From:	Tim Schlosser <Tim.Schlosser@continentalcement.com>
Sent:	Friday, September 30, 2016 4:17 PM
To:	zzMSHA-Standards - Comments to Fed Reg Group
Cc:	Jason Morin; Joe Pennings; Mark Menapace; Matt Helms; Gail Gough; Pat Arnold; Talya Mayfield; Todd Swenson
Subject:	Continental Cement Comments on MSHA's Proposed Work Place Exam Rule
Attachments:	2016-09-30 Comments on Examinations of Working Places Proposal - Continental Cement Co Comments.pdf

Attached are Continental Cement Company, LLC's comments on the MSHA's Proposed Work Place Exam Rule.

Please contact me, if you have any questions or comments.

Regards,

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September 30, 2016

VIA Email: zzMSHA-comments@dol.gov
Mine Safety and Health Administration
Office of Standards, Regulations, and Variances
201 12th Street South
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SEP 30 2016

Re: Continental Cement Company, LLC's Comments on Examinations of Working Places in Metal and Nonmetal Mines; Proposed Rule, 81 Fed. Reg. 36,818 (June 8, 2016), 81 Fed. Reg. 58,422, (Aug. 25, 2016). *Dkt. No. MSHA–2014–0030.*

Dear Sir or Madam:

Continental Cement Company, LLC (Continental Cement) appreciates the opportunity to comment on the Mine Safety and Health Administration's (MSHA) proposed updates to the Examinations of Working Places in Metal and Nonmetal Mines, 81 Fed. Reg. 36,818 (May 18, 2016) ("proposal"). Continental Cement has two (2) Portland cement manufacturing facilities located in Davenport, Iowa, and Hannibal, Missouri. Continental Cement is also a member of the Portland Cement Association (PCA). The proposal will directly impact Continental Cement's operations.

As set forth in more detail in Sections A-E below, Continental Cement provides comments on the following topics:

- **MSHA should withdraw the proposal and take a harder look at the purported justifications, costs, and potential benefits before promulgating any final rule.** While Continental Cement supports MSHA's objective of helping reduce work place injuries and fatalities, it is not clear to what extent the proposal would further that objective. The proposal fails to meet MSHA's obligations under the Mine Act, the Administrative Procedure Act, general principles of administrative law, and various executive orders to fully analyze and vet the efficacy and potential costs and benefits before promulgating new requirements. MSHA must thoroughly evaluate and validate the ability of the proposed changes to prevent occupational injuries and illnesses; evaluate alternatives, consistent with modern safety management practices; and quantify and balance the cost of new regulations with the potential benefits before finalizing the proposal.

- **Any update to the work place examinations rule should include a clearer definition of "working place."** Continental Cement appreciates the clarification on the scope of "working place" that MSHA provided in the preamble. However, the definition of "working place," especially as it relates to examinations, remains overly broad and vague. We urge MSHA to codify clarifications on the scope of working places and to provide additional clarification beyond what MSHA set forth in the preamble.

- **MSHA should further clarify the timing for examinations.** Continental Cement supports MSHA's clarification that examinations need not take place at the beginning of a shift, but rather when work begins in an area. We suggest that MSHA provide further flexibility and clarification in recognition of practical work flow and mining conditions.

- **The proposed record-keeping requirements should be more flexible.** Continental Cement supports MSHA's alternative proposal to forego signature requirements and to allow simply naming the person who conducts an examination. However, we believe any final proposal requires more flexibility and clarification. MSHA should clarify that those who perform examinations are not subject to enforcement actions, and that records can be maintained electronically. MSHA should clarify that citations may not be based solely on conditions referenced in

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examination records. Furthermore, any final rule should recognize that the designated competent person performing the examination may not necessarily be the same person who identifies a corrective action. Finally, any final proposal should allow records to be completed before the person responsible for the examination leaves the job site for the end of the day, not before the end of the shift.

- **Continental Cement supports MSHA's clarification on the meaning of "prompt notification."** MSHA's August 25, 2016 notice included a common sense clarification of what it means to "promptly notify miners" under the proposal. To the extent MSHA moves forward with the proposal, it should codify this definition of prompt notification.

Continental Cement's Specific Comments and Concerns

Continental Cement respectfully asks MSHA to consider the following comments on the proposal.

A. MSHA should withdraw the proposal and take a harder look at the purported justifications, costs, and potential benefits before promulgating any final rule.

Continental Cement applauds MSHA's motive to reduce workplace injuries and fatalities. However, the proposal does not appear to have fully vetted the consequences of imposing new regulatory burdens or made any attempt to verify the efficacy of the proposal. Federal regulators have an obligation to assure new rules are necessary to further the purpose and goal of the statutes they are authorized to implement, while minimizing unnecessary costs to the regulated community. In fact, the President has mandated that all federal agencies, including MSHA, assure that the benefits of regulations are justified by their costs, that they are tailored to impose the least burden and maximum benefits, that they favor performance objectives over specifying behavior or manner of compliance, and that the agency promulgating a regulation identifies and assesses available alternatives to direct regulation. *E.g.*, Executive Order 13563, 76 Fed. Reg. 3,821 (Jan 21, 2011). The proposal does not comply with these obligations.

The proposal fails to adequately assess the benefits and costs of imposing its new requirements. Indeed, the proposal includes no evidence or support for the assumption that the proposal would lead to more beneficial outcomes. As the proposal put it, "MSHA is unable to quantify the benefits from this proposed rulemaking, including the proposed provisions that an examination of the working place be conducted before miners begin work in an area . . ." 81 Fed. Reg. 36,823. Rather, the agency relies on the arbitrary "anticipation" that "there would be benefits from the proposed requirements." *Id.* This is insufficient. The proposal misses the mark on the biggest single cause of injuries, behavior. While the proposal is focused on workplace conditions, virtually all safety professionals agree that the overwhelming majority of accidents are functions of behavior.

MSHA should thoroughly evaluate the effect that the timing, manner and documentation of workplace examinations has on outcomes before changing the regulations. While we support the laudable goal of reducing incident rates and preventing fatalities, it is not clear that the proposal would even address the types of incidents that MSHA cites as justification for the proposal. For example, the proposal describes an incident in which a contract supervisor was fatally injured by a pipe when supervising an operation using a pipe-fusion machine. 81 Fed. Reg. at 36,820. "The positioning cylinder was defective and had been removed from the pipe-fusion machine eight (8) days prior to the accident," which prevented the machine from holding the pipe in place. *Id.* MSHA asserts that it "believes" that the injury would have been avoided had a competent person identified and recorded the adverse condition before miners used the machine. But the proposal does not explain how or why MSHA believes this to be the case. For example, the proposal does not address whether existing examination requirements were followed and whether they may have prevented the incident. From the description, the incident sounds like a situation in which the machine should have been marked as out of service or "tagged out" at the time the positioning cylinder was removed; not an examination failure. Similarly, the proposal describes an incident in which a heavy equipment operator was fatally injured when operating an excavator near a water-filled ditch. The proposal states that "[t]hree days prior to the accident, several inches of rain fell in the area causing the ditch to fill with water and overflow, making the ditch invisible to persons working in the area." *Id.* at 36,820. It is not clear that current examination requirements were followed or how the new provisions contained in the proposal would address these "invisible" conditions.

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The fundamental question of how the new regulations would prevent injuries must be further analyzed before MSHA can rightfully finalize any changes to the regulations. MSHA should commission or undertake an interdisciplinary study of how the timing and nature of workplace examinations and the documentation thereof affects outcomes. The Agency should then compare the benefits of any proposed changes to alternatives, such as risk assessment/risk management programs and promotion of behavior based safety programs.

As to costs, MSHA recognizes that there will be increased record-keeping, training, and salary burdens, but it simply guesses at the amount of time and cost of the proposed compliance burdens. *Id.*at 36,823. Indeed, the proposal includes no justification for the time "estimates" that the Agency does evaluate and fails to account for downtime during inspections, training, and additional documentation burdens. *Id.*

In short, without having performed any empirical analysis of the benefits and costs of the proposal, MSHA has failed to fulfill its obligations to avoid arbitrary and capricious rulemaking under the Mine Act, the Administrative Procedures Act, and the relevant executive orders. Extensive changes to regulatory requirements, like those contained in the proposal, should be carefully crafted to protect worker safety while minimizing costs. MSHA has noted that it cannot quantify the benefits from the proposal and that it has no empirical evidence that the proposal will prevent injuries. Meanwhile, MSHA has failed to reasonably analyze the costs, which will include extensive amounts of time, training, updating of procedures, developing new documentation, creating storage systems, and possibly lost hours. MSHA must take the time to further address these issues before imposing new requirements. For example, Circular A-4 from the White House Office of Management and Budget provides instruction on identifying and measuring benefits and costs from proposed regulations, including health and safety regulations with benefits and costs that may be difficult to quantify. MSHA should withdraw the proposal and prepare a thorough analysis of the potential benefits and costs and compare them to alternatives. Otherwise, the Agency cannot have fulfilled its obligations to assure the benefits of the proposal justify its costs and provide the most flexible approach to addressing the problem at hand.

B. Any update to the work place examinations rule should include a clearer definition of working place.

The proposal would impose additional requirements regarding the timing, extent and documentation of each "working place" at a mine site. A competent person would be required to examine each "working place" before work begins in an area and to complete certain documentation requirements. "Working place" is broadly defined to include "any place in or about a mine where work is being performed." 30 C.F.R. §§ 56.2, 57.2. Given the breadth of this definition, the proposal could be interpreted to require extensive examination of very large areas, including areas in which no work will be performed during a shift, before any work can begin. Continental Cement would like to remind MSHA of the magnitude of a cement manufacturing facility included as part of the mine site. Addition of the cement manufacturing facility increases the potential working places to be examined by an estimated 5 to 10 times. We understand that is not the intention of the proposal and that MSHA has attempted, through guidance documents and statements in the regulatory preamble to clarify its intent. However, Continental Cement remains concerned that the broad definition of "working place" will lead to diverse and subjective interpretation and application of the proposed requirements. To the extent MSHA moves forward with the proposal, the regulatory language should more specifically define what is and is not a "working place" covered by the requirements. We urge MSHA to propose a revision to the definition of "working place" or to provide more clarity regarding the scope of examinations in the regulatory language before finalizing the proposal. To that end, we provide the following suggestions.

Codify and clarify the limitations on "working place" already identified by MSHA. As indicated above, the definition of "working place" is overly broad and vague, leading to misinterpretation and unnecessary dispute. MSHA has provided some helpful clarification on the intended definition of "working place" through guidance and the proposal's preamble. For example, the proposal acknowledges that various guidance documents, including PPL No P15-IV-01, have explained that "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." *Id.* 36,821. Similarly, MSHA's August 25, 2016 notice extending the comment period on the proposal, 81 Fed. Reg. 58,422 (Aug. 25, 2016), explained that "a 'working place' is not the entire mine unless miners will be working in all areas of the mine." Additionally, "[u]nless required by other standards, mine operators would only be required to examine isolated, abandoned or idle areas of mines or mills when

miners have to perform work in these areas during the shift." *Id.* These are important clarifications that should be added to the definition of "working place" to assure regulatory certainty and avoid inconsistent application of the regulations.

Revise the definition of "working place" and the examination requirements to allow examination of only those parts of a working place or area in which work is performed. In the interest of safety and efficiency, operators and competent persons should be authorized to examine the portions of large areas in which work is actually performed and exclude other portions of those areas unless and until work is performed in them. For example, some cement manufacturing facilities include large covered raw material storage buildings (*e.g.*, 60-70 yards wide and 300 yards long). Loader operators may need to recover buckets of raw material from a storage building to move them into a feed hopper. This task requires work in only a very small portion of the large storage building and may take only 10-15 minutes. However, as written, the rule could be interpreted to require the examination of the entire building and all equipment in it before the loader operator begins his task. That would turn a 10-15 minute job into one that could take more than 45 minutes. Meanwhile, examining the entire storage building and all equipment therein would not improve the safety of the loader operator because he would not be working within the majority of the building or with the equipment therein.

Similarly, a typical cement quarry can cover hundreds of acres, but only a small portion is in production at any one time. While the preamble recognizes that "a 'working place' is not the entire mine unless miners will be working in all areas of the mine," opinions may differ in the field as to which areas of a quarry are part of a "working place" or not. The examination requirements should focus on protecting workers in the areas or portions of areas in which they will actually work and not foster disputes regarding the extent of a "working place."

To address these concerns, MSHA should revise the proposal to allow examination of only those portions of an area in which work is actually conducted. The regulations should expressly allow a designated competent person to identify subsets of working areas that require examination, while leaving portions of an area in which no work is taking place to be examined as needed.

Revise the examination requirements *and definition of "working place" to lighten the burden of examining pass through areas.* Miners often must pass through various areas of a facility to get to a working place. These "pass through" areas are arguably included in MSHA's examination requirements. MSHA should clarify that "competent persons" need not examine every portion and all equipment in a pass through area, but rather only those portions that could include a foreseeable hazard.

C. MSHA should further clarify the timing for examinations.

In its August 25, 2016 notice extending the comment period, MSHA helpfully clarified that "[i]t is not MSHA's intent for mine operators to conduct an examination of the entire mine before the start of each shift." Rather, the proposal "would require an examination of 'each working place' 'before work begins in an area.'" 81 Fed. Reg. at 58,423. Continental Cement supports this clarification and urges MSHA to codify it, if the proposal is finalized. Allowing examinations at the beginning of work in an area, as opposed to the beginning of the shift, recognizes the reality that not all work is predictable at the beginning of the shift and companies must be permitted to prioritize their designated competent persons' time based on work flow. At a mine site, including a cement manufacturing facility, examinations at the beginning of shift could add an additional staffing requirement on each shift to inspect areas that most likely will not have miners present during the shift.

MSHA should provide additional and necessary flexibility in the timing for examinations. Competent persons should be permitted to perform examinations almost simultaneously with the beginning of work. For example, a work crew, including a designated competent person, should be permitted to enter an area and conduct his or her examination as the first step in doing the work. This fosters natural and functional work flow. The area worked in is examined by one or more designated competent persons and then work begins. Rigid examination requirements that are segregated from work are unnecessarily time consuming and costly.

Additionally, MSHA should propose and codify clarification of what constitutes "work begin[ing] in an area." The current regulations provide no definition and the vague instruction to examine an area before work begins will lead to subjective

and diverse application in the field, both by the regulated community and MSHA inspectors. For example, MSHA should clarify whether an engineer who is standing in a building observing the operation of equipment is "working" for the purposes of the examination requirements. Further, MSHA should clarify whether a maintenance person has "begun work" while he is standing in a building waiting for a piece of equipment to stop moving so that he can start an examination of the area and begin work.

D. The proposed record-keeping requirements should be more flexible.

MSHA has acknowledged concerns that the proposed signature requirements "would discourage miners from conducting working place examinations and would have a negative impact on the quality of examinations." 81 Fed. Reg. 58,424. It seeks comments on an alternative approach "of simply requiring the name of the competent person, rather than the signature be included in the examination record." Continental Cement supports this alternative approach, but urges the Agency to provide more clarification.

Part of the concern with the signature requirement is that it may have a chilling effect on competent persons who are concerned that they will face liability for problems with the examination or records. MSHA should clarify that, in the absence of intentional misconduct, it is only the operator who faces enforcement concerns related to examinations. This is consistent with the concept of allowing the operator to designate who among the work force is considered a "competent person" for examination purposes. The onus is on operators to assure that their examiners are competent, well-trained, follow proper procedures, and assure the safety of miners. Along with removing the signature requirement, clarifying that examiners will not be subject to civil penalties or enforcement action for examinations (apart from intentional misconduct) will help to prevent any chilling effect on identifying the person who conducts the examination.

Removing the signature requirement also allows for the necessary flexibility and use of technology. Operators and examiners should be permitted to keep electronic, rather than paper, records of examinations. For example, some operators may allow examination forms to be filled out electronically or on hand held devices. Allowing identification of examiners without signatures will foster this type of flexibility, recognition of technology, and electronic document management.

Furthermore, to avoid disincentives to the record keeping requirements, MSHA should clarify that violations will not be based solely on records of conditions. Any final proposal should indicate that MSHA will not issue citations simply based on the documentation of hazardous conditions and corrective actions. The purpose of documentation is to assure corrective action gets taken and conditions are safe. Citations should be based only on conditions observed during the examination or on failure to perform the appropriate examinations. MSHA examiners should not be permitted to base citations solely on past conditions that are identified in examination reports.

The proposal includes an unnecessarily restrictive suggestion that the competent person responsible for the examination also include any appropriate corrective actions in his or her documentation of the examination. Depending on the condition, the competent person who conducts the examination may not be the same person who identifies the corrective action. For example, some corrective actions may require input from engineers or others within an operation. The regulations should be revised to allow a separate portion of the documentation for corrective actions that separately identifies the person who determines the appropriate corrective action.

Finally, the proposal's requirement that the examination records get completed before the end of the shift is unnecessarily restrictive. Work days, especially days that require corrective actions for hazardous conditions, can be dynamic and demanding. MSHA should revise any final proposal to allow the documentation to be completed before the designated competent person or persons leaves the job site for the end of the work day, not before the end of the shift.

E. Continental Cement supports MSHA's clarification on the meaning of "prompt notification."

In the August 25, 2016 notice, MSHA clarified that:

> "to promptly notify miners" means any notification to the miners that alerts them to adverse conditions in their working place so that they can take necessary precautions to avoid an accident or injury before they begin work in that area. This notification could

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> take any form that is effective to notify affected miners of the particular condition: Verbal notification, prominent warning signage, other written notification, etc. MSHA believes that, in most cases, verbal notification or descriptive warning signage would be needed to ensure that all affected miners receive actual notification of the specific condition in question.

81 Fed. Reg. 58,423. Continental Cement supports this clarification. Providing this amount of flexibility recognizes the dynamic nature of working conditions and allows operators to select the most effective tools for providing notification based on operations and working conditions. We urge MSHA to codify this language and explicitly define "promptly notify" to mean "any notification that alerts miners to adverse conditions in their working place, which can take any form that is effective to notify affected miners of the particular condition."

Thank you for the opportunity to comment on the proposal. Please do not hesitate to contact me with any questions regarding these comments.

Sincerely,

Timothy L. Schlosser

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