

# MSHA Enforcement & Inspection Issues

Special Institute on Mine Safety and Health Law  
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# A Friendly Reminder: The Mine Act's Purpose

- Establish Health and Safety Standards Capable of Protecting America's Miners
- Provide for Government Enforcement of Health and Safety Standards
- Ensure Cooperation Between Federal and State Regulatory Efforts
- "To improve and expand, in cooperation with the States and the coal or other mining industry," programs aimed at preventing coal or other mine accidents or disease.

# MSHA Document Requests Under The Mine Act

- What is “covered”?
  - Better Question: What isn’t “covered”?
  - For Coal Mines, MSHA Requires Operators to Maintain:
    - 73 Underground Coal Mine Records
    - 18 Underground Coal Mine Postings
    - 24 Surface Facility Records
    - 11 Surface Facility Postings
    - 24 Surface Mine Records
    - 11 Surface Mine Postings

# MSHA Document Requests Under The Mine Act

- “Up, Up With the Fish” Analogy
- Section 103(h):
  - *In addition to such records as are specifically required...every operator of [a] mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary...may reasonably require from time to time to enable him to perform his functions under this Act.*

# MSHA Document Requests Under The Mine Act

- For Operators, the Mine Act Assumes Reasonable Action by MSHA
- Section 103(e) Protects Operators Against:
  - Unreasonable Burdens;
  - Unnecessary Duplication;
  - MSHA Requests Inconsistent With Underlying Purposes of Mine Act; and
  - Patently Unclear MSHA Requests. *See Hopkins County Coal, LLC v. Secretary of Labor*, 31 FMSHRC 481 (2009).

# MSHA Document Requests Under The Mine Act

- If “Covered,” Mine Owes MSHA a Duty to Cooperate...But Expect Citations to Arise Anyway.
- If “Not Covered,” the Mine Operator Will Have Some Decisions to Make and Questions Will Arise:
  - Has the mine operator provided the same or similar information to MSHA in the past?
  - How well does the mine cooperate with the local MSHA district office?
  - Does the mine operator have a good faith belief that MSHA is beyond its authority?
  - Does the mine operator fear retaliation from the MSHA District Office as a result of decision not to voluntarily turn the documents over?

# MSHA Document Requests Under The Mine Act

## ■ “Cooperation With MSHA”?

– On February 12, 2009, Mine Makes FOIA Request for CY 2008 Asking For:

■ “[a]ny and all documents, MSHA forms, maps and notes from the previous Regular Safety & Health Inspections (E01)”

– MSHA Cost Estimate: \$250.00

# MSHA Document Requests Under The Mine Act

## “Cooperation With MSHA”?

- Following Year, Same Mine Recognizes Previous Request Was Too Broad and Only 4<sup>th</sup> Quarter of Immediately Prior Year is Necessary.
- On January 20, 2010, Same Mine Submits Narrower FOIA Request Asking For:
  - “[a]ny and all documents, MSHA Forms, maps and notes from the previous Regular Safety and Health Inspections (E01) conducted during the 4<sup>th</sup> quarter of CY 2009.”
- Considerably Less Information Requested and Nothing Should Be Archived by MSHA Yet.

# MSHA Document Requests Under The Mine Act

“Cooperation With MSHA”?

- MSHA Cost Estimate: \$750.00
- \$500.00 More
- 1/4 of the Information
- An MSHA Presumably Operating With Unprecedented Transparency

# Policy Issues Relating to Sections 103(j) and 103(k) of the Mine Act

## ■ **Section 103(j) of the Mine Act:**

- *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 mines.*

# Policy Issues Relating to Sections 103(j) and 103(k) of the Mine Act

## ■ Section 103(k) of the Mine Act:

- *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.*

# Policy Issues Relating to Sections 103(j) and 103(k) of the Mine Act

## ■ MSHA Program Policy Letter No. P09-V-09 and MSHA Procedure Instruction Letter I09-V-8:

- *Upon learning of a mine emergency, unless MSHA is already present, MSHA should verbally issue a 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....*
- *Upon MSHA's arrival on-site and following assessment of conditions, MSHA may modify the section 103(j) order...to reflect that MSHA is now proceeding under the authority of section 103(k) of the Mine Act....The section 103(k) order is intended to protect all persons involved in the emergency operation or accident investigation.*

## ■ Policy Shift Eliminates Practice of the “Verbal (k) Order”

# Policy Issues Relating to Sections 103(j) and 103(k) of the Mine Act

- **Policy Shift Still Leaves Unresolved Issues:**
  - What is an “Emergency”?
  - Is it Prudent for MSHA to be “Issuing Instructions” Pursuant to 103(j) Prior to Establishing a Presence at the Mine?
  - In Practice, Are District Offices Exercising Any More Restraint in Issuing 103(j) Orders Than Was Shown in the Issuance of Verbal (k) Orders?

# Policy Issues Relating to Sections 103(j) and 103(k) of the Mine Act

## ■ Policy Shift Still Leaves Unresolved Issues:

### – What is the Definition of “Accident”?

- Section 3 (k) of the Mine Act
- 30 CFR 50.2(h) Definition
- A Judicially Rendered Blend of Both Definitions

# Policy Issues Relating to Sections 103(j) and 103(k) of the Mine Act

- **Policy Shift Still Leaves Unresolved Issues:**
  - **What Tools Are Helpful in Defining “Accident”?**
  - **Section 103(d) of the Mine Act—referring to “accidents including unintentional roof falls...”**
  - **Section 3(j) of the Mine Act**
  - **Existing Case Law**
  - **Statutory Construction Canons and Theories:**
    - **The Whole Act Rule**
    - **Ejusdem Generis (of the same class)**
    - **Expressio Unius Est Exclusio Alterius (express mention of one thing excludes all others)**
    - **In Pari Materia (upon the same matter or subject)**
    - **Noscitur A Sociis (words are understood by company)**

# MSHA Enforcement & Inspection Issues

- Going Forward Two Choices Exist:
  - Cooperation
  - Litigation
- In Either Case, Today's Discussion Will Be Resolved by MSHA and Mine Operators in the Near Future
- Hopefully, The Path Chosen by MSHA and Mine Operators Will Serve the Best Interests of America's Miners