

Northeast Mine Safety & Health Conference

April 3-5, 2017

Working Place Examinations: Where Are We Now And Where Are We Going?

PRESENTED BY

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Increased Emphasis on Working Place Exams



Final Rule Timeline

- Published in *Federal Register* January 23, 2017
- Original Effective Date of May 23, 2017
- New Proposed Effective Date of July 24, 2017



7680 Federal Register / Vol. 82, No. 13 / Monday, January 23, 2017 / Rules and Regulations

§§ 70.45–70.52 [Reserved]

Subpart D—Public Records and Filing Standards

§ 70.53 Office of Labor-Management Standards.

(a) The following documents in the custody of the Office of Labor-Management Standards are public information available for inspection and/or purchase of copies in accordance with paragraphs (b) and (c) of this section.

(1) Data and information contained in any report or other document filed pursuant to sections 201, 202, 203, 211, 301 of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 524–528, 79 Stat. 524–28, 530, 79 Stat. 888, 73 Stat. 530, 29 U.S.C. 431–433, 441, 461).

(2) Data and information contained in any report or other document filed pursuant to the reporting requirements of 29 CFR part 458, which are the regulations implementing the standards of conduct provisions of the Civil Service Reform Act of 1978, 5 U.S.C. 7120, and the Foreign Service Act of 1980, 22 U.S.C. 4117. The reporting requirements are found in 29 CFR 458.3.

(3) Data and information contained in any report or other document filed pursuant to the Congressional Accountability Act of 1995, 2 U.S.C. 1351, 109 Stat. 19.

(b) The documents listed in paragraph (a) of this section are available from: U.S. Department of Labor, Office of Labor-Management Standards, Public Disclosure Room, N-1519, 200 Constitution Avenue NW., Washington, DC 20210. Reports filed pursuant to section 201 of the Labor-Management Reporting and Disclosure Act of 1959 and pursuant to 29 CFR 458.3 implementing the Civil Service Reform Act of 1978 and the Foreign Service Act of 1980 for the year 2000 and thereafter are also available at <http://www.union-reports.dol.gov>.

(c) Pursuant to 29 U.S.C. 435(c) which provides that the Secretary will by regulation provide for the furnishing of copies of the documents listed in paragraph (a) of this section, upon payment of a charge based upon the cost of the service, these documents are available at a cost of \$ 15 per page for record copies furnished. Authentication of copies is available in accordance with the fee schedule established in Sec. 70.40. In accordance with 5 U.S.C. 552(a)(4)(A)(vi), the provisions for fees, fee waivers and fee reductions in subpart C of this part do not supersede these changes for these documents.

(d) Upon request of the Governor of a State for copies of any reports or documents filed pursuant to sections

201, 202, 203, or 211 of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 524–528, 79 Stat. 888; 29 U.S.C. 431–433, 441), or for information contained therein, which have been filed by any person whose principal place of business or headquarters is in such State, the Office of Labor-Management Standards will:

(1) Make available without payment of a charge to the State agency designated by law or by such Governor, such requested copies of information and data, or

(2) Require the person who filed such reports and documents to furnish such copies or information and data directly to the State agency thus designated.

§ 70.54 Employee Benefits Security Administration.

(a) The annual financial reports (Form 5500) and attachments/schedules as filed by employee benefit plans under the Employee Retirement Income Security Act (ERISA) are in the custody of the Employee Benefits Security Administration (EBSA) at the address indicated in paragraph (b) of this section, and the right to inspect and copy such reports, as authorized under ERISA, at the fees set forth in this part, may be exercised at such office.

(b) The mailing address for the documents described in this section is: U.S. Department of Labor, Employee Benefits Security Administration, Public Documents Room, 200 Constitution Avenue NW., Washington, DC 20210.

Appendix A to Part 70—FOIA Components

The following list identifies the individual agency components of the Department of Labor for the purposes of the FOIA. Each component is responsible for making records in its custody available for inspection and copying, in accordance with the provisions of the FOIA and this part. Unless otherwise specified, the mailing addresses for the following national office components are listed below. Updated contact information for national and regional offices can be found on the EOL Web site at <http://www.dol.gov/eol/foia>.

U.S. Department of Labor
200 Constitution Avenue NW.
Washington, DC 20210.

1. Office of the Secretary (OSEC).
2. Office of the Solicitor (SOLA).
3. Office of Administrative Law Judges (ALJ), 800 K Street NW., Suite N-400, Washington, DC 20001-4002.
4. Office of the Assistant Secretary for Administration and Management (OASAM).
5. Office of the Assistant Secretary for Policy (OASPI).
6. Office of the Chief Financial Officer (OCFO).
7. Office of Congressional and Intergovernmental Affairs (OCIA).
8. Office of Disability Employment Policy (ODEP).
9. Office of Federal Contract Compliance Programs (OFCCP).
10. Office of the Inspector General (OIG).
11. Office of Labor Management Standards (OLMS).
12. Office of Public Affairs (OPA).
13. Office of Workers' Compensation Programs (OWCP).
14. Bureau of International Labor Affairs (ILAB).
15. Bureau of Labor Statistics (BLS), Postal Square Building, Room 4040, 2 Massachusetts Avenue NE., Washington, DC 20212-4001.
16. Employment and Training Administration (ETA), Job Corps (part of ETA).
17. Mine Safety and Health Administration (MSHA), 201 12th Street, South, Arlington, Virginia 22202.
18. Occupational Safety and Health Administration (OSHA).
19. Employee Benefits Security Administration (EBSA).
20. Veterans' Employment and Training Service (VETS).
21. Employees' Compensation Appeals Board (ECAB).
22. Administrative Review Board (ARB).
23. Benefits Review Board (BRB).
24. Wage and Hour Division (WHD).
25. Women's Bureau (WB).

Appendix B to Part 70—[Reserved]

Thomas E. Perez,
Secretary of Labor,
[FR Doc. 2017-00453 Filed 1-19-17; 8:45 am]
BILLING CODE P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 56 and 57
[Docket No. MSHA-2014-0030]
RIN 1219-AB87

Examinations of Working Places in Metal and Nonmetal Mines

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Final rule.

SUMMARY: The Mine Safety and Health Administration's final rule amends the Agency's standards for the examination of working places in metal and nonmetal mines. This final rule requires that an examination of the working place be conducted before miners begin working in that place, that operators notify miners in the affected areas of any conditions found that may adversely affect their safety or health, that operators promptly initiate corrective action, and that a record be made of the examination. The final rule



New Effective Date

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 56 and 57

[Docket No. MSHA-2014-0034]

RIN 1219-AB87

Examinations of Working Places in Metal and Nonmetal Mines

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Proposed rule; date.

SUMMARY: On January 14, 2014, the Mine Safety and Health Administration (MSHA) published a final rule in the **Federal Register** amending the safety and health standards for the examination of working places in metal and nonmetal mines. The effective date of the rule is May 23, 2017. MSHA is proposing to delay the effective date of the final rule on Examinations of Working Places in Metal and Nonmetal Mines to assure that mine operators and miners affected by the examination of working places final rule have the training and compliance assistance they need prior to the rule's effective date. The proposed rule would delay the effective date of the final rule to July 24, 2017. MSHA is soliciting comments on the limited issue of whether to extend the effective date to July 24, 2017, and whether this extension offers an appropriate length of time for MSHA to provide stakeholders training and compliance assistance.

DATES: Comment Deadline: April 26, 2017.

“MSHA is proposing to delay the effective date of the final rule . . . to assure that mine operators and miners affected . . . have the training and compliance assistance they need prior to the rule's effective date.”

Important Distinctions Between Current Rule and New Rule

Current Rule

- **Allows mine operators to perform the workplace examination anytime during the shift before corrective action is taken.**

New Rule

- **Requires an examination of each working place before miners begin work in that place.**

Important Distinctions Between Current Rule and New Rule

Current Rule

- **Contains no requirement for operators to notify miners of adverse working conditions.**

New Rule

- **Requires mine operators to notify miners of adverse working conditions in their working places.**



Important Distinctions Between Current Rule and New Rule

Current Rule

- Does not address the contents of the examination record.

New Rule

- Requires the examination record to include:
 - The name of the person conducting the examination;
 - Date of the examination;
 - Location of all areas examined;
 - A description of each condition found that may adversely affect the safety or health of miners;
 - And, when necessary, be supplemented to include the date of corrective actions taken for adverse conditions.



Important Distinctions Between Current Rule and New Rule

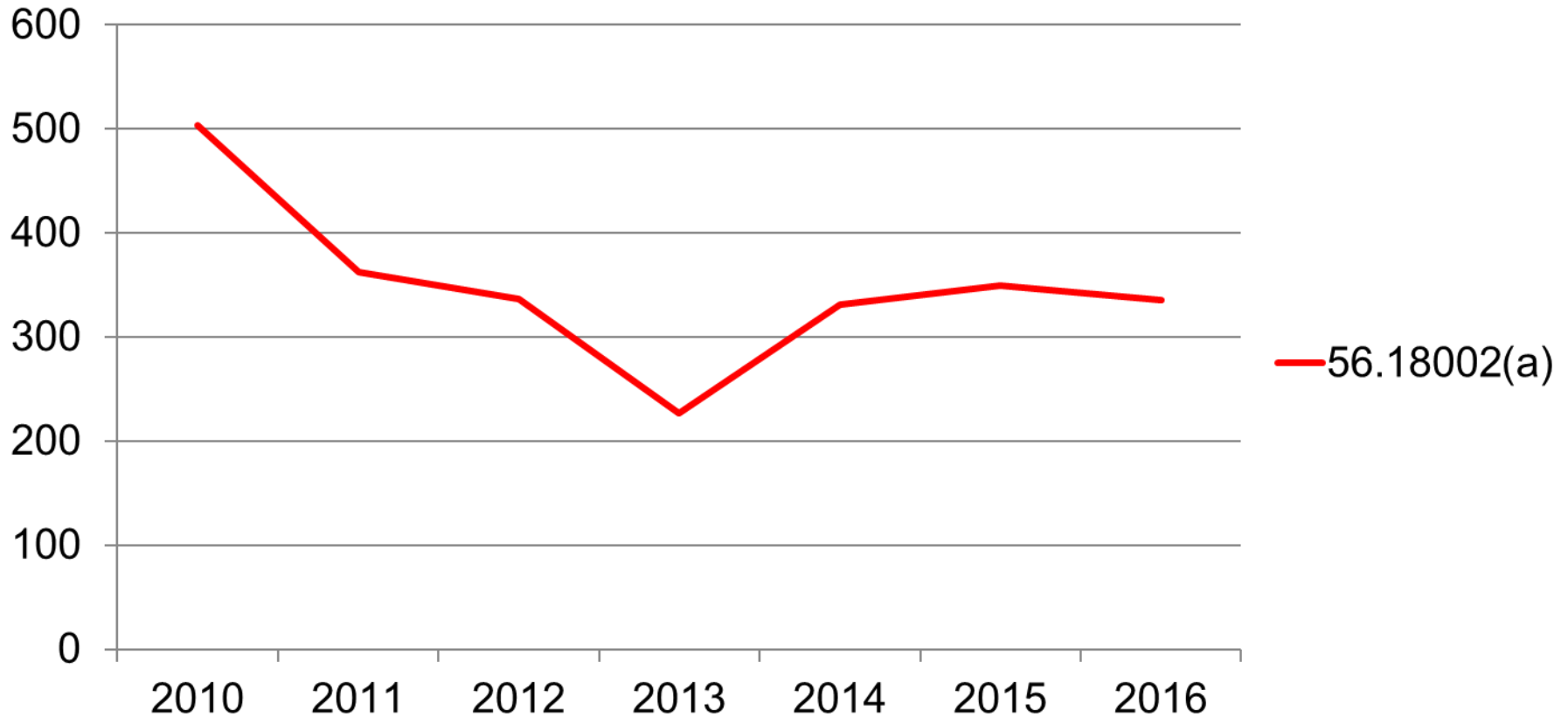
Current Rule

- **Requires mine operators to make the record of examinations available for review by the Secretary or his authorized representative.**

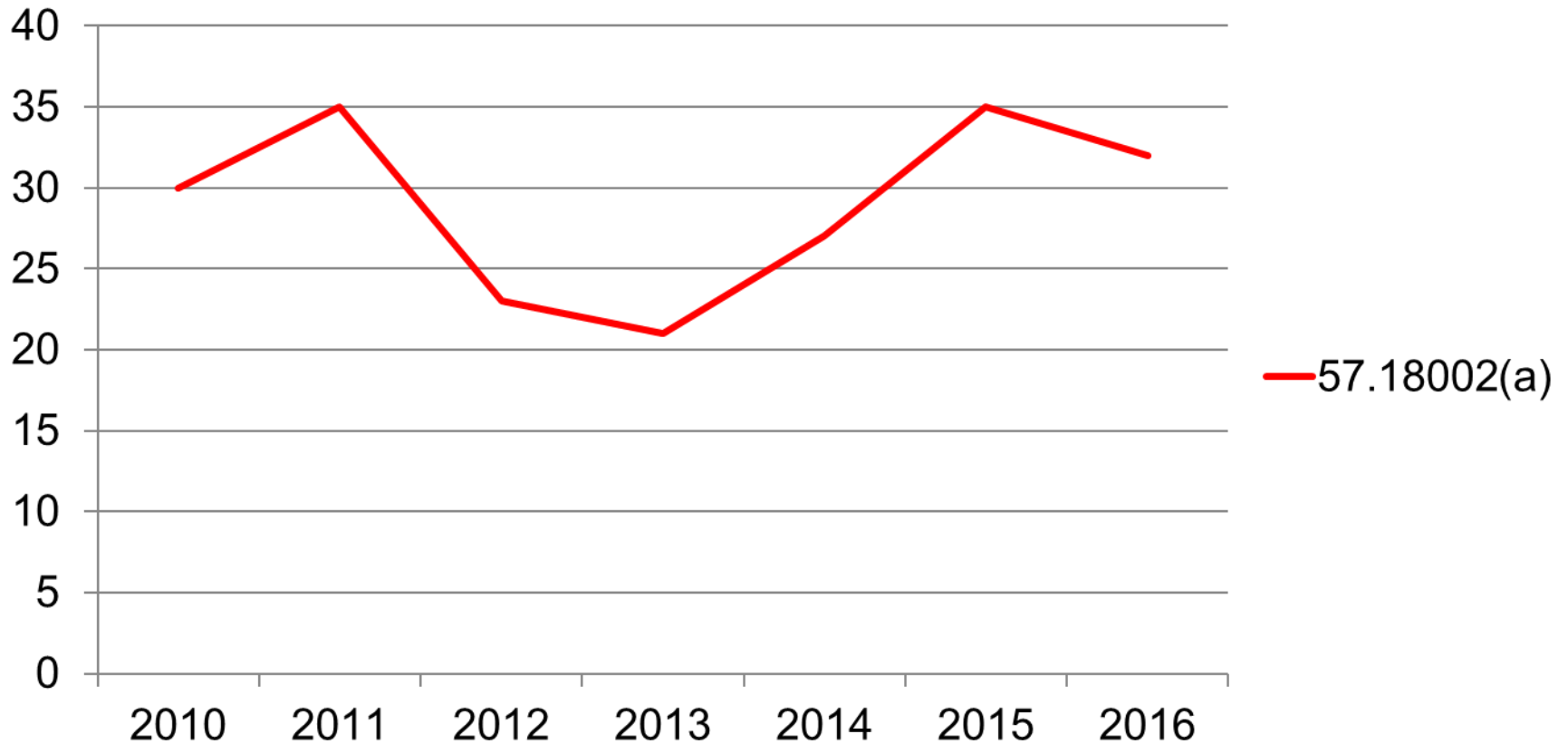
New Rule

- **Requires mine operators to make the examination record available for inspection by an authorized representative of the Secretary and miners' representatives and provide a copy upon request.**

56.18002(a) Enforcement



57.18002(a) Enforcement



Changes in Interpretation

- Agency has sought to expand breadth and scope of the rule through interpretation rather than rulemaking
- Various iterations and modifications as outlined in Program Policy Letters on 56/57.18002(a)



What is a “working place”?



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[50 FR 4054, Jan. 2
FR 33723, June 29,
1995]

Subpart B—

AUTHORITY: 30 U.S.C.
SOURCE: 51 FR 33723, June 29, 1995, as amended, unless otherwise noted.

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[51 FR 36197, Oct. 8,
38840, June 29, 2004]



Three Program Policy Letters in 3 Years

March 25, 2014

EFFECTIVE DATE: March 25, 2014

PROGRAM POLICY LETTER NO. P14-IV-01

FROM: MARVIN LICHTENFELS
Acting Administrator for
Metal and Nonmetal Mine Safety and Health

SUBJECT: Reissue of P11-IV-01 - Examination of working places
(30 C.F.R. §§ 56/57.18002)

Scope

This Program Policy Letter (PPL) applies to surface and underground metal and nonmetal mine operators, contractors, equipment manufacturers, miners, miners' representatives, and Metal and Nonmetal Mine Safety and Health enforcement personnel.

Purpose

The purpose of this PPL is to clarify that the examination of working places required under 30 C.F.R. §§ 56/57.18002 includes the requirement that the operator shall examine each working place at least once each shift for conditions which adversely affect safety or health. The examination must be maintained and made available for review by the Secretary or his authorized representative.

Policy

56/57.18002 Examination of Working Places

30 C.F.R. §§ 56/57.18002, Examination of working places, provide

- 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 appropriate action to correct such conditions.
- A record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative.
- In addition, conditions that may present an imminent danger which are noted by the person conducting the examination 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.

July 22, 2015

EFFECTIVE DATE: July 22, 2015

PROGRAM POLICY LETTER NO. P15-IV-01

FROM: NEAL H. MERRIFIELD
Administrator for Metal and Nonmetal
Mine Safety and Health

SUBJECT: Examination of working places (30 C.F.R. §§ 56/57.18002)

Scope

This Program Policy Letter (PPL) applies to surface and underground metal and nonmetal mine operators, contractors, equipment manufacturers, miners, miners' representatives, and Metal and Nonmetal Mine Safety and Health enforcement personnel.

Purpose

The purpose of this PPL is to clarify that the examination of working places required under 30 C.F.R. §§ 56/57.18002 includes the requirement that the operator shall examine each working place at least once each shift for conditions which adversely affect safety or health, that the examination must be conducted by a competent person, and that a record of the examination must be maintained and made available for review by the Secretary or his authorized representative.

Policy

56/57.18002 Examination of Working Places

30 C.F.R. §§ 56/57.18002, Examination of working places, provide

- 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 appropriate action to correct such conditions.
- A record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative.
- In addition, conditions that may present an imminent danger which are noted by the person conducting the examination 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.

The terms "competent person" and "working place," used in §§ 56/57.18002(a), are defined in §§ 56/57.2, Definitions.

A "competent person," according to §§ 56/57.2, is "a person having abilities and experience that fully qualify him to perform the duty to which he is assigned."

The 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

July 9, 2015

EFFECTIVE DATE: July 9, 2015

PROGRAM POLICY LETTER NO. P15-IV-01

FROM: NEAL H. MERRIFIELD
Administrator for Metal and Nonmetal
Mine Safety and Health

Examination of working places (30 C.F.R. §§ 56/57.18002)

This Policy Letter (PPL) applies to surface and underground metal and nonmetal mine operators, equipment manufacturers, miners, miners' representatives, and Metal and Nonmetal Mine Safety and Health enforcement personnel.

The purpose of this PPL is to clarify that the examination of working places required under 30 C.F.R. §§ 56/57.18002 includes the requirement that the operator shall examine each working place at least once each shift for conditions which adversely affect safety or health, that the examination must be conducted by a competent person, and that a record of the examination must be maintained and made available for review by the Secretary or his authorized representative.

Examination of Working Places

30 C.F.R. §§ 56/57.18002, Examination of working places, provide

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 appropriate action to correct such conditions. A record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative. In addition, conditions that may present an imminent danger which are noted by the person conducting the examination 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. The terms "competent person" and "working place," used in §§ 56/57.18002(a), are defined in §§ 56/57.2, Definitions. A "competent person," according to §§ 56/57.2, is "a person having abilities and experience that fully qualify him to perform the duty to which he is assigned."

Program Policy Letter No. P11-IV-01

February 17, 2011

The phrase "working place" is defined in 30 CFR §§ 56/57.2 as: "any place in or about a mine where work is being performed." As used in the standard, the phrase applies to those locations at a mine site where persons work in the mining or milling processes.

Program Policy Letter No. P14-IV-01

March 25, 2014

The phrase "working place" is defined in 30 C.F.R. §§ 56/57.2 as: "any place in or about a mine where work is being performed." As used in the standard, the phrase applies to those locations at a mine site where persons work in the mining or milling processes.



Program Policy Letter No. P15-IV-01

July 9, 2015 and July 22, 2015

This includes areas where work is performed on an infrequent basis, such as areas accessed primarily during periods of maintenance or clean-up. All such working places must be examined by a competent person at least once each shift.

New “Interpretations” in Proposed and Final Rule



Although the Final Rule does not change the definition of working place it now includes . .





January 26, 2017 Stakeholder Meeting – Birmingham, AL

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MR. PIERCE: No. The roadways and the travelways would not be considered a workplace unless you're actually there doing work.

changing the definition of working places.



And exactly what they have said: If you're not going there to work, then you do not have to do a workplace exam there until you actually do go there to do work.

Just because you're traveling through the area doesn't require a workplace exam if you're not going to be actually doing work there. So that's come from Mr. Merrifield and Mr. Main.

EXAMPLES

- Roadways
- Dump points
- Ramps
- Screens/Crushers/Conveyors
- Control towers/MCC/Scale house
- Shops
- Highwalls
- Any areas of the mine where men are required to work or travel

“ . . . any place in
or about a mine
where work is
being
performed.”

Is that clear?



Travelways

Mine Safety and Health Admin., Labor

§ 56.2

Non-electric delay blasting cap means a detonator with an integral delay element and capable of being initiated by miniaturized detonating cord.

Overburden means material of any nature, consolidated or unconsolidated, that overlies a deposit of useful materials or ores that are to be mined.

Overload means that current which will cause an excessive or dangerous temperature in the conductor or conductor insulation.

Permissible means a machine, material, apparatus, or device that has been investigated, tested, and approved by the Bureau of Mines or the Mine Safety and Health Administration and is maintained in permissible condition.

Potable water means water which shall meet the applicable minimum health requirements for drinking water established by the State or community in which the mine is located or by the Environmental Protection Agency in 40 CFR part 141, pages 169-182 revised as of July 1, 1977. Where no such requirements are applicable, the drinking water provided shall conform with the Public Health Service Drinking Water Standards, 42 CFR part 72, subpart J, pages 527-533, revised as of October 1, 1976. Publications to which references are made in this definition are hereby made a part hereof. These incorporated publications are available for inspection at each Metal and Nonmetal Mine Safety and Health District Office of the Mine Safety and Health Administration.

Powder chest means a substantial, nonconductive portable container equipped with a lid and used at blasting sites for explosives other than blasting agents.

Primer means a unit, package, or cartridge of explosives used to initiate other explosives or blasting agents, and which contains a detonator.

Reverse-current protection means a method or device used on direct-current circuits or equipment to prevent the flow of current in the reverse direction.

Rock fixture means any tensioned or nontensioned device or material inserted into the ground to strengthen or support the ground.

Roof protection means a framework, safety canopy or similar protection for

the operator when equipment overturns.

Safety can means an approved container, of not over five gallons capacity, having a spring-closing lid and spout cover.

Safety fuse means a flexible cord containing an internal burning medium by which fire is conveyed at a continuous and uniform rate for the purpose of firing blasting caps or a black powder charge.

Safety switch means a sectionalizing switch that also provides shunt protection in blasting circuits between the blasting switch and the shot area.

Scaling means removal of insecure material from a face or highwall.

Secondary safety connection means a second connection between a conveyance and rope, intended to prevent the conveyance from running away or falling in the event the primary connection fails.

Shaft means a vertical or inclined shaft, a slope, incline or winze.

Short circuit means an abnormal connection of relatively low resistance, whether made accidentally or intentionally, between two points of different potential in a circuit.

Slurry (as applied to blasting). See "Water gel."

Storage facility means the entire class of structures used to store explosive materials. A "storage facility" used to store blasting agents corresponds to a BATF Type 4 or 5 storage facility.

Storage tank means a container exceeding 60 gallons in capacity used for the storage of flammable or combustible liquids.

Stray current means that portion of a total electric current that flows through paths other than the intended circuit.

Substantial construction means construction of such strength, workmanship and workmanship that the structure will withstand all reasonable use and usage, to which it is subjected.

Suitable means meeting the requirements and qualifications to meet a given purpose, occasion, condition, function or circumstance.

Travelway means a passage, walk or way regularly used and designated for

" . . . means a passage, walk or way regularly used and designated for persons to go from one place to another."

267



Aren't "work" and "travel" the same?

- 30 CFR 850.101 - definition of working

“ . . . a passage, walk or way regularly used and designated for persons to go from one place to another.”

- § 56.3130; 56.3131 (requiring ground control in “places where persons ***work or travel***)
- § 56/57.3200 (requiring hazardous ground conditions to be taken down before “other ***work or travel*** is permitted in the affected area.”)
- § 56/57.3430 (stating that persons “shall not ***work or travel*** between machinery and the highwall, except that “[t]***ravel*** is permitted when necessary for persons to dismount”)
- § 56/57.16015 (prohibiting “***work from or travel on*** the bridge of an overhead crane” unless certain precautions are taken)



**IF IT CAN'T BE GROWN,
IT HAS TO BE MINED**



Jackson Kelly Safety & Health



What's the practical effect?

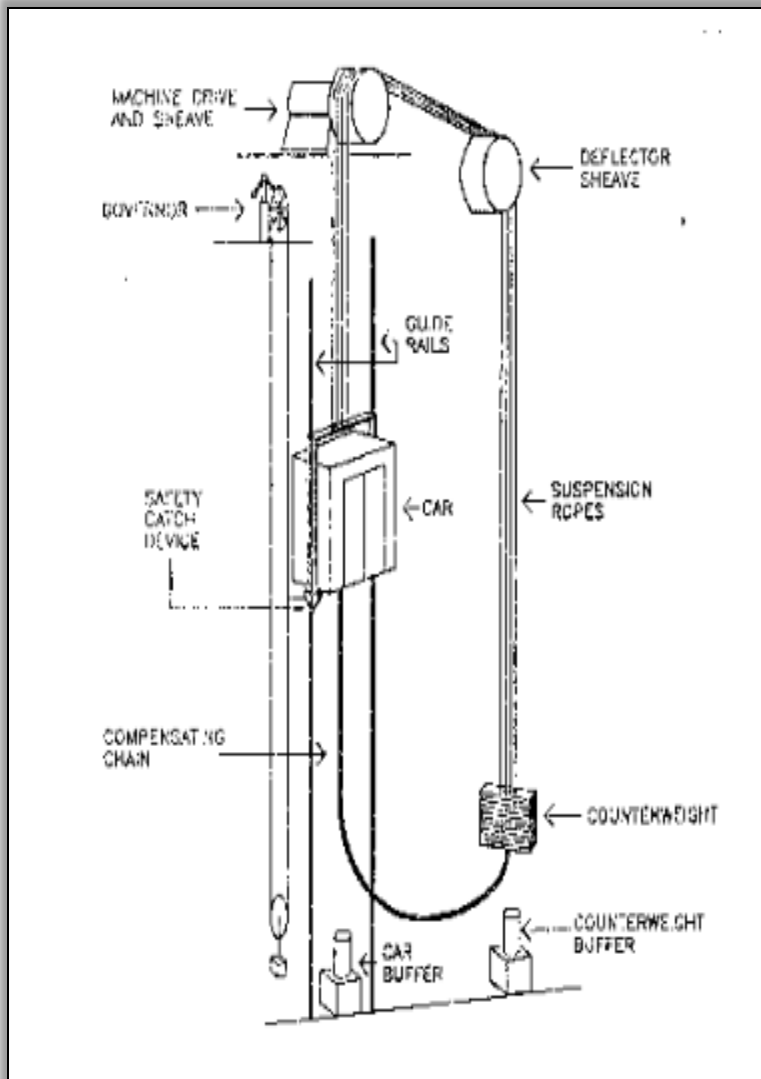


February 2014 - Fatalgram

Best Practices

- Immediately report any elevator problems to management.
- Ensure that any problems affecting the safety of an elevator are repaired promptly.
- Ensure that elevator door interlocks, that prevent the door from being opened unless the elevator car is present, are functional.
- Ensure that elevator doors will not open unless an elevator car is at the floor landing.
- Install audible signals that sound when the elevator car is at the landing prior to the doors opening.
- Train all persons to be aware of their surroundings when entering or exiting an elevator car.





SOL v. CEMEX Construction Materials Atlantic, LLC

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 5204
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-8953 / FAX: 202-434-9949

APR 29 2016

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

CEMEX CONSTRUCTION MATERIALS,
ATLANTIC, LLC,
Respondent.

CIVIL PENALTY PROCEEDING:

Docket No. SE 2014-328-M
A.C. No. 40-00840-350438

Mine: Knoxville Cement Plant Cemex Inc.

DECISION

Appearances: Timothy Turner, Esq., U.S. Department of Labor, Office of the Solicitor,
Denver, Colorado for Petitioner

Michael T. Cimino, Esq.; Adam Schwendeman, Esq., Jackson Kelly,
PLLC, Charleston, West Virginia for Respondent

Before: Judge David Barbour

In this civil penalty case arising under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815, 820, (the "Mine Act"), the Secretary of Labor ("Secretary") on behalf of his Mine Safety and Health Administration ("MSHA") petitions for the assessment of civil penalties of \$1,838 for alleged violations of 30 C.F.R. § 56.18002(a) and 30 C.F.R. § 56.14100(c).¹ The purported violations were cited at the Knoxville Cement Plant (the "Knoxville plant"), a facility owned and operated by Cemex Construction Materials Atlantic, LLC. ("Cemex").² The citations were issued by MSHA Inspector David Smith on March 10, 2014. Inspector Smith found that Cemex did not designate a competent person to examine the plant's elevators during each shift and therefore that the company violated section 56.18002(a). He believed the alleged violation was reasonably likely to result in a fatality and that the condition was a significant and substantial contribution to a mine safety hazard (an "S&S" violation). He also found the alleged violation was caused by the company's moderate negligence. In addition, while he was inspecting one of the elevators, Smith found the "in-use" lights on two call site stations did not activate when the elevator was moving. Further, the

¹ Sections 56.18002(a) and 56.14100(c) are mandatory safety standards applicable to the nation's surface metal/non-metal mines. Section 56.18002(a) states that, "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" and that the operator "shall promptly initiate appropriate action to correct [any] such conditions." Section 56.14100(c) requires that when defects on self-propelled mobile equipment "make continued operation [of the equipment] hazardous to persons, the defective items . . . shall be taken out of service . . . or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected."

² In addition to the Knoxville plant the company owns several other facilities where cement is produced.

- April 29, 2016 Decision
- Administrative Law Judge David Barbour
- 38 FMSHRC 827



Secretary's Argument

- A. In my interpretation, once the miner places himself or herself onto the elevator car to perform their duties, whether to transport from one floor to the other floor or that they're bringing tools or their expertise as a person to a different level to perform their duties, they are working.

o

target task



Operator's Argument

- In order to prove a violation the Secretary must establish that actual work and not mere travel by personnel was taking place on the elevators
- Secretary failed to provide adequate notice of his change in interpretation



ALJ's Decision

- “The Secretary must show that on the shift when the inspection took place or on a specifically identified prior shift, a designated competent person did not conduct an examination of areas of a specific elevator where a work-related task involving the elevator’s car or landing doors was being performed, was assigned to be performed but not yet started, or where such a task could be expected to be performed.”



Work

- Was being performed
- Was assigned to be performed but not yet started
- Could be expected to be performed



Travel is not Work

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“The court fully agrees with Cemex that use of an elevator solely to move personnel from one level to another to get them to a working place does not in and of itself mandate an elevator’s examination.”



Due Process

“Given the documented history of Secretarial non-enforcement at the plant, the Secretary’s assertion that ‘MSHA simply expected the elevator car and surrounding landing area to fall under the exam umbrella’ rings hollow.”

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ncern with elevator inspection;
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- It’s conviction
- It’s deterrence
- elevator of
- protection

A far more likely scenario is that MSHA never gave a thought to the inspection of elevators under any standard until after the February 21, 2014, accident and then decided that section 56.18002(a) could be stretched to fit the need.

SOL v. Ash Grove Cement Company

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004
Telephone No.: (202) 434-9900 / Fax No.: (202) 434-9949

AUG 04 2016

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

ASH GROVE CEMENT COMPANY,
Respondent

CIVIL PENALTY PROCEEDINGS:

Docket No. WEST 2014-963
A.C. No. 45-00359-356120

Docket No. WEST 2015-503
A.C. No. 45-00359-375229

Docket No. WEST 2015-523
A.C. No. 45-00359-377531

Mine: Seattle Plant

DECISION

Appearances: Daniel Brechbuhl, Esq., Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado, for Petitioner

John Nelson, Esq., Ash Grove Cement Company, Overland Park, Kansas,
for Respondent

Before: Judge Barbour

These cases are before me upon three Petitions for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of his Mine Safety and Health Administration ("MSHA") under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"), 30 U.S.C. § 815(d). Between May and August 2014, the Secretary issued four citations to Respondent, Ash Grove Cement Company ("Ash Grove"), for alleged violations of 30 C.F.R. §§ 56.18002(a), 56.14110, 50.10, and 50.12 at its cement plant (the "Seattle Plant"), which is located in King County, Washington.¹ Ash Grove filed an answer denying the violations occurred, or if they did, challenging the Secretary's gravity and negligence findings and his proposed civil penalties.

¹ Citation Nos. 8780591 (30 C.F.R. § 56.18002(a)) and 8611830 (30 C.F.R. § 56.14110) were assigned Civil Penalty Docket No. WEST 2014-963. Citation No. 8780422 (30 C.F.R. § 50.10) was assigned Civil Penalty Docket No. WEST 2015-503. Citation No. 8780423 (30 C.F.R. § 50.12) was assigned Civil Penalty Docket No. WEST 2015-523. Subsequently, the cases were consolidated for hearing and decision.

- August 4, 2016 Decision
- Administrative Law Judge Barbour
- 38 FMSHRC 2151

Secretary's Argument

- Term “working places” applies to elevators because miners perform work on the elevator by moving equipment, supplies, and themselves throughout the floors of the buildings.



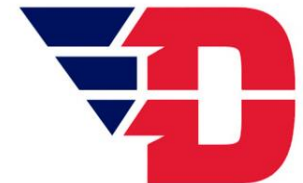
Operator's Argument

- Elevators not “working places” because work was not being done at the time of the MSHA inspection.
- Clearly exempted because there was not work being done on or near the elevators at the time the citation was issued.



ALJ's Decision

- “As the court held otherwise, it would still vacate the citation on due process grounds.”



SOL v. CEMEX Southeast, LLC

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, DC 20004-1710
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NOV 26 2016

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

CIVIL PENALTY PROCEEDING

Docket No. SE 2014-299-M
A.C. No. 01-00016-349326

v.

CEMEX SOUTHEAST, LLC,
Respondent

Mine: Demopolis Plant CEMEX Inc.

DECISION AND ORDER

Appearances: Timothy J. Turner, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner

Michael T. Cimino, Esq. & Adam J. Schwendeman, Esq., Jackson Kelly P.L.L.C., Charleston, West Virginia, for Respondent

Before: Judge McCarthy

I. STATEMENT OF THE CASE

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, ("the Mine Act"), 30 U.S.C. § 815(d). The matter arises out of three citations and one order issued by the Secretary of Labor ("the Secretary") to mine operator CEMEX Southeast, LLC ("Cemex") in February and March 2014. The citations and order allege that safety violations relating to elevators occurred at the Demopolis Plant CEMEX Inc. ("the Demopolis Plant" or "the mine"), a cement processing plant operated by Cemex in Demopolis, Alabama that is subject to the Secretary's health and safety regulations at 30 C.F.R. Part 56. The parties settled three of the violations prior to hearing. I approved the settlement by Order dated June 16, 2016. The parties litigated the remaining citation, Citation Number 8641317.

Citation Number 8641317 was issued under section 104(a) of the Mine Act and alleges that Cemex violated the mandatory health and safety standard at 30 C.F.R. § 56.18002(a).¹ The

¹ The cited standard states: "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 appropriate action to correct such conditions." 30 C.F.R. § 56.18002(a).

1

- November 26, 2016 Decision
- Administrative Law Judge Thomas McCarthy
- 38 FMSHRC 2151

Secretary's Argument

3 Q.

4 elevator

5 A.

6 place.

7 working

10 A. Well, it says working place, but if they
11 had an accident while they were walking to where
12 they're going, they would have -- they would file
13 workman's comp. So I mean, you know, it's like they've
14 got to have -- I mean, they're working there. They're
15 on the clock and that's a working place. It's as
16 simple as that.

Operator's Argument

- The elevators do not fall within the definition of working place, per se
- The Secretary has failed to produce any evidence of work being performed
- The Secretary's proposed definition of working place is too broad
- Expanding the working place examination requirement to include travelways is contrary to the regulatory language
- Even if the Secretary could meet his burden of proving a "working place," MSHA failed to provide adequate notice of its change in interpretation



ALJ's Decision

- "... alth... the sope
of 5...
"Contrary to the Secretary's
proposed definition of 'work,' which
is so broad that it encompasses
travel . . . **the regulations clearly
treat work and travel as separate
concepts and distinguish
between places where people
work and places where they
travel.**
- "R... des
not sugg... to cover
elevators or . . . the job

- § 56.3130; 56.3131 (requiring ground control in “places where persons ***work or travel***)
- § 56/57.3200 (requiring hazardous ground conditions to be taken down before “other ***work or travel*** is permitted in the affected area.”)
- § 56/57.3430 (stating that persons “shall not ***work or travel*** between machinery and the highwall, except that “[t]***ravel*** is permitted when necessary for persons to dismount”)
- § 56/57.16015 (prohibiting “***work from or travel on*** the bridge of an overhead crane” unless certain precautions are taken)

Coal vs. M/NM Exam Requirements

By contrast, in the underground coal mining context, the Secretary has promulgated a detailed pre-shift examination standard that specifically includes “[r]oadways, travelways, and track haulageways where persons are scheduled ... to work or travel during the oncoming shift.” 30 C.F.R. § 75.360(b)(1). M/NM mine safety standards expressly require daily examination of “[h]oisting, winding, and transporting persons,” 30 C.F.R. § 75.1400-3; see also 30 C.F.R. § 75.1400-4. The

“By contrast, in the underground coal mining context, the Secretary has promulgated a detailed pre-shift examination standard that specifically includes “**roadways, travelways, and track haulageways** where persons are scheduled . . . To **work or travel** during the oncoming shift.”

Why does this matter?

- Transparency
 - Regulated community deserves to know what is required
- Consistency
 - Regulatory community deserves to be treated fairly and uniformly



Questions?

