



September 11, 2023

COMMENTS OF THE BRICK INDUSTRY ASSOCIATION

Pursuant to 29 C.F.R. 1910.3, the Brick Industry Association, on behalf of its member companies, hereby submits these Comments in response to the Mine Safety and Health Administration's ("MSHA" or "the Agency") June 30, 2023, "Notice of Proposed Rulemaking" ("NPRM") on "Occupational Exposure to Crystalline Silica. See 88 Fed. Reg. 44842.

Introduction – the BIA

The Brick Industry Association (BIA) is the national trade associations representing the brick industry, consisting of manufacturers (26) and distributors (125) of traditional clay brick products (both face and paver brick) across the United States.

BIA frequently represents its members before Federal agencies, courts, and Congress in matters of common concern, and has filed comments before the Department of Labor in various proceedings affecting the interests of its members, who are subject to the agency's jurisdiction. Most of BIA's members are small businesses according to the Small Business Administration (SBA). Annual sales of clay brick are estimated to value about \$1.5 billion.

By way of background, brick is recyclable and delivers outstanding thermal benefits. Recent testing by Clemson University's National Brick Research Center demonstrated that a brick wall assembly can yield energy savings of up to 50 percent over wall assemblies made of competitive products. Brick does an excellent job of delivering shelter. Brick has attained a one hour-long fire rating (from the US Government's National Institute of Standards and Technology). Additionally, the Wind Science and Engineering Research Center at Texas Tech University showed that homes built with brick offer dramatically more protection from wind-blown debris than homes built with other forms of siding. The tests found that homes made with brick exceed the 34 mph impact resistance requirement for high velocity hurricane zones in the Florida building code.

BIA recognizes that MSHA's aim in this rulemaking is the promotion of the health and safety of workers exposed to respirable crystalline silica, and supports that goal. The BIA and its members are focused upon safety/health and one of the key aspects of the organization is assisting members with safety/health compliance. For the reasons stated below, we believe that the industry can maintain high standards of safety without the additional compliance burden created by some aspects of this rule. Consumers have many choices when purchasing building materials and some reject brick due to its price relative to other inferior products. BIA must be able to manufacture and distribute bricks at a price that will be accepted in the market.

Many BIA members face an existential threat from unnecessary compliance costs. Of our 26 manufacturers, 22 are small businesses under applicable SBA rules and some of those are family-owned and hope to continue to pass along the companies to future generations. These companies already struggle with the costs of complying with existing regulation.

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Accordingly, BIA, on behalf of its members, suggests consideration be given to improvements to MSHA's proposed regulation, specifically in the areas where the proposed regulatory burden increases employer cost without an anticipated measurable improvement in health/safety, where increased regulation will exacerbate existing difficulties with attracting and maintaining employees, and where compliance with the proposed regulation is infeasible.

Question Number 15 – Employee Rotation

The proposed rule prohibits the rotation of miners as an administrative control. In a typical brick production operation, the numbers of employees is low to begin with, and almost none of the member companies is fully staffed. Brick employers have an incredibly difficult time securing enough employees to fully staff regular operations. Accordingly, an operator's ability to strategically rotate locations/work of various employees through the shift is deeply ingrained in many brick operations as a necessity.

Further, the rule would prohibit respiratory protection as a way to limit exposure to levels below the Permissible Exposure Limit (PEL) and/or Action Level (AL). If these companies cannot rotate out employees, and/or allow them to wear respirators to conduct their day to day tasks, then mining activity may in some scenarios come to a halt. This is especially true during the very dry summer months and even during winter, during which precipitation is minimal. The mining operators will struggle with their day-to-day planning on what pits to mine and in what order because some may cause more silica issues than others. The mining of raw material will have to change drastically and in turn will cost a great amount of money with little to no health benefits to the worker. In short, some companies say that they **will** have to shut down some of their operations if the rule passes as it is currently written.

The brick industry will suffer these consequences without any corresponding improvement to the health/safety of workers – or possibly to the detriment of some/the benefit of others. No employee will be exposed to silica above the PEL, because that is the legal requirement. What will happen is that some employees will be exposed more (within the PEL) than others simply because the employer is prohibited from rotating them out to a job with less/no exposure.

Questions 5, 32, 33 and 35 -- Medical Surveillance

Companies express confusion regarding the medical surveillance requirement. It appears that operators would be required to offer medical surveillance for miners even when the sampling data proves there is no one over the PEL or AL, and even if they will be spending fewer than 30 days at the mine site. We understand the requirement of medical testing as part of a respiratory protection program, but the proposed rule does not permit respirators to be used to control exposure (except on a temporary basis). So this is additional required surveillance without a clear purpose.

These requirements will worsen existing staffing issues. Many of companies' employees are deeply suspicious of anyone being privy to their personal information and some do not trust medical professionals at all. Companies will not be able to hire workers if they know up front that upon hire they must undergo medical testing – even if they will not be wearing a respirator. And, we believe a number of existing employees will quit if they are required to undergo medical surveillance. One company had 103 employees who were eligible for a medical surveillance program in 2018-2020, and 61 declined to participate. In the 2021-2023 cycle, 108 were eligible for the program, and 83 declined to participate. If participation in a medical surveillance program is a condition of employment, companies will not be able to staff their operations.

Even if companies could succeed in getting employees to participate, many companies operate in rural areas and finding occupational doctors who understand the silica program and specialize in upper respiratory are hard to come by, and getting harder. Most offices – due to lack of physicians - are only staffing three days per week. When one schedules, you're scheduling further out than 30 days in some instances. This creates tremendous difficulty even without an obligation that these medical facilities be NIOSH-approved. Member companies are struggling just to get any appointment anywhere. We cannot be choosy about the site's approvals. Further, it is not just the medical evaluation itself – follow up often will be required (TB test read, cardio follow up, etc.).

Finally, for all of these reasons, MSHA mandating respiratory protection be provided on the next shift is nearly impossible for member companies. The miner has to complete a respiratory questionnaire and the questionnaire must be reviewed by a medical doctor, and he/she has to sign off on it. The doctor may have questions that he/she must pose to the miner prior to signing off. The miner may need to submit clearance from a cardiologist prior to signing off. None of this will happen prior to his next shift. This is a huge threat to the miners' ability to work.

Contractors

BIA members often are confused regarding their obligations regarding contractor employees. We urge that the final rule and/or the preamble to the final rule include some guidance regarding the miner's obligations to the employees of contractors operating at the site.

Summary

While BIA supports the goal of MSHA's emphasis here, the Association believes that significant changes should be made in order to allow operators to manage for safety and health without having to bear excessive burdens that would have the effect of impeding efficient production of traditional clay brick.

Thank you for your consideration of these comments. I can be reached at (703) 674-0741.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph Casper", written in a cursive style.

Joseph Casper
Senior Vice President
Brick Industry Association