TRAINING UNDER PART 48

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A. <u>Section 115: The Basic Framework</u>

One of the most important components of the Federal Mine Safety and Health Act of 1977 ("Mine Act") is the mandatory health and safety training requirements set out at § 115, 30 U.S.C. § 825. This section establishes the basic, underlying framework for the training regulations for underground and surface miners set out at 30 C.F.R. Part 48. This basic framework includes a minimum of (1) 40 hours of training for new underground miners; (2) 24 hours of training for new surface miners; (2) eight hours of annual refresher training; (4) new task training; (5) compensation of miners for training; and (6) certification of such training. These minimum requirements must be included in an operator training plan which must be approved by the Mine Safety and Health Administration ("MSHA").

All of these section 115 requirements, along with the requirement for hazard training, are included in the training regulations at 30 C.F.R. Part 48. Part 48 is divided into two subparts. Subpart A, §§ 48.1 through 48.12, pertains to underground miners. Subpart B, §§ 48.21 through 48.32, pertains to surface miners and miners working in the surface areas of underground mines.[1]

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[1] Part 48 was originally promulgated to apply to *all* miners. From 1980 - 2000, however, Congress, through a continuing training resolution inserted in the Omnibus Budget Bill, prohibited MSHA from utilizing its budget to enforce the Part 48 training requirements at surface stone, surface clay, sand and gravel, surface limestone, colloidal phosphate, and shell dredging operations. This enforcement prohibition was removed with the promulgation of training requirements at 30 C.F.R. Part 46 which are applicable and enforceable in these specific mining industries. Training and Retraining of Miners Engaged in Shell Dredging or Employed at Sand, Gravel, Surface Stone, Surface Clay, Colloidal Phosphate, or Surface Limestone Mines, 64 Fed. Reg. 53080 (Sept. 30, 1999)(to be codified at 30 C.F.R. pts. 46 and 48).

B. All "Miners" Must Receive Training

1. Training Dictated by Level of Exposure to Mine Hazards

The basic framework for Part 48 training is that miners receive training commensurate to their level of exposure to mine hazards. Pursuant to 30 C.F.R. § 48.2, miners with significant exposure to mine hazards are required to receive the comprehensive training set out at 30 C.F.R. §§ 48.3 through 48.10, in addition to hazard training set out at § 48.11.[2] Section 48.2(a)(1) requires comprehensive training for "any person working in an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator [or contracted] by the operator to work at the mine for frequent or extended periods." [3] This section specifically excludes from the comprehensive training requirements "shaft and slope workers, workers engaged in construction activities ancillary to shaft and slope sinking, and workers engaged in the construction of major additions to an existing mine which requires the mine to cease operations." 30 C.F.R. § 48.2(a)(1)(i).[4]

Pursuant to 30 C.F.R. §§ 48.2(a)(2) and 48.22(a)(2), miners with less exposure to mine hazards are only required to receive hazard training pursuant to 30 C.F.R. §§ 48.11 and 48.31. Such miners include "any person working in an underground [/ surface] mine, including any delivery, office, or scientific worker or occasional, short-term maintenance or service worker contracted by the operator, and any student engaged in academic projects involving his or her extended presence at the mine." 30 C.F.R. §§ 48.2(a)(2), 48.22(a)(2).

2. Regular, Frequent, or Extended Exposure

A common dispute over the years between mine operators, independent contractors and MSHA involves the extent of hazard exposure that is necessary to require comprehensive training. A proper determination hinges on whether the exposure to mine

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[2] Miners working at surface mines and the surface areas of underground mines are governed by the virtually identical definition set out at 30 C.F.R. § 48.22. As with § 48.2, the extent of exposure to mine hazards dictates whether the comprehensive training requirements, set out at §§ 48.23 through 48.30 for surface miners, are applicable.

[3] Section 48.2(a)(1) further clarifies that this definition includes "the operator if the operator works underground on a continuing, even if irregular, basis." It also allows comprehensively trained "short term, specialized contract workers" the option of receiving hazard training with each new employment, rather than more comprehensive training. 30 C.F.R. §§ 48.2(a)(1) , 48.22(a)(1); *See L&J Energy Co.,* 16 FMSHRC 424, 448-449 (Weisberger, J., 1994) (No violation of hazard training requirement at section 48.31 for failing to provide such training because section 48.22 gives short term auger crew members "option" of receiving hazard training or comprehensive training).

[4] *See Black Diamond Construction, Inc.,* 21 FMSHRC 1188, 1199 (1999)(MSHA determination that Construction personnel engaged in impoundment elimination work at a preparation plant were miners subject to Part 48 was "not reasonable in law and fact").

hazards is "regular," "frequent," or "extended." Although these terms are not defined in Part 48, Federal Mine Safety and Health Review Commission decisions have tended to defer to MSHA's policy definition.[5]

MSHA's Program Policy Manual states that regular exposure "means either frequent exposure, that is exposure to hazards at the mine on a frequent rather than consecutive day basis (a pattern of recurring exposure), or extended exposure of more than 5 consecutive workdays, or both." 3 MSHA, *Program Policy Manual* 34 (2005) (hereinafter "*Program Policy Manual*"). Judges who have examined this issue have generally emphasized the gravity of the hazard exposure rather than strictly counting the days of exposure.[6]

3. Independent Contractor Training Obligations not Dictated by Formal Contract or Ability to Control Operations

Independent contractors performing services at a mine, who have limited exposure to mine hazards, are often surprised when MSHA treats them as operators for training compliance purposes. The definition of "operator" set out at 30 C.F.R. §§ 48.2(e) and 48.22(e) is as follows:

> [A]ny owner, lessee, or other person who operates, controls, or supervises [a surface mine or surface area of] an underground mine; or *independent contractor* identified as an operator performing services or construction at such [time] mine .

(emphasis added).

This definition is similar to the definition found at § 3(d) of the Mine Act, 30 U.S.C. § 802(d) which describes an operator as:

> any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent

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[5] *See Dakco Corp.,* 10 FMSHRC 1259, 1288 (Koutras, J., 1988).

[6] *See Anderson Equip. Co.,* 14 FMSHRC 222, 226 (Maurer, J., 1992)(Miner contracted to do mobile equipment maintenance work at various mine sites was regularly exposed to mine hazards on a frequent basis, including at one location for six consecutive days); *Energy Trucking, Inc.*, 19 FMSHRC 1685 (Fauver, J., 1997)(Independent contractor truck driver making daily trips to uranium mine site was frequently exposed to mine hazards, including radiation, dust, and equipment accidents); *Conesville Coal Preparation Co.,* 12 FMSHRC 639, 687 (Koutras, J., 1990) (Coal truck driver delivering coal to preparation plant three time per day, three days per week, and often exiting cab to facilitate dumping was "frequently and regularly exposed to mine hazards" and therefore was miner subject to comprehensive training requirements); *See also Kelly Trucking Co.*, 11 FMSHRC 2441 (Maurer, J., 1989)(Withdrawal order for lack of training appropriate where dragline operator worked with dragline for three or four days and loaded piles of coal fines).

> contractor performing services or construction at such mine.

Notwithstanding this broad coverage, some service contractors have asserted, based on the definition of "independent contractor" found at 30 C.F.R. Part 45, that they are not independent contractors subject to operator status and the compliance obligations that accompany that status. The independent contractor regulation at 30 C.F.R. § 45.2(c) defines an "independent contractor" as:

> any person, partnership, corporation, subsidiary, of a corporation, firm, association or other organization *that contracts to perform services or construction at a mine.*

(emphasis added).

In *Joy Technologies, Inc.,* 15 FMSHRC 2147 (1993), *aff'd*, 17 FMSHRC 1303 (1995), *affi'd sub nom. Joy Technologies, Inc. v. Secretary of Labor, MSHA*, 99 F.2d 991 (10th Cir. 1996), an equipment manufacturer, citing this definition, argued that the fact that (1) there was no service contract between Joy and the mine, and (2) Joy did not control the performance of any operations or services at the mine meant that it was not, under common law, an independent contractor subject to the refresher training requirements imposed on operators. Affirming the Review Commission, the Tenth Circuit Court of Appeals rejected these arguments.[7]

In Joy *Technologies,* a service representative visited a mine site in conjunction with the delivery of a new continuous mining machine and other equipment. According to service reports, the service representative visited the mine four times over a two month period, twice for two days, for a total of six days. Additional visits were not documented in service reports. During that time, the service representative assisted with the unloading of new shuttle cars, checked the condition of the shuttle cars, assisted in troubleshooting a problem on one of the shuttle cars, obtained replacement parts, and operated the remote control to assist maintenance workers (the action that was observed by an MSHA inspector and was the basis for a citation). All of these activities were undertaken without any formal service contract in place.

Noting that "neither Congress nor MSHA's definition has spoken to the precise question of whether a service contract is required," the Tenth Circuit deferred to MSHA's "reasonable interpretation" that such a contract is not required. *Joy Technologies*, 99

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[7] The Tenth Circuit also rejected a third argument asserted by Joy. Specifically, Joy argued that it was not an operator under § 3(d) of the Mine Act because it was not sufficiently involved in the extraction process or it did not have a continuing presence at the mine. The Tenth Circuit adopted a broad reading of § 3(d) of the Mine Act based on the plain meaning of the definition of operator as including "any independent contractor performing services.: *Joy Technologies*, 99 F.2d at 999 (*quoting Otis Elevator,* 921 F.2d 1285, 1290 (D.C. Cir. 1990)).

F.2d at 995.[8] Similarly, with respect to the control issue, the Tenth Circuit, also deferred to the Secretary of Labor's reasonable interpretation and declined to adopt the narrower common law control test for determining who is an independent contractor under the Mine Act, because it would "thwart the remedial purposes of the Mine Act." *Id.* at 997. One central purpose was to broaden the Act's protections "to include all those whose presence at a mine affects the health and safety of miners." *Id.* at 998.

C. Training Plans

1. Basic Components

Each operator, including independent contractors, is required, under §§ 48.3 and 48.23, to develop and submit a written training plan before opening a mine, reopening a closed mine, or "before work commences."[9] This plan must contain "programs for training new miners, training experienced miners, training miners for new tasks, annual refresher training, and hazard training." 30 C.F.R. §§ 48.3(a), 48.23(a). These sections provide a detailed **list** of the information that must be included in the plan and filed with the MSHA District Manager.

Significantly, the training plan must contain a predicted time that training will occur, and a list of MSHA approved instructors. Changes in the list of approved instructors do not need to be re-approved by the District Manager so long as the changes are kept with the approved plan. *Program Policy Manual*, *supra* pg. 2, at 41. New mine ownership can continue to utilize the previous owner's approved plan, so long as procedures and conditions at the mine remain the same. *Program Policy Manual*, *supra* pg. 2, at 41. A proposed training plan must be provided to the representative of miners at least two weeks before submission to the District Manager. 30 C.F.R. § 48.3(d), 48.23(d). A copy of the plan must also be maintained at the mine site so that it can be examined by miners.[10]

2. District Manager Authority

District Managers have authority under §§ 48.3(j)(1) and 48.23(j)(1) to require revisions to proposed training plans as a pre-requisite for approval. They also can require revisions to already approved plans in order to retain approval. When requiring revisions, the District Manager must accord the operator and the representative of the miners the opportunity to discuss the revisions. The District Manager can also approve

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[8] The Tenth Circuit noted that "[u]nder Joy's interpretation, a party performing services at a mine could avoid the requirements of the Act" by not formally establishing a contract. *Joy Technologies*, 99 F.2d at 996.

[9] *Konitz Contracting, Inc.,*17 FMSHRC 1586 (Manning, J., 1995) (Independent Contractor at gold mine violated § 48.23 when it failed to file plan before beginning crushing).

[10] *Reintjes of the South, Inc.,* 21 FMSHRC 687 (Weisberger, J., 1999)(Plan must be "physically present").

specific sections of the plan while other sections are being revised or discussed. 30 C.F.R. §§ 48.3(j)(2), 48.23(j)(2).

District Managers may also "disapprove" a training plan or a proposed modification which fails to comply with Part 48 requirements. 30 C.F.R. §§ 48.3(m), 48.23(m). Such disapproval must be in writing and specify (1) the deficiency; (2) the remedial action necessary; and (3) the deadline for such action. 30 C.F.R. §§ 48.3(m), 48.23(m). Until this deadline, "punitive" enforcement action is suspended, except in the case of imminent danger situations. 30 C.F.R. §§ 48.3(m), 48.23(m).

3. Appeals Procedures

Under 30 C.F.R. §§ 48.12 and 48.32, operators, miners, and miners' representatives have the right to appeal decisions by the District Manager regarding training plans. Such appeals must be submitted in writing, within 30 days of a decision by the District Manager, to either the Administrator for Coal Mine Safety and Health or the Administrator for Metal and Non-metal Mine Safety and Health as appropriate. 30 C.F.R. §§ 48.12(a), 48.32(a).

The Administrator can request additional information with which to evaluate the appeal, but is required to issue a decision with 30 days of the filing of the appeal. 30 C.F.R. §§ 48.12(b-c), 48.32(b-c).

D. New Miner Training

Sections 48.5 and 48.25 establish a specific course of instruction for all "new miners." Under § 48.5, new miners at underground mines must receive 40 hours of training before being assigned to work duties. Section 48.25 prescribes 24 hours of training for new miners at surface mines, or the surface areas of underground mines.[11] The regulations set out specific **subjects** that must be included in this training. In addition, at the conclusion of this training, and before work duties are assigned, the operator must administer an oral, written or practical demonstration to determine the successful completion of the training. 30 C.F.R. §§ 48.5(c), 48.25(c).[12]

1. New Miner

[11] Unlike § 48.5, § 48.25, at the discretion of the District Manager, allows operators to assign work duties after only eight hours of training. 30 C.F.R. § 48.25(a). This initial training must include (1) introduction to the work environment; (2) hazard recognition; and (3) health and safety aspects of the tasks to which the new miners will be assigned. The balance of the 24 hours of training must be provided within 60 days. This schedule must be set out and approved in the training plan submitted to the District Manager. *Id.*

[12] A test or demonstration must also be administered following the eight hours of initial training allowed at surface operations. 30 C.F.R. § 48.25(a).

The regulations define a "new miner" as "a miner who is not an experienced miner." 30 C.F.R. §§ 48.2(c), 48.22(c). An "experienced miner" is defined in these regulations, as follows:

> (1) A miner who has completed MSHA-approved new miner training for underground [/ surface] miners or training acceptable to MSHA from a State agency and who has had at least 12 months of underground [/ surface] mining experience; or
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> (2) A supervisor who is certified under an MSHA-approved State certification program and who is employed as an underground [/ surface] supervisor on October 6, 1998.

30 C.F.R. §§ 48.2(b), 48.22(b). Significantly, a newly employed miner with less than 12 months of experience, who has taken all of the new miner training within 36 months of employment does not have to repeat new miner training. Only experienced miner training is necessary for such miners. 30 C.F.R. §§ 48.5(d), 48.25(d).

2. Training Rights of Prospective and Laid-off Employees

Issues frequently arise about operator consideration of training in hiring, layoff and recall decisions. The Review Commission and the courts have consistently found that § 115 of the Mine Act does not provide a statutory right to training to prospective employees or laid-off employees.[13] Consequently, it is appropriate for operators to consider the training status of such personnel in making these decisions. With that said, the Review Commission has also been consistent in its position that if operators rely on prehire training of rehires to satisfy its statutory training obligations with respect to "new miners," the operator must reimburse miners for the expense of their training.[14]

E. Experienced Miner Training

Experienced miners who are (1) newly employed by the operator; (2) transferred

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[13] *See UMWA ex rel. James Rowe v. Peabody Coal Co.,* 7 FMSHRC 1357, 1363 (1985), *aff'd sub nom. Brock v. Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987); *Secretary of Labor, MSHA ex rel. I.B. Acton v. Jim Walter Resources,* 7 FMSHRC 1348, 1354 (1985), *aff'd sub nom. Brock v. Peabody Coal Co.,* 822 F.2d 1134 (D.C. Cir. 1987) (Commission concluded that mine operator policies to bypass for rehire laid-off individuals because those individuals lacked current safety and health training required by the Mine Act did not constitute discrimination under the Mine Act); *Emery Mining Corp. v. Secretary of Labor, MSHA,* 83 F.2d 155 (10th Cir. 1986)(Hiring policy requiring job applicants to obtain 32 hours of MSHA-approved training prior to hire does not violate Mine Act).

[14] *UMWA ex rel. James Rowe v. Peabody Coal Co.,* 7 FMSHRC 1357 (1985), *aff'd sub nom. Brock v. Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987) ; *Secretary of Labor, MSHA ex rel. I.B. Acton v. Jim Walter Resources, Inc.,* 7 FMSHRC 1348 (1985),), *aff'd sub nom. Brock v. Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987).

to the mine; (3) experienced underground miners transferred from surface to underground or underground to surface; or (4) returning to the mine after an absence of more than 12 months, are required to receive the course of training set out at 30 C.F.R. §§ 48.6 and 48.26. Except for experienced miners returning to mining following an absence of five years or more, §§ 48.6 and 48.26 does not require a specific time period for training.[15] Rather, the training must be tailored to meet the training needs of specific miners. 30 C.F.R. §§ 48.6(d) , 48.26(d). This training must cover the specific subjects laid out in the regulation.

A miner returning to a mine after an absence of 12 months or less is only required to receive training regarding major changes that have occurred at the mine since he or she has been gone.[16] 30 C.F.R. §§ 48.6(e), 48.26(e). The person who conducts this limited training must be knowledgeable of the changes but does not have to be MSHA certified. 30 C.F.R. §§ 48.6(e)(1), 48.26(e)(1). No record of this training is necessary. 30 C.F.R. §§ 48.6(e)(2), 48.26(e)(2). Although not set out in the regulation, at least one administrative law judge has interpreted section 48.6(e) to require this limited training to be conducted before the experienced miner begins work.[17]

A common problem that operators encounter in providing experienced miner training is determining the substance and extent of training that is necessary to be deemed adequate under the standard. Given the fact that the sufficiency of such training is dictated by the needs and experience level of each individual miner, each factual situation is judged on its own merits.[18]

F. Task Training

Miners are required to receive training regarding tasks in which they have had no previous experience. 30 C.F.R. §§ 48.7, 48.27. The scope of that training is dictated by the type of task to which a miner is assigned. Sections 48.7(a) and 48.27(a) set out more rigorous task training, including supervised practice and operation, for equipment

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[15] Experienced miners returning from an absence of five years or more must receive at least eight hours of experienced miner training. 30 C.F.R. §§ 48.6(b), 48.26(b).

[16] Annual refresher training under 30 C.F.R. must be provided if it was missed during the less than 12 month absence. 30 C.F.R. §§ 48.6(e)(3), 48.26(e)(3).

[17] *Bethenergy Mines Inc.*, Nos. PENN 94-95-R, PENN 94-216, 1994 WL 173917 (FMSHRC May 2, 1994) (ALJ deferred to MSHA interpretation that section 48(e) training must be provided to returning laid-off miners before beginning work after two month absence).

[18] *Cannelton Industries, Inc.*, 24 FMSHRC 840 (Barbour, J., 2002) (Introduction to haul road hazards to experienced mine truck drivers *while* hauling first load did not comply with § 48.26); *Holt Co. of Texas*, 22 FMSHRC 196, 201 (Melick, J., 2000) (Failure to conduct any training for mobile equipment mechanic was violation; lack of evidence that blocking of Caterpillar 990 Loader would have been covered in training meant violation was not significant and substantial); *Energy Trucking, Inc.,* 19 FMSHRC 1685, 1688 (Fauver, J., 1997) (Training that drivers received did not approach the "scope, detail, and content" required by § 48.26).

operators and blasting personnel:

> Miners assigned to new work tasks as mobile equipment operators, drilling machine operators, haulage and conveyor systems operators, roof [§ 48.7 only] and ground control machine operators, and those in blasting operations shall not perform new work tasks in these categories until training prescribed [in this section] has been completed.

30 C.F.R. §§ 48.7(a), 48.27(a).

Miners in this category are specifically prohibited from performing these tasks unsupervised until safe operating procedures have been demonstrated to the operator or the operator's agent. 30 C.F.R. §§ 48.7(b), 48.27(b). Miners who have been trained or who have performed a task in the past, and who have demonstrated safe work procedures in that task within 12 months of assignment are not subject to this task training requirement. 30 C.F.R. §§ 48.7(a), 48.27(a).

Miners who are assigned a task that does not fall into the § 48.7(a) or 48.27(a) category set out above must receive instruction before performing the task but are not required to perform supervised practice or operation. 30 C.F.R. §§ 48.7(c), 48.27(c).[19]

All task training and supervised practice and operation must be conducted by either qualified trainers or experienced persons. 30 C.F.R. §§ 48.7(e), 48.27(d).

1. A Task

In order for the task training requirements to be applicable, an activity must first constitute a "task." Not every activity at a mine constitutes a task. The definition of the term "task" set out at 30 C.F.R. §§ 48.2(f) and 48.22(f) describes a task as "a work assignment that includes duties of a job that occur on a regular basis and which requires physical abilities and job knowledge." The key issue in this definition, which has failed to produce much consensus, is how to determine that an activity "occur[s] on a regular basis." In *Twentymile Coal Company,* 26 FMSHRC 666, 678 (2004), *appeal docketed*, aff'd, Nos. 04-1291, 04-1312 2005 WL 1364691 (D.C. Cir. June 10, 2005), the Review Commission ruled that the job of unclogging a new rock chute, which had jammed only once before, but which was similar to chutes in the mine that had jammed more frequently, could reasonably be expected to occur on a regular basis. Consequently, the failure to conduct training regarding this task was deemed a violation of 30 C.F.R. § 48.7(c).[20]

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[19] Section 48.7(d) specifies that "[a]ny person who controls or directs haulage operations at [an underground] mine shall receive and complete training courses in safe haulage procedures related to the haulage system, ventilation system, firefighting procedures, and emergency evacuation procedures in effect at the mine before assignment of duties."

[20] The majority opinion explained that "[i]mposing a literal definition of 'regular,' however, creates a situation in which the health and safety aspects of events that are reasonably foreseen as recurring, but not

It is noteworthy that the concurring Commissioners in *Twentymile* disagreed with this "reasonable foreseeability" analysis, stating that:

> The definition [at Section 48.2(f)] does not specify duties that *could occur* on a regular basis. To say that task training is required for any event that foreseeably might occur more than once is to redefine the word "regular." Further, while it may be reasonable to characterize events which occur infrequently, but predictably (such as longwall moves), as "regular" and to include events which would be expected to occur unpredictably, but frequently (such as tire repairs) as "regular," it is another matter to similarly characterize events which are expected neither frequently nor predictably.

Twentymile, 26 FMSHRC at 689 (Suboleski, Commissioner, concurring) (emphasis added).[21]

Nonetheless, the D.C. Circuit Court of Appeals affirmed the Review Commission majority's analysis explaining that to read the section 48.2(h) definition of task and it's "use of the term 'occur' in a way that precludes coverage of events that have not previously occurred yet promise to occur with regularity in the future would lead to absurd results: it would only require mines to train workers for dangerous tasks that have already been undertaken at least once before in the mine" *Twentymile*, 2005 WL 1364691, at *4. The D.C. Circuit noted that such a result was "hardly reasonable" given the central concern of the Mine Act: the health and safety of miners. *Id.*

2. Reasonably Prudent Person Test

It has been noted by the Review Commission that the language of the task training standards is broadly worded, with no specificity about "which 'health and safety aspects' and 'safe operating procedures' must be covered in training or the extent or duration required for 'supervised practice' or 'direct and immediate supervision.'" [22] Consequently, application of a "reasonably prudent person test" has been deemed appropriate in determining whether task training is adequate. Specifically, the issue posed is "whether a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the specific prohibition or

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at scheduled or fixed intervals, would escape the mine's training program." *Twentymile*, 26 FMSHRC at 678.

[21] *Twentymile*, 26 FMSHRC at 690 (Concurring in finding of violation because maintaining rock chute was regularly occurring subtask within the general assignments of a beltman)*; see also Bridger Coal Co.,* 23 FMSHRC 887 (Weisberger, J., 2001) (No requirement for training under § 48.27(c) where miner occasionally assigned to press the "up" and "down" button on a bridge crane).

[22] *White Oak Mining & Construction Co.,* 20 FMSHRC 1130, 1133 (1998).

requirement of the standard."[23] In tailoring task training for specific miners, it is appropriate to "adapt the training to reflect experience" as long as the end result is "the type of training that a reasonably prudent person would have provided in order to meet the protection intended by the standard's requirements."[24]

G. **Annual Refresher Training**

A cornerstone of the Mine Act's § 115 training framework is the requirement, set out at 30 C.F.R. §§ 48.8(a) and 48.28(a), that miners receive a minimum of eight hours of annual refresher training. This training reviews and reinforces the central subjects covered in new miner and experienced miner training. 30 C.F.R. §§ 48.8(b), 48.28(b). MSHA allows a certain level of flexibility for operators conducting this refresher training. For instance, the 12 month refresher training cycle can be calculated on a monthly basis so that training can be completed anytime during the last month of the cycle. *Program Policy Manual*, *supra* pg. 2, at 43.[25]

It should be noted that, consistent with the requirements of 30 C.F.R. §§ 48.6(e)(3)and 48.26(e)(3), experienced miners returning to the mine after an absence of 12 months or less are required to receive refresher training in the same annual cycle that they were subject to when they previously worked at the mine. Cognizant of the administrative difficulties that the unexpected return to work of miners can create with respect to the provision of proper refresher training, MSHA policy affords District Managers the discretion to grant operator requests for limited extensions of time to provide refresher training when such unforeseeable events arise. *Program Policy Manual*, *supra* pg. 2, at 44-45.[26]

H. **Hazard Training**

As explained at the outset, hazard training is required for "any person working in an underground [/ surface] mine, including any delivery, office, or scientific worker or

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[23] *White Oak Mining*, 20 FMSHRC at 1134 (citing *Ideal Cement Co., 12 FMSHRC 2409, 2415-16 (Nov. 1990)*).

[24] *White Oak Mining*, 20 FMSHRC at 1134 (Remanding case to administrative law judge to determine if returning, experienced continuous miner operator received sufficient information and practice, in light of experience level, to cover § 48.7(a) requirements); *See also*

[25] *See Emery Mining Corp. v. Secretary of Labor, MSHA,* 744 F 2d. 1411 (10th Cir. 1985)(Section 48.8(a) requires that each miner shall receive refresher training within 12 months of last training, and not merely once each calendar year).

[26] District Managers will only exercise this discretion if (1) the miners are "experienced miner[s]"; (2) the operator made good faith efforts to meet the annual requirement; (3) proper task training has been provided; and (4) the required refresher training will be completed properly. *Program Policy Manual*, *supra* pg. 2, at 44-45.

occasional, short-term maintenance or service worker contracted by the operator, and any student engaged in academic projects involving his or her extended presence at the mine." 30 C.F.R. §§ 48.2(a)(2), 48.22(a)(2). The standards for hazard training, 30 C.F.R. §§ 48.11 and 48.31, establish the minimum course of instruction necessary to enable persons to identify and avoid hazards, follow emergency and evacuation procedures, understand safety rules and utilize self rescue and respiratory equipment. The underground (§ 48.11) and surface (§ 48.31) regulations are virtually identical except for two important differences. First, underground hazard training must require each miner to conduct complete donning procedures with self-contained self-rescue devices. 30 C.F.R. § 48.11(a)(4). Second, miners subject to hazard training must be accompanied by an experienced miner while underground. 30 C.F.R. § 48.11(e).[27]

MSHA policy emphasizes that hazard training should be commensurate with the level of exposure. Specifically, MSHA policy states that hazard training should be:

1. mine specific, so that persons are advised of the hazards they may encounter; and
2. conducted each time a person enters a different mine.

These criteria are evident in hazard training examples set out by MSHA in the Program Policy Manual. *Program Policy Manual*, *supra* pg. 2, at 48-50. If a particular job entails frequent or extended exposure to mine hazards, new miner or experienced miner training is required.

Review Commission administrative law judge decisions that have dealt with these standards have primarily focused on the status of persons as "miners" subject to hazard training requirements and the adequacy of training provided. Hazard exposure tends to be the critical element in the analysis of both violation and gravity. For example, in *R B Coal Co.* 23 FMSHRC 65, 66-68 (Melick, J., 2001), a mine operator was deemed to have violated § 48.31 for failing to provide hazard training to customers hauling coal from its tipple. In finding a violation and in agreeing that it was "significant and substantial," the judge pointed to the number of hazards to which the untrained drivers were exposed. These included "traffic hazards presented to other trucks and to pedestrians, objects falling from conveyors, potential ignition of diesel fuel by smokers near the diesel fuel tanks, and exposure to electrocution from contact with low hanging overhead power lines." *R B Coal Co*., 23 FMSHRC at 66–67.[28]

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[27] *See C.W. Mining Co.*, 17 FMSHRC 175 (Morris, J., 1995) (Two vendors following experienced miner into the mine in a separate vehicle violates section 48.11(e)).

[28] *See also Cogema Mining Inc.,* 18 FMSHRC 919, 929 (Cetti, J., 1996) (Roofing contractor employees working on mine office building roof located on mine property "were 'occasional short-term maintenance' workers within the meaning of [Section 48.31]." Consequently, standard hazard training provided to visitors which "did not specify the use of safety belts and lines when working near the edge of the roof," the primary hazard to which the employees were exposed, did not comply with § 48.31).

I. Records of Training

Operators are required under 30 C.F.R.§§ 48.9(a) and 48.29(a) to certify and record that each miner has completed each MSHA approved training program. The regulation designates MSHA Form 5000-23 as the appropriate document for this certification and record. A copy of these certificates must be given to the miner, and made available at the mine site for inspection and examination by MSHA inspectors, the miner's representative, and State inspection agencies.[29] Miners are entitled to a copy of their training certificates when they leave the operator's employ. 30 C.F.R. §§ 48.9(a) and 48.29(a)[30]

Violations of §§ 48.9(b) and 48.29(b) is punishable under §§ 110(a) and (f) of the Mine Act. Criminal prosecution under § 110(f) can be directed at individuals as well as operators.[31]

J. Compensation for Training

Section 115(b) of the Mine Act requires that all training be provided during "normal working hours" and that each miner receive the "normal rate of compensation" while participating in such training. 30 U.S.C. 825(b). These central tenets are set out at 30 C.F.R. §§ 48.10(a) and 48.30(a). In addition, §§ 48.10(b) and 48.30(b) set out the § 115(b) requirement that miners be compensated for any "additional cost" incurred when training is conducted away from the normal place of work.

The term "normal working hours" is defined at 30 C.F.R. §§ 48.2(d) and 48.22(d) as the "period of time during which a miner is otherwise scheduled to work."[32] These same provisions state that miners must be paid "the same rate of pay that they otherwise would have received had they been performing their normal work tasks." For new miners, this means that they must "be paid at their starting wage rate when they take the new miner training." 30 U.S.C. § 825(b).

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[29] *See Joseph Rostosky Coal Co.,* 21 FMSHRC 1123 (Barbour, J., 1999)(Surface Coal Mine Operator violated 30 C.F.R. § 48.29(a) because training documents were kept at owner's home rather than at mine). Hazard training certificates must also be made available for inspection. 30 C.F.R. §§ 48.11(d), 48.31(d).

[30] Copies of these documents must be maintained at the mine site for two years or for 60 days after employment has ended. 30 C.F.R. §§ 48.9(c), 48.29(c).

[31] Knowingly making a false certification carries a potential fine under the Mine Act of $10,000 and up to five years in prison. Under the Alternate Sentence Provisions of the Federal Sentencing Guidelines, 18 U.S.C. § 3571, such an infraction can be set at up to $250,000 for individuals and $500,000 for operators.

[32] The regulation goes on to provide some flexibility in allowing an operator to schedule training classes on the sixth or seventh working day if such a work schedule has been established for a sufficient period of time to be accepted as the operator's common practice." 30 C.F.R. §§ 48.2(d), 48.22(d); *but see Peabody Coal Co*., 11 FMSHRC 230 (Melick, J., 1989) (Scheduling training during period when miners not normally scheduled violated § 48.10 where there was no practice of operator-initiated cross-shifting).

As discussed in Section D.2 above, the Review Commission has determined that this compensation obligation extends to prehire training of "rehired" miners that is relied upon by the operator to meet its new miner training. *UMWA ex rel. James Rowe v. Peabody Coal Co.,* 7 FMSHRC 1357 (1985), *aff'd sub nom. Brock v. Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987); *Secretary of Labor, MSHA ex rel. I.B. Acton v. Jim Walter Resources, Inc.,* 7 FMSHRC 1348 (1985), *aff'd sub nom. Brock v. Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987).