



## Workplace

### Examinations:

A Riddle Wrapped in a Mystery  
Inside an Enigma

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IMAA 2016 WINTER MEETING

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# MSHA's Statutory and Regulatory Enforcement Scheme

- Federal Mine Safety and Health Act of 1977 (“Mine Act”) (and subsequent amendments).
- Title 1, Section 101(a) of the Mine Act, provides statutory authority for the Secretary to “develop, promulgate, and revise mandatory safety standards through notice and comment rulemaking.
- Standards then codified in the Code of Federal Regulations (such as 30 C.F.R. Sections 56/57).

# MSHA's Administrative Enforcement Scheme

- MSHA's administrative enforcement scheme is set out as "Compliance Information" on MSHA's website.
- The "purpose" of MSHA policy directives is to present the agency's interpretation or clarification of a regulation, and to advance uniformity in enforcement and clarity to the industry.
- Policy directives used to broaden the scope of regulations - internally created - with little or no industry input – no notice and rulemaking

# MSHA's Administrative Policy Enforcement Scheme

- MSHA “policy” documents include:
  - Program Information Bulletins (PIBs).
  - Procedural Instruction Letters (PILs).
  - Program Policy Manual (PPMs).
  - Coal/ Metal/Non Metal
    - General Policies and Programs Interpretations and Guidelines on Enforcement (30 C.F.R. Sections 56/57).

## New Work Place Examination PPL

- Program Policy Letters (PPLs) (an integral part of MSHA's Program Policy Manual).
- P15-IV-01 – July 9, 2015 (replaced P14-IV-01); quickly pulled by MSHA (task training/training plan modifications).
- P15-IV-01 – July 22, 2015 (replaced the July 9, 2015 version).
- Spawned by fatality prevention initiatives

## MSHA Stakeholders Meeting July 22, 2015

- On July 22, 2015, MSHA held a stakeholders meeting to explain PPL No. P15-IV-01.
- M/NM Administrator, Neil Merrifield, announced that the PPL did not create a change in Sections 56/57.18002
- MSHA argued strongly there would be no changes from the issuance of the PPL.



# The Work Place Examination Regulation

Sections 56/57.18002 Examination of working places

- (a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.
- (b) A record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative.
- (c) In addition, conditions that may present an imminent danger which are noted by the person conducting the examination shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.

# Changes in PPL P15-IV-01

## July 22, 2015, MSHA Stakeholders Meeting

- The PPL did not change the language of Sections 56/57.18002.
- However, close examination of the PPL's language reflects MSHA's intention to drastically alter its approach to enforcement of the standard.

# Impact of the New PPL

- Expect increased enforcement and special investigations under the Mine Act.
  - Every condition found by inspector could result in three citations: 1) condition found; 2) inadequate examination; and 3) task training
  - Multiple violations in same area
  - Multiple violations for similar conditions
  - Conditions not observed by multiple examiners

# Impact of the New PPL

- Expect increased enforcement
  - Citations for “obvious” conditions
  - Insufficient scope of exams for “accessible” areas
  - Increased negligence (hourly examiners)
  - Unwarrantable failure for foreman examiners missing obvious or noticeable conditions
  - Inadequate corrective action / Failure to correct
  - Inadequate training of examiners / withdrawal orders

# RECOGNIZING HAZARDS

# New Requirements In The Text Of The PPL: (Recognizing Hazards)

- The examiner should be able to recognize “hazards” ... that are known by the operator to be present in the work area; or predictable to someone familiar with the mining industry.
- Issues:
  - Sections 56/57.18002(a) requires examiners to look for conditions which may adversely affect safety or health.
  - The duty to recognize “hazards” is not present in the regulation or the former PPL; and is not defined in MSHA regulations or the Mine Act.
  - Subjective term; open to many different interpretations.

## New Requirements In The Text Of The PPL: (Recognizing Hazards)

- For Example:
  - The Federal Mine Safety and Health Review Commission (“Commission”) has attempted to define “hazard” or “hazardous condition”:
    - “A measure of danger to safety and health” or “a possible source of peril, danger, duress, or difficulty or a condition that tends to create or increase the possibility of loss.”

# New Requirements In The Text Of The PPL: (Recognizing Hazards)

- MSHA has tried to define the term “hazardous condition”:
- Hazard:                   A source of danger.
- Conditions:             The factors or circumstances that affect the situation somebody is living or working in.
- Hazardous Conditions = Dangerous Conditions
  - <http://www.msha.gov/training/docs/mnm-workplace-examinations.pdf>
- Not defined in regulation or case law; fails to clarify exactly what must be reported in examination records.



## New Requirements In The Text Of The PPL: (Recognizing Hazards)

- The examiner must identify both “**conditions that affect safety and health**” and/or “**hazards**” **known by the operator** to be present in the work area or predictable to someone familiar with the mining industry.
- “Known by the operator” speaks directly to the foreman / supervisor examiner.
- Expands practice of citing for inadequate examinations based solely on the inspector’s subjective observations - Obvious? Should have noticed?
- Existence of condition = Inadequate exam (?)

## New Requirements In The Text Of The PPL: (Recognizing Hazards)

- No legal definition, so a “hazard” becomes any violation, particularly for MSHA’s “Rules to Live By” regulations.
- In the current PPL, MSHA accomplished through enforcement what it should have done through notice and comment rulemaking .
- Inspectors will compare the most recent examination report to their inspection observations to support violations. (CATCH – 22 effect)

# Rules to Live By I

## “Fatality Prevention”

- PRIORITY STANDARDS: METAL/NONMETAL
- [§56.9101](#) Operating speeds and control of equipment
- [§56.12017](#) Work on power circuits
- [§56.14101\(a\)](#) Brake performance
- [§56.14105](#) Procedures during repairs or maintenance
- [§56.14130\(g\)](#) Seat belts shall be worn by equipment operators
- [§56.14131\(a\)](#) Seat belts shall be provided and worn in haul trucks
- [§56.14205](#) Machinery, equipment, and tools used beyond design
- [§56.14207](#) Parking procedures for unattended equipment
- [§56.15005](#) Safety belts and lines
- [§56.16002\(c\)](#) Bins, hoppers, silos, tanks, and surge piles
- [§56.16009](#) Persons shall stay clear of suspended loads
- [§56.20011](#) Barricades and warning signs
- [§57.3360](#) Ground support use
- <http://www.msha.gov/focuson/RulestoLiveBy/RulestoLiveByI.asp>

## Rules to Live By III "Preventing Common Mining Deaths"

- PRIORITY STANDARDS: Metal/NonMetal
- [§46.7\(a\)](#) New task training
- [§56.3130](#) Wall, bank, and slope stability
- [§56.3200](#) Correction of hazardous conditions
- [§56.14100\(b\)](#) Safety defects; examination
- [§56.15020](#) Life jackets and belts
- [§57.14100\(b\)](#) Safety defects; examination, correction and records
- <http://www.msha.gov/focuson/RulestoLiveByIII/MNMStandards.asp>

# New Requirements In The Text Of The PPL: (Recognizing Hazards)

- How do operators combat this trend?
- Increased training for examiners ; assuring competency
- Training on “hazard recognition”; Proper documentation
- Create written Part 46/48 Training Program for examiners:
  - Familiarity with work areas and potential hazards or conditions
  - Familiarity with equipment used
  - Familiarity with “Rules to Live By” and MSHA Fatal Accident Reports

## New Requirements Of The PPL: (Recognizing Hazards)

- **Concern:** The competency of examiners will be judged by MSHA inspectors through their inspections.
- **Equalizer:** An inspector's subjective judgment is reviewed in litigation by an objective standard.

## New Requirements In The Text Of The PPL: (Recognizing Hazards)

- Objective standard:
- Whether a reasonably prudent person, familiar with the mining industry and the protective purposes of a particular standard would consider the condition a hazard.
- The examiner's opinion matters, but it must be supported by facts and evidence of the conditions he/she observed.
- Operator's final recourse is to challenge enforcement actions when an inspector is overreaching .

# FOREMAN/SUPERVISOR EXAMINERS



## New Requirements In The Text Of The PPL: Best Practice (Foreman/Supervisor Examiners)

- “A **best** practice is for a foreman or other supervisor to conduct the examination; an experienced non supervisory miner may also be competent.”
- Issues:
  - Best practice has no basis in the Mine Act or the regulation permitting the operator to designate the “competent person.”
  - Suggestion also contrary to MSHA’s Program Policy Manual (Volume IV Metal and Non Metal Mines)

## New Requirements In The Text Of The PPL: Best Practice (Foreman/Supervisor Examiners)

- The agency intends the term “competent person” used in Sections 56/57.18002 will be interpreted as defined in Sections 56/57.2, which is:
  - “A person having abilities and experience that fully qualify him to perform the duty to which he is assigned.”
- Contrary to the new PPL, MSHA’s PPM says “MSHA” does not require that a competent person be a foreman, supervisor or associated with mine management.

## New Requirements In The Text Of The PPL: Best Practice (Foreman/Supervisor Examiners)

- Operators should select examiners with previous abilities and experience to enter and examine the working area.
- If the person selected lacks the ability or experience to deal with a particular issue that may be present in a work area, it is advisable to designate another competent person to inspect the area.
- The “best practices” language in the PPL does not legally require operators to use a foreman or supervisor to conduct examinations.
- **The test is one of competence and not job title** – a foreman/supervisor may not be qualified to perform the duty assigned.

# New Requirements In The Text Of The PPL: Best Practice (Foreman/Supervisor Examiners)

- In FMC-Wyoming, 11 FMSHRC 1622 (Sept. 1988) (supervisor conducting work place examinations where asbestos was being removed from a turbine was not competent)
- The Commission held:
  - The term "competent person" ... [means] a person capable of recognizing hazards that are known by the operator to be present in a work area or the presence of which is predictable in the view of a reasonably prudent person familiar with the mining industry.
- MSHA adopted Commission's language in FMC Wyoming in the work place examination PPL

# New Requirements In The Text Of The PPL: Best Practice (Foreman/Supervisor Examiners)

- Why does MSHA recommend foreman and supervisors conduct work place examinations?
  - They are agents of the operator.
  - MSHA is used to “agents” conducting pre-shift, on shift, supplemental, and weekly examinations on the coal side.
  - Examiners under 30 C.F.R. Part 75 must be state certified to conduct examinations and they are required to certify their examination results.

## New Requirements In The Text Of The PPL: Best Practice (Foreman/Supervisor Examiners)

- “Agents” subject to potential civil liability under Section 110 of the Mine Act for “knowing” violations, and potential criminal liability for “willful” violations.
- **Remember the new language in the PPL:** The examiner must now identify “hazards” known by the operator to be present in the work area; or predictable to someone familiar with the mining industry.
- Training foremen or supervisors on their duties, rights and MSHA special investigations under Section 110 is imperative.

## New Requirements In The Text Of The PPL: Best Practice (Foreman/Supervisor Examiners)

- Hourly workers may conduct examinations if “competent.”
- Hourly workers are generally not operator “agents” and are not subject to individual liability under Section 110 of the Mine Act. But be aware of “lead man” status.
- MSHA’s PPM: the supervisor or manager of the examiner is responsible for selecting the “competent person” to conduct the examination.

## New Requirements In The Text Of The PPL: Best Practice (Foreman/Supervisor Examiners)

- Responsibility on the supervisor or manager to assure the examiner has the “abilities and experience that fully qualify him to perform the duty.”
- If you are a supervisor or manager, you are an “agent” of the operator.
- Failure to assign proper personnel to conduct examinations or to assure prompt abatement, could result in an MSHA special investigation, even if you did not conduct the work place examination.



# SCOPE OF “WORKING PLACE”

## New Requirements In The Text Of The PPL: (Scope of “working Place”)

- The phrase working place is defined in 30 C.F.R. Sections 56/57.2 as: “**any place in or about a mine where work is being performed.**”
- **PPL No. P15-IV-01: Applies to those locations at a mine site where persons work in the mining or milling process.**
  - This includes areas where work is performed on an infrequent basis, such as areas accessed primarily during periods of maintenance or clean up. All such working places must be examined by a competent person at least once per shift.

\*Bold text above does not appear in 30 C.F.R. Sections 56/57.2 .

\*Red text above is new language not present in former PPL.

## New Requirements In The Text Of ThePPL: (Scope of Working Place)

- Two issues arise from the new language in this section of the PPL:
- **First:** “Will a main office building be subject to the work place examination requirement?”
- Section 3(h)(1) of the Mine Act defines a “coal or other mine” as . . .  
(c) . . . structures, facilities, . . . or other property . . . used in, or to be used in, or resulting from, the work of extracting such minerals. . . .”
- MSHA could consider a main office building part of a “coal or other mine” and subject it to inspections **if located on mine property.**

## New Requirements In The Text Of The PPL: (Scope of Working Place)

- “Working place” in Sections 56/57.2 is defined as “any place in or about a mine where work is being performed.”
- Section 56.18002 requires work place examinations in each working place at least once each shift.
- However, the following language in the current PPL (carried over from PPL No. P14-IV-01) is helpful:
  - “As used in this standard the phrase [working place] applies to those locations at a mine site where persons work in the mining or milling processes.”

## New Requirements In The Text Of The PPL: (Scope of Working Place)

- Additional language in the PPL supports argument that working places are limited to locations where the physical act of mining or milling is taking place.
- MSHA may still cite for failure to conduct an examination in an office building because they have broad authority.
- Consider a dialogue with MSHA to clarify expectations of what it will consider a “working place” at your operation

## New Requirements In The Text Of The PPL: (Scope of Working Place)

- MSHA's focus going forward likely will be on the **quality of examinations** as judged by the inspector.
- Operators should be prepared to challenge MSHA's overreaching.
- Careful Selection, Training, and Documentation imperative!

## New Requirements In The Text Of The PPL: (Scope of Working Place)

- The second issue on the scope of the examination in the PPL No. P15-IV-01:
  - This includes areas **where work is performed on an infrequent basis**, such as areas **accessed primarily** during periods of **maintenance or clean up**. All such working places must be examined by a competent person **at least once per shift**.
- Anticipate confusion on this topic during upcoming inspections.

## New Requirements In The Text Of The PPL: (Scope of Working Place)

- Policy directives are intended for clarity; Does PPL P15-IV-01 provide clarity?
- MSHA intends to discuss the new PPL at 12,000 mines across the United States. Many different interpretations are likely.
- Adequate notice?



## New Requirements In The Text Of The PPL: (Scope of Working Place)

- PPL says examinations must be conducted in areas where work is performed on an *infrequent basis*.
- **Riddle:** “*Infrequent basis*” is not defined in the PPL.
- Neil Merrifield: “a working place is where people are working . . . . anywhere you have people working then there must be a competent person that does an examination at least once a shift where those people are working.”

*July 22, 2015 MSHA stakeholders meeting on PPL No. P15-01-IV.*

## New Requirements In The Text Of The PPL: (Scope of Working Place)

- Neil Merrifield: “If nobody’s been working in those locations then they are not required to do an examination because there is nobody working in those places.
- Patricia Silvey (MSHA Deputy Assistant Secretary for Operations): “If a person is not in an area for two weeks, no examination is required.”
- **Solve the Riddle.** How are operators to determine what an “infrequent basis” means?

## New Requirements In The Text Of The PPL: (Scope of Working Place)

- Example in the PPL: Areas accessed for **maintenance or clean-up** will always require examinations, irrespective of frequency - Short duration work
- Reminder to operators to examine those areas.
- **Approach this language with caution** – does not limit the areas where examinations are required based on infrequent visits to the area.

## New Requirements In The Text Of The PPL: (Scope of Working Place)

- Our review of Commission cases did not reveal any directly addressing “frequency” and impact on the examination obligation.
- Two ALJ cases addressed frequency of visits in determining if safe access was provided under Section 56.11001 (Safe access shall be provided and maintained to all working places).
- Secretary of Labor v. Texas Architectural, 10 FMSHRC 1213 (Judge Koutras) (1988) (ALJ rejected operator’s argument that the location of disconnect boxes is not a "working place" because visits to that area were infrequent).

## New Requirements In The Text Of The PPL: (Scope of Working Place)

- **Secretary of Labor v. Millington Gravel Co.**, 21 FMSHRC 1065 (Judge Barbour) (1999) (that a cited walkway was used rarely does not detract from the fact that it served as a means to reach or to leave a working place).
- As a result, a place where miners travel “**infrequently**” may be construed as a “working place” and be subject to the examination requirement.
- Pay careful attention to “housekeeping”

## New Requirements In The Text Of The PPL: (Scope of Working Place)

- The PPL allows MSHA to track how promptly conditions are abated.
- Lack of follow-up examinations could be viewed as a failure to promptly correct conditions previously reported.
- Be diligent to “promptly” correct reported conditions
- Ensure that follow-up examinations and reports are made for conditions requiring more than one shift to correct and any progress made.

# TASK TRAINING/TRAINING PLAN MODIFICATIONS

## New Requirements In The Text of the PPL: (Task Training)

- If a trained competent person fails to identify multiple hazards or if multiple trained competent persons fail to identify similar safety hazards, this may indicate that task training as required under parts 46 and 48 was inadequate or did not occur. Evidence of inadequate training may be a basis on which MSHA may require training plan revisions under Part 46 (30 C.F.R. Section 46.3(a) and (b)(3) or Part 48 30 C.F.R. Sections 48.3(c)(8)/48.23(c)(8))
- Issue: Has task training and training plan revisions been eliminated from the PPL?



## New Requirements in The Text of the PPL: (Task Training)

- Task training language first appeared in the initial version of PPL No. P15-IV-01, which was later retracted by MSHA.
- The difference in the two versions involved a grant of mandatory versus discretionary authority by MSHA .
- The early version of PPL No. P15-IV-01 stated “conducting a working place examination is a new task for which the competent person must be trained.”

## New Requirements In The Text of the PPL: (Task Training)

- The July 22, 2015, version of PPL No. P15-IV-01 contains discretionary language on MSHA's authority to enforce task training and training plan revisions:
  - “If a trained competent person fails to identify multiple safety hazards or if multiple trained competent persons fail to identify similar safety hazards this may indicate task training was inadequate.”
  - “Evidence of inadequate training may be a basis on which MSHA may require training plan revisions.”
- Removed mandatory language to avoid a legal challenge to the current PPL as a “mandatory health and safety standard.”

## New Requirements in The Text of the PPL: (Task Training)

- Decision to use discretionary language should not be construed as a change in practice.
- MSHA will likely issue violations for inadequate task training each time an inspector finds “multiple safety hazards” (i.e. citations or orders).
- As a result, operators likely will be required to modify training programs.
- On its face, this appears to create a problem for MSHA with respect to Part 46.3 training programs (approved under Section 46.3(b)). However, MSHA may require the revisions under Section 46.3(b)(3)’s requirement to include subject areas in the plans.

## New Requirements In The Text of the PPL: (Task Training)

- MSHA will likely continue to cite operators under Sections 56/57.18002 for inadequate work place examinations, even though there is no “adequacy” requirement in the regulations.
- The Commission case, Sun Belt Rentals, will address the “adequacy” question.
- MSHA could issue an order under Section 104(g(1) of the Mine Act for inadequate training.

## New Requirements In The Text Of ThePPL: Task Training/Training Plan Revisions

- Due to MSHA's expanded discretion, operators must carefully analyze all enforcement on inadequate examinations.
- If challenging inadequate examination citations, operators must identify and challenge all related enforcement actions .
- Training of examiners and supervisors on the importance of proper documentation will be crucial - **Review prior exam records and citations to identify trends - be attentive to safety complaints**
- Early gathering of facts and documents is critical to a successful legal challenge.

# DESCRIPTION OF CONDITIONS

# New Requirements Of The PPL: Best Practice (Description of Conditions)

- PPL No. P15-IV-01 states: It is a best practice also to include a description of such conditions in the examination record to facilitate correction and to alert others at the mine of conditions that may recur or in other ways affect them.
- **Wrapped in a Mystery:**
  - What are operators required to include in a work place examination record?

## New Requirements of The PPL: Best Practice (Description of Conditions)

- Sections 56/57.18002(b) requires examination records be kept for **one** (1) year and be made available for review by the Secretary or his authorized representative.”
- MSHA’s PPM, Volume IV- Metal and NonMetal Mines, Subpart Q, Safety Programs, states :
  - Sections 56/57.18002(b) requires operators to keep records of working place examinations. These records must include:
    - (1) the date the examination was made;
    - (2) the examiner’s name; and
    - (3) the working place examined.



## New Requirements of The PPL: Best Practice (Description of Conditions)

- Sections 56/57.18002(b) or MSHA's Program Policy Manual do not require conditions found during examination to be in the record; only the date, examiner's name, and the working place examined.
- The requirement to record examination findings in the report only appears in PPL No. P15-IV-01.

## New Requirements of The PPL: Best Practice (Description of Conditions)

- MSHA's stated reason in the PPL: "to facilitate correction and to alert others at the mine of conditions that may recur or in other ways affect them."
- Mine operators must assure conditions found in work place examinations are recorded and promptly corrected.
- MSHA inspectors may seek copies of examination records to support inadequate examination citations and orders.
- A current Commission case will examine if operators are required to produce copies of the reports listing conditions found during a work place examination.

## New Requirements of The PPL: Best Practice (Description of Conditions)

- **Inside an Enigma**: No matter how perfect the examination, it will be judged by what the inspector finds after the examination.
- Whether or not a “hazard” or violation exists will be based on the inspector’s subjective determination.
- A fully competent exam can be made to appear inadequate or the examiner incompetent.

## New Requirements of The PPL: Best Practice (Description of Conditions)

- Operators must assure properly trained and competent people are conducting examinations – no exceptions.
- Examiners must be vigilant in identifying conditions that “may adversely affect safety or health”, and pay particular attention to reoccurring conditions .
- If you have doubts about a condition, err on the side of including it in your report.

## New Requirements of The PPL: Best Practice (Description of Conditions)

- Use MSHA's "Rules to Live By" standards to assist the examiner in identifying conditions MSHA is likely to cite.
- Examiners should be aware of the most frequently cited conditions at your operations - scrutinize prior exam records and citations
- Examiners be aware of MSHA's "top twenty" list of frequently cited conditions (inspectors are creatures of habit).
- Ensure prompt correction of listed conditions and follow-up.

## New Requirements of The PPL: Best Practice (Description of Conditions)

- Never fill out and sign an examination report you did not conduct.
- Keep personal notes with accurate dates, times, areas and conditions you examine.
- If you do not think a condition is a hazard or adversely affects safety or health (but you believe an inspector might), make a note of this.
- MSHA inspectors do not have the only opinion.

## New Requirements of the PPL: Best Practice (Description of Conditions)

- A competent examiner qualifies as a “reasonably prudent person.”
- Prevent or defend against inadequate examination violations with proper training and planning - mitigation of negligence
- Examiners: never turn over your personal notes to an MSHA inspector.
- During the next inspection (after notification by MSHA) they will enforce the PPL No. P15-IV-01’s requirements.
- Be prepared.

# MSHA's 2016 Regulatory Agenda

- February 2016 – release of proposed agency initiative to address work place examinations in M/NM, expected to:
  - Clarify experience, training and abilities required of designated “competent persons”
  - Impose task training requirements for examiners
  - Modify record-keeping requirements to facilitate corrective action
  - Codify “Best Practices”???





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