

MSHA Critical Issues: *Supervisor Enforcement Liability*

VTCA Aggregates Safety Seminar

Nov. 30 – Dec. 1, 2022



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1. Supervisory Liability: A Short Story

- Supervisor observes contractor not wearing fall protection in man-lift.
- Supervisor orders contractor to the ground.
- While lowering lift to the ground, contractor breaks light on an elevated walkway.
- Supervisor calls electrician who immediately comes to the scene.
- Supervisor waits for electrician to arrive, points out the broken light, and leaves the area.

An Unexpected Outcome

- Two weeks later, MSHA inspector conducts a regular inspection
- Observes a broken light on the elevated walkway
- Requests workplace exams and work orders for that area
- Issues 104d1 Unwarrantable Failure Citation & Order
- MSHA Conducted a Special Investigation

Unwarrantable Failure Allegations

- *Electrical Conductor Allegation* – The Supervisor engaged in aggravated conduct constituting more than ordinary negligence by allowing the miners to travel and work next to energized conductors. This condition was noted in a work order. (§56.12004)
- *Workplace Exam Allegation* – The Supervisor engaged in aggravated conduct by allowing miners to work and travel in areas with obvious hazards that had not been observed, reported and corrected by an effective work place examination. (§56.18002)

How Could This Have Been Avoided?

- Better Communication within Supervisory Team
- Consistent Follow-up Regarding Repairs Efforts
- Greater Care with Internal Company Documents



2. SUPERVISOR RESPONSIBILITY FOR SAFETY



The Company and MSHA

- Company wants Safety and Compliance
- MSHA Rules are a Minimum Safety Plan
- They Are Consistent with Company Safety Goals
- Failure to Comply has Consequences
 - Penalties against Company
 - Disruptive Orders of Withdrawal
 - Civil Money and Criminal Penalties
 - Supervisors and Managers
 - Civil Money Penalties
 - Criminal Sanctions

Importance of a Supervisor on Mine Property

- You connect operation's goals to people
- You direct how operation's goals are achieved
- You take care of your team
- You promote safety with genuine dedication
- You communicate effectively with MSHA
- You protect the company and yourself from enforcement liability

You are Legally the “Agent” of the Company

Under the Federal Mine Safety and Health Act --

An “agent” is any person charged with responsibility for the operation of all or part of a mine, or supervision of miners.



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Your Conduct as “Agent” is the Company’s Conduct

- An Agent Represents the Mine Operator
- An Agent can Create Liability for Company
- Agent’s Negligence is the Company’s Negligence
- This is Different from Non-Supervisors
 - Lead Men / Supervisory Authority

The Challenge of Being A Supervisor On Mine Property

- The Mine Act Places Great Responsibility on Supervisors
- Supervisors Seen as Being in the Best Position to:
 1. Know Work Procedures
 2. Know Working Conditions
 3. Know What Training Miners Have Received

3. Small Events Can Produce Serious Problems for Supervisors

- Defective headlights
- Material spill
- Conversation with a miner about conditions in the workplace
- Identification of a hazard in a workplace exam record
- Identification of a condition in a pre-op inspection report

Case In Point: Defective Windshield Wiper

- **Friday** – Plant Manager sees truck on side of road with Mechanic and Driver working inside cab
 - Possible electrical short
 - Long Summer Day - Blue sky
 - Plant Mgr. suggests wiper be fixed during overnight maintenance / bring truck in sooner if weather changes
- **Monday (am)** – MSHA inspector observes truck driving at dawn in light rain w/o wiper functioning
 - Talks to Driver (“Plant Mgr. told me to put it back into service.”)
 - Issues Unwarrantable Failure Citation

104(d)(1) Citation:

Management allowed miner to operate haul truck with defective windshield wiper. Truck was observed on primary haul road while it was raining. Plant Manager John Doe was aware of the condition and nonetheless authorized use of equipment. This violation is an unwarrantable failure to comply with a mandatory standard.

Inspector Rush to Judgment-- Unwarrantable Failure

- No notification to Overnight Mechanic that repair needed to be made
- Inspector did not care about the weather conditions on Friday
- Judge focused on supervisory responsibility.

4. Enforcement – Citations, Orders, Penalties...*and More*



What is “Unwarrantable Failure”?

Unwarrantable Failure is “aggravated conduct” --
something more than ordinary negligence



Unwarrantable Failure Starts with an S&S Violation

Mine Act: A violation is S&S if it “significantly and substantially contributes to the cause and effect of a mine safety or health hazard.”

Courts: “Reasonable likelihood of a reasonably serious injury”.

MSHA: Any likelihood of injury.

What Generates 104(d) Allegations?

Actual Supervisor Knowledge (You were there or you knew it was happening)

or

Constructive Supervisor Knowledge (You've done it or seen it done before, or the condition or practice has existed so long that you should have been aware that it was happening)

5. Why Do We Care About Unwarrantable Failure Citations?

- Potential for 110(c) Individual Civil Penalties
- Special Assessments for the Company [\$79,428]
- Pattern of Violation Enforcement
- Flagrant Violations [\$274,175]
- Impact Inspections



The Unwarrantable Failure Chain

1. Unwarrantable failure citation issued
2. Second unwarrantable failure violation within 90 days (S&S not required) = withdrawal order
- OPERATION IS NOW ON CHAIN -
3. All subsequent unwarrantable failures = withdrawal orders.
4. Need Clean Inspection to get off the chain.

6. What Can Lead to Allegations of Supervisor Knowledge?

- Supervisor Proximity to Condition or Practice
- Documents
- Concessions to Inspectors
- Evidence of Longstanding Conditions
- Accidents
- Misunderstood Communications
- Repeat Violations

MSHA Document Requests

Upon request, Company **must** provide MSHA with any document specified in regulations.

1. Workplace Examination Sheets
2. Defects that Affect Safety Log (Pre-Op)
3. Training Documents
4. Safety Data Sheets

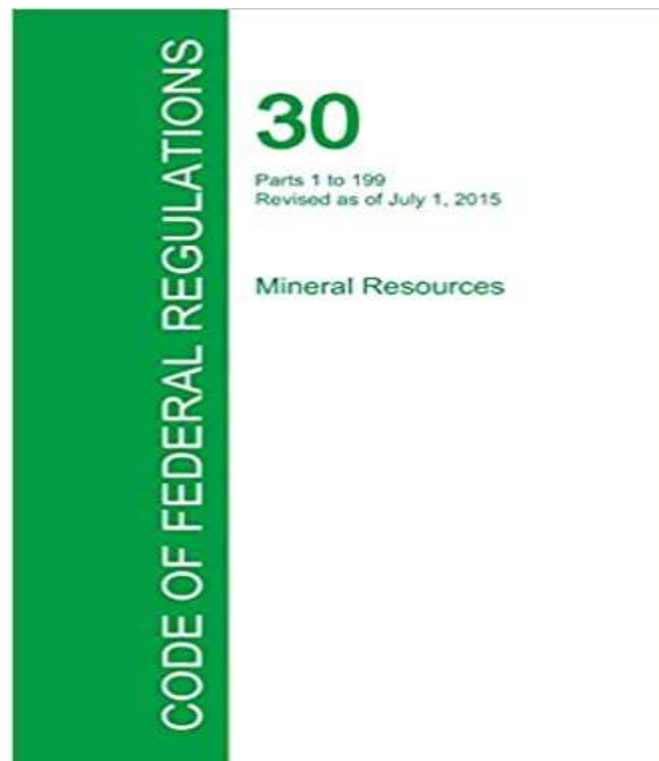


Documents *Not* Required

- Company is *not* required to provide documents which are not specified in the regulations.
- Documents which are commonly requested, include:
 1. Maintenance Logs and Records
 2. Work Orders
 3. Supervisor Notes or Logs
 4. Emails
 5. SOPs
 6. Audit Report

WHEN IN DOUBT...

Ask inspector to show you the regulation that requires that a document be turned over.



7. MANAGING MSHA INSPECTIONS



Discussions with Inspector

Inspectors rely on statements made by supervisors as basis for serious allegations:

- Know your rights
- All Information Given To Inspector Must be Accurate
- *Never* Make Concessions
- Focus on the Moment, not on Past Conditions or Actions
- Be Professional

Beware of Inspector Inquiries Regarding Supervisor Knowledge

- **Who in management is aware of this?**
- **How long has this condition been present?**



When Accompanying Inspector

- Take Notes
- Take Photographs
- Fix Violations as Quickly as Possible
 - **104(b) / Order**
- Get Advice When Needed

8. How Does A Supervisor Cope With All of This?



Supervisor Tips

- Recognize the Danger Signs
- Follow-up, Follow-up, Follow-up
- Discussions With the Inspector Must Be Accurate
- No Concessions
- Allow Inspector Access To Only Required Documents
- Get Help

9. Know / Anticipate MSHA's Inspection Focus

- Most Frequently Cited Standards
- Violation History / www.msha.gov
 - *Mine Data Retrieval System*
- Powered Haulage
- Workplace Examinations

Most Frequently Cited Standards Nonmetal Facilities

1. Housekeeping – 56.20003(a)
2. Electrical Conductors – 56.12004
3. Adequate Guards – 56.14107(a)
4. Inspection and Cover Plates – 56.12032
5. Safety Defects on Equipment – 56.14100(b)
6. Safe Access – 56.11001
7. Testing Grounding Systems – 56.12028
8. Tagging Defective Equipment – 56.14100(c)

2021 Fatal Accidents

■ Fatal Accident History

- 2022 – 27 (as of 11/27/22)
- 2021 – 36
- 2020 – 29
- 2019 – 27

■ 2022 Stats

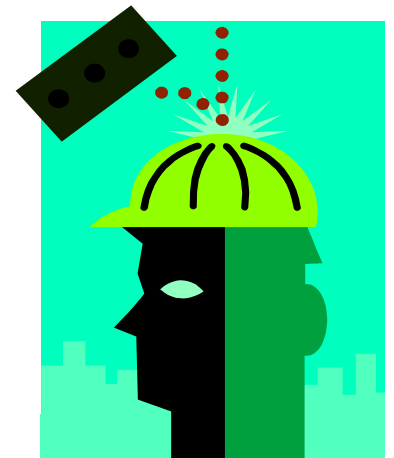
- MNM – 17
- Powered Haulage – 4 (incl.1 from Coal)
 - 2021 – 13 (including 3 from Coal)

The Same Mistakes Are Repeated Over and Over Again

- Shortcutting
- Inattention
- Not understanding job
- Not taking precautions
- Belief that nothing will happen
- Working on Equipment without Blocking
- Not Locking-out Electrical Power
- Not Controlling Mobile Equipment
- Not Using Fall Protection

What Every Supervisor Needs to Remember

- Employees will do what they are clearly told
- Repeating the message is important
- Good example is indispensable
- Positive Reinforcement helps
- Warnings Play a Role
- Discipline May be needed
- Message is “We care about your safety”



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