

Legal Update On MSHA
Enforcement Impacting
Metal / Nonmetal

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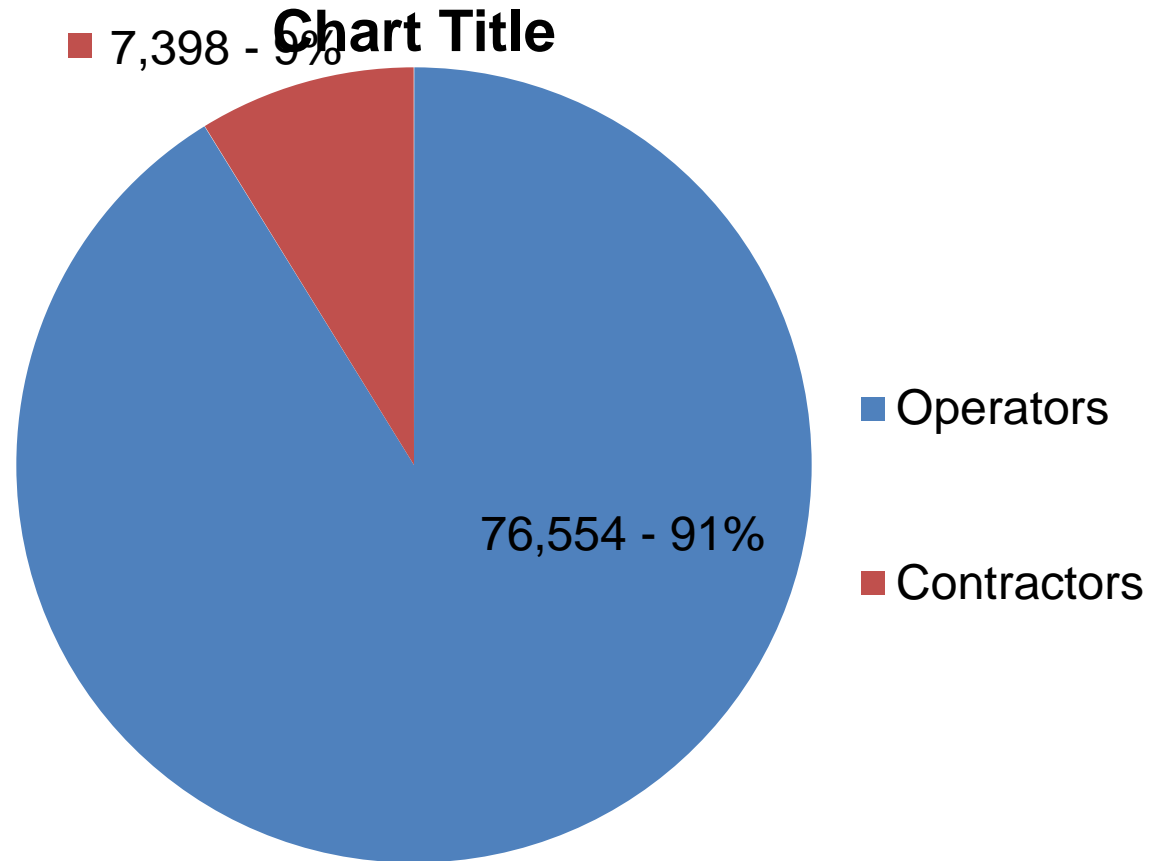
RESPONSIBLE ATTORNEY: Max L. Corley, III



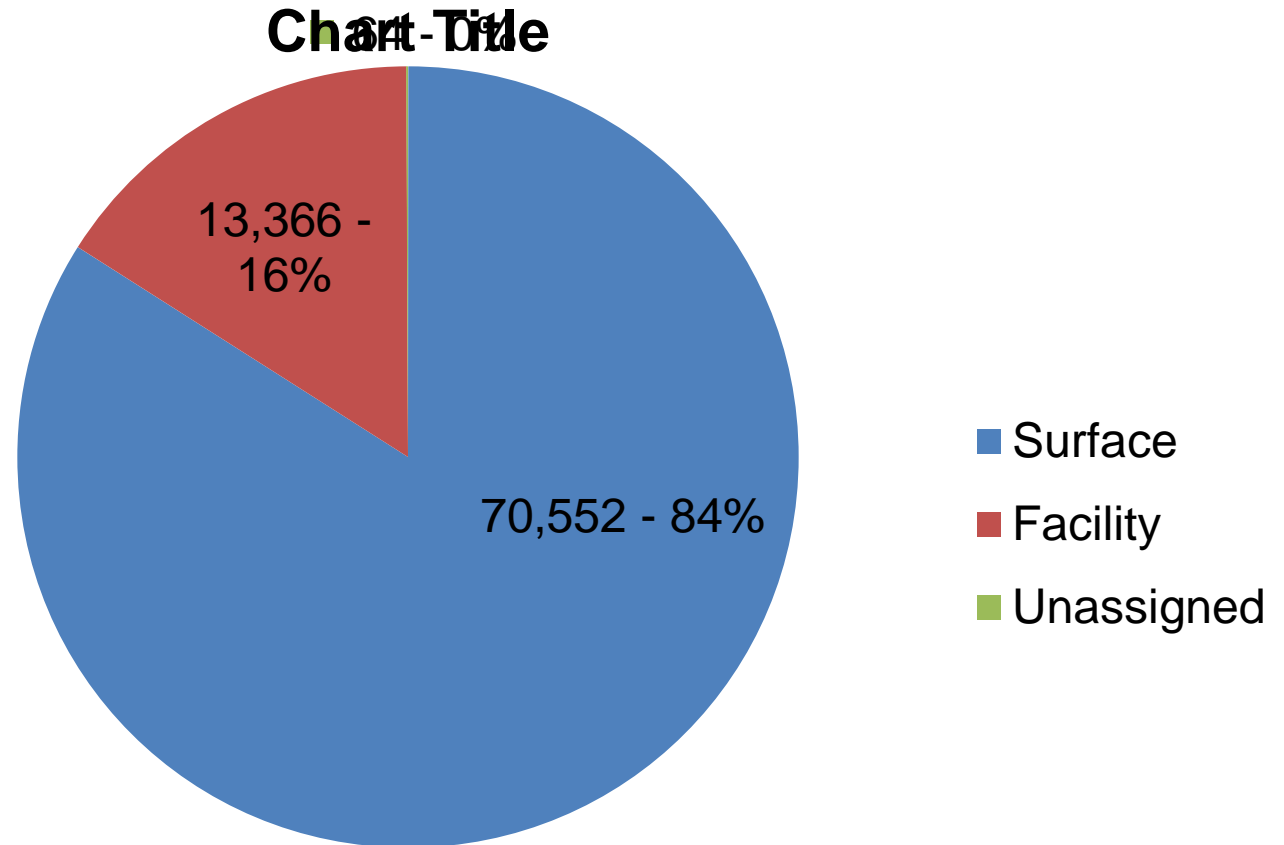
MSHA Enforcement – Metal / Nonmetal

- ▶ 2013-2014 Data (through August 21, 2014)
 - ▶ 83,952 enforcement actions issued to M/NM mines
 - ▶ 76,554 enforcement actions issued to operators
 - ▶ 7,398 enforcement actions issued to contractors

MSHA Enforcement – Metal / Nonmetal

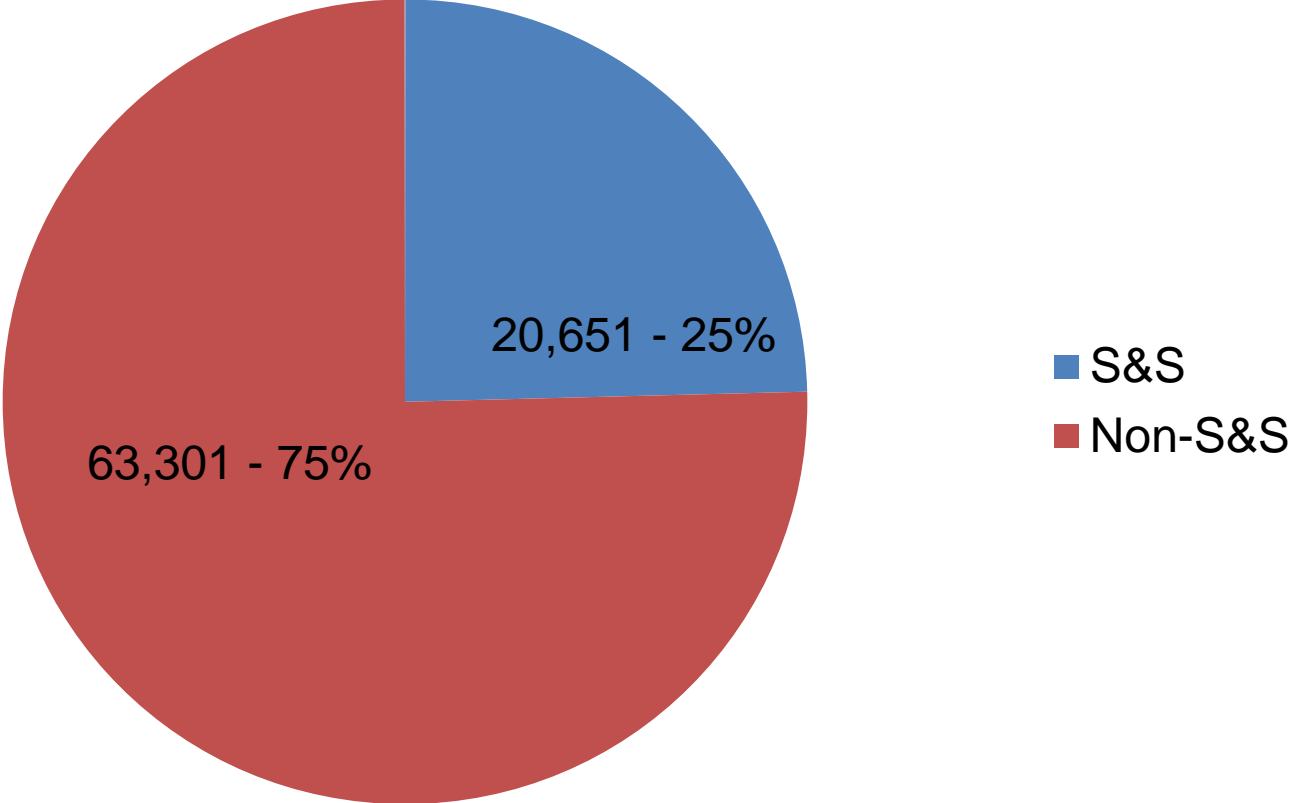


MSHA Enforcement – Metal / Nonmetal

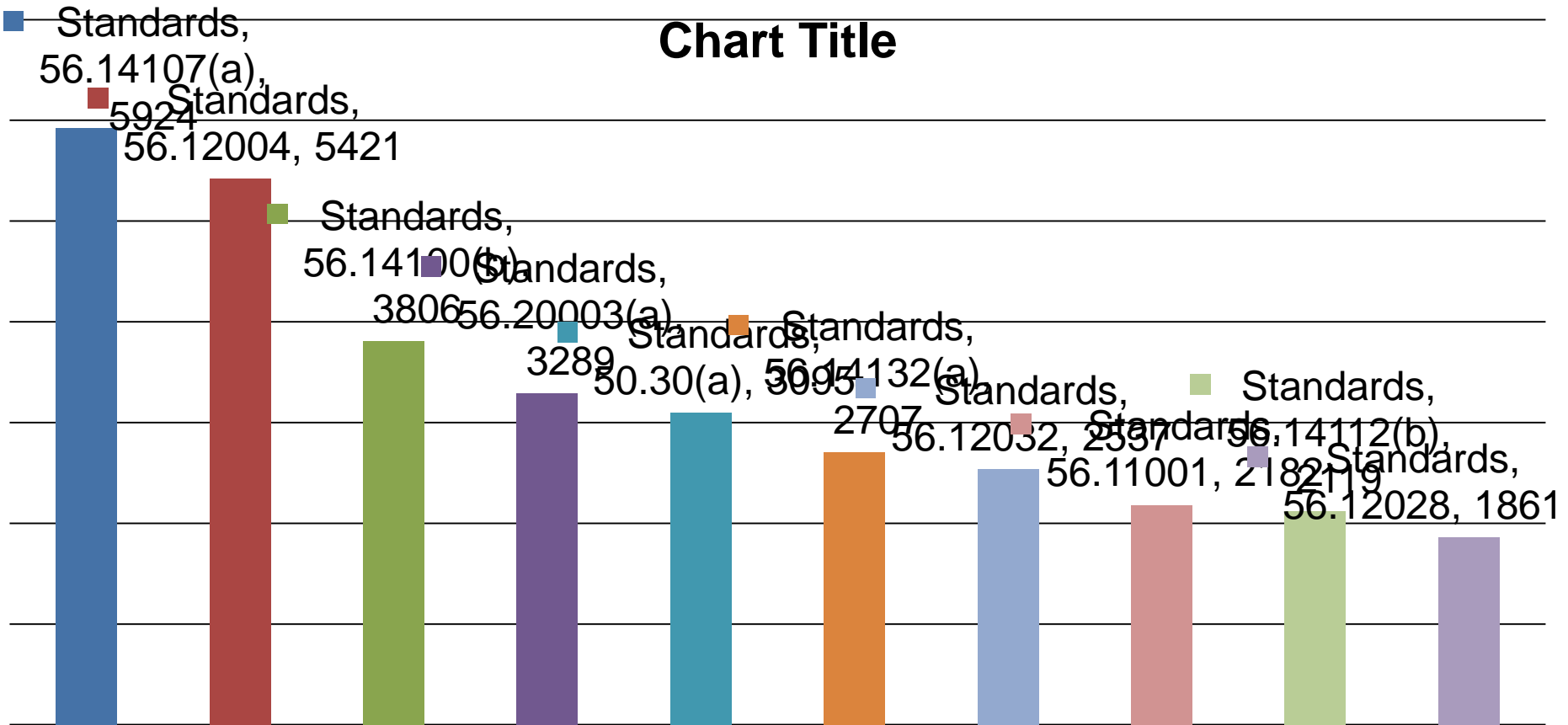


MSHA Enforcement – Metal / Nonmetal

Chart Title

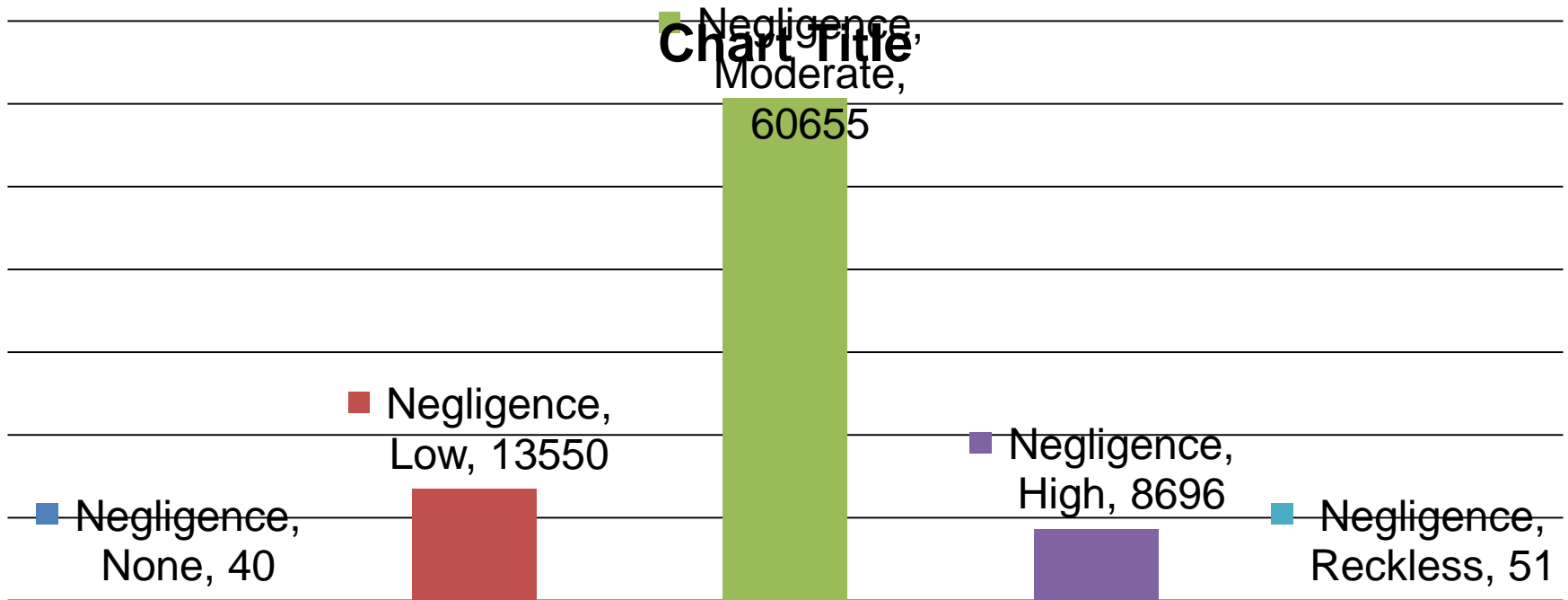


MSHA Enforcement – Metal / Nonmetal



These top 10 standards represent 32,941 enforcement actions issued during 2013-2014

MSHA Enforcement – Metal / Nonmetal



74% of issued paper was moderate
15% of issued paper was low
10% of issued paper was high
<1% of issued paper was reckless
<1% of issued paper was none

MSHA Enforcement – Metal / Nonmetal

- ▶ 2013-2014 Data (through August 21, 2014)
 - ▶ Special Assessment
 - ▶ 10,976 enforcement actions were sent for special assessment or approximately 13% of all issued paper

MSHA Enforcement – Metal / Nonmetal

- ▶ 2013-2014 Data (through August 21, 2014)

- ▶ Proposed Penalties \$36,940,432*

- ▶ Largest Penalties \$139,300
 \$136,500 (3)
 \$115,200
 \$108,200
 \$70,000 (11)

- ▶ 102 assessments over \$25,000 each

*Note: Some enforcement actions have not been assessed

MSHA Enforcement – Metal / Nonmetal

Monthly Impact Inspections – repeat offenders / poor safety records

Fatal Accidents – MSHA's Prevention Initiatives (25 fatalities from 10/2013 - 08/2014) (7 UG /18 surface) (5 contractor / 20 operator)

MSHA's proactive measures for operators include:

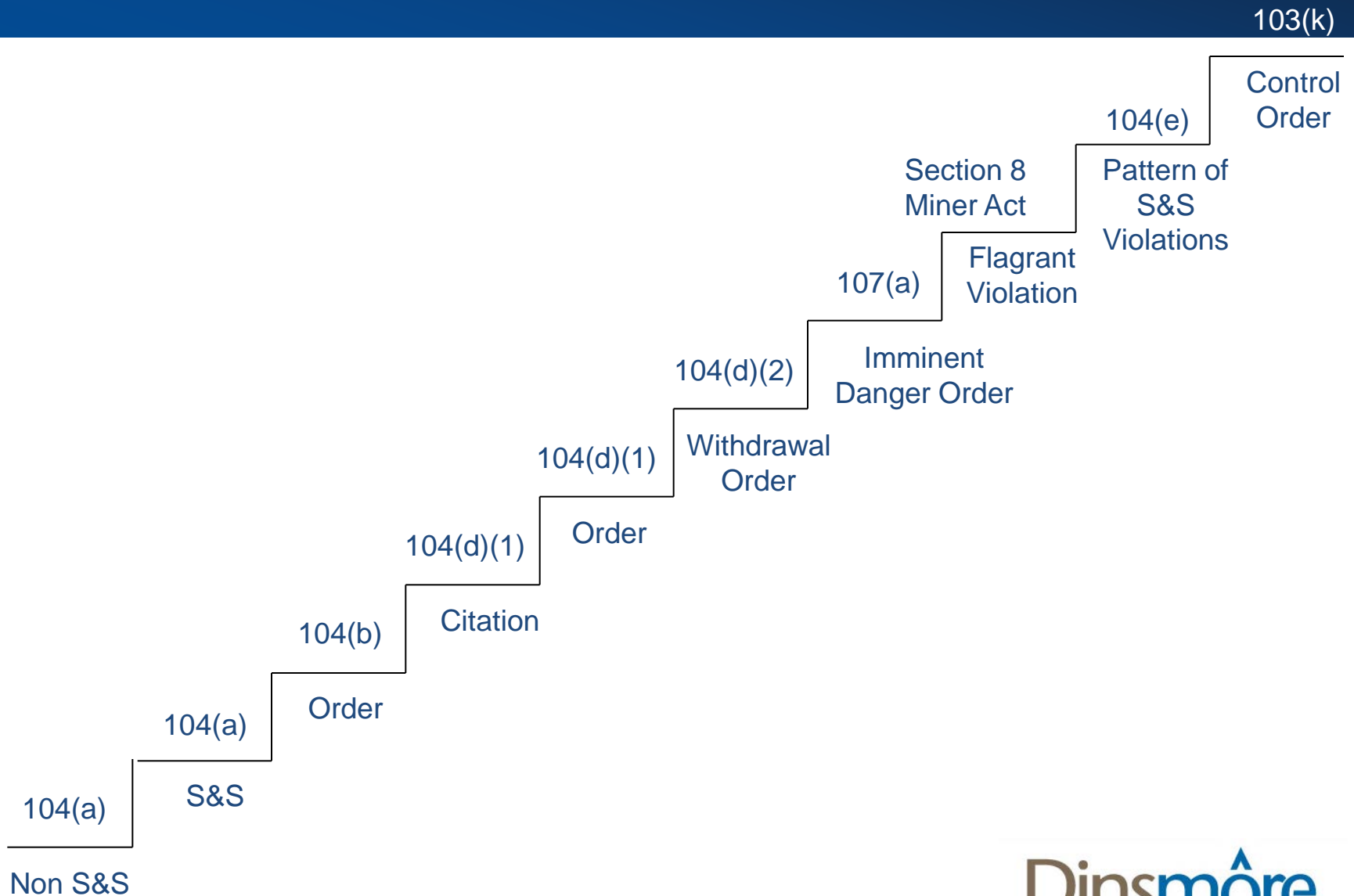
- ▶ Provide training, including task training
- ▶ Conducting proper workplace examinations / pre-op checks
- ▶ De-energize power and lock-out/tag-out
- ▶ Maintain mobile equipment
- ▶ Provide/wear PPE

Rise in Section 110(c) Special Investigations

MSHA's Graduated Enforcement Scheme

- ▶ MSHA employs a graduated enforcement scheme.
- ▶ Designed, in theory, to provide more regulator muscle as a mine operator's conduct becomes more egregious.
- ▶ Moving target of enforcement
- ▶ Inconsistency in enforcement - varies among districts / inspectors

MSHA's Graduated Enforcement Scheme



Background of the Regulatory Enforcement Scheme

- ▶ How can the industry combat heightened regulatory enforcement and special investigations from MSHA?
 - ▶ By focusing on improving safety and regulatory compliance and culture in your operations.
 - ▶ By understanding how to deal with MSHA's moving target of enforcement through pre-enforcement awareness training.

Pre-Enforcement Awareness Training

- ▶ Understand the MSHA enforcement process
- ▶ Understand S&S, gravity, negligence, and unwarrantable failure designations.
- ▶ Understand the importance of accompanying the MSHA inspector and the absolute necessity of documentation.
- ▶ Focus on building a strong safety and compliance culture
- ▶ Exercise your right to challenge improper, arbitrary or excessive enforcement

Section 110(C) Special Investigations

- ▶ It is important to understand how and why a Section 110(c) investigation is initiated.
- ▶ It often begins with elevated enforcement actions by MSHA during regular E01 inspections, surprise impact inspections, accident investigations, or anonymous safety complaints.
- ▶ Apparent increase of investigations in metal/nonmetal.

Impact Inspections

- ▶ MSHA using impact inspections more frequently.
- ▶ Targeting repeat offenders / poor safety records / egregious conduct.
- ▶ Impact Inspections not provided for in Mine Act or any promulgated regulations.
- ▶ Special Initiative following UBB disaster to enhance surprise.

Impact Inspections

- ▶ **Avoiding Impact Inspections:**
 - ▶ Create safety programs targeting common standards – ensure tracking and accountability (**Corrective Action Plans** – Mitigating Circumstance prior to POV).
 - ▶ Aim to reduce violations of most commonly cited standards and those related to fatalities.
 - ▶ Aim to reduce S&S rate / VPID.
 - ▶ Develop strong safety culture / training program.

Impact Inspections

- ▶ ALJ recently held that operator's "walkaround rights" per Section 103(f) of the Mine Act were violated during impact inspection. (Big Ridge, Inc., LAKE 2012-453R et al.) (ALJ McCarthy)
 - ▶ ALJ found "walkaround rights" were violated where foreman not allowed to make any calls to get more escorts to accompany three inspectors during belt inspections.
 - ▶ Excluded MSHA's evidence and vacated citations – where company could not observe violations in same condition as the inspector
- ▶ Develop a plan and a back-up plan to handle surprise visits and multiple inspectors – Request more time to get help.

Understanding Negligence and Its Impact

What is Negligence?

- ▶ The Mine Act requires operators to be on the alert for hazards that can affect employee safety.
- ▶ The Mine Act requires operators take steps to prevent or correct these hazards.
- ▶ The failure to do so is called negligence.

Degrees of Negligence

- ▶ No Negligence: The operator exercised diligence and could not have known of the violative condition.
- ▶ Low Negligence: The operator knew or should have known of the violative condition or practice but there are considerable mitigating circumstances.

Degrees of Negligence

- Moderate Negligence: The operator knew or should have known of the violative condition or practice, but there were mitigating circumstances.
- High Negligence: The operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.
- Reckless Disregard: The operator displayed conduct which exhibits the absence of the slightest degree of care.

The Importance of Mitigating Circumstances

- ▶ The concept of mitigating circumstances is crucial in determining the degree of negligence and in determining the proper gravity of a citation.
- ▶ Mitigating circumstances may include, but are not limited to, efforts you have made to prevent or correct hazardous conditions.
- ▶ Mitigating circumstances can be found for any citation MSHA issues.

The Importance of Mitigating Circumstances

- ▶ Mitigating circumstances represent what the operator did or was in the process of doing in order, PRIOR TO the issuance of the enforcement action, to prevent or correct a potentially hazardous condition from occurring.
 - ▶ 30 C.F.R. Section 100.3(d).

The Importance of Mitigating Circumstances

- ▶ Maintain detailed log of inspector visits, areas inspected or traveled, time frames.
- ▶ ALJs recently considered fact that MSHA inspectors previously traveled area cited and did not issue any citations - “**not on notice**” that guarding insufficient.
- ▶ Established lack of knowledge and proactive measures, such as documented safety meetings and training; increased lighting; installed more resilient guards; ordered parts; hired extra person to work on and examine guards.

Understanding “Unwarrantable Failure” and Its Impact

Section 104(d) Unwarrantable Failure Citations and Orders

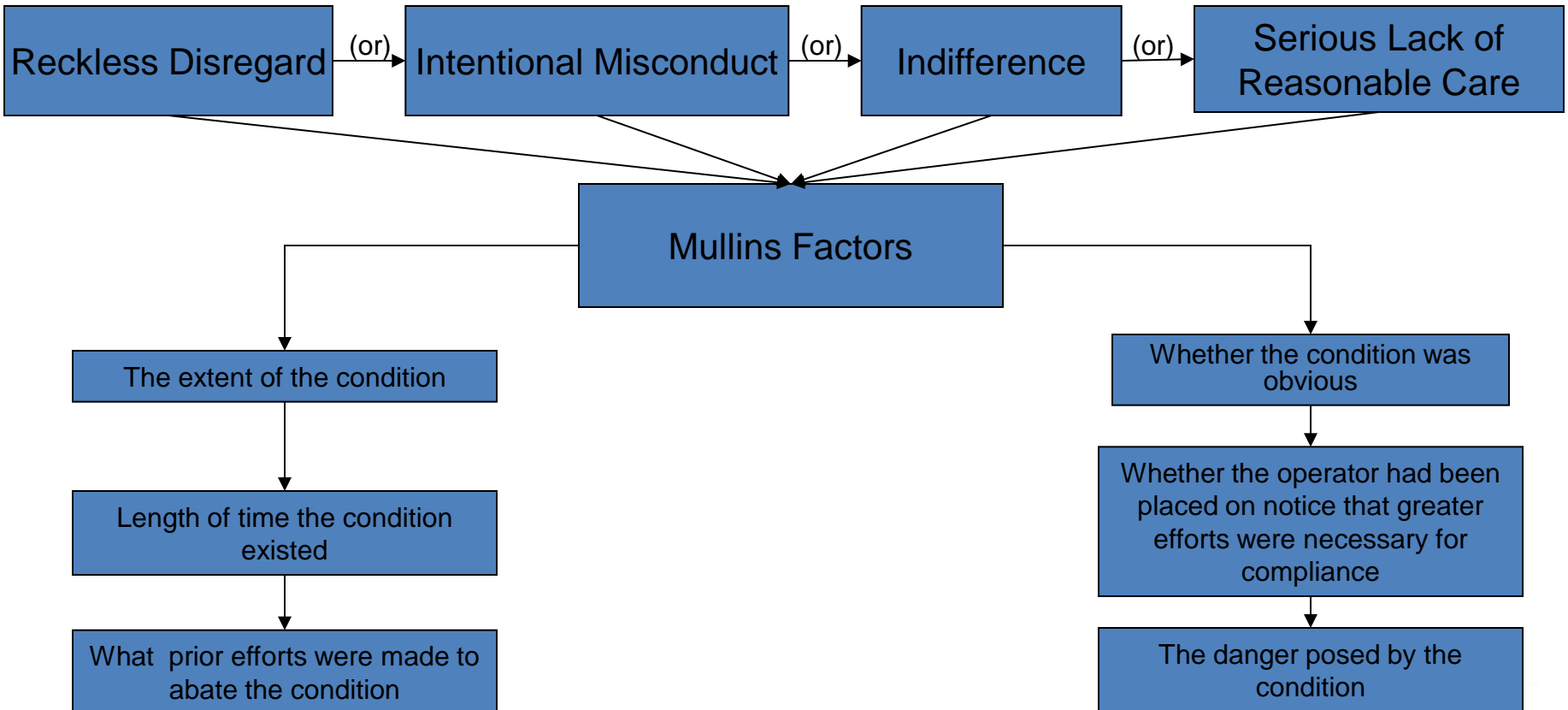
- ▶ Unwarrantable failure citations and orders must be based on “aggravated conduct.”
- ▶ **“Aggravated Conduct”** is defined as *reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care.*
- ▶ It is not “negligent conduct” which is defined as inadvertent, thoughtless, or inattentive.

The Mullins Factors

- ▶ Extent of the violative condition (post-citation abatement efforts).
- ▶ Length of time the condition existed.
- ▶ Efforts made to abate the condition prior to issuance of the citation (Post-citation efforts are irrelevant – Enlow Fork Mining Co., PENN 94-259; PENN 94-400 (Jan. 1997)).
- ▶ Whether the violation was obvious.
- ▶ Whether the operator placed on notice that greater efforts were necessary for compliance.
- ▶ The danger posed by the violative condition.

UNWARRANTABLE FAILURE 104(d)

Aggravated conduct is more than ordinary negligence.



The Mullins Factors

- ▶ MSHA does not need to produce evidence on every one of the *Mullins* factors.
- ▶ Knowledge of the condition alone is not enough to support a finding of aggravated conduct.
 - ▶ The use of a knew or should have known test by itself would make unwarrantable failure indistinguishable from ordinary negligence. Virginia Crews Coal Company, 15 FMSHRC 2103 (Oct. 1993).

The Mullins Factors

- ▶ More recent Commission case law on the “knowledge” factor:
 - ▶ Actual knowledge not required - “Reasonably should have known” may be sufficient to meet the knowledge factor
 - ▶ A subjective “good faith disagreement” with an inspector’s findings may be a defense, but it must “objectively reasonable.”
 - ▶ IO Coal Company, Inc., 31 FMSHRC 1346 (2009)

The Mullins Factors

- ▶ Whether the operator was placed on notice that greater compliance efforts were necessary:
 - ▶ Repeated similar violations may be relevant (not necessarily limited to same area of the mine).
 - ▶ Past discussions with MSHA about a problem.
 - ▶ Uncontested prior citations are final and are deemed conclusive violations of the Act.
 - ▶ IO Coal Company, Inc., 31 FMSHRC 1346 (2009)

The Mullins Factors

- ▶ Whether the operator was placed on notice that greater compliance efforts were necessary:
 - ▶ **Past violations of a broad standard may be insufficient notice.** See, e.g. *Cumberland Coal Res., LP*, 31 FMSHRC 137, 157 (Jan. 2009) (finding that “to establish that [the operator] had been put on notice that additional compliance efforts were needed, the Secretary was required to show more than a history of prior citations for violations of the broad standard [75.400]);
 - ▶ See also, *Big Ridge, Inc., Lake 2012-453R et al.*, slip op. at p. 23 (June 19, 2014) (ALJ McCarthy) (finding that the operator was not on notice of greater compliance efforts where MSHA did not notify the operator that “the practice was prohibited . . . MSHA sanctioned the abatement method . . . [and] in the absence of any evidence that the past citations or discussions with MSHA involved conditions that bore any resemblance to the conditions cited”).

The Mullins Factors

- ▶ Efforts made to abate the condition prior to issuance of the citation:
 - ▶ Once on notice, level of priority given to the problem is relevant.
 - ▶ Previous repeated violations = “heightened alert.”
 - ▶ Operator’s remedial efforts to address conditions.
 - ▶ IO Coal Company, Inc., 31 FMSHRC 1346 (2009)

Ramifications of Unwarrantable Failure Citations and Orders:

- ▶ Section 104(d) Chain – future withdrawal orders.
- ▶ Mandatory minimum penalties/special assessments.
- ▶ Special investigations under Section 110(c) of the Mine Act.
- ▶ Pattern of Violations Consideration.
- ▶ Flagrant Violations.

Other Considerations in Unwarrantable Failure Cases

- ▶ FOIA Inspector's Notes - Request Informal Conference
- ▶ If “put on notice”, implement plan to address similar conditions; MSHA is warning you – so pay attention to it.
- ▶ Consider filing Notice of Contest within 30 days of issuance – possible expedited hearing.
- ▶ Knowledge + No corrective action = UWF (monitor examinations).

Other Considerations in Unwarrantable Failure Cases

- ▶ Document training on company safety policies / actively and consistently enforce policies - (violations without company knowledge may not be unwarrantable).
- ▶ Get confirmation in writing that there are no open or pending 110 investigations before settling UWF citations/orders.
- ▶ If investigation is open or pending, negotiate closure as part of settlement.

Section 107(a) Imminent Danger

- ▶ If, upon any inspection or investigation of a coal or other mine, ... an inspector finds that an imminent danger exists:
 - ▶ He shall determine the extent of the area affected and issue an order requiring all persons ... be withdrawn and prohibited from entering the area until the inspector determines the conditions or practices which caused such imminent danger no longer exist.

Section 107(a) Imminent Danger

- ▶ Non-Assessable; but
 - ▶ The issuance of an imminent danger order shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.
 - ▶ **Must contest within 30 days of issuance because it will not be assessed.**
 - ▶ Evaluated as part of the POV review process.

Section 103(k) “Control Order”

- ▶ In the event of any accident occurring in a coal or other mine
 - ▶ An authorized representative of the Secretary, when present
 - ▶ May issue **“such orders as he deems appropriate”** to insure the safety of any person in the coal or other mine
- ▶ The operator ... shall obtain the approval of the authorized representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in the mine.
 - ▶ Or to recover the coal or other mine or return affected areas of the mine to normal.

Section 103(k) “Control Order”

- ▶ “Such orders as he deems appropriate” has not been litigated
- ▶ Is there a limit? Broad discretion to ensure safety /
Deference given to the inspector
- ▶ Commission has a liberal and expansive view of what constitutes an “accident”
- ▶ Eighth Circuit utilized an “arbitrary and capricious” standard

Section 103(k) “Control Order”

- ▶ MSHA using “control orders” to mandate plan changes
- ▶ Shut downs - acquiescence required to lift order
- ▶ Broad discretion afforded to MSHA
- ▶ Incredible power – due process?
- ▶ Sixth Circuit affirmed MSHA’s issuance of “control order” mandating plan changes

104(b) – Failure to Abate Order

- ▶ Follow-up inspection of a coal or other mine
- ▶ A violation not totally abated within the time originally fixed or as subsequently extended, and that the period of time for the abatement should not be further extended
- ▶ Issue an order to immediately cause all persons to be withdrawn from, and to be prohibited from entering, such area until such violation has been abated.

104(b) – Failure to Abate Order

- ▶ 104(b) orders are typically not assessed.
- ▶ However, failures to abate may be assessed \$7,500 for each day during which such violation continues.
- ▶ The abatement period must be “reasonable”
- ▶ Must contest within 30 days of Issuance (Notice of Contest Proceeding)

SAFEGUARDS

- ▶ **Commission has held that safeguards can be S&S.**
- ▶ **Challenge safeguard when citation issued in the future for violation of the safeguard or request technical citation to challenge immediately.**
- ▶ **Consider expedited hearing, if operation adversely affected by onerous requirements**
- ▶ **ALJ rejected operator's direct contest of safeguards (Commission review pending – *Pocahontas Coal Co.*, WEVA 2014-642-R, *et. al.*, 06/11/14)**

Operator / Contractor Dual Liability

- ▶ MSHA will cite an operator and contractor for violations related to contractor activities, regardless of the level of control exercised or contractual provisions.
- ▶ Issues of concern:
 - ▶ Monitoring contractor activities on property
 - ▶ Training (ensure contract employees are trained – hazard, new miner, experienced miner, annual re-training)
 - ▶ Task Training (increased enforcement)
 - ▶ Examinations of work areas (increased enforcement)

Operator / Contractor Dual Liability

- ▶ An ALJ recently increased a penalty because “the operator failed to properly oversee the working conditions of the on-site contractor conducting the mining.”
- ▶ The ALJ further stated simply allowing “a separate workforce to operate within their mine without any oversight is exactly the type of responsibility shifting the Mine Act sought to discourage”
 - ▶ *Sturgeon Mining Co., Inc.*, KENT 2012-701 (06/20/14)

Operator / Contractor Dual Liability

- ▶ Mitigating factors to reduce dual liability:
 - ▶ The level of control exercised over contractor activities / employees
 - ▶ Clarify foremen duties and responsibilities
 - ▶ Require proof of proper training / documentation (watch for new employees)
 - ▶ Conduct task training for all “new” tasks (when in doubt – train them)

Operator / Contractor Dual Liability

- ▶ Mitigating factors to reduce dual liability:
 - ▶ Provide training on company safety policies / enforce them
 - ▶ Ensure contract employees are being monitored by their supervisor
 - ▶ Conduct meaningful workplace examinations / reporting
 - ▶ Indemnity provisions in contracts

SECTION 110(C) SPECIAL INVESTIGATIONS

Section 110(C) Special Investigations

- ▶ Section 110(c) of the Mine Act states:
 - ▶ Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsection (a) and (d).

Section 110(C) Special Investigations

- ▶ Knowingly -- "A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." *MSHA v. Richardson*, 3 FMSHRC 8 (1981).
 - ▶ Under this standard, aggravated conduct is required.
 - ▶ The conduct must go beyond simple negligence and be at least high negligence.

Section 110(C) Special Investigations

- ▶ MSHA has authority to bring criminal prosecutions under the Mine Act against a director, officer, or agent.
- ▶ MSHA must prove a willful violation of a mandatory health and safety standard “beyond a reasonable doubt.”
- ▶ Willfully -- “...done knowingly and purposely by a [person] who, having a free will and choice, either intentionally disobeys the standard or recklessly disregards its requirements.” U.S. v. Consolidation Coal Co. & Kidd, 504 F.2d 1330, 1335 (6th Cir. 1974).

Initiation of 110 Investigation

- ▶ According to MSHA PPM, the investigation is initiated at the District Manager's request usually due to one of the following:
 - ▶ A mine accident.
 - ▶ A complaint (such as false reporting or equipment misrepresentation).
 - ▶ A review of citations/orders for possible knowing or willful violations.
 - ▶ Each 104(a) citation which contributed to a 107(a) imminent danger order of withdrawal.
 - ▶ Each 104(d) citation/order identified as S&S and the negligence is marked as "high" or "reckless disregard,"
 - ▶ Each citation issued for working in violation of a withdrawal order.

Preparing for a 110 Investigation

- ▶ Assume a 110(c) investigation for every 104(d) citation/order.
- ▶ Advise managers of their rights (avoid admissions):
 - ▶ Right to talk to an investigator.
 - ▶ Right not to talk to an investigator.
 - ▶ Right to counsel before talking.
 - ▶ Company policy on indemnification.

Preparing for a 110 Investigation

- ▶ Thoroughly investigate all 104(d) citations/orders:
- ▶ Consider securing outside counsel to preserve privileges.
- ▶ Identify and interview all management and hourly witnesses.
- ▶ Secure and preserve pertinent documents/tangible items.
- ▶ Obtain other supporting evidence: photographs, witness statements, notes, maps, computer system printouts.
- ▶ Send FOIA request for the inspector's notes.

Preparing for a 110 Investigation

- ▶ Make decisions on independent representation for foreman/hourly miners (indemnification).
- ▶ Conference all 104(d) citations/orders.
- ▶ Consider filing notice of contest under Section 105 and possibly request an expedited hearing.

Preparing for a 110 Investigation

- ▶ Challenge pertinent assessments.
- ▶ FOIA Inspector's notes.
- ▶ Manage document production carefully (marking exhibits/confidentiality issues).

Important Things to Know about 110 Investigations

- ▶ Investigators are specially trained to investigate for civil or criminal liability of both a company and individual (FBI Training).
- ▶ Investigators typically speak to hourly and supervisory employees on or off company property.
- ▶ They will try to befriend you – always assume you are a target – be on guard.

Important Things to Know about 110 Investigations

- ▶ Important to be fully advised before decisions of whether, when, and how to proceed.
- ▶ Important rights can be lost if not timely asserted.
- ▶ Investigators discourage legal assistance to proceed unimpeded but legal counsel is preferred.
- ▶ All investigations, except certain aspects of accident investigations, can be postponed without adverse consequences.

Important Things to Know about 110 Investigations

- ▶ The company may not interfere with investigations, but may insist they be conducted in ways that are not disruptive.
- ▶ Need not permit employee interviews on company time, but policy must be applied on a non-discriminatory basis.
- ▶ Do not sign any MSHA prepared statement or notes.

Important Things to Know about 110 Investigations

- ▶ The company is permitted to provide legal assistance to any supervisor or representative involved and it is a good policy to do so.
- ▶ Request written confirmation from MSHA that no investigation is pending or contemplated before settling any underlying enforcement action that gave rise to the 110 investigation.

Prevention of Special Investigations

- ▶ Strategies to avoid a special investigation:
 - ▶ Training/Re-Training of Foreman/Leadmen
 - ▶ Mine Safety Regulations
 - ▶ Citation investigation/pre-assessment awareness
 - ▶ Foreman's rights
 - ▶ Safety policies/promoting strong safety culture.

Prevention of Special Investigations

Stressing pre-shift, on-shift, and pre-operational examinations

- ▶ Reporting unsafe conditions or behaviors
- ▶ Taking action on safety complaints and reported hazards.
- ▶ Documenting actions taken.
- ▶ Enforce safety policies/regulations
 - ▶ Discipline – persistent and consistent.

Prevention of Special Investigations

- ▶ Conference all 104(d) citations/orders.
 - ▶ Pre-assessment reduction of gravity or negligence.
- ▶ Consider involving counsel early in process.
- ▶ Review documentation for problems.

Proper Handling of Inspections

- ▶ Paramount rule of the walk around: It is all about the facts
 - ▶ **F** -- Follow the Inspector
 - ▶ **A** -- Ask Clarifying Questions
 - ▶ **C** -- Control Comments
 - ▶ **T** -- Take Contemporaneous Notes
 - ▶ **S** -- Secure Pertinent Documents / Evidence

(Avoid Spoliation / Adverse Inferences)

Proper Handling of Inspections

- ▶ You are the front line of defense in MSHA citations.
- ▶ Developing independent facts is crucial to success.
- ▶ Nearly all legal challenges to MSHA citations and orders fail when the operator cannot produce first hand knowledge about the conditions cited or to refute inspector's observations.
- ▶ Inspectors take notes – so should foremen (make independent judgments).

Proper Handling of Inspections

- ▶ Foreman should always greet inspector.
- ▶ Shadow the inspector – never leave him alone.
- ▶ Track and document his movements / time frames of arrival and departure of areas.
- ▶ Duplicate everything the inspector does:
 - ▶ Take measurements
 - ▶ Air readings
 - ▶ Digital photographs
 - ▶ Document inspector's statements and the statements of others

Proper Handling of Inspections

- ▶ Do not be afraid to ask clarifying questions, but listen more than you talk.
- ▶ Avoid unnecessary admissions.
- ▶ Do not volunteer information.
- ▶ **However, never interfere, withhold information or lie!!**

Proper Handling of Inspections

- ▶ Never feel like you have to explain a condition.
- ▶ If you do not know the answer to an inspector's question do not guess or speculate; tell him you will find out.
- ▶ **Remember: what you say can and often will be used against the mine operator and maybe you.**

Proper Handling of Inspections

- ▶ Management's Notes (Do's and Don't's):
 - ▶ Your notes should include facts and not personal opinions.
 - ▶ Your notes are being taken in anticipation of potential litigation and as such should be guarded as legal work product.
 - ▶ NEVER provide copies of your notes to any inspector without talking to the company's legal counsel.

CASE LAW AND RULE- MAKING UPDATE

Dickenson-Russell Coal Co. v. Sec'y of Labor

- ▶ Part 50 reporting requirements.
- ▶ Dickenson-Russell was the owner-operator of the Roaring Fork No. 4 Mine. An employee of Bates Contracting, a temporary labor agency that supplied miners to work at the mine, was injured.
- ▶ Although the injured worker was an employee of Bates Contracting, he was under the control and supervision of personnel from Dickenson-Russell on the day of his injury.

Dickenson-Russell Coal Co. v. Sec'y of Labor

- ▶ Following the injury, Bates Contracting submitted a 7000-1.
- ▶ Two months later, MSHA issued a citation to Dickenson-Russell for failure to timely report an occupational injury and file a 7000-1, as required by 30 CFR 50.20(a), even though Bates Contracting had submitted a 7000-1.
- ▶ To abate, Dickenson-Russell crossed out Bates Contracting and replaced it with Dickenson-Russell Coal Company.
- ▶ Dickenson-Russell contested the citation and the Secretary moved for summary decision.

Dickenson-Russell Coal Co. v. Sec'y of Labor

- ▶ Dickenson-Russell argued that since the injury had been timely reported to MSHA, it did not violate the cited standard.
- ▶ The ALJ disagreed and determined that the responsibility to report rested solely upon Dickenson-Russell.
- ▶ Dickenson-Russell filed a Petition for Discretionary Review with the Commission, which was denied.
- ▶ Dickenson-Russell then filed a Petition for Review with the 4th Circuit.

Dickenson-Russell Coal Co. v. Sec'y of Labor

- ▶ Dickenson-Russell's Argument: Either Dickenson-Russell or Bates Contracting was required to report the injury, but not both.
- ▶ Secretary's Argument: The Secretary argued that Dickenson-Russell's policy was contrary to the plain language of the regulation, which requires "each operator to report each occupational injury."

Dickenson-Russell Coal Co. v. Sec'y of Labor

- ▶ Fourth Circuit looked to the language of the regulation to determine whether the regulation was ambiguous.
- ▶ “Each operator shall report each accident, occupational injury, or occupational illness at the mine. The operator shall mail completed MSHA Mine Accident, Injury and Illness Report Form 7000-1s to MSHA within ten (10) working days after an accident or occupational injury occurs or an occupational illness is diagnosed.”
- ▶ Fourth Circuit held that this language was unambiguous, permitted no exceptions, and was unconditional.
 - ▶ **Anyone who qualifies as an operator under 50.20(a) must report every qualifying accident or injury.**
 - ▶ **When there are two (2) or more operators who are subject individually to the reporting requirements in 50.20(a), every one of them must report every qualifying accident or injury.**

Russell Ratliff v. Cobra Natural Resources (Miners' Discrimination)

- ▶ Face operative at Cobra's Mountaineer Mine
- ▶ History at Mountaineer Mine
- ▶ October 2012 Incident in Bathhouse
- ▶ March 2012 Evaluations
- ▶ November 2012 Reduction in Force

Russell Ratliff v. Cobra Natural Resources (Miners' Discrimination)

- ▶ Ratliff's 105(c) discrimination complaint
- ▶ Secretary = Concluded that Ratliff's claim was not frivolously brought and applied to the Commission for his temporary reinstatement
- ▶ Hearing before Judge Steele
 - ▶ Ratliff's complaint was not frivolously brought
 - ▶ Rejected Cobra's tolling defense since work was still available at the mine for shuttle car operator
 - ▶ Ordered Ratliff's immediate reinstatement
- ▶ Commission affirmed Reinstatement Order

Russell Ratliff v. Cobra Natural Resources (Miners' Discrimination)

- ▶ Cobra filed petition for review of the Commission's decision, asserting jurisdiction under the collateral order doctrine and arguing that the Commission erroneously denied its tolling defense.
- ▶ Secretary agreed that the Fourth Circuit possessed jurisdiction under the collateral order doctrine.
- ▶ An order falls within the collateral order exception when it:
 - ▶ Conclusively determines a disputed question
 - ▶ Resolves an important issue separate from the merits in the action
 - ▶ Is effectively unreviewable on appeal from a final judgment

Russell Ratliff v. Cobra Natural Resources (Miners' Discrimination)

- ▶ January 2014 -- 4th Circuit Decision
- ▶ 3 other sister Court of Appeals (6, 7 and 11) had confronted this same issue and concluded that appellate review was appropriate, that temporary reinstatement orders are subject to timely review, and temporary reinstatement orders under the Mine Act fall directly within the collateral order exception
- ▶ In a 2-1 decision, the Court dismissed Cobra's appeal for lack of jurisdiction, concluding that the Court did not possess jurisdiction under the collateral order doctrine.

Implications of the 4th Circuit's Decision

- ▶ Creates an unnecessary split between the 4th circuit and its sister circuit courts in the 6th, 7th, and 11th circuits with respect to a significant jurisdictional issue.
- ▶ Results in the uneven administration of the Mine Act among federal circuits.
 - ▶ The same appellate rights assured to miners and mine operators in the 6th, 7th, and 11th circuits will be denied to those within the 4th circuit.

Russell Ratliff v. Cobra Natural Resources (Miners' Discrimination) Implications of the 4th Circuit's Decision

- ▶ Grant of administrative immunity to the Commission with respect to temporary reinstatement orders entered by the Commission.
- ▶ Mootness issues
 - ▶ Judge Agee: “Immediate review would avoid creating an unreviewable harm. Cobra’s claims, and the claims of future mine operators and miners, will be unreviewable absent immediate appeal because the issue of temporary reinstatement will be moot by the time the parties resolve the full merits proceedings.”

Flagrant Violations

- ▶ **Two-track approach** for establishing a flagrant violation:
- ▶ **First Track**
 - ▶ Proving the operator recklessly failed to eliminate a known hazard.
- ▶ **Second Track**
 - ▶ Proving the operator repeatedly failed to eliminate a known violation.
- ▶ Standard fails to define many of the terms used and creates an excessively broad standard.

Flagrant Violations

- ▶ MSHA issued a final rule on flagrant violations in 2006, 30 C.F.R. §105(e)
 - ▶ Rule codified the language of §110 (b) of the MINER Act
 - ▶ Did not define the terms:
 - ▶ Flagrant
 - ▶ Reckless Failure
 - ▶ Repeated Failure
 - ▶ Known Violation
 - ▶ Substantially and proximately caused

Flagrant Violations

Secretary of Labor v. Oak Grove Resources

- ▶ ALJ Feldman recently determined criteria for a “repeated failure” flagrant violation.
- ▶ In order for the Secretary to establish a condition constitutes a repeated flagrant violation, the Secretary bears the burden of demonstrating the following criteria:

Flagrant Violations

Secretary of Labor v. Oak Grove Resources

- ▶ (1) A repeated flagrant violation is a flagrant violation that is demonstrated by either
 - ▶ (a) a repeated failure to eliminate the violation properly designated as flagrant, or
 - ▶ (b) a relevant history of violations that also meet the requirements for a flagrant violation with respect to knowledge, causation and gravity, as enumerated below.
- ▶ (2) A flagrant violation must be a known violation that is conspicuously dangerous, in that it cannot reasonably escape notice.

Flagrant Violations

Secretary of Labor v. Oak Grove Resources

- ▶ (3) A flagrant violation must be the substantial and proximate cause of death or serious bodily injury that has occurred or can reasonably be expected to occur.
 - ▶ (a) a substantial and proximate cause is a dominant cause without which death or serious bodily injury would not occur.
 - ▶ (b) a serious bodily injury is a grave injury that results in significant debilitating and/or permanent impairment.
 - ▶ (c) such injury is reasonably expected to occur if there is a significant probability of its occurrence.

Pattern of Violations (POV)

- ▶ Brody Mining challenged MSHA's POV regulations soon after it was notified of POV status.
- ▶ Chief Judge Lesnick upheld the POV regulations - decision was affirmed by the Commission in August 2014.
- ▶ In November, Judge Moran dismissed the POV charge against Brody, stating that the POV charge was a violation of due process.

Pattern of Violations (POV)

- ▶ In this case, 54 citations and orders were involved
- ▶ To determine whether a pattern existed, Judge Moran stated that MSHA would have to:
 - ▶ Identify the basis for its claim that the 54 citations and orders formed a pattern;
 - ▶ Establish that those citations and orders were violations,; and
 - ▶ Establish that each citation and order was S&S.

- ▶ The Secretary failed to identify beyond general and vague statements the basis for the pattern claim.
- ▶ Judge Moran’s decision precludes MSHA from issuing any further withdrawal orders to the Brody Mine under 104(e) of the Mine Act.
- ▶ **“The rules were announced only after the game had been played, after the hand had been played, and that one party announced the basis for the winning hand.”**

Pattern of Violations (POV)

- ▶ Secretary filed an Emergency Motion to Stay, which was denied by Judge Moran.
- ▶ Later, the Secretary filed:
 - ▶ Motion for Certification for Interlocutory Review = Granted
 - ▶ Renewed Emergency Motion for Stay = Denied
- ▶ January 29, 2015 – Closed Meeting (Cancelled)
 - ▶ Issues include whether to grant or deny the Secretary's Emergency Motion for Stay

MSHA's Proposed Rule To Amend 30 CFR Part 100 (RIN 1219-AB72)

- ▶ On July 31, 2014, MSHA published a proposed rule to amend its civil penalty regulation
- ▶ According to MSHA, the new rule is designed to simplify the criteria, which will promote consistency, objectivity, and efficiency in the proposed assessment of civil penalties and facilitate the resolution of enforcement issues
- ▶ The proposed rule places a greater emphasis on the more serious safety and health conditions and provides improved safety and health for miners
- ▶ MSHA extended the comment period until December 3, 2014 (79 FR 55408) in response to comment on the proposed rule

MSHA'S Attempt To Alter The Commission's Exclusive Authority To Assess Civil Penalties

- ▶ The proposed penalty rule attempts to circumvent the Commission's authority
- ▶ Currently, MSHA issues "proposed" assessments of civil penalties to mine operators
- ▶ The Commission, on the other hand, possess exclusive authority to "assess" civil the penalties after consideration of the six statutory criteria set forth in §110(i) of the Mine Act

MSHA'S Arguments Against The Commission Right To Assess Civil Penalties

- ▶ MSHA raises several arguments in favor of limiting the Commission's statutory authority. First, the current approach does not provide sufficient *predictability and consistency* in penalties
 - ▶ ALJ's are not bound by Part 100 regulations or MSHA's proposed penalty assessment
 - ▶ ALJ's are not required to give a presumption of validity to MSHA's proposed penalty
 - ▶ ALJ's are free to assess lower penalties even if the ALJ sustains all the findings in the violation

MSHAs Proposed Civil Penalty Rule

- ▶ Reduces the current 10A possibility of injury category to three (3):
 - ▶ Unlikely - Condition or practice cited has little or no likelihood of causing an event that could result in an injury or illness.
 - ▶ Reasonably Likely
 - ▶ Condition or practice cited is likely to cause an event that could result in an injury or illness.
 - ▶ Occurred - Condition or practice cited has caused an event that has resulted or could have resulted in an injury or illness.

Gravity – Severity

▶ Old Rule

- ▶ No Lost Workdays = 0
- ▶ Lost Workdays = 5
- ▶ Permanently Disabling = 10
- ▶ Fatal = 20

▶ Proposed Rule

- ▶ No Lost Workdays = 0
- ▶ Lost Workdays = 5
- ▶ ~~Permanently Disabling~~
- ▶ Fatal = 10

Number of Persons Affected

	<u>Old Rule</u>	<u>Proposed Rule</u>
▶ 0	= 0	▶ No = 0
▶ 1	= 1	
▶ 2	= 2	▶ Yes = 1
▶ 3	= 4	
▶ 4	= 6	
▶ 5	= 8	
▶ 6	= 10	
▶ 7	= 12	
▶ 8	= 14	
▶ 9	= 16	
▶ 10+	= 18	

MSHA's Proposed Civil Penalty Rule

- ▶ Deletes the concept of mitigating circumstances from all degrees of negligence - What does this mean?
 - ▶ Removes the possibility for operators to present mitigating factors.
 - ▶ Creates a potential increase in Section 104(d) unwarrantable failure enforcement actions.
 - ▶ Creates a potential advantage to MSHA in prosecuting of Section 104(d) unwarrantable failure enforcement actions

‣ Old Rule

- No Negligence = 0
- Low = 10
- Moderate = 20
- High = 35
- Reckless Disregard = 50

‣ Proposed Rule

- Not Negligent = 0
- Negligent = 15
- Reckless Disregard = 30

Unwarrantable Failure

- ▶ MSHA's Proposed Rule on Civil Penalty Assessments (Federal Register Number 2014-17935)
 - ▶ MSHA is proposing an increase of 50% in the mandatory minimum penalties established in the Mine Improvement and New Emergency Response Act (MINER Act).
 - ▶ Proposed rule raises the 104(d)(1) citation or order from a \$2,000.00 mandatory minimum penalty to \$3,000.00.
 - ▶ Proposed rule raises the 104(d)(2) order from a \$4,000.00 mandatory minimum penalty to \$6,000.00.
 - ▶ Proposed rule raises questions regarding the validity of changing the mandatory minimum penalties set forth by Congress in Section 110(a)(3)(A)-(B) of the MINER Act.

MSHAs Proposed Civil Penalty Rule

- ▶ Proposed rule for additional good faith abatement under 30 C.F.R. Section 100.3(f).
 - ▶ Rule maintains the 10% reduction in regular assessments.
 - ▶ MSHA is “considering” an “alternative” which would provide for an additional 20% reduction in the proposed penalty.
 - ▶ Operators must waive any right to contest “both” the penalty and the violation and pay the assessed penalty prior to it becoming a final order of the Commission.
 - ▶ Requires payment within 30 days of receipt of the 1000-179 form.

Pre-rule Stage - Rule on Workplace Exams

- ▶ MSHA to issue a request for information on examination of working places in M/NM mines to determine adequacy of existing standards.
- ▶ Recent fatalities in M/NM raised concerns that examiners do not always identify conditions that may adversely affect safety or health OR do not correct such identified conditions in a timely manner.
- ▶ MSHA to seek information relative to: (1) persons conducting the examination, (2) quality of the examination, and (3) recordkeeping.
- ▶ Considering whether issuing guidance or best practices regarding existing standards would effectively accomplish the Agency's goal.

Questions?

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The logo for Dinsmore, featuring the word "Dinsmore" in a serif font. The "Din" is in a dark brown color, and "smore" is in a blue color. A small blue triangle is positioned above the letter "o".

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