



# Mining MSHA - What is Negligence?

Insights

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*Welcome to “Mining MSHA,” a regular series of posts focusing on mine safety fundamentals – but designed for both new and experienced mine safety professionals. This series will help safety professionals develop their MSHA legal knowledge as we explore over 40 years of case law developed by the Federal Mine Safety and Health Review Commission and its bench of Administrative Law Judges. You will want to share this series with your safety personnel at all levels, because understanding what MSHA can and cannot legally do is the first step in managing your relationship with this enforcement agency. Join your Fisher Phillips Mine Safety team as we mine legal knowledge from the body of Federal Mine Safety and Health law.*

So far in this series, we have discussed conferencing and contesting citations and orders and what is “Significant and Substantial.” Here, we turn our attention to another important designation on a citation or order: operator negligence.

## Operator Negligence

The Federal Mine Safety and Health Act of 1977 (Mine Act) is a strict liability statute. This means MSHA can issue enforcement actions without regard to fault. However, an MSHA inspector will still evaluate negligence when issuing a citation or order. This article will tell you what you need to know about MSHA’s negligence determinations and what information to provide an MSHA inspector to mitigate negligence.

Negligence is defined in 30 C.F.R. section 100.3(d) as “...conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.” Put differently, negligence essentially means “what did you know and what did you do about it?”

For example, if an operator does not know of the existence of an alleged condition or practice that violates a safety and health standard (or regulation), the operator’s negligence should be low. If an operator knew about an alleged violation but then did something about it, the operator’s negligence should be low. If an operator knew about an alleged violation and did not do anything to correct it, the operator’s negligence may be high.

30 C.F.R. Part 100 defines the levels of negligence:

- **No negligence** – the operator exercised diligence and could not have known of the violative condition or practice.
- **Low negligence** – the operator knew or should have known of the violative condition or practice but there are considerable mitigating circumstances.
- **Moderate negligence** – the operator knew or should have known of the violative condition or practice but there are mitigating circumstances.
- **High negligence** – the operator knew or should have known of the violative condition or practice and there are no mitigating circumstances.
- **Reckless disregard** – the operator displayed conduct that exhibits the absence of the slightest degree of care.

These degrees of negligence introduce the concept of mitigating circumstances. In the context of operator negligence, mitigating circumstances are actions that reduce the severity or seriousness of the existence of an alleged violation. Mitigating circumstances include considerations about whether the operator made reasonable efforts to prevent or correct hazardous conditions or practices before the inspector observed the conditions or practices. For example, ordering repair parts, posting warning signs, or restricting travel in a hazardous area prior to being cited could be considered mitigation.

### **Mitigating Negligence During Inspections**

When issuing a citation or order, the MSHA inspector is supposed to evaluate and document the following factors when making a negligence determination:

- The length of time the violation existed and the basis for this determination, including record books, physical factors, or statements;
- The obviousness of the condition;
- Evidence indicating operator presence in the area where the violative condition or practice may have existed, including the name and title of witnesses and how the evidence was determined, including dates and times; and
- Any information regarding action(s) or effort taken by the operator to prevent or correct the hazardous conditions or practices.

Operators can evaluate the following questions to mitigate negligence:

- Did the cited condition just occur or occur after the last examination?
- How obvious was the cited condition?
- Was the violation in an area that is routinely inspected or traveled or on equipment that is used and inspected periodically?

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- Were there any efforts made to correct the cited condition?
- Did the violation occur due to unforeseeable employee misconduct?
- Had MSHA previously inspected the cited condition without any citations issued?

These questions are designed to evaluate the level of operator knowledge of the existence of an alleged violation and whether an operator has been exercising the level of care required to prevent or minimize the existence of an alleged violation. Operators may decide to share favorable information during an MSHA inspection or document useful information for the conferencing or contest process.

### **Pay Attention to Negligence Determinations**

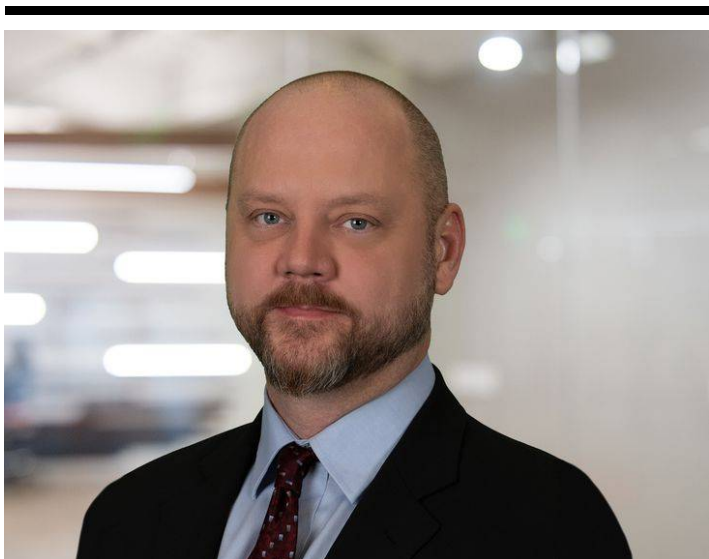
Controlling the negligence on any citation or order can be very important. Negligence determinations directly affect penalty amount; the higher the negligence, the higher the corresponding penalty. High or reckless disregard negligence designations can lead to potential unwarrantable failure findings (i.e., 104(d)(1) citations and orders) and 110(c) consequences. High negligence enforcement actions that are also significant and substantial is a pattern of violations criteria, and in limited circumstances, high negligence or reckless disregard designations can impact potential civil litigation. In short, operators should understand negligence and mitigate wherever possible.

In the next issue, we will cover another important topic – “unwarrantable failure.” Stay tuned, and don’t forget to reach out to your mine safety lawyer or [any attorney in our Mine Safety & Health group](#) for specific questions and guidance on any of the topics covered in this series.

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*This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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