



**AMERICAN SOCIETY  
OF SAFETY ENGINEERS**

1800 East Oakton Street  
Des Plaines, Illinois 60018-2187 USA

847.699.2929  
FAX 047.290.3709  
www.asse.org



September 13, 2004

Marvin Nichols  
Director  
Office of Standards, Regulations, and Variances  
Mine Safety and Health Administration  
US Department of Labor  
1100 Wilson Blvd., Room 2313  
Arlington, VA 22209-3939

**RE: MSHA Proposed Rule on Training  
and Retraining of Miners –  
RIN 1219-AB35**

Dear Mr. Nichols:

Enclosed please find the comments of the American Society of Safety Engineers (ASSE) regarding the Mine Safety and Health Administration (MSHA) rulemaking addressing Training and Retraining of Miners, 30 CFR part 48, as proposed at 69 Fed. Reg. 42841 et seq. (July 16, 2004).

ASSE respectfully asks that these comments be included in the record of this rulemaking.

Thank you for your assistance in this matter.

Sincerely,

David L. Heidorn, JD  
Manager of Government Affairs and Policy

AB35-COMM-101

**Statement**  
**of the**  
**American Society of Safety Engineers**  
**Concerning Part 48 Training Amendments**  
**to the**  
**Mine Safety and Health Administration**  
**U.S. Department of Labor**  
**August 26, 2004**

The American Society of Safety Engineers (ASSE) appreciates the opportunity to submit this statement to the Mine Safety and Health Administration (MSHA) concerning proposed modifications to 30 CFR Part 48, as proposed at 69 Fed. Reg. 42841 et seq. (July 16, 2004). These comments reiterate public comments made by ASSE's Federal Representative, Adele Abrams, Esq., at the August 26, 2004 public hearing held on this issue.

ASSE commends MSHA for seeking to include shaft and slope construction workers in existing requirements for miner safety and health training at mine sites covered by 30 CFR Part 48, which addresses training requirements for underground mine workers. However, ASSE is concerned that MSHA has not gone far enough in expanding such training. If training is important for these construction workers, MSHA should make every effort in this rulemaking to include all construction workers exposed to hazards of mining operations at such mine sites. ASSE urges that, before final rulemaking, MSHA provide more explanation and conduct further inquiry to support its decision to exempt all construction workers. MSHA has quantified the fatalities and injuries suffered by slope and shaft construction workers, but it has not provided similar data documenting the risks of other construction workers at these mines.

From our members' hands-on perspective, safety and health training may be the single most effective means of advancing safety and health on any job site. Any means to ensure that workers receive adequate training cannot be overlooked. For this same reason, ASSE also urges MSHA to incorporate by reference in a final rule the ANSI Z490.1 voluntary consensus standard, *Criteria for Accepted Practices in Safety, Health and Environmental Training*, which provides a recognized means of helping ensure that the effectiveness of the safety and health training that employers arrange for their employees. ASSE also makes a variety of practical suggestions on how to make these requirements consistent and manageable without compromising worker safety and health

ASSE's particular interest in this rulemaking arises from the active involvement of its Mining Practice Specialty – one of thirteen Society practice specialties – in mining safety and health. Reflecting that involvement, ASSE and MSHA since 2003 have worked together in an Alliance that joins ASSE's members with MSHA employees to advance mine safety and health. Our Mining Practice Specialty members, including those members participating in the ASSE-MSHA Alliance, are recognized leaders in mining safety and health with the necessary knowledge and expertise to move safety and health forward on a global level.

ASSE is the oldest and largest society of safety engineers and safety professionals in the world. Founded in 1911, ASSE represents about 30,000 dedicated safety and health professionals. ASSE's members include Certified Safety Professionals, Certified Mine Safety Professionals, Certified Industrial Hygienists, Professional Engineers, academicians, fire protection engineers, system safety experts, health professionals and an impressive collection of other disciplines. Our members are committed to excellence and expertise in carrying out their professional responsibilities for protecting people, property and the environment worldwide.

#### Application of Training Requirements to Construction Workers

Section 115 (a) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 825, directed the Secretary of Labor to promulgate regulations concerning health and safety training programs for miners. Section 115(d) then specifies that MSHA should promulgate appropriate training standards specifically governing construction workers at mine sites. Since 1977, MSHA has refrained from doing so. When it promulgated training standards in 1978 and codified them at 30 CFR Part 48, it exempted all slope and shaft construction workers from the scope of mandatory miner training.<sup>1</sup> The exemption was based in part on the assumption that shaft and slope construction was substantively different from extraction and production mining and, so, that miner training would not be relevant or necessary for construction workers.

However, as this rulemaking proposal notes, between 1982 and 2003, 15 individuals who were engaged in shaft and slope construction were killed at mines in the United States. MSHA's own review of these accident reports indicates that the hazards confronting shaft and slope construction workers are not substantially different from hazards faced by all other underground or surface miners. This review indicated that shaft and slope construction workers perform a number of tasks that are similar to those performed by miners already covered under Part 48, including drilling, blasting, mucking, welding and making gas examinations.

Moreover, in recent years, MSHA has changed its perspective and has taken the position that there is no outright bar to including construction workers within training standards generated for workers employed by mines or mine operators. Section 115(d) of the Mine Act simply directs the Secretary of Labor to “promulgate appropriate standards for safety

---

<sup>1</sup> 47 Fed. Reg. 47453 (Oct. 13, 1978). Those regulations mandate the training that miners, including short-term specialized contract miners, must receive before working in surface or underground mines.

and health training for coal or other mine construction workers.” Thus, the plain statutory language does not require independent training requirements that apply exclusively to mine construction workers.

Despite these clear indications that treating construction workers differently than mine workers in training requirements is not necessary, this proposed rule retains the training exclusion for mine construction workers other than shaft and slope workers as well as the reference to “subpart C,” which is reserved for any separate mine construction training rule. The agency has also announced its intent to set aside the training coverage of the other mine construction workers for future rulemaking, as appropriate.

### Inconsistent Rationale

The rationale continuing to exclude non-shaft and slope construction workers is not very clear, given that MSHA has already addressed construction worker training for certain categories of mines. For example, in 1999, the agency created a separate Part 46 training standard covering most of the surface nonmetal mines regulated by MSHA.<sup>2</sup> In that rule, MSHA intentionally included construction workers within the definition of “miner.”

Part 46.2(g)(1) states:

Miner means:

(i) Any person, including any operator or supervisor, who works at a mine and who is engaged in mining operations. This definition includes independent contractors and employees of independent contractors who are engaged in mining operations; and

(ii) **Any construction worker who is exposed to hazards of mining operations.**

(2) The definition of “miner” does not include scientific workers; delivery workers; customers (including commercial over-the-road truck drivers); vendors; or visitors. This definition also does not include maintenance or service workers who do not work at a mine site for frequent or extended periods.

The preamble of the Part 46 final rule suggests that “exposure to the hazards of mining” occurs for those construction workers who perform activities that are “integral to extraction and production” or who are working at an “active mine site.”<sup>3</sup> This basically encompasses virtually all construction workers other than those engaged in new construction at a mine not yet open, or one that has temporarily suspended active mining for the construction project or because it only has intermittent operations.

<sup>2</sup> The Part 46 rule took effect on October 2, 2000. It covers the surface operations of the following commodities: surface stone, surface clay, sand, gravel, surface limestone, colloidal phosphate, shell dredging, marble, granite, sandstone, slate, shale, traprock, kaolin, cement, feldspar, and lime.

<sup>3</sup> 64 Fed. Reg. 53095 (Sept. 30, 1999).

By contrast, the current Part 48 training standard, which covers all other types of surface and underground metal/nonmetal surface mines and all coal mines, defines “miner” as specifically excluding “(w)orkers under subpart C of this part 48, including shaft and slope workers, workers engaged in construction activities ancillary to shaft and slope sinking, and workers engaged in the construction of major additions to an existing mine which requires the mine to cease operations.” 30 CFR §48.2(a)(1)(i) and §48.22(a)(1)(i).

MSHA’s Program Policy Manual sets forth the following definition for purposes of applying this exemption: “Construction work includes the building or demolition of any facility, the building of a major addition to an existing facility, and the assembling of a major piece of new equipment, such as installing a new crusher or the assembling of a major piece of equipment such as a dragline.”

### Including All Construction Workers

In covering construction workers within the scope of Part 46, back in 1999, MSHA wrote:

Part 46 requires training for construction workers and it takes a proactive approach toward the training of independent contractor employees that come onto mine property. We believe that these provisions, along with other enhancements included in part 46, will result in improved safety and health for the construction workers, independent contractor workers, and miners who work near these individuals at the mine.<sup>4</sup>

ASSE believes this rationale was well expressed and has stood the test of time. Yet, under Part 48, MSHA has not articulated why training requirement expansion applies only to construction workers engaged in shaft/slope work and other construction workers at Part 48-regulated mines should receive lesser protection than construction workers at Part 46-regulated mines.

ASSE urges that, before final rulemaking is pursued, MSHA provide more explanation and conduct further inquiry to support this decision. MSHA has quantified the fatalities and injuries suffered by slope and shaft construction workers, but no similar data are provided for injuries and illnesses suffered by the other construction workers at these mines who would be left outside the proposed training standard. MSHA needs to make this data publicly available before a final rule is promulgated so that a determination can be made whether continued exemption of all other construction workers is still warranted

### Credit for Experience

Under Part 46 training requirements, MSHA recognized that individual construction workers may have long-term experience and training before coming to a mine site that is relevant to the tasks they will perform as “miners.” Consequently, they were given credit for experience in positions such as a heavy equipment operator or a skilled craftsman. If

---

<sup>4</sup> 64 Fed. Reg. 53091 (Sept. 30, 1999).

MSHA does extend Part 48 to slope and shaft construction workers or to all construction workers now or in the future, as ASSE hopes MSHA will do, then similar “grandfathering” should be permitted for any construction workers who have at least 12 months of cumulative<sup>5</sup> prior experience performing the tasks that they will perform at the mine and have appropriate documented training such as the OSHA 10 or 30 hours courses for construction. Such training credits should apply to initial training and the annual refresher training. Such workers would, of course, require site-specific training on mine hazards as well as supplemental hazard communication training with respect to chemical hazards at the mine to which they could foreseeably be exposed in the course of their assigned duties, and task training when their duties are revised or new hazards are introduced to the mine work environment.

### Experienced Miners

We agree that construction workers engaged in work at mines as of the effective date of the rule should be grandfathered in as “experienced miners,” but this classification should be further extended. MSHA should permit such workers to be classified as “experienced miners” permanently, regardless of what date they begin work at the mine or if they resume work at a mine after an extended absence. This will ease any unnecessary burden prospectively on construction employers and should not diminish the protection of workers.

Such individuals would still receive the site-specific hazard training to ensure they are thoroughly familiar with the particular environment and hazards present at a mine that is new to them, as well as any requisite task training if their activities or equipment at the mine differ from what they are accustomed to in their construction work off-site. Further, they should still be subject to the eight-hour annual refresher training requirement if they did not have equivalent, documented training under an OSHA construction training program within the 12 months preceding their return to the mine site.

### New Miner Training Credit

MSHA also has set a precedent under Part 46 of giving partial credit toward “new miner training” for construction workers who come to the mine “pre-trained” on certain mandatory subjects set forth in the MSHA standard. The following illustration was given by MSHA in the preamble to Part 46, and ASSE urges the agency to adopt the same flexible approach under Part 48 for this category of workers.

[A]ssume that you hire a new miner who worked in the construction industry and whose previous employer provided him with some health and safety training. You determine that the new miner has received four hours of training on first aid methods; one hour of training on instruction and demonstration on the use, care and maintenance of respiratory devices; six

---

<sup>5</sup> This recognizes that construction may be an intermittent industry in some parts of the country, making 12 consecutive months of experience impractical to attain, and is consistent with the definition of “experienced miner” under Part 46.

hours of training on the safe operation of a front-end loader; and four hours of instruction on the following subjects: electrical hazards, silica, fall prevention and protection, excavations, material handling and moving equipment. You would be able to credit the miner for four hours for the first aid training. Additionally, if the miner will be required to use a respirator that is the same type as the one for which he received training, you may credit the miner with one hour of training on this subject. Further, if the new miner will be operating the same type of front-end loader that he was trained on as one of his tasks, you may credit some, if not all, of the six hours of training. Finally, you would have to determine how much of the training on electrical hazards, silica, fall prevention and protection, excavations, material handling, and moving equipment are relevant to the miner's exposure to hazards at your mine. If you determine that all of the training is relevant, you could credit the new miner with four hours of training. In this example you would be able to credit the new miner with up to 15 hours of training.<sup>6</sup>

Without compromising safety, such flexibility provides a reasonable approach for those businesses engaged in shaft and slope construction that but only occasionally at mine sites (and who, for example, normally do tunneling work on OSHA-regulated construction projects).

MSHA should also exempt from the comprehensive new miner training requirements those construction workers who do not have a regular presence at the mine and/or who work no more than five (5) consecutive days at the site. This is consistent with MSHA's current approach for non-construction contractors at the mine.<sup>7</sup>

### Training Plan Approval

With respect to training plans under §§ 48.3/48.23, we support giving construction companies at least 120 days from the date of the final rule to get plan approval from MSHA. However, more flexibility is needed. These employers should be able to elect to have their own Part 48 training plans or to use (with the mine operator's consent) the plan already approved for the mine where the employees will perform work. This flexibility is needed because the training plan approval process within MSHA can be lengthy. The rule indicates 60 days but, in practice, the time period can be longer, especially if it must be rewritten due to a local MSHA office challenge. Some construction projects can come

<sup>6</sup> 64 Fed. Reg. 53106 (Sept. 30, 1999).

<sup>7</sup> MSHA's Program Policy Manual specifies that the comprehensive Part 48 training for independent contractors, who are not otherwise engaged in the extraction or production process, is only needed where the employees is "Regularly exposed" (either frequent exposure, that is exposure to hazards at the mine on a frequent rather than consecutive day basis in a pattern of recurring exposure), or has "extended exposure of more than 5 consecutive workdays, or both." "Extraction and production" refers to the process of mining and removal of coal or ore from a mine. This process includes both the mechanical and chemical separating of coal from the surrounding rock and metal or valuable minerals from ore and concentrate; removal and milling of conglomerates or rocks by crushing, screening, or sizing; and haulage associated with these processes.

up on a sudden basis, or may involve subcontractors at the last minute, which precludes such employers from being able to go through the plan clearance process before beginning work. At a minimum, plan approval exemptions to the requirement of 30 CFR §§ 48.3(u)(2)/48.23(v)(2) should be granted on a case-by-case basis.

### Trainer Qualifications

Since the proposed rule is silent concerning qualifications for trainers of shaft/slope construction workers, it is implied that existing Part 48 requirements would carry over to these newly covered entities. ASSE suggests that it would be appropriate that MSHA look to Part 46 for such procedures since construction employers are already covered there and may be the same ones covered under newly expanded Part 48. The construction company should be able to use the mine's "Part 48 approved instructor" or the construction company's own "competent person," under OSHA requirements, to oversee the training provided by the construction company's in-house trainer. When some companies may only perform one or two jobs at a mine site, it will be extremely impractical for construction companies to have their own personnel "MSHA approved" in a timely manner. Moreover, because of resource limitations, many of the state grant recipients do not have sufficient personnel to provide such training to companies that are not directly engaged in mine operations on a regular basis.

Finally, with respect to the "grandfathering" of training and the "credit" for partial training received through OSHA-oriented programs (e.g., the 10 or 30 hour courses), MSHA should consider waiving the requirement that such training be provided by an MSHA-approved instructor. This requirement is probably infeasible for nearly all construction operations to satisfy. Under Part 46, no "MSHA approved instructor is needed." Part 46 simply requires the trainer to be a "competent person" designated by the employer. MSHA should adopt a similar "competent person" requirement for construction employers under Part 48.

### ANSI Z490 Standard Applicability

Often difficult for employers is the task of ensuring that the safety and health training they arrange for workers meets the needs of their workers and the situations workers find themselves. Through the voluntary consensus process, a tool has been made available to help ensure training is adequate. In furtherance of its mission to help its members advance occupational safety and health, ASSE serves as Secretariat of numerous American National Standards Institute (ANSI) Committees that develop safety and health standards used by private sector organizations and state and federal governmental agencies, including MSHA and OSHA. The consensus standard relevant to this rulemaking is ANSI Z490.1, *Criteria for Accepted Practices in Safety, Health and Environmental Training*, which was derived from the recognized need for improved safety, health and environmental training that would help ensure that workers have the knowledge, skills and abilities necessary to protect themselves and others in the workplace.



MSHA and others from the mining community participated in the development of this standard. In fact, under the Technology Transfer Act of 1995 (Public Law 104-113) and the Office of Management Budget (OMB) Circular A-119, MSHA is required to consider existing voluntary consensus standards and, where appropriate, include them in any relevant rulemaking activity. Given MSHA's laudatory goal of expanding training requirements for mine workers, ASSE urges MSHA to review this standard and reference it in the forthcoming standard as a method of improving the efficacy of Part 48 miner training and providing a method for mine operators, contractors and construction industry employers to benchmark their training practices.

### Conclusion

Appropriate and effective training is a critical element of any company's safety and health program, regardless of whether the employer is engaged in mining, construction or shaft/slope work. Nevertheless, the proposed rule makes some long-overdue modifications to Part 48 that should increase safety and health protections for those individuals engaged in shaft and slope construction work at Part 48-regulated mines. ASSE urges MSHA to consider applying the same flexibility to these companies as it does to their construction counterparts who perform similar work at Part 46-related mines, and to also more fully evaluate whether the remaining exemption for other categories of construction workers at Part 48 mines is still valid.

ASSE pledges its support in working with the agency to ensure that best practices in miner training are developed and disseminated for use by the entire mining community, so that no worker is left behind in terms of safety and health protections. Thank you for your consideration of these comments. We will be happy to provide further information upon request.