

# MSHA Inspection Series – Parts I & II

## MAKING THE MSHA INSPECTION PROCESS WORK FOR YOU

August 25, 2016

Webinar for the National Stone,  
Sand and Gravel Association  
("NSSGA")

The logo for Dinsmore, featuring the word "Dinsmore" in a blue serif font. The letter "i" is lowercase and blue, while "nsmore" is uppercase and blue. A small blue triangle is positioned above the letter "o".

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# What We Will Be Covering

## **PART I – Preparing for the MSHA Inspection**

- ▶ Work Place Examinations

# What We Will Be Covering

## PART II – Navigating the MSHA Inspection

- ▶ Information Gathering and the Role of Management During the Inspection
  - ▶ Rules to Guide the Inspection Process
  - ▶ Handling Your Notes
  - ▶ What to do After the Inspection
- ▶ Understanding Gravity, Negligence & Unwarrantable Failure
- ▶ Impact Inspections
- ▶ Prevention of Special Investigations

# Safety Should Be More Than a Slogan!



# PART I – Workplace Examinations

## Workplace Examinations:

“ . . . a Riddle Wrapped in a  
Mystery Inside an Enigma . . . ”

Winston S. Churchill

# Chronology of the Proposed Rule

- In July 2015, MSHA issued Program Policy Letter (“PPL”) No. P15-IV-01 relating to work place examinations.
- This PPL was a precursor to the proposed rule.
- On June 7, 2016, MSHA issued the proposed rule revamping the work place examination standards in 30 C.F.R. Sections 56/57.18002.



# Current Status of the Proposed Rule

- During the comment period MSHA has held four public hearings on the proposed rule:
  - July 19, 2016, Salt Lak City, Utah;
  - July 21, 2016, Pittsburgh, PA;
  - July 26, 2016, Arlington, Virginia;
  - August 4, 2016, Birmingham, Alabama.
- 27 comments have been posted to date at:  
<https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=MSHA-2014-0030>

# Current Status of the Proposed Rule

- Latest comment period ends on September 6, 2016.
- Commenters have requested:
  - a 60 day extension on comment period (November 6, 2016);
  - postponement of the public hearings until December 6, 2016;
  - a 30 day post hearing comment period ending January 6, 2017.
- MSHA extended the comment period to **September 30, 2016**, to further evaluate the proposed rule, and how it impacts operators.

# MSHA's Justification for the Proposed Rule

- “Recent fatalities and other accidents [in metal/ non-metal] suggest miners would benefit from rigorous work place examinations conducted by experienced and trained examiners.” *Joe Main, Assistant Secretary of Labor for Mine Safety and Health*
- MSHA contends the “modified” rule will ensure operators identify and correct conditions that may “adversely affect the safety or health of miners.”

# The Reality of The Proposed Rule

- Expansion of the obligations in the July 2015 PPL No. P15-IV-01.
- Comprehensive overhaul of the work place examination standards.
- According to MSHA data between 2000 and 2014, MSHA issued over 14,500 citations and orders to metal/nonmetal operators related to work place examinations, including 81 issued for fatal and non-fatal accidents.
- If implemented as proposed, this number is expected to increase, along with Section 110 special investigations against company “agents.”

# Current 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.

# Comparison of Proposed Rule and Old Rule

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.

▶ Current Rule

- ▶ a) A competent person designated by the operator shall examine each working place at least once each shift, **before miners begin work in that place**, for conditions that may adversely affect safety or health.
- ▶ (1) The operator shall promptly notify miners in any affected areas of any adverse conditions found that may adversely affect safety or health and promptly initiate appropriate action to correct such conditions.
- ▶ (2) Conditions noted by the person conducting the examination that may present an imminent danger 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.

▶ Proposed Rule

# Comparison of Proposed Rule and Old Rule

- ▶ 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.
- ▶ Current Rule
- ▶ (b) A record of each examination shall be made and the person conducting the examination shall sign and date the record before the end of the shift for which the examination was made.
- ▶ (1) The record shall include the locations of all areas examined and a description of each condition found that may adversely affect the safety or health of miners.
- ▶ Proposed Rule

# Secretary of Labor v. Sunbelt Rentals, Inc. 7/20/16

To be adequate, an examination must identify conditions which may adversely affect safety and health that a reasonably prudent competent examiner would recognize.

- The “Reasonably Prudent Person” test is based on conclusions made by an *objective observer* after reviewing relevant facts which were gathered prior to the violation being issued.
- The test must be applied to all the facts, and not just those which favor one party or the other.
- The test requires a Judge to determine validity of the citation by comparing the inspector’s facts, and the facts established by a reasonably prudent work place examiner.



# Competent Person Standard

- The proposed rule does not require the “competent person” to be a supervisor.
- This raises several critical questions:
  - Will an hourly examiner be an “agent” of the operator when MSHA alleges an inadequate exam?
  - Will the supervisor who assigned the hourly examiner be responsible for an alleged inadequate exam?
  - Will both the hourly examiner and the supervisor be responsible?
  - These questions are important given the potential for civil and criminal sanctions against operator agents under §110 of the Mine Act.

# Competent Person Standard

- MSHA is seeking comment on whether the “competent person” should have a minimum level of experience or particular training or knowledge to identify hazards.
- Based the holding in *Sunbelt Rentals*, Commission Judges likely will evaluate competency of examiners to detect adverse conditions.
- Developing comprehensive training programs for examiners will be beneficial in future litigation involving inadequate examinations.

# 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.

# 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.”
- ▶ **Solving the Riddle:** How are operators to determine what an “infrequent basis” means?

## MSHA Notice: Scope of “Working Place”

- ▶ MSHA Notice: definition of “working place” is the same
- ▶ Not necessary to examine entire mine – only actual work areas
- ▶ “Before work begins in any area” – depends on when work starts
- ▶ Includes roads traveled to and from a work area.

## MSHA Notice: Scope of “Working Place”

- ▶ Does not include:
  - ▶ roads not involved in the mining process,
  - ▶ administrative buildings,
  - ▶ parking lots,
  - ▶ lunchrooms,
  - ▶ toilet facilities, or
  - ▶ inactive storage areas
- ▶ Isolated, abandoned or idle areas – only if work performed in these areas during a shift

# Timing of Work Place Examinations

- MSHA is seeking comment on whether examinations should be conducted within a specified time period before miners begin working in an area.
- Proposed rule modeled after preshift examination standards in Part 75 for underground coal.
- This is a classic case of trying to drive a square peg in a round hole.

# Timing of Work Place Examinations

- Comments raised issues encountered by M/NM operators not always present in underground coal (i.e., nine different starting times in a single day).
- Comment questions included:
  - Do I need an examiner for each shift?
  - Can an examiner overlap his exam with those on another shift?
  - Can a 12 hour shift examiner use the work place examination of an 8 hour examiner if the 8 hour shift is over, but the 12 hour shift is not?



# Conditions That “Adversely Affect” Safety or Health

- The proposed rule fails to define conditions may “adversely affect safety or health.”
- This problem also exists in Part 75, which requires examiners to find and record “hazardous conditions.”
- Is a condition that may “adversely affect” safety or health the same as a “hazardous” condition?
- PPL No. P15-IV-01 required the examiner to recognize “hazards.” The phrases seem interchangeable.

# Conditions That “Adversely Affect” Safety or Health

- ▶ Citations for inadequate examinations are based solely on the inspector’s subjective observations.
- ▶ Does the existence of a condition = Inadequate exam (?)
- ▶ No legal definition, so a “hazard” becomes any violation,
- ▶ Violations of “Rules to Live By” equated to “hazardous conditions.”
- ▶ Inspectors compare recent examination reports to their observations to support violations. **(CATCH – 22)**

# Conditions That “Adversely Affect” Safety or Health

- Without defining key terms, what is an examiner to do?
- Operators should seek clarity during the comment period.
- Examiners must pay attention to “Rules to Live by Standards,” MSHA’s top twenty list and history of violations.
- MSHA inspectors are creatures of habit.

## Conditions That “Adversely Affect” Safety or Health



# Prompt Notification of Miners in Any Affected Areas

- The proposed rule requires operators to “promptly notify” miners in any affected areas of any adverse conditions found.
- Concern: the obligation to notify could exceed the area of the “working place” being examined!
- Examiners may be expected to consider areas beyond the “working place” in evaluating who to notify.
- Comment is needed to clarify the scope of the examiner’s notification requirement in subpart (a)(1).

# Prompt Notification of Miners in Any Affected Areas

- ▶ MSHA Notice: “To promptly notify miners” means any effective form of notice to alert miners of adverse conditions in their “working place” before they begin work in the area.
- ▶ Before potential exposure
- ▶ ASAP after work begins, if discovered while working
- ▶ Can be verbal, written or descriptive warning signage.

# Reporting and Corrective Action

- The proposed rule requires the examination record to include:
  - a description of the corrective action taken;
  - the date the corrective action was taken;
  - the name of the person who made the record of the corrective action;
  - the date the record of the corrective action was made.

# Reporting and Corrective Action

- Preamble: MSHA expects the person correcting the condition to create the record.
- What if the person correcting the condition is someone other than the examiner?
- Is the examiner responsible if the person correcting does not make a record?
- MSHA takes the signing of examination records seriously.
- Operators should consider comments on this topic.



# Reporting and Corrective Action

- ▶ Introduction: MSHA also expects the person conducting the examination to sign and date, before the end of the shift.
- ▶ Comment concerns: signing requirement would increase potential liability under 110(c).
- ▶ MSHA Notice: “**agent**” **liability** under the Act relates to the “substantive duties and delegated responsibilities.”
- ▶ Does not change “competent person” qualification.
- ▶ MSHA is seeking comment on alternative approach of simply identifying the “competent person” in the record.

# Reporting and Corrective Action

- ▶ Comments: recordkeeping for immediately corrected conditions.
- ▶ MSHA Notice: not burdensome, such record would increase operator awareness of potential dangers and make them more proactive.
- ▶ MSHA seeks comment on how operators use records to identify and correct “systemic adverse conditions” and possible limitations on using such records.

# Task Training

- ▶ MSHA will likely issue violations for inadequate task training each time an inspector finds “multiple safety hazards” (i.e. citations or orders).
- ▶ Orders likely under Section 104(g)(1).
- ▶ Operators may be required to modify training programs.
- ▶ Task train miners on new tasks and changes in tasks.

# THE TAKE AWAY

- This is a *proposed* rule. You have an opportunity, through September 30, 2016, to submit comments for consideration.
- Be proactive - now is the time to voice concerns and offer examples on how the rule will impact your operation.
- No second chance outside of litigation.
- Expect increased enforcement, special investigations and potential criminal prosecutions (DOJ memo).

# Tips on Examining Working Places

- ▶ Examiners must be vigilant in identifying adverse conditions and reoccurring conditions.
- ▶ Promptly correct reported conditions.
- ▶ Lack of follow-up examinations could be viewed as a failure to correct reported conditions “within a reasonable time”.
- ▶ Ensure that follow-up examinations and reports are made for conditions requiring more than one shift to correct and note progress made.

# Tips on Examining Working Places

- ▶ **Use MSHA's "Rules to Live By"** to assist the examiner
- ▶ Be aware of frequently cited conditions.
- ▶ Be aware of MSHA's "top twenty" list of frequently cited conditions (creatures of habit).
- ▶ Ensure prompt correction and follow-up.

# Tips on Examining Working Places

- ▶ **Think beyond abatement** - are there systemic or latent hazards to address? Why are they reoccurring?
- ▶ **Communicate with employees** about examinations and citations, and **include them in safety meetings**.
- ▶ Devise ways to prevent reoccurrences.
- ▶ Review citations and inspection notes with employees to increase their knowledge of compliance issues.

# Tips on Reporting Examinations

- ▶ Never fill out and sign an examination report you did not conduct.
- ▶ Keep personal notes with accurate dates, times, areas and conditions examined.
- ▶ If you do not think a condition is a hazard (but you believe an inspector might), make a note of this.



# Tips on Reporting Examinations

- ▶ The Reasonably Prudent Person Test: a “competent” examiner qualifies
- ▶ MSHA inspectors do not have final say on whether a “hazard” exists. These decisions are fact based.
- ▶ The examiner’s opinion matters, if supported by facts and evidence.
- ▶ Document conditions that need reported and those you decide not to report.

# Tips on Reporting the Examinations

- ▶ Expect increased MSHA scrutiny of examination records for more detailed descriptions of conditions found and to support inadequate examination citations.
- ▶ Avoid “over-writing” conditions in the record.
- ▶ Avoid editorials, opinions, speculation, and over generalizations of conditions.
- ▶ If you have doubts, err on the side of reporting.

# The Inadequate Examination Citation/Order

- ▶ When was examination done compared to the inspection?
- ▶ **MSHA must prove the condition existed** at the time of the examination.
- ▶ **Speculative** - unless inspector obtains a statement.
- ▶ **BE AWARE:** Inspectors routinely obtain statements from management to support their argument that the condition existed at the time of the examination.

# Dual Liability for Contractors

- ▶ **Concern:** Dual Liability of operators and contractors
- ▶ Contractor employees' lack of training, knowledge of safety regulations or PPE
- ▶ Operator's lack of knowledge of contractors on site, where, how long, why and activities
- ▶ Failure to conduct pre-shift examinations on equipment
- ▶ Failure to communicate responsibility for examinations

# PART II – NAVIGATING THE MSHA INSPECTION

## PART II – NAVIGATING THE MSHA INSPECTION

- ▶ Information Gathering and the Role of Management During the Inspection
  - ▶ Rules to Guide the Inspection Process
  - ▶ Handling Your Notes
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- ▶ Understanding Gravity, Negligence & Unwarrantable Failure
- ▶ Impact Inspections

# MSHA Enforcement – Metal / Nonmetal

Monthly Impact Inspections – repeat offenders / poor records

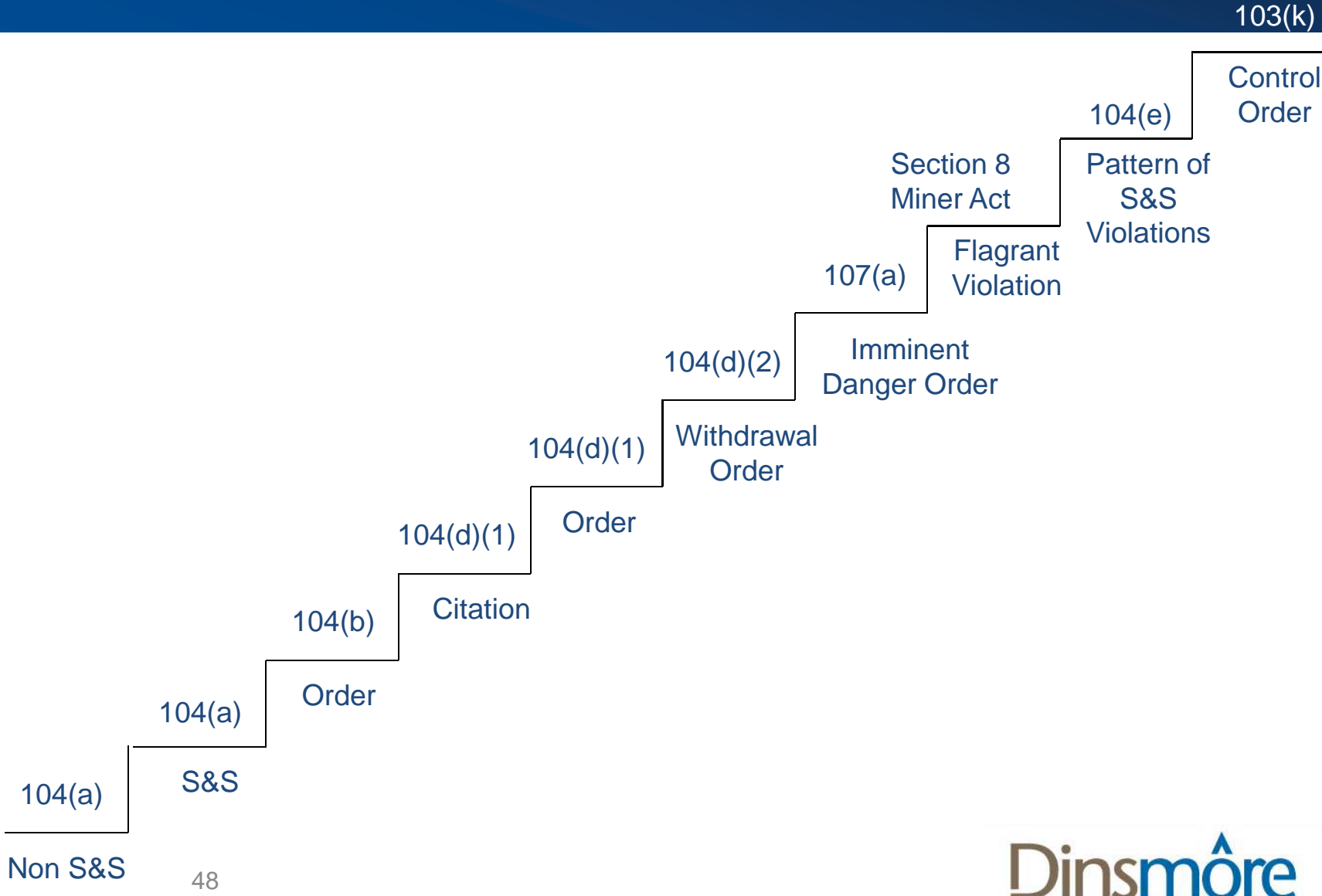
Fatal Accidents – MSHA's Prevention Initiatives

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





# Defining the Role of Management During the Inspection

- ▶ What rights do operators have?
  - ▶ Section 103(f) of the Mine Act states:
    - ▶ “...a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine...for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine.

# Defining the Role of Management During the Inspection

- ▶ The First Rule of the Walk Around: It is all about the facts.

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# Defining the Role of Management During the Inspection

- ▶ The First Rule of the Walk Around: It is all about the facts.
  - ▶ Management is the first line of defense to MSHA enforcement actions.
  - ▶ Only management can timely capture what occurred.
  - ▶ **Developing facts independent of the mine inspector is crucial** to your success in informal conferences and to our success when litigating challenges before FMSHRC.

# Defining the Role of Management During the Inspection

- ▶ The First Rule of the Walk Around: It is all about the facts.
  - ▶ You must **duplicate the inspector's activities**:
    - ▶ Take measurements
    - ▶ Take photographs (digital is best)
    - ▶ Document inspector's statements
    - ▶ Document statements of others involved in the inspection

# Defining the Role of Management During the Inspection

- ▶ The First Rule of the Walk Around: It is all about the facts.
  - ▶ Your goal should be to gather as much evidence as you can about the inspection and the conditions cited.
  - ▶ Document the facts for the safety director and legal counsel.
  - ▶ Only include facts in your notes that are relevant to the inspection.

# Defining the Role of Management During the Inspection

- ▶ The First Rule of the Walk Around: It is all about the facts.
  - ▶ **Contemporaneous documentation is crucial** because:
    - ▶ Developing facts about what actually happened is the only way to refute the inspector's position.
    - ▶ Without independent facts, the inspector's findings will be credited by the conferencing officer during an informal conference or by the ALJ at hearing.

# Defining the Role of Management During the Inspection

- ▶ The First Rule of the Walk Around: It is all about the facts.
  - ▶ Success at conference or hearing is based on what is known at the time of the inspection.
  - ▶ Arguing will only alienate the inspector.
    - ▶ Exceptions? Yes – talk about the S&S, negligence and unwarrantable failure standards, and mitigating circumstances.
    - ▶ It is vital to preserve facts to support arguments.

# Defining the Role of Management During the Inspection

- ▶ The Second Rule of the Walk Around: Handle the MSHA Inspector with Care.
  - ▶ Ensure that foremen or lead men greet the inspector on arrival.
  - ▶ Immediately secure a companion for an unaccompanied inspector
  - ▶ During every inspection, show respect. Your attitude can impact the paper issued.



# Defining the Role of Management During the Inspection

- ▶ The Second Rule of the Walk Around: Handle the MSHA Inspector with Care.
  - ▶ **Shadow** the inspector. Do not leave him or her alone.
  - ▶ **Document** the inspector's movements and all activities
  - ▶ **Time frames are vital** – record the dates and times of every event that occurs during the inspection, arrival and departure to and from all areas, travel times, and time spent there.
  - ▶ Do not assist the inspector with his job – aid in the inspection only as a guide.

# Defining the Role of Management During the Inspection

- ▶ The Second Rule of the Walk Around: Handle the MSHA Inspector with Care.
  - ▶ Do not volunteer information unnecessarily – but if asked, you must be truthful.
  - ▶ Never interfere, withhold information or lie!
  - ▶ Always listen more than you talk. But, do not be afraid to ask clarifying questions when necessary.

# Defining the Role of Management During the Inspection

- ▶ The Second Rule of the Walk Around: Handle the MSHA Inspector with Care.
  - ▶ AVOID making admissions – if you do not know the answer to a question, do not speculate or give an opinion. Offer to follow up.
  - ▶ NEVER feel compelled to explain a condition or apologize for it – it will go in his notes.
  - ▶ **What you say can be used against the company and maybe you.**

# Defining the Role of Management During the Inspection

- ▶ Management's Notes (Do's and Don't's):
  - ▶ Your notes should include facts and **NOT** personal opinions.
  - ▶ Notes are taken “**in anticipation of litigation**” and should be guarded as legal work product.
  - ▶ NEVER provide copies of your notes to inspectors without consulting legal counsel.
  - ▶ Keep track of documents provided to inspectors – centralize handling of MSHA requests.

# What to Do After the Inspection

- ▶ Plan for the prompt abatement of citations:
  - ▶ Confirm that verbal and written abatement deadlines match
  - ▶ Communicate with foremen
  - ▶ Delegate responsibility – clearly define tasks
  - ▶ Ensure that area is barricaded – equipment tagged out, conspicuously
  - ▶ Determine if the abatement deadline is reasonable – request extension if necessary

# What to Do After the Inspection

- ▶ Regularly communicate with the foremen or miners to follow-up on the progress of the abatement.
- ▶ Carefully document follow-up and progress.
- ▶ If more time is necessary, the promptly notify MSHA and seek an extension.
- ▶ Should MSHA subsequently issue a Section 104(b) failure to abate order, consider filing a Section 105 notice of contest within thirty (30) days of the date issuance of the order.

# What to Do After the Inspection

- ▶ The Commission recently held that an inspector abused his discretion when setting abatement times that resulted in the issuance of four Section 104(b) failure to abate orders. Hibbing Taconite Co., LAKE 2013-231-RM, et. al.
- ▶ The inspector required immediate corrective action, but he conceded that the operator may not have been capable of abating the cited conditions within the time allotted.

# What to Do After the Inspection

- ▶ MSHA “must set an abatement time based upon the amount of time necessary to fully abate a violation.”
- ▶ If the operator fails to comply, the inspector must determine if an extension is warranted without affecting safety or if the operator’s delay was justified.
- ▶ Then, and only then, would it be appropriate for the inspector to issue a 104(b) failure to abate order.



# What to Do After the Inspection

- ▶ Document extension requests, supporting facts and inspector's response.
- ▶ Document all corrective action, participants and resources utilized.
- ▶ Document the time period of the corrective action and its completion.
- ▶ Maintain an active dialogue through the chain of command.

# What to Do After the Inspection

- ▶ The person traveling with the inspector should be able to rely on company resources.
- ▶ Recognize and identify issues that need to be discussed with the safety or human resources departments.
- ▶ Inspection notes should be typed into a Word document and saved electronically (maintain the originals).
- ▶ Send FOIA request for inspector's notes

# What to Do After the Inspection

- ▶ Review citations with the notes taken during the inspection.
  - ▶ Note discrepancies with your notes and inspector's findings.
  - ▶ Review previous inspections (and any notes) to determine if repeated issues need addressed.
  - ▶ Decide which actions to conference within 10 days.
  - ▶ Decide early whether to involve legal counsel.

# Understanding Gravity (S&S)

- ▶ Question the inspector's knowledge about the standard that he is going to cite.
  - ▶ Is this the correct standard?
  - ▶ Does a violation actually exist? Are there any guidance documents that would help determine if a violation exists (PIL, PIB, PPM, etc.)?
  - ▶ Do you have information to share that would establish that this condition was not previously cited?

# Understanding Gravity (S&S)

- ▶ Question the inspector's understanding of a significant and substantial (S&S) violation.
  - ▶ The elements to prove an S&S violation are:
    - ▶ (1) The underlying **violation of a mandatory safety standard**;
    - ▶ (2) A **discrete safety hazard** – that is, a measure of danger to safety – contributed to by the violation;
    - ▶ (3) A **reasonable likelihood** that the **hazard contributed to will result in an injury**; and
    - ▶ (4) A reasonable likelihood that the injury in question will be of a **reasonably serious nature**.
      - ▶ Mathies Coal Co., 6 FMSHRC 1 (1984)

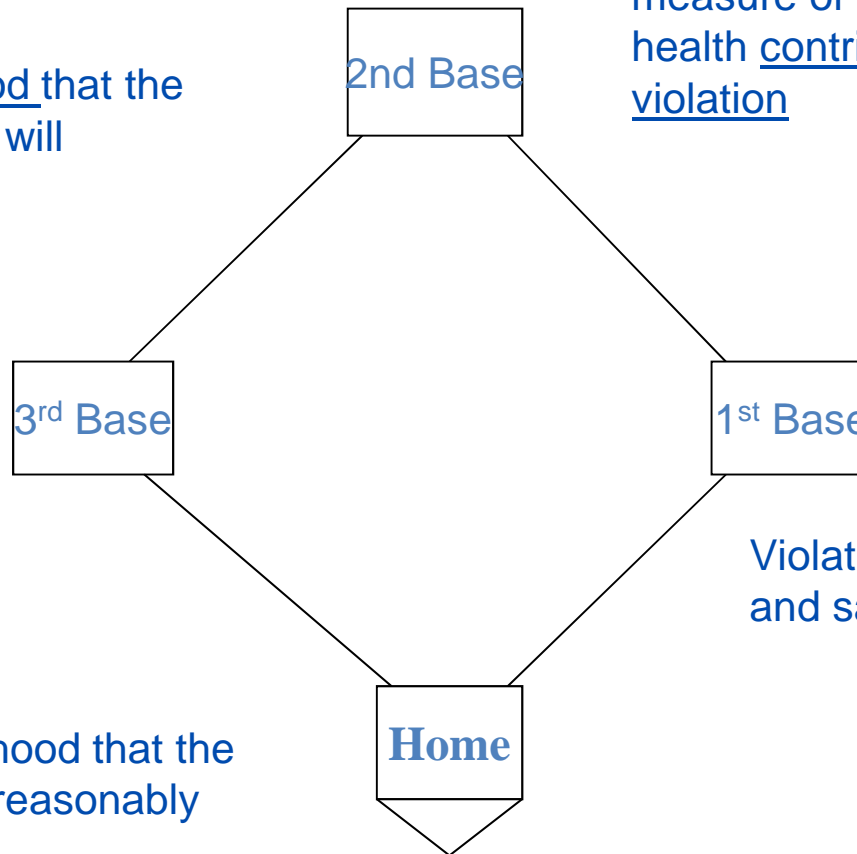
# Understanding Gravity (S&S)

**\*Most important element**

**[Cause and effect]**

A reasonable likelihood that the hazard contributed to will result in an injury

A discrete safety hazard –a measure of danger to safety and health contributed to by the violation



Reasonable likelihood that the injury will be of a reasonably serious nature

Violation of a mandatory health and safety standard

# PART II – NAVIGATING THE MSHA INSPECTION

## UNDERSTANDING “NEGLIGENCE”

# What is Negligence?

- ▶ “**Negligence**” is committed or omitted conduct which falls below a standard of care established under the Mine Act to protect persons against the risks of harm.
- ▶ Operators are required to be on the alert for hazards that can affect employee safety.
- ▶ Operators are required to take steps to prevent or correct hazards.
- ▶ The failure to do so is called negligence.



# Degrees of Negligence

Question the basis of the inspector's negligence finding:

- ▶ **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 exhibiting 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 made to prevent or correct hazardous conditions**, PRIOR TO enforcement.
- ▶ Can be found for any citation issued.

# The Importance of Mitigating Circumstances



# The Importance of Mitigating Circumstances

- ▶ Maintain detailed log of inspector visits, areas inspected or traveled, time frames.
- ▶ ALJs recently considered 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 What Questions to Ask

- ▶ Question the inspector's understanding of the levels of negligence and mitigating circumstances.
  - ▶ Identify all mitigating circumstances.
    - ▶ MSHA is not present on a daily basis and the inspector is not aware of steps taken to correct or prevent potentially hazardous conditions.
  - ▶ Inspectors tend not to focus on “mitigating circumstances.”
  - ▶ Are there “mitigating circumstances” to justify a reduction?

# PART II – NAVIGATING THE MSHA INSPECTION

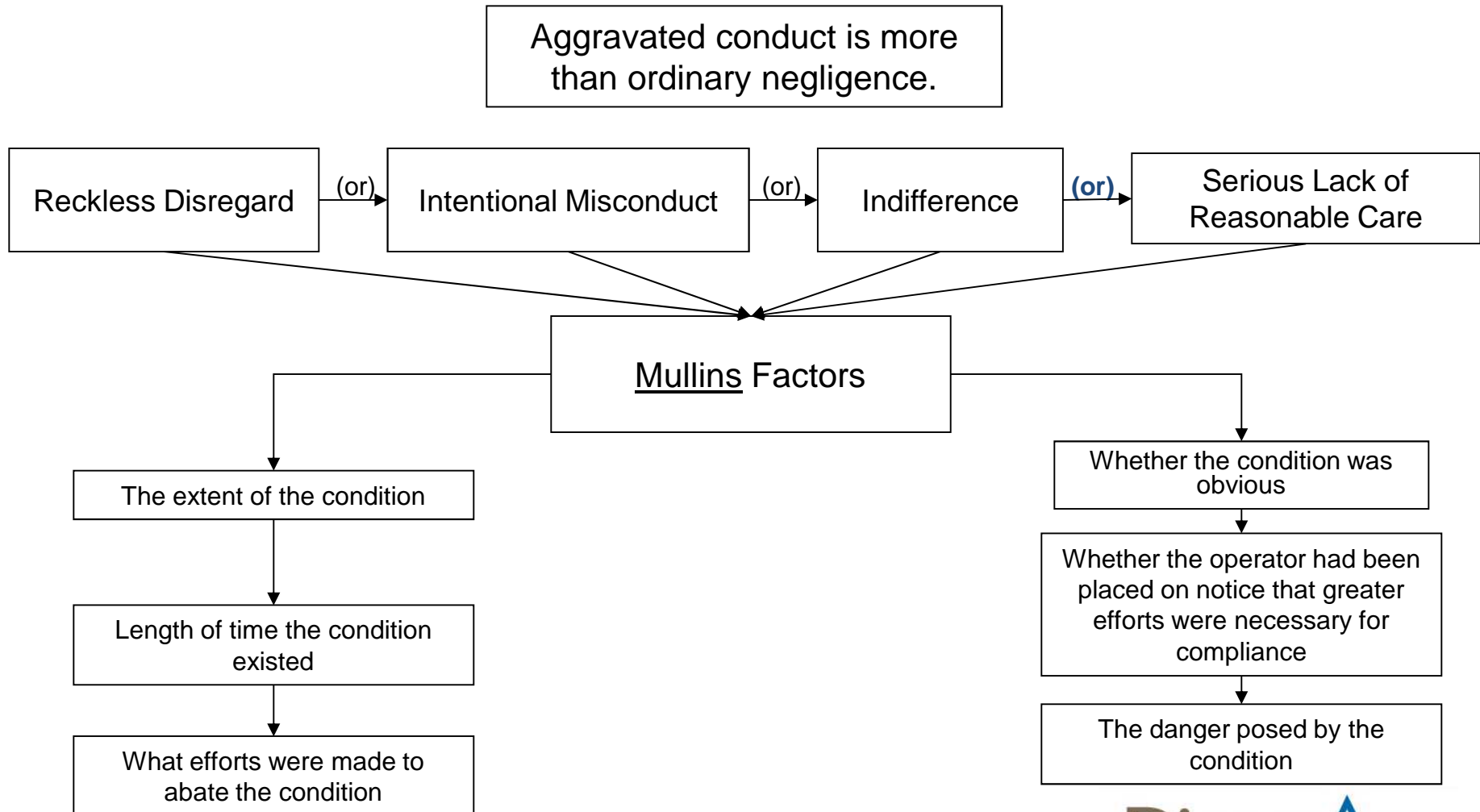
## Understanding “Unwarrantable Failure” and Its Impact

# UNWARRANTABLE FAILURE STANDARD

- ▶ 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 “negligence,” which conduct is defined as “inadvertent, thoughtless, or inattentive.”



# The Mullins Factors



# 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 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 deemed conclusive violations of the Mine Act.
    - ▶ IO Coal Company, Inc., 31 FMSHRC 1346 (2009)

# The Mullins Factors

- ▶ Whether the operator was 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 is relevant.
  - ▶ Previous repeated violations = “heightened alert.”
  - ▶ Operator’s remedial efforts to address conditions.
    - ▶ IO Coal Company, Inc., 31 FMSHRC 1346 (2009)

# The Mullins Factors

- ▶ Question the inspector's understanding of unwarrantable failure.
  - ▶ What is the danger posed by this condition?
  - ▶ What efforts were made to abate the condition?
    - ▶ Example: The guard is damaged, but the area was dangered off and every miner notified to stay away until the parts ordered have been delivered and installed.
  - ▶ Not obvious because the area is only examined weekly – have you reviewed our examination records?
  - ▶ How does this rise to the level of “aggravated conduct”?

# 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.
- ▶ Flagrant Violations
- ▶ Pattern of 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!**
- ▶ **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 - (lack of company knowledge may not be unwarrantable).
- ▶ Get written confirmation that there are no open or pending 110(c) investigations before settling UF citations/orders.
- ▶ If investigation is open, negotiate closure as part of the settlement of underlying orders.

# PART II – NAVIGATING THE MSHA INSPECTION

## IMPACT INSPECTIONS

# 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).
  - ▶ Reduce violations of most commonly cited standards and those related to fatalities; Reduce S&S rate / VPID.
  - ▶ Develop strong safety culture / training program.
  - ▶ Expect and prepare for Part 50 audit.

# Impact Inspections

- ▶ ALJ 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)
  - ▶ "Walkaround rights" were violated where foreman was not allowed to call for 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.

# Prevention of Special Investigations

**Stress the importance of proper pre-shift, on-shift, and pre-operational equipment examinations!!!**

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

# Prevention of Special Investigations



# 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 on a regular basis.
- ▶ Conduct regular compliance meetings with foremen; Accountability matters.



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. The letter "o" in "more" has a small blue triangle above it, resembling an accent mark or a stylized "o".

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