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Special Investigations
Procedures Handbook

PREFACE

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 Previously issued material on this subject matter is superseded by this handbook.

SPECIAL INVESTIGATIONS PROCEDURES HANDBOOK

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INTRODUCTION

Section 103(a) of the Federal Mine Safety and Health Act of 1977 (Mine Act), as amended by the Mine Improvement and New Emergency Response Act of 2006, provides that an Authorized Representative of the Secretary of Labor shall have a right of entry to, upon, or through any 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 provides guidance to MSHA personnel to ensure consistency throughout the Special Investigations Program, which includes investigations of discrimination complaints filed pursuant to Section 105(c), and special investigations associated with Section 110 of the Mine Act. This handbook also establishes procedures for issues which may require injunctive action pursuant to Section 108(a) of the Mine Act.

Disclaimer

This handbook provides general, nonbinding guidance for the conduct of special investigations. Particular investigations may require different procedures depending on relevant facts or circumstances. This handbook does not create legal obligations or confer legal rights for any persons or entities.

CHAPTER 1 - GENERAL INFORMATION

A. OVERVIEW OF THE SPECIAL INVESTIGATIONS PROGRAM

1. The Technical Compliance and Investigation Division

MSHA Office of Assessments, Technical Compliance and Investigation Division (TCID) is responsible for the national Special Investigations Program and promoting consistent application and management of the program.

2. District Managers

Each District Manager (DM) with oversight and concurrence from their Regional Administrator (RA) is responsible for operation of the Special Investigations Program in their district and for consistent application and enforcement of national policies and procedures. The DM with oversight from their RA will ensure that the district's special investigations program reflects an appropriate and cost-effective utilization of resources.

3. The Conference Litigation Representative Special Investigator Supervisor

The Special Investigator Supervisor (Supervisor) for each district reports directly to the DM. The Supervisor is responsible for the daily management of the Special Investigations Program in the district. The primary duties of the Supervisors are as follows:

- Coordinate program activities with the DM, RA and TCID;
- Supervise Special Investigators (SIs) and Complaint Processors (CPs);
- Liaise 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;
- Provide timely verbal updates to the RA and TCID on significant actions to cases.

4. Special Investigators

The first priority of SIs is to conduct special investigations and related activities. All full-time and collateral-duty SIs will report directly to the Supervisor when conducting investigations. Their responsibilities include the following:

- Interview persons and generate statements and memoranda of interviews (SOIs and MOIs) or electronically-recorded statements concerning alleged violations of the Act;
- Review pertinent records, documents, and files;
- Evaluate the testimony and evidence;
- Ensure the investigative record supports MSHA jurisdiction;
- Write the final investigative report that details the facts of the case, analyzes the merits, and recommends an appropriate course of action;
- Notify the Supervisor of allegations concerning possible criminal activity not covered by the Mine Act, (e.g., stolen explosives, drug trafficking allegations);
- Work with and provide information to SOL and DOJ attorneys when directed to do so by the RA, Supervisor, or TCID.

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

MSHA SIs do not have the authority to exercise specific law enforcement powers:

- MSHA 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 USC § 930). Firearms or other dangerous weapons are not to be transported in government vehicles at any time (see Administrative Program Policy Manual (APPM) Volume II, Chapter 500, § 512.h).
- SIs do not have authority to make arrests or obtain and execute search warrants. Agency personnel may 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 engage beyond the provision of assistance.

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

assistance through the DM and RA.

B. CREDENTIALS

The minimum requirements to obtain MSHA SI credentials include an active Authorized Representative (AR) or Right of Entry (ROE) card and completion of the formal training program set forth by TCID.

SI credentials will be requested by the DM by submitting a memorandum through the RA to TCID that describes the qualifications of the prospective SI.

Accompanying the memorandum should be Credential Request Form and an unlined 3x5 index card with the individual's name printed exactly as their name will appear on the credentials. 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 TCID. (All SI pictures should be taken in business attire on a solid white background.)

TCID will submit the request to the Director of the Office of Assessments who will determine if the candidate has completed all required Agency training, and if so, will prepare a memorandum for submission to the Assistant Secretary for issuance of the credentials.

SI credentials must be kept in the possession of the person to whom they were issued and must not be loaned to or used by others. Credentials shall 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 of or failure to safeguard SI credentials, or unauthorized use of other credentials may result in disciplinary action. Conservator of the Peace or similar credentials or badges are examples of credentials UNAUTHORIZED for special investigation use.

The SI shall notify the Supervisor, DM and RA 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 the loss is discovered, the Supervisor, DM or RA will immediately notify the local Federal Bureau of Investigations (FBI) office and police of the loss or theft in writing.

The Supervisor shall be responsible for recovering an SI's credentials when the SI separates from MSHA or is reassigned to another position within the Agency. The Supervisor shall forward the credentials to TCID 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 on behalf of MSHA. When conducting other investigative business (i.e., accompanying the accident investigation team), the SI will use discretion and professional judgment regarding the display of credentials.

C. EQUIPMENT AND FACILITIES

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

- A private area or facilities for conducting interviews, writing reports, reviewing recordings, etc. (caution should be taken to prevent confidential information from being overheard or intercepted);
- Locking facilities, such as a locked room or cabinets, for the collection and maintenance of all physical evidence; as specified by DLMS 5 Chapter 200 §224A, Minimum Safeguards:

“Safeguarding Stored Information. Minimum standards for physically safeguarding personal information from unauthorized or unintentional access, disclosure, modification, or destruction requires that records containing personal information be stored in a bar-lock cabinet, safe file, or a secured room. To the extent possible, access to areas where personal records are stored will be limited to those persons whose official duties require them to work in such areas. Control of personal records will be maintained at all times, and will include an accounting of their removal from the storage area. This minimum standard is prescribed for nonduty hours as well as for duty hours.”
- Appropriate transportation (the agency recognizes that appropriate transportation may mean an unmarked vehicle);
- Cameras and/or video recorders (at least one available per office for SIs to use in connection with their duties);
- Data cards and appropriate camera accessories;
- Voice recorder and appropriate transcribing accessories;
- Laptop computer or tablet and portable printer;
- Evidence kit containing:
 - Measuring tape;
 - Master log (bound with numbered pages);
 - Etching tool or other permanent marking device;
 - Padlock;
 - Evidence tags (MSHA Form 2000-181);
 - Forms necessary for collection and preservation of evidence:
 - Chain of custody (MSHA Form 2000-200);

- Itemized receipt (MSHA Form 2000-201).

SIs must ONLY use government issued equipment and software in all investigations. SIs are not to use personal electronics, such a personal cellular telephones or digital cameras, to take photographs or record interviews.

D. CONFIDENTIALITY AND MEDIA INQUIRIES

All special investigations are confidential and must not be discussed with unauthorized persons (including MSHA employees not assigned to the SI program, mine operators, or their agents). Failure to maintain the confidentiality of information obtained during a special investigation can result in disciplinary action.

Requests for information regarding special investigation records, including those requests filed under the provisions of the Freedom of Information Act (FOIA), must be referred to TCID for processing and response. (See APPM, Vol. III, Ch. 400, paragraph 433). Discussions regarding on-going special investigations should be restricted to individuals on a “need to know” basis.

Requests for information received from news media (newspapers, television, radio, etc.) should be referred to the DOL Office of Public Affairs. Disclosure or withholding of information will be governed by the FOIA and Privacy Act and current Departmental and Agency regulations and policies. The Criminal Division of the DOJ will review proposed responses to media inquiries in referred cases or matters where their involvement appears probable. The Associate Solicitor for Mine Safety and Health is responsible for clearing such responses with DOJ’s Criminal Division.

E. SOURCES OF INFORMATION

Special investigations may source information from:

- Interviews;
- Record/document reviews;
- Observations;
- News articles;
- Confidential sources (informants).

During the course of investigations, it may be necessary to examine certain records and public documents, official and unofficial. Many types of records may be obtained from MSHA and other federal and state agencies.

The SI should know where to locate and obtain official copies of public documents. The SI should know the records, documents, and reports required by the Mine Act, and know where and how to access them.

F. CONTACTS WITH LAW ENFORCEMENT AGENCIES AND PROSECUTORIAL AUTHORITIES

Liaise With Law Enforcement

The RA and DM, with the assistance of the Supervisor, will promote and maintain close working relationships with officials of other federal, state and local regulatory and law enforcement agencies such as U.S. Attorneys and Marshals, local police, state inspectors, etc.

Designated headquarters personnel will maintain essential contacts with headquarters officials at federal law enforcement agencies. The Supervisor and TCID will promote and ensure coordination with SOL.

Requests for Information or Services

Listed below are the procedures to be followed in those instances when information or services are requested. The following requests may be initiated by the Supervisor after the DM's approval and RA's concurrence.

- ***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 in a pending FBI investigation. The purpose of the background check request should be provided in the request.

When requesting laboratory examination of evidence, guidance on the packing and transmittal of evidence must be obtained from the FBI field office.

- ***FBI Headquarters***

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

G. SURVEILLANCE

In general, surveillance means keeping a close and continuous watch over a person, group, or operation. Surveillance may be categorized as either physical or technical as defined below.

Neither physical nor technical surveillance will be used in the course of MSHA special investigations, except with the express authorization and approval of the DOJ and the Assistant Secretary for MSHA in conjunction with SOL.

Whenever surveillance is being considered, the DM shall submit a memorandum through the RA to the Administrator for Mine Safety and Health Enforcement (Administrator) detailing the need for the surveillance.

H. UNDERCOVER OPERATIONS

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

With the approval from the Administrator's Office, MSHA SIs may assist a 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 (e.g., the FBI);
- The operation has been approved by the U.S. Attorney's Office; and
- The Assistant Secretary for MSHA and SOL have authorized the use of MSHA personnel in the activity. In these instances a written request must be submitted by the RA to obtain authorization from the Assistant Secretary.

I. MEMORANDA OF UNDERSTANDING WITH OTHER FEDERAL AGENCIES

Agreement with Office of Workers' Compensation Programs

The Black Lung Benefits Act (BLBA) makes it unlawful for a mine operator to "discriminate against any miner employed by him by reason of the fact that such miner is suffering from pneumoconiosis." 30 USC § 938.

The BLBA is administered by the Office of Workers' Compensation Programs (OWCP), Black Lung Office, of the United States Department of Labor. MSHA and the OWCP entered into a Memorandum of Understanding (MOU) to provide additional receiving points for discrimination complaints filed under Section 105(c) and the BLBA.

TCID and the OWCP will be responsible for coordination and consultation in the handling of discrimination complaints covered by the MOU. A comprehensive investigation shall be completed in alleged Black Lung-related cases. TCID 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 Section 105(c), a copy of the entire case file may be forwarded by TCID to OWCP for evaluation under the BLBA.

Given the overlap between the protected classes – a miner “suffering from pneumoconiosis” under the BLBA versus a miner who “is the subject of medical evaluations and potential [Part 90] transfer” under the Mine Act -- it can be difficult to determine whether a claim arises under the Mine Act, the BLBA, or both. The Supervisor should consult TCID and SOL for guidance if there is any doubt about the issue.

Agreement with National Labor Relations Board

The National Labor Relations Act (NLRA) forbids employers from interfering with employees in the exercise of rights to form, join, or assist a labor organization for collective bargaining, or from working together to improve terms and conditions of employment, or refraining from any such activity. Similarly, labor organizations may not interfere with employees in the exercise of these rights. Employees covered by the NLRA are protected from certain types of employer and union misconduct. 29 USC §§ 151-169.

The NLRA is enforced by the National Labor Relations Board (NLRB), an independent agency of the United States government charged with conducting elections for labor union representation and with investigating and remedying unfair labor practices. Unfair labor practices may involve union-related situations or instances of protected activity.

MSHA and the NLRB entered into an MOU governing the coordination of complaints which allege violations of the Mine Act and the NLRA. Both TCID and the NLRB are responsible for coordination and consultation in the handling of discrimination complaints and investigations covered by this MOU.

J. OTHER STATUTORY PROVISIONS

Section 111 Compensation Claims

The Mine Act grants to miners a right to compensation for missed wages for established periods of time depending on the circumstances, if a mine is shut down because of a Mine Act withdrawal order. Under Section 111 of the Mine Act, miners must file a petition for compensation directly with the Commission, not with MSHA. If a miner attempts to file a claim for compensation with an SI,

the SI should advise the miner that the compensation claim must be filed with the Commission, and provide the Commission's contact information:

Federal Mine Safety and Health Review Commission
1331 Pennsylvania Ave., N.W. Suite 520N
Washington, D.C. 20004-1710
Phone: (202) 434-9900
Email: docket@fmshrc.gov

However, if the miner alleges that he/she suffered an adverse employment action in retaliation for having filed a compensation claim with the Commission, a possible Section 105(c) violation has occurred because filing of a compensation claim is a protected Mine Act right. A Section 105(c) investigation should be conducted to determine if the miner's exercise of the right to seek compensation caused an adverse action or was otherwise interfered with. The next chapter addresses such investigations in more detail.

CHAPTER 2 - DISCRIMINATION COMPLAINTS

A. INTRODUCTION

Congress recognized that, if our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Mine Act to ensure safe and healthful mining conditions and practices. Congress also understood that miners cannot reliably participate absent protection against interference or any resulting discrimination.

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. Section 105(c) also prohibits interference with the exercise of miners' protected rights. MSHA vigorously investigates Section 105(c) complaints to encourage miners to exercise their rights under the Mine Act and to maximize their involvement in monitoring safety and health conditions.

Section 105(c) complaints are given priority over all other SI cases. All available special investigation resources, including Supervisors, will be used to ensure the timely initiation and completion of Section 105(c) investigations. TCID will coordinate when multiple investigations are ongoing, 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, disability, and other non-Mine Act related factors, 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 under the Mine Act in addition to other discriminatory acts not covered under the Act. Consult TCID and SOL when these situations arise.

B. PROCESSING DISCRIMINATION COMPLAINTS (GENERAL)

A complaint filed pursuant to Section 105(c) may be filed with any MSHA district, field, or Headquarters office, or OWCP 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 specifically trained to

handle inquiries and process complaints. At least one alternate should be appointed and properly trained in these tasks, in case the complaint processor is unavailable.

Confidentiality must be maintained by all MSHA employees involved in the Section 105(c) process. Copies of discrimination complaints shall NOT be retained by the complaint processor. Only the original is to be retained and maintained in the physical case file.

1. Receiving Complaints

The Discrimination Complaint, MSHA Form 2000-123, and the Discrimination Report, MSHA Form 2000-124, may be obtained from any MSHA Office or OWCP Black Lung Office.

Additionally, the complaint processor or alternate person will provide:

- Relevant excerpts from the Federal Mine Safety and Health Review Commission Rules of Procedure; and
- Privacy Act Statement.

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

- Information on Backpay for Miners; and
- Claimant Expenses, Search for Work, and Interim Earnings Report.

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 alternate 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 alternate person (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 office to file their complaint.

- *In Person:* Individuals who come into an MSHA office with questions concerning an alleged discriminatory action shall be referred to the complaint processor, or, if unavailable, to the alternate person, or Supervisor, who will

discuss the general nature of the complaint with the individual, provide the forms and other documents listed above and assist in filling out the forms.

- *By Telephone:* Individuals who make inquiries by telephone shall be referred to the complaint processor. The complainants 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 and mailed to the complainant enclosing each of the forms and documents listed above, and transmitted via mail with delivery confirmation.
- *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 (e.g. "all members of the section crew" or "all miners working on second shift") and the complaint and remedy are the same for all, 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 appear to be different or unique issues for particular individuals within the group, 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.

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 Supervisor. Arrangements can then be made to forward the information promptly 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 SI assigned to the case from the Supervisor. It will be the responsibility of the SI to generate the event number when the investigation begins. The complaint processor shall obtain an Inspection/Investigation Data Summary form and place it in the case file. The complaint processor shall then fill out an Investigation Assignment Control, MSHA Form 2000-158. '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 transmitted to TCID along with a copy of MSHA Forms 2000-123 and 2000-124.

3. Notification Letters

Once the SI has been assigned, notification letters will be prepared and distributed to the complainant (miners filing complaints) and respondent (generally mine owners, independent contractors, or management officials responding to complaints).

- The notification letter to each **complainant** should include MSHA Forms 2000-123 and 2000-124 as enclosures.
- The notification letter to each **respondent** should **only include** the completed MSHA Form 2000-124 and the Federal Mine Safety and Health Review Commission Rules of Procedure as enclosures.
- Do NOT send a copy of the completed MSHA Form 2000-123 to the respondent.
- 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 Supervisor shall be notified immediately. All certified mail receipts shall be forwarded to the Supervisor for inclusion in the case file.

4. General Investigative Procedures and Timeframes

All timeframes for Section 105(c) investigations are initiated from the date the complaint is 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 seek temporary reinstatement (TR). The SI should inform the complainant

that TR can only be obtained through the Secretary of Labor.

Timeframes for all Section 105(c) Investigations

- All investigations must be initiated within 15 days from the date the complaint is received by an MSHA office.
- All investigative reports must be submitted to TCID within 45 days from the date the complaint was received.
 - Sixty days after the complaint is received, TCID must complete the review on the merits and decline the case or refer it to SOL.
 - Ninety days after the complaint is received, the Secretary must file a complaint with the Commission or decline to do so.

Timeframes for an application for TR

- Seven days to notify TCID and SOL of a miner's request for TR. This notification shall include the following information:
 - The complainant's name;
 - The fact that the complainant seeks TR and the date of that request;
 - The name and mine identification number of the relevant mine/independent contractor; and
 - The name and phone number of the SI assigned to the case;
- Fifteen days for the District to conduct a TR investigation and to forward the case to TCID with the District's finding;
- Twenty days for MSHA to refer case to SOL or decline;
- Thirty days for the Secretary to file an application for TR or decline.

5. Withdrawn Complaints

Complainants wishing to withdraw their complaint may do so at any time during the investigation by submitting a signed written statement to this effect. Complainants should complete Discontinuance of Discrimination Complaint request forms. Requests to withdraw complaints received through the mail that are not witnessed by an SI should be verified with the complainant prior to submitting the request to TCID for approval.

If the complainant specifies that the requested withdrawal is due to an understanding/settlement/agreement reached with the respondent, TCID shall prepare a "Withdrawn Satisfied" letter to the complainant, with a copy to the respondent, and send via certified mail, return-receipt requested.

If the complainant indicates that they are requesting withdrawal of the complaint

for any reason other than those noted above, TCID shall prepare a “Withdrawn General” letter to the complainant, with a copy to the respondent, send via certified mail, return-receipt requested.

C. ELEMENTS OF A SECTION 105(c) DISCRIMINATION CASE

In order to establish a prima facie case of discrimination under Section 105(c) of the Mine Act, the investigator must gather evidence indicating that (1) the complainant participated in a protected activity, (2) that an adverse action was taken against the complainant, and (3) that the adverse action was motivated in any part by that protected activity.

1. Protected Class

If the complainant is not in the protected class, MSHA has no authority to pursue a discrimination complaint under the Mine Act. Section 105(c) protects three categories of complainants:

- *Miners:* Section 3(h) of the Act, defines a “miner” as “any individual working in a coal or other mine.”
- *Representatives of Miners:* A “representative of miners” is any person, group or organization designated by two or more miners to represent their interests during health and safety enforcement processes at their mine.

Individuals or any member of a union representing miners who are designated to serve as miners’ representatives must meet MSHA’s requirements by completing and filing the appropriate paperwork with the DM in accordance with 30 CFR Part 40.

Non-employees can be miners’ representatives. There is no requirement that the miners’ representative actually work at the mine in order to be protected by Section 105(c). A miners’ representative who is discharged does not automatically lose his or her status as a representative of miners.

- *Applicants for Employment:* An applicant for mine employment is any individual who has applied for work as a miner. The typical applicant discrimination case involves a complainant who has been blacklisted and cannot obtain new employment because word has spread throughout the local network of employers that he or she engaged some type of activity protected under Section 105(c) of the Mine Act.

2. Protected Activity

The scope of “protected activity” is broad. It includes not only those rights that are expressly established in the Mine Act, but also those activities that advance the Act’s purpose of promoting miner involvement in health and safety issues. These protections are part of the statutory enforcement scheme and extend not only to the exercise of statutory rights by the miner on their own behalf, but also on behalf of others.

The activities listed below are some of the most common examples. If a complaint involves an unusual type of activity, the SI should consult with TCID or SOL to determine if the activity is protected.

Protected activities include, but are not limited to, the following:

- Filing or reporting a complaint of an alleged danger or safety or health violation to MSHA, another governmental agency, or mine management;
- Participating in an MSHA inspection or investigation;
- Instituting any proceeding under the Mine Act (for example, filing a compensation complaint with the Commission pursuant to Section 111);
- Testifying in a Mine Act-related legal proceeding;
- Being the subject of a medical evaluation and potential transfer under Section 101(a)(7) (harmful physical agents and toxic substances);
- Enforcing the safety training provisions of Section 104(g) and Section 115;
- Refusing to work in unsafe or unhealthful conditions¹;
- Reporting an injury to a supervisor or the mine operator²; and
- Exercising any statutory right afforded by the Mine Act.

The SI should conduct a thorough interview with the complainant to determine if other protected activity occurred that the complainant did not list on the initial complaint form.

¹ A miner’s work refusal must be based on both a reasonable and good faith belief that performing the task would endanger his/her safety or health or that of other miners. The analysis focuses on the miner’s actions given information available to the miner at the time of the work refusal. A miner’s attempt to communicate concerns to management when circumstances allow, and the operator’s failure to take reasonable action in response prior to the work refusal, is evidence of a miner’s good faith belief.

² Being injured on the job is not a protected activity under the Mine Act; however, reporting the injury to the operator, or requesting that the injury be reported, is a protected activity. It may not occur to a miner that he or she has engaged in protected activity by reporting an injury or requesting that an injury be reported.

3. Adverse Action

Evidence collected during the investigation must show that the complainant suffered some form of *adverse action* (i.e., discriminatory act), which is an employment injury or harm that is “materially adverse to a reasonable miner.” The words *materially adverse* mean that the mine operator’s actions were harmful to the point that they could discourage a reasonable miner from engaging in protected activity.

Determining whether an employment action is sufficiently harmful to amount to an adverse action depends on the specific facts and context of each complaint. However, Section 105(c) cases often involve employment actions which are obviously adverse because they lead to a reduction of pay or a similar tangible adverse result. Such actions include:

- Discharge, termination, or layoff;
- Demotion;
- Reprimand;
- Refusal of employment;
- Suspension (with or without pay);
- Placement on probation;
- Reduction in benefits, vacation, bonuses, or rates of pay;
- Denial of overtime;
- Promises of benefit or threats of reprisal;
- Transfer to a job that is more dangerous or less desirable, even if it is within the same job classification as the original position;
- Harassment by co-workers that is so severe and pervasive that it creates a hostile work environment.

A complainant may not realize that certain forms of harassment or changes in shift assignments may qualify as adverse actions under the totality of a particular case’s circumstances. Therefore, the SI should conduct a thorough interview with the complainant to determine whether the complainant suffered other materially adverse employment actions that were potentially retaliatory.

4. Nexus (i.e., Connection)

The SI must obtain evidence that a *nexus* (i.e., a connection) exists between the

complainant's involvement in a (operator-perceived or real) protected activity and the alleged discriminatory action. Some ways of showing the connection are to obtain evidence which demonstrates the following:

- Proximity in time between the protected activity and the adverse action;
- The employer's knowledge of the protected activity;
- Hostility towards protected activity;
- Evidence of disparate treatment;
- Admission by the discriminating official.

Operator Knowledge

To establish the nexus, there must be some evidence that the person who took the adverse action against the complainant, or a person who influenced the adverse action, knew or suspected that the complainant engaged in protected activity.

- *Direct evidence of knowledge:* e.g., an admission by the decision maker that he or she knew about the complainant's protected activity, testimony by the complainant that he or she made a safety or health complaint directly to the decision maker.
- *Circumstantial evidence of knowledge:* evidence inferring that the individual who made or influenced the adverse action knew of the complainant's protected activity.

If each of the four elements of Section 105(c) has been addressed, and the evidence obtained supports the complaint, a prima facie case has been established.

5. The Operator's Defense

During the investigation, the SI shall provide the respondent with the opportunity to provide evidence that supports a legitimate, alternative basis for the adverse action taken or otherwise refutes the complainant's claims. This evidence may include witness statements, a written position statement provided by the respondent or their attorney, as well as documents relating to past disciplinary actions against the complainant, written statements of company policy, or any internal investigation the company conducted related to the complainant's allegations or the adverse action in question.

The respondent may make a variety of arguments in defending against a claim of discrimination, e.g., claiming that:

- The complainant was not involved in any protected activity;
- There was no discriminatory act/adverse action/harassment;
- The action taken was motivated solely by the complainant's unprotected activities including:
 - insubordination;
 - failure to abide by company rules;
 - poor work performance;
 - engagement in unsafe activities; and
 - engagement in serious misconduct.

Sometimes, the evidence suggests that the complainant's protected activity played some role in the respondent's disciplinary decision, but that the operator also was motivated to discipline the miner for other, non-retaliatory reasons. These cases are referred to as "mixed motives" cases and may still constitute a violation of the Mine Act.

D. TEMPORARY REINSTATEMENT

Background

Under Section 105(c)(2) of the Mine Act, a miner who has been discharged or reassigned may request temporary reinstatement (TR) to his/her former position. Under this provision, the Secretary of Labor may file a petition with the Commission requesting that the complainant be returned to his/her job while the Secretary conducts a full investigation into the merits of the complaint. TR is designed to ease the financial hardship a miner would otherwise suffer. Applicants for employment do not have TR rights.

Only the Secretary may file an application for TR with the Commission; unlike in merits cases, the complainant has no private right to bring a TR case. Therefore, it is important that MSHA ensure that a TR case is initiated when the complainant requests TR and the facts of the case support such an action.

At the initial interview, the SI must explain the requirements and application process for TR to the complainant and ask if he/she wishes to seek this remedy. If the complainant declines TR, the reasons must be documented. If the complainant requests TR, the SI must conduct a preliminary investigation and determine whether the evidence alleged by the complainant provides a *reasonable cause to believe* that discrimination *may have occurred*. Where *reasonable cause* exists, the request for TR is considered *not frivolously brought*.

The TR Investigation

The DM is responsible for submitting the finding of the preliminary investigation (Exhibit 2-1) to TCID within 15 days of receipt of the complaint. A copy of the finding and the investigation case file shall also be submitted to SOL for review and discussion within that time period. The TR finding must be signed and dated by the DM or designee, and receive the RA's concurrence prior to submission. The District shall inform TCID via electronic mail when the documentation was sent. Where the District and TCID find the request for TR "not frivolous" (i.e., the complainant provided "reasonable cause to believe"), or where the District and TCID disagree on whether it is "frivolous," within 20 days of receipt of the request for TR, the District, TCID, and SOL should conduct a conference call to discuss the case. The District is responsible for setting up the conference call. Where the District and TCID agree that the request for TR was frivolously brought, no conference is required, and TCID should notify the miner that their request for TR has been declined.

Legal Procedure for TR Cases

If the evidence demonstrates that the request for TR was not frivolously brought, SOL will file an application for TR with the Commission. Under Commission procedural rules, within 10 calendar days of receiving the Secretary's petition, the mine operator may request a hearing before an Administrative Law Judge (ALJ). If requested, the hearing must take place within 10 calendar days of the mine operator's petition.

At the hearing, the Secretary will call witnesses, and the mine operator will have the opportunity to cross-examine the Secretary's witnesses and limited opportunity to present its own case. The complainant and the SI may testify at the hearing. The ALJ will issue the order within seven days after the close of the hearing.

If the ALJ awards TR, the complainant will be reinstated to his or her previous position at the same rate of pay and with the same benefits, effective as of the date of the ALJ's decision. TR only entitles the miner to immediate reinstatement, and not other remedies that are available after a favorable determination in a "merits" case. Where TR is ordered, the complainant will be required to report to work as directed by the company.

In some cases, where both the complainant and the mine operator agree, TR can take the form of *economic reinstatement*. Economic reinstatement means the complainant will not report to work but will be paid the same wage and provided the same benefits as if he or she were at work.

Withdrawn Requests for TR

A complainant wishing to withdraw a request for TR shall submit a signed statement to the Supervisor or SI assigned to the case explaining the reason for withdrawal. If a request for withdrawal is received through the mail, or otherwise not signed in the presence of a Supervisor or SI, the request should be verified with the complainant prior to notifying TCID of the withdrawal.

E. ELEMENTS OF A SECTION 105(c) INTERFERENCE CLAIM

Section 105(c) also prohibits interference with the exercise of statutory rights. Conduct may constitute interference if, under the totality of the circumstances, the conduct reasonably can be viewed as tending to interfere with miners' exercise of a protected activity. An operator or other person who engages in conduct that may make it less likely for miners to exercise protected activity can defend such action by demonstrating a legitimate and substantial reason for taking the action, which outweighs the harm associated with such conduct.

Interference claims differ from retaliation/adverse action cases:

- It is not necessary to show that the miner engaged in or was suspected of engaging in protected rights in order to show an interference violation. As long as there is conduct that tends to interfere with the protected activity, there may be an interference violation. The prohibition against interference is intended to prevent the obstructing of the exercise of protected rights by those miners who are directly affected, as well as by other miners who might wish to avoid similar treatment and thus refrain from asserting their rights.
- It is not necessary to show that a miner suffered an adverse employment action in order to show unlawful interference. The basis of an interference violation is the operator (or other person's) conduct that interferes with the exercise of protected activity, whether or not such conduct would be an "adverse action" under the retaliation cause of action.
- Interference claims do not depend on the operator's motive or intent. If a mine operator's comments or conduct interfere with the exercise of statutory rights, regardless of the operator's intent, there may be an interference violation.

The focus of the interference analysis is *not* whether the employer or person acted in good faith, but rather whether their actions, reasonably viewed from the perspective of members of the protected class and under the totality of the circumstances, tended to interfere with the exercise of protected rights.

Interference violations may take several forms, including threats of discipline or job loss conditioned on a miner's protected activity, interrogations regarding past or future protected activity, improper surveillance of protected activity, unlawful promises or conferral of benefits to miners who abstain from protected activity, and other policies or practices that have the effect of dissuading or preventing workers from exercising statutory rights.

Interference is evaluated from the perspective of a reasonable miner in the circumstances faced by the complainant. Thus, what may seem merely suggestive or innocuous in another relationship may interfere with exercise of rights in an employment relationship.

F. SECTION 105(c) CASE FILES

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 below. A label shall be affixed to the case folder as follows:

BECKLEY-CD-2019-01
Doe v. ABC Coal Company

BIRM-MD-2019-01
Doe v. XYZ Gravel

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 Supervisor.

The district will retain each original Section 105(c) case file folder. All case files shall be marked "CONFIDENTIAL."

1. Organization of Case Files

The organization of a Section 105(c) hard copy case file (on the left inside cover) is as follows, from front to back:

- For Official Use Only – Privacy Act Cover Sheet (MSHA Form 1000-345);
- Investigation Assignment Control Form.

The organization of a Section 105(c) case file (on the right inside cover) is as follows, from front to back:

- For Official Use Only – Privacy Act Cover Sheet (MSHA Form 1000-345);
- Cover memo from the RA to the Chief, TCID containing case recommendation;

- Memorandum of Investigation (Final Report);
- List of Exhibits:
 - For documents received from sources outside MSHA, the List of Exhibits should identify the source of the documents.
For example:
 - “Exhibit 5: Complainant Personnel Records, received from Operator”
 - “Exhibit 6: Complainant Medical Records, received from Complainant”;
- Exhibits:
 - Each exhibit shall be marked with Exhibit and Page numbers;
- The following exhibits shall be included in all Section 105(c) case files:
 - Discrimination Complaint Form 2000-123;
 - Discrimination Complaint Form 2000-124;
 - Notification Letters, Certified Return Receipts;
 - Legal Identity Report;
 - Names, addresses, and telephone numbers of any persons interviewed;
- If applicable, additional exhibits may include any of the following, depending on the particular facts of the case:
 - Statement of Interviews (MSHA Form 7000-56) or Memoranda of Interviews (MSHA Form 7000-57), if conducted (each should be exhibited separately);
 - Complainant personnel records;
 - Other employee personnel records;
 - Employee medical records;
 - Employer position statement;
 - Employer supporting documents;
 - Mine records relevant to the case report;
 - Technical reports or laboratory analysis;
 - Applications for unemployment or workers’ compensation;
 - Internal memorandums, e-mails, if relevant;
 - Mine Status Report, if relevant.

Investigators’ notes relevant to the case shall be kept in a sealed envelope separate from the case file. These records must be maintained as part of the special investigation record and copies must be provided to SOL if the matter proceeds to litigation. Any additional documents and miscellaneous information obtained in the course of the investigation that is not relevant to the issues identified in the complaint should be maintained by the district, separate from the case file.

If more than one case file folder is required, each file folder shall be numbered sequentially and labeled with the case number. The “For Official Use Only -

Privacy Act Cover Sheet" (MSHA Form 1000-345) will be placed at the front of each side of each folder containing case information.

2. Investigation Reports

Every investigation report, regardless of the type of investigation, shall be prepared in the appropriate manner as described in this handbook (see Exhibits 2-1 and 2-2). When the Supervisor is reviewing the investigation report for completeness and adherence to policy, the Supervisor will not make changes without first consulting the SI who conducted the investigation and prepared the final report. Each investigation report written by the SI will be forwarded through the Supervisor to the DM for approval and the RA's concurrence. The case file will then be transmitted from the DM to the Chief, TCID.

SAMPLE
INVESTIGATION FOR TEMPORARY REINSTATEMENT

CASE NUMBER: BARB-CD-2021-01 INVESTIGATOR: Johnny Appleseed

DISTRICT: [___] Date Investigation Started: November 31, 2020

COAL/MNM: Coal Date of this Report: December 12, 2020

Complainant 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 worked for Allied Switch Makers for approximately 3-1/2 years.

On October 8, 2018 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 terminated because he 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 that when Rockney attempted to do work safely, 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, claimed that they strictly and conscientiously enforced their policies prohibiting the use of drugs and alcohol at the mine and that they never would fire a miner for raising concerns

about drug or alcohol use at the mine.

[OR]

The respondents named in this case did not participate in the investigation. The SI attempted to contact them on [dates] but as of the date of this report, has received no response.

Conclusion: Evidence obtained from witnesses indicates that 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. Moreover, after working for Allied Switch for approximately 3-1/2 years, Rockney was fired within 3 days of raising concerns about drug and alcohol use at the mine. While management claims that they enforce their drug/alcohol policy and would not fire a miner for making related complaints, there is some evidence to support the complainant's claim of discrimination.

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

Do you recommend reinstatement?

____Yes	____No	(Special Investigator)	Date: _____
____Yes	____No	(Supervisor)	Date: _____
____Yes	____No	(District Manager)	Date: _____
____Yes	____No	(Regional Administrator)	Date: _____

Exhibit 2-2

SAMPLE
SECTION 105(c) INVESTIGATIVE REPORT

DATE:

MEMORANDUM FOR:

District Manager

THROUGH:

Supervisor

FROM:

Special Investigator

SUBJECT:

Special Investigation Report of a Discrimination Complaint
Under Section 105(c) of the Federal Mine Safety and Health
Act of 1977 (Mine Act)
Jane Carson v. Academy Mining Corporation, Mine No. 1,
I.D. No. 12-34567; Case Number -----

The evidence gathered during this investigation indicates that a violation of Section 105(c) has (has not) occurred. Therefore, the District recommends that (no) further action be taken concerning this matter.

Introduction

On August 21, 2019, Jane Carson (Carson) filed a discrimination complaint against Academy Mining Company, Mine No. 1. Carson alleges that Academy Mining Company terminated her employment after she complained about poor brakes on a front-end-loader (FEL).

Discussion of the Facts

Academy Mining Company operates Mine No. 1, a small crushed limestone operation in Beckley, West Virginia. The operator produces and sells crushed limestone to mines in a three state area (Exhibit 2, page 1; Exhibit 8, page 3).

Carson worked at the mine as an FEL operator for approximately 30 months. She loaded pit trucks with the blasted material for transport to the processing plant (Exhibit 1, page 2; Exhibit 3, page 2; Exhibit 4, page 2; Exhibit 4, page 3; Exhibit 5, page 2; Exhibit 7, page 2).

Carson alleges she complained about poor brakes on the FEL for about 3 weeks, beginning August 2. She told Maintenance Mechanic John Jones and Foreman Gary Davis several times that the brakes were bad and getting worse. Carson had written her complaints on the required daily pre-operational check forms several times between August 2 and August 19. These forms are signed by Foreman Davis and Mine Manager Bob Kern (Exhibit 3, page 3; Exhibit 8, Pages 1-12).

Carson contends that on August 9, Davis told her that she did not need brakes as long as she dropped the bucket to stop the loader. This conversation was witnessed by her co-workers, Truck Drivers Pat Simpson and Ned Brooks (Exhibit 3, page 5; Exhibit 5, page 4-5; Exhibit 6, page 2).

Simpson, Brooks, and Jones all stated that Carson was a good equipment operator and did not have any problems until the brakes went bad on the FEL. They all stated they never heard anything negative about her performance until she started complaining about the brakes (Exhibit 3, page 4; Exhibit 5, page 3; Exhibit 6, page 3; Exhibit 7, page 2).

On August 19, Carson told Davis that she would no longer operate the FEL until the brakes were repaired. Davis told her the FEL did not need brakes on flat ground, to just use the bucket to stop it. Carson told Davis that it was unsafe to use the bucket and was afraid she would run over someone or have a wreck and did not want to use it again until it was fixed. Carson asked if she could go to the shop to work while the FEL was being repaired. Davis told Carson she was terminated for insubordination and failure to perform her assigned tasks. She was escorted off mine property. (Exhibit 3, page 5; Exhibit 4, page 2; Exhibit 5, page 3 & 5; Exhibit 7, pages 2-3) This conversation was witnessed by Simpson, Brooks and Jones (Exhibit 3, page 5; Exhibit 5, page 4-5; Exhibit 6, page 2; Exhibit 7, page 3).

Academy Mining Company submitted a position statement and contends that Carson was not a good equipment operator and was constantly finding reasons not to perform her assigned tasks. The statement further explains that she was terminated for insubordination (Exhibit 8, page 4; Exhibit 9, pages 1-2).

Carson requests her job back with back pay and all benefits. She also wants any negative comments removed from her personnel file.

Conclusion and Recommendations

A prima facie case has been established. Complainant Jane Carson is a miner who engaged in protected activity when she reported the bad brakes on the FEL to Foreman Gary Davis several times between August 2 and August 19. On August 19, she refused to operate the FEL until the brakes were repaired. Miners Pat Simpson, Ned Brooks, and John Jones heard the conversation between Carson and Davis.

The company claims Carson was terminated for insubordination when she refused to perform her assigned tasks. However, the evidence supports the complainant's position. Simpson, Brooks, and Jones all stated that Carson was a good equipment operator and did not have any problems until the brakes went bad.

The evidence indicates that a violation of Section 105(c) occurred when Davis terminated Carson after she refused to operate the unsafe FEL. Therefore, the District recommends that a complaint be filed with the Federal Mine Safety and Health Review Commission.

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

This chapter contains guidance for obtaining injunctive relief in instances where inspectors are denied entry to mine property, mine operators work against closure orders, or inspectors or investigators are denied access to information or documents during the course an inspection and/or investigation. This chapter also contains guidance on how to address situations involving the assaults or harassment of MSHA officials, and attempts by mine operators or their agents to delay, hinder, or impede inspections and investigations.

B. DEFINING INJUNCTIVE ACTIONS

An injunction is issued by a United States District Court to order a person to do something (e.g., allow entry) or to refrain from doing something (e.g., working against an order of withdrawal). The failure or refusal to comply with any type of injunction is punishable by contempt of court proceedings.

Section 108(a)(1) of the Mine Act states: "The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent —

- (A) violates or fails or refuses to comply with any order or decision issued under this Act;
- (B) interferes with, hinders, or delays the Secretary or his authorized representative, or the Secretary of [Health and Human Services ("HHS")] or his authorized representative, in carrying out the provisions of this Act;
- (C) refuses to admit such representatives to the coal or other mine;
- (D) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine;
- (E) refuses to furnish any information or report requested by the Secretary or the Secretary of [HHS] in furtherance of the provisions of this Act; or
- (F) refuses to permit access to, and copying of, such records as the Secretary or the Secretary of [HHS] determines necessary in carrying out the provisions of this Act."

Injunctive relief will be requested by the DM, with RA's concurrence, having jurisdiction over the particular mine.

In most cases, the inspector or SI will be the person involved in the initial action leading to a request for an injunction.

There are two steps to an injunctive action: a preliminary injunction and a 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 without a preliminary injunctive order to prevent the other party from engaging in or continuing illegal actions as defined by the Mine Act. A preliminary injunction stays in place until a party is granted or denied a permanent injunction. In exigent circumstances, it may be necessary to obtain a Temporary Restraining Order (TRO). A TRO may be needed before a preliminary injunction request can be heard by the court. In most cases only the party requesting the TRO is required to be present for the proceeding.

2. Permanent injunction

A permanent injunction is a final order requiring the party named in the order 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. TYPES OF ACTIONS WHICH MAY LEAD TO A REQUEST FOR INJUNCTIVE RELIEF

1. Denials of Entry

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.

2. 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 order of withdrawal, and list the names of witnesses present. The inspector shall then issue a separate Section 104(a) citation for failure to comply with each order violated.

3. Advance Notice of Inspection/Investigation

Section 103(a) of the Mine Act, in addition to providing the statutory right of entry, prohibits any person from providing advance notice of MSHA inspections. Section 110(e) of the Mine Act, which provides for the possible imposition of monetary penalties and imprisonment for improperly giving advance notice of an MSHA inspection, is an additional enforcement tool that can be used to discourage this practice. The Mine Act does not prohibit advance notice of special investigative activities (activities which are not direct enforcement activities).

4. Non-compliance with an Imminent Danger Order

D. PROCEDURES AND RESPONSIBILITIES FOR INITIATING INJUNCTIVE ACTION

Inspection Supervisor

When an inspector reports a denial of entry, working in violation of an order of withdrawal, or witnesses advance warning of an inspection, the 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 statement or affidavit.

District Manager

The DM, or their designee, with RA's concurrence shall be the person primarily responsible for requesting and coordinating injunctive actions in the district office. When it is determined injunctive relief should be requested, the following actions should be taken:

- Obtain a case number from the Supervisor and transmit the inspector's memorandum to TCID;
- Contact the appropriate Regional Solicitor's Office (RSOL) by telephone and describe the order, danger, regulation violation (if appropriate), and the circumstances of noncompliance; request assistance and advice;
- Have a statement or affidavit prepared by the inspector outlining the event;
- The RA, or their designee, shall report the status of all injunctive cases to the Administrator by the 15th of each month when injunctive cases are pending, otherwise no report is required.

Supervisor

The Supervisor will be responsible for:

- Advising and assisting the inspector, field office supervisor, DM, and RA;

- Informing the DM of all developments;
- Advising TCID of all pending cases;
- Establishing a case file for the material and labeling it appropriately;
- Collecting and assembling the case materials in the case file for transmission (affidavit/ statement, citations, orders, jurisdictional information, etc.);
- Notifying TCID when case file is available and securely transmit a copy of the case file to the appropriate RSOL; and
- Monitoring case progress and litigation; maintaining the case file.

Office of the Solicitor

The Department of Labor's RSOL has responsibility for advising MSHA regarding whether injunctive relief is advisable. The merits of a case, and sufficiency of supporting information, must be determined by RSOL.

E. PROCEDURES UPON RECEIPT OF INJUNCTION

Upon notification from RSOL that an injunction was granted, the DM, or their designee, with RA's concurrence, shall decide whether service of the injunction can be safely completed by MSHA personnel. In these instances, when the injunction is received, the DM may request that the RSOL arrange for service accompanied by a U.S. Marshal, if appropriate. The cover letter shall direct an inspection be conducted within 15 days and contain instructions for the certificate of service. A copy of the letter and injunction shall be placed in the case file.

Upon receiving the injunction, the field office 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 and forward it to the DM, or their designee, for inclusion in the case file.

In the case of a denial of entry, upon notice that an injunction has been issued, the inspector may be accompanied by a U.S. Marshal. The inspector's supervisor shall accompany the inspector 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.

When the inspection report and certificate of service are received by the DM, or their designee, copies should also be transmitted to TCID noting that the case is closed.

If the operator does not comply with the injunction after service has been completed, the Supervisor and inspector shall record as much of the incident as possible (if it can be done safely onsite) and return to the office and contact the DM, or their designee, who will notify the RA.

The Supervisor will:

- Immediately contact the attorney handling the case for advice and assistance;
- Notify TCID by telephone of the noncompliance and the solicitor's instructions.

F. ASSAULT OR HARASSMENT OF INSPECTORS/INVESTIGATORS

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. MSHA inspectors and investigators are included in Section 1114 since the enactment of Public Law 95-87 in 1977.

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.

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 or investigator, while such inspector or investigator 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 US Attorney in the federal courts.

Procedures to Follow

MSHA procedures require the inspector or investigator to leave the scene of any situation which appears to be developing into a confrontation that may result in a violation of Section 1114 or 111. The inspector or investigator should inform the person involved in the confrontation that an assault on or interference with an MSHA inspector or investigator is a federal crime, and they may be subject to investigation and arrest by the FBI.

G. ORGANIZATION OF CASE FILES

The organization of a Section 108 case file (on the left inside cover) is as follows, from front to back:

- For Official Use Only – Privacy Act Cover Sheet (MSHA Form 1000-345);
- Investigation Assignment Control Form (MSHA Form 2000-158).

The organization of a Section 108 case file (on the right inside cover) is as follows, from front to back:

- For Official Use Only – Privacy Act Cover Sheet (MSHA Form 1000-345);
- Cover memo from the DM through the RA to the Chief, TCID containing case recommendation;
- Memorandum of Investigation (Final Report);
- List of Exhibits;
- Exhibits:
 - Each exhibit shall be marked with Exhibit and Page numbers;
 - The following exhibits shall be included in all Section 108 case files:
 - Memorandum from MSHA inspector/investigator providing a detailed summary of events in chronological order (Exhibit Nos. 3-1 and 3-2);
 - Legal Identity Report;
 - Names, addresses, and telephone numbers of persons interviewed;
 - Additional exhibits may be included, depending on the particular facts of the case:
 - Citation/Order Documentation Forms (MSHA Forms 7000-3 and 7000-3a), if a citation or ordered was issued;
 - Inspector's notes.

If more than one case file folder is required, each file folder shall be numbered sequentially and labeled with the case number. The "For Official Use Only - Privacy Act Cover Sheet" (MSHA Form 1000-345) will be placed at the front of each side of each folder containing case information.

H. DENIAL OF ACCESS TO INFORMATION OR DOCUMENTS

Section 103(h) of the Mine Act provides MSHA with the statutory right to request information and documents during the course of inspections and investigations. This authority extends to SIs conducting special investigations. In instances where inspectors or investigators are denied access to documents or

information requested during enforcement activities, the inspection supervisor or Supervisor should be notified immediately. These actions may constitute an impeding violation.

Some MSHA investigations may require a formal request of documents or information from the DM. If information is requested during other types of investigations the letter should be tailored to reflect the type, such as Section 110, accident, etc.

I. REQUESTING PRIVACY ACT DOCUMENTS AND INFORMATION COVERED BY HIPAA

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is a federal law that, among other things, creates privacy rights and protections for consumers of health services. The law prohibits *covered entities* from using or disclosing an individual's medical records without that individual's consent, except in certain circumstances. A covered entity is defined as "a health plan, a health care clearinghouse, or a health care provider."

Covered entities may disclose protected information to MSHA (when justified) because MSHA is a "public health authority," "health oversight agency," and "law enforcement" agency exempted from HIPAA's general disclosure prohibitions. See 45 C.F.R. §§ 164.512(b), (d)(1) and (f). Extra care should be taken with any medical records obtained in the course of an investigation. These are usually protected against disclosure under the Privacy Act and FOIA. MSHA SIs are responsible for maintaining and safeguarding these records from unauthorized access or disclosure.

CHAPTER 4 - SECTION 110 INVESTIGATIONS

A. INTRODUCTION

Title I of the Mine Act establishes the overall enforcement scheme by which MSHA ensures compliance with health and safety standards. This enforcement mechanism provides for several levels of enforcement action by MSHA, increasing 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 require 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 or an agent who willfully violates a mandatory safety or health standard.

These provisions apply *only to agents of corporations*, including agents of LLCs (“limited liability corporations” or “limited liability companies”).³ Agents of partnerships or sole proprietors are not covered, either criminally or civilly. The SI should make every effort to establish the legal business structure of the operator entity.

B. LEGAL DEFINITIONS

In reference to Section 110(c) of the Act, a precedent-setting decision 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.⁴

MSHA must show, by a preponderance of evidence that a civil violation

³ Secretary of Labor (MSHA) v. Bill Simola, 34 FMSHRC 539 (2012); Sumpter v. Secretary of Labor, 763 F.3d 1292 (11th Cir. 2014)

⁴ BethEnergy Mines, Inc., 14 FMSHRC 1232 (1992); Secretary of Labor (MSHA) v. Kenny Richardson, 3 FMSHRC 8 (1981)

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) by 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.

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.”⁵

Reckless disregard has been defined 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.”⁶

When bringing Section 110(d) charges, the court will rely on the language of the Mine Act or the regulation in their precise and technical meaning, and implication or indirect meanings will not be recognized.

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 through the RA, usually as a result of one of the following circumstances:

- A mine accident;
- Complaints alleging violations of Section 110(e) (advance notice), 110(f) (false reporting), or 110(h) (equipment misrepresentation);

⁵ U.S. v. Consolidation Coal Co. & Kidd, 504 F.2d 1330, 1335 (6th Cir. 1974)

⁶ U.S. v. Kyle Jones, Gary Neil, 735 F.2d 785 (4th Cir. 1984)

- Reviewing citations/orders

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. The DM will then forward the allegations to the RA. The DM will notify the Administrator, who will in turn contact the Office of the Inspector General for further investigation. All other special investigations shall be conducted by the District SIs.

2. Review of Citations and Orders

For each citation and/or order that must be reviewed per MSHA policy, a Possible Knowing/Willful Violation Review Form, MSHA Form 7000-20, shall be completed.

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 Assistant District Manager (ADM), Supervisor, and DM for immediate review. This package will be forwarded to the RA. The information on Form 7000-20 is confidential, pre-decisional information, and generally not releasable under FOIA. These documents shall only be maintained in the special investigation files and shall not be maintained with other field office inspection files.

The Supervisor shall review each violation for evidence of a possible knowing and/or willful violation. After the ADM and Supervisor have completed their review, the complete package will be forwarded to the DM for review, and then RA for final approval.

Within 30 calendar days of the date of issuance of the citation/order a determination must be made by the RA (with the assistance of the Supervisor), whether to initiate a special investigation, a preliminary investigation, or take no further action. The reasons for not initiating an investigation should be documented.

If an investigation is to be initiated, an SI will be assigned to the case along with an event number. If a preliminary investigation is to be initiated, then within 45 calendar days of the date of issuance of the citation/order a determination must be made on whether or not to initiate a Section 110 investigation.

3. Assigning Case Number and Investigator

Once a determination is made to initiate an investigation, the complaint processor shall obtain a case number and the name of the SI assigned to the case from the Supervisor. 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 should then initiate the Investigation Assignment Control Form, place it in the case file, and distribute the copies as indicated.

Supervisors and SIs conducting special investigations should record ALL time spent conducting an investigation on MSHA Form 2000-158 (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 citations/orders under investigation. Such information is normally available from the Supervisor or TCID. This background information, as well as the violation history and accident/injury data, should be 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.

5. Section 110 Case File Timeframes

All timeframes for Section 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, RA makes determination to initiate or decline investigation;
- Within 45 calendar days, if a preliminary investigation is conducted, the RA makes a determination whether to initiate or decline a Section 110 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 days⁷, a district-recommended case must be submitted to TCID;
- Within 220 calendar days, Section 110(c) cases should be forwarded to Office of Assessments;
- Within 240 calendar days, criminal referrals should be forwarded to DOJ through SOL.

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 SI duties will be to observe conditions and monitor interviews 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 SI shall:

- Inform the accident investigation team leader immediately in private to the extent possible, that a Section 110 violation may have occurred.
- Advise the accident investigation team leader of the requirements for the preservation of evidence (See Chapter 5 of this Handbook).
- Notify the Supervisor 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. TCID Procedures Relative to Mine Disasters

Representatives from TCID 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.

⁷ If the required deadline cannot be met, the DM will submit an extension request in writing with justification to TCID. These timeframes are management goals and shall not be used for individual performance evaluations.

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 evidence 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 interstate commerce.⁸ If there is uncertainty regarding jurisdiction, the agency representative must gather all related information and relay it to the RA. If uncertainty remains, the RA should consult with the Administrator and SOL. Once jurisdiction is established, the case may proceed.

D. CRIMINAL INVESTIGATIONS

Whenever the district determines that there is potential for criminal liability in a Section 110 investigation, TCID and the criminal counsel in SOL (Mine Safety and Health Division (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 TCID within 120 days of the date of the underlying violation. If the required deadline cannot be met, the DM through the RA will submit an extension request in writing with valid justification to TCID.

TCID 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 Associate Solicitor to the Administrator outlining the circumstances of the case. The SOL-MSH will then prepare a letter, signed by the Administrator and Associate Solicitor, forwarding the case file to the appropriate local U.S. Attorney's Office. MSHA 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 Section 110(c) civil action. The district and TCID will confer about further steps, including offering an agent conference, or will close the case (see Section 2 below).

If the Administrator and the Associate Solicitor do not agree on a

⁸ See United States v. Arvil Lake, 985 F.2d 265, 267-68 (6th Cir. 1993) (criminal case); also, D.A.S. Sand & Gravel v. Chao, 386 F.3d 460 (2d Cir. 2004) and Mechanicsville Concrete, Inc. v. FMSHRC and Reich, 35 F.3d 556 (4th Cir 1994) (unpublished) (civil cases)

recommendation, MSHA and SOL will discuss the case further and, where necessary, request a review by DOJ. Once resolved, the case will be handled as described above.

If a case will not be referred to DOJ for possible criminal prosecution under the MINE Act, but MSHA has indications of other possible criminal activity not covered under the MINE Act (e.g., drug cases, tax evasion, etc.), MSHA will inform DOJ of such information.

In some circumstances, it may be necessary to expedite the review procedures for referral of a case. The following criteria can help identify cases where expedited handling is appropriate:

- 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;
- DOJ 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 must approve referral of the case to the DOJ, as appropriate. The DM through the RA will prepare a memorandum to TCID requesting approval for expedited referral to the DOJ. The levels of review for such referrals are the same as other Section 110 cases, except that criminal cases will be given higher priority.

In exceptional cases, where oral approval is granted to expedite the referral, the RA will submit a memorandum of the request for expedited referral.

E. REPORTING OF CRIMINAL PROSECUTIONS

Grand jury indictments, criminal information, all defendant pleas, convictions, and sentencing should expeditiously be reported by the Supervisor by telephone to the Chief, TCID. Some information in this context is prohibited from disclosure or dissemination outside a closed group and is sensitive. It should not, except in the case of publicly filed documents, be transmitted via email. The corresponding court documents should be obtained and forwarded to TCID 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;
- Copies of plea agreements signed by the defendant, and/or record of court convictions after trial; and
- The judgment in a criminal case sentencing record.

Each of these should be obtained and submitted to TCID as soon as each document is available from the court or Assistant United States Attorney (AUSA).

In cases where there is more than one co-defendant, TCID should be immediately notified via telephone each time an individual or operating company is charged, pleads, or is sentenced (as outlined above), followed by submission of the supporting court document as soon as it is available. A “Summary of Criminal Proceedings” should be prepared and submitted to TCID immediately after conviction of, or court-accepted plea by, each 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 TCID.

F. SECTION 110 CASE FILES:

1. Organization Of Case Files

The organization of a Section 110 case file (on the left inside cover) is as follows, from front to back:

- For Official Use Only – Privacy Act Cover Sheet (MSHA Form 1000-345);
- Investigation Assignment Control Form.

The organization of a Section 110 case file (on the right inside cover) is as follows, from front to back:

- For Official Use Only – Privacy Act Cover Sheet (MSHA Form 1000-345);
- Cover memo from the District Manager to the Chief, TCID containing case recommendation;
- Agent conference notification letters, if applicable;
- Memorandum of Investigation (Final Report);
- List of Exhibits:

- For documents received from sources outside MSHA, the List of Exhibits should identify the source of the documents.
For example: “Exhibit 5: Exam Records, received from Operator”
- Exhibits:
 - Possible Knowing/Willful (PKW) Violation Review Form (MSHA Form 7000-20), if applicable⁹:
 - Citation/Order Documentation Forms (MSHA Forms 7000-3 and 7000-3(a), citation/order documentation notes, and general field notes;
 - All subsequent actions;
 - Special Assessment Review Form, if applicable;
 - Close-out Conference Information;
 - All relevant documentation used to support the citation/order; including, but not limited to:
 - General field notes;
 - Photographs;
 - Maps;
 - Sketches.
 - Legal Identity Report (MSHA Form 2000-7), Contractor ID Request MSHA 7000-52), if applicable and Mine Information Form (MIF) (MSHA Form 2000-209);
 - Documentation verifying business entity types, i.e.
 - Articles of Incorporation, if applicable;
 - State issued verification, if applicable;
 - Statement of Interviews (MSHA Form 7000-56) or Memorandum of Interviews (MSHA Form 7000-57) (each should be exhibited separately).

The following evidence may be exhibited if it is relevant to the investigation:

- Photographs, maps, and sketches;
- Mine Records, i.e., ventilation plans, roof control plans, training records, pre-shift/on-shift examination records, etc.;
- MSHA accident reports relative to the investigation;
- Technical Reports or Lab analysis – provided by (Individual/Company’s Name);
- Citation/Order History;
- Mine Assessment History;
- Internal Memoranda;

⁹ Please note that each PKW with its citation/order and its corresponding documentation should be exhibited separately.

(If an investigation is initiated as a result of an allegation/falsification of records, etc., and no citation/order is issued, a memorandum signed by the District Manager containing justification for the investigation and all supporting documentation must be included in Exhibit 1 of the case file)

- Names, Addresses, and Telephone Numbers of Persons Interviewed.

2. Case File Guidelines

- The “List of Exhibits” referenced above is an example and not limited to the referenced documents. All documents pertaining to the investigation should be included in the file.
- Each item exhibited on a “List of Exhibits” should specify the origin of the exhibit. In instances where information/documentation is received from the operator or other sources, indicate the origin. (i.e.: Lab analysis – provided by ABC Mining Company).
- All other miscellaneous records relevant to the case file may be exhibited, as necessary.
- If more than one case file folder is required, each file folder shall be numbered sequentially and labelled with the case number. The “For Official Use Only - Privacy Act Cover Sheet” (MSHA Form 1000-345) will be placed at the front of each side of each folder containing case information.

3. Investigation Reports

Every investigation report shall be prepared in the manner described below. The Supervisor will not change the report during the review for completeness and adherence to policy without 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 Supervisor to the DM for approval and RA’s concurrence. The case file will then be transmitted in a secure manner from the DM to the Chief, TCID.

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

VINC-CSI-2019-01	WAR-MW-2019-01
ABC Coal Company	XYZ Gravel

The district will retain each original case file folder.

Cases Not Recommending Further Action

For any Section 110 special investigation case file where there is insufficient 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. The DM shall notify the operator or contractor by letter (identifying the citation and order involved) and indicate that MSHA will not to pursue further action. A copy of the notification letter shall be sent to TCID along with a memorandum briefly stating the reasons for the district's determination. If an agent conference letter has already been sent, then the same closure letter should be sent to the agent.

When responding to requests from the Regional Solicitor (RSOL) to review Section 110 cases closed by the DM, a cover memo shall be prepared by the DM. Regional Solicitors should still direct their request for copies of Section 110 case files to SOL-MSH, co-located with MSHA headquarters.

Exhibit 4-1

SAMPLE
SECTION 110 REPORT

DATE:

MEMORANDUM FOR:

District Manager

THROUGH:

Supervisor

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

This case was initiated after MSHA received a hazard complaint¹ on January 20, 2019 regarding conditions and training at the ABC Mining, Inc.'s ("ABC") No. 2 Mine ("the mine"), an underground coal mine located in Beckley, West Virginia. MSHA Inspector Lawrence Phillips conducted an E03 hazard inspection the following day and corroborated the allegations.

The complaint alleged that, on January 16, 2019, MSHA-Approved Instructor James Felder provided annual refresher training consisting of only four hours of instruction, rather than the required eight hours. Each miner received an MSHA Form 5000.23 indicating that annual refresher training had been completed. Inspector Phillips interviewed several miners and issued Section 104(g)(1) Order No. 789456, immediately removing nine inadequately trained ABC miners from the mine until they received the required annual refresher training (Ex. 1, p. 2).

¹ The hazard complaint was filed under Section 103(g)(1) of the Mine Safety and Health Act of 1977 ("the Act").

The complaint also alleged that, on January 17, 2019, the afternoon shift took several deep cuts on the No. 1 Section, measuring approximately 51 feet in length. Inspector Phillips determined that the section foreman was present when the deep cut was taken and had instructed the miners to mine the deep cut. Inspector Phillips issued three (3) Section 104(d)(2) Orders, as follows: Order No. 6068166 for exceeding the maximum approved depth of cut; Order No. 6068167 for failure to maintain ventilation controls within ten (10) feet of the face (Ex. 2, p. 2, Ex. 2, p. 2, Ex. 6 and Ex. 7); and Order No. 6068168 for inadequate pre-shift and on-shift examinations (Ex. 3, p. 2).

Background and Jurisdiction

ABC Mining, Inc., (“ABC”) is a corporation registered in the Commonwealth of Pennsylvania. ABC owns and operates the No. 2 Mine (“the mine”), an underground mine that extracts coal from the Pittsburgh seam, which is then 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 (Ex. 3, Ex. 4, p. 2, and Ex. 5). At the time the violations were cited, ABC was a corporation in good standing.

Summary and Discussion of Facts

The targets of this Section 110 investigation are Mine Foreman/“Fire Boss” John Doe and MSHA-Approved Training Instructor James Felder.

James Felder:

James Felder is an MSHA-Approved Training Instructor, under 30 C.F.R. Part 48, ID No. 999-999. Felder completed certain programs of instruction conducted by MSHA or approved by MSHA and has been an MSHA-approved training instructor for approximately 6 years. Felder is also a member of the ABC safety department.

Felder authorized the violation described in Section 104(g)(1) Order No. 789456, allowing untrained miners to work on the mine site. On January 16, 2019, Felder conducted Annual Refresher Training² for nine miners, which consisted of videos and some lecture. This was verified by the sign in sheet provided by ABC (Ex. 20). Felder stated that he was warned by Doe repeatedly that production levels must be maintained and he had to keep training to a minimum. Felder explained that midway

² Annual Refresher Training is a mechanism by which miners (1) are refocused on the multitude of dangers inherent in the mining occupation and the brought up to date on new development in the mining environment, and (2) re reminded of their legal right to a safe working environment under the Mine Act. The subjects required for Annual Refresher Training are outlined in ABC approved training plan, (Ex. 8, pages 6-15).

through his course Doe contacted him and wanted him to release the crew from training because production was low. Felder said he signed the training forms and gave one to each miner in the class. Felder did not indicate that he opposed the release the miners but indicated that he was doing what he was told.

John Doe:

Doe is the Foreman/“Fire Boss”³ on the No. 1 Section. Doe conducted the on-shift examinations and directed the work force. When performing these duties, he was acting as an agent of the corporate operator (Ex. 6, p. 6, Ex. 12, p. 1, Ex. 13, p. 2, Ex. 14, p. 1, and Ex. 19, p. 2).

Doe ordered the violation cited in Order No. 6068166, exceeding the maximum approved depth of cut. Doe was responsible for directing the work force on the No. 1 Section. The continuous mining machine (“CMM”) operator told Doe that he (the miner operator) had cut 37 feet and had not holed through. Doe took measurements and determined that the block of coal was 44 feet from rib line to rib line. Doe then instructed the miner operator to cut it through. The miner operator and miner helper questioned Doe’s instructions. Doe again instructed them to mine the cut through, into the next entry, saying they could install a few quick rows of bolts. Doe stayed and observed the mining machine cut through into the next entry (Ex. 13, p. 1, Ex. 14, p. 2, and Ex. 19, p. 1).

Doe, by his own admission, knew the cut was too long when he first approached it before he gave the order to cut it through. Doe explained in his statement that it was safer to just cut the face through instead of exposing miners to the hazards of unsupported top while temporary supports were installed. The line canvas could be moved closer to the face so that methane readings could be taken and he knew he had a remote-controlled miner; therefore, no one would be exposed to unsupported roof.

Doe authorized the violation described in Order No. 6068167, failing to maintain ventilation controls within ten (10) feet of the face (Ex. 2, p. 2, Ex. 2, p. 2, Ex. 6 and Ex. 7). Doe knew the cut was too long because he measured the width of the block of coal as 44 feet from rib to rib. Doe 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 (Ex. 13, p. 1, Ex. 14, p. 2, and Ex. 19, p. 1).

Doe carried out the violation described in Order No. 6068168, failing to conduct adequate pre-shift and on-shift examinations. Miner witnesses indicated that Doe told

³ A “fire boss” is a State-certified supervisory mine official who examines the mine for combustible gases and other dangers before a shift comes into it and who usually makes a second examination during the shift.

them that he (Doe) had fire bossed only some area of the mine because he did not have the time and he had to make sure the product was up. Evidence in the record indicated that dates, times and initials were only present in one area. Doe certified on the pre-shift and on-shift examination reports that no hazards existed (Ex. 15). Doe stated that he did not believe that any hazards existed so he did not mark it in the record books, despite the fact that he admitted he knew of some of the dangerous conditions and had reason to know of the others, given his presence in the area and the open and obvious nature of the violations. (Ex. 3, p. 2).

Conclusion and Recommendation

The evidence indicates that Mine Foreman John Doe and MSHA-Approved Training Instructor James Felder are agents of the corporate operator, who knowingly authorized, ordered and carried out the violations cited in this investigation.

It is recommended that civil penalties be assessed against Doe, under Section 110(c) of the Act, for all four violations. Doe ordered the miners to take the deep cut and watched as they did so. Doe at least had reason to know that ventilation was inadequate because he was in the area, knew about the deep cut, and allegedly conducted an examination of the area. Doe's examination ignored the open and obvious hazards discussed above, making it an inadequate exam. Finally, Doe pulled the miners out of training and put them back to work, knowing that the training had not been completed and that the miners were working without the required annual refresher training. Therefore, the evidence indicates that Doe ordered, authorized, and carried out the violations. The District recommends a civil penalty be assessed against Felder, under Section 110(c), for the training violation. Felder ended training early, allowed miners to be returned to work, and falsely certified on their training forms that a full 8 hours of training had been conducted.

By falsifying the training forms, Felder arguably also committed a violation of Section 110(f) of the Act, exposing him to potential criminal penalties. Although the facts support a technical violation of Section 110(f), the particular circumstances of this case do not warrant criminal prosecution. Instead, given that the training in questions was annual refresher training and not new miner training, approximately half of the training was provided, and it is unclear if Felder had the authority to remove the miners himself or refuse to send them back to work, the District believes that a civil penalty more appropriately addresses his conduct. In addition, the District is in the process of proposing to temporarily revoke Felder's training certification. The combination of these two punishments should have an adequate deterrent effect.

CHAPTER 5 - EVIDENCE

A. INTRODUCTION

SIs do not have authority to seize evidence which is not voluntarily released. If evidence is not voluntarily released, a search and seizure warrant must 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 to do so. SIs do not have the authority to obtain or execute search warrants but may assist in these activities. If an SI believes a search warrant is needed, they shall brief the Supervisor on the reasons for needing the warrant. If the Supervisor agrees that a search warrant is necessary, they shall notify the DM, RA and TCID of the request. The DM will confer with SOL and TCID (if necessary). If it is determined by the DM that a search warrant is necessary, the information will be presented to the US Attorney with assistance from TCID and SOL as appropriate. Even though SIs do not have search warrant authority, there is authority under Mine Act 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.

Evidence that may have a connection with the case should be collected. Nothing should be rejected because it appears too physically unwieldy, 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 and connected to the location where it was found through the use of photographs, sketches, or other testimony. Photographs of the evidence must be carefully documented. MSHA-provided cameras must be used in compliance with MSHA policies and procedures.

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, and cables) presented for inspection to the trier of fact, "speaks for itself." It is usually considered trustworthy evidence by the trier of fact.
- Documentary Evidence: It consists of a document (i.e., roof control plan, deed, or contract), rather than a tangible object.
- Testimonial Evidence: Testimony given in court (or by deposition) by a

witness may be either factual or opinion, such as when a transcript of an interview addresses facts in the case, or when an expert witness offers an expert opinion regarding the case.

2. Types of Evidence

There are three types of evidence:

- Direct Evidence: a fact that proves the issue without any inference or presumption;
- Circumstantial Evidence: evidence which offers indirect proof;
- Cumulative evidence: the totality or accumulation of direct and/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 is sometimes referred to as the “chain of custody” or the “chain of evidence”. This section describes these procedures. The attorney assigned to the case, or TCID, can 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 Supervisor). This ensures that each piece 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 a record of all the items of evidence which were collected, which shows that the evidence was properly handled and was not tampered with or altered.

1. Identification

All physical evidence obtained must have an Evidence Identification Tag 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 and care must be taken not to cover up, deface, alter, or in any way destroy the items. The markings may be any unique symbol which can be positively identified by the person. An "X" or other common symbols should not be used. The SI's notes should reference the

identification markings used, the date, time, specific location where the object was found, and any additional information necessary to distinguish a particular item from other evidence collected.

There are times when it is necessary for MSHA 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. 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. 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, these should be secured in the appropriate MSHA office. If large items are collected they may be secured in a storage area at the mine site. When storage at the mine site is necessary, "joint custody" is shared by the MSHA custodian and the mine operator. 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. Removal or transfer would only occur for examination, analysis, or use in a hearing or trial. When such a transfer occurs, Form 2000-200 shall be completed.

3. Preservation of Evidence

All evidence shall be carefully secured under the direct control of the Supervisor or SI having custody. All information concerning the evidence received or removed shall be recorded in the master log. The originals and certified copies 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

Precautions must be taken to ensure the proper handling of evidence and preservation of chain of custody when evidence is transmitted from one place to another for the purposes of evaluation, laboratory analysis, expert opinion, etc. 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 require special arrangements, made by the Supervisor or other appropriate official. The following non-exhaustive list of procedures must be followed when transmitting evidence, though additional procedures may be warranted in particular situations.

- *Briefing the Recipient:* The custodian of the evidence must brief the recipient (either in person, by memorandum, or both) on the actions required when evidence is received and processed. The custodian shall request that the recipient pack the evidence as indicated below, for its return. 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 Form 2000-200:* This form is initially completed by the custodian of evidence (custodian). The original, and both copies, will be packed with the evidence and transmitted to the recipient. The custodian shall make a copy for their records. Upon receipt of the evidence, the recipient will fill in the appropriate sections on all copies of the *Form 2000-200*, including date received, signature, name, title, and purpose of custody change. The original will always remain with the piece of evidence. After the recipient has filled in their portion of the form, a copy will be given to the custodian. The custodian will note when and who received the evidence, and for what purpose, in the master evidence log book once they receive the completed form. The recipient should return the evidence to the custodian properly packaged and transmitted as directed by the custodian. The custodian shall note receipt of returned evidence in the master log book. All parties with access to the evidence should take the following measures to preserve the chain of custody:
 - Pack the evidence;
 - Wrap the evidence and the original and both copies of the Chain of

- Custody form in appropriate protective material;
- Place in a box or envelope;
- Seal the container;
- Clearly indicate 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 appropriate directions such as "Expedite," "Urgent," "Fragile," "Explosive," "Inflammable," "Perishable".

5. Return of Material Gathered as Evidence

No evidence shall be returned to the owner (or their agent or attorney), without prior written approval of the Administrator. In the event of an ongoing criminal investigation involving the DOJ, evidence shall not be released without the written consent of both the Administrator and the AUSA (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 an authentic copy of the original document. The MSHA Administrative Policy and Procedures Manual, Volume I - Organization, Chapter 349.6, Certification of Documents, provides the procedures for certifying or affixing an official seal to attest to the authenticity of the official MSHA documents. The SI should direct their request for certification of documents to the Supervisor.

E. HANDLING OF GRAND JURY INFORMATION

If the DOJ proceeds with prosecution, the case may be presented to a grand jury. Access, use, and disposal of grand jury information and materials (e.g., information about or presented to the grand jury, or the notes on their deliberations) are governed by Rule 6(e) of the Federal Rules of Criminal Procedure, as well as certain statutes and DOJ protections.

1. Access

A federal prosecutor may disclose grand jury information to MSHA personnel from whom they require assistance. 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 “6(e) List”) are authorized to have access to grand jury materials. The SI may provide the AUSA with the names of MSHA personnel who should have authorized access to the grand jury information. This may include personnel from TCID and SOL. MSHA personnel shall take strict precautions to ensure that grand jury information is not disclosed to any unauthorized personnel. The SI shall ensure 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 6(e) does not permit disclosure of grand jury material for civil law enforcement purposes or use of these materials for any other investigative purpose. Access to and use of grand jury material is permitted solely 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 information, or any information which might be related to the grand jury investigation or to the grand jury process. If SIs are in doubt, material should be considered confidential unless federal prosecutors have advised in writing that it is not within the prohibitions of Rule 6(e).

A record of consultation and authorization with federal prosecutors regarding use and handling of Rule 6(e) material should be placed in the investigative file, preferably in a bound ledger book with numbered pages. The ledger should contain the time, date, names of all persons involved, and a summary of the discussion.

In addition, SIs will stamp all Rule 6(e) material received with a warning of its Rule 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 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. Material provided to the defendant loses its 6(e) protection.

CHAPTER 6 - 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 of the Federal Mine Safety and Health Review Commission (FMSHRC), is a crucial step in the enforcement process. Careful preparation of the case is essential to ensure success at trial; complete cooperation between SOL and SI is necessary.

In all civil cases, an attorney from the SOL will present the Agency's case. In criminal matters, an attorney from the DOJ will present the Agency's case, with assistance from SOL.

SIs should become thoroughly familiar with the information in this chapter to better understand the relationship between case preparation, presentation of evidence, and the decision of a court. Although this chapter focuses on criminal proceedings, the order of presentation and testimony of witnesses is the same in all trials. The variation in rules of procedure and trier of fact (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 a criminal prosecution under Section 110 of the Mine Act occurs, 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 U.S. Attorney may ask the SI 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 before the grand jury.

The SIs should study their notes and witness interview transcripts, to refresh their memory. The SI should organize their notes and interviews to allow 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 ask the SI to assist in the preparation of 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 provide relevant information to SOL. Full cooperation shall be given to both attorneys.

C. THE TRIAL

1. Evidence

In all trials, the testimony of witnesses is taken orally in open court (unless otherwise provided by law or these rules.) Certain exceptions are covered by law or the Federal Rules of Evidence. 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 order the exclusion of witnesses from the courtroom. This prevents:

- prospective witnesses from discussing the case with each other;
- a witness from hearing a testifying witness; and
- a witness 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 to prove the charged offenses. This is done by direct questioning of witnesses and introducing evidence. The witness is turned over to the defense counsel for cross-examination upon conclusion of direct examination (questioning) by the US Attorney. After cross-examination, the Government has the opportunity for “redirect”, or additional questioning of the witness. 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 testimony on direct examination by revealing that the testimony was contrary to circumstances, probabilities, and other evidence in the case;
- Discredit the witness by revealing bias, interest, corruption, or specific acts of misconduct.

The courts allow more latitude during cross-examination. For example, the cross-examiner may use leading questions to elicit 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 aspect 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 appropriate 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 ask the SI to take notes, especially with respect to any false, misleading, or erroneous statements. The SI may also assist in preparing questions for 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 inappropriate conduct. Likewise, any SI 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

SI testimony can be an essential component of a case and this testimony will usually be vital in establishing civil or criminal violations. Testimony may include a review of the SI's books or records.

The US Attorney can provide additional instruction and preparation for both direct and cross-examination.