

# TRANSCRIPT OF PROCEEDINGS

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IN THE MATTER OF: )  
 ) Docket No. MSHA-2014-0030  
EXAMINATIONS OF WORKING PLACES )  
IN METAL AND NONMETAL MINES )  
PROPOSED RULE )

Pages: 1 through 87  
Place: Arlington, Virginia  
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## HERITAGE REPORTING CORPORATION

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

IN THE MATTER OF: )  
 ) Docket No. MSHA-2014-0030  
EXAMINATIONS OF WORKING PLACES )  
IN METAL AND NONMETAL MINES )  
PROPOSED RULE )

7th Floor Conference Room  
MSHA Headquarters  
201 12th Street, South  
Arlington, Virginia

Tuesday,  
October 24, 2017

The parties met, pursuant to the notice, at  
9:00 a.m.

BEFORE: ROSLYN FONTAINE  
Moderator

PANEL MEMBERS:

SAMUEL PIERCE, MSHA,  
Southeast District Manager  
for Metal and Nonmetal Mine Safety and Health

BRAD MANTEL, MSHA,  
Office of the Solicitor

SUSAN OLINGER, MSHA,  
Office of Standards

MICHAEL CURRAN, MSHA,  
Office of the Solicitor

DONALD VICKERS, MSHA,  
Metal and Nonmetal Mine Safety and Health

P R O C E E D I N G S

(9:00 a.m.)

1  
2  
3 MS. FONTAINE: Good morning. My name is  
4 Roslyn Fontaine, and I am the Deputy Director of the  
5 Office of Standards, Regulations, and Variances for  
6 the Mine Safety and Health Administration. I am the  
7 moderator for this public hearing on MSHA's proposed  
8 rule on Examinations of Working Places in Metal and  
9 Nonmetal Mines, which was published in the *Federal*  
10 *Register* on September 12, 2017.

11 On behalf of Acting Assistant Secretary for  
12 Mine Safety and Health Wayne Palmer, I want to welcome  
13 all of you here today and thank you for your  
14 attendance and participation.

15 The purpose of this hearing is to receive  
16 information from the public that will help MSHA  
17 evaluate the proposed rule that would make limited  
18 changes to the Agency's January 2017 final rule on  
19 Examinations of Working Places in Metal and Nonmetal  
20 Mines.

21 This is the first of four public hearings.  
22 The next three will take place on this Thursday,  
23 October 26, in Salt Lake City, Utah; on Tuesday,  
24 October 31 in Birmingham, Alabama; and on Thursday,  
25 November 2 in Pittsburgh, Pennsylvania.

1 I'd like to introduce the members of our  
2 panel. We have Samuel Pierce, the Southeast District  
3 Manager for Metal and Nonmetal Mine Safety and Health;  
4 and Brad Mantel from the Office of the Solicitor.

5 In front, we have Donald Vickers, who works  
6 for Metal and Nonmetal Mine Safety and Health; Susan  
7 Olinger, who works for the Office of Standards; and  
8 Michele Curran with the Office of the Solicitor.

9 These hearings are conducted in an informal  
10 manner. Formal Rules of Evidence do not apply. The  
11 hearing panel may ask questions of speakers and  
12 speakers may ask questions of the panel. Speakers and  
13 other attendees may present information to the court  
14 reporter for the rulemaking record.

15 MSHA will accept comments and other  
16 information for the record from any interested party,  
17 including those not presenting oral statements. We  
18 ask everyone in attendance to sign the attendance  
19 sheet. It's right out front.

20 As background, on January 23, 2017, MSHA  
21 published the final rule on Examinations of Working  
22 Places in Metal and Nonmetal Mines. The effective  
23 date of the final rule was stayed until June 2, 2018.  
24 This January 2017 final rule which strengthens and  
25 improves MSHA's existing requirements for metal and

1 nonmetal examinations of working places requires a  
2 mine operator to have a competent person examine each  
3 working place at least once each shift before miners  
4 begin work in that place; promptly notify miners in  
5 affected areas of any conditions that may adversely  
6 affect their safety or health; promptly initiate  
7 action to correct the adverse condition; withdraw all  
8 persons from affected areas when alerted to any  
9 conditions that may present an imminent danger until  
10 the danger is abated; create an examination record  
11 before the end of each shift that includes the name of  
12 the person conducting the examination, date of the  
13 examination, location of all areas examined, and  
14 description of each condition found that may adversely  
15 affect the safety or health of miners.

16           The record must also include or be  
17 supplemented to include the dates of corrective  
18 actions taken; maintain examination records for at  
19 least one year; make such records available for  
20 inspection by MSHA and miners' representatives, and  
21 provide copies upon request.

22           The January 2017 rule retains several  
23 existing concepts, definitions, and responsibilities,  
24 such as the definitions of competent person and  
25 working place, the conditions that may present an

1 imminent danger, and the retention and availability of  
2 examination records.

3 For example, the term "competent person"  
4 continues to be defined as a person having abilities  
5 and experience that fully qualify him to perform the  
6 duty to which he is assigned. A working place  
7 continues to be defined as any place in or about a  
8 mine where work is being performed.

9 On September 12, 2017, MSHA published a  
10 proposed rule that would make limited changes to the  
11 January 2017 final rule. The limited changes being  
12 considered would require that examination of a working  
13 place must be conducted before work begins or as  
14 miners begin work in that place.

15 The January 2017 final rule requires the  
16 examination be made before miners begin work in the  
17 working place. The proposed change would provide  
18 operators additional flexibility in scheduling the  
19 working place examinations by allowing miners to enter  
20 the working place at the same time that a competent  
21 person conducts the examination. However, as noted in  
22 the preamble to the proposed rule, MSHA intends that  
23 the examination be conducted in a timeframe sufficient  
24 to ensure that any adverse conditions be identified  
25 and corrected before miners are exposed.

1           Like the January 2017 final rule, the  
2 proposed rule would continue to permit mine operators  
3 with consecutive shifts or those that operate on a 24-  
4 hour, 365-day basis to conduct the examination for the  
5 next shift at the end of the previous shift.

6           As stated in the January 2017 final rule,  
7 however, because conditions at mines can change, MSHA  
8 expects that operators will conduct examinations at a  
9 time sufficiently close to the start of the next shift  
10 to minimize miners' potential exposure to conditions  
11 that may adversely affect their safety or health, and  
12 the examination record must include descriptions of  
13 adverse conditions that are not corrected promptly and  
14 the dates of corrective action for these conditions.

15           The January 2017 final rule requires that  
16 each adverse condition be documented in the  
17 examination record. The proposed rule, however, would  
18 reduce the mine operator's recordkeeping burden by  
19 requiring that the examination record include a  
20 description only of each adverse condition that is not  
21 corrected promptly.

22           A similar conforming change would require  
23 that the examination record include the dates of  
24 corrective action for only those adverse conditions  
25 that are not corrected promptly. Therefore, under the

1 proposed rule, when adverse conditions are corrected  
2 promptly, there would be no requirement that the  
3 examination record include descriptions either of  
4 those corrected adverse conditions or of corrective  
5 action dates for those conditions.

6 MSHA interprets the term "promptly" to mean  
7 before miners are potentially exposed to adverse  
8 conditions. The proposed rule would not change any  
9 other information to be included in the examination  
10 record as specified in the January 2017 final rule.

11 We are requesting comments and information  
12 from the mining community only on these limited  
13 changes in the proposed rule; that is, the timing of  
14 the working place examination and documenting adverse  
15 conditions and corrective action dates in the  
16 examination record and how these proposed changes may  
17 affect the safety and health of miners.

18 We also request comments on all cost and  
19 benefit estimates presented in the preamble to the  
20 proposed rule and on the data and assumptions the  
21 Agency used to develop these estimates. This includes  
22 the Agency's assumptions on the number of instances  
23 adverse conditions are promptly corrected and time  
24 saved by not requiring these corrected conditions to  
25 be included in the record.

1           As you address the proposed limited changes  
2 either in your testimony today or in your written  
3 comments, please be specific. Specific information  
4 and supporting rationale helps MSHA produce a final  
5 rule that is responsive to the needs and concerns of  
6 the stakeholder community.

7           MSHA will make available a verbatim  
8 transcript of this public hearing approximately two  
9 weeks from the completion of the hearing. You may  
10 view the transcripts of all public hearings and  
11 comments on our website at [msha.gov](http://msha.gov) and on  
12 [regulations.gov](http://regulations.gov).

13           If you have a copy of your testimony, please  
14 give a copy and any submissions to the court reporter  
15 so that they can be appended to the hearing  
16 transcript.

17           Following this public hearing you may also  
18 submit additional comments using one of the methods  
19 identified in the Addresses section of the proposed  
20 rule. All comments must be received by Monday,  
21 November 13, 2017.

22           Again, if you haven't signed in on the  
23 attendance sheet, please do so. Please also be  
24 advised that on October 5, 2017, MSHA published the  
25 final rule to stay the effective date of the January

1 2017 examinations final rule to June 2, 2018. This  
2 delay will allow MSHA additional time and flexibility  
3 to provide compliance assistance to industry and  
4 training to stakeholders and MSHA inspectors on the  
5 final rule requirement. Meanwhile, MSHA will continue  
6 to enforce the rule you've all been working under so  
7 far.

8 So, with that, I would like to introduce our  
9 first speaker, Mr. Henry Chajet.

10 MR. CHAJET: Good morning.

11 MS. FONTAINE: Good morning. Could you  
12 please state and spell your name for the court  
13 reporter? You also need to push that green button to  
14 turn the mike on.

15 MR. CHAJET: Good morning. My name is Henry  
16 Chajet, C-H-A-J-E-T. I'm with the firm of Husch  
17 Blackwell and I represent the Mining Coalition, a  
18 group, informal group of metal and nonmetal mining  
19 companies that has participated in probably every  
20 rulemaking that you've held that's covered metal/  
21 nonmetal. It's a pleasure to be here and we  
22 appreciate the opportunity to be here.

23 Let me begin with maybe the hardest question  
24 that MSHA is faced with. It seems to me that the  
25 President of the United States issued an order on

1 January 20 freezing all regulatory activity and taking  
2 away this Agency's authority to promulgate rules that  
3 didn't undergo review according to that order. This  
4 Agency published this rule after that order.

5 The question in my mind and which I think  
6 will eventually be looked at by a court somewhere if  
7 you follow through on this path is why did the Agency  
8 continue and where is the record of all the  
9 correspondence exchanges and materials that went into  
10 the decision-making process to publish what you're now  
11 calling a final rule and what you're also calling now  
12 an amendment or change to that final rule.

13 That presidential order was clear on its  
14 face and required a stop as of January 20. We've seen  
15 no evidence that there was any effort to do anything  
16 but full speed ahead with this rule following the  
17 order of the President of the United States. We think  
18 the rule is null and void, and the fact that it was  
19 published in that manner requires you to reinstate the  
20 old rule, which has been our position all along.

21 Reinstating the old rule brings with it more  
22 than three decades of clarity. The application of the  
23 old rule was successful millions and millions of times  
24 throughout the metal/nonmetal industry and throughout  
25 time. If you look at our comments that we filed in

1 the last rulemaking on the proposed rule, you'll see  
2 the statistics that we cited for the safety  
3 improvements in the industry under the old rule.  
4 Those are your numbers, and the only thing that MSHA  
5 put forth to support the change was its belief that  
6 safety would be enhanced.

7 The Agency admitted that there was no  
8 quantifiable safety benefits, that there was no  
9 quantifiable risks to be cited in that rulemaking. So  
10 we have a significant concern with change for the sake  
11 of change or for whatever reason this was instituted  
12 and rushed through to try to beat President Trump's  
13 order. That's a pretty significant action for an  
14 agency to take, to violate an order of the President  
15 of the United States.

16 It also flies in the face of the Civil  
17 Justice Reform Act in Executive Order 12988, which  
18 MSHA takes two sentences to say that it complies with.

19 But that executive order requires clarity and actions  
20 which promote clarity to stop or prevent or reduce  
21 litigation and confrontation in adversarial  
22 situations.

23 The Rule 18002 is well understood and  
24 complied with across the industry. The proposed rule,  
25 you yourselves are struggling with the nature of

1 what's potentially a risk, when that potential risk  
2 occurs how you should try to rephrase the rule to  
3 address I'm not sure what with more time, but still  
4 trying to require the rule to be complied with before  
5 any work is done. So there's some time period in  
6 there that you created that's not clear.

7 But all of the effort to confuse this rule  
8 with record-keeping and timing and information that  
9 has not played a role in 35 years of compliance,  
10 successful compliance, all of that confusion is  
11 contrary to the Civil Justice Reform executive order  
12 requiring clarity.

13 It's very difficult to read this rule and  
14 understand what MSHA means. Those of us that have  
15 been in the industry for many years know that there is  
16 a process in the mining cycle that takes place. So,  
17 when a piece of equipment goes into a heading for the  
18 first time, does that area have to be examined right  
19 then? Does the miner, is that miner required to get  
20 out from under his canopy and do work to examine and  
21 create hazards that weren't there before, or can he  
22 continue in the process and get the work done and  
23 examine as he proceeds?

24 I don't think it's your intent to create  
25 more hazards, but I think that your proposed rule and

1 your -- what you call your final rule encourages  
2 individuals or would encourage individuals to rely on  
3 a single event being what constitutes a workplace  
4 inspection, and you estimate that event to take five  
5 minutes in your cost estimates at one point.

6 The reality is that miners are constantly  
7 inspecting for hazards, and 18002 has been interpreted  
8 as it was intended: that the inspection could take  
9 place throughout the shift, and that was a very  
10 successful process and it gave everybody a part of the  
11 responsibility.

12 If you as an agency are going to require an  
13 individual to be designated to conduct one inspection  
14 that takes three minutes or four minutes, you're going  
15 to decrease safety, something that you're prohibited  
16 from doing under the very language of the Mine Act.

17 So, again, we encourage you to go back.  
18 It's not broken. Don't fix it. Those were our  
19 comments the last time out. Those are our comments  
20 this time out.

21 We don't know of any entity from the  
22 industry that suggested or requested this rulemaking.

23 It appears to us to have been an MSHA initiative and  
24 an MSHA conclusion without regard to the hundreds of  
25 comments that oppose this rulemaking.

1           In our comments to you from the Mining  
2           Coalition, we not only cited the data showing the  
3           safety improvements, but we asked you for eight types  
4           of information that are in your domain. There was no  
5           response. We did not get the information or the data.

6           But we suggest that the data is critical to  
7           understanding what the risks are and what the benefits  
8           are or are not.

9           For example, how long does your inspector  
10          take to conduct an inspection of a work area? What  
11          order does he inspect, he or she inspect in? When do  
12          they inspect a work area? How do they go about that?

13          How much time and effort is put into that? What's  
14          the result of that inspection? What are the documents  
15          they keep? That kind of information should inform  
16          your attempted change to the requirements for the  
17          operator's inspection. You have a file on every  
18          fatality that was an investigation.

19          In your proposed rule stage, you cited a few  
20          of those as reasons, but none of the ones you cited  
21          were the result of bad inspections. The one I recall  
22          the most was a tragic situation of an individual who  
23          turned over a piece of equipment into a lake of water  
24          that was not visible, it was not visible, and MSHA's  
25          report said it was not visible. If it wasn't visible

1 and the gentleman had, I believe, 35 years of mining  
2 experience, and there's no discussion on whether a  
3 workplace inspection had been done or had not been  
4 done or when it was done, it doesn't support your  
5 rule, and that's the type of evidence that is repeated  
6 multiple times in the rulemaking on the proposed rule.

7 And very disturbing, in the rulemaking  
8 record at the Office of Management and Budget, on the  
9 last minute after the President's executive order  
10 freezing regulatory activity, this Agency put into the  
11 record dozens of new pieces of information. No one  
12 had a chance to comment on that information. It would  
13 have been frozen by the regulatory freeze as well  
14 because it was put in there in support of this change,  
15 and, again, it was part of this rush to regulate and  
16 rush to beat President Trump's executive order.

17 So we have a lot of issues with the rule.  
18 Let me say that the proposal to provide more  
19 flexibility on record-keeping is a welcome proposal.  
20 Record-keeping diverts from safety and health in many  
21 cases, particularly in a case like this where the MSHA  
22 rule seeks to address conditions and does nothing to  
23 address human causes, which our comments demonstrate  
24 with statistics and data as being at a minimum of  
25 80 percent of the causes of accidents, probably much

1 higher.

2 But I would conclude by saying we will file  
3 written comments before the end of the rulemaking that  
4 will address in detail some of these concerns, but our  
5 conclusion is simple. It's not broke, don't fix it,  
6 put the old rule back in place. The old rule as a  
7 conclusion to this rulemaking is a logical outgrowth  
8 of the mess that's being created to restore an  
9 effective rule that's been in place for 35 years.

10 I'm happy to answer any questions, and I  
11 have copies of my summary and of our testimony from  
12 the last time out. We would ask that you enter into  
13 the record all of the correspondence and emails that  
14 occurred in the last two months before this rule was  
15 sent to the Office of Management and Budget and OIRA  
16 leading up to its publication. Thank you.

17 MS. FONTAINE: Thank you.

18 Our next speaker will be Mr. Jon Conrad, and  
19 I would just like to reiterate that the purpose of  
20 this hearing is the timing of the examination and the  
21 content of the examination record.

22 MR. CONRAD: Good morning, Mr. Pierce, Ms.  
23 Fontaine, Mr. Mantel. Thanks for entertaining us  
24 today and allowing us to be here on behalf of the  
25 mining industry and with regards to the proposed

1 manner in which we're speaking about, which in that  
2 case is the examination of working places in the metal  
3 and nonmetal.

4 I represent Tata Chemicals in southwest  
5 Wyoming. We're an underground in-service mine with  
6 approximately 500 employees, trona with an end product  
7 of soda ash. I am the safety manager of that  
8 organization, and after me you'll hear from Mr. John  
9 Fackrell, who is the mining superintendent. My  
10 remarks are more importantly comments with a few  
11 suggestions.

12 May I first express my appreciation to Mr.  
13 Chajet, who's expressed a great number of those which  
14 mirror my comments as well.

15 In the beginning of this proposal, Mr. Joe  
16 Main cited 122 death on metal/nonmetal facilities from  
17 the year 2010 to 2015 as a reason this law is  
18 necessary. But within MSHA's own proposal it states,  
19 "MSHA is unable to quantify the benefits from this  
20 proposed rulemaking, including the proposed provisions  
21 that an examination of the working place be conducted  
22 before miners begin work in an area."

23 And my impression and opinion of the  
24 reactionary nature of this proposed rulemaking appears  
25 almost grossly impulsive without truly quantifiable

1 data or belief in the results. Reinforcing my belief  
2 is the proposal which states the examination must  
3 begin before work is done in this area, although, as  
4 noted, and I appreciate you recognizing that, by  
5 nature, mining is dynamic and ever-changing.

6 My question to you, is there any evidence  
7 that supports the tragic deaths of those 122 that Mr.  
8 Main had commented about could be associated with  
9 conditions that existed at the beginning of the shift?

10 We always and will continue to do our workplace  
11 examinations. As noted, it's an ever-changing  
12 dynamic. We do that on the fly.

13 Your request for comments asks for  
14 consideration or rather, in your request for comments,  
15 you asked for suggestions. I believe strongly that  
16 consideration and education must be promoted and  
17 encouraged on miners' behaviors and not solely lie on  
18 the conditions as a responsibility of the mine owner.

19 As noted by Mr. Chajet, this value is approximately  
20 80 percent. I would support that conclusion.

21 Further illustration of this lack of clarity  
22 in rulemaking is the continual pattern of the lack of  
23 specificity. The continuation of vagueness and  
24 promoting inspectors' opinion during an inspection  
25 truly compounds the interpretation of standards,

1 expectations, and more importantly, accountability.

2 As you have already noted, Ms. Fontaine,  
3 that there are suggestions within the rulemaking that  
4 talks about promptly adequate, competent, just to name  
5 a few, and I'm sure some of my peers will talk more  
6 about the competent person. Is that competent person  
7 a salaried officer or agent of the company or can that  
8 be a United Steelworker employee? I look forward to  
9 that answer.

10 In conclusion, all of us here I'd be very,  
11 very clear. No one in this room wants to see anyone  
12 injured, no one. As the record shows, we continue to  
13 do a great job and continue promoting a safe work  
14 environment and providing that safest environment to  
15 our employees.

16 The proposal which we are here today  
17 discussing unfortunately I believe is short-sighted  
18 and sets us up as owners and company officials not for  
19 success. MSHA needs to provide meaningful rulemaking  
20 that is collaborative, definable, sustainable, and  
21 quantifiable. This workplace examination does neither  
22 of the above and falls short in these respective  
23 areas.

24 I appreciate the opportunity of being here  
25 today, but on behalf of Tata, myself, I do look

1 forward to your consideration and appreciation of  
2 these comments which I render today. Thank you. Any  
3 questions for me?

4 MR. PIERCE: I don't really have a question.  
5 I just want to clarify something for you just a  
6 second. You did have a question about who would be  
7 the competent person.

8 MR. CONRAD: Yes, sir.

9 MR. PIERCE: MSHA's not going to designate  
10 who the competent person would be. That's up to the  
11 operator. Each operator will decide who their  
12 competent people is going to be. We don't tell you.  
13 You tell us.

14 MR. CONRAD: Okay.

15 MR. PIERCE: We won't ask to say that it's  
16 got to be a supervisor or it's got to be a mine  
17 representative. You tell us.

18 MR. CONRAD: A blue cardholder?

19 MR. PIERCE: You tell us.

20 MR. CONRAD: Okay.

21 MR. PIERCE: We're depending on the operator  
22 to tell us who the competent person's going to be, and  
23 that's strictly your call because you know your people  
24 better than we do. How would we decide who the  
25 competent person would be when you know your employees

1 better than anybody?

2 MR. CONRAD: Okay.

3 MR. PIERCE: So we depend on the operator to  
4 tell us who their competent person is going to be.  
5 Hopefully, that clears that up.

6 MR. CONRAD: It does, Mr. Pierce. And I  
7 appreciate that because within the Act, the '77,  
8 obviously, it does define what a competent person is,  
9 so we can take that verbatim and move forward.

10 MR. PIERCE: Exactly.

11 MR. CONRAD: Because, in fairness and full  
12 transparency, there is some push back on our union  
13 members are they a competent person. So, in this  
14 case, it's MSHA's direction and/or advice to us that  
15 we define who that competent person is --

16 MR. PIERCE: Exactly.

17 MR. CONRAD: -- as long as they meet the  
18 criteria outlined in 1977's Act.

19 MR. PIERCE: Exactly.

20 MR. CONRAD: Thank you very much.

21 MS. FONTAINE: You're welcome. Thank you.

22 Yes, our next speaker will be Mr. John  
23 Fackrell.

24 MR. FACKRELL: Hi. I'm John Fackrell and  
25 Director of Mining Operations for Tata Chemical, and I

1 mirror the statements by Jon Conrad with our concerns  
2 over the final ruling, and specifically, as I said, he  
3 mirrored everything that I was about to say, so  
4 there's no need duplicating it.

5 But we were definitely interested in the  
6 competent person ruling. We've always identified the  
7 competent person, and my personal feelings are a  
8 competent person is an underground miner, and after a  
9 certain period of time, one, two years, that  
10 individual should be a competent person or he probably  
11 shouldn't be in the mining industry to identify  
12 hazards. Individuals have to take some responsibility  
13 on their own to identify hazards where a supervisor  
14 cannot constantly monitor all activities every second  
15 of the day.

16 So that was one of the big issues that we  
17 had with this. And I appreciate Mr. Chajet's comments  
18 and his relative concerns with the mining industry,  
19 and that's -- I'll conclude saying that. Any  
20 questions of me?

21 (No response.)

22 MS. FONTAINE: Thank you. The next speaker  
23 will be Brett Smith.

24 MR. SMITH: Still works. Good morning.

25 MS. FONTAINE: Good morning.

1                   MR. SMITH: Thank you for holding this  
2 public hearing this morning. My name is Brett Smith.

3           I'm Senior Director of Government Relations for the  
4 American Iron and Steel Institute, or AISI. AISI  
5 serves as the voice of the North American steel  
6 industry in the public policy arena and advances the  
7 case for steel in the marketplace as the preferred  
8 material of choice.

9                   AISI is comprised of 19 member companies,  
10 including integrated and electric arc furnace  
11 steelmakers, and approximately 120 associate members  
12 who are suppliers to or customers of the steel  
13 industry. The industry in the United States operates  
14 more than 100 steelmaking and production facilities  
15 and has shipped 87 million tons of steel products  
16 valued at \$98 billion in 2016.

17                   The industry directly employs approximately  
18 140,000 people in steel manufacturing operations in  
19 the United States and directly or indirectly supports  
20 nearly 1 million U.S. jobs. Integral parts of the  
21 AISI membership are the three companies who mine and  
22 process iron ore in the United States: ArcelorMittal,  
23 Cleveland-Cliffs, Inc., and United States Steel.

24                   AISI's member companies maintain eight large  
25 active iron ore mining and processing facilities in

1 the U.S. located in northeast Minnesota and Michigan's  
2 Upper Peninsula. In aggregate, these facilities  
3 directly employ nearly 5,000 workers when at full  
4 production and play an outsized role in supporting the  
5 regional economies of those geographic areas. Iron  
6 ore is a critical raw material needed for the  
7 production of steel. These production -- these  
8 facilities provide the bulk of the iron ore consumed  
9 by the U.S. integrated steel industry.

10 Before addressing the MSHA proposed  
11 revisions to this mine examination rule, it's  
12 important to recognize that the domestic steel  
13 industry continues to combat a steel import crisis.  
14 Steel producers in America are currently under  
15 substantial challenges from international competitors,  
16 foreign government subsidies, and other market-  
17 distorting policies in the steel sector have resulted  
18 in a massive global steel overcapacity.

19 In September of this year, the Organization  
20 for Economic Cooperation and Development, or OECD, has  
21 estimated that global overcapacity at approximately  
22 657 million metric tons, over eight times U.S. raw  
23 steel production in 2016. Several of the countries  
24 continue to disrupt world markets by subsidizing the  
25 production and exportation of their steel by their

1 producers.

2           The U.S. iron ore industry remains in  
3 recovery following the 2015-16 steel import crisis  
4 during which five of the eight major domestic iron ore  
5 mining and processing facilities were partially or  
6 fully idled and nearly 2,000 of the workers were laid  
7 off. While industry conditions have stabilized and  
8 many of the displaced workers have been called back to  
9 work, market conditions remain challenging for both  
10 the iron ore sector and the downstream steel industry.

11       In order to compete in global competitive iron ore  
12 and steel markets, producers must strive to maintain  
13 maximum efficiency while upholding commitments to  
14 worker health and safety and environmental  
15 stewardship.

16           Our member companies have made substantial  
17 efforts to decrease the number and frequency of  
18 workplace incidents and continue to work through AISI  
19 to share information and best practices to meet  
20 our shared goal of improving occupational safety and  
21 health.

22           Our experience has demonstrated that  
23 competitive cooperative efforts among company  
24 management, employees, and government can help  
25 maximize safety and health, and all of our member

1 companies, whether they are regulated by MSHA or OSHA,  
2 are committed to making continuous improvements so  
3 that our employees return home safely each day.

4 AISI and our member companies appreciate the  
5 fact that MSHA leadership has recognized the concerns  
6 of the regulated community of mining companies that  
7 alterations are necessary to the version of the  
8 examination rule that was finalized in January of this  
9 year.

10 As we stated in written and oral public  
11 comments last year on the original proposed rule, our  
12 industry believed that there were substantial flaws in  
13 the original proposal that would create compliance  
14 cost to employers that were not adequately balanced  
15 with the foreseen benefits of the proposal. We also  
16 believe that MSHA needed to further define and provide  
17 clarity to several key terminologies used in the  
18 proposed rule.

19 The amendments proposed in September of this  
20 year to the final rule contain several changes that,  
21 if finalized, would be improvements from our sector's  
22 perspective. In particular, we appreciate MSHA's  
23 proposed clarification on the definition of some terms  
24 in the rule, as well as some additional flexibility  
25 for the documentation requirements for employers.

1           That said, AISI member companies retain  
2           several substantial concerns with the rule that, even  
3           if amended as proposed, would present challenges to  
4           employers without providing additional safety  
5           protections for our employees.

6           AISI intends to submit detailed comments on  
7           the proposed rule to the docket in conjunction with  
8           associations representing other regulated sectors by  
9           the November deadline, but today I'd like to highlight  
10          just a few of our key concerns from our member  
11          companies' perspectives on the examination rule as  
12          potentially amended by the September proposal.

13          Number one, the documentation requirements  
14          of the proposed examinations remain problematic. As  
15          we noted in 2016, iron ore mines are vast operations  
16          with footprints encompassing from 12 to over 50 square  
17          miles wide, consisting of multiple buildings and  
18          varied operations. These mine sites include multiple  
19          employees and jobs operating simultaneously. Mining  
20          operations remain running 24 hours a day, seven days a  
21          week.

22          Within this timeframe, employees work shift  
23          rotations, overtime, early shifts, fixed schedules,  
24          relief times, flex time, and other variations. The  
25          proposed amendments fail to address these issues and

1       wrongly assume that all mining operations function on  
2       fixed schedules. This leaves operators with varied  
3       and intermingled work schedules vulnerable to  
4       citations based on varied interpretations from  
5       individual inspectors.

6               Secondly, the proposed amendments to the  
7       final rule do not provide clarity as to whether asset  
8       management systems currently in use by regulated  
9       companies would qualify as an acceptable form of  
10      record-keeping under this rule. It's essential that  
11      the final rule ensure flexibility within existing  
12      electronic work order and record-keeping systems as to  
13      avoid redundancy and undue administrative burden.  
14      Being forced to implement another tracking system onto  
15      an existing system will only complicate the ability of  
16      employers to ensure corrective actions are being  
17      completed.

18              Next, the term "promptly" for the purposes  
19      of notification and remediation requirements remains  
20      subject to the interpretation of individual  
21      inspectors. While the proposed amendments provide  
22      some guidance with respect to when conditions need to  
23      be recorded, that guidance remains subjective and  
24      requires greater clarification.

25              Then finally, AISI remains concerned that

1 the potential final rule, as amended in this proposal,  
2 still does not identify the unsafe work practices that  
3 necessitate such additional regulation. MSHA has not  
4 identified the threat imposed by current operator  
5 practices, nor the increased safety results that it  
6 would achieve.

7           AISI and its member companies urge MSHA to  
8 continue to reevaluate and reform the workplace  
9 examination rule for metal/nonmetal mining operations.

10       While we appreciate that several of the changes  
11 proposed to the rule would expand compliance  
12 flexibility to employers, substantial concerns from  
13 the iron ore sector remain.

14           In particular, the rule continues to  
15 incorrectly assume that all mining operations function  
16 on fixed schedules, leaving operators vulnerable for  
17 citations based on inconsistent interpretations by  
18 individual inspectors. The proposed revision also  
19 does not provide certainty that currently used asset  
20 management systems would qualify as an acceptable form  
21 of record-keeping under the rule.

22           We believe that MSHA should ensure that the  
23 final rule results in enhanced safety benefits at  
24 mining operations that are not outweighed by the  
25 anticipated increased costs of compliance to regulated

1 parties. Further, MSHA must not create unforeseen  
2 consequences in the final rule that ultimately limit  
3 safety achievements at our operations while limiting  
4 the sector's overall international competitiveness.

5 Again, thank you for the opportunity to  
6 appear before you today and I'm happy to answer any  
7 questions you may have.

8 MS. FONTAINE: Okay. I would just like for  
9 you to submit your estimation of compliance costs.

10 MR. SMITH: Sure. As I said, we'll do that  
11 for the docket.

12 MS. FONTAINE: Okay.

13 MR. SMITH: Thank you.

14 MS. FONTAINE: Thank you. With your  
15 supporting.

16 MR. SMITH: Uh-huh.

17 MS. FONTAINE: All right. Thank you.

18 Our next speaker is Joseph Casper.

19 MR. CASPER: Good morning.

20 MS. FONTAINE: Good morning.

21 MR. CASPER: And thank you. I'm Joe Casper  
22 of the National Stone, Sand and Gravel Association. I  
23 just wanted to provide some brief comments on the  
24 repropose rule. We have not yet formally taken a  
25 position on it, although we do have some concerns.

1           I do want to state at the outset NSSGA and  
2           its member companies, producers of stone, sand, and  
3           grave, essential for the built environment, have  
4           worked very, very diligently to make workplaces safer  
5           and reduce injuries, and last year was the sixteenth  
6           consecutive year in which the injury rate in  
7           aggregates fell from the year earlier level. Last  
8           year, it closed out at just 1.95 injuries per 200,000  
9           hours worked.

10           What's interesting is to look at that score  
11           relative to those of other sectors. That score  
12           compares favorably even to the section of higher  
13           education. That means school teachers teaching  
14           spelling in sixth grade face about as much  
15           occupational threat of workplace injury as somebody  
16           working in a stone, sand, and gravel mine. So we are  
17           very proud of our achievements in having made our  
18           workplaces safer than they've ever before been.

19           And the 18002 standard that is still in  
20           effect today, that has been in effect for decades, has  
21           been a key element of that. Our operators do a good  
22           job of conducting workplace exams. It's built into  
23           our work processes. We do this (a) because it's the  
24           right thing to do; (b) it's called for in the  
25           standard; and (c) it makes good business sense to do

1 outstanding workplace exams. So we're committed to  
2 the current 18002 standard.

3 NSSGA's commitment to safety and health has  
4 included work with MSHA on the Alliance for Education  
5 and Training. This has been a very aggressive effort  
6 and we're a very active alliance.

7 Let me speak briefly about some of our  
8 concerns with the current rule.

9 Number one, the timing of the examinations.  
10 The initial version of the final rule required that  
11 exams be conducted before miners begin working in that  
12 place, but MSHA has proposed to amend the rule such  
13 that examinations would be required before work begins  
14 or as miners begin work in that place. This does not  
15 provide adequate relief compared to the earlier rule  
16 in the following several ways.

17 Number one, it continues to unnecessarily  
18 constrain the timing of when operators can conduct  
19 their exams. We would contend operators know best  
20 when to conduct those exams relative to the work  
21 production process, and as anybody who knows just a  
22 little bit of mining knows, realizes, hazards in the  
23 workplace can appear at any time. It's not just  
24 before a shift begins.

25 Also, operators need flexibility to conduct

1 exams as circumstances dictate. Shifts are not  
2 typically uniform at all operations. Circumstances  
3 can change, as I stated, and the existing exam  
4 standard provides the necessary flexibility.

5 The phrase "that place" in the proposed  
6 amendment is unclear and could lead to confusion in  
7 the field. It raised uncertainty as to where  
8 specifically one should examine to cover work that is  
9 to be done by an oncoming shift.

10 Also, with regard to documentation, MSHA has  
11 proposed to reduce the documentation requirement such  
12 that conditions that are found and promptly corrected  
13 would no longer need to be recorded, nor would their  
14 corrections. MSHA has advised that for the purposes  
15 of this provision "promptly" means before miners are  
16 potentially exposed to adverse conditions.

17 This is an improvement because a number of  
18 conditions found during an exam are able to be  
19 corrected during the examination, and we appreciate  
20 that. What we would ask consideration of, however, is  
21 that if any new workplace exam standard is to take  
22 effect, MSHA should consider further revising the  
23 documentation requirement such that conditions that  
24 are corrected during the shift which they are found --  
25 during which they are found should not be required to

1 be recorded. This would further the intent of the  
2 amendment of only requiring recording of conditions  
3 that are unable to be corrected in a timely basis.

4 Operators are concerned that the increased  
5 documentation requirement will lead to additional  
6 enforcement based solely on the examination records.  
7 This is a substantial concern. We believe that in the  
8 midst of continued improvements in safety in stone,  
9 sand, and gravel, and in a number of other sectors in  
10 mining, this is not the right time to boost  
11 enforcement liability, especially given that the  
12 Agency never came close to providing empirical  
13 documented evidence on why a rule change such as this  
14 is warranted.

15 Regarding costs, MSHA's accounting for costs  
16 in the final rule does not appear to consider real  
17 world consequences of new regulation. We need to look  
18 at that more closely. We will make more specific  
19 comments in our formal submission by November 13.

20 With regard to notification, the final rule  
21 and proposed amendments continues to fail to define  
22 what constitutes notification of adverse conditions to  
23 affected miners. This kind of vagary could lead to  
24 enforcement inconsistency and obviously compliance  
25 inconsistency, and that wouldn't be good for the

1 effective management of safety.

2 Also, the term "working" as far as unclear  
3 conditions -- terms are concerned. The term "working  
4 place" for purposes of 18002, it remains troublesome  
5 that MSHA appears to consider areas commonly thought  
6 of as travelways to be working places when the  
7 existing standard already differentiates between a  
8 working place and a travelway.

9 Also, the term "conditions that may  
10 adversely affect safety and health." During the  
11 comment period preceding promulgation of the final  
12 rule, commenters raised that this term was potentially  
13 ambiguous, yet MSHA did not provide definitional  
14 guidance for this term. This is particularly  
15 problematic because examining for conditions that may  
16 adversely affect safety and health is the touchstone  
17 of the entire rule, including the changes contemplated  
18 in the proposed amendments.

19 The term "initiate appropriate action" for  
20 the remediation provision, this is also subjective and  
21 could result in varying interpretations in  
22 enforcement.

23 Regarding individual liability, records  
24 maintained in accordance with the workplace  
25 documentation standard should not be used for the

1 future assessment of individual liability under  
2 Section 110 of the Mine Act against miners performing  
3 examinations.

4 And, finally, duplicate citations for exams  
5 and conditions. Operators are concerned that the new  
6 exam standard, even with proposed amendments, will  
7 more readily lead to MSHA inspectors issuing multiple  
8 citations for a single situation: one for the  
9 condition and one for the examination. Operators  
10 request that MSHA ensure that such additional  
11 enforcement not result from any revision to the  
12 workplace examination standard.

13 One final note. I noted that President  
14 Trump in his February 23 news conference about  
15 regulatory reform asserted the importance of  
16 regulations. NSSGA totally buys into that. We need  
17 to be a heavily regulated industry, as we are and as  
18 we have been. But to increase the enforcement  
19 capabilities with regard to this standard when there's  
20 been no proof that the standard isn't being complied  
21 with or that the current standard isn't enabling  
22 management for safety and health in the workplaces we  
23 think renders this action very potentially as just  
24 outside the spirit and the letter of what President  
25 Trump was talking about in his very strong February 23

1 statement about appropriate regulation in the U.S.  
2 economy versus that which is excessive and unduly  
3 excessive and counterproductive. So that's a  
4 quick overview of where NSSGA is at in this  
5 assessment. We will submit formal comments by  
6 November 13. We very much appreciate the opportunity  
7 to present, and we'd be happy to take any questions.

8 MS. FONTAINE: Thank you.

9 MR. CASPER: Thank you, and I will submit  
10 later today the text of this --

11 MS. FONTAINE: Okay.

12 MR. CASPER: -- without the chicken scratch.

13 MS. FONTAINE: Thank you.

14 MR. CASPER: Thank you.

15 MS. FONTAINE: Our next speaker is Steve  
16 Robuck.

17 MR. ROBUCK: I've decided to make my  
18 comments in Birmingham. I'm going to be down there  
19 next week and I'll make my comments.

20 MS. FONTAINE: Okay. Hunter Prillaman.

21 MR. PRILLAMAN: Thank you. My name is  
22 Hunter Prillaman, and I'm here today for the National  
23 Lime Association. NLA represents the makers of  
24 quicklime and other lime products. Our members'  
25 limestone mines and their production facilities are

1 under the jurisdiction of MSHA.

2 We commend MSHA for reopening the rulemaking  
3 record on the workplace exam rule. Both of the  
4 substantive changes that have been proposed are  
5 improvements. As we explained in earlier comments and  
6 testimony, many NLA members believe that it is best to  
7 train miners to perform examinations of their own  
8 working areas, and thus it is appropriate to allow  
9 inspections as they begin work so that it is clear  
10 that they can perform these exams themselves.

11 Secondly, we agree that adverse conditions  
12 that are promptly corrected should not have to be  
13 noted on examination forms. We believe that otherwise  
14 the forms will be overwhelmed by minor housekeeping  
15 issues that can be and routinely are immediately  
16 corrected.

17 While MSHA has only proposed limited changes  
18 to the rule, this should also be an opportunity for  
19 the Agency to provide clarification on some of the  
20 other issues with the rule that may not require  
21 modification of the rule language itself.

22 For example, NLA and other commenters  
23 strongly urged MSHA to make clear that it would not  
24 issue citations based on adverse conditions noted in  
25 examination records as long as the conditions were

1 promptly corrected with proper notice to miners. In  
2 the January 23 rule preamble, the Agency states:

3 "Many commenters were concerned that the  
4 Agency will use the examination record to write  
5 citations based solely on the adverse conditions  
6 identified in the record. This is not MSHA's intent,  
7 nor do we plan to train our inspectors to do this."

8 We believe that MSHA should state this more  
9 definitively as a matter of policy and not just a  
10 statement of intent and plans.

11 NLA also believes that there should be more  
12 clarity on what MSHA has in mind with respect to  
13 inspection of travelways, as someone else previously  
14 mentioned. At the least, MSHA should make clear that  
15 its revised language allowing inspection as miners  
16 enter an area for work applies to travelways as well.

17 Finally, although the proposed changes are  
18 in the right direction, NLA continues to believe that  
19 the rule has additional serious defects and that it  
20 would be better for EPA (sic) to open up the entire  
21 rule for further comment and reconsideration, and we  
22 urge the Agency to consider doing so. Thank you.

23 MS. FONTAINE: Thank you.

24 Okay. Our next speaker will be Linda  
25 Raisovich-Parsons.

1 MS. RAISOVICH-PARSONS: Good morning. My  
2 name is Linda Raisovich-Parsons and I currently serve  
3 as the Deputy Administrator of the Department of  
4 Occupational Health and Safety for the United Mine  
5 Workers of America. I come before you today in a  
6 state of exasperation and bewilderment over the  
7 Agency's decision to modify the rule for examination  
8 of working places in metal and nonmetal mines.

9 My first concern is the fact that we are  
10 even here today revisiting a rule that has been  
11 through the rulemaking process and published as a  
12 final rule on January 23, 2017. The rule was  
13 scheduled to take effect May 23, 2017, and should be  
14 in effect today. Instead, the Agency chose to delay  
15 the rule's effective date until October 2 and now has  
16 chosen once again to delay the rule, as well as reopen  
17 the rule to undo the two important protections it  
18 provided and reinstate rulemaking on a rule that  
19 should already be in place.

20 I find this quite disturbing and frustrating  
21 that the Agency charged with -- charged with  
22 protecting our nation's miners would suddenly exhibit  
23 such a change in heart in its mission to do so. To  
24 demonstrate the exasperation I feel on this matter, I  
25 only need to quote MSHA's Fact Sheet previously issued

1 on the proposed rule. Its introduction summarized the  
2 need for this rule eloquently, and I quote:

3 "The Mine Safety and Health Administration's  
4 proposed rule would enhance the quality of working  
5 place examinations in metal and nonmetal mines,  
6 improve protections for miners, and save lives.

7 "MSHA believes it has taken a common sense  
8 approach with this proposed rule. Require mine  
9 operators to conduct working place examinations to  
10 identify hazards before work begins in an area, record  
11 the hazards before the end of each shift, and also  
12 record the corrective actions and the date they were  
13 corrected, and make sure miners are aware of potential  
14 hazardous conditions.

15 "Effective working place examinations are a  
16 fundamental accident prevention tool that under  
17 Section 2 of the Federal Mine Safety and Health Act  
18 will 'provide more effective means and measures for  
19 improving the working conditions and practices in the  
20 nation's mines in order to prevent death and serious  
21 physical harm.'

22 "Recent fatal and other accidents at metal  
23 and nonmetal mines make clear the need to do more to  
24 prevent mining deaths and injuries. These accidents  
25 support that miners would benefit from rigorous

1 working place examinations, conducted by a competent  
2 person, to better identify hazards so they can be  
3 addressed before miners get injured or killed.

4 "From January 2010 through mid-December  
5 2015, there have been 122 miners killed in 110  
6 accidents at mines/nonmetal mines, and more than 60  
7 percent of those deaths were linked to violations of  
8 the 'Rules to Live By' standards, which are standards  
9 that most frequently cause mining deaths. Sixty  
10 miners have died just since October 2013. MSHA  
11 believes that many of these fatalities could have been  
12 prevented with better working place examinations.

13 "One of those deaths was Michael Jay  
14 Nickels, a haul truck driver, who was killed in March  
15 2015 when his truck drove off an elevated haul road  
16 embankment and into the mine's dredge pond. The  
17 roadway had no berm or barrier to stop the truck. An  
18 examination of the work area should have identified  
19 this hazardous condition.

20 "MSHA believes that the additional  
21 communications that operators would be required to  
22 make under this proposed rule would encourage prompt  
23 corrective action and help prevent fatalities and  
24 other accidents. While MSHA has been encouraging the  
25 mining industry to improve mine workplace examinations

1 to prevent these deaths, MSHA has concluded that the  
2 time has come to require these improved examinations."

3 I must ask, why the change of heart? What  
4 has happened between then and now to warrant changing  
5 this rule? How could sending miners into their  
6 workplace before an examination has been conducted  
7 possibly be safer than identifying those hazards  
8 beforehand, correcting them, and informing the miners  
9 of such hazards before they begin their work?

10 By MSHA's own statement, a total of 60  
11 miners' deaths could have been prevented by better  
12 workplace examinations. I must ask, would the death  
13 of Michael Jay Nickels have been prevented with an  
14 examination of the workplace after he drove off in his  
15 truck?

16 If an examination had been conducted prior  
17 to Michael going to work, the roadway with no berm or  
18 barrier would have been identified, a danger or a  
19 warning sign posted in the area and could have  
20 possibly saved his life. MSHA makes a point of this  
21 in their discussion of this fatality. The fatal  
22 report indicates MSHA issued an unwarrantable failure  
23 because "Management engaged in aggravated conduct  
24 constituting more than ordinary negligence by failing  
25 to ensure persons are properly conducting workplace

1 examinations." Clearly, a workplace examination prior  
2 to Michael's shift could have saved his life.

3 Examinations are the fundamental tool for  
4 assessing the overall safety condition of the mine. A  
5 proper pre-shift examination includes all areas where  
6 miners are scheduled to work or travel during the  
7 shift. The examiner focuses on discovering both  
8 existing and developing hazards, such as gas  
9 accumulations, bad roof, water accumulations, unstable  
10 highwalls, missing berms, and determining  
11 effectiveness of the mine's ventilation system. These  
12 examinations are particularly effective in the  
13 discovery and correction of hazardous conditions and  
14 practices before they lead to injuries or fatalities,  
15 that is, if they are conducted before miners are  
16 exposed.

17 Conditions in the mining environment can  
18 change rapidly. Therefore, recurring examinations are  
19 necessary to ensure the safety of the miners. A  
20 timely workplace examination for hazardous conditions  
21 ensures the safety of the miner on a routine basis.  
22 The standard should not be changed to allow  
23 examinations after miners are already exposed.

24 The second part of this rule involves  
25 record-keeping of conditions that have been corrected.

1       The original proposal required that all hazardous  
2       conditions found in workplace examinations would be  
3       recorded. This new proposal only requires a record of  
4       hazardous conditions that have not been corrected.  
5       All conditions found during a workplace examination  
6       should and must be recorded.

7               If hazards are not recorded, how will it be  
8       evident that trends are developing? Issues with roof  
9       or rib control would be a good example of this. If  
10      the examiner repeatedly finds a roof control issue but  
11      installs extra support and then does not record it,  
12      there is no evidence that a roof condition may be  
13      developing that would warrant changes to the roof  
14      control plan.

15              Likewise with ventilation issues or any  
16      hazardous condition that may becoming a larger issue  
17      that may need further action to address. If there is  
18      no record, how will it be identified? This also shows  
19      the operator and/or the examiner are diligent in  
20      identifying and correcting hazards.

21              As MSHA pointed out in its Fact Sheet:

22              "Mining conditions change continuously as  
23      materials are mined, transported, and processed,  
24      exposing miners to new conditions and hazards. It is  
25      important that these changing conditions are

1 constantly monitored and examined to protect the  
2 miners that may be exposed to them.

3 "MSHA believes that making and maintaining a  
4 record of adverse conditions found and corrective  
5 actions taken would help the mine operators, miners,  
6 and their representatives to become more aware of  
7 dangerous and unhealthful conditions and more  
8 proactive in correcting these hazards before an  
9 accident, injury, or fatality occurs."

10 It is essential to keep records of all  
11 conditions found to provide some insight into the  
12 ever-changing conditions in a mine and to look for  
13 patterns of developing problems which need attention.

14 We believe that the current federal law is  
15 nowhere near stringent enough to adequately protect  
16 miners from hazards that can adversely affect their  
17 health and safety. Proper workplace examinations are  
18 extremely important and have a vital role in  
19 preventing accidents and injuries. Proper workplace  
20 examinations by a competent person that has the proper  
21 experience and training in recognizing hazardous  
22 conditions, violations of mandatory health and safety  
23 standards, imminent dangers, and adverse conditions  
24 are vital to the safety of the miners working at the  
25 mine.

1           Making the examinations prior to someone  
2 working in the area is just common sense. This gives  
3 the miners coming into the next shift with knowledge  
4 of what conditions the hazards may be present before  
5 they arrive.

6           The UMWA suggests that the examinations be  
7 performed as close to the start of the next shift as  
8 possible but no more than two hours prior to. We  
9 would also suggest that persons performing these exams  
10 have a mine foreman or assistant mine foreman  
11 certification as well. This would ensure that they  
12 have the experience and knowledge in recognizing  
13 hazards that could adversely affect the health and  
14 safety of miners.

15           The requirement to record the location,  
16 hazards found, corrective action taken, and the date  
17 action was taken must be required to ensure proper  
18 documentation, as well as ensure the hazard was  
19 corrected. This would also help to make the operator  
20 as well as the miner more aware of the hazards so that  
21 they cannot say they were not aware of a hazard and  
22 not correct it.

23           Many hazards will be able to be corrected  
24 during the time of the exam, but some will require  
25 time and manpower to correct, and this requirement

1 will show what process -- progress is being made in a  
2 particular area and hazard. It is also important for  
3 miners and their representatives to have access to  
4 these records to see what hazards they may encounter  
5 and what actions are or were taken prior to correct  
6 these hazards.

7 It is essential to keep records of all  
8 conditions found to provide some insight into the  
9 ever-changing conditions in the mine and to look for  
10 patterns of developing problems which need attention.

11 We ask that the full original exam rule be  
12 implemented. I thank you for the time and allowing me  
13 to comment. If you have any questions, I'll answer  
14 those.

15 And one thing I would note is that we  
16 received a call from the Agency upset that we would  
17 have any interest in this rule and that we did not  
18 represent any metal/nonmetal mines, which I care to  
19 differ with that. There is at least three operations  
20 of metal/nonmetal mines that we do represent: the  
21 Feldspar Corporation in North Carolina. There's  
22 Dicaperl Minerals, which is a pearlite mine in the  
23 West, and Carmeuse Lime & Stone operation in Kentucky.

24 But this is a rule that the coal industry  
25 has lived with for eons, and we don't understand what

1 a pre-shift examination, why there is so much  
2 opposition to this because this is something we just  
3 habitually do in the coal industry. If you have any  
4 questions at this time, I'll answer these.

5 MS. FONTAINE: Okay. Well, I just want to  
6 apologize because everyone has a right to participate  
7 in any public hearing we have.

8 MS. RAISOVICH-PARSONS: Right, right, and we  
9 were quite disturbed that someone would point that out  
10 to us.

11 MS. FONTAINE: Thank you. Any questions?

12 MR. MANTEL: I just want to echo that  
13 everybody has a right to participate and to come.

14 MS. RAISOVICH-PARSONS: Right, and we do  
15 represent some metal/nonmetal miners. Not a lot, but  
16 we do represent some.

17 MR. PIERCE: I just want to say thank you  
18 for speaking up for the miners. As I sit here this  
19 morning, I heard people representing companies,  
20 representing associations, representing law firms, but  
21 I was wondering who was going to speak for the miners.  
22 So thank you for speaking up for the miners.

23 MS. RAISOVICH-PARSONS: I appreciate that.  
24 We believe that a pre-shift examination before the  
25 miner starts to work is only common sense, and then a

1 record of what hazards are found, even if they're  
2 corrected, if there's trends developing, like I said,  
3 in roof conditions, ventilation problems, whatever,  
4 how are you going to know that if there's no record of  
5 it? You know, if it's corrected there's no record of  
6 that. That gives you a record to identify those kind  
7 of things and to change mine plans accordingly if need  
8 be.

9 MS. FONTAINE: Thank you.

10 MR. PIERCE: Thank you.

11 MS. FONTAINE: We don't have anybody else  
12 signed up to make a presentation, but is there anyone  
13 out there interested?

14 MR. REDDING: I'm Kim Redding. I'm with N-  
15 Compliance Safety Services, Inc., and I work on and  
16 off for about 365 companies mostly in the West, do  
17 work for some in Alabama and some in Texas, and just  
18 the last comment about we're not here for the miner.  
19 I believe everybody in this room is here for the  
20 miner, and I used to be a miner. Some of these owners  
21 are miners. Just because they're an owner doesn't  
22 mean they're not out running a front-end loader or  
23 working.

24 So I represent a lot of little companies. A  
25 lot of clients asked me to come speak about this. I

1 used to be an MSHA inspector. I worked in the gold  
2 mines. I've worked in mining since 1989, and one of  
3 the things I printed off this morning was MSHA put  
4 this out for -- provide for repeal. I think that this  
5 should be repealed. That I agree with the earlier  
6 speakers, and I believe the district manager would  
7 probably agree with me, that the original law for  
8 workplace exam has been more than adequate.

9 Matter of fact, I brought this out last year  
10 when I spoke and put on the *Federal Register* an  
11 objection to this, that MSHA certifies who does the  
12 workplace exam on the coal side, and the coal side has  
13 14 fatalities this year, where on the metal/nonmetal  
14 side where the mine operator says who does the  
15 workplace exam has 10.

16 Now this morning I looked through those 10  
17 fatalities. Three were cited for not doing workplace  
18 exam. So, out of the seven, MSHA did not find a  
19 problem with the workplace exam. No citations were  
20 issued, and so fatalities don't occur because of  
21 workplace exam.

22 One of the concerns that has not been  
23 brought up is in the 2006 New Miner Act, which fixed  
24 Part 100 that also didn't need fixed, that only -- the  
25 only problem was the assessment's office wasn't doing

1 their job properly because MSHA had the ability to  
2 write \$60,000 tickets at that time and never wrote a  
3 \$60,000 ticket.

4 Since the 2006 Mine Act has come out, a mine  
5 operator, a small operator cannot get over 10  
6 citations in a two-year period basically, 15 months,  
7 but through the process it takes at least 20 months.  
8 That includes paperwork.

9 So we have four quarterly reports that were  
10 reported one day late, which the IRS allows us to  
11 report things on the 16th if the 15th falls on a  
12 Sunday, but not MSHA. And so we get four citations on  
13 a record.

14 We get a garbage can lid not on. We get any  
15 type of citations times 10, and those companies are  
16 now in peril, companies that care and love their  
17 miners. Now I've worked for 365 companies. All the  
18 owners stay up at night worried about their miners.  
19 They worry about how they're going to pay their  
20 miners. They're worried about continued regulation  
21 putting them out of business.

22 A couple mine owners came with me today to  
23 speak. They're family run operations, meaning they're  
24 in peril and have to lay off all their family members  
25 who are miners by definition only. We don't see them

1 as miners. We see them as family. And so I take  
2 offense to anybody in this room, these attorneys are  
3 here to protect miners.

4 But as we all know, if a miner doesn't put  
5 their seatbelt on and they go off into a pond and  
6 drown or they are speeding or everybody has a right to  
7 refuse to do anything they feel is unsafe, including  
8 not driving down a road without a berm.

9 I worked at Newmont Gold. Since day one we  
10 did the workplace exam not only at the start of shift  
11 but throughout the shift. One of the biggest  
12 contentions I have with this law is we have to do the  
13 workplace exam at the start of shift. I have mines in  
14 Soda Springs where we had 345 earthquakes in three  
15 days which affect our mining operation, and you're  
16 telling me at 5:00 in the morning when they do the  
17 workplace exam that's going to protect my guys at  
18 noon?

19 Also, in the West and in the higher northern  
20 states where we're now getting into freeze/thaw,  
21 workplace exam is worthless if we just do it first  
22 thing. That we show up to work in the morning and  
23 it's 14 degrees and by noon it's 50. Our earth is  
24 moving like crazy. And so a proper workplace exam is  
25 done throughout the shift, and miners are notified if

1 they're in that area.

2 One of the biggest problems with this new  
3 proposed rule or whatever since it was supposed to go  
4 into effect, keeps being put on hold, shouldn't even  
5 be looked at is that who is a miner? In the sand and  
6 gravel industry where we serve outside customers,  
7 there's A1 and A2 miners, and so, when I have a truck  
8 driver come into get a load of gravel, do I notify him  
9 that a guard has been found off and we've placed  
10 ribbon around it, locked it out? Are we supposed to  
11 tell that driver who is a miner, he is in our pit,  
12 that we found a violation, and if we don't, is that a  
13 ticket, which I already know the answer. It'll be  
14 yes, it's a ticket, and I'll give you an example.

15 The law says for site-specific we can have  
16 signs. At one of my sand and gravel pits, we have a  
17 sign that every truck driver is required to stop at  
18 and read. A truck driver stopped at it, read it,  
19 pulled up, jumped out in flip-flops and no hard hat in  
20 front of the MSHA inspector, and we were cited for not  
21 giving him proper site-specific even though they saw  
22 him read the sign which is covered under (F) of that  
23 standard.

24 And so you can say they won't be cited, but  
25 everything happens, as it's well known. I think

1 that's one of the things I'm hearing most is tell us  
2 specifically. I hear that all the time. When laws  
3 are open-ended, they're interpreted grossly.

4 For instance, one of the companies I worked  
5 for got cited for a Lay's potato chip bag being in a  
6 garbage can, that it might spontaneously combust and  
7 things with oil like potato chip oil need to have a  
8 metal can with a metal lid. So, if it sounds like I'm  
9 being atrocious, I'm not. We run into these things  
10 all the time.

11 And so there's no quantification for what  
12 purpose of this law. Being in the industry as long as  
13 I have, being an MSHA inspector, working for 16 years  
14 as a consultant, you can obviously see this is a way  
15 to write more citations. I even brought that up in  
16 the last hearing, that when the competent person, and  
17 it was brought up is the competent person representing  
18 management, everybody here knows they do. If you do a  
19 workplace exam, that's something required by the mine  
20 operator. And so, if I have a worker do it, he's now  
21 the owner, and if he fails somehow, is he subject to  
22 personal fines, and I have miners all the time who  
23 want to be involved in their safety but don't want to  
24 do the workplace exam now because they might get a  
25 personal fine. And so that is a major concern for

1 many companies.

2           If it's not broke, why are we fixing it?  
3 Our record on the metal/nonmetal side has continually  
4 lowered in deaths and injuries to the point now where  
5 MSHA doesn't have enough fatalgrams to put out for  
6 training, that they now put out near misses, which is  
7 awesome. That's the way it should be, right?  
8 Hopefully, at some point in time we'll have no fatals.

9       But none of it was because of this new exam. This  
10 new exam hasn't gone into effect. It hasn't helped  
11 one iota, and it won't. All it does is set up  
12 companies for failure where they get into financial  
13 difficulties because the fines escalate at a rapid  
14 rate based on we didn't put a date on a piece of  
15 paper.

16           Last week I had four citations that we  
17 terminated all based on faxing something into MSHA,  
18 and I asked MSHA, who did we keep safe, who? If I'm  
19 just faxing something in to terminate a violation,  
20 once I put something on a piece of paper, did that  
21 make a miner safe? I don't think so.

22           But just last week, and so if we change this  
23 workplace exam thing where it can get five citations,  
24 it has the possibility of more and more citations  
25 because someone makes a clerical error, I don't think

1 that's the intent of MSHA. MSHA's whole intent is to  
2 protect the miner, and I'd agree with Mr. Pierce about  
3 that. I believe the mine operators want to protect  
4 the miners too.

5 We have an aging workforce. A lot of our  
6 accidents now are because of the fact we're getting  
7 older, all of us, and doing these mining jobs is  
8 harder and harder. I rarely go into a place where  
9 people don't care about safety on every level.

10 And so I just wanted to make sure I was put  
11 on the record for that, to again -- I mean, we sit  
12 here and speak in this room, but this affects peoples'  
13 livelihoods, and none of us want the miners  
14 unemployed, and I have a bunch of companies that are  
15 getting into financial peril over quarterly reports  
16 being reported one day late, or you didn't put a  
17 number one on something. That's what this workplace  
18 exam is set up for. We don't need it. Workplace exam  
19 has worked just fine. The present law works just  
20 fine.

21 And so, with that, I'll conclude, and if you  
22 guys have any questions for me, I appreciate the time  
23 to come speak again. Thank you.

24 MR. MANTEL: No questions.

25 MS. FONTAINE: Thank you.

1 MS. ABRAMS: Good morning. My name is Adele  
2 Abrams, and I'm the President of the Law Office of  
3 Adele Abrams, PC. We have offices in the Washington,  
4 D.C. area, and Denver, Colorado, and also Charleston,  
5 West Virginia, and I'm an attorney and also a  
6 certified mine safety professional. I was in safe  
7 mine safety before I was an attorney, so perhaps I'm  
8 going to put a little bit of a different spin on this  
9 than some of my colleagues.

10 I wasn't planning to testify today but  
11 hearing a lot of the things discussed I feel like I  
12 want to weigh in on a few things. I'm representing  
13 myself and I'm not imputing my testimony to anybody  
14 that I represent, but I do want to say this.

15 I have handled over 200 fatality cases in my  
16 career. I've been in the mining industry since the  
17 1980s. When I got into the mining industry we were  
18 experiencing about 125 deaths per year, 125 too many,  
19 and, yes, it is laudable that we got that down to 25  
20 or 26 last year. I am deeply concerned that we're  
21 going to start seeing things going in the other  
22 direction, and I was just noting some statistics  
23 yesterday that, you know, in the coal side there were  
24 seven fatalities last year, and we're up to 13 or 14  
25 now this year, and that's unacceptable. I don't want

1 to see metal/nonmetal go in that direction.

2 I've worked the majority of my mining  
3 experience in the metal/nonmetal sector, including  
4 with mining associations, and I do represent mine  
5 operators in litigation, of course, with MSHA and with  
6 OSHA. I also do proactive work. I do safety audits,  
7 and training. I'm an MSHA-approved Part 40A trainer,  
8 and I always feel like positive, proactive  
9 interventions are much, much better and much more cost  
10 effective for all concerned than being reactive,  
11 putting new systems in place in response to  
12 catastrophic events that have occurred.

13 The protection of the miner is our only  
14 responsibility really when it comes to focusing on  
15 mine safety and health.

16 Yes, as a safety professional with a lot of  
17 training in this area, I am aware that about 60  
18 percent, excuse me, 80 percent of accidents are due to  
19 unsafe acts, about 20 percent are due to unsafe  
20 conditions. The unsafe acts, and I talk about this  
21 when I train on incident investigations, there is very  
22 often this tendency to just blame the victim. You  
23 know, they did something stupid. You know, I've even,  
24 God forbid, even heard people joking about people  
25 dying from death by stupidity.

1           Whenever you have an unsafe act, there's  
2 still going to be root causes that need to be  
3 identified and very often it is training deficiencies,  
4 very often it is a negative safety culture. Very  
5 often it is a tension between productivity and safety,  
6 either explicitly or implicitly. You know, there can  
7 be many contributing factors.

8           Some of these can be controlled of course by  
9 better training, by better enforcement internally of  
10 safety rules and policies and procedures. But the 20  
11 percent of fatalities that are due to unsafe  
12 conditions, that's on us. You know, those are things  
13 that can be addressed.

14           Yes, have I see situations that have been  
15 catastrophic, unpredictable situations? Absolutely.  
16 Do all unsafe conditions arise at the beginning of the  
17 shift? Absolutely not. But this rule, the existing  
18 standard, the final rule that came out and, you know,  
19 I had some complaints about that as well, and the  
20 proposed rule, which I think makes some modest  
21 improvements to address some of the final rule issues,  
22 you know, these are tools that can be used to  
23 eliminate those 20 percent fatalities.

24           And so to me the old rule from a both safety  
25 practitioner's perspective and, frankly, from a

1 lawyer's perspective was problematic because you were  
2 expected to do an exam but you didn't have to write  
3 anything down other than name, rank, and serial  
4 number, and there is now this Sunbelt Rentals case  
5 that the Commission decision came out last year that  
6 is binding precedent and it infers an adequacy  
7 requirement even in the existing old rule, I'll call  
8 it.

9 Well, if I'm a defense attorney, which I am,  
10 how can my client prove that their workplace exam was  
11 adequate if all they've written down in the name of  
12 the examiner, the date, and the area examined, and the  
13 shift? It's very difficult to prove this. So, as a  
14 practical matter best practices would dictate that you  
15 should be writing down the problems that you find. If  
16 you find a problem and you don't write down, you know,  
17 any correction to it, that can be problematic as well,  
18 and I've had that come up in MSHA cases, you know,  
19 where I really deeply wished my client had made note  
20 because things can recur.

21 That particular case dealt with burnt-out  
22 light bulbs, and my client got a 104(d), immortal  
23 failure because the inspector looked at old inspection  
24 work orders and thought that the same light bulb had  
25 burned out for six months. Didn't realize that

1 different bulbs had been replaced. We did get that  
2 worked out, but, you know, this is something that you  
3 really consider is are you doing an effective  
4 workplace exam if you're making no record of it.

5 I do have deep concerns about a "gotcha"  
6 mentality. Some other speakers had mentioned that;  
7 that MSHA may be tempted, especially if they come into  
8 a workplace and don't find any existing violative  
9 conditions, that they could let their fingers do the  
10 walking through 12 months worth of workplace exam  
11 records and say, oh, you know, you had a guard off,  
12 you know, three months ago so I'm going to cite you  
13 for an inadequate guard.

14 This is problematic because the Mine Act is  
15 a strict liability statute, and the inspector does not  
16 have to see a violation in order to cite it. He  
17 simply has to believe that a violation has occurred.  
18 By nature, virtually all the hazards that we're going  
19 to be recording are going to potentially constitute a  
20 violation of the Mine Act.

21 So, I would really urge MSHA to look at  
22 OSHA's audit, self-audit safe harbor policy. It's  
23 been in existence, they even published it in the  
24 *Federal Register*. It's been around for a couple of  
25 decades now, and, in essence, it holds that if a

1 condition is discovered through self-evaluation and  
2 it's corrected before OSHA shows up, they won't issue  
3 you a citation simply because it's in an audit record.

4 Let's use that same approach to these  
5 workplace exam records. If something's recorded and  
6 it hasn't been fixed, it's fair game. If something  
7 was recorded and it has been fixed, it should not be  
8 used against the operator.

9 You know, in addition, MSHA should not  
10 reflexibly use 56 and 57.18002 simply because an  
11 injury has occurred. It's not, you know, *res ipsa*  
12 *loquitur*, you know, just the things speak for itself.

13 As noted by others, hazardous conditions can  
14 occur throughout the course of a shift, and simply  
15 because something wasn't captured at the beginning of  
16 the shift doesn't mean it existed at the time that the  
17 inspection was occurred.

18 I wanted to speak to a few of the things  
19 here. You talk about in this rulemaking now,  
20 reopening it, that conditions that are -- or hazards  
21 that are promptly corrected would not need to be  
22 recorded, and I think that makes a great deal of  
23 sense, but we need to better define what is promptly  
24 and what is corrected, and I've talked to a number of  
25 people in my travels out in the field since this

1 proposal was issued. There's a lot of confusion out  
2 there. Some have said promptly would be if it's  
3 corrected that same shift. Ah, maybe yes, maybe no.

4 I mean, how grievous a hazard is this? If  
5 you've got moving machine parts and there's no guard  
6 on it, you know, I would argue that that should be  
7 recorded, you know, even if you're going to put a new  
8 guard on it, you know, before people leave for the  
9 day. So, what does promptly mean? Is it lifting up  
10 the garbage can lid that blew off and putting it back  
11 on? Sure, that's promptly.

12 Maybe include a definition in the rule  
13 because the vagaries of the inspector are something  
14 that we are all concerned about. MSHA is concerned  
15 about it, my clients are concerned about it. It makes  
16 me crazy, you know, when I see conditions being cited  
17 that have been accepted for long periods of time as  
18 well. So, that inconsistency is something that we all  
19 seek to have eliminated.

20 Corrected, let's be clear about that  
21 because, again, I was with a group of 20 miners last  
22 Friday and a lot of them thought that putting caution  
23 tape up means corrected. Is that corrected, you know?

24 Is that a barrier? I'm hearing that some inspectors  
25 don't even consider caution tape to serve as a barrier

1 even though the term "tape" is used in the definition  
2 in Part 56 and Part 57.

3 So, let's all be clear. If we're going to  
4 relax this rule and say if you promptly correct  
5 something you don't have to list it, let's all be on  
6 the same page. Is it a permanent fix? Is it a  
7 temporary fix? What about a loose railing, what do  
8 you do about that? Is blocking off the stairs at the  
9 bottom of that work platform sufficient or do you  
10 actually have to correct the railing? So, those  
11 are some things to look at.

12 I'd like to also make a modest suggestion on  
13 the recordkeeping. We're going to be adding to this,  
14 whether your amendment takes effect, whether the old  
15 -- the final rule that came out in January stays in  
16 effect, or if we revert back to the existing rule  
17 that's now in effect. Let's be clear about paperwork.

18 Your policy, your program policy manual for  
19 years said notwithstanding the requirement to keep  
20 records for 12 months you really only need to keep  
21 them since the last inspection as long as someone in  
22 management would effectively certify that the  
23 preceding months worth of inspection, workplace exams  
24 had been done. That made a lot of sense.

25 Then you put out the July 2015 program

1 policy letter, the famous double or triple dipping  
2 policy about being able to cite if you find hazards  
3 you could cite for an inadequate inspection. That's  
4 been borne out by the Sunbelt Reynolds decision, and  
5 that also said that that would indicate a lack of  
6 appropriate training for the workplace examiner so you  
7 could triple dip and cite for task training on top of  
8 the workplace exam, on top of the other hazards that  
9 were cited, that policy. That policy reverted back to  
10 the 12 months.

11 So, as we stand right now, the last time I  
12 looked you've got the program policy manual saying you  
13 only have to keep the records since the last  
14 inspection. You've got a more recent PPL that says  
15 we're back to 12 months. You've got the January 2017  
16 rule that says 12 months. Where are we on this?

17 I would suggest let's codify that PPM that  
18 you only need to keep the records and make them  
19 available to an authorized representative of the  
20 secretary for records that have not been reviewed  
21 previously, since the last inspection. That will cut  
22 down on the paperwork burden of mine operators, both  
23 large and small, and I don't think it has any  
24 diminution in safety value, but, you know, just does  
25 insulate you from a situation where an inspector would

1 say, "Hey, let me see your workplace exam record from  
2 last November 3rd," and you can't find it. Ding,  
3 you've got an automatic gotcha. So, let's try to  
4 avoid that.

5 The other thing that I wanted to mention is  
6 contractors. In the Sunbelt Reynolds case that seems  
7 to infer that every contractor or subcontractor at a  
8 mine site who, of course, is defined under the Mine  
9 Act as a mine operator has a duty to conduct their own  
10 individual workplace examination, and, of course, it  
11 would have to be documented under the new rule and  
12 under your proposal, and then Sunbelt held that  
13 basically the host mine operator can also be liable  
14 and 20 Mile Coal says MSHA has unreviewable discretion  
15 to cite the mine operator, the contractor or both for  
16 a contractor's violation.

17 So, now this infers a duty on the mine  
18 operator to have to go around and inspect each  
19 contractor's workplace exam record to determine if  
20 it's adequate after maybe having only done the  
21 workplace exam in that area themselves an hour before.

22 So, let's look at this contractor issue and  
23 maybe, you know, inject some real world experience  
24 into this. If a contractor is coming in to do work  
25 for a couple of hours and it's in an area that has

1 already been examined by the mine operator for that  
2 shift and documented, does that electrical contractor  
3 really need to examine that whole work area?

4 As the law stands right now that is how it  
5 is, so let's try to clarify that and, you know,  
6 eliminate the need for maybe five contractors, plus  
7 the mine operator who are all working in a contiguous  
8 work area, to create five separate reports or six  
9 separate reports that MSHA would be looking at.

10 The last couple of things here. Competent  
11 person, you know, I agree the mine operator should  
12 have that flexibility. I agree it should be able to  
13 be an hourly or a salaried individual. The miners do  
14 know their areas quite well. There should not be an  
15 automatic assumption that someone is an agent of  
16 management for Section 110 purposes simply because  
17 they do the workplace exam. We have that Nelson  
18 Quarries decision that really needs some  
19 clarification. That's another one where hourly  
20 employees were found to be agents for 110(c) purposes,  
21 and one of the indicia that were relied upon was  
22 they're conducting the workplace exams.

23 The other thing is that because someone who  
24 is a competent person must promptly initiate  
25 corrective action. Let's make it clear that that

1 prompt initiation of corrective action does not equate  
2 with directing the workforce because, again, you've  
3 heard special investigators out there. That's the  
4 thing they're really using these days is do you direct  
5 the workforce, and if a competent person gets on the  
6 radio and says, "Hey, we got a loose railing up on the  
7 work platform, can you bring some steel over here,"  
8 that should not transform them into facing potentially  
9 \$70,000 in personal penalties because they tried to do  
10 the right thing.

11 So, again, these are kind of on-the-fly  
12 comments that I have here. I can tell you that I work  
13 with mines from two employees up to multinational  
14 publicly-traded companies. Each one is going to have  
15 a different approach to how they do the workplace  
16 exams and each one should have that flexibility.

17 Generally, I think it's a good practice to  
18 do the exam before anybody enters the work area,  
19 whether that be at the start of the shift or whether  
20 it be later in the day. But I just want to close with  
21 the fact that there seemed to be some sentiment from  
22 other witnesses that if you require this to be done at  
23 the start of the shift or before people enter that  
24 that means that everyone has got blinders on the rest  
25 of the day and doesn't have to look at or reflect or

1 report or address any hazards that might be emergent  
2 through the course of the work shift.

3 Folks, this Mine Act is a strict liability  
4 statute. You have an ongoing obligation -- dare I say  
5 a general duty -- to provide a safe and health work  
6 environment, and that doesn't, you know, disappear by  
7 osmosis simply because a workplace exam was done and  
8 documented earlier that day. So, you know, everybody  
9 has to stay frosty out there because we all work  
10 together. Thank you very much. Any questions?

11 MR. PIERCE: I just want to say thank you  
12 for your testimony, and you're right. One of the  
13 comments I was going to have is let's don't get  
14 confused with the workplace exam and hazard  
15 recognition.

16 You know, we train our people in recognizing  
17 hazards and that's ongoing throughout the day. The  
18 workplace exam is for us too, and I think Mr. Chajet  
19 pointed it out, how could a quick exam help safety.  
20 What we're looking for in a workplace exam at the  
21 beginning when people start work is to fix the obvious  
22 problems that we didn't see on a previous shift, you  
23 know, because mining does change minute by minute  
24 sometimes, you know, so it's not going to be the same  
25 if you do a workplace exam at seven o'clock there may

1 be by five after seven maybe something has happened.  
2 That's got to be on our people to recognize hazards  
3 and change as ongoing.

4 That's not what we're asking for. We're  
5 asking for before people go into work let's look at  
6 our areas to make sure that we see the obvious stuff  
7 like a ladder in a walkway or something.

8 You know, if I'm a maintenance person and  
9 I've got to go up on a walkway and I've got my hands  
10 full of tools as I start walking out across this  
11 catwalk that's 30-foot in the air I'd like to know  
12 that somebody's ahead of me and making sure that all  
13 the wells are good and everything and it's not going  
14 to fall out from under me as I walk across through  
15 there.

16 That's all we're asking for. We're not  
17 asking for this to be your only exam you do all day  
18 long. That's under another hazard recognition.

19 You brought up a lot of good points, and I  
20 appreciate that because, you know, yes, we do all have  
21 that obligation, and my comment earlier about the lady  
22 speaking for the miners I didn't mean that all the  
23 other people in here didn't represent miners. I don't  
24 think we have anybody in here that don't believe in  
25 miner safety or you wouldn't be here today. You

1 wouldn't have took time out of your busy schedule to  
2 come here. I don't believe that at all, and I didn't  
3 mean it to come across that way. I just was glad to  
4 see that we had a representative for our miners, and  
5 sometimes that gets confusing a little bit, but I  
6 didn't mean to imply that people didn't care about  
7 miner safety just because you are an operator or an  
8 owner or an attorney, or you wouldn't be here and I  
9 appreciate that.

10           You know, a lot of questions have been asked  
11 why for this rule, why. Well, are we satisfied with  
12 where we're at? I'm going to ask each one of you  
13 that. We've got 12 fatalities in metal/nonmetal,  
14 right. Are we happy with that? Yes, it's a great  
15 accomplishment but that's 12 people that's lost a  
16 family member.

17           So, do we want to just keep doing what we've  
18 always done and say 12 is okay because, you know, this  
19 exam has been fine in the past or do we want to try to  
20 get better at what we do?

21           Yes, sir.

22           MR. WIRKKALA: I was just wondering is the  
23 hearing closed?

24           MR. PIERCE: No, sir, I don't think so. No.  
25 That's the whole point is we can't just sit

1 where we are at. We've got to try to improve on what  
2 we do. I know a lot has been brought out about we  
3 hadn't cited workplace exam in some of these  
4 fatalities.

5 If you go back and you look at -- just read  
6 the federal investigation, you may not see a workplace  
7 exam citation in there, but if you went back and  
8 looked at the whole investigation it might have been  
9 on an E16, but we have cited a lot of workplace exams.

10 It may not just have been one that we directly  
11 contributed to that fatality. It may have been  
12 something that did indirectly contribute to it by --  
13 throughout the day, the conditions change, whatever,  
14 but they are out there. We have cited it. It just  
15 may not read -- you may not pull it up on the federal  
16 investigation and see that we cited that. We have  
17 cited some. I can give you some examples all day long  
18 here, but that's not the purpose of this hearing.

19 Yes, there are times when our inspectors get  
20 a little zealous and write things that they probably  
21 shouldn't, right? That's not nothing new to all of  
22 us. We all sit here and talk about consistency and we  
23 want to do things -- I think we all want to do what's  
24 right and I know we all try to treat our inspectors,  
25 but, you know, those guys are individuals too.

1           Just like you said awhile ago, they all have  
2    is a belief, but we still have to prove it, and burden  
3    of proof still does finally get back to us, so we try  
4    to teach our people, you know, let's write good  
5    violations. If it's not a violation let's don't try  
6    to make it into a violation. We've done this with our  
7    7001s. You report accidents. We don't run out and  
8    write you a violation just because we -- if we get out  
9    there and the condition has been corrected, we're not  
10   going to write it. I don't see this as being any  
11   different.

12           We're not going to spend time and go back 12  
13   months of workplace exams and find where you found a  
14   guard off and, you know. Now, if we find -- we're  
15   still seeing that now, you know, guards are off,  
16   guards have been left off for two-three weeks, that's  
17   a problem. That creates a trend and somebody should  
18   be, you know, addressing that, but to write you a  
19   citation just because we found six months ago you had  
20   a guard off, no, we're not going to do that. I think  
21   I can speak for the Agency. We're not going to do  
22   that, just like our 7001s.

23           We want you to correct the condition.  
24   That's what this rule is about, correcting the  
25   conditions when you see them, and hopefully before you

1 put people to work you try to make sure there's no  
2 obvious conditions before they start to work.

3 So, I just want to say thank you for  
4 bringing out a lot of good points, and hopefully I  
5 cleared up some of the stuff that I said earlier.

6 MS. ABRAMS: Thank you. Any other  
7 questions? Thank you.

8 MS. FONTAINE: Thank you. Yes?

9 MR. WIRKKALA: I was wondering if it would  
10 be possible to address --

11 MS. FONTAINE: Absolutely.

12 MR. WIRKKALA: I couldn't resist. I guess I  
13 do qualify as a miner. My name is Arnie Wirkkala. I  
14 appreciate the opportunity to be able to say  
15 something. I represent a family-owned business. We  
16 vary from six employees to 30, and we just don't have  
17 family there, but everybody that works for us is part  
18 of our family. I have no interest in killing my sons,  
19 my son-in-law, my cousins, myself. But if we could  
20 afford it, I could have flown out everyone of our  
21 employees and to a man or woman, they would consider  
22 that the biggest threat to their health and safety is  
23 this organization.

24 By God's grace our company has existed for a  
25 little over 70 years. We predate you guys. I'm not

1 going to claim the credit for it, but by the grace of  
2 God we've never had a fatality. We have had injuries.

3 There have been accidents, but what MSHA has with  
4 their point system thing is -- and you have your own  
5 judge, too -- apparently somebody has made the  
6 decision that companies like ours don't need to exist  
7 anymore. We are the only private entity that has  
8 living wage jobs that isn't a gas station or a grocery  
9 store in our community, and we come from southwestern  
10 Washington.

11 Our family came over from Finland about  
12 three generations ago. We come from a logging  
13 background and that's how we got into operating some  
14 quarries for building logging roads, and I don't know  
15 how we survived the woods, but we still do that.

16 But what I'm going to address is that this  
17 is one more nebulous rule. We've had over seven years  
18 more inspections than I could even begin to tell you,  
19 and everything has passed muster for 40 years, and  
20 then we get cited. We often have a thing that was  
21 terminated by an inspector and signed off on and the  
22 very next visit the same exact thing we get cited for.

23 Now, like I said, we're a small company and  
24 we just came through a biblical, I don't know if you  
25 call it depression or recession, but our business went

1 down by to where we were only 25 percent of what we  
2 had been before, and it wasn't just two or three  
3 years. We just have begun to see the turn in the  
4 last, say year and a half, and we used up most of our  
5 family seed corn to keep roofs over our employees'  
6 heads, and I think that in Seattle they concluded that  
7 we just couldn't have the budget to be able to warrant  
8 staying in business because we got 21 visits, 10 a  
9 year, some of them for a month or more at a time, and  
10 the points are going up. I think they're trying to  
11 hit the \$250,000 jackpot, but we can't print money.  
12 We can't create no divisions.

13 I'm an equipment operator. I'm the  
14 inspector. I'm a miner. I'm a shovel operator, this  
15 kind, and, yes, I deeply care about the safety of  
16 everybody that works there, but you're breaking our  
17 backs, and it's all up to interpretation, and boy,  
18 indeed, we do get cited. I got cited for a tag on a  
19 loader -- I didn't manufacture it, Kamatsu did. It  
20 wasn't brand new, but the inspector told me I know  
21 that it meets the ROP things, but this tag doesn't  
22 have the right numbers on it.

23 So, for about two months I went through hell  
24 trying to terminate that because the company that  
25 built that was in Canada that made that cap, and they

1 were no longer part of Kamatsu's operation.

2 Well, anyway, fortunately, they tracked down  
3 the numbers that were missing on that tag. Like I  
4 said, that had been inspected over and over. When it  
5 was all said and done and I got the paperwork back  
6 from the manufacturer finally that it did indeed meet  
7 every standard, I said what can we do. They're not  
8 even in existence. I don't know how to get the tag  
9 print. Oh, just scratch them in there.

10 So, I believe you, sir, that if you came  
11 there you would be that way, but that -- it just  
12 depends on who it is and what day it is. And, yeah,  
13 we don't exist at the pleasure of MSHA or any other  
14 agency of which I'm primarily the inspector for things  
15 we need to be in compliance with, clean water and  
16 everything else, and workplace exams. I'm a mechanic,  
17 I'm an electrician, you name it, and I'm here at least  
18 just to plead for maybe a year or two more of  
19 existence, and I will be meeting with my congresswoman  
20 as well to address these issues which I have in the  
21 past, and she's aware that I'm here today.

22 I thank you for the opportunity to talk to  
23 this, so to me that's the thing about these is I have  
24 other information with me. One of them has to do with  
25 a coal mining accident where the company was cited

1 over and over and over and over and workplace  
2 examinations and so on, but the miner still perished  
3 in there, and that's a terrible thing to have happen.

4 But I felt like walking around the building  
5 and looking for how many wheel chocks were there, and  
6 if they were put on the exact right side because in  
7 order for a wheel chock to do good they need to be put  
8 on the downhill side. I have pictures on my phone of  
9 wheel chocks placed by inspectors that have been on  
10 site that were on the uphill side of the thing. But  
11 if we get a subduction zone earthquake and it tilts  
12 the other way it should be good. We've had inspectors  
13 jump on moving wheel loaders, one that I was cited for  
14 criminal negligence with our employees. He had his  
15 hand on the wall that was claimed to be so bad, also  
16 had passed at least 40 inspections.

17 Really, that's about all I have to say.  
18 Very little of what I've said probably will make any  
19 difference in what happens or comes down the pike, but  
20 I appreciate the opportunity to address you and I  
21 thank you and hopefully some of these things will be  
22 taken into consideration.

23 MR. PIERCE: I have one question.

24 MR. WIRKKALA: Yes, sir.

25 MR. PIERCE: Thank you for being here and

1 representing the small operators, because we do have a  
2 lot of small operators throughout the country just  
3 like you that only employs family and small number of  
4 people, but they don't always come to these kind of  
5 meetings, and we do appreciate that.

6 You said you had 20 inspections?

7 MR. WIRKKALA: Twenty-one. I think this  
8 year so far we've had 10.

9 MR. PIERCE: The reason I'm asking that are  
10 you talking about that came and did inspection --

11 MR. WIRKKALA: Oh, yeah.

12 MR. PIERCE: -- and had to come back?

13 MR. WIRKKALA: Oh, yeah, we had one that was  
14 a full inspection on a Friday and another one on the  
15 following Monday. Different inspector, but, bam.

16 MR. PIERCE: Was he there to terminate  
17 violations?

18 MR. WIRKKALA: No, no, complete new full  
19 inspection.

20 MR. PIERCE: Okay. What's the name of your  
21 company?

22 MR. WIRKKALA: Naselle Rock, an asphalt  
23 company.

24 MR. PIERCE: Okay.

25 MR. WIRKKALA: If you want to cuff me, I'm

1 right here.

2 MR. PIERCE: No, we want to look into that  
3 because that's not normal.

4 MR. WIRKKALA: But like I said before --

5 MR. PIERCE: That's not normal and we want  
6 to look into that.

7 MR. WIRKKALA: We know what's normal. Like  
8 I said, we've been around 70 years.

9 MR. PIERCE: Well, thank you, sir.

10 MR. WIRKKALA: You bet. Thank you, sir.

11 MS. BREEN: Hi.

12 MS. FONTAINE: Hello.

13 MS. BREEN: My name is Rosalein Breen and  
14 I'm representing Sterling Breen Crushing in Washington  
15 State. I don't have a formal statement. It's a  
16 little intimidating here, but just a couple of the  
17 points that I wanted to discuss on the workplace site  
18 inspections.

19 We have -- we do them every morning. The  
20 issues, some of the issues that we have when the  
21 inspectors come is that say, for example, restricted  
22 area, if there is a platform on the crusher we have a  
23 restricted area, and the inspectors and, in fact, one  
24 of the inspectors told us how he would like it done.  
25 A year or two later we get an inspection and he

1 doesn't like it. I mean, we're doing it as directed  
2 by one of the inspectors.

3           So, we feel almost -- I mean, it's almost  
4 like we're not -- our hands aren't tied but we don't  
5 really know which way to go, and then we get a  
6 citation for it. We don't even get a warning saying,  
7 well, all right, you know, I understand that you were  
8 just -- you were instructed to do it a certain way or  
9 recommended to do it a certain way, but when a  
10 citation is involved it doesn't feel like a  
11 recommendation. I mean, we have to do it that way.

12           But then, like I said, a couple years later  
13 we get a citation again because this inspector didn't  
14 like it. It's so subjective. We don't know where  
15 we're going to go or where we'll stand from inspection  
16 to inspection. I realize that that's not really what  
17 this hearing is about, but we do do our site  
18 inspections and they are continued throughout the day.

19           There was something though that you said  
20 that kind of caught my attention in that you don't go  
21 back if there is not -- well, this last inspection  
22 that we are finalizing, it felt to us like a witch  
23 hunt. He went back years and cited us on a situation  
24 where one of our miners was -- they were changing  
25 cable and he got hit by it. There was no -- I mean,

1 it was -- he did tell our supervisor and the  
2 supervisor told him to go to the doctor, but the  
3 doctor, it was basically a bruise. He did fill out an  
4 Accident, Injury, and Illness Report (Form 7000-1)  
5 because the miner came in saying it. But he had  
6 nothing to report other than a bruise. The doctor  
7 gave him pain pills which the miner didn't even fill  
8 so that's how minor it was.

9 So, we didn't fill out an injury because  
10 there basically wasn't. I mean, we certainly took the  
11 steps to prevent that from happening in case it did  
12 cause much more serious injury, so nothing was done on  
13 that. He wasn't hurt. You know, we did send him home  
14 but this man -- four years later this inspector wrote  
15 us up for it.

16 MR. PIERCE: Was he doing a Part 50 audit or  
17 something? Was he doing an audit of your --

18 MS. BREEN: Yes. Yeah.

19 MR. PIERCE: Okay.

20 MS. BREEN: And he was just going through  
21 everything. Like I said, it felt like a witch hunt.  
22 He was writing -- he was also the one who wrote the  
23 citation on the restricted access barrier that we had  
24 put up.

25 MR. PIERCE: Right.

1 MS. BREEN: So, I guess that's just our  
2 frustration is trying to -- we are -- you know, in our  
3 safety classes, you know, tailgate meetings, whatever,  
4 you know, we talk about the fact, yes, we do want to  
5 make production. We're there to make money, but first  
6 and foremost, and we say this, we want everyone  
7 walking out the gate that night with all their fingers  
8 and toes, and healthy. I mean, we don't want, we  
9 don't want that to our employees. We are a small  
10 company. We know them. They may not be family but  
11 they feel like it.

12 So, anyway, that's just my point.

13 MR. PIERCE: Well, thank you.

14 MS. BREEN: Thank you.

15 MS. FONTAINE: What was the name of your  
16 company again?

17 MS. BREEN: Sterling Breen Crushing, and  
18 that's in Centralia, Washington.

19 MS. FONTAINE: Thank you. Is there anyone  
20 else who would like to make a presentation?

21 Okay. Well, I thank everyone for coming  
22 forward and making a presentation. Thank you for  
23 attending the hearing. I want to emphasize that we  
24 need your comments by Monday, November 13th. We will  
25 take all your comments and concerns into consideration

1 when we develop the final rule. I continue to  
2 encourage you to participate and provide your input  
3 during this rulemaking process.

4 Before the hearing concludes, I would also  
5 like to mention MSHA's upcoming Regulatory Reform  
6 Initiative, Executive Order 13777, Enforcing The  
7 Regulatory Reform Agenda. It directs each federal  
8 agency to evaluate existing regulations and make  
9 recommendations regarding their repeal, replacement or  
10 modification consistent with acts of the law. To  
11 comply with this executive order, we will seek  
12 stakeholder input to assist MSHA in identifying and  
13 evaluating existing regulations that could potentially  
14 be removed, revised, or streamlined while not reducing  
15 protection for miners.

16 MSHA considers early public participation in  
17 the regulatory reform process to be particularly  
18 important for the mining community to present their  
19 views and recommendations, information and data,  
20 including economic and technological feasibility  
21 concerns. Therefore, under the heading "Spotlight" on  
22 MSHA's main web page we have included a link to an  
23 email address where stakeholders can submit their  
24 comments on reform of MSHA's regulations. The address  
25 is [zzmsa-osrvregulatoryreform@dol.gov](mailto:zzmsa-osrvregulatoryreform@dol.gov). That's

1       zzmscha-osrvregulatoryreform@dol.com.

2               Also, MSHA will hold stakeholder meetings in  
3 various locations around the country to hear your  
4 ideas. MSHA will publish a *Federal Register* notice  
5 announcing the dates and locations of the stakeholder  
6 meetings. Information that the mining community  
7 provides will help improve the health and safety of  
8 miners and assist MSHA in determining the appropriate  
9 regulatory action.

10              At this time I want to thank you very much.  
11 Our public hearing is concluded.

12              (Whereupon, at 11:00 a.m., the hearing in  
13 the above-entitled matter was concluded.)

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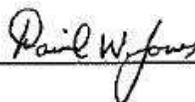
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REPORTER'S CERTIFICATE

DOCKET NO.: MSHA-2014-0030  
CASE TITLE: Examination of Working Places in Metal  
and Nonmetal Mines, Proposed Rule  
HEARING DATE: October 24, 2017  
LOCATION: Washington, D.C.

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

Date: October 24, 2017



David Jones  
Official Reporter  
Heritage Reporting Corporation  
Suite 206  
1220 L Street, N.W.  
Washington, D.C. 20005-4018

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

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

*Public Hearing, Arlington, VA*  
*October 24, 2017*

***AISI Introduction***

Good morning and thank you for holding this public hearing on the MSHA proposed amendments to the rule for examinations of working places in metal and nonmetal mines. I am Brett Smith Senior Director of Government Relations for the American Iron and Steel Institute, or AISI. AISI serves as the voice of the North American steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. AISI is comprised of 19 member companies, including integrated and electric furnace steelmakers, and approximately 120 associate members who are suppliers to or customers of the steel industry. The U.S. steel industry operates more than 100 steelmaking and production facilities, and shipped 87 million tons of steel mill products valued at \$98 billion in 2016.

The industry directly employs approximately 140,000 people in steel manufacturing operations in the United States, and directly or indirectly supports nearly one million U.S. jobs. Integral parts of the AISI membership are the three companies who mine and process iron ore in the United States - ArcelorMittal, Cleveland-Cliffs Inc., and U.S. Steel. AISI's member companies maintain the eight large active iron ore mining and processing facilities in the United States located in Northeast Minnesota and Michigan's Upper Peninsula. In aggregate, these facilities directly employ nearly 5,000 workers when at full production and play an outsized role in supporting the regional economies of those areas. Iron ore is a critical raw material needed for the production of steel.

These facilities provide the bulk of the iron ore consumed by the U.S. integrated steel industry. The United States is a net exporter of iron ore.

### *Domestic Steel Industry Background*

Before addressing the MSHA-proposed revisions to this mine examination rule, it is important to recognize that the domestic steel industry continues to combat a steel import crisis. Steel producers in America are currently under substantial challenges from international competitors. Foreign government subsidies and other market-distorting policies in the steel sector have resulted in massive global steel overcapacity. In September 2017, the Organization for Economic Co-operation and Development (OECD) estimated global overcapacity at approximately 657 million metric tons, over eight times U.S. raw steel production in 2016. Several of the countries continue to disrupt world markets by subsidizing the production and exportation of steel by their producers.

The U.S. iron ore industry remains in recovery following the 2015-2016 steel import crisis during which five of the eight major domestic iron ore mining and processing facilities were partially or fully idled and nearly 2,000 workers were laid off. While industry conditions have stabilized and many of the displaced workers have been called back to work, market conditions remain challenging for both the iron ore sector and the downstream steel industry. In order to compete in the globally competitive iron ore and steel markets, producers must strive to maintain maximum efficiency while upholding commitments to worker health and safety and environmental stewardship.

AISI member companies have made substantial efforts to decrease the number and frequency of workplace incidents and continue to work through AISI to share information and best practices to meet their shared goal of improving occupational

safety and health. Our experience has demonstrated that cooperative efforts among company management, employees, and government can help maximize safety and health. All of our member companies - whether they are regulated by OSHA or MSHA - are committed to making continuous improvements so that our employees return home safely each day.

### *Comments on Proposed Amendments to Examination Rule*

AISI and its member companies appreciate the fact that MSHA leadership has recognized the concerns of the regulated community of mining companies that alterations are necessary to the version of the <sup>Exam.</sup> rule finalized in January of this year. As we stated in written and oral public comments in 2016 on the original proposed rule, our industry believed there were substantial flaws that would create compliance costs to employers that were not adequately balanced with the foreseen benefits of the proposal. We also believed that MSHA needed to further define and provide clarity to several of the key terminologies used in the proposed rule.

The amendments proposed in September of this year to the final rule contain several changes that, if finalized, would be improvements from our sector's perspective. In particular, we appreciate MSHA's proposed clarification on the definition of some terms in the rule, as well as some additional flexibility for the documentation requirements for employers. That said, AISI member companies retain several substantial concerns with the rule that, even if amended as proposed, would present challenges to employers without providing additional safety protections for our employees. AISI intends to submit detailed comments on the proposed rule to the docket, in conjunction with associations representing other regulated sectors, by the November deadline.

Today, I would like to highlight the following key concerns our member companies have with the examination rule, as potentially amended by the September proposal:

- The documentation requirements of the proposed examinations remain problematic. As we noted in 2016, iron ore mines are vast operations with footprints encompassing twelve to over fifty square miles wide, consisting of multiple buildings and varied operations. These mine sites include multiple employees and jobs operating simultaneously. Mining operations remain running 24 hours-a-day, seven-days-a-week. Within this timeframe employees work shift rotations, overtime, early starts, fixed schedules, relief times, flex time and other variations. The proposed amendments fail to address these issues and wrongly assume that all mining operations function on fixed schedules. This leaves operators with varied and intermingled work schedules vulnerable for citations based on varied interpretations by individual inspectors.
- The proposed amendments to the final rule do not provide clarity as to whether asset management systems currently in use by regulated companies would qualify as an acceptable form of recordkeeping under the rule. It is essential that the final rule ensure flexibility within existing electronic work order and record-keeping systems as to avoid redundancy and undue administrative burden. Being forced to implement another tracking system onto an existing system will complicate the ability of employers to ensure corrective actions are being completed.
- The term "promptly" for purposes of the notification and remediation requirements remains subject to the interpretation of the inspectors. While the proposed amendments provide some guidance with respect to when conditions need not be recorded, that guidance remains subjective and requires greater clarification.

- AISI remains concerned, that the potential final rule, as amended in this proposal, still does not properly identify the unsafe work practices that necessitate such an additional regulation. MSHA has not identified the threat imposed by current operator practices, nor the increased safety results that it would achieve.

### *Conclusion*

AISI and its member companies urge MSHA to continue to reevaluate and reform the workplace examination rule for metal/non-metal mining operations. While we appreciate that several of the changes proposed to the rule would expand compliance flexibility to employers, substantial concerns from the iron ore sector remain. In particular, the rule continues to incorrectly assume that that all mining operations function on fixed schedules, leaving operators vulnerable for citations based on inconsistent interpretations by individual inspectors. The proposed revision also does not provide certainty that currently used asset management systems would qualify as an acceptable form of recordkeeping under the rule.

We believe that MSHA should ensure that the final rule results in enhanced safety benefits at mining operations that are not outweighed by the anticipated increased costs of compliance. Further, MSHA must not create unforeseen consequences in the final rule that ultimately limit safety achievements at our operations, while limiting the sector's overall international competitiveness.

Again, thank you for the ability to appear before you today and I look forward to answering any questions that you may have.

NLA Testimony Oct. 24, 2017

My name is Hunter Prillaman, and I am here today for the National Lime Association. NLA represents the makers of quicklime and other lime products. Our members' limestone mines and their production facilities are under the jurisdiction of MSHA.

We commend MSHA for reopening the rulemaking record on the workplace examination rule. Both of the substantive changes that have been proposed are improvements. As we explained in earlier comments and testimony, many NLA members believe that it is best to train miners to perform examinations of their own working areas, and thus it is appropriate to allow inspections "as" they begin work, so that it is clear that they can perform these exams themselves.

Secondly, we agree that adverse conditions that are promptly corrected should not have to be noted on examination forms; we believe that otherwise the forms will be overwhelmed by minor housekeeping issues that can be and routinely are immediately corrected.

While MSHA has only proposed limited changes to the rule, this should also be an opportunity for the agency to provide clarifications on some other issues with the rule that may not require modification of the rule language itself.

For example, NLA and other commenters strongly urged MSHA to make clear that it would not issue citations based on adverse conditions noted in examination records, as long as the conditions were promptly corrected with proper notice to miners. In the January 23, 2017 rule preamble, the agency states:

Many commenters were concerned that the Agency will use the examination record to write citations based solely on the adverse conditions identified in the record. This is not MSHA's intent, nor do we plan to train our inspectors to do this. 82 FR 7687.

We believe that MSHA should state this more definitively as a matter of policy, and not just a statement of intent and plans.

NLA also believes that there should be more clarity on what MSHA has in mind with respect to inspection of travelways. At the least, MSHA should make clear that its revised language allowing inspection "as" miners enter an area for work applies to travelways as well.

Finally, although the proposed changes are in the right direction, NLA continues to believe that the rule has additional serious defects, and that it would be better for MSHA to open up the entire rule for further comment and reconsideration, and we urge the agency to consider doing so.

Thank you.

**Testimony of Linda Raisovich-Parsons**  
**Representing the United Mine Workers of America**  
**On the**  
**Proposed Rule, Limited Reopening of the Rulemaking Record**  
**For Examinations of Working Places in Metal and Nonmetal Mines**  
**October 24, 2017**

Good Morning. My name is Linda Raisovich-Parsons and I currently serve as the Deputy Administrator of the Department of Occupational Health and Safety for the United Mine Workers of America. I come before you today in a state of exasperation and bewilderment over the Agency's decision to modify the rule for Examinations of Working Places in Metal and Nonmetal Mines. My first concern is the fact that we are even here today, revisiting a rule that has been through the rulemaking process and published as a final on January 23, 2017. The rule was scheduled to take effect May 23, 2017, and should be in effect today. Instead, the Agency chose to delay the rule's effective date until October 2, 2017, and now has chosen once again to delay the rule as well as reopen the rule to undo two important protections it provided and reinstate rulemaking on a rule that should already be in place. I find this quite disturbing and frustrating that the Agency charged with protecting our nation's miners would suddenly exhibit such a change of heart in its mission to do so. To demonstrate the exasperation I feel on this matter I only need to quote MSHA's Fact Sheet previously issued on the Proposed Rule. Its introduction summarized the need for this rule eloquently and I quote:

*"The Mine Safety and Health Administration proposed rule would enhance the quality of working place examinations in Metal and Nonmetal Mines, improve protections for miners and save lives.*

*MSHA believes it has taken a **common sense** approach with this proposed rule – (1) Require mine operators to conduct working place examinations to identify hazards **before** work begins in an area, (2) record the hazards before the end of each shift, and also record the corrective action and the date they are corrected, and (3) make sure miners are aware of potential hazardous conditions.*

*Effective working place examinations are a fundamental accident prevention tool that under Section 2 of the Federal Mine Safety and Health Act will "provide more effective means and measures for improving the working conditions and practices in the Nation's . . . mines in order to prevent death and serious physical harm . . ."*

*Recent fatal and other accidents at MNM mines make clear the need to do more to prevent mining deaths and injuries. These accidents support that miners would benefit from rigorous working place examinations, conducted by a competent person, **to better identify hazards so they can be addressed before miners get injured or killed.***

*From January 2010 through mid-December 2015, there have been 122 miners killed in 110 accidents at MNM mines, and more than 60 percent of those deaths were linked to violations of the "Rules to Live By" standards, which are standards that most frequently cause mining deaths. Sixty miners have died just since October 2013. MSHA believes many of these fatalities could have been prevented with better working place examinations.*

*One of those deaths was Michael Jay Nickels, a haul truck driver, who was killed in March 2015 when his truck drove off an elevated haul road embankment and into the mine's dredge pond. The roadway had no berm or barrier to stop the truck. An examination of the work area should have identified this hazardous condition.*

*MSHA believes that the additional communication that operators would be required to make under this proposed rule should encourage prompt corrective action and help prevent fatalities and other accidents. While MSHA has been encouraging the mining industry to improve mine workplace examinations to prevent these deaths, MSHA has concluded that the time has come to require these improve examinations."*

I must ask "Why the change of heart?" What has happened between then and now to warrant changing this rule? How could sending the miners into their workplace before an examination has been conducted possibly be safer than identifying those hazards beforehand, correcting them, and informing the miners of such hazards before they begin their work? By MSHA's own statement, a total of sixty miner's deaths could have been prevented by better work place examinations. I must ask "Would the death of Michael Jay Nickels have been prevented with an examination of the workplace after he drove off in his truck?" If an examination had been conducted prior to Michael going to work, the roadway with no berm or barrier would have been identified, a danger or warning sign posted in that area and could have quite possibly saved his life. MSHA makes a point of this in their discussion of this fatality. The fatal report indicates MSHA issued an unwarrantable failure because "Management engaged in aggravated conduct constituting more than ordinary negligence by failing to ensure persons were properly conducting workplace examinations..." Clearly, a workplace examination prior to Michael's shift could have saved his life.

Examinations are the fundamental tool for assessing the overall safety condition of the mine. A proper pre-shift examination includes all areas where miners are scheduled to work or travel during the shift. The examiner focuses on discovering both existing and developing hazards, such as gas accumulations, bad roof, water accumulations, unstable highwalls, missing berms, and determining the effectiveness of the mine ventilation system. These examinations are particularly effective in the discovery and correction of hazardous conditions and practices before they lead to injuries or fatalities. That is if they are conducted before miners are exposed. Conditions in the mining environment can change rapidly, therefore recurring examinations are necessary to ensure the safety of the miners. A timely workplace examination for hazardous

conditions ensures the safety of the miner on a routine basis. The standard should not be changed to allow examinations after miners are already exposed.

The second part of this rule change involves recordkeeping of conditions that have been corrected. The original proposal required that all hazardous conditions found in workplace examinations would be recorded. This new proposal only requires a record of hazardous conditions that have not been corrected. All conditions found during a workplace examination should and must be recorded. If hazards are not recorded, how will it be evident that trends are developing? Issues with roof or rib control would be a good example of this. If the examiner repeatedly finds a roof control issue, but installs extra support and then does not record it, there is no evidence that a roof condition may be developing that would warrant changes to the roof control plan. Likewise with ventilation issues or any hazardous condition that may becoming a larger issue that may need further action to address. If there is no record, how will it be identified? This also shows the operator and/or the examiner are diligent in identifying and correcting hazards.

As MSHA pointed out in its Fact Sheet:

*Mining conditions change continuously as materials are mined, transported, and processed, exposing miners to new conditions and hazards. It is important that these changing conditions are constantly monitored and examined to protect the miners that may be exposed to them.*

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

It is essential to keep records of all conditions found to provide some insight into the ever-changing conditions in a mine and to look for patterns of developing problems which need attention.

We believe that the current federal law is nowhere near stringent enough to adequately protect miners from hazards that can adversely affect their health and safety. Proper workplace exams are extremely important and have a vital role in preventing accidents and injuries. Proper workplace examinations by a competent person that has the proper experience and training in recognizing hazardous conditions, violations of mandatory safety standards, imminent dangers, and adverse conditions are vital to the safety of the miners working at that mine.

Making the examinations prior to someone working in that area is just common sense. This gives the miners coming into the next shift with knowledge of what conditions and hazards may be

present before they arrive. The UMWA suggest that the examinations be performed as close to the start of the next shift as possible but no more than 2 hours prior to. We would also suggest that the person performing these exams have a mine foreman or assistant mine foreman certification as well. This would ensure that they have the experience and knowledge in recognizing hazards that could adversely affect the health and safety of miners.

The requirement to record the location, hazards found, corrective action taken, and the date action was taken must be required to ensure proper documentation as well as ensure the hazard was corrected. This would also help make the operator as well as the miners more aware of the hazards so that they cannot say that they were not aware of a hazard and not correct it. Many hazards will be able to be corrected during the time of the exam but some will require time and manpower to correct and this requirement will show what progress is being made in a particular area and hazard. It's also important for miners and their representatives to have access to these records to see what hazards they may encounter and what actions are/were being taken to correct those hazards.

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We ask that the full original exam rule be implemented.

Thank you for your time and allowing me to comment.