



January 09, 2009

MEMORANDUM FOR: RICHARD E. STICKLER
Acting Assistant Secretary for
Mine Safety and Health

Elliot P. Lewis

FROM: ELLIOT P. LEWIS
Assistant Inspector General
for Audit

SUBJECT: Complaints Received from The American
Coal Company
05-09-002-06-001

The Office of Inspector General (OIG) received written complaints from The American Coal Company (Am Coal) dated June 9, 2008, September 5, 2008, October 2, 2008, and October 9, 2008, related to the Mine Safety and Health Administration's (MSHA) oversight of the Galatia Mine (ID 11-02752). The complaints allege that MSHA personnel in District 8 have (a) abused their authority and discretion; (b) breached ethical obligations; (c) violated the Federal Mine Safety and Health Act of 1977 (Mine Act), the MINER Act, and federal regulations; and (d) taken actions that are arbitrary and jeopardize the safety of miners.

In addition, some of Am Coal's complaints challenge the appropriateness of specific enforcement actions initiated by MSHA. As the delegated program agency, it is MSHA's responsibility to interpret and implement mine safety and health statutes. The Federal Mine Safety and Health Review Commission (FMSHRC) provides administrative trial and appellate review of legal disputes arising under the Mine Act. Challenges of specific enforcement actions taken by MSHA are properly adjudicated by the FMSHRC. Therefore, we have not assessed the merits of Am Coal's complaints related to the appropriateness of specific enforcement actions.

Overall, we found no indications that MSHA personnel had abused their authority or discretion, breached ethical obligations, acted arbitrarily, or took actions that jeopardized the safety of miners. We did, however, identify statutory, regulatory, and operational issues that require resolution to assure consistent implementation of MSHA's oversight responsibilities at all coal mines. Moreover, we found that in some instances MSHA has already taken actions to address issues raised by Am Coal.

The specific complaints and our disposition of each are summarized in the following table.

	Description of Complaint	Disposition
1.	MSHA District 8 did not timely review and approve mine plans and amendments submitted by Am Coal.	See p. 3
2.	MSHA's District 8 District Manager directed unwarranted and excessive inspections of Am Coal's Galatia Mine.	No indications found
3.	MSHA's District 8 Assistant District Manager made "unethical, biased" statements against Galatia Mine personnel to a reporter which were subsequently printed in a trade publication.	MSHA addressed this matter through administrative action
4.	MSHA inspectors did not provide mine management the opportunity to accompany them during a mine inspection.	No indications found
5.	MSHA inspectors did not comply with the underground tracking system required by the mine's approved Emergency Response Plan when conducting an inspection.	See p. 3
6.	MSHA District 8 management directed inspectors to issue a predetermined minimum number of violations per inspection hour.	See p. 5
7.	MSHA's District 8 Assistant District Manager prohibited mine examiners from travelling beyond the area of a roof fall without justification, effectively idling the entire mine.	Enforcement action challenge should be addressed to FMSHRC
8.	MSHA inspectors obtained direction from supervisors prior to notifying Am Coal management of whether and what type of violation would be issued after an inspection.	No indications found
9.	MSHA's District 8 Assistant District Manager required an unwarranted evacuation of one area of the mine (Galatia North portal) based on conditions in another, unrelated area of the mine (New Era portal).	Enforcement action challenge should be addressed to FMSHRC
10.	MSHA inspectors issued a closure order based on air readings inappropriately taken in gob areas outside a bleeder system.	See p. 5
11.	MSHA inspectors issued a citation regarding marking of escapeways that conflicted with State of Illinois mining laws.	Enforcement action challenge should be addressed to FMSHRC
12.	MSHA inspectors threatened and intimidated mine examiners with revocation of their State certification.	See footnote below ¹
13.	MSHA District 8 inappropriately issued closure orders related to roof falls and required Am Coal to submit clean-up plans for approval.	Enforcement action challenge should be addressed to FMSHRC
14.	MSHA inspectors issued verbal closure orders without being present at the mine.	See p. 7

¹ Am Coal did not provide details which we could follow-up on and verify. However, inspectors we interviewed denied threatening or hearing other inspectors threaten mine examiners. District 8 officials recalled receiving this type of complaint from a mine operator more than 3 years ago (but not from Am Coal) and took administrative action.

Please inform me within 60 days of the actions that MSHA plans to take to address the issues and recommendations summarized below.

#1 - Timely Mine Plan Approval

Am Coal complained that its mine plan submissions are not being reviewed and approved in a timely manner. MSHA acknowledged that current limits on the number of fully qualified coal mine inspectors and an emphasis on completing all mandatory inspections (i.e., 100 percent plan) has negatively impacted the timeliness of mine plan reviews across all districts. Many district personnel whose duties would typically focus on reviewing mine plans have been re-directed to perform mandatory mine inspections. Data provided to the OIG by MSHA showed 442 plans with overdue reviews across MSHA's eleven coal districts as of June 2, 2008.

District →	1	2	3	4	5	6	7	8	9	10	11	Total
# of Overdue Plan Reviews	50	91	68	87	17	15	32	69	10	1	2	442
% of Total	11.3	20.6	15.4	19.7	3.8	3.4	7.2	15.6	2.3	0.2	0.5	100.0

MSHA officials stated that they have taken specific actions in an effort to address the problem of overdue plan reviews. At various times during Fiscal Year (FY) 2008, MSHA temporarily re-assigned four individuals to District 8 specifically to assist in reviewing submitted mine plans. In addition, throughout FY 2008, MSHA had temporarily re-assigned personnel to various districts – primarily Districts 2, 4, and 8 – to assist in completing mandatory inspections. MSHA stated that these additional inspection resources have allowed the receiving districts to re-allocate their existing resources to help with needed mine plan reviews.

MSHA estimated that the backlog of overdue mine plan reviews should be significantly reduced or eliminated by January 2009 as current inspector trainees become fully qualified coal mine inspectors. These increased inspection resources are expected to allow MSHA to re-allocate existing resources to plan reviews.

We recommend that MSHA establish a written plan for eliminating the current backlog of overdue mine plan reviews and maintaining timely reviews in the future.

#5 - Guidance re Inspector Compliance with Emergency Response Plans

Am Coal complained that MSHA coal mine inspectors are violating the MINER Act by refusing to comply with the underground tracking provisions contained in the mine operator's Emergency Response Plan (ERP). District 8 personnel stated that MSHA personnel are exempt from the ERP tracking requirement because providing such information would constitute "pre-notification" of an inspection, which is prohibited by the Mine Act. They further stated that they only provide the mine operator with information on their location in the mine after reaching their inspection destination.

MSHA explained that its position on this issue was made known to mine operators in a "Question and Answer (Q & A)" document associated with a Program Policy Letter² concerning implementation of Emergency Response Plans required by the MINER Act. Under the heading of "Post-accident Tracking," the Program Policy Letter stated

The tracking system used by the operator should be able to determine the current, or the immediate pre-accident location of all underground personnel.

Item 2 under the "Post-accident Tracking" section of the related Q & A document stated:

2. *Are mine operators required to track Federal and state government officials to comply with the tracking requirements of the MINER Act?*

Mine operators are not required to track Federal and State officials.

However, the Program Policy Letter expired on March 31, 2008, without being reissued or permanently incorporated into MSHA's Program Policy Manual.

MSHA also provided the OIG with guidance contained in an October 18, 2007, e-mail from the Solicitor's Office (SOL) indicating that "extraordinary measures" such as non-compliance with ERP tracking provisions are legal when MSHA "has some justification for believing there is something hard to detect, but dangerous going on" and "is employed only to deter the most dangerous conduct." The SOL guidance concludes that "MSHA doesn't have to tell the dispatcher where they are going, nor report their locations to the dispatcher. Once the special inspection activity is completed in an area, MSHA inspectors and any accompanying miners' rep. or company rep. can then report their location under the ERP."

MSHA's Coal Mine Safety and Health (CMS&H) Administrator stated that he expected coal mine inspectors to comply with tracking requirements in ERPs during most inspections.

We believe MSHA's policy regarding its mine inspectors' compliance with the tracking requirements of mine operators' Emergency Response Plans is unclear. The position stated in the SOL e-mail and the expectations expressed by the CMS&H Administrator are narrower than the guidance provided in the Q & A related to the Program Policy Letter. The Program Policy Letter's expiration further confuses a clear understanding of MSHA's current position.

We recommend that MSHA issue a written policy or, if necessary, pursue legislation to establish the basis for and circumstances under which inspectors

² Program Policy Letter P06-V-09 was issued on August 4, 2006. It was superseded by Program Policy Letter P06-V-10 issued on October 24, 2006 which included the same information on post-accident tracking.

are not required to comply with tracking requirements of ERPs during an inspection.

#6 - Enforcement Quota

Am Coal complained that an MSHA coal mine inspector had stated that he had been directed by his supervisors to issue “0.4 violations per inspection hour.” We interviewed five District 8 inspectors and officials and found disagreement on this issue. Some recalled supervisors discussing their use of “key indicator” data to monitor inspection activity, but did not interpret the statements to establish an “enforcement quota” for inspectors. Others recalled the data being presented as an “expectation” of inspectors’ performance.

MSHA Headquarters officials stated that (a) there are no minimal levels of enforcement actions expected of mine inspectors, (b) historical data is tracked as one of several tools available to managers to oversee enforcement activity, and (c) inspectors are trained to issue appropriate citations or orders for any violations observed during the course of an inspection of the mine. They further stated that enforcement expectations are defined in MSHA’s *Citation and Order Writing Handbook for Coal Mines and Metal and Nonmetal Mines*. Based on Section 104(a) of the Mine Act, the handbook states that a mine inspector “must issue a citation or order to the mine operator” when the inspector “believes that the operator has committed a violation of the Mine Act or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to the Mine Act.”

We recommend that MSHA clarify with all of its inspectors and managers that historical enforcement data is not intended to establish any minimum level of enforcement actions and that citations or orders for any violations are to be based on observations made during the course of an inspection.

#10 - Examination of Bleeder Systems

Am Coal complained that an imminent danger order was issued by MSHA in April 2007 at the Graben Bleeder system for accumulations of methane gas based on air readings taken in an adjacent gob area, rather than at established evaluation points within the system.

Title 30 of the Code of Federal Regulations, Section 75.334(b) states:

(1) During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings and into a return air course or to the surface of the mine.

(2) After pillar recovery a bleeder system shall be maintained to provide ventilation to the worked-out area, or the area shall be sealed.

The District 8 Ventilation Supervisor stated that in the days preceding issuance of the imminent danger order mine records showed that methane levels had been increasing at some locations within the bleeder system. As a result, he suspected that the overall system was not functioning properly. In an effort to investigate and pinpoint potential problems, he took additional air readings in an adjacent entryway between two mined out longwall panels. This entry was part of the "internal airflow paths," which MSHA considers important to the overall evaluation of bleeder systems. He found methane readings in the entryway to be within the explosive range, justifying the imminent danger order. MSHA Headquarters officials confirmed that it can be necessary and appropriate to take air readings in locations other than established evaluation points, including internal airflow paths, to assure proper operation of a bleeder system.

In late 2006 MSHA prepared a Draft Program Policy Letter that stated:

The application of Section 75.334(b)(1) has been addressed differently from District to District and has resulted in inconsistencies throughout the industry. This PPL is intended to assure uniform and consistent understanding of the standard.

The draft Program Policy Letter included the following guidance:

Methane and oxygen concentrations, air quantity and direction of the airflow at bleeder connectors and within the primary internal airflow paths are important considerations relative to the adequacy of dilution of contaminant gases and overall system effectiveness [underlining added for emphasis].

A determination that a methane concentration of 3.0 percent or more at approved measurement point locations (MPL's), evaluation points, or in bleeder entries does not exist or the fact that there has not been a determination to include additional MPL's in the ventilation plan, does not mean that the bleeder system is in compliance with Section 303(z)(2) of the Mine Act or 30 CFR 75.334(b)(1). The operator has a continuing obligation to evaluate the effectiveness of the bleeder system by a method and at locations appropriate to the circumstances [underlining added for emphasis].

The draft policy document was never issued in a final form. Rather, MSHA informed the OIG that it has interpreted several Federal appellate court decisions to have affirmed its practice with respect to bleeder systems.³ Therefore, MSHA had decided it was not necessary to pursue the time consuming process of establishing a Program Policy Letter through the rule-making process.

³ Cumberland Coal Resources, LP v. FMSHRC, 171 Fed. Appx. 852 (D.C. Cir. 2005) (unpublished decision); Plateau Mining Corp. v. FMSHRC, 519 F.3d 1176 (10th Cir. 2008); and Cumberland Coal Resources, LP v. FMSHRC, 515 F.3d 247 (3d Cir. 2008).

However, case law precedence can be affected and modified by newly decided cases. Individual cases are also subject to varying interpretations based on specific facts or for other reasons. It is unreasonable to expect mine operators – especially small operators – to understand and comply with unwritten MSHA policy by continually monitoring and interpreting case law. Issuance of a stated policy, similar to the one drafted in 2006, would most effectively establish MSHA’s expectations regarding evaluation of bleeder systems.

We recommend that MSHA issue written guidance to its inspectors and to mine operators, consistent with existing laws and regulations, that clarifies its policy regarding the proper evaluation of a bleeder system.

#14 - Verbal 103(k) Orders and Written Clean-up Plans for Unplanned Roof Falls

Am Coal complained that MSHA has incorrectly issued verbal closure orders (i.e., by telephone) under Section 103(k) of the Mine Act although the statutory language states that an inspector may issue orders to insure the safety of any person in the coal mine “when present.”

SOL confirmed that MSHA has no written policy addressing the issuance of verbal closure orders. Rather, there is an “unwritten practice” to issue verbal closure orders when warranted by the facts. For example, when inspectors cannot get to a site immediately after a reported accident due to location and/or time of day factors, they may issue a verbal closure order and get to the site as soon as possible. SOL bases this position on MSHA’s overall mandate under the Mine Act to assure the safety of miners.

We recommend that MSHA take immediate action, to include seeking legislative changes if necessary, to resolve the conflict between its existing practice and the language in Section 103(k) of the Mine Act that requires an inspector to be present to issue a closure order.