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U.S. Mine Safety and Health Administration
Office of Standards, Regulations and Variances
201 12th Street South, Suite 4E401
Arlington, VA 22202

RE: Examinations of Working Places in Metal and Nonmetal Mines, RIN 1219-AB87

Dear Sirs:

The National Mining Association (NMA) appreciates the opportunity to comment on the Mine Safety and Health Administration (MSHA) proposed rule to amend the requirements of 30 C.F.R. Parts 56 and 57 governing the examination of workplaces in metal and nonmetal mines, 81 *Fed. Reg*. 36,818 (June 8, 2016).

NMA is a national trade association that includes the producers of most of the nation's metals, industrial and agricultural minerals and other firms serving the mining industry. The proposed revisions to MSHA's existing regulations would significantly alter how examinations are conducted at metal and nonmetal mines thereby impacting the proven operational procedures employed at those mines to ensure the safe and efficient production of metals and minerals essential to our economy.

General Comments

At the outset let us state, without equivocation, NMA member company support for and understanding of the vital role that workplace examinations play in providing a safe and healthful work environment for our nation's metal and nonmetal miners. Examinations are a critical component of an integrated system to identify and alleviate potential hazards before they evolve into conditions that place miner's in harm's way.

Despite this recognition we have serious concerns with both the rationale underlying the proposed rule as well as several elements of the proposal. We, like MSHA, want an examination process that is effective and workable. This can be accomplished within the structure of the proposed rule. Unfortunately, the rule as proposed may have the

opposite effect as operators are forced to abandon successful examination procedures merely to ensure compliance with regulatory requirements. Such as outcome would be detrimental to miner safety and health and we encourage the agency to consider the modifications we propose that will result in a real rule provides for timely examinations that are effective.

Importantly, even the agency itself admits that it has proposed a rule whose benefit is spurious at best:

> *MSHA is unable to quantify the benefits* from this proposed rulemaking, including the proposed provisions that an examination of the working place be conducted before miners begin work in an area; that the operator notify miners in the working place of any conditions found that may adversely affect their safety or health; and that the examination record include a description of the adverse conditions found that may adversely affect their safety or health; and that the examination record include a description of the adverse conditions found and the corrective action taken. (81 *Fed. Reg.* 36,823, June 8, 2016) (Emphasis added)

Central to the agency's proposal is the belief that inadequate or untimely workplace examinations were a contributory factor in more than half of the fatalities that occurred in metal and nonmetal mines between January 2010 and December 2015. This claim is proffered with little or no substantiation. A review of the docket for this rulemaking contains little, if any, supporting documentation for this claim.

While it is correct to assume that workplace examinations have the potential to identify hazardous conditions, the nature of mining, especially underground mining, creates the potential for hazardous conditions to arise after an examination has occurred. In such instances the agency's characterization of a fatal event arising from an inadequate examination is unsubstantiated and would mischaracterize the workplace examination as a contributing factor. Despite this shortcoming in the agency's rationale for the proposed rule, we recognize the importance of examinations and, as noted above, want a system that is workable, efficient and effective. As such we offer these comments to improve and make workable the proposed rule. With this predicate our comments focus on the following three areas that are of primary concern:

- Timing of when examinations are to occur;
- Notification to miners of adverse conditions identified during the examination; and
- Recordkeeping requirements, including the requirement for competent persons to sign and date examination records

Before turning to the items delineated above we feel it important to note that, despite the agency's declaration that the definition of "working place" is not being modified in

the proposed rule there still remaining significant question of what constitutes a “working place”. It is our view that a “working place” should be where active extraction and exploration is occurring or where support activities directly related to extraction and exploration are occurring. Regularly used travelways, administrative areas (offices, lunchrooms), toilets facilities and inactive storage and mining areas should be exempt from this requirement. In the event that areas not normally accessed during a shift must be entered, then we recommend that a competent person conduct an examination before work in that area(s) begin. We encourage the agency to include this definition of “working place” in the final rule.

A. Timing of Examinations

The current regulations 30 C.F.R. § 5/57.18002 require a competent person designated by the operator to examine each working place at least once each shift. Under the proposed revisions the examination will be required to take place “before miners begin work…” While we understand the rationale for this change and support it in principal, the change raises numerous questions that must be considered in the context of the proposed revisions to § 56/57.18002(b) that would require recording where the examination occurred, the results and a record of the corrective actions.

Requiring the examination at the beginning of the shift before any work commences in the mine will create an undue burden on the operator and would not be considered a “best practice” by NMA members. Workplace conditions can change throughout a mine on a regular or recurring basis. Examinations should be completed prior to work commencing and then continuously throughout the shift in order to effectively identify adverse conditions which could create a hazard to employees. In addition, many mines are physically and logistically too large to cover in a timely manner. Typical morning rounds by a mine/process shifter or foreman can take up to 3-4 hours to complete. Today workplace examinations in the mine coincide with mining cycles and also cover other examinations which must be conducted prior to miners entering work areas.

We believe the proposed revision fails to recognize the dynamic nature of the mining environment, the breadth and scope of the operations and the critically important role that individual miners play to ensure that their work is being carried out in a safe manner in an environment free of recognizable hazards. Unfortunately, all of this occurs in an environment where enforcement actions by inspectors are often based on subjective views of conditions and the inspector’s opinion, rather than objective, measurable standards.

The proposed revisions lack an objective standard of criteria so that compliance may be achieved. The rule as written is inherently vulnerable to any one inspector’s opinion and bias as to what constitutes correct workplace examinations, rather than an examination based on objective, measurable standards and will result in arbitrary enforcement. As constructed the proposed rule presents the potential for the issuance of multiple

enforcements actions for a single condition. The rule could be interpreted to permit, if not require, issuance of citations for: (1) the underlying condition; (2) failure to conduct an adequate examination; and (3) failure to train or ensure that individuals conducting the examination are competent to do so. Caution must be exerted, if not explicitly described in the final rule to prevent what is a well-intentioned regulation from becoming mirrored in controversy due to the unbridled actions of an inspector who chooses to use the structure created by the proposed rule to, without warrant, punish an operator. Unfortunately, this has happened in the past and care must be taken to prevent a reoccurrence.

Should the agency finalize the requirement for examinations to occur before working begins we recommend the following issues/questions be considered:

1. Has the agency considered the impact of varied work schedules on the requirement to conduct the examination before work begins?
2. Has the agency considered the timeframe between when the examination is conducted and when work begins, i.e. the potential for conditions to change in the work environment?
3. Is the current standard better suited to account for the changing mining environment?
4. When are examinations to be conducted and by whom in operations that run a 24-hour schedule and change-out in the working place?

B. Notification to miners of adverse conditions identified during the examination

In general, NMA members support communicating the results of workplace examinations to those that whose safety and health may be adversely impacted by conditions identified during the examination. This support is predicated upon mine operators being afforded flexibility to design communication tools that best meet the needs of their particular workforce and work environment. What would the minimum requirement be for notification? Would the operator be allowed to use:

i. Shift log;
ii. Signage and barricade;
iii. Tag out;
iv. Pre-shift meeting/lineout;
v. Verbal passdown between shifts;
vi. Smartphone, text or other form of electronic communication?

In addition, how would this communication occur during the shift? Many mines currently use verbal communication of hazards during the shift but there is no formal documentation. Would new employees entering the work area be required to somehow document that they were notified of the known hazards in the area or would it just be for any active hazards which have not been mitigated or controls applied?

To be effective operators should be permitted to determine if verbal or written communications are most effective and the method (time and location) for these to occur. While in some instances sharing the results of workplace examinations might occur prior to miners proceeding to their workplace, if the examination is done by someone than the miner themselves, other communications might be more efficient and effective if conducted face-to-face by the on-coming and out-going workers. Despite the desire to develop a one-size-fits all approach, the unique and widely varying workplace and scheduling arrangements across the metal and nonmetal sectors necessitates that operators be permitted to design communication methods to best serve the safety and health interests of their employees.

C. Recordkeeping requirement, including the requirement for competent persons to sign and date examination records

Of greatest concern is the new requirement for the person conducting the examination to "sign and date the record before the end of the shift for which the examination is made." The agency provides no rationale explaining the necessity for this and how it will result in more effective workplace examinations. Moreover, and importantly, the requirement is devoid of an appreciation of the expanse of many mines and the operational difficulties that will arise should hourly persons no longer be deemed competent persons able to perform workplace examinations.

Central to this is our concern that under the proposed rule miners who conduct workplace examinations could become the subject of Section 110(c) investigations. Unfortunately, this is far more than mere conjecture as the Federal Mine Safety and Health Review Commission (FMSHRC) has considered potential Section 110(c) liability for hourly miners on numerous occasions, noting "even a rank-and-file miner can be found to be an agent while performing critical, management-related functions such as required safety examinations." *Active Minerals*, 33 F.M.S.H.R.C. 2,869, 2,880 (Nov. 2011) *see also SOL o/b/o Hyles v. All American Asphalt*, 21 F.M.S.H.R.C. 34, 44 (Jan. 1999) (noting "[i]n determining whether a miner is an operator's agent, we have examined such factors as whether the miner was exercising managerial or supervisory responsibilities at the time the allegedly violative conduct occurred…."); *Amax Coal Company*, 19 F.M.S.H.R.C. 846, 852 n.5 (May 1997) ("[C]ounsel for AMAX emphasized the rank-and-file status of the miner who conducted the preshift examination in question. Regardless of the miner's status, however, he was AMAX's agent for the purpose of conducting a preshift examination, and his actions – and mistakes – are fully imputable to AMAX."); *Rochester & Pittsburgh Coal Company*, 13 F.M.S.H.R.C. 189, 194 (Feb. 1991) (noting "[b]ased on the language of the Mine Act and settled principles of the common law of agency, we have no difficulty concluding that a rank-and-file employee like Mantini is the agent of an operator when carrying out the required examinations entrusted to him by the operator."); *Nelson Quarries, Inc.*, 31 F.M.S.H.R.C. 318, 329 (March 2009) ("The Commission has concluded that in carrying

out required examination duties for an operator, an examiner may be appropriately viewed as being charged with responsibility for the operation of part of a mine."). In this case, the operator argued that the miners were merely leadman and not agents of the operator. The Commission also cited to *SOL o/b/o Hyles v. All American Asphalt*, 21 F.M.S.H.R.C. 119, 130 (Feb. 1999) where it was found that leadmen who acted in a supervisory capacity and were in a position to affect safety were agents of the operator to whom employees would logically voice their complaints.

While the preamble accompanying the proposed rule is explicit that no changes to the definition of competent person are envisioned the operational reality of the proposed rule creates an entirely different reality. The agency has recognized previously, and restates in the preamble, "although a best practice is for a foreman or other supervisor to conduct the examinations in most cases an experienced non-supervisory person may also be "competent." Unfortunately, the practical reality of exposing hourly workers to potential Section 110(c) liability is to remove them from this essential function thereby limiting workplace examinations to managerial personal who, while competent to do so, cannot accommodate these responsibilities within the parameters necessary to operate an economically viable facility. By way of example, one NMA member company mine spans tens of miles underground. While not all of these areas would be subject to a workplace examination "before miners begin work" significant portions would, resulting in substantial delays before miners could begin work as managerial personnel complete and communicate the results of the "pre-shift" examination to those entering the working places. MSHA should not restrict competency of inspection based on hourly or salaried status as all miners are responsible to observe and correct hazards. This is defined by the Act itself in that all miners are trained to the same standards pursuant to 30 C.F.R. Part 48.

It is critical that the final standard not impede, by policy or practice, the ability to use a competent person to conduct workplace examinations. Due to the size and dynamic nature of many hardrock mining operations it will be nearly impossible for the line supervisor to travel to all working areas in the mine and conduct all inspections required. Competent persons possess the knowledge, skills and abilities to conduct a complete and thorough examination prior to work commencing. Operators provide adequate training and direction to ensure that any hazards identified are recorded and communicated. In cases where the hazards can be readily corrected, the miner would do so then record the event on their workplace examination card. All miners are trained on how to conduct a workplace examination as part of their new miner or experienced miner training and for many workplace examinations are reviewed by a Supervisor and the Safety Department to ensure all hazards and conditions that have been identified have been recorded and that appropriate corrective measures have been taken or initiated.

We believe the current practice of permitting hourly persons to conduct workplace examinations without the threat of Section 110(c) liability has been successful in

identifying potentially hazardous conditions before they evolve into conditions that place miners in harm's way. Should the agency however, choose to finalize the rule as proposed we recommend that explicit language be added to stipulate that hourly employees deemed competent persons for the purpose of conducting workplace examinations will not be subject to Section 110(c) liability.

In addition to eliminating the potential for hourly employees to be subjected to 110(c) liability we recommend that the final rule be revised to include:

1. The method for recording adverse conditions and the level of detail expected
    a. Can a form be used to simply checkoff locations or is more detail expected?
    b. Will the agency provide a uniform sheet for all operators to use or will operator developed documents be permitted?
    c. Will the agency permit the competent person to determine how specific the description of the condition must be?
2. The time requirements for recording correcting adverse conditions
    a. How will the agency view ongoing corrective actions – what if it takes a significant amount of time to correct a condition? Just as the agency provides extended abatement time, when necessary, to address conditions cited by inspectors so to must the agency recognize the need for additional time where the competent person and management determine that correcting the adverse condition will require more than the usual amount of time.
3. Recognizing electronic recordkeeping including electronic signature.

Conclusion

We believe the proposed rule, while well intended, should be withdrawn and re-proposed to address the multitude of shortcomings that we and other commenters have identified in written submissions and testified to during the 4-public hearings. Barring this, we strongly encourage the agency to consider, as have many commenters, the potentially detrimental impact the rule will have on miner safety. Issuing a final rule that has the potential to significantly curtail the use of competent hourly persons or alternatively subject them to 110(c) liability will, in our estimation, violate the spirit and intent of Section 101(a)(9) the Act which prohibits the issuance of standards that "reduce the protection afforded miners…"

Sincerely,

Bruce Watzman