

APRIL 11, 2016 | MSHA INSPECTIONS, CITATIONS & ENFORCEMENT

# Is Your Operation Prepared for a Multi-Inspector MSHA Inspection?

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MSHA is continuing the increased enforcement of the Metal/Non-Metal (M/NM) industry. The agency recently began conducting what inspectors have referred to as “blitz” inspections at mines across the country. During a blitz, MSHA may arrive on site with multiple inspectors to conduct simultaneous and widespread inspections of a mine, similar to what the industry now recognizes as an impact inspection.

Whether a new enforcement tool or disguised impact inspection, the blitz is yet another development for MSHA's enforcement of the mining industry as a whole, with a consistently growing emphasis on M/NM operators. The agency continues to cite the pattern of fatal injuries which occurred between October 2013 and August 2015 as the main impetus behind the increased enforcement. Unfortunately, MSHA views the fact that 2015 saw the fewest mining deaths and the longest consecutive stretch of days without a fatality (August 3 – December 15, 2016) in the agency's history, as evidence of the success of increased enforcement's more so than operators' continued diligence towards safety.

No matter how misguided the reasoning behind MSHA's continued spike in enforcement, multi-inspector inspections pose a unique logistical issue for any operator who wishes to exercise their right accompany the inspector during the mine inspection, under §103(f) of the Mine Act. For the vast majority of operators, there is most likely one, or maybe two, plant managers, superintendents, foremen, safety directors or designated operator's representative trained to accompany a MSHA inspector around the mine. So what happens if MSHA arrives on site with five or six inspectors?

With that in mind, the multi-inspector inspections will most likely be considerably shorter than a regular health and safety inspection due to the number of inspectors on site and the usually a more specific narrowed scope of the inspection. These inspections are not usually meant to be a comprehensive, wall-to-wall inspection. Therefore, the inspectors may only inspect certain portions of the mine site for certain conditions such as ground control or guarding, albeit simultaneously.

A best practice for handling any inspection is to assign a superintendent or foreman to accompany the MSHA inspector(s) on their respective inspection. With multiple inspectors on site, it becomes necessary to ensure the mine can send an individual with each inspector, or inspection group, venturing into the mine. If all the inspectors

remain as a single inspection group, a unified inspection party approach should be adopted throughout, however, the operators should still maintain enough trained miners at the ready to accompany each inspector if the group disperses.

In addition to fielding enough personnel to accompany inspectors, the operator representatives should be properly trained to participate in the inspection. The representatives should be familiar with MSHA regulations and the company's policies and procedures, including those on maintenance, workplace and pre-shift inspections, equipment or area removal from service and training. Additionally, the operator representatives should take photographs and record notes regarding each alleged violation MSHA points out.

However, exercise caution and beware, MSHA can request any photographs taken by the operator in the course of discovery during litigation. Additionally, unless the operator was instructed to take the notes by counsel they will be discoverable as well, yet communication with MSHA counsel can make notes privileged, and therefore not discoverable, if the proper procedures are followed.

Be mindful that the company's notes and photographs do not make matters worse. Most importantly, the representatives need to be aware that their comments during the course of the inspection can and will affect the operation in some capacity.

What an operator's representative says during the course of the inspection can either help create a cooperative environment with MSHA or, if tempers flare, the inspection can turn into a contentious endeavor. The representatives should be very careful with respect to any commentary or responses regarding MSHA's questions on an alleged violation. Such comments will most definitely be recorded by the inspector, and can be used against the company as the basis for heightened negligence, gravity or severity designations.

If egregious enough, the statement can even be used against the employee as the cause of action for a special investigation, which have the potential to result in civil and/or criminal penalties against the representative if they are found to be an agent of management and knowingly caused or failed to correct a hazardous condition or practice.

If a miner or manager accompanying the inspector disagrees with the issuance of a citation or order, it may be best to wait until the closeout meeting to discuss the issue instead of questioning the inspector during inspection. Questioning the inspector at the moment of issuance may not only prolong the inspection, but it may create an acrimonious environment and potentially result in more paper. Additionally, waiting until the close out will also grant the operator time to gather mitigating circumstances to present to MSHA.

However, there may be certain situations in which an immediate discussion is necessary, such as the case of an unwarrantable failure, withdrawal order, or imminent danger order. The aforementioned actions would have an immediate impact on continued operations, removing the area or equipment subject to the issuance from service until abatement is approved by MSHA, and therefore a discussion on the spot would be prudent.

Dealing with multiple mini-inspections may be difficult, as the individuals usually designated to accompany the inspector will not be able to participate in all aspects of this inspection, that is, unless operators prepare and train additional miners as to act as operator representatives. Company representatives should be trained and competent to work with MSHA inspectors to facilitate a safe and efficient inspection of the site. It is also crucial

that individuals tasked with accompanying each inspector remain in communication with other company personnel, and if needed the company's MSHA attorney, in order to coordinate abatement or in the event that an issue arises which requires greater attention and action by the company.