

# PUBLIC SUBMISSION

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**Docket:** MSHA-2014-0030

Examinations of Working Places in Metal and Nonmetal Mines. 30 CFR Parts 56 and 57

**Comment On:** MSHA-2014-0030-0179

Examinations of Working Places in Metal and Nonmetal Mines - Proposed rule, limited reopening of the rulemaking record; notice of public hearings; close of comment period.

**Document:** MSHA-2014-0030-0198

Comment from Brian bigley, NA

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## Submitter Information

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**Organization:** NA

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## General Comment

A key concern is that this regulation is still ambiguous in the definition of adversely affects and that MSHA will expand this beyond its intent. Imprecise wording has caused inspectors to gradually expand jurisdiction, until a standard is applied to miscellaneous things for which it was never intended.

The standard still requires that all hazards that "adversely affect" a miner's safety need to be documented. Is a pile of material that could be walked around an adverse effect? What about a small puddle of oil, or a smear of grease? 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 beneficial if MSHA would define this, 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.

The rule to require recordkeeping of these conditions and documentation of their fix is still difficult to understand and implement. How would MSHA best proposed mine operators do Recordkeeping of hazards abated? Use an example that will be commonplace in many operations: A hazard is noted by an examiner (examiner 1), and documented on the inspection. A second examiner is also in the area, later, and also notes the hazard on his inspection sheet. Workers, who come to prepare the area for hazard abatement, also do an exam for their safety, and all three note the hazard (even if the hazard has been cordoned off, barricaded, etc., it is still

AB87-COMM-140

9/26/2017

a hazard, and a hard working examiner may still note it on their documents). If the hazard needs another shift, or a part that may not be available for a day, or a specialized operation (say, aluminum welding), it may exist for days, or weeks, and be noted on examiner's records. Regardless of WHY, it is very likely that a given hazard might be noted on multiple exams, by multiple examiners, in a mine.

When the hazard is abated, each of those exam records must be found, and the corrective action date placed on it. If ten exam records are made noting the hazard (by, for example, a crew of laborers each doing a workplace exam prior to entry), they all ten must be "finalized". If one of the exams gets turned in late, or is missed by the "abatement documenter", that exam is now citable. This creates a situation where the more pro-active a miner/examination program is, the more likely MSHA can (and will) find an error, and cite the company for it. The mine does everything right, goes over and beyond by having every employee looking for and documenting hazards, and earns a citation because MORE people are looking for hazards, rather than less.

Rather than dismiss this as "it can't happen, or would be rare", think about how many miners cross a parking lot on a snowy, winter day. If each of them noted in their workplace exams that "walkways are icy/slippery", then each of those exams would have to have a documented termination date. If you had 100 miners turn in an exam, and you managed to get the date properly on 99, but one stuck to the back of another inspection form and you missed it... you are just as liable for a citation as a company that did nothing at all. All it would take is the inspector looking through the workplace exams, and finding every one without a termination date.

#### Conflict/Duplication of efforts

MSHA states that this information is needed 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 should not duplicate what is already being done, let alone impede those processes.

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

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.

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## Attachments

October WPE comments

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

Thank you for the chance to submit comments regarding the adjustments to the proposed workplace Exam rule.

I know that the comments are limited to only two aspects of the proposed rule change to the Workplace Exam, specifically, that workplace exams may begin as miners begin their work, and that only adverse conditions not corrected promptly must be included in the workplace exam records. I will attempt to limit my comments to those specific areas, as requested, and comment on the infeasibility of MSHA still requiring that such records not be retained electronically, nor the absurdity of their claims that a working cement plant can be fully inspected by an examiner in an hour.

**Definitions of adverse conditions:**

A key concern is that this regulation, as proposed, is still ambiguous in the definition of adversely affects and that MSHA, in the future through inspectors, 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.

The standard still requires that all hazards that "adversely affect" a miner's safety need to be documented. Is a pile of material that could be walked around an adverse effect? What about a small puddle of oil, or a smear of grease? 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 beneficial 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.

The rule to require recordkeeping of these conditions and documentation of their fix is still difficult to understand and implement. 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.

Another example that will be commonplace in many operations: A hazard is noted by an examiner (say, examiner 1), and documented on the inspection. A second examiner is also in the area, later, and also notes the hazard on his inspection sheet. Workers, who come to prepare the area for hazard abatement, also do an exam for their safety, and all three note the hazard (even if the hazard has been cordoned off, barricaded, etc., it is still a hazard, and a hard working examiner may still note it on their documents). If the hazard needs another shift, or a part that may not be available for a day, or a specialized operation (say, aluminum welding), it may exist for days, or weeks, and be noted on examiner’s records. Regardless of WHY, it is very likely that a given hazard might be noted on multiple exams, by multiple examiners, in a mine.

When the hazard is abated, each of those exam records must be found, and the corrective action date placed on it. If ten exam records are made noting the hazard (by, for example, a crew of laborers each doing a workplace exam prior to entry), they all ten must be “finalized”. If one of the exams gets turned in late, or is missed by the “abatement documenter”, that exam is now citable. This creates a situation where the more pro-active a miner/examination program is, the more likely MSHA can (and will)

find an error, and cite the company for it. The mine does everything right, goes over and beyond by having every employee looking for and documenting hazards, and earns a citation because MORE people are looking for hazards, rather than less.

Rather than dismiss this as “it can’t happen, or would be rare”, think about how many miners cross a parking lot on a snowy, winter day. If each of them noted in their workplace exams that “walkways are icy/slippery”, then each of those exams would have to have a documented termination date. If you had 100 miners turn in an exam, and you managed to get the date properly on 99, but one stuck to the back of another inspection form and you missed it... you are just as liable for a citation as a company that did nothing at all. All it would take is the inspector looking through the workplace exams, and finding every one without a termination date.

### **Conflict/Duplication of efforts**

MSHA states that this information is needed 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 should not duplicate what is already being done, let alone impede those processes.

### **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, 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, apparently, from zealous mine inspectors.

These concerns are not far-fetched, as these 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 having a single working light in a standard, above-ground elevator that always had, and was manufactured with, only a single working cab light.
- 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.