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# Workplace Examinations

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# What's Been Happening?

## Timeline of Events:

- July 22, 2015 – MSHA Issues Program Policy Letter incorporating “Task Training” and “Best Practices”
- June 8, 2016 – MSHA Issues PROPOSED RULE
- July 12, 2016 – Review Commission Sunbelt Rental decision
- January 20, 2017 – Pres. Trump Issues Executive Order – “Freezing” All New Regulations, Effective Immediately
- January 23, 2017 – MSHA Published FINAL RULE
- February 24, 2017 – MSHA Officials Announce “PAUSE” on the Final Rule
- March 17, 2017 – Petition filed in 11<sup>th</sup> Circuit challenging rule
- March 24, 2017 – We have learned effective date is now July 24th



# Overview – 30 CFR 56/57.18002

- The language of the standard as it reads today is unchanged from August 1979, when the workplace exam standard became a mandatory standard (no longer advisory)
- MSHA has determined that workplace exams are a critical element to any effective Accident Prevention Program
- Since 2000, nearly 14,000 citations/orders issued to M/NM operators related to WORKPLACE EXAMS, including more than 80 issued for fatal and non-fatal accidents
- MSHA's concerns over inadequate Workplace Exams leads to the issuance of a new Program Policy Letter on July 22, 2015, which effectively added heightened TRAINING requirements for the "COMPETENT PERSON"



# OVERVIEW – 30 CFR 56/57.18002 (cont'd)

- PPL applies to all surface and underground, metal/nonmetal mine operators, including independent contractors, equipment manufacturers, miners and miner's reps.
- PPL targets TASK TRAINING miners on workplace exams
- PPL adds that if multiple safety hazards are not identified by the examiner, this may indicate INADEQUATE OR ABSENT TASK TRAINING (OR TRAINING PLAN) under 46.7, 46.3(a) and (b)(3) or 48.3(c)(8)/48.23(c)(8)
  - This can lead to double (or triple) dipping on citation issuance!
- Part 46 task training is also one of MSHA's "Rules to Live By" and can result in special assessments = higher penalties!
- Part 46 and Part 48 violations for missing training result in Sec. 104(g) orders, withdrawing miner until training is complete
  - Sec. 104(g) orders are also an elevated action for Pattern of Violations (POV) purposes



# Current Duty under 56/57.18002

- 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 corrective action to correct.
  - The examiner – even if hourly employee - will be considered an “agent of management” for Sec. 110(c) purposes – *Nelson Quarries* case
- A **RECORD** that examinations were conducted shall be kept for a year and made available for review by MSHA upon request.
- Conditions which may present an **IMMINENT DANGER** which are noted by the examiner shall be brought to the immediate attention of the operator, who shall withdraw all persons from the affected area until the danger is abated.
  - Persons who are involved with abatement, under Sec. 104(c) of Mine Act, are permitted within the area



# “Competent Person”

- Defined in 30 CFR 56/57.2 as “**a person having abilities and experience that fully qualify him to perform the duty to which he is assigned**”
- MSHA Policy adds: “Examiner should be able to recognize hazards and adverse conditions that are known by the operator to be present in a work area or that are predictable to someone familiar with the mining industry.”
- MSHA “Best Practice”: For a foreman or supervisor to conduct the exam; an experienced non-supervisory miner may also be “competent” but inexperienced miners should not conduct the workplace exam.



# “Working Place”

- Defined in 30 CFR 56/57.2 as: “Any place in or about a mine where work is being performed”
- As used in 56/57.18002, MSHA applies the phrase to all locations at a mine site where miners work in the extraction or milling processes.
- This includes area where work is infrequently performed, such as areas accessed during maintenance periods or clean-up.
- ALL such working places must be examined by a competent person at least once per shift.



# “Imminent Danger”

## *107(a) Imminent Danger*

- *"Imminent danger" is defined in the Act as*

*"the existence of any condition or practice in a mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." The two important elements of an imminent danger are:*

- *the existence of a condition or practice which could reasonably be expected to cause death or serious physical harm; and*
- *the imminence of the danger is such that it may cause death or physical harm before it can be abated.*

THIS IS FROM MSHA's Program Policy Manual...





# When does the Exam Need to Occur Under Current Reg?

- MSHA's current requirement is to perform the Workplace Exam **“At Least Once Each Shift”**
- **Currently there is no start time requirement**
- BUT – even though the exam could be performed at any time during a shift, does it make sense for your operation to perform the exam BEFORE any work begins in that “working place”?
- Does that translate to a procedure to perform the exam at the BEGINNING of each shift?



# What needs to be inspected???

- Will be unique to each mine, but should cover:
  - Highwalls and ground conditions (also a separate duty under standard at 30 CFR 56/57.3401)
  - Roadways
  - Dump points
  - Ramps
  - Screens, crushers and conveyors
  - Control towers, MCC and scale house
  - Shops
  - Any other areas where workers work or travel (travelways, walkways, floors with tripping hazards)
  - Any other hazardous conditions



# Ground Control Inspections

- 30 CFR 56/57.3401

## §57.3401 Examination of ground conditions.

“Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Underground haulageways and travelways and surface area highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant.”



# What Needs to be Documented???

- THREE THINGS:
  - THE EXAMINER'S INITIALS OR NAME
  - THE DATE
  - THE PLACES EXAMINED



# Workplace Exam Documents

- The Standard simply requires that there be A RECORD that the exam was conducted, and that the record be KEPT FOR A YEAR. Currently no specific content requirement.
- But if you DO provide detail on hazards found, know that detailed information on similar hazardous conditions may inadvertently document ONGOING VIOLATION & FAILURE TO ABATE the previously identified hazardous conditions.
- This can lead to issuance of Sec. 104(d) citations (up to \$250,433) and possible personal Sec. 110(c) penalties (up to about \$70,000) against the examiner and any other “agent of management” who had KNOWLEDGE of the alleged violative condition and failed to promptly implement corrective action!



# If Hazards are Found – Fix and Barricade!

- Barricades & Warnings – 56/57.20011 – The standard states that:
- “Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, and display the nature of the hazard and any protective action required.”
- Don’t get caught without needed barricades or warning signs!
- BUT -- Extended use of barricades or “caution” tape may be viewed by MSHA as allowing condition to exist without abatement = knowledge = aggravated conduct!
- Barricades are a RTLB (Rules To Live By) – allows more aggressive enforcement efforts



# MSHA's Program Policy Manual (PPM) on Workplace Exams

- MSHA's Program Policy Manual (PPM) states:

“Although presence of hazards covered by other standards may indicate failure to comply with this standard, MSHA does not intend to cite 56/57.18002 automatically when the agency finds an imminent danger or a violation of another standard.”
- PPM had allowed the operator to discard records after MSHA completes its next regular inspection of the mine, IF the operator also certifies that the examinations have been made for the preceding 12 months (person certifying is subject to criminal prosecution if false certification). **NO LONGER!**
- MSHA now requires the operator to maintain records for a period of ONE YEAR, and made available to the inspector



# Program Policy Manual...

- “MSHA intends to allow operators considerable flexibility in complying with this provision [examination records] in order to minimize the paperwork burden. Records of examinations may be entered on this computer data-bases or documents already in use, such as production sheets, logs, charts, time cards, or other format that is more convenient for mine operators.”
- ***BEWARE: Using multi-purpose forms for exam records gives MSHA a LOT more information than it is entitled to under the standard ... information that can be used against you in a court of law!***
- [Access the MSHA Program Policy Manual:  
http://arlweb.msha.gov/REGS/COMPLIAN/PPM/PDFVersion/PPM%20Vol%20IV.pdf](http://arlweb.msha.gov/REGS/COMPLIAN/PPM/PDFVersion/PPM%20Vol%20IV.pdf)





# MSHA Program Policy Letter (PPL) P15-IV-01 - July 22, 2015

- PURPOSE of PPL: To clarify the EXISTING REQUIREMENTS in the standard -- that examination of working places includes:
  - that the operator examine each working place at least once each shift for conditions which adversely affect safety or health (NOTHING NEW), and
  - that the examination be conducted by a competent person, and (NOTHING NEW),
  - that a record of the exam be maintained and made available to MSHA – records must be retained for rolling 12-month period (NOTHING NEW),

***BUT THE PPL ALSO . . .***



# MSHA PPL also adds...

BUT NOW - MSHA NOW INTRODUCES THE IDEA THAT

- TASK TRAINING of competent person MAY BE INADEQUATE, if multiple safety hazards are not identified during exams...
- TRAINING PLAN MAY BE INADEQUATE, if multiple safety hazards are not identified during exams...
- The examiner must be a TRAINED, competent person
- Miner's Task Training must now include training on how to perform workplace examinations, or risk citation
- The operator's TRAINING PLAN must detail how the task training will be conducted, or risk citation



# MSHA PPL also says...

- BEST PRACTICES SUGGESTED IN THE PPL:
  - Assign Foreman or Supervisor to conduct exams
  - Document a description of any condition found by the examiner “that may affect safety or health” in the exam record, and
  - ALERT OTHERS at the mine of conditions found by the examiner that may reoccur or otherwise affect other miners...



# Recordkeeping: MSHA PPL

- MSHA takes position that a “meaningful” record should contain the following:
  - (1) the date the examination was made;
  - (2) the examiner’s name; and
  - (3) the working places examined
- MSHA adds: it is a BEST PRACTICE to also 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.
- EVIDENCE that a previous exam was not conducted or that corrective action was not promptly initiated constitutes a violation of 56/57.18002(a) – EVIDENCE may include information which demonstrates that safety or health hazards existed prior to the shift on which they were found.



# PROPOSED RULE ISSUED ON JUNE 6, 2016

- WHAT THE PROPOSED RULE WOULD HAVE REQUIRED:
  - “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 adversely affect safety or health.” (NEW)
  - Definitions of “competent person” and “working place” remain same per 56/57.2 (current)
  - Examination of each working place at least once each shift (current) but before miners begin work in an area (NEW)
  - The Operator must promptly notify miners of any adverse conditions found (NEW)
  - The examiner/competent person must sign and date the examination record before the end of the shift (signing NEW)
  - The examination record must include a description of any adverse conditions found (NEW)



# Proposed Rule (cont.) . . .

- The examination record must include a description of the action taken to correct the adverse condition, (new)
- The date the corrective action was taken, (new)
- The name of the person who documented the corrective action and date (and MSHA expects that person to be the person taking the corrective action) (new)
- The examination record must be made available to miners and their representatives (new)
- The examination record must be made available to the Secretary upon request (current)
- The examination record must include locations examined and date (current)
- Withdrawal of miners if an imminent danger is found and notification of Operator (current)
- Examination record maintained for a period of 1 year (current)



# MSHA's Rationale for Rule

- MSHA states that mine operations are dynamic and conditions can change rapidly and without warning
- Prevention against hazards is the primary responsibility of mine operators with the assistance of miners (The Mine Act)
- Compliance with safety and health standards *and* adoption of safe work practices provides a substantial measure of protection against hazards
- MSHA has determined that effective accident prevention includes an effective examination of working places – ineffective examinations have resulted in more accidents
- MSHA states that violations of Rules To Live By standards were cited in the majority of recent fatalities, and that the communication requirement will prevent accidents



# **SUNBELT RENTALS - Review** **Commission Decision – July 12, 2016**

## **THE BACKGROUND:**

- MSHA issued citations to Sunbelt Rentals, Inc. and several of its contractors, for violations of 56.18002(a); contests were filed;
- The Secretary of Labor argued that the Workplace Exam standard required the operator to perform an ADEQUATE EXAMINATION;
- Judge McCarthy held that the plain language of 56.18002(a) DOES NOT INCLUDE AN 'ADEQUACY' REQUIREMENT ... if MSHA wants to impose an adequacy requirement, MSHA may revise the standard to give the industry fair notice.
  - *Secretary of Labor v. Sunbelt Rentals, Inc. LVR, Inc., and Roanoke Cement Co., LLC* (ALJ McCarthy, 2013)





# The Review Commission Vacated the Judge's Decision

- The Secretary of Labor/MSHA appealed the Judge's decision finding NO adequacy requirement
- On July 12, 2016, the Review Commission vacated Judge McCarthy's decision, and
- Commission held the examination MUST BE "ADEQUATE"
- "ADEQUATE" in the sense that it identifies conditions which may adversely affect safety and health ...
- . . . that a REASONABLY PRUDENT COMPETENT EXAMINER would identify during the examination
- A Reasonably Prudent Person ... should be able to recognize a hazard warranting corrective action
- "ADEQUATE" found to be a consistent concept in Commission case law, and "repeatedly applied to broadly worded standards



# Impact of Sunbelt Rentals??

- The Sunbelt Rentals decision broadened the scope of the examination – **NOW THE EXAMINATION MUST BE “ADEQUATE”**
- The 56/57.18002 current rule and previous case law did not require a level of quality or even thoroughness for the examination
- The Commission held that multiple operators (contractors) can be cited for failing to perform adequate working place examinations or the same violation – dual citation theory
- The Commission dismissed Sunbelt’s “fair notice” arguments (that it did not have fair notice that it could be cited for an “inadequate” examination) holding that Sunbelt had fair notice through the longstanding “reasonably prudent person” test, and that specific prohibitions and requirements of the standard would be recognized by a reasonably prudent person.



# What is the Reasonably Prudent Person Test??

- Sunbelt Rentals decision restated the Reasonably Prudent Person Test:
  - “An alleged violation is appropriately measured against whether a reasonably prudent person,
    - ...familiar with the factual circumstances surrounding the allegedly hazardous condition,
    - ... including any facts particular to the mining industry,
    - ...would recognize a hazard warranting correction within the purview of the applicable standard.”



# “Double-dipping” enforcement

- “The fact that five citations were issued citing visible safety problems is too slender a reed on which to hang a violation of 56.18002(a)” *Dumbarton Quarry Ass’n v. Secretary of Labor*, 21 FMSHRC 1132 (ALJ Manning 1999)
- Standard is violated only if examinations are not being conducted or corrective action is not being taken as neither the regulation nor the PPM mentions “adequacy” in the language. *Secretary of Labor v. Lopke Quarries, Inc.*, 22 FMSHRC 899 (ALJ Hodgdon 2000)
- Unwarrantable failure litigated based on inadequate workplace exam, based on “failure to report obvious hazards” and history of similar housekeeping, safe access, and electrical violations in past. Judge vacated citation, but cautioned “there may be situations in which a hazard or danger is so patently obvious and so egregious that the failure to report it is tantamount to a failure to conduct an on-shift examination and [could justify a citation].” *Secretary of Labor v. Cemex*, 32 FMSHRC1897 (ALJ Rae 2010)



# FINAL RULE WAS ISSUED ON JANUARY 23, 2017

- THIS RULE HAS BEEN “PAUSED” AND “PULLED BACK” BY THE TRUMP ADMINISTRATION AND THE CONGRESS (Regulatory Freeze Directive issued 1/20/17)
- THE EFFECTIVE DATE IS LISTED AS MAY 23, 2017, now JULY 24, 2017
- The stakeholder outreach meetings set to begin in March have been rescheduled to an undetermined future date
- But understanding its requirements is prudent, as MSHA has taken steps since 2015 to enhance the duties and requirements for workplace exams, and in light of the Sunbelt Rentals decision.



# FINAL RULE WAS MODIFIED ...

- MODIFIED from the PROPOSED RULE, LESS AGGRESSIVE
- HERE'S THE FINAL RULE (with NEW duties underlined):

## **§56.18002 Examination of working places.**

- “(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 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.



# FINAL RULE (Cont'd) . . .

- (b) A record of each examination shall be made before the end of the shift for which the examination was conducted. The record shall contain the name of the person conducting the examination; date of the examination; location of all areas examined; and description of each condition found that may adversely affect the safety or health of miners.
- (c) When a condition that may adversely affect safety or health is corrected, the examination record shall include, or be supplemented to include, the date of the corrective action.
- (d) The operator shall maintain the examination records for at least one year, make the records available for inspection by authorized representatives of the Secretary and the representatives of miners, and provide these representatives a copy on request.”



# FINAL RULE – NEW DUTIES

- Competent Person is Still looking for -  
“CONDITIONS THAT ADVERSELY AFFECT SAFETY OR HEALTH”  
BUT THE NEW REQUIREMENTS WOULD INCLUDE:
- Identify Hazards BEFORE WORK BEGINS
- Operator Must COMMUNICATE Hazards to Miners
- Record Made BEFORE THE END OF THE SHIFT
- Record Must INCLUDE A DESCRIPTION of Each Condition Found During the Examination
- Record Must Include the DATE OF THE CORRECTIVE ACTION





# Part 46 Task Training – RTLB

- “You must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned, including the safe work procedures of such task, information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program. This training must be provided before the miner performs the new task.” 46.7(a)
- Training given by competent person designated by operator (not MSHA certified)
- Inspectors trained to observe the work habits and operation of miners for any abnormal activities, and to ensure equipment inspectors and workplace examiners are trained and competent.
  - **Part 46 Toolkit specifically lists “inspector/preshifter” among list of tasks covered!!!**



# MSHA Guidelines for Effective Task Training

Employees have received task training in new tasks:

- The mine has established an adequate task training program
- Task training is performed on all machines and job duties
- Adequate task training records are completed for all task training
- Task training is performed on all maintenance activities
- Task training is provided when there is a change to the equipment, process or condition



# MSHA Guidelines for effective task training (continued)

All tasks have been assessed utilizing:

- Equipment or job checklists, job safety analysis, or safe job procedures
- Operator's manuals checked to determine specific hazards related to equipment
- Established communication procedures for task trainers
- Adequate task list in the training plan
- Action plan to address any changes to equipment, process or condition



# MSHA Guidelines for effective task training (continued)

- Evaluate miners' skills needed to perform tasks safely:
  - Allow adequate time for task training
  - Ensure miner's ability to demonstrate knowledge of company and MSHA procedures applicable to task
  - Task train in non-production setting and in production mode
  - Be sure to cover hazard communication and review SDSs for chemical products
  - Ensure knowledge of required maintenance and service of equipment
  - Cover pre/post op checks of equipment
  - Train on how and where to report problems and malfunctions
  - Have trainee demonstrate safe operating procedures and start up/shut down of equipment
  - Include proper procedure to address any change to the equipment, process or condition



# Task Trainer Tips

- Establish guidelines for trainers (and remember they are “agents of management” in MSHA’s eyes, targets for possible 110c investigation)
- Utilize checklists, JSA, manuals and SOPs
- Task trainers **MUST** have been trained themselves and have the necessary skills to perform adequate and efficient task training
- Task trainers should provide the same training on all equipment and job duties
- Evaluation procedures are critical to determine that all health and safety aspects of tasks are addressed in a correct and consistent manner
- Trainer should conduct follow up evaluation of task training and implement any training necessary to address changes to equipment, process or condition



# Part 46 Task Training Fun Facts

- Part 46 does not specify a duration for task training, and allows needs of individual miners to be taken into account for particular aspects of TT ... but a reasonable amount of time must be allotted for training in each task, based on individual needs, complexity of the assigned task
- Task training can be included as part of initial New Miner Training (as part of “instruction on the health & safety aspects of the tasks to be assigned”)
- If equipment operator is trained on one brand of equipment, or particular model, and is assigned to operate a similar piece of equipment by a different manufacturer/model, new task training must be provided and documented
- Training plan must list covered tasks, description of teaching methods and course materials, approximate time range to be spent on each subject area, and description of evaluation procedures to determine effectiveness of training
- Time spent on training must be listed on training certificate for each type of training



# Workplace Examination Take-aways:

- MSHA Program Policy Letter P15-IV-01 (July 22, 2015) is in effect now, and does not require documenting the safety hazards discovered during a WPE, but suggests it is “best practice” to document a description of the hazards, and to “alert others” at the mine of these safety hazards;
- MSHA PPL alerts mine operators that TASK TRAINING violations will be scrutinized, and citations or orders may be issued for failing to adequately task train your examiner/competent person, or for an INADEQUATE TRAINING PLAN;
- Sunbelt Rental Review Commission decision requires an ADEQUATE exam; applies “reasonably prudent person test”
- FINAL RULE expands the current examination requirements;
- Keep your eyes on the FINAL RULE – scheduled effective date is July 24, 2017, but is currently on hold, BUT - be ready if the new regulation moves forward!



# QUESTIONS???

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