

TRANSCRIPT OF PROCEEDINGS

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

Pages: 1 through 37
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BEFORE THE U.S. DEPARTMENT OF LABOR
MINE SAFETY AND HEALTH ADMINISTRATION

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

Forum A&B
Sheraton Hotel
2101 Richard Arrington Blvd.
Birmingham, Alabama

Tuesday,
October 31, 2017

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

BEFORE: SHEILA McCONNELL
Director of Standards
Regulations and Variances

PANEL MEMBERS:

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

MICHELE CURRAN, MSHA,
Office of the Solicitor

P R O C E E D I N G S

(9:00 a.m.)

1
2
3 MS. McCONNELL: Good morning. My name is
4 Sheila McConnell. I am the director of the Office of
5 Standards, Regulations and Variances for the Mine
6 Safety Health Administration, and I am the moderator
7 for this public hearing on MSHA's proposed rule on
8 examinations of working places in metal and nonmetal
9 mines which was published in the *Federal Register* on
10 September 12, 2017.

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

15 I also want to recognize Deputy Assistant
16 Secretary for Operations, Patricia Silvey, who is also
17 in the audience today.

18 The purpose of this hearing is to receive
19 information from the public that will help MSHA
20 evaluate the proposed rule that would make limited
21 changes to the Agency's January 2017 final rule on
22 examinations of working places in metal and nonmetal
23 mines.

24 This is the third of four public hearings.
25 The first hearing was held on Tuesday, October 24, at

1 MSHA Headquarters at Arlington, Virginia, and the
2 second on Thursday, October 26, in Salt Lake City.
3 The last hearing will take place on Thursday, November
4 2, in Pittsburgh, Pennsylvania.

5 Before we start, I'd like to introduce the
6 members of our panel. We have Samuel Pierce, the
7 Southeast District Manager for Metal and Nonmetal Mine
8 Safety and Health; and Michele Curran from the Office
9 of the Solicitor.

10 These hearings are conducted in an informal
11 manner. Formal rules of evidence do not apply. The
12 hearing panel may ask questions of speakers and
13 speakers may ask questions of the panel. Speakers and
14 other attendees may present information to the court
15 reporter for the rulemaking record. MSHA will accept
16 comments and other information for the record from any
17 interested part, including those not presenting oral
18 statements.

19 We ask everyone in attendance to sign the
20 attendance sheet.

21 Before we start, I'd like to give you a
22 little background. On January 23, 2017, MSHA
23 published a final rule on examinations of working
24 places in metal and nonmetal mines. The effective
25 date of the formal rule was stayed until June 2, 2018.

1 This January 2017 final rule, which strengthens and
2 improves MSHA's existing requirements for metal and
3 nonmetal examinations of working places, requires a
4 mine operator to do:

5 1) Have a competent person examine each
6 working place at least once each shift before miners
7 begin working that place;

8 2) Promptly notify miners in affected areas
9 of any conditions that may adversely affect their
10 safety or health;

11 3) Promptly initiate action to correct the
12 adverse conditions;

13 4) Withdraw all persons from affected areas
14 when alerted to any condition that may present an
15 imminent danger until the danger is abated;

16 5) Create an examination record before the
17 end of each shift that includes the name of the person
18 conducting the examination, date of the examination,
19 location of all areas examined, and description of
20 each condition found that may adversely affect the
21 safety and health of miners. The record must also
22 include or be supplemented to include the dates of
23 corrective actions taken;

24 6) Maintain examination records for at least
25 one year, make such records available for inspection

1 by MSHA, and miners' representatives, and provide
2 copies upon request.

3 The January 2017 rule retained several
4 existing concepts, definitions and responsibilities
5 such as definitions of a "competent person" and
6 "working place"; the conditions that may present
7 imminent danger; and the retention and availability of
8 examination records.

9 For example, the term "competent person"
10 continues to be defined as a person having abilities
11 and experience that fully qualify him to perform the
12 duty to which he is assigned. A "working place"
13 continues to be defined as any place in or about a
14 mine where work is being performed.

15 On September 12, 2017, MSHA published a
16 proposed rule that would make limited changes to the
17 January 2017 final rule. The limited changes being
18 considered would require that:

19 1) Examination of working places must be
20 conducted before work begins or as miners begin work
21 in that place. The January 2017 final rule requires
22 that the examination be made before miners begin work
23 in that place.

24 The proposed change would provide operators
25 additional flexibility in scheduling the working place

1 examination by allowing miners to enter a working
2 place at the same time that the competent person
3 conducts the examination. However, as noted in the
4 preamble to the proposed rule, MSHA intends that the
5 examination be conducted in a time frame sufficient to
6 assure that any adverse conditions be identified and
7 corrected before miners are exposed.

8 Like the January 2017 final rule, the
9 proposed rule would continue to permit mine operators
10 with consecutive shifts or those that operate on a 24-
11 hour, 365-day basis to conduct the examination for the
12 next shift at the end of the previous shift. As
13 stated in the January 2017 final rule, however,
14 because conditions at mines can change, MSHA expects
15 that operators will conduct examinations at a time
16 sufficiently close to the start of the next shift to
17 minimize miners' potential exposure to conditions that
18 may adversely affect their safety and health.

19 The second change would be:

20 2) The examination record must include
21 descriptions of adverse conditions that are not
22 corrected promptly and the dates of the corrective
23 actions for these conditions.

24 The January 2017 final rule requires that
25 each adverse condition be documented in the

1 examination record. The proposed rule, however, would
2 reduce the mine operator's record keeping burden by
3 requiring that the examination record include a
4 description only of each adverse condition that is not
5 corrected promptly.

6 A similar conforming change would require
7 that the examination record include the dates of
8 corrective action for only those adverse conditions
9 that are not promptly corrected. Therefore, under the
10 proposed rule when adverse conditions are corrected
11 promptly, there would be no requirement that the
12 examination record include descriptions either of
13 those corrected adverse conditions or of corrective
14 action dates for those conditions. MSHA interprets
15 the term "promptly" to mean before miners are
16 potentially exposed to adverse conditions.

17 The proposed rule would not change any other
18 information to be included in the examination record
19 as specified in the January 2017 final rule.

20 We are requesting comments and information
21 from the mining community only on these limited changes
22 in the proposed rule -- that is, the timing of the
23 working place examination, and documenting adverse
24 conditions and corrective action dates in the
25 examination record -- and how these proposed changes

1 may affect the safety and health of miners.

2 We also request comments on all costs and
3 benefit estimates presented in the preamble to the
4 proposed rule and on the data and assumptions the
5 Agency used to develop these estimates. This includes
6 the Agency's assumption on the number of instances
7 adverse conditions are promptly corrected and the time
8 saved by not requiring these corrective actions to be
9 put in the record.

10 As you address the proposed limited changes,
11 either in your testimony today or in your written
12 comments, please be specific. Specific information
13 and supporting rationale helps MSHA produce a final
14 rule that is responsive to the needs and concerns of
15 the stakeholder community.

16 MSHA will make available a verbatim
17 transcript of this public hearing approximately two
18 weeks from the completion of the hearing. You may
19 view the transcripts of all public hearings and
20 comments on our website at msha.gov and on
21 regulations.gov.

22 If you have a copy of your testimony, please
23 give a copy and any submissions to the court reporter
24 so that these can be appended to the hearing
25 transcript. Following this public hearing, you may

1 also submit additional comments using one of the
2 methods identified in the address section of the
3 proposed rule. All comments must be received by
4 Monday, November 13, 2017.

5 Again, if you haven't signed the attendance
6 sheet, please do so.

7 Please also be advised that on October 5,
8 2017, MSHA published a final rule to stay the
9 effective date of the January 2017 examination rule to
10 June 2, 2018. This delay allows MSHA additional time
11 and flexibility to provide compliance assistance to
12 industry and training to stakeholders and MSHA
13 inspectors on the final rule requirements.

14 So with that, I would like to introduce our
15 first speaker, Mark Savit, Husch Blackwell. Please
16 state and spell your name for the court reporter.

17 MR. SAVIT: My name is Mark Savit, M-A-R-K,
18 S-A-V-I-T. I'm with the law firm of Husch Blackwell,
19 LLP, H-U-S-C-H, B-L-A-C-K-W-E-L-L.

20 We represent a coalition of mining companies
21 and representatives from Husch Blackwell have
22 testified on behalf the coalition in both Washington,
23 D.C. and Salt Lake City. For that reason, there's no
24 reason for me to go into the specific concerns
25 regarding the rule that were raised by those two folks

1 on behalf of the coalition, so I'd just ask once again
2 that those concerns be reincorporated in the testimony
3 I'm giving and I would agree and concur with what they
4 said.

5 Having said that, there are a couple of
6 things I'd still like to address. Primarily this:
7 when the Agency proposed to postpone the effective
8 date, among the things it said in the preamble to that
9 proposed postponement -- which I know it was not
10 reiterated by Ms. McConnell when she gave the
11 introduction -- was that it wanted to consult with
12 stakeholders. This isn't consultation. Hearings are
13 nothing but a chance for us to make a statement and
14 there is no give-and-take in this process. If the
15 Agency wants to consult with stakeholders, it will
16 have to engage in a different process, and that
17 process would require -- because of the Administrative
18 Procedures Act, would require that the rule be
19 withdrawn and consultations be undertaken so that the
20 parties could sit down and exchange ideas.

21 And let me talk about a couple of principles
22 that I think we all agree on and which the rule
23 doesn't address and which I would like to see -- the
24 coalition would like to see the Agency take up. First
25 of all, I brought this up in a number of different

1 fora on behalf of a number of different people, but I
2 have never found any disagreement that more examiners
3 would be better than less examiners, that more people
4 doing examinations consistently throughout the shift
5 would be better than a single examination conducted by
6 a single person at a single time, no matter how
7 competent that person might be. But yet, the rule
8 discourages that. While MSHA says it encourages
9 people to do more exams, it doesn't require it, it
10 doesn't facilitate it, and it doesn't provide an
11 avenue for it.

12 We all share a common goal, and the common
13 goal is to improve the health and safety of miners.
14 If we all agree that furthering that common goal would
15 be allowing, encouraging, empowering more people to do
16 exams, empowering those people and encouraging them to
17 do those exams more frequently during the shift or as
18 conditions change. If we all agree on that, it seems
19 to me that there ought to be a way in which we can
20 facilitate that through the rule.

21 I think everyone also recognizes that there
22 are issues with the current rule. I appreciate the
23 Agency's explication of how the rule came to be. As a
24 matter of fact, I worked for the Agency when that was
25 going on and I understand the origin of the rule and

1 how it came to be what it is now. But absent the
2 requirement in that rule, companies have developed
3 their own effective examination programs which have
4 resulted, as part of a regulatory and industry and
5 labor effort, in a huge reduction in accidents and
6 fatalities in our industry, probably the best among
7 all industries in the country.

8 If we cannot find a way to sit down and
9 consult with each other so that everyone's best ideas
10 can be incorporated into the rule, then we are not
11 cooperating and achieving that common goal of
12 improving miner safety and health. I encourage the
13 Agency to move back from this process, withdraw the
14 rule, and open up a real consultation, a real dialogue
15 with industry and labor so that we can sit down and
16 develop the best possible rule based on things we all
17 agree on, and by doing that, improve the safety and
18 health of our nation's miners.

19 Thank you.

20 MS. McCONNELL: Thank you, Mr. Savit.

21 MR. SAVIT: Do you have questions?

22 MS. McCONNELL: No, I don't have any
23 questions, but I would like to state for the record
24 that I don't see how our final rule, our January 2017
25 rule prohibits the operator from having the

1 flexibility to conduct or continue to conduct the
2 examinations that they have been doing prior to the
3 final rule being issued on January 23, and so that is
4 where I would say that I disagree with that
5 assessment. And if you do have particular, besides
6 the generality in terms of how the January 2017 rule
7 prohibits that flexibility, it would be helpful for
8 you to be specific, either now or further in your
9 written comments, about how that would do that.

10 MR. SAVIT: Let me address that just
11 briefly, and certainly we'll address that more in
12 written comments, but I did not use the word
13 "prohibit", I absolutely did not. It inhibits but
14 doesn't prohibit. In other words, by requiring that
15 an examination be made by a single person at a
16 specific time during the shift, it does not encourage
17 others to do more. In other words, it does not
18 provide a regulatory framework which maximizes the
19 incentive for more people to do exams rather than
20 less. It creates the impression that once done -- I
21 didn't say prohibit -- it creates the impression that
22 once done at the beginning of the shift by a
23 "competent" person, the exam is over and there is no
24 need to conduct a further exam.

25 We all agree that conditions change, we all

1 agree that the hazards at one part of a shift are
2 different than the hazards at a different part of the
3 shift, and the idea that the regulatory requirement is
4 discharged when a single exam is done at a beginning
5 of a shift discourages others from doing more exams.
6 It doesn't prohibit the flexibility to allow, but it
7 discourages it by establishing a regulatory
8 requirement which takes the tacit position, if not
9 explicit, that one exam by one person at one time
10 discharges the responsibility.

11 MS. McCONNELL: However, the timing of the
12 examination that is under the current code, which is
13 can be conducted any time during the day during the
14 shift, does not provide, as we noted in the January
15 2017, the protections that miners should be offered
16 before they begin work or as they begin work, as we're
17 proposing now. So the timing does not inhibit the
18 operator's requirement that he must continually
19 examine the working place for hazardous conditions
20 throughout the shift. That was required prior to the
21 January 2017 rule, as it would be required within the
22 January 2017 rule.

23 MR. SAVIT: I have studied the rules for 40-
24 some years, I don't know of a rule which requires
25 ongoing exams. I also acknowledged in my testimony

1 that everyone understands that there are potential
2 problems or issues with the existing rule, and that
3 voluntary industry efforts have taken and largely
4 replaced what it says in the rule in terms of allowing
5 and encouraging and empowering miners to do exams
6 constantly throughout the shift.

7 So I'm not here to say that it prohibits,
8 I'm not here to say that the current rule is the be-
9 all and end-all, what I'm suggesting is that there is
10 a better way than the proposal. I'm suggesting that
11 there are plenty of people who have given this an
12 awful lot of thought with whom discussions might be
13 had, and I call to the Agency's attention its avowed
14 or expressed interest in consultation. This isn't
15 that. This is a different process.

16 MS. McCONNELL: Well, this process is
17 basically looking at two changes to the final rule
18 which would propose having a change in the timing and
19 the change of what's in the record. So basically,
20 what we really are talking about is really outside of
21 the scope of this proposed rule in some sense. But do
22 you have any specific comments on those two proposed
23 changes?

24 MR. SAVIT: As I said, I'm adopting the
25 specific comments that were made by Mr. Dullea and Mr.

1 Chajet at the previous two hearings. I'm suggesting
2 to MSHA that it might want to take a different
3 approach, if it is truly interested in, one,
4 consultation, and two, improving the final rule as a
5 total product.

6 MS. McCONNELL: Okay. Thank you very much,
7 Mr. Savit.

8 Did you have any questions?

9 (No response.)

10 MS. McCONNELL: Mr. Jeff Wilkes, Wilkes
11 Mining Safety Consulting. He's not here?

12 Mr. Patrick James, Lehigh Hanson.

13 MR. JAMES: Good morning.

14 MS. McCONNELL: Good morning, sir. Could
15 you please spell your name for the court reporter?

16 MR. JAMES: Patrick, P-A-T-R-I-C-K, James,
17 J-A-M-E-S.

18 I'm not as polished as Mr. Savit, so I'm
19 going to reach for my prepared script, and I'll
20 provide that later as well.

21 Good morning. My name is Patrick James. My
22 role is the vice president, environment safety and
23 health for Lehigh Hanson, based in Dallas, Texas.
24 Lehigh Hanson is a leading building materials company
25 across the North America, employing 9,500 workers in

1 the cement, aggregate and ready-mix industry. This
2 includes over 19 cement plants and terminals and over
3 180 active quarries and pits across the business. A
4 significant number of these businesses are regulated
5 by MSHA and would be impacted by the proposed rule.

6 Thank you for the opportunity to provide
7 some brief comments as part of this public hearing
8 process. Lehigh Hanson will also provide formal
9 comments individually as a company and collaboratively
10 with the NSSGA and PCA industrial associations.

11 I will begin today's comments by
12 acknowledging that Lehigh Hanson recognizes that the
13 health and safety of all workers, both employees and
14 contractors, is a core value and foundation of Lehigh
15 Hanson. Being safe and responsible is a key
16 foundation of our organization. Lehigh recognizes the
17 safety benefits of workplace examination and utilizes
18 safety practices that provide for a safe workplace.
19 At the same time, we are concerned about any need for
20 a new rule.

21 For the proposed rule to provide the most
22 benefit to worker safety and health, it must retain at
23 least some of the flexibility of the rule that we have
24 in place this time last year. That rule provided for
25 examinations to be performed at any time during the

1 shift. We support returning to the former rule, but
2 recognize that this is not on the table at this time,
3 so what we address here are the two changes in the
4 most recent proposed rulemaking.

5 So number one, regarding the proposal for
6 the workplace examination to be performed either prior
7 to or as miners being work in a working place. The
8 addition is an improvement in that it would allow
9 increased flexibility and timing of the workplace
10 examination over the rule promulgated previously,
11 however, it continues to unnecessarily constrain when
12 operators can conduct their workplace examinations.
13 The proposed language does not go far enough in
14 providing flexibility to conduct the examination to
15 provide the greatest opportunity to find and correct
16 hazards.

17 Shifts often vary in operations and
18 circumstances change constantly as a shift progresses
19 and conditions change. The former standard provides
20 that flexibility. Examination can be completed at any
21 time during the shift. We need to go back to that in
22 order to permit the examination timing to be tailored
23 to the actual working conditions which would further
24 the safety goal of having workplace exams timed to
25 enhance the likelihood of finding and correcting

1 hazards.

2 The second discussion is specific to adverse
3 conditions. Adverse conditions that are promptly
4 corrected do not have to be recorded on the workplace
5 examination record. The proposed amendment is an
6 improvement over the final rule because the number of
7 conditions found during a workplace examination are
8 able to be corrected during the examination. Promptly
9 is defined as being before miners are potentially
10 exposed. This should be clarified as not including
11 the workplace examiner. The fact that the workplace
12 examiner may potentially have been exposed to the
13 condition before it was corrected or while correcting
14 it should not render this a condition that has to be
15 recorded.

16 For example, an examiner may travel down a
17 catwalk and see a pile of material which he
18 immediately removes. In the course of doing that, he
19 finds that a bolt previously hidden under the spilled
20 material is sticking up from the catwalk. He corrects
21 that as well before anyone else is in the work area.
22 Neither the spill nor the protruding bolt should need
23 to be recorded. Recording it would serve no safety
24 purposes because the conditions have been corrected.

25 Prompt correction could also include

1 displaying a barricade, tagging out or removing
2 damaged equipment, or closure of an entire area. Many
3 conditions can and are corrected through such means of
4 preventing access to the hazard.

5 The requirements for recording of adverse
6 conditions continue to be vague and ambiguous. How
7 much information about the condition must be recorded?

8 The standard only says a description. This leaves
9 too much room for inconsistent and unnecessary
10 enforcement. Only a brief description providing
11 enough information to identify the location and nature
12 of the hazard should be required.

13 And the standard is ambiguous also and
14 overly broad where it describes the type of conditions
15 that are the focus of the standard as being those that
16 may adversely affect safety or health. We recognize
17 that this term is the same as in prior standards, but
18 now that there is a requirement for such conditions to
19 be recorded, it is important that the standard use
20 more precise language. There are many conditions that
21 may adversely affect safety but would only do so if
22 other conditions were also present. In isolation,
23 they may be perfectly safe. The word "may" should be
24 removed from the standard.

25 Enforcement guidance should make clear that

1 even if a condition recurs later in the shift, it does
2 not have to be recorded on the examination record if
3 it was promptly corrected when initially found in the
4 examination. An example would be a material spill
5 that was cleaned promptly upon discovery in the
6 examination but which then recurs later in the shift.

7 This should be considered a new occurrence even if it
8 comes from the same source. Otherwise, the
9 examination would be considered to remain open for the
10 entire shift, which is not what it is intended to do
11 by the standard.

12 Enforcement guidance also needs to be clear
13 regarding how these records will be used in
14 inspections. Inspectors should not be using the
15 workplace examination records themselves as the basis
16 for writing citations unless the record itself lacks
17 the required items. The purpose of this rule should
18 be to provide for enhanced worker safety of the
19 operation, not evidence for the issuance of
20 retroactive citations for conditions that were
21 previously corrected.

22 And finally, the term "conditions that may
23 adversely affect safety and health" is ambiguous and
24 requires further definition. During the comment
25 period preceding promulgation of the final rule,

1 commenters raised that this term was potentially
2 ambiguous, yet MSHA did not provide definitional
3 guidance for this term.

4 That is particularly problematic because
5 examining for conditions that may adversely affect
6 safety and health is the touchstone of the entire
7 rule, including the changes contemplated by the
8 proposed amendments.

9 Lehigh Hanson recognizes the value of
10 conducting timely and thorough workplace examinations
11 and it is part of our culture to conduct meaningful
12 workplace examinations, as well as risk assessments,
13 safety audits and other internal audits that go beyond
14 the minimum MSHA requirements.

15 We appreciate having the opportunity to
16 provide comments in this rulemaking process and
17 encourage the Agency to continue to provide and
18 respect the open dialogue that is part of this
19 process. So thank you very much.

20 MS. McCONNELL: Thank you, Mr. Hanson.

21 MR. JAMES: James.

22 MS. McCONNELL: I'm sorry. That's the name
23 of your company. I apologize, Mr. James. Thank you
24 for your testimony, thank you for the examples that
25 you provided for our consideration. I think those are

1 very helpful. I don't have any particular questions
2 on those at this time, no one on the panel does
3 either, so thank you very much for coming here today.

4 MR. JAMES: Thank you.

5 MS. McCONNELL: That was the last speaker
6 who signed up, but that does not preclude anyone else
7 who would like to use this opportunity to say a few
8 words about our proposed rule.

9 Please state your name and spell your name
10 and your organization for the court reporter.

11 MR. ROBUCK: Good morning. I'm Steve Robuck
12 from the Portland Cement Association. I spell my
13 name -- last name, Robuck, is R-O-B-U-C-K.

14 And I just wanted to note up front there is
15 another 2101 Richard Arrington Boulevard in
16 Birmingham. I found it this morning on my GPS. It
17 was Arrington Boulevard South. I punched in the wrong
18 one.

19 MS. McCONNELL: How far is that second
20 location?

21 MR. ROBUCK: About 15 minutes from here, not
22 too bad.

23 MS. McCONNELL: Well, I'm glad you made it.

24 MR. ROBUCK: Thank you.

25 Hello. My name is Steve Robuck. I'm the

1 senior director of government affairs for Portland
2 Cement Association. PCA is headquartered in Skokie,
3 Illinois, with the government affairs office in
4 Washington, D.C. Portland Cement Association
5 represents 92 percent of the U.S. cement manufacturing
6 capacity, with over 92 plants in 32 states, with
7 distribution facilities in every state.

8 Cement and concrete product manufacturing
9 directly or indirectly employs approximately 500,000
10 people in the country and our collaborative industries
11 contribute approximately \$100 billion to the economy.

12 PCA's members are committed to providing a safe
13 workplace and robust economic opportunities for our
14 workers, their families and their host communities.

15 And now a little bit about the rule. One
16 point I want to make up front is the lack of benefits
17 that we perceive in the rule. First and foremost, it
18 remains unclear why this rule is necessary. As you've
19 heard the other speakers say, the initial workplace
20 exam rule was predicated on any finding of unsafe work
21 practices with the existing workplace examination
22 standard.

23 MSHA also could not identify any benefit to
24 a new workplace exam rule. The proposed amendments do
25 nothing to fix this issue. There is still no need for

1 a new rule and there are no expected benefits.
2 Without a clear statement of benefits to offset the
3 significant costs of the rule, MSHA should revisit
4 whether the new rule should remain in effect.

5 Recognizing these more fundamental concerns
6 about the legal and business basis for the 2017 rule,
7 we appreciate and support the Agency's decision to
8 revise the workplace exam regulation to address policy
9 flaws in the 2017 workplace exam rule, and believe
10 that the current proposal is an important step in that
11 direction.

12 As we will discuss in greater detail in our
13 written comments, MSHA can and should make further
14 improvements to the rule by, number one, providing
15 greater flexibility with respect to timing of the
16 examinations, eliminating unnecessary and redundant
17 documentation, incorporating more realistic analysis
18 of the costs, clarifying or eliminating many of the
19 vague and unclear terms, clarifying that miners
20 performing workplace exams should not be subject to
21 individual liability, and prevent the issuance of
22 multiple citations for single violations.

23 So on the timing of the exams, the initial
24 version of the rule required workplace examinations be
25 conducted by a competent person before miners begin

1 work in that place and now it's changed to before work
2 begins or as miners begin work in that place.

3 The proposed amendment does not provide
4 adequate remedy for the following reasons: it
5 continues to unnecessarily constrain when operators
6 can conduct their workplace exams.

7 And for our cement plants, for instance,
8 we're 24/7 operations and need the flexibility to do
9 the exams as they fit into our daily schedules. Also,
10 since hazards tend to show up randomly throughout the
11 day, examinations are appropriate at virtually any
12 time during the shift.

13 The existing workplace examination rule
14 standards provide for safe workplaces and allows
15 operators to manage their safety programs given the
16 particular circumstances of their operations, and the
17 existing workplace exam provides the necessary
18 flexibility.

19 On the documentation side, MSHA has proposed
20 some what we feel are better options, and it's
21 important in the final rule because of a number of
22 conditions found during a workplace exam are able to
23 be corrected during the examination.

24 If any new workplace exam standard is to
25 take effect, operators should be afforded maximum

1 flexibility in the recording of conditions and
2 corrections, including the use of work orders and
3 existing electronic databases for documentation.

4 And one point, you know, there are members
5 that stated this idea of going back after examination
6 and putting the time that something was corrected on
7 the record. That's a lot of extra effort to go back
8 to those forms, when really things like maintenance
9 work orders could be used for that purpose, so we
10 would be making extra documentational efforts to do
11 that, and really not needed.

12 On the cost, it's believed that MSHA is
13 underestimating the impact of the new examination
14 standard, even with the proposed amendments. It's
15 expected that some operators will need to hire
16 additional employees to manage the requirements of the
17 new rule, and even some of our small plants are
18 estimating one new person to take care of the
19 documentation and so forth.

20 Another point I'd like to make is we feel
21 that some of the terms are still vague and unclear.
22 The term "working place" for instance, in the original
23 preamble included travelways and walkways in the
24 definition, and we don't feel that that's appropriate.

25 We feel the original definition of working

1 place was a better definition. There was also a court
2 case where elevators was described as a working place
3 and we don't feel that's appropriate either. So
4 again, we'd like you to take a look at the definition
5 of "working place." We'd like more clarity and
6 definition on "conditions that may adversely affect
7 safety and health." We would like some more clarity
8 and definition around "promptly initiate appropriate
9 action" and the term "notification."

10 As far as individual liability goes, records
11 maintained in accordance with workplace examination
12 standards should not be used for assessment of
13 individual liability under Section 110 of the Mine Act
14 against miners performing examinations.

15 Nor do we believe that there should be
16 duplicate citations for exams and conditions.
17 Operators are concerned that any new workplace
18 examination standard, even the proposed amendments,
19 will more readily lead to MSHA inspectors issuing
20 multiple citations for a single situation, one for the
21 condition and one for the examination. Operators
22 request that MSHA ensure that such additional
23 enforcement not result from any revision to the
24 workplace examination standard.

25 And then lastly, kind of an item I threw in

1 at the end here around systems not susceptible to
2 alteration. Some of our folks from the field feel by
3 this description in the rule that that precludes the
4 use of electronic systems for collecting data on
5 exams.

6 We ask that there be more clarity on those
7 rules because we don't really want to get into a
8 situation of shuffling papers for our workplace exams,
9 we'd rather use electronic systems. You know, banks
10 transfer billions of dollars through electronic
11 systems, we should be able to handle our workplace
12 exams by electronic systems.

13 MS. McCONNELL: Mr. Robuck, I was going to
14 wait until after you finished, but I just want to make
15 sure you understand that the final rule, the January
16 2017 rule allows for electronic systems. We
17 enunciated that in the preamble. So I didn't want to
18 interrupt you, but I just wanted to let you know that
19 the rule does not prohibit the use of electronic
20 systems.

21 MR. ROBUCK: I think the clarity around how
22 that's described, the systems that are not susceptible
23 to alteration, I don't know what you can do about
24 those words, but if you could put some clarity in
25 there, that would be helpful.

1 And that's my comments.

2 MS. McCONNELL: Well, I thank you for
3 traversing Birmingham today and providing comments.

4 Do you have any questions?

5 MR. PIERCE: I was going to ask one
6 question. You stated that you projected that this new
7 rule would require adding an additional person just
8 for the paperwork.

9 MR. ROBUCK: This is feedback we collect
10 from our members, and that's what was mentioned.

11 MR. PIERCE: My question would be who's
12 doing it now? You still have to record your exams.

13 MR. ROBUCK: Right. So there's more
14 requirements now with the new rule, and the thought of
15 these operators is that they would need a new person
16 to do that, and especially if they're handling the
17 forms and they're going back and adding things back to
18 forms after examinations.

19 MR. PIERCE: That's what I wanted to
20 clarify, is what do you see different going forward
21 and what we're already doing.

22 MS. CURRAN: Can you provide a cost
23 associated, or an estimated cost? That would be
24 helpful.

25 MR. ROBUCK: We're making an attempt in our

1 written comments to go back and get those comments or
2 those costs.

3 MR. PIERCE: Thank you.

4 MS. McCONNELL: And the costs should be
5 associated with the two changes that we're making to
6 the proposed rule.

7 Thank you, Mr. Robuck.

8 Would anybody like to take this opportunity
9 to share their thoughts on the proposed rule?

10 State your name and spell your name for the
11 court reporter.

12 MR. DAVIS: Steve Davis, D-A-V-I-S. I'm
13 with Lehigh Hanson also.

14 The one thing we looked at, the question why
15 is it going to cost more money. Well, they're thinly
16 staffed now as it is. The supervisors the whole
17 morning are getting their employees out, every shift,
18 all three are getting their employees out, so you've
19 got all the supervisors tied up with their employees
20 right now and you're wanting the workplace done before
21 they get in there, so if they have to do that exam in
22 there beforehand, you're going to have to hire more
23 people.

24 That's one thing we discussed because you
25 don't have anybody to do it. Right now we've got the

1 workers when they go in there on their shift doing the
2 exams, but if they're not allowed in there before the
3 exam is done, we're going to have to hire people.
4 That's where the expense is coming from.

5 MS. McCONNELL: Can you tell me how you guys
6 do it now?

7 MR. DAVIS: Our workers are actually doing
8 the exams.

9 MS. McCONNELL: Your workers are competent
10 persons?

11 MR. DAVIS: Yes, ma'am, and they're doing
12 the workplace exams in our plant.

13 MS. McCONNELL: And so under this proposed
14 rule, the changes that we're making under this
15 proposed rule in respect to the 2017 rule, how would
16 your operations change?

17 MR. DAVIS: We're going to have to hire
18 employees to go in there, someone to do the exam.

19 MS. McCONNELL: We're not changing the
20 definition of "competent person."

21 MR. DAVIS: But you're saying the workplace
22 has to be examined before the employees go in there.

23 MS. McCONNELL: No. The proposed rule is
24 suggesting that it could happen as the employees -- as
25 miners enter the workplace, as miners begin work.

1 Under that proposed modification, how would that
2 impact your day-to-day operation?

3 MR. DAVIS: If they can still do the exam?

4 MS. McCONNELL: If your miner is a competent
5 person and the other miners who are not competent
6 persons are able to enter into the working place as
7 the competent persons are conducting the exam, how
8 would that impact your operation?

9 MR. DAVIS: I'm not sure, I'd have to check.

10 MS. McCONNELL: Okay. Think about it and
11 let us know and you can provide written comments.

12 MR. DAVIS: Okay. Thank you.

13 MS. McCONNELL: Sure. Or think about it
14 now.

15 MR. DAVIS: Thank you.

16 MS. McCONNELL: Sure.

17 Is there anyone else? I'm pausing as
18 everyone considers.

19 (No response.)

20 MS. McCONNELL: Why don't we take a break.
21 It's 9:49, how about ten minutes, ten o'clock we'll
22 come back.

23 (Whereupon, a brief recess was taken.)

24 MS. McCONNELL: Okay. It's 10:30. We
25 extended our break longer than initially stated. So

1 with that, is there anyone else who would like to
2 speak, discuss the proposed rule?

3 (No response.)

4 MS. McCONNELL: No one? So therefore, I
5 thank everyone for coming forward who did make a
6 presentation, and for everyone here in the audience
7 for attending our public hearing I want to thank you.

8 I also want to emphasize that we will need
9 your comments by Monday, November 13, and we will take
10 all your comments and concerns into consideration when
11 we develop the final rule.

12 I continue to encourage you to participate
13 and provide your input during this rulemaking process,
14 and as is MSHA's way, we will be developing -- as we
15 stated in the final rule that extended the effective
16 date and I'm stating it now, as is MSHA's way, we will
17 be holding stakeholder meetings, developing training
18 materials, sharing them with the mining community
19 before the effective date of June 2018.

20 Also, before this hearing concludes, I'd
21 also like to mention MSHA's upcoming regulatory reform
22 initiative. Executive Order 13777, Enforcing the
23 Regulatory Reform Agenda, directs each federal agency
24 to evaluate existing regulations and make
25 recommendations regarding their repeal, replacement or

1 modification consistent with applicable law.

2 So to comply with this Executive Order, we
3 are seeking your assistance in identifying evaluating
4 our standards that could potentially be removed,
5 revised or streamlined without reducing protections
6 offered our miners.

7 MSHA believes that if we consider early
8 public participation in this reform effort, it will be
9 very helpful in terms of hearing from you in terms of
10 your recommendations, providing information and any
11 data, including any technological and economic
12 feasibility concerns.

13 We have placed a notification on our website
14 at msha.gov under the SPOTLIGHT section. From there
15 you will find a link to an email box where you can now
16 submit your recommendations in compliance with this
17 Executive Order.

18 We will be in the future publishing requests
19 for information in terms of helping to address and
20 fulfilling the requirements of the Executive Order,
21 but we thought it would be good to hear from you now
22 as we draft that request for information.

23 We will be making available on our website
24 the information and recommendations we've heard from
25 stakeholders through this initial effort.

1 So there is the email address, which I will
2 not read off to you now because I'm not quite sure how
3 meaningful it is because as email addresses goes, this
4 one is a very long one, but if you go to msha.gov on
5 the opening page under SPOTLIGHT, you will see a link
6 that you can access and send your comments.

7 As also part of this initiative, we will be
8 holding stakeholder meetings, eventually holding
9 stakeholder meetings to discuss this effort in terms
10 of regulatory reform. When we do, we will announce
11 those stakeholder meetings in the *Federal Register*.

12 So at this time, I'd like to thank you very
13 much for attending, and our public hearing is
14 concluded.

15 (Whereupon, at 10:40 a.m. the public hearing
16 was concluded.)

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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 31, 2017
LOCATION: Birmingham, Alabama

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: November 3, 2017



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MSHA's September 12, 2017 Proposal to Amend the "Examinations of Working Places in Metal and Nonmetal Mines" Rule
October 31, 2017 Public Meeting in Birmingham, AL

Hello, my name is Stephen Robuck and I am Senior Director, Government Affairs, for the Portland Cement Association, or PCA. PCA is headquartered in Skokie, IL with a Government Affairs Office in Washington, DC.

The Portland Cement Association (PCA) represents 92% of the US cement manufacturing capacity with over 90 plants in 32 states and distribution facilities in every state in the continental US.

Cement and concrete product manufacturing directly or indirectly employs approximately 500,000 people in our country, and our collective industries contribute approximately \$100 billion to the economy.

PCA's members are committed to providing a safe workplace and robust economic opportunities for their worker's, their families, and their host communities.

• **Lack of Benefits:** First and foremost, it remains unclear why this rule is necessary. The initial Workplace Examination Final Rule was not predicated on any finding of unsafe work practices with the existing workplace examination standard. MSHA also could not identify any benefit to a new Workplace Examination Rule. The Proposed Amendments do nothing to cure this issue. There is still no need for a new rule, and there are no expected benefits. Without a clear statement of benefits to offset the significant costs of the rule, MSHA should revisit whether the new rule should remain in effect.

Recognizing these more fundamental concerns about the legal and business basis for the 2017 WPE Rule, we appreciate and support the Agencies decision to revise the workplace examination regulation to address the legal and policy flaws in the 2017 WPE Rule, and believe that the current proposal is an important step in that direction. As we will discuss in greater detail in our written comments, MSHA can and should make further improvements to the rule by:

- providing greater flexibility with respect to the timing of examinations;

- Eliminating unnecessary and redundant documentation requirements;
- Incorporating more realistic analysis of the costs associated with WPE rule;
- Clarifying or eliminating many the many vague and unclear terms and provisions in the rule;
- clarifying that miners performing WPE examinations should not be subject to individual liability;
- Prevent the issuance of multiple citations for single violations

• Timing of Examinations: The initial version of the Final Rule required that workplace examinations be conducted by a competent person “before miners begin work in that place.” MSHA has proposed to amend the Final Rule on Workplace Examinations such that examinations would be required “before work begins or as miners begin work in that place.” The Proposed Amendment does not provide adequate relief for the following reasons:

- It continues to unnecessarily constrain when operators can conduct their workplace examinations.
 - Allow more flexibility on the timing of the Workplace Exams. Most cement facilities are 24/7 operations and need the flexibility to do examinations as they fit into the daily schedule. Also, since hazards tend to show up randomly throughout the day, examinations are appropriate at virtually any time in the shift.
- The existing Workplace Examination standard provided for safe workplaces and allows operators to manage their safety programs given the particular circumstances of their operations.
- The existing Workplace Examination standard provides the necessary flexibility.

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

potentially exposed to adverse conditions.” All other documentation requirements contained in the initial version of the Final Rule remain.

- The Proposed Amendment is an improvement over the Final Rule because a number of conditions found during a workplace examination are able to be corrected during the examination.
- If any new Workplace Examination standard is to take effect, operators should be afforded maximum flexibility in the recording of conditions and corrections, including use of work orders and existing electronic databases for documentation.
 - Do not require companies to go back and add the date(s) of the corrective action(s) to the WPE form. Allow the use of other records (ie Maintenance work orders) for this purpose; or inspectors can look at follow-up exams to ensure a hazard was addressed.

•Costs

- It is believed that MSHA is underestimating the impact of the new Workplace Examination standard, even with Proposed Amendments, on small operators.
- It is expected that some operators will need to hire additional employees to manage the requirements of any new Workplace Examination standard.

•Vague and Unclear Terms and Provisions: The initial Workplace Examination Final Rule contained many vague and unclear terms and provisions. The Proposed Amendments do not offer any clarification of these terms. Vague and unclear terms include:

- The term “working place” for purposes of 56/57.18002(a). It remains troublesome that MSHA appears to consider areas commonly thought of as travelways as “working places” when the existing standard already differentiates between a “working place” and a “travelway.” 30 C.F.R. §§ 56/57.2.

- The term “conditions that may adversely affect safety and health” for purposes of 56/57.18002(a)(1). During the comment period preceding promulgation of the Final Rule, commenters raised that this term was potentially ambiguous, yet MSHA did not provide definitional guidance for this term. That is particularly problematic because examining for “conditions that may adversely affect safety and health” is the touchstone of the entire rule, including the changes contemplated by the Proposed Amendments.
- The term “promptly” for purposes of the notification requirement and remediation requirement of 56/57.18002(a)(1). This term is subjective and could result in varying interpretations in enforcement. Additionally, although the Proposed Amendments provide some guidance as to the term “promptly” with respect to when conditions need not be recorded, that guidance remains subject to interpretation and requires greater clarification.
- The term “initiate appropriate action” for the remediation provision of 56/57.18002(a)(1). This term is also subjective and could result in varying interpretations in enforcement.
- Notification: The Final Rule with the Proposed Amendments continues to fail to define what constitutes notification of adverse conditions to affected miners.

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

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

• Systems Not Susceptible to Alteration: Many of our members are concerned that the language around the use of workplace exam data systems that are “not susceptible to alternation”, precludes the use of computerized systems. Since there appears to be confusion on this point in the field, we request that MSHA clarify the language to allow; and even encourage, the use of computerized recordkeeping systems; as opposed to paper systems.