



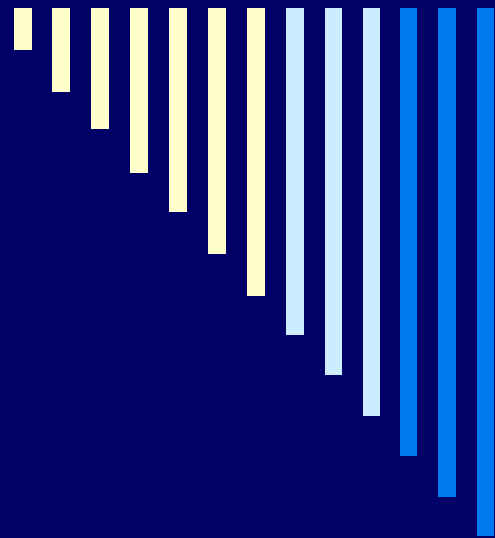
MSHA 101: What Do You Mean I'm a Miner?

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MSHA Jurisdiction

- ❑ Mine Safety & Health Administration (MSHA) has broad discretion to claim jurisdiction over “coal and other mines,” as well as facilities related to mining or where “mineral milling” occurs.
 - ❑ Examples of “non-traditional mines” –
 - ❑ Cement plants
 - ❑ Alumina processing
 - ❑ Steel pellet production
 - ❑ Maintenance shops where mining equipment is prepared
 - ❑ Coal fired energy plants (sometimes)
 - ❑ Asphalt hot mix batch plants (sometimes)
 - ❑ Ready-mix concrete manufacturing (sometimes)
 - ❑ Carbon manufacturing (sometimes)
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Coal Loading Facilities And Preparation Plants

- [Sections 3\(h\)\(2\)](#) and [3\(i\)](#) of the Act address coal loading facilities over which MSHA asserts jurisdiction. These facilities will be examined to determine the nature and purpose of the work that takes place there. If the facility prepares coal according to any specifications for benefit of either the operator or the consumer, MSHA will inspect the facility. MSHA will not inspect facilities where coal is prepared solely to facilitate loading and not to meet specifications or to render the coal for any particular use. Local OSHA authorities should be informed by MSHA district personnel of any determination to terminate jurisdiction over a loading facility.
- [Section 3\(i\) of the Act](#) addresses jurisdiction over private or custom preparation plants and other related surface coal facilities not directly associated with a single mine or group of mines.



Interagency Memorandum Of Understanding

- MSHA and OSHA have entered into an agreement to delineate certain areas of inspection responsibility, and to provide for coordination between the two agencies in areas of mutual interest.
- MSHA has jurisdiction over operations whose purpose is to extract or to produce a mineral.
- MSHA does not have jurisdiction where a mineral is extracted incidental to the primary purpose of the activity. Operations not functioning for the purpose of producing a mineral include, but are not limited to, the following:
 - key cuts in dam construction (not on mining property or used in mining); public road and highway cuts; tunnels; railroad, highway, water diversion, etc.; and storage areas, gas, petroleum reserves, high and low level radioactive waste.
 - The question of jurisdiction in these and similar types of operations is contingent on the purpose and intent for which the facility is being developed.



Who Is A “Miner”

- “Any individual working at a coal or other mine” (Mine Act)
- Part 46 definition for training purposes:

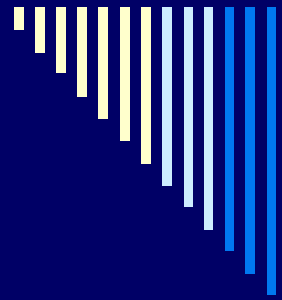
“A miner is a person, including any operator or supervisor, who works at a mine and who is engaged in mining operations. This definition includes independent contractors and employees of independent contractors who are engaged in mining operations; and construction workers who are exposed to hazards of mining operations for frequent or extended periods.

 - The definition of "miner" does not include scientific workers; delivery workers; customers (including commercial over-the-road truck drivers); vendors; or visitors.
 - Non-miners providing services at mine sites are still required to have Site-specific Hazard Awareness Training.
 - This definition of "miner" also does not include maintenance or service workers who do not work at a mine site for frequent or extended periods.
 - "Frequent" exposure is defined as a pattern of exposure to hazards at mining operations occurring intermittently and repeatedly over time. "Extended" exposure means exposure to hazards at mining operations of more than five consecutive work days.



Who Is a “Mine Operator”

- “Any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine “ (Mine Act)
 - MSHA Policy states:
 - [Section 3\(d\) of the Act](#) expands the definition of "operator" to include independent contractors. Regulations governing independent contractors are found in Part 45 of Title 30 CFR. MSHA policy regarding independent contractors is set forth in this Manual in Volume III, Parts 45 and 50.
 - [Section 3\(h\)\(1\) of the Act](#) defines the term "mine" and includes related milling operations within that definition. Mine development, rehabilitation activities, and exploration work at an established mine are within the Act's scope. All types of mining, including placer, dredge, and hydraulic operations must be inspected. Government owned or operated mines and mills, whether federal, state, county, or other, are included within the jurisdiction of the Act. All such operations located anywhere in the United States, as well as in any of its territories, protectorates, or commonwealths, must be inspected.
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Mining Operations

- For training purposes, and exposure to hazards, mining operations are defined as:
 - Mine development, drilling, blasting, extraction, milling, crushing, screening, or sizing of minerals at a mine;
 - Maintenance and repair of mining equipment; and
 - Associated haulage of materials within the mine from these activities.



Twentymile Coal Decision

- MSHA has “*unreviewable discretion*” to cite the production operator, contractor or both ... July 2006 (US Ct. of Appeals, DC Circuit)
 - Disturbing trend: Holding contractor responsible for unsafe mine conditions that they do not control or abate
 - Blasters held responsible for loose material on highwall
 - Third-party engineers held responsible (civil, possible criminal) for retreat mining method that caused fatalities at Crandall Canyon
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Distinctions Between MSHA and OSHA

MSHA --

- ❑ Warrantless searches
- ❑ Strict liability
- ❑ Mandatory inspections
- ❑ Mandatory penalties up to \$242,000 per citation
- ❑ Personal prosecutions (civil and criminal) even where no injury – fines up to \$70,000
- ❑ Corporate criminal penalties of up to \$250,000
- ❑ Pattern of violations can shut down all or part of mine for repeated violation pattern
- ❑ Whistleblower 105C cases – private right of action and MSHA fines

OSHA –

- ❑ Can require warrant to enter
- ❑ Affirmative defenses available to fact of violation
- ❑ No mandatory inspections (types are programmed and event-driven)
- ❑ No minimum penalty; maximum is \$70,000 per citation
- ❑ No personal civil prosecution; criminal only if willful violation resulting in fatality
- ❑ Whistleblower 11C cases – no private right of action but can seek punitive damages in US District Court



Statutory and Regulatory Requirements

- Mine Act of 1977
 - MINER Act of 2006
 - Pending S-MINER Act
 - Regulations – 30 CFR Parts 1-104
 - HazCom: Part 47
 - Training: Parts 46 and 48
 - Noise: Part 62
 - Recordkeeping: Part 50
 - Contractor Requirements: Part 45
 - Civil Penalties: Part 100
 - Pattern of Violations: Part 104
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Regulatory Requirements

- Mine Rescue Teams: Part 49
 - Metal/nonmetal:
 - Surface: Part 56
 - Underground: Part 57
 - Abrasive Blasting and Drill Dust: Part 58
 - Coal:
 - Surface Health: Part 71
 - Surface Safety: Part 77
 - Both (Health): Part 72
 - Underground Health: Part 70
 - Underground Safety: Part 75
-



What Does MSHA Do?

- ❑ Writes standards (subject to APA)
 - ❑ Develops policy and guidance
 - ❑ Provides consultation and training
 - ❑ Inspects (twice/yr surface, four times/yr in underground mines)
 - ❑ Proposes civil penalties
 - ❑ Makes criminal referrals to DOJ (included in 2016 DOL/DOJ MOU)
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MSHA Statutory Framework

Federal Mine Safety and Health Act of 1977

The Act provides for promulgation of safety and health standards and of other regulations needed to carry out the Act.

Title 30 - Code of Federal Regulations (30 CFR)

The safety and health standards and other regulations enforced by MSHA are contained in 30 CFR.

MSHA Enforcement

MSHA enforces the Act and 30 CFR and issues citations and orders.

Operators and Miners Appeal

Operators, miners, or their representatives have the right to appeal citations and orders (Sections 105(a) and 105(d) of the Mine Act).

Administrative Law Judges (ALJ)

Hearings are conducted by ALJs who are part of the Federal Mine Safety and Health Commission.

Federal Mine Safety & Health Review Commission (Five members appointed by the President)

ALJ decisions can be appealed to the Commission.

Federal Appeals Court

Commission decisions can be appealed to a Federal court. (U.S. Circuit Court of Appeals.)



Voluntary Consensus Standards

- MSHA incorporates these by reference and they are considered “binding”
 - Common VCS include:
 - ACGIH (air contaminant standards)
 - ANSI (equipment specs)
 - SAE (automotive specs)
 - ASME (equipment, boilers, pressure vessels)
 - ASTM (equipment specs)
 - NFPA (fire codes)
 - IME (blasting and explosives)



When Is A Citation Valid

- ❑ MSHA must have jurisdiction (broad deference)
 - ❑ Standard must apply to the cited employer
 - ❑ Standard's requirements were not met
 - ❑ MSHA makes gravity findings (how serious/ how likely)
 - ❑ MSHA makes negligence findings (what did you know and when)
 - ❑ MSHA has initial burden of proof
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MSHA Recordkeeping Requirements

- Requirements originate in the Mine Act (training, hours, illness/injury reports)
- Operators must report “Accidents” (30 CFR 50.2(h)) within 15 minutes or face mandatory \$5,000 minimum penalty.
- Mine operators and contractors must maintain injury/illness records and submit to MSHA (7000-1 forms) within 10 days of event/report
- Mine operators and contractors must report hours worked (7000-2 forms) quarterly



MSHA Recordkeeping

- Mine operators and contractors must keep Part 46/48 training records and have written training plan (Part 48 plans must be approved by MSHA District Office in advance)
 - Contractors can use Part 48 training at Part 46 regulated sites, but not visa versa
- Other required records include –
 - Equipment defects -- Workplace examinations
 - Hoist/crane records -- Electrical examinations
 - Hearing Conservation Plans
 - Hazard Communication Program

MUST MAKE RECORDS AVAILABLE TO MSHA



MSHA Recordkeeping

- ❑ Falsification of records, reports or any documents or information given to MSHA is a felony criminal offense
 - ❑ Destruction of records after investigation commences may be “obstruction of justice” and/or a violation of Section 103 of the Mine Act.
 - Can trigger \$242,000 civil penalty and impeding an inspection can result in injunction from US District Court
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Criminal Proceedings

- ❑ Criminal referrals are on the rise
 - ❑ U.S. Department of Justice handles, not MSHA (MSHA makes initial referral)
 - ❑ States' attorneys may also file charges arising from workplace injuries and deaths
 - ❑ Corporations are fined, individuals go to prison!
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Criminal Prosecution

- Mine Act has statutory provisions for criminal penalties (Section 110)
 - Section 110F – Class E felony for falsification of records or false statements. This imposes up to 5 years in prison and criminal fine of up to \$250,000
 - Section 110D – Class A misdemeanor for willful or knowing violations of MSHA rules or orders. This imposes prison sentence of up to 1 year, and a \$250,000 fine (\$500,000 for second offense, with an “upgrade” to a Class E felony).
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Criminal Prosecution

- 18 USC 3331-4120 also can be triggered in obstruction/conspiracy cases
 - Increases fines against individuals to \$250,000 per violation
 - Additional corporate fines of up to \$500,000 per violation.
 - BUT does not impact terms of imprisonment under Mine Act – government can impose penalties under BOTH statutes!
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Criminal Prosecutions

- ❑ If you decide to give a statement, you have the right to counsel.
 - ❑ Nothing is ever “off the record” with MSHA!
 - ❑ Special investigations triggered by 104(d) citations/orders, 107(a) orders, 104(g) orders that are “high” or “reckless disregard” negligence classification.
 - ❑ Every citation subject to special investigation is reviewed for criminal referral to US DOJ
-



Criminal Prosecutions: Why me?

- Admissions by corporate agents, officers or directors
 - Review of mandatory records reveals falsified paperwork
 - False statements given to MSHA investigators or inspectors
 - Government holds public hearing or studies reveal knowing violations (e.g., Crandall Canyon)
 - Giving advance notice of inspection
-



Minimizing Liability

- DON'T LIE!!!!!!!!!!
 - You CAN invoke the Fifth Amendment and right to counsel
 - MSHA has personally prosecuted both salaried and hourly workers, as long as they “direct the workforce” in some manner or exercise management responsibilities such as training or workplace inspections
 - Company management must NEVER tell employees not to talk to MSHA. This is obstruction of justice and/or conspiracy
 - You cannot discipline or harass employees who cooperate with MSHA – this is a separate violation under Section 105(c) of the Mine Act
 - Employees should be aware of their rights – preferably prior to the occurrence of any incident that triggers an investigation!
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MSHA Training Requirements

- Part 46: surface aggregate and cement
 - Part 48: underground non-metal, surface and UG metal, surface and UG coal
 - All miners must be trained according to mine training plan
 - Part 46: “Competent people” do training
 - Part 48: Must be MSHA-approved instructor
-



MSHA Training

- Part 46 and Part 48 both apply to mine contractors. Depending upon amount of exposure, need comprehensive (24 hr or 40 hr) training, or just site-specific hazard training
- Applies to contractors with “frequent or regular” presence at the mine.
 - Infrequent presence triggers hazard training only.
- Training violations and improper paperwork is a significant trigger of criminal investigations
- Records must be retained and provided to MSHA upon request – no warrant required



MSHA Inspections

- MSHA will inspect two or four times a year (surface/underground) whether you need it or not. Be prepared!
 - Additional inspections may be triggered by:
 - Complaints
 - Reportable Incidents (30 CFR 50.2)
 - Injury or Illness Reports
 - Targeted/Special Emphasis Initiatives
-



Inspection Rights

- Mine operator (and contractors) have right to have representative accompany inspector
- Miners' representatives accompanies inspector(s) with pay during any Section 103A inspection
- There should be an opening conference (mine operator and miners' rep can attend)
- Closeout conference (generally when citations are presented)



Inspection Rights

- ❑ Miners can speak privately with inspectors
- ❑ Anyone can have the representative of their choosing present during interviews – OR refrain from making statement entirely
- ❑ The inspector must only wait a “reasonable period” for the operator or miner’s rep to show up – normally about 30 minutes
- ❑ MSHA now has right to home addresses/phone # for all employees so it can interview them off-site!
- ❑ If a contractor is on site, he and his workers also have the right to participate in the inspection.
 - Statements made by the “operator’s rep” are imputed to the operator. The “rep” is considered an agent of management for Section 110(C) purposes



Document Requests

- Any mandatory documents must be produced immediately or else violation
 - Includes: training plan & records, workplace examinations, pre-shift inspection of equipment, injury/illness and quarterly hour reports
 - Non-mandatory documents can be demanded under Sec. 103A (impeding inspection/investigation) or Sec. 108(a)(1)(E) (MSHA can get federal court injunction to product)
 - MSHA compels production of audits, near miss reports, internal incident reports, purchase orders, sampling results and much more
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What Next?

- ❑ MSHA must issue a citation where the inspector “believes” a violation occurred
 - ❑ You can request an informal conference within 10 days of receipt of citation/order for citations – request must be in writing and does not serve as “contest” of citation
 - ❑ Abatement by date listed on citation is still required even if under contest – get extension if needed to avoid penalties or withdrawal orders
 - ❑ Requesting a conference does not toll the 30-day period for filing a Notice of Contest
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Contest of Citations

- You get “two more bites”
 - Can file NOC within 30 days of citation. This should be done where high negligence, imminent danger, fatality or serious injury case, or where abatement is unreasonable.
 - Can contest proposed penalty assessment AND fact of violation, negligence and gravity once penalty assessment arrives (file within 30 days of receipt)
-



Unwarrantable Failure

- Citations/Orders under Section 104D of the Mine Act
 - High negligence or reckless disregard
 - Infers that a management agent “knew or should have known” of hazard – or was personally involved in the violation
 - These will trigger a “special investigation”
 - Can result in \$242,00000 penalties against both the company AND \$70,000 against one or more agent(s)
 - Liable to trigger a criminal referral
 - Civil penalty will be “specially assessed”
-



Imminent Danger

- ❑ Order issued under Section 107 of Act
 - ❑ Can trigger a special investigation
 - ❑ Will be “specially assessed”
 - ❑ Requires immediate abatement (workers cannot resume work in area until corrected)
 - ❑ May lead to criminal referral
-



S&S Findings

- S&S analysis is two-part test:
 - Violation must be “reasonably likely” to cause injury or illness
 - If injury or illness were to occur, must be “reasonably serious”

- Consider –
 - What would have to happen to cause an injury/illness
 - How likely is this to occur
 - Are protections in place to prevent injury under these conditions
 - Is PPE used
 - Has there been a prior injury under these circumstances



Discrimination Claims

- ❑ Section 105C prohibits discrimination against miners (including supervisors) who exercise safety and health rights
 - ❑ Company and its agents can be fined by MSHA and ordered to provide reinstatement, back pay, attorney fees etc.
 - ❑ MSHA will represent the miner at no charge if it believes that discrimination occurred
 - ❑ Temporary reinstatement may be ordered if MSHA certifies its charges – will last until litigation is completed if ALJ grants motion.
 - ❑ The miner can proceed pro se (private right of action) even if MSHA finds no discrimination occurred!
-



QUESTIONS???

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