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Enforcement Commences on MSHA Workplace Exam Rule

By Adele L. Abrams, Esq., CMSP, ASSP Federal Representative

On Oct. 1, 2018, Mine Safety and Health Administration (MSHA) began enforcing its revised standard governing workplace examination requirements at surface and underground metal/nonmetal mines. The final rule, published in the April 9, 2018, *Federal Register*, applies to mine operators at a variety of operations (including stone, sand and gravel pits, cement plants, metal mines, and processing facilities for alumina and taconite), as well as to contractors who perform services or maintenance activities at such mine sites.

Technically, the effective date was June 2, 2018, but MSHA agreed to generally refrain from issuing citations under the new requirements until the fall in order to complete its series of stakeholder outreach activities and to issue new guidance on the revised requirements. The 2018 rule replaces a long-standing MSHA rule, codified at 30 CFR 56/57.18002, by adding more robust notification and documentation requirements.

The rule was initially published on Jan. 23, 2017, but the effective date was stayed. The rule was then reopened in response to litigation filed by numerous mining trade groups. That litigation is pending, and it was unclear whether it would be withdrawn as the agency did not grant some of the relief sought in the amended standard.

The rule requires mine operators and their contractors to:

- Have a *competent person* examine each working place for conditions that may adversely affect the safety or health of miners. The working place must be examined at least once each shift, *before work begins or as miners begin work in that place.*
- *Promptly initiate appropriate corrective action* when adverse conditions are found.
- *Promptly notify miners* in affected areas if adverse conditions are found and not corrected before miners are potentially exposed.
- *Withdraw all persons* from affected areas when alerted to any conditions that may present an *imminent danger*, until the danger is abated.
- Create an *examination record before the end of each shift* that includes: the name of the person conducting the examination (not just initials); date of the examination; location of all areas examined; a description of each condition

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found that may adversely affect the safety or health of miners that is not promptly corrected; and the date when the described condition is corrected.

- *Make the examination record available to MSHA and miners' representatives, with a copy provided upon request. Records must be kept for a rolling 12-month period. The previous exception in MSHA's Program Policy Manual that allowed the record to be discarded once the mine had been inspected is no longer in effect. The record can be made at any time before the end of the shift. Once an adverse condition is recorded, it need not be re-recorded each shift until corrected, but once it is corrected, then the date of correction must be added to the original record. Records can be maintained in any format, including electronic, as long as they are available upon request and also cannot be altered if stored on a computer system.*

Many of the original rule's provisions remain unchanged, such as the definition of "competent person" and "working place." MSHA has clarified that a working place applies to all areas in a mine where miners work in the extraction or milling processes. Travelways are considered "working places" that must be examined if they are used to get to and from other work areas, but they do not include areas not directly involved with mining (such as parking lots, administrative buildings, lunchrooms, toilet facilities, or inactive storage areas). However, remember that MSHA has authority to inspect all areas of a mine, and can cite hazardous conditions even if they are located in areas exempt from the workplace examination requirement.

A "competent person" for purposes of this standard is one who has the abilities and experience that fully qualifies them to perform the duty, and to be able to recognize hazards and adverse conditions that are expected or known to occur in the work area, predictable to someone familiar with the mining industry. The competent person must also have training in the task of workplace examination, but this is enforced through MSHA's existing Part 46/48 training provisions. If a workplace examination is deemed inadequate, this may cause MSHA to question the effectiveness of the task training for the examiner and can result in additional citations/orders.

The competent person must also have authority to initiate corrective action and to withdraw miners if an imminent danger is identified. While older case law has held that the act of performing a workplace examination may transform an hourly miner into an "agent of management," in its new guidance materials, MSHA clarifies that "a competent person may be an agent based on the totality of his/her responsibilities at the mine, but the sole act of conducting a workplace examination does not make the miner an agent." This position is not altered by the new requirement that the examiner's name must be included on the workplace exam record.

Under the original rule, an exam could be conducted at any point in the shift, and the problems identified did not need to be included in the record. Now, the examination must be done each shift before work begins, or as miners begin work in the area later in the shift. MSHA advises: “The examination should be conducted sufficiently close in time to the start of work so that an operator would reasonably expect conditions to not adversely change before work begins in the examined area.”

If a mine has consecutive shifts or operate on a 24-hour basis, the exam for the next shift can be done at the end of the previous shift, as long as it covers all places where miners will be working and is conducted sufficiently close to the start of the next shift. However, if a mine has only a single shift, the examination cannot be performed at the end of the previous day as MSHA believes this is not sufficiently close in time, and conditions could change significantly overnight.

Miners can continue to work in an area where adverse conditions are identified as long as they are promptly notified so they can avoid the condition, but the operator must promptly identify corrective action of any condition that could adversely affect miners’ safety or health. If a maintenance shift starts after the commencement of a production shift, an exam must be conducted sufficiently close in time to the start of maintenance work, so conditions would not be expected to change. The notification can be verbal, or warning signs can be used as long as they provide actual notification of the adverse condition (e.g., “Danger – Loose Wire” would be acceptable, whereas “Danger” alone would not be). The warning signage must be sufficiently precise to advise miners of what the condition is to avoid. If a condition will remain uncorrected across multiple shifts, then barricades with descriptive signage may be required in MSHA’s view.

Miners who plan to work in an area can travel to it along with the competent person who will conduct the examination, but the exam must be done before miners are exposed to hazards. If the competent person finds an adverse condition, the condition must be corrected, or miners must be notified before any exposure occurs. Once an area is examined, work can proceed while the competent person continues with the examination.

One potential issue is that “sufficiently close in time” is not defined in the rule. Because this is a new requirement, there is no existing case law to interpret the phrase. This is a subjective provision that likely will be defined in litigation.

Contractors are considered “operators” under the Mine Act and so they are also subject to the examinations rule. Production operators (the “host employer”) and contractors can arrange any number of ways to ensure that the exams are completed, but if a contractor does not fulfill its obligations, the host mine operator can also be cited and fined up to \$259,725 per violation.

For more information on these requirements or development of best practices for effective workplace examinations, contact [Adele L. Abrams, Esq., CMSP](#).