

Chapter 7

Preparing for and Conducting Internal Accident and Incident Investigations: How to Protect the Attorney-Client and Work-Product Privileges and Prevent Subsequent Remedial Measures from Being Used Against You

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§ 7.01. Overview.

In the wake of several tragic accidents that have occurred since 2005, garnering national media attention, mine operators face increased scrutiny in today’s heightened enforcement climate. While the industry focuses on safety, making every effort to ensure that accidents like the ones which have occurred in recent years are prevented, operators must also ensure that their management personnel and their workforce are properly trained and adequately prepared to respond if and when tragedy strikes. In addition to emergency response rescue and recovery efforts, mine personnel must also

be educated about the investigative process that is sure to follow any serious accident.

Effective preparation and participation in the external investigation that will be conducted by the Mine Safety and Health Administration (MSHA) and the corresponding state agency largely depends upon a mining operation having its own internal accident investigation procedures in place.² Mine employees must not only be educated on what steps need to be taken in the crucial hours and days following an accident, but also why those steps are important. In addition, management personnel need to understand the importance of engaging outside counsel and how to use that counsel effectively.

§ 7.02. Preparedness — Understanding Statutory and Regulatory Requirements Regarding Proper Documentation and Training of Key Personnel Regarding Their Roles During an Investigation.

Before any investigation process can be successful, all key personnel must receive proper training regarding the applicable law, the Federal Mine Safety and Health Act of 1977 (the Mine Act).³ As will be demonstrated below, it is critical during the investigation process to maintain proper documentation. The regulations enacted to implement the Mine Act delineate specific responsibilities with regard to conducting daily pre-shift and on-shift inspections of the mine as well as the requirements for posting information and retaining records regarding any hazardous conditions discovered during these inspections.⁴ Following the report(s) of the actual incident that triggered

² While the discussion in this chapter focuses primarily upon interactions with MSHA inspectors, most all of the guidance offered herein is applicable to dealing with state mine inspectors as well. Moreover, the term “inspector” is used generally to refer to both MSHA inspectors and investigators.

³ Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 (2002) *et seq.*, amended by Mine Improvement and New Emergency Response Act of 2006, Pub. L. No. 109-236 (codified as amended in scattered sections of 30 U.S.C.)(hereinafter cited as The Mine Act).

⁴ See 30 C.F.R. § 75.360 (2010)(requiring that a pre-shift examination be conducted by a certified person within three hours before the beginning of any eight-hour period