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MSHA Announces Proposed Rule on Workplace Exams

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Last week, MSHA released its Proposed Rule for the Examinations of Working Places in Metal and Nonmetal Mines in the Federal Register, the Proposed Rule was formally published on June 8, 2016. The Proposed Rule addresses modifications to the current MSHA standards regarding Examinations of Working Places, 30 C.F.R. §56.18002 and §57.18002 (for underground M/NM mines).


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DEPARTMENT OF LABOR
Mine Safety and Health Administration
30 CFR Parts 56 and 57
[Docket No. MSHA-2014-0030]
RIN 1219-AB87
Examinations of Working Places in Metal and Nonmetal Mines
AGENCY: Mine Safety and Health Administration, Labor.
ACTION: Proposed rule; Notice of public hearings.
SUMMARY: The Mine Safety and Health Administration (MSHA) is proposing to amend the Agency's standards for the examination of working places in metal and nonmetal (MNM) mines. The purpose of this proposed rule is to ensure that mine operators identify and correct conditions that may adversely affect miners' safety or health. MSHA is proposing to require that an examination of the working place be conducted before miners begin work in an area and that the operator notifies miners in the working place of

In the proposed rule, MSHA suggests modifications to the examination format and record keeping requirements of the existing standards. Under the existing workplace exam standards, a mine operator is required to comply with the following provisions:

"(a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall

promptly initiate appropriate action to correct such conditions.

(b) A record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative.

(c) In addition, conditions that may present an imminent danger which are noted by the person conducting the examination shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated."

During the last 22 years, MSHA issued five Program Policy Letters (PPL) clarifying and emphasizing certain aspects §56/57.18002. Most recently, MSHA issued a PPL in July 2015 that many considered *de facto* rulemaking for the way it discussed the future enforcement of training requirements for competent persons. The July 2015 PPL (PPL P15-IV-01) encouraged that a foreman or other supervisor act as the competent person for the purpose of workplace exams as a "best practice." A best practice that also directly links the recognition of hazards, or lack thereof, to the company through an agent of management for elevated enforcement from MSHA, and possibly special investigation under Section 110 of the Mine Act.

At the same time, MSHA proclaimed that the failure to identify potential hazards could indicate a lack of adequate task training for the competent person, even though the determination of competence has always been left to an operator's discretion, leading an operator to question, who, if anyone, at their mine site is suitable to task train senior management and how to satisfy the agency's training requirements. Although the proposed rule maintains the existing definitions in §56/57.2 regarding competent persons and what constitutes a working place, the proposed rule places additional burdens on operators related to recordkeeping, and examination and correction of hazard scheduling.

In an MSHA-issued press release explaining the Agency's rationale for the rule proposal, Joseph A. Main, Assistant Secretary of Labor for MSHA offered:


UNITED STATES DEPARTMENT OF LABOR

Mine Safety and Health Administration (MSHA)

MSHA proposes rule on workplace examinations that could prevent injuries, fatalities at US metal, nonmetal mines

"We believe that many of these fatalities could have been prevented with better working place examinations. MSHA has proactively provided notices to the mining industry on the need to improve mine site examinations, but now the time has come to require better, more effective examinations."

When Will Workplace Exams Be Completed?

Currently, operators are required to "*examine each working place at least once each shift . . . .*" Under the proposed rule, MSHA plans to codify one of its long-standing best practices – workplace exams occurring before miners work in an area.

This change to the existing language could lead to difficulty for operations that have become accustomed to rolling workplace exams throughout the day, especially for small operations that only have one or two competent persons designated to perform the task at the mine. In this situation, the mine would have to either train additional miners to perform workplace examination, and deem them competent, or have the existing examiners initiate their exams at a much earlier time to accommodate the entire operation beginning work at the same time.

While many operations already conduct workplace exams towards the beginning of their shifts, the proposed rule requires that the exam be completed prior to work being conducted in an area. Though simple enough, this requirement could greatly affect operations, possibly leading to increases in overtime pay or lost production while miners wait for workplace examinations to complete prior to beginning work.

The earlier start time may also be necessary for maintenance personnel to ensure that any adverse conditions discovered during a workplace exam are addressed prior to shift. If any adverse conditions are found, some corrective action, and notification to miners in the area, must be taken prior to work beginning. Therefore, the

start time for the competent person and maintenance crews will be critical to ensure on-time operations, allowing for the examination of adverse conditions, correcting or isolating those conditions and notifying miners who work in the area.

What Must Be Recorded in Workplace Exams?

Until the proposed rule, or a variation of it, becomes final, mines will continue to comply with the existing requirements of §56/57.18002. In terms of recordkeeping, the current requirement comprises of the competent person creating a record that must include at least the date, name of examiner and location examined. For one year following the examination, the record must be kept made available to an MSHA inspector at his/her request.

The proposed rule expands the recordkeeping requirements for M/NM operators, yet still requiring the record be maintained for one year from the date of creation. To comply, the record must include:

1. A list of all areas examined;
2. Any adverse conditions discovered;
3. Any corrective action taken with regard to adverse conditions;
4. The date corrective actions were taken;
5. The name of the miner recording the corrective actions; and
6. Dated signature of the competent person before the end of the shift on the day the examination was conducted.

The above requirements, under the proposed rule, place more training responsibility on the person conducting the examination regarding the specific type of adverse conditions discovered and the corrective action taken for each area they examine in the mine. The prerequisite that the corrective action be detailed in the report will necessitate enhanced coordination among the person conducting the examination, miners working in the area, as well as maintenance crews.

The actual process of completing the examination and filling out the workplace examination report will be more time-consuming and comprehensive. MSHA estimates this additional time to be five (5) minutes per report, however, this is likely a gross underestimate given the increased detail essential for each specific area of the mine examined and the follow-up corrective action recording requirement.

The current rule does not require any specific detail concerning adverse conditions discovered, nor does it require any description of the action taken to correct those conditions. MSHA has touted the recording of specific adverse conditions as a best practice for years and the proposal would make that part of the standard.

Under the proposed rule, inspectors will review examination reports, looking for detailed descriptions concerning any adverse conditions found and corrective action taken. The mine will also be required to not only make the records available to a MSHA inspector at his/her request, but also miner representatives. This increased scrutiny will likely lead to more issued citations as MSHA fails to specifically describe how detailed they expect the descriptions of hazards or corrective action to be. This uncertainty will undoubtedly be left to the subjectivity and discretion of individual inspectors, which will ultimately result in confusion for operators and a lack of consistency with enforcement between districts, field offices and inspectors.

Will the Proposed Rule Increase Liability for Workplace Examiners?

Although the current rule does require the workplace examiner to list their name on the record, the proposed rule essentially asks an examiner to give an "all clear" on each area before work continues. While MSHA claims that their view regarding an examiner as a *de facto* agent of management will not change under the new rule, the requirement that the records are signed, dated and conducted prior to work increases the likelihood for assigning blame for injuries to both agents of management and the company.

At a time when mines are already experiencing problems with finding miners willing to become agents of management because of the fear of prosecution by MSHA, the proposed rule could amplify that issue. The requirement to sign and date the examination report, and its potential to create unintended liability issues, will be a major hurdle, if this rule becomes finalized in the current form. As an examiner would be certifying that a working area is free of hazards, or that all hazards were recognized in an area, the likelihood of a Section 110 action, or personal lawsuit, in the event of an injury or death is more ominous than ever.

Operators will also be required to promptly notify all miners working in an area of any alleged hazard discovered during the workplace examinations. MSHA anticipates this will prevent injuries or fatalities from occurring while promoting better communication within the workforce. However, the rule is vague as to how and when miners must be notified, leaving operators to decide whether or not this should also be recorded.

The responsibility to notify miners of defects in an area prior to entering, albeit a reasonable action already performed at most mines, will once again pose concern for operators regarding form and recordkeeping. Operators must decide when and how to transfer the information from the examiner to all workers who may enter an area. Additionally, operators must determine if a verbal notification is sufficient, or whether or not another record is created and signed by all miners in the areas acknowledging that they were informed of the existence of a potential hazard. The latter would likely be the more prudent of the two. But, having miners sign and date a form acknowledging that an operator notified them of the hazard discovered, could also be used against an operator, if correction of the hazard is determined to be untimely or insufficient.

The aforementioned changes to the existing rule remain simply a proposal until enacted, and while MSHA claims the proposal is commonsense based, it undoubtedly carries a laundry list of repercussions for industry.

MSHA has opened a 90-day period to submit comments about this proposed rule. Operators and other stakeholders interested in submitting comments should contact Nick Scala (nscala@connmaciel.com), the Chair of the national MSHA Practice Group at Conn Maciel Carey LLP for further information and assistance.

The Current Rule

- *56/57.18002 Examination of working places.*

(a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

(b) A record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative.

(c) In addition, conditions that may present an imminent danger which are noted by the person conducting the examination shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.

The Proposed Rule

- *56/57.18002 Examination of working places.*

(a) A competent person designated by the operator shall examine each working place at least once each shift, before miners begin work in that place, for conditions that may adversely affect safety or health.

(1) The operator shall promptly notify miners in any affected areas of any adverse conditions found that may adversely affect safety or health and promptly initiate appropriate action to correct such conditions.

(2) Conditions noted by the person conducting the examination that may present an imminent danger shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.

(b) A record of each examination shall be made and the person conducting the examination shall sign and date the 44 record before the end of the shift for which the examination was made.

(1) The record shall include the locations of all areas examined and a description of each condition found that may adversely affect the safety or health of miners.

(2) The record also shall include:

(i) A description of the corrective action taken,

(ii) The date that the corrective action was taken, and

(iii) The name of the person who made the record of the corrective action and the date the record of the corrective action was made.

(3) The operator shall maintain the examination records for at least one year; shall make the records available for inspection by authorized representatives of the Secretary and the representatives of miners; and shall provide these representatives a copy on request.