you move forward on a number of the key
2 questions we've raised today with the proposed
3 examination regulation, we ask that you recognize the
4 challenges we currently face. The specific details of
5 the proposal have a great potential to affect our
6 sector's international competitiveness.

7 Again, thank you for the ability to appear
8 here before you today, and I stand ready to answer any
9 questions you may have.

10 MS. MCCONNELL: Okay. I don't have any
11 questions. Thank you.

12 MR. SMITH: Okay. Thank you very much.

13 MS. MCCONNELL: Our next speaker is Todd
14 Ohlheiser, Colorado Stone, Sand and Gravel Associates.
15 There you go.

16 MR. OHLHEISER: This is a copy of my
17 presentation.

18 MS. MCCONNELL: Oh, thank you.

19 MR. OHLHEISER: I'll give it to the recorder.

20 MS. MCCONNELL: You can give this to the
21 recorder. Also, if you could send us an electronic
22 copy with your written comments if you --

23 MR. OHLHEISER: Yes. He has it on his
24 computer already.

25 MS. MCCONNELL: Okay.

1 MR. OHLHEISER: And I think it's coming up.

2 MS. MCCONNELL: Okay. Right.

3 MR. OHLHEISER: And I will, so if there's
4 more required, no problem. Is this working?

5 MS. MCCONNELL: I don't know. Tap it.

6 MR. OHLHEISER: Yeah, okay.

7 MS. MCCONNELL: Can you hear? Can you hear
8 the speaker? I think you're good to go.

9 MR. OHLHEISER: Good to go. Very good.
10 Thank you. My name is Todd Ohlheiser, Executive
11 Director of the Colorado Stone, Sand and Gravel
12 Association and I'm pleased to be here and part of this
13 to testify in regards to the workplace examination
14 proposal by MSHA.

15 As I'm currently the executive director, I've
16 spent over 25 years in the mining industry running
17 different businesses and so forth in the for profit
18 side versus the nonprofit association I'm part of now.
19 And so I have, you know, a little bit of that is from
20 the - you know, the examples I guess I will give are
21 more in my previous roles of running various businesses
22 and so forth.

23 But, I appreciate, and the entire State of
24 Colorado, appreciates MSHA's concern in trying to drive
25 additional safety.

1 A little bit about the stone, sand and gravel
2 association, which I don't know if I'll be able to
3 switch --

4 MS. MCCONNELL: How does he advance to the
5 next slide?

6 (Pause.)

7 MR. OHLHEISER: Very good. Thank you. Okay.
8 So, a little bit about the Colorado Stone, Sand and
9 Gravel Association. This is the construction aggregate
10 side, versus the Colorado Mining Association, so
11 processing and materials and sales and so forth.

12 There are currently about 600 sites permitted
13 in the state. Not all of those are active obviously
14 but 600 permitted in the state, about 2,700 employees
15 with contractors and so forth that are involved in the
16 mining of our operations and most of the mines in
17 Colorado are considered the small mines, 20 employees
18 and under.

19 A little bit of the entire state and their
20 involvement with safety. Years ago CSSGA joined in
21 partnership with the Colorado Division of Reclamation
22 Mining and Safety, the DRMS, and put together a Part 46
23 training program. It was a DVD program.

24 That's currently in its fourth edition of
25 English and Spanish, and it's been, it's been very

1 good. We're currently in the process of putting that
2 on an online learning platform as well, because DVD's
3 are phasing out, and there's still, obviously, training
4 to be done. And it's currently, we've, the group has
5 sold over 4,000 copies of this.

6 And the reason since, since the Year 2000,
7 the reason I bring that up is that the entire -- the
8 operators in the State of Colorado are very concerned
9 about safety, they take it very seriously and so forth.

10 And, I mean, I think that's obvious with them
11 sending me here today, obviously -- I couldn't make the
12 hearing in Utah so, you know, they feel enough --
13 strongly enough about this to send me to say, "Hey,
14 look, we, you know, there's some things we don't like
15 about this, we want our voice heard." Obviously we
16 will follow up with written comments as well.

17 CSSDA certainly acknowledges that one
18 accident is one too many. We understand that. We know
19 that we all need to, you know, look for more ways to
20 drive safety.

21 And, as mentioned before, we believe that the
22 current workplace examination rules work. They, you
23 know, so it's driving safety the right direction, and
24 especially in the mines that we're involved with, and
25 we think that the situation works and, has been part of

1 the contribution in the right direction.

2 But the current proposal, we believe it is
3 unwarranted. We see it as redundant in some cases; and
4 overreaching in some others, I'll give some examples;
5 and really leads to more unpredictability of what
6 miners can expect.

7 One thing it gives, it -- well, let me -- I'm
8 not keeping up with my presentation. The provision
9 gives a risk that only at the beginning of a shift is
10 when safety hazards can or should be addressed.

11 It was also mentioned earlier that everyone
12 has to be involved in safety, not just one person
13 signing off on this and so forth.

14 Again, mentioned, but I think it's worth
15 mentioning again, is that the entire focus remains on
16 equipment inspections and not anything to do with
17 employee behavior. And 80-90%, and sometimes the
18 estimates are higher even, of incidents that are driven
19 from the actions and the decisions that the employees
20 themselves make out there.

21 You know, currently there's no mandate of a
22 drug and alcohol testing. And of course, companies do
23 that and because they need to and they need to find out
24 what's really going on as well. And rarely MSHA finds
25 the employee conduct of breaking the rules or taking

1 shortcuts as the problem.

2 And, I guess, an example I would give of that
3 is when I was running businesses in Western Colorado,
4 we had a small four-man crew. It was, it was remote,
5 it was spread out quite a ways with conveyors and so
6 forth. And this situation kept me up late at night for
7 quite a while. We had, again, the four man crew, and
8 one of the belts stopped. The next one overflowed, of
9 course, and so there was bigger material down there
10 underneath the belt that needed to be cleaned out,
11 obviously.

12 So, the gentleman involved decided to take
13 out the guard and clean it out. And in the meantime we
14 had pull-chords on both sides of the conveyor because
15 conveyors, at that point in time, because I thought
16 what happens when somebody needs access to that on the
17 other side.

18 So he took out the guard, of course, climbed
19 in there just in time for the plant operator, which was
20 stretched out quite a ways away, to hit the on button.
21 And, of course, in he goes to the pulley and the other
22 guy with him pulled the cord and just, just busted his
23 arm and caught his head in there.

24 I happened to be in the western part of
25 Colorado that day. Went to the hospital, there was

1 still gravel all over the floor and so forth. And,
2 again, it kept me up nights going, how do we keep these
3 people safe?

4 And afterwards, of course, you talk to them
5 and you say, "you know, did you have -- what more could
6 we have given you for training? What more could we
7 have done anything involving this?"

8 And he said, "You know, I was just too lazy
9 to go and do the proper lockout and the tagout
10 procedures." And he didn't use that term obviously,
11 but it was just shortcuts. Shortcuts over and over
12 again, we see as where we need to continue to put focus
13 on and get people to say, we don't want you to take the
14 shortcuts. Certainly MSHA doesn't want you to take the
15 shortcuts. Do it properly.

16 Regarding the call to document hazards and
17 fixes, documentation doesn't illustrate a precise cause
18 of the issue or the hazard. The inspector seeing
19 evidence of a particular volatile condition could
20 misunderstand what some of that paperwork is reading.

21 And the big concern there is inconsistency.
22 There's, right now a lot of inconsistency between
23 inspectors. And I think that's going to lead to a lot
24 more inconsistency, and more citations, quite honestly.

25 It's, so you're sending a confusing message

1 to a lot of people. As an example, if one of the
2 documentation says, you know, fix the guard; or the
3 bolt was loose on the guard and tighten it up. Well,
4 you know, how extensive is that? Is that, is that
5 going to lead to an S&S citation down the road? Just
6 inconsistency that I don't think has really been
7 thought through.

8 And, again, the operators would be confused
9 on how much detail is needed in regards to that. There
10 will be additional paperwork. And we would refer to
11 the MSHA mobile equipment standard where the record of
12 the deficit -- the defect is maintained only until the
13 defect has been corrected. A system, again, that
14 works.

15 The provision -- we believe the provision or
16 regarding the call to document hazards and fixes,
17 again, provision leads to additional and needless
18 paperwork.

19 Paperwork is just taking time away from when
20 operators need to be doing things that are actually
21 going to drive safety, instead of filling out paperwork
22 and little benefit to the provision. And, again,
23 mostly driven from the concept that everyone is
24 responsible for safety, and performing exams already in
25 a high level of responsibility are already on these

1 people. When you start looking at one person in charge
2 of that and signing off on it, is a concern.

3 Regarding the call to make inspectors
4 available -- or inspections available to inspectors,
5 workers and representative; we don't believe it's going
6 to improve or benefit safety. We see it as quite
7 honestly ammunition for MSHA to write more citations if
8 there's the near-miss example that we were talking
9 about. We're all familiar with the pyramid, right, of
10 safety where you have obviously a fatality at the top
11 and then you have a lot of different things and, of
12 course, the near misses are an important part of that.

13 I was big on near misses, because we're
14 getting ahead of the game, and so forth. And now to
15 have those near misses be -- we believe, causes for
16 citations is, again, just going the wrong way. And we
17 can state that, well, that's not the intent of it.
18 That's the way it's going to probably work out,
19 especially with some inconsistency between inspectors.

20 Fewer individuals are willing to conduct area
21 inspections. My son is a superintendent of a sand and
22 gravel operation in Colorado. And I'll be honest with
23 you, I don't know what to tell him, because signing off
24 on these inspections and heaven forbid something
25 happens, who do you think they're going to go to? From

1 a -- now, there's already ramifications for plant
2 managers and so forth. We understand that. He
3 understands that and all the other plant managers and
4 operators do.

5 But when you solely put all of the
6 responsibility on that person for the safety -- and
7 that's how we see this instead of everyone's
8 responsible for safety -- it's, it's a huge concern and
9 we see it as, you know, government overreach. And the
10 small operators in Colorado are really finding it more
11 -- or would have more difficulty complying with it.

12 In summary, the mining industry has moved
13 beyond the belief that more rules and having mechanical
14 issues is going to solve all the problems. It's simply
15 not. And, again, proven by 80 percent of the cases, at
16 least again in our estimate.

17 And injuries and accidents are the result of
18 behaviors and decisions most of the time, so we've got
19 to focus on that part of it. It could actually lead to
20 more confusion, is our belief. Again, when you have --
21 when you center on a person responsible -- one person
22 more responsible for safety than everybody on that
23 crew.

24 And lastly, we believe that MSHA should adopt
25 more of a modernized philosophy and approach towards

1 recognizing these behaviors, instead of additional
2 inspections or in the documentation of these
3 inspections and so forth that you're proposing now, and
4 take into account the human behavior factor on this.

5 We believe that right now it's a rushed
6 rulemaking, and won't do what I know you intend it to
7 do, and that's keep the miners safe. We don't see that
8 happening. We believe it's broad and leads to
9 increasingly difficult operating conditions versus
10 truly driving safety. Thank you.

11 MS. MCCONNELL: I just wanted to ask you a
12 question.

13 MR. OHLHEISER: Yeah.

14 MS. MCCONNELL: To better understand your
15 concerns, I was wondering if you could give me a sense:
16 under the existing standard your members are required
17 to make a record of examinations of the working places.

18 Could you give me a sense of what is
19 currently contained in that record? What do they
20 currently record in terms of when they see an adverse
21 condition or a condition that may adversely affect
22 safety or health, what would they record and what would
23 they record in terms of any corrective actions? Under
24 their current practice, what do you, what do you see as
25 the current practice that's being done?

1 MR. OHLHEISER: Well, in general and, of
2 course, within Colorado we have a lot of different
3 small mines, large mines and so forth.

4 MS. MCCONNELL: I agree. I understand, yeah.

5 MR. OHLHEISER: And so, you know, in general
6 some of them would treat that as a, as a near miss.
7 And some document those, some don't. Some are fearful
8 of documenting them because of what could happen so
9 they, so they fix them and so forth.

10 Again, I came from an operation where we
11 actually tracked those and then, you know, tried to
12 incentivize people actually for coming up with ideas of
13 how to drive safety and coming with those.

14 I don't think there is any one-size-fits-all
15 to answer your question in regards to that.

16 MS. MCCONNELL: Okay. Is there a common
17 practice within your membership of the timing of the
18 examination?

19 MR. OHLHEISER: Yeah, I think as mentioned
20 earlier, as soon as you can, in general, at daybreak.
21 You know, some are going to be 24 hour operations, some
22 not. But, certainly, you know, at the beginning --
23 towards the beginning of a shift during daybreak hours.

24 MS. MCCONNELL: Okay. Could you give me a
25 sense of the general practice of who conducts the

1 examination?

2 MR. OHLHEISER: That will, that will vary.
3 Sometimes it's the plant manager, sometimes it's -- you
4 know, a shift leader, sometimes you know if -- but
5 someone that -- so that, you know, someone that
6 certainly the operator believes is competent but, again
7 not a, not a one-size-fits-all, but, again competent.

8 MS. MCCONNELL: Okay. Under the existing
9 record, do you record who conducted? Like, is the
10 general practice on the existing practices to record
11 who conducted the examination?

12 MR. OHLHEISER: It's been a while since I
13 have been involved. I would say, yes, in general.

14 MS. MCCONNELL: Okay. In general. Okay.

15 And one last thing from me is that I just
16 wanted to make -- clarify is that one of your concerns
17 was that the record under the proposed rule would have
18 to be made available to MSHA and the miners'
19 representative.

20 And the change that we're making in this
21 proposed rule is that we're adding the miners'
22 representative. Under the existing standard, the
23 record has to be made available to MSHA. So that's not
24 a change. Just wanted to clarify that for you.

25 MR. OHLHEISER: Yeah.

1 MS. MCCONNELL: Okay. And I turn to --

2 MR. TRAINOR: Let's go back to that point you
3 were talking about when you were an operator. You said
4 that when you found these conditions you wrote them
5 down? Or you did something with them, in your
6 experience at your operation?

7 MR. OHLHEISER: I think the reference I was
8 making was that we tried to do what we could towards
9 safety including, you know, pull chords on both sides
10 of a, of a conveyor and so forth.

11 MR. TRAINOR: I thought you said something
12 about you, in your particular operation, you documented
13 some of the stuff that you found, you know, you were
14 tracking it?

15 MR. OHLHEISER: We would, we would track near
16 misses.

17 MR. TRAINOR: Okay. Did you -- was that
18 shared with MSHA? Was that -- did that lead into more
19 citations? Did that cause a problem with MSHA?

20 MR. OHLHEISER: It was not shared with MSHA.

21 MR. TRAINOR: Okay.

22 MS. MCCONNELL: Mr. Ohlheiser, I want to
23 thank you so much for your testimony. It was very
24 helpful.

25 MR. OHLHEISER: Thank you.

1 MS. MCCONNELL: I appreciate you coming
2 today.

3 MR. OHLHEISER: Thank you.

4 MS. MCCONNELL: Mr. Mark Ellis, Industrial
5 Minerals Association, North America.

6 MR. ELLIS: Good morning. Is this working?

7 MS. MCCONNELL: It appears to.

8 MR. ELLIS: Okay, good. I'm Mark Ellis and
9 I'm President of the IMA-NA, the Industrial Minerals
10 Association, North America. IMA-NA is a nonprofit
11 501(c)(6) trade association representing North American
12 producers and processors of industrial minerals and
13 associate members that support the industrial minerals
14 industry.

15 Industrial minerals are feed stock for the
16 manufacturing and agricultural sectors. They are the
17 ingredients for many of the products used in everyday
18 life such as glass, ceramics, paper, plastics, paints
19 and coatings, cosmetics, pharmaceuticals and laundry
20 detergent.

21 Our companies and the people they employ are
22 proud of their industry and the socially responsible
23 methods they use to deliver these beneficial resources.

24 IMA-NA represents producers and processors of
25 ball clay, barite, bentonite, borates, calcium

1 carbonate, diatomite, feldspar, industrial sand,
2 kaolin, soda ash, talc and wollastonite.

3 Our producer members operate both surface and
4 underground mines, while many of our associate members
5 are contractors who provide services to mines and could
6 also be affected by the proposed requirements.

7 Safety and health are of paramount concern to
8 IMA-NA's member companies,⁵ which is why we come before
9 you today to address MSHA's notice of Proposed
10 Rulemaking on Examination of Working Places in Metal
11 and Nonmetal Mines.

12 With me today are Mr. Robert Carlson,
13 Director of Health and Safety for Fairmount Santrol;
14 Mr. Matt Stewart, Director of Health, Safety,
15 Environment and Product Risk for Vanderbilt Global
16 Resources; and Ms. Adele Abrams with the law office of
17 Adele Abrams.

18 Mr. Carlson serves as the Chairman of IMA-
19 NA's Safety and Health Committee; Mr. Stewart serves as
20 Vice Chairman of the Committee and Ms. Abrams serves as
21 Outside Counsel to IMA-NA.

22 IMA-NA appreciates the opportunity to put
23 these comments before MSHA for consideration. Written
24 copies of our oral presentations are available to the
25 reporter preparing verbatim transcripts and to the MSHA

1 Panel for inclusion in the rulemaking record.

2 So, without further ado, please allow me to
3 turn the microphone over first to Mr. Stewart and then
4 to Mr. Carlson. All of us will be available to respond
5 to questions at the conclusion of their testimony.

6 MR. STEWART: Good morning. Thank you for
7 your time. It's really an honor to be part of the
8 rulemaking process. Again, my name's Matt Stewart with
9 R.T. Vanderbilt.

10 IMA-NA supports the proposed rule in part and
11 we've offered some constructive criticism in part. We
12 believe that the rule will be beneficial to the
13 protection of miners, although it may be hard to
14 quantify; however, we have concerns about potential
15 methods of enforcement, self-incrimination issues and
16 personal prosecution of management agents that may flow
17 from the expected additional documentation
18 requirements.

19 IMA-NA already urges its members to be
20 proactive in terms of hazard identification and
21 mitigation, and the robust workplace examination
22 program is really an inherent part of an effective
23 health and safety management program.

24 IMA-NA endorses the proposed changes of
25 requiring workplace exams to be conducted in all

1 working places before work commences in a given area.

2 The current rule simply requires that an exam be
3 performed and documented before the end of the shift,
4 and we agree that this may allow miners to be exposed
5 to uninspected hazard conditions before the competent
6 person reaches that portion of the mine.

7 However, MSHA should make it clear that the
8 entire mine does not need inspection prior to the start
9 of each shift, particularly because many mines no
10 longer have fixed shifts and work in areas may overlap
11 so that workers from multiple shifts are present
12 concurrently.

13 It's also infeasible to expect process
14 equipment to be fully shut down at the end of each
15 shift so that a new inspection can be conducted.

16 MSHA should also clarify that the revised
17 requirement only covers areas with reasonably
18 anticipated or previously assigned duties for miners
19 and contractors at the worksites.

20 There will always be unanticipated production
21 concerns, or mechanical issues that arise during the
22 course of a work day, which may require a miner to
23 enter a different area mid-shift, either to perform
24 repairs or deal with, you know, other situations that
25 may arise. In those situations, it should be a practice

1 for miners to notify a designated competent person that
2 they plan to work in a novel area temporarily, so that
3 in advance of entry an examination can be conducted and
4 documented prior to commencement of the work.

5 There may also be confusion about whether
6 roadways that are traveled when going to and from work
7 areas need to be inspected for berms and road
8 conditions at the start of a shift, since it can't
9 always be anticipated when or whether vehicles may be
10 traveling to a particular area of the road. Excuse me.

11 Because of changing work needs during the
12 course of the shift, it's impractical to expect the
13 entire mine to be inspected prior to the start of the
14 shift, just in case someone might have to enter a work
15 area later.

16 Pardon me. My eye's bothering me. I'm
17 choking up here.

18 IMA also opposes to setting an artificial
19 time limit such as two hours in which to perform an
20 examination prior to workers entering a given area.
21 Mine operators must maintain some level of flexibility
22 when scheduling exams under the rule.

23 IMA-NA also believes that thorough hazard
24 awareness training is key to identifying the hazards,
25 that MSHA can be an enormous resource to assist the

1 industry in developing training materials on this
2 subject to help better inform those tasks with
3 workplace exams.

4 MSHA's 2015 Program Policy Letter on this
5 subject includes commentary that inadequate workplace
6 exams may be a sign that competent workplace training
7 is also inadequate. Sorry, I apologize.

8 We agree that workplace examiners should be
9 task-trained on a task of performing thorough audits
10 each shift and that this training should be documented.

11 We're pleased that MSHA has not included any
12 separate requirement for this in the revisions of
13 56/57.18002 and point out that the existing Part 46 and
14 Part 48 requirements already cover this situation
15 appropriately.

16 We encourage MSHA to produce a workplace exam
17 task training video and collateral material for mine
18 operators to use, which would standardize the approach
19 and clarify that MSHA's determined -- or is demanding
20 from a competent person.

21 Another suggestion would be for the Agency to
22 develop templates for workplace exam checklists that
23 could cover different commodities and typical work
24 tasks in areas, and suggest the potential hazards to
25 watch for.

1 IMA-NA would welcome the opportunity to
2 partner with MSHA on this project and believes that its
3 members would cooperate in hosting, filming and we
4 would assist the Agency in developing the materials.

5 The Agency must recognize that simply because
6 an examiner disagrees that something constitutes a
7 hazard, this should not be used by MSHA as a de facto
8 proof that the training was inadequate.

9 As noted by several FMSHRC Judges, who've
10 considered workplace exam issues, reasonable people can
11 differ as to what constitutes a hazard. Therefore, we
12 hope that, going forward, MSHA will exercise restraint
13 in utilizing its authority to double-dip by using
14 citations for inadequate exams and inadequate training
15 simply because hazards are found and cited in a
16 particular work area.

17 It's patently unfair to expect a daily or
18 pre-shift examination to be as thorough in scope as an
19 MSHA wall-to-wall inspection, which in many cases can
20 last three or four -- three or more weeks and involve
21 multiple Agency inspectors.

22 Consequently, the finding of a previously
23 unrecorded potential violation by MSHA should not
24 automatically equate with the day's workplace exam
25 being inadequate.

1 A review of current law and policy is helpful
2 in putting our remaining comments in context. The
3 current standard is codified at 30 CFR 56.18002 for
4 surface mines and 57.18002 for underground mines. It
5 also has been the subject of multiple, sometimes
6 conflicting policy statements for MSHA dating from at
7 least 1984 through 2015.

8 There is also information on this standard in
9 MSHA's Program Policy Manual for Metal and Nonmetal
10 Mines that conflicts with other Program Policy Letters
11 of the past and present concerning the recordkeeping
12 requirements.

13 To add to the confusion, on July 12th, 2016,
14 the Federal Mine Safety and Health Review Commission
15 rendered a split decision in *Secretary of Labor versus*
16 *Sunbelt Rental, Incorporated, et al*, relative to MSHA's
17 Workplace Exam Standard Requirements. The FMSHRC
18 reversed ALJ McCarthy's original ruling that vacated
19 three workplace exam citations against the mine
20 operator and two contractors. It held that there is
21 adequacy requirements inherent in the examination
22 standard.

23 This essentially would permit a violation of
24 a current standard to be upheld if it was based upon an
25 inspector's discovery of hazards in the workplace, left

1 unabated, following a workplace exam.

2 The examination would be deemed inadequate
3 under the Mine Act's strict liability theory, based
4 upon a difference of opinion between MSHA inspectors
5 and the workplace examiner over what constitutes a
6 hazard.

7 Prior to the *Sunbelt Rentals* FMSHRC decision,
8 there was a long line of ALJ cases holding that there
9 was not an adequacy requirement in workplace
10 examination requirements.

11 *Sunbelt Rentals* is the first precedential
12 ruling on this issue. The FMSHRC remanded the case to
13 the ALJ for further deliberation and taking of
14 additional evidence. It's highly unlikely that the
15 case will be ultimately decided at the U.S. Court of
16 Appeals level within the next few years. I'm sorry, it
17 is highly likely.

18 A second legal issue associated with the
19 enforcement of the workplace exam standard addresses
20 the commissions in *Sunbelt Rentals* workplace
21 examination requirements for multi-employer worksites
22 under MSHA jurisdiction.

23 In this case the production operator, a
24 cement plant, as well as two contractors, all were
25 cited for inadequate workplace exams, even though only

1 one company had any employee onsite. FMSHRC chose to
2 treat this as a dual citation situation, although the
3 citation issued to each company focused on inadequacy
4 or absence of each company's own examination.

5 Under the 2006 *Twentymile Coal Mine* decision,
6 the U.S. Court of Appeals, D.C. Circuit held that MSHA
7 has unreviewable discretion to cite the production
8 operator, an independent contractor, or both, for a
9 contractor violation.

10 As will be discussed today and in our
11 forthcoming written comments, the issue of workplace
12 examinations in the multi-employer workplace situation
13 and the host mine operator's obligation to inspect each
14 contractor's workplace examination paperwork, will be
15 significantly complicated if full effect is given to
16 the proposed rule without modification in light of the
17 *Twentymile Coal* holding.

18 While a workplace examination must be
19 performed, for the purpose of identifying workplace
20 safety and health hazards, once each shift in all
21 active working places by a competent person with
22 authority to promptly initiate corrective action and to
23 withdraw effective miners, if an imminent danger
24 situation is discovered, all of the existing policies
25 and court decisions agree on a few things concerning

1 what is mandatory:

2 The inspection must be documented but the
3 documentation need only list the working places
4 examined, so where they examined, the date and name of
5 the competent person who conducted the examination. So
6 that's it. There is no binding requirement under
7 current law to specify what hazard conditions were
8 discovered, nor to record the remedial measures taken.

9 MSHA Policy Letters have stated that
10 encouraged -- as prudent or best practice including a
11 description of the conditions found which may adversely
12 affect safety or health in the examination of the
13 record. While the examiner's name leads to be
14 listed, no signature is currently required.

15 MSHA should eliminate the signature
16 requirement as this is inconsistent with the ability to
17 maintain this requisite record electronically.

18 Electronic recordkeeping, particularly for 12
19 months of records, is critical to have as an option.
20 We do not oppose the proposed new requirement that the
21 workplace exam record must be made available to miners
22 and their representatives and that a copy be provided
23 to the Secretary or his authorized representative or a
24 miner's representative when they request a copy.

25 Clarification is also needed as to whether

1 the original competent person, who recorded the
2 hazards, needs to be the same person who documents
3 abatement of the hazard; or whether the person
4 documenting abatement also need to be a competent
5 person.

6 We believe that the added requirement to
7 record and date the corrective action is unnecessary.
8 It's confusing and may overly complicate the record
9 keeping and add little value in terms of worker
10 protection.

11 If it is retained, MSHA should clarify what
12 needs to be documented. Everything inclusive of
13 interim, temporary measures, while parts are on order
14 or being fabricated or just final corrective action.
15 So it's a process that takes time in some situations.

16 MSHA should allow inspection reports to be
17 left open for a period of time, as warranted on a
18 case-by-case basis.

19 Another thing requiring clarification is
20 whether putting up barrier tape would need to be
21 documented. What if the person creating the original
22 report is on leave when the corrective action is taken?
23 Would a separate report be required just for
24 documentation of corrective action, or would the
25 original report continually be amended each time a

1 problem's resolved?

2 The language of the proposal suggests that
3 the different person might need to document the
4 corrections, because they must also be identified by
5 name, but it's unclear whether they would be amending
6 the report created by a different miner. So you can
7 see the quandary or the confusion.

8 This also raises legal concerns, because as a
9 mandatory document that must be given to MSHA, it
10 exposes the creator to felony criminal prosecution
11 under section 110(f) of the Mine Act if the record is
12 altered in a way that now renders it false.

13 The original miner who creates the report may
14 not wish to follow the other miner, or edit it in his
15 or her absence, since the miner's signature will
16 already be on the report.

17 After considering the corrective actions
18 documented, part of the proposal and the potential
19 complications, we conclude that the requirement to
20 document remedial measures should be deleted.

21 We do encourage members and other mine
22 operators to continue documenting corrective actions;
23 however, as part of a voluntary good practice.

24 I'll now turn my testimony -- our testimony
25 over to Robert Carlson of Fairmount Santrol, IMA-NA

1 Safety and Health Committee Chairperson for
2 presentation of the remainder of our comments.

3 MR. CARLSON: All right. Thank you, Matt.

4 Both the current and the proposed rule share
5 the incorporation by reference of the definitions of
6 competent person and working place that are codified in
7 30 CFR 56.2 and 57.2.

8 A competent person is a person having
9 abilities and experience that fully qualify him to
10 perform the duty to which he is assigned. MSHA's PPM
11 adds: "This definition includes any person who, in the
12 judgement of the operator, is fully qualified to
13 perform the assigned task. MSHA does not require that
14 a competent person be a mine foreman, a mine
15 superintendent or other person associated with mine
16 management."

17 The phrase "working place" is defined in 30
18 CFR 56.2 and 57.2 as: "Anyplace in or about a mine
19 where work is being performed." The PPM adds: "As
20 used in the standard, the phrase applies to those
21 locations at a mine site where persons work during a
22 shift in the mining or milling process." This would
23 seem to narrow the scope of the area that must be
24 examined but it is not clear from the proposal.

25 For purposes of the proposed rule, we believe

1 that further clarification is warranted to distinguish
2 between regular working places and the occasional or
3 sudden assignment that requires a miner to enter into a
4 place that is not a regularly active production area or
5 where mining activities are not present.

6 For such areas, it should be sufficient to
7 perform the inspection prior to entrance into this new
8 working place even if the assignment occurs midshift.

9 It is also unclear whether places like
10 offices, bathrooms, break rooms, locker rooms and
11 kitchens at the mine site should be included in the
12 requirements of the document workplace examinations
13 (since there are instances of MSHA issuing citations in
14 these areas for things like space heaters, toasters and
15 microwaves, vending machines, illumination, holes in
16 bathroom floors, missing toilet paper and even
17 inadequate bushings on computer wires at workers'
18 desks).

19 This needs to be clarified, as it may not be
20 a universal practice to document such inspections, and
21 because it is highly uncommon for any serious injury to
22 occur in these office areas. We suggest that not only
23 production areas -- we suggest that only production
24 areas of the mine should be included in the revised
25 requirements.

1 With regard to competent persons, the
2 situation has been complicated by case law finding that
3 hourly workers who conduct workplace examinations under
4 the standard can be held to be agents of management for
5 purposes of personal liability under Section 110(c) of
6 the Mine Act. See *Nelson Quarries* Review Commission
7 from 2009.

8 Going back to Program Policy Letter P94-4-5
9 from December 12th, 1994, MSHA wrote in its guidance:
10 "Persons conducting examinations must also be
11 authorized to take action necessary to correct
12 hazardous conditions found in the working place, or be
13 able to initiate such action promptly." It is this
14 authority that seems to be the hinge upon which hourly
15 workers' Section 110 (c) liability exposure swings.

16 MSHA has sought comment in the proposal about
17 who should be competent and whether any specific
18 qualifications should be codified. Its latest Program
19 Policy Letter, P15-4-1 from July 22nd, 2015, already
20 states that: "A best practice is for a foreman or
21 other supervisor to conduct the examination. An
22 experienced nonsupervisory miner may also be
23 competent."

24 Got a long way to go yet.

25 (Laughter.)

1 MR. CARLSON: There is, however, a real
2 danger if only supervisors conduct the shift workplace
3 examinations and this is done only at the start of the
4 shift, or at some designated point in time before
5 workers enter the area, because rank-and-file miners
6 may become complacent. They may no longer regard
7 hazard identification and correction as their shared
8 responsibilities.

9 This can also have the effect to delay
10 discovery by management of hazards that arise post-shift-
11 inspection later in the day because awareness and prompt
12 corrective action by workers in the work area may
13 diminish.

14 IMA-NA believes that MSHA should not specify
15 any limitations on who can serve as the workplace
16 examiner, other than that they be appropriately task-
17 trained for this activity, be authorized to initiate
18 corrective action and have sufficient understanding of
19 hazard recognition principles to be capable of
20 identifying conditions that could pose a threat to
21 miner safety or health.

22 IMA-NA urges MSHA to expressly reject its
23 policy of personally prosecuting hourly miners, if they
24 would only be considered agents of management based
25 upon their execution of the workplace examinations

1 under the standard.

2 MSHA investigators commonly ask questions
3 about conducting workplace examinations during special
4 investigations of Section 110(c) liability used both
5 for civil MSHA prosecution and for possible criminal
6 referral to the U.S. Department of Justice, to
7 determine agents' status. And numerous hourly
8 employees have been prosecuted due to their imputed
9 knowledge of hazards found in the workplaces that they
10 were tasked with examining for compliance with the
11 standard.

12 As a practical matter, many of IMA-NA's
13 members utilize hourly workers, properly task-trained
14 to conduct the mandatory workplace examinations and
15 this is an inherent feature of safety and health
16 programs and their employee empowerment provisions.

17 We have concern about the potential legal
18 liability exposure of these hourly miners, particularly
19 if they fail to fully record every hazard identified or
20 every corrective action taken.

21 While many hourly employees are empowered at
22 our member company mines, this does not mean that
23 management abdicates its responsibilities pertaining to
24 maintaining a safe and healthy workplace, of course.

25 A management oversight and commitment of

1 resources to continual safety and health improvement is
2 always critical; but there's a real concern that if the
3 mandated paperwork requirements are so grossly
4 expanded, hourly miners may become reluctant to assume
5 the expanded responsibilities including tracking and
6 dating the corrective actions taken.

7 The culture at many industrial minerals
8 operations allows each miner both authority and
9 responsibility to immediately address every safety and
10 health issue he/she finds. If the miners can fix it
11 themselves, they have the authority to do so. If
12 additional assistance is needed, they can go to their
13 safety or operations management resources to obtain
14 whatever is needed to eliminate the identified hazard.

15 It is also common for miners to have
16 authority to shut down any equipment, process, or plant
17 as appropriate to address a safety or health issue.
18 Consequently, from that perspective, the proposed rule
19 would not require major changes or add significant
20 additional cost for many of our larger members.

21 For smaller companies or those with strict
22 union contracts over what duties miners can carry out,
23 the changes would be more burdensome.

24 While current processes for many companies do
25 follow the best practices MSHA advocated in its policy

1 documents, in terms of memorializing what hazards are
2 identified and how they are mitigated, this is not
3 universal.

4 The key issue, of course, is that doing so
5 now is voluntary, and operators cannot be cited if
6 specific hazards are not listed on the form, because
7 that is not a current requirement. For those already
8 doing this, modifications can still be needed if the
9 current proposal is adopted.

10 MSHA has also proposed adding a requirement
11 that the competent person notify miners promptly about
12 any adverse conditions. MSHA needs to clarify what
13 "promptly" means. For example, is it 15 minutes, or
14 will this be subjectively interpreted by inspectors?
15 And what will constitute notice, such as verbal or
16 written? Will the supply to all types of hazards
17 noticed, regardless of how minor, or will it be limited
18 to situations that are reasonably likely to result in
19 injury or illness?

20 It would also be helpful to have guidance on
21 whether use of caution tape would satisfy the notice
22 requirements, if workers are trained to recognize that
23 this means "stay out of an area until remedial measures
24 can be implemented."

25 In some situations, MSHA has rejected the use

1 of tape, even though it is included in the definition
2 of barrier in 30 CFR 56 and 57.2 or inspectors have
3 elevated negligence on citations because in their
4 opinion the tape was left up for too long.

5 Good guidance on this final rule can help
6 eliminate inconsistent enforcement going forward and
7 ensure that all are on the same page in terms of MSHA's
8 expectations.

9 Similarly, the proposed rule requires miners
10 to be withdrawn from a working area if an imminent
11 danger is present. The rules should clarify what
12 criteria should be used by the competent person to
13 classify a situation as an imminent danger.

14 The case law is currently clouded by a June
15 2016 split decision in Knife River Construction. In
16 that case, a parking brake citation classified by an
17 Administrative Law Judge as unlikely to result in
18 injury was found sufficient to substantiate a Section
19 107(a) imminent danger order.

20 That case is now under appeal to the U.S.
21 Court of Appeals, D.C. Circuit, but it may be years
22 before further judicial clarification is rendered. In
23 the meantime, this ambiguity would suggest that under
24 MSHA's Proposed Rule, any unlikely hazard by the
25 examiner would trigger withdraw of all miners from a

1 working place until it is corrected, even if something
2 as minor as a small opening in a guard, a small pile of
3 spilled material, or a missing bolt.

4 We urge MSHA to clarify that, for purposes of
5 the workplace examination rule, only significant and
6 substantial hazards that are highly likely to result in
7 death or serious bodily harm would trigger the
8 withdrawal requirement.

9 IMA-NA shares the concerns of others who have
10 testified on this proposed rule about MSHA's failure to
11 quantify any cost savings or other benefits from the
12 changes in the standard.

13 An appropriate economics impact analysis must
14 be performed and made part of the rulemaking record,
15 particularly as it relates to the expansion of the
16 scope of the records, which adds to the paperwork
17 burden without any commensurate health and safety
18 benefit that MSHA can pinpoint.

19 At a time when the mining industry is ailing
20 financially, it is inappropriate to add any new
21 regulatory requirements that impose significant cost on
22 employers, without a documented and justified offset in
23 terms of improved safety and health protections and
24 performance.

25 Our association believes that MSHA has also

1 substantially underestimated the cost involved with
2 transforming existing programs and training to conform
3 with the proposed requirements, and we will gather cost
4 data, as available from our members to include in our
5 formal written comments.

6 It is not credible, however, to suggest, as
7 MSHA does in its proposal, that having to expand record
8 keeping to include documentation of every hazard found
9 in every active part of the mine as well as corrective
10 actions for each would add only five minutes to the
11 task of examining a workplace, and 10 million dollars
12 per year in total cost for all of metal and nonmetal
13 mines.

14 Depending upon the requirements of the final
15 rule, a mine might have to hire a dedicated individual
16 to do nothing but conducting documented workplace exams
17 in the future, and these costs have not been considered
18 by the Agency.

19 IMA-NA is concerned that the 12 months of
20 historic workplace examination reports may be
21 scrutinized for listings of now long-corrected hazards
22 and result in citations long after the fact simply
23 because of strict liability and MSHA's lack of a
24 statute of limitations in the Mine Act.

25 By comparison, OSHA not only has a six month

1 statute of limitations for issuance of citations in
2 most circumstances; OSHA also has a Safe Harbor Policy
3 for voluntary self-audits, which provides that with
4 some limitations, OSHA will refrain from using old
5 audit records as the basis for citations as long as
6 hazards identified in the reports were timely corrected
7 prior to the inspector visiting the worksite.

8 IMA-NA urges MSHA to adopt a similar policy
9 if it plans to include the hazard listing and
10 corrective action requirements in the final rule to
11 avoid creating a chilling effect on the listing of
12 hazards.

13 As the saying goes, garbage in, garbage out.
14 If competent persons are afraid to list all identified
15 hazards because each one could expose the operator to
16 citations for the next 12 months, even if the condition
17 is immediately fixed, the report will be rendered
18 meaningless.

19 While we appreciate MSHA's need to affirm
20 that examinations are being done in accordance with the
21 standard, this must be balanced against the operator's
22 ability to truthfully record what conditions are
23 observed without fear that it can lead to thousands of
24 dollars of citations or personal fines even though
25 appropriate action was properly initiated.

1 IMA-NA understands, of course, that currently
2 and going forward, if MSHA reviews historical forms and
3 finds a pattern of the same hazardous conditions
4 repeatedly occurring and present during the instant
5 inspection, this may support heightened negligent
6 findings against the operator and its agents under
7 Sections 104(d) and 110(c) of the Mine Act.

8 We agree that elevated actions might be
9 warranted in such circumstances, because MSHA could
10 potentially substantiate a lack of diligence in
11 implementing a permanent resolution to the problem.

12 Currently and in the proposed rule, records
13 of workplace examinations must be maintained and made
14 available by the mine operator to the Secretary's
15 authorized representative, typically the MSHA inspector
16 or investigator, upon request.

17 The codified standard and the proposal both
18 require the records to be maintained for 12 months.
19 The current program policy manual states that operators
20 can discard the records after an inspection occurs, as
21 long as the operator certifies that the full 12 months
22 of examinations took place. However, Program Policy
23 Letter P11-4-1 from February 17th, 2011, specifically
24 rescinds the exception, and reinstated the requirement
25 to physically maintain a full 12 months of records.

1 The conflicting policies can create confusion among
2 mine operators concerning their compliance obligations.

3 Maintaining records for 12 months for large
4 mining operations is a significant paperwork burden
5 under the current rule, and that mandatory burden will
6 be magnified if the proposed rule's enhanced paperwork
7 requirements for recordation of all hazards identified
8 and corrective actions, is adopted.

9 IMA-NA recommends that MSHA limit the length
10 of time for retention of these documents and we suggest
11 either a fixed six-month time limit or codification of
12 the PPM to allow operators to dispose of old
13 examination reports once the operation has had an MSHA
14 EO1 wall-to-wall inspection.

15 IMA-NA strongly supports MSHA's efforts to
16 clarify its requirements, and to clearly delineate its
17 interpretation of the responsibilities that mine
18 operators -- both production operators and independent
19 contractors -- have to conduct and document appropriate
20 protective workplace examinations in active working
21 places at the mine.

22 We look forward to working proactively and
23 cooperatively with the Agency. As this rule making
24 proceeds, IMA will submit further comments within the
25 provided period of time, and we are pleased to respond

1 to any questions. Thank you for your consideration of
2 our perspective.

3 MS. MCCONNELL: Ms. Abrams, I'm sorry, do you
4 have any testimony you would like to give or --

5 MS. ABRAMS: No, I'm simply here along with
6 Mr. Ellis to respond to any questions the panel might
7 have, particularly since we have raised a few legal
8 issues in our testimony.

9 MS. MCCONNELL: Okay. I only asked because
10 you signed the sheet and just wanted to make sure.

11 MS. ABRAMS: Nope, I'm with them.

12 MS. MCCONNELL: Okay, great. Well I want to
13 thank you for your very thorough testimony today. I
14 have just a few questions for clarification.

15 Mr. Stewart, I believe you stated that -- and
16 I'm trying to find it. Where you supported that a
17 workplace examination be conducted before work begins
18 in a place?

19 MR. STEWART: That's correct.

20 MS. MCCONNELL: Okay. The one thing you
21 objected to was whether or not -- MSHA offered an
22 example for flexibility that the examination be
23 conducted within two hours of when work begins in that
24 place, but you objected to that as an option. Could
25 you provide some clarity on why?

1 MR. STEWART: Sure. Yeah. I guess what I
2 think of it as being at the mine sites, most of our
3 operations are smaller. And our workforce needs to be
4 nimble, so they need to be able to focus on what
5 they're doing -- you know, they're -- obviously we're
6 currently doing our exams before work begins.

7 But to have to go separately two hours in
8 advance when they're currently working on a specific
9 issue, put that issue aside, go do an exam so far out
10 in advance, really isn't practical. We find it far
11 more effective to do an exam fairly close to when the
12 work's going to begin. For two reasons, one to give
13 them the ability to be nimble. Plus, if you're doing
14 the exam close to when the work's done you're going to
15 be more likely to address fresh hazards.

16 MS. MCCONNELL: Okay.

17 MR. STEWART: But, it's -- we need fluidity.
18 Because our workforces are so small, we don't like to
19 have that specific time period of two hours.

20 MR. CARLSON: If I can, Ms. McConnell?

21 MS. MCCONNELL: Uh-huh.

22 MR. CARLSON: I'd like to make one real quick
23 comment as well.

24 MR. STEWART: Sure.

25 MR. CARLSON: You know, the way it currently

1 works in many cases, people are doing these workplace
2 inspections as they are entering their workplace. It's
3 very efficient that way.

4 This would say if your shift starts at 6:00
5 you must be 100 percent done before 6:00, and it just
6 doesn't help with that efficiency.

7 MR. STEWART: If I can as well. We heard
8 some testimony today about conditions that make it
9 impractical or potentially impossible to conduct a
10 workplace exam, given daylight hours.

11 I mean, you can't inspect high-wall stability
12 when it's dark out, so I think that the flexibility of
13 the current rule suggests that your proposal imposes
14 restrictions that may not be practical. And we need to
15 find a way to work around that so that there's enough
16 flexibility in whatever we end up with as a final
17 workplace rule, so the hazard gets addressed at the
18 appropriate time.

19 MS. ABRAMS: One point, if I may?

20 MS. MCCONNELL: Sure.

21 MS. ABRAMS: And just to put the flip side of
22 this on, if there's a hard and fast rule that the exam
23 has to be done no less than two hours before work
24 begins in the area, this can be complicated as well in
25 terms of flexibility. Because as the saying goes, you

1 know, man plans and God laughs.

2 You might have somebody assigned to do a
3 particular task and you're anticipating they're going
4 to do it at 9:00 in the morning, but due to other
5 things that arise, perhaps they don't get into that
6 area to do the task until 11:00 in the morning.

7 Now, they're outside the two hour window from
8 when the competent person did the exam in preparation
9 for the work to be done. And now you're having the
10 redundancy of that competent person having to come
11 back, stop what they're doing, reexamine an area that
12 they examined three hours earlier simply because of
13 this artificial time limit.

14 MR. STEWART: Yeah. As an operator, she's
15 absolutely correct.

16 MS. MCCONNELL: Is there a time after work
17 begins when the exam should have been concluded?

18 MR. STEWART: Is there a time after work
19 begins that the exam should have been -- well,
20 certainly before work begins.

21 MS. MCCONNELL: I mean, like -- yeah. So in
22 terms of, it seems like -- I'm trying to get some kind
23 of an understanding of, of starting and completion.
24 And so you're saying as work begins in a working place,
25 you recommend that the examination be conducted. So

1 it's simultaneous as work is beginning that the
2 examination is done?

3 MR. STEWART: That's typical. I'm not --

4 MS. MCCONNELL: Okay.

5 MR. STEWART: I can't speak for all
6 operators, but that's typical.

7 MS. MCCONNELL: Okay.

8 MR. CARLSON: Yeah. Again, it's not a
9 fits-all type of situation but that is a very, that's
10 solution-based right there, and effective.

11 MR. STEWART: Again, I think a win for MSHA
12 would be to codify, do your exam before the work
13 begins, to me. I mean, I see that as a win here --

14 MS. MCCONNELL: Okay.

15 MR. STEWART: -- for you.

16 MS. MCCONNELL: Thank you. Now, Mr. Carlson,
17 I'd like to talk -- ask a few -- some clarifying
18 questions on your testimony. We have heard several
19 cases that our paperwork requirements are -- in your
20 words, grossly expanded.

21 So, I guess what I need to understand is that
22 how: why do you, what is it about the proposed
23 requirements that would create this expansion?

24 Based on what I've heard it seems that -- and
25 correct me if I'm wrong, that your members are

1 recording, or identifying hazardous conditions found
2 and corrective actions taken? Is that not correct
3 under the existing standard or are they doing something
4 different?

5 Maybe the way to understand it better is,
6 could you give me a sense of what your members are
7 currently doing in terms of recording their working
8 place examinations so I can get a sense of the
9 difference?

10 MR. CARLSON: Yeah. We stick to the current
11 requirements; which requires the date, the area
12 inspected and who did it. And we leave it to that on
13 that documented paperwork, because anything else we put
14 in there opens us up.

15 MS. MCCONNELL: Okay, so --

16 MR. CARLSON: Now, we would have to -- let's
17 say they found 20 things. Twenty things get recorded
18 as to who, what, when, where and how it was; plus the
19 follow through on corrective actions done on each. The
20 difference between the two is substantial.

21 MS. MCCONNELL: Okay.

22 MR. STEWART: I'd like to add something to
23 that. You know, I don't want anybody here to get the
24 impression we're trying to hide what we're doing. But,
25 it's just like, I've got four boys and we talk about

1 how their homework goes. And when their paper is being
2 graded it's a much more deliberative process; whereas,
3 when it's a rough draft it's probably more creative,
4 you're getting more information from them.

5 So what I see happening here is: if we are
6 saying, "okay, these documents, everything you find is
7 going to have to be reported to the Agency," they're
8 either just not going to record it because they don't
9 want to have to fuss with it, shame on them. Or
10 because they're scared about criminal liability or, you
11 know, just the scrutiny.

12 Whereas, you know, I've seen inspection
13 reports that they're not pretty, they certainly contain
14 the when, where and who, but we allow them the freedom
15 on the documents at some of our mines to record what
16 they're doing.

17 It's not part of what we would provide to
18 MSHA, but it's so much more productive. They're
19 recording stuff, they're talking about issues, they're
20 fixing issues. It may not be perfectly documented as
21 to what the corrective action was, but it's being
22 fixed, so we don't want to stifle that. I don't think
23 anybody wants to stifle thorough documentation of an
24 exam.

25 MS. ABRAMS: And I'll add onto this as well:

1 I've, in addition to working with a lot of industrial
2 minerals companies which tend to be larger, I deal with
3 a lot of mom and pop, small aggregate operations, as
4 well as some of the smaller industrial minerals. And
5 it can be less formal. Again, as the witnesses have
6 said, what is mandatory now is simply the kind of name,
7 rank and serial number type of report without the
8 detail.

9 It's always going to be a best practice to
10 make note of things that need correction. But a lot of
11 smaller companies, especially if they've only got two
12 or three employees, it's done verbally, they're not
13 recording this. They'll pick up the radio and say,
14 "Hey, we need somebody to get over and shovel on this
15 walkway." They're not taking a record of it, they're
16 not going -- circling back and saying: at this date
17 and time, you know, Bobby Carlson shoveled the walkway.

18 And so this is adding a lot of paperwork
19 requirements that are not currently being done by a lot
20 of the smaller operators.

21 And especially with the threat of potential
22 citations for anything an inspector sees that is not
23 recorded on the form, it is going to really get into
24 the minutia of, as we've already talked about, every
25 missing bolt, every hole that might be one inch by two

1 inches in a guard where a Bobcat hit it -- you know,
2 now you're having to take the time, record that -- you
3 know, whether or not you feel that it truly creates a
4 safety and health hazard; because an inspector might
5 consider it to create a safety and health hazard.

6 So, you know, I respectfully disagree that
7 this does not change existing requirements very much.
8 The, you know, criminal and civil liability exposure
9 personally of recording the corrective actions is also
10 problematic, because there is no safe harbor. And
11 that's why having a program equivalent to what OSHA is
12 doing is pretty critical if you are going to demand
13 this level of documentation.

14 MS. MCCONNELL: Could I just ask -- just
15 follow up, unless you wanted to say something?

16 MS. ABRAMS: No.

17 MS. MCCONNELL: Okay. So, I guess I'm just
18 -- again, these questions are to fully understand
19 existing practices under the existing standard.

20 And so, if it's just who, what and when. Is
21 that the three w's?

22 MR. CARLSON: Yes.

23 MS. MCCONNELL: Okay.

24 MS. ABRAMS: The date, the shift, the area
25 examined and the name of the examiner.

1 MS. MCCONNELL: Okay. And now practice may
2 include a verbal notification during examination that a
3 hazard has been found. How does the operator ensure
4 that the corrective action has been taken for that
5 hazard?

6 So, for example, if a guardrail is missing
7 and it's just a verbal notification -- I know, actually
8 that's a visual. That's a bad example.

9 MS. CARLSON: I understand.

10 MS. MCCONNELL: Yeah. But, I guess the point
11 is, you understand my question.

12 MR. CARLSON: There's a plethora and it
13 depends on the operator. I've seen grease boards used,
14 you know, that way it's just --

15 MS. MCCONNELL: What was that again?

16 MR. CARLSON: I've seen grease boards.

17 MS. MCCONNELL: Oh, grease boards.

18 MR. CARLSON: You know, in the work area,
19 that way you can just write the two or three things
20 that they found and when they, when they knock it out
21 you erase it. There may be verification in the field
22 or it could just be a question right back over the
23 radio, "did you complete that." But, again, there's a
24 plethora of different means being used.

25 MS. MCCONNELL: And I guess the other

1 question, just to follow up in terms of to get a sense
2 of operations: during a normal workplace examination
3 how many hazards typically are found, do you think, or
4 noted? I mean, can you -- is it -- can you give me an
5 idea or ballpark? Can you go through --

6 MR. CARLSON: A couple.

7 MS. MCCONNELL: A couple. On every -- like
8 every --

9 MR. CARLSON: Because it's done every shift.

10 MS. MCCONNELL: Right.

11 MR. CARLSON: Really, the hazards are
12 developing during that shift as just nature breaks
13 stuff down, yeah.

14 MS. MCCONNELL: Okay. Okay. Al, do you have
15 anything?

16 MR. DUCHARME: No, you've covered everything
17 I was thinking of.

18 MS. MCCONNELL: You got anything?

19 I think we're done here. Thank you so much
20 everyone.

21 MR. CARLSON: Thank you.

22 MS. ABRAMS: Thank you.

23 MS. MCCONNELL: Okay. I think that means
24 that Joseph Casper, National Stone, Sand and Gravel
25 Association is our next speaker.

1 MR. CASPER: Good morning.

2 MS. MCCONNELL: Good morning.

3 MR. CASPER: My name is Joe Casper, Vice
4 President for Safety at National Stone, Sand and Gravel
5 Association. And when I get back to my office I will
6 email to you a text of these talking points that have
7 been adjusted a bit as we've gone.

8 Thank you for your time.

9 NSSGA is pleased to provide preliminary
10 comments on the workplace exams proposal. We
11 acknowledge, at this time, MSHA's good work that's been
12 undertaken by many good professionals and public
13 servants aimed at boosting compliance in our industry
14 and boosting safety and health.

15 NSSGA for its part is very proud that the
16 stone, sand and gravel sector has attained its lowest
17 injury rate in history. Today for the year-end 2015
18 the rate stands at just 2.0 injuries per 200,000 hours
19 worked. Further, last year was the 15th consecutive
20 year in which the rate for stone, sand and gravel
21 dropped from its year earlier level.

22 While NSSGA is proud of its safety and
23 improvements achieved, it is worth remembering that the
24 business still suffers significantly from the effects
25 of the Great Recession. USGS data show that after that

1 drop in production from 3 billion metric tons produced
2 in 2006 in the Great Recession it dropped -- that level
3 dropped by a third down to 2 billion tons.

4 Since then, the comeback in production has
5 only comeback 25 percent from that low in 2010 of just
6 2 billion tons produced. So this industry is still a
7 long way away from full recovery.

8 The workplace exams proposal, in our view, is
9 unwarranted at this time. We would contend that there
10 are a number of concerns.

11 While the proposal is largely focused on
12 workplace conditions, virtually all safety
13 professionals today recognize that the overwhelming
14 majority of accidents are functions of worker or
15 management behavior, not conditions. We'd like to
16 provide, that's a general statement that I think is
17 very important to understand about what this proposal's
18 stated goals are.

19 Let us give some preliminary comments on some
20 of the proposal's key provisions. In regard to
21 conducting exams before the beginning of the shift,
22 this risk's giving the workers the misimpression that
23 safety is just a function of conditions at the
24 beginning of a shift. Yet the reality is, as a number
25 of people have stated today, the mining process is a

1 dynamic one, and hazards don't just present themselves
2 at the beginning of a shift.

3 One practical challenge is that surface mines
4 are outdoors and, as stated earlier, frequently
5 impossible to illuminate before the beginning of the
6 first shift. A substantial problem tied to this is
7 that facilities with three shifts at work would have no
8 time in which to conduct a workplace exam before the
9 beginning of work.

10 Number 2, in regard to the call to notify all
11 employees of hazards found. This risks conveying a
12 message that with the conclusion of a workplace exam,
13 no hazards need to be checked for afterward. There is
14 a risk from this provision of distracting uninvolved
15 miners with the information about hazards those miners
16 don't need to know about.

17 An additional practical challenge would be
18 knowing how operators could, in the future, prove to an
19 inspector that communication of hazards had, in fact,
20 taken place. While we appreciate the apparent intent
21 of this provision, we believe that implementation would
22 be very complicated.

23 Number 3, in regard to the call to document
24 hazards and fixes. Documentation of hazards doesn't
25 illustrate the precise cause of a hazard or violative

1 condition. Yet an inspector, perhaps seeing evidence
2 of particular violative condition, that had occurred
3 months earlier, might misunderstand the varying causes
4 of the violation. So documentation doesn't really help
5 in that way.

6 Also, operators could be confused about how
7 much detail is needed in documentation. These workers
8 are miners, they are good miners, they are trained to
9 work safely. But they are not trained to be
10 stenographers of work performed, and that's a very
11 important component that we think needs to be
12 understood.

13 There is no safety benefit to keeping
14 documented descriptions of locations and conditions
15 examined, beyond what is called for in the standard.
16 Even under the MSHA mobile equipment standard, a record
17 of the defect found is maintained only until the defect
18 has been corrected.

19 This could lead to a big waste of time for a
20 number of reasons. One reason is, if the hazard can be
21 quickly corrected it wouldn't even need documentation.

22 However, a provision such as this would
23 spawn, in fact, much needless paperwork and small
24 operators in particular, excessive paperwork can become
25 a very big problem, just from a management standpoint.

1 And we believe that all needless paperwork is valuable
2 time taken away from the process of effectively
3 managing for safety; for instance, doing root cause
4 analysis, conducting behavior observations, doing
5 coaching, training, et cetera.

6 Put another way, virtually anyone performing
7 an exam already has a high level of responsibility and
8 accountability; more paperwork cannot help make this
9 job get conducted in a more safe manner.

10 Number 4, in regard to the call to make
11 available records to inspectors, workers and miners'
12 representatives, this change would in no way benefit
13 safety. As we see it, it would simply give the Agency
14 more ammunition for writing citations. That is not a
15 good contribution to the current compliance process.

16 And the point needs to be made that MSHA has
17 said that in recent years the compliance track record
18 in industry has improved. Inspectors are much less
19 inconsistent in what they are writing, and operators
20 overall are demonstrating a higher level of compliance
21 in the workplace; and yet this provision really risks
22 undercutting that success in our view.

23 In response to the question of whether MSHA
24 should require in the rule minimum experience, ability
25 or knowledge level to be a competent person, NSSGA's

1 answer is: no, the operator knows better than MSHA who
2 on the company staff is competent.

3 In regard to the Agency question of should an
4 exam be conducted not before the shift but within two
5 hours of the shift's beginning, we could contend that
6 only the operator knows best when an exam ought to be
7 conducted.

8 Even if the exam were to be taken as many as
9 two hours after a shift's beginning, it still may be,
10 in certain parts of the country, not yet daylight.

11 Finally, in regard to the anticipated impact
12 of the proposal on small operators, NSSGA is very
13 concerned, because small operators are the least likely
14 to have the resources to fully comply with this
15 proposal, despite the good intentions of the Agency in
16 putting forward the proposal.

17 So NSSGA is concerned with the proposal from
18 a number of standpoints.

19 MS. MCCONNELL: Mr. Casper, thank you very
20 much for your testimony. I just have one quick
21 question.

22 In your testimony, you were suggesting that
23 hazards, which are immediately corrected, shouldn't
24 have to -- a record should not need to be made. So, I
25 just have a question in terms of: do you have a sense

1 of how many hazards that are identified are immediately
2 corrected? Do you have a sense in terms of a workplace
3 examination like how often that happens?

4 MR. CASPER: My sense, most of them are
5 immediately corrected. And certainly even if they
6 can't be fully corrected most of them have the
7 correction process begun immediately after the defect
8 is found.

9 MS. MCCONNELL: And you would think
10 immediately was within what timeframe, like a 15, 20
11 minutes, hour?

12 MR. CASPER: I think within an hour or two
13 based on what I've spoken to different operators about.

14 MS. MCCONNELL: Okay.

15 MR. CASPER: May I also interject one other
16 point? We have one operator that provided comments,
17 and the operator said it's doing most of what is called
18 for in the proposal. We believe the operators ought to
19 have the freedom to comply with the letter and spirit
20 of .18002 as they are currently doing.

21 If the world were a perfect place and a day
22 could last 30 hours and not 24, a lot of the provisions
23 here may not be anywhere near as unworkable as we
24 currently fear they are for certain operators.

25 Other operators are able to do some of --

1 some or all of this. And they are to be commended for
2 the good work they're doing, but we don't need more,
3 more rules that we need to contend with in this area,
4 because that's not going to benefit safety in our view.

5 We believe firmly that the vast majority of
6 accidents and safety concerns come from behavior,
7 either of management or the worker, and it's the
8 behavior area that we really need to look at.

9 Have we attained historic safety success in
10 our sector? Yes. But the fact remains, we have too
11 many injuries. One fatality is too many, and we're not
12 yet down to one.

13 The ways to attain better, more improvements
14 is to attack on the behavior side from the -- with
15 regard to both management and workers, not to focus on
16 conditions.

17 Conditions have been addressed pretty, pretty
18 effectively by the vast majority of mining companies in
19 this day and age.

20 MS. MCCONNELL: Okay. Al, do you have
21 anything?

22 MR. DUCHARME: No.

23 MS. MCCONNELL: Larry, something?

24 MR. TRAINOR: No, nothing.

25 MS. MCCONNELL: Thank you, sir.

1 MR. CASPER: Thank you for the opportunity.

2 MS. MCCONNELL: You're welcome. Okay. Mr.
3 Josh Roberts, UMWA, is our next speaker.

4 Good morning.

5 MR. ROBERTS: Good morning.

6 Josh Roberts, I'm the Administrator of Health
7 and Safety for the United Mine Workers. It pleases me
8 to hear that the Agency has decided to take steps into
9 reviewing its current rules and regulations pertaining
10 to workplace exams at metal nonmetal mines.

11 I firmly believe that the current law was
12 nowhere near stringent enough to adequately protect
13 miners from hazards that can adversely affect their
14 health and safety.

15 It was just two years ago I was a fire boss
16 at an underground coal mine in southern West Virginia.
17 I know the importance of making proper workplace exams
18 and how they prevent accidents and injuries from
19 happening.

20 I believe that a proper workplace exam by a
21 competent person that has the proper experience and
22 training in recognizing hazards and adverse conditions
23 is vital to the safety of the miners working at the
24 mine.

25 The proposed revisions to the current rule

1 are simple and easy to apply, but can make a huge
2 impact on improving the health and safety of miners.

3 Making the exams prior to someone working in
4 an area just seems like common sense to me. That gives
5 the miners coming into the next shift a good idea what
6 conditions and hazards have been presenting itself
7 before they arrive.

8 I would suggest that the exam be performed as
9 close to the start of the next shift as possible, but
10 no more than two hours. I would also suggest that the
11 person performing these exams have a mine foreman
12 certification as well. This would show that they have
13 a certain amount of experience and knowledge in
14 recognizing hazards that could adversely affect the
15 health and safety of miners.

16 The requirement to record the location,
17 hazard found, correction action taken and the date the
18 action was taken, would help make the operator as well
19 as the miners more aware of hazards, so they cannot say
20 that they were not aware of the hazard and not correct
21 it.

22 Many hazards were -- will be able to be
23 corrected during the time of the exam, but some will
24 require time and manpower to correct and this
25 requirement will show what progress is being made on a

1 particular area and hazard.

2 It's also important for miners and their
3 representatives to have access to these records to see
4 what hazards they may encounter and what actions are
5 being taken to correct those hazards.

6 One thing I see being a concern for some is
7 the fact that a person performing the exam must sign
8 and date and exam book. As a former mine examiner
9 myself I can say that you will worry that you missed
10 something; however, over time I realized that as long
11 as I did my job and followed the law to the very best
12 of my ability, I didn't have much to worry about.

13 The only people who have a need to worry
14 about this requirement is the people who cut corners
15 while making their exams, or who turn a blind eye to
16 certain things that may be too expensive or time-
17 consuming to fix, or people who don't report or record
18 hazards because of pressure from their operator.

19 Honest people who try to follow the law will
20 have nothing to worry about. This rule will also help
21 keep people accountable and more alert to hazards.

22 The proposed rules and regulations seem like
23 common sense revisions to the current exam rule and,
24 quite frankly, should have been made years ago.

25 These are much like the rules and regulations

1 used in coal. I'm aware that nonmetal mines -
2 metal/nonmetal mines are not exposed to the hazards
3 that present itself from coal dust; however, aside from
4 that, most if not all other hazards can be found in
5 both coal and metal and nonmetal mines.

6 Thank you for allowing me to comment on the
7 proposed rule.

8 MS. MCCONNELL: Thank you, Mr. Roberts. I
9 don't have any questions but I'm going to turn to my
10 panel.

11 MR. DUCHARME: Just want to make sure he
12 supports the signing of the record.

13 MS. MCCONNELL: We want to make sure that
14 your testimony is that you do support the competent
15 person whose conducting the examination signs the
16 record?

17 MR. ROBERTS: Yes.

18 MS. MCCONNELL: Okay. Larry?

19 MR. TRAINOR: I'm good.

20 MS. MCCONNELL: Okay. Thank you, sir.

21 MR. ROBERTS: Yeah.

22 MS. MCCONNELL: Our next speaker is Jim
23 Frederick, USW. Hi. Good morning, sir.

24 MR. FREDERICK: Good morning. So, again,
25 good morning, my name's Jim Frederick. I'm the

1 Assistant Director of Health Safety and Environment at
2 the United Steelworkers Union.

3 The USW represents more than 650,000 workers
4 in the U.S. and Canada. We represent a significant
5 numbers of workers in metal and nonmetal mines in the
6 United States.

7 It's approximately 130 mines where our
8 members work in the U.S. These miners work with a
9 variety of commodities from iron ore to trona, from
10 copper to salt, from nickel to silver.

11 Our members mine and process these materials
12 in our represented workplaces, below ground, in service
13 mining, and a variety of MSHA covered processing
14 facilities.

15 Our members' work is sometime -- sometimes
16 produces finished product but often as producing an
17 intermediate product that's utilized in other parts of
18 the economy. The USW local unions and our members'
19 role in the workplace health and safety are vital to
20 the overall success of those operations.

21 The USW Health Safety Environment Department
22 works with our local unions on issues pertaining to
23 worker and miner health and safety.

24 In our mining sector workplaces we've
25 recently noted hazards that include the following in

1 mining workplaces in the U.S. and Canada. Things such
2 as: Machine guarding problems, exposure to hazardous
3 materials, scaling, roof fall, slide of ground,
4 transportation and mobile equipment hazards and
5 electrical hazards. What do these types of hazards
6 have in common? They can all be effectively identified
7 and controlled in an examination of the workplace.

8 Prevention is a key to successful health and
9 safety management systems. This proposed rule ensures
10 that mine operators are practicing hazard
11 identification, control and prevention as part of their
12 overall health and safety system.

13 The USW strongly supports the Mine Safety and
14 Health Administration's Proposed Rule for Examination
15 of Working Places in Metal and Nonmetal Mines. The USW
16 urges MSHA to move forward and issue the final rule as
17 quickly as possible.

18 Today we provide the following specific
19 comments to the proposal, and will provide more
20 detailed comments in our written comments in a bit of
21 time.

22 First, the USW supports the requirement for
23 mine operators to conduct workplace examinations to
24 identify hazards before work begins. We know that
25 workplace hazards cause injuries and illness to workers

1 in these mines.

2 We strongly believe that the responsibility
3 and legal obligation belongs to the employer to achieve
4 this. The union and our members certainly play an
5 important role in this process but the obligation and
6 responsibility belongs to the mine operator.

7 The mine operator retains not only the
8 responsibility, but also the authority and the capacity
9 to correct these items identified during the
10 examination process.

11 At the USW, we see health and safety
12 management systems in place in a variety of workplaces,
13 in mining and manufacturing and service sector
14 workplaces alike.

15 We know that the most effective means to
16 address and correct identified hazards from workplace
17 to workplace includes a system that first identifies
18 them, but then formally logs those hazards and assigns
19 responsibility to someone for the correction of those
20 hazards. We believe that a system such as this is
21 warranted and should be considered good practice in
22 metal and nonmetal mines.

23 We also have learned from employers and local
24 unions that for our workers to be successfully engaged
25 and involved in health and safety systems in any

1 workplace, that feedback must occur between those
2 involved in health and safety hazard control, and the
3 effected workers about the hazards reported.

4 Like any effective management process, this
5 communication closes the loop at the
6 worker-to-workplace interface and assists in the
7 process of worker engagement and involvement. It's
8 also vital that workers are informed about the hazards
9 in their work area.

10 In all areas of the workplace, workers must
11 receive notice of identified hazards. This provides
12 them with the means to apply hazard controls, and to
13 utilize the information that they have been provided
14 through training and experience to assess and address
15 their hazards of work.

16 Regarding the reference and the use of a
17 competent person in the examination process, we concur
18 with the MSHA definition of a competent person
19 essentially as a person having the abilities and
20 experience that fully qualify him to perform the duty
21 which he's assigned.

22 We believe there needs to be additional
23 specific training in hazard identification and control
24 for the designated competent person or persons at each
25 facility. We understand that the mine operator will

1 continue to select or designate the competent person in
2 the workplace.

3 MSHA identifies that the competent person may
4 be a management representative. However, we know that
5 in many USW-represented metal and nonmetal mines that a
6 worker or union health and safety representative may be
7 designated as the competent person in at least some
8 instances.

9 In those instances where the employer
10 designates a worker to be the competent person, we
11 believe that MSHA needs to specify and require specific
12 training for those workers.

13 We also believe that it's imperative that
14 MSHA inform mine operators and workers alike of the
15 obligations and liabilities of the examination process,
16 regardless of whom they designate to perform said
17 examination.

18 Requiring the competent person to sign and
19 date the documentation of hazards is certainly
20 appropriate. However, again, MSHA should require that
21 those persons designated have a combination of
22 experience and training to be truly competent; and that
23 the mine operator retains the obligations,
24 responsibilities and liability for the examination.

25 The USW concurs that this rule provides

1 needed and necessary clarification to mine operators of
2 the Mine Act requiring mine operators to prevent the
3 existence of conditions that lead to injury and
4 illness.

5 The proposed rule provides clarification of
6 the requisite process for mine operators as well as
7 providing a means for miners, representatives and
8 safety committees at USW-represented metal and nonmetal
9 mines to assure mine operator compliance with the Act.

10 Thank you for the opportunity to share this
11 information with MSHA this morning and interested
12 stakeholders. Again, we'll provide more detailed
13 comments in our written comments soon. Thank you.

14 MS. MCCONNELL: Thank you. Do you have any
15 questions of him? Do you guys have any?

16 MR. DUCHARME: No.

17 MS. MCCONNELL: For mines that you have,
18 where you represent the miners, I'm just curious do you
19 -- could you give me a flavor of how, under the
20 existing standard how workplace examinations are
21 conducted, what's included in the record?

22 MR. FREDERICK: So, it's, you know, 130
23 mines. The varying degrees to which the examinations
24 are currently performed is truly different from
25 workplace to workplace. But generally speaking there

1 is employee engagement involvement. There is someone
2 with the responsibility. In many of the facilities we
3 represent a process is taking place that's very similar
4 to what's proposed.

5 MS. MCCONNELL: A process that's taking place
6 is similar to what is -- currently?

7 MR. FREDERICK: Currently. Yeah.

8 MS. MCCONNELL: Okay. Thank you. Thank you
9 very much.

10 MR. FREDERICK: Thanks.

11 MS. MCCONNELL: Our next speaker is Hunter.
12 No, it's not Hunter. Is it Hunter Pearlman?

13 MR. PRILLAMAN: Hunter Prillaman.

14 MS. MCCONNELL: Prillaman, Hunter Prillaman,
15 National Lime Association.

16 MR. PRILLAMAN: Hunter Prillaman from the --
17 I'm the Director of Government Affairs at the National
18 Lime Association. I'm just going to make a few brief
19 comments, somewhat reacting to some of what other
20 people have said. I think there have been a lot of
21 good comments, and we'll be writing more lengthy
22 comments, but I wanted to just hit a couple of points.

23 Based on what I've heard and read, I think
24 that there are a lot of elements in this rule that need
25 to be clarified and fleshed out and some gaps in the,

1 in the preamble.

2 And I would urge you to consider re-proposing
3 the rule rather than going directly to a final rule,
4 because I think you're going to need to make changes in
5 the things that need to be explained.

6 Probably the biggest one, and you've heard a
7 bunch of people mention it today, is the question of:
8 what happens if a condition is described on the, on the
9 form, it's been corrected, and now an MSHA inspector
10 comes; is he going to write a citation?

11 That is not addressed in the preamble at all.

12 I expected it to be. Because I thought well this is,
13 this is my first question: well, what happens if -- in
14 this situation? Well, it's not in the preamble one way
15 or the other. I really think that you should address
16 that because what you have is a lot of people
17 speculating about what's going to happen in that
18 situation, and there's really no answer from MSHA on
19 that.

20 I think that's really crucial to know, do you
21 think the inspector must write a citation, that he
22 should not, that he may, that he may not? It really
23 needs to be answered.

24 So that, I think, and several people have
25 mentioned reasons why it's not a good idea to have an

1 inspector write a citation for a condition that has
2 been corrected in a timely manner. I'm not going to
3 repeat that. I think it's pretty obvious, but what
4 does MSHA think about it?

5 The second point that I wanted to raise was
6 about recordkeeping. You asked a number of good
7 questions about, well, how does this change in the rule
8 increase record keeping?

9 I think that -- others have mentioned and
10 this is true in the lime industry as well, there's a
11 lot of variation in what kind of records people keep of
12 hazardous conditions they find and how they're
13 corrected.

14 But even for those generally large, well-run
15 operations that currently do keep records of all that,
16 your rule will create a substantial change in the, in
17 the document flow and how they're, how they're
18 maintained, and that's going to cost money, and it's
19 going to be a big change.

20 So even those -- so, for example, some of
21 them have a procedure whereby when a hazardous item is
22 found, a ticket is generated and sent to maintenance,
23 and then it's corrected and a record is kept of that.
24 Well, it's not the same record as the workplace exam
25 record.

1 So even people who already have a mature
2 recordkeeping program that addresses that, you're
3 asking for a pretty substantial change. But right now
4 the workplace exam records are primarily a verification
5 system to verify that the exams were done and when they
6 were done.

7 This is really quite a -- would be quite a
8 change in the purpose of those, because now rather than
9 a record that's prepared and stored, you now have a
10 record that has to be able to be re-accessed in order
11 to add the corrective action in.

12 So, as some smaller companies are not keeping
13 those kind of records, they might be using a grease
14 board or some method like that, that was described by
15 others, but for everybody it's going to be a pretty
16 substantial change and it's going to be a lot more than
17 five minutes per exam, particularly if a large number
18 of exams find problems.

19 The last point I would like to make is just
20 to flush out a little bit more about the issue of
21 competent persons. We agree -- we commend you for not
22 changing the definition of competent persons, and we
23 don't think you should. One reason is that in our
24 industry and I think in others, many companies have a
25 strong interest in empowering workers and training them

1 to take as much responsibility for their own work areas
2 as possible.

3 And so what many of our members are doing is
4 training workers to be able to do the workplace exams
5 of their own work areas, as opposed to having a foreman
6 perform that.

7 Now, we agree that it's essential that they
8 be properly trained and have proper experience to do
9 that but we -- but many of our members, and I agree
10 with this, think that it's best for a worker to be able
11 to exam his own work area.

12 Now, and one benefit that you get of that is
13 the vast majority of workers who do that, perform that
14 exam at the beginning of the shift. And that's just
15 the natural time to do it. You go to work and you look
16 and see is my work area in a safe condition or not.

17 And I think in terms of some of these
18 questions about the two hours and exactly when the work
19 -- and the daylight and all those issues; I think, I
20 think there's a big difference between a workplace exam
21 that's being performed by the person who's going to do
22 that work and one that's being performed by a
23 supervisory person.

24 So, for example, if it's being performed by a
25 supervisory person; the two hour limit may not make

1 sense, because the supervisory person may want to do a
2 fairly broad exam of areas of the plant. Like, if
3 you're going to talk about travelways or something like
4 that. And, again, someone else mentioned that there
5 needs to be more clarification about just what work
6 areas are.

7 So, I guess what I'm saying is, I don't
8 really think that the, the two hour limitation is
9 necessary, because it won't really be applicable to
10 most people who are, who are examining their own work
11 areas. And it might be a significant burden where the
12 exam is being performed by somebody else. So that's,
13 that's my point there.

14 Anyway, that's really all I had to say. I
15 think that - and again, I'll just reiterate, I think a
16 lot of these comments that people are making are pretty
17 substantive, so I would urge you to consider re-
18 proposing and, and fleshing these out a little bit so
19 that, so that the regulated community can comment more
20 on what you really have in mind.

21 MS. MCCONNELL: Thank you, sir. I have just
22 one quick question. You were mentioning about re-
23 accessing a record to add the corrective action if it
24 can't be done within -- the corrective action cannot be
25 corrected during -- the hazard couldn't be corrected

1 during the shift.

2 Do you have a sense of the number of
3 instances where corrective actions take place after the
4 shift has -- in terms of proportions of how many are
5 done on the shift versus how many are done after the
6 shift is concluded?

7 MR. PRILLAMAN: I don't know. I really can't
8 say about proportions. I agree with others that
9 probably most of them are things that can be corrected
10 immediately, like, "put a lid on that bucket." But, if
11 it's, if it's something that requires repair to a piece
12 of equipment or something like that, it might -- it
13 could easily take beyond the shift.

14 MS. MCCONNELL: Right.

15 MR. PRILLAMAN: So, in terms of proportions I
16 really, I really don't know.

17 MS. MCCONNELL: Okay. Okay. Al, do you have
18 anything?

19 MR. DUCHARME: No.

20 MS. MCCONNELL: Do you guys have anything?
21 Thank you, sir.

22 MR. PRILLAMAN: Thank you.

23 MS. MCCONNELL: Well, that is our, our last
24 speaker who has signed up. That doesn't preclude
25 anyone else who has -- did not sign up but wishes to

1 provide their remarks now.

2 So, is there anyone who would like to speak?

3 I'll pause a little bit here as we collect our
4 thoughts.

5 (Pause.)

6 MS. MCCONNELL: I don't see any takers. Is
7 that the case?

8 (No response.)

9 MS. MCCONNELL: Okay. Well, since I see that
10 no one else wishes to make a presentation, I'm going to
11 conclude this hearing.

12 I thank everyone for coming forward and
13 making a presentation.

14 I also thank everyone else who attended the
15 hearing. It shows your interest in this rulemaking,
16 and I want to emphasize again that right now we need
17 all your comments by September 6. However, again, I'm
18 going to reiterate that we have received several
19 requests to extend the comment period which we are
20 considering.

21 We will take -- oh, Mr. Casper, would you
22 like to come back down?

23 MR. CASPER: Just one administrative
24 question. Sorry to interrupt.

25 The start time for the Birmingham meeting,

1 public hearing?

2 MS. MCCONNELL: 8:30.

3 MR. CASPER: Thank you.

4 MS. MCCONNELL: We will take all your
5 comments and concerns into consideration when we
6 develop the final rule. And I will continue to
7 encourage you to participate and provide your comments
8 during this rulemaking.

9 So, thank you very much. And our public
10 hearing is concluded.

11 (Whereupon, at 11:18 a.m., the hearing in the
12 above-entitled matter concluded.)

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REPORTER'S CERTIFICATE

DOCKET NO.: MSHA-2014-0030

CASE TITLE: Examination of Working Places in Metal and
Nonmetal Mines

DATE: July 26, 2016

LOCATION: Arlington, Virginia

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the U.S. Department of Labor, Mine Safety & Health Administration.

Date: July 26, 2016



Margaret Blumenthal
Official Reporter
Heritage Reporting
Corporation
Suite 206
1220 L Street, N.W.
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Good Morning Ladies and Gentlemen,

My name is Anne Kelhart, I am Past Chair of the National Stone Sand and Gravel Assn. Health & Safety Committee, and 2003 Recipient of the National Stone Sand and Gravel Assn. James A. Christie Safety Professional of the year award, and Current and longtime Chair of the Pennsylvania Aggregate and Concrete Assn Health & Safety Committee. I am also the current Director of Safety and Human Resources at Martin Stone Quarries, a position I have held for 27 years. I speak for Martin Stone Quarries today.

Located in Eastern Pennsylvania, we are a small organization with an employee population of 54. We produce 1.5 – 2M tons of product per year. All but 2 of our employees work the day shift. Martin Stone Quarries is representative of many smaller operations; all the way down to the Mom and Pop mines.

In my 27 years working in mine safety, I have seen MSHA and Industry work together to significantly reduce fatalities and injuries.

I understand that there is more to be done. As always, reflective dialogue from all perspectives is important to ensure the greatest potential for a positive result. I thank you for the opportunity to contribute to this ongoing dialogue.

The sad duties of issuing citations and investigating serious incidents and fatalities has led MSHA to believe that some mine operators may need to improve on mine site exams. I am not here to dispute your findings.

HOW we improve these exams needs careful consideration, warranting input from all perspectives, in order to achieve the highest potential for improvement. With this in mind, I offer the following thoughts:

1. You propose that inspections of the mine site will occur BEFORE the beginning of each shift. While this may appear logical, please consider the following:

A. All miners are currently required to examine their equipment and immediate work area prior to beginning any task, regardless of the time of day. That's the basic key to resolving immediate hazards that may have appeared since the previous day or shift. Examination of the entire mine is completely different and should be performed in full daylight.

B. Surface mines can be vast and complex, both mechanically and geographically. Most surface mines begin operations long before daylight for the majority of the year and are impossible to illuminate to a level equal to that of daylight in the pre-dawn hours.

Mine examiners must be competent and carry great responsibility, both legally and morally, to ensure a safe workplace for all their fellow miners.

Your proposal will require these miners to do their best work in the dark. The most competent person in the world could miss hazards before dawn that would never be missed in full daylight. Therefore, this proposal is just too much to expect from anyone, regardless of competency level.

It has been suggested that the timing of the exam could occur within 2 hours of the beginning of the shift. Again, this may not provide the adequate daylight that competent examiners deserve.

It takes about 2 hours to do a mine exam at our operation. This includes walking the plants and conveyor systems as well as examining walls, benches, piles and all manner of ground control.

C. The alternative to performing exams in the dark would require operators to begin production well after daylight, after the mine site exam has been successfully completed. This will have a direct and negative impact on our miners:

1. Miners would have to work later in the day, exposing them to the very insidious but often serious and even fatal problems related to heat stroke for at least 3 months of the year in the Northern states and for longer periods in the southern states.

2. Currently, and whenever possible, our miners work on a 4 day-10 hour schedule. They love it. It gives them more time with their families, they get more rest, they save money on gas, and that savings is also good for the environment.

With a full daylight schedule, we would likely have to return to a 5 day, or even 6 day work week, in order to maintain current levels of production.

3. It is also important to remember that in this scenario, miners would have to work much later in the day, perhaps well into the evening. This may not seem like much, but miners are safer and healthier when they are at home for dinner. Stronger relationships at home give miners great reasons for getting home safe after every shift.

Perhaps it makes more sense to continue with the current rule but gear up on education. Ground control examination is difficult because problems can be subtle and/or subjective.

This is not the first challenge of this type that has been successfully improved. Inspecting guards is a huge part of workplace examination. I am reminded of the tremendous numbers of guarding citations that were issued each and every year, prior MSHA issuing Harvey Kirk's outstanding Guarding PowerPoint DVD. That educational piece took all of the subjectivity out of what is and what isn't a proper guard. Because it is self-explanatory and extraordinarily portable, it has been seen by an unprecedented number of miners, and a very dramatic reduction in guarding citations was the direct result.

As an alternative to your proposal, I suggest that we need a similar project on GROUND CONTROL. I am willing to bet that there are associations and mine operators in this room that would volunteer to assist with this endeavor. I think the results would amaze you.

2. The question has been raised as to the relative burden or safety benefit to mandate that operators promptly notify miners of any conditions that may adversely affect safety.

Immediate notification of adverse conditions to involved miners has always made sense. Notification to others is traditionally accomplished with berms, signage, or other means of access prevention.

Distracting uninvolved miners with unneeded information may have negative consequences. It is better to inform them of changes or adverse conditions at a time that does not create a distraction. Historically, this is done at the safety meeting before the start of their next shift, long after the condition has either been corrected or contained with berms, signage, or other means of access prevention.

3. The question has been raised as to the relative burden or safety benefit to mandate that the exam record must include a description of locations examined, conditions found, and corrective actions taken. In addition, it is proposed to mandate that records must be available for inspection by MSHA and miners' representatives.

I understand Section 104 of the Mine Act. I also understand that MSHA can work interpretively within this Section and still be respectful of the law.

In all fairness, MSHA may have created significant resistance to this proposal. MSHA has a history of punitive enforcement; imposed EVEN WHEN A POTENTIAL VIOLATION HAS BEEN DISCOVERED - LONG AFTER corrective abatement is achieved.

This whole concept is counterproductive to the progress of mine safety. I, personally, have been advised by both senior MSHA personnel and counsel, NOT to post best practices that have been produced by my safety committee as a training tool to avoid another near miss, as I could be cited....after the fact.... for the underlying incident. How does that make sense?

Ladies and Gentlemen, if our positions were reversed, I'm inclined to believe that you would agree with me on this. It's not surprising that Mine Operators are in direct opposition to the additional information you are proposing to add to current reporting.

At our operation, anything that needs immediate attention is conveyed to the mine manager, via telephone, at time of discovery, in order that prompt response is implemented. Other, less pressing issues are prioritized, added to a general list of tasks, and scheduled accordingly. It works well for us.

4. The question has been raised as to whether the agency should require minimum experience, ability or knowledge level to be seen as a 'competent person'.

The answer is NO.

Though all surface mines have some common hazards, each mine is complexly unique in its own right. What equals "competent" at one surface mine, may not be so at a different mine.

Changing the criteria for competent persons opens a huge door. It's important to remember that the term "Competent Person" applies to everything, not just workplace exams. Mandatory definitions will drive everyone crazy, even MSHA. A miner can often be declared competent with a specific task in a short time. Overall competence to examine the complexity of a surface mine site can take a very long time, depending upon the miner.

If you persist in this endeavor the overall impact could be significant. To that, I offer the following: I am familiar with the MSHA system for certification of competency in underground mining. It is complex. It requires passing written tests for each level, after completing classes developed at the National Mine Academy. Successful completion grants miners, "mining papers" at a given level. This is a long standing and time consuming program.

There is no such program for surface mining. If MSHA were to mandate a similar program for surface mining there would be a significant cost. While a price cannot be put on safety, we are asked by congress to report the anticipated cost of new regulations.

As you know, all miner training is paid at the miner's regular rate. While training, the miner is also not contributing to production. The cost of the instructor must also be considered. Considering some of the workbooks for MSHA classes that I have taken, the time spent for each class will be considerable. This number, multiplied by the number of affected miners, will likely skyrocket the overall economic impact.

It might be worth the cost, if statistics proved that underground mining performs better than surface mining specifically because of the differences in training methods. I have serious doubts that there is a significant difference in miner performance between surface and underground mining that is specifically the result of methods used in safety training.

That completes my testimony on this proposal. Thank you for the opportunity to share them.

Statement of Brett S. Smith
Sr. Director, Government Relations, American Iron and Steel Institute

Mine Safety and Health Administration (MSHA)
Proposed Rule for Examinations of Working Places in Metal and Nonmetal Mines
30 CFR Parts 56 and 57; Docket ID: MSHA-2014-0030

Public Hearing, Arlington, VA
July 26, 2016

AISI and Steel Industry Background

Good morning and thank you for holding this public hearing on the MSHA proposed rule for examinations of working places in metal and nonmetal mines. I am Brett Smith Senior Director of Government Relations for the American Iron and Steel Institute, or AISI. AISI serves as the voice of the North American steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. AISI is comprised of 19 member companies, including integrated and electric furnace steelmakers, and approximately 124 associate members who are suppliers to or customers of the steel industry.

The U.S. steel industry operates more than 100 steelmaking and production facilities, producing 98 million tons in steel shipments valued at \$75 billion in 2014. Steel production facilities directly employ about 142,000 people in the United States, and they directly or indirectly support almost one million U.S. jobs.

An integral part of the AISI membership are the three companies who mine iron ore in the United States – ArcelorMittal, Cliffs Natural Resources, and U.S. Steel. AISI's member companies maintain the eight large active iron ore mining and processing

facilities in the United States located in Northeast Minnesota and Michigan's Upper Peninsula. In aggregate, these facilities directly employ nearly 5,000 workers when at full production and play an outsized role in supporting the regional economies of those areas. Iron ore is a critical raw material needed for the production of steel. These facilities provide the bulk of the iron ore consumed by the U.S. integrated steel industry. The United States is a net exporter of iron ore.

Ongoing Steel Import Crisis

The domestic steel industry is presently combating a steel import crisis. Due to the surge in dumped and subsidized steel from China and many other countries, finished steel imports took a record 29 percent of the U.S. market in 2015. Domestic steel shipments declined by over 12 percent, and capacity utilization averaged just 70 percent for the year. American steel producers were forced to lay off nearly 14,000 workers since January 2015. Though import market share year-to-date is 24 percent and capacity utilization has risen slightly to 72.8 percent through last week, the fundamental challenges to the industry remain.

Foreign government subsidies and other market-distorting policies have fueled the massive global overcapacity in steel which is estimated by the OECD to be about 700 million metric tons today. More than half of that – 425 million metric tons – is located in China. China represents half of all global steel production, and the Chinese steel industry is overwhelmingly government-owned, controlled and subsidized.

The U.S. iron ore industry has been particularly hard-hit by the steel import crisis and companies were forced to idle facilities and lay-off nearly 2,000 workers in 2015 alone. While industry conditions have stabilized and nearly 1,000 miners have been called back to work in recent months, market conditions remain very challenging for both the iron ore sector and the downstream steel industry.

Steel Industry Workplace Safety and Health Commitment

AISI member companies have made substantial efforts to decrease the number and frequency of workplace incidents and continue to work through AISI to share information and best practices to meet their shared goal of improving occupational safety and health. Our experience has demonstrated that cooperative efforts among company management, employees, and government can help maximize safety and health.

The North American steel industry is committed to the highest safety and health standards. Since 2005, U.S. steel producers have achieved a reduction of 50 percent in both the total OSHA recordable injury and illness and lost workday case rates. All of our member companies – whether they are regulated by OSHA or MSHA – are committed to making continuous improvements so that our employees return home safely each day.

Comments on Proposed Examination Rule

After reviewing the MSHA proposed examination rule for metal/nonmetal mines, AISI members have a number of concerns and questions that need further explanation. I will address a few of those issues in my statement this morning and we will provide more detail in our formal written comments to the proposal that we will submit to the docket in September.

Of particular note is the concern from our member companies that full compliance with the proposed rule will require substantially more commitment than the additional five minutes forecast in the proposal. Iron ore mines are vast operations with footprints encompassing tens of square miles. Mine operations in the United States range from

twelve to over fifty square miles wide, consisting of multiple buildings and varied operations. These mine sites include multiple employees and jobs operating simultaneously. For instance, an average-sized building at one of our member company mines has over 150 thousand square feet and five floors. Compliance with all of the various diverse functions across a broad mine operation will certainly be challenging and require more than the limited time MSHA foresees. The agency should reevaluate that estimate.

The industry also is concerned about the impact of the proposed rule on the hourly employees. Our member companies believe that all employees, from management down to the shop floor, must share in a commitment to safety at every moment of the work period. Identifying only one or a few employees to have the responsibility for safety, as this proposal appears to do, will counteract the shared commitment to safety that all of our employees consistently must have.

Furthermore, the provisions in the proposal to include adverse conditions and corrective actions on the examination records raise the concern that MSHA will cite operators for violations it finds in records even if operators are in the process of abating or already abated those conditions. What does MSHA foresee as the remedy if the corrective action the operator has chosen is not what the inspector would like done? In addition, will the final rule include a safe-harbor provision so that MSHA does not issue citations based on what is found in records?

There are also several additional terms used in the proposed rule that we believe require more detailed explanation. In particular, is a "travelway" at a mine operation considered a "working place" in the regulation? Additionally, under the rule, does MSHA intend "competent persons" be considered "agents of the operator?" Providing clarity to these and other terms in the final are critical to insure compliance ability and the rule's eventual success.

Conclusion

AISI and its member companies urge MSHA to reevaluate existing workplace examination practices currently in place within the iron ore mining sector. In particular, the agency should ensure that the expected compliance costs to the employer are adequately balanced with the foreseen benefits of the proposal. Furthermore, we request that MSHA further define and provide clarity to several of the key terminologies used in the proposed rule.

AISI and its members truly stand at a crossroads for our industry in the U.S. moving forward. We face from a surge of foreign imports – often from areas of the world where steel production is heavily subsidized and undertaken with little or no commitment to workplace safety and health. Nowhere in our industry have these challenges been more accurately felt than in the iron ore production sector.

As you move forward on a number of the key questions we have raised today with the proposed examination regulation, we ask that you recognize the challenges we currently face. The specific details of this proposal have great potential to affect our sector's international competitiveness.

Again thank you for the ability to appear before you today and I am ready to answer any questions that you may have.



Colorado Stone, Sand & Gravel Association

Comments regarding MSHA's Proposed Rule on Workplace Exams

**Todd R Ohlheiser
Executive Director
July 26, 2016**



Colorado Stone, Sand & Gravel Association

CSSGA Overview

CSSGA is pleased to testify on the Workplace Exam proposal.

- We appreciate MSHA's concerns for miner safety, and acknowledge MSHA's work that has helped operators in recent years improve safety and health.

About Colorado Stone, Sand & Gravel Association

- Construction Aggregates
 - Mining, processing material sales
- 600+ Stone, Sand & Gravel sites in state
 - employ about 2,700* employees
- Majority of these sites are considered small operations
 - less than 20 employees

* MSHA Statistics



Partnership with CSSGA/DRMS

- CSSGA has a strong partnership with CO State Grant Program & CO Division of Reclamation, Mining & Safety (DRMS)
- CSSGA/DRMS jointly built the Part 46 New Miner Training Interactive DVD
 - Currently in 4th edition (English & Spanish), also Task Training and MSHA Operator's Guide
 - National Distribution - All three products have won National MSHA Training Materials Competition Award
- Distributed 4,000+ training DVD's nationally since 2000
 - DRMS uses this and other tools training mining contractors each year



Workplace Exam Proposal

- CSSGA acknowledges one workplace injury, is one too many, and must be prevented.
 - The current workplace examination rule provides the flexibility needed to address the differences from one mine to another, along with changing environments within the mining cycle.
 - The current workplace examination rule has contributed to significant safety improvements that we do not want to jeopardize, unless there is evidence and data to demonstrate that the changes to the current rule will be beneficial. Currently there is no data demonstrating a benefit.
- The Workplace Exam proposal is unwarranted.
 - What is called for in the proposal is largely redundant to what's already mandated in MSHA's standards. Duplication and confusion.
 - Accordingly, we see this as arbitrary and unpredictable.



Workplace Exam Proposal

- This provision risks giving the impression to workers that safety is simply a function of beginning of shift.
 - Reality is that the mining process is dynamic, and many times hazards don't present themselves at shift start.
- Entire focus is on equipment and inspections, not employee behavior.
- Does nothing to drive safety of 80% to 90% of all incidents, being employee actions and decisions made in the field
 - For example, MSHA never mandates drug and alcohol testing following serious or fatal accidents, even though impairment is nationally recognized in many situations.
 - Similarly, MSHA rarely finds that employee conduct in breaking or short cutting an enforced safety rule caused a fatal accident.



Regarding call to document hazards and fixes:

- Documentation of hazards doesn't illustrate the precise cause of a hazard or volatile condition.
 - Inspector, seeing evidence of a particular volatile condition could misunderstand the causes of the situation.
 - This provision gives inspectors great authority to write more citations without any idea of what is actually going on in the facility relative to actual hazards to workers.
 - Inconsistency between inspectors occurs now, and this provision will lead to more inconsistency and mixed messages to miners.
- Operators will be confused about how much detail is needed. Many companies need to write very little so employees know about hazards, and how to correct.
- Even under the MSHA mobile equipment standard, a record of the defect is maintained only until the defect has been corrected.



Regarding call to document hazards and fixes:

- This provision leads to additional and needless paperwork.
 - Needless paperwork is valuable time taken away from the process of managing for safety, doing root cause analysis, behavior observations, training, etc.
- Little benefit to this provision.
 - Virtually anyone performing an exam already has a high level of responsibility, accountability, liability. More paperwork cannot help this.



Regarding call to make all inspections available to inspectors, workers, rep's

- This change would not benefit safety. Rather, it would simply give MSHA more ammunition for writing citations.
 - Again, more inconsistency
 - Fewer individuals willing to conduct area inspections
 - Increased issuance of multiple citations for the same conditions
 - This is government over-reach.
- Small operators are the least likely to have the resources to comply with this proposal.



Summary

- Mining industry in all sectors has moved beyond the belief that creating more rules and having mechanical safety items in place will keep all employees safe and result in no injuries.
- The industry has learned that injuries are the result of behaviors and decisions, and are focused on working with employees to make the correct decisions.
- The proposed rules could actually create a situation where employees may not be able to note and correct safety issues throughout the shift in the ever changing environment.



Summary

- MSHA must modernize its safety philosophy and approach to truly prevent serious injuries and deaths.
- MSHA must take into account that human behavior plays a significant role in at least 80% of accidents, and these behaviors are not impacted by work place exams.
- MSHA is unable to demonstrate how this rushed new rule making will actually keep miners safe.
- It is to broad and not clearly thought out, and leads to increasingly difficult operating conditions versus driving miner safety.

Statement for the Mine Safety and Health Administration Public Meeting on the Notice of
Proposed Rulemaking on Examinations of Working Places in Metal and Nonmetal Mines

(Docket No. MSHA-2014-0030)

(RIN 112-AB87)

Mine Safety and Health Administration Headquarters

201 12th St, South, Rooms 7W204 and 7W206

Arlington, VA

July 26, 2016

By

Mark Ellis

President

Industrial Minerals Association – North America

Robert Carlson

Director of Health and Safety

FairmountSantrol

Matt Stewart

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Vanderbilt Global Services

Adele Abrams

President

Law Office of Adele L. Abrams, PC

Good morning. I am Mark Ellis, and I am the President of IMA-NA -- the Industrial Minerals Association -- North America. 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 deliver 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.

Safety and health are of paramount concern to IMA-NA's member companies, which is why we come before you today to address MSHA's Notice of Proposed Rulemaking on Examinations of Working Places in Metal and Nonmetal Mines. With me today are Mr. Robert Carlson, Director of Health and Safety for FairmountSantrol, Mr. Matt Stewart, Director of Health, Safety, Environment and Product Risk for Vanderbilt Global Services, and Ms. Adele Abrams, with the Law Office of Adele Abrams. Mr. Carlson serves as the chairman of IMA-NA's Safety and Health Committee, Mr. Stewart serves as vice chairman of the Committee, and Ms. Abrams serves as outside counsel to IMA-NA.

IMA-NA appreciates the opportunity to put these comments before MSHA for consideration. Written copies of our oral presentations are available to the reporter preparing verbatim transcripts and to the MSHA panel for inclusion in the rulemaking record. So, without further ado, please allow me turn the microphone over first to Mr. Stewart, and then to Mr. Carlson. All of us will be available to respond to questions at the conclusion of their testimony.

Mr. Stewart:

IMA-NA supports the proposed rule, in part, and we have offered constructive criticism, in part. We believe that, overall, the rule will be beneficial to the protection of miners although this may be hard to quantify. However, we have concerns about potential methods of enforcement, self-incrimination issues, and personal prosecution of management agents that may flow from the expanded documentation requirements. IMA-NA already urges its members to be proactive in terms of hazard identification and mitigation, and a robust workplace examination program is an inherent part of any effective safety and health management program.

IMA-NA endorses the proposed change of requiring workplace examinations to be conducted in all working places before work commences in that area. The current rule simply requires the exam to be performed and documented before the end of each shift, and we agree that this may allow miners to be exposed to uninspected hazardous conditions before the competent person reaches the affected area. However, MSHA should make it clear that the entire mine does not need inspection prior to the start of each shift, particularly because many mines no longer have fixed shifts and work in an area may overlap so that workers from multiple shifts are present concurrently. It is also infeasible to expect process equipment to be fully shut down at the end of each shift, so that a "new" inspection can be conducted.

MSHA should also clarify that the revised requirement only covers areas with reasonably anticipated or previously assigned duties for miners and contractors at the worksite. There will always be unanticipated production concerns or mechanical issues that arise during the course of a workday, which may require miners to enter a different area mid-shift, either to perform repairs or deal with other situations. In those situations, it should be a practice for miners to notify the designated "competent person" that they plan to work in a novel area temporarily, so that -- in advance of entry -- an examination can be conducted and documented prior to commencement of work. There may also be confusion about whether roadways that are traveled when going to/from a work area would need to be inspected for berms and road conditions at the start of each shift, since it cannot always be anticipated when or whether vehicles may travel any particular mine road.

Because of changing work needs during the course of a shift, it is impractical to expect the entire mine to be inspected prior to the start of a shift, just in case someone might have to enter an area later. IMA-NA also opposes setting an artificial time limit, such as two hours, in

which to perform the examination prior to workers entering an area. Mine operators must maintain some flexibility when scheduling examinations under this rule.

IMA-NA also believes that thorough hazard awareness training is key to identifying hazards and that MSHA can be an enormous resource to assist the industry in developing training materials on this subject to help better inform those tasked with workplace examinations. MSHA's 2015 Program Policy Letter on this subject included commentary that inadequate workplace examinations may be a sign that the competent person's task training was also inadequate (and could be a citable situation).

We agree that workplace examiners should be task trained on the task of performing thorough audits each shift, and that this training should be documented. We are pleased that MSHA has not included any separate requirement for this in the revision of 56/57.18002, and point out that the existing Part 46 and Part 48 requirements already cover this situation appropriately. We encourage MSHA to produce a workplace examination task training video and collateral materials for mine operators to use, which would standardize the approach and clarify what MSHA is demanding from the competent persons. Another suggestion would be for the agency to develop templates for workplace examination checklists that could cover different commodities and typical work tasks and areas, and suggest what potential hazards to watch out for. IMA-NA would welcome the opportunity to partner with MSHA on this project and believes that its members would cooperate in hosting filming and we would assist the agency in development of materials.

The agency must recognize that simply because an examiner disagrees that something constitutes a hazard, this should not be used by MSHA as *de facto* proof that the training was inadequate. As noted by several FMSHRC judges who have considered workplace exam issues, "reasonable people can differ as to what constitutes a hazard." Therefore, we hope that going forward, MSHA will exercise restraint in utilizing its authority to "double dip" by issuing citations for inadequate examinations and inadequate training simply because hazards are found and cited in a particular work area. It is patently unfair to expect a daily or per-shift examination to be as thorough in scope as an MSHA wall-to-wall inspection which, in many cases, can last three or more weeks and involve multiple agency inspectors. Consequently, the finding of a previously unrecorded potential violation by MSHA should not automatically equate with that day's workplace examination being inadequate.

A review of current law and policy is helpful in putting our remaining comments in context. The current standard is codified at 30 CFR 56.18002 for surface mines and at 57.18002 for underground mines. It also has been the subject of multiple, sometimes conflicting policy statements from MSHA dating from at least 1994 through 2015. There is also information on this standard in MSHA's Program Policy Manual for metal/nonmetal mines that conflicts with other program policy letters of the past and present concerning the recordkeeping requirements.

To add to the confusion, on July 12, 2016, the Federal Mine Safety & Health Review Commission (FMSHRC) rendered a split decision in *Secretary of Labor v. Sunbelt Rentals Inc. et al.*¹ relative to the MSHA workplace examination standard's requirements. FMSHRC reversed ALJ McCarthy's original ruling that vacated three workplace examination citations against the mine operator and two contractors. It held that there is an "adequacy" requirement inherent in the examination standard. This essentially would permit a violation of the current standard to be upheld if it was based upon an inspector's discovery of hazards in the workplace left unabated following a workplace examination. The examination would be deemed inadequate, under the Mine Act's strict liability theory, based upon a difference of opinion between the MSHA inspector and the workplace examiner over what constitutes a hazard.

Prior to the *Sunbelt Rentals* FMSHRC decision, there was a long line of ALJ cases holding that there was not an "adequacy" requirement in workplace examination requirements. *Sunbelt Rentals* is the first precedential ruling on this issue, and FMSHRC remanded the case to the ALJ for further deliberations and taking of additional evidence. It is highly likely that the case will be ultimately decided at the U.S. Court of Appeals level within the next few years.

A second legal issue associated with enforcement of the workplace examination standard addressed by the Commission in *Sunbelt Rentals* was workplace examination requirements for multi-employer worksites under MSHA jurisdiction. In this case, the production operator (a cement plant) as well as two contractors all were cited for inadequate workplace examination, even though only one company had any employees on site. FMSHRC chose to treat this as a "dual citation" situation, although the citations issued to each company focused on inadequacy or absence of each company's own examination.

¹ See http://www.fmsihrc.gov/decisions/commission/COMMD_7122016-VA%202013-275%2C%20et%20al.pdf.

Under the 2006 *Twentymile Coal* decision,² the US Court of Appeals, DC Circuit held that MSHA has unreviewable discretion to cite the production operator, an independent contractor, or both, for a contractor's violation. As will be discussed today and in our forthcoming written comments, the issue of workplace examinations in the multi-employer worksite situation (and the host mine operator's obligation to inspect each contractor's workplace examination paperwork) will be significantly complicated if full effect is given to the proposed rule without modification, in light of the *Twentymile Coal* holding.

While a workplace examination must be performed, for the purpose of identifying workplace safety or health hazards, once each shift in all active working places by a competent person with authority to promptly initiate corrective action, and to withdraw affected miners if an imminent danger situation is discovered, all of the existing policies and court decisions agree on a few things concerning what is mandatory: the inspection must be documented, but the documentation need only list the working places examined, date, and name of the competent person who conducted the examination.

There is no binding requirement under current law to specify what hazardous conditions were discovered, nor to record the remedial measures taken. MSHA policy letters have stated that encouraged – as “prudent” or “best practices” – including a description of the conditions found which may adversely affect safety or health in the examination record. While the examiner's name needs to be listed, no signature is currently required.

MSHA should eliminate the signature requirement, as that is inconsistent with the ability to maintain the requisite records electronically. Electronic recordkeeping, particularly for 12 months of records, is critical to have as an option. We do not oppose the proposed new requirements that the workplace exam record must be made available to miners and their representatives, and that a copy be provided to the Secretary or his authorized representative or a miners' representative when they request a copy.

Clarification is also needed as to whether the original “competent person” who recorded the hazard needs to be the same person who documents abatement of the hazard (or whether the person documenting abatement also needs to be a “competent person”). We believe that the added requirement to record and date the corrective action is unnecessary, is confusing, may overly complicate the recordkeeping, and adds little value in terms of protections.

² See

[https://www.cadc.uscourts.gov/internet/opinions.nsf/C97310FFD96C005B852574400044F440/\\$file/05-1124a.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/C97310FFD96C005B852574400044F440/$file/05-1124a.pdf).

If it is retained, MSHA should clarify what needs to be documented –everything inclusive of interim, temporary measures while parts are on order or being fabricated, or just final corrective actions? MSHA should allow inspection reports to be left open for a period of time, as warranted on a case-by-case basis. Another thing requiring clarification is whether putting up barrier tape would need to be documented.

What if the person creating the original report is on leave when the corrective action is taken? Would a separate report be required just for documentation of corrective actions, or would the original report continually be amended each time a problem is resolved? The language of the proposal suggests that a different person might need to document the corrections (because they must also be identified by name) but it is unclear whether they would be amending the report created by a different miner.

This also raises legal concerns because, as a mandatory document that must be given to MSHA, it exposes the creator to felony criminal prosecution under Section 110(f) of the Mine Act if the record is altered in a way that now renders it false. The original miner who creates the report may not wish to allow other miners to edit it in his/her absence since the miner's signature will already be on the report. After considering the corrective action documentation part of the proposal and the potential complications, we conclude that the requirement to document remedial measures should be deleted. We do encourage members and other mine operators to continue documenting corrective actions, however, as part of voluntary good practices.

I will now turn our testimony over to Robert Carlson of FairmountSantrol, IMA-NA Safety & Health Committee Chairman, for presentation of the remainder of our prepared comments.

Mr. Carlson:

Both the current and proposed rules share the incorporation by reference of the definitions of “competent person” and “working place” that are codified at 30 CFR 56.2/57.2.

- A “competent person” is a person having abilities and experience that fully qualify him to perform the duty to which he is assigned. MSHA’s PPM adds: “This definition includes any person who, in the judgment of the operator, is fully qualified to perform the assigned task. MSHA does not require that a competent person be a mine foreman, mine superintendent, or other person associated with mine management.” (emphasis added)
- The phrase “working place” is defined in 30 CFR §§ 56/57.2 as: “any place in or about a mine where work is being performed.” The PPM adds: “As used in the standard, the phrase applies to those locations at a mine site where persons work during a shift in the mining or milling processes.” This would seem to narrow the scope of areas that must be examined, but it is not clear from the proposal.

For purposes of the proposed rule, we believe that further clarification is warranted to distinguish between regular working places and the occasional or sudden assignment that requires a miner to enter into a place that is not a regularly active production area, or where mining activities are not present. For such areas, it should be sufficient to perform the inspection prior to entrance into the new working place, even if the assignment occurs midshift.

It is also unclear whether places like offices, bathrooms, break rooms, locker rooms, and kitchens at the mine site would be included in the requirements to document workplace examinations (since there are instances of MSHA issuing citations in these areas for things like space heaters, toasters and microwaves, vending machines, illumination, holes in bathroom floors, missing toilet paper, and even inadequate bushing on computer wires at a worker’s desk). This needs to be clarified, as it may not be a universal practice to document such inspections, and because it is highly uncommon for any serious injuries to occur in these office areas, we suggest that only production areas of the mine should be included in the revised requirements.

With regard to “competent persons,” the situation has been complicated by case law finding that hourly workers who conduct workplace examinations under this standard can be held to be agents of management for purposes of personal liability under Section 110(c) of the

Mine Act. See *Nelson Quarries* (FMSHRC 2009). Going back to Program Policy Letter P94-IV-5 (12/12/1994), MSHA wrote in its guidance: "Persons conducting examinations must also be authorized to take the action necessary to correct hazardous conditions found in the working place or be able to initiate such action promptly." It is this authority that seems to be the hinge upon which hourly workers' Section 110(c) liability exposure swings.

MSHA has sought comment in the proposal about who should be competent and whether any specific qualifications should be codified. Its latest Program Policy Letter, (P15-IV-01, 7/22/15, <http://arlweb.msha.gov/REGS/COMPLIAN/PPLS/2015/p15-iv-01.asp>) already states that "A best practice is for a foreman or other supervisor to conduct the examination; an experienced non-supervisory miner also may be 'competent.'"

There is, however, a real danger if only supervisors conduct the shift workplace examinations, and this is done only at the start of the shift or at some designated point in time before workers enter the area, because rank and file miners may become complacent. They may no longer regard hazard identification and correction as their shared responsibility. This can also have the effect of delaying discovery by management of hazards that arise post-shift-inspection, later in the day, because awareness and prompt corrective action by workers in the area may diminish.

IMA-NA believes that MSHA should not specify any limitations on who can serve as the workplace examiner, other than that they be appropriately task trained for this activity, be authorized to initiate corrective action, and have sufficient understanding of hazard recognition principles to be capable of identifying conditions that could pose a threat to miner safety or health. IMA-NA urges MSHA to expressly reject its policy of personally prosecuting hourly miners, if they would only be considered "agents of management" based upon their execution of workplace examinations under this standard.

MSHA investigators commonly ask questions about conducting workplace examinations during special investigations of Section 110(c) liability (used for both civil MSHA prosecution and for possible criminal referral to the US Department of Justice) to determine agent status, and numerous hourly employees have been prosecuted due to their imputed knowledge of hazards found in working places that they were tasked with examining for compliance with this standard.

As a practical matter, many of IMA-NA's members utilize hourly workers – properly task trained – to conduct the mandatory workplace examinations, and this is an inherent feature of

safety and health programs and their employee empowerment provisions. We have concern about the potential legal liability exposure of these hourly miners, particularly if they fail to fully record every hazard identified or every corrective action taken.

While many hourly miners are empowered at our member companies' mines, this does not mean that management abdicates its responsibilities pertaining to maintaining a safe and healthful workplace, of course, and management oversight and commitment of resources to continual safety and health improvement is always critical. But there is a real concern that if the mandated paperwork requirements are so grossly expanded, hourly miners may become reluctant to assume the expanded responsibilities – including tracking and dating the corrective actions taken.

The culture at many industrial minerals operations allows each miner both authority and responsibility to immediately address every safety or health issue s/he finds. If the miners can fix it themselves, they have authority to do so. If additional assistance is needed, they can go to their safety or operations management resources to obtain whatever is needed to eliminate the identified hazard. It is also common for miners to have authority to shut down any equipment, process or plant as appropriate to address a safety or health issue. Consequently, from that perspective, the proposed rule would not require major changes or add significant additional cost for many of our larger members. For smaller companies, or those with strict union contracts over what duties miners can carry out, the changes could be more burdensome.

While current processes for many companies do follow the “best practices” MSHA advocated in its policy documents, in terms of memorializing what hazards are identified and how they are mitigated, this is not universal. The key issue, of course, is that doing so now is voluntary and operators cannot be cited if specific hazards are not listed on the form, because that is not a current requirement. For those already doing this, modifications may still be needed if the current proposal is adopted.

MSHA has also proposed adding a requirement that the competent person notify miners promptly about any adverse conditions. MSHA needs to clarify what “promptly” means (e.g., is it 15 minutes, or will this be subjectively interpreted by inspectors) and what will constitute “notice” (e.g., verbal or written). Will this apply to all types of hazards noted, regardless of how minor, or would it be limited to situations that are reasonably likely to result in injury or illness? It would also be helpful to have guidance on whether use of caution tape would satisfy the “notice” requirement if workers are trained to recognize that this means “STAY OUT” of an area until

remedial measures can be implemented. In some situations, MSHA has rejected the use of tape (even though it is included in the definition of “barrier” in 30 CFR 56/57.2) or inspectors have elevated negligence on citations because, in their opinion, the tape was left up “too long.” Good guidance on this in the final rule can help eliminate inconsistent enforcement going forward and ensure that all are on the same page in terms of MSHA’s expectations.

Similarly, the proposed rule requires miners to be withdrawn from a working place if an imminent danger is present. The rule should clarify what criteria should be used by the competent person to classify a situation as an imminent danger. The case law is currently clouded by a June 2016 split FMSHRC decision in *Knife River Construction*.³ In that case, a parking brake citation classified by the ALJ as “unlikely” to result in injury was found sufficient to substantiate a Section 107(a) imminent danger order. That case is now under appeal to the US Court of Appeals, DC Circuit, but it may be years before further judicial clarification is rendered.

In the meantime, this ambiguity would suggest that – under MSHA’s proposed rule – any “unlikely” hazard found by the examiner would trigger withdrawal of all miners from the working place until it is corrected, even if something as minor as a small opening in a guard, a small pile of spilled material, or a missing bolt. We urge MSHA to clarify that, for purposes of the workplace examination rule, only significant-and-substantial hazards that are highly likely to result in death or serious bodily harm would trigger the withdrawal requirement.

IMA-NA shares the concerns of others who have testified on this proposed rule about MSHA’s failure to quantify any cost savings or other benefits from the changes in this standard. An appropriate Economic Impact Analysis must be performed and made part of the rulemaking record, particularly as it relates to the expansion of the scope of the records, which adds to the paperwork burden without any commensurate health and safety benefit that MSHA can pinpoint. At a time when the mining industry is ailing financially, it is inappropriate to add any new regulatory requirements that impose significant costs on employers without a documented and justified offset in terms of improved safety and health protections and performance.

Our association believes that MSHA has also substantially underestimated the costs involved with transforming existing programs and training to conform with the proposed requirements, and we will gather cost data, as available from our members, to include in our formal written comments. It is not credible, however, to suggest as MSHA does in its proposal,

³ See http://www.fmsihrc.gov/decisions/commission/COMMd_6082016-WEST%202013%201009-M%2C%20et%20al.pdf.

that having to expand recordkeeping to include documentation of every hazard found in every active part of a mine, as well as the corrective action for each, would add only 5 minutes to the task of examining the workplace (and \$10 million per year in total costs for all metal/nonmetal mines)! Depending upon the requirements in the final rule, a mine might have to hire a dedicated individual to do nothing but conduct and document workplace exams in the future, and these costs have not been considered by the agency.

IMA-NA is concerned that the 12 months of historical workplace examination reports may be scrutinized for listings of now-long-corrected hazards and result in citations long after the fact, simply because of strict liability and MSHA's lack of a statute of limitations in the Mine Act.

By comparison, OSHA not only has a six-month statute of limitations for the issuance of citations in most circumstances. OSHA also has a "safe harbor" policy for voluntary self-audits,⁴ which provides that, with some limited exceptions, OSHA will refrain from using old audit records as the basis for citations, as long as the hazards identified in the reports were timely corrected prior to the inspector visiting the worksite. IMA-NA urges MSHA to adopt a similar policy, if it plans to include the hazard listing/corrective action requirements in the final rule, to avoid creating a chilling effect on the listing of hazards.

As the saying goes, "garbage in, garbage out" ... if competent persons are afraid to list all identified hazards because each one could expose the operator to citations for the next 12 months, even if the condition is immediately fixed, the reports will be rendered meaningless. While we appreciate MSHA's need to affirm that examinations are being done in accordance with the standard, this must be balanced against the operator's ability to truthfully record what conditions are observed without fear that it can lead to thousands of dollars of citations or personal fines even though appropriate action was promptly initiated.

IMA-NA understands, of course, that currently and going forward, if MSHA reviews historical forms and finds a pattern of the same hazardous condition repeatedly recurring, and present during the instant inspection, this may support heightened negligence findings against the operator and its agents under Sections 104(d) and 110(c) of the Mine Act. We agree that elevated actions might be warranted in such circumstances, because MSHA could potentially substantiate a lack of diligence in implementing a permanent resolution to the problem.

⁴ 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&p_text_version=FALSE.

Currently, and in the proposed rule, records of the workplace examinations must be maintained and made available by the mine operator to the Secretary's authorized representative (typically the MSHA inspector or investigator) upon request. The codified standard, and the proposal, both require the records to be maintained for 12 months. The current Program Policy Manual⁵ states that operators can discard the records after an inspection occurs, as long as the operator certifies that the full 12 months of examinations took place. However, Program Policy Letter P11-IV-01 (2/17/2011) specifically rescinded the exception, and reinstated the requirement to physically maintain a full 12 months of records.

The conflicting policies can create confusion among mine operators concerning their compliance obligations. Maintaining records for 12 months for large mining operations is a significant paperwork burden under the current rule, and that mandatory burden will be magnified if the proposed rule's enhanced paperwork requirements for recordation of all hazards identified and all corrective actions is adopted. IMA-NA recommends that MSHA limit the length of time for retention of these documents, and we suggest either a fixed six-month time limit, or codification of the PPM, to allow operators to dispose of old examination reports once the operation has had an MSHA EO1 wall-to-wall inspection.

IMA-NA strongly supports MSHA efforts to clarify its requirements, and to clearly delineate its interpretation of the responsibilities that mine operators (both production operators and independent contractors) have to conduct and document appropriately protective workplace examinations in active working places at the mine.

We look forward to working proactively and cooperatively with the agency as this rulemaking proceeds. IMA-NA will submit further comments within the provided period of time, and we are pleased to respond to any questions. Thank you for your consideration of our perspective.

⁵ <http://arlweb.msha.gov/REGS/COMPLfsolellAN/PPM/PMVOL4E.HTM#77>.

**Comments of the United Mine Workers of America
On The
Proposed Rule for Examinations of Working Places in Metal
and Nonmetal Mines
July 26th, 2016**

It pleases me to hear that the agency has decided to take steps into reviewing its current rules and regulations pertaining to workplace exams at Metal Non Metal mines.

I firmly believe that the current federal law is nowhere near stringent enough to adequately protect miners from hazards that can adversely affect their health and safety. ^{Just 2 yrs ago I was a} As a ~~former~~ fireboss at an underground coal mine in southern West Virginia, I know the importance of making proper workplace exams and how they prevent accidents and injuries from happening. I believe that a proper workplace exam by a competent person that has the proper experience and training in recognizing hazardous and adverse conditions is vital to the safety of the miners working at that mine. The proposed revisions to the current rule are simple and easy to apply but can make a huge impact on improving the health and safety of miners.

Making the exams prior to someone working in that area just seems like common sense to me. This gives the miners coming into the next shift a good idea of what conditions and hazards may be presenting itself before they arrive. I would suggest that the exam be performed as close to the start of the next shift as possible but no more than 2 hours ^{prior to the start of the next shift.} ~~on working sections and no more than 4 hours in other areas.~~ I would also suggest that the person performing these exams have a mine foreman certification as well. This would show that they have a certain amount of experience and knowledge in recognizing hazards that could adversely affect the health and safety of miners.

The requirement to record the location, hazards found, corrective action taken, and the date action was taken would help make the operator as well as the

miners more aware of the hazards so that they cannot say that they were not aware of a hazard and not correct it. Many hazards will be able to be corrected during the time of the exam but some will require time and man power to correct and this requirement will show what progress is being made on a particular area and hazard. It's also important for miners and their representatives to have access to these records to see what hazards they may encounter and what actions are being taken to correct those hazards.

One thing that I see being a concern for some is the fact that the person performing the exam must sign and date in the exam book. As a former mine examiner myself I can say that you will worry if you missed anything. However over time I realized that as long as I did my job and followed the law to the very best of my ability, I wouldn't have much to worry about. The only people who have a need to worry about this requirement is the people who cut corners while making their exams or who turn a blind eye to certain things that may be too expensive or time consuming to fix. Or people who don't report and record hazards because of pressure from their operator. Honest people who try to follow the law will have nothing to worry about. This rule will also help keep people accountable and more alert to hazards.

The proposed rules and regulations seem like common sense revisions to the current exam rule and quite frankly should have been made years ago. These are much like the rules and regulations used in coal. I'm aware that MNM mines are not exposed to the hazards that present itself from coal dust. However, aside from that, most if not all other hazards can be found in both coal and MNM mines.

Thank you for allowing me to comment on the purposed rule.