

IMA-NA Preliminary Input to MSHA on E.O. 13777

PART 45—INDEPENDENT CONTRACTORS

§45.4 Independent contractor register.

(a) Each independent contractor shall provide the production-operator in writing the following information:

- (1) The independent contractor's trade name, business address and business telephone number;
- (2) A description of the nature of the work to be performed by the independent contractor and where at the mine the work is to be performed;
- (3) The independent contractor's MSHA identification number, if any; and
- (4) The independent contractor's address of record for service of citations, or other documents involving the independent contractor.

(b) Each production-operator shall maintain in writing at the mine the information required by paragraph (a) of this section for each independent contractor at the mine. The production-operator shall make this information available to any authorized representative of the Secretary upon request.

§45.6 Address of record and telephone number; independent contractors.

(a) The address and telephone number required under this part shall be the independent contractor's official address and telephone number for purposes of the Act. Service of documents upon independent contractors may be proved by a Post Office return receipt showing that the documents were delivered to the address of record or that the documents could not be delivered to the address of record because the independent contractor is no longer at that address and has established no forwarding address; because delivery was not accepted at that address; or because no such address exists. Independent contractors may request service by delivery to another appropriate address of record provided by the independent contractor. The telephone number required under this part will be used in connection with the proposed penalty assessment procedures in 30 CFR Part 100.

Comment: The concern is with 45.4, but 45.6 is included for reference purposes. There is considerable confusion as to which entities would be considered "independent contractors" under this section. The Mine Act defines an independent contractor as "any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine." It does not require privity of contract WITH the mine operator, and so trucking companies engaged by customers to pick up product at the mine and deliver it off-site could technically come within this definition.

While long-term contract work is easy to address under this standard in terms of contractor prequalification and management, there are many short-term contractors (e.g., an electrician on site for a few hours, or a scale company representative who is doing calibration, or a fuel service company filling tanks or generators for a few minutes per visit) for whom capturing the daily information of who is present is unduly burdensome. MSHA does not even require site-specific hazard training to be documented for some of these contractors (it can be provided via signage or a pre-printed form), yet these third-party contractors' information must be accurately included on the mandated "register" that must be shown to MSHA inspectors upon request. This must be updated each shift, to reflect the current identification information (and more) for every contractor on site that day.

To be in technical compliance, the mine operator would have to update this registry multiple times each day with the information in 45.4, and should not include contractors who are not on site in order to be technically accurate. Moreover, if a contractor provides to the mine operator identification information different from that required in 45.6, then the register will also be out of compliance.

30 CFR Part 45 should be deleted in its entirety, as it serves no purpose in advancing safety or protecting miners. Independent contractors are considered “mine operators” under the Mine Act, and so all sections of the CFR apply to them individually. If MSHA wants to require all contractors to have a mine ID (currently limited to certain categories of contractors in advance of work – others will be issued IDs if they are found on site to have engaged in a violation, in order to be cited).

PART 46—TRAINING AND RETRAINING OF MINERS ENGAGED IN SHELL DREDGING OR EMPLOYED AT SAND, GRAVEL, SURFACE STONE, SURFACE CLAY, COLLOIDAL PHOSPHATE, OR SURFACE LIMESTONE MINES.

§46.2 Definitions.

(d)(1) *Experienced miner* means:

(i) A person who is employed as a miner on April 14, 1999;

(ii) A person who has at least 12 months of cumulative surface mining or equivalent experience on or before October 2, 2000;

(iii) A person who began employment as a miner after April 14, 1999, but before October 2, 2000, and who has received new miner training under §48.25 of this chapter or under proposed requirements published April 14, 1999, which are available from the Office of Standards, Regulations, and Variances, MSHA, 201 12th Street South, Arlington, VA 22202-5452; or,

(iv) A person employed as a miner on or after October 2, 2000 who has completed 24 hours of new miner training under §46.5 of this part or under §48.25 of this title and who has at least 12 cumulative months of surface mining or equivalent experience.

(2) Once a miner is an experienced miner under this section, the miner will retain that status permanently.

Comment: Paragraph (d)(1) of this regulation needs modification to revise the definition of “experienced miner” as one who has completed new miner training under Part 46 or Part 48 previously, and who has at least 12 cumulative months of surface mining or equivalent experience. Delete (d)(1)(i), (d)(1)(ii) and (d)(1)(iii). Modify (d)(1)(iv) to delete the reference to “on or after October 2, 2000.” The reason for this modification is that the original intent of the agency, and the comments of stakeholders, was for a miner to be “experienced” after a year’s experience and initial training. So the reference to employment prior to October 2, 2000, is unnecessary now, 17 years after enactment of the rule.

PART 48—TRAINING AND RETRAINING OF MINERS

§48.3 Training plans; time of submission; where filed; information required; time for approval; method for disapproval; commencement of training; approval of instructors.

(g) Except as provided in §48.7 (New task training of miners) and §48.11 (Hazard training) of this subpart A, all courses shall be conducted by MSHA approved instructors.

(h) Instructors shall be approved by the District Manager in one or more of the following ways:

(1) Instructors shall take an instructor's training course conducted by the District Manager or given by persons designated by the District Manager to give such instruction; and instructors shall have satisfactorily completed a program of instruction approved by the Office of Educational Policy and Development, MSHA, in the subject matter to be taught.

(2) Instructors may be designated by MSHA as approved instructors to teach specific courses based on written evidence of the instructors' qualifications and teaching experience.

(3) At the discretion of the District Manager, instructors may be designated by MSHA as approved instructors to teach specific courses based on the performance of the instructors while teaching classes monitored by MSHA. Operators shall indicate in the training plans submitted for approval whether they want to have instructors approved based on monitored performance. The District Manager shall consider such factors as the size of the mine, the number of employees, the mine safety record and remoteness from a training facility when determining whether instructor approval based on monitored performance is appropriate.

(4) On the effective date of this subpart A, cooperative instructors who have been designated by MSHA to teach MSHA approved courses and who have taught such courses within the 24 months prior to the effective date of this subpart shall be considered approved instructors for such courses.

(i) Instructors may have their approval revoked by MSHA for good cause which may include not teaching a course at least once every 24 months. Before any revocation is effective, the District Manager must send written reasons for revocation to the instructor and the instructor shall be given an opportunity to demonstrate or achieve compliance before the District Manager on the matter. A decision by the District Manager to revoke an instructor's approval may be appealed by the instructor to the Administrator for Coal Mine Safety and Health or Administrator for Metal and Nonmetal Mine Safety and Health, as appropriate, MSHA, 201 12th Street South, Arlington, VA 22202-5452. Such an appeal shall be submitted to the Administrator within 5 days of notification of the District Manager's decision. Upon revocation of an instructor's approval, the District Manager shall immediately notify operators who use the instructor for training.

Comment: This regulation should be reviewed for streamlining and consistency. It appears that in some districts, years of underground mining experience may be required even when the individual plans to work at a Part 48-regulated surface mine. MSHA used to allow certification by the district based on a review of the resume (or professional certifications etc.), whereas now the MSHA course is often required, but rarely provided and is not currently taught online, which limits the ability of new instructors who cannot easily get to the Mine Academy in WV to become certified.

In addition, some districts are arbitrarily and capriciously imposing their own limitations on trainers, plan adoption, or class size. Some trainers have been told they must give two weeks advance notice before putting on a class (which limits the ability to quickly initiate new miner training or contractor training), some are told that no more than 20, or 25 or 30 students can be in a class, and some are told that new miner training for contractors, provided through the state grants program, cannot be signed-off on as completed until a Part 48-approved trainer at the host mine does the "mine tour" for the contractor, then must sign off on the completed training (liability issues, since the mine did not do the 24 hours of training). Another issue is that some districts are refusing to accept training done by contractors under a Part 48 plan approved by a different district. The training is supposed to be transferrable across the U.S. and yet this is suddenly not the case. Finally, some districts will approve an 8-16 split (allowing 8 hours before work begins at the mine, with the remaining 16 hours completed in a specified time frame as on-the-job training), while others will not. The entire Part 48 framework should be reexamined as to whether its stringent provisions are still required, or whether a uniform Part 46/48 training

regulation with greater flexibility and ability to include web-based training more readily should be developed.

PART 56—SAFETY AND HEALTH STANDARDS—SURFACE METAL AND NONMETAL MINES

Subpart D—Air Quality and Physical Agents

AIR QUALITY

§56/57.5001 Exposure limits for airborne contaminants

Except as permitted by §56/57.5005—

(a) Except as provided in paragraph (b) of this section, the exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1 through 54, which are hereby incorporated by reference and made a part hereof. This publication may be obtained from the American Conference of Governmental industrial Hygienists by writing to 1330 Kemper Meadow Drive, Attn: Customer Service, Cincinnati, OH 45240; <http://www.acgih.org>", or may be examined in any Metal and Nonmetal Mine Safety and Health District Office of the Mine Safety and Health Administration. Excursions above the listed thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference.

(b) *Asbestos standard*—(1) *Definitions*. Asbestos is a generic term for a number of asbestiform hydrated silicates that, when crushed or processed, separate into flexible fibers made up of fibrils.

Asbestos means chrysotile, cummingtonite-grunerite asbestos (amosite), crocidolite, anthophyllite asbestos, tremolite asbestos, and actinolite asbestos.

Asbestos fiber means a fiber of asbestos that meets the criteria of a fiber.

Fiber means a particle longer than 5 micrometers (μm) with a length-to-diameter ratio of at least 3-to-1.

(2) *Permissible Exposure Limits (PELs)*—(i) *Full-shift limit*. A miner's personal exposure to asbestos shall not exceed an 8-hour time-weighted average full-shift airborne concentration of 0.1 fiber per cubic centimeter of air (f/cc).

(ii) *Excursion limit*. No miner shall be exposed at any time to airborne concentrations of asbestos in excess of 1 fiber per cubic centimeter of air (f/cc) as averaged over a sampling period of 30 minutes.

(3) *Measurement of airborne asbestos fiber concentration*. Potential asbestos fiber concentration shall be determined by phase contrast microscopy (PCM) using the OSHA Reference Method in OSHA's asbestos standard found in 29 CFR 1910.1001, Appendix A, or a method at least equivalent to that method in identifying a potential asbestos exposure exceeding the 0.1 f/cc full-shift limit or the 1 f/cc excursion limit. When PCM results indicate a potential exposure exceeding the 0.1 f/cc full-shift limit or the 1 f/cc excursion limit, samples shall be further analyzed using transmission electron microscopy according to NIOSH Method 7402 or a method at least equivalent to that method.

(c) Employees shall be withdrawn from areas where there is present an airborne contaminant given a "C" designation by the Conference and the concentration exceeds the threshold limit value listed for that contaminant.

Comment: MSHA allows credit for PPE only after exhausting all feasible engineering and work practice controls, and gives no real consideration to economic infeasibility of controls such as worker rotation. This will become an even greater issue if MSHA ultimately adopts the same reduced PEL for crystalline silica as OSHA has (50 ug/m³ for an eight-hour TWA, versus the current MSHA limit, which is the equivalent of 100 ug/m³).

MSHA should conduct a Request for Information on how to feasibly address the issue of outdated Permissible Exposure Limits (PELs). Currently, the Metal/Nonmetal exposure limits are enforced through the 1973 edition of the ACGIH TLVs (Coal uses the 1972 version, which lacks short-term exposure limits).

While most mine operators are going beyond minimum compliance with these outdated limits, there is nothing to reliably indicate what is actually needed to protect miners other than the limited information for chemical products included on Safety Data Sheets. OSHA engaged in a similar RFI in 2015-16 concerning changes to the regulation of airborne contaminants, and that record should be reviewed as well for possible options (including referencing NIOSH Recommended Exposure Limits, or using Control Banding practices) that might have cross-applicability in mining.

§56.11001 Safe access.

Safe means of access shall be provided and maintained to all working places.

Comment: This standard is one of the most-cited rules and is also one of the most ambiguous and subjective. It covers everything from a walkway with an electrical cord across it, to work on conveyors, a distance of two feet to climb up or down from a platform or equipment, and even oddities such as small icicles on a light fixture over an entryway in winter. The definition of “working places” is so broad as to have this standard operate as a kind of general duty clause. This standard is often used as a “gotcha” where no obvious violations of specific standards can be cited. Given that MSHA already has standards dealing with defects affecting safety on equipment, machinery and tools, railings, safe design of work platforms, berming of roads, and fall protection requirements, this standard is redundant and should be eliminated.

§56.11016 Snow and ice on walkways and travelways.

Regularly used walkways and travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable.

Comment: This standard is redundant with 56.11001 (safe access), but also is open to arbitrary enforcement as to what constitutes “as soon as practicable” – this will be within the inspector’s discretion, and mine operators have been cited under this while snow is actively falling as early as one hour into a workshift. If this standard is not deleted entirely, then some guidance should be provided as to what is required (such as community “clear sidewalk” laws do when specifying how long after the snowfall ends is provided to clear the walkways).

56.11002 Handrails and toeboards.

Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails and maintained in good condition. Where necessary, toeboards shall be provided.

Comment: MSHA issued a citation for lack of handrails on an elevated platform used for preventive maintenance, inspection and repairs, stating miners could suffer serious impact injuries from falling. The equipment cited was a “step-up” approximately 21-inches high, used occasionally to view a gauge. MSHA should consider specifications similar to OSHA’s requirements for elevated platforms where guard rails are required for platforms four feet or

higher above the surface below it. This would eliminate ambiguity and subjectivity while not reducing the safety of miners.

56.12028 Testing grounding systems.

Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on request by the Secretary or his duly authorized representative.

Comment: The requirement for testing and maintaining records for continuity and resistance should be modified to make clear what is to be tested. MSHA has issued citations when a personal portable fan was found and no testing was conducted by the operator. Appropriate grounding systems are necessary for operational equipment and tools provided by the operator, however, extending the standard to include personal appliances such as clocks, radios, coffee makers, fans, etc., places an unnecessary burden on the operator while providing no additional safety for the miner.

§56.13017 Compressor discharge pipes.

Compressor discharge pipes where carbon build-up may occur shall be cleaned periodically as recommended by the manufacturer, but no less frequently than once every two years.

Comment: This standard is intended for combustible underground mines and places undue burden and risk on surface mine operators.

§56.14207 Parking procedures for unattended equipment.

Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank.

Comment: This standard has been more frequently cited since MSHA included it on its “Rules to Live By” (RTL B) list (which has the impact for special assessments and targeting operators for impact inspections, based on their RTL B rate). While no one disagrees that chocking of wheels is needed on steep grades or under unusual circumstances where risk of movement exists during service work, MSHA has taken enforcement too far under strict liability. Even grades of 1% or less (“where any water can roll” is the test inspectors use) require chocking, including at times visitor’s cars parked in an office lot. The mine operators often receive the citations either solely or in tandem with contractors who fail to chock their vehicles (even when the mine operator provided chocks). These chocking citations are sometimes written as unwarrantable failure citations under Section 104(d) of the Mine Act, subjecting individuals to additional personal penalties. One such citation was issued to a host mine operator, for an electrical contractor’s truck that was in PARK (automatic transmission), with a functional parking brake set, on a 1% grade. The citation noted that “the mine supervisor failed to ensure that every vehicle parked at the mine was appropriately chocked.” This is a burden that no supervisor at a mine site can ever satisfy.

In addition, we note that unnecessary chocking of vehicles each time it is moved and parked can result in musculoskeletal injury risk, due to lifting of chocks, bending and stretching when positioning them and removing them.

While this standard should not be eliminated entirely, it should be revised to limit situations where chocks are required (perhaps specifying a higher percent grade), because so many mine vehicles are now automatic transmission and will not move when parked on slight grades when using a functional parking brake.

§56.15005 Safety belts and lines.

Safety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

Comment: “Safety belts and lines” refers to outdated personal protective equipment that can, in fact, injure workers. This should be modified to reflect “safety harnesses and lanyards” and MSHA should consider incorporating by reference the ANSI Z359.2 specifications for fall protection equipment (used by OSHA when upgrading its walking/working surfaces and fall protection standards in 2016). This will ensure greater protection for miners and uniformity in the types of fall protection PPE used (with a grandfathering provision for existing equipment – only apply to newly purchased equipment after the effective date of any modified rule).

The bigger issue with this standard, however, is its subjectivity – there is no height limit against which a mine operator can benchmark compliance (as opposed to OSHA’s use of 4’ for general industry, 5’ for maritime, 6’ for construction and 15’ for steel erection).

MSHA issued policy guidance stating that in many situations, MSHA will follow the OSHA “six-foot” construction rule. <https://arlweb.msha.gov/regs/complian/ppls/2014/PPL14-IV-02.asp>

It also issued guidance stating that if mobile equipment platforms are no more than two meters above the lower level and meet ISO/SAE specifications, then railings and fall protection equipment will not be required in most circumstances. This guidance is several years old and is no longer shown on MSHA’s website, although it does continue to be recognized (at least among those inspectors who were with the agency at the time it was issued).

However, both of these policies allow inspectors discretion to issue citations at lower heights depending on the situation, and they are not binding on the agency because they were not created through rulemaking under the Administrative Procedure Act. Therefore, there is no predicable way to know how an individual inspector will view a situation. This ambiguity in the current standard is also confusing to the many contractors who perform construction, repair and service work at mines but who are trained and oriented toward OSHA compliance on most of their jobs.

MSHA should consider adopting the OSHA Construction fall protection rules to provide uniformity.

§56.16009 Suspended loads.

Persons shall stay clear of suspended loads.

Comment: In the recent case of *Secretary of Labor v. Sims Crane* (currently under appeal before the FMSHRC), an administrative law judge upheld MSHA’s citation and found that the spreader bar on a crane – to which rigging lines are attached – is a suspended load within the meaning of the MSHA standard, and as such rigging of cranes on mine property is now technically prohibited. MSHA issued policy during the pending appeal, adopting in part the OSHA Crane Standard, but imported the incorrect definition of “load” from that standard (the one referring to total weight calculation, which does include the rigging as well as the “load” being lifted) rather than the other definitions that more clearly differentiate between rigging and loads, and which define safe work practices for the rigging process. <https://arlweb.msha.gov/REGS/COMPLIAN/PPLS/2017/P17-IV-01.asp>

Given that the OSHA Crane Standard was developed through negotiated rulemaking (with the participation of experts in the crane field from manufacturers, employers and labor writing the draft rule), all crane operators are trained and certified to OSHA standards, and most crane operators at mine sites routinely work at OSHA construction worksites as well, MSHA should defer to the OSHA Crane Standards and clarify that this standard does not apply to work with cranes.

§56.18006 New employees.

New employees shall be indoctrinated in safety rules and safe work procedures.

Comment: This standard predates the adoption in 2000 of 30 CFR Part 46 and is therefore no longer necessary because all new miners must have 24 hours of training, or experienced new miner training, or be current on annual refresher training and also have site-specific hazard training. This standard offers nothing additional except the ability to issue duplicative citations.

§56.18012 Emergency telephone numbers.

Emergency telephone numbers shall be posted at appropriate telephones.

Comment: Many mine sites no longer have hard-wired phones and rely on cellular communications. Mine operators can cover how to call 911 and the local MSHA office as part of new miner training. This standard is no longer needed.

§56.20014 Prohibited areas for food and beverages.

No person shall be allowed to consume or store food or beverages in a toilet room or in any area exposed to a toxic material.

Comment: This standard is ambiguous and is another “gotcha” tool, because “toxic material” is not defined in the standard nor is there any benchmark below which a “toxic material” in a lunchroom is acceptable. This has been used to cite mine operators when any lead is detected by wiping a table surface, as well as when people eat in a control room that might have a can of Raid in the cabinet. Given that the DOL classifies crystalline silica as a toxic chemical under the MSHA and OSHA hazard communication standard, in theory any sand or quartz dust present in a lunch area (which occurs 100% of the times because it is ubiquitous) would constitute a violation. This standard could be eliminated without any reduction in safety to miners. It is doubtful that MSHA has had a single recorded injury or illness since 1978 as a result of a lunchroom exposure to a toxic material.

PART 62—OCCUPATIONAL NOISE EXPOSURE

Comment: The revised noise rule allows credit for PPE only after exhausting all feasible engineering controls, and this has been interpreted many times in an arbitrary manner. Prior to the enactment of Part 62, MSHA would provide mine operators with “P” codes: once the mine operator installed all feasible engineering and work practice controls for a particular task or type of equipment, if the PEL was still exceeded, the mine operator would agree to maintain the controls and utilize appropriate PPE and receive the code. Then, as long as these controls were still maintained, subsequent inspectors would not issue citations for overexposures. MSHA did away with P codes under Part 62, so now each new inspector can issue citations and demand changes to the controls in use.

MSHA should modify this standard to reinstate the use of “P Codes.”

NOTE: MSHA could also consider the same “P code” approach for feasible engineering controls in the future, should changes be made to the air contaminants standard or the crystalline silica requirements.