

When MSHA Comes to Call

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WHO IS MSHA AND WHAT, EXACTLY, ARE THEY DOING HERE?

- The purpose of the Federal Mine Safety and Health Act is to protect miners
- The Act covers all surface and underground mines, all mine operators, independent contractors working at mines, and all miners
- The Act creates the Mine Safety and Health Administration (MSHA)
- MSHA is responsible for rulemaking and enforcement

OVERVIEW (CONT'D)

- MSHA inspects mines regularly for compliance with mandatory health and safety standards (30 C.F.R.)
- There is strict liability for mine operators, *i.e.* no excuses – if it really happened, and if it really is a violation
- There are citations, closure orders and mandatory civil penalties for violations
- Miners are protected from retaliation for raising safety concerns

THE MINE ACT: INSPECTION MANDATE



THE MINE ACT: INSPECTION MANDATE

- underground mines are inspected at least 4x per year
- surface mines are inspected at least 2x per year
- MSHA has the right to enter mine sites without a warrant
- giving advance notice of inspections is a crime

TWO RELEVANT ENFORCEMENT CONCEPTS

- negligence
- significant and substantial (S&S)

NEGLIGENCE – 30 C.F.R. § 100.3(D)

- None: the operator **exercised diligence and could not have known** of the violative condition or practice.
- Low: the operator knew or should have known of the violative condition or practice, but there are **considerable mitigating circumstances**.
- Moderate: the operator knew or should have known of the violative condition or practice, but there are **mitigating circumstances**.
- High: the operator knew or should have known of the violative condition or practice, and there are **no mitigating circumstances**.
- Reckless disregard: the operator displayed conduct which exhibits **the absence of the slightest degree of care**.

SIGNIFICANT AND SUBSTANTIAL (“S&S”)

The consequences:

- higher penalty
- can be the start of a (d) chain
- for publicly-held companies, disclosure in SEC filings
- factor in evaluation for assessment as a flagrant violation
- factor in determining whether pattern of violations exists

SIGNIFICANT AND SUBSTANTIAL (“S&S”) (CONT’D)

MSHA must prove:

1. that a mandatory safety standard was violated;
2. the existence of a safety hazard made more serious by the violation;
3. a reasonable likelihood that the hazard would result in an injury; and
4. a reasonable likelihood that the injury would be serious.

Mathies Coal Co. (Jan. 1984)

MSHA CITATIONS AND ORDERS

§ 104(a) citation

- violation of the Mine Act, a mandatory safety or health standard, or other regulation
- reasonable abatement time allowed
- civil penalty must be assessed based on (among other things) inspector's findings regarding
 - gravity
 - negligence

MSHA CITATIONS AND ORDERS (CONT'D)

§ 104(d)(1) citation

- violation of mandatory safety or health standard
- unwarrantable failure charged
- significant and substantial violation charged
- reasonable abatement time allowed
- triggers 90-day “probation” period
- penalty assessed – \$2,277 minimum
- disclosure in quarterly SEC filings

MSHA CITATIONS AND ORDERS (CONT'D)

§ 104(d)(1) and § 104(d)(2) orders

- violation of mandatory safety or health standard
- unwarrantable failure charged
- no requirement that violation be significant and substantial
- no time for abatement: all miners must be withdrawn from affected area
- special investigation possible
- idled miners are entitled to pay
- higher penalty assessed, special assessment possible (\$4,553 minimum penalty)
- disclosure in SEC filings

MSHA CITATIONS AND ORDERS (CONT'D)

§ 104(b) order

- failure to abate citation
- must withdraw all miners from affected area: no more time for abatement
- idled miners are entitled to pay
- high penalty assessed
- possible daily civil penalties of up to \$7,500 per day
- disclosure in SEC filings

§ 104(g) ORDER – UNTRAINED MINER



§ 107(a) imminent danger order



MSHA CITATIONS AND ORDERS (CONT'D)

§ 107(a) order

- imminent danger exists
- no violation required
- no time for abatement
- idled miners are entitled to pay
- disclosure in SEC filings

FALSE STATEMENTS. JUST ... DON'T.

Mine Act § 110(f):

- ***Whoever knowingly*** makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Act shall, upon conviction, be punished by a fine of not more than [\$250,000], or by imprisonment for not more than five years, or both.
- for example, 5000-23 training certificates, preshift books, equipment pre-op exam records

FALSE STATEMENTS (CONT'D)



INSPECTIONS AND INVESTIGATIONS



BEFORE THE INSPECTION BEGINS ...

- ensure that required records are up to date and available
- assign management representatives
- educate employees about the right to talk (or not to talk) to inspector

PARTICIPATING IN THE INSPECTION:

- accompany the inspector at all times
- participate in conversations with inspector
- take notes: keep a record of all activities and discussions with the inspector
- ask about details of expected citations and orders
- correct violations promptly (before time for abatement expires) – if appropriate, you can always challenge later
- be truthful
- avoid admissions about how long a violation existed or whether anyone knew about it
- never speculate – stick to the facts
- do not conduct demonstrations

STAY WITH THE MSHA INSPECTOR



PROTECTING COMPANY DOCUMENTS

- keep documents you are required to keep for the period required by law
- for all other records, consider whether they are appropriate to keep at mine (e.g. medical records pertaining to workers compensation or FMLA leave)
- have and use internal document-retention policy
- take steps to protect privileged and/or confidential company documents
- consult with safety department and/or counsel about MSHA demands for documents not required to be kept

EQUIPMENT INSPECTIONS

- is the equipment tagged out
- what does the tag say?
- has it been given a pre-op?

NO GOOD CAN COME OF THIS.





**KEEP
CALM
AND
ASK
QUESTIONS**