Chapter 8
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Walking the MSHA Investigation Tightrope — Implementing an Effective Inspection Management Plan

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§ 8.01. Introduction.

The Federal Mine Safety and Health Act of 1977 ("Mine Act")\(^1\) has a noncontroversial fundamental purpose — to provide safe and healthful working conditions for the Nation’s miners.\(^2\) Mine operators and the United States Department of Labor’s Mine Safety and Health Administration (MSHA), as well as individual miners and their representatives, all share major responsibilities under the Mine Act in working to achieve this goal.

The Mine Act’s primary mechanism for seeking to accomplish its purpose, however, is a very intensive, highly intrusive, command and control enforcement scheme. Under this scheme, Congress and MSHA have established extremely detailed technical, procedural and legal requirements that mine operators must meet. MSHA polices compliance with these requirements through recurring comprehensive inspections, and civil and criminal sanctions are imposed where violations occur. Therefore, despite the shared goal of protecting miner safety and health, the Mine Act’s rigorous enforcement scheme places MSHA and the mine operators it inspects in inherently adversarial positions. Consequently, during inspections and investigations mine operators must strike a delicate balance between cooperating with MSHA in their mutual effort to provide safe working conditions, and protecting themselves and their agents from the significant potential liabilities that are threatened under the Mine Act.

A combination of four factors assures that the threat of substantial liability can never be eliminated from a mining operation. First, by its very nature the mining process is extremely dynamic. In both underground and surface extraction operations, ground conditions — and therefore

\(^2\) Section 2(a) of the Mine Act provides that “the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource — the miner.” 30 U.S.C. § 801(a).
miners’ working conditions — are constantly changing. Hazardous or noncomplying conditions can develop very suddenly or be caused by subtle deterioration occurring gradually over time. Therefore, liability risks can never truly be eliminated from the mining environment.

Second, “to err is human.” 3 Although “to forgive” may be “divine,” 4 forgiveness is not an option for MSHA given the six criteria for determining an appropriate penalty set forth in Section 110(i) of the Mine Act (30 U.S.C. 820(i)) and the mandatory requirement that a penalty be assessed whenever a violation occurs. 5 Even the best employees are not perfect. Although an effective safety program can reduce accidents and injuries, mistakes in judgment and work performance will still occur, as may intentional acts of wrongdoing by some individuals. When improper actions by mining personnel do occur, they can lead to potentially significant liabilities for the mine operator.

Third, under the Mine Act’s “liability without fault” scheme, mine operators are liable for any violations that occur at their mines. 6 Therefore, regardless of whether an operator is negligent, had knowledge of a violative condition, or could have prevented it, the operator is held responsible for the violation.

Fourth, the MSHA inspection process is recurring. Because a minimum number of complete inspections must be conducted at each mining operation every year, MSHA will have repeated and ample opportunities to observe violations that may occur. 7 Therefore, like past investment performance, past favorable MSHA inspection experience is no guarantee of future success.

The above factors, MSHA’s strong enforcement powers, and the many forms of significant liabilities that can be imposed under the Mine Act combine to make the navigation of an MSHA inspection and investigation

3 Alexander Pope, An Essay on Criticism (1711).
4 Id.
5 See discussion at § 8.02[6], infra.
6 Id.
7 Section 103(a) of the Mine Act requires that MSHA inspect each underground mine “at least four times a year” and each surface mine “at least two times a year” in their entirety. 30 U.S.C. § 813(a).
as challenging and risky as a walk on a tightrope. A clear understanding of the risks presented and of the steps that can be taken to bring more balance to the inspection and investigation process will make a mine operator’s walk on the MSHA investigation tightrope far less precarious.

§ 8.02. Liability Opportunities Under the Mine Act.

The multiple types of inspections and investigations that MSHA conducts present a wide variety of potential “liability opportunities” for mine operators and their agents. Furthermore, various legal principles applicable to MSHA’s authority under the Mine Act and how challenges to MSHA’s enforcement actions will be reviewed substantially tilt the odds in favor of MSHA and against mine operators.

[1] — Recurring Scheduled Inspections.

Recurring (quarterly or semi-annual) complete, regular inspections of mines must be conducted by MSHA without regard to the comprehensiveness of a mine’s safety and health program or its record of safety performance. Recurring “spot” inspections made as frequently as one inspection during every five working day period are mandated for certain mines, i.e., those that liberate specified quantities of explosive gasses, have had a gas ignition or explosion resulting in death or serious injury within the past five years, or in which another “especially hazardous condition” exists. Such a pervasive enforcement presence greatly increases the likelihood that, at some point, violative conditions will arise and be cited by MSHA.


In addition to these regular recurring inspections, miners or their representatives “have a right to an immediate [special] inspection” by notifying MSHA that they have grounds to believe that a violation or
imminent danger exists. Furthermore, “prior to or during any inspection” miners or their representatives “may notify the Secretary” of violations or imminent dangers that they have “reason to believe exist” in the mine and MSHA is required to provide an explanation to them if enforcement action is not taken concerning the complaint. These rights to essentially obtain inspections on demand, whether appropriately exercised or abused for purposes of harassment, pose obvious substantial liability threats.


Followup inspections are conducted by MSHA to determine whether previously cited violations have been timely abated. If the inspector determines that abatement has not been accomplished, and the abatement period should not be extended, he or she “shall promptly issue” a withdrawal order prohibiting persons from entering the area until it is determined that the violation has been abated. MSHA may also propose a civil penalty of $5,000 for each day that the violation or failure to abate has continued.


In addition to the inspections summarized above, numerous types of investigations are authorized by the Mine Act and carried out by MSHA. Unlike regular inspections that must be carried out regardless of any specific reason to believe that a violation may have occurred or that a hazard exists, investigations generally are triggered by specific events or complaints that will be the focus of MSHA’s intense scrutiny.

[a] — Accident Investigations.

Section 103(b) of the Mine Act authorizes MSHA to investigate “any accident or other occurrence relating to health or safety” in a mine. The

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not a “miner” or “miner representative” authorized to request an inspection under Section 103(g)(1), it nonetheless upheld the inspection based on the broad authority to conduct inspections granted to MSHA by Section 103(a) of the Mine Act.

11 Section 103(g)(2), 30 U.S.C. § 813(g)(2).
12 Section 104(b), 30 U.S.C. § 814(b).
13 Section 110(b), 30 U.S.C. § 820(b).
term “accident” is defined in the Mine Act as including “a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person.”\textsuperscript{15} MSHA, however, has adopted a regulation defining “accident” much more expansively.\textsuperscript{16} Mine operators are required to “immediately contact” MSHA and report the accident.\textsuperscript{17} If MSHA decides to conduct an accident investigation it will be initiated within 24 hours.\textsuperscript{18} In conducting accident and other investigations, MSHA is authorized to “hold public hearings, . . . sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths.”\textsuperscript{19} Because of the serious nature of the events constituting “accidents,” including fatalities and serious injuries, significant liability risks are presented whenever an “accident” occurs at a mine.

[b] — Knowing/Willful Civil and Criminal Investigations.

The most serious threats of liability against both mine operators and individuals are posed by Sections 110(c) and 110(d) of the Mine Act. Section 110(c) provides that “[w]henever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with” certain orders issued under the Act, . . . any director, officer, or agent of such corporation who knowingly\textsuperscript{20} authorized, ordered, or carried out such violation, . . . shall be subject to the same

\textsuperscript{15} Section 3(k), 30 U.S.C. § 802(k).
\textsuperscript{16} 30 C.F.R. § 50.2(h).
\textsuperscript{17} 30 C.F.R. § 50.10.
\textsuperscript{18} 30 C.F.R. § 50.11(a).
\textsuperscript{19} Section 103(b), 30 U.S.C. § 813(b).
\textsuperscript{20} As used in Section 110(c), “knowingly” means “knowing or having reason to know.” A person has “reason to know” if he has “such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.” Kenny Richardson, 3 F.M.S.H.R.C. 8, 16 (1983), aff’d, sub nom., Richardson v. Secretary, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983). “If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of a violative condition,” such person has acted knowingly. \textit{Id.}

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Section 110(d) of the Mine Act provides that “[a]ny operator who willfully22 violates” a standard or “knowingly violates or refuses to comply” with certain orders “shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both . . . .”23 Second convictions are punishable by fines of up to $50,000, or imprisonment of up to five years, or both.24 Where MSHA determines through its investigation that a criminal violation of Sections 110(c) or (d) has occurred, it refers the proceeding to the U.S. Department of Justice for possible criminal prosecution.


Section 105(c)(1) of the Mine Act25 protects miners, applicants for employment at mines, and representatives of miners from adverse actions taken against them in retaliation for their exercise of rights granted under the Act. Section 105(c) prohibits all “persons”26 from discharging,

21 30 U.S.C. § 820(c). The constitutionality of Section 110(c) has been upheld against an equal protection challenge attacking the distinction between corporate and non-corporate operators. Kenny Richardson, supra; Beth Energy Mines, Inc., 14 F.M.S.H.R.C. 1232 (1992). See also, Secretary v. Donald Guess and Paul Shirel, 15 F.M.S.H.R.C. 2440 (1993), aff’d, D.C. Cir., No. 94-1030, March 29, 1995 (agents of a partnership comprised of two corporations are not subject to individual liability under Section 110(c)).

22 As used here, “willfully” has been held to mean “done knowingly and purposely by a [person] who, having a free will and choice, either intentionally disobeys the standard or recklessly disregards its requirements.” United States v. Consolidation Coal Co., 504 F.2d 1330 (6th Cir. 1974).


24 Id. Importantly, the criminal penalties set forth in the Mine Act can be, and usually are, substantially enhanced by application of general federal criminal penalty provisions, e.g., the Comprehensive Crime Control Act (18 U.S.C. § 3559) and the Criminal Fines Improvements Act (18 U.S.C. § 3571), as well as by general aiding and abetting (18 U.S.C. § 2) and conspiracy (18 U.S.C. § 371) provisions.


26 “Person” is defined as “any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization.” Section 3(f) of the Mine Act, 30 U.S.C. § 802(f).
discriminating against, or interfering with the exercise of any rights under the Act by miners, representatives of miners, or applicants for employment, because such persons engaged in activities protected by the Act. Protected activities specified in Section 105(c)(1) include filing or making a safety-related complaint, being subject to medical evaluation and transfer requirements under Section 101(a) of the Mine Act, instituting any proceeding under the Act, testifying or planning to testify in a proceeding under the Act, or exercising any other statutory right provided by the Act. The enumerated rights, however, are “intended to be illustrative and not exclusive” and Section 105(c) is interpreted “expansively” to accomplish its purpose of encouraging miner participation and discouraging retaliation for safety activities.\textsuperscript{27}

Section 105(c) authorizes the Secretary as well as the individual discriminatee to bring actions, and allows for appropriate relief tailored to the particular circumstances to make the discriminatee whole, including attorneys fees, costs and expenses.\textsuperscript{28}


For the purposes of conducting “any inspection or investigation” the Mine Act grants the Secretary a “right of entry to, upon, or through” any mine.\textsuperscript{29} The Supreme Court has upheld the constitutionality of this authorization of warrantless inspections.\textsuperscript{30} The Commission has held that a warrant also is not required for an MSHA inspector or investigator to inspect accident records required to be maintained under the Mine Act and which are to be “available” to the Secretary and “open for inspection by interested persons.”\textsuperscript{31} It also has been held, however, that warrantless

\textsuperscript{27} S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), \textit{Legislative History of the Federal Mine Safety and Health Act of 1977}, Senate Subcommittee on Labor, Committee on Human Resources, at 624 (1978). For example, although not set forth in the Act itself, a work refusal made on the basis of a reasonable and good faith belief that performance of the work is hazardous is a protected activity. \textit{See e.g.}, Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989).

\textsuperscript{28} Sections 105(c)(2) and (3) of the Mine Act, 30 U.S.C. §§ 815(c)(2) and (3).

\textsuperscript{29} Section 103(a), 30 U.S.C. § 813(a).


searches of documents and records not required by the Mine Act are not authorized. Furthermore, when entry is denied citations, orders and proposed penalties may be issued and injunctive relief sought.


Once MSHA is on mine premises, the likelihood that mine operators will face some form of liability as a result of an MSHA inspection is heightened because of the Mine Act’s strict liability scheme. Mine operators are liable for violations of the Mine Act that occur at their mine “without regard to fault.” As the Tenth Circuit succinctly stated in Asarco:

To us the plain meaning of [the Mine Act] is that when a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a penalty. When a violation occurs, a penalty follows. The statute says nothing which would indicate that if the operator’s supervisory employees are without fault, the citation should be dismissed.

Therefore, when there is a violation, assessment of a civil penalty is mandatory. The civil penalties authorized by the Mine Act are substantial. Penalties of up to $50,000 per violation, and penalties of up to $5,000 per day if cited conditions are not timely abated may be assessed. The operator’s negligence will, however, be considered as one of six factors in determining the amount of the penalty to be assessed.

33 See discussion at § 8.02[9], infra.
35 868 F.2d at 1197; accord, Allied Products v. FMSHRC, 666 F.2d 890 (5th Cir. 1982).
36 See also, Tazco, Inc., 3 F.M.S.H.R.C. 1895, 1896 (August 1981) (Administrative law judge could not “suspend” mine operator’s payment of a $400 penalty on basis that foreman who violated standard was discharged by the operator. “A suspended penalty is virtually the same as assessing no penalty” and “[b]oth actions are contrary to Mine Act’s mandatory penalty structure.”
37 Sections 110(a) and (b), 30 U.S.C. §§ 820(a) and (b).
38 Section 110(i), 30 U.S.C. § 820(i).

Substantial criminal penalties, including fines and imprisonment, are provided in the Mine Act for certain conduct by operators and individuals including the following: knowing or willful violation of standards or certain orders by operators, and directors, officers, or agents of corporate operators;\textsuperscript{39} making false statements in documents filed or required to be maintained under the Act;\textsuperscript{40} providing unauthorized advance notice of an inspection;\textsuperscript{41} knowing distribution, sale, or delivery of equipment misrepresented as complying with the Act, regulations, or specifications;\textsuperscript{42} and forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering with MSHA personnel in the performance of their duties.\textsuperscript{43}


Apart from the sanctions of monetary penalties and imprisonment summarized above, the Mine Act authorizes MSHA to impose additional burdensome sanctions on mine operators through various types of “withdrawal orders” that can be issued. These withdrawal orders require that mining operations cease, and that miners be withdrawn and prevented from entering a mine, or specific parts of the mine, until the withdrawal order is terminated.

The types of withdrawal orders that can be issued include failure to abate orders;\textsuperscript{44} unwarrantable failure orders;\textsuperscript{45} pattern of violations orders;\textsuperscript{46} failure to abate respirable dust violations;\textsuperscript{47} untrained miner orders;\textsuperscript{48} imminent danger orders;\textsuperscript{49} and orders issued to control accident scenes, direct rescue and recovery efforts and preserve evidence.\textsuperscript{50}

\textsuperscript{39} Sections 110(c) and (d), 30 U.S.C. §§ 820(c) and (d). See discussion at § 8.02[4][b], supra.
\textsuperscript{40} Section 110(f), 30 U.S.C. § 820(f), and 18 U.S.C. § 1001).
\textsuperscript{41} Section 110(e), 30 U.S.C. § 820(e).
\textsuperscript{42} Section 104(h), 30 U.S.C. § 814(h).
\textsuperscript{43} 18 U.S.C. § 111.
\textsuperscript{44} Section 104(b), 30 U.S.C. § 814(b).
\textsuperscript{45} Sections 104(d)(1) and (2), 30 U.S.C. §§ 814(d)(1) and (2).
\textsuperscript{46} Section 104(e), 30 U.S.C. § 814(e).
\textsuperscript{47} Section 104(f), 30 U.S.C. § 814(f).
\textsuperscript{48} Section 104(g), 30 U.S.C. § 814(g).
\textsuperscript{49} Section 107, 30 U.S.C. § 817.
\textsuperscript{50} Sections 103(j) and (k), 30 U.S.C. §§ 813(j) and (k).
In addition to the threats of monetary penalties, withdrawal orders, and imprisonment, the availability of injunctive relief is another weapon in MSHA’s enforcement arsenal. Section 108 of the Mine Act provides that MSHA “may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order” in U.S. District Court.\footnote{30 U.S.C. § 818.} Injunctive relief is available to address a wide range of operator conduct including violating or refusing to comply with orders or decisions issued under the Act; refusing to admit inspectors or investigators to the mine; refusing to permit, or interfering with, hindering, or delaying an inspection or investigation;\footnote{Citations, orders and penalties also can be issued for denials of entry or hindering inspections. Waukesha Lime & Stone Co., 3 F.M.S.H.R.C. 1702 (July 1981); Topper Coal Co., 17 F.M.S.H.R.C. 945 (June 1995)(A.L.J. Hodgdon).} and refusing to furnish or permit access to records, reports and information relevant to enforcement under the Mine Act.\footnote{Section 108(a)(1), 30 U.S.C. § 818(a)(1).}

[10] — Deference
Although not typically viewed as an enforcement tool or sanction, the principle of “deference” actually serves a very important enforcement role in favor of MSHA and to the detriment of mine operators. In brief, the “deference” principle means that in reviewing the Secretary’s interpretation of an ambiguous standard or regulation, the Review Commission and the courts must defer to the Secretary’s interpretation as long as it is reasonable.\footnote{Energy West Co. v. Secretary, 40 F.3d 457 (D.C. Cir. 1994).} Even if an operator’s or the Commission’s contrary interpretation of the ambiguous provision is equally reasonable, or perhaps even more reasonable, MSHA’s interpretation must be upheld.\footnote{Martin v. OSHRC, 499 U.S. 144 (1991).} Furthermore, the interpretation of a standard or regulation that is required to be deferred to may be an interpretation that is expressed by MSHA in a citation or order issued by an inspector.\footnote{\textit{Id.} at 157.} Therefore, the deference principle itself substantially contributes to the strong liability risk faced
by mine operators whenever MSHA conducts an inspection, because MSHA’s view of the meaning of a vague regulatory requirement will prevail as long as it can be viewed as a reasonable interpretation.

§ 8.03. MSHA Inspections and Investigations as “Discovery.”

In light of the panoply of enforcement powers possessed by MSHA, the various legal principles that support MSHA’s exercise of its powers, and the substantial penalties that can be imposed, it is important that mine operators and mine personnel in positions of authority recognize MSHA inspections and investigations for what they essentially are — the start of a litigation process between adverse parties. An MSHA inspector’s or investigator’s arrival at a mine signals that the government is about to begin an extremely one-sided “discovery” process. As a result, long before the generally recognized start of the “litigation process,” i.e., the filing of a notice of contest of citations or penalties issued by MSHA, the fact is that MSHA already has completed most of its discovery. Quite often, MSHA completes this discovery without direct involvement of company attorneys — certainly not the typical approach to litigation adopted by defendants faced with potentially significant liabilities.

Mine operators and their agents who fail to recognize that inspections and investigations are “litigation,” and who respond to MSHA’s presence passively or with a “business as usual” approach, are increasing the risk that they will have liabilities imposed that could have been avoided.


[a] — Ex parte Proceedings.

MSHA possesses a large advantage right from the start of the inspection “discovery” process: the surprise factor. In its role of prosecutor it generally schedules and initiates inspections and investigations on its own timing and terms. In fact, unless otherwise authorized by the Mine Act, it is a crime for “any person” to give advance notice of any MSHA inspection.57 MSHA also will not provide advance notice of investigations unless notice or arrangements are essential for carrying out the specific

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57 Section 110(e), 30 U.S.C. § 820(e).
type of investigation activity being conducted. Thus, mine operators do not enjoy a “right to be heard” concerning whether an inspection or investigation will be initiated, and when the inspection is begun MSHA can proceed to issue citations requiring immediate abatement and withdrawal orders requiring that immediate actions be taken. Practically speaking, unlike in a typical discovery process, MSHA proceeds largely in an “ex parte” fashion.

[b] — Entry onto Premises.

In normal discovery, a party who wants to enter onto the land or premises of an adverse party must serve a request on the adverse party to enter and inspect the specified property. Under the Occupational Safety and Health Act of 1970, if an employer does not consent to an inspection OSHA must obtain a warrant. MSHA, however, has a warrantless right to enter onto mine property and conduct a comprehensive inspection.


During the typical discovery process, the parties may serve on each other requests that relevant documents be produced. Responses must be filed within 30 days and objections to producing the documents can be made. During the MSHA inspection or investigation process, however, a one-sided document production process is engaged in. MSHA requests, either orally or in writing, that the mine operator provide access to or copies of documents and expects that the documents will be immediately produced. If, in MSHA’s view, requested documents are not provided fast enough, it may issue citations and orders alleging that its inspection is being hindered. Except for requesting that an inspector or investigator’s

59 See, e.g., Fed. R. Civ. P. 34.
60 29 U.S.C. § 651 et seq. (“OSH Act”).
63 See, e.g., Fed. R. Civ. P. 34.
64 See discussion at § 8.04[4], supra.
65 See discussion at §§ 8.02[5], supra, and 8.03[1][e], infra.
credentials be produced for examination, and that copies of complaints triggering inspections be provided, the mine operator must wait for commencement of litigation and discovery before obtaining relevant inspection documents from MSHA.

[d] — Witness Interviews.

They typical discovery process also provides several methods by which each adverse party can pose questions and obtain answers from the other party. For example, interrogatories and requests for admissions may be served and depositions may be taken. During MSHA inspections and investigations, however, the only questioning that typically occurs is that done by MSHA in its interviews of mine personnel and its taking of employee “statements.” Although mine operators may have discussions with MSHA inspectors, they do not have a similar opportunity to formally interview the inspectors or to take their statements.


MSHA has a significant advantage in being able to back up its inspection “discovery” requests with a wide array of powerful self-help sanctions. When MSHA believes that information it is entitled to is not being provided, or is not being provided quickly enough, MSHA can threaten or secure injunctive relief, or issue citations, orders and proposed penalties for refusing to permit or interfering with its inspections or investigations. MSHA takes a broad view of “denial of entry” including: refusing to furnish inspectors transportation at a mine when it is difficult to travel on foot; withdrawing personnel from the mine when an inspector arrives; failing to provide information to inspectors concerning areas

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66 Section 103(g)(1), 30 U.S.C. § 813(g)(1).
70 The Review Commission has affirmed a violation of Section 103(a) where refusal to provide transportation to an accident site effectively denied the inspector access to the area. U.S. Steel Corp., 6 F.M.S.H.R.C. 1423 (June 1984).
71 Review Commission administrative law judges have held that Section 103(a)'s “right of entry” requirement was violated when operators notified miners underground that
that are unsafe to travel into and inspect without specific knowledge; removing power from the mine or its ventilation system when an inspector arrives; denying access to equipment or the immediate work area; and withholding information regarding operation or ownership of mine and equipment.72

Comparatively, mine operators have extremely limited opportunities for conducting “discovery” against MSHA during inspections or investigations. The steps that operators may take include the following:

[a] — Presentation of Credentials.
Request that the inspectors or investigators show their credentials at the start of an inspection to verify their identity and that they are representatives of the Secretary authorized to conduct the inspection or investigation they seek to conduct. Document all identifying information contained on the credentials.

[b] — Opening Conference.
Request that an “opening” or “pre-inspection” conference be held to discuss the type, purpose and scope of the inspection and to coordinate necessary inspection arrangements.

[c] — Walkaround Representation.
Designate walkaround representatives to accompany the MSHA inspection team or teams at all times during the inspection of the mine.73

[d] — Reasonable Inspection Procedures.
Establish reasonable ground rules for the conduct of the inspection. Section 103(e) of the Mine Act provides that “[a]ny information obtained

by the Secretary ... shall be obtained in such a manner as not to impose an unreasonable burden upon operators, . . . .” 74  Mine operators may request that an orderly process be followed for receiving and responding to MSHA requests to review or copy documents; 75 request that an orderly process be followed for receiving and responding to requests to interview employees; 76 and request that meetings be held with MSHA during inspections or investigations to discuss inspection status and issues.

[e] — Post-Inspection Conferences.

Mine operators should insist on a “closing conference” and, where appropriate, “post-inspection” conferences to discuss the results of the inspection or investigation, and any citations and orders that are planned or have been issued.


As established above, each step of the MSHA inspection or investigation process presents adversarial parties, competing rights, potentially divisive issues and potentially significant liabilities. The way in which inspection issues are raised, addressed and resolved can directly determine whether an operator’s liabilities are decreased or increased. In order to minimize liability exposure, a pre-planned inspection and investigation management procedure should be adopted. The basic elements of such a plan are summarized below.


Training of key personnel should be conducted concerning the MSHA inspection and investigation process. This training should include explanation of the procedural rights of MSHA, operators and miners; the company’s inspection management procedures; required lines of communication during an inspection; the lines of authority for decisionmaking on issues that arise during inspections; the Mine Act

75 See discussion at § 8.04[3].
76 See discussion at § 8.04[4].
litigation process; and the effects that actions taken and statements made during the inspection or investigation can have in subsequent litigation.

Key personnel include personnel likely to be the initial points of contact when MSHA arrives, e.g., guards, front office personnel, and area supervisors; site management; safety and health personnel; headquarters or other off-site company management; and the legal department.


Designate a knowledgeable onsite company person as the primary contact person for interfacing with MSHA during inspections and investigations. This person should be responsible for coordinating with MSHA all of the various inspection activities, including staffing and assembling walkaround teams; requesting and scheduling necessary or requested meetings or conferences; receiving and responding to requests for documents; and receiving and scheduling interview requests.

In order to properly perform their roles, walkaround representatives must be very knowledgeable regarding the Mine Act and the respective rights of all parties. They must recognize that any comment or statement they make in MSHA’s presence may constitute evidence or admissions. They also must understand that their primary purpose is to accompany the inspectors and observe their actions, not to assist the inspector in observing or documenting violations or to serve as a company representative available to the MSHA inspector to confirm or admit that observed conditions are violations of MSHA standards.


Part of inspection pre-planning should include developing standard formats for typical inspection correspondence or forms. When properly drafted and used, these documents will assist in ensuring that MSHA inspections and investigations are approached in a more organized and consistent manner. Importantly, they will also provide evidence that the

77 These personnel need to know who at the site must be immediately contacted to inform them that an inspection or investigation is beginning and how to respond to the inspectors upon their arrival, e.g., whether to instruct them to wait in the area for the operator’s inspection representatives to arrive or to direct them to another location.
company is proceeding in a reasonable manner during the inspection and is attempting in good faith to cooperate with MSHA. Standard types of useful inspection documents include the following: a letter to MSHA designating who the operator’s contact person will be during the inspection; a letter to MSHA establishing reasonable procedures for presenting its document requests to the operator so that they may be reviewed and responded to appropriately;\(^{78}\) a document control “log” for recording and tracking MSHA’s document requests, the status of the company’s responses, and the documents that were provided; a procedure for maintaining an identical set of the documents produced;\(^ {79}\) and a letter to MSHA requesting that all requests for employee interviews be made through the contact person so that a reasonable interview schedule can be established. In implementing these document request procedures, however, MSHA’s authority to have access to and inspect documents required to be kept by the Mine Act must be kept in mind.\(^ {80}\)

In producing documents to MSHA, a procedure also should be established concerning who will be involved in reviewing MSHA’s document requests and determining what documents are or are not responsive. Before documents are produced to MSHA they should be reviewed by a person who is able to determine whether the documents requested are required to be maintained under the Act and to be provided

\(^{78}\) Such a letter would explain that the procedures are intended to facilitate, not hinder the inspection, request that requests for documents be in writing, that they be directed to the identified contact person, and that documents identified as trade secret or business confidential information be kept confidential under the Trade Secrets Act, 18 U.S.C. § 1905, as well as under Exemption 4 to the Freedom of Information Act, 5 U.S.C. § 552(b)(4). See McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162 (D.C. Cir. 1995), and Critical Mass Energy Project v. Nuclear Regulatory Comm’n, 975 F.2d 871 (D.C. Cir. 1992) (both discussing government’s authority to disclose confidential information submitted voluntarily or under compulsion).

\(^ {79}\) Depending on the amount of documentation that will be produced, a system of numbering each page produced can prove extremely useful in tracking information that has been produced and precisely in referencing specific documents in discussions with MSHA or in subsequent litigation.

\(^ {80}\) See discussion at § 8.02[5], supra.
to MSHA upon request; are relevant to MSHA’s request; or are confidential or privileged information.


It is extremely important to recognize that an “interview” is a part of the MSHA inspection or investigation process that is separate and distinct from the physical inspection of mine property, and that different rights and responsibilities attach to these separate components of an inspection. It is also important to recognize that any conversations with MSHA inspectors or investigators, any questions they ask or answers they are given, and any statements or comments otherwise made to them or in their presence are, in essence, “interviews.” If these basic points are not understood, important rights are not being fully protected.

Much evidence supporting alleged MSHA violations comes from employee interviews. Often this “evidence” is the result of miscommunication, misunderstanding, poor questioning, poor answering, or just plain erroneous information that is conveyed. Therefore, the fullest possible participation during the investigatory interview process is the best way of understanding the facts and information that are being communicated and the possible liability issues that may be arising. Nevertheless, it must be understood that issues concerning participation in representation of miners during interviews can be particularly contentious.

Section 8(a)(2) of the OSH Act provides that “the Secretary . . . is authorized . . . to question privately any . . . employer, owner, operator, agent or employee.”\(^{81}\) The Mine Act does not have a similar provision addressing MSHA’s right to hold “private” interviews. Rather, the Mine Act simply states that “for the purpose of making any investigation of any accident or other occurrence relating to health or safety . . . the Secretary may, after notice, hold public hearings, and may sign and issue subpoenas for the attendance and testimony of witnesses . . . .”\(^{82}\) In *Int’l Union, UMWA v. Martin*,\(^ {83}\) the court drew a distinction between accident investigation interviews held at a mine and those held away from the

\(^{82}\) Section 103(b) of the Mine Act, 30 U.S.C. § 813(b).
mine. The court held that MSHA could exclude employer and union representatives from off-minesite interviews while suggesting that they have the right, under the walkaround provisions of Section 103(f) of the Mine Act\textsuperscript{84} to attend MSHA accident investigation interviews conducted at the mine.

MSHA’s present procedures for accident investigation interviews purport to give its investigators discretion to hold interviews with only the witness and the witness’s representative present. As to the question of who may serve as an employee’s representative, an employee’s right to choose as his representative the same attorney who represents the employer has been expressly upheld in the context of OSHA interviews.\textsuperscript{85} There is no reason why the same result should not obtain in the MSHA interview context. If a miner chooses to be represented in MSHA interviews by the attorney representing the operator, a written election of counsel form reflecting that an informed and voluntary waiver of potential conflicts has been made by the miner will help establish the representative’s right to be present if objections are made.\textsuperscript{86} Where individuals are themselves targets of enforcement actions, and the interests of the individual and the operator are adverse, a conflict of interest would be presented and the individual should be advised that separate representation should be obtained.

As of June 1996, MSHA’s policy concerning accident investigation interviews, including the issues of who may attend interviews and whether and in what circumstances MSHA may exclude persons from interviews, was still under review.\textsuperscript{87}

Apart from the representation issue, it is important to establish reasonable procedures for addressing and responding to MSHA’s requests for interviews of employees during inspections. First, it must be recognized that, in the absence of a subpoena, the interviews that MSHA requests are voluntary interviews. Therefore, the individual that MSHA seeks to

\begin{itemize}
\item \textsuperscript{84} 30 U.S.C. § 813(f).
\item \textsuperscript{85} Secretary of Labor v. Muth, 34 F.3d 240 (4th Cir. 1994). Compare Trinity Industries v. Secretary of Labor, 963 F.2d 795 (5th Cir. 1992).
\item \textsuperscript{86} See Dole v. Bailey, 14 BNA O.S.H.C. 1534, 1537 n.5 (N.D. Tex. 1990).
\item \textsuperscript{87} 60 Fed. Reg. 40859 (August 10, 1995).
\end{itemize}
interview can agree to the interview or decline the request. Second, if an interview is requested during the miner’s working hours the mine operator, as the individual’s employer, has a substantial say in the timing and arrangements for the interview.

Accordingly, operators should request that the scheduling of interviews to be conducted by MSHA at the mine site be coordinated through a contact person designated by the operator. This will allow any necessary workforce adjustments to be made and for suitable facilities for the interviews to be provided. Operators also should consider pre-interviewing personnel to determine facts and to provide their employees information concerning the interview process, including the rights of interviewees. Where agreed to by the employee, debriefing sessions may also be held to gain a further understanding of relevant facts and potential issues. Needless to say, however, any pre-interviews or debriefing sessions must be handled appropriately and with care to avoid complaints under the Mine Act’s anti-discrimination provisions or charges of impeding inspections or obstruction of justice.


During inspections and investigations MSHA is conducting its “discovery” under the various grants of authority in the Mine Act. Given the enforcement focus and structure of the Act, mine operators are not provided corollary opportunities to obtain information from MSHA during the inspection phase concerning its actions, findings and conclusions. For the most part, operators must wait for the initiation of formal litigation before they can engage in extensive discovery. Nevertheless, some useful “offensive discovery” can be undertaken during inspections and investigations.

First, an operator’s trained walkaround representatives should closely observe all of MSHA’s inspection activities and note their possible concerns. Second, careful questioning of inspectors and investigators may

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88 In Int’l Union, UMWA v. Martin, 785 F. Supp. at 1027, n.1, Judge Gesell suggested that except for public hearings held during accident investigations, MSHA may not have the authority to issue subpoenas.

89 Section 105(c), 30 U.S.C. § 815(c).
reveal findings that have been made, potential issues that are developing, or relevant facts that are being overlooked. Third, where possible problem areas or apparent violations are identified, helpful information can be gathered and voluntarily provided to MSHA to eliminate or mitigate their concerns.


Throughout an inspection or investigation, as MSHA’s concerns or possible violations are identified, the defenses to likely citations should be formulated and prepared in consultation with counsel. Potentially relevant information or sources of such information should be determined while the facts and issues are still fresh with the personnel involved. A determination should be made as to the utility of offering the information to the MSHA inspectors themselves or whether to save it for use in subsequent discussions, negotiations, or litigation.

At the closing conference, attempts should be made to have the inspectors explain the basis for their findings of violation with as much detail as possible. At the same time, however, any comments made by mine operator representatives concerning the inspection and MSHA’s alleged violations must be made with care in order to avoid possible admissions or further damaging information.

§ 8.05. Conclusion.

The Mine Act’s fundamental purpose of protecting the safety and health of miners is noble, laudable and noncontroversial. Both MSHA and mine operators share this goal and both play major roles in the effort to provide safe working conditions in the Nation’s mines. Their shared efforts fall short of a true “partnership for safety,” however, because of the inherent adversarial relationship that the command and control enforcement scheme of the Mine Act forces them to adopt.

In light of the significant liabilities that can be imposed on mine operators and their agents under the Mine Act, operators must take both offensive and defensive actions throughout the course of MSHA inspections and investigations. Mine operators should recognize that the arrival of MSHA at a mine starts the government’s “discovery” process. Operators also should recognize that the basic inspection management
steps outlined above will greatly assist them in more safely navigating the MSHA investigation tightrope.