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ALERT – MSHA ISSUES PROPOSED RULE ON WORKPLACE EXAMS AND REQUEST FOR INFORMATION ON DIESEL PARTICULATES

Proposed Workplace Examination Rule – Its Potential Impact

By: Tina M. Stanczewski, Esq., MSP

The Mine Safety and Health Administration (MSHA) is proposing to amend the standard for the examination of working places in metal and nonmetal (M/NM) mines which is currently found at 56./57.18002. The proposed rule was released on June 8, 2016 and can be round at the Federal Register. MSHA is confident that this change will "ensure that mine operators identify and correct conditions that may adversely affect miners' safety or health."

The most significant changes require operators to 1) conduct an examination *before miners begin work in an area* 2) *provide notification* to miners of any conditions identified that may adversely affect their safety or health, and 3) requiring operators to *document the adverse condition found and corrective action taken*. In addition, MSHA has added more focus to ensuring the individual conducting the examination is competent, which means at minimum, trained to identify safety hazards. Recent fatalities have led MSHA to believe that those conducting examinations may not be distinguishing between hazards that need immediate attention. The last significant change requires operators to make the records available to miners and their representatives.

MSHA examined data from January 2010 to mid- December 2015 and found that 122 miners died in 110 accidents at M/NM mines. 252 citations were issued as a result of the fatality investigations spanning alleged violations of 95 distinct mandatory safety and health standards. MSHA data suggests that in more than 60 percent of fatal accidents (67 out of 110), a possible root cause of the fatality was a result of violations of Rules to Live By (RTLB) standards. Since operators are on notice about RTLB standards, MSHA considers the fatalities to be connected to inadequate examinations.

MSHA has found support in additional data which shows an increase in fatalities since 2013. Specific examples of fatalities MSHA believes to have bee preventable if an examination had identified and corrected the condition, include:

- A contract supervisor was fatally injured when he was struck by a section of pipe. Allegedly the cylinder was defective and the machine should have been removed from service.
- A fatal accident occurred at a phosphate rock mine. An excavator tipped over near a water filled ditch and the cab became submerged. Recent rainfall had created a pool of water that was not easily seen or corrected.
- A fatal accident of a haul truck driver at a sand and gravel mine. The driver was on an elevated roadway next to the dredge pond. The truck traveled off the roadway that allegedly had no berms landing in a pond. An examination would have found the lack of berms.
- There were two miners in a silver mine who died of carbon monoxide poisoning because the area was un-ventilated. Management failed to take action. Examination of blast area would have identified carbon monoxide build up.

As written, this new rule will expand MSHA's enforcement toolbox, burden operators with additional reporting and recording requirements, possible expose operators to 104(d) and 105(c) actions, require operators to disclose previously internal information, and most likely force operators to retrain the workforce on travel activities around the mine.

The existing workplace examination rule requires the following:

1. 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.
2. 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.
3. 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.

Competent person and working place are defined in §§ 56/57.2, Definitions. A "competent person, is "a person having abilities and experience that fully qualify him to perform the duty to which he is assigned." MSHA's current policy states that "[t}his definition includes any person who, in the judgment of the operator, is fully qualified to perform the assigned task. MSHA does not require that a competent person be a mine foreman, mine superintendent, or other person associated with mine management." Further, MSHA's policy states that "working place" is "any place in or about a mine where work is being performed." MSHA policy interprets this as "locations at a mine site where persons work during a shift in the mining or milling processes."

The proposed rule requires the following:

Requiring the Examination Be Conducted Before Miners Begin Work in an Area

MSHA has stated that the definition of working area will remain the same. However, there has always been significant differences of opinion between operators and inspectors as to whether work is being performed. If a miner travels through an area to access his work area, has work occurred? Since MSHA's goal is to ensure examinations are made before work begins, it is highly likely the entire mine site will need examining before miners start their shift. Operators will face challenges trying to ensure miners do not travel into an area that has not been examined. This will require additional procedures and training of the workforce to make sure they are not accessing uninspected areas. If a miner does enter the uninspected area and reports a safety violation or the fact of it being uninspected, and subsequently receives disciplinary action because the operator's policy is not to enter the area, a possible 105(c) action may be filed by the miner. In this case, the miner would assert he engaged in a protected activity by reporting the condition and violation and suffered harm because of it. Further, the operator is now burdened with conducting examination either in totality before miners set foot onto mine property or trying to control where miners enter on a staggered basis as the examination are completed.

Operator Must Notify Miners in the Working Place of Any Conditions Found that May Adversely Affect their Safety or Health

This is a new requirement that imposes additional communication requirements on the operator. Most strikingly, this creates potential 104(d) and also 105(c) consequences for the operator. First, the operator must ensure the miners are not entering an area where they could be exposed to these identified hazards, and second, the operator must notify the miner. It will be left to the inspector's opinion as to whether an item affects safety and health and this is often a contention between operators and inspectors already. However, if the operator has failed to notify a miner and that miner enters the area, becoming exposed to the hazard, MSHA is likely to argue aggravated conduct on the part of the operator. New procedures and policies will need to be implemented to ensure miners receive information on all alleged hazards and the hazards are corrected before they enter. This is likely to have costly production impacts while action is taken and to ensure proper communcation.

Competent Person Conducting the Examination Sign and Date the Examination Record Before the End of Each Shift AND *Record Includes Information Regarding Adverse Conditions Found and Corrective Actions Taken*

The requirements for a competent person have not been formerly changed by MSHA. Generally, recent discussions have implied that it should be an experienced miner, familiar with the hazards of the industry. Traditionally, the individual did not have to be a foreman, but MSHA has suggested that it expects the person conducting the exam to be the one initiating corrective action. Since most operators entrust the ability to initiate action in foreman or management, it is likely that those mines using hourly miners to conduct exams may need to

reassess their policy. This addition also formalizes what MSHA has required for years – a written record signed and dated.

Most unsettling is the requirement to record the adverse condition and correctives actions taken. First, and foremost, this creates a paper trail of citable conditions for inspectors, although MSHA has said it will not be used in that manner. Even if MSHA does not take the exam records and issue citations because an admitted hazard existed, it will provide inspectors with a roadmap to areas of the plant that require special attention. If older equipment is leaking or material is falling frequently, it will allow inspectors to target areas that they may not have before and interview miners about these alleged conditions. Second, if MSHA is not pleased with the corrective action taken, citations could be issued. With the operator required to memorialize this data, it will also lay the foundation for agent knowledge and aggravated conduct of areas where repeat or even single issues arise.

For example, if a crusher is overflowing, the material spills into an area frequently, and the operator corrects the condition through clean up every time it occurs, MSHA could find the corrective action inadequate because the condition continues to occur. Most costly will be the impact to operators if fatalities or serious injuries occur. With a record of the condition and actions taken, tort actions for wrongful death or worker's compensation suits by injured miners will have documented evidence of the mine's condition before the incident occurred. There is no guidance on at what point in the shift the condition and action must be documented. However, with the intent of the rule to require notice to miners and examination before work begins, it is logical that documentation would need to occur in real time.

Operators Make Such Records Available to Miners and Their Representatives

Although the intent of this addition to the standard is to ensure open communication, it can have unforeseen consequences. For miners reviewing the records and disagreeing with management's inspection or corrective action, unfounded hazard calls may be made to MSHA. Further, giving this right to miners creates a protected activity for them to engage which translates to potential 105(c) actions if the miner asserts that he was discriminated against for exercising his right of review.

Overall, the new standard increases the potential issuances of citations and opens the door for heightened enforcement. Operators may now see citations for 1) failing to make records available, 2) failing to correct a hazard "properly," 3) failing to document the corrective action, 4) failing to document the "adverse condition," 5) failing to sign and date the record (before the end of the shift), 6) failure to notify miners (this could increase the number of workers affected for penalty purposes if notification is not given to all miners who have potential to enter the area), and 7) failure to conduct the examination before work begins in the area.

It is expected that industry stakeholders will voice significant concern over these changes. Interested parties should consider attending the hearings and submitting comments. Comments are due by September 6, 2016. Hearing Dates will be: July 19, 2016, July 21, 2016, July 26, 2016, and August 4, 2016 at the following locations:

- July 19, 2016 Homewood Suites by Hilton Salt Lake City-–Downtown 423 West 300 South Salt Lake City, UT
- July 21, 2016 Hyatt Place Pittsburgh--North Shore 260 North Shore Drive Pittsburgh, PA 15212
- July 26, 2016 Mine Safety and Health Administration Headquarters 201 12th Street, South Rooms 7W204 & 7W206 Arlington, VA 22202
- August 4, 2016 Sheraton Birmingham Hotel 2101 Richard Arrington Jr. Boulevard North Birmingham, AL 35203

For assistance in drafting comments or if you would like a member of the Law Office to provide testimony on your behalf, contact Tina Stanczewski, Esq., at 301-595-3520.

Diesel Exhaust Rulemaking Announced by MSHA

By: Adele L. Abrams, Esq., CMSP

The Mine Safety & Health Administration (MSHA) has announced its intention to pursue possible rulemaking that would limit diesel exhaust at underground coal and metal/nonmetal mines, via a "Request for Information" (RFI) that was published in the June 8, 2016, *Federal Register*. *See* 81 Fed. Reg. 36826. The possibility remains that the rulemaking could be expanded to surface operations as well, based on the information submitted to the rulemaking record. The comment period closes on September 6, 2016.

Since 2001, MSHA has regulated diesel particulate matter (DPM) at underground mines. While there is no permissible exposure limit (PEL) for DPM in the coal sector, the metal/nonmetal side now has to meet a maximum PEL of 160 ug/m3 for total carbon, as a surrogate for DPM, based on an eight-hour time-weighted average. That rule is codified at 30 CFR 57.5060.

The coal DPM standard focuses on equipment types, maintenance practices, and miner training, because the agency concluded that there were too many confounding factors in coal mines for total carbon to be an effective surrogate for DPM. The current coal standard does specify that permissible equipment and non-permissible heavy-duty equipment must not emit more than 2.5 grams per hour of DPM; non-permissible light-duty equipment must not emit more than 5 grams per hour of DPM; and operators must use engineering controls to reduce exposures, and also provide annual training to workers who are exposed to DPM. An inventory of all of the mine's diesel-powered equipment must be maintained as part of the standard.

Three states – Pennsylvania, Ohio and West Virginia – have more stringent diesel exhaust standards than the federal requirements, and these states mandate that diesel-powered equipment in underground coal mines must include an exhaust emissions control and conditioning system meeting specified limits. The states also regulate ambient concentrations of diesel exhaust and require testing, examinations and maintenance recordkeeping.

For its part, the Occupational Safety & Health Administration (OSHA) does not currently have any PEL for DPM. Findings by MSHA could, however, be used to support enforcement under OSHA's General Duty Clause (Section 5(a)(1) of the OSH Act), if the agency can demonstrate that the employer recognized that DPM exposure could cause death or serious harm to workers. In addition, findings by the US Department of Labor can be acknowledged by courts considering worker's compensation claims arising from health issues associated with DPM exposure.

MSHA based its latest initiative on a study by the National Institute for Occupational Safety & Health and the National Cancer Institute, which found that there was a strong correlation between diesel exhaust and lung cancer. Diesel exhaust was classified as a human carcinogen by the International Agency for Research on Cancer in 2012. The agency says that it is reopening the diesel issue because of the lung cancer risk and "to prevent material impairment of miners' health."

In announcing the initiative, MSHA noted that many underground mines already use a variety of engineering controls to combat overexposures to diesel -- including ventilation, equipment maintenance, ultra-low sulfur fuel, diesel oxidation catalysts, new EPA-approved engines – as well as work practice controls such as limiting idling time for diesel-powered equipment. The agency claims that since the rules took effect, metal/nonmetal miners' exposures have declined by 57 percent, and that most mines now have exposures below the PEL. But, the agency maintains, there is still evidence of miners being at risk and the RFI is a method of compiling more information, to see if even more stringent standards are required.

The goal of the RFI is to compile industry data and experiences in controlling diesel exhaust since the 2001 MSHA rule took effect, and to determine whether there is a basis to reduce the PEL further or to mandate other changes affecting equipment, maintenance or other procedures.

There are a variety of questions posed in the RFI, including:

For Underground Coal Mines

- Is there evidence that non-permissible light-duty diesel-powered equipment used in underground mines emits 2.5 g/hr of DPM or less?
- What administrative, engineering, and technological challenges would the coal industry face in meeting a 2.5 g/hr DPM emissions level for non-permissible light-duty diesel-powered equipment?
- What costs would the coal mining industry incur if a 2.5 g/hr limit was set for non-permissible light-duty diesel-powered equipment?
- What percentage of non-permissible light-duty diesel-powered equipment does not meet current EPA emissions standards?
- What modifications could be applied to this equipment to meet EPA emissions standards?
- What are the advantages and disadvantages of following state (PA, WV, and Ohio) standards limiting diesel equipment in the outby areas of underground coal mines based on the air quantity approved on the highest ventilation plate?
- What would be the benefits and costs of testing non-permissible light-duty diesel-powered equipment on a weekly basis for carbon monoxide (as is required by heavy-duty equipment currently)?
- What are the costs and benefits of expanding exhaust emission tests to include nitric oxide and nitrogen dioxide to determine the effectiveness of emission controls in underground coal mines?
- Should MSHA require that diagnostics tests include engine speed, operating hour meter, total intake restriction, total exhaust back pressure, cooled exhaust gas temperature, coolant temperature, engine oil pressure and temperature, as required by some states?
- Should there be additional records requirements to document the testing and maintenance of diesel-powered equipment in underground coal mines?
- What exhaust after-treatment technologies are currently used on diesel-powered equipment, and what costs are associated with these technologies?
- What are the advantages and disadvantages of using DPM filters capable of reducing concentrations by at least 75 percent, or by an average of 95 percent?
- Are integrated engine and exhaust systems used to control DPM and gaseous emissions in the mining industry, and what are the associated costs?
- Are mine operators replacing engines on existing equipment with Tied 4i (interim) or Tier 4 engines?

For Underground Metal/Nonmetal Mines

- Are there alternative surrogates, other than total carbon, to estimate a miner's DPM exposure, and what is the surrogate's limit of detection and potential interferences in the mine environment?
- What information do you have on advances in sampling and analytical technologies to measure miners' DPM exposure that may allow for a reduced exposure limit?
- What existing controls were most effective in reducing exposures since the current rule took effect?
- What are the technological challenges and relative costs of reducing the DPM exposure limit?

For assistance in drafting comments to respond to MSHA's RFI, please contact Adele Abrams, Esq., CMSP, or Michael Peelish, Esq., at 301-595-3520.