



Mining MSHA – Understanding Agent Liability

Insights

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Welcome to “Mining MSHA,” a regular series of posts focusing on mine safety fundamentals – but designed for both new and experienced mine safety professionals. This series will help safety professionals develop their MSHA legal knowledge, as we explore over 40 years of case law developed by the Federal Mine Safety and Health Review Commission and its bench of Administrative Law Judges. You will want to share this series with your safety personnel at all levels, because understanding what MSHA can and cannot legally do is the first step in managing your relationship with this enforcement agency. Join your [Fisher Phillips Mine Safety Team](#) as we mine legal knowledge from the body of Federal Mine Safety and Health law.

In the last Mining MSHA article, we explored the unwarrantable failure finding and indicated that an unwarrantable failure finding can lead to agent liability. We continue this series with a discussion of agent liability. This article focuses on individual civil liability. Operators should understand what agent liability is and how to avoid special investigations and a potential “knowing violation” of a mandatory standard.

What Is Agent Civil Liability?

Section 110(c) of the Mine Act provides MSHA the ability to assess 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.

- Section 3(e) of the Mine Act defines “**agent**” as “any person charged with the responsibility for the supervision of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine.”
- A “**corporate operator**” includes LLCs (“Limited Liability Companies) but not partnerships, even if corporate.
- In the context of potential 110(c) liability, “**knowingly**” means knowing or having reason to know. There is no need for bad faith or intent to violate a mandatory standard. A person has reason to know when they have such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence. *See SOL v. Kenny Richardson*, 1 FMSHRC 874 (Rev. Comm. July 1979).

Section 110 investigations are typically initiated by the District Manager based on recommendations made by inspectors. They are generally the result of reviewing section 104(d) unwarrantable failure

made by inspectors. They are generally the result of reviewing section 104(a) unwarrantable failure citations or orders, all fatal and serious injury accidents, 107(a) imminent danger orders that also involve a violation of a mandatory standard, 104(g) training violations, enforcement actions alleging working in violation of a withdrawal order, advance notice violations, falsification, or equipment misrepresentation. The majority of 110 investigations arise from potential violations of 110(c) of the Mine Act.

Avoiding Agent Liability

As we learned in [our last article discussing unwarrantable failure](#), allegations of aggravated conduct leading to an unwarrantable failure designation are the most common trigger of a section 110 investigation. MSHA inspectors evaluate several factors when determining aggravated conduct, including whether:

- The alleged violative condition or practice was obvious or extensive;
- The alleged violative condition had existed for a period of time;
- Similar violations have been cited to the operator or contractor in the recent past;
- An agent of the operator or contractor had conducted an examination or had been in the area or was aware of the existence of the condition; and
- The alleged violative condition or practice had been reported to the operator or contractor who then allowed it to exist, without correcting or adequately addressing the problem, for a period of time.

Because mine operators have a duty of care to prevent or correct hazardous conditions, the evaluation of these factors is designed to determine the level of knowledge an agent has or should have regarding the existence of a violative condition or practice. Information used to avoid an unwarrantable failure designation can also be used to avoid potential agent liability. Examples of useful information can include some of the following:

- The violation just occurred or occurred after the most recent examination;
- Corrective action was taken, but the condition reoccurred;
- Systems and procedures (e.g., additional examinations) have been put in place to prevent the occurrence of conditions previously cited; or
- Agents of the operator were not aware of the existence of the alleged violative condition.

However, sharing information or explaining processes during an MSHA inspection can be a double-edged sword when it comes to section 110 investigations. Operators and agents should take steps to avoid admissions against self-interest when providing mitigating circumstances. During a section 110 investigation, statements made can be used against you or anyone else in the company. Do not lie when asked a question, but also know that you can refuse to answer a question you think would incriminate yourself or anyone else.

Handling A 110 Investigation

Section 110 investigations are some of the more complicated MSHA-related activities an operator can face. These investigations are not often a surprise, however, so there is usually time to prepare. They typically follow some specific event, such as a citation or order being issued or an accident of some sort, that should put you on notice that a 110 investigation may soon follow.

Operators should be prepared for such an investigation by deciding who will be involved and designate a point of contact with MSHA. It is recommended that point of contact by an attorney experienced in mine safety investigations. You should preserve evidence and retain relevant records. Counsel can also help determine how to respond to document requests and interviews of company personnel.

All mine personnel have rights during a section 110 investigation, including but not limited to:

- The right to refuse to be interviewed;
- The right to a confidential interview with the agency;
- The right to influence the time and location of the interview;
- The right to the presence of a representative of the employee's choosing during the interview; and
- The right to discontinue the interview at any time.

Operators should not be intimidated by any investigation. Knowing your rights and MSHA's limits during the process is extremely important, and will help you overcome any initial intimidation you may feel when first learning of the inspection.

In the next issue, we will cover another important topic – discrimination complaints. Stay tuned, and don't forget to reach out to your mine safety lawyer, or [any attorney in our Mine Safety & Health group](#), for specific questions and guidance on any of the topics covered in this series.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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