From: Platt, Nicole <NPLATT@edwclevy.net>
Sent: Monday, November 13, 2017 8:49 AM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: RIN 1219-AB87, Docket# MSHA-2014-0030.
Attachments: Docket# MSHA-2014-0030..docx.docx

Good Morning please see the attached comments for MSHA's Workplace Exam Rule Proposal.

Thanks
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AB87-COMM-170

Suggested Comments on
MSHA's Workplace Exam Rule Proposal

Email address to be used is: zzMSHA-comments@dol.gov
Re: ***RIN 1219-AB87, Docket# MSHA-2014-0030.***

Introduction

Thank you for considering the comments outlined below. I work for Edw. C. Levy Co., which has 8 active mining facilities. Our company employs approximately 200 miners.

We appreciate the fact that the Trump Administration worked hard to change the earlier 2016 rule on workplace exams. However, we still have significant concerns. I'd like to present some of our concerns from the standpoints of our ability, as an operator, to effectively manage for safety.

Our industry has long been committed to workplace safety and health. And, this commitment is illustrated in the degree to which we've reduced injuries in stone sand and gravel. For each of the past 16 years – under the traditional 56.18002 workplace exams standard - our operators have reduced the injury rate 16 consecutive years of reduced injuries. The injury rate for stone, sand and gravel now stands at the record low level of just 1.95 injuries per 200,000 hours worked. We are far from convinced that a new standard is needed or justified.

Overview of key concerns

•Timing of Examinations: The new proposal would require that exams be conducted "before miners begin work in that place." MSHA has proposed to that exams would be required "before work begins or as miners begin work in that place." This does not provide adequate relief for the following reasons:

- It continues to unnecessarily constrain when operators conduct exams. Operators need flexibility, for instance daylight provides better visibility. Shifts are not typically uniform at all operations. Circumstances often change. The existing Exams standard provides the necessary flexibility.

- The phrase "that place" in the revised proposal is unclear and could lead to confusion. It raised uncertainty as to where specifically one should examine to cover work that is to be done by an oncoming shift.

- There is too much uncertainty here for enforcement.

•Documentation: MSHA has proposed to reduce the documentation requirement such that conditions that are found and promptly corrected would no longer need to be recorded, nor would their corrections. MSHA has advised that, for purposes of this provision, "promptly" means "before miners are potentially exposed to adverse conditions."

- While this proposal is an improvement over the 2016 rule, we suggested the agency consider a new approach here: further revising the documentation requirement such that conditions that are corrected during the shift on which the condition is found should not need to be recorded.

- If any new documentation provision of an exam standard is to take effect, operators should be afforded maximum flexibility in the recording of conditions and corrections, including use of **work orders** and **existing electronic databases** for documentation.

- We are concerned that the increased documentation requirement will lead to additional enforcement based solely on the examination records.

•Costs

- MSHA's accounting for costs of the 2016 rule, even with the revised proposal from September, doesn't seem to consider real-world consequences of the new regulation.

- We as an operator may need to hire additional employees to manage the requirements of the new exam standard.

•Notification: The revised proposal continues to fail to define what constitutes notification of adverse conditions to affected miners.

•Lack of Benefits: The initial 2016 rule was not predicated on any finding of unsafe work practices with the existing exams standard. It also could not identify any benefit to a new exams standard. The revised proposal does nothing to cure this defect.

•Vague and Unclear Terms and Provisions: The initial rule proposed in 2016 contained many vague and unclear terms and provisions. The re-proposed rule does not offer any clarification here. Vague and unclear terms include:

- The term "working place" remains troublesome as MSHA appears to consider areas commonly thought of as travel-ways as "working places" when the existing standard already differentiates between a "working place" and a "travel-way."

- The term "conditions that may adversely affect safety and health" was previously described by commenters as potentially ambiguous ; yet, MSHA failed in the September re-proposal to provide definitional guidance. This is particularly problematic because examining for "conditions that may adversely affect safety and health" is the touchstone of the entire rule.

- The term "promptly" for purposes of the notification requirement is subjective and could result in varying interpretations in compliance and enforcement. Additionally, although the revised proposal provided some guidance as to the term "promptly" - with respect to when conditions need not be recorded - that guidance remains subject to interpretation and requires greater clarification.

- The term "initiate appropriate action" for the remediation provision is also subjective and could result in varying interpretations.

•Individual Liability: Records maintained in accordance with the exams standard should not be used for the assessment of individual liability under Section 110 of the Mine Act against miners performing examinations.

•Duplicate Citations for Exams and Conditions: We are concerned that any new exam standard, even with the re-proposal, will more readily lead to MSHA inspectors issuing multiple citations for a single situation: one for the condition and one for the examination. We request that MSHA ensure that such additional enforcement not result from any revision to the exams standard.

Conclusion

While we appreciate the work done by the Trump Administration to relieve some of the burdens anticipated from the initial rule proposed in 2016, we remain concerned about the re-proposed rule, and the lack of clarity provided. The rule that's been in effect for decades is working well; a revision is not needed.