

MSHA HANDBOOK SERIES



U. S. Department of Labor
Mine Safety and Health Administration
Metal and Nonmetal Mine Safety and Health
Coal Mine Safety and Health
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Special Investigations Procedures

PREFACE

This handbook sets forth guidelines and instructions for conducting special investigations pursuant to Title 1 of the Federal Mine Safety and Health Act of 1977. The guidelines and instructions in this handbook are primarily procedural and administrative, and are intended to serve as organizational and technical aids for MSHA's enforcement personnel. Previously issued material on this subject matter is superseded by this handbook.

RAY McKINNEY
Administrator for
Coal Mine Safety and Health

FELIX A. QUINTANA
Acting Administrator for
Metal/Nonmetal Mine Safety and Health

NEAL H. MERRIFIELD
Director, Office of Assessments

SPECIAL INVESTIGATIONS PROCEDURES HANDBOOK

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SPECIAL INVESTIGATIONS PROCEDURES HANDBOOK

INTRODUCTION

The goal of the Special Investigations Program is to enforce compliance with mandatory safety and health standards as a means to eliminate fatal accidents and injuries; reduce the frequency and severity of nonfatal accidents; minimize safety and health hazards; and promote improved safety and health conditions in the Nation's mines. This handbook serves the purpose of ensuring consistency throughout the Special Investigations program in order to achieve our unified goal.

Section 103(a) of the Federal Mine Safety and Health Act of 1977, Public Law 91-173, as amended by Public Law 95-164 (Mine Act), states, in part that an Authorized Representative of the Secretary of Labor shall have a right of entry to, upon, or through any coal or other mine for the purpose of making any inspection or investigation to determine whether there is compliance with mandatory standards or any other requirement of the Mine Act.

Purpose

This handbook has been developed to provide guidance for investigations of discrimination complaints pursuant to Section 105(c), and special investigations pursuant to Section 110 of the Mine Act. It also establishes procedures to follow when issues arise which may require injunctive action pursuant to Section 108 of the Mine Act.

Responsibility

Section 5 of Secretary's Order 4-95, dated May 31, 1995, delegated authority to the Assistant Secretary of Labor for Mine Safety and Health to administer and enforce the Department's mine safety and health programs under the Mine Act (Except Title IV of the Mine Act, with the exception of legal authorities which are delegated to the Solicitor of Labor).

Disclaimer

This handbook is only to be used as a guide in conducting special investigations. Particular investigations may require different procedures and guidelines to be followed. Failure to follow the handbook guidelines does not necessarily nullify any case or investigation.

CHAPTER 1 - GENERAL INFORMATION**A. OVERVIEW OF THE SPECIAL INVESTIGATIONS PROGRAM:**

1. **The Technical Compliance and Investigation Office:** The Technical Compliance and Investigation Office (TCIO) is responsible for overall administration of the national special investigations program and providing guidance to promote consistent application and management of the program.
2. **District Manager:** Each District Manager (DM) is responsible for the operation of the special investigations program in their district and for the consistent application and enforcement of national policies and procedures. The DM will ensure that the district special investigations program is efficient and reflects an appropriate and cost-effective utilization of resources.
3. **The Supervisory Special Investigator:** The Supervisory Special Investigator (SSI) reports directly to the DM. The SSI is responsible for the daily management of the special investigations program in the district. The primary duties of the SSI are as follows:
 - Supervise Special Investigators (SIs) and Complaint Processors (CPs)
 - Liaison with the Office of the Solicitor (SOL) and Department of Justice (DOJ)
 - Determine investigation priorities
 - Make recommendations concerning initiation of investigations
 - Assign cases
 - Review and approve work products
 - Conduct or schedule training for SIs and CPs
 - Coordinate program activities with the DM and TCIO
 - Provide timely verbal updates to the DM and TCIO on significant actions on cases
4. **Special Investigators:** All full-time and collateral-duty SIs will report directly to the SSI when conducting investigations. The first priority of SIs is to conduct special investigations and related activities. Their responsibilities include the following:
 - Interview persons, generate signed statements, memorandums of interview (MOIs), or electronically-recorded statements concerning an alleged violation of the Act (see Chapter 5)
 - Review pertinent records, documents, and files which may have a bearing on the case (see Chapter 6)

- Evaluate the testimony and evidence gathered (see Chapter 7)
- Assure the investigative record contains proof of jurisdiction to support interstate commerce (see Chapter 4)
- Write the final investigative report detailing the facts of the case, analyze the merits, and recommend the appropriate action (see Chapter 7)
- Notify the SSI of allegations concerning possible criminal activity not covered by the Mine Act, (i.e., stolen explosives, drug trafficking allegations)
- Work with and provide information to SOL and DOJ attorneys when directed by the DM or SSI

Mine Safety and Health Administration (MSHA) SIs **do not conduct internal investigations into allegations against MSHA employees.** Possible violations of Section 110(e) (advance notice of inspections) shall be immediately forwarded to the DM for review and possible action.

Mine Safety and Health Administration SIs **do not have the authority to exercise specific law enforcement powers.** Mine Safety and Health Administration employees are not authorized to carry firearms or other dangerous weapons at any time while on official duty and are prohibited from doing so. It is a Federal crime to carry a firearm or other dangerous weapon on a Federal facility (18 U.S.C. 930). Firearms or other dangerous weapons are not to be transported in government vehicles at any time (see Administrative Program Policy Manual II (APPM), Chapter 500, § 512.h). Special Investigators do not have authority to make arrests or obtain and execute search warrants. Agency personnel may continue to assist Assistant U.S. Attorneys (AUSA), who are authorized to obtain search warrants, and other law enforcement officers who are authorized to execute search warrants, but may not exceed this role of "assistance" only. See Chapter 1, Sections F and G, and Chapter 6 for further instructions.

The SI should contact the SSI if it is determined that assistance is required from another SI at a distant location not within the normal geographical area of the SI assigned to the case. The SSI will be responsible to arrange for additional assistance.

B. CREDENTIALS:

Special Investigator credentials will be requested by the DM or SSI, by submitting a memorandum to TCIO that reflects the qualifications of the prospective SI. Accompanying the memorandum should be an unlined 3x5 index card (see Exhibit 1-1), with the individual's name exactly as their name will appear on the credentials and Credential Request Form (see Exhibit 1-2). The name should be printed and signed by the individual with a **black fine-point felt-tip** pen. The signature **must** be legible. The

card should also contain the individual's Authorized Representative (AR) or Right of Entry Card (ROE) number. A digital picture of the prospective SI should be taken and e-mailed to TCIO. (All SI pictures should be taken in business attire on a solid white background.)

The Director, Office of Assessments, shall review the request for credentials to determine if the person has completed the required Agency training, and will prepare a memorandum for the appropriate Administrator to submit to the Assistant Secretary for issuance of the credentials.

The minimum requirements to obtain MSHA SI credentials should include an active Authorized Representative (AR) or Right of Entry (ROE) card and completion of the formal training program set forth by TCIO. Credentials may also be obtained through an on-the-job training program under the direct supervision of the SSI and DM with approval by TCIO.

Special Investigator credentials must be kept in the possession of the person to whom issued and must not be loaned to others. Credentials will not be used to obtain preferential treatment on personal matters. Only MSHA-approved credentials may be used in the performance of a special investigation. Improper use or failure to safeguard SI credentials or use of other unauthorized credentials may result in disciplinary action. Conservator of the Peace or similar credentials or badges are examples of **UNAUTHORIZED** credentials.

The employee shall notify the SSI immediately if their credentials are lost or stolen. Every effort should be made to recover lost credentials, including a thorough search of the locations where the loss may have occurred. If the credentials are not recovered within 24 hours after they are discovered to be missing, the SSI or DM will immediately notify the local Federal Bureau of Investigations (FBI) office and police of the loss or theft by written communication.

The SSI shall be responsible for obtaining an SIs credentials when the SI separates from MSHA or is reassigned to another position within the Agency. The SSI shall forward the credentials to TCIO by certified mail for cancellation.

When conducting interviews, SIs must introduce themselves, display their credentials, and advise the interviewee that they are conducting an investigation for MSHA. This identification procedure shall precede any request for information. When conducting other investigative business (i.e., accompanying the accident investigation team), the SI will use discretion and judgment concerning the display of credentials.

C. EQUIPMENT AND FACILITIES:

Each SI Unit must maintain appropriate equipment and facilities as follows:

- Private facilities for conducting interviews, report writing, review of tape recordings, etc.
- Locked file cabinet or safe; access to private telephone lines and/or cellular phones¹
- appropriate transportation²
- Photographic equipment
 - Cameras or video recorders (at least one available per office for SIs to utilize in their duties)
 - Film and appropriate accessories
- Voice recorder and appropriate transcribing accessories
- Laptop computer and portable printer
- Miscellaneous:
 - Measuring tape
 - Master log (bound with numbered pages)
 - Etching tool or other permanent marking device
 - Padlock
 - Evidence tags, MSHA Form 2000-181 (exhibit 6-3)
 - Forms necessary for collection and preservation of evidence
 - Chain of custody, MSHA Form 2000-200 (exhibit 6-4)
 - Itemized receipt, MSHA Form 2000-201(exhibit 6-5)

D. CONFIDENTIALITY AND MEDIA INQUIRIES:

All special investigations are confidential and must not be discussed with any unauthorized persons, including mine operators and their agents. Failure to maintain the confidentiality of information obtained during a special investigation can result in serious disciplinary action. Requests for information regarding any case, including those requests filed under the provisions of the Freedom of Information Act (FOIA), must be referred to TCIO. (See Administrative Policy and Procedures Manual Vol. III, Ch. 400). Requests by news media (newspapers, television, radio, etc.) should be sent to the Administrator, TCIO, and the Office of Program, Education, and Outreach Services. Disclosure or withholding of information will be governed by the FOIA regulations and current Departmental and Agency policies.

¹Because of the way certain non-digital cellular phones transmit, precaution should be taken to prevent confidential information from being intercepted.

²The agency recognizes that appropriate transportation may mean an unmarked vehicle.

The Criminal Division of the DOJ will review the proposed response to media inquiries in referred cases or matters where their involvement appears probable. Responsibility for clearance with the Criminal Division of Justice has been assigned to the SOL. Any such inquiries shall be promptly referred to TCIO for review and then forwarded to the Associate Solicitor's Office for clearance with DOJ.

E. SOURCES OF INFORMATION:

1. **General:** Special investigations generally involve the use of one or more of the following aids:
 - Personal interviews
 - Record/document reviews
 - Personal observations
 - Newspaper articles
 - Confidential sources (informants)

2. **Examination of Records and Documents:** During the course of most investigations, it becomes necessary to examine certain records and public documents. Official and unofficial records are a source of essential information pertinent to all investigations. Many types of records may be obtained from MSHA and other Federal and State agencies. The SI should become familiar with where to locate and obtain official copies of public documents, and be knowledgeable of the information available at courthouses, registrars of deeds, and similar institutions. The SI should be familiar with all of the records, documents, and reports required to be kept or maintained by the Mine Act, and know where to access them.

It is important to determine what records or documents are needed or what documents are necessary. The SSI will be available to assist in this effort. Certain investigations require the copying of data from original records. Detailed planning is necessary before undertaking this task. Be sure that the information is pertinent to the investigation.

F. SURVEILLANCE:

In general, surveillance means keeping a close continuous watch over a person, group, or operation. Surveillance may be categorized as either physical or technical as defined below. **NEITHER PHYSICAL SURVEILLANCE NOR TECHNICAL SURVEILLANCE WILL BE UTILIZED IN THE COURSE OF MSHA SPECIAL INVESTIGATIONS, EXCEPT WITH THE EXPRESS AUTHORIZATION AND**

APPROVAL OF THE DOJ AND THE ASSISTANT SECRETARY FOR MINE SAFETY AND HEALTH IN CONJUNCTION WITH THE OFFICE OF THE SOLICITOR.

Whenever surveillance is being considered, the DM shall submit a memorandum to the Administrator (as described in the various sections below) detailing the reasons for wanting to conduct the surveillance.

1. **Physical Surveillance:** the act of performing a close and constant personal observation.
 - Physical surveillance from private property without the express permission of the landholder raises serious legal issues which need to be resolved by federal prosecutors before conducting such an activity. Furthermore, physical surveillance may pose potential risks to government personnel who are engaged in it and also may pose questions of effective use of personnel and fiscal resources. Mine Safety and Health Administration SIs **are not law enforcement officials** and **are not authorized to conduct physical surveillance activities**. For these reasons, MSHA policy is to have a law enforcement agency assist the MSHA investigation by carrying out any physical surveillance.
 - Where physical surveillance is authorized by the DOJ, and is being conducted by a law enforcement agency in aid of the MSHA investigation, MSHA SIs (who have been trained or instructed regarding physical surveillance procedures) may assist law enforcement officials in carrying out physical surveillance after obtaining the approval of the federal prosecutor and the Administrator.
 - If physical surveillance is determined to be warranted in a matter criminally referred by MSHA, and it has been determined that MSHA SIs (rather than law enforcement personnel) are to be the personnel carrying out the physical surveillance activity, **approval and authorization must be obtained** from the U.S. Attorney's Office with jurisdiction over the surveillance, as well as from the Assistant Secretary and the Solicitor of Labor. In these instances, a written request for authorization must be submitted. The written request shall be prepared to specifically advise the Assistant Secretary of the following:
 - The purpose of the physical surveillance
 - The duration of the physical surveillance
 - The location(s) where physical surveillance will be maintained

- The protections and risks posed by the physical surveillance
- The position of the federal prosecutor regarding carrying out these activities
- Status of the appropriate legal and policy clearance needed for employees of MSHA to engage in these physical surveillance activities
- Waiting outside the residence or work place of a potential witness or source of information in order to approach that person for information or an interview is not surveillance and is not covered by the above. Whenever such activity will take place after dark, the approval of the DM should be obtained (if only to approve the use of government time in pursuit of the interview or information).

2. **Technical Surveillance:** (electronic/mechanical monitoring/recording) is the utilization of electronic or mechanical (bugging) devices for the purpose of secretly intercepting or recording conversations.

Electronic monitoring/recording is subject to strict legal requirements and safeguards. Failure to strictly follow those guidelines may result in violation of federal criminal laws by those engaging in such monitoring. Such monitoring is divided into several categories. The two most relevant to MSHA SIs are:

- **Non-Consensual Personal Or Electronic Monitoring:** Electronic or mechanical monitoring of conversations conducted where none of the parties to the conversation are aware that the conversation is being monitored/recorded by a device.

Mine Safety and Health Administration SIs **are not law enforcement officials** and **are not authorized under any circumstances** to conduct **non-consensual** monitoring or eavesdropping using an electronic device. Non-consensual monitoring is illegal unless authorized by law.

MSHA SIs (trained in technical surveillance procedures) may assist in non-consensual monitoring at the request of federal prosecutors or law enforcement officers only if authority has been granted by the DOJ and appropriate federal court orders have been issued **AND** if written authorization has been received from the Assistant Secretary and Solicitor of Labor authorizing the MSHA SI to assist the law enforcement officials.

- **Consensual Monitoring:** Electronic or mechanical monitoring of conversations conducted where one of the parties to the conversation consents to and is aware that the conversation is being monitored/recorded by a device.

If federal prosecutors desire to utilize **consensual** electronic or mechanical monitoring/recording in an MSHA-referred criminal matter, it is MSHA policy that they seek the assistance of a federal law enforcement agency (i.e., the FBI) to direct and carry out that activity. The law enforcement official and the federal prosecutor (i.e., Assistant U.S. Attorney), are responsible to obtain proper authorization from their organizations.

Where consensual monitoring is authorized by the DOJ, and is being conducted by a law enforcement agency in aid of the MSHA investigation, MSHA SIs (who have been trained in these surveillance procedures) may assist law enforcement officials in carrying out consensual monitoring with the approval of the federal prosecutor and the Administrator.

If federal prosecutors desire to utilize consensual electronic or mechanical monitoring/recording in an MSHA-referred criminal matter and, for exigent circumstances or other appropriate reasons, it is not possible to utilize the services of a law enforcement agency to carry out this activity (as discussed above), MSHA SIs may be utilized. However, before any MSHA SI may engage in any type of consensual monitoring activity, approval and authorization is required from the U.S. Attorney's Office with jurisdiction over the technical surveillance, as well as from the Assistant Secretary and the Solicitor of Labor. In these instances, a written request for authorization must be submitted and include:

- The nature of the monitoring/recording being planned
- The expected non-consenting party and their status relative to the investigation
- The place, location, and duration of the consensual monitoring
- The reasons why a law enforcement agency (i.e., FBI) may or may not be utilized
- The name and position of the approving federal prosecutor
- The opinion of the federal prosecutor regarding carrying out this activity
- The status of the needed appropriate legal and policy clearances for employees of MSHA to engage in such consensual surveillance
- In an emergency situation, the U.S. Attorney, acting alone, may orally authorize MSHA SIs to engage in consensual monitoring activity; however, a written request shall be submitted as soon as possible to the Assistant Secretary and the Solicitor of Labor for approval
- All requests for approval of surveillance and monitoring shall be signed by the DM and submitted to the Administrator for approval

G. UNDERCOVER OPERATIONS:

The term undercover operations includes any effort by a government employee to pose as someone else (usually a private citizen) in order to observe or report persons committing illegal acts in their presence. It would include having private citizens engaging in such activity at the behest and on behalf of the government agency. It also would include posing as a citizen seeking to make an illegal purchase, as well as posing as one who is in the business of selling illegal services (e.g., falsified dust samples). Very strict legal and procedural requirements are imposed on government law enforcement agencies who are conducting undercover or “sting” operations. Special legal issues are presented by all such operations.

Acting alone, MSHA SIs are not authorized to conduct any manner of undercover operations. This prohibition includes, for example, purchasing or seeking to purchase a false training certificate from an individual who is under investigation for selling such certificates.

MSHA SIs may assist a duly authorized law enforcement agency in conducting an undercover operation provided:

- That the undercover operation is directed at uncovering violations of law pertaining to the safe and healthful operation of a mine or the direct enforcement of other provisions of the Mine Act
- The operation is under the direct and constant supervision of a federal law enforcement agency (i.e., the FBI)
- The operation has been approved by the U.S. Attorney’s Office
- The Assistant Secretary and the Solicitor of Labor have authorized the use of MSHA personnel in such activity. In these instances, a written request for authorization must be submitted to obtain this authorization. In these instances a written request must be submitted by the DM to obtain authorization from the Assistant Secretary

H. CONTACTS WITH LAW ENFORCEMENT AGENCIES AND PROSECUTORIAL AUTHORITIES:

1. **Liaison:** The DM, with the assistance of the SSI, will promote and ensure close working relationships between supervisory and other SIs and officials in local, federal, and state law enforcement agencies (prosecuting attorneys, U.S. Marshals, etc.). Designated headquarters personnel will maintain the necessary contacts with Federal law enforcement agencies. The SSI and National

Headquarters staff (TCIO) will promote and ensure coordination with the Office of the Solicitor.

2. **Requests for Information or Services:** Listed below are the procedures to be followed in those instances when information or services are requested. The following procedures may be initiated, but only after approval from the DM:

- FBI Field Offices and Laboratory

Requests for background checks may be made directly to FBI field offices. The FBI will provide such data, except in those instances where the subject of the request is involved with a pending FBI investigation. The purpose of the background check request should be indicated.

When requesting laboratory examination(s) of evidence, guidance on the packing and transmittal of evidence will be provided by the FBI field office.

- FBI Headquarters

Written requests for identification (i.e., fingerprint records) must be directed to the FBI headquarters office. The purpose of the request must be given.

SAMPLE UNLINED 3 x 5" CARD

- **PRINTED NAME :** JAMES JOYCE
- **SIGNATURE:** *James Joyce*
- **AR or ROE Number:**

U.S. DEPARTMENT OF LABOR
CREDENTIAL REQUEST FORM

All credentials will have an expiration date **five** years from the date of issuance. You are responsible for returning the credentials to the Security Center if your employment or position changes.

DATE: _____

NAME: _____

(PLEASE PRINT CLEARLY)

POSITION TITLE: (As it should appear on credentials) MSHA Special Investigator

AGENCY: Mine Safety and Health Administration

- REGION:
- | | |
|---|--|
| <input type="checkbox"/> I - Boston, MA | <input type="checkbox"/> II - New York, NY |
| <input type="checkbox"/> III - Philadelphia, PA | <input type="checkbox"/> IV - Atlanta, GA |
| <input type="checkbox"/> V - Chicago, IL | <input type="checkbox"/> VI - Dallas, TX |
| <input type="checkbox"/> VII - Kansas City, MO | <input type="checkbox"/> VIII - Denver, CO |
| <input type="checkbox"/> IX - San Francisco, Ca | <input type="checkbox"/> X - Seattle, WA |
| <input type="checkbox"/> - National Office | |

ROOM NUMBER _____

PHONE NUMBER _____

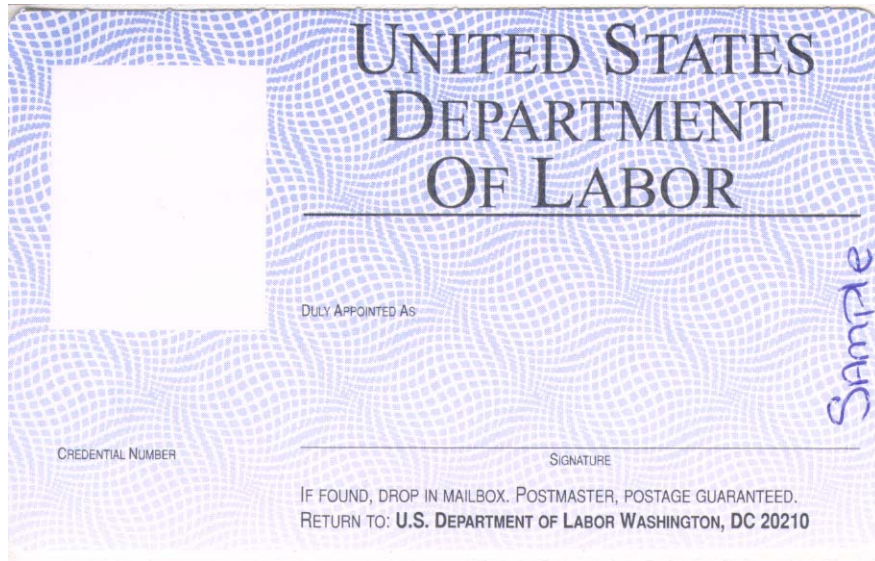
AUTHORIZING OFFICIAL _____ (signature)
(Assistant Secretary of Mine Safety and Health)

DO NOT WRITE BELOW THIS LINE

COMPLETED BY _____

DATE COMPLETED _____

Sample SI Credentials



CHAPTER 2 - DISCRIMINATION COMPLAINTS**A. INTRODUCTION:**

The intent of Congress, as expressed in part by Senate Conference Report No. 95-181, was that miners would have to play an active part in the enforcement of the Mine Act to have a truly effective mine safety and health program.

Under provisions of Section 105(c) of the Mine Act, miners, representatives of miners, and applicants for mine employment are protected from retaliation for engaging in safety or health-related activities, such as identifying hazards, asking for MSHA inspections, or refusing to engage in an unsafe act. MSHA vigorously investigates discrimination complaints to encourage miners to exercise their rights under the Mine Act and to maximize their involvement in monitoring safety and health conditions. Particular attention is given to those mine operators who have repeatedly discriminated against miners.

Miner discrimination complaints are given priority over all other SI cases. All available special investigation resources, including SSIs, will be used to ensure the timely initiation and completion of Section 105(c) investigations. The Technical Compliance and Investigation Office will coordinate, and if necessary, provide additional resources to a district receiving an unusual number of Section 105(c) complaints.

Discrimination on the basis of race, sex, age, religion, handicap, etc., is not covered by Section 105(c) of the Mine Act. Efforts should be made by investigative staff to assist the complainant in contacting other agencies for the appropriate relief. In certain situations there may be discrimination(s) under the Mine Act, in addition to other discriminatory acts not covered under the Act. Consult TCIO and SOL when these situations arise.

Section 428, Title IV--Black Lung Benefits of the Mine Act, prohibits discrimination against coal miners (not applicants for employment) who are suffering from pneumoconiosis. That section is administered by the Employment Standards Administration (ESA) of the United States Department of Labor. Section 428 (a), 30 USC § 938, states:

“No operator shall discharge or in any other way discriminate against any miner employed by him by reason of the fact that such miner is suffering from pneumoconiosis. No person shall cause or attempt to cause an operator to violate this section. For the purposes of subsection, the term ‘miner’ shall not include any person who has been found to be totally disabled.”

1. **Agreement With Employment Standards Administration:**

Mine Safety and Health Administration and the ESA entered into a Memorandum of Understanding (MOU) to provide additional receiving points for discrimination complaints filed under Sections 105(c) and 428 of the Mine Act. The ESA complaint processors, located in the various ESA Black Lung Offices, have been delegated the responsibility of receiving Section 105(c) and Section 428 discrimination complaints.

The Technical Compliance and Investigation Office (TCIO) and ESA's Office of Workers' Compensation Programs will be responsible for coordination and consultation in the handling of discrimination complaints covered by this MOU.

Miners are afforded the right of transfer based on medical evaluation as stipulated in 30 CFR Part 90. Only underground coal miners are eligible for this right pursuant to Section 105(c)(1) of the Mine Act.

Surface miners and applicants for employment may not be entitled to any remedy under Section 105(c), although in some instances they may appropriately file a claim pursuant to Section 428 of the Mine Act. Therefore, a comprehensive investigation shall be completed in alleged Black Lung-related cases.

The Technical Compliance and Investigation Office will evaluate the merits of each Black Lung-related case to determine if a violation of Section 105(c) of the Mine Act has occurred. If the evidence does not support a violation of 105(c), a copy of the entire case file may be forwarded by TCIO to ESA for evaluation under Section 428.

2. **Agreement With National Labor Relations Board:**

MSHA and the National Labor Relations Board (NLRB) entered into a MOU for coordinating complaints received which alleged violations of the Mine Act and the National Labor Relations Act.

Both TCIO and NLRB are responsible for the coordination and consultation in handling discrimination complaints covered by this MOU.

B. PROCESSING DISCRIMINATION COMPLAINTS (GENERAL):

This section outlines the procedures to be used by MSHA in processing discrimination complaints. The proper coordination and processing of inquiries and complaints ensures efficient action on the part of MSHA investigators and complaint processors. A discrimination complaint filed pursuant to Section 105(c) may be filed with any MSHA district, field, or Headquarters office, or any ESA Black Lung Office. All MSHA enforcement personnel should be familiar with the provisions of Section 105(c) so that they may receive complaints and handle them properly. However, at least one person (the complaint processor or other person so designated) in each MSHA District and Field Office must be designated and trained to handle inquiries and process complaints. At least one alternate should be appointed in the event the complaint processor is unavailable.

Confidentiality must be maintained by all MSHA employees involved in the Section 105(c) process. Copies of discrimination complaints are **NOT** to be retained by the complaint processor, in accordance with Privacy Act provisions and record-keeping procedures published in the Federal Register. Only the original is to be maintained in the case file.

1. **Receiving Complaints:** The Discrimination Complaint, MSHA Form 2000-123 (Exhibit 2-1), and Discrimination Report, MSHA Form 2000-124 (Exhibit 2-2 and 2-3), may be obtained from any MSHA Office or ESA Black Lung Office.

The following forms will be provided by the complaint processor:

- Discrimination Complaint Form 2000-123 (Exhibits 2-1)
- Discrimination Report Form 2000-124 (Exhibit 2-2)
- Federal Mine Safety and Health Review Commission Rules of Procedure (Exhibit 2-4)
- Privacy Act Statement (Exhibit 2-5)

If the complainant(s) indicate that the alleged discriminatory action resulted in a loss of wages or employment, the complaint processor or designated person will provide the following forms:

- Information on Backpay for Miners (Exhibit 2-6)
- Claimant Expense Search for Work, and Interim Earnings Report (Exhibit 2-7).

Copies of the forms referenced above shall be maintained (as designated by the district office) where MSHA enforcement personnel have access to them in the event

the complaint processor or person designated to receive complaints is not available. A complaint filed in person at any MSHA office shall be received for processing by the complaint processor (or any other MSHA employee available), regardless of the field office or district office responsible for inspecting the mine where the complainant is (or was) employed. Every effort shall be made to assist the complainant. Persons wishing to file a complaint shall not be told to go to another field office to file their complaint.

- **In Person:** Individuals who come into an MSHA office with questions concerning an alleged discriminatory action should be referred to the complaint processor, SSI, or other designated person. The complaint processor should discuss the general nature of the complaint with the individual(s), provide the forms and other documents listed below and assist in filling out the forms.
- **By Telephone:** Individuals who make inquiries by telephone shall be referred to the complaint processor. The complainant(s) shall be advised that they may come into any MSHA office and will be assisted in preparing and filing a discrimination complaint. In those instances where a person cannot come to an MSHA office, a cover-letter should be prepared (Exhibit 2-8), enclosing each of the forms listed above, and transmitted via certified mail; return-receipt requested.
- **By Mail:** A signed letter or written document received in any MSHA office, regardless of its form, which alleges a discriminatory act, will be treated as a complaint filed with the Secretary under Section 105(c). The information submitted will be transferred by the complaint processor onto MSHA Forms 2000-123 and 2000-124, which will be attached to the complainant's letter. The date the complaint is received should be inserted in the appropriate block on Form 2000-123. The SI will ensure that Form 2000-124 has been signed and dated by each complainant during the course of the investigation. If additional information is needed to complete the required forms, the complaint processor should contact the complainant by telephone or by mail.
- **Group Complaints:** If a miner, representative of miners, or applicant for employment wishes to file a complaint on behalf of a group of individuals (i.e., "all members of the section crew" or "all miners working on second shift") and the complaint and remedy is the same for all, then only one case number should be assigned and one case file prepared. During the investigation the SI should obtain a signature from each person in the group. Where there appears to be different or unique issues, or where the events occurred at different times for the different individuals involved, every attempt should be made to encourage the filing of a separate complaint by each individual complainant. Because of the complexity and uncertainty of the Procedural Rules which would govern "class

action” filings, the filing of individual complaints guarantees each complainant that their complaint will be investigated.

- **Referral To Another District:** When a discrimination complaint is received pertaining to a mine inspected by a field office in another district, the complaint processor shall immediately notify the SSI. Arrangements can then be made to forward the information to the appropriate district office for processing.
2. **Assigning Case Number and Investigator:** Upon receipt of a written discrimination complaint, the complaint processor shall obtain a case number and the name of the Special Investigator (SI) assigned to the case from the Supervisory Special Investigator (SSI). It will be the responsibility of the SI to initiate the event when the investigation begins. The complaint processor shall obtain an Inspection/ Investigation Data Summary, and place it in the case file. The complaint processor shall then fill out an Investigation Assignment Control, MSHA Form 2000-158 (Exhibit 7-3). Instructions for completing Form 2000-158 are included in Exhibit 7-4. ‘Copy D’ (Case Diary Sheet) shall be placed in the case file, and the other copies will be distributed as indicated on the form pages. The ‘Headquarters’ copy of the assignment control form shall be mailed to TCIO along with a copy of MSHA Forms 2000-123 and 2000-124. A Documentation Log (Exhibit 2-14) shall be established and maintained by the SSI for all cases filed (See Chapter 7 for further instructions on preparing and releasing the completed case file folder).
 3. **Notification Letters:** Once the SI has been assigned, notification letters will be prepared and distributed to the complainant(s) and respondent(s).

The notification letter to each complainant (Exhibit 2-8) should include MSHA Forms 2000-123 and 2000-124 (Exhibits 2-1 and 2-2) as enclosures.

The notification letter to each respondent (Exhibit 2-10) should include only the completed MSHA Form 2000-124 (Exhibit 2-2) and the Federal Mine Safety and Health Review Commission Rules of Procedure (Exhibit 2-4) as enclosures.

Do NOT send a copy of the completed MSHA Form 2000-123 to the respondent(s).

Each complainant and respondent listed on the completed MSHA Form 2000-123 must be sent a separate notification letter and appropriate enclosures by certified mail, return-receipt requested, or hand-delivered and documented on the copy of the letter maintained in the investigative file for proof-of-service purposes. If the certified mail documents are not delivered to the addressee, but are returned as undelivered or unclaimed, the SSI shall be notified immediately. All certified mail receipts shall be forwarded to the SSI for inclusion in the case file.

4. **General Investigative Procedures and Timeframes:**

An investigation of an alleged discriminatory act must address each of the five elements as described in Exhibit 2-15. **All timeframes for Section 105(c) investigations are initiated from the date the complaint was filed (received by an MSHA office).** These timeframes should not impede the miner's right to a thorough investigation or to be informed of their right to temporary reinstatement. The SI should inform the complainant that their right to a TR can only be requested by the Secretary. Timeframes for 105(c) investigations are listed below:

Timeframes for all Section 105(c) Investigations:

- All investigations must be initiated within **15 days** from the date the complaint was filed (received by an MSHA office)
- All investigative reports must be submitted (postmarked) to TCIO within **45 days** (from the date the complaint was filed)

Timeframes for application for temporary reinstatement:

- **Seven Days** to notify TCIO and SOL (see Exhibit 2-16). This notification shall include the following information:
 - The complainant's name
 - The date the complainant filed a request for temporary reinstatement
 - Whether the complainant seeks temporary reinstatement, and the date of that request
 - The name and mine identification number of the concerned mine
 - The name and phone number of the SI assigned to the case (see Exhibit Nos. 2-9 and 2-10)
- **Twenty Days** for MSHA to refer case to SOL or decline (see Exhibit Nos. 2-17 and 2-18)
- **Thirty Days** for SOL to file case or decline

Timeframes for a case on the merits:

- **Sixty Days** after the complaint is filed, the investigation on the merits must be completed by TCIO and referred to SOL or declined
- **Ninety days** after the complaint is filed, SOL must file a complaint with the commission or decline

5. Withdrawn Complaints:

A complainant wishing to withdraw their complaint at any time during the investigation shall submit a signed written statement to this effect. Preferably, a Discontinuance of Discrimination Complaint (see example in Exhibit 2-11) should be completed by the complainant and witnessed by the SI or notarized.

Requests to withdraw complaints received through the mail, or otherwise not signed in the presence of an SI, should be verified with the complainant prior to submitting the request to TCIO for approval.

If the complainant specifies that the requested withdrawal is due to an understanding/settlement/agreement reached with the respondent, a letter to the complainant (Exhibit 2-12), with a copy to the respondent, shall be prepared by the Assistant Director of TCIO and sent via certified mail, return-receipt requested. See Exhibits 2-1 and 2-12 for information on designation and distribution of other copies of the letter.

If the complainant indicates that they are requesting withdrawal of the complaint for any reason other than those noted above, an appropriate letter to the complainant (Exhibit 2-13), with a copy to the respondent, shall be prepared by the Assistant Director of TCIO and sent via certified mail, return-receipt requested. See Exhibits 2-1 and 2-13 for information on designation and distribution of other copies of the letter.

Discrimination Complaint

U.S. Department of Labor
Mine Safety and Health Administration



Section A-This Block is for MSHA Use Only.

1. District	2. Field Office	3. Date Filed	4. Received By	Case Number
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Section B-Complainant Completes the Rest of the Form

1. Complainant(s)-Person(s) Discriminated Against

a. Name(s)	b. Address(es)	c. Area Code/Phone Number(s)
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2. Has the Discriminatory Action Resulted in your being suspended, laid off, or discharged?

Yes No

3. Date of Discriminatory Action	4. Kind of Job You had at Time of Discriminatory Action
5. Rate of Regular Pay at Time of Discriminatory Action	6. Number of Regular Hours Worked each Week (Based on Last 12 Months of Work)
7. Rate of Overtime Pay at Time of Discriminatory Action	8. Average Number of Overtime Hours Worked each Week (Based on Last 12 Months of Work)

Section C-Respondent-Organization Committing Discrimination

1. Name of Company	2. Address	3. Area Code/Phone Number
4. Mine ID Number (if known)	5. Mine Name	6. Mine Area Code/Phone Number

Section D-Person(s) Responsible for Discriminatory Action

1. Name(s)	2. Job Title(s)
------------	-----------------

Section E- If You desire that a copy of all correspondence addressed to you from MSHA be provided to a representative (e.g. union representative, attorney, etc.) please give his/her name and address to the right.

Please use MSHA Form 2000-124, Discrimination Report, to provide a summary of your complaint explaining what discriminatory action was taken against you, including the date time, and location of the action. Explain why you believe this action was discriminatory, and describe the relief being sought (for example, reinstatement, back pay, etc).

DISCRIMINATION COMPLAINT FORM 2000-123
General Instructions for Completion

The purpose of the form is to capture pertinent data from the Complainant on specific items as outlined below:

Section A - (To be completed by complaint processor)

Item 1 - District Office

Item 2 - Field Office

Item 3 - Date Filed (date complaint received by an MSHA Office)

Item 4 - Received By (complaint processor)

Case Number - (Assigned by Supervisory Special Investigator.)

Section B - (To be completed by Complainant) (Information requested is specific to each individual filing the complaint)

Item 1 - (a.) Name; (b.) Address; and (c.) Phone Numbers (of each Complainant)

Item 2 - Has the discriminatory action resulted in your (Complainant) being suspended, laid off, or discharged? (Check Yes or No block)

Item 3 - Date of discriminatory action

Item 4 - Kind of job you had (Complainant) at the time of discriminatory action

Item 5 - Rate of regular pay (Complainant) at the time of discriminatory action

Item 6 - Number of regular hours (Complainant) worked each week

Item 7 - Rate of overtime pay (Complainant) worked each week

Item 8 - Average number of overtime hours (Complainant) worked each week - based on (Complainant's) last 12 months of work

Section C - (To be completed by Complainant) (Information requested is specific to each respondent [Company] listed in the complaint)

Item 1 - Name of company

Item 2 - Address (of company)

Item 3 - Area Code/Phone Number (of company)

Item 4 - Mine I.D. Number (if known)

Item 5 - Mine Name

Item 6 - Mine Area Code/Phone Number

Section D - (To be completed by Complainant) (Information requested is specific to each individual listed in the complaint)

Item 1 - Name(s) (of persons responsible for the discriminatory action)

Item 2 - Job title(s) (Example: superintendent, mine foreman)

Section E - (To be completed by Complainant)

Should be completed if Complainant desires copies of correspondence forwarded to another party

NOTE: Assure that Complainant does not begin the summary of discriminatory action on this form. Only the information specifically requested should be provided. The complainant shall be advised that names, addresses, and phone numbers of potential witnesses ARE NOT to be included on Form 2000-123.

Discrimination Report

U.S. Department of Labor
Mine Safety and Health Administration

Exhibit 2-2



Discrimination Complaint of (name(s))	Case Number
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Summary of Discriminatory Action

Signature(s) of Complainant(s)

Date

DISCRIMINATION COMPLAINT FORM 2000-124

General Instructions for Completion

The purpose of this form is to summarize the discriminatory action as described by the Complainant.

Space is provided at the top of Form 2000-124 for the name(s) of the complainant(s) and the case number.

The main portion of the form provides space for the complainant(s) to present a summary of the events which resulted in the discriminatory action (Exhibit 2-2). The information provided should be brief but concise, usually requiring only one or two paragraphs. When preparing this form, the complainant(s) shall be advised that names, addresses, and phone numbers of potential witnesses **ARE NOT** to be included on Form 2000-124. However, the complainant should be advised that this kind of information will need to be MADE available to the investigator. If names, etc. have been included on Form 2000-124, the complaint processor **SHALL BLANK OUT THE INFORMATION BEFORE COPYING IT TO SEND OUT TO THE RESPONDENT!**

Example: **ON** (Show the date of occurrence or most recent date of an ongoing occurrence), **I** (Describe involvement in a protected activity afforded under the Mine Act, i.e. "reported an unsafe condition - requested training - refused to perform an unsafe act, etc."). **I INFORMED/REPORTED THIS TO** (Name the person(s) you spoke to and conveyed the information to -- this must be someone from management). **AS A RESULT OF THIS, I WAS** (Describe the discriminatory action, i.e. discharged, laid off, suspended, denied the right to travel with the inspector, interfered with, etc.).

I AM SEEKING (Describe what remedy is being sought).

Space is provided at the bottom of Form 2000-124 for the signature(s) of the complainant(s) and the date the complainant(s) signed the complaint. (If more than two or three complainants are filing, i.e. where it involves the entire crew or shift, you may attach an additional sheet with the additional signatures, or you can make copies of the complaint form and have each person sign their own complaint form.)

**FEDERAL MINE SAFETY
AND
HEALTH REVIEW COMMISSION**



**PROCEDURAL
RULES**

MAY 1993

FEDERAL MINE SAFETY AND HEALTH**REVIEW COMMISSION****PROCEDURAL RULES
29 C.F.R. Part 2700****MAY 1993**

This volume contains the Federal Mine Safety and Health Review Commission's Procedural Rules published in the Federal Register at 58 Fed. Reg. 12158 (March 3, 1993) effective May 3, 1993. These rules are applicable to proceedings before the Commission and its Administrative Law Judges and are intended to secure the just, speedy and inexpensive determination of these proceedings. This publication is provided for the convenience of users. Practitioners should consult the official rules as published in the Federal Register, or, as forthcoming, the July 1, 1993 edition of Volume 29, Part 2700 of the Code of Federal Regulations.

Subpart E - Complaints of Discharge, Discrimination or Interference§ 2700.40 Who may file.

(a) The Secretary. A discrimination complaint under section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2), shall be filed by the Secretary if, after an investigation conducted pursuant to section 105(c)(2), the Secretary determines that a violation of section 105(c)(1), 30 U.S.C. 815(c)(1), has occurred.

(b) Miner, representative of miners, or applicant for employment. A discrimination complaint under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary, after investigation, has determined that the provisions of section 105(c)(1) of the Act, 30 U.S.C. 815(c)(1), have not been violated.

§ 2700.41 Time to file.

(a) The Secretary. A discrimination complaint shall be filed by the Secretary within 30 days after his written determination that a violation has occurred.

(b) Miner, representative of miners, or applicant for employment. A discrimination complaint may be filed by a complaining miner, representative of miners, or applicant for employment within 30 days after receipt of a written determination by the Secretary that no violation has occurred.

§ 2700.42 Contents of complaint.

A discrimination complaint shall include a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested.

§ 2700.43 Answer.

Within 30 days after service of a discrimination complaint, the respondent shall file an answer responding to each allegation of the complaint.

§ 2700.44 Petition for assessment of penalty in Secretary's complaint. A discrimination complaint filed by the Secretary shall propose a civil penalty of a specific amount for the alleged violation of section 105(c) of the Act, 30 U.S.C. 815(c). The petition for assessment of penalty shall include a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Act. 30 U.S.C. 820(i).

(b) Petition for assessment of penalty after sustaining of complaint by miner, representative of miners, or applicant for employment. Immediately upon issuance of a decision by a Judge sustaining a discrimination complaint brought pursuant to section 105(c)(3), 30 U.S.C. 815(c)(3), the Judge shall notify the Secretary in writing of such determination. The Secretary shall file with the Commission a petition for assessment of civil penalty within 45 days of receipt of such notice.

United States Department of Labor
Mine Safety and Health Administration

Notice of Conditions Under Which This Information Is Requested and Used

Pursuant to Section 3(e)(3) of the Privacy Act of 1974 (Public Law 93-579), the individual furnishing information on this form is advised as follows:

1. The authority for solicitation of the information is Section 105(c) of the Federal Mine Safety and Health Act of 1977 (Public Law 91-173 as amended by Public Law 95-164).
2. The principal purpose for the information requested is to assist the Mine Safety and Health Administration (MSHA) investigate the merits of the discrimination complaint being filed.
3. The routine uses of the information are:
 - a. To allow the MSHA investigator to initiate the investigation of the discrimination complaint.
 - b. With regard to Page 2 of the complaint form which asks for a "Summary of Discriminatory Action," a copy of this page will be provided to the respondent(s) by MSHA as required by the provisions of Section 105(c).
4. The effect on the individual of not providing all or any part of the requested information would be to hinder the initiation, conduct, and completion of the investigation, and delay decisions on whether the complaint was not frivolously brought and whether discrimination occurred in violation of Section 105(c).

INFORMATION ON BACKPAY FOR MINERS

NOTICE

YOU MAY BE ENTITLED TO BACKPAY

Read this information carefully and follow each instruction to ensure that you will receive all the money which you may have coming.

1. PURPOSE OF THIS LEAFLET

You, or your representative, have filed a 105(c) discrimination complaint under the 1977 Federal Mine Safety and Health Act. This may result in a decision by an Administrative Law Judge of the Federal Mine Safety and Health Review Commission (FMSHRC) that you have been illegally discharged, laid off, demoted, or refused employment. The FMSHRC may decide that you are entitled to backpay because of this. We will need your help to find out how much the backpay may be. The purpose of this leaflet is to tell you what backpay is and how you can help us. It is important to remember, however, that the charges concerning your complaint may be dismissed. If this happens, you will not receive backpay.

2. WHAT IS BACKPAY?

Backpay has two parts. The first is what you would have earned if the mine operator had not violated the law and caused you to be discharged, suspended, laid off, demoted or refused employment. This is called gross backpay. The second part is what you earn while you are kept from your rightful job. This is called interim earnings. The backpay due you is the difference between gross backpay and interim earnings. To use a simple example, suppose you were making \$200 a week before you were discharged. The FMSHRC finds that you were illegally discharged and orders that you be paid for loss of earnings. Immediately after being discharged, you take another job for \$150 a week. Then, 10 weeks after your discharge, the operator who illegally discharged you offers you your old job. The gross backpay is \$2,000 (\$200 per week for 10 weeks) and your interim earnings are \$1,500 (\$150 per week for 10 weeks). Thus, your backpay would be \$500 (\$2,000 minus \$1,500).

This calculation for backpay is normally computed for every calendar quarter during which you were entitled to backpay and the backpay due you for a particular quarter will normally not be offset by additional interim earnings from a different calendar quarter.

3. **ARE YOU EMPLOYED NOW OR LOOKING FOR WORK?** (Read what follows very carefully, it is important)

YOU WILL NOT GET BACKPAY FOR TIMES WHEN YOU ARE UNEMPLOYED AND DO NOT LOOK FOR WORK OR ARE UNABLE TO WORK.

You must make a real and sincere effort to obtain work even though you may have been illegally discharged. If you decide to take a fishing trip for a month rather than look for a job, you may not get backpay for that month. If you decide to be a full-time homemaker or go back to school or college full-time, you may not qualify for backpay until you again start looking for a full-time job. Therefore, we must know whether you were looking for work by going to employers, by registering with your state employment service (or unemployment insurance office) and in various other ways. You may not remember names of places where you apply for work and are turned down unless you keep a written record of your search for work on a daily or weekly basis. We have provided a form, Claimant Expense and Search for Work Report, for the purpose of keeping a record of the expenses you have while searching for employment (such as mileage, phone calls, motels, parking fees, etc.) and this form will also provide a convenient record of your search for work.

YOU WILL BE ABLE TO SHOW THAT YOU LOOKED FOR WORK BY DOING THE FOLLOWING THINGS:

- a. Register at your local employment service (or unemployment insurance office). Keep a record on the Claimant Expense and Search for Work Report (Part I,A) and keep whatever registration card or record that office gives you. Note the date of your registration and the location of the office. When you receive unemployment insurance benefits, keep all records which show the dates of payment of the benefits, etc. If you register with any other state, private, or union employment agency, this information must also be recorded.
- b. Whenever you apply or ask for a job, keep a record on the Claimant Expense and Search for Work Report, (Part I,B) on the date you asked for work, the name of the employer, its location, whom you talked to and what was said (e.g., "Sorry, we have no work for you" or "We will let you know if a job opens", etc.)

c. You must also list in the space provided (Part I,C) the dates and reasons why you were unavailable for work for any period of time during the calendar quarter.

d. If you become employed by another employer, but for any reason lose the job, before the operator from which you were illegally discharged asks you to return to work, you must again make a real and sincere effort to obtain work in the manner discussed above.

4. YOUR INTERIM EARNINGS

When you do find another job, you must keep a record of the name and address of the employer, the job classification, when you start, how much you earn, how long you continue working at the job and why your employment ended. Keep this information on Part II,B, of the Claimant Expense and Search for Work Report. In addition, keep all records that show what you earn at these other jobs, including pay stubs, W-2 forms or any other record of your earnings.

5. YOUR EXPENSES

You may have to spend money looking for other work or holding another job and you be may entitled to deduct these expenses from your interim earnings. It is important to keep a record of these expenses on the enclosed Claimant Expense and Search for Work Report (Part II,A).

FOR EXAMPLE: On your new job, you may have to pay more money to get to and from work than you had to pay with your old job. You may be entitled to the increased cost as an expense. You may have spent bus fare or used a car looking for work. You may have paid employment agency fees to get a job. You may have had to pay union initiation or work permit fees or dues to keep a job. You may be entitled to a credit for those expenses when your backpay is calculated. Therefore, it is very important to keep a record of all your expenses on the Claimant Expense and Search for Work Report form.

In your search for work, you should record your mileage, parking fees, public transportation expenses, etc., on Part II,A, of the form. Maintain the Claimant Expense and Search for Work Report form until the MSHA special investigator investigating your case requests that you provide the form to him/her or until such time as you are notified that MSHA has determined that no violation occurred.

If the alleged discriminatory action results in your incurring an unusual loss, such as the loss of a car, truck, or home due to your not being able to make the payments, you should document and maintain all information pertinent to that loss and notify the MSHA special investigator assigned to your case immediately.

6. KEEPING RECORDS

In addition to recording the necessary information on the form we have provided, you should keep all the records you have on applications made for claim on your own behalf.

7. WHEN DO YOU GET YOUR BACKPAY?

If you help by doing the things listed above, we will be able to figure out your backpay without delay. This assumes, of course, that the FMSHRC decides that you are entitled to backpay. Not all cases take the same time. Therefore, we cannot tell you **now, when,** or **if** you will get backpay.

**REMEMBER TO TELL THE MSHA SPECIAL INVESTIGATOR ABOUT ANY
CHANGE IN YOUR ADDRESS**

KEEP THIS PAMPHLET FOR YOUR INFORMATION



CLAIMANT EXPENSE SEARCH FOR WORK, AND INTERIM EARNINGS REPORT		PERIOD COVERED BY THIS REPORT (Check One)			
		<input type="checkbox"/> JAN 1 - MAR 31 _____ <small>(Year)</small>	<input type="checkbox"/> APR 1 - JUN 30 _____ <small>(Year)</small>		
		<input type="checkbox"/> JUL 1 - SEP 30 _____ <small>(Year)</small>	<input type="checkbox"/> OCT 1 - DEC 31 _____ <small>(Year)</small>		
YOUR NAME AND CURRENT ADDRESS					
CASE NUMBER	CASE NAME				
It is important that you maintain records concerning your interim earnings and expenses, your search of work, and your availability for work during the entire period of time until your back pay entitlement has been resolved. Additional copies of this form are available from any MSHA office.					
PART 1					
A. LIST ALL STATE, PRIVATE AND UNION EMPLOYMENT SERVICES WHERE YOU REGISTERED FOR WORK DURING THIS QUARTER: LIST THE DATE YOU REPORTED TO THEM: AND LIST THE COMPANIES AND DATES WHEN YOU WERE REFERRED FOR WORK.					
DATE VISITED	NAME AND ADDRESS OF EMPLOYMENT SERVICE	REFERRED FOR WORK?			NAME AND ADDRESS OF COMPANY
		YES	NO	DATE	
B. SEARCH FOR EMPLOYMENT: LIST ALL OTHER PLACES WHERE YOU LOOKED FOR WORK THIS QUARTER.					
DATE	NAME AND ADDRESS OF COMPANY	COMPANY RESPONSE (What was said? By Whom?)			
C. LIST ALL PERIODS OF TIME DURING THIS QUARTER WHEN FOR ANY REASON YOU WERE UNABLE TO WORK. (For example, because of illness, pregnancy, vacations, military service, jail, layoff, strike duty, etc.)					
DATES		REASON			
FROM	TO				



Part II

A. LIST ALL EXPENSES RELATED TO SEARCHING FOR WORK AND OR HOLDING ANOTHER JOB (KEEP ALL RECORDS). FOR AUTOMOBILE EXPENSE LIST TRIP MILEAGE FOR ALL OTHER EXPENSES SHOW DOLLAR AMOUNT.

DATE	MILEAGE	PHONE CALLS	OUT OF TOWN		PARKING	LIST TYPE AND AMOUNT OF ANY OTHER EXPENSE
			MEALS	LODGING		

B. KEEP A RECORD OF ALL THE FOLLOWING INFORMATION FOR EVERY JOB YOU HOLD DURING THIS CALENDAR QUARTER.

DATE OF EMPLOYMENT	NAME AND ADDRESS OF EMPLOYER	JOB TITLE	GROSS WEEKLY PAY	REASON FOR LEAVING THIS EMPLOYER
FROM:				
TO:				
FROM:				
TO:				
FROM:				
TO:				
FROM:				
TO:				
FROM:				
TO:				

Letter to Complainant when Inquiry Received
By Mail or Telephone

Complainant's Name
Street Address
City, State Zip Code

Dear Mr./Ms.

With regard to your (letter or telephone call) on (date), we are enclosing Discrimination Complaint Forms which must be completed and returned to (address of nearest MSHA office).

The forms should be filled in as completely and accurately as possible and returned as quickly as possible, even if you cannot provide all of the requested information. Please list all witnesses on a separate piece of paper.

The Federal Mine Safety and Health Act of 1977 provides that a miner may, within 60 days after a discriminatory action occurs, file a complaint with MSHA. If 60 days have elapsed prior to (your letter or phone call), please attach a letter explaining why the complaint was not filed within the 60-day period. If you have any questions, please contact me at the address listed above or call (name of designated person at local office) at (telephone number).

Sincerely,

(Complaint Processor or
To be designated by the District Manager)

Enclosures: (6)

Complaint Forms 2000-123 and 2000-124
Federal Mine Safety and Health Review Commission Rules of Procedure
Privacy Act Statement
Information on Backpay for Miners
Claimant Expense and Search for Work Report
A copy of A Guide to Miner's Rights and Responsibilities Under the Federal Mine Safety and Health Act of 1977

Complainant's Name
Street Address
City, State Zip Code

Re: Discrimination Complaint Case Number _____

Dear Mr./Ms.

The discrimination complaint you recently filed with the Mine Safety and Health Administration (MSHA) (copy enclosed) has been assigned to _____, Special Investigator, (--- --- ----). Any questions you have concerning this case should be directed to this investigator.

The investigator will contact you concerning the investigation of your complaint. Please retain any evidence related to your complaint, such as time cards, notifications of personnel actions, disciplinary slips, notes, letters, memorandums, check stubs, etc. Also, it would be helpful if you would make a list of names, addresses and telephone numbers of individuals who can support your complaint, together with a brief summary of what each individual should know concerning the alleged discrimination.

Please give this information and your full cooperation to the investigator. Such action on your part will aid in an accurate and speedy completion of the investigation.

Sincerely,

(Complaint Processor or
To be designated by the District Manager)

Enclosures (2)

Complaint Forms 2000-123 and 2000-124

bcc: Case File

Respondent's Name
Company Name
Street Address
City, State Zip Code

Re: Discrimination Complaint Case Number
Filed by

Dear Mr./Ms.

Enclosed please find a copy of a discrimination complaint filed under Section 105(c) of the Federal Mine Safety and Health Act of 1977. The complainant alleges that he/she has been discriminated against by you or your company.

The Mine Safety and Health Administration has assigned an investigator, who will contact you or an agent of your company during the fact-finding segment of this investigation. If you have any questions, you may write or call _____, Special Investigator, at _____.

Also enclosed for your information is a copy of excerpts from the Federal Mine Safety and Health Review Commission's "Rules of Procedure."

Sincerely,

(Complaint Processor or to be designated by the District Manager)

Enclosures: (2)

Complaint Form 2000-124
Federal Mine Safety and Health Review Commission Rules of Procedure

bcc: Case File

(EXAMPLE)

DISCONTINUANCE OF DISCRIMINATION COMPLAINT

CASE NO. _____

My name is _____,

and I am the listed complainant of the discrimination complaint, _____

versus _____ filed _____.

I wish to discontinue any additional action concerning this complaint. I furthermore state that I make this request voluntarily and without coercion from anyone. My reasons for requesting to withdraw my complaint are explained below, in the document attached, or have been provided in a statement to the investigator.

(Signature)

_____ Day of _____
(Month/Year)

(Witness)

(Investigator)

-----AND/OR-----

Subscribed and sworn to before me this _____ day of _____ 20____.

NOTARY PUBLIC

Complainant's Name
Street Address
City, State Zip Code

Re: Investigation of Your Discrimination Complaint
Case Number _____

Dear Mr./Ms.

Your complaint of discrimination under Section 105(c) of the Federal Mine Safety and Health Act of 1977 has been investigated by a special investigator of the Mine Safety and Health Administration (MSHA).

A review of the information gathered during the investigation indicates that the complaint has been satisfied.

Your request for withdrawal of the complaint has been approved and, with this approval, the case is closed.

Sincerely,

Assistant Director, Technical Compliance and Investigation Office

cc: Respondent's Name, Title
Name of Company
Street Address
City, State Zip Code

bcc: Supervisory Special Investigator
District Manager
Case Files
Headquarters

Complainant's Name
Street Address
City, State Zip Code

Re: Results of Discrimination Investigation
Case Number _____

Dear Mr./Ms.

On _____, you executed a waiver and release which notified MSHA that you wished to discontinue your complaint of discrimination.

Based on your request for withdrawal, no further action was taken in your case. Our files are now closed.

Sincerely,

Assistant Director, Technical Compliance and Investigation Office

cc: Respondent's Name, Title
Name of Company
Street Address
City, State Zip Code

bcc: Supervisory Special Investigator
District Manager
Case Files
Headquarters

105(c) DOCUMENTATION LOG



CASE NO.	EVENT NO.	DATE CASE FILED	TYPE OF COMPLAINT	COMPLAINANT V RESPONDENT	COMPANY NAME	MINE NAME	MINE I.D.	INVESTIGATOR NAME	15-DAY START DATE	45- DAY DUE DATE	90- DAY DUE DATE	DATE REPORT MAILED	CASE STATUS

ELEMENTS OF A 105(C) INVESTIGATION

In order to establish a prima facie case of discrimination under § 105(c) of the Mine Act, the investigator must prove by a preponderance of the evidence that the complainant participated in a protected activity and that the adverse action taken against the complainant was motivated in any part by that protected activity.

1. **Protected Class**: Section 105(c) of the Mine Act affords protection from discrimination for:
 - miners
 - representatives of miners
 - applicants for employment

A person filing a complaint must provide evidence that they were employed as, or acting in the capacity of, one of the categories listed above.

2. **Protected Activities**: Protected activities include, but are not limited to:
 - filing or making a complaint of an alleged danger or safety or health violation
 - instituting any proceeding under the Mine Act (for example, filing a complaint with the Federal Mine Safety and Health Review Commission pursuant to Section 111)
 - testifying or is about to testify in any such proceedings
 - being the subject of medical evaluation and potential transfer under Section 101 (harmful physical agents and toxic substances)
 - enforcement of the safety training provisions of Section 104(g) and Section 115
 - refusing to work in unsafe or unhealthy conditions or,
 - exercising any statutory right afforded by the Mine Act

The complainant must provide evidence that they were involved in, or that management believed they were involved in, activity afforded protection under the Mine Act. Where issues of work refusal or complaints about safety or health issues are involved, the investigator must obtain evidence to support that a reasonable attempt was made by the complainant to convey their concerns to a member of management. The investigator must also seek evidence to support that the complainant was reasonable in their belief that the condition or work assignment was unsafe/unhealthful, etc.

3. **Discriminatory Acts**: Discriminatory acts include, but are not limited to:
 - discharge, termination, or laying off
 - demotion
 - refusal of employment

- reduction in benefits, vacation, bonuses, or rates of pay
- change in pay or hours of work
- interference with the exercise of the statutory rights of miners
- subtle forms of interference, (i.e., promises of benefit or threats of reprisal)
- transfer to another position with compensation at less than the regular rate of pay received immediately prior to transfer

The complainant(s) must provide evidence that some type of adverse action has occurred.

4. **Nexus**: The investigator must show by a preponderance of evidence, that there is a connection between the involvement of the complainant (perceived or real) in a protected activity and the alleged discriminatory action. Some ways of showing the connection are to provide evidence which supports:
- timeliness of events
 - evidence of disparate treatment
 - admission by the discriminating official
 - knowledge of the miner's protected activity

If each of these four elements has been addressed, and the evidence obtained supports the complaint, a prima facie case has been established.

The investigator must also gather evidence in support of the respondent. The respondent may either rebut the complainant's prima facie case or offer evidence to affirmatively defend.

5. **Operator's Defense**: The investigator shall gather all evidence presented by the respondent(s) which purports to show that:
- the complainant was not involved in any protected activity
 - there was no discriminatory act
 - the action taken was motivated by the complainant's involvement in unprotected activities and that the adverse action would have been taken in any event based on the unprotected activities alone

In cases where the respondent is able to affirmatively defend their position, findings of "No violations of § 105(c)" have been issued by ALJs and the FMSHRC.

6. **Temporary Reinstatement Standard of Proof**: The investigation only has to establish that there is "a reasonable cause to believe" that a discriminatory act occurred or was not frivolously brought as distinguished from the preponderance of evidence standard to prove the underlying discrimination.

May 12, 2005

MEMORANDUM TO: -----
Associate Regional Solicitor
Nashville, Tennessee

ATTENTION: -----, Attorney
Office of the Solicitor

THROUGH: -----
District Manager for
District 22

FROM: -----
Supervisory Special Investigator

SUBJECT: Notification of request for temporary reinstatement of a
discrimination complaint filed in accordance with Section 105(c)
of the Federal Mine Safety and Health Act of 1977. Case BARB-
CD-2003-41, George L. Sullivan vs. Leslie Resources, Inc., Burnt
Ember Mine, ID 22-00180

On May 5, 2003, George L. Sullivan (complainant) filed a discrimination complaint in which he seeks temporary reinstatement against Leslie Resources, Inc. ID 22-00180.

If you have any questions, please feel free to contact me at 606/546-5123.

cc: (Name), Assistant Director, TCIO
District 22, Special Investigation Files

May 22, 2005

MEMORANDUM TO: -----
 Associate Regional Solicitor
 Nashville, Tennessee

ATTENTION: -----, Attorney
 Office of the Solicitor

THROUGH: -----
 District Manager for
 District 22

 Supervisory Special Investigator

FROM: -----
 Special Investigator

SUBJECT: Notification of no further action regarding temporary reinstatement
 of a discrimination complaint filed in accordance with Section
 105(c) of the Federal Mine Safety and Health Act of 1977. Case
 No. BARB-CD-2003-00, George L. Sullivan vs. Fly Rock
 Quarries, Burnt Ember Mine, ID No. 22-00180

After an initial investigation of this complaint, it was found that it does not meet the criteria for immediate reinstatement. Therefore, no temporary reinstatement (TR) request will be forthcoming. This determination was made through a thorough investigation of the merits brought to light by the complainant, George L. Lewis and his witnesses. No further action is recommended on a TR in this case. The investigation is being finalized and when complete, will be transmitted to headquarters.

If you have any questions, please feel free to contact the appropriate Supervisory Special Investigator at this (telephone number).

cc: (Name), Assistant Director, TCIO
 SI Files

INVESTIGATION FOR TEMPORARY REINSTATEMENT**CASE NUMBER:** BARB-CD-2005-00 **INVESTIGATOR:** Johnny Appleseed**DISTRICT:** 22 **Date Investigation Started:** November 31, 2002**COAL/MNM:** Coal **Date of this Report:** December 24, 2002**Complainant(s) v Respondents:** Koot Rockney v Allied Switch Makers, Inc., Right Branch Facility, ID No. 44-10000**Protected Class:** X Miner _____ **Representative of Miners**_____ **Applicant for Employment**

Complainant Position: Complainant Rockney was a walker (boss) for Allied Switch Makers, a contractor for Woory County Coal Company, sinking shafts and slopes at the Right Branch Facility. He had worked for Allied Switch Makers for 3-1/2 years.

October 8, 2004 Rockney was terminated from employment by J. R. Vanhooose, Superintendent. Vanhooose informed Rockney that he was treating his people unfairly, being verbally abusive, and he was not handling his crew properly.

Rockney alleges that he was discharged because he had made safety complaints and reported possible drug and alcohol abuse by some of the employees to Lyle Shooten, Assistant Superintendent, and J. R. Vanhooose, Superintendent.

Statements from the complainant's witnesses indicate that Rockney was generally good to his workers and was not abusive to his employees. It was substantiated that he made safety complaints and complained of possible drug and alcohol abuse by employees to his supervisors. Witnesses also stated when Rockney attempted to do work safely that Vanhooose would criticize the work, stating it took too long to do things in a safe manner.

Respondents Position: The respondents named in this case through their attorney, refused to be interviewed by Mine Safety and Health Investigators.

Conclusion: Evidence taken from witnesses indicates Rockney may have been terminated because of his safety complaints to management, and his concern for the possible drug and alcohol use on the job. From all accounts, management did not seem concerned with anything other than getting the work done. They rushed the work, encouraging things to be done unsafely. Their attitudes regarding safety complaints and the possible use of drugs and alcohol on the job were at the least apathetic. The safety of the employees seems to be the least important issue at the job site.

Based on evidence gathered thus far, it appears this discrimination complaint was not frivolously brought.

Do you recommend reinstatement?

_____ **Yes** _____ **No**
(Special Investigator)

_____ **Yes** _____ **No**
(Supervisory Special Investigator)

_____ **Yes** _____ **No**
(District Manager)

CHAPTER 3 - INJUNCTIVE ACTIONS AND ASSAULTS ON INSPECTORS**A. INTRODUCTION:**

This chapter contains the procedures for obtaining injunctive relief when inspectors are denied entry or when mine operators work against closure orders. It also contains guidance on how to deal with situations involving assault or harassment of inspectors or attempts to delay inspections.

Section 103(a) of the Mine Act provides the statutory right of entry for Authorized Representatives (AR) of the Secretary. A denial of entry, therefore, constitutes a violation of the Mine Act.

Section 108 contains the statutory provisions for injunctive relief that the Secretary may take when an AR is denied entry to a mine or for other reasons indicated.

When an injunctive action is contemplated, first establish whether or not the operation falls under the jurisdiction of the Mine Act. Proof that the mined product enters or affects interstate commerce must be provided. Section 3(h)(1) of the Act defines a coal or other mine which is subject to the provisions of the Act. (See Chapter 4, Section C.8., Assuring Jurisdiction.)

B. DEFINING INJUNCTIVE ACTIONS:

An Injunction is an order from a United States District Court commanding a person to do something (i.e., allow entry) or to refrain from doing something (i.e., working against an order of withdrawal). The failure or refusal to comply with any type of Injunction is punishable by contempt of court proceedings. There are two steps to an injunctive action: a Preliminary Injunction and the Permanent Injunction. The Preliminary and Permanent Injunctions are usually sought in the same action but in two separate phases.

1. **Preliminary Injunction:** A Preliminary Injunction is an order issued after a hearing with both parties present pending a full hearing. The requesting party must show that irreparable damage will occur if a Preliminary Injunctive Order is not issued to prevent the other party from engaging in or continuing illegal actions as defined by the Mine Act. Whether granted or not, the case will still be active until a final decision on the Injunction request is issued. In exigent circumstances, it may be necessary to obtain a **Temporary Restraining Order (TRO)**. A TRO may be issued by a court based on the argument demonstrating that irreparable damage or harm will occur to the party or case before the case can be fully argued in court. In most cases the party requesting the TRO is required to be present for the proceeding (an ex parte proceeding, i.e., MSHA).

2. **Permanent Injunction**: A Permanent Injunction is the final order requiring the party to do what the order requires. The Injunction is issued after a full hearing or trial. It is not uncommon for the trial record of the Preliminary Injunction to be the basis for determining the granting of a Permanent Injunction.

C. **ACTIONS WHICH MAY LEAD TO A REQUEST FOR INJUNCTIVE RELIEF:**

1. **Introduction**: Injunctive relief will be requested by the DM having jurisdiction over the particular mine. In most cases, the inspector will be the person involved in the initial action leading to a request for an Injunction. Injunctive actions may be requested when:
 - There has been a denial of entry
 - When the operator is working in violation of a withdrawal order, or a 103(j) or (k) order, as explained below
 - When there is prior notification of an inspection
 - Advance warning of inspections/investigations
2. **Denials of Entry**: Denials of entry may be classed into two main types:
 - Direct denials involving a confrontation
 - Indirect denials involving interference, delays, or harassment

In view of the particular types of denials which may be encountered, several preliminary determinations must be made by the inspector before an injunctive action is requested.

Upon being denied right of entry, the inspector should first attempt to determine the reason for the denial. The procedures to be followed for each type of denial of entry are outlined below:

- **Denials not involving MSHA's statutory authority**: When the operator or their agent informs an inspector that an inspection of the mine will not be permitted, and no challenge is made concerning MSHA jurisdiction, the following actions should be taken if the inspector can do so safely:
 - The inspector should explain the mandatory inspection requirements in Section 103(a) of the Mine Act to the operator or their agent(s), and that a citation will be issued and penalty assessed for the denial of entry

- If after explaining MSHA's position to the operator, the inspector is still denied entry to the mine, the inspector shall issue a 104(a) citation, citing a violation of Section 103(a), and establish a reasonable time for abatement
- If upon the conclusion of the abatement period, the operator or their agent withdraws the denial and permits the inspection, the inspector should terminate the citation. If the operator or their agent still denies entry to the mine, the inspector should issue an Order of Withdrawal (define the area affected by the order as "no area affected" unless specific hazards are present), and notify the immediate MSHA supervisor so that an injunctive action may be considered
- Denials involving MSHA's statutory authority: When the operator or their agent refuses to permit an inspection based upon the belief that MSHA does not have the right or authority to inspect the mine, the inspector should explain to the operator or their agent the mandatory inspection requirements under Section 103(a) of the Mine Act, and that there will be a citation and penalty assessed for the denial of entry. The inspector should carefully note the operator's response as to why the mine is not subject to the Mine Act, then proceed as previously discussed
- Indirect denials: (delays, interferences, or harassment): When the mine has an I.D. number and the operator or their agent is known and present and does not verbally refuse right of entry, but takes indirect action to prevent inspection of the mine, the inspector should explain:
 - The particular actions which are considered to be a denial of entry
 - The mandatory inspection requirements and/or supplementary (spot) inspection requirements under section 103(a) of the Mine Act
 - That there will be a citation issued and a penalty assessed for the denial or impeding of entry. If after explaining MSHA's position to the operator, the inspector is still denied entry to the mine, a 104(a) citation shall be issued, citing a violation of section 103(a)
 - If upon the conclusion of the abatement period, the operator or their agent permits the inspection, the inspector should terminate the citation; however, if the operator or their agent still denies entry to the mine, an Order of Withdrawal shall be issued. (Unless the specific hazards are obvious, define the area affected by the Order as "no area affected.")
 - The immediate MSHA supervisor should be notified so that injunctive procedures may be considered
 - When the mine has an I.D. number and the operator or their agent is known but is not present, and access to the mine is indirectly denied, the inspector should notify the immediate MSHA supervisor, issue a 104(a) citation for a

violation of Section 103(a), and mail the citation to the operator by certified mail, return-receipt requested. The inspector should return to the mine site at the conclusion of the abatement period and terminate the citation if an inspection is allowed. If entry is still denied, issue an Order of Withdrawal (unless other hazards are present, the area affected by the Order should be "no area affected") and notify the MSHA supervisor of the action taken so that injunctive action may be considered

- When the mine does not have an I.D. number and the operator or their agent is unknown, and access to the mine is indirectly denied, the inspector should notify the MSHA supervisor and assist in identifying the mine property and property owner to determine jurisdiction. When the property is identified and jurisdiction has been established, the inspector or the supervisor should meet with the operator or agent and explain MSHA's mandatory authority to gain access
 - The operator or agent must be informed that they have been identified as the operator, owner, lessee, etc., that MSHA has evidence that the operation is under the jurisdiction of the Mine Act, and be given a description of the circumstances which prevented access. The inspector should then explain the statutory right of entry and again attempt to gain entry to the mine property. Should a denial of entry again occur, the inspector or supervisor should take appropriate action
3. **Working in Violation of Withdrawal Orders:** When an inspector encounters an operator working in violation of an Order of Withdrawal, the inspector shall (if conditions permit or exist) enter the mine, observe the operations, note the activity which is in violation of the outstanding Order of Withdrawal, and list the names of witnesses present. The inspector shall then issue a separate 104(a) citation for failure to comply with each order violated.

If the order is complied with, the 104(a) citation for working in violation of the Order of Withdrawal will be terminated. If the operator continues to work in violation of the order, the inspector should immediately consult the MSHA supervisor, without terminating the 104(a) citation for working in violation of the order. It is **not** necessary to write another order.

4. **Advance Warning of Inspection/Investigation:** Encountering an operator who gives advance notice of MSHA's presence on mine property to outlying surface and underground facilities with the intent to impede an investigation/inspection.

D. PROCEDURES AND RESPONSIBILITIES FOR INITIATING INJUNCTIVE ACTION:

1. **Inspection Supervisor:** When an inspector reports a denial of entry or working in violation of an Order of Withdrawal, the inspection supervisor should immediately contact the DM, or their designee, and assist in preparation of the inspector's summary memorandum, and (if advised) assist in preparation of the inspector's affidavit (Exhibit 3-1).
2. **District Manager:** The DM, or their designee, shall be the person primarily responsible for requesting and coordinating injunctive actions in the district office.

When the DM determines that injunctive relief should be requested, the following actions should be taken:

- Obtain a case number from the SSI and transmit (by fax) the inspector's memorandum to TCIO
- Contact the appropriate RSOL by telephone and describe the order, danger, regulation violation (if appropriate), and the circumstances of noncompliance; request assistance and advice
- Have an declaration prepared by the inspector (Exhibit 3-1)
- The DM, or their designee, shall report the status of all injunctive cases to the Administrator by the 15th of each month. No report is required for any month in which there is no injunctive activity

When an imminent danger order is not being complied with, the following actions should be taken:

- Obtain a case number from the SSI and advise TCIO by telephone
- Contact the appropriate RSOL by telephone, describe the order, danger, and regulation violation (if appropriate), as well as the circumstances of noncompliance; request assistance and advice
- Unless the attorney advises otherwise, proceed as indicated above

3. **Supervisory Special Investigator:** The SSI will be responsible for:
 - Advise and assist the inspector, supervisor, ADM, and DM
 - Inform the DM of all developments
 - Advise TCIO of all pending cases
 - Establish a case file for the material and label accordingly
 - Collect and assemble the case materials in the case file for transmission (affidavit, citations, orders, jurisdictional information, etc.)

- Transmit copies of the case file to the appropriate RSOL and TCIO
 - Monitor case progress and litigation for the DM, in conjunction with headquarters staff; maintain the case file
4. **Office of the Solicitor:** The Department of Labor's Regional Offices of the Solicitor (RSOL) have the responsibility for advising MSHA whether or not injunctive relief is advisable or possible. The merits of a case, as well as the sufficiency of information, must be determined by RSOL.

E. PROCEDURES UPON RECEIPT OF INJUNCTION:

1. Upon notification by the RSOL that an Injunction has been granted, the DM, or their designee, shall decide whether service of the Injunction can be safely completed by MSHA personnel. In these instances, when the Injunction is received, the DM will forward the Injunction under cover-letter to the ADM, or their designee, with instructions for serving the Injunction. In appropriate circumstances, the DM may request that the RSOL arrange for service accompanied by a U.S. Marshal.
2. Within 2 days of receipt of the Injunction, the DM, or their designee, shall transmit the Injunction cover-letter to the appropriate field office. The transmittal letter shall direct that an inspection be conducted within 15 days and contain instructions on the certificate of service. A copy of the letter and Injunction shall be placed in the case file.
3. Upon receiving the Injunction, the inspection supervisor shall accompany the inspector assigned to the mine. The supervisor shall serve a copy of the Injunction to the operator and accompany the inspector on the first day of the inspection. Upon return to the office, the supervisor shall complete a certificate of service (Exhibit 3-2) and forward it to the DM, or their designee, for inclusion in the case file. Upon completion of the inspection, a copy of the inspection report shall be forwarded to the DM, or their designee, for inclusion in the case file.
4. Upon notice that an Injunction has been served accompanied by a U.S. Marshal, the supervisor shall accompany the inspector assigned to the mine on the first day of inspection. Upon completion of the inspection, a copy of the inspection report shall be forwarded to the DM, or their designee, for inclusion in the case file.
5. When the inspection report and certificate of service are received by the DM, or their designee, copies should also be transmitted to TCIO noting that the case is closed.

6. If the operator, after service of the Injunction, does not comply with the Court Order to obey a withdrawal order or to permit inspection (when served or at any other time), the supervisor and inspector shall record as much of the incident as possible (if it can be done safely) and return to the office and contact the DM, or their designee.
7. The SSI will:
 - Immediately contact the attorney handling the case for advice and assistance
 - Notify TCIO by telephone of the noncompliance and the solicitor's instructions

F. ASSAULT OR HARASSMENT OF INSPECTORS:

1. **Introduction:** Section 1114, Title 18, United States Code, makes it a Federal crime to kill or attempt to kill an officer or employee of the United States Government (listed within the body of Section 1114) who is assigned to perform investigative or inspection functions. Prior to the enactment of Public Law 95-87, such employees of MSHA were not included under this protection.

Section 111, Title 18, United States Code, makes it a Federal crime to forcibly assault, resist, oppose, impede, intimidate, or interfere with any person designated in Section 1114 of Title 18 while such person is engaged in, or on account of, the performance of their official duties. Therefore, as a result of the amendment to Section 1114, it is a crime to assault or harass (as stated above) an MSHA employee assigned to perform investigative or inspection duties, or to assist in law enforcement functions. This means that any person who assaults an MSHA inspector, while such inspector is engaged in, or on account of, the performance of their official duties, is subject to investigation and arrest by the Federal Bureau of Investigation (FBI) and prosecution by the U.S. Attorney in the Federal courts.

2. **Procedures to Follow:** MSHA procedures require the inspector to leave the scene of any situation which appears to be developing into confrontation where an apparent violation of Section 1114 or 111 may have occurred. In an attempt to avoid a confrontation, the inspector may now inform the person(s) that an attack or interference on an MSHA inspector is a Federal crime, and they may be subject to investigation and arrest by the FBI. If an inspector believes that they may be subject to physical harm or assault, they should leave the property immediately and promptly notify their supervisor. If the inspector encounters harassment or delays during a mine inspection, an attempt should be made to complete the inspection, without further provocation by the operator. The supervisor shall be contacted immediately.

In the event of an assault, intimidation, harassment, or the impeding of an inspection, the supervisor shall be responsible for collecting all facts, reducing them to writing, and contacting the ADM. In egregious situations, telephone contacts may be made, with written documentation prepared later. The ADM should immediately contact the DM who will notify TCIO for further instructions. If the inspection is not the result of an imminent danger complaint, inspection personnel should not return to the mine without approval by headquarters. If it is an imminent danger complaint, an inspector and supervisor should attempt another inspection. No less than two inspection personnel should be sent to the mine property.

DECLARATION
(Guideline for Gathering Affidavit Information)

_____, being duly sworn according to law deposes and says:

1. I am a Federal (Coal or Metal and Nonmetal) Mine Inspector, employed by the United States Department of Labor, Mine Safety and Health Administration and assigned to

(Office Location)

I have personal knowledge of the facts and circumstances stated herein.

2. On _____, I was assigned to make a _____ inspection of
(Date) (Type)
_____ owned by _____, pursuant to the Federal Mine
(Name of Mine) (Name of Owner)

Safety and Health Act of 1977, Public Law 91-173, as amended by Public Law 95-164.

3. Pursuant to my assignment, on _____, I traveled to said mine. Upon
(Date)
my arrival at _____ (a.m.) (p.m.) I identified myself to _____,
(Time) (Name)
_____, of the mine, and communicated my assignment to inspect.
(Title if Known)

4. (Here briefly describe the actual denial or inspector's observations that mine was working.) Example: _____ refused to permit my inspection by stating
(Name)
“ _____.”
(What was said)

5. I then informed _____ of the Statutory Right of Entry under
(Name)
Section 103(a) of said Act. After _____, I again asked _____ if inspection
(Time Elapsed) (Name)
would be permitted. He/she again refused stating “ _____.”
(What was said)

I then left the mine property.

(Signed - Inspector)

This Statement was signed and sworn before me on

_____/_____/_____.
(Day) (Month) (Year)

(Seal)

(Notary)

My Commission Expires ____/____/_____.
(Day) (Month) (Year)

Certificate of Service

I, _____, do hereby certify that I am an
(Name)

Authorized Representative of the Secretary of Labor. On _____, I was
(Date)

assigned to make an inspection of _____ in _____
(Mine Name) (City/County,) (State)

Upon arrival at this mine at _____ a.m./p.m. I served _____
(Name)

with a copy of the order issued by the Honorable _____, Judge of the
(Judge's Name)

United States District Court for the _____ District of _____ in Civil
(State)

Action _____.
(Case Number From Order)

By:

Sworn to and subscribed before me this _____ day of _____,
(Date) (Month) (Year)

My Commission Expires _____/_____/_____
(Month) (Day) (Year)

CHAPTER 4 - SECTION 110 INVESTIGATIONS**A. INTRODUCTION:**

Title I of the Mine Act establishes the overall enforcement mechanism to ensure compliance with established health and safety standards. This enforcement mechanism exists at various levels which increases in severity to the point where a violation may be the subject of criminal prosecution.

Sections 110(c) and 110(d) of the Mine Act requires that MSHA ensure compliance with the Mine Act and 30 CFR. Under these provisions MSHA is authorized to propose assessments of civil penalties against a director, officer, or agent of a corporate operator who knowingly orders, authorizes, or carries out a violation of a mandatory safety or health standard. The Agency may also pursue criminal proceedings against an operator who willfully violates a mandatory safety or health standard.

B. LEGAL DEFINITIONS:

In reference to Section 110(c) of the Act, a precedent decision has defined “knowingly” as follows:

[T]he term “knowingly” as used in the Act . . . does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when 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.¹

MSHA must show, by a preponderance of evidence, that a civil violation occurred which may result in the assessment of a civil penalty against any director, officer, or agent of a corporation. It is expected that the majority of cases involving special investigations will fall into this category.

The most severe enforcement actions that can be taken involve criminal penalties contained in the statutory provisions of Sections 110(d), (e), (f), and (h).

To prevail in charges under Section 110(d) alleging willful violations of the Mine Act, the Government must establish beyond a reasonable doubt, that any operator, “willfully” violated a mandatory health or safety standard or other provision of the Act. The Sixth and Fourth Circuit Courts of Appeals have defined a “willful” violation as:

The failure to comply with a mandatory health or safety standard is ‘willful’ if done knowingly and purposely by a mine operator who, having a free will and choice, either intentionally disobeys the standard or recklessly disregards its requirements.²

¹ Secretary of Labor (MSHA) v. Kenny Richardson, 1 FMSHRC 874 (July 1979)

² U.S. v. Consolidation Coal Co. & Kidd, 504 F.2d 1330, 1335 (6th Cir. 1974)

The Fourth Circuit Court of Appeals has defined reckless disregard as: The closing of the eyes to or deliberate indifference toward the requirements of a mandatory safety standard which standard defendant should have known and had reason to know at the time of the violation.³

When bringing Section 110(d) charges, a strict (or literal) construction of the Mine Act must be used. The Mine Act or the regulation violated will be interpreted precisely and implication or indirect meanings will not be recognized. The court will take the language used in its precise and technical meaning.

C. **INITIATING SECTION 110 INVESTIGATIONS:**

1. **General:** Investigations are fact-finding exercises. The investigation of a possible Section 110 violation of the Act is initiated at the request of the DM (District Manager), usually as a result of one of the following circumstances:

After a mine accident

As a result of complaints received alleging violations of section 110(e) (advance notice), 110(f) (false reporting), or 110(h) (equipment misrepresentation)

As a result of reviewing citations/orders

Special Investigators **DO NOT** conduct internal investigations into allegations against MSHA employees. Possible violations of Section 110(e), advance notice of inspections, shall be immediately forwarded to the DM. All other special investigations shall be conducted by the District SIs (Special Investigators).

2. **Review of Citations and Orders:** For each citation and/or order required by MSHA Policy to be reviewed, a Possible Knowing/Willful Violation Review Form, MSHA Form 7000-20, shall be completed (Exhibits 4-2 and 4-3).

The completed Form 7000-20, copies of the citation/order, modifications (if issued), Legal Identity Report Form, inspector's notes, and any other supporting documentation will be forwarded to the ADM (Assistant District Manager), SSI (Supervisory Special Investigator), and DM for immediate review. This package will be forwarded separately from any other inspection-generated documents. The information on Form 7000-20 will be considered confidential, pre-decisional information, and not generally releasable under FOIA (Freedom of Information Act). These documents shall be maintained only in the special investigation files and shall not be maintained in the Field Office inspection files.

The SSI shall review each violation for evidence of a possible knowing and/or willful violation. After the ADM and SSI have completed their review, and signed and dated Form 7000-20, the complete package will be forwarded to the DM for review.

³U.S. v. Kyle Jones, Gary Neil, 735 F.2d 785 (4th Cir. 1984)

Within **30 calendar days** of the date of issuance, of the citation/order a determination must be made by the DM (with the assistance of the SSI), whether to initiate an investigation or take no further action. If an investigation is to be initiated, an SI will be assigned to the case along with an event number. After a determination has been made by the DM as to what action will be taken, the appropriate copy of each completed Form 7000-20 shall be sent to TCIO, along with a copy of the citation/order and supporting documentation justifying the action taken. A memorandum to the file will be distributed to all persons involved in the review documenting the reasons for not initiating an investigation. If the decision is to initiate an investigation, a copy of the Investigation Assignment Control Form 2000-158 will also be sent. MSHA's goal is to conduct comprehensive investigations as expeditiously as possible. All Section 110 investigations must be initiated within **60 calendar days** of the issuance of the underlying citation or order. The investigation will be considered initiated when the investigator makes personal contact with a potential witness.

3. **Assigning Case Number and Investigator:** Once a determination is made by the DM (with the assistance of the SSI), to initiate an investigation, the complaint processor shall obtain a case number and the name of the SI assigned to the case from the SSI. A single case number shall be assigned to any group of related citations or orders being investigated. It will be the responsibility of the SI to initiate the event when the investigation begins. The complaint processor shall obtain an Inspection/Investigation Data Summary, MSHA Form 4000-40, and place it in the case file. The complaint processor should then initiate the Investigation Assignment Control Form (Exhibit 7-3), place it in the case file, and distribute the copies as indicated (instructions for completion are included in Exhibit 7-4).

A documentation log (i.e., Exhibit 4-4) shall be established and maintained by the SSI to support action taken for each reviewed citation/order. If the initiated action is to conduct a special investigation, documentation will be included in the case file and report. The completed Form 7000-20, and accompanying materials, will be sufficient documentation.

All SSIs and SIs conducting special investigations should record ALL time spent conducting an investigation on MSHA Form 2000-158 (Exhibit 7-3) (i.e., case preparation, travel, time spent conducting interviews, report writing, etc).

4. **Pre-Investigation Research:** Prior to contacting any principals in the investigation, the SI should determine if there are any prior or current Section 110 or 105(c) cases which may have a bearing on the case. Such information will normally be available from the SSI or TCIO. Both DOJ and SOL want this background information, as well as the violation history and accident and fatality data, included in the final report of a Section 110 investigation.

Investigations of possible knowing and/or willful violations should be conducted as quickly as possible. Special Investigators should review case law to determine the manner in which the investigation is conducted.

5. **Section 110 Case File Timeframes:**

All timeframes for 110 investigations are initiated from the date of the issuance of the citation/order, or from the date when MSHA had actual notice of the subject incident.

- Within 30 calendar days, DM makes determination to initiate or decline investigation
- Districts have authority to close cases as soon as critical defects are identified
- Within 60 calendar days, of the date of issuance a case should be initiated
- Within 150 calendar days*, a district-recommended case must be submitted (postmarked) to TCIO
- Within 220 calendar days, 110(c) cases forwarded to Office Of Assessments
- Within 240 calendar days, criminal referrals forwarded to DOJ

***If the required deadline cannot be met, the DM will submit an extension request in writing with valid justification to TCIO. These timeframes are management goals and shall not be used for individual performance evaluations.**

6. **Investigations of Mine Accidents and Fatalities:** An SI, or a person who has received special investigative training, may accompany fatal accident investigation teams. The SIs duties will be to observe all pertinent conditions and monitor statements to determine if a possible Section 110 violation may have occurred and if a special investigation should be recommended.

If, during the course of the accident investigation, the SI believes that a Section 110 violation may have occurred, the following actions shall be taken:

Inform the accident investigation team leader immediately that a Section 110 violation may have occurred

Advise the accident investigation team leader of the requirements for the preservation of evidence (See Chapter 6 of this Handbook)

Notify the SSI as soon as possible that a possible Section 110 violation may have occurred

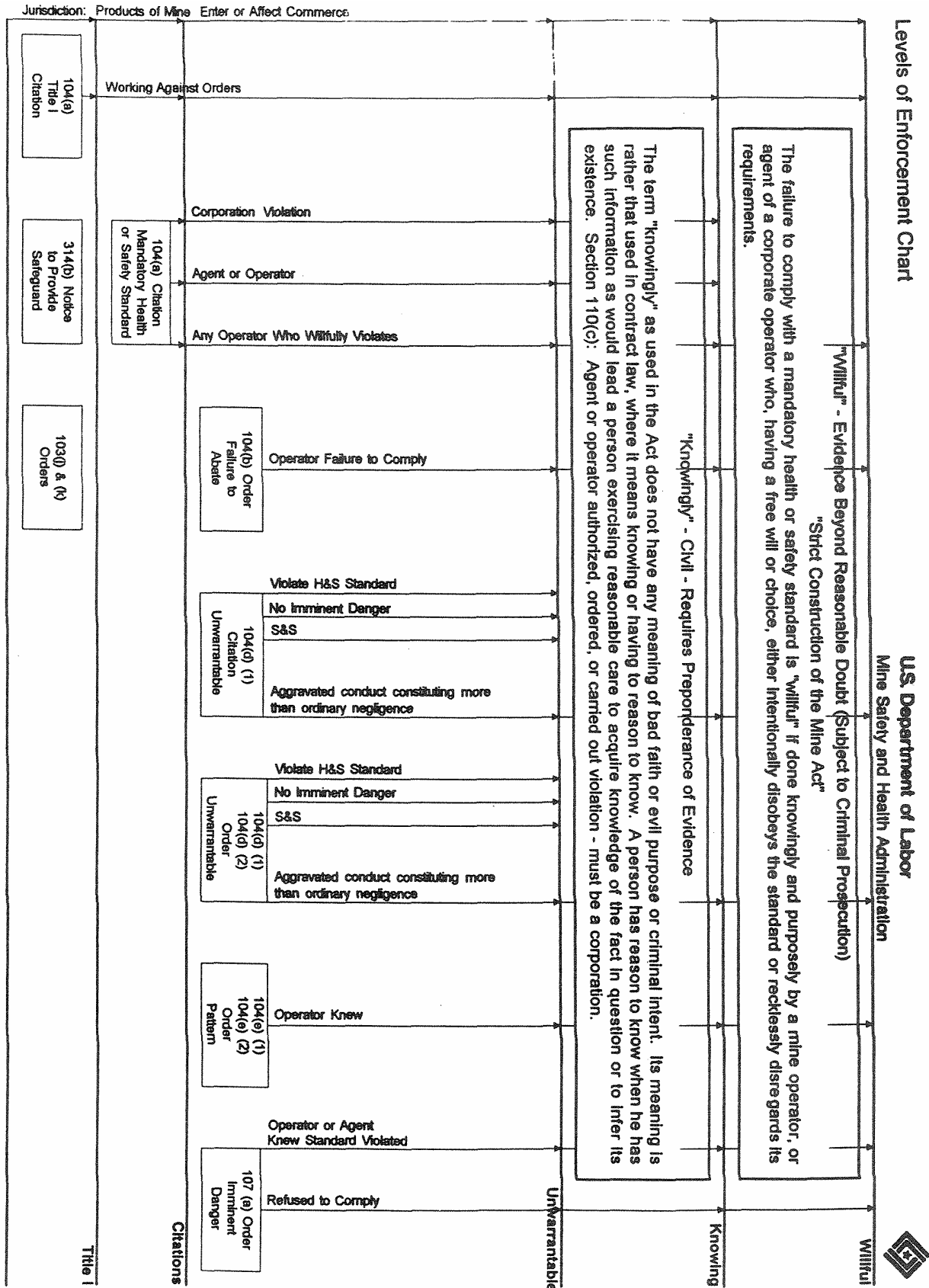
In the event that a Section 110 violation appears to have occurred, the participation of the SI in the accident investigation shall be terminated if the investigator will be assigned to conduct the related special investigation.

The investigator may continue to participate in the accident investigation if the special investigation is assigned to another investigator.

7. **Special Procedures Relative to Mine Disasters:** Representative(s) from TCIO may be dispatched to the site of all mine disasters and certain accidents as requested by the Administrator. Their activities will not interfere with the rescue and recovery operation. These individuals will have responsibilities as assigned by the team leader or Administrator.

8. **Assurance of Jurisdiction:** One of the most important elements in any investigation is to assure that the operation falls under the jurisdiction of the Mine Act. Investigative files must include documentation to prove that the operation is a mine (as defined by the Mine Act), and that the mine products enter commerce or that the operations of the mine or its products affect commerce.⁴ If there is uncertainty regarding jurisdiction, the agency representative must gather all related information and relay it to the DM. If uncertainty remains, the DM should consult with the Administrator and the SOL. Once jurisdiction has been established, the case may proceed.

⁴ See United States v. Arvil Lake, 985 F.2d 265 (6th Cir. 1993)



*also includes willful falsification and misrepresentation under Sections 110(f) and 110(h)

POSSIBLE KNOWING/WILLFUL VIOLATION REVIEW FORM
(Confidential, Pre-decisional Information)

U.S. Department of Labor
Mine Safety and Health Administration



MINE ID _____ MSHA OFFICE _____
MINE NAME _____
COMPANY NAME _____
Citation/Order No. _____ Date _____

ACCIDENT INFORMATION:

Was this violation associated with an accident which caused an injury? Yes [] No [] If Yes: Fatal? [] Non-fatal? []

REVIEW CRITERIA: (Attach supplemental information if needed)

1. Did the condition or practice cited create the presence of a high degree of risk to the health and/or safety of miners? Yes [] No []
a) Who was exposed to the hazard? (Name and Occupation) _____
b) How were they exposed to the hazard? _____
c) When and over what period of time did the exposure occur? _____
d) Is this first hand information? Yes [] No []
If not, who provided the information? (Name and Occupation) _____
2. Did the operator or agent have actual knowledge, or reason to know, of the facts or conditions constituting the violation? Yes [] No []
a) Who had this knowledge? (Name and Title) _____
b) How was this knowledge evidenced? _____
c) Is this first hand information? Yes [] No []
If not, who provided the information? (Name and Occupation) _____
3. Any other pertinent information: _____

INSPECTOR'S CONCLUSION:

Based on this review, does this appear to be a possible knowing and/or willful violation of the Act or mandatory health or safety standard? Yes [] No []
Inspector AR Number: _____ Signature: _____ Date _____
Supervisor: Do you agree with the inspector's conclusion? Yes [] No []
Signature: _____ Date _____

POSSIBLE RECOMMENDED ACTIONS:

A. Conduct a special investigation. [] C. No further action. []
Assistant District Manager: Recommendation: _____ (A or C from the list above)
Signature: _____ Date _____
Supervisory Special Investigator: Recommendation: _____ (A, C from the list above)
Signature: _____ Date _____
District Manager: Action Decision: _____ (A, C from the list above)
Signature: _____ Date _____

ADDITIONAL COMMENTS OR REMARKS:

CASE ASSIGNMENT INFORMATION:

Investigation Case No. _____ Date Assigned _____
Investigator Assigned _____ ID No. _____

INSTRUCTIONS FOR COMPLETING 7000-20 REVIEW FORM

The following types of citations and orders are to be reviewed for possible further action:

Each 104(a) citation that contributed to the issuance of a 107(a) imminent danger order of withdrawal

Each 104(d) citation or order identified as being significant and substantial (S&S) and the negligence evaluated “high” or “reckless disregard”

Each citation issued for working in violation of an order of withdrawal

Only a violation of a mandatory health or safety standard or order issued under the Mine Act shall be reviewed for possible further action. This includes violations of 30 CFR Parts 46, 47, 48, 49, 56, 57, 58, 62, 70, 71, 72, 75, 77, and 90. The inspector and their supervisor shall first review each citation or order to ensure that the violation has been properly cited.

110(f) and (h) Willful Violations

Criminal investigations may result from reports of alleged violations of Section 110(f) false reporting or Section 110(h) equipment misrepresentations. This would include any violations of Parts 5 through 50 of 30 CFR. In these instances, a review of the violation should be conducted using the Possible Knowing/Willful Violation Review Form.

ENTER CITATION/ORDER NO. AND DATE OF ISSUANCE

Question No. 1:

This question should not be answered until sections 1a, 1b, 1c, and 1d have been completed.

Question No. 1a:

Information provided by the inspector should include the name and occupation of each person who was exposed to the hazard. If all of the names are not known, the inspector should provide at least one name, telephone number, and (if possible) an address. Please be specific; comments such as “the entire crew” are too general.

Question No. 1b:

The inspector should give a description of the hazard perceived to exist which created the presence of a high degree of risk to the health and safety of the miners. The hazard must have existed at the time the violation was cited or observed, not what could occur if the condition were allowed to continue to exist unabated. The inspector should provide a detailed description of their evaluation of the conditions.

The inspector should consider what event they anticipated occurring, such as a fire, roof fall, electrical shock, etc. The inspector should determine whether the event was likely to occur because other conditions existed (other violations cited) which would influence the occurrence. The inspector should describe what they observed, who the inspector interviewed, what the inspector was told, what records were checked, what examinations were conducted, what measurements were taken and recorded, who else participated in the inspection, and anything else which would help support the presence of a high degree of risk. The inspector should also include information concerning comments made by management or miners about the situation.

Question No. 1c:

One way to establish how long this condition was present is by reviewing entries in the record books (required to be maintained by the Mine Act). The inspector could establish the length of time the condition existed based on their experience.

Question No. 1d:

If “YES” is checked, the inspector must have been present when the condition occurred and witnessed it themselves. It has to be **FIRST-HAND** knowledge. If the inspector did not witness the condition when it occurred but received the information from others, “NO” should be marked.

If “NO” is checked, give the name, occupation, and telephone number (if possible) of the person who provided the information. The inspector should detail what each witness told them about the conditions and how they occurred.

After completing 1a, 1b, 1c, and 1d, the inspector is now able to accurately check “yes” or “no” in response to question number 1.

Question No. 2:

This question should not be answered until sections 2a, 2b, and 2c have been completed.

Question No. 2a:

Write in the name(s) and title(s) of the agent(s) or operator who had the knowledge. Understand that “should have known” is not an acceptable reason to list a name of an agent.

Question No. 2b:

Knowledge MAY be established by showing that information about the condition was written in reports or other documents (maintained by the operator and signed or countersigned by agents), or through statements obtained by the inspector from persons who witnessed the condition. The length of time or number of entries listing the condition in the record book are helpful in establishing knowledge on the part of the agents or operator. Statements made by miners that they reported the condition to management are VERY HELPFUL. If management has taken action to correct the condition, this information should also be included because it MAY mitigate the fact that the operator had knowledge of the condition.

Question No. 2c:

If “YES” is checked, the inspector must have been there when it occurred and witnessed it. It has to be FIRST-HAND information. If the inspector did not witness the condition when it occurred, but observed it after the fact, or received the information from others, “NO” should be checked.

If “NO” is checked, give the name, occupation, and telephone number (if possible) of the person who provided the information. The inspector should detail what each witness told them about the conditions and how it occurred.

After completing 2a, 2b, and 2c, you are now ready to check “yes” or “no” in response to question number 2.

Question No. 3:

Include any other information that you feel is pertinent (past history, past practices); keep in mind that each violation normally will stand or fall on its own. Include everything that you know about the incident to ensure each reviewer has been provided with the necessary information to make an accurate evaluation and recommendation.

Conclusion:

The inspector can now check “YES” or “NO” based on the information provided above.

PLEASE REMEMBER, IF YOU CHECK “NO” TO EITHER QUESTION NUMBER 1 OR 2, YOU SHOULD NOT CHECK “YES” IN THE CONCLUSION. After checking “yes” or “no” the inspector should fill in their AR number and sign and date the form.

The inspection supervisor will then complete their portion of the form by checking whether they “Agree” or Disagree” with the inspector. Normally, the inspection supervisor and the inspector will agree. One of the reasons the inspector and their supervisor are to conduct each violation review jointly is so that they can work through disagreements. Once the joint review process has been completed, there is nothing wrong with the supervisor marking that they disagree with the inspector. The supervisor shall detail in writing the reasons for disagreeing. So that the reviewers will have additional information to consider when each subsequent reviewer makes their independent evaluation. Once the inspection supervisor has completed their review, the packet should be forwarded immediately to the ADM.

The following items will normally accompany each completed Form 7000-20 to assist the ADM, SSI, and DM in making a proper determination:

- A copy of the citation or order reviewed and all subsequent actions
- A copy of the legal identity report form 2000-7
- A legible copy of the inspector’s notes
- Copies of maps, sketches, and photos
- Copies of records required to be kept by MSHA
- A copy of a plan or the portion of a plan, which pertains to the violation [this may be either a plan required by MSHA (roof control, ventilation and dust control, ground control), or one the operator has developed independent of MSHAs requirements
- A copy of the Part 100, Health and Safety Manager’s Conference results
- The completed multi-page MSHA Form 7000-20. This information in this form is considered confidential and pre-decisional; **Do not keep a copy of this form**

Recommendations:

The reviewers will recommend to the DM to either conduct a special investigation, or to take no further action.

- A. The ADM shall complete their review and sign and date the 7000-20 form. When the ADM makes a recommendation that differs from that of the inspector or

supervisor, they should provide reasons in writing on the form or a sheet attached to the form. The violation review packet of material and 7000-20 form will then be forwarded to the SSI.

- B. The SSI shall complete their review and sign and date the form. When the SSI makes a recommendation that differs from that of the inspector, inspection supervisor, or the ADM, they should provide reasons in writing on the form or on a sheet attached to the form. Each violation review packet and 7000-20 form will be immediately forwarded to the DM with the SSIs recommendation and reasons for the recommended action.
- C. The DM will make their decision to conduct an investigation or to take no further action based upon the information provided with each citation/order. Where the decision of the DM is to take no further action, and there was disagreement among the reviewers, the SSI will prepare a memorandum to the file detailing the reasons for not conducting a special investigation. All documentation provided shall be maintained by the SSI in accordance with Chapter 4 of the Special Investigations Handbook and the Program Policy Manual.

CITATION/ORDER - 110 CASE DOCUMENTATION LOG



CITATION/ ORDER NO.	EVENT NO.	ISSUE DATE	CFR STANDARD	TYPE ACTION	MINE I.D.	DATE RECEIVED	110 CASE NO.	DATE ASSIGNED	INVESTIGATOR NAME	DUE DATE	DATE REPORT MAILED	CASE STATUS

CHAPTER 5 - INTERVIEWING**A. INTRODUCTION:**

The spoken word is potentially the greatest of all sources of investigative evidence. No investigation is complete until every interviewee (with personal knowledge of relevant facts) has been contacted by the SI, and a determination made whether to conduct an interview. Proficiency in interviewing will ensure a high degree of reliability in the results achieved and will help prevent unexpected testimony from arising later. Exhibit 5-1 is a suggested outline of the steps to be taken when conducting an interview.

Initial contacts with all interviewees (whether hourly or management employees), should be in private (preferably not on mine property) to ensure confidentiality.

Successful interviewing is a skill developed through specialized training and experience. Special Investigators should use all available resources (i.e., training materials received from MSHA and other reference sources dealing with interviewing).

B. PREPARING FOR THE INTERVIEW:

1. **Location:** Statements of each interviewee should be taken separately. In circumstances where joint statements are taken, and an interviewee wishes to give a statement to the SI in private, it will be permitted. Generally, the SI should control the physical conditions where an interview will take place. It is desirable to interview at a location that is private. Persons may be interviewed in their homes if there are no disturbing noises or interfering situations present. When appropriate, persons should be interviewed on a prearranged schedule by appointment at a specific time and place. If an interviewee is no longer employed by the company being investigated, contact through the new employer should be avoided if possible, or made in a manner to avoid the impression they are the subject of an investigation.
2. **Selection of Interviewees:** All persons having information relevant to the case should be interviewed and statements taken. Each interviewee, whether an hourly worker or a member of management, shall be contacted by the SI to arrange for an interview. If an interviewee indicates a desire to be interviewed only in the presence of a representative, such as legal counsel, that desire shall be honored. The SI should make every effort to conduct interviews of hourly workers off mine property to promote confidentiality.

All miners have a right under the Mine Act to provide MSHA with a confidential statement on any matter relating to safety or health. Accordingly, all investigations must be conducted in a manner which offers interviewees the

opportunity to exercise that right. The SI should make reasonable efforts to ensure that management employees have the opportunity to provide MSHA with a confidential statement. It is appropriate to arrange interviews with management employees through an attorney only if the SI is confident those employees will not provide a confidential statement.

If an interviewee does not need to be interviewed, or if they refuse to be interviewed or provide information, the SI must document this (usually a memorandum to the file) in the case file. If additional information is needed, additional interviews may be required.

3. **Participation of Representatives of Interviewees:** An SI will not offer objections to the presence of an attorney or other representative(s) during the interview if a request is made. If an interviewee is being represented by counsel, they should be advised that the attorney may also be representing other parties involved in the investigation. In interviews conducted in the presence of attorneys, or other representatives, SIs will not engage in arguments concerning interpretations of the law, facts of the case, or matters of procedure. Interviews will be courteously discontinued where the attorney or other representatives seek to take charge and control the scope and progress of the investigation. Attorneys or other representatives may advise their clients but may not reply for them. When an interview is discontinued under the above circumstances, the facts will be documented in the investigative report.

C. **PLANNING THE INTERVIEW:**

1. **General:** Establish a goal and prepare a plan or outline before questioning.
 - Establish rapport
 - Logically determine the direction of the interview
 - Analyze the violations
 - Analyze the issues
 - Analyze potential witnesses and their knowledge
 - Prepare a logical outline
 - Determine issues and topics of discussion
2. **Establishing the Order of the Interviews:** Generally, interviewees who can and will voluntarily give the most complete account of the event and associated background information should be interviewed first. It is advantageous to corroborate the statement of an interviewee with statements obtained from other interviewees. It is usually effective to obtain statements from non-management employees prior to interviewing management personnel.

D. CONDUCTING THE INTERVIEW:

Special Investigators will conduct interviews in a professional manner without making any threats or promises whatsoever to elicit information. It is essential that questions be clear, communicative, and designed to elicit information, since they are the primary tools of the SI. Each person shall be interviewed separately and in private. If two or more person(s) want to be interviewed at the same time, the SI shall explain the reason why this would be inappropriate (i.e., confidentiality would be compromised).

1. Credentials:

The SI shall present their credentials to establish their authority prior to conducting the interview.

2. Important Considerations:

It is the policy of MSHA and the Department of Labor to offer pledges of confidentiality to interviewees when their statements are taken in circumstances consistent with such a pledge. Individuals who are interviewed in private, or with a personal representative present, must be advised that their statement will be kept confidential by the Department of Labor to the extent provided by law. Care must be taken **not to offer** pledges of confidentiality when the interview is taken in circumstances inconsistent with such a pledge. When conducting multiple interviews, or when the company's attorney or other representative is present, pledges of confidentiality would be considered invalid. During formal and informal dealings with others, care should be taken not to reveal the identity of persons who have given statements or the nature of the statements.

Only the interviewee shall be offered a copy of their statement. Interviewees who request MSHA to provide other parties with a copy of their statement should be instructed that they may share their statement with others but that MSHA would advise against it. They should be reminded that MSHA will not provide other parties with a copy of their statement (unless required to do so), and will keep the statement confidential, to the extent provided by law. **All authorized MSHA personnel have the responsibility to maintain the security and confidentiality of any statements obtained.**

Never argue with a interviewee. The SI should start off with questions that are readily answered and positive in nature. This approach will create an environment for cooperation.

Use every precaution to avoid false rumors, embarrassment, or character defamation. It should be kept in mind that even the recognized presence of an MSHA SI may cause speculation. Other considerations are as follows:

- Ensure leading questions are not used
- Keep in mind that potentially cooperative interviewees still may not give desired information because:
 - They have faulty perception
 - They do not remember pertinent facts
 - The question was not asked properly
 - They are not aware that they possess worthwhile information
 - They are reluctant to get involved
 - They are reluctant to implicate others
 - They are not impressed with the importance of cooperation
 - They do not feel friendly toward the SI or the Agency
 - They dislike the possible inconvenience of appearing in court
 - The time or place of interview may not be convenient
 - They are unknowingly prejudiced
 - Their logic or conclusions are faulty
 - They mistake rumors for facts

3. **Establishing Rapport:**

Attempt to establish a sincere and trusting attitude with the interviewee to enlist full cooperation. Some procedures for establishing rapport are:

- Prior to the beginning of the interview, establish confidence and trust by having a friendly discussion
- If possible, do not begin the interview until the interviewee appears cooperative
- Keep conversation informal and simple
- Urge the interviewee to stay focused but never hurry or pressure them
- Be interested in the interviewee's problems, avoiding expressions of emotion
- Do not ask questions that insinuate suspicion of the interviewee, either by composition or method of asking
- Try to reestablish rapport at any time during the questioning when the interviewee appears to become reserved or hostile
- Avoid labor-management discussions that appear to put MSHA in the position of advisor

4. **The Questions:**

An SI should start an interview by asking the interviewee to give a narrative of what is known about the matter being investigated. All items that have not been satisfactorily covered should be examined. Each detail should be explored before proceeding to the next. It may be necessary to ask a series of questions to elicit relevant information.

Efforts should be made to confirm the information given by an interviewee. An informal cross-examination may be used to verify the completeness or accuracy of the testimony.

If an interviewee claims no knowledge, the SI should ask a variety of other questions concerning the matter. The interviewee may unintentionally reveal corroborating information. When the withholding of information is suspected, rephrase the question and continue to explore until you get precise answers on every point.

Some indications that an interviewee has additional information are:

- Attempts to evade questions
- Vague answers
- Conflicting information with previous statements
- Physical actions and appearance of the interviewee
- Information from other sources indicating the interviewee has certain knowledge
- Circumstances placing the interviewee in a position to know certain information

A leading question (limited to the specific point) may be used if an interviewee continues to be evasive, despite repeated rephrasing of the question. Caution must be used not to continue with leading questions after the interviewee provides an answer. Subsequent questions on the specific issue should not be leading.

5. **Truthfulness:**

Some methods of verifying truthfulness are:

- Determine if information was relayed to the interviewee by another person
- Using personal experience
- How did the third party get it?

- How reliable is the word of the third party and what were the circumstances under which it was related?
- Was the information possibly obtained from joking or gossiping?
- If the information was deduced from circumstances, what facts were the deductions based on?
- Determine the degree of contact an interviewee has had with other persons, subjects, and occurrences
- Observe the demeanor of the witness, including physical, mental, and emotional state

6. **Verifying the Information:**

After the interview is finished, recheck to ensure that the interview has been satisfactorily explored and verified.

The SI should rearrange the information obtained so that the details are in logical order and summarize the testimony of the interviewee. Ask the interviewee to verify and correct the information (if needed) before proceeding.

7. **Conclusions:**

Be careful not to base reasoning on false assumptions. In the initial evaluation, be skeptical of stated facts until verified. Use care in interpreting the facts.

E. **TYPES OF QUESTIONS:**

1. The following seven questions (The Seven W's) are useful in most interviewing situations:

- Who? (Who was involved?)
- What? (What happened?)
- When? (When did it happen?)
- Where? (Where did it happen?)
- How? (How did it happen, how much, how many?)
- Why? (Why did it happen?)
- Which? (Which one did it?)

When answers to these seven elements are obtained, the issue is usually resolved.

2. **Leading Questions:** Leading or suggestive questions are those which suggest or direct the desired answer from the interviewee. Leading questions should be avoided when asking for initial information.

3. **Extended-Answer Questions:** Extended-answer questions should be phrased to elicit narrative answers. Occasionally, answers to "yes" or "no" questions do not supply accurate information. Such questions are acceptable when summarizing or verifying the statement with the interviewee.

F. **NOTE TAKING:**

1. **Introduction:** This section describes the legal support for, and the proper means of, taking, preparing, and preserving contemporaneous notes and written statements. With respect to activities associated with the investigation, SIs should understand the importance of documenting their findings. The extra time spent taking notes is productive, since documenting activities can save time when memories fade and issues become unclear.
2. **Contemporaneous Notes:** Contemporaneous notes are the SIs documentation of comments and observations. These notes may include handwritten comments, daily reports, diaries, tape recordings, scrap paper, internal memoranda, and other similar articles pertaining to the investigation.

These documents must be retained even if they are transcribed into official documents. (i.e., interview notes taken at the time of the interview and later typed into a formal statement). The original handwritten notes must be retained in the case file in a sealed envelope.

3. **Legal Support:** The Agency's retention procedure of contemporaneous notes is based on the "Rules of Criminal Procedures for the United States District Courts." Rule 16 states in part; "...upon request of the defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant . . . (or) the substance of any oral statements which the government intends to offer in evidence."

In non-criminal matters, see also FRCP 26 that requires maintaining relevant documents.

4. **Format:** There is no official MSHA form for recording notes required during a special investigation. Exhibit 5-2 illustrates a format which may be used. Contemporaneous notes must be written in a manner so they may be interpreted and understood by an individual who is not familiar with the investigation.
5. **Content:** Investigative notes, such as those taken during an interview, should accurately depict the exact words of the interviewee. It is important that exact words be used so that the SI may preserve the original intent of the interviewee.

In addition, investigative notes should contain the following:

- Subject of notes (either person or incident)
- Date notes were taken
- Place notes were taken
- SIs signature or initials
- Case number

If a second SI is present, both should prepare their own notes.

G. STATEMENTS:

Signed or electronically-recorded statements may be used at the discretion of the DM or SSI. Signed statements are preferred when conducting Section 110 investigations. Potential criminal cases pursuant to Section 110(d) may also utilize the MOI (Memorandum of Interview) at the discretion of the AUSA (Assistant United States Attorney) in the respective districts. Special Investigators must consult with the SSI for guidance when it is determined that a case may result in a Section 110(d) prosecution prior to continuing any further investigation. The DM and the SSI should consult with TCIO and SOL for guidance and direction if needed.

1. **Introduction:** The purpose of the interview statement is to obtain all the information an interviewee has that will help resolve the case. It is necessary to prepare a permanent record for future use. Each interview shall be carefully reviewed for accuracy. When the statement is examined by the interviewee, they should correct errors, make minor modifications, or provide additional information if needed.
2. **Use of Statements:** The interview statement may be used to refresh the memory of an interviewee during a trial or administrative hearing. It may also be used to impeach an interviewee on the stand when their previous statement is inconsistent with current testimony, or to furnish a basis for prosecution of an interviewee who testifies at the trial. If the statement constitutes a confession or an admission, the relevant parts may be submitted as evidence during the trial.
3. **Signatures of Interviewees:** The SI should not delay submission of an otherwise-completed investigation by making repeated attempts to acquire signatures. Each interviewee should be afforded the opportunity to review and correct their statement. Sometimes an interviewee has reviewed their statement but has chosen not to initial or sign it. If this occurs, the SI should attempt to get them to verbally confirm that the statement is accurate. Immediately following

the termination of the interview, the SI should complete the last page of the statement (Exhibit 5-4).

4. **Types of Statements:** The SI may take handwritten notes when taking a statement. An electronic recording device may be used with the expressed advance consent of the interviewee. Types of statements are as follows:
- Handwritten Statements
 - Electronically-Recorded Statements
 - Memorandum of Interview (MOI)
 - The MOI is an informal note of a written record. It is a record of what occurred at the interview and may be in the format shown in Exhibit 5-5. It is not intended to be a verbatim record of the interviewee's statement. It should reflect the SIs interpretation of the stated facts and serve to record those facts deemed important to the investigation. It should be promptly signed and dated by the SI but does not require a signature by the interviewee.

Each statement should contain the following information; however, all information is voluntary and may be refused. All refusals should be documented.

- Date, time, and place where the statement was taken
- Name, home address, home telephone number, date of birth, and Social Security Number
- Case number
- Name of the SI
- Names and titles of all other persons present at the interview and the reason for their presence

Additional information required is to verify through the interviews that their statement was made freely and voluntarily, without duress, and that no promises or commitments were made by the SI. Assure the interviewee that the information provided will be held confidential to the extent provided by law.

Note: Refer to Exhibit 5-3 for examples of closing questions.

H. TRANSCRIBING ELECTRONICALLY-RECORDED INTERVIEWS:

Electronically-recorded interviews are preferred and encouraged when conducting Section 105(c) investigations. The method of documenting interviews is left to the discretion of the DM and SSI in both Section 105(c) and 110 cases. The SI is not permitted to transcribe electronically-recorded interviews. Electronically-recorded interviews are to be transcribed by persons trained in the use of transcription equipment. The SI may prepare an MOI after listening to the tape.

INTERVIEW OUTLINE**A. INTRODUCTION**

An interview is the questioning of a person who is believed to possess knowledge that is of official interest to the SI. The effectiveness of an investigation is largely dependent upon the SIs ability to obtain information from complainants, interviewees, informants, and suspects. The greater part of an investigation is usually devoted to interviews. In many cases, interviews are the only source of information.

B. PRE-INTERVIEW

It is imperative that the SI adequately prepare for each interview. This will greatly enhance the quality of the interview and ensure that a thorough and complete investigation has been conducted. There are a number of steps the SI should take prior to conducting an interview, including:

1. Questions to determine the issues are as follows:
 - Who was involved?
 - What was the incident?
 - Where was the incident?
 - When did the incident occur?
 - Why did the incident occur?
 - How did it happen?
 - What was known prior to the incident?
 - What was the intent of those involved in the incident?

The SI should review the following MSHA documents:

- Accident or illness reports
 - Investigation reports
 - Violation history reports
 - Approved plans
 - Mine records and maps
2. Determine who is to be interviewed. The SI should review all the information available and determine who needs to be interviewed based on the type of case being investigated. Normally you will interview the complainant first [in a 105(c) case], and interview the inspector or person who reported the incident [in a 110 case]

to determine who may be a potential interviewee. Each time the SI chooses to interview someone, they should solicit the following information:

- What is the objective (purpose) of the interview?
- What is to be accomplished?
- What information might the interviewee provide and how will it affect the investigation?

Each interviewee is to be contacted by the SI separately in private to arrange the interview. **This is true of both management personnel as well as hourly personnel.** The SI should make every effort to obtain phone numbers and addresses of every person they intend to interview.

3. Schedule the interview:
 - The SI should, as a general rule, select a location, date, and time to conduct the interview
 - Arrange the interview so as to accommodate the interviewee's schedule
 - Schedule the interview as soon as possible after the event

C. INTERVIEW

Always remember to dress appropriately for the occasion. Where you conduct the interview and the person being interviewed will normally dictate what attire is appropriate.

1. Establish rapport with interviewee:
 - Introduce and identify yourself
 - Establish a relationship with the interviewee
 - Refrain from saying or doing anything which will cause the interviewee to be unwilling to talk.
2. Questioning:

Knowing what to ask and when to ask it is critical to any interview. The SI should achieve:

 - Accurate information
 - Control of conversation

- Corroborating information
 - Identifying inaccuracies
3. Non-Verbal Characteristics. Signs of evasive behavior to observe:
- Sweating
 - Color changes
 - Dry mouth
 - Pulse
 - Abnormal breathing
 - Nervousness
 - Evasive facial expressions
 - Embarrassment
4. Recorded statement:
- Written:
 - The SI should not take out their notebook at the beginning of an interview
 - Listen to interviewee's story first without taking notes
 - Request permission to take notes before going back over the information that the interviewee has provided. (If permission is not given, make notes of conversation immediately following the conclusion of interview)
 - Tape recorded:
 - Obtain permission before using a tape recorder
 - If permission is given to use a tape recorder, begin the tape recording by identifying yourself and reference the case number
 - State the date, time, location, and names of persons present
 - Before asking any other questions, ask the interviewee if they are aware that the tape recorder is being used and again ask if they are giving you permission to use the tape recorder
 - Also include on the tape confirmation that the information is being given voluntarily and that the interviewee is aware that they may stop the interview at any time

EXAMPLE FORMAT FOR INVESTIGATIVE NOTES

July 2, 2005 2:10 p.m.

Case Number: PITT-CD-2005-00

Location of Interview:

Federal Building, Room 222
Pine Avenue; Denver, Colorado 80225

Persons Present:

Sam Doe, Interviewee
(SSN: 123-45-6789; DOB: 09/13/54)
Peter Smythe, Attorney for Sam Doe
John P. Jones, MSHA Special Investigator

Doe said he is married and lives at 201 South Street, Springfield, Colorado 99999

Doe stated that he and Phil Black were preparing to roof bolt a place when.....

Doe made the statement: 'Bill Smith set the temporary supports in the 001 section...'

Doe said he had complained before to his foreman about.....

Doe said there were others who will be able to confirm this such as.....

Doe said he would be willing to testify to what he said.

John P. Jones
Special Investigator

EXAMPLE FORMAT FOR QUESTION AND ANSWER STATEMENT

Interview statement of John J. Jones at his residence, 115 South Street, Cumberland, Maryland 77033 (301/555-1212) at 9:30 a.m., on Tuesday, April 6, 1997, concerning . . .

Persons present during interview:

John J. Jones, Interviewee (SSN# and Date of Birth)
Adam Adams, Attorney
Dave Smith, SI

(Questions were asked by Dave Smith, SI, and answers were given by Mr. Jones, unless otherwise specified.)

1. Q. Mr. Jones, you were requested to answer questions concerning . . . Do you fully understand this? (If the interviewee requests clarification either as to his/her rights or the purpose of the investigation, the SI will give such explanation as is necessary to clarify the matter.)
2. Q. Mr. Jones, do I have your permission to tape record this interview?

NOTE: After the questioning is concluded, the interview is closed with the following questions:

43. Q. Mr. Jones, is there anything that you expected me to ask, that I did not ask?
A. (Interviewee may say "no" or offer information).
44. Q. Do you have any questions or comments?
A. (Interviewee may say "no" or ask question or comment).
45. Q. Have I, or has any other MSHA personnel, threatened or intimidated you in any manner?
A. No.
46. Q. Have I, or has any other MSHA personnel, offered you any rewards, or promises of reward, in return for this statement?
A. No.

47. Q. Have you given this statement freely and voluntarily?

A. Yes.

48. Q. Is there anything further you care to add for the record?

A. No.

49. If this statement is transcribed, you will be given an opportunity to read it, correct any typographical errors, and sign it.

I have read and have had an opportunity to correct this statement consisting of _____ pages. I hereby certify that the foregoing answers to the questions asked by Dave Smith, SI, are true and correct. I have initialed each page of the statement.

I understand that my identity and any information contained in this statement which might lead to a disclosure of my identity, will be held in confidence by the U.S. Government and will not be disclosed as long as the case remains open, unless and until the Government requires my presence as a interviewee in any legal proceeding. After the case is closed, my identity and the information contained in this statement will be held in confidence to the extent provided by law.

(Signature)

_____ Day of _____
(Month/Year)

(Interviewee)

(SI)

STATEMENT



Case No: _____

I, _____ reside at

_____ in the city of
(number) (street)

_____, county of _____

State of _____, Zip Code _____

My telephone number is (area code/phone number) (_____) _____

I (was) (am) employed by _____

located at _____
(number) (street) (city) (state) (zip code)

Office telephone (area code/phone number) (_____) _____

My employment at this location consists of approximately _____ beginning on
(years) (months)

_____ 20 ____ . My job classification (was) (is) _____

I understand that this statement will be held in confidence by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the statement in a formal proceeding. After the case is closed, the information will be held in confidence to the extent provided by law.

Interview is started at: _____ (Date/Time)

Date of Birth: _____ (mm/dd/yyyy)

Present during interview: _____

Location of Interview: _____

Page 1 of _____ (Initial and Date)



STATEMENT OF _____ (Continued)

Lined area for writing the statement.



STATEMENT OF _____ (Continued)

Lined area for writing the statement.

I have read (or have had read to me) and had an opportunity to correct this statement consisting of ____ pages. I find these facts to be true, accurate and correct to the best of my knowledge and belief. It was made voluntarily and I have initialed or signed each of the foregoing pages and affixed my signature to the last page No. _____.

____ Day of _____ (Month/Year)

(Signature of Interviewee)

(Witness)

(Investigator)



MEMORANDUM OF INTERVIEW

Case Number: _____

Date and time of interview: _____
_____ a.m. to _____ p.m.

Name, address and phone number of Interviewee:
(Obtain SSN# and Date of Birth, if at all possible)

Place: Location of Interview _____

Present: _____ (Interviewee)
_____ (Job Title)
_____ (Attorney)
_____ (Others present)

You understand that this statement will be held in confidence by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the statement in a formal proceeding. After the case is closed, the information will be held in confidence to the extent provided by law.

Interview conducted by MSHA Investigator _____

Body of Memo: (All Pertinent information relating to the interview should be in the memorandum in some logical, manner, either in order of topics discussed or of importance, chronologically or in any other appropriate order.)

I (prepared) dictated this memorandum on _____, 20____, after refreshing my memory from notes made during and immediately after the interview.

Investigator

I verify that this memorandum has recorded in it a summary of all pertinent matters discussed with the interviewee on _____, 20____

Investigator

CHAPTER 6 - EVIDENCE**A. INTRODUCTION:**

Special Investigators do not have authority to seize evidence which is not voluntarily released. If a piece of evidence is not voluntarily released, a search and seizure warrant would have to be obtained from a U.S. Magistrate. Title 28 CFR, Part 60 establishes authorization for federal law enforcement officers to request a search warrant and lists those who are authorized. Special Investigators do not have the authority to obtain or execute search warrants but may assist in these activities (see Chapter 1 for other guidance and restrictions). If an SI believes a search warrant is needed, they shall brief the SSI on the reasons for needing the warrant. If the SSI agrees that a search warrant is necessary, they shall notify the DM and TCIO of the request. The DM will confer with SOL and TCIO (if necessary). If it is determined by the DM that a search warrant should be obtained, arrangements will be made (with assistance as necessary from TCIO and SOL) to present the information to the U.S. Attorney. Even though SIs do not have search warrant authority, there is authority under Sections 103(a) and 103(h) in conjunction with Section 108, to obtain information necessary for the Secretary to fulfill his or her responsibilities under the Mine Act.

Every piece of evidence that could have a connection with the case should be collected. Nothing should be rejected because it appears too large or insignificant. Objects or material that may seem insignificant at the time of discovery may later prove to be valuable evidence. Any physical evidence received into custody must be identified to connect it to the location where it was found through the use of photographs, sketches, or other testimony. The photographs of the evidence must be carefully documented. The following information should be recorded:

- Description of the photograph
- Location where the photograph was taken
- Names of persons present when photograph was taken
- Type of camera
- Type of lens
- Shutter speed
- Aperture opening (f/stop)
- Type of film used (film speed)
- Time of day
- Natural or artificial lighting
- Processing information
- Chain of custody of negatives and prints

A Photo Log (Exhibit 6-1) should be used to record this information. Exhibit 6-2 contains instructions for completing the Photo Log.

B. NATURE AND TYPE OF EVIDENCE:

1. **Forms of Evidence:** There are three forms of evidence: real, documentary, and testimonial. They are defined as follows:
 - Real (Physical) Evidence: Tangible objects (i.e., roof bolts, equipment, cables) presented for inspection to the trier of fact, "speaks for itself." It is usually the most trustworthy type of evidence
 - Documentary Evidence: It consists of a document (i.e., roof control plan, deed, contract), rather than a tangible object
 - Testimonial Evidence: Testimony given in court (or by deposition) by a witness may be either factual or opinion (one example of testimonial evidence is an interview statement)

2. **Types of Evidence:** There are three types of evidence which the SI may be required to collect:
 - Direct Evidence: A fact that proves the issue without any inference or presumption
 - Circumstantial Evidence: Evidence which offers indirect proof
 - Cumulative Evidence: The accumulation of direct or circumstantial evidence

C. CUSTODY OF EVIDENCE:

If a Section 110 investigation is conducted, special procedures are required for the custody, or the collection and preservation, of evidence. This section describes these procedures. The attorney assigned to the case or TCIO will provide additional assistance if needed.

A master log of all physical evidence taken into custody, and documentary evidence received, shall be maintained by the custodian of evidence (usually the SSI). This ensures that each item of evidence can be accounted for and positively identified from the time it is taken into custody until it is presented at trial or the case is closed. The master log is kept to record all the items of evidence which were collected. Its purpose is to show that the evidence was properly handled, to ensure that it has remained in the same condition as found, and was not tampered with or altered.

1. **Identification:** All physical evidence obtained must have an Evidence Identification Tag (see Exhibit 6-3) attached and be marked by the person receiving it into custody so that it can be positively identified at a later time. Where large numbers of a similar item of evidence are collected, it is necessary to tag and mark only a representative number of the similar items.

The identification markings must be permanent in nature, and care must be taken not to cover up, deface, alter, or in any way destroy the items. The markings may be the person's initials or any unique symbol which can be positively identified by the person. An "X," or other such common symbols, should not be used. The SIs notes should reference the identification markings used, the date, time, specific location where the object was found, and any additional information necessary to distinguish each item from other evidence collected.

There are times when it is necessary to release a piece of evidence, pursuant to a subpoena. In order to maintain the chain of custody of the object, MSHA Form 2000-200 (Chain of Custody) shall be prepared (see Exhibit 6-4). The SI shall give the individual providing the evidence a signed, MSHA Form 2000-201 (Itemized Receipt) for each piece of evidence released to the SI (see Exhibit 6-5). A copy of the receipt will be retained in the case file. When the evidence is returned, the SI shall obtain the original receipt and have the person acknowledge in writing that the evidence was returned.

A piece of evidence may be excluded from admission as evidence in court, if the chain of custody has not been maintained, or if it has been improperly handled so that it is no longer in its original condition (See Section 4: Transmission of Evidence, for information on Chain of Custody form).

2. **Joint Custody:** When the evidence consists of small items, it should be secured in the respective MSHA office. If large items are collected, it may be necessary to secure these items in a storage area at the mine site. When this is necessary, "joint custody" is shared by the MSHA custodian and the owner of the evidence. The evidence must be secured in such a manner that both parties (the custodian and the owner) would have to be present to unlock the secured area and have access to the evidence. (For example, two separate locks and each party having a key to only one lock.) The evidence shall not be removed or transferred from the secured area without the written consent of all the joint custody parties listed on the MSHA Form 2000-200, Chain of Custody (Exhibit 6-4). The only purpose for the transfer would be for examination, analysis, or use in a hearing or trial. When such a transfer occurs, a copy, Chain of Custody Form 2000-200 shall be completed.

3. **Preservation of Evidence:** All evidence shall be carefully stored under lock and key under the direct control of the SSI or SI having custody. All information concerning the evidence received or removed shall be recorded in the master log. The originals and certified copies (or photocopies of documents) will be preserved as received and filed for evidentiary purposes. These directions are not intended to restrict laboratory examination of original documentary evidence.

Certain types of evidence may have to be submitted to a laboratory for analysis, such as gas, air, or dust samples. To ensure an accurate analysis, the evidence must be received in the same condition as when it was originally collected. It may be appropriate to send along a "standard sample of the evidence" for comparison purposes.

4. **Transmission of Evidence:** When evidence is transmitted from one place to another for the purposes of evaluation, laboratory analysis, expert opinion, etc., precautions must be taken to ensure that the evidence is not tampered with or altered, and the chain of custody is not broken. The evidence must be transmitted in person or by certified-mail. Other methods can be used to transmit evidence with the permission of the DOJ or SOL attorney assigned to the case. Large items which cannot be mailed or carried will require special arrangements to be made by the SSI or other appropriate official. The following procedures must be followed when transmitting evidence. These procedures are not all inclusive, and additional procedures should be considered for every circumstance.
 - **Briefing the Recipient:** The custodian of the evidence must brief the recipient (either in person, by memorandum, or both) on the actions they must take when the evidence is received and processed. The custodian shall suggest that the recipient pack the evidence as listed below when returning the evidence. The recipient should be told that they may have to testify in court as to the precise actions taken while the evidence was in their custody.
 - **Complete Chain of Custody Form:** This Chain of Custody form (Exhibit 6-4) is originally completed by the custodian of evidence. The original and both copies will be packed with the evidence and transmitted to the recipient. The custodian of evidence shall make a copy for their records. Upon receipt of the evidence, the recipient will fill in the appropriate blocks on all copies of the Chain of Custody form (date received, signature, name, title, and purpose of custody change). The original will always remain with the piece of evidence. A copy will be returned to the custodian after the recipient has filled in the appropriate blocks. When the custodian receives this copy of the Chain of Custody form, a note will be made in the master evidence log book as to when and who received the piece of evidence and for what purpose. When the evidence is ready to be returned to the custodian, it should be packaged

properly and transmitted as directed by the custodian. When the custodian receives the returned evidence, it shall be noted in the master log book. The following measures should be taken to ensure the chain of custody is not broken:

- Pack the evidence
 - Wrap the evidence and the original and both copies of the Chain of Custody form in an appropriate covering material. Place in a box or envelope
 - Seal the container. Place the name, title, address, and return address on the outside of this container
 - Mark each side of the package with the words "Evidence - to be opened only by authorized personnel"
 - Give directions such as "Expedite," "Urgent," "Fragile," "Explosive," "Inflammable," "Perishable"
5. **Return of Material Gathered as Evidence:** No items of evidence are to be returned to the owner (or their agent or attorney), without prior written approval of the appropriate MSHA Administrator (see Exhibit 6-6 for sample request letter). In the event of an ongoing criminal investigation, involving the DOJ (Department Of Justice), evidence shall not be released without the written consent of both the Administrator and the appropriate AUSA (Assistant United States Attorney) (see Section E of this chapter for further details concerning the handling of Grand jury materials).

D. CERTIFICATION OF DOCUMENTS:

When copies of MSHA documents are submitted as evidence during a legal proceeding under Section 110 of the Act, they must be certified as being an authentic copy of the original document. Mine Safety and Health Administration's Administrative Policy and Procedures Manual, Volume I - Organization, Chapter 349.6, Certification of Documents, (Exhibit 6-7) provides the procedures for certifying or affixing an official seal to attest to the source of authenticity of official documents of MSHA. The SI should direct their request for certification of documents to the SSI.

E. HANDLING OF GRAND JURY INFORMATION:

If the DOJ proceeds with prosecutorial action, the investigation may progress to the point that the case is presented to a grand jury. Access, use, and disposal of grand jury materials are governed by Rule 6(e) of the Federal Rules of Criminal Procedure, as well as certain statutes and DOJ protections.

1. **Access: Grand jury information may be disclosed to MSHA personnel deemed necessary by a federal prosecutor to assist the federal prosecutor.** In order to be permitted access to grand jury material, the AUSA must seek and receive a court order authorizing disclosure to the SI or other staff personnel. **ONLY** persons named in the court order (normally referred to as the “6E List”) are authorized to have access to grand jury materials. The SI may provide the AUSA with the names of MSHA personnel who should be authorized access to the grand jury information. The list may include personnel from TCIO and SOL. Strict precautions shall be taken by MSHA personnel to ensure that grand jury information is not disclosed to any personnel not authorized access to this material, including SIs working on other matters or MSHA personnel who have civil law enforcement functions. The SI shall be responsible to see that grand jury materials are secured in locked files accessible only by those MSHA personnel identified on the court order as having authorized access.
2. **Use: Rule 6E does not permit disclosure of grand jury material for civil law enforcement purposes or use of materials for any other investigative purpose.** Access and use of grand jury material is for the limited purpose of assisting federal prosecutors in the conduct of the criminal investigation. Agency personnel shall not use grand jury information for any other purpose. Special Investigators must consult with the AUSA before disclosing, discussing, or disseminating any grand jury-based information, or any information which may appear to be related to the grand jury investigation or to the grand jury process. If SIs are in doubt, material should be considered non-disclosable unless federal prosecutors have advised that it is not within the prohibitions of Federal Rule 6(e).

A record of consultation and authorization with federal prosecutors regarding use and handling of 6(e) material should be placed in the investigative file. Use of a bound ledger book with numbered pages is recommended for recording this information. It should contain the time, date, names of all persons involved, and a summary of the discussion. Grand jury information may not be placed in other case files without express authorization from the federal prosecutors.

In addition, SIs will stamp all 6(e) material received with a warning of its 6(e) prohibition against disclosure such as:

**GRAND JURY MATERIAL--RULE 6(e)
CONFIDENTIAL--DO NOT DISCLOSE**

NOTE: All districts need to acquire a stamp stating the above.

3. **Disposal: Special care must be taken with grand jury material after the close of a criminal investigation.** Prior to disposal, such information must be kept secure in locked files. Disposal of grand jury material which retains its 6(e) status [material provided to the defendant loses its 6(e) protection] must be accomplished in accordance with instructions from the AUSA. If the SI is instructed to destroy the material it should **NEVER** be placed in garbage or recycling containers.

SPECIAL INVESTIGATIONS PROCEDURES HANDBOOK

CHAPTER 6

Exhibit 6-1

PHOTO LOG



COMPANY _____
MINE _____
I.D. NO. _____
DATE OF PHOTOS _____
REFERENCE _____

PHOTOGRAPHER _____
WITNESS(ES) _____
PROCESSED AT: _____
PROCESS: _____

ROLL _____ OF _____

PHOTO NO.	NEGATIVE NO.	TYPE OF CAMERA	TYPE OF LENS	SHUTTER SPEED	DIAPHRAGM OPENING	KIND OF FILM SPEED (ISO)	TIME OF DAY	LIGHTING NAT./ARTIF.	REMARKS

PHOTO LOG
General Instructions for Completion

TOP PORTION:

COMPANY: Official Business Name of Operator as it appears on the Legal Identification Report Form 2000-7 (Item 9) or Official Business Name of Independent Contractor

MINE: Name of mine as it appears on the Legal Identification Report Form 2000-7 (Item 9)

ID NO: Federal Mine Identification Number as it appears on the Legal Identification Report Form 2000-7 (Item 1) and/or Independent Contractor Number

DATE OF PHOTOS: Date photograph(s) were taken

REFERENCE: Case or accident investigation number

ROLL ____ OF ____: If more than one roll is used, list number of this roll and total number of rolls, consecutively

PHOTOGRAPHER: Name of person taking photograph(s)

WITNESS(ES): Name of person(s) present when photograph(s) were taken

PROCESSED AT: Site where photograph(s) were developed

PROCESS: Obtain the method of processing information from the processor (i.e. C-41, E-7). The processor would know the photographic process being used to develop and print the film

CHART:

PHOTO NO: Number of the photograph (all pictures taken should be numbered sequentially)

NEGATIVE NO: The number appearing on the negative

TYPE OF CAMERA: Brand name, type, and model number of camera

TYPE OF LENS: Standard, wide angle, telephoto, macro, zoom (i.e. 28mm, 50mm, etc.,)

SHUTTER SPEED: Time setting of 1 to 1,000 found on camera (may not apply for fully automatic camera)

APERTURE OPENING: “f” stop

TYPE OF FILM: Brand, size, and format of film (i.e. Kodak 35mm print)

ISO SPEED: Film number (i.e. 100, 150, 200, 400, etc.)

TIME OF DAY: Time photograph(s) were taken (use military time)

LIGHTING - NATURAL OR ARTIFICIAL: Natural lighting or flash used

REMARKS: Description of individual photograph; used for description labels to be placed on photographs (include where it was taken)

Evidence Identification
Tag

U.S. Department of Labor
Mine Safety and
Health Administration

1. Unique Identifier

2. Date

3. Office Location

4. Exhibit Number

5. Description of Article

6. Taken From

6. Received From

7. Received By (print or type name)

8. Signature

9. Witness

10. Special Instructions

MSHA Form 2000-181, Mar 89
(over)

Evidence Identification (continued)			
Date	Chain of Custody		Purpose of Custody Change
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	

Chain of Custody

U.S. Department of Labor
 Mine Safety and Health Administration



1. Unique Identifier 2. Date 3. Office Location 4. Exhibit Number

5. Description of Article

6. Taken From (person or location) Received From Found At

7. Received By (print or type) 8. Signature 9. Witness

10. Special Instructions

Date	Chain of Custody		Purpose of Custody Change
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	

Date:

MEMORANDUM FOR: (Name of Administrator)
Administrator
for (Coal or Metal/NonMetal) Mine Safety and Health
Administration

(Name of Assistant Director)
Assistant Director, TCIO
Office of Assessments

FROM: (Name of District Manager)
District Manager-- (Coal or Metal/NonMetal) Mine Safety and
Health District (Number)

SUBJECT: Request to Release Evidence Received During a (Fatal/Nonfatal
Accident, Special, or Other Type of) Investigation which Occurred
at (Mine Name) Mine, I.D. No. (Federal I.D. No. From Legal
Identity Report), (Name of Mine Operator), (City, Town, Borough,
etc.), (County), (State)

In one or two paragraphs, provide a brief description of what occurred, and when and where the incident occurred which lead to the investigation.

List or attach a list of those items which were received into evidence during the investigation. Tell who is the custodian of the evidence and where the evidence is secured.

Explain the reason(s) for requesting the release of evidence (i.e., all examination and testing has been completed and there are no pending actions by MSHA which would require use of this evidence)

cc: TCIO
SSI
AUSA/SOL
Files

MSHA ADMINISTRATIVE POLICY AND PROCEDURES MANUAL
ORGANIZATION - VOLUME 1, CH 300

NOTE: Officials exercising this authority must assure that such correspondence does not: (1) violate existing policy, (2) make policy exceeding authority, (3) officially comment on, affect, or concern legislation or (4) commit MSHA in a manner contrary to existing policies and procedures, or compromise the Assistant Secretary.

Re-delegation:

All first and second level officials. NOTE: The definition of first and second level officials can be found in Paragraph 304 of this manual chapter.

May be further re-delegated.

Limitations: Correspondence with the President requires approval by the Assistant or Deputy Assistant Secretary, and is reserved for the signature of the Secretary of Labor.

Correspondence in response to Congressional inquiries is reserved for the signature of the Assistant or Deputy Assistant Secretary.

349.5 Testimony of Employees

Authority: Grant permission for officials and/or employees of MSHA to give testimony, pursuant to a subpoena issued by an administrative or judicial body, concerning business matters of the government or the contesting of official records (29 CFR, Subpart C, 2.20-2.25).

NOTE: This delegation does not apply to testimony or statements made during the normal course of MSHA business.

Reservation: Authority is reserved to the Solicitor's Office.

349.6 Certification of Documents

Authority: Authenticate and release correspondence, reports, publications, and other documents from the files of MSHA (Memorandum from the Assistant Secretary for Administration and Management, March 13, 1978). The signing and issuing of certifications of authentication is under the seal of the Department of Labor (29 CFR, Section 70.68). In most instances, MSHA Form 1000-225, True Copy Record Certification, is to be used in certifying documents.

MSHA ADMINISTRATIVE POLICY AND PROCEDURES MANUAL
ORGANIZATION - VOLUME 1, CH 300

Re-delegation:

Coal/Metal and Nonmetal	Administrators and Deputy Administrators
Office of Assessments	Deputy Director, Assessments, Technical Compliance and Investigation Office District Managers
Administration and Management	Director and Deputy Director Chief, Management Services Division
Program Evaluation and Information Resources	Director Chief, Information Resource Center Chief, Office of Injury and Employment Information

May be further re-delegated.

Special Re-delegation: The Director of Assessments and Chief, Civil Penalty Compliance Office are re-delegated the authority to serve as Authentication Officers only in connection with the release and authentication of documents associated with the assessment and collection of penalty payments, respectively, assessed under Section 110, Federal Mine Safety and Health Act of 1977. This authority may be further re-delegated.

CHAPTER 7 - CASE FILES AND FINAL REPORTS**A. CASE FILES:**

1. A case file will be established for every special investigation. It will consist of a file folder with a two-prong fastener affixed to the right side at the top, with attachments as specified below.
2. Case numbers shall be assigned as indicated in Exhibit 7-1 for Coal Mine Safety and Health (CMS&H) or Exhibit 7-2 for Metal and Nonmetal Mine Safety and Health (MNM). Every case file shall have an Investigation Assignment Control, MSHA Form 2000-158 (Exhibit 7-3), stapled onto the left inside cover. Instructions for completing Form 2000-158 are outlined in Exhibit 7-4. No other documents are to be placed on the left side of the case folder.

Contact with any person involved in the investigation shall be noted on the Investigation Assignment Control Form. This chronology of events may be used to resolve any differences of opinion concerning events which transpired during investigation of the case.

3. Clear and legible copies of all statements and other documents referred to as exhibits in each investigation report shall be numbered sequentially. Each exhibit shall be tabbed on the first page and the tab appropriately marked with an exhibit number (i.e., 1, 2, and 3). If the exhibit consists of more than one page, each page shall be numbered in the lower right-hand corner, showing the exhibit number and page (i.e., 1-1, 1-2, and 1-3).
4. The investigation report and all exhibits shall be attached to the right side of the case file folder and "post-bound" using the two-prong fastener. If more than one folder is required, each shall be numbered sequentially. Each folder shall have a label indicating the case number and parties involved as described in C.1. and C.2. below.
5. All special investigative case files shall be stamped "CONFIDENTIAL" on the outside cover and must be kept under lock and key. The SI (Special Investigator) shall be responsible for maintaining the confidentiality and security of all files. Access to these files shall be by authorized personnel under the discretion of the SSI (Supervisory Special Investigator). A record of persons having had access to the file shall be recorded on the Investigation Assignment Control Form (Exhibit 7-3).

6. When an investigation has been completed, all investigative notes generated by the SI must be marked with the case number (and the word “NOTES”) and placed in the case file. If later called upon to testify, these investigative notes may be used to refresh their memory. Personal memoranda or other extraneous notations not related to the investigation SHALL NOT be included among these papers.
7. If a hazardous condition or potential violation is identified during an investigation, the action taken by the SI and SSI (i.e., referral of that condition to the DM) shall be documented in a memorandum to the file (see Program Policy Manual (PPM) Vol. I., Sec. 110).
8. The SSI shall maintain the official (original) file in the district office. The SI may retain an extra copy until a case has been litigated or closed, at which time it will be forwarded to the SSI for disposal.

B. ORGANIZATION OF CASE FILES:

1. Section 105(c): The organization of the case file should reflect the order in which the case report is presented. The organization of the case file is as follows:
 - Cover letters, transmittal letters, etc. (Sample 105 cover letter (Exhibit 7-6))
 - Memorandum of Investigation (Final Report)
 - List of Exhibits
 - Discrimination Complaint Forms (MSHA Forms 2000-123 and 2000-124), notification letters, copy of signed certified mail receipt
 - Legal Identity Report
 - Interview Statements and Memorandums of Interview
 - Photographs, maps, and sketches of areas which indicate pertinent locations or points
 - Copies of mine plans relevant to the case file
 - Mine records relevant to the case report
 - Technical reports or laboratory analysis
 - Mine Status Report
 - Internal memorandums
 - Names, addresses, and telephone numbers of persons interviewed
 - Other records, notes, and miscellaneous information relevant to the case file are to be kept in a sealed envelope separate from the case file
2. Section 110: The organization of the case file should reflect the order in which the case file report is presented. The organization of the case file is as follows:

- Cover letters, transmittal letters, etc., (see Exhibit 7-5 for sample 110 cover letter)
- Memorandum of Investigation (Final Report)
- List of Exhibits
 - Possible Knowing/Willful Violation Review Form (MSHA Form 7000-20), Citation/Order Documentation Forms (MSHA Forms 7000-3 and 7000-3a), inspection notes, and documentation
 - Legal Identity Report Form
 - Articles of Incorporation
 - Interview Statements and Memorandums of Interview
 - Mine Status Report Form
 - Conference Worksheet (MSHA Form 7000-12)
 - Photographs (taken during the investigation), maps, and sketches of area(s) which indicate pertinent locations or points
 - Copies (certified for those cases recommending referral to Justice) of mine plans (i.e., approved ventilation and roof control plans)
 - MSHA accident reports relative to the investigation
 - Technical reports or lab analysis
 - Mine records (i.e., preshift/on-shift examination records)
 - Other miscellaneous records relevant to the case file as necessary
 - Citation/Order History
 - Mine Assessment History
 - Internal memorandums
 - Names, addresses, and telephone numbers of persons interviewed
- Notes and miscellaneous information are to be kept in a sealed envelope separate from the case file

C. INVESTIGATION REPORTS:

Every investigation report, regardless of the type of investigation, shall be prepared in the appropriate manner as described below. When the investigation report is being reviewed by the SSI for completeness and adherence to policy, changes shall not be made without first consulting with the SI who conducted the investigation and prepared the final report. Each investigation report written by the SI will be forwarded through the SSI to the DM for approval.

The required number of case file copies (as discussed below) will then be transmitted from the DM to the Assistant Director, TCIO (see Exhibit 7-5 for Section 105(c) cases and Exhibit 7-6 for Section 110 cases). All files shall be placed in heavy duty envelopes

and sent by certified mail, return-receipt requested. Transmittal envelopes shall be clearly marked "Special Investigation – Confidential" and addressed to the attention of the Assistant Director, TCIO.

1. **Section 105(c):** A case file will be established by the complaint processor, for all Section 105(c) cases. It will consist of a file folder prepared as described in sections A.1. and A.2. above. A label shall be affixed to the case folder as follows:

CMS&H

M/NM

HOPE-CD-2005-01
Doe v. ABC Coal Company

SE-MD-05-01
Doe v. XYZ Gravel

The original Forms 2000-123 and 2000-124, and copies of notification letters to the complainant(s) and respondent(s) (as prepared by the complaint processor), shall be inserted in the file (see section B. 1. for case file organization).

When a complaint alleging a discharge is received, the complaint processor shall stamp the word "DISCHARGE" in large red letters on the outside cover of the file folder. After the case file has been assembled, the complaint processor will release the file in accordance with instructions received from the SSI. Case files shall be sent to the SI (assigned to the investigation), by certified mail, return-receipt requested.

- **Number of Case Files:** The district will retain each original 105(c) case file folder. The following number of case file copies must be prepared and submitted to TCIO. Copies of each 105(c) complaint investigated MUST be submitted to TCIO regardless of the findings in the report

<u>Type of Investigation</u>	<u>Number of Case Files</u>
Section 105(c), discrimination complaint cases	2 copies

The guideline that follows illustrates suggested report format and content for Section 105(c).

SECTION 105(C) INVESTIGATIVE REPORT

DATE:

MEMORANDUM FOR:

DM--Coal or Metal and Nonmetal Mine Safety and Health

THROUGH:

Supervisory Special Investigator

FROM:

Special Investigator

SUBJECT:

Special Investigation Report of a Discrimination Complaint
Filed in Accordance with Section 105(c) of the Federal
Mine Safety and Health Act of 1977 (Mine Act)
John Doe v. ABC Mining Corporation, No Luck Mine, I.D.
No. 12-34567; Case Number -----

The evidence gathered during this investigation supports that a violation of Section 105(c) has (has not) occurred. It is therefore recommended that (no) further action be taken concerning this matter.

Introduction: The purpose of this section is to quickly orient the reader with the subject matter of the investigation.

Analysis:

Protected Class: Section 105(c) of the Mine Act affords protection from discrimination for:

- Miners
- Representatives of miners
- Applicants for employment

Persons filing complaints must provide evidence that they were employed in, or acting in, one of the categories listed above.

EXAMPLE: Complainant John Doe, Mechanic and Mine Health and Safety Committeeman, has performed services at the ABC Mine Mining Corporation for approximately 6 years. The complainant was a member of a protected class.

Protected Activity: Protected activities may include the following:

- Filing or making a complaint of an alleged danger or safety or health violation
- Instituting any proceeding under the Mine Act (for example, filing a complaint with the Federal Mine Safety and Health Review Commission pursuant to Section 111)
- Testifying (or is about to testify) in any such proceedings
- Being the subject of medical evaluation and potential transfer under Section 101 (harmful physical agents and toxic substances)
- Enforcing the safety training provisions of Section 104(g) and Section 115
- Refusing to work in unsafe or unhealthy conditions
- Exercising any statutory right afforded by the Mine Act

The complainants must provide evidence that they were involved in (or that management believed they were involved in) activities afforded protection under the Mine Act. Where issues of work refusal or complaints about safety or health issues are involved, the SI must obtain evidence to support that a reasonable attempt was made by the complainants to convey their concerns to a member of management. The SI must also seek evidence to support that the complainants were reasonable in their beliefs that the condition or work assignment was unsafe, unhealthful, or similarly violative. EXAMPLE: On September 17, 2005, Complainant John Doe, acting in the capacity of safety committeeman, reported to mine management and union officials, hazardous and violative conditions he discovered during his shift.

Adverse Action (Discriminatory Acts): Discriminatory acts may include the following:

- Discharge, termination, or laying off
- Demotion
- Refusal of employment
- Reduction in benefits, vacation, bonuses, or rates of pay
- Change in pay or hours of work
- Interference with the exercise of the statutory rights of miners
- Subtle forms of interference such as promises of benefit or threats of reprisal
- Transfer to another position with compensation at less than the regular rate of pay received immediately prior to transfer.

The complainants must provide evidence that some type of adverse action has occurred. EXAMPLE: John Doe was singled out, separated from his crew, and sent to an area

outby to work, in retaliation for safety complaints that management officials believed Doe made to a union representative and State and MSHA inspectors.

Nexus: The investigator must show by a preponderance of evidence, that there is a connection between the involvement of the complainant (perceived or real) in a protected activity and the alleged discriminatory action. Some ways of showing the connection are to provide evidence which supports and one of the following:

- Timeliness of events
- Evidence of disparate treatment
- Admission by the discriminating official

If each of these four elements has been addressed, and the evidence obtained supports the complaint, a prima facie case has been established.

The investigator must also gather evidence in support of the respondent. The respondent may either rebut the complainant's prima facie case or offer evidence to affirmatively defend. EXAMPLE: Doe's protected activities are directly connected to the discriminatory actions of management. Doe reported several health and safety related complaints to mine management on September 16, 2005 (Exhibit 4, p. 2, Exhibit 5, p. 1, Exhibit 19, p. 1, Exhibit 20, p. 3, and Exhibit 25, p. 12). That same morning management overheard Doe joking with his crewmembers about calling the inspectors (Exhibit 22, p. 1 and Exhibit 25, p. 3). When Doe reported to work the next day, he was sent to perform minimal, labor-intensive duties that were outside the realm of his normal work duties.

Operator Defense: The investigator shall gather all evidence presented by the respondent(s) which purports to show that:

- The complainant was not involved in any protected activity
- There was no discriminatory act
- The action taken was motivated by the complainant's involvement in unprotected activities and that the adverse action would have been taken in any event based on the unprotected activities alone

In cases where the respondents are able to affirmatively defend their position, findings of "No violations of § 105(c)" have been issued by an ALJ and the FMSHRC. EXAMPLE: Mine Management stated that they changed Doe's work orders because they didn't need a mechanic on the No. 018 Section that day because of the potential limited production. Management stated that at the time they changed Doe's work orders, they believed the conditions in the outby areas reported to them by Doe on the Safety Director's list (Exhibit 21) were the same conditions Doe was sent to clean up.

Relief Requested: This section concerns the complainant's request of relief from the Respondent or remedy being sought. EXAMPLE: Doe is seeking to have the company cease and desist from retaliating against him for reporting safety complaints to inspectors. He believes such action by management will cause a chilling effect on safety at the mine. He is also requesting that the company develop a better way of dealing with serious safety matters (Exhibit 1, p. 2 and Exhibit 4, p. 6).

Background and Jurisdiction: A brief profile of the operation, including interstate commerce information, should be included in this section. EXAMPLE: Mining services are conducted at the ABC Mining Corporation with the object of mineral production. This process of mineral use falls under the jurisdiction of MSHA. The mine employs approximately 300 persons on 3 production shifts and United Miners, Local No. 9999, represent the miners.

Discussion of the Facts: EXAMPLE: A *prima facie* case has been established. Complainant Doe is a "miner" who engaged in protected activity when he reported violative safety and health conditions to mine management on September 16, 2005. One of the conditions Doe reported to management prompted inquiries from the United Miners and resulted in investigations being conducted by State Inspectors Brady and Arrington. The next two days, management assigned Doe to work outby the section away from the rest of his crew. Miners Hanson and Thompson were present when management told Doe he was given this assignment because he called the inspector prompting an investigation into the conditions Doe had reported to management (Exhibit 10, p. 2 and Exhibit 11, p. 3).

The respondent claims that Doe was not needed to work in the section he was originally assigned to work the night of September 17, 2005, because of the anticipated low production. The respondent also claims he sent Doe to correct clean up conditions he believed Doe had identified and reported to management on September 16, 2005.

The evidence supports that the respondent knew the conditions identified by Doe had been corrected by the utility crew, before the start of Doe's shift on September 17, 2005. Furthermore, Doe will testify that he was not sent to clean up the area he had reported but to a different area (Exhibit 4, p. 4, Exhibit 6, and Exhibit 7). The hazardous water conditions on the section reported by Doe were not corrected until October 4, 2005, when State Inspector Brady cited the operator (Exhibit 15, p. 2).

The disparate treatment of Doe on September 17 and 18, 2005, was discriminatory, and a direct act of retaliation, because the respondent believed Doe caused inspectors to be called resulting in an investigation of conditions that existed at the mine.

2. **Section 110:** The secretary or complaint processor will establish a case file for all Section 110 cases. It will consist of a file folder prepared as described in sections

A.1. and A.2. above. A label, as in the example below, shall be affixed to the folder:

<u>CMS&H</u>	<u>M/NM</u>
VINC-CSI-2005-01 ABC Coal Company	NE-MW-05-01 XYZ Gravel

The Violation Review Form, and all supporting information and documentation from the DM authorizing initiation of an investigation shall be inserted under the two-prong fastener (see section B.2. for case file organization).

The final investigation case file for each Section 110 investigation shall contain on the right side, in this order, the Investigation Report, the List of Exhibits page(s), and all documents properly tabbed as exhibits (see A.3. above).

- **Number of Case Files:** The district will retain each original case file folder. The following number of case file copies must be prepared and submitted to TCIO:

<u>Type of Investigation</u>	<u>Number of Case Files</u>
Section 110 special investigation cases recommending prosecutorial action (The original case file shall be retained by the investigator, or the custodian of evidence, so that the chain of custody may be maintained)	3 copies
Section 110 special investigation cases recommending civil agent penalty action	2 copies
Section 110 special investigation cases recommending no further action	none

- **Cases Not Recommending Further Action:** For any Section 110 special investigation case file where there is no evidence of a violation of Section 110, and none of the citations or orders investigated are recommended for further action, the DMs have the authority to close the case. The DM is authorized to close a Section 110 case, based upon a determination that a knowing or willful violation has not occurred, and that there is no merit in pursuing further action. The DM shall notify the operator or contractor by letter (identifying the citation(s) and order(s) involved) and indicate that MSHA has decided not to pursue further action (Exhibit 7-8). A copy of the

notification letter shall be sent to TCIO along with a memorandum briefly stating the reasons for the district's determination.

When responding to requests from the Regional Solicitor (RSOL) to review 110 cases closed by the DM, a cover memo shall be prepared by the DM similar to that contained in Exhibit 7-9. Regional Solicitors should still direct their request for copies of 110 case files to SOL, Arlington, VA.

The guideline that follows illustrates suggested report format and content for Section 110.

SECTION 110 INVESTIGATIVE REPORT

DATE:

MEMORANDUM FOR:

District Manager--Coal or Metal and Nonmetal Mine
Safety and Health

THROUGH:

Supervisory Special Investigator

FROM:

Special Investigator

SUBJECT:

Special Investigation Report of Possible Knowing and/or Willful Violations under Section 110 of the Federal Mine Safety and Health Act of 1977, at ABC Mining, Inc., No. 2 Mine, ID No. 00-12345, Case Number _____

Introduction

The introduction orients the reader to the violation(s) or conditions which initiated the investigation.

EXAMPLE: This investigation was initiated as a result of 104(d)(2) Order No. 6068166 for a violation of the approved roof control plan and 104(d)(2) Order No. 6068167 for a violation of the approved ventilation plan.

On January 27, 2005, during a Safety and Health Inspection (E01i) conducted at ABC Mining, Inc., No. 2 Mine, a State Mine Inspection official informed MSHA Inspector Jerry Phillips that a deep cut had been mined in the No. 1 Section during the afternoon shift of January 27, 2005. Miners from the midnight and morning shift told Phillips that the afternoon shift had mined a cut of coal measuring approximately 51 feet in length. They also informed Phillips that the line canvas was not maintained to within 10 feet of

the face. Phillips determined that the section foreman on the afternoon shift was present when the deep cut was taken and that he also instructed the miners to mine the deep cut. Inspector Phillips issued 104(d)(2) Order No. 6068166 for exceeding the maximum approved depth of cut and 104(d)(2) Order No. 6068167 for failure to maintain ventilation controls within 10 feet of the face (Exhibit 1, p. 2, Exhibit 2, p. 2, Exhibit 6 and Exhibit 7).

Background and Jurisdiction:

One of the most important elements in any investigation is to establish that the operation falls under the jurisdiction of the Federal Mine Safety and Health Act of 1977. To establish jurisdiction, provide documentation to prove that the operation is a mine as defined by the Act and that the mine products enter commerce or product affects commerce. If there is uncertainty regarding jurisdiction, the agency representative must gather all related information and relay it to the DM. If uncertainty remains, the DM should consult with the Administrator and the SOL. Once jurisdiction has been established, the case may proceed. It is also necessary to establish that the operator is a corporate operator in good standing on the date of the underlying violation. This is usually established by contacting the Office of the Secretary of State or that office's website and obtaining documentation establishing the necessary foundation for a 110(c) civil penalty.

EXAMPLE: The No. 2 Mine is owned and operated by ABC Mining, Inc., which is a corporation registered in the Commonwealth of Pennsylvania. Coal is extracted from the Pittsburgh seam and is processed and sold for use for electric power generation. The product enters into and affects interstate commerce. The mine is in an active status and has been since September 14, 1995. The miners are represented by the United Mine Workers of America, Local No. 1234 (Exhibit 3, Exhibit 4, p. 2, and Exhibit 5).

The operator requested a conference regarding the subject violations in this case. At the conference, the mine operator withdrew both orders from discussion (Exhibit 20).

As of the date of this report the subject citations/orders have not been assessed.

The following agent of the corporate operator may have committed knowing and/or willful violations as defined in the Federal Mine Safety and Health Act of 1977:

Foreman James Felder
ABC Mining, Inc.

Foreman James Felder has not been the subject of any previous civil or criminal actions.

Proof the violations were properly cited:

This section demonstrates whether the description of the subject citation(s) or order(s) is consistent with the information contained within the case file. For example, although a citation has not been contested and is final, the investigator may have a concern that the wrong standard has been cited: that concern should be noted in this portion of the

summary. The status of the violations between the operator and the agency should be discussed.

EXAMPLE: Two 104(d) Orders were issued on January 28, 2005. Phillips properly cited 30 CFR Section 75.220(a) (1), for mining deep cuts in excess of 40 feet and not having a conspicuous reference marker or other visual means to determine when the maximum depth of the cut was attained (Exhibit 8); Phillips also properly cited 30 CFR Section 75.330(b) (2) for the failure to install ventilating control devices at a distance no greater than 10 feet from the face (Exhibit 9). These violations have not been assessed so the operator has not had the opportunity to contest them.

Proof the individual was an agent:

This portion of the report should discuss the proof that the individuals who are to be charged with authorizing, ordering, or carrying out a violation are, in fact, agents of the operator. The definition of the term agent is included in the definition section of the Mine Act and includes a person who has control over a portion of the mine or who supervises miners. In some cases, the basis for the claim will be clear, i.e., the individual is in upper mine or company management such as President, General Manager, or a supervisor of miners, such as mine superintendent, shift foreman, or section foreman. In other cases, the basis for the claim will have to rest on the actual proof of the person's responsibilities. Federal case law establishes that one who is delegated responsibility by the mine operator to conduct preshift and onshift examinations for hazardous conditions is an agent of the operator while performing that statutory duty. Evidence must be provided that the alleged agent has authority or control over the activities that relate to the knowing/willful violation being investigated.

EXAMPLE: ABC Mining, Inc., was a corporation in good standing at the time the violations were cited. James Felder is employed as a foreman at the No. 2 Mine. On January 27, 2005, Felder was the foreman in the No. 1 Section who conducted the on-shift examination and directed the work force. When performing these duties, he was acting as an agent of the corporate operator (Exhibit 6, p. 6, Exhibit 12, p. 1, Exhibit 13, p. 2, Exhibit 14, p. 1, and Exhibit 19, p. 2).

Proof of high degree of risk:

Risk is the potential for harm caused by a condition or practice. The risk is elevated when some conduct or oversight increases the potential for harm to miners. While a high degree of risk is not a strict element of proof in such cases, evidence of such a risk is often useful in establishing the other elements of Section 110 such as reason to know and authorized, ordered, or carried out. This discussion should include, but not be limited to, special evaluation findings which accompanied the initial enforcement action.

EXAMPLE: The area of unsupported roof was approximately 51 feet long and 20 feet wide. The larger the area of unsupported roof, the greater the risk of a roof fall occurring. This mine has experienced 17 unplanned roof falls, above the anchorage zone, during the time period from December 1998 to January 2005 (Exhibit 29, p. 2 and Exhibit 30, p. 1). The mine liberates approximately 1,275,000 cubic feet of methane in a 24-hour period. The Lost Eagle side of the mine liberates 91,000 cubic feet of methane in a 24-hour

period and is on a 5-day spot inspection. Not ventilating a cut of this length could expose miners to a build up of methane and respirable dust (Exhibit 3, p. 2 and Exhibit 16, p. 1 and Exhibit 22, p. 4).

Proof agent authorized, ordered, or carried out the violation:

Section 110(c) requires the Secretary to establish that an agent knowingly authorized, ordered, or carried out a violation. This portion of the report should specifically state the proof that the agent in fact authorized, ordered, or carried out the violation, thereby having constructive knowledge of the condition or practice, (i.e., interviewed miner witnesses confirm that they were, in fact, directed by Section Foreman _____ to take deep cuts on this date and shift). It is the agency position that if violations are being carried out in the presence of an agent, and that agent does not take affirmative action to prevent or eliminate the violative condition, then the agent is indirectly authorizing the violation to be carried out or the hazard to persist.

EXAMPLE: Foreman James Felder was responsible for directing the work force on the No. 1 Section. Felder was informed by the continuous mining machine operator, that he (miner operator) cut 37 feet and had not holed through. Felder took measurements and determined that the block of coal was 44 feet from rib line to rib line. Felder then instructed the miner operator to cut it through. The miner operator and miner helper questioned Felder's instructions. Felder again instructed them to mine the cut through, into the next entry, saying they could install a few quick rows of bolts. Felder stayed and observed the mining machine cut through into the next entry (Exhibit 13, p. 1, Exhibit 14, p. 2, and Exhibit 19, p. 1).

Section 110(d) requires proof of willful disobedience or reckless disregard. This portion of the report requires proof of criminal liability and should discuss the evidence supporting the charge that the operator or individual(s) willfully or with reckless disregard violated a federal safety or health standard or order issued under the Mine Act. An action is done willfully if it is done intentionally and with purpose to commit the violation or with reckless disregard for compliance with the standard. An example of willful and intentional conduct would be a shift foreman who knows that no one has conducted a pre-shift examination but orders miners to work despite that knowledge. In that example, the pre-shift examiner who entered a false report that the examination was conducted should also be under investigation for willful and intentional misconduct including falsification of the record under Section 110(f).

Moreover, the mine superintendent who knew or had reason to know of this misconduct condones the conduct of the shift foreman and the pre-shift examiner and has committed a willful violation. Reckless disregard for compliance extends the reach of the criminal provisions of the statute to situations where an individual did not have specific knowledge or intent in a specific instance, but knew from actions and words that this type of misconduct was occurring. A mine superintendent who denies requests for ventilation or roof support materials and who repeatedly demands high production levels, but who

claims to have no knowledge or intent to inadequately support or ventilate a specific area of the mine on a given day can be charged with a willful violation under a theory that they had a reckless disregard for compliance with those standards. Please note that a willful or reckless disregard by an individual agent of a company is legally imputed to a corporate operator. The conduct of the mine superintendent, the shift foreman and the pre-shift examiner would all support a charge of a willful violation against a corporate operator as well. This principle can differ in the case of a sole proprietorship or partnership. Not entering a known violative condition in a required record book should be noted for consideration for prosecution as a false statement under Title 18, United States Code.

EXAMPLE: James Felder had reason to know the cut was too long because he measured the width of the block of coal as 44 feet from rib to rib. In fact, by his own admission, he knew the cut was too long when he first approached it before he gave the order to cut it through. Felder also knew that no roof bolts had been installed in the cut so he knew the line canvas was more than 10 feet from the point of deepest penetration (Exhibit 13, p. 1, Exhibit 14, p. 2, and Exhibit 19, p. 1).

Position of defense:

This portion of the report summarizes what evidence and statements have been provided by the individuals or companies under investigation. These parties have no obligation to provide explanatory defenses to their conduct. If they have done so, those statements and documentary evidence should be summarized in this section.

EXAMPLE: James Felder said it was safer to just cut the face through instead of exposing miners to the hazards of unsupported top while temporary supports were installed. Felder also said that line canvas could be moved closer to the face so that methane readings could be taken. Felder said he knew he had a remote-controlled miner; therefore, no one would be exposed to unsupported roof. Felder said the section did not liberate methane (Exhibit 19, p. 3, and Exhibit 20).

Conclusion:

This portion of the report should briefly state the analysis and conclusion of the evidence. The conclusion should be supported by reference to the evidence relied upon and in the event of multiple individuals or companies, should specifically discuss the evidence as it relates to each possible defendant.

EXAMPLE: The clear preponderance of evidence supports that Foreman James Felder, an agent of the corporate operator, knowingly authorized and ordered the violations as cited. Felder measured the length of the cut and knew the cut was too long. By his own admission, he knew that he had problems related to the length of the cut; however, he took no action to stop mining and install roof bolts and advance the ventilating curtain. Instead Felder instructed the crew to cut through into the next entry despite the miners questioning his instructions.

We recommend that James Felder be assessed civil penalties for his actions with regard to the subject violations.

D. HEADQUARTERS (TCIO) CASE REVIEW AND ANALYSIS:

TCIO will review and analyze each investigation case file submitted for quality, substance, and validity of conclusions.

1. **For each Section 105(c) investigation case file:**

TCIO will do **one** of the following:

- **Refer the case to SOL and recommend that the case be filed with the FMSHRC**

Each case file sent to RSOL will be accompanied by a summary analysis and either a recommendation to proceed with the case or, in an unusual situation, a request for advice. RSOL will independently review each case submitted for legal sufficiency and prepare a response to TCIO.

When an investigation file involving a finding of discrimination is recommended for further action by TCIO, and RSOL does not concur, RSOL will advise TCIO. RSOL will prepare a written analysis describing why they believe the case does not merit litigation. (If this can not be resolved, the issue may be presented to the Assistant Secretary for resolution.) This review, and any consultations or requests for additional information, will be targeted for completion within the 90-day statutory timeframe for responding to discrimination complaints. Once all issues have been resolved, the case will be filed with the FMSHRC or returned to TCIO for closing as described below.

- **Notify The District Requesting Additional Information**

This may or may not require the district to conduct further investigation.

When TCIO disagrees with the district, they will present the case to the appropriate Administrator for a final determination on MSHAs position. After resolution, those cases which have merit will be forwarded to the appropriate RSOL for review and analysis. Those found not to have merit will be returned to TCIO for closing as described below.

- **Close The Case**

TCIO will issue a letter to the complainant(s) indicating that MSHA did not find sufficient evidence to sustain that a violation of Section 105(c) of the Mine Act has occurred, and advise the complainant(s) of the right to file an independent action directly with the FMSHRC under Section 105(c)(3). Copies of this letter will be sent to the Respondent(s) and to the District.

2. **For Each Section 110 Investigation Case File:**

All timeframes for the processing of 110 cases are determined from the date of the underlying violation.

- **Potential Criminal Cases**

Whenever the district determines criminal potential in a 110 investigation, TCIO and the criminal counsel in Solicitors Office – Mine Safety and Health Division (SOL-MSH) should be notified immediately. A discussion of the merits of the case should be initiated for potential referral to the DOJ.

Potential criminal investigative files must be forwarded to TCIO within 120 days of the date of the underlying violation. If the required deadline cannot be met, the DM will submit an extension request in writing with valid justification to TCIO.

TCIO and the SOL-MSH will review and analyze the case. If the case is accepted for criminal referral, SOL-MSH will prepare a memorandum from the appropriate Administrator to the Assistant Secretary. Cases are referred to the appropriate local U.S. Attorney's Office or to the DOJ. The SOL-MSH will prepare a letter, signed by the Administrator and Associate Solicitor, forwarding the case file to the appropriate office. The Mine Safety and Health Administration and SOL should work together to make the case presentation to DOJ if requested.

If the Administrator and the Associate Solicitor decide NOT to pursue the case as a criminal matter, the case, if appropriate, will move forward as a 110(c) action. The district and TCIO will confer about further steps, including offering a Part 100 conference, or will close the case (see Section 2 below) See Exhibits 7-10 and 7-11.

If the Administrator and the Associate Solicitor do not agree on a recommendation, MSHA or SOL-MSH will discuss the case further and, where necessary, request a review by DOJ. Once resolved, the case will be handled as described above.

Advice from DOJ will also be sought in sensitive matters (i.e. drug cases, tax evasion, or other criminal activities not covered under the Mine Act) where there is agreement not to refer a matter for possible criminal prosecution.

In some circumstances, it may be necessary to expedite the review procedures for referral of a case. The following criteria can identify a case that may need expedited handling:

- A fatality or serious risk to safety or health occurred and there is strong evidence that deliberate noncompliance is involved in the case
 - The case is significant and there is a likelihood that evidence will be tampered with or documents destroyed
 - There are significant indications of criminal wrongdoing, but resorting to compulsory process may be necessary to develop evidence of that wrongdoing
 - The DOJ or a U.S. Attorney has asked for immediate referral of the case unless there is no indication of criminal wrongdoing
 - In a case that meets one or more of these criteria, headquarters approval for referral of the case to the DOJ or U.S. Attorney, as appropriate, is required. The DM will prepare a memorandum to TCIO requesting approval for the expedited referral to the DOJ. The levels of review for such referrals are the same as other Section 110 cases, except that the review will be given higher priority
 - In exceptional cases, where verbal approval is granted to expedite the referral, the DM will submit a memorandum of the request for expedited referral (see Exhibit 7-13)
- **Refer The Case To SOL And Recommend Pursuing Civil Penalty Action Under Section 110(c)**

All timelines referred to in this section are from date of issuance of the violation or when MSHA had actual notice of the subject incident. TCIO must forward each case to SOL-MSH within 210 days. Within 210 days from the date of the underlying violation, the DM shall submit a memorandum to TCIO, containing the results of the agent health and safety conference, attaching any documentation submitted during or as a result of the conference. In those situations where the results of the conference change the recommendation of the DM, the memorandum shall explain the reasons for the change in recommendation. Based upon this review and upon further consultation between TCIO, SOL-MSH, and the district, the case will either be pursued for civil penalty action or closed by TCIO.

If no conference is requested, or is requested but not conducted, the DM shall submit a memorandum to TCIO, with information explaining why the health and safety conference was not conducted. Regardless of which memorandum is submitted, the DM shall include their recommendation on proposal of an individual civil penalty. The correct home address of each agent for which a civil penalty is being proposed shall be included (see Exhibit 7-12).

When an investigation file involving civil agent penalties is recommended for further action by TCIO, and SOL-MSH does not concur, SOL-MSH will notify TCIO if it has concluded that the civil penalty against any individual should not be proposed. If TCIO disagrees, they may contact the SOL-MSH to try to resolve the disagreement. Once all issues have been resolved, the case will either be pursued for civil penalty action or will be closed by TCIO.

TCIO has 220 days to coordinate the final decision and notify the Assistant Director, Special Assessments, that the violation is ready for assessment of individual civil penalties. All individual civil penalties should be issued within 240 days of the date of the underlying violation. If the 240-day timeframe is exceeded, TCIO will review the case and decide whether to recommend referral to the Director of Assessments so that the individual civil penalty may be proposed. In such cases, the referral memorandum to the Office of Assessments will be approved and signed by the Administrator and the Assistant Director, TCIO.

- **Notify the District Requesting Additional Information**
This notification may or may not require the district to conduct further investigation.

When there is disagreement between TCIO and the district, TCIO will present the case to the Administrator for resolution. After resolution, the case will be forwarded to SOL-MSH or returned to TCIO for closing.

E. REPORTING OF CRIMINAL PROSECUTIONS:

Grand jury indictments, criminal information, defendant pleas (including pre-indictment, nolo contendere or guilty pleas), convictions, and sentencing should expeditiously be reported by telephone to the Assistant Director, TCIO. The corresponding court documents should be obtained and forwarded to TCIO for inclusion in the Section 110 case file. Most criminal prosecutions will require a minimum submission of three court documents:

- The indictment and/or information
- The defendant signed agreement pleas and/or record of court convictions after trial
- The judgment in a criminal case sentencing record

Each of these should be obtained and submitted to TCIO as soon as each document is available from the court or AUSA.

In cases where there is more than one co-defendant, immediate verbal notification to TCIO should occur each time that an individual or operating company is charged, pleas, or is sentenced (as outlined above), followed by the timely submission of the supporting court document. A “Summary of Criminal Proceedings” (Exhibit 7-14) should be prepared and submitted to TCIO immediately after conviction or plea by the initial defendant. The Summary should reflect the date set for sentencing, if scheduled. Revisions to include action against co-defendants should also be prepared and submitted to TCIO.

SPECIAL INVESTIGATIONS - COAL

CASE NUMBERS AND CODES FY - 05

Case Numbers will be assigned using the following prefixes for identification:

HEADQUARTERS – HQ	DISTRICT 6 – PIKE
DISTRICT 1 - WILK	DISTRICT 7 - BARB
DISTRICT 2 - PITT	DISTRICT 8 - VINC
DISTRICT 3 - MORG	DISTRICT 9 - DENV
DISTRICT 4 - HOPE	DISTRICT 10 - MADI
DISTRICT 5 – NORT	DISTRICT 11 – BIRM

Activities will be coded in the following manner (Example: The third discrimination complaint filed in District 6 during FY - 05 would be PIKE-CD-2005-03):

CASE NUMBERS

CD-2005-01	Discrimination Complaint	105(c)
CSI-2005-01	Special Investigation	110(c), (d), (f) or (h)
CDE-2005-01	Denial of Entry	108(a)
CAO-2005-01	Working Against Orders	108(a)
CTI-2005-01	Threats Against Inspectors	108(a)
CAW-2005-01	Advance Warning of Inspection (Impeding)	108(a)

MSIS CODES

E12	Knowing/Willful Investigations	110(c), 110(d), 110(f), and 110(h)
E05	Injunctive Actions or Other SI Activities	(108)
E11	Special Investigator Discrimination Investigation	(105)
T03	Legal Hearings/Documents ¹	
T04	Violation Conference	
T16	Citation/Order Review	

¹ This code is to be used for the purpose of tracking time spent on all referrals to the DOJ and SOL.

SPECIAL INVESTIGATIONS - METAL AND NONMETAL

CASE NUMBERS AND CODES FY - 05

Case numbers will be assigned using the following prefixes for identification:

HEADQUARTERS – HQ	SOUTHEAST DISTRICT - SE
NORTHEAST DISTRICT - NE	SOUTH CENTRAL DISTRICT - SC
NORTH CENTRAL DISTRICT - NC	WESTERN DISTRICT - WE
ROCKY MOUNTAIN DISTRICT - RM	

Activities will be coded in the following manner (Example: The third discrimination complaint filed in Northeast District during FY - 05 would be NE-MD-05-03):

CASE NUMBERS

MD-05-01	Discrimination Complaint	105(c)
MW-05-01	Special Investigations	110(c), (d), (f), or (h)
MDE-05-01	Denial of Entry	108(a)
MAO-05-01	Working Against Orders	108(a)
MTI-05-01	Threats Against Inspectors	108(a)
MAW-05-01	Advance Warning of Inspection (Impeding)	108(a)

MSIS CODES

E12	Knowing/Willful Investigations	110(c), 110(d), 110(f), and 110(h)
E05	Injunctive Actions or Other SI Activities	(108)
E11	Special Investigator Discrimination Investigation	(105)
T03	Legal Hearings/Documents ¹	
T04	Violation Conference	
T16	Citation/Order Review	

¹ This code is to be used for the purpose of tracking time spent on all referrals to the DOJ and SOL.

SPECIAL INVESTIGATIONS PROCEDURES HANDBOOK

CHAPTER 7
Exhibit 7-3

Investigation Assignment Control

U.S. Department of Labor
Mine Safety and Health Administration



1. Case Number		2. Date Case Assigned		3. Investigator	
4. Mine Company		5. Mine Name		6. ID Number 36-	
7. Address			8. Type of Discrimination:		
Discrimination Complaints Only items 9 - 13					
9. Complainant's Name			10. Phone Number		
11. Address			12. Respondent's Name(s)		
13. Date Complaint Received		15-Day Start Date		90-Day Decision Date	
15. Prior History/Supervisor's Remarks/Event Number				14. Referrals	
16. Attorney Assigned		17. Date		18. Disposition	
19. Field Office					

Case Diary

Date	Action	Place	Hours	Initials

**INVESTIGATION ASSIGNMENT CONTROL FORM
(MSHA Form 2000-158)****General Instructions for Completion**

The purpose of the Investigation Assignment Control Form is to summarize pertinent case data, provide a chronological record of investigative activities, and track the amount of time the investigator spends on the investigation. The form is a permanent part of the case file.

The complaint processor, or other individual initiating the case file folder, will complete Items 1 through 13 and 19 for discrimination investigations. The investigator assigned to the case will complete the "Case Diary" section as the investigation progresses. The Case Diary Sheet - Copy D will be stapled to the left inside cover of the case file; the other copies will be distributed as indicated on the bottom of each form sheet.

Listed below is an explanation of the information needed under each item number:

1. Case Number: The number assigned to the special investigation by the SSI.
2. Date Case Assigned: The date the case number was assigned to the investigator.
3. Investigator: The name of the individual who will conduct the investigation and the investigator's phone number.
4. Mine Company: The name of the principle mine company involved in the investigation.
5. Mine Name: The name of the principle mine involved in the investigation.
6. I.D. Number: I.D. Number of mine.
7. Address: The complete address of the mine operator.
8. Type of Discrimination: Discharge; Interference; or Applicant for Employment.

Complete Items 9 through 13 for discrimination complaints only:

9. Complainant's Name: The name of the person filing the complaint. If more than one person is filing, you may put the name of the first person and then "et al".

10. Phone: A telephone number(s) where the person filing the complaint can be reached.
11. Address: The home address of the person filing the complaint.
12. Respondent's Name(s): The name(s) of the individual(s) who allegedly took discriminatory action against the miner. If more than one respondent is named, you may put the name of the first, followed by "et al".
13. Date Complaint Received: The date the complaint was received in an MSHA or ESA Black Lung Office.

15-Day Start Date: The date by which the investigation started (15 calendar days after the date the complaint was received).

90-Day Decision Date: The date by which a determination must be made as to whether or not a violation occurred (90 calendar days after the date the complaint was received).

14. Referrals: The date and office/person to whom the case file was sent.

Example: On 01/10/05 the complaint processor sent the case file to John Doe, SI.

01/10/05	John Doe, SI
01/31/05	Bill Smith, SSI
02/05/05	TCIO

15. Prior History/Supervisor's Remarks/Event Number: The supervisory special investigator will indicate other complaints filed by the miner or against the respondent, previous violations which were under investigation, or other background information which would aid the current investigation. **THE EVENT NUMBER SHOULD BE CLEARLY NOTED IN THIS SECTION.**

16. Attorney Assigned: The name of the headquarters or regional attorney assigned to the case.
17. Date: The date the attorney was assigned to the case.
18. Disposition: The special investigation headquarters office will indicate the final results of the case, (i.e., "violation, penalty assessed", "case dismissed", etc.).
19. Field Office: The location of the field office and the district where the complaint is filed.

Example: Harlan, Kentucky, District 7

Case Diary: A chronological listing of all the actions the special investigator takes during the course of any investigation:

- Date: The date the action occurred
- Action: The particular activity performed, (i.e., "interviewed William Jones")
- Place: Where the particular activity was performed
- Hours: Time spent on the activity
- Initials: Initials of person performing the activity

Date:

MEMORANDUM FOR: (Name)
Assistant Director, Technical Compliance
and Investigation Office

FROM: DM

SUBJECT: Transmittal of Report of Special
Investigation Case Number _____

Enclosed is the subject report of a special investigation. A review of the information gathered during the investigation indicates that a possible violation of Section 110(c) has (or has not) occurred.

If you have any questions, please contact _____ Supervisory Special Investigator at (____) ____ - ____.

Enclosures (include appropriate number of case files)

Date:

MEMORANDUM FOR: (Name)
Assistant Director, Technical Compliance
and Investigation Office

FROM: DM

SUBJECT: Transmittal of Report of Discrimination
Investigation Case Number _____

Enclosed is the subject report of a discrimination investigation. A review of the information gathered during the investigation indicates that a possible violation of Section 105(c) has occurred.

If you have any questions, please contact _____ Supervisory Special Investigator at (____) ____ - ____.

Enclosures (include appropriate number of case files)

REPORT
OF
DISCRIMINATION
INVESTIGATION

Case No. _____

Date Complaint Received _____

Deadline for Submittal to Headquarters _____ (45 days after receipt of complaint)

Final Decision Must Be Made by _____ (90 days after receipt of complaint)

January 27, 2005

Apology Coal Company
P.O. Box 1234
Youngwood, West Virginia 25555

Re: Long Shot Mine
I.D. No. 46-99999

Dear Operator:

The Mine Safety and Health Administration has conducted a special investigation related to Citations 3986116, 3986117 and Order 3986118 issued on 05/05/05. We have decided not to pursue further investigative action at this time and the case is closed.

Sincerely,

DM

bcc: TCIO
MC:SSI:05/05/05

Date:

MEMORANDUM FOR:

REGIONAL SOLICITOR

FROM:

District Manager

SUBJECT:

Section 110 Investigation Case File

As per your request of Trial Attorney _____ on _____, enclosed is the subject closed investigative file for review and internal informational purposes only.

As you are aware, MSHA uniformly extends pledges of confidentiality in special investigations to encourage people to come forward and provide source statements, which are taken voluntarily and with the opportunity for personal representation. This confidentiality preserves MSHA’s ability to conduct special investigations in light of the very adverse impact that can occur if witness information becomes known.

Repercussions of having persons linked to statement information can include harassment, ostracism, loss of livelihood, blackballing and worse. Under the circumstances, it is difficult enough in some cases to obtain information even with the MSHA pledge of protection. This fact makes it critical that any information capable of identifying a source be protected in accordance with the “informant’s privilege.”

We request that this file copy be returned upon completion of the attorney’s review. Thank you for your cooperation. If you have any questions, please contact Supervisory Special Investigator _____ at _____.

Enclosures

cc: TCIO

Date:

Agent's Name:

Address of Agent:

City, State and Zip Code:

Dear Mr./Ms. _____:

This is to inform you that pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act), the Mine Safety and Health Administration (MSHA) is proposing to assess an individual civil penalty against you as an agent of (Name of Operating Corporation), (Name of Mine), (Mine I.D. No.) for knowingly violating (Section violated) as cited in (Citation/Order No.), which was issued on (Date Citation/Order was issued) (copy enclosed).

This proposed penalty is based on information obtained during a special investigation conducted under the Mine Act, MSHA Case No. (List case number).

This letter is also to inform you of your rights to a Safety and Health Conference, during which you may discuss negligence involved in the violations and present any information you wish to provide concerning the facts in mitigation of the violations. Your request for a conference must be submitted within ten days of your receipt of this letter. The request for a Safety and Health Conference should be sent to:

DM or person designated to conduct manager's conference

Address of DM or person designated to conduct manager's conference

or you may call him/her at (give phone number of person designated to conduct manager's conference). Otherwise, a conference will not be conducted. Should you not desire a conference, a response is not necessary. Your request for a conference does not affect your right to a formal hearing with the Federal Mine Safety and Health Review Commission. Statutory criteria for penalty assessment and conference procedures, as outlined in 30 CFR, Part 100, are enclosed.

Sincerely,

District Manager

Enclosures: (List number of items enclosed)

cc: TCIO

Date:

Agent's Name:

Address of Agent:

City, State and Zip Code:

Dear Mr./Ms. _____:

This is to confirm the conversation of (Date of phone contact), between you and (Name and title of MSHA person who made phone call) of this office. During the conversation, (Mr./Ms.) advised you that pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act), the Mine Safety and Health Administration (MSHA) is proposing to assess an individual civil penalty against you as an agent of (Name of Operating Corporation), (Name of Mine), (Mine I.D. No.) for knowingly violating (Section violated) as cited in (Citation/Order No.), which was issued on (Date Citation/Order was issued) (copy enclosed).

This proposed penalty is based on information obtained during a special investigation conducted under the Mine Act, Case No. ().

(Mr./Ms.) also informed you of your rights to a Safety and Health Conference, during which you may discuss negligence involved in the violations and present any information you wish to provide concerning the facts in mitigation of the violation(s). He/she further advised you that your request for a conference must be submitted within ten days from the date of the telephone notification, which would be (show the date by which the request must be received). Your written request should be sent to:

DM or Person designated to conduct manager's conference
Address of DM or person designated to conduct manager's conference

or you may call him/her at (give phone number of person designated to conduct manager's conference). Otherwise, a conference will not be conducted. Should you not desire a conference, a response is not necessary. Your request for a conference does not affect your right to a formal hearing with the Federal Mine Safety and Health Review Commission. Statutory criteria for penalty assessment and conference procedures, as outlined in 30 CFR, Part 100, are enclosed.

Sincerely,

District Manager

Enclosures: (List number of items enclosed)

cc: TCIO

Date:

MEMORANDUM FOR: (Name)
Assistant Director, Technical Compliance
and Investigation Office

FROM: District Manager

SUBJECT: Results of Safety and Health Conference on Proposed Civil
Penalty Assessment Against (Name of Agent) for Knowingly
Violating [Section(s) Violated] as Determined Based on the
Investigation Conducted under (Case Number)

Based on your memorandum, dated (Date of Memo), (Name of Agent) was informed by certified letter (Date of Notification Letter) of his/her right to a Safety and Health (Manager's) Conference concerning the proposed civil penalty assessment. A conference (was/was not) requested.

IF A CONFERENCE WAS CONDUCTED:

The conference was conducted on (Date of Conference), at (Address of Conference), by (Name and Title of Person who Conducted Conference). The results of the conference (Including any Documents Submitted) are enclosed. The information presented during the conference (Does/Does Not) change the findings in the case. (Name of Agent) (Should/Should Not) be assessed a civil penalty for knowingly (Authorizing, Ordering or Carrying Out) a violation of (Section Cited) as cited in (Citation/Order) issued (Date Issued).

IF A CONFERENCE WAS NOT CONDUCTED, THEN STATE:

No conference was requested or conducted. The DM still recommends that (Name of Agent) be assessed a civil penalty for knowingly (Authorizing, Ordering or Carrying Out) a violation of (Section Cited) as cited in (Citation/Order) issued (Date Issued).

**IN EITHER CASE, INCLUDE ANY OTHER COMMENTS YOU WISH TO MAKE.
WHEN THE DM RECOMMENDS THAT AN AGENT BE ASSESSED A PENALTY:**

The current mailing address for (Name of Agent) is:

Mr./Ms. (Name of Agent)
(Address of Agent)
(City, State, and Zip Code)

Enclosures: (Number)
cc: Files

Date:

MEMORANDUM FOR: ADMINISTRATOR
(for Coal Mine Safety and Health)
(for Metal/Nonmetal Mine Safety and Health)

FROM: DISTRICT MANAGER

SUBJECT: Request for Expedited Referral to the Department of Justice of
Special Investigation into Possible Willful Violations of
Mandatory Mine Safety and Health Standards at (Company
Name), (Mine Name), I.D. No. (I.D. Number), in (Location of
Mine), Case Number (Case Number)

In one or two paragraphs, describe why the case was opened and a summary of the facts to date.

Explain why you are requesting an expedited referral, i.e., potential destruction of evidence or “no further meaningful investigation may be conducted without compulsory (Grand Jury) testimony,” etc.

cc: TCIO
SSI
Files

SUMMARY OF CRIMINAL PROCEEDINGS

Technical Compliance and Investigation Office

United States of America

vs.

J & T Coal, Inc.

and

Garry Williams, Sr.

Southern District of West Virginia

Cr. No. 92-00061-01-B,

92-00061-02-B

March 18, 1993

MSHA Case No. NORT-CSI-91-21

REASON FOR INVESTIGATION:

This investigation was initiated as the result of a fatal roof fall accident that occurred on February 13, 1991, at J & T's No. 1 Mine, which resulted in the death of 4 miners.

CHARGES:

On December 16, 1992, in U.S. District Court for the Western District of Virginia, a Federal Grand Jury handed down a 12-count Indictment against J & T Coal, Inc., and Garry Williams, a former Superintendent at the No. 1 mine. The corporation and Williams were each charged in 6 counts of the 12 count Indictment. The charges included: failure to ensure the areas of the mine where miners worked or traveled were adequately supported; allowing miners to work or travel under unsupported roof; exposing miners to hazards caused by excessive widths of room, crosscuts and entries; failure to follow the approved roof control plan; failure to use a sightline or other methods of directional control to maintain the projected direction of mining; and failure to use the closed loop method or another accurate method of traversing a miner. All in violation of 30 U.S.C. 820(c), (d), and 30 CFR 75.203(b), 75.220(a)(1) and 75.1200-2(b).

On March 18, 1993, J & T, Inc., filed a motion to dismiss 6 counts of the indictment that charged violations of 30 U.S.C. 820(d) and 30 CFR 75.202(a)-(b), 75.203(a)-(b), 75.220(a)(1), and 75.1200-2(b) claiming double jeopardy. The corporation contended that the government previously assessed civil penalties against it under 30 U.S.C. 820(a) for approximately \$300,000.00 in civil penalties in connection to the accident. The court denied the plea of double jeopardy.

DISPOSITION OF CASE:

On March 18, 1993, after a jury trial, J & T, Inc., was found guilty on all 6 misdemeanor counts charged in the December 16, 1992, indictment. On August 30, 1993, the corporation was fined \$1,078,713.00.

Also on March 18, 1993, Garry Williams plead guilty to 3 misdemeanor counts for roof control violation. In his plea, Mr. Williams agreed not to work in the coal mining industry in the future, either as a mine superintendent, mine foreman, or as a miner.

On May 25, 1993, Williams was sentenced to 18 months in jail, 1 year supervised released and fined \$20,000.00. Upon appeal, the sentence was upheld.

SUMMARY OF CRIMINAL PROCEEDINGS

Technical Compliance and Investigation Office

United States of America

vs.

Diamond C Fuels

and

Leonard Clark

Eastern District of Kentucky

Cr. Nos. 93-28-1

93-29-1

May 24, 1993

MSHA Case No. TASK-ILM-93-13

REASON FOR INVESTIGATION:

This investigation was initiated as a result of information relative to fraudulent respirable coal dust samples received during the investigation of Stamper Technical Services, Inc. (TASK-ILM-92-03).

CHARGES:

On March 4, 1993, in U.S. District Court for the Eastern District of Kentucky, a Federal Grand Jury handed down a 12-count Indictment against Diamond C Fuels' President/Owner Leonard Clark. The Indictment charged Clark with 12 counts of willfully making and using falsified respirable dust data cards and submitting them to MSHA, representing samples taken in the active working areas of the mine (a felony). These acts are a violation of Title 18 U.S.C. 1001. On May 12, 1993, Clark plead not guilty to the charges alleged in the indictment. Later on May 24, 1993, the corporation plead guilty to a 1-count Information. The Information charged the corporation with willfully making and using falsified respirable dust cards and submitting them to MSHA representing samples taken in the active working areas of the mine (a felony). This act was in violation of Title 18 U.S.C. Sec. 1001.

DISPOSITION OF CASE:

On July 24, 1993, the corporation was given a sentence of 1 year unsupervised probation and a civil penalty of \$200.00. The fine against the corporation was waived because the mine has been closed since December 1992.

On May 24, 1993, Clark plead guilty to a Superseding Criminal Information charging him with willfully failing to take valid respirable dust samples at the mine from each mechanized mining unit, and each designated area on a production shift during the bimonthly sampling period (a misdemeanor). This act was in violation of Title 30 CFR Sec. 70.201(a), 70.207(a), 70.208(a), and Title 30, U.S.C. Sec. 820(d). On July 15, 1993, Clark was sentenced to 1 year probation and fined \$2,000.00.

As a result of the charges against Clark, MSHA permanently suspended his certification to sample for respirable coal mine dust, effective the date of sentencing.

CHAPTER 8 - COURT PROCEDURES**A. INTRODUCTION:**

The trial of a case, whether before a U.S. District Court Judge or U.S. Magistrate, or before an ALJ (Administrative Law Judge) of the FMSHRC (Federal Mine Safety and Health Review Commission), is a crucial step in the enforcement process. Careful preparation of the case is essential to ensure success at trial; complete cooperation between the attorney and SI (Special Investigator) is necessary.

In all civil cases, an attorney from the SOL (Office of the Solicitor) will present the Agency's case. In criminal matters, an attorney from the DOJ (Department of Justice) will present the Agency's case, with assistance from SOL.

Special Investigators should become thoroughly familiar with the information in this chapter to enable them to understand the relationship of case preparation, presentation of evidence, and the decision of a court. Although this chapter is oriented to criminal proceedings, the fundamental order of presentation and testimony of witnesses is the same in all trials. The variation in rules of procedure and decision-making (judge instead of jury) are not critical for SIs and can be explained by the attorney trying the case.

B. PLANNING FOR THE TRIAL:

Before prosecutorial action under Section 110(d) of the Mine Act may be taken, the case may be presented to a grand jury by the U.S. Attorney and an indictment returned, or “an information” may be filed by the U.S. Attorney. Prior to the presentation of the case before a grand jury, the SI may be requested by the U.S. Attorney to review the case and evaluate its merits, weaknesses, and particular problems. The SI may assist in the preparation of a draft indictment and may testify at length before the grand jury.

The SI may be requested to aid in the preparation of a trial brief or trial book. If asked, a witness sheet should be prepared by the SI which includes the following:

- Name and address
- Business or occupation
- Expected testimony
- Description of all documents that the witness will produce or identify
- Location of the records or documents (if not in the custody of the witness)
- Data of a derogatory nature (criminal record, etc.), which would be pertinent to the witness' reliability or credibility

A copy of the witness sheet will be provided for the U.S. Attorney and for each person who will assist in the trial.

Because of the Jencks Act (Section 3500, Title 18, U.S. Code), it is advisable to list any documents such as signed statements, affidavits, or interviews obtained from witnesses. The witness sheets may be placed in a looseleaf notebook in the order in which the witnesses are expected to testify. If several witnesses are involved, it is helpful to assign each witness a number. They should be listed in the same order as the witness sheets. All of the above will be subject to the discretion of the U.S. Attorney. The attorney will request all relevant facts from the SI.

The SIs should study their notes and witness interviews to refresh their memory concerning the investigation. They should arrange their notes and interviews to provide for quick reference when testifying at the trial. Copies of all statements that have any bearing on the SIs testimony should be available for presentation to the court, if requested by the defense under Title 18, U.S.C. 3500.

The U.S. Attorney may also request the SIs assistance in providing information on the Government's response to various pretrial motions (i.e., motions to suppress evidence, for a bill of particulars, for discovery and inspection.) The U.S. Attorney may also request legal assistance from SOL which may require the SI to discuss the case or provide relevant information to SOL. The SIs full cooperation must be given to both attorneys.

C. **THE TRIAL:**

1. **Evidence (Rule 26):** In all trials, the testimony of witnesses is taken orally in open court (unless otherwise provided by law or these rules.) There are certain exceptions covered by law or these rules. The admissibility of evidence and the competency and privileges of witnesses are governed by the principles of common law and by the Federal Rules of Evidence (as may be interpreted by the courts of the United States), in light of reason and experience.
2. **Sequestering of Witnesses:** Some courts will bar from the courtroom all witnesses except the one on the stand. This involves:
 - Preventing the prospective witnesses from discussing the case with each other
 - Preventing them from hearing a testifying witness
 - Preventing them from discussing the case with a witness who has left the stand

- If the order of exclusion is knowingly disobeyed, the court may, in its discretion, disqualify the witness or take other disciplinary measures. If this rule is invoked, the court may, at the request of the U.S. Attorney, make an exception permitting necessary MSHA representatives to remain in the courtroom to assist in the trial
3. **Presentation of the Case:** The Government is first to present evidence in proof of the charged offenses. This is done by questioning witnesses and introducing documentary evidence. The witness is turned over to the defense counsel for cross-examination upon conclusion of direct-examination by the U.S. Attorney. After cross-examination, the Government has the opportunity for redirect-examination. Upon conclusion of the Government's case, the prosecution will rest, and the defense may then go forward with their evidence. After the defense rests, the prosecution may offer proof in rebuttal and cross-examine defense witnesses.
 4. **Cross-Examination:** After the attorney has finished examining each witness, the opposing attorney has the right to cross-examine. The purpose of cross-examination is to test the truth of the statements made by the witness. This is done by questions designed to:
 - Amplify the story given in direct-examination so as to place the facts in a different light
 - Establish additional facts in the cross-examining party's favor
 - Discredit the witness's testimony by showing that the testimony on direct-examination was contrary to circumstances, probabilities, and other evidence in the case
 - Discredit the witness by showing bias, interest, corruption, or specific acts of misconduct

The courts allow more latitude during cross-examination; the cross-examiner may ask leading questions. Another method often used is to question the witness to obtain inconsistent statements by going over the same testimony covered in the direct-examination.

The general rule in Federal courts (with respect to witnesses other than defendants) is that questions asked during cross-examination must be within the scope of prior questioning brought forth during direct-examination. The rule is liberally construed and where the direct-examination opens a general subject, the cross-examiner may go into any phase of that subject. If the cross-examiner wishes to obtain from the witness evidence on subjects not addressed during direct-examination, the cross-examiner must call the witness and subject the witness to direct examination. The U.S. Attorney will make any necessary objections. If there is no objection, the question should be answered.

5. **Rebuttal:** After the defense rests, the prosecution may offer proof in rebuttal to explain, counteract, or disprove the defendant's evidence. The Government may offer evidence to discredit the defendant.

D. RESPONSIBILITY AND CONDUCT OF THE SI:

The SI may or may not be present at the counsel table with the U.S. Attorney. The SI must listen and heed the advice and instruction of the U.S. Attorney. This may include:

- Maintaining all Government exhibits in proper order for ready reference and presentation
- Keeping a list of both Government and defense exhibits as they are introduced
- Checking to ensure that Government witnesses are present and ready to testify

The U.S. Attorney may request the SI to take notes, in order to alert them as to any false, misleading, or erroneous statements. The SI may also assist in preparing questions to be asked of defense witnesses on cross-examination.

The SI should avoid any direct contact with the defendant at the trial in order to eliminate the possibility of any embarrassing or compromising situations that could arise. Likewise, their association with defense counsel should be only in open court and with the knowledge and consent of the U.S. Attorney.

The court will usually instruct the jury against any contact with the attorneys or witnesses in the case. Any attempts by the SI to associate with members of the jury may cause a mistrial.

E. TESTIFYING:

Testifying in court is one of the most important duties that an SI may be called upon to perform. The testimony will usually be vital in establishing civil or criminal violations. Testimony may concern examination of the subject's books or records, and the extent to which they were examined (including procedures followed and facts discovered.)

As a witness, the SI must be thoroughly prepared as follows:

- Present clear and orderly facts
- Present a neat and professional appearance
- Testify in a natural and truthful manner
- Have a respectful attitude toward the court and jury

The SI is frequently subject to rigorous and lengthy cross-examination. They must present themselves in a courteous manner, and refrain from any display of anger, hostility, or evasiveness. Some rules of conduct for the SI, or any other person on the witness stand, are listed below:

- Listen to the question carefully and answer truthfully; if you do not know the answer, do not guess (remember, you are under oath)
- Answer the question fully, but do not volunteer information as it may seriously affect the U.S. Attorney's strategy
- Do not answer a question you do not understand; inform the attorney that you do not understand the question
- If an objection to a question is raised by either counsel, wait to answer until the court rules (or this could result in a mistrial)
- Wait until the question is completed before attempting to answer
- Direct your answers to the jury, but do not ignore the judge
- Speak clearly and loudly enough to be heard by the judge and jury
- Refrain from any demonstration of personal feeling or bias
- Do not use idioms or language unique to the industry unless necessary