TRANSCRIPT OF PROCEEDINGS

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

Pages: 1 through 103

Place: Salt Lake City, Utah

Date: July 19, 2016

HERITAGE REPORTING CORPORATION
Official Reporters
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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;)
PROPOSED RULE)

Salt Lake City, Utah

Tuesday,
July 19, 2016

The parties convened, pursuant to the notice, at 8:30 a.m.

APPEARANCES:

MSHA Panel: SHEILA McCONNELL, MARVIN LICHTENFELS, ALFRED DUCHARME, LARRY DAVEY

Speakers:
ERIK M. DULLEA, Husch Blackwell, counsel to the mining coalition
BRIAN BIGLEY, safety manager for Lehigh Southwest Cement Plant
MICHAEL SALVO
SIMON POLLARD
BRECK DURHAM, safety and health training coordinator for Barrick Goldstrike
LON THOMAS, Star Stone Quarries
SHERI LIM, Lim Construction
KEITH BLANK, health and safety manager for Garnet USA
MICHAEL FARONI, Barrick Gold Corporation
KIM REDDING, N-Compliance Safety Services, Inc.
PATRICK JAMES, Rio Tinto

P R O C E E D I N G S

(8:30 a.m.)

MS. McCONNELL: Good morning. My name is Sheila McConnell. 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 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 you all here today and thank you for your attendance and 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; Al Ducharme on my left from the Office of the Solicitor; Larry Davey, far end, from the Office of Standards; and in the front, I'd like to introduce Pamela King, who also works for MSHA's Office of Standards.

This is the first of four public hearings on a proposed rule for examinations of working places in metal/nonmetal mines. The remaining hearings will take place on July 21st in Pittsburgh; July 26th in

Washington, D.C. -- well, excuse me -- at MSHA headquarters in Arlington, Virginia; and August 4th in Birmingham, Alabama.

Immediately following today's hearing and the three remaining hearings on the proposed examination rule, we will hold public meetings on MSHA's request for information on exposure of underground miners to diesel exhaust. We are holding these meetings in response to requests from stakeholders. And in the interest of efficiency, we decided to hold the public hearings for the proposed rule and the request for information at the same time -- or consecutively.

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

The hearing panel may ask questions of the speakers, and the speakers may ask questions of the panel. Speakers and other attendees may present information to the court reporter for the rulemaking record. MSHA will accept comments and other

information for the record from any interested party, including those not presenting oral statements. We ask everyone in attendance to sign the attendance sheet.

Before we discuss specific issues and hear from you, I want to reiterate why we are proposing this rule. MSHA is proposing to amend the Agency's existing standards on examinations of working places to ensure that mine operators identify and correct adverse conditions that may affect miners' safety or health. The proposed rule would strengthen and improve MSHA's existing requirements for metal/nonmetal mines working place examinations.

The proposed rule would require that:

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

The mine operator properly notify miners in any affected area of any adverse conditions found that may adversely affect their safety or health, and promptly initiate appropriate action to correct the adverse conditions;

Conditions noted by the competent person

conducting the examination that may present an imminent danger be brought to the immediate attention of the operator, who must withdraw all persons from the area affected until the danger is abated;

A record of the examination be made and the competent person conducting the examination sign and date the record before the end of each shift for which the record was made.

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

The examination also would include a description of the corrective action taken, the date that the corrective action was taken, and the name of the person who made the record of the corrective action, and the date the record of the corrective action was taken.

The mine operator must make -- would have to maintain their examination record for at least one year, make the records available for inspection by MSHA and the miners' representatives, and provide these representatives a copy upon request.

The proposed rule would build on existing concepts, definitions, and responsibilities so that

the new notification and recording requirements can be easily adopted by mine operators.

The proposed rule would not change the existing definitions of "competent person" and "working place" used in sections 56/57.18002 and defined in sections 56/57.2.

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

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

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

Under MSHA's existing examination of working place standards for metal/nonmetal mines, a working place examination can be conducted at any time during the shift. The existing standards do not require that the examination be conducted before miners begin work.

The existing standards also do not require:

That the examination record include locations of the areas examined, a description of the adverse conditions found, and corrective action taken;

That mine operators promptly notify miners when adverse conditions are found.

And the existing standards also do not include that operators make the examination records available to miners' representatives.

Under the Mine Act, mine operators with the assistance of miners have the primary responsibility to prevent the existence of unsafe and unhealthful conditions and practices. MSHA's best practices include describing adverse conditions in the examination record to facilitate correction of the condition and to alert others at the mine of an adverse condition that may affect them.

Making and maintaining a record of adverse conditions found and the corrective actions taken to correct the adverse condition would help mine operators and miners and their representatives become more aware of dangerous and unhealthful conditions and become more proactive in correcting these hazards before an accident, injury, or fatality occurs.

The proposed requirements are a commonsense approach and consistent with the remedial purpose of the Mine Act and MSHA's existing mandatory safety and health standards. Over the years, MSHA has issued Program Policy Letters regarding workplace examinations and has taken the position that a meaningful record of an examination should contain the following:

The date the examination was made;

The examiner's name;

The working places examined; and

A description of the conditions found that adversely affect safety or health.

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

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

We are also interested in comments on who should conduct the working place examination. MSHA believes that, to be effective, the working place examination must be conducted by a competent person designated by the mine operator. MSHA has emphasized that a competent person is a person who should be able to recognize hazards and adverse conditions that are expected or known to occur in a specific work area or that are predictable to someone familiar with the mining industry. MSHA has stated in various Program Policy Letters that, although a best practice is for a foreman or other supervisor to conduct the examination, in most cases an experienced non-supervisory person may also be competent to conduct a working place examination.

MSHA has also stated that a competent person designated by the operator must have the experience and training to be able to perform the examination and identify safety and health hazards.

We request comments on whether MSHA should require that the competent person conducting the working place examination have a minimum level of experience or particular training or knowledge to identify workplace hazards.

We also request comments on all cost and benefit estimates presented in this preamble and on the data and the assumption MSHA used to develop these estimates.

We also ask that you provide any other data or information and the rationale with sufficient detail in your comments to enable MSHA to review and consider. Where possible, include specific examples to support the rationale and other relevant information, including past experience, studies and articles, and standard professional practices. Include any related cost and benefit data with your submission.

Today as you address the proposed provision, either in your testimony or in your written comments, please be specific. Specific information helps us produce a final rule that is responsive to the needs and the concerns of the mining public.

MSHA will make available a verbatim

transcript of this public hearing approximately two weeks after the completion of the hearing. You may review the transcripts of all public hearings and comments on our website at msha.gov and on regulations.gov.

If you have a copy of your testimony, please give submissions to our court reporter so that they may be appended to the hearing transcript. Following this public hearing, you may submit additional comments using one of the methods identified in the address section of the proposed rule. Comments must be received by September 6th.

Again, if you haven't signed our attendance sheet, please do so.

Before we start hearing testimony for the proposed rule, I'd like to encourage those of you who have interests in approaches to control and monitor miners' exposure to diesel exhaust to attend our public meeting today. As I stated earlier, that public meeting will begin immediately following the conclusion of this public hearing.

So with that, I would like to introduce our first speaker, Mr. Erik Dullea.

Good morning.

MR. DULLEA: Good morning.

MS. McCONNELL: And if you could state for the court reporter your name again so we have the correct pronunciation, and even -- and where you're from.

MR. DULLEA: You bet.

This might make it easier as well if I hand this to her.

Good morning, Ms. McConnell and members of the board. Thank you for allowing us to participate in this important event today.

My name is Erik M. Dullea, and that's E-r-i-k, M as in MSHA, D as in defense, u-l-l-e-a. And I am senior counsel with the law firm of Husch Blackwell, and we represent the mining coalition.

The mining coalition is a group of MSHA-regulated companies in a wide variety of industries. Our members operate quarries, processing facilities, mines, and has thousands of employees in vastly different conditions, operations, and utilize different methods and practices.

The coalition does agree and support MSHA's goal of protecting the safety and health of the workforce. And with that in mind, we do recognize that one workplace injury is one too many.

That being said, the current workplace

1 examination rule has been a time-tested, successful
2 initiative to advance the safety and the conditions
3 for miners, and we believe that working with that
4 current rule is the best process going forward.
5 From a procedural standpoint, we are
6 concerned on the timeline that has been laid out for
7 this proposed rule and for the diesel RFI. These
8 timelines are accelerated and nearly unprecedented in
9 the schedule that MSHA typically follows in the
10 rulemaking process. Traditionally, MSHA proposes
11 that regulated parties and the agency use years, not
12 months, when evaluating complex issues such as the
13 diesel RFI and a workplace examination ruling.
14 Today's schedule is combining two complex
15 topics that may be or may not be interrelated. And
16 we believe that to allow the stakeholders to provide
17 meaningful testimony, that this process should be
18 bifurcated, they should be treated separately; and we
19 ask that the proposed rulemaking be delayed until all
20 of the data and evaluations are completed.
21 My colleague Henry Chajet has submitted a
22 letter on behalf of the mining coalition to MSHA
23 asking that the timeline be extended. We will
24 provide our written comments at the conclusion of the
25 public hearing process or any amendments to that

process as they are laid out.

From a substantive standpoint, the coalition has several concerns with the proposed rule; and, like a good news story, I capture these in the five W's: the who, the what, the when, the where, and the why.

Who is a competent person? And you have explained that the definition is going to remain unchanged under the proposed rule; but what risks come with that responsibility for that individual? Both the Mine Act and the current rule as a time-tested mechanism have recognized that operators with the assistance of the miners are responsible for correcting safety and health hazards. We believe that it is important to continue to empower the miner that is working in that area to examine the workplace for hazards that may affect him or her.

We are concerned that MSHA inspectors may question the adequacy of an inspection or the credibility of a miner who has performed a workplace exam if conditions, later on in the shift when an MSHA inspector is on scene, may be different from what existed at the time that the work shift began.

If a competent person is, as a best practice, anticipated to be a supervisor, the

1 question becomes whether that person is deemed to be
2 an agent of the company. We ask for clarification or
3 assurance that that may not -- is not the case and
4 that miners who are performing this vital task in
5 their work areas would not be subject to 110(c)
6 liability under the Mine Act.
7 Based on the wide range of conditions and
8 the physical size that can vary from one mine to
9 another in the metal/nonmetal community, we believe
10 it is counterproductive to restrict the number of
11 competent personnel that a mine operator can
12 designate to conduct workplace examinations.
13 The current requirement amply meets the
14 needs on this endeavor. There are already extensive
15 training requirements that are in place to address
16 and recognize hazards, and there is no evidence to
17 support the idea that restricting who is a competent
18 person will advance the safety interests for the
19 mining community.
20 We are also concerned that, as an
21 ancillary or side effect, if workplace examinations
22 are allocated or assigned to supervisors or other
23 people with management responsibility as a best
24 practice, that that may inadvertently lead miners to
25 believe that they can put their faith in someone else

to conduct their workplace exam, and that as a by-product of that misapprehension, we will see a deterioration in safety as opposed to an improvement in safety. Again, the idea is that the miner that is going to be in that area, that is familiar with that area, may be the best person to analyze and look for the hazards and take corrective action.

The next topic is what. What is going to be documented in the records of the workplace examinations? The coalition is concerned that the actual contents in each inspection record may not be acceptable from one MSHA inspector to another, that there may be -- this could be an area of inconsistency or disagreements over interpretation.

Moreover, a competent person who performs what he or she believes to be a thorough and complete workplace examination and documents it as such may find out after the fact that the MSHA inspector disagrees with the level of detail provided in the card or in the inspection record. That may place the miner in the defensive position of having to prove that what he or she did hours ago under conditions that may not exist currently in the shift was adequate at the time.

In addition, the proposed rule requires

that we notify miners of the adverse conditions when they are identified. How is that notification going to take place? What level of breadth from a geographic and a time perspective need to be included to be adequate under the proposed rule? If you have a mine that is laid out vertically with different levels, does each miner, regardless of what level they're working on, need to be notified of hazards? Do they need to be notified when they arrive at an area of what had been inspected and identified six, seven, eight hours earlier on a shift, even if those conditions no longer apply?

We are concerned that the term "adverse conditions" is inherently subjective. Much like the concept of loose ground, you can have reasonable persons disagree over what they see or what they deem to be adverse.

The corrective actions may also be subjective. As one example, if there is a rack of acetylene tanks and the chain is off the hook, that may be an adverse condition. If the miner, as part of his workplace exam, puts the hook back on -- that's a corrective action -- are those both required to be documented? If only one step is included and given -- because of momentary distractions the miner

forgets to describe the corrective action, what is the significance of that for the workplace examination record?

When this paperwork is filled out and finalized, under the proposed rule there's a significant time gap between those two events. The workplace examination will take place at the beginning of a shift or perhaps two hours prior. The proposed rule contemplates that the person at the end of the shift will then document and sign or certify what has taken place. There is a significant possibility for human factors concerns and distractions to come into play and for paperwork items, not necessarily corrective actions that did in fact take place, but the documentation or the memory of what corrective actions occurred may fall through the cracks and not be documented on the paperwork.

In those situations, when people apply the values or the benefits of 20/20 hindsight and look at those records 30 days later, 90 days later, 180 days later, how will those human errors be reconciled?

The third W is when: when will the exam be performed, and whether doing it prior to the beginning of a shift is the best practice and the best technique to address miner safety. The

coalition is aware of the accident reports that were included in the proposed rule and as part of the administrative record. What was interesting is that in each of those terrible accidents, the conditions that led to the injury or the fatality in the sense from a proximate cause standpoint occurred seven hours, if not ten hours after the shifts began. In some cases, the conditions that contributed to that accident were not even present or discernible before the shift began.

The next W is where. Where are the exams required to take place in a mine? Granted that this is a difficult topic to quantify based on the wide range of geographic sizes and characteristics of metal/nonmetal mines. However, we do see operators encounter differing opinions from MSHA inspectors on what areas of the mine are active or inactive. The natural by-product of that concern would be what areas need to be inspected or examined before a shift occurs and which areas do not.

The coalition would like clarification and assurances from MSHA on what areas are not to be -- do not need to be inspected before a shift begins and how that information should be communicated to an MSHA inspector on the inactive areas that are not

inspected or examined.

With MSHA's recommended best practice of supervisors being the individuals that are considered competent persons that would examine areas of the mine, the coalition is concerned whether MSHA expects that those competent persons will be examining more work areas than one on any given shift. Does the Agency anticipate that a supervisor will need to scramble between two, three, or four different work areas to look for hazards, and then commence the notification process before miners would begin their work shift? And if that is the case, has MSHA examined whether there is empirical or objective evidence that indicates a supervisor that is responsible for examining multiple areas is likely to discern all of the hazards that an experienced miner who is only concerned with one work area and has seen it day in and day out will recognize?

The final W is why. Why are we here and why are we considering this? I do understand and appreciate your explanations, Ms. McConnell. However, the coalition is also curious and captured by some of the language in the proposed rule. And this was published on page 36823 of the Federal Register, which is the proposed rule. And I quote:

"MSHA is unable to quantify the benefits from this proposed rulemaking, including the proposed provisions that an examination of the working place be conducted before miners begin work in an area; that the operator notify miners of the working place of any conditions found that may adversely affect their safety or health; and that the examination record include a description of the adverse conditions found that may adversely affect their safety or health; and that the examination record include a description of the adverse conditions found and the corrective action taken."

If MSHA has acknowledged that we are unable to quantify those benefits and each of those four elements are at the very heart of this proposed rule, then we believe that there is more research and analysis that needs to be done.

One of the key areas that should be examined and explored is the contributing role that human factors plays in accidents and injuries at the workplace. Across multiple industries, human error may cause between 60 and 80 percent of the accidents and injuries that occur; and that should be where we are putting our focus, empowering the miners to look at the hazards, to assume responsibility and

accountability and their share of responsibility under the Mine Act to address those hazards, and making sure that they know and understand that they have a role in their own safety rather than advocating that role and putting trust in somebody else that may have a very large paperwork burden to tackle.

At this point in the process, the coalition has not been able to fully quantify what we believe the costs of compliance with this rule will be. We do expect to provide in our written comments a more thorough cost analysis. However, some of our estimates are that the cost estimates provided by MSHA may need to increase by a factor of 15 in order for a large mine with multiple facilities to gather that data, track the data, identify loose ends or gaps as an examination record, and the corrective action may roll from one shift to another.

Some of our members have indicated that they receive a thousand workplace examinations a day, therefore, 365,000 records that you need to maintain. The administrative burden for that may be so large that we would -- each mine, each coalition member would require full-time staff merely to process and track the paperwork.

Ms. McConnell, that concludes my testimony. If the board has any questions, I am available.

MS. McCONNELL: I thank you for your testimony, Mr. Dullea. I do have a couple -- I want to make one clarifying remark in terms of -- and I have a couple questions.

The request for information on diesel is a pre-rulemaking stage. It is -- the action of an RFI is simply to -- Request For Information -- is simply to gather information from the regulated community on questions that we have regarding our existing standards and whether or not they are sufficiently protective. That does not necessarily mean that we're going to move into a proposed rulemaking stage. So these two actions are significantly different. I just wanted to clarify that for the record.

MR. DULLEA: And I appreciate that. Maybe I did not -- I didn't -- in my verbal words may not have done a decent enough job of spelling out a proposed rule versus the RFI. Completely agree with that. What we --

MS. McCONNELL: But in terms of 90 days, we're not going -- you know, we would have to then initiate a proposed rule that would have another set

of period of time for comments. I just wanted to make sure that --

MR. DULLEA: You bet.

MS. McCONNELL: Yeah, okay.

MR. DULLEA: And for some of our underground members who may be affected by both, they have felt it time compressing in order to adequately participate on the RFI side of this event as well as the proposed rule.

MS. McCONNELL: And I hear you on that.

I did want to ask a clarifying question. And I'm taking notes as you're speaking; but this one I was curious about, how your coalition currently records an examination. You mentioned that -- the proposed requirement that at the end of the shift we would require that the record be completed, dated, and signed. And I believe you were saying that we are proposing that the examination be conducted before work begins in a place. The timing that you suggested may introduce human error due to that delay.

And so my question is, just to understand your concern, what would be the appropriate time, in your mind or your coalition's mind, that the record would be made or signed and dated?

MR. DULLEA: With the wide range in layouts of individual mines and the scope of the operations for each operator, we do believe that that discretion should be left to the operator. And we support where the current rule is, that the operator have the flexibility of deciding when to conduct the workplace examination.

MS. McCONNELL: How about when the record is made?

MR. DULLEA: I will get back to you on that. That's a good question.

MS. McCONNELL: That's my question. Because that's what you -- so we have proposed an examination before the shift and a record at the end of the shift.

MR. DULLEA: Correct.

MS. McCONNELL: And you were suggesting that human error could be introduced by that delay.

MR. DULLEA: Yes.

MS. McCONNELL: So my question was, well, what would mitigate the possible human error that you were suggesting based on that timing that we have proposed? What are you suggesting would be a more --

MR. DULLEA: We will address that in our written comments to make sure I give you an informed

answer than one off the cuff.

MS. McCONNELL: Okay. I think that was my only substantive question.

Marvin, do you have any questions?

MR. LICHTENFELS: Just for clarification -- I don't want to assume what you said -- you made a comment about one mine in particular would have up to a thousand workplace exams in a day?

MR. DULLEA: Yes.

MR. LICHTENFELS: Could you explain how that could be? Is that every miner making their own exams?

MR. DULLEA: For all of their facilities. You're right, absolutely right. So if you have a corporation that will have multiple mine sites and they're looking to put -- roll out a program that is going to be systemic in nature and will cover all of their facilities; and then if you're looking at three shifts per day of crews and then also multiple working areas within each facility, that's how they came to their numbers.

MR. LICHTENFELS: But that's, again, with every miner making the examination?

MR. DULLEA: No, sir.

MR. LICHTENFELS: No?

MR. DULLEA: No. It would have been for each area.

MR. LICHTENFELS: Okay. Thank you.

MS. McCONNELL: Just to follow up with Marvin, I actually also had a similar kind of thought and I didn't articulate it, either, but he's making me think about it.

Is that -- what is different? I mean, we're not changing -- so in hearing -- you responded to us in your written comments. How is our proposed rule different from existing practices in terms of a competent person examining every workplace? Because we're not changing the definition of a competent person, so I guess in terms of how -- if you can enunciate in your proposed comments about why is it so extraordinarily more different than what is under the existing standard in terms of the number of examinations being conducted?

MR. DULLEA: We'll definitely address it.

MS. McCONNELL: Sir, thank you very much for your comments and participating in our hearing today. Appreciate it.

MR. DULLEA: Thank you. I appreciate the board's time.

MS. McCONNELL: Our next speaker is Brian Bigley.

Good morning, Mr. Bigley.

MR. BIGLEY: Good morning.

MS. McCONNELL: Could you please, for the court reporter, correctly pronounce your name, and if you need to, spell it, and who you are representing.

MR. BIGLEY: My name is Brian Bigley, B as in boy, i-g-l-e-y. And Brian is spelled correctly with an i.

Thank you for the opportunity to speak today. I am the safety manager for Lehigh Southwest Cement Plant in Tehachapi, California. Today I'm here to speak on behalf of the California Construction and Industrial Minerals Association, CalCIMA. It's a trade association for aggregate and industrial minerals in California. The members of CalCIMA include over 250 mining operations in California, producing everything from aggregates and minerals for construction and agriculture to unique commodities key to the nation's manufacturing, hi-tech, and green technology industries.

We agree with MSHA, and we all believe how important safety is to the industry, how much mine safety has evolved and improved over the years. We

take mine safety seriously. And I think I can speak for all mine operators on this: every mine operator out there takes safety seriously.

In addition, we believe that the workplace exam is an important safety tool. The goal of every mine operation should be to ensure that miners enter a safe workplace.

We also believe that any new regulation or standard should be carefully considered for how it will further the goal of mine safety. And with this in mind, we have some comments and concerns about specific aspects of this new rule.

Our general concern is that this new rule is creating new paperwork requirements without really advancing safer workplaces. We think it is important in the proposed rule, especially one that has some far-reaching administrative impacts, to have a well-defined nexus to a problem or to a concern. And while the stated intent is to reduce fatalities, MSHA has itself admitted that no objective evidence is offered to support that conclusion.

So it's admittedly difficult to quantify this; but if the entire reason for the regulatory change is to save miners' lives, then we feel that some evidence should be provided to prove that it

will save miners' lives and achieve the actual benefits claimed. Because it's an important counterbalance to the costs needed to comply, in both terms of dollars and the time that we're going to spend. We don't disagree that saving miners' lives is important; we'd just like to see the evidence out there that this particular rule is going to advance that cause.

Another key concern is that this regulation as it's proposed is ambiguous in several aspects, and we are concerned that MSHA inspectors will expand it beyond its intent. This has often been the case with MSHA regulations. Imprecise wording has caused inspectors to gradually expand jurisdiction until a standard is applied to miscellaneous things for which it was never intended.

One example of our concern is how does the rule propose to define "adversely affect"? With the new program, all hazards that adversely affect a miner's safety need to be communicated. Does an extension cord on the ground, which is a tripping hazard, adversely effect the health and safety of the miners that come across it? Is a pile of material that could be walked around in a walkway an adverse effect?

If an examiner comes across something that adversely affects safety, this new regulation would require certain actions to be done. In the interest of training our examiners, it would be nice if MSHA could better define this term so that we as lay people could utilize it. Otherwise, we are at the mercy of every inspector and their ever-changing definitions of "adversely affects" that they will bring with them every time they come on an inspection.

There are several requirements in the proposed rule that appear difficult to implement, or at least seem to lack clarity in how they will be implemented. For one, the rule will require operators to communicate to the miners potential hazards found in an exam. What methods of hazard communication does MSHA suggest for typical items found in workplace examinations? How does an examiner communicate to all miners what has been found?

One difficulty with the wording as stated is that they notify miners, quote, "in the area," unquote. What exactly does this mean? Miners that might be entering the area later, are they included? How is that best communicated? Through tags?

Through signs? Through postings? Through twitters and tweets? We're not sure.

Is an announcement over a radio sufficient for communicating hazards that are found? How would this be done in a mine with, say, 50 mine workers going about their exams? Must the operators communicate all the hazards that were found or only those that weren't immediately abated? Again, if you find material in a walkway and you clean it up yourself, you must note it, communicate it, or, since you immediately abated, do you not need to? We're unsure.

Since MSHA would prefer the inspection be done prior to work, who gets communicated to? Incoming shift workers who are not yet even in the area, not yet even at work, perhaps? Again, it would be helpful if MSHA can be crystal clear on what is required for communication.

There's another aspect in the proposal to the rule to require recordkeeping. How would MSHA best propose that miners do the recordkeeping of the hazards abated? For example, an examiner finds a pile of material encroaching in a walkway. Either they would clean it up themselves, or quite often they would notify an area labor crew to clean the

pile and remove it. Perhaps the crew can achieve that later in the afternoon or early the next day. Who then records the completion in abatement of the hazard on that workplace exam form?

What about a light that's out in a rarely used building? It's, say, one of four lights, so the priority to replace it is fairly low. So two weeks go by, and then the electrician gets the light replaced. Who updates the workplace exam with the abatement and the time limitations?

A guard is found to be loose but still in place. The motor is scheduled to be replaced on a down day about a month from now. The guard is fine until then. But now a month has passed, and who updates the workplace exams that note that the loose guard is replaced? Again, with a thousand exams out there, recordkeeping can be time consuming and difficult. Clarity would be helpful.

MSHA also states that a description of the corrective action and the date that the corrective action was taken is to be required as part of the workplace exam records. Many operators already have systems in place to track work orders, repairs, all the way through up to and including completion. When such systems are in place requiring the same detail

on a separate workplace exam, it is duplicative and provides no real benefit. Moreover, it increases administration time without actually making the workplace safer. Duplicative efforts would take time that could be spent making the workplace safer and eliminating hazards. We hope MSHA can consider how this new requirement would not duplicate what's already being done.

A real concern, however, for mine operators is that the new rule may have unintended consequences of just being another way to cite mine operators. For this rule to have validity with the workforce, it needs to be seen as protecting workers, not just as a punitive tool. MSHA wants operators to find conditions that may affect safety and health of workers, sign and date the record, document the findings, corrective actions, notify employees, and make these records available to MSHA and miners.

If MSHA wants all this documentation provided openly for the purpose of creating safer workplaces and preventing injuries, then MSHA needs to provide some protections to operators so that when we do so, we do not result in preparing a case against ourselves for purposes of issuing citations. Good faith efforts should be encouraged, not

punished, if current law does not allow for this protection.

These concerns are not that far-fetched, as some recent examples of MSHA's citations might attest to. An operator was cited for a sign that stated "no smoking, matches, or open lights" in this area, because the standard requires the same sign to say "no smoking or open flames." One word.

An operator was cited for using the incorrect font on a site-specific training checklist, and an operator was cited for not including the middle name of an employee on a task training certificate.

So there is a tremendous fear that this is just another way that inspectors will play "gotcha" with the mining industry.

So while we have concerns with the proposal as it's drafted, we do offer a suggestion to perhaps help improve it. The standard requires workplace inspections to be done. Rather than create an ambiguous, ill-defined big stick, why not try a carrot approach instead? Require that every operator create and implement a workplace inspection program, just like we have to create and implement a training program. You can ask us to meet certain criteria,

and, well, define them, please.

But when a plan is created, it can be submitted for approval; or, if you prefer the Part 46 method, simply document it and show it to MSHA. Then an MSHA inspector can ask an operator to demonstrate compliance to our own plan. Is the operator doing what they said they would do? Good, then no citations. If we're not doing what we promised to do, then you can issue some type of failure to abide by the approved workplace inspection plan. This gives us as operators an incentive to be creative, to design plans that work for our unique situations, and to follow those plans. And if we do not follow our plans, there is no one to blame except ourselves for failing to do what we said that we could do.

Thank you for the opportunity to comment. We appreciate your consideration of our comments. And I'd be happy to answer questions about my comments today or my programs at my plant in general.

MS. McCONNELL: Mr. Bigley, thank you very much for your testimony. I have one, maybe two possible follow-up questions.

I know I'm part of a generation that does not tweet or twitter. I don't even -- this is my first time ever even getting a smart phone. So when

you suggested an opportunity that a notification of the miners could be -- in terms of a hazardous condition -- could be using electronic technology beyond our traditional posting requirements on a board or -- and I even heard you say something along a radio announcement. Is it typical that a miner will have their electronic device, a phone with them at all times during a -- during their -- when they're working?

MR. BIGLEY: It would very much depend, I truly believe, on the nature of the mining operation and the miner's job. For our operation, a surface mine cement plant, almost all of my supervisors carry their phones with them.

MS. McCONNELL: What about the rank and file?

MR. BIGLEY: For the rank and file, majority of them probably leave their phones in the break rooms. However, it's not unusual for our haul truck drivers, for example, to have a phone with them. They have radios in their vehicle cabs; but sometimes, given the nature of the twists and turns of the roads, they can't hit the repeater, and it's just as easy for them to stop and call and get instructions as it is for them to do it on the radio.

So it's very dependent on individuals and the jobs they're doing.

However, if tweeting were to become a method of communicating and complying with the standard, we could easily allow all of our operators to carry their phones.

MS. McCONNELL: I think -- I think that's all I'm going to ask for today.

Marvin, did you have a question?

MR. LICHTENFELS: No.

MS. McCONNELL: Anyone else?

Mr. Bigley, thank you again.

MR. BIGLEY: Thank you.

MS. McCONNELL: Mr. Danny Lowe? He did not sign -- oh, there -- no. Mr. Danny Lowe. I believe he signed up with us previously but may not be in attendance today.

Okay. Those are the three that formally signed up to speak, but that does not mean anyone in the audience who is interested in speaking, that does not preclude you from coming down and giving your remarks. I recommend it. Testimony helps us craft a rule that is responsive to your concerns. Come on down.

Thank you, sir. Could you give your name

and your organization for the court reporter.

MR. SALVO: Michael Salvo, S-a-l-v-o. S as in Sally, a as in Alice, l as in Lewis, v as in Victor, o as in ocean. And then --

MS. McCONNELL: Are you independent, or are you with someone? Or --

MR. SALVO: I'm a miners' rep. And just listening to this, the improving protections for miners, which, through the workplace exams, as everybody stated, we've seen dramatic results.

One thing that -- or a couple things that I've seen in that was the operators for -- you know, preferably with the operator being the one doing the exam, it doesn't benefit the miner as much as it would if they did it together. But I know that you guys were wanting it before shift. And that if before shift the exams were done, then in line-outs or before starting work right then, it could be disseminated that this is the hazards that we found. And it would be taxing on the operator to do that with every section of the mine or every operator doing an inspection. But I think maybe instead of putting it directly on them, to have something where the miners themselves are actually going to benefit from it, actually going to be learning the CFR,

knowing what to look for.

I know in a mining industry, it's ever changing. So what you have at the beginning of the shift could be different from what you have at the end. And I think good practice is you're continually checking your areas.

But on that instance, I don't know if a training plan or just -- that way, not only can the operator disseminate the information of the hazard at line-out, but also he can better prepare himself to eliminate that hazard, mediate it in whatever way he needs to, and put the manpower to correct those hazards and also meet production needs. So it better be informing to the miner to, you know, in line-out or beforehand to say, hey, these are the hazards we have; this is what I need you guys to get on.

So if there was a time frame where within, you know, an allotted amount of time we were able to correct these hazards, then, you know, going -- going forward from start of shift, you know, that's -- I think -- I think it's a good thing. I think you could take down some stuff. And not necessarily that the operator or shifter has to be there with you doing this exam, but daily or whenever, for them to go out with a miner, you know, and point out hazards

or have the miner work with them I think would be a good thing, you know.

MS. McCONNELL: Could I just ask a follow-up question? Because I just want to make sure I understand.

Right now the proposed rule would require that the examination begin before work begins in a place.

MR. SALVO: Yes.

MS. McCONNELL: Are you suggesting -- are you in favor of that, or are you suggesting an alternative?

MR. SALVO: No. I'm in -- I'm partially in favor. I'm in favor of the hazards that have been identified from the previous shift be passed on so that the miners and the operator can concentrate on those areas so that these hazards can be mediated and go on with the shift and meet production needs.

So as far as it having to be done before the end of the shift or if the hazards were just passed on, I think that would probably benefit. And even with the operator knowing the manpower that's going to be needed or the hazards in these areas before we can get on -- you know, knowing that we're going to need the extra manpower, or the operator

going in knowing exactly what he needs to do, you know, first off, you know, the things that they found and mediating that way. So --

MS. McCONNELL: Anything else?

As a miners' representative -- as a miners' representative, do you have -- could you provide any clarifying comments to our proposed -- proposed rule -- proposed rule to notify miners when a hazardous condition is found in a workplace?

MR. SALVO: Yeah. I think that we can notify the miners at the beginning of the shift. If you're going to do an examination before the shift starts, then if you notify them at the beginning of the shift in a line-out or whatever you guys decide --

MS. McCONNELL: What is a line-out?

MR. SALVO: Like a -- before you start work where you gather around, okay, this is our safety share; and then, okay, so-and-so, you're going to be working in this area; you know, we need this today. But not only lining out what we need on our production demands but lining out the hazards that we found, the steps we've already taken to mediate them, and the steps that we further need to do so we can get back into just, you know, what we need as far as

production and putting safety first, mediating those hazards and going forward from there.

So at the beginning of the shift, sometimes you know where you're going to go; you just go there. But in most mines and instances that I've worked in, that's something that we do is before shift they tell us where we'd be, what we'd be doing, what they'd need. But if -- there's going to be an exam anyways on every shift. So taking a couple minutes and saying, hey, in this area the last operator found this, this, and this; you know, this is their corrective action. Did they finish it? If not, we need it done.

And just that couple minutes could be, I think, plenty of notification. And then anything else in the shift that they've done, they can report, mediate; and if it's too big for that time, there's corrective actions we can take and start -- and start the process of mediating that hazard. So --

MS. McCONNELL: Okay. Thank you.

MR. SALVO: All right.

MS. McCONNELL: I didn't mean for you to stop. Anything else?

MR. SALVO: No. I think that's good. But I think -- I think -- I think that putting it all on

the operator, you know, could lead to some people not getting the benefit of, you know, learning this stuff. And I think that maybe a little bit more effort from the operator in the field, boots on the ground, I think it could benefit the whole workforce, you know. I know in instances where you get a new miner, and he didn't -- he didn't know, that, you know, something as simple as a hose laying in front of, you know, a disconnect or something like that could be a citation.

So I think that it would be good practice to continually not -- not have the operator every shift go into an area and be responsible for that area, but continually throughout the work week, you know, take some time, go in that area, go around with your guys, you know, because you're teaching them and it'll become habit. And I think that's a better idea than just putting it off on an operator -- or the operator. So -- I'm done.

MS. McCONNELL: Okay. Thank you very much.

Would anyone else -- would anyone else like to come down and --

Thank you, sir. And for the court reporter, please state your name and who you are

with.

MR. POLLARD: My name is Simon Pollard. S-i-m-o-n; P as in Peter, o-l-l-a-r-d. I'm with Barrick Gold, but I'm not representing the company. We are preparing some formal comments.

Just some personal opinions. I'll try not to cover any of the ground that's been covered.

MS. McCONNELL: Uh-huh.

MR. POLLARD: Defining who the competent person is I think is important. At the moment, we define at our operation the competent person as any employee who has been properly trained to identify and mitigate those risks.

My fear is anytime you push the term "competent person" towards a supervisor or a designated person and say that they are responsible for this task, you are -- you're almost excusing the miner, him or herself, from looking after their own safety. And 26 years into this industry, every time I've seen somebody be able to say it's someone else's job, the quality of the job goes down.

Number one, the person that's going to live with that hazard in the heading, the person that's going to spend hours around it may not be the person that's designated as the person responsible

for identifying and correcting it. I think that's inherently wrong for a couple of reasons.

One, as has been mentioned before, the people that live in those headings that do the work every day are most familiar with the conditions and are just as well trained as our supervisors to identify and correct them. In the case of our mine, we have over 40 active -- different -- 40 active different headings throughout the mine, geographically located in a very wide area.

MS. McCONNELL: Could you define a heading, please?

MR. POLLARD: A mining tunnel; a drift, if you would.

For a supervisor -- you know, right now we carry three operational supervisors on every shift. Just on average, 13 headings to visit, inspect, conduct the mitigation, communicate to others, and then move on.

Just like any job, when it becomes repetitive, when there's a time pressure, it's easy to let the quality of that task go if you're doing it repetitively under time pressure. And to be quite honest, ma'am and gentlemen, you won't have to live with that hazard after you leave the heading. Okay?

Would the quality of that inspection go down versus the one or two individuals who are going to be in that heading who have to live around those hazards whose very safety depends on mitigating the problem? Would the quality of the work go down?

The other incident -- and we haven't brought it up this morning, but just the matter of the cost in lost productivity. For us to say that we would not open a heading up to work until a supervisor had made it there to conduct the inspection, for the first one or two headings, that might not be too onerous. But for, say, heading No. 12 or No. 13, that may be into the afternoon of the shift before people are allowed to conduct useful work.

MS. McCONNELL: Would the cost be mitigated if a competent person that was conducting was, you know, not a supervisor -- as you're currently doing now, a competent person in our existing definition which we're not changing in this proposed rule, could be a nonsupervisory person as long as they have the abilities and training?

MR. POLLARD: And that's how we're conducting the work right now. The people that are in the headings are trained to be competent.

MS. McCONNELL: So the cost issue you raised would only occur if a supervisor or foreman is required to conduct?

MR. POLLARD: Yes, ma'am. But there has been -- not formally, but there's been plenty of communication through the industry that a competent person may be designated with some limitations on how many years of experience they have, what type of experience they have, versus somebody who is properly trained coming in.

We have a new hire training plan that brings people in. We work them through our crews, get them experience with more experienced miners. But if you were to say, well, a person needs to have 6 months, 24 months of experience before they're considered competent, then someone else has to do that work for them. And there will be a significant impact on large operations if a supervisor has -- or a designated person has to visit each heading. Or even if it's only half of your people that are deemed competent persons, that will slow down the work.

And I believe that as long as the training that is conducted up front is sufficient and is of high quality, it's an unnecessary delay of cost in the industry.

Those were the comments I had this morning.

MS. McCONNELL: Thank you very much.

Marvin, did you have anything?

MR. LICHTENFELS: Under your current exam program with competent persons being other than supervisors, how do you -- how would you foresee that working with recording the results of the exam before the end of the shift? If you would explain how that would affect you.

MR. POLLARD: I wish I had better understood what the intent of a recording is. Right now we do ask -- it is a requirement of our miners that when they perform their workplace inspection -- we have a checklist of, you know, is the signage good? Is the ground support good? You know, so they go through a checklist to say they've examined these areas. They do have a hazard reporting capability on the back of that same card.

However -- and, sorry. This is a point that I think is pretty important. When it comes to the documentation, when I walk into a blasted heading after we've initiated a blasted round, I can name you four hazards that will be there every single time. There will be loose ground on the ribs in back, there

will be dust coating everything, there will be tripping hazards on the ground, and there will most likely be issues of materials that have been blown around and aren't resting in a good place, so they present a tripping hazard as well. Ninety-nine times out of a hundred, if I blast around, that is what the heading will look like. There will be those four hazards coming in.

Mitigation is to scale the ground soundly and to support it, to use a loader or some other implement to scrape the floor, to pick up the implements if they've been blown over, and to hose down the heading to eliminate that dust hazard. That will happen every single time we enter that heading. It's just a matter of normal operations going into a blasted heading.

Under the proposed rule, would we actually require our miners to document that every single time they do it? Because it's going to happen every single time they re-enter a blasted area.

My thoughts are there are several hazards that are going to be like that, they're to be expected, and that every miner that would enter that area would expect them and would know how to handle them. Would you expect them to document those, or

would you instead ask them to document something that was out of the ordinary or unexpected?

Coming in, and some of that fly rock is hitting the electrical cable and exposing conductors, not to be expected every time, something worth -- something worth addressing and possibly documenting. Had we had a failure of a rib, failure of a wall or a back, would we expect them to -- yes, that's something out of the ordinary we don't expect every time.

But there are -- and I'm just talking about underground hard rock metal mining. The aggregate companies, the open pit companies, they'll have different hazards than we have, but there are hazards that you can expect every single time you go into the situation. Do we necessarily need to document every time? That's onerous and probably defeats the spirit of what we're trying to achieve.

We do have a program in place. As Mr. Bigley said, we have programs in place that we believe are working. What I'm scared of is the ambiguity that's in this, the possibility of setting people up for failure by pushing responsibility to someone else for their safety, and just the whole idea of creating extra work without adding any extra

benefit.

Those are -- those are my main concerns as an individual, not as my company, but as an individual.

MS. McCONNELL: Thank you, sir.

MR. POLLARD: Thank you, ma'am.

MS. McCONNELL: Appreciate your comments.

Is there anyone else who would like to present today or offer their remarks? Both of you can come.

Again, for the court reporter, your name, and if you could spell it out for her as well as your organization.

MR. DURHAM: Certainly. Breck, B-r-e-c-k, Durham, D-u-r-h-a-m. My current role is training coordinator -- safety and health training coordinator for Barrick Goldstrike.

The main issue that -- or aspect of the proposed rule that I would like to speak on and voice some concerns that not only my site but other sites have is the -- is the aspect of, as Simon alluded to, the definition of a competent person and what we've seen in recent training plan submissions and verbiage that's being used, and also aspects of the inspections that we've had in the last year and a

half to two years.

As we know, there's been an initiative to focus on workplace exams and training during inspections of our mine sites. And as far as the training aspect goes, we've had it entered in, after the original submission to some training plan updates, to include verbiage that states that workplace exam training must take place.

Personally at our site, we already have that verbiage in the training that is laid out in the training plans for both new hire -- or including new hire annual refresher and the hazard training that is already required by the Mine Act.

In my discussions with inspectors and the discussions I've had with western district personnel at different meetings talking about our training plan submissions, the push that we -- that we sense or that we've seen, have experienced, is to have a separate 5000-23 documenting training for workplace exams. Now, obviously, we can't give every miner one 5000-23 and say, you're trained on workplace exams. That's like saying you can run all loaders, for instance.

So the prospect of going down the rabbit hole of having to give a 5000-23 that says this

person is trained to do a workplace exam for each specific working area. And we know through plenty of different litigations over citations, there's great debate about what a working area can be from mine to mine.

The burden that that puts on trainers and miners seems completely unnecessary, when the Mine Act has already specified under part 48, specifically hazard training, that a miner must be trained in the hazards of his working area before being given work in that area. Under that, we have taken that to mean that if you have completed that hazard training and we've given you that 5000-23, then you are a competent person under the Act.

We've included, to be specific in our training plans, the verbiage of going over workplace exam and hazard recognition and accident prevention -- all required topics under the Mine Act. As living in training and working with our divisional trainers who handle the workplace exam and task training for the miners, the frustration that we feel is that, rather than create a new document, create a new rule, we need to focus on the rules and the documents and the requirements that we already have over us.

I mentioned the emphasis on inspecting training. And to be frank, in the last couple of years, we've had an extra scrutiny on training records, which isn't a bad thing in and of itself. But as far as scrutiny on training itself, that really hasn't occurred. No one has asked -- other than looking at training plans or looking at 5000-23 documents, we haven't really looked at how miners are being trained.

And if that's truly the -- the worry is that we're sending untrained people out to do workplace exams, then a 5000-23 might show that we didn't put somebody's middle name in, as it was alluded to earlier, or maybe a document was overlooked or lost. But that doesn't necessarily say, the same way that a properly filled out 5000-23 doesn't guarantee that that person can do that job or that aspect of that job.

So by creating more documents, by creating more requirements when we're not already looking at the ones we have, we're creating extra burdens for us as an industry and as individual sites, and then miners as well.

That's my main concern. That's what I want to discuss or bring up was -- was the aspect

of -- and it's already starting to occur. Like I said, we've had those put into our training plans. It hasn't affected my site directly as much as I know it's impacted other sites because of the verbiage that they are already using.

MS. McCONNELL: Thank you. I don't have any questions.

Marvin?

Al would like me to ask you if -- since we're not changing the concept and definition of competent person, and it's only that person -- a competent person is still an individual who has the abilities, skills, knowledge to be able to conduct an examination of a working place, how is -- how do you see the burden being increased based on your sense of training?

MR. DURHAM: The definition of a competent person hasn't changed, but it's how we have quantified that somebody is competent, that we've already seen this addition to training plans and the scrutiny from inspectors to say, well, this person needs a 5000-23 that says they can do a workplace exam in this area, when we've already provided them with a 5000-23 that says they've completed the required hazard training for that particular area,

mine ID, or working place.

So it's not -- the definition of competent person hasn't changed, right? It's the definition of how they became competent, if you will.

MS. McCONNELL: Okay.

MR. DURHAM: Right? And we're adding extra documentation into that when we already have it.

MS. McCONNELL: Okay. So you're concerned that the proposed rule would add additional documentation on how a competent person is identified?

MR. DURHAM: Correct, in that we're creating new paperwork, more bureaucracy, if you will, instead of already enforcing what we have. Or I don't know if "enforce" is the right word, but instead of utilizing what we already have in place.

MS. McCONNELL: Okay.

MR. DURHAM: And we've seen it in the field and inspections already where an inspector has looked at the supporting documentation on somebody's training and said, well, but they don't have a 5000-23 that says "workplace exam." Well, no, our training plan says that we're training on hazard recognition and workplace exam, and here's all the

5000-23's that we have provided for their hazard training and their task training that encompass that.

MS. McCONNELL: All right. Well, you bring up some interesting points. Thank you.

MR. DURHAM: Thank you.

MS. McCONNELL: Good morning.

MR. THOMAS: Good morning.

MS. McCONNELL: For our court reporter, your name, and please spell it out, and who you are representing.

MR. THOMAS: Lon Thomas. L-o-n, T-h-o-m-a-s.

MS. McCONNELL: Could you speak closer to the microphone?

MR. THOMAS: Sorry. I'm afraid of them.

Lon Thomas. L-o-n, T-h-o-m-a-s. I'm representing Star Stone Quarries. I'm an owner-operator. I have several small quarries. I'm very concerned about the men that work for me. They're like part of my family.

In addition to having special concern about my people, I'm also in a group that's self-insured. So if one of my people gets injured, I not only pay all of their expenses, I pay an additional 20 percent on top of it because it runs

through the insurance business stuff there. So I pay more than 100 percent of all of their injuries. So besides being my friends and my family, I'm financially concerned about the individuals as well.

One of the things that concern me, some of my, you know, miners in general, I'll say, when you train an individual, show them how to do something, tell them what the rules are, supervise them to make certain they do things correctly, ask them questions to ensure that they are properly trained and they know exactly what to do, why to do it and how to do it, and then as soon as you're not looking, they go and do something stupid and get injured.

You know, it can really be -- I know MSHA then says that I'm to blame. It would be nice if somehow the individual miners could somehow have some sort of self-accountability or self-responsibility for some of their own actions. This new proposed rule that comes in seems like it shifts more of the burden onto the mine owner, to me, that I have some special representative out there that inspects some machine or workplace exam.

I want to see if it passes the stupid rule. Why would I tell Bob to go inspect a machine that George is going to run? George runs the

machine. He operates the machine. He knows the machine. He understands the machine. He knows what's right and what's wrong with it.

The person who operates the machine should be the one that inspects the deal. So not a -- you know, I'm in Salt Lake; Bob is 200 miles away in the quarry; and I'm supposed to have my own personal person out there that inspects it for Bob, who's probably never ran the machine in his life.

So I don't -- I don't think that that part of that rule passes the stupid rule. So I'd like the whole rule out. That's all.

MS. McCONNELL: Al has asked me to clarify, and I agree, that -- I hear your concerns, but we just want to remind everyone that we're not changing the definition of the competent person and who can conduct a workplace examination. So, for example, who is conducting the workplace examination for Bob and his machine? And under the existing rule, who is -- I guess -- and in that case, that would be the same -- under the proposed rule, that would be the same person conducting the examination. The difference would be the timing under the proposed rule and when the record is created and what's in the record.

MR. THOMAS: Maybe I don't understand all of the rule exactly, then; because I understand that there's going to be more recordkeeping that's going to be required. The miners aren't necessarily great recordkeepers. They can look at a machine and they can write down what's wrong with it, but --

MS. McCONNELL: So your concern is actually the individual who may be conducting the examination may not be the person who can actually create the record needed to identify the hazard and the corrective action taken?

MR. THOMAS: They just make it -- I see it as I'm going to get a lot more tickets for when the guys already are trained to do the stuff and they do do the stuff, and then somebody comes in and says, well, we don't like the way that you did the stuff because of one reason or another, and then more tickets for me, which --

MS. McCONNELL: And the "stuff" you're referring to is what's in the examination record? How --

MR. THOMAS: Yes.

MS. McCONNELL: Okay. Just wanted to make sure for the record.

MR. THOMAS: And how it's enforced -- the

inspector comes in and looks at my records and says, I don't like your records the way that they're done; here's more violations.

MS. McCONNELL: Okay. I understand. I hear you now. I've got your concern.

Did you have anything?

MR. LICHTENFELS: Just for clarification, we're talking about workplace exam requirements with the new proposed rule. And I think part of what you were talking about was the equipment examination requirement to preop on your piece of equipment, which that isn't affected by this example.

So it's two different rules. I understand your concern that the equipment operator should be the one to inspect that piece of equipment, and I have no doubt that that's what should be done and that's what you're doing. So there is a difference. There's two different standards. One is the hazards in the workplace is what we're talking about, and the other one is the preop on the individual piece of equipment. So I hope that helps.

MS. McCONNELL: I want to thank you for coming down and talking to us.

Anyone else like to come down and speak?

For the record --

MS. LIM: Sheri Lim, L-i-m, Lim Construction. I'm also an owner-operator of a small sand and gravel operation.

And so I think this last gentleman that talked, I kind of understand what he's saying. A lot of times on our operations, we have two to maybe four people that's only on a job site. And so I think what he was saying is we are hit with a lot of paperwork that our guys have to do. And sometimes I have a loader operator, and then I have a labor/competent person/the operator of -- the plant operator. He's doing all of these things.

And so I think when I look at this, I was looking at, you know, the -- kind of the additional paperwork that he's going to have to do. I already have him filling out some DEQ reports. I have him filling out all of his workplace exams, which we already are doing. But also when I -- when I put on to them that they're the competent person, and then I tell them all the requirements that come with that and the legal aspects of that, I see them, like, really back off. And they're like, I don't know that I want to sign that or put my name on it; but they have to because they're there.

But I think, you know, when -- you know,

MSHA asks a lot of these people that we have out on the job site, especially small, you know, mine owners and operators, because you're asking them to be -- you know, I can't be there all the time, you know. But, you know, I have this guy that's out there, you know, running this. He has to be, you know, responsible for all of this. And he has to sign this document that he's 100 percent responsible if something happens on the job site.

So I think, you know, we train them; and then, like this gentleman said, I go out there to do a safety inspection or go check on a job to see what's going on. And it's like, why are you doing this thing that we trained on, we go over in our weekly, you know, safety meetings, and I've told you a hundred times what to do, and then I see you doing -- and as a mine operator, you know, it's hard.

So I think sometimes we see it as, you know, another form I've got to come up with and, you know, another -- you know, every -- every hazard seen you've got to write down. Every -- you know, everything corrected, you know, when we're already doing workplace exams.

And, you know -- and I understand, you know -- you know, huge mines have -- they have people

that this is what they do. But your small operators, when you pull us into these same regulations, we have one person. And where -- you know, a sand and gravel surface operation where, you know, we're running the loader and we're screening material, resizing, you know, crushing. They're smaller operations. And yes, accidents happen the same, but it's -- it's a lot of -- it's a lot of detailed paperwork that we have to put on to someone to fill out.

So just for my understanding, I'm trying to get a picture of what is -- under the existing rule operators are required to conduct a workplace examination. What we don't really specify is what's in the record. You have to maintain a -- do an examination, maintain a record. But we really don't specify what's in the record. So what we're suggesting is that we identify hazardous conditions as they come up and corrective actions that are taken.

So I guess, just to understand, the difference between what is under -- practice under the existing rule versus what is being proposed is what is in your examination record now? Just curious. I mean, when you do an examination, what would you put in the record?

Well, right now we have ground conditions. We have high walls. We have all the equipment. You know, they would do a walk-around of conveyors, of, you know, the electrical. You know, they do a full walk-around of all the equipment. Any changes, you know, from the night before -- you know, stockpiles and -- you know, anything. You know, it's a list. They go through; they check it.

MS. McCONNELL: Oh, I see. You have an established list of items that they need to identify?

MS. LIM: Right. And some of them are done first thing in the morning. Some they do -- as the day goes along, they'll check, you know. And then --

MS. McCONNELL: So in that -- they check that, and if they find something that is a -- would be considered an adverse or hazardous condition, what would the record show at that point?

MS. LIM: They would note it on there that it needs to be taken care of. And the -- you know, and there's -- if the plant operator, say he has a laborer, the laborer might walk around and check some of the stuff. So he would come to the plant operator and say, you know, there's a couple of guards we need to fix, tighten up, or whatever. And so then they

would make a plan, get that done, and then fix them.

MS. McCONNELL: This is very helpful. Thank you.

Do you have any questions?

MS. LIM: I think -- I think -- I think what we fear, though, is whenever we write that stuff down, then it -- then we become, you know, more liable if -- and that competent person becomes -- they fear if they write anything down or if they have to become more liable that if something happens, then they're going to get in trouble by MSHA when those inspections are done.

MS. McCONNELL: Okay.

MS. LIM: And it is a big fear. I mean, whenever I start -- whenever I do training and I tell my people, this is how it is, they're like, well, I don't know that I want this job. I don't know that I want to be the competent person. I don't know if I want to be a lead man on your crusher. They don't want it.

So I don't know how to take that fear away from those people but have them be accountable and step up to that position.

MS. McCONNELL: So the fear is more associated with the signing and dating or the

recording of the hazardous condition, or a combination of everything?

MS. LIM: Combination, and that they'll be prosecuted if something happens. I mean, that's what -- or fined.

MS. McCONNELL: Thank you so much. Wait, let me turn to my colleagues.

Anything?

Thank you very much.

Anyone else? Oh, we have a couple.

You know the rule.

MR. BLANK: Yeah.

Hello. My name is Keith Blank, K-e-i-t-h, B-l-a-n-k, health and safety manager for Garnet USA.

To start off, I mean, this is -- as being health and safety manager, that was a career choice. It wasn't just an opportunity. It's something I chose to do because I do care about the health and well-being of people around me and people I'm working with. And I do feel that in some form, whether it's putting more attention towards our current standards that are out there or adding new ones, that there should be a little more emphasis on their inspections.

With that said, I think there should be

some more clarification. I have a few questions. Some things have popped up in my head.

So clarification on exactly what areas are going to need to be inspected. So it says before work is done in that area. To put into an example, we have one plant that's going to run, but our other plants aren't going to run for our processing facilities. We have to access that facility. We have to drive through the other areas to get to that facility. What's the extent of the work? Is that where the person's on the clock, they're driving, they are accessing through an area to get to the area that they're going to actually physically be doing their job in? Is that work for them to be driving through that area? So is every single area that could be accessed or potentially accessed, driven through, they all need an inspection before work is done. So if you had two people come in, they have to inspect all of the areas there could be access.

Another thing that comes to light is, say we have staggered shifts. We'll have somebody come in early to start plants, somebody stay later to shut down plants. It has to be -- these are inspections that are going to have to be done before work is done, but what's the timeline? If the next shift

1 starts three hours later, will there have to be
2 another inspection completed in that area, or is the
3 one that was done at the beginning of the first shift
4 sufficient to account for both of the shifts because
5 they're overlapping?
6 Another thing. So yes, we do have one
7 person that will be a competent person that is doing
8 those inspections in the areas. But let's say
9 somebody's walking along and finds a hose on the
10 ground. That was an example used earlier. We have a
11 tripping hazard. They rectify it, pick the hose up,
12 pick the cord up. Is that something that has to have
13 a corrective action noted? Yes, it was a hazardous
14 condition; it was immediately rectified. Does there
15 have to be some type of corrective action noted on
16 that inspection?
17 For notification of the miners, once
18 again, if it's something that was immediately
19 corrected, do miners have to be notified of that?
20 Yes, it was a hazard that was found. They corrected
21 it immediately. Do we still have to notify miners
22 that this was something that was found, or is it
23 something that is still an existing hazard
24 specifically?
25 And, you know, of course I'm sure it's

1 going through everybody's head on how they're going
2 to notify all their miners. Is there going to be a
3 sound board? Are you going to use the radio? Are
4 you going to have a whiteboard that you write
5 everything down for each area and have people have to
6 stop and access it? Would a simple boundary barrier
7 with an information tag around that specific hazard,
8 something along those lines suffice? So it's not
9 directly when they're entering the work area, but it
10 would be before they're actually exposed to those
11 hazards.
12 And the examinations have to be signed and
13 dated by the end of the shift. Would it have to be
14 the same person that was doing the initial
15 inspection? So let's say for some reason that person
16 had to leave and they're gone, or we did have that
17 staggered shift where there's two hours extenuating,
18 they're sticking out on each end of that shift. So
19 we have one person start it; they're not able to sign
20 off. Is there another person that can go through and
21 look at it and say, yes, I'm a competent person, we
22 had these hazards, these were the corrective actions;
23 and they can sign off on it?
24 So I just think that it would be nice to
25 have a little more clarification on what the rules

are. So a big part of it is we'll take that interpretation of the inspector out of the equation a little bit more. We have one come on and say, yes, work was done in this area; or, no, he drove through, he didn't actually do any work here. Well, he did drive through, so he did work. There should have been an inspection in this specific spot.

MS. McCONNELL: I want to thank you for your questions that you're asking us in terms of clarifications that are needed in the proposed rule. I think they would be very helpful. I don't have any follow-up questions.

MR. LICHTENFELS: I don't have any.

MS. McCONNELL: Thank you. This will be very helpful. Thank you.

MR. BLANK: Thank you.

MR. FARONI: Thank you for allowing us to speak.

MS. McCONNELL: You're welcome.

MR. FARONI: Thank you. Michael Faroni, also with Barrick Gold Corp.

And some of the ideas that are concerns that I see with this workplace exam that's come out is -- it seems to be a common philosophy -- is interpretation. There's broad room for

interpretation for this, meaning network (working) place exams, what an apparent hazard is.

Inspectors we know have their related fields. Some have an expertise in electrical; some have their expertise in mechanical; some have their expertise as a general miner; some have their expertise in surface operations; some have their expertise in underground. Because that interpretation, or what they're -- of what a hazard is varies greatly.

At the facility that I work at, we have five mine IDs alone: two surface open pit operations, an underground operation, two processing facilities. From that area, we see a lot of different interpretations as you go through the different areas.

In your PPL letters already that have been sent out, different interpretations have been given, such as the latest one where the definition -- or gives an example of whether three violations are found in a work area constitutes workplace exam violation, that there is a citation issued just based on that sole opinion alone. So you don't have a clarification of what a workplace area is or what that definition can conclude, because it's a wide

brace. It's up for interpretation again. That can be far reaching of what that includes.

So what I was wanting to -- or concerns that would be here is we do -- with workplace violations or workplace exams, what constitutes a hazard, we need to be specific to that. You know, does it relate back to a standard that can be done to it? I think the comment we often hear is common sense. Well, common sense is only common to the person it's common to, right, meaning that an underground miner -- you weren't understanding what a drift was. You have no common sense in that, correct? An underground miner would know that it would be common sense, a drift is an open hunt, just like an open pit operation level would be a drift or a step to it out to a processing area. A circuit would be an operator.

So that's where I'm getting at is when we do these interpretations imperatively, when we look at these, we take the time to coach our inspectors that go out there and not leave it open to interpretation, because there's such a broad range of inspectors that are out there. We see visitor inspectors from different areas. Again, they see different focuses.

The other aspect of this that hasn't been touched is contractors working in the same areas. We've seen an interpretation. We've actually had inspectors say when an operations comes into a work area, they need to do one; when a maintenance person comes into that same area, a workplace needs to be done; and when a contractor comes into that workplace, a workplace exam needs to be done. There's three. You were concerned about how a thousand workplace exams can be done, period. Well, you can see how that adds up pretty quickly. And each area would have to do that.

And again, we're up to interpretation again. Each person may have a definition of what a -- what a hazard is and what needs to be done in that area to correct it, whether it can be done at that moment or if it needs to be planned accordingly out in the future to be corrected. Right?

And what we've seen is creatively misinterpreted inspectors will grab the three to that and look at the three of them and go, wait a minute. Well, this was identified; why didn't the other two identify that? And we play that advocate of going, well, somebody recognized it, but you guys and the other can't? Or during the inspection, conditions

had changed from when the original was done. Well, why didn't you understand that it's an adverse hazard? Why didn't you pick that up? Again, it's up to interpretation.

So I think we've hit it -- you know, everybody here has hit it pretty heavily that clarification is really needed in this, because we get a broad interpretation.

As far as the finances, think of the amount of time that when a creative and citation or a notice has been found, think of the time and effort that companies need to put in place to go to litigation and have these frank conversations after the fact. There's a huge cost in that. And we're trying to correct something ahead of the game.

In the past, we've been working at -- I would say the industry has been working at giving a definition to the current standard already, and we're leaving it, again, as a broad base. We're trying to change it, but we're still leaving a great room for interpretation with this standard.

And I'd say unitedly the people that are here are looking for a lot of clarification so that we can all be on the same page so an inspector doesn't get a creative misinterpretation because he's

an expert in electrical. Joe the miner might not know all the hazards dealing with electrical. He may know, I just stay the hell away from electrical hazards unless I don't have to be here, And if I do, I'm going to go get trained and ask about it. Correct?

So that's what I ask the group here today is how do we do that creative interpretation and how do we do it with contractors or different groups that work in the different work areas, and what is required of it? Because we've already been seeing that from our inspectors, just from the PPL letters that have gone out and suggestions and the creative misinterpretations, and already the costs that we've had to have, conversations with litigation going back to it. So --

Short and sweet questions for me or for our group?

MS. McCONNELL: Mr. Blank, thank you very much. You brought up some interesting points for the record, and we appreciate that. I do not have any follow-up questions.

Marvin?

Thank you very much.

MR. FARONI: Thank you.

THE REPORTER: I'm sorry. What was your last name?

MR. FARONI: Faroni. F-a-r --

MS. McCONNELL: Oh, I'm sorry. I apologize for that. I referred to him as Mr. Blank, and I didn't -- I referred to the last speaker.

MR. FARONI: That's all right.

F-a-r-o-n-i. Thank you.

MS. McCONNELL: Do we have any other remarks for the proposed rule on metal/nonmetal working place examinations proposed rule?

I'm just pausing here for a second as everyone collects their thoughts and considers whether or not they'd like to come down.

MR. SALVO: Yeah, I've got a suggestion.

MS. McCONNELL: Come on down.

MR. SALVO: Sorry.

MS. McCONNELL: Just -- you have to reintroduce yourself.

MR. SALVO: Mike Salvo, S-a-l-v-o.

As far as the workplace examinations, if we had a written action plan with the hazards that we already know exist in that area or what we're trying to mediate, and we went over that action plan, that might help in what you guys are trying to achieve

with the reduction in deaths and injuries.

And then the miners and the representatives need access to those area exams from previous shifts. It could tell a lot in an ever-changing environment. You know, we were seeing water here; why don't we see water here? You know, there's rocks here. You know, it could -- by being able to examine the last shift, it could lead to finding potential failures in equipment or other places in the mine.

And then -- yeah, other than the -- then he hit on hazards, 5000-23's and recognitions. And in mining sometimes there's various chemicals, conveyors, stuff like that. I do think that hazard training does need to be done on known hazards in that area. You know, a 5000-23 -- if we know it's hazardous or potentially harmful, yeah, those miners -- a piece of paper stating that we told this gentleman about it, we trained him on it. Even if it's more paperwork, it's worth it. You know, this guy is going to go in knowing how to abate being harmed by a hazard that's already known. So chemicals, conveyors, stuff like that.

But yeah, I think instead of putting it all on the operator to do these inspections, an

action plan before starting work, a written action plan, you know, everybody signs on to it and knows what they have to do.

So that's all I've got. Thanks.

MS. McCONNELL: Thank you.

Is there anyone else?

MR. REDDING: Good morning.

MS. McCONNELL: Good morning.

MR. REDDING: My name is Kim Redding, and my company's name is N-Compliance Safety Services, Inc. And I represent or work for over 365 companies, all the way from Gale Lim, which may be a two-man operation, to Tronex, which is a thousand people. And so I've worked in mining since 1989. I've been an MSHA inspector. And I now help companies deal with MSHA, and I do workplace exams for them.

And one of the things that the metal/nonmetal guys in this room may not know is that MSHA has been required -- or requires on the coal side that you get a blue card or certified by MSHA to do workplace exams. And you started this out by saying on the metal/nonmetal side we've had 110 deaths since 2010, I believe. And where MSHA bore the responsibility of certifying miners and competent people on the coal side, they've killed more than

that in one disaster in the coal side.

And so I just want it to be known that on this side, the metal/nonmetal side -- and I know everybody in this room works hard to keep people safe.

One of the concerns with this workplace exam push, because we already have a law for workplace exam. Most of the people in this room keep records. I've worked for Newmont Gold. I've worked at Barrick Goldstrike as a contractor, both as an electrical contractor out there and also as a consultant to help them do workplace exam. And they pass down the workplace exam. Every shift I was required to come in and look at the prior workplace exam.

A lot of problems people have is -- like, let's look at the word "adverse." That should be defined. For instance, so is a cracked window on an operator station adverse? Like, DOT clearly spells out that the crack has to be -- I'm just using an example of a piece of mobile equipment -- has to be over the windshield wiper, which is reasonable. Yet we've been cited plenty of places where there's a crack in a small side of the corner. And so because it's not spelled out, then it's open to

interpretation.

And I know you guys know that, because at the mine academy we're taught constantly to be consistent. And I think the inconsistency comes from at the same mine academy you're taught, this is the law, but whatever the district manager says is what you do. And -- so that may not be known to everybody in this room, but it is known to me and it is known to you.

And so from a consistency standpoint, that is what these people are asking for is, make it clear. If you just make it clear, it will be done. Now, I know not everything can be clear. I get that. And I understand that when the laws were written, in a lot of ways metal/nonmetal was smarter to write their laws ambiguous, because when the laws were written in the '70s, we did not have 400-ton haul trucks. We did not have boring machines. We did not have roasters. We did not have these things that still fall under the same law and still apply.

So whether it's the most simplified operation or you're working at Barrick and you're producing rock or oxidizing rock in the same way a volcano would, metal/nonmetal laws have always covered those things.

Where we run into things is, what's adverse? Like, what if you did find three violations in my work area? What if three of those I left my middle name off? Like, I know one of the gentlemen in this room that got up and testified has a $13,000 ticket for a piece of paper. That's what people are concerned about.

Also, like Sheri brought out, if I have to sign and date that, that's the big question is, what if I made a mistake? Because MSHA is not the end game. And the attorneys in this room know that, too, that whatever MSHA writes a ticket on can write you -- open you up to liability and a lawsuit, even as an individual. So if I'm a miner's rep filling out the workplace exam and I sign it and date it and a mistake was made, there's bigger ramifications than just this rulemaking. And I think everybody in this room knows that, but maybe they can't articulate that.

And so there has to be some kind of reasonable or balanced view of this. I'll give you a for instance. I was just out in Oregon and came in two hours after the MSHA inspector was there two weeks ago. He found one violation; I found 20. When is MSHA held accountable for leaving things behind

and not being able to see things?

I worked on a fatal up in Wyoming, because I'm a fatal investigator, where the inspector had been there two weeks before and a young man got into a tail pulley and got his head tore off. I go in there and find 65 violations two weeks after an MSHA inspector is there. I hand it to the same MSHA inspector. The workplace exam I did around the area that wasn't cordoned off, I found 65 violations that he did not.

And so I think fair should be fair, and I don't think that's what happens. And I think that should be written in the record, too, that these mine operators care about their people. I work with the owners; I work with the workers. These owners stay up at night worried about their workers. I don't think that's in the record. I've heard from these different guys that are talking -- these are people who care. We all care.

I work for 365 companies. I know that MSHA cares. But we're out of balance. Where I get ten citations -- I just was contesting some tickets where on one piece of paper we got four violations. We didn't put the date right. We didn't have the individual's middle name. We didn't have one

initial. They had done the training and had forgot to follow up with the inspector, and we got a ticket for that.

And so one piece of paper where we put the date, we initialed it, and we put their middle name has now kept the miner safe? And that's a problem. The fact that the fining process has been changed where those paperwork violations now count against our record. And everybody in this room, every one of you sitting at this table have had the government agency come in and tell you, you forgot an initial. I don't know how many times things were FedExed to me from the district office because I forgot to initial something, and they didn't want to get in trouble.

And so when you're doing paperwork, workplace exam, and things aren't clearly spelled out -- for instance, I'll go into a place and say, you guys need to do workplace exam; and they say, well, we never heard of workplace exam. We do JHAs, or we do JSAs, same thing. I have a five-point card. If I'm an inspector and you're telling me you don't know what a workplace exam is as a worker, wow, off they go. This place is not running properly, management doesn't care, when, in fact, I have trained -- companies have brought me in just to train

workplace exam over and over and over again. And because we're humans, we may not recognize it.

One of my jobs -- I work with CalCIMA and Oregon Independent Aggregate Association and these different associations -- is we go talk to congressmen and senators. And I go in through their office on purpose and look at all the garbage cans with food and don't have a lid on them. And so when I sit down with the senator, I let him know he has 18 violations in his work area, and that if he worked at an MSHA site he would now not be eligible for hundred-dollar tickets, and they think I'm crazy. And we think it's crazy, too, that there's no balance.

Like, what's adverse? What is adverse? When they're talking about someone looking at something in that moment, is it adverse? It can be a violation without being adverse. So I understand something could be a violation of the law, and we need to rectify it. But is it adverse? That needs to be clearly defined as to what adverse is.

I'll give you an example that's not mine related that just happened to my cousin this week. He owns a restaurant, small hamburger joint, and he said he was standing at the freezer. He's an owner,

so he's in thought, thinking about, who knows what, probably trying to figure out what food order he needs to make, why his workers aren't coming in, whatever the case may be.

One of his young workers spilled some mayonnaise behind him and was in the process of mopping it up when he stepped back, fell, tore his bicep and had to get ten stitches in his hand. It wasn't adverse. They were cleaning it up. But that can be how something quickly changes to where that would be considered S and S. And because he's 50 like me, and a fall of that size can also be catastrophic.

So what's adverse? And for reality, we're punished for everything, any mistake we make. I'll give you a for instance. Recently, about three months ago -- or a year ago, excuse me; it's been a year already -- we had an inspector come in and start an inspection July 7th at a place, and then he started calling the mine operator in September wanting to know why things weren't fixed. And so mine operator's new to mining, he doesn't even know what MSHA means. He doesn't understand.

So I asked him, did the inspector give you citations? No; we haven't received anything. So I

called the inspector and said, you're calling my mine operator and yelling at him. Did you send the citations in the mail? No, I haven't typed them up yet.

In 104(a) the Mine Act clearly says those things have to be given to us immediately, and yet MSHA made us go to court. My mine operator couldn't afford it. We ended up settling those tickets because they couldn't pay the attorney 20 grand for 26 citations that MSHA violated the law on in 2015.

And so it's like two standards here. You guys come in and tell us, we've had 110 fatalities. You guys are responsible for the workplace exam on the coal side, and you have way more than that. And had the EPA not killed coal, you would still have more than that.

So I think those things need to be said and in the record. And MSHA has quantitative information, because you're responsible for it on the coal side. And really there's very little difference when it comes to the laws of physics on the coal side versus metal/nonmetal. Other than that, rock burns and kicks out methane, but we have mines here that kick out methane.

And so I just wanted to make sure that was

in the record and that when you guys are looking at what you're doing -- because everybody sees us as just another hammer. It didn't work on the coal side, so how is this hammer going to work now?

You can already write us a ticket. You can already write us a ticket. I was writing tickets in 1999 for guys having so many violations in their work area. And I'd write them a ticket for not doing a workplace exam, and they would fly. So I don't know why we need to make this law unless it's just to hammer us some more.

So that's -- I just needed to say that. So if you have any questions of me, I'd be glad to answer them.

MS. McCONNELL: Well, I thank you for your remarks. I don't have any questions.

MR. REDDING: Do you, Marvin?

MR. LICHTENFELS: I appreciate your comments. Consistency is an important issue, and we work at it all the time.

MR. REDDING: I know you do.

MR. LICHTENFELS: I know you know that. Hopefully, we're getting better. And there are some things that have been done that have made improvements. And we appreciate your comments.

Just one general question. The big difference in the proposed rule and the current rule is before work begins and anytime during a shift. What's your feelings on that?

MR. REDDING: Well, I tell my companies that they need to do it. It's got to be an ongoing thing with workplace exam, because even like weather conditions changing -- so if I come in and do my workplace exam in Green River, Wyoming, at 8 o'clock in the morning and it's December, by 10 o'clock it's heating up and those rocks are starting to move.

Or barometric pressure above -- if I'm underground and a storm front is coming through and it hasn't reached me yet, my workplace exam is going to change as the day goes on. So it has to be a throughout-the-day thing. I know it does. So -- and we teach on it.

So -- and that's the thing is I'm a fatal investigator, so there's not a law for not using a cell phone. And I just recently worked for a company where we had identified we needed berms and workplace exam. They told the guy to go build them. And he was taking a selfie of himself in a 769 haul truck, not wearing his seat belt, went off the top and cost us millions of dollars. And there's no

responsibility on him. As a matter of fact, he sued the contractor I worked for that we were just near by. And so I think there has to be some kind of responsibility.

And as mine operators, they know that they have to discipline workers, like, that's already -- we know that. But we have a diminishing workforce as well, and everybody knows it. It was in U.S.A. Today's money section two years ago where 46 percent of the mine workforce turns 65 this coming year. So we have a hard time with states nearby, Colorado and Washington and Oregon, getting people to pass a drug test, although you don't have to be in those states to not be able to find workers.

And so that's our concern is they're going to have people say, I'm just going to work at McDonald's, because I'm not going to be sued as a worker because I missed something in a workplace exam. And as an MSHA inspector and working with MSHA, that was a concern of ours as inspectors is what if we miss something? Because we could be held liable.

So that's -- like, everybody's on -- everybody wants the same end game here. And our fatals are down. We're at record low. And so

nobody -- why not you just put it in -- why don't you put workplace exam in like you did preop with the rules to live by and enforce it stricter? Like, you already have the tool. Why do we have to make this tool to where it's so rigid and hammerlike that all you can do is fail?

Like, you heard all these different things, like, who signs it? Like, I'm the one who identified it as a problem, but Joe over here doesn't know what I'm talking about, but he's got to sign off on it as being fixed. And you know that as well as I do that one inspector will come in and say, something's good, we have pictures of it, and the next week we have an inspector saying, it's no good. So that's human. That's not just MSHA.

And so if I'm the one who signed off on it and now Joe's saying it's good and it's not, I'm in trouble and so is Joe. And that's a problem. So what's adverse? And, you know, and it's a big concern everywhere.

And that's what I'm seeing is you guys have already put out two PPLs and you've made it very clear what you've expected. My companies are already doing that. They already have a checklist. When I worked at Newmont in 1990, we had a checklist. When

I worked for Heckla in 1989, we had a checklist and we were held responsible for it. And when we came in on the next shift, we were required to sign the book saying we looked at workplace exam. Every work -- I was a worker.

And so those pass-downs always happen, but if it has to go on paper, if everything has to go on paper, we're just setting ourselves up for failure. And then if you can get a $13,000 ticket for a paperwork violation, it's crazy.

And so if you guys were held to the same standard, I'm pretty sure you'd see our side of it.

MR. LICHTENFELS: So one more question.

MR. REDDING: Okay.

MR. LICHENFELS: You mentioned it and a couple of other folks mentioned it, the fear of signing an inspection --

MR. REDDING: Yeah.

MR. LICHENFELS: -- when the current regulation said the name of the person who did the exam.

MR. REDDING: Sure.

MR. LICHENFELS: So the difference is the signature that is --

MR. REDDING: I just think, like -- like,

why do we need to change it? What's the purpose of changing it? What's you guys's end game? Like, we have a good workplace exam standard, so what -- like these guys are saying, it's like redundant where I'm doing hazard training. And the one miner's rep had brought up, well, I need to know what chemicals -- it's already required. HazCom law already requires that, and then task training already requires that. And then site-specific already requires that, and hazard training. And then I'm going to make you fill out some more paperwork.

So these miners -- like, if it was the old days where I had to hold my 5000-23's like we used to have to have them on our bodies, holy crap. I'd have to have a backpack with 5000-23's. And then as an inspector, because I can do the same thing, I can go in and scrutinize you guys's paperwork and find all kinds of problems. Anybody could do that with the paperwork. And that's -- that's just a concern.

You guys already have a good law. We have record low fatalities. MSHA has changed now where they're putting out the accidents that are occurring, not the fatals. We're in the right direction.

And so I'm pretty sure I can speak for this group, although I don't know everybody in the

room, to say all we see is another hammer. Like, why -- why do you need to sharpen this ax? You've already got a pretty blunt instrument. And you can accomplish anything -- we can accomplish anything -- I used to write the tickets, and they would fly and people would fix things. And most of the mine operators, even as an inspector, just wanted to know what do you want, and that's what we'll do.

And, you know, guarding has always been an issue. And even with you guys putting out your guarding booklets, the inspectors will come in and say, that's not adequate. And the good thing is we now have pictures where we can go show them and say, this is what you guys said was adequate.

And so even -- all the training you guys do, and I know you guys do lots of training with your inspectors. You know, just like the one guy was talking about with workers, they're workers. So you could do all the training you want to. I went to the academy with several guys that ended up flushed out because they had issues, like packing guns or alcohol issues or all the same things we deal with.

So -- so that's our concern is you already have a good law. It's effective. All these guys do it. I've been working around these places forever.

Do they recognize everything? No. That's why we constantly train every year. That's what workplace examines. And I promise you that's what happened, especially the places I'm at. We go over all those papers you guys send out. Those pictures that you guys send us aren't wasted. We talk about them in depth.

So I just want to make sure that's on the record. Do you guys have any questions? I know you do.

MS. McCONNELL: Marvin, do you have any questions?

MR. REDDING: Thank you.

MS. McCONNELL: Thank you, sir.

Is there anyone else?

Good morning.

MR. JAMES: Hello.

MS. McCONNELL: Your name for the record.

MR. JAMES: Hello. My name is Patrick James, J-a-m-e-s, and I work with Rio Tinto. Rio Tinto is a global mining company, around 60,000 workers worldwide. In the U.S. our operations include Boron, Kennecott, two of the larger mining operations in the U.S., and also the Resolution project in Arizona, which will be the largest

underground project in the Americas.

So my comments are informal, but we do anticipate that our formal comments will be reflected in the NMA comments that will be provided formal.

So just a couple quick things as I've listened to the speakers today and to the panel. So I appreciate the opportunity to make a couple comments.

The first one is that -- so, just my experience is that I've worked in surface coal; underground coal; metal, both surface and underground, both in the agency function, health safety environmental function, as well as in operations. So I just throw that out as far as experience.

A couple of questions I have or comments I have on the proposed standards would be, I very much appreciate that the competent person definition hasn't changed, so that's good. But when we start talking about -- and workplace examinations obviously have a strong place in our environment. When we go into work areas, we should inspect the area to make sure that there are no hazards present.

But when we start to talk about the miners begin work in that place for conditions that may

adversely affect safety and health, what are we looking for? Are we looking for slip, trip, and fall hazards? Are we looking for injuries that could cause a hand injury, or are we looking for things that are going to cause a fatal incident?

Because the causal factors of those incidents are completely different. And I think you're quite aware that current studies today show that the Heinrich pyramid would not necessarily apply to the causal factors of many fatalities. So I just throw that out. They are different causal factors. So what are we looking for by adversely affect safety and health? Slip, trips, and falls, or fatal risk?

The other one is that -- the other comment I just want to make is that when we talk about records of each examination -- the gentleman earlier, I think the first speaker, threw the number out 100,000, and that drew some reaction from the panel. I find that completely conservative. We're talking hundreds of thousands of records, right, that are going to be created.

And then my question would be, then -- or my comment would be, what do we do with those records? Because data is only important if you can analyze it. You know, data for data's sake adds no

value unless that data is only going to be used for the inspector to write a citation. But what are we going to do with the data? Hundreds of thousands -- we find that in our own company. You know, we require documentation on a lot of different things, and we're moving away from that. You know, we're starting to use -- somebody was talking about smart phones. We're actually using applications on phones and smart devices now to start tracking data, be able to analyze the data, geo map the data, where the risks are, you know, where we're not looking for risks, those type of things.

So just to have hundreds of thousands of records that are not really going to be utilized other than if there's an accident and an inspector can use that as a citation doesn't really make a lot of sense. And if the intent is to protect the health and safety of the miner, additional paperwork is not going to achieve that.

So those are just my two very informal comments. I'm open to questions.

MS. McCONNELL: And I thank you for those. And I just have something -- for my own clarification, I'm asking for this to better understand the number of records to be created. So

right now under the existing rule, examination has to be conducted at least once per shift and a record has to be maintained. But what we don't clarify in the existing standard is -- and what we're doing in the proposed rule is saying what that record would contain, the contents of that record.

So that's kind of a change -- in addition to the timing, that's the other substantive recordkeeping change, an existing record of what was inside of it.

So I guess I need help in understanding how our proposed rule would increase the number of records. That's where I'm confused.

MR. JAMES: Yeah. Well, and we're saying right here that the records shall include -- it gives all kinds of different data for each work area.

MS. McCONNELL: So for each work -- so under the existing rule, you do not see that there would be a record for each work location now?

MR. JAMES: Not necessarily.

MS. McCONNELL: Okay.

MR. JAMES: Not necessarily. And in a lot of situations -- and I think another gentleman also commented about you'll have workers complete pre-task hazard assessments. Those workers are competent.

You may not then go back in and do an additional record on that. You know, maybe you do the pre-task hazard assessment, take five, unless you're -- it's an individual risk assessment conducted by everybody in the workplace. You know, would that be -- would that be an adequate record? Or does it have to be a special form that meets all the requirements as you have -- obviously would have to meet all the requirements, or there's another option for a citation. But yeah.

MS. McCONNELL: Okay. That's all.

MR. JAMES: But I think the total number of -- you know, I don't think I know that we're talking hundreds and thousands of records that generally will not be used.

MS. McCONNELL: Thank you.

Marvin? Gentleman, anyone else?

MR. JAMES: Thank you.

MS. McCONNELL: Thank you.

Anyone else who would like to come down? Just another pause as everyone thinks about that.

I'm just going to offer it one more time. Anyone like to come down offer some remarks? These have been extremely helpful and appreciated by MSHA in helping us craft a final rule.

Okay. Since I see that no one else wishes to make a presentation, I'm going to conclude this hearing. I thank everyone for coming forward and making a presentation. I also thank everyone else who attended the hearing. It shows your interest in this rulemaking, and I want to emphasize again that we need any comments you have by September 6th.

We will take all of your comments and concerns into consideration when we develop the final rule. And I continue to encourage you to participate and provide your comments during this rulemaking process.

So thank you very much, and our public hearing is concluded.

(The hearing concluded at 10:47 a.m.)

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REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, VICKY McDANIEL, Registered Merit Reporter and Notary Public in and for the State of Utah, do hereby certify:

That on July 19, 2016, the foregoing proceedings were reported by me in stenotype and thereafter transcribed, and that a full, true, and correct transcription of said proceedings is set forth in the preceding pages.

WITNESS MY HAND this 26th day of July, 2016.

Vicky McDaniel

Vicky McDaniel, CSR, RMR
Notary Public
Residing in Salt Lake County

Testimony re MSHA's Proposed changes to Workplace Inspections (Docket No. MSHA-2014-0030)

Introduction

Thank you for the opportunity to speak today. My name is Brian Biglely. I am safety manager of Lehigh SW Cement's Tehachapi Plant in California.

Today, I am also here to speak on behalf of the California Construction and Industrial Materials Association (CalCIMA). It is the trade association for aggregate and industrial mineral companies in California. The members of CalCIMA include over 250 mining operations in California, producing everything from local aggregates and minerals for construction and agriculture, to unique commodities key to the nation's manufacturing, high tech, and green technology industries.

Opening

I think it is important to keep in perspective how important safety is to the industry, and, how much mine safety has improved over the years.

We take mine safety seriously. I believe I can speak for everyone in this room, and all mine operators, that one fatality is too many.

In addition, we believe the work place exam is an important safety tool. The goal of every operation should be to ensure that miners enter a safe work place.

We also believe that any new regulation or standard should be carefully considered for how it will further the goal of mine safety. With this in mind, we have some comments and concerns about specific aspects of this new rule. We have a general concern that this rule is creating a new paperwork requirement without really advancing safer workplaces.

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We think it important that a proposed rule—especially one that appears to have a far reaching administrative impact—have a well-defined nexus to a problem or concern.

While the stated intent is to reduce fatalities, no objective evidence is offered to support this conclusion. While this is admittedly difficult to quantify, if this is the entire reason for this regulatory change, some evidence should be provided to prove that it is necessary and will achieve the actual benefits claimed, as a counterbalance to the cost needed to comply, both in terms of dollars and time.

Definitions of key parameters:

A key concern is that this regulation, as proposed, is ambiguous in several aspects and will expand beyond its intent. This has often been the case with MSHA regulations. Imprecise wording has caused inspectors to gradually expand jurisdiction, until a standard is applied to miscellaneous things for which it was never intended.

One example of our concern is how the rule proposes to define "adversely affect"? With this new program, all hazards that "adversely affect" a miner's safety need to be communicated. Does an extension cord on the ground, a tripping hazard, "adversely affect" the health and safety of miners that could come across it? Is a pile of material that could be walked around an adverse effect? If an examiner comes across something that adversely affects safety, this regulation requires certain actions. In the interest of training our examiners, it would be nice if MSHA could better define this term, so that laymen could utilize it. Otherwise, we are at the mercy of every inspector and the ever changing definitions of "adversely affects" that they bring with them each inspection.

Comments on Practicality of Specific Provisions

There are several requirements of the proposed rule that appear difficult to implement, or seem to lack clarity in how they will be implemented.

For one, the rule will require operators to communicate to miners the potential hazards found in an exam. What methods of hazard communication does MSHA suggest for typical items found on a workplace examination? How does an examiner communicate

to all miners what has been found? One difficulty with the wording as stated is that they notify miners "in the area" What does this mean? Miners that might be entering the area later? How is that best communicated? Through tags/signs/postings? What about twitter, or tweeting?

Is an announcement over a radio sufficient for communicating hazards? How would this be done in a mine with a 50 workers going about their exams? Must the operator communicate all hazards found, or only those they can't abate? For instance, if you find material in a walkway, and clean it up yourself, must you note it, communicate it, or since you abated it immediately, you don't need to? Since MSHA would prefer the inspection be done prior to work, who gets communicated to? Incoming shift workers, not yet in the area? Not yet at work? Again, it would be helpful if MSHA can be clear on what is required.

There is another proposal in the rule to require recordkeeping. How would MSHA best proposed mine operators do Recordkeeping of hazards abated. For example, the examiner finds a pile of material encroaching a walkway. Typically, they would notify an area crew to clean the pile/remove it. Perhaps the crew can achieve that later in the afternoon, or early the next day. Who then records the completion/abatement of the hazard on the workplace exam form? A light out in a rarely used building. It is one of four lights, so the priority to replace is low. Two weeks go by, and the light is replaced. Who updates the workplace exam with the abatement time/notations? A guard is found to be loose, but still in place. The motor is scheduled to be replaced on the next down day, one month from now. Who updates the workplace exam(s) that note the loose guard when it is replaced? Again, clarity would be helpful.

Conflict/Duplication of efforts

MSHA states that a description of the corrective action and the date the corrective action was taken is required as part of the workplace exam record. Many operators already have systems in place to track work orders, repairs, etc., including completion. When such systems are in place, requiring this same detail on the workplace exam itself is duplicative and provides no benefit; moreover it would increase administration time

without making the workplace safer. In fact, duplicative efforts would take time that could be spent in making the workplace safer, and eliminating hazards. We hope MSHA can consider how this new requirement does not duplicate what is already being done.

Regulatory Experience: The GOTCHA laws

A real concern for mine operators is that this new rule may have the unintended consequence of being just another way to cite mine operators. For this rule to have validity with the workforce, it will need to be seen as protecting workers, not just a punitive tool.

MSHA wants operators to find conditions that may affect safety and health of workers, sign and date the record, document findings and corrective actions, notify employees of these conditions and make records available to MSHA and miners. If MSHA wants all this documentation provided openly, for the purposes of creating a safer workplace and preventing injuries, then MSHA needs to provide protections to operators such that doing so does not result in "preparing the case against them" for purposes of issuing citations. Good faith efforts should be encouraged, not punished, yet current law does not allow for this protection.

These concerns are not far-fetched, as these recent examples attest:

- Being cited for a sign that stated "No Smoking, Matches or Open Lights in this area", because the standard requires the sign to say 'No smoking or open FLAMES".
- Being cited for using the incorrect font on a site specific training checklist
- Being cited for not including the middle name of an employee on a task training certificate

Suggestion

While we have concerns with the proposal as drafted, we offer this suggestion to improve it.

The standard requires workplace inspections be done. Rather than create an ambiguous big stick, use the carrot approach instead:

Require that every operator create and implement a workplace inspection program, similar to an operator having to create a training plan. You can have them meet certain criteria (when well defined by MSHA), and when a plan is created, it can be submitted for approval, or, like a part 46 plan, simply documented/shown to MSHA. Then, MSHA can simply ask the operator to demonstrate compliance to their own plan. Is the operator doing what they said they would do? Good, no citations. Are they not? Then issue a "failure to abide by the written/submitted/approved Workplace Inspection plan" citation.

This will give operators an incentive to be creative, to devise plans that work for THEIR situations, and follow them. And if they don't, there is no one to blame except themselves, for failing to do what they said they could do.

Conclusion

Thank you again for the opportunity to comment. We appreciate consideration of our comments.