

Accident Investigation

MSHA Requirements and
Legal Considerations

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Overview

- Preparedness: MSHA Requirements and Accident Investigation
- Attorney Client Privilege
- Investigation and Post-Accident Best Practices

What is an “Accident”?

- Minor incidents/First Aid (No Notification)
 - Means one-time treatment, and any follow-up visit for observational purposes, of a minor injury
- Occupational Injury (Notice Required)
 - means any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

When must an accident be reported immediately?

- An injury (or an entrapment) which has the “reasonable potential to cause death”
- Includes incidents such as the death of a miner(s), entrapment for more than 30 minutes, explosions, uncontrolled fires and unplanned roof falls that impede passage or ventilation, etc.
- Must be reported to hotline within 15 minutes

I called and reported the accident, what do I do now?

- Operator or his agent must investigate to determine the cause and the means of preventing a recurrence.
- Must produce an incident report separate from the 7000-1 form
- Reports must be kept and made available to MSHA

What should be in the report?

FACTS!

What should be in the report?

- The date and hour of occurrence;
- The date the investigation began;
- The names of individuals participating in the investigation;
- A description of the site;
- An explanation of the accident or injury, including a description of any equipment involved and relevant events before and after the occurrence, and **any explanation of the cause of any injury, the cause of any accident or cause of any other event which caused an injury;**
- The name, occupation, and experience of any miner involved;
- A sketch, where pertinent, including dimensions depicting the occurrence;
- **A description of steps taken to prevent a similar occurrence in the future.**

Duty to Preserve

- Unless granted permission by a MSHA District Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to:
 - rescue or recover an individual;
 - prevent or eliminate an imminent danger;
 - or prevent destruction of mining equipment.
- Gather and preserve all relevant documents: employee files, maintenance logs etc.
- Consider providing a litigation hold to employees and others involved.

Should we call our lawyer?

- Seriousness of the injury
- Was a third party involved?
- Is an MSHA inspection imminent?
- Is there a conflict between the company and employee?
- Are criminal charges possible?

What are the types of Attorney Client Privilege?

- **Attorney-Client Communications**
 - Communications between a lawyer and client regarding a legal matter
- **Work-Product**
 - Information and documents prepared in anticipation of litigation

Attorney Client Communications

Generally the following elements must be present before the attorney-client privilege may be invoked:

- (1) a communication;
- (2) between an attorney or his agent and a client;
- (3) in confidence, *i.e.*, in a manner which demonstrates that the client reasonably believes that the communication will remain confidential;
- (4) for the purpose of obtaining or providing legal assistance.

Attorney Client Communications

- The strongest privilege: neither you or your lawyer can be compelled to disclose
- It does not cover the underlying facts:
 - What did you say or write to the attorney?

Versus

- I already discussed what I saw with my lawyer, so I don't have to tell MSHA.

Work Product Privilege

- Protects materials prepared “in anticipation of litigation”
- Cannot be used to prevent discovery of facts as it only limits discovery of “documents and tangible things” — not discovery of facts that may be learned from those documents, even when the documents themselves are work product
- Purpose of internal accident investigation will determine whether the results will be protected

What is the best way to ensure that the privileged items stay private?

- Avoid waiver – if you share it, you destroy the privilege
- Involve outside counsel early on
- Watch out: no immediate appeal of order to disclose
- Can failure to waive can be a factor in a criminal proceeding?
- Be realistic and be cautious: assume everything will need to be disclosed.

MSHA is coming, what should we do?

- Have a plan: appoint a lead safety person and notify personnel/security to direct MSHA to designated person on arrival
- Typically avoid foremen as lead
- Do not be informal
- Have required pre- and post-shift documents ready
- Inform employees of MSHA enforcement mechanisms:
 - “significant and substantial” citation issued under Section 104(a)
 - or an “unwarrantable failure” citation issued pursuant to Section 104(d)

MSHA is here, what should we do?

- Operator has a right to accompany MSHA
- If you do, understand why MSHA is there:
 - Identify any violations;
 - Obtain documents informally;
 - Issue appropriate citations
- Never withhold information, but understand you are not obligated to assist the inspector
- Never speculate or guess: if you need to get back to the inspector that is better than being inaccurate.

Contemporaneously prepare your own Notes

- FACTS not opinions: your opinion is irrelevant to MSHA's conclusions
- Document who is involved, date and time, and every event that occurs
- Where feasible, measure what the inspector measures
- Write down inspector's statements
- Label your notes as "being gathered to be provided to legal counsel"
- Courts will consider contemporaneous reports over recollection

Employee Statements

- Employees may have right to counsel but must provide facts to MSHA
- There may not be privilege between the employee and company
- Recorded statements are almost always discoverable

Conclusion

- Be accurate, not speculative
- Assume anything you write down may be disclosed down the road
- If it is serious, call your lawyer
- Educate employees on MSHA enforcement and have a plan

- Questions?

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- As a litigator with strong trial and arbitration experience, Kyle approaches every dispute as if it could go to trial. He credits his background in finance and financial forecasting with helping him effectively work with clients to analyze their business problems, identify potential solutions, and decide on a course of action. Using this analysis-driven, preparation-focused approach, Kyle has successfully represented Fortune 500 companies and insurance companies and their insureds in a wide variety of disputes including trucking liability, products liability, premises liability, dram shop liability, and business litigation.
- Some of Kyle's representative litigation experience includes:
 - Serving as second-chair in a jury trial in the representation of a night club owner in a premises liability case involving an injured customer, resulting in a favorable settlement for the client.
 - Serving as second-chair in a jury trial in the representation of a restaurant owner in a premises liability case involving an injured customer, resulting in minimal exposure for the client.
 - Serving as lead counsel in 20+ arbitrations involving matters related to bodily injury, underinsured motorist claims and breach of contract allegations.
 - Representing a national trucking company in numerous transportation-related liability cases involving severe and catastrophic bodily injuries to motorists.
 - Representing a fabrication company in a premise liability case involving a disastrous building fire that also affected a major interstate in Arizona, resulting in a favorable settlement for the client.