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From: Judy Rivlin [mailto:jrivlin@umwa.org]
Sent: Saturday, February 26, 2011 11:13 AM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: RIN 1219-AB75

2011 FEB 28 P 12:35

Attached are comments of the UMWA on MSHA's proposed rulemaking concerning Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards.

We appreciate having this opportunity to contribute to this rulemaking process.

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AB75-COMM-7

United Mine Workers of America
Comments on the
Mine Safety and Health Administration's
Proposed Rule:
Examinations of Work Areas in Underground Coal Mines for
Violations of Mandatory Health or Safety Standards
"RIN 1219-AB75"

The United Mine Workers of America (UMWA or Union) is pleased to have the opportunity to offer these comments on the Mine Safety and Health Administration's (MSHA or Agency) *Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards; Proposed Rule*.

The UMWA supports the Rule proposed by MSHA and reported in the *Federal Register*, Vol. 75, No. 247, December 27, 2010. Requiring all mine examinations to be conducted in a consistent manner will help ensure that violations of health and safety standards will be found, corrected, and recorded, thereby improving the safety of miners. However, we suggest the following improvements for Agency consideration.

I. The UMWA Supports Adoption of the Proposed Rule

A. Identification of Mandatory Health & Safety Standards Violations (§§ 75.360-62, 364)

The UMWA supports MSHA's proposal to revise the existing standards codified in Section 75.360-362, and 364 to require that violations of mandatory health or safety standards are timely identified and recorded.¹ This is what Congress required when it passed the Mine Act in 1977 and implemented interim mandatory safety standards for underground coal mines (at §303 (d)(1)[re: pre-shift], and (f)[re: weekly exams]). Since the ventilation regulations were changed, examiners have not been required to look for standards' violations. Under current standards, a mine examiner conducting pre-shift, supplemental, on-shift and weekly examinations is only required to identify and record those conditions the examiner believes in his or her subjective opinion to be hazardous. The Proposed Rule addresses a glaring deficiency in the existing standard, under which a mine examiner may walk past an obvious violation of a mandatory health and safety standard – a violation of the law – and do absolutely nothing. As the Agency notes in the preamble to its Proposed Rule, numerous recent accidents have occurred where the “examiner did not identify a hazardous condition, [but] the conditions involved a violation of a mandatory health or safety standard.” Proposed Rule at 81168.² While some comments suggest MSHA's reliance on these accident reports are misleading, we agree with MSHA that, in their entirety, they reveal that some accidents and injuries likely could have been

¹ The UMWA also supports application of the proposed revisions to pumpers, who are certified persons.

² MSHA concludes based on its review of data from 2005-2009 that if its Proposed Rule had been in effect for that five year period, it would have prevented 12 fatalities and 32 non-fatal injuries. Proposed Rule at 81169-70.

avoided if the examiner had been required to – and did -- report standards' violations as well as conditions he or she deemed hazardous. While some comments suggest that examiners who have to report standards' violations will get distracted from their obligation to identify hazardous conditions, this was not a problem when the Mine Act first took effect when examiners were responsible for looking for both hazards and the violations of standards. That earlier experience confirms that it can be done, without jeopardizing the quality of such exams.

Health and safety standards were developed to protect miners from hazards in the mine environment. Even if some violations of the standards may not be *immediately* hazardous, the standards were developed to protect miners, and they should be followed. Moreover, conditions in mines can quickly change and a violation that may not seem to be hazardous at one point can develop into a hazard if it is not first abated. By relieving examiners of the burden of having to determine whether a particular health and safety violation they find is actually hazardous at the time they discover it, miners will be better protected because operators will be able to learn about such conditions at an earlier time and can abate the violations before they ever become hazardous. Moreover, by requiring examiners to better identify and report violations of ventilation standards, we can expect a reduction in respirable coal dust exposures, as MSHA projects. By making the proposed changes, the Proposed Rule will represent a significant improvement over the existing regulations and will undoubtedly prevent injuries and save lives.

A mine examiner's task becomes simpler and more straightforward when he or she is required to identify and record all violations of mandatory health and safety standards instead of only those violations that he or she believes to be hazardous. Identification of all violations is a more objective task than the necessarily subjective "judgment call" a mine examiner must make to determine whether a particular violation is hazardous. Revision of regulatory standards to require identification and recordation of *all* violations removes the examiner's "judgment call" from the examination process. If a violation is identified, it is recorded and must be abated. Under the Proposed Rule, the criteria applied to mine examiners' observations are the mandatory health and safety rules, as well as any hazardous conditions that do not violate a standard. Whatever unspecified and inevitably diverse criteria each examiner uses under the current standard to determine whether a violation is hazardous will no longer be controlling in most circumstances, because if a standard is violated it would have to be reported and abated. The examination process would become more consistent, in addition to becoming simpler and more protective.

The Proposed Rule should result in a more thorough examination in which all violations are identified, posted and recorded, while maintaining the current practice whereby operators prioritize and correct violations based on the seriousness of the hazard. The proposed revision to the existing standard - to focus examinations on all violations of mandatory health and safety standards rather than a vaguely defined subset of hazardous violations - is essential in light of evidence MSHA included in its proposed rule showing that numerous recent fatalities and injuries involved uncorrected violations that apparently had not been deemed hazardous insofar as they had not been reported and recorded.

B. Hazardous Conditions and Violations of Mandatory Health or Safety Standards; Posting, Correcting, and Recording (§ 75.363)

The UMWA supports the proposed revision of the existing standard at § 75.363 requiring the correction, posting, and recording of hazardous conditions. The proposed requirement that operators record, post and correct violations of mandatory health and safety standards is a necessary counterpart to the new requirement that they identify such violations. A rule that requires identification of violations will necessarily require recordation, clear notice to employees and abatement.

If the new standard requiring identification of mandatory health and safety standard violations would not require recording or abatement, the new standard would amount to the Agency's formal adoption of a policy tolerating the operator's non-compliance with the law. Once a violation is identified, it may not be ignored. Prompt abatement cures the immediate problem giving rise to the violation and recording enables the operator and miners to assess whether violations concentrated in specific areas or recurring with frequency require a systemic fix. The posting requirement is equally essential. If it were not included in the Proposed Rule, miners would be put at risk of unwitting exposure to the unsafe condition and violations during the period between identification and abatement.

The Agency could not (and does not propose to) adopt a policy that requires identification of violations, without also requiring their recording, posting and prompt abatement. The UMWA does not expect opposition to such requirements. Even in the absence of regulation, we would not expect any responsible operator to intentionally fail to notify its personnel of a known safety violation, fail to correct it, or fail to record it for the purpose of addressing systemic problems. However, making the reporting and abatement of violations into clear requirements will better protect all miners. However, we think it would improve the rule, if it made clear that MSHA would not write citations based on violations that an operator's examiner identified, so long as appropriate abatement efforts are made. That is, the fact that a violation once existed should not give rise to a citation if the operator addresses it once it is identified. Making this clarification would eliminate concerns some operators expressed. Further, we expect MSHA will exercise its discretion such that it would not cite an operator for examinations violations when the underlying condition that was not identified by the examiners was not fairly obvious. For example, rock dust compliance cannot always be confirmed by a visual review. Thus, while an operator is responsible for maintaining certain rock dust levels, it should not rely exclusively on these required examinations to ensure its compliance with the standard. If MSHA rock dust samples reveal inadequate rock dust, we would expect that MSHA will cite the violation itself, but probably not also one for an inadequate examination - unless the violation should have been obvious to a properly trained examiner.

The UMWA also supports the new requirement that mine operators review with mine examiners on a quarterly basis all citations and orders issued in areas where examinations are required. It makes sense to apprise the examiners of citations, orders and self-identified violations so that they can be sure to identify any recurrences and report them to the operator for prompt abatement. There may be an initial learning curve as examiners become familiar with their expanded responsibility in performing examinations, but reviewing all citations and orders will help improve the skills of all examiners. Also, having this periodic review will ensure that all those performing examinations at a particular operation become knowledgeable about violations recently observed at that operation. This will help examiners with their examinations

thereafter, and make them more alert for the specific problems found at their particular operation. In short, this will improve the knowledge and skills of each operation's examiners.

As proposed, this regulation would further the statutory requirement that operators "have the primary responsibility to prevent" unsafe and unhealthful conditions. Operators *should* be finding and correcting all unsafe and unhealthful conditions as well as all violations of regulations. MSHA inspections should serve to confirm that operators are meeting this obligation, and the government should not be the first one to identify and find violations an operator is equally able to find and correct.

Once the new examination protocol is in place, with examiners identifying and recording health and safety standards and operators abating them promptly, not only should there be the reduction in fatal and non-fatal accidents that MSHA projects, but we can expect MSHA inspections to become more efficient. After all, if operators are finding and correcting violations of health and safety standards as they arise, inspectors should begin to find fewer violations when they inspect. MSHA inspections will then be quicker to complete, yielding savings in the nature of MSHA manpower, and related administrative resources. Insofar as an operator has a representative accompany MSHA inspectors, and also pays for a miners' representative to accompany MSHA inspectors, the operator will realize its own payroll savings if MSHA can perform more efficient inspections. Further, if MSHA discovers fewer violations (because the operator already detected and fixed them), enforcement procedures will be fewer in number, resulting in further savings to the operator and government, alike. Of course, the sooner violations are detected and corrected, the better will be miners' health and safety, which remains paramount.

II. The Proposed Rule Can Be Improved to Provide Greater Protection to Miners

A. Adding and Requiring Uniform "Reasonable Time" for Abatement

Under the new regulation, the language in .363 and .364 should specify that operators must abate health and safety violations at least within a "reasonable time," as the Act requires for the violations MSHA cites. (For example, see 104(a) "...the citation shall fix a reasonable time for the abatement of the violation.") As written, however, the Background Information to this proposed rule *suggests* that operator-found violations would have to be abated within a reasonable time, but the proposed regulation itself fails to specify *any* time limits, failing to even include the "reasonable time" language referenced in the background.

Even in applying the "reasonable time" standard to the operator's obligation under the Proposed Rule to correct violations of mandatory health and safety standards, the Agency should consider the inconsistent manner in which this has been applied under the current procedures. While the UMWA recognizes that operators must be granted "reasonable time" to fix or abate violations, there have been far too many instances where abatement time has been extended beyond what is "reasonable." The UMWA supports the "two day rule" currently used by MSHA and referenced in the proposal, but regrets that the Agency has too often been willing to extend abatement time significantly without any legitimate justification.

The UMWA proposes the following procedure for application of the “reasonable time” standard: Once a violation of a mandatory health or safety standard is identified, abatement work (or at least concrete steps in preparation for the same) must be implemented. Part of this initial step should involve the assignment of an adequate amount of manpower and equipment to accomplish timely abatement. Finally, the operator must keep a written record of each discrete step taken to abate the violation, as well as the number of persons, shifts, and man-hours used to perform each step. This record must be made available to all interested parties. In the event MSHA determines the operator has not designated enough manpower or equipment to complete the task in a truly “reasonable time,” the Agency should require the operator to increase its commitment, whether of manpower, equipment, or both. An operator’s obligation to so increase its commitment of resources should be enforced under Section 104(b) of the Act.

B. Miners’ Representatives Under Section 103(f)

The rule should incorporate the valuable role the Section 103(f) designated miners’ representative can serve in the identification of hazards. The UMWA proposes that at least one miner designated as miners’ representative be included in the quarterly review process. In addition, all persons designated as a miners’ representative should have a protected right to review the citations and orders provided to the examiner by the operator and to provide the mine examiner a written description of miners’ safety concerns. Persons designated as a miners’ representative should be permitted immediate access, upon request, to the “secure book” or “computer system” the Proposed Rule requires for the purpose of recording the “results of each examination.”

C. Mine Examiner Training and Authority

Proposed modifications to the mine examiner’s role will undoubtedly improve miner safety and health, but such improvement can only be maximized if examiners are provided adequate training and uncompromised authority in the performance of that role.

1. Mine Examiner Training

Mine examiners who will be responsible for identification of mandatory health and safety standards violations must be adequately trained in the performance of that task. Operators should provide mine examiners the same training and equipment provided to MSHA inspectors. The substance and frequency of such training and an inventory of equipment provided to mine examiners should be detailed in a plan submitted to MSHA for approval. Refresher examination training should be provided on an annual basis, at minimum. In addition, operators should be required to maintain a training record available for inspection by interested parties.

The operator also should be required to provide mine examiners copies of regulatory changes, updates and MSHA policy changes. Such changes should be addressed no less often than at the annual training immediately following implementation of the changes, unless MSHA indicates at the time it enacts a regulatory or policy change that immediate training on such changes is necessary.

2. Mine Examiners Have No Superiors

In order to perform their important job effectively, it is critical that mine examiners have **no superiors** while engaged in the performance of their duties. The Proposed Rule should include a provision making it a violation of law for any operator to direct or attempt to direct a mine examiner while he or she is engaged in an examination.

Hourly employees who are certified should be guaranteed the right to refuse to use their certification to perform an examination if they so choose. In other words, an operator should be prohibited from requiring a certified employee to perform a mine examination or fireboss the mine. Vj k'ltgevkp'y cu'ej cpi gf 'd{ 't'lwdugs wgpv'lwdo lukp0'Rgcug'tgg'pgzv't ci g0

Conclusion

The UMWA supports the rule proposed by MSHA and urges its adoption as a final rule, along with the improvements described herein.

**United Mine Workers of America
Supplemental Comments on the
Mine Safety and Health Administration's
Proposed Rule:
Examinations of Work Areas in Underground Coal Mines for
Violations of Mandatory Health or Safety Standards
"RIN 1219-AB75"**

The United Mine Workers of America already submitted comments on this proposed rule. This comment adjusts the last section of the earlier submitted comments; new language is shown in italics.

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Hourly employees who are certified should be guaranteed the right to refuse to use their certification to perform an examination if they so choose; *the only exception would be when MSHA regulations anticipate that certain miners may perform their own pre-shift, as the pumper/fireboss does.* In other words, an operator should be prohibited from requiring a certified employee to perform a mine examination or fireboss the mine.

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