

**RECONCILING THE LEGAL ISSUES AFFECTING DOCUMENT PRODUCTIONS
AND MINE ACT PROTECTION AND CONTROL ORDERS WITH THE
COOPERATION AND TRUST INTENDED BY THE MINE ACT**

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I. INTRODUCTION

The Energy and Mineral Law Foundation (“EMLF”) asked this panel to address Mine Safety and Health Administration (“MSHA”) enforcement and inspection issues. More specifically, the panel was charged with addressing: (1) document issues arising during the course of routine inspections; (2) MSHA policy changes with regard to MSHA orders issued pursuant to Sections 103(j) and 103(k) of the Mine Safety and Health Act of 1977 (the “Mine Act”); and (3) documenting a scene for the purposes of litigation. All of the panelists come to the table with very different perspectives and goals. This outline presents some of the key issues and questions facing all of the panelists, while offering some specific insight into the views of in-house counsel on these issues and questions.

II. A FRIENDLY REMINDER: THE EXPLICIT PURPOSE OF THE MINE ACT

In the often hyper-technical discussions of the health and safety regulations controlling the mining industry, the forest is often overlooked in favor of debating the precise type of tree at which we are looking. Congress found four (4) clear statements of purpose and worthy of inclusion in the introductory provisions of the Mine Act. The four (4) enunciated purposes are:

- a. The establishment (originally by Congress and today by the Secretary of Labor) of health and safety standards capable of protecting the nation’s miners;
- b. Providing for governmental enforcement of such standards and compliance with such standards by mine operators;
- c. Ensuring cooperation between federal and state regulatory efforts; **and**
- d. “[T]o improve and expand, in cooperation with the States and the coal or other mining industry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry.”

Notably, cooperation is the core component of two of the four purposes of the Mine Act. Throughout this panel’s discussions and, more broadly, within this Special Institute on Mine Safety and Health Law, this notion of cooperation should remain at the forefront of our

¹ The opinions of the author expressed herein are not necessarily the opinions of Alliance Coal, LLC, its management, directors, officers or its subsidiaries. Additionally, as a result of certain ongoing litigation, the author, at his discretion, may decline to comment at this time.

discussions. “Enhanced” enforcement, Commission backlogs, fine increases, and debates by both sides regarding the other’s reasonableness all focus on the enforcement component of the Mine Act’s express purpose. Is it possible that, as disasters have struck this industry, we (all of us) doubled down on the wrong purpose in our response? Furthermore, does such a response expose miners to more—rather than less—risk as time passes?

III. MSHA REQUESTS FOR DOCUMENTS UNDER THE MINE ACT

a. What’s “Covered” by the Mine Act?

MSHA provides a list to its coal mine inspectors of what it considers to be “covered” documents required to be maintained pursuant to the Mine Act and corresponding regulations.² In reviewing the list, one begins to wonder what documents MSHA does **not** require to be maintained pursuant to the Mine Act.

All in all, MSHA identifies seventy-three (73) underground coal mine records, eighteen (18) underground coal mine postings, twenty-four (24) surface facility records, eleven (11) surface facility postings, twenty-four (24) surface coal mine records, and eleven (11) surface coal mine postings. All will be scrutinized by MSHA during the course of its inspections of a mine operator’s operations.

Additionally, if a document is not specifically set forth as one required under the Mine Act or a corresponding regulation, then MSHA typically falls back upon broad language and liberal construction of the Mine Act as a justification for demanding a mine provide and/or create documents responsive to MSHA’s desired inquiry.³

Section 103(h) of the Mine Act provides:

In addition to such records as are specifically required by this Act, every operator of coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary or the Secretary of Health, Education, and Welfare may reasonably require from time to time to enable him to perform his functions under this Act. The Secretary or the Secretary of Health, Education, and Welfare is authorized to compile, analyze, and publish, either in summary or detailed form, such reports or information so obtained. Except to the extent otherwise specifically provided by this Act, all records, information, reports, findings, citations, notices, orders, or decisions required or issued pursuant to or under this Act may be published from time to time, may be released to any interested person, and shall be made available for public inspection.⁴

² General Coal Mine Inspection Procedures and Inspection Tracking System, MSHA Handbook Series, Handbook Number PH-08-V-1 (January 1, 2008).

³ See generally, 30 U.S.C.A. § 813(h) (2006).

⁴ *Id.*

In response, mine operators have little in the way guidance, under the Mine Act or case law, regarding the breadth of MSHA’s power to invoke 103(h) as a way of obtaining documents not specifically required pursuant to the Mine Act and/or federal regulation. Generally, however, Section 103(e) provides:

*Any information obtained by the Secretary or by the Secretary of Health, Education, and Welfare under this Act shall be obtained in such a manner as not to impose an unreasonable burden upon operators, especially those operating small businesses, consistent with the underlying purposes of this Act. Unnecessary duplication of effort in obtaining information shall be reduced to the maximum extent feasible.*⁵

Additionally, Judge Barbour recently raised the issue⁶ of whether MSHA had placed an “unreasonable burden” upon the mine operator by requesting certain employment documents as part of a discrimination investigation.⁷ Following Judge Barbour’s initial decision, the parties resolved the matter. Thus, Judge Barbour did not have to weigh-in on this issue beyond his initial order. With that said, the type of claim involved in the *Hopkins County Coal* case (i.e., miner’s discrimination claims) appears to be the most likely candidate for recurrent disputes on MSHA document requests “not covered” by the Mine Act or accompanying regulations.

b. If a Requested Document is “Covered,” What is the Extent of the Mine Operator’s Responsibility in Responding to MSHA?

These situations should be simple enough. The short answer is that a mine has a duty to, and should in good faith, cooperate with MSHA to make required documents available for inspection and copying.

Nevertheless, we still see disputes arise in these situations, regardless of the mine’s willingness to cooperate. Anecdotally, for an in-house counsel, these types of citations and legal disputes **always** have back stories that **never** find their way into the courtroom. More often than not, an MSHA inspector, rightfully or wrongfully, simply grows impatient with a mine operator’s ability to produce a document on demand. As a result, legal disputes and questions start to arise.

What is a “mine site” for the purposes of record keeping?⁸ What does a phrase like “made available for inspection” mean?⁹ If a mine operator has already filed a report with MSHA, is a mine operator required to provide replacement copies to inspectors requesting one? When MSHA wants copies of records they have examined, can the mine operator send them the bill?

⁵ 30 U.S.C.A. § 813(e) (2006).

⁶ *Hopkins County Coal, LLC v. Secretary of Labor*, 31 FMSHRC 481 (April 21, 2009) (ALJ Barbour) (stating “[T]he Secretary’s investigation must be reasonable, and part of being “reasonable” when requesting materials is to make sure that which is sought is clearly described.”).

⁷ *Id.*

⁸ *Secretary of Labor v. East Tennessee Zinc Co.*, 31 FMSHRC 941 (August 21, 2009) (ALJ Melick; *But see Reintjes of the South v. Secretary of Labor*, 21 FMSHRC 687 (May 17, 1999) (ALJ Weisburger).

⁹ *Id.*

Can the mine operator tell MSHA to provide its own copy arrangements? Bordering on the absurd, these are the types of issues that come up as cooperation and trust between the parties in this process begins to break down.

c. What Factors Influence a Mine Operator’s Response to a MSHA Request for a Document That Is Not “Covered”?

Obviously, any mine is going to weigh the specific facts and circumstances surrounding a particular MSHA document request. However, mines make other, more general considerations in formulating their response to an MSHA demand. These types of considerations may not be subjects raised explicitly, but instead are implicit considerations a mine operator makes and often involve issues of which outside attorneys (and sometimes in-house, as well) are not immediately aware. As an outside or in-house counsel, discovering these concerns is key to understanding the mine operator’s current day-to-day relationship with MSHA and determining the mine operator’s willingness to either produce or deny a MSHA document request that is outside the scope of MSHA’s statutory or regulatory authority.

Some of the questions a mine operator may consider when deciding how to respond to an MSHA document request include, without limitation:

- i. Has the mine operator provided the same or similar information to MSHA in the past?
- ii. What is the current level of cooperation existing between the mine operator and the MSHA District Office?
- iii. Does the mine operator have a legitimate and good faith belief that MSHA is exceeding the bounds of its authority under the Mine Act?
- iv. Has MSHA been forthcoming in its reasons for requesting the information from the mine operator?
- v. What is the mine operator’s level of fear of retaliation from the MSHA District Office as a result of the mine operator’s decision?

Again, these considerations are not intended to level charges against MSHA’s conduct. These very real and frequent concerns of operators do provide insight into the overall level of cooperation between and among the players in the mining community right now.

IV. POLICY ISSUES RELATING TO SECTIONS 103(j) AND 103(k) OF THE MINE ACT

a. The MSHA Policy Shift on Issuance of 103(j) and 103(k) Orders.

Section 103(j) of the Mine Act provides:

*In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.*¹⁰

In contrast, Section 103(k) of the Mine Act provides:

*In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.*¹¹

On August 12, 2009, MSHA issued Program Policy Letter No. P09-V-09.¹² MSHA then followed the Program Policy Letter with Procedure Instruction Letter No. I09-V-8 on September 10, 2009.¹³ In both cases, the relevant policy language was, as follows:

Upon learning of a mine emergency, unless MSHA is already present, MSHA should verbally issue a section 103(j) order to the operator, including initial instructions, as soon as possible. The order, including any instructions, should be reduced to writing and transmitted to the operator as soon as practicable. The order should be written so as to protect all persons engaged in the rescue and recovery operation, as well as any other persons on-site[.]...

Upon MSHA's arrival on-site and following assessment of conditions, MSHA may modify the section 103(j) order, including all instructions, to reflect that MSHA is now proceeding under the authority of section 103(k) of the Mine Act. MSHA should inform parties on-site that any activities that are rescue or recovery related will be permitted through subsequent modifications of the section 103(k) order. The section 103(k) order is intended to protect all persons involved in the emergency operation or accident investigation.

The policy shift appears to have been intended to do away with certain MSHA Districts' longstanding practice of inspectors issuing a "verbal (k) Order" in response to a mine reporting an "accident." The new policy prescribes the issuance of an Section 103(j) Order verbally,

¹⁰ 30 U.S.C.A. § 813(j) (2006).

¹¹ 30 U.S.C.A. § 813(k) (2006).

¹² MSHA Program Policy Letter No. P09-V-09 (August 12, 2009).

¹³ MSHA Procedure Instruction Letter No. I09-V-8 (September 10, 2009).

followed by a modification to a Section 103(k) Order in writing once the inspectors reach the mine.

b. What is an “Emergency” and What is an “Accident”?

Notably, both the Program Policy Letter and the Procedure Instruction Letter utilize the phrase, “Upon learning of a mine emergency...”. At the same time, both letters reference the statutory text of Sections 103(j) and 103(k) of the Mine Act. In both Sections 103(j) and 103(k), the text refers to MSHA response to an “accident” and not an “emergency.”

What does MSHA consider to be an “emergency”? Moreover, one could posit the theory that MSHA consciously made the determination to use “emergency” to avoid additional litigation attempting to determine precisely what “accident” means within the context of Section 103(j) and 103(k) Orders pursuant to the Mine Act,¹⁴ as opposed to what “accident” means within the context of a citation issued under 30 C.F.R. Part 50.¹⁵

Recently, in *Emerald Coal Resources, LP v. Secretary of Labor*, Judge Zielinski found that “[a]n unplanned roof fall occurred above the anchorage zone in the ‘active workings’ of the mine, i.e., on a haulage track and escapeway” and concluded that such a roof fall “was an accident within the meaning of 103(k) of the [Mine] Act.”¹⁶ In so concluding, Judge Zielinski relied on several notions, including:

- i. The Secretary’s broader definition of “accident” promulgated under 30 CFR 50.2;
- ii. Section 103(d) of the Mine Act;¹⁷

¹⁴ 30 U.S.C.A. § 802(k) (1977). “[A]ccident’ includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person[.]”

¹⁵ 30 C.F.R. § 50.2(h). *Accident* means: (1) A death of an individual at a mine; (2) An injury to an individual at a mine which has a reasonable potential to cause death; (3) An entrapment of an individual for more than 30 minutes or which has a reasonable potential to cause death; (4) An unplanned inundation of a mine by a liquid or gas; (5) An unplanned ignition or explosion of gas or dust; (6) In underground mines, an unplanned fire not extinguished within 10 minutes of discovery; in surface mines and surface areas of underground mines, an unplanned fire not extinguished within 30 minutes of discovery; (7) An unplanned ignition or explosion of a blasting agent or an explosive; (8) An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage; (9) A coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than one hour; (10) An unstable condition at an impoundment, refuse pile, or culm bank which requires emergency action in order to prevent failure, or which causes individuals to evacuate an area; or, failure of an impoundment, refuse pile, or culm bank; (11) Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes; and (12) An event at a mine which causes death or bodily injury to an individual not at the mine at the time the event occurs.

¹⁶ *Emerald Coal Resources, LP v. Secretary of Labor*, 30 FMSHRC 122, 126 (January 31, 2008) (ALJ Zielinski).

¹⁷ 30 U.S.C.A. § 813(d) (2006). The provision states, in pertinent part, “All accidents, including unintentional roof falls (except in any abandoned panels or in areas which are inaccessible or unsafe for

iii. The following, referenced in footnote 4 of the decision:

*[T]he Commission has accepted the Secretary's argument that "the word 'includes'...is a term of enlargement [and] that an event not specifically listed in the definition falls within the definition of 'accident' if it is 'similar in nature or present[s] a similar potential for injury or death as a mine explosion, ignition, fire, or inundation.'"*¹⁸

However, and with all due respect to Judge Zielinski's decision, each of the three supporting points has serious and arguable points against them. Indeed, questions still exist that are worthy of more extensive discussion and analysis. Some of those questions might include:

- i. Does the 30 C.F.R. 50.2(h) definition of "accident" replace, expand upon or have no impact upon the Mine Act's definition of "accident"?
- ii. How does Section 103(d) relate to or impact the Mine Act's definition of "accident"?
- iii. What theories, doctrines, or canons of statutory construction are potentially relevant to determining the meaning of "accident" under the Mine Act?
- iv. What importance does the phrase "or injury to, or death of, any person" have in how you interpret the term "accident" under the Mine Act?
- v. Does the Mine Act's definition of "imminent danger" provide any further guidance or insight into how we interpret the Mine Act's definition of "accident"?
- vi. What was the ultimate ruling in *Alcoa*? Was the Commission expanding, exercising restraint, or avoiding comment with regard to the definition of "accident" under the Mine Act?

V. CONCLUSION

Watch as the issues discussed in this panel continue to be addressed by the mining community and MSHA over the coming months. These issues are the types of issues that highlight the level of cooperation (or lack thereof) between our respective clients. If cooperation and trust exists between the mine operators and MSHA, then these types of issues will be fewer in number and the topic of this panel may be effectively mooted. If, however, cooperation and

inspections), shall be investigated by the operator or his agent to determine the cause and the means of preventing a recurrence."

¹⁸ *Emerald Coal Resources, LP*, 30 FMSHRC 122, 124 fn4 (January 31, 2008) (ALJ Zielinski) (citing *Alcoa v. Secretary of Labor*, 15 FMSHRC 1821, 1825-1826 (September 22, 1993)).

trust do not exist and/or do not develop, one easily could see these types of issues increase in number and the need for more judicial guidance grow.