

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)

Room 1-3
Hyatt Place Pittsburgh -
North Shore
260 North Shore Drive
Pittsburgh, Pennsylvania

Wednesday,
July 21, 2016

The parties convened, pursuant to the notice, at 8:29 a.m.

APPEARING:

SHEILA McCONNELL, Director
Office of Standards, Regulations and Variances,
Mine Safety and Health, Department of Labor

ALFRED DUCARME, Esquire
Office of the Solicitor, Department of Labor

MARVIN LICHTENFELS, Deputy Administrator
Metal and Nonmetal Mine Safety and Health,
Department of Labor

PAMELA KING,
Office of Standards, Mine Safety and Health,
Department of Labor

MICHAEL WRIGHT, Director
Health Safety and Environment, United Steelworkers

HENRY CHAJET,
Husch Blackwell

P R O C E E D I N G S

(8:29 a.m.)

MS. MCCONNELL: Good morning. My name is Sheila McConnell, and I am the Director of the 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 Work Places on Metal Nonmetal Mines.

The proposed rule was published in the Federal Register on June 8th, 2016. On behalf of the Assistant Secretary, Joseph Main, I want to welcome all of you here today and thank you for your participation.

First, I'd like to introduce the members of our panel. We have Marvin Lichtenfels, Deputy Administrator, Metal and Nonmetal Mine Safety and Health; Alfred Ducharme on my left from the Office of Solicitors, and in front I'd like to introduce Pamela King who works in the MSHA'S Office of Standards.

This is the second of four hearings on the Proposed Rule for Examinations of Working Places in Metal Nonmetal Mines. The first took place in July 19th in Salt Lake City, Utah. The remaining hearings will take place on July 26th at MSHA Headquarters in Arlington, Virginia and August 4th in Birmingham,

1 Alabama. Immediately following today's hearing on the
2 proposed examinations rule we will hold public
3 meetings on MSHA's request for information on Exposure
4 of Underground Miners to Diesel Exhaust.

5 We are holding these meetings in response to
6 requests from stakeholders. In the interest of
7 efficiency, we decided to hold the public hearings for
8 the proposed rule and the public meetings for the
9 request for information consecutively. The purpose of
10 this hearing is to receive information from the public
11 that will help MSHA evaluate the proposed requirements
12 and produce a final rule that will improve safety and
13 health for miners at metal/nonmetal mines.

14 The hearings are conducted in an informal
15 manner. Formal rules of evidence do not apply. The
16 hearing panel may ask questions of the speakers, and
17 the speakers may ask questions of the panel. Speakers
18 and other attendees may present information to the
19 court reporter for the rulemaking record. MSHA will
20 accept comments and other information for the record
21 from any interested party including those not
22 presenting oral statements. We ask everyone in
23 attendance to sign the attendance sheet.

24 Before we discuss specific issues and hear
25 from you, I want to reiterate why we are proposing

1 this rule. MSHA's proposing to amend the Agency's
2 existing standards on examinations of working places
3 to ensure that mine operators identify and correct
4 adverse conditions that may affect miners' safety and
5 health. The proposed rule would strengthen and
6 improve MSHA's existing requirements for
7 metal/nonmetal examinations of working places.

8 The proposed rule would require that: a
9 competent person designated by the mine operator
10 examine each working place at least once each shift
11 before miners begin work in that place for conditions
12 that may adversely affect their safety or health.

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

18 Conditions noted by the competent person
19 conducting the examination that may present an
20 imminent danger be brought to the immediate attention
21 of the operator who must withdraw all persons from the
22 area affected until the danger's abated.

23 A record of the examination be made and the
24 competent person conducting the examination sign and
25 date the record before the end of each shift for which

1 the record was made.

2 The examination record include the locations
3 of all areas examined and a description of each
4 condition found that may adversely affect the safety
5 or health of miners. The examination record also
6 would include a description of the corrective actions
7 taken, the date the corrective action was taken, and
8 the name of the person who made the record of the
9 corrective action and the date the record of the
10 corrective action was taken.

11 The mine operator maintain the records for
12 at least one year and make the records available for
13 inspection by MSHA and the miners' representatives and
14 provide these representatives a copy upon request.

15 The proposed rule would build on existing
16 concepts, definitions and responsibilities so that the
17 new notification and record keeping requirements can
18 be easily adopted by mine operators. The proposed
19 rule would not change the existing definition of a
20 competent person and working place used in Sections 56
21 and 57 18002 and defined in Sections 56 and 57.2.

22 The existing definition of a competent
23 person is: a person having abilities and experience
24 that fully qualify him to perform the duty for which
25 she is assigned. The existing definition of a working

1 place is any place in or about a mine where work is
2 being performed.

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

15 Under MSHA's existing examination of working
16 place standards for metal/nonmetal mines, a working
17 place examination can be conducted at any time during
18 the shift. The existing standards also do not require
19 that the examination be conducted before miners begin
20 work. The existing standards also do not require:
21 that the examination record include the locations of
22 areas examined or a description of the adverse
23 conditions found and the corrective actions taken;
24 that mine operators promptly notify miners when
25 adverse conditions are found; and that operators make

1 the examination records available to miners'
2 representatives.

3 Under the Mine Act, mine operators, with the
4 assistance of the miners, have the primary
5 responsibility to prevent the existence of unsafe and
6 unhealthful conditions and practices. MSHA's best
7 practices include describing adverse conditions in the
8 examination record to facilitate correction of the
9 condition and to alert others at the mine of an
10 adverse condition that may affect them. Making and
11 maintaining a record of adverse conditions found and
12 the corrective actions taken to correct the adverse
13 condition would help mine operators and miners and
14 their representatives become more aware of dangers and
15 unhealthful conditions and become more proactive in
16 correcting those hazards before an accident, injury or
17 fatality occurs.

18 The proposed requirements are a common sense
19 approach and consistent with the remedial intent of
20 the Mine Act, MSHA's existing mandatory safety and
21 health standards. Over the years, MSHA has issued
22 program policy letters regarding workplace
23 examinations and has taken the position that a
24 meaningful record of an examination should contain the
25 following: the date the examination was made, the

1 examiner's name, the working places examined and a
2 description of the conditions found that adversely
3 affect safety or health.

4 We are requesting comments from the mining
5 community on all aspects of the proposed rule. But
6 for now, I would like to go over some of the specific
7 requests for comments and information we included in
8 the Preamble to the Proposed Rule.

9 In the Preamble to the Proposed Rule, we
10 stated that we are interested in comments on whether
11 the Agency should require that examinations be
12 conducted in an area within a specific time period;
13 for example, two hours before miners start working in
14 a place.

15 We are also interested in comments on who
16 should conduct a working place examination. MSHA
17 believes that to be effective, working place
18 examinations must be conducted by a competent person
19 designated by a mine operator. MSHA has emphasized
20 that a competent person is a person who should be able
21 to recognize hazards and adverse conditions that are
22 expected or known to occur in a specific work area, or
23 that are predictable to someone familiar with the
24 mining industry.

25 MSHA has stated in previous program policy

1 letters that although a best practice is for a foreman
2 or other supervisor to conduct the examination, in
3 most cases an experienced non-supervisory person may
4 also be competent to conduct a working place
5 examination. MSHA has also stated that a competent
6 person designated by the operator must have the
7 experience and training to be able to perform the
8 examination and identify safety or health hazards.

9 We request comments on whether MSHA should
10 require that the competent person conducting a working
11 place examination have a minimum level of experience
12 or particular training or knowledge to identify
13 workplace hazards. We also request comments on all
14 cost and benefit estimates presented in this Preamble
15 and in the data and assumptions the Agency used to
16 develop these estimates.

17 Please provide any other data or information
18 and the rationale and sufficient detail in your
19 comments to enable proper Agency review and
20 consideration. Where possible, include specific
21 examples to support the rationale and other relevant
22 information including past experience, studies,
23 articles, and standard professional practices.
24 Include any related cost and benefit data with your
25 submission.

1 Today, as you address the proposed revision
2 either in your testimony or in your written comments,
3 please be specific. Specific information helps MSHA
4 to produce a final rule that's responsive to the needs
5 and the concerns of the mining public. MSHA will make
6 available a verbatim transcript of this public hearing
7 approximately two weeks after the completion of the
8 hearing. You may view the public transcripts of all
9 public hearings and comments on our website at
10 MSHA.gov and on Regulations.gov.

11 If you have a copy of your testimony, please
12 give submissions to the court reporter so that they
13 can be appended to the hearing transcript. Following
14 this public hearing, you may submit additional
15 comments using one of the methods identified in the
16 address section of the proposed rule. Comments must
17 be received by September 6th. Again, if you haven't
18 signed the attendance sheet, please do so.

19 Before we start hearing testimony for the
20 proposed rule, I would like to encourage those of you
21 who have interest in approaches to control and monitor
22 miners' exposure to diesel exhaust to attend our
23 public meeting today. As I stated earlier, the public
24 meeting will begin immediately following the
25 conclusion of all testimony on the proposed rule.

1 So with that, I would like to introduce --
2 while we don't have any speakers signed up. So is
3 there anyone who would like to come and speak or
4 provide your comments on the proposed rule?

5 (No response.)

6 MS. MCCONNELL: This is a good opportunity,
7 if you have anything. You don't have to have prepared
8 remarks, just your thoughts or concerns.

9 (Pause.)

10 MS. MCCONNELL: Is there anyone here who
11 would like to speak? Provide some comments on the
12 proposed rule?

13 MR. WRIGHT: Is this examinations?

14 MS. MCCONNELL: I'm sorry?

15 MR. WRIGHT: Examinations already?

16 MS. MCCONNELL: Examinations, we're still on
17 examinations.

18 MR. WRIGHT: Yeah, I'll come.

19 MS. MCCONNELL: Oh, well, come forward.

20 MR. WRIGHT: Okay.

21 MS. MCCONNELL: We didn't have anyone who
22 formally signed. So I'm pleading with the audience to
23 come forward.

24 MR. WRIGHT: My apologies. I thought we were
25 supposed to start at 9:00.

1 MS. MCCONNELL: Well, there was a -- that
2 was what the proposed rule initially said. Then we
3 wanted to combine the two, and we issued a subsequent
4 notice and changed it. But just fine. You're right
5 on time.

6 MR. WRIGHT: Okay.

7 MS. MCCONNELL: Could you please state your
8 name and your organization for the court reporter.

9 MR. WRIGHT: This will be very brief. My
10 name is Mike Wright. I'm the head of Health Safety
11 and Environment for the United Steelworkers. Despite
12 our name, United Steelworkers, we represent people in
13 a variety of industries, including about 130 metal and
14 nonmetal mines in the U.S. and an equivalent number in
15 Canada for what it's worth.

16 We're generally in support of the proposed
17 rule. We will have more to say at the Washington
18 hearings and a lot more to say in the post-hearing
19 comments, which I believe are still due September 6th?

20 MS. MCCONNELL: Correct.

21 MR. WRIGHT: We generally support this rule.
22 We don't think it's a major change. We are a little
23 surprised by the amount of industry opposition to it.
24 It makes sense to us that we better define what a
25 competent person is, and that we have these

1 examinations at the beginning of a shift instead of
2 during a shift. When I, a couple of days ago I had to
3 go up and look at my gutters of my house, I looked at
4 my ladder before I got on it, not halfway up. And it
5 seems to me the same principle applies here. We ought
6 to be looking at these work places at the beginning of
7 a shift instead of during a shift.

8 We won't catch everything that way. We've
9 done studies of fatalities in the Steelworkers not
10 just in mining but in our local unions generally going
11 back to 1980, and we found that actually almost a
12 majority, a little less than 50 percent, occur under
13 unusual or upset conditions. That's not surprising.
14 The things that happen routinely, if they were going
15 to kill somebody, usually they would have done that
16 before.

17 But typically a fatality is, something
18 breaks. They throw a bunch of maintenance workers at
19 it, they need it back into production right away, and
20 something goes wrong. So being able to look at,
21 especially changed and upset conditions is a very
22 important thing to do, not just in mining but in
23 industry generally.

24 We also, we do have one concern about the
25 rule, and that is a concern that also exists with the

1 current rule. That concern is that some mining
2 operators, certainly not all, will attempt to avoid
3 their own responsibilities by picking out a miner
4 saying, "You are our designated competent person, go
5 look at the work place, and if anything goes wrong,
6 it's your fault."

7 We've seen some of that in the past. We've
8 been able to pretty much deal with that in unionized
9 facilities. I'm a little afraid of what will happen
10 to miners in a non-unionized facility.

11 Those are pretty much our comments. We
12 thank you for the opportunity. And like I said, we'll
13 have a lot more to say in the DC hearings and in the
14 post-hearing comments later.

15 MS. MCCONNELL: Thank you very much. I
16 don't have any additional questions or comments,
17 Marvin?

18 MR. LICHTENFELS: No.

19 MS. MCCONNELL: I think we're good. Thank
20 you, Mike. Is there anyone else who would like to
21 share their thoughts and comments on the proposed
22 rule?

23 I'm just going to give everybody a minute to
24 think. This is just a pause as we collect our
25 thoughts.

1 (Pause.)

2 MS. MCCONNELL: Come on back.

3 MR. WRIGHT: I'll only add two things, since
4 I have the opportunity.

5 MS. MCCONNELL: You have lots of
6 opportunities. Go ahead.

7 MR. WRIGHT: Apparently, yeah. One is that
8 the rule does not simply look at compliance with
9 MSHA's standards but at unsafe conditions generally,
10 and we think that's a very good thing.

11 The same study of our fatalities that I
12 mentioned earlier also looked at whether fatalities --
13 at the root causes of fatalities. And I should say we
14 examined a representative sample of about a thousand.
15 We didn't examine all thousand. We took a sample of
16 about 150. But in those cases, we found that in a
17 majority, a violation of an OSHA/MSHA or equivalent
18 Canadian standard was not a root cause.

19 Often, they were contributing factors, and
20 usually after a fatality the government is able to
21 find other violations that may not have been related
22 to fatalities. So most fatality investigations result
23 in one or more citations.

24 But as I said, in a majority, a bare
25 majority, a violation of the standard was not a root

1 cause. The, if you think about it, it's not
2 surprising because when the government, be it OSHA or
3 MSHA or any of the Canadian provincial agencies, set a
4 new standard, the death rate from that kind of
5 accident decreases dramatically.

6 After, for example, OSHA set a confined
7 space standard, deaths in confined spaces went way
8 down. So the fact that many of our fatalities do not
9 involve, as a root cause a violation, of the standard
10 is a good thing. It shows us that standards work.

11 But it also shows us that standards are not
12 enough. And what that means is that MSHA has very
13 much made the right decision by requiring that these
14 inspections concentrate not just on violations of the
15 rulebook, but on unsafe working conditions generally.

16 So I think you very much did the right thing with
17 that.

18 MS. MCCONNELL: Okay, thank you, sir. Do we
19 have anyone else who would like to make remarks today?
20 Come on down.

21 Please state your name and your organization
22 for the court reporter.

23 MR. CHAJET: Good morning.

24 MS. MCCONNELL: Good morning.

25 MR. CHAJET: My name is Henry Chajet, C-H-A-

1 J-E-T. I'm with the firm of Husch Blackwell, and I'm
2 here representing the Mining Coalition, a few of the
3 companies in the metal/nonmetal business that operate
4 on dozens of facilities around the country and
5 thousands of employees.

6 Let me start by saying that the Coalition is
7 fully committed to the continued progress in
8 preventing injuries and fatalities, and shares that
9 goal with all of you. But the Coalition doesn't feel
10 that this proposed rule advances that goal, and I'll
11 lay out the reasons why.

12 But first, let me note that we filed a
13 request for an extension of time, for postponement of
14 these hearings, and for additional comment period
15 after a significant amount of MSHA data is released.
16 We are concerned that this rulemaking procedure has
17 been accelerated to an unparalleled, unprecedented
18 extent.

19 Never before has MSHA tried to do a rule in
20 three months, and that just doesn't give you or the
21 industry time for reasoned rulemaking. You know and
22 we know that rulemakings take years, not weeks and
23 months. And this rule as it's currently proposed
24 demonstrates the reason for that, as I'll point out as
25 we go through the testimony.

1 First of all, the current rule has provided
2 the flexibility to address the varying conditions of
3 mines and the varying conditions within mines from day
4 to day and even minute to minute. Your Preamble and
5 many statements by the Assistant Secretary recognize
6 that there are vast differences from mine to mine.
7 And from hour to hour as mines advance, their
8 production conditions change.

9 The current area inspection rule is the
10 result of a well thought out discussion by the
11 advisory committees that met when it was put together
12 and made mandatory. And it provides the flexibility
13 for a mine to address its own conditions and its own
14 methods, and the timing of that could be different
15 from place to place.

16 It's also, the current rule has encouraged
17 individuals to take responsibility and allowed them to
18 do so without signing forms or creating record keeping
19 burdens. This proposed rule would change that, and it
20 would discourage individuals from taking
21 responsibility to do inspections, because you're going
22 to ask them to sign a form and take burdensome record
23 keeping and communication actions that may not be
24 appropriate, and it may not be needed.

25 And we oppose that. We oppose taking a

1 currently effective rule and making it less effective
2 or less safe, and we think MSHA's prohibited from
3 doing that by the Mine Act, which prohibits the
4 reduction of safety in any rulemaking.

5 So I think that's the first point. Your own
6 data and I will submit for the record before the
7 record ends, your own data shows tremendous advances
8 in safety since this rule was put in place.

9 When I started in this business with Marvin,
10 we had the tragic situation of in excess of 250 fatalities
11 per year. It was disastrous and awful, and we've made
12 tremendous progress.

13 One is still one too many, and it has to be
14 prevented. But let's acknowledge the progress, and
15 let's stop saying that the mining industry is one of
16 the most dangerous industries in the country because
17 it's not. And if you look at the National Safety
18 Council results or the BLS results, you'll see a whole
19 stack of industries that have records not as good as
20 ours.

21 So let's take pride in what we've
22 accomplished and try to design rules that will further
23 those accomplishments instead of describing ourselves
24 as unsuccessful in this process. We are successful,
25 and we have done tremendous progress in preventing

1 injuries, illness and fatalities.

2 So you know, what are the problems with this
3 rule. Well, the first one is a matter of time and
4 data and information. MSHA cites some accident
5 reports in its Preamble. And it's unbelievable for me
6 to read this information, because it doesn't include
7 when an area inspection was performed, what the
8 procedure was for the area inspection, what the
9 actions were taken during the area inspection, who
10 performed the area inspection, what the background and
11 competence of that person was, what was done following
12 that area inspection.

13 The fact that someone writes an accident
14 report and MSHA puts it in the record doesn't support
15 the rule. The rule has to be supported by a full
16 analysis of the information that you're trying to use.
17 This record contains none of that -- none of it. I can
18 use a couple examples.

19 I think the first report you put into the
20 record was an excavator that tipped over in a
21 condition that MSHA described as an invisible ditch
22 underwater. That report has no information whatsoever
23 about the inspections that were done. You have those
24 files. You have those inspector notes.

25 You have that information. It's not in the

1 record. Place it in the record. Let people comment
2 on it. Let's figure out what the problem was, and
3 then we'll try to address it. Let's not create a
4 solution to a problem that we don't know exists, and
5 in fact we don't think exists.

6 That's one piece of information for every
7 one of those citations you have that we need to put in
8 the record so that we can have meaningful rulemaking;
9 not accelerated, predetermined end result rulemaking.

10 Let's also look at your own experience as an
11 agency. Your personnel are in the fields conducting
12 area inspections every day. We have no data about how
13 long it takes them, what they're doing, how they're
14 doing it, how they've been trained to conduct these
15 inspections. None of that information's in the
16 record.

17 We don't have any data that compares the use
18 of this rule versus other standards that are cited at
19 the same time, although we do know that it's all too
20 common that the Agency will double up and cite an area
21 inspection because a condition existed, without
22 further information or evidence.

23 That's similar to what happens with safe
24 access and that standard where we may get a safe
25 access standard and a parallel citation for another

1 condition or practice.

2 So that's another problem here, that there's
3 no analysis of MSHA's own personnel. How long does it
4 take, when do they do the area inspections, how many
5 do they do in a shift, you know, how many areas of
6 work are they looking at. I think this data needs to
7 be mined, put in the record, evaluated by both MSHA
8 and an opportunity for comment in order to have
9 meaningful rulemaking.

10 We need to also know the amount of
11 information and data that MSHA's collecting, so we can
12 determine what kind of burden this is going to put on
13 us. So how much data does the inspector collect in
14 the way of notes, comments, information. How many
15 pages of notes are there for each one of these
16 incidents? We don't know. You do. None of that
17 information's in the record.

18 We can't adequately look to see whether
19 you've made a good estimate of burden and cost,
20 because the data is not there. But we can tell you
21 that looking at just a couple of large mines, we think
22 your estimate is low by 15 time, that the actual cost
23 for some of those large mines is going to be 15 times
24 or more.

25 We have some mines in the Coalition that

1 under this rule will generate over 1,000 area
2 inspection cards per day. And that's a very
3 significant burden.

4 And then you've added communication
5 requirements, and you've added more record-keeping
6 requirements on who did the inspection, on where it
7 was done. You have all these descriptions that are
8 being done, that are being required by this proposed
9 rule that don't do anything to further safety.

10 If somebody sees a hose laying in a walkway
11 and that is part of an area inspection and they pick
12 up the hose to avoid a hazard and stop that from
13 becoming a hazard, how does that record keeping system
14 assist in that safety process? It doesn't. It
15 doesn't.

16 We need you to examine your own data and
17 publish it about how many doubled-up citations there
18 are for 18002 and other standards. And then you need
19 to ask yourself the question why do you need to double
20 up on enforcement. We don't see any reason that that
21 advances safety.

22 MSHA itself, in the Federal Register, admits
23 that it is unable to quantify the benefits of this
24 rulemaking. That's a critical admission.

25 The rule uses the term "MSHA believes"

1 dozens of times. MSHA's belief is not enough to
2 support the establishment of risk to support a
3 regulation. If there's no data, no incidents, no
4 underlying analysis of the information you have and
5 you admit you can't quantify the data, you shouldn't
6 do rulemaking. You should get the data first and find
7 out how to quantify the benefit.

8 It's an alarming concession, in the middle
9 of a rulemaking. It's something you need to handle
10 before you go to rulemaking.

11 Instead of having that data and looking at
12 what this rule means, there's an assumption that if
13 you move the timeframe and you add these record
14 keeping requirements, it's going to advance safety.
15 That assumption's wrong. It may well be, that in many
16 mines as the day advances, conditions change, and that
17 it's better to do the regulatory area inspection in
18 the middle of the shift or towards the end of the
19 shift, or as many competent people do, as an ongoing
20 inspection.

21 And we have preached and so have you the
22 safety message that you're always on alert for
23 conditions that affect safety, and you always take
24 action to correct those conditions, and you always
25 report those conditions if you can't correct them. And

1 if you can't correct them that you barricade or post
2 it, and danger off the area. And if it's equipment,
3 that you tag it out.

4 That's been a mutual message from the Agency
5 and the industry for the 37 years that I've been in
6 this business. Are you going to change that overnight
7 by telling people they should do just one inspection
8 and rely on it? Are you going to incentivize
9 individuals to not move every day throughout the shift
10 to look at their workplace, by saying you can now do
11 this one inspection at the beginning of the day? We
12 think that's a very bad idea.

13 In addressing your data, you tie this rule
14 into the rules to live by, and I can tell you that the
15 rules to live by contain conditions and also
16 practices, and this rule has not much to do with
17 practices. So that when you set forth in a blanket
18 manner that it will advance compliance with rules to
19 live by, you're not distinguishing between practices
20 and human failures and conditions. And if you want to
21 make further progress as we do, you have to make that
22 distinction.

23 I am not aware of a single MSHA report that
24 has ever been written that has issued a cause of the
25 accident as drug abuse, or alcohol abuse, or

1 impairment. Not one. And yet, I'm fully aware of
2 fatalities that we have investigated with you, where
3 the autopsy reports showed tremendous levels of drugs
4 or alcohol that impaired human action.

5 MSHA needs to get hold of this problem and
6 take action on this problem. This rule does nothing
7 for that, and to use accident reports that run away
8 from this problem is illogical and unconnected to
9 achieving safety. You need to come to grips with this
10 issue as the whole country does. We have an epidemic
11 of opioid abuse, and we need to know how we're going
12 to treat that. Not with an expanded area inspection
13 causation issue, because it has nothing to do with
14 that.

15 We also have to be able to address human
16 error, which the Agency doesn't look at often enough,
17 and instead says safe access was denied or the
18 workplace inspection was inadequate. In your notes
19 and in your field office, materials for every one of
20 these accident reports are information about these
21 issues.

22 Let's start anew in trying to address the
23 remaining fatalities that we have to prevent, and
24 let's get to the bottom of this problem. This rule
25 doesn't do it. Those are some of the leading causes

1 that we need to get to.

2 This proposed rule will confuse what has
3 become a very successful safety program element: the
4 current area inspection. You don't take the data as
5 to how many successful area inspections have been done
6 under this rule. You have that data because your
7 inspectors are out there inspecting, and there are
8 thousands and hundreds of thousands of shifts that
9 inspections were made for without any problems with
10 the methods being used for area inspections.

11 In fact, oftentimes the inspectors will
12 compliment the sites on their efforts and on their
13 programs for area inspections as well as mobile
14 equipment inspections. And none of that data as to
15 how many inspections are done, how many hours are
16 done, how many areas are looked at without finding
17 fault with the area inspection system in use, none of
18 that data is in the record.

19 That's improper rulemaking, and that's
20 because this rule has been so accelerated. And it's
21 obvious to those of us reading the Federal Register
22 that your intent is to finalize a rule in the next six
23 months, and that's unheard of. This is not an
24 emergency rulemaking under the Act. This is a routine
25 rulemaking.

1 Let me spend a moment on Section 110(c) of
2 the Mine Act. When you ask competent individuals to
3 put their name on a card, you're asking them to take
4 the risk that they will be personally penalized under
5 the civil penalty provisions of this statute. You are
6 asking them to take the risk that they will be
7 criminally prosecuted under this statute for knowing
8 and willful violations because they put their name on
9 an inspection form.

10 We will have great difficulty in that
11 setting, convincing people that they should take on
12 this responsibility. I don't think the Agency really
13 wants to deter people from being safety advocates and
14 taking on inspection responsibilities, and that's what
15 this rule will do. It will decrease the reasons for
16 them to act and take on this responsibility.

17 We oppose the rule for these reasons. These
18 are disincentives to the performance of inspections.
19 they are incentives for increased enforcement that we
20 don't need.

21 By its very definition, the term "competent
22 person" acknowledges that the individual has to have
23 appropriate experience, expertise, training to do his
24 job or her job in conducting an inspection. We don't
25 need additional requirements on a competent person

1 that will exclude some people, or that will make it
2 much more burdensome.

3 In one of these reports -- again, I'll use
4 the first one that appeared in the stack of material
5 that was put in the record, the excavator that tipped
6 over. That individual had 35 years experience in that
7 operation in that procedure in that activity, as far
8 as we can tell from the report.

9 I can't imagine that individual not being
10 competent to perform a workplace inspection. But MSHA
11 cited an inadequate workplace inspection, and at the
12 same time in the report it said the hazard was
13 invisible, could not be seen. There was a flood, and
14 the water covered up the ditch that caused the
15 accident.

16 That combination of the use of this
17 regulation improperly and the use of this event to
18 justify this change in the rule for an invisible
19 event, as MSHA said, condition doesn't make any sense.
20 And again it's part of the problem with taking little
21 pieces out of accident reports that don't necessarily
22 find cause, but find enforcement actions instead.

23 This rule does not analyze the penalty,
24 citation and abatement burdens that would come with
25 the implementation of the rule. To the extent the

1 Agency moves towards elevating the requirements for
2 competent people, we'll have less people that will be
3 able to do this job. We will restrict the ability of
4 mine operators.

5 And the idea of limiting this rule to
6 supervisors is terrible, because we don't have the
7 number of supervisors to go all over a large operation
8 and do workplace exams before the work begins. We
9 don't have the number of personnel to run out to a
10 distant location that's only rarely visited for some
11 maintenance job, at the beginning of every work day,
12 just in case the maintenance department has to go
13 there.

14 So you need to leave the flexibility in the
15 rule that currently permits that work area to be
16 inspected as it's needed during the developments of
17 the day. Those are the major issues that we have
18 identified in this rule in the very limited time we
19 had to look at it. We will come back to you as the
20 rulemaking progresses, and try to supplement our
21 comments and give you a more thorough set of comments
22 in writing at the end of the process.

23 But, again, we plead with you to extend the
24 date and to allow meaningful participation -- not to
25 push this through in a few months. Thank you.

1 MS. MCCONNELL: Thank you, Mr. Chajet. I
2 have a few things I'd like to bring to your attention.

3 MR. CHAJET: Sure.

4 MS. MCCONNELL: Number one, we have received
5 your request for an extension and are reviewing it.

6 In addition, I'd like to clarify. You were
7 not here for my opening remarks, but I noted that the
8 definition of competent person would not be changed
9 under this proposed rule. Therefore, a competent
10 person does not need to be a supervisor or a foreman.

11 We have recommended that in previous policy
12 letters, but we did not change that definition. So a
13 competent person could be a person with appropriate
14 abilities, knowledge, skills that could or could not
15 -- it doesn't necessarily have to be a supervisor.

16 MR. CHAJET: I'm glad to hear that. I hope
17 you share that with some of your field personnel that
18 are already involved in having these discussions in
19 the mines, telling people that it should be a
20 supervisor.

21 And because you raise this issue, I want to
22 note that MSHA is not in a position to define best
23 practices. MSHA does not operate mines. MSHA does
24 not know the day-to-day everyday procedures and
25 practices and variabilities that take place in those

1 mines.

2 MSHA can issue minimum standards and
3 regulations when there's a need for them and there's a
4 benefit from them. But they are not authorized under
5 the statute to come up with advisory standards, best
6 practices, anything else you want to call them. And
7 when you do that, you discourage. You discourage
8 cooperative efforts because a lot of your inspectors
9 take that information and say, "This is what the
10 Agency wants me to cite."

11 So we encourage you to not go into the
12 business of the National Safety Council or the
13 Engineering Association, of coming up with standards
14 that are not legal standards, but you call them best
15 practices or something else. We don't think that's
16 appropriate for the Agency.

17 MS. MCCONNELL: Okay.

18 MR. CHAJET: And we think it's
19 counterproductive.

20 MS. MCCONNELL: In addition, I have some --
21 in trying to understand your comments and your
22 concerns, in particular about, I guess I need a sense
23 of your membership in terms of existing, under the
24 existing standards, how that work place examination is
25 conducted by your members.

1 So, for example, under the existing
2 standard, a workplace examination must be conducted at
3 least one time per shift by a competent person. We do
4 not define -- a record must be maintained and made
5 available to MSHA. We do not in the existing standard
6 define what has to be maintained in that record. That
7 would be something that we are proposing now, under
8 this proposed rule.

9 But in the normal course of an examination,
10 do they require to know who conducted the examination
11 and the date of the examination, in their existing --
12 I mean for their own business practices? Is that
13 something that they then want to know?

14 Just as, even though it's not required under
15 the existing rule. But as a normal course of business
16 and after an examination is done, is the record not,
17 does not now contain any information on the date, the
18 time or the individual who conducted the examination?

19 MR. CHAJET: There were a couple questions
20 in there. One of them sounded like you were asking me
21 if the operator knows who's conducting the
22 examinations, and I would say to you yes.

23 MS. MCCONNELL: Okay. How do they know
24 that? Is that just anecdotal? Is that verbal? Is
25 that, is there no written record of that?

1 MR. CHAJET: Well, I don't think any
2 operator wants to create any additional unnecessary
3 documents or record-keeping or burdens of associated
4 with record keeping. To the extent they're spending
5 time on processing forms, that's taking resources away
6 from safety efforts, and that's -- they're not in the
7 business of creating records for the purpose of
8 creating records.

9 So that's not an acceptable reason to create
10 a rule, and it's not something that you can generalize
11 from site to site from place to place, because these
12 are very highly variable different types of
13 operations. If you go to a salt mine in Louisiana,
14 that's a very different place than a gold mine in
15 Nevada.

16 And its practices and its procedures and its
17 operations and its delegations of authority to people
18 for different purposes are always different. Because
19 they're faced with different conditions, different
20 equipment, different practices, different mining
21 methods, differences from day to day. Because when
22 you advance the mine, you're changing the mine.

23 Your Assistant Secretary has made a
24 statement to that effect, appreciating the fact that
25 these are variable conditions to start with and then

1 variable conditions from moment to moment as the day
2 progresses.

3 But I can tell you that the Agency and the
4 industry has taken the position that if you see a
5 hazard, you take action to address that hazard.
6 Whether it's at the start of the shift or at the
7 middle of the shift or at the end of the shift. And
8 you conduct this ongoing evaluation of workplaces, and
9 I don't think you want to stop that.

10 MS. MCCONNELL: No.

11 MR. CHAJET: I mean that's a good idea. We
12 empower people to create safety and to take action.
13 And we tell them, if you can't fix it yourself, report
14 it and barricade it. I mean, those are good actions.

15 MS. MCCONNELL: So I was just really just
16 trying to understand the concerns from your community,
17 and the difference between under the existing standard
18 and what we are proposing.

19 And to get a sense of that, I was just
20 wondering, the difference between under the existing
21 standards. One of the differences between the
22 existing standard and our proposed rule would be
23 knowing who conducted the examination, what competent
24 person conducted the examination, and the time and the
25 date examination was conducted.

1 So I was just seeing how grave of a
2 difference under the existing standard versus this
3 proposed rule, this was, this change would be.

4 MR. CHAJET: Massive.

5 MS. MCCONNELL: So they don't know who
6 conducted the examination or the time or the date?

7 MR. CHAJET: It's not a matter of not
8 knowing, right.

9 But if you, if your inspectors inspect these
10 facilities four times a year in their entirety, or two
11 times a year in their entirety for surface, right, and
12 they don't write failures to do area inspections 97
13 percent of the time, because they're satisfied the
14 area inspections are being done; then why do you want
15 to create a record keeping burden and create a 110(c)
16 possible liability disincentive for people not to do
17 inspections?

18 Why do you want to create situations that
19 are adverse to promoting safety? You don't. You
20 can't. The law doesn't allow you to. And that's what
21 you're asking me, that I require all of my people to
22 sign --

23 MS. MCCONNELL: No, I didn't. That's not
24 what I was asking.

25 I was just asking about the differences in

1 terms of what under the existing -- so you're not --
2 that's what I was asking: the difference between
3 existing practices versus what we would propose in
4 terms of knowing who conducted the examination and the
5 date and time. What is the difference in the two.

6 MR. CHAJET: Well, you didn't propose -- you
7 didn't propose that the operator know. You proposed
8 that they make a record for MSHA. That's what you
9 proposed. You didn't just propose that we know our
10 business. We know our business.

11 MS. MCCONNELL: Well, there is a requirement
12 for a record under the existing rule.

13 MR. CHAJET: There's a requirement for a
14 record that the area inspection was done. Not for the
15 record that you have proposed, which would require the
16 signature, descriptions, communication records --

17 MS. MCCONNELL: No, I agree. There is
18 other, there are other --

19 MR. CHAJET: It's to require date with
20 records.

21 MS. MCCONNELL: No, I agree with you. I was
22 just looking at one particular requirement, just to
23 get an understanding of the concerns. That's all, just
24 looking at one. You're right, there were other --
25 within the record, we are actually changing the

1 contents of the record in terms of hazard found, the
2 corrective action taken, in addition to the date and
3 signature. And I just was curious because I need to
4 understand your concerns regarding the --

5 MR. CHAJET: My concerns are the same
6 concerns that the very wise people who created this
7 standard understood when it was adopted.

8 I would suggest to you that the first step
9 you should do is get the advisory committee
10 transcripts from when this standard was discussed and
11 then adopted. Back in 1977 timeframe when I was still
12 young, okay, and those very wise people sat down and
13 said, "We have varying conditions and we want to
14 incentivize people to correct hazards."

15 And they talked it through, and you have
16 advisory committee transcripts that provide multiple
17 reasons why this is a better rule than the very rule
18 you're thinking about creating today; right. And you
19 know, you're not learning from history. You're trying
20 to create something new that complicates and creates
21 burdens and creates disincentives for safety.

22 MS. MCCONNELL: And that's what I'm going to
23 get. Is it really new?

24 MR. CHAJET: Yes.

25 MS. MCCONNELL: Is it new that the operator

1 would want to know who conducted the examination?

2 MR. CHAJET: That's not the proposed rule.

3 The proposed rule doesn't say the operator should know
4 who conducted the examination. The proposed rule
5 says, "create all these records, sign all these
6 documents, then create some more records, then when
7 you do the abatement, create some more records. And
8 let's do some communication, let's require that to be
9 recorded." That's the proposed rule -- not what
10 you're saying.

11 This is not simple like you're describing
12 it. This is complex, and it adds multiple layers of
13 burdens, multiple 110(c) individual penalty
14 opportunities for abuse, in their use. It create
15 tremendous potential for controversy at the site.

16 You want to create more counterproductive
17 encounters between inspectors and mine operator
18 personnel? There's a recent decision by a judge that
19 said the MSHA inspector was bullying the miner
20 involved in this case, and was biased; right?

21 We don't want to create more of those
22 situations, we want to create less. We want to get
23 the job done, and that's what's being done today.

24 MS. MCCONNELL: Can I ask another question?

25 MR. CHAJET: Sure.

1 MS. MCCONNELL: Again, this is just to
2 understand your concerns and with the proposed rule.
3 And one of the changes that the proposed rule would
4 make is that it would require that the examination be
5 conducted in the beginning, before work began in that
6 place. And I believe you said in your testimony that
7 middle of the shift to the end of the shift would be
8 preferable.

9 MR. CHAJET: I did not say that.

10 MS. MCCONNELL: Oh, okay. Then I -- you did
11 reference in lieu of in the beginning --

12 MR. CHAJET: I said the flexibility of
13 designing the system for your operation and the
14 particularities of that operation, have to be provided
15 by the rule. Which is why the rule today allows you
16 to do it during the shift but doesn't define the time,
17 for that flexibility.

18 MS. MCCONNELL: Right, but it's, right now
19 it would be at least once again, under the proposed
20 rule it would be at least once per shift, but the
21 first examination, the examination would be conducted
22 before work began in an area.

23 So I guess the question would be then since
24 you didn't specify or didn't -- I mean, I apologize. I
25 thought you mentioned that you thought that the middle

1 or the end of the shift would have been a more
2 appropriate time to conduct an examination.

3 MR. CHAJET: I did not. I said that the
4 mine operator has to make those decisions based on the
5 differences and variable conditions and procedures of
6 their mine.

7 MS. MCCONNELL: So you're not offering any
8 particular time, or --

9 MR. CHAJET: I am. I'm offering the exact
10 language of the current rule, which provides the
11 flexibility to do this examination when it's most
12 appropriate and most beneficial, or provides the
13 flexibility to consider the whole shift an examination
14 and then create the record that it was done.

15 MS. MCCONNELL: Okay. I don't have any more
16 questions? Marvin?

17 MR. LICHTENFELS: Just one for clarity and
18 based on what I understand what you said.

19 MR. CHAJET: Marvin, I've been around too
20 many blasts. So I --

21 MR. LICHTENFELS: I'll move closer. Just
22 one, say, a follow up question from what Sheila
23 previously asked. But you mentioned that it would be
24 more 110(c) potential.

25 And by our current policy, the name of the

1 examiner is included in the record. So the new
2 proposed rule says a signature would be required. So
3 is that the difference that you're concerned there
4 would be more 110(c)'s, and what additional
5 requirement in the new proposed rule do you see that
6 would promote more 110(c)'s?

7 MR. CHALET: Well, certainly the signature
8 requirement is unproductive. It doesn't improve
9 safety. But it does create more risk of 110(c)
10 actions. And I'm not so sure that your current policy
11 is appropriate. So I don't want to endorse it either.

12 And MSHA can write lots of policies that are
13 not supported and seems to be doing that recently,
14 sadly, instead of going through rulemaking. You know,
15 there's some PowerPoints out there from some of your
16 districts about how they're totally reinterpreting
17 this regulation. And we'll try to submit those for
18 the record in advance of the rulemaking. That's
19 inappropriate.

20 So, yes, the signature creates a problem and
21 creates a disincentive for people to serve. You know,
22 I've stood there and listened to the miner who said,
23 "I'm not signing that thing because I don't want to be
24 on the hook for MSHA." And, "I'm not doing the
25 inspection."

1 I've heard that when I'm doing training at
2 the mining operations when we're doing how to deal
3 with MSHA training and how to create positive
4 relationships and get your job done, and miners don't
5 like that. They don't like situations where they're
6 signing forms and they're on the hook. Neither do
7 supervisors.

8 Nobody wants to be in a position that they
9 create a target for a potentially abusive, even if
10 it's rare, inspector; right? To go after them. And
11 yet, that's what we have. There's an awful lot of
12 authority in these inspectors that you've given to
13 them. Some of them don't use all that authority in
14 the right way. I mean, that's just a fact.

15 MR. LICHTENFELS: I don't have anything
16 else.

17 MS. MCCONNELL: May I have another question,
18 Mr. Chajet?

19 MR. CHALET: You can have all the questions
20 you want.

21 MS. MCCONNELL: Thank you.

22 MR. CHALET: I don't know that I have
23 answers, but --

24 MS. MCCONNELL: Well, I guess I'm trying to
25 make sure I understand everyone's concerns.

1 MR. CHALET: We don't like the rule. That's
2 the concern.

3 MS. MCCONNELL: I got the opinion. But now
4 I want to know, I guess I'm trying to understand, also
5 understand, under the existing rule: what is
6 typically done by your members in terms of workplace
7 examinations? Do you have a sense of when they are
8 conducted, what they typically collect in terms of the
9 record? Do you have, could you give me a sense of
10 that?

11 MR. CHALET: You know, I would hope that the
12 Agency would ask its inspectors to answer that
13 question. And that you would collect that information
14 and evaluate it before you go to rulemaking. So that
15 the Agency has a sense of conditions and practices
16 before they change a very successful rule; right?

17 And I'm going to answer your question with
18 just that; right? Do your job. If you're going to go
19 to rulemaking, figure out what's out there before you
20 regulate. That's step one. You cannot regulate. The
21 law does not allow you to regulate without knowing
22 what the current conditions and practices are.

23 And the very fact that you're asking the
24 question, is complete and total acknowledgment of the
25 inappropriateness of this rulemaking.

1 MS. MCCONNELL: Okay. Thank you, sir. I
2 don't have any further questions.

3 MR. CHALET: Thank you. We hope you'll
4 withdraw this rule and go back to the drawing board
5 and collect the information and data that we've
6 suggested, so we can take a good look at what you're
7 trying to do. Thank you.

8 MS. MCCONNELL: So anyone else who would
9 like to provide remarks on the proposed rule?

10 I'm just going to pause -- oh, Mr. Wright,
11 would you like to make a --

12 MR. WRIGHT: Just in regard to the last --
13 I'm sorry, this is Mike Wright from Steelworkers.

14 MS. MCCONNELL: Yes, thank you.

15 MR. WRIGHT: Just in regard to the last
16 testimony, I can't say I've visited every one of our
17 130 metal/nonmetal mines, but I've visited a fair
18 number.

19 In the last couple weeks, I was in a large
20 iron mine in Northern Minnesota, where of course all
21 the iron mines are. And they do what are essentially
22 pre-shift inspections. They operate most areas
23 continuously. So what would be a during-the-shift
24 inspection on one shift becomes a pre-shift inspection
25 for the next shift.

1 But they would I think be appalled if
2 somebody said, "you don't have to do this." They look
3 not only at safety items, but they look at maintenance
4 items. Most safety items turn out to be maintenance
5 items.

6 They keep records of that. They know who's
7 done them. They don't throw away the record at the
8 end. I've sat in on pre-shift meetings where all the
9 things that they need to fix before somebody works in
10 an area are up on a white board. They're there
11 because somebody kept a written record of that.
12 Nobody's memory is good enough to, you know, to
13 remember everything that they've seen in a pre-shift
14 or a during-the-shift inspection.

15 They keep, as far as I know for the most
16 part, they keep a written record of what they found.
17 They really need to do that because they need to be
18 able to know what kind of equipment has broken in the
19 past and what they needed to do to fix it in case the
20 same thing happens in the future.

21 I think that the list of sort of horrible
22 results that we've just heard, at least in this mine
23 and in other mines that I've been in where I've looked
24 at this kind of situation just doesn't exist. They do
25 inspections. They keep records of them. They know

1 who did it. They know what they found. They know
2 what they fixed. They need that information to
3 operate the mine.

4 MS. MCCONNELL: Thank you. I don't have any
5 comments. Is there any other individual who would
6 like to make a presentation or remarks?

7 I'm just going to pause for a moment as
8 everyone collects their thoughts.

9 (No response.)

10 MS. MCCONNELL: So, I believe that there
11 will be no one else making any remarks or
12 presentations on this proposed rule. Therefore, I'm
13 going to conclude this hearing.

14 I thank everyone for coming forward and
15 making a presentation. I also thank everyone else who
16 attended the hearing. It shows your interest in this
17 rulemaking, and I want to emphasize again that we need
18 all your comments, and that the comment period closes
19 on September 6.

20 We will take all of your comments and
21 concerns into considerations when we develop the final
22 rule, and I continue to encourage you to participate
23 and provide your comments during this rulemaking
24 process. So thank you very much, and our public
25 hearing is concluded.

1 (Whereupon, at 9:38 a.m., the hearing in the
2 above-entitled matter concluded.)
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REPORTER'S CERTIFICATE

DOCKET NO.: N/A

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

DATE: July 21, 2016

LOCATION: Pittsburgh, Pennsylvania

I hereby certify that the proceeding 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 21, 2016



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