MINIMIZING LIABILITY AND MSHA ENFORCEMENT

Presented by the Holland & Hart Workplace Safety / Emergency Response Team
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Quite Simply:

Workplace fatalities and injuries are no longer perceived as an acceptable cost of doing business.
How Are We Doing?

Number of fatal work injuries, 1992–2013*

The 2013 preliminary total of 4,405 fatal work injuries is 5 percent below the final count of 4,628 fatal work injuries reported for 2012.

*Data for 2013 are preliminary. Data for prior years are revised and final.
Note: Data from 2001 exclude fatal work injuries resulting from the September 11 terrorist attacks.
Fatalities By State

Number of fatal work injuries, by state, 2013*

Seventeen states and the District of Columbia had preliminary counts showing more fatal injuries in 2013 than in 2012. Thirty states had fewer fatal workplace injuries in 2013 compared to 2012. Three states saw no change between the two years.

*Data for 2013 are preliminary.
What Causes Fatalities?

Fatal occupational injuries, by major event, 2013*

- Roadway incidents: 22%
- Transportation incidents: 40%
- Violence and other injuries by persons or animals: 17%
- Other: 17%
- Homicides: 9%
- Struck by object or equipment: 11%
- Falls to lower level: 13%
- Falls, slips, trips: 16%
- Contact with objects and equipment: 16%
- Fires and explosions: 3%
- Exposure to harmful substances or environments: 7%
- Other: 3%

Total = 4,405

More fatal work injuries resulted from transportation incidents than from any other event in the 2013 preliminary counts. Roadway incidents alone accounted for nearly one out of every four fatal work injuries.

*Data for 2013 are preliminary.
Note: Transportation counts presented in this release are expected to rise when updated 2013 data are released in spring 2015 because key source documentation detailing specific transportation-related incidents has not yet been received. Percentages may not add to 100 due to rounding.
Fatal work injury rates, by age group, 2013*

- Fatal work injury rate (per 100,000 full-time equivalent workers)

<table>
<thead>
<tr>
<th>Age group</th>
<th>Fatal work injury rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>18 to 19</td>
<td>2.4</td>
</tr>
<tr>
<td>20 to 24</td>
<td>2.1</td>
</tr>
<tr>
<td>25 to 34</td>
<td>2.4</td>
</tr>
<tr>
<td>35 to 44</td>
<td>2.7</td>
</tr>
<tr>
<td>45 to 54</td>
<td>3.3</td>
</tr>
<tr>
<td>55 to 64</td>
<td>3.9</td>
</tr>
<tr>
<td>65 and over</td>
<td>8.8</td>
</tr>
</tbody>
</table>

All worker fatal work injury rate = 3.2

Fatal work injury rates for workers 45 years of age and over were higher than the overall U.S. rate, and the rate for workers 65 years of age and over was more than 2 times the rate for all workers.

*Data for 2013 are preliminary.
Note: Fatal injury rates exclude workers under the age of 16 years, volunteers, and resident military. For additional information on the fatal work injury rate methodology, please see [http://www.bls.gov/iif/oshact13.htm](http://www.bls.gov/iif/oshact13.htm).
Fatalities by Industry Sector

Number and rate of fatal occupational injuries, by industry sector, 2013*

<table>
<thead>
<tr>
<th>Industry Sector</th>
<th>Number of Fatal Work Injuries</th>
<th>Fatal Work Injury Rate (per 100,000 full-time equivalent workers)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction</td>
<td>796</td>
<td>9.4</td>
</tr>
<tr>
<td>Transportation and warehousing</td>
<td>687</td>
<td>13.1</td>
</tr>
<tr>
<td>Agriculture, forestry, fishing, and hunting</td>
<td>479</td>
<td>22.2</td>
</tr>
<tr>
<td>Government</td>
<td>476</td>
<td>2.6</td>
</tr>
<tr>
<td>Professional and business services</td>
<td>408</td>
<td>2.0</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>304</td>
<td>1.8</td>
</tr>
<tr>
<td>Retail trade</td>
<td>253</td>
<td>1.8</td>
</tr>
<tr>
<td>Leisure and hospitality</td>
<td>202</td>
<td>1.8</td>
</tr>
<tr>
<td>Wholesale trade</td>
<td>190</td>
<td>5.1</td>
</tr>
<tr>
<td>Other services (exc. public admin.)</td>
<td>179</td>
<td>2.6</td>
</tr>
<tr>
<td>Mining, quarrying, and oil and gas extraction</td>
<td>154</td>
<td>0.7</td>
</tr>
<tr>
<td>Educational and health services</td>
<td>131</td>
<td>0.9</td>
</tr>
<tr>
<td>Financial activities</td>
<td>84</td>
<td>1.4</td>
</tr>
<tr>
<td>Information</td>
<td>39</td>
<td>2.4</td>
</tr>
<tr>
<td>Utilities</td>
<td>23</td>
<td></td>
</tr>
</tbody>
</table>

Total fatal work injuries = 4,405
All-worker fatal injury rate = 3.2

Construction had the highest preliminary count of fatal injuries in 2013, but the agriculture, forestry, fishing and hunting sector had the highest fatal work injury rate.

*Data for 2013 are preliminary.
Note: Fatal injury rates exclude workers under the age of 16 years, volunteers, and resident military. The number of fatal work injuries represents total published fatal injuries before the exclusions. For additional information on the fatal work injury rate methodology, please see [http://www.bls.gov/iif/oshinjusr10.htm](http://www.bls.gov/iif/oshinjusr10.htm).
A Brief Summary

- 1891 – Congress passes first Federal Statue
  - Established minimum ventilation requirements at underground coal mines
  - Prohibited employment of children under 12 years of age
- 1910 – after 2000 annual coal mine deaths, Congress establishes Bureau of Mines
  - Responsibility limited to researching coal mines and reducing accidents, but no inspection authority until 1941
- 1952 – Federal Coal Mine Safety Act
  - Required annual inspections in certain underground mines, limited enforcement authority, including violation notices and imminent danger orders. Amended to cover ALL underground mines in 1966
Metal/Non-Metal Regulation

- 1966 - Federal Metal and Nonmetallic Mine Safety Act
  - Mostly advisory standards
  - Authorized inspections and investigations
  - Minimal enforcement authority

  - Most comprehensive regulation yet
  - Surface and underground coal mines
  - Required two annual inspections of every surface mine, four at every underground
  - Authorized monetary penalties for all violations/criminal penalties for knowing and willful
  - Established health standards, and compensation for “black lung”
Modern Era

- **1973** – Secretary of Interior creates Mining Enforcement and Safety Administration (MESA) as a new departmental agency separate from the Bureau of Mines
  - Disconnects mineral development activity of the Bureau from safety enforcement
- **1977** - Federal Mine Safety and Health Act of 1977 (Mine Act)
  - Creates MSHA under U.S. Dept. of Labor
  - Consolidates all federal health and safety regulations of the mining industry, coal as well as non-coal mining, under a single statutory scheme
  - Covers all mines, mills, mine development, rehabilitation, exploration, alumina refineries and cements plants. Applies to all owners, lessees, operators, or entities that control or supervise mines as well as independent contractors
  - Establishes Federal Mine Safety and Health Review Commission (FMSHRC)
- **2006** – Mine Improvement and New Emergency Response Act (MINER)
  - Requires mine-specific emergency response plans in underground coal mines; adds new regulations regarding mine rescue teams and sealing of abandoned areas; requires prompt notification of mine accidents; and increases civil penalties significantly
Strict Liability

- The Mine Act is a strict liability statute
- Does not matter whether an operator is at fault or whether operator intended to violate a safety or health regulation
- In addition, under 110(c), if an agent of the mine (management, supervisor, foreman, etc.) knowingly violates or fails to comply with any order issued under the Act, the individual can be personally liability for additional penalties and could be subject to imprisonment
Strict Liability

It Doesn't Matter Why It Happened
S&S = Seriousness
Negligence = Obviousness
Assessing Negligence

- What did I know?
- When did I know it?
- What did I do about it?
Assessing Negligence

- **(TIME ANALYSIS)**
  How long did the violation exist before the inspector discovered it?

- **(RISK ANALYSIS)**
  Did seriousness justify increased attention?

- **(COMMUNICATION ANALYSIS)**
  Records, complaints, observations, work orders, etc.

- Did management observe, direct, or approve of the action?
What We Need To Do

- “Audit” for compliance
- Know what has been a problem in the past
- Establish safety procedures to address unsafe behavior
- Repeat…
“Audit” For Compliance

- Front line supervisors **must** find potential violations before an inspector does
- Miners must recognize the role they play in preventing violations
Past Problems

- Know what has been a problem in the past
- Track citations
- Identify the four or five standards that have been cited the most in the past two years
- Recognize those standards which MSHA will focus on
Past Problems

- Do you know where to look?
- **http://www.msha.gov**
  - Click on **Mine Data Retrieval System**
  - Enter your mine ID number
  - Click on “More Info”
  - Enter a start date 2 years ago
- Click on “Violations” and “Get Report”
  - Cut and paste the data into a spreadsheet
  - Sort on the standard
Rules To Live By – COAL
(Fatality Prevention)

75.362(a)(1) - On-shift examination
77.404(a)   - Machinery and equipment; operation and maintenance
77.405(b)   - Performing work from a raised position; safeguards
77.1000     - Highwalls, pits and spoil banks; plans
77.1605(b)  - Loading and haulage equipment; installations
77.1606(a)  - Loading and haulage equipment; inspection and maintenance
77.1607(b)  - Loading and haulage equipment; operation
77.1713(a)  - Daily inspection of surface coal mine; certified person; reports of inspection
Rules To Live By: M/NM
(Preventing Common Mining Deaths)

- 46.7(a) – New task training
- 56.3130 – Wall, bank, and slope stability
- 56.3200 – Correction of hazardous conditions
- 56.15020 – Life jackets and belts
- 56.14100(b) – Safety defects; examination, correction and records
- 57.14100(b) – Safety defects; examination, correction and records
Your Safety Culture

How can you influence miner behavior?

- Recognize the problem
- Develop solutions
- Tell people about the problem and the solutions
- Monitor to see if they are doing what you have asked
- Manage non-compliance, i.e. discipline

How can supervisors & managers do a better job of motivating their miners to work safely?
Miner Behavior

- **Information is the key to get improved safety practices**
  - Let them know what you’re doing and why, plus
  - …let them know what they can do to help…

- **Involvement…**
  - Workforce participation in workplace inspections and “audits”
  - Safety and health committee
  - Suggestions for improvements – quick feedback essential

- **Partnership between miners and management…**
Supervisor Behavior

- Recognize that you can’t do it alone...
- Communicate with your crew
  - Tell them what you expect
  - Listen at least half the time
  - Facilitate solutions
  - Give feedback objectively and in a timely manner
- Manage compliance
  - If miners do not follow instructions, you must follow up; with progressive discipline, if necessary
- If it’s not written down, it doesn’t exist/ didn’t happen...
Manager Behavior

- Recognize that you can’t do it alone…
- **Support your supervisors and miners in their efforts to improve safety**
- Ensure that they have the resources to get the job done safely
  - A safe workplace, including safe equipment
  - Safety procedures that the workforce can buy into
  - Safety and health equipment
- Communicate your objectives and the consequences of non-compliance
- Monitor and manage compliance
Employer/Employee Rights

- No “Miranda” warnings for investigations if you are not “in custody”
- Not required to talk to an investigator
- Right to counsel
- Right to discontinue an interview at any time
- Right to refuse to be recorded

- Right to refuse to sign a written statement
- Present exculpatory evidence and information
- Evaluate the direction of the investigation by asking questions
- Collect evidence
- Seek assistance and time to consider a response
Government Tactics

- Telephone calls and visits at home
- Questions during site visits in front of hourly personnel
- Questions in the hallway that seem informal
- Group interviews / discussions
- “You are not the target”
- “If you have nothing to hide...”
Records Not Required To Be Produced On Demand

- Insurance records
- Reports of incidents or injuries (that are not required by law)
- Personnel records
- Safety audits
- Company policy memoranda, rules, procedures or correspondence
- Maintenance records, logs, manuals, or work orders
Examples Of Records Immediately Available To The Government

- Government-required accident, injury and illness records
- Inspections required by regulations
- Employee training records
- Required plans
The Leading Causes of Criminal Prosecutions

- Record Falsification
- False or Misleading Information
- Conspiracy
- Obstruction of Justice
NO ADMISSIONS!
Crisis Management
Cardinal Rules

- NO fact witnesses on investigation team
- NO persons with personal or criminal exposure on investigation team
- One point of contact for all media coverage
- One point of contact for all interactions with agency investigators
Whistleblowers provide knowledge of alleged hazards

- Low bar for protected activity
- Discrimination against whistleblowers is an expensive violation of law that can lead to government prosecutions and liability risks
Miners’ Rights

- Section 103(g): If a miner has reasonable grounds to believe that there is an imminent danger, a violation of the Mine Act, or a violation of a mandatory safety or health standard, a miner may file a written complaint with MSHA and obtain an immediate inspection.

- Section 105(c): A miner has a right to make a safety complaint to MSHA, to a representative of miners, or to the operator.
Addressing Complaints

- Use experienced people to thoroughly evaluate the complaint
- If possible, provide complaining employee opportunity to observe investigation/evaluation
- Explain evaluations and conclusions clearly and calmly
Miners have a right to make a safety complaint to MSHA

But MSHA is not necessary to the resolution of a safety complaint

Your goal: have miners make safety complaints to the company first and resolve them internally
Section 105(c) – No miner may be discharged or discriminated against because the miner has:

- lodged a safety complaint with MSHA, the miner’s employer, or a representative of miners
- exercised a right under the Mine Act
- testified or is going to testify in a proceeding under the Mine Act
What Is Discrimination?

- Adverse action – examples include . . .
  - termination
  - demotion
  - transfer to a less favorable shift
  - ending a benefit previously provided
  - failure to hire
- If a miner has made a safety complaint to you or MSHA, you may not retaliate against the miner for making the complaint even if the complaint has no merit.
Proposed Change to Part 100

- Proposal to amend civil penalty regulation
- Stated purpose: “place a greater emphasis on the more serious safety and health conditions and provide improved safety and health for miners.”
- Only involves changes to regular assessment penalty formula . . .
- But, “may have an indirect impact on special assessments.”
“Key Principles” Driving Proposal

- Improvement in consistency in how inspectors write citations
- Simplification of penalty criteria (which should lead to less disputes)
- Greater emphasis on serious s&h conditions
- Openness and transparency in application of regular formula penalty criteria
<table>
<thead>
<tr>
<th>Criteria</th>
<th>Existing Rule</th>
<th>Proposed Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Penalty Point Range</td>
<td>Percentage as a Percentage of Total Maximum Points**(***)</td>
</tr>
<tr>
<td>Mine Size</td>
<td>0 to 15</td>
<td>0% to 7%</td>
</tr>
<tr>
<td>Controller Size</td>
<td>1 to 10</td>
<td>0.5% to 5%</td>
</tr>
<tr>
<td>Contractor Size *</td>
<td>0 to 25</td>
<td>0% to 12%</td>
</tr>
<tr>
<td>TOTAL Size Criterion</td>
<td>0 to 25</td>
<td>0% to 12%</td>
</tr>
<tr>
<td>Overall Violations</td>
<td>0 to 25</td>
<td>0% to 12%</td>
</tr>
<tr>
<td>Repeat Violations</td>
<td>0 to 20</td>
<td>0% to 10%</td>
</tr>
<tr>
<td>TOTAL Violation History Criterion</td>
<td>0 to 45</td>
<td>0% to 22%</td>
</tr>
<tr>
<td>TOTAL Negligence Criterion</td>
<td>0 to 50</td>
<td>0% to 24%</td>
</tr>
<tr>
<td>Likelihood</td>
<td>0 to 50</td>
<td>0% to 24%</td>
</tr>
<tr>
<td>Severity</td>
<td>0 to 20</td>
<td>0% to 10%</td>
</tr>
<tr>
<td>Persons Affected</td>
<td>0 to 18</td>
<td>0% to 9%</td>
</tr>
<tr>
<td>TOTAL Gravity Criterion</td>
<td>0 to 88</td>
<td>0% to 42%</td>
</tr>
<tr>
<td>Total Maximum Points</td>
<td>208</td>
<td>100</td>
</tr>
</tbody>
</table>

* Points for contractor size equal the sum of the points for mine and controller sizes for operators.

** Maximum points add to over 100 percent due to rounding.

*** Conversion uses 208 points for the existing rule and 100 points for the proposed rule.
## Impact - Using 2013 Violation Data

### Table 2: Comparison of Relative Weights of Criteria under the Existing and Proposed Rules

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Existing Rule</th>
<th>Proposed Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Penalty Points for Criterion</td>
<td>% of Total Penalty Points</td>
</tr>
<tr>
<td>Mine Size</td>
<td>853,482</td>
<td>10.9%</td>
</tr>
<tr>
<td>Controller Size</td>
<td>661,044</td>
<td>8.5%</td>
</tr>
<tr>
<td>Contractor Size</td>
<td>56,077</td>
<td>0.7%</td>
</tr>
<tr>
<td>TOTAL Size Criterion</td>
<td>1,570,603</td>
<td>20.1%</td>
</tr>
<tr>
<td>Overall Violations*</td>
<td>758,394</td>
<td>9.7%</td>
</tr>
<tr>
<td>Repeat Violations</td>
<td>145,111</td>
<td>1.9%</td>
</tr>
<tr>
<td>TOTAL Violation History Criterion *</td>
<td>903,505</td>
<td>11.6%</td>
</tr>
<tr>
<td>TOTAL Negligence Criterion *</td>
<td>2,350,120</td>
<td>30.1%</td>
</tr>
<tr>
<td>Likelihood</td>
<td>1,799,400</td>
<td>23.1%</td>
</tr>
<tr>
<td>Severity *</td>
<td>953,235</td>
<td>12.2%</td>
</tr>
<tr>
<td>Persons Affected</td>
<td>228,835</td>
<td>2.9%</td>
</tr>
<tr>
<td>TOTAL Gravity Criterion</td>
<td>2,981,470</td>
<td>38.2%</td>
</tr>
<tr>
<td>TOTAL Penalty Points for 121,089 violations</td>
<td>7,805,698</td>
<td></td>
</tr>
</tbody>
</table>

* Proposal would increase the criterion’s relative weight as a percentage of all penalty points.
### Negligence “Simplified”

#### Part 100 Table X—Negligence

<table>
<thead>
<tr>
<th>Existing Rule</th>
<th>Penalty Points (out of maximum 208 points)</th>
<th>Proposed Rule</th>
<th>Penalty Points (out of maximum 100 points)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>No Negligence</strong>&lt;br&gt;(The operator exercised diligence and could not have known of the violative condition or practice.)</td>
<td>0</td>
<td><strong>Not Negligent</strong>&lt;br&gt;(The operator exercised diligence and could not have known of the violative condition or practice.)</td>
<td>0</td>
</tr>
<tr>
<td><strong>Low Negligence</strong>&lt;br&gt;(The operator knew or should have known about the violative condition or practice, but there are considerable mitigating circumstances.)</td>
<td>10</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Moderate Negligence</strong>&lt;br&gt;(The operator knew or should have known about the violative condition or practice, but there are mitigating circumstances.)</td>
<td>20</td>
<td><strong>Negligent</strong>&lt;br&gt;(The operator knew or should have known about the violative condition or practice.)</td>
<td>15</td>
</tr>
<tr>
<td><strong>High Negligence</strong>&lt;br&gt;(The operator knew or should have known about the violative condition or practice, but there are no mitigating circumstances.)</td>
<td>35</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Reckless Disregard</strong>&lt;br&gt;(The operator displayed conduct which exhibits the absence of the slightest degree of care.)</td>
<td>50</td>
<td><strong>Reckless Disregard</strong>&lt;br&gt;(The operator displayed conduct which exhibits the absence of the slightest degree of care.)</td>
<td>30</td>
</tr>
<tr>
<td>Existing Rule</td>
<td>Penalty Points (out of maximum 208 points)</td>
<td>Proposed Rule</td>
<td></td>
</tr>
<tr>
<td>------------------------</td>
<td>--------------------------------------------</td>
<td>--------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>No Likelihood</td>
<td>0</td>
<td>Unlikely (Condition or practice cited has little or no likelihood of causing an event that could result in an injury or illness.)</td>
<td>0</td>
</tr>
<tr>
<td>Unlikely</td>
<td>10</td>
<td>Reasonably Likely (Condition or practice cited is likely to cause an event that could result in an injury or illness.)</td>
<td>14</td>
</tr>
<tr>
<td>Reasonably Likely</td>
<td>30</td>
<td>Occurred (Condition or practice cited has caused an event that has resulted or could have resulted in an injury or illness.)</td>
<td>25</td>
</tr>
<tr>
<td>Highly Likely</td>
<td>40</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Occurred</td>
<td>50</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Severity

**Part 100 Table XII—Gravity: Severity**

<table>
<thead>
<tr>
<th>Existing Rule</th>
<th>Penalty Points (out of maximum 208 points)</th>
<th>Proposed Rule</th>
<th>Penalty Points (out of maximum 100 points)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Severity of Injury or Illness If the Event Has Occurred or Were To Occur</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No lost work days (All occupational injuries and illnesses as defined in 30 CFR Part 50 except those listed below.)</td>
<td>0</td>
<td>No lost work days (All occupational injuries and illnesses as defined in 30 CFR Part 50 except those listed below.)</td>
<td>0</td>
</tr>
<tr>
<td>Lost workdays or restricted duty (Any injury or illness which would cause the injured or ill person to lose one full day of work or more after the day of the injury or illness, or which would cause one full day or more of restricted duty.)</td>
<td>5</td>
<td>Lost workdays or restricted duty (Any injury or illness which would cause the injured or ill person to lose one full day of work or more after the day of the injury or illness, or which would cause one full day or more of restricted duty.)</td>
<td>5</td>
</tr>
<tr>
<td>Permanently disabling (Any injury or illness which would be likely to result in the total or partial loss of the use of any member or function of the body.)</td>
<td>10</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fatal (Any work-related injury or illness resulting in death, or which has a reasonable potential to cause death.)</td>
<td>20</td>
<td>Fatal (Any work-related injury or illness resulting in death, or which has a reasonable potential to cause death.)</td>
<td>10</td>
</tr>
</tbody>
</table>
Proposed Rule Schedule

- Comments due December 3, 2014
- Public Hearings
  - December 4 in Arlington, VA
  - December 9 in Denver, CO
- Post-Hearing Comments due January 9, 2015
“Most discussions of decision making assume that only senior executives make decisions or that only senior executives’ decisions matter. This is a dangerous mistake.”

– Peter Drucker

“The way you see them is the way you treat them and the way your treat them is the way they often become.”

– Zig Zigler