

# *The Good, The Bad & The Ugly of Accident Investigations*

## Indiana Minerals and Aggregates Association Winter Workshops

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PRESENTED BY

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# Accident

*noun* ac-ci-dent \ 'ak-sə-dənt

- An unfortunate incident that happens unexpectedly and unintentionally, typically resulting in damage or injury.
  - *Oxford Dictionary*
- An unexpected happening causing loss or injury which is not due to any fault or misconduct on the part of the person injured but for which legal relief may be sought.
  - *Merriam Webster*

# MSHA's Definition of "Accident"

- **As set forth in 30 C.F.R. § 50.2, "accident" would include:**
  - 1. Death**
  - 2. Injury with the reasonable potential to cause death**
    - **Concussions**
    - **CPR given**
    - **Limb amputations**
    - **Major upper body blunt force trauma**
    - **Intermittent or extended unconsciousness**

- 3. Entrapment for more than 30 minutes OR which has a reasonable potential to cause death**
- 4. Unplanned inundation by liquid or gas**
- 5. Unplanned ignition or explosion of gas or dust**
- 6. Underground unplanned mine fire not extinguished within 10 minutes or surface fire not extinguished within 30 minutes of discovery**



- 7. Unplanned ignition or explosion of blasting agent or explosive**
- 8. Unplanned roof fall at or above the anchorage zone in active workings or that impairs ventilation or impedes passage**
- 9. Coal or rock outburst that causes the withdrawal of miners or disrupts regular mining activity for more than an hour**



- 10. Unstable condition at or failure of an impoundment, refuse pile, or culm bank**
- 11. Damage to hoisting equipment in shaft or slope which endangers an individual or interferes with use of equipment for 30 minutes or more**
- 12. Event causing death or injury to an individual not at mine when event occurs**



# What Happens Next?

- **What do you do?**
- **Who do you call?**
- **What do you do with the employees on site?**
- **What do you do about the accident scene?**





# Notification

## Whom to notify:

- **Appropriate MSHA office (800 number)**
- **Company management**
- **Counsel**
- **Affected families of employee(s)**



## • Immediate Reporting



- Immediate notification is defined as “at once without delay and within 15 minutes.”
- Time is allowed to determine if an accident occurred.

# The Investigation

## An Overview of The Main Elements

- **What authority does MSHA have?**
- **Is there a § 103(k) Order, what will it cover?**
- **The Inspection/Investigation Team**
- **Scene Examination**
- **Equipment Evaluation**
- **Document Production/Requests**
- **Interviews/Statements**
- **Other Investigation Issues/Wrap Up**



# The Investigation

## MSHA's Authority to Investigate



- **The Mine Act grants MSHA broad authority to enter upon mine property to investigate the cause of accidents, determine appropriate remedial measures and to determine whether any willful or knowing violations occurred.**

# MSHA Authority

## Inspections & Investigations

- Conduct warrantless entries/searches of mine sites and records required to be kept under Mine Act.
- Authority to issue subpoenas for testimony and/or documents, and administer oaths. [§ 103(b)]
- Authority to issue withdrawal orders without prior adjudication hearing. [§ 103; § 104; § 107]
- Obtain injunctions for failure to comply with administrative orders or to cooperate in an investigation. [§ 108]
- Conduct private interviews. [§ 103(a)]



# § 103(k) Order

- **MSHA will first issue the verbal § 103(j) order and modify it to a written § 103(k) order when the first Authorized Representative arrives on scene.**
  - **Determine the scope of both orders**
- **You must preserve the accident scene and ensure that nobody accesses the area without MSHA's authorization.**

- **Affected Area Determination**

- **If the hazardous condition(s) or practice(s) causing that accident is likely to exist elsewhere at the mine, the § 103(k) order shall include all such areas of the mine.**

# What are Potential Outcomes of § 103(k) Order Requirements

- **Forced revision of a mine's ground control plan, ventilation plan, and emergency plan.**
- **Forced changes to operational procedures, such as how haul trucks are loaded.**
- **Forced mitigation measures beyond the scope of what is required for regulatory compliance.**





# § 103(k) Order

- You must comply with the terms of the § 103(k) order.
- Failure to comply with the order can result in a § 104(a) citation for working in the face of an order.
  - This may result in individual civil liability.



# The Investigation

## The Investigation Team

- **MSHA Personnel**
  - **May include specialists in ventilation, electrical standards, etc.**
  - **If a serious accident or fatality is involved, an MSHA special investigator may accompany the team**
- **Management Representatives**
- **Employees' Representatives**

# The Inspection/Investigation Team

- **From the operator's perspective, who is involved?**
- **Who interfaces with MSHA?**
- **What procedures does the employer have in place for such an investigation?**



# The Inspection/Investigation Team

- **Should the operator have an attorney?**
- **When and under what circumstances should you hire a technical consultant?**
- **What issues might arise with the equipment manufacturer?**
- **Will MSHA bring a Special Investigator, engineer, or government attorney?**



# Accident Investigation

## Be Prepared To:

- Accompany the investigator at all times.
- Take photographs or video record of the same items the investigator does.
  - Turn the audio off when taking video
- Take notes of all conditions noted by the investigator.

# Accident Investigation

## Be Prepared To:

- **Take notes of all available evidence regarding any potential alleged violation (e.g., witness names and statements; investigator's comments; description of condition or hazard including measurements, diagrams, equipment, time and location).**

# Scene Examination/ Equipment Evaluation

- **What will be examined and why?**
- **Documenting the scene**
- **How do you preserve important evidence**
  - **Photos**
  - **Videos**
  - **Measurements**
  - **Equipment**



# The Investigation

## The Collection of Evidence

- **If it is necessary to remove evidence from the site, maintain chain of custody records on any evidence removed.**
- **If destructive testing is necessary, agree on the laboratory or facility and make arrangements to participate with the necessary expert consultants present.**





# Document Requests and Production

- **What will MSHA be interested in and why?**
- **How will requests be made and what controls should be in place?**
- **What will you want to provide and what might you have concerns about?**



# Documents from Internal Investigation

- **Documents that may result from an internal investigation include:**
  - Notes and minutes from company meetings
  - Internal memoranda
  - Draft reports
    - Causation, root cause or safety factor analyses, and documentation of re-enactments
  - Diagrams, Drawings
  - Statements
  - Photographs or video



# Documents From Internal Investigation

- **Notes from interviews of company employees may also result from the investigation.**
- **If experts or consultants are retained during the course of the investigation, these documents may be generated:**
  - **Correspondence with the consultant**
  - **Reports containing expert conclusions and opinions**



# Can You Prevent Disclosure of Documents?

- **Preventing Disclosure**

- It is not always possible to protect internal investigative materials from disclosure.
- In determining how best to conduct an internal investigation so as to protect materials, there are two doctrines which provide some measure of protection and with which you should be familiar:
  1. **the attorney-client privilege**
  2. **the attorney work product privilege**



# The Investigation

## Witness Interviews

- Interviews are an informal device used by MSHA to gather information.
- Objectives of the interviews are to:
  - Determine the cause of the accident;
  - Uncover evidence of violations;
  - Evaluate inconsistent statements;
  - Determine whether the accident resulted from a knowing or willful violation; and
  - Discover evidence of a history of unlawful activities or practices.

# Interviews

- **The Mine Act permits investigators to conduct private interviews of employees.**
- **However, the employee must give his or her consent to such interview.**
- **Always ask the employee if a management representative can be present during the interview.**



# Interviews

## Company Interviews of Employees

- **Legal counsel can conduct a confidential investigation that generally will be protected by the attorney work product doctrine.**
- **Counsel can monitor the government investigations to promote fairness and ensure the statements prepared by investigators are complete and accurate.**



# Interviews

## Company Interviews of Employees

- **Written statements from employees may become evidence.**
- **If a statement is given, it is important that it recounts the facts fully, clearly, and accurately.**





# Conducting The Company's Investigation

- You should be conducting the company's investigation alongside the MSHA investigation.
- This does not mean that you are necessarily going to share all of the information you gather with MSHA.
  - Do not turn over your investigation notes
  - Do not automatically turn over photographs

# What Do You Do After MSHA Leaves The Property?

- **Determine the status of the § 103(k) order and make sure you remain in compliance with it until it is terminated**
- **Prepare your investigation report pursuant to 30 C.F.R. § 50.11 and have it available for MSHA's review upon request**
- **File the 7000-1 form with MSHA**



- **Care should be exercised in preparing any reports of the accident, particularly with regard to the explanation of the injury and the steps taken to prevent a similar occurrence.**



# § 50.11 Investigation Report

- **Each operator of a mine shall investigate each accident and each occupational injury at the mine. Each operator of a mine shall develop a report of each investigation.**
- **An operator shall submit a copy of a § 50.11 investigation report to MSHA at its request.**
- **Each report prepared by the operator shall include the nine items set forth in § 50.11(b).**



# Questions?



**For more information on  
these and other occupational  
safety and health topics,  
please visit:**

**<http://safety-health.jacksonkelly.com/>**

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