

**Testimony of Adele L. Abrams, Esq., CMSP
Federal Representative, American Society of Safety Engineers
Concerning Part 48 Training Amendments
Before the Mine Safety and Health Administration
U.S. Department of Labor
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The American Society of Safety Engineers (ASSE) is the oldest and largest society of safety engineers and safety professionals in the world. Founded in 1911, ASSE represents approximately 30,000 dedicated safety and health professionals. ASSE's membership includes 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 dedicated to excellence, expertise and commitment to the protection of people, property and the environment worldwide.

The Society has thirteen (13) practice specialties including Mining, and since 2003 ASSE has worked cooperatively with the Mine Safety and Health Administration (MSHA) through an Alliance to advance mine safety and health. The ASSE members in these divisions, and those participating in the ASSE-MSHA Alliance, are leaders in their fields with the knowledge and expertise needed to move safety and health forward on a global level.

ASSE is pleased to submit this statement at today's hearing, concerning modifications to 30 CFR Part 48, as proposed at 69 Fed. Reg. 42841 et seq. (July 16, 2004). We commend MSHA for addressing the issue of construction worker training at mine sites covered by 30 CFR Part 48. In addition to our testimony here today, we are submitting these comments in written form for the formal administrative record.

Background

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) of the Mine Act specifies that MSHA should promulgate appropriate training standards specifically governing construction workers at mine sites. Since 1977, MSHA has refrained from doing so. Based at least in part on this statutory language, it exempted all slope and shaft construction workers from the scope of mandatory miner training when it promulgated training standards in 1978 and codified them at 30 CFR Part 48.¹ The exemption was also based on an assumption that shaft and slope construction was substantively different from extraction and production mining and that the miner training would not be relevant or necessary.

¹ 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.

However, MSHA's rulemaking proposal notes that between 1982 and 2003, 15 individuals engaged in shaft and slope construction were killed at mines in the United States. MSHA's review of these accident reports indicates that the hazards confronting these workers are not substantially different from hazards faced by all other underground or surface miners; and that shaft and slope construction workers perform a number of tasks that are similar to those performed by miners already covered under Part 48, such as 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 (e.g., independent contractors). Section 115(d) of the Mine Act simply directs the Secretary of Labor to "promulgate appropriate standards for safety 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 this, MSHA's proposed rule would retain the training exclusion for mine construction workers, other than shaft and slope workers, and 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. The rationale for this is not very clear, given that MSHA has already addressed construction worker training for certain categories of mines.

In 1999, the agency created a separate Part 46 training standard covering most of the surface nonmetal mines regulated by MSHA.² 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.

² 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.

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.”³ 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.

By contrast, the current Part 48 training standard, which covers all other times of surface and underground metal/nonmetal surface mines, and all coal mines, defines “miner” as specifically excluding: “Workers 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.”

Comments on Proposal

With respect to limiting the Part 48 expansion to only construction workers engaged in shaft/slope work, ASSE believes more explanation is needed for this decision. In the preamble to the proposed rule, MSHA has quantified the fatalities and injuries suffered by slope and shaft construction workers, but no data are provided for injuries and illnesses suffered by other categories of construction workers at these mines, who would still be left outside the training standard under the proposal. ASSE suggests that MSHA make this data publicly available in its final rule so that it can be determined whether continued exemption of all other construction workers is still warranted. As of now, the agency has not articulated why construction workers at Part 48-regulated mines should receive lesser protection than construction workers at Part 46-regulated mines.

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.⁴

³ 64 Fed. Reg. 53095 (Sept. 30, 1999)

⁴ 64 Fed. Reg. 53091 (Sept. 30, 1999)

By including construction workers in Part 46 training requirements, however, MSHA recognized that these individuals may have long-term experience and training before coming to a mine site that is relevant to the tasks they will perform as “miners,” and consequently gave them credit for such experience in positions such as a heavy equipment operator or a skilled craftsman.

If MSHA does extend Part 48 to slope and shaft construction workers (or to all construction workers now or in the future), then a similar “grandfathering” should be permitted for any construction workers who have at least 12 months of cumulative⁵ prior experience performing the tasks that they will perform at the mine, and who also have documented, appropriate training, such as the OSHA 10 or 30 hours courses for construction. This crediting of training should apply to the 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.**

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 continue to 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, because the 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. These workers 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.

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

⁵ 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.

hour of training on instruction and demonstration on the use, care and maintenance of respiratory devices; six 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.⁶

This will ease the regulatory burden on businesses engaged in shaft and slope construction that only occasionally perform such work at mine sites (and who, for example, normally do tunneling work on OSHA-regulated construction projects). It also will avoid redundancy, and provide needed flexibility, while not diminishing training protections for the employees.

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.⁷

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

⁶ 64 Fed. Reg. 53106 (Sept. 30, 1999).

⁷ 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.

indicates 60 days but, in practice, it can be longer – especially if the local MSHA office decides to challenge components of the plan and it must be rewritten by the employer), and some construction projects can come 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 commencing work. Thus, at a minimum, plan approval exemptions to the requirement of 30 CFR §§ 48.3(o)(2)/48.23(o)(2) should be granted on a case-by-case basis.

The proposed rule is silent concerning qualifications for trainers of shaft/slope construction workers, and it is implicit that existing Part 48 requirements would carry over to these newly covered entities. However, it may be worth considering a departure here and following the agency’s procedures under Part 46, which already covers construction employers (some of whom may be the same ones covered under newly expanded Part 48). We suggest that the construction company should be able to use the mine’s “Part 48 approved instructor” or the construction company’s own “competent person” (who normally provides company safety and health training for its work on OSHA-regulated sites – such as a person who has completed the OSHA 500 course and has appropriate credentials) to oversee the training provided by the construction company’s in-house trainer, as it will be extremely impractical for construction companies to get their own personnel “MSHA approved” in a timely manner when they may only perform one or two jobs at a mine in the entire business life-cycle. 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-improved instructor as this is probably infeasible for virtually all construction operations to satisfy. This is not an issue with Part 46, as 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

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. MSHA participated in the Committee that created this standard and has previously endorsed its use in the MSHA Hazard Communication Standard. One relevant consensus standard to this rulemaking initiative is the ANSI Z490.1, *Criteria for Accepted Practices in Safety, Health and Environmental Training*. We urge 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. 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.

