Workplace Examination Enforcement: What’s the Reality on the Ground?

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Overview

- A Brief History of the Rulemaking
- Latest Changes to the Rule
- Current Enforcement Issues
- Best Practices
- On the Horizon
How We Got Here –
A Brief, Convoluted History

- Published in *Federal Register* on January 23, 2017 (“2017 Rule”)
- Revised Final Rule: April 9, 2018 (“2018 Rule”)
- Effective Date: June 2, 2018
- Enforcement Delayed until October 1, 2018
How We Got Here – A Brief, Convoluted History

- Union Court Case Challenging 2018 Rule
- Union wins 2018 Rule Voided: Court Mandate August 23, 2019
- MSHA Reinstates 2017 Rule: Effective September 30, 2019
- Industry Case Challenging 2017 Rule *pending* in Eleventh Circuit
### Where We are Now -- 2017 versus 2018 Rule

<table>
<thead>
<tr>
<th>What Has Changed</th>
<th>2017 Rule (Now in Effect)</th>
<th>2018 Rule (Revoked by MSHA)</th>
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</thead>
<tbody>
<tr>
<td>Timing of exam</td>
<td>Before work begins in the working place</td>
<td>Before work begins or as miners begin work in the working place</td>
</tr>
<tr>
<td>What adverse conditions to record</td>
<td>Every condition found</td>
<td>Every condition that is not corrected promptly</td>
</tr>
</tbody>
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Summary of Current Rule

- Examine Before Work Begins
- Notify Miners of Adverse Conditions
- Record
  - Name of Competent Person
  - Date and Location of Examination
  - Adverse Conditions Found
  - Date Condition Corrected
- Keep for One Year
- Provide to MSHA and Miners Representative upon Request
Enforcement Issues
Citations for Citations

“There were no workplace exams conducted or recorded for the dust collector in the mill building where two violations were found involving material buildup.” (S&S and High Negligence)

- MSHA Policy Manual: MSHA does not intend to cite automatically when another violation is found
Enforcement Issues

“Working Place” Definition

“The Inspector is saying we have to inspect the entire building before miners can work in any part of it. Is that right?”

- 56.2: “Working place” = any place where work is being performed.
Task Training

“Does a competent person have to be task trained on exams?”

- Should not be required
- Competent person = ability and experience
- Documented training is a best practice
Agent of Operator

“Does a miner’s doing an exam put him at risk of 110(c) individual penalties?”

- No
- But a miner’s doing exam does not shield operator from heightened negligence
Enforcement Issues

How Soon Before Work Begins

“How long a gap in time can exist between end of exam and beginning of work?”

- Close enough to start of work that conditions not likely to change
- Vague meaning – subject to inspector interpretation
Enforcement Issues

Descriptions in Exam Record

“Exam was not adequate and it did not include the entire working place.”

- Describe areas examined
- Describe conditions found
Enforcement Issues

Timing of Creating Record of the Exam

“Examination was completed but no record created.”

- Complete record of the exam by end of the shift
- Examiner does not have to be the one recording the exam
Enforcement Issues

Contractors

“Do we have to do an exam in a place where only a contractor will be working.”

- No
- But dual citations can still be issued
- Contractor exam records must be available at the mine
Prompt Correction of Hazard

 Citation: “The operator did not promptly initiate corrective action.”

- Promptly = condition is corrected before miners are potentially exposed
- Barricade and tag, where needed
Best Practices

■ Training
  ■ Hazard Recognition
  ■ Recording Adverse Conditions

■ Document Verbal Notifications of Adverse Conditions
Best Practices

- Record Continuing Conditions until Corrected
- Record Date Corrected on Every Exam with Condition
- Keep Work Orders Separate from Exams
Best Practices

- Multiple Exams per Area per Shift
- Monitor Contractors’ Exam Practices
- Consider Potential Hazards in Nearby Areas that Could Create Adverse Conditions in the Working Place
On the Horizon…

- 2017 Rule – More Compliance Assistance Coming
- Further Case Law Interpreting the Rule
- Upcoming Eleventh Circuit Decision on 2017 Rule
Questions?
Thank You!

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