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MSHA’s Final Rule on Workplace Examinations in Metal/Nonmetal Mining Operations

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On January 17, 2017, the Mine Safety and Health Administration (MSHA) announced its final rule on workplace examinations for metal/nonmetal mining operations. According to MSHA, after the rule becomes effective on May 23, 2017, it is poised to enhance the quality of workplace examinations and improve protections for a quarter of a million metal/nonmetal miners in 11,800 mining operations nationwide.

As is often the case with MSHA’s regulatory initiatives, there is always healthy debate over the need and worthiness of additional regulation in an industry already burdened by significant governmental intervention. The workplace examination rule is certainly no exception. Since MSHA’s announcement of the proposed rule on June 8, 2016, metal/nonmetal operators, miners and industry groups alike have enthusiastically voiced their concerns over implementation of the rule. In spite of a good dose of wide-spread industry angst, a drawn out comment period and stakeholder meetings across the nation, it now appears MSHA began with the end in mind as the final rule bears an uncanny resemblance to the predecessor proposed rule – albeit with a few minor concessions.

During a stakeholder’s meeting on January 17, 2017 announcing the publication of the final rule, Patricia W. Silvey, MSHA’s Deputy Assistant Secretary for Operations, stated that MSHA incorporated many of the suggestions and concerns from the regulated community. According to MSHA, the reason for the changes in 30 C.F.R.

Section 56/57.18002 was because it determined that “examinations of working places are an important part of an effective accident prevention strategy” and “they are a first line of defense because they allow operators to find and fix conditions before such conditions can adversely affect the safety or health of miners.” In spite of MSHA’s attempt to put its best spin on the rollout of the final rule, industry trade associations dispute MSHA’s claim that the final rule will improve workplace safety, and may attempt to block the final rule’s implementation.

The final rule has five major components: (1) the workplace examination must be conducted before miners begin working in that place; (2) operators must notify miners in the affected areas of any conditions found that may adversely affect their safety or health; (3) operators must promptly initiate corrective action; (4) a record must be made of the examination; and (5) the examination must be made available to the Secretary of Labor’s authorized representative and the miners’ representative upon request. Against this backdrop, this article will review each provision, discuss the slight concessions MSHA made in the rule and provide insight on how metal/nonmetal operators and their workplace examiners can prepare for the changes.

Sections 56/57.18002(a) – Requirements for Conducting Working Place Examinations

Examination to be completed at least once each shift…

The final rule mirrors the proposed rule in that operators are required to designate a competent person to examine each working place at least once each shift for conditions that may adversely affect safety or health. The previous workplace examination rule permitted operators to complete the workplace examination at any point during the shift. In the final rule, MSHA now requires operators to conduct the examination before miners or other employees work in that place.[1] MSHA had considered requiring the examination to take place during a two or three hour window before the shift started, but because of comments submitted by the regulated community the final rule allows operators to determine when the examination will be conducted. MSHA stated that the examination can be conducted before or after the shift begins so long as the examinations are conducted close in time before work begins in that place.

For example, if the first shift starts at 7 a.m., the final rule does not require operators to complete the workplace examination prior to the start of the 7 a.m. shift, if miners are not working in an area. Instead, the examination must be completed before miners actually begin work – meaning that if the first hour of the shift is not spent at the working place, the workplace examination would need to be completed before 8 a.m. As contemplated in the preamble to the final rule this requirement “allows for the competent person to examine a work area before workers begin working there, rather than requiring the competent person to examine all possible work areas before a shift can begin.” Moreover, “if miners are not scheduled to work [in that working place] for some time (e.g. 4 hours) after the shift begins; the final rule would only require that the examination be performed prior to the beginning of work.”

As MSHA stressed multiple times in the preamble to the final rule, “mining operations have dynamic work environments where working conditions can change rapidly and without warning.[2] In order to avoid situations where conditions might change in a work area, MSHA will require the examination be completed as close as practicable to the start of the shift, or when miners are expected to work in a certain area. For many operators this new requirement will not pose any additional burdens as their current practice is to perform the workplace examination at the beginning of the shift. For those who have previously performed a workplace examination later in the shift, this change will create new operational challenges.

Working place…

The final rule did not amend the definition of “working place” in the existing standard or in the proposed rule. “Working place” is defined as “any place in or about a mine where work is being performed.” *See* 30 C.F.R. §§ 56/57.2. However, MSHA has clarified that operators do not need to examine the entire mine before work begins (unless work is being performed in the entire mine). Instead, workplace examinations are only required in those areas where work will be performed. If miners are not scheduled to work in an area until later in a shift the final rule would only require a workplace examination before miners begin working in that area. The preamble also clarified that where oncoming miners on an overlapping or maintenance shift are scheduled to work in an area that has been previously examined, an additional examination for the oncoming shift is not needed if the oncoming shift’s work begins close to when the previous workplace examination was conducted, and it is not expected that conditions would have changed.

For example, on the day shift at 3 p.m., a workplace examination was conducted in an area where mechanics would be working on a haul truck outby a crusher. Evening shift maintenance workers were then scheduled to work in the same area beginning at 5 p.m. In this situation, an additional workplace examination would not be required for the evening shift maintenance crew to work in the area, assuming conditions did not change in the area. On the other hand, if the evening shift maintenance crew did not arrive at the area until 6 p.m. or 7 p.m., a second examination may be necessary if conditions have changed. MSHA’s emphasis in the preamble to the final rule is that the workplace examination must occur sufficiently close to when the miners begin work.[3]

Furthermore, a “working place” only applies to locations where miners work in the “extraction or milling process,” which may include roads traveled to and from a work area. Conversely, a “working place” does not include roads not directly involved in the mining process, administrative office buildings, parking lots, lunchrooms, toilet facilities or inactive storage areas. Finally, mine operators will not be required to examine isolated, abandoned or idle areas of mines or mills, unless required by other standards or when miners must perform work in those areas.

While the clarification of what constitutes a “working place” is helpful, there is still enough ambiguity to raise concerns with over-reaching by a rouge MSHA inspector employing a definition of the phrase “working place” completely different from the regulatory definition or what is required by the final rule.

Conditions that may adversely affect safety or health…

The final rule did not change the existing standard or MSHA's proposed rule regarding the requirement that examiners be on the lookout for conditions that may adversely affect safety or health. This broadly-worded phrase generated numerous comments from the regulated community during the proposed rule's comment period arguing that the term was ambiguous and open to multiple interpretations. Faced with this opposition and a history of ever-changing interpretations of regulations, MSHA decided to side-step the issue by simply stating that "the mining community understands the meaning of 'adverse' in these standards, because it has been in place since 1979."

Despite its failure to respond to a growing industry concern, MSHA doubled down on its position suggesting it will provide outreach and compliance assistance programs on this issue. Further, MSHA intends to identify best practices that it will share with the mining community. MSHA predicts this approach will create consistency nationwide on the application of the phrase "adversely affect safety or health." MSHA's response is simply code language for its age-old belief that the MSHA inspector will determine whether a condition in a working place adversely affects safety or health.

While MSHA claims that it went to great lengths to consider comments submitted by the regulated community on this issue, the agency failed to recognize a very recent decision by the Federal Mine Safety and Health Review Commission (commission) which incorporated the "reasonably prudent person standard" into matters involving workplace examinations in the metal/nonmetal industry.

In *Sunbelt Rentals, Inc.,* 38 FMSHRC 1619 (July 2016), the commission was charged with determining whether workplace examinations under 30 C.F.R. Section 56.18002(a) contained an adequacy requirement. In its opinion, the commission recognized that the workplace examination is intended to identify conditions that may affect safety or health, and further noted the broadly worded nature of the language in 30 C.F.R. Section 56.18002(a). Given the nature of the regulation's language, the commission held that 30 C.F.R. Section 56.18002(a) "must be 'broadly adaptable' and, therefore, is appropriate for application of the reasonably prudent person standard." *Id.* at 1627.[4]

Accordingly, an MSHA inspector's subjective opinion of a particular condition (i.e., whether it adversely affects safety or health) must be judged according to the reasonably prudent competent examiner standard set forth by the commission in *Sunbelt Rentals.* Stated differently, when a dispute arises over whether a particular condition may adversely affect safety and health, MSHA's best practices will be considered by the commission, but the inspector's opinion will not necessarily be dispositive on the issue.

Operators should be aware that it is crucial to continue maintaining well-trained, competent mine examiners. In order to meet the reasonably prudent person standard it's important for mine examiners to actively document facts and circumstances associated with their examinations. Doing so will provide the evidence needed to advance an alternative position on the key issue of whether a particular condition

adversely affected safety or health. Because the reasonably prudent person standard relies heavily on facts that surround an alleged violation, the examiner – not the MSHA inspector – is in the best position to judge a particular condition.

Competent person…

The final rule did not change the existing standard or the proposed rule regarding competent persons. Competent person is defined as a person having abilities and experience that fully qualify him to perform the duty to which he is assigned. *See* 30 C.F.R. §§56/57.2. MSHA believes that a competent person should be able to recognize hazards and adverse conditions that are expected or known to occur in a specific work area or that are predictable to someone familiar with the mining industry. Without explicitly stating as much, MSHA appears to have set forth the exact standard set forth by the commission in *Sunbelt Rentals.*

Notification to miners…

The final rule did not change the proposed rule's requirement to notify miners in any affected area of any conditions that may adversely affect safety or health. During the comment period questions were asked relating to the phrase "promptly notify." Importantly, MSHA first noted in the preamble that if conditions are corrected before miners begin work, then notification is not required. As far as the type of notification, MSHA is providing operators the flexibility to select the most appropriate method of communication. However, in the preamble MSHA states verbal notification or prompt warning signage is needed to deliver actual notification of the adverse conditions. Moreover, notification is only required to those miners in the affected area – not necessarily the entire mine.

The question of how the examiner defines the "affected area" for purposes of notification to miners is not addressed in the final rule or the preamble. If the adverse condition discovered is limited to only the workplace, then conventional wisdom dictates the notification would be limited to miners working or who may enter the defined area. However, the harder question is what if the adverse condition has the potential of affecting miners outside the working place? In this situation examiners must be cautious in ascertaining the scope of the adverse condition, and subsequently, the breadth of the notification to miners. It is anticipated MSHA will be liberally enforcing the phrase "affected area" when it comes to miner notification of adverse conditions.

Promptly initiate corrective action…

Like the proposed rule, the final rule incorporates the requirements from the existing standards requiring operators to take prompt corrective action to correct conditions that may adversely affect miners' safety or health.

Imminent danger…

There are no substantive changes in preamble or the final rule relating to the requirement that operators withdraw miners from an area where an imminent danger

exists.

Record of examination…

The existing standards require operators to maintain a record of the workplace examination. The final rule, like the proposed rule, requires the following information in the record: (1) the name of the person conducting the workplace examination; (2) the date of the examination; (3) the location of all areas examined; and (4) a description of each condition found that may adversely affect the safety or health of miners. In the final rule, MSHA deviated from the proposed rule and removed any requirement that the workplace examination record contain the signature of the competent person, as well as the requirement that operators describe the corrective actions taken.

However, the final rule requires the record to contain the name of the individual conducting the examination. MSHA dropped the signature requirement in the proposed rule because of industry concerns that a signature on the examination record could possibly result in potential civil or criminal liability for workplace examiners pursuant to Section 110 of the Federal Mine Safety and Health Act (Mine Act).

Workplace examiners should be cautious in breathing a sigh of relief over MSHA's charitableness in abandoning the signature requirement in workplace examination records. As MSHA stated in its analysis of the final rule it is the identity of the examiner that is important to the examination record. In the preamble to the final rule, MSHA attempts to spin the importance of examiner identification by characterizing it as beneficial in clarifying conditions found and assisting with follow ups relating to the conditions. Operators would be remiss to accept MSHA's statement as the full story. In the Section 110 context, the purpose MSHA's investigation is to determine whether an identified agent of the operator committed a knowing or willful violation of a mandatory safety and health standard.[5]

The final rule, like the proposal, also requires the record to contain the location of all areas examined. In spite of strong industry comment to the contrary, MSHA decided to retain the language in the final rule stating that the requirement will ensure operators are aware that all locations in a working place were examined.

Lastly, in the final rule MSHA maintained language from the proposed rule requiring examiners to provide a description of each condition found that may adversely affect the safety or health of miners. Again, industry comments submitted during the comment period raised concerns over the amount of specificity that will be necessary in the description of the conditions. On this question, MSHA once again punted stating that the description should provide sufficient information to allow operators to notify miners of the condition and to take prompt action to correct the condition.

MSHA's response to the specificity question does little to allay the concerns of industry. Without any clarity on the question, the amount of specificity provided in a workplace examination record will ultimately be determined by each examiner on a case-by-case basis. Without proper guidance, the industry should be concerned that

examiners may begin editorializing the conditions listed in their workplace examination reports by offering superfluous information, or worse yet, rendering their opinions in the workplace examination record. These types of statements by examiners do not advance the intent of the regulation's language, which is to describe the condition so miners are aware of it and it can get corrected. Moreover, MSHA inspectors are quite proficient at identifying unneeded commentary in workplace examination reports and using the comments to elevate enforcement actions. These same elevated enforcement actions often become the basis for MSHA Section 110 investigations.

Once corrective action is taken, only the date the corrective action was completed needs to be included in the record. Importantly, MSHA will not accept any other proof that corrective action was completed (i.e., work order/invoice/etc.) as the original examination record must include the date the corrective action was taken.

According to MSHA, the final rule provides operators flexibility in how to record the results of the examination – this could be done by a checklist or any other format selected by the operator – as long as all of the recording requirements are included in the examination form. MSHA went on to specifically state that all adverse conditions must be recorded – even those that are corrected immediately (and which would not then require notification to miners). Apparently, the idea here is that operators can use the examination records as a means of identifying conditions that occur on a regular basis so steps can be taken to prevent future occurrences.

Likewise, MSHA stated that if a condition cannot be immediately corrected, the continuing adverse condition does not need to be recorded each shift. This would still require operators to provide notification (by means of verbal notification or warning signage) of the continuing condition. Once corrective action has been taken the record must be supplemented to include the date of the corrective action.

However, this statement from MSHA could lead to confusion and possible enforcement actions from inspectors. For example, a condition is found on a Monday and the operator records it and promptly notifies its miners. However, the condition cannot be corrected for two weeks because the operator must order parts and hire a contractor to repair the condition. The following Friday an MSHA inspector sees the condition and reviews the workplace examination record for that Friday and does not see a notation for the condition cited (as it was not carried over in the workplace examination report).

With some MSHA inspectors, this scenario could result in the threat of an enforcement action for a violation of 30 C.F.R. Section 56/57.18002 for an "inadequate workplace examination" despite the fact that the condition was in the workplace examination record earlier in the week. If this occurs, operators would be wise to immediately advise the inspector of the previous workplace examination record. The other possibility is to consider carrying over conditions that adversely affect safety or health in each subsequent workplace examination until the condition is corrected. When using this approach, operators must be diligent in updating the previous workplace examination records to show the corrective action. This should eliminate the threat of any additional enforcement actions being issued by MSHA.

The full text of the final rule is set forth below:

§ 56.18002 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 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 before the end of the shift for which the examination was conducted. The record shall contain the name of the person conducting the examination; date of the examination; location of all areas examined; and description of each condition found that may adversely affect the safety or health of miners.

(c) When a condition that may adversely affect safety or health is corrected, the examination record shall include, or be supplemented to include, the date of the corrective action.

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

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(b) A record of each examination shall be made before the end of the shift

for which the examination was conducted. The record shall contain the name of the person conducting the examination; date of the examination; location of all areas examined; and description of each condition found that may adversely affect the safety or health of miners.

(c) When a condition that may adversely affect safety or health is corrected, the examination record shall include, or be supplemented to include, the date of the corrective action.

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

The final rule goes into affect on May 23, 2017 (absent any legal challenges to the implementation of the rule). Thus, operators should take the next 120 days to review, and possibly amend, their workplace examination program to be able to fully comply with the changes in the final rule. While there are no extraordinary changes and the final rule largely mirrors the proposed rule, operators should take time to review the final rule with all of their competent persons who will perform workplace examinations. Operators should also consider providing training to examiners and contemplate revising existing workplace examination forms to be able to comply with the new corrective action recording requirements.

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[1] The "other employee" reference here only appears in MSHA's section-by-section analysis of the final rule. There does not appear to be an explanation or definition for the reference to "other employees.

[2] Mine operators should keep MSHA's pronouncement in mind when defending enforcement actions alleging inadequate workplace examinations. Often, MSHA bases the enforcement action on a comparison of the operator's workplace examination record and MSHA's finding in the same area. The MSHA inspection is often hours, days, or even weeks after a workplace examination was conducted by the operator's examiner.

[3] The example provided above is not an attempt to establish a bright line timing standard as the preamble of the final rule did not provide any such guidance (i.e., three or four hours prior to the next oncoming shift). The important takeaway is that a subsequent workplace examination may need to be conducted if conditions have changed for the next oncoming shift. It may also be necessary to conduct the subsequent examination, in the example provided, the further out in time one gets from the original examination.

[4] The "reasonably prudent person standard" states that "an alleged violation is appropriately measured against whether a reasonably prudent person, familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting correction within the purview of the applicable standard." *Sunbelt Rentals, Inc.,* 38 FMSHRC 1619, 1626 (July 2016) (citing *Spartan Mining Co., Inc.,* 30 FMSHRC 699, 711 (Aug. 2008); *see also Asarco, Inc.,* 14 FMSHRC 941, 948 (June 1992); *Alabama By-Products Corp.,* 4 FMSHRC 2128, 2129 (Dec. 1982)

[5] Sections 110(c) and (d) of the Mine Act state in relevant part:

> (c) Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).
>
> (d) Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 104 and section 107, or any order incorporated in a final decision issued under this title, except an order incorporated in a decision under subsection (a) or section 105(c), shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this Act, punishment shall be by a fine of not more than $50,000, or by imprisonment for not more than five years, or both.