

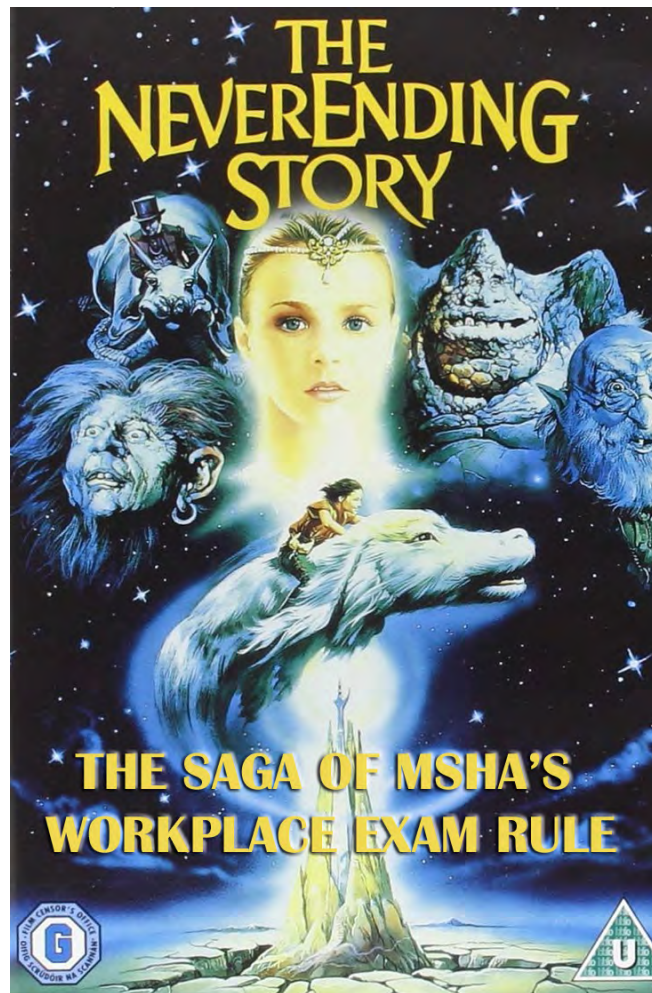
Spring Thaw 2018

CALCIMA

**California Construction and
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Ontario February 27 Sacramento March 13

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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



What's Been Happening?

Timeline of Events:

- March 27, 2017 – MSHA proposes to delay the effective date of the final rule to July 24, 2017
- May 22, 2017 – MSHA proposes to delay the effective date of the final rule to October 2, 2017
- September 12, 2017 – MSHA proposes to delay the effective date of the final rule again; proposes amendments to two sections of the final rule
- October 5, 2017, MSHA notifies stakeholders that the effective date of the rule will be delayed until June 2, 2018
- February 12, 2018 - During a Quarterly Training Call, Assistant Secretary Zatezalo states that MSHA is addressing the comments from stakeholders and are working on issuing a new final rule; did not provide a date when the new final rule would be issued



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"



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.



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



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!



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 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 – But since modified)
 - 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, - But since modified)



Proposed Rule (cont.) . . .

- The examination record must include a description of the action taken to correct the adverse condition, (New – But since modified)
- 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



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



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.”



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 WAS LISTED AS MAY 23, 2017
- 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. (Since modified)
- (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. (Since Modified)

(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.”



Proposed Changes to Final Rule

On September 12, 2017, MSHA published proposed changes to the final rule. These changes include:

- Change in timing for the workplace exam:
 - The original final rule required operators to conduct the workplace exam prior to work beginning in a working place.
 - MSHA proposed to change the standard to require that the “competent person to examine each working place at least once each shift before work begins or as miners begin work in that place for conditions that may adversely affect safety or health.”



Proposed Changes to Final Rule (continued)

- Proposed change to recordkeeping requirements:
 - The original final rule required operators to require operators to make a record of the working place examination and include, among other information, a description of each condition found that may adversely affect the safety or health of miners.
 - MSHA proposed to change the standard to require that the examination record include only those adverse conditions that are not corrected promptly.
 - Further, the Sept. 12, 2017 changes would require that the record include, or be supplemented to include, the date of corrective action for an adverse condition that is not promptly corrected. (As opposed to all adverse conditions)
 - MSHA interprets “promptly” to mean before miners are potentially exposed to adverse conditions.



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 OR AS 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 that is not corrected PROMPTLY
- Record Must Include the DATE OF THE CORRECTIVE ACTION for any adverse condition that is not corrected promptly



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 June 2, 2018, but is currently on hold, BUT - be ready if the new regulation moves forward!



QUESTIONS???

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