

MSHA Inspection Series – Parts I & II

MAKING THE MSHA INSPECTION PROCESS WORK FOR YOU

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AGG1 Academy
Nashville, Tennessee

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RESPONSIBLE ATTORNEY: Max L. Corley, III

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
- ▶ Section 110(c) Special Investigations



▶ Question:

- ▶ When is the best time to defend an enforcement action issued by MSHA?

▶ Answer:

- ▶ Before MSHA issues the enforcement action.

How?

Educate management to prevent violations and assist in legal challenges.

Risk comes from not knowing what you are doing.

Warren Buffett

An investment in knowledge pays the best interest.

Benjamin Franklin

PART I – Workplace Examinations

Workplace Examinations:

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

Winston S. Churchill

MSHA's Administrative Enforcement Scheme

- ▶ MSHA's enforcement scheme is set out as "Compliance Information" on MSHA's website.
- ▶ Policy directives are intended to the agency's interpret or clarify a regulation.
- ▶ They often broaden the scope of regulations.
- ▶ MSHA policy is internally created – no notice and rulemaking.

MSHA's Administrative Policy Enforcement Scheme

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

The Workplace 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.

MSHA's Administrative Enforcement Scheme

- ▶ Between 2010 and 2013, MSHA's PPL on work place examinations continued without change.
- ▶ 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.

Changes in PPL P15-IV-01-15-01 July 22, 2015, MSHA Stakeholders Meeting

- ▶ The PPL did not change the language of Sections 56/57.18002.
- ▶ However, the PPL suggests MSHA's intention to alter enforcement.
- ▶ Expect increased enforcement, special investigations and potential criminal prosecutions (DOJ memo).

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.
 - ▶ Creates duty to recognize “hazards” not defined in the regulation, the former PPL or the Mine Act.
 - ▶ Subjective term open to different interpretations.

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 working in.
 - ▶ **Hazardous Conditions = Dangerous Conditions**
 - ▶ <http://www.msha.gov/training/docs/mnm-workplace-examinations.pdf>
 - ▶ Definition not supported in regulations or Commission case law; fails to clarify exactly what must be reported.

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

- ▶ “**Known by the operator**” speaks directly to the foreman / supervisor examiners.
- ▶ Citing for inadequate examinations based solely on the inspector’s subjective observations.
- ▶ Existence of condition = Inadequate exam (?)

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

- ▶ No legal definition, so a “hazard” becomes any violation,
- ▶ Violations of the “Rules to Live By” have been equated to “hazardous conditions.”
- ▶ Inspectors can compare recent examination reports to their observations to support violations. **(CATCH – 22)**

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 of reportable conditions
 - ▶ **Concern:** Competency of examiners will be judged through inspections.
 - ▶ 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, if supported by facts and evidence.
- ▶ Operator's final recourse is to challenge arbitrary or overreaching enforcement.

FOREMAN / SUPERVISOR EXAMINERS

New Requirements 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 is contrary to MSHA’s Program Policy Manual (Volume IV Metal and Nonmetal Mines).

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

- ▶ In FMC-Wyoming, 11 FMSHRC 1622 (Sept. 1988) (supervisor conducting 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 the PPL.

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

- ▶ The agency intends the term “competent person” used in Sections 56/57.18002 to 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.”

- ▶ MSHA’s PPM does not require that a “competent person” be a foreman, supervisor or associated with mine management.

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

- ▶ Select examiners with previous abilities and experience to recognize particular issues that may be present in the working area.
- ▶ If the person lacks the ability or experience, designate another competent person.
- ▶ The PPL does not legally require a foreman or supervisor to conduct examinations.
- ▶ **The test is one of competence and not job title** – a foreman/supervisor may not be qualified.

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

- ▶ Why does MSHA recommend foreman and supervisors conduct work place examinations?
 - ▶ Foremen are “agents” of the operator and subject to potential civil liability under Section 110 of the Mine Act for “knowing” violations, and potential criminal liability for “willful” violations.
- ▶ Training foremen on their right, responsibilities, and Section 110(c) special investigations is imperative.

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

- ▶ “Competent” hourly workers may conduct examinations.
- ▶ Hourly workers are generally not operator “agents” when conducting examinations. But be aware of “lead man” status.
- ▶ MSHA’s PPM: The supervisor or manager is responsible for selecting the “competent person.”

New Requirements 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.”
- ▶ Failure to assign proper personnel to conduct examinations or to assure prompt abatement, could result in a special investigation, even if you did not conduct the examination.

SCOPE OF “WORKING PLACE”

New Requirements 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.

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

- ▶ First Issue, **MSHA's focus** will be on the **quality of examinations** as judged by the inspector.
- ▶ Consider whether or not to challenge MSHA's overreaching.
- ▶ Careful Selection, Training, and Documentation is imperative!

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

- ▶ The second issue on the scope of the examination in 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 issue during upcoming inspections.

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

- ▶ **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 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 Assistantt 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?

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

- ▶ Example in the PPL: “areas accessed primarily during periods of maintenance or clean-up” is not helpful.
- ▶ Areas accessed for maintenance or clean-up will always require examinations, irrespective of frequency .
- ▶ **Approach this language with caution** – does not limit the areas where examinations are required based on infrequent visits.

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

- ▶ Two ALJ cases addressed frequency of visits in determining if safe access was provided under Section 56.1101.
- ▶ 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 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 examinations.

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

- ▶ The PPL allows MSHA to track time period of abatement.
- ▶ Lack of follow-up examinations could be viewed as a failure to correct reported conditions “within a reasonable time”.
- ▶ 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 note progress made.

TASK TRAINING / TRAINING PLAN MODIFICATIONS

New Requirements of the PPL: (Task Training)

- ▶ PPL 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 or did not occur.”
 - ▶ “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 of the PPL: (Task Training)

- ▶ The 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).
- ▶ Operators will likely be required to modify training programs.

New Requirements 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.
- ▶ Orders likely under Section 104(g)(1) of the Mine Act for inadequate training.
- ▶ Commission case, Sun Belt Rentals, will address the “adequacy” question.

New Requirements Of The PPL: Task Training/Training Plan Revisions

- ▶ 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

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 is required to include in a work place examination record?

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

- ▶ Sections 56/57.18002(b) require examination records be **kept “for one (1) year and be made available** for review by the Secretary or his authorized representative.”
- ▶ MSHA’s Program Policy Manual, Volume IV- Metal and NonMetal Mines, Subpart Q, Safety Programs, states :
 - ▶ 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 PPM do not require reporting conditions found during examination; only the date, name, and place examined.
- ▶ MSHA's stated reason in PPL: "to facilitate correction and to alert others at the mine of conditions that may recur or in other ways affect them."
- ▶ Obligated to assure conditions are properly recorded and promptly corrected.

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

- ▶ A Commission case will examine if reports listing conditions must be produced.
- ▶ **Inside an Enigma**: The examination is judged by what is found **after** the examination.
- ▶ A “hazard” or violation will be based on the inspector’s subjective opinion.
- ▶ A proper 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 heed reoccurring conditions.
- ▶ If you have doubts, err on the side of reporting.
- ▶ Expect MSHA inspectors to seek copies of examination records to support inadequate examination citations.

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**.
- ▶ Discuss ways to prevent reoccurrence.
- ▶ Review citations and inspection notes with all employees so they understand compliance issues.

Tips on Examining Working Places

- ▶ 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 Examining Working Places

- ▶ 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.

Recording the Work Place Examination

- ▶ Expect MSHA inspectors to scrutinize examination records for a more detailed description of conditions found.
- ▶ Avoid “over-writing” conditions in the record.
- ▶ Avoid editorials, opinions, speculation, and over generalizations of conditions.

Recording the Work Place Examination (Imminent Danger)

- ▶ Sections 56/57/18002(c) states: 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 Mine Act) until the danger is abated.
- ▶ Section 3(j) of the Mine Act defines “imminent danger” as:
 - ▶ “the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.”

The Inadequate Examination Citation/Order

- ▶ Operators should carefully analyze all enforcement on inadequate examinations.
- ▶ If challenging inadequate examination citations, identify and challenge all related enforcement actions.
- ▶ Train examiners on the importance of proper documentation.

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.

The Inadequate Examination Citation/Order

- ▶ Conduct an immediate investigation of enforcement action to preserve evidence.
- ▶ Consider contesting under section 105(d) of the Mine Act, especially if issued a section 104(d) unwarrantable failure.
- ▶ Begin gathering facts, statements, and supporting documentation before a civil penalty is assessed - critical to a successful legal challenge. .

- ▶ 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?
- ▶ Be Prepared.

PART II – NAVIGATING THE MSHA INSPECTION

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- ▶ 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
- ▶ Section 110(c) Special Investigations
- ▶ MSHA's Proposed Rule on Civil Penalty Assessments

MSHA Enforcement – Metal / Nonmetal

Monthly Impact Inspections – repeat offenders / poor records

Fatal Accidents – MSHA's Prevention Initiatives

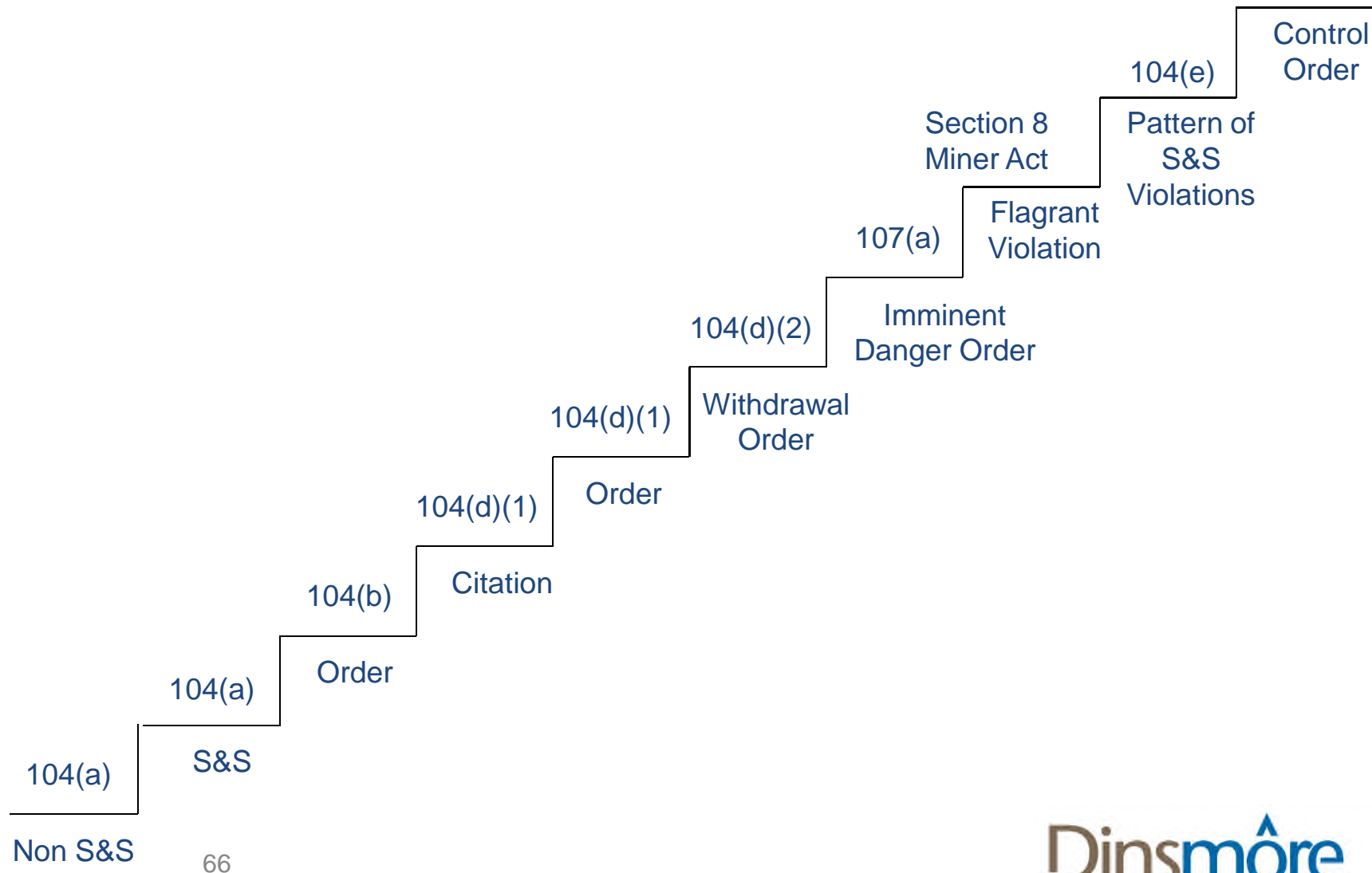
MSHA's proactive measures for operators include:

- ▶ 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

103(k)



Defining the Role of Management During the Inspection

- ▶ What is the Purpose of the MSHA Inspection?
 - ▶ This is not a friendly visit to your mine.
 - ▶ The purpose is to identify potential violations of the Federal Mine Safety and Health Act of 1977 and the regulations.
 - ▶ Enforcement actions and civil penalty assessments are designed to force compliance.

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 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 everything the inspector does**:
 - ▶ 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 serve to 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 to the inspector- 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.

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.

PART II – NAVIGATING THE MSHA INSPECTION

UNDERSTANDING GRAVITY (S&S)

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 knowledge of the gravity level he wants to cite.
 - ▶ The possibility that an injury or illness might occur (10A).
 - ▶ No Likelihood **0 Points**
 - ▶ Unlikely **10 Points**
 - ▶ Reasonably Likely **30 Points**
 - ▶ Highly Likely **40 Points**
 - ▶ Occurred **50 Points**

Understanding Gravity (S&S)

- ▶ Question the inspector's finding on the severity of an injury (10B).
 - ▶ No Lost Workdays **0 Points**
 - ▶ Lost Workdays or Restricted Duty **5 Points**
 - ▶ Any injury or illness which would cause the loss of one full day of work or more after the day of the injury or illness, OR one day or more of restricted duty.
 - ▶ Permanently Disabling **10 Points**
 - ▶ Any injury or illness likely to result in total or permanent loss of the use of any member or function of the body.
 - ▶ Fatal **20 Points**
 - ▶ Any work related injury or illness resulting in death, or which has a reasonable potential to cause death.

Understanding Gravity (S&S)

- ▶ Question the inspector's knowledge of the persons potentially affected. (10D).

Number of Persons	Points
0	0
1	1
2	2
3	4
4	6
5	8
6	10
7	12
8	14
9	16
10 or more	18

- ▶ How many miners were actually or potentially exposed?

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)

- ▶ Question the inspector's understanding a significant and substantial (S&S) violation.
 - ▶ (2) A **discrete safety hazard** – that is, a measure of danger to safety – contributed to by the violation.
 - ▶ What is the specific hazard you have identified?
 - ▶ Example: Missing guard on belt line.

Understanding Gravity (S&S)

(3) A **reasonable likelihood** that the **hazard contributed to will result in an injury.**

- ▶ Is injury reasonably likely to occur because of the hazard?
 - ▶ Example: Entanglement due to missing guard.
 - ▶ What facts support the inspector's findings that entanglement would occur? Where is the missing guard? Is it accessible? Inadvertent or intentional contact needed?
 - ▶ Remember, what is "reasonably likely" to occur and not what "could" occur.

Understanding Gravity (S&S)

(4) A reasonable likelihood that the injury in question will be of a **reasonably serious nature**.

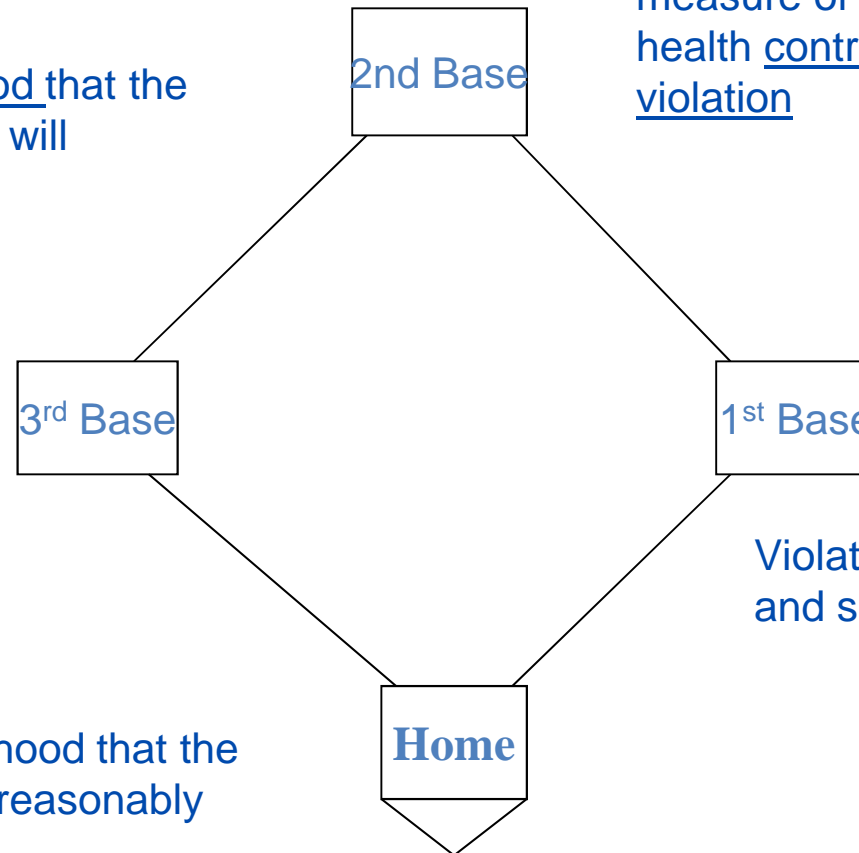
- ▶ How serious is the injury anticipated by the inspector?
- ▶ Is his opinion reasonable based on the condition cited? Why not?
- ▶ Are only minor injuries likely or possible?

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



Violation of a mandatory health and safety standard

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

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.

NEGLIGENCE – PENALTY POINTS

- ▶ Question the inspector's understanding of the levels of negligence.
 - ▶ None **0 Points**
 - ▶ Low **10 Points**
 - ▶ Moderate **20 Points**
 - ▶ High **35 Points**
 - ▶ Reckless Disregard **50 Points**

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**.
- ▶ Can be found for any citation issued.

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 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

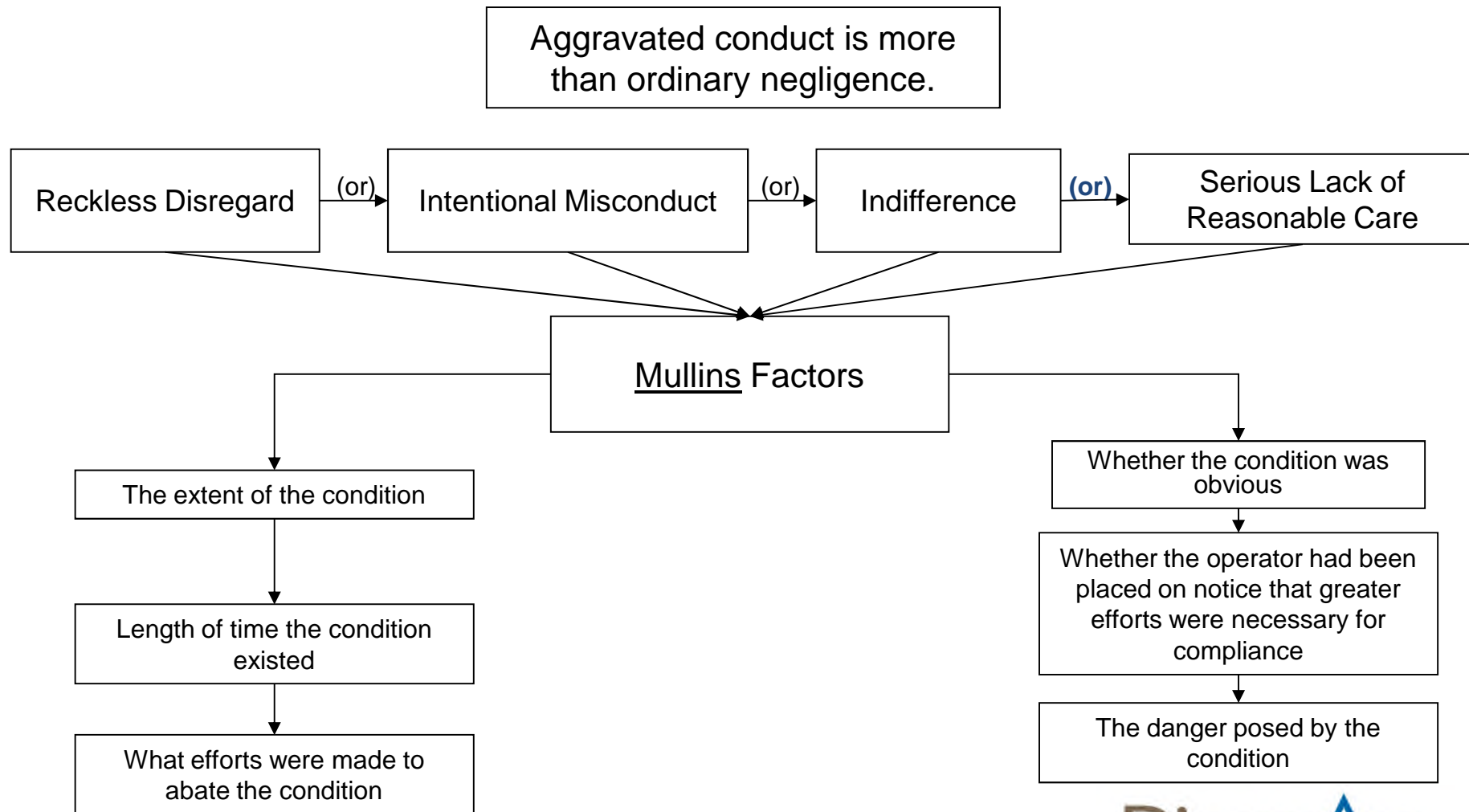
UNWARRANTABLE FAILURE STANDARD

- ▶ 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

- ▶ 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)
- ▶ 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.

The Mullins Factors



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 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.

PART II – NAVIGATING THE MSHA INSPECTION

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

- ▶ 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.

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 be at least high negligence.

SECTION 110(C) SPECIAL INVESTIGATIONS

- ▶ MSHA has authority to bring criminal prosecutions 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 a 110(c) Investigation

- ▶ According to MSHA's 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(c) 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(c) 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(c) Investigation

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

Preparing for a 110(c) Investigation

- ▶ FOIA Inspector's notes for underlying citations.
- ▶ Manage document production carefully (marking exhibits / confidentiality and privilege issues / privilege log).
- ▶ Review prior inspection notes, citations, history of violations
- ▶ Preserve records of examinations, training, safety meetings etc...

Important Things to Know about 110 (c) 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 potential target – be on guard.

Important Things to Know about 110(c) Investigations

- ▶ Important to be fully advised before deciding 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 recommended.
- ▶ All investigation interviews, except certain aspects of accident investigations, can be postponed without adverse consequences.

Important Things to Know about 110(c) Investigations

- ▶ The company may not interfere with investigations, but may insist that they not be disruptive to operations.
- ▶ 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.**
- ▶ Request an informal conference of 110(c) notices within 10 days

Important Things to Know about 110(c) Investigations

- ▶ The company is permitted to provide legal assistance to any supervisor or representative involved. Good policy.
- ▶ Request written confirmation from MSHA that no investigation is open or pending before settling any unwarrantable failure citations or orders.
- ▶ Avoid talking with co-workers about ongoing investigations or circumstances.
- ▶ Be courteous and respectful to investigators.

Prevention of Special Investigations

Strategies to avoid a special investigation:

- ▶ Training / Re-Training of Foreman / Leadmen
 - ▶ Mine Safety Regulations
 - ▶ Citation investigation / pre-assessment awareness
 - ▶ Foremen and miners' rights
- ▶ Safety policies / promoting strong safety culture.

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

- ▶ 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" has a small blue triangle above it, resembling an accent mark.