

MSHA Handbook Series

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



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Special Investigations Procedures

PREFACE

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 Previously issued material on this subject matter is superseded by this handbook.

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SPECIAL INVESTIGATIONS PROCEDURES HANDBOOK

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INTRODUCTION

Authority

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

Purpose

This handbook has been developed to provide guidance for investigating discrimination complaints pursuant to Section 105(c) and conducting special investigations pursuant to Section 110 of the Federal Mine Safety and Health Act of 1977. It also establishes procedures to follow when issues arise which may require injunctive action pursuant to Section 108 of the Mine Act.

Responsibility

Section 5 of Secretary's Order 4-95, dated May 31, 1995, delegated to the Assistant Secretary of Labor for Mine Safety and Health, authority for the responsibility of administration and enforcement of the Department's mine safety and health programs under the Federal Mine Safety and Health Act of 1977, except Title IV of the Act, with the exception of legal authorities thereunder which are delegated to the Solicitor of Labor.

CHAPTER 1 - GENERAL INFORMATION

A. OVERVIEW OF THE SPECIAL INVESTIGATIONS PROGRAM:

1. **The Technical Compliance and Investigation Division:** The technical Compliance and Investigation Divisions (TCID) are responsible for overall administration of the national Special Investigations program and providing guidance to promote consistent application and management of the program.
2. **District Manager:** Each District Manager is responsible for the operation of the Special Investigations program in his\her district and for the consistent application and enforcement of national policies and procedures. The District Manager will ensure that the district Special Investigations program is efficient and reflects an appropriate and cost effective utilization of resources.
3. **The Supervisory Special Investigator:** The Supervisory Special Investigator (SSI) reports directly to the District Manager. The SSI is responsible for the daily management of the Special Investigations program in the district. The primary duties of the SSI include:
 - a. supervising investigators;
 - b. determining investigation priorities;
 - c. making recommendations concerning initiation of investigations;
 - d. assigning cases;
 - e. reviewing and approving work products;
 - f. conducting and/or scheduling training for investigators and complaint processors;
 - g. coordinating program activities with the District Manager and with TCID; and,
 - h. providing immediate verbal updates to the District Manager and TCID on all significant actions on cases.
4. **Special Investigator:** Each Special Investigator (SI) reports directly to the SSI. The first priority of the Special Investigations staff is to conduct special investigations and related activities. The SI's responsibilities include, but are not limited to, the following:
 - a. interviewing persons and taking written or oral statements concerning an alleged violation of the Act (see Chapter V);
 - b. reviewing pertinent records, documents, or files which may have a bearing on the case (see Chapter VI);
 - c. evaluating the testimony and evidence gathered (see Chapter VII);

- d. establishing jurisdiction (see Chapter IV);
- e. writing the final investigative report detailing the facts of the case, analyzing the merits, and recommending appropriate action (see Chapter VII); and,
- f. notifying the supervisory special investigator of any allegations of possible criminal activity not covered by the Mine Act, e.g., stolen explosives, drug trafficking allegations, etc. (The supervisory special investigator will discuss the situation with the District Manager and contact the National Office or other Federal agency where appropriate.);
- g. working with and/or providing information to the Office of the Solicitor and the Department of Justice attorneys and court related activities.

MSHA SI's **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 headquarters office.

MSHA SI's **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 therefore prohibited from doing so. Furthermore, it is a Federal crime to carry a firearm or other dangerous weapon on a Federal facility (18 U.S.C. 930). Firearms or other dangerous weapons are not to be transported in Government vehicles at any time (see APPM II, Chapter 500, Paragraph 512.h). MSHA SI's also do not have authority to make warrantless arrests or obtain and execute search warrants. MSHA personnel may continue to assist Assistant U.S. Attorneys (AUSA), who are authorized to obtain search warrants, and other law enforcement officers who are authorized to execute search warrants, but may not exceed this role of "assistance" only. See Chapter I, Sections F and G and Chapter VI for further instructions.

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

B. CREDENTIALS:

Special Investigator (SI) credentials will be requested by the District Manager or Supervisory Special Investigator (SSI), by submitting a memorandum to the TCID office, reflecting the qualifications of the proposed SI. A Special Investigator Credentials card (see Exhibit 1-1), signed by the individual exactly as his/her name will appear on the typed portion of the card, and a 1-1/4 inch wide by 1-1/2 inch high color photograph shall be sent with the memorandum to expedite the procedure. The Administrator shall review the request for

credentials to determine if the person has completed the required Agency training, prior to submission to the Assistant Secretary for issuance of the credentials.

Special Investigator credentials will be kept in the possession of the person to whom issued and will not be loaned to others. Credentials also will not be used to obtain preferential treatment on personal matters. Only official MSHA approved credentials issued may be used in the performance of any MSHA special investigation. Improper use or failure to safeguard SI credentials, or use of credentials not authorized by MSHA may result in disciplinary action . (Conservator of the Peace or similar credentials or badges are examples of credentials NOT authorized by MSHA.)

If an employee loses his/her credentials, or if they are stolen, the employee shall notify the SSI immediately. Every effort should be made to recover lost credentials, including a thorough search of the locations where the loss may have occurred. If the credentials are not recovered within 24 hours after they are discovered to be missing, the SSI or District Manager will immediately notify the local FBI office and police of the loss or theft by written communication. The employee will prepare a memorandum explaining in detail the circumstances surrounding the loss or theft of the credentials. The memorandum will be forwarded through appropriate channels to the appropriate TCID office. The same procedures will be followed if the missing credentials are later recovered.

The SSI shall be responsible for obtaining an investigator's credentials when the investigator separates from MSHA or when the investigator is reassigned to another position within the Agency. The SSI shall forward the credentials to the appropriate TCID office, by certified mail, for cancellation.

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

C. EQUIPMENT AND FACILITIES:

Each District Special Investigations unit must maintain appropriate equipment and facilities so that each special investigator may properly conduct special investigation activities. As a minimum, each District Special Investigations unit shall maintain:

private facilities for conducting interviews, report writing, review of tape recordings, etc.;

locked file cabinet or safe;

access to private telephone lines and/or cellular phones¹;

appropriate transportation²;

photographic equipment:

 camera (35 mm and self-developing);

 film and appropriate accessories;

cassette recorder and appropriate transcribing accessories;

laptop computer and portable printer;

miscellaneous:

 measuring tape

 master log (bound with numbered pages)

 etching tool or other permanent marking device

 evidence tags, MSHA Form 2000-181 (Exhibit 6-3)

 forms necessary for collection and preservation of evidence:

 Chain of Custody, MSHA Form 2000-200 (Exhibit 6-4)

 Itemized Receipt, MSHA Form 2000-201 (Exhibit 6-5)

 padlocks

D. CONFIDENTIALITY AND MEDIA INQUIRIES:

All special investigations are confidential and shall not be discussed with any unauthorized persons. Any request for information on a particular case, including those requests filed under the provisions of the Freedom of Information Act (FOIA) shall be referred to the appropriate TCID headquarters office. (See Administrative Policy and Procedure Manual Vol. III CH 400). Requests by news media (newspapers, television, radio, etc.) should be sent to TCID and the Office of Information and Public Affairs. Disclosure or withholding of information will be governed by the FOIA and current Departmental and Agency policies.

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

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

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

E. SOURCES OF INFORMATION:

1. **General:** Expeditious and logical investigations generally involve the use of one or more of the following investigative aids: personal interviews, record/document reviews, personal observations, newspaper articles, and confidential sources (informants).
2. **Examination of Records and Documents:** During the course of most investigations, it becomes necessary to examine certain records and public documents. Official and unofficial records are a source of essential information pertinent to practically all investigations. Many types of records may be obtained from the Department and other Federal and State agencies. The investigator should become familiar with where to locate and how to obtain official copies of public documents, and have some knowledge of the information that is available at courthouses, registries of deeds and similar institutions. Most importantly, the investigator should be familiar with all of the records, documents and reports required to be kept and/or maintained by the Mine Act, and where these may be found.

It is important to determine what records are needed or what documents are necessary. Know what to look for, and have some idea of where the information may be found. The SSI will be available to assist in this effort. Certain investigations require the hand-copying of data from original records. Detailed planning is necessary before undertaking this task. Be sure that the information is significant and necessary to the investigation.

F. SURVEILLANCE:

In general, surveillance means keeping a close continuous watch over a person, group, or operation. Surveillance may be categorized as either physical or technical as defined below. **NEITHER PHYSICAL SURVEILLANCE NOR TECHNICAL SURVEILLANCE WILL BE UTILIZED IN THE COURSE OF MSHA SPECIAL INVESTIGATIONS, EXCEPT WITH THE EXPRESS AUTHORIZATION AND APPROVAL OF THE DEPARTMENT OF JUSTICE AND THE ASSISTANT SECRETARY FOR MINE SAFETY AND HEALTH IN CONJUNCTION WITH THE OFFICE OF THE SOLICITOR!**

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

1. **Physical Surveillance:** Physical surveillance is the maintenance of a close and constant personal observation.

- a. Physical surveillance from private property without the express permission of the landholder raises serious legal issues which need to be resolved by federal prosecutors before conducting such an activity. Furthermore, physical surveillance may pose potential risks to government personnel who are engaged in it and also may pose questions of effective use of personnel and fiscal resources. MSHA SI's **are not law enforcement officials** and **are not authorized to conduct physical surveillance activities**. For these reasons, MSHA policy is to have a law enforcement agency assist the MSHA investigation by carrying out any physical surveillance.

Where physical surveillance is authorized by the Department of Justice and is being conducted by a law enforcement agency in aid of the MSHA investigation, MSHA SI's (who have been trained in physical surveillance procedures) may assist law enforcement officials in carrying out physical surveillance after obtaining the approval of the federal prosecutor and the Administrator.

- b. If physical surveillance is determined to be warranted in a matter criminally referred by MSHA, and it has been determined that MSHA SI's (rather than law enforcement personnel) are to be the personnel carrying out the physical surveillance activity, **approval and authorization must be obtained** from the U.S. Attorney's Office with jurisdiction over the surveillance, as well as from the Assistant Secretary and the Solicitor of Labor. In these instances, a written request for authorization must be submitted.

The written request shall be prepared to specifically advise the Assistant Secretary of: (1) the purpose of the physical surveillance; (2) the duration of the physical surveillance; (3) the location(s) where physical surveillance will be maintained; (4) the protections and risks posed by the physical surveillance; (5) the position of the federal prosecutor regarding carrying out these activities; and (6) the status of the appropriate legal and policy clearance needed for employees of MSHA to engage in these physical surveillance activities.

- c. Waiting outside the residence or work place of a potential witness or source of information in order to approach that person for information or an interview is not surveillance and is not covered by the above strictures. However, whenever such activity will take place after dark, the approval of

the District Manager should be obtained, if only to approve the use of government time in pursuit of the interview or information.

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

Electronic monitoring/recording is subject to strict legal requirements and safeguards. Failure to strictly follow those guidelines may result in violation of federal criminal laws by those engaging in such monitoring. Such monitoring is divided into several categories. The two most relevant to MSHA SI's are: (1) non-consensual personal or electronic monitoring, i.e., electronic or mechanical monitoring of conversations is conducted where none of the parties to the conversation is aware that the conversation is being monitored/recorded by a device; and, (2) consensual monitoring, i.e., electronic or mechanical monitoring of conversations is conducted where one of the parties to the conversations consents to and is aware that the conversation is being monitored/recorded by a device.

- a. **NON-CONSENSUAL MONITORING:** MSHA SI's are not law enforcement officials and are not authorized under any circumstances to conduct non-consensual monitoring or eavesdropping using an electronic device. Non-consensual monitoring is illegal unless authorized by a federal court order and the monitoring is conducted by authorized law enforcement officials (See 18 U.S.C. 2510-2522).

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

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

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

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

The written request shall state: (1) the nature of the monitoring/recording being planned; (2) the expected non-consenting party and his/her status relative to the investigation; (3) the place, location and duration of the consensual monitoring; (4) the reasons why a law enforcement agency (i.e., FBI) cannot or should not be utilized; (5) the name of the approving federal prosecutor; (6) the position of the federal prosecutor regarding carrying out this activity; and finally, (7) the status of the needed appropriate legal and policy clearances for employees of MSHA to engage in such consensual surveillance.

In an emergency situation, the U.S. Attorney, acting alone, may orally authorize MSHA SI's to engage in consensual monitoring activity; however, the written request, for approval by the Assistant Secretary and the Solicitor of Labor, shall be submitted as soon as possible.

G. UNDERCOVER OPERATIONS:

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

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

MSHA SI's may assist a duly authorized law enforcement agency in conducting an undercover operation provided: (1) 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 Federal Mine Safety and Health Act; (2) the operation is under the direct and constant supervision of a federal law enforcement agency (i.e. the FBI); (3) the operation has been approved by the U.S. Attorney's Office; and, (4) the Assistant Secretary and the Solicitor of Labor have authorized the use of MSHA personnel in such activity. In these instances, a written request for authorization must be submitted to obtain this authorization.

The requirements for approval of such operations can be detailed. Specific approvals must be obtained before any MSHA employee is in any way involved in an undercover operation. Those participating and those authorizing such operations have an independent responsibility to assure themselves that proper clearances have been obtained.

H. CONTACTS WITH LAW ENFORCEMENT AGENCIES AND PROSECUTORIAL AUTHORITIES:

1. **Liaison:** District Managers will promote and ensure close working relationships between supervisory and other special investigators and officials (prosecuting attorneys, U.S. Marshals, etc.) in local, Federal and State law enforcement agencies. Likewise, designated headquarters personnel will maintain the necessary contacts with Federal law enforcement agencies. Supervisory Special Investigator and National Headquarters staff will promote and ensure coordination with the Office of the Solicitor.
2. **Requests for Information or Services:** Listed below are the procedures to be followed in those rare instances when information or services are requested from the various FBI offices. The following procedures may be initiated, but only after approval from the District Manager.

- a. **FBI Field Offices and Laboratory**

Requests for name checks concerning information in FBI files may be made directly to the FBI field offices. The FBI will provide such data except in those instances where the subject of the request is involved with a pending

FBI investigation. The purpose of the name check request should be indicated.

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

b. FBI Headquarters

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

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

The intent of Congress, as expressed in part by Senate Conference Report No. 95-181, was that in order to have a truly effective national mine safety and health program, miners will have to play an active part in the enforcement of the Mine Act. To do this, miners must be encouraged to be active in safety and health matters and protected against any possible discrimination which they might suffer as a result of their participation. Section 105(c) of the Mine Act prohibits such discrimination. (Discrimination on the basis of race, sex, age, religion, handicap, etc., is not covered by Section 105(c) of the Mine Act. Efforts should be made to assist the complainant in contacting other agencies for the appropriate relief.)

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

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

1. Agreement With Employment Standards Administration:

MSHA and the Employment Standards Administration (ESA), U.S. Department of Labor, entered into a memorandum of understanding in order to provide additional receiving points for discrimination complaints filed under Sections 105(c) and 428 of the Mine Act. Essentially, the ESA complaint processors, located in the various ESA Black Lung Offices, have also been delegated the responsibility of receiving Section 105(c) and Section 428 discrimination complaints.

The Technical Compliance and Investigation Division for CMS&H (TCID) and the ESA Office of Workers’ Compensation Programs will be responsible for coordination and consultation in the handling of the discrimination complaints covered by this agreement.

Part 90 is the only program which provides a right of transfer based on medical evaluation, pursuant to Section 105(c)(1), for which only underground coal miners are eligible.

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

Technical Compliance and Investigation Division (TCID) for Coal will evaluate the merits of each Black Lung related case to determine if a violation of Section 105(c) of the Mine Act has occurred. If the evidence does not support a violation of 105(c), a copy of the entire case file may be forwarded by TCID for Coal to the National Employment Standards Administration office for evaluation under Section 428.

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

MSHA and the National Labor Relations Board (NLRB) entered into a memorandum of understanding for coordinating complaints received which may allege violations of both the Mine Act and the National Labor Relations Act.

The Technical Compliance and Investigation Divisions and the National Labor Relations Board, Division of Operations Management, will be responsible for coordination and consultation in the handling of discrimination complaints covered by this memorandum of understanding.

B. PROCESSING DISCRIMINATION COMPLAINTS (GENERAL):

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

Confidentiality must be maintained by all MSHA employees involved in the Section 105(c) process. In accordance with MSHA Privacy Act record-keeping procedures published in the Federal Register, no copies of discrimination complaints are to be retained by the complaint processor. Only the original is to be maintained in the case file.

1. **Receiving Complaints:** The Discrimination Complaint, MSHA Form 2000-123, and Discrimination Report, MSHA Form 2000-124, (Exhibits 2-1 and 2-2) may be

obtained from any MSHA Office or ESA Black Lung Office. Instructions for completing Forms 2000-123 and -124 are included in Exhibit 2-3.

If a miner, representative of miners, or applicant for employment wishes to file a complaint on behalf of a group of individuals (i.e., “all members of the section crew” or “all miners working on second shift”) and the complaint is the same for all, then only one case number needs to be assigned and only one case file needs to be prepared. During the investigation, the SI should obtain a signature from each person in the group. Where there appears to be different or unique issues or where the events occurred at different times for the different individuals involved, every attempt should be made to encourage the filing of a separate complaint by each individual complainant. Because of the complexity and uncertainty of the Procedural Rules which would govern “class action” filings, the filing of individual complaints guarantees each complainant that his/her complaint will be investigated.

- a. In Person: Individuals who come into an MSHA office with questions concerning an alleged discriminatory action shall be referred to the complaint processor or other designated person. The complaint processor should discuss the general nature of the complaint with the individual(s), provide the forms and other documents listed below and assist in filling out the forms. These items shall be provided by the complaint processor:

--Discrimination Complaint Form 2000-123 (Exhibits 2-1)

--Discrimination Report Form 2000-124 (Exhibit 2-2)

--Federal Mine Safety and Health Review Commission Rules of Procedure (Exhibit 2-4)

--Privacy Act Statement (Exhibit 2-5).

If the complainant(s) indicate that the alleged discriminatory action resulted in a loss of wages, the complaint processor should also provide the following items:

--Information on Backpay for Miners (Exhibit 2-6)

--Claimant Expense Search for Work, and Interim Earnings Report (Exhibit 2-7).

Copies of the forms referenced above shall be stored where all MSHA enforcement personnel have access to them in the event the complaint processor or person

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

- b. **By Telephone:** Individuals who make inquiries by telephone shall be referred to the complaint processor. The complainant(s) shall be advised that they may come into any MSHA office and will be assisted in preparing and filing a discrimination complaint. In those instances where a person cannot come to an MSHA office, a cover letter should be prepared (Exhibit 2-8), enclosing each of the Exhibits listed in Item 1.a., and transmitted via certified mail--return receipt requested.
- c. **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 on to the official 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 investigator 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.

2. **Assigning Case Number and Investigator:** Upon receipt of a written discrimination complaint, the complaint processor shall obtain a case number and the name of the Special Investigator (SI) assigned to the case from the Supervisory Special Investigator (SSI). The complaint processor shall obtain a Mine Activity Data, MSHA Form 2000-22 for CMS&H (Exhibit 2-15), or Inspection/Investigation Data Summary, MSHA Form 4000-40 for M/NM (Exhibit 2-16), and place it in the folder after filling in the general information about the operator and the mine. It will be the responsibility of the SI to activate the event when the investigation begins. The complaint processor shall then fill out an Investigation Assignment Control, MSHA Form 2000-158 (Exhibit 7-3). Instructions for completing Form 2000-158 are included in Exhibit 7-4. Copy D ("Case Diary Sheet") shall be placed in the case file, and the other copies will be distributed as indicated on the form pages. The 'Headquarters' copy of the Assignment Control Form shall be mailed to TCID along with a copy of MSHA Forms 2000-123 and 2000-124. A Documentation Log

(Exhibit 2-14) shall be established and maintained by the SSI for all cases filed. (See Chapter VII for further instructions on preparing and releasing the completed case file folder.)

When a discrimination complaint is received which pertains to a mine inspected by a field office in another district, the complaint processor shall immediately notify the SSI so that arrangements can be made to forward the information to the appropriate office for processing and assignment of appropriate case number and investigator.

3. **Notification Letters:** Once the SI has been assigned, the appropriate notification letters will be prepared and distributed to the complainant(s) and respondent(s).

The notification letter to each complainant (Exhibit 2-9) should include as enclosures the completed MSHA Forms 2000-123 and 2000-124 (Exhibits 2-1 and 2-2).

The notification letter to each respondent (Exhibit 2-10) should include as enclosures only the completed MSHA Form 2000-124 (Exhibit 2-2) and the Federal Mine Safety and Health Review Commission Rules of Procedure (Exhibit 2-4). Do **NOT** send a copy of the completed MSHA Form 2000-123 to the respondent(s)!

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

4. **General Investigative Procedures:** Section 105(c) requires that the investigation commence within 15 calendar days of receipt of a complaint. If a discrimination complaint alleges a discharge, the SI assigned will begin the investigation as quickly as possible. In all cases, MSHA policy requires that within 45 calendar days of receipt of the complaint, the investigation will be completed and a final report submitted to Headquarters. The submittal will be considered timely if postmarked within 45 days. In those instances where a Section 105(c) investigation will not be completed within the 45-day time limit, a written request for extension of time, with justification, may be submitted by the SSI through the District Manager to the TCID office. An investigation of an alleged discrimination shall address each of the five elements described in Exhibit 2-17. (See Chapters V, VI and VII for further details on conducting investigations and preparing the final report.)

5. **Withdrawn Complaints:** If at any time during the investigation a complainant wishes to withdraw his/her complaint, this request should be reduced to writing and signed by the complainant. Preferably, Exhibit 2-11 should be completed by the complainant and witnessed by the SI or notarized.

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

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

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

6. **Backpay Determination for Discharge and Lay-off Complaints:** As a result of MSHA filing a Section 105(c)(2) action with the FMSHRC, SI's will assist complainant(s) in the preparation of documents to determine the amount of backpay and interest owed the complainant(s). If interest on backpay is to be awarded to the complainant(s), the FMSHRC, in Local Union 2274, Dist. 28, UMWA v. Clinchfield Coal Company, 10 FMSHRC 1493 (Nov. 28, 1988), has adopted the short-term federal rate applicable to the underpayment of taxes. This short-term federal rate is a change from the previous method used by the FMSHRC in computing interest on backpay awards and is the method currently being used by the NLRB. In adopting this new method, the FMSHRC has retained its previously used quarterly method of computation.

At the time the complaint is filed, the complaint processor will have provided the complainant(s) with a pamphlet entitled "Information on Backpay for Miners" (Exhibit 2-6) and a "Claimant Expense Search for Work, and Interim Earnings Report" (Exhibit 2-7).

The purpose of the "Information on Backpay for Miners" pamphlet is to initially inform the complainant(s) of their rights and responsibilities. The complainant's

responsibilities include maintaining accurate records on interim earnings, expenses incurred, and their search for work which should be documented on the “Claimant Expense Search for Work, And Interim Earnings Report” (a copy of which is attached to the Information Pamphlet and is also included as Exhibit 2-7). The complainant will be required to provide the above data to MSHA on a calendar-quarter basis if a determination is made that the Secretary will pursue the complainant’s case with the FMSHRC.

The following general information should be conveyed to the complainant(s) by the SI. Please note that the numerical reference in parentheses refers to the appropriate location of specific items found in the NLRB Manual.

--Backpay - 2 types: (NLRB 10530)

- a. Gross Backpay - The amount of money the complaint(s) would have earned had the alleged discriminatory action not occurred. (Formulas: NLRB 10534-10546)
- b. Net Backpay - Gross backpay less interim earnings reduced by expenses. (NLRB 10530.1)

--Interim earnings - Money earned by complainant(s) during backpay period from interim employment. (NLRB 10530.1)

--Samples of items included in interim earnings:

- a. Earnings from self-employment are considered “interim earnings” and are deductible from gross backpay. (NLRB 10602)
- b. Tips and gratuities (i.e., barbers, cab drivers, waiters) are deductible as “interim earnings” from gross backpay. (NLRB 10602.1)

--Samples of items not included as deductible interim earnings: (NLRB 10604.1)

- a. Union benefits
- b. Home relief payments
- c. Unemployment insurance benefits
- d. Workers’ Compensation not attributed to lost wages

- e. Earnings from overtime substantially in excess of overtime that would have been worked at original employer (respondent). (NLRB 10604.3)

--Moonlighting - General Rule (NLRB 10606)

If complainant(s) held a second job prior to alleged discrimination and continued to hold that second job during the backpay period, earnings are not deductible as “interim earnings” from gross backpay.

--Expenses deductible from interim earnings (NLRB 10610)

- a. Extra transportation costs incurred in finding and keeping interim employment
- b. Employment agency fees
- c. Room and board when complainant(s) must travel beyond commuting distance from home in order to acquire work
- d. Moving expenses (family and household)
- e. Union dues if a condition of employment

NOTE: Expenses are irrelevant if incurred in a quarter with no interim earnings, but should be documented. (For example, to prove a reasonable search for work.)

--Search for Work (NLRB 10616)

- a. Complainant(s) (upon discharge, layoff, suspension, etc.) must make “reasonable efforts” to obtain other employment.

The SI should emphasize that the complainant must make “reasonable efforts” to search for work and document same. If the complainant fails to do so, the FMSHRC may disallow any or all of the backpay claimed as due to the complainant.

- b. Maintaining records (Claimant Expense Search for Work, and Interim Earnings Report):
 - (1) Register with State employment service (NLRB 10616.1)
 - (2) Record specific places and times work was sought (NLRB 10616.2)

--Unavailability for Work - Generally (NLRB 10612)

Due to:

- a. Pregnancy (NLRB 10618.1)
- b. Illness (NLRB 10618.2)
- c. Military service (NLRB 10618.2)
- d. Institutional confinement (NLRB 10618.2)
- e. Attendance at educational institutions (NLRB 10618.3)

If MSHA has determined that a discriminatory act has occurred in violation of the Act, and requests that the Office of the Solicitor file on behalf of the complainant with the FMSHRC, all information relative to the complainant's backpay, interim earnings, expenses, etc., must be provided to the Solicitor of Labor (SOL) so that the interest due on backpay may be computed. Headquarters only will work in conjunction with the appropriate Office of the Solicitor in determining the interest due, using the NLRB method, which incorporates appropriate Internal Revenue Service interest rates, the amount of which will be computed into the final net backpay due the complainant.

--INTEREST IS ONLY COMPUTED WHEN SETTLEMENT/PAYMENT DATE IS KNOWN.

--INTEREST IS ONLY COMPUTED BY THE SOL or TCID.

CHAPTER 3 - INJUNCTIVE ACTIONS AND ASSAULTS ON INSPECTORS

A. INTRODUCTION:

This chapter contains the procedures for obtaining injunctive relief when inspectors are denied entry or when mine operators work against closure orders. It also contains guidance on how

to deal with situations involving assault or harassment of inspectors or attempts to delay inspections.

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

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

When an injunctive action is contemplated, first establish whether or not the operation falls under the jurisdiction of the Act. Proof that the mined product enters or affects interstate commerce must be provided. Section 3(h)(1) of the Act defines a coal or other mine which is subject to the provisions of the Act. (See Chapter IV, Section C.7., Establishing Jurisdiction.)

B. DEFINING INJUNCTIVE ACTIONS:

An Injunction is an order from a United States District Court commanding 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. There are two steps to an injunctive action--a Preliminary Injunction and the Permanent Injunction. The Preliminary and Permanent Injunctions are usually sought in the same action but in two phases.

1. **Preliminary Injunction:** A Preliminary Injunction is an order issued after a hearing with both parties present, but is still pending a full hearing. The requesting party must show that irreparable damage will result if a Preliminary Injunctive Order is not issued to prevent the other party from doing something or to require the other party to do something. Whether granted or not, the case will still be active until a final decision on the Injunction request is issued. In exigent circumstances, it may be necessary to obtain a **Temporary Restraining Order (TRO)**. A TRO may be issued by a court based on the argument and showing of only one party (an ex parte proceeding), for example MSHA, that irreparable harm to the party or case will result before the case can be fully argued by the parties. These are not generally sought by the Office of the Solicitor but could be pursued if, for example, an operator was working in violation of a 107(a) Order of Withdrawal.
2. **Permanent Injunction:** A Permanent Injunction is the final order requiring the party to do what the order requires. The Injunction Order 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 the determination on the granting of a Permanent Injunction.

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

1. **Introduction:** Injunctive relief will be requested by the District or Assistant District Manager having jurisdiction over the particular mine. Most probably, the inspector will be the person involved in the initial action leading to a request for an Injunction. Injunctive actions may be requested when: (1) there has been a denial of entry; or, (2) when the operator is working in violation of a Withdrawal Order, or a 103(j) or (k) order, as explained below.
2. **Denials of Entry:** Denials of entry may be classed into two main types: (1) direct denials involving a confrontation; and (2) indirect denials involving interference, delays and/or harassment.

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

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

- a. **Denials not involving MSHA's statutory authority:** When the operator or his/her agent informs an inspector that an inspection of the mine will not be permitted, and no challenge is made concerning MSHA jurisdiction, the following actions should be taken if the inspector can safely do so:

The inspector should explain to the operator or his/her agent the mandatory inspection requirements in Section 103(a) of the Mine Act and that there will be a citation issued and penalty assessed for the denial of entry.

If after explaining MSHA's position to the operator, the inspector is still denied entry to the mine, the inspector shall issue a 104(a) Citation, citing a violation of Section 103(a), and establish a reasonable time for abatement.

If upon the conclusion of the abatement period, the operator or his/her agent withdraws the denial and permits the inspection, the inspector should terminate the citation. However, if the operator or his/her agent still denies entry to the mine, the inspector should issue an Order of Withdrawal (define the area affected by the order as "no area affected" unless specific hazards are present), and notify the immediate MSHA supervisor so that an injunctive action may be considered.

- b. Denials involving MSHA's statutory authority: When the operator or his/her agent refuses to permit an inspection based upon the belief that MSHA does not have the right or authority to inspect the mine, the inspector should explain to the operator or his/her agent the mandatory inspection requirements under Section 103(a) of the Mine Act, and that there will be a citation and penalty assessed for the denial of entry. The inspector should carefully note the operator's response as to why the mine is not subject to the Mine Act, then proceed as in (2.a.) above.
- c. Indirect denials--delays, interferences, or harassment: When the mine has an I.D. number and the operator or his/her agent is known and present and does not verbally refuse right of entry, but takes indirect action to prevent inspection of the mine, the inspector should explain: (1) the particular actions which are considered to be a denial of entry; (2) the mandatory inspection requirements and/or supplementary (spot) inspection requirements under Section 103(a) of the Mine Act; and (3) that there will be a citation and penalty assessed for the denial of entry. If after explaining MSHA's position to the operator, the inspector is still denied entry to the mine, a 104(a) Citation shall be issued, citing a violation of Section 103(a).

If upon the conclusion of the abatement period, the operator or his/her agent permits the inspection, the inspector should terminate the citation. However, if the operator or his/her agent still denies entry to the mine, an Order of Withdrawal shall be issued. (Unless the specific hazards are obvious, define the area affected by the Order as "no area affected.")

The immediate MSHA supervisor should be notified so that injunctive procedures may be considered.

When the mine has an I.D. number and the operator or his/her agent is known but is not present, and access to the mine is indirectly denied, the inspector should notify the immediate MSHA supervisor, issue a 104(a) Citation for a violation of Section 103(a), and mail the citation to the operator by certified mail, return receipt requested. The inspector should return to the mine site at the conclusion of the abatement period and terminate the citation if an inspection is allowed. If entry is still denied, issue an Order of Withdrawal (unless other hazards are present, the area affected by the Order should be "no area affected") and notify the MSHA supervisor of the action taken so that injunctive action may be considered.

When the mine does not have an I.D. number and the operator or his/her agent is unknown, and access to the mine is indirectly denied, the inspector

should notify the MSHA supervisor and assist in identifying the mine property and property owner to determine jurisdiction. When the property is identified and jurisdiction has been established, the inspector and/or the supervisor should meet with the operator or the agent and demand access.

The operator or the agent must be informed that he/she has been identified as the operator, owner, lessee, etc., that MSHA has evidence that the operation is under the jurisdiction of the Mine Act, and be given a description of the circumstances which prevented access. The inspector should then explain the statutory right of entry and again attempt to gain entry to the mine property. Should a denial of entry again occur, the inspector and/or the supervisor should take appropriate action depending upon the type of denial received, as previously discussed.

3. **Working In Violation of Withdrawal Orders:** When an inspector encounters an operator working in violation of any Order of Withdrawal, the inspector shall, if possible or necessary, enter the mine, observe the operations, note the activity which is in violation of the outstanding Order of Withdrawal, and list the names of witnesses present. The inspector shall then issue a separate 104(a) Citation for failure to comply with each order violated.

If the order is complied with, that is, persons are withdrawn and prohibited from entering the affected area or using the equipment, the 104(a) citation for working in violation of the Order of Withdrawal will be terminated. However, if the operator continues to work in violation of the order, the inspector should immediately consult the MSHA supervisor, without terminating the 104(a) citation for working in violation of the order. It is not necessary to write another order.

D. PROCEDURES AND RESPONSIBILITIES FOR INITIATING INJUNCTIVE ACTION:

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

When an Assistant District Manager determines that injunctive relief should be requested, the following actions should be taken:

- a. Review the decision with the District Manager. If the District Manager concurs, obtain a case number and transmit (by “fax”) the inspector's memorandum to the TCID office.
- b. Contact the Regional Solicitor by phone and discuss the case for any special instructions.
- c. Have an affidavit prepared by the inspector (Exhibit 3-1).
- d. Establish a case file for the material, labeling it with the case number.
- e. Direct the collecting of necessary information. Assemble the case materials in the case file for transmission (affidavit, citations, orders, jurisdictional information, etc.).
- f. Transmit copies of the case file to the appropriate Office of the Regional Solicitor and to the TCID office.

When an Assistant District Manager determines that an imminent danger order is not being complied with, the following actions should be taken:

Consult with the District Manager, and if the District Manager concurs, obtain a case number and advise the TCID office by telephone.

Contact the appropriate Office of the Regional Solicitor by telephone, describe the order, danger and regulation violation, if appropriate, to an attorney, as well as the circumstances of noncompliance and request assistance and advice.

Unless the attorney advises otherwise, proceed as indicated in Items (a) through (f) above.

3. **Supervisory Special Investigator:** The Supervisory Special Investigator will be responsible for:
 - a. Advising and assisting the inspector, supervisor, Assistant District Manager, and District Manager.
 - b. Informing the District Manager of all developments.

- c. Advising TCID of all pending cases.
 - d. Monitoring case progress and litigation for the District Manager, in conjunction with headquarters staff.
4. **District Manager:** The District Manager shall report the status of all injunctive cases to the Administrator by the 15th of each month. No report is required for any month in which there is no injunctive activity.
 5. **Office of the Solicitor:** The Department of Labor's Regional Offices of the Solicitor have the responsibility for advising MSHA whether or not injunctive relief is advisable and/or possible. Therefore, the merits of a case, as well as the sufficiency of information, must be determined by those offices.

E. PROCEDURES UPON RECEIPT OF INJUNCTION:

1. Upon notification by the Regional Solicitor that an Injunction has been granted, the District Manager shall decide whether service of the Injunction can be safely completed by MSHA personnel. In these instances, when the Injunction is received, the District Manager will forward the Injunction under cover letter to the Assistant District Manager with instructions for serving the Injunction. In appropriate circumstances, the District Manager may request that the Regional Solicitor arrange for service accompanied by a U.S. Marshal.
2. Within two days of receipt of the Injunction, the Assistant District Manager shall transmit the Injunction under cover memorandum to the appropriate field office. The transmitting memorandum shall direct that an inspection be conducted within 15 days and contain instructions on the certificate of service. A copy of the memorandum and Injunction shall be placed in the case file.
3. Upon receiving the Injunction, the inspection supervisor shall accompany the inspector assigned to the mine. The supervisor shall serve a copy of the Injunction to the operator and accompany the inspector on the first day of the inspection. Upon return to the office, the supervisor shall complete a certificate of service (Exhibit 3-2) and forward it to the Assistant District Manager for inclusion in the case file. Upon completion of the inspection, a copy of the inspection report shall be forwarded to the Subdistrict/Assistant District Manager for inclusion in the case file.
4. Upon notice that an Injunction has been served accompanied by a U.S. Marshal, the supervisor shall accompany the inspector assigned to the mine on the first day of inspection. Upon completion of the inspection, a copy of the inspection report shall be forwarded to the Assistant District Manager for inclusion in the case file.

5. When the inspection report and certificate of service are received by the Assistant District Manager, copies should also be transmitted to the TCID office, noting that the case is closed.
6. If the operator, after service of the Injunction, does not comply with the Court's order to obey a withdrawal order or to permit inspection (when served or at any other time), the supervisor and inspector shall record in their notes as much as possible of the incident (at the time, if it can be safely done) and return to the office and contact the Assistant District Manager, who shall inform the District Manager.
7. The District Manager shall:
 - a. immediately contact the attorney handling the case for advice and assistance; and
 - b. notify the TCID office by telephone of the noncompliance and of the Solicitor's instructions.

F. ASSAULT OR HARASSMENT OF INSPECTORS:

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

Section 111 of Title 18 of the 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 his/her official duties. Therefore, as a result of the amendment to Section 1114, it is a crime to assault or harass (as stated above) an MSHA employee assigned to perform investigative or inspection duties, or to assist in law enforcement functions. This means that any person who assaults an MSHA inspector, while such inspector is engaged in, or on account of, the performance of his/her official duties, is subject to investigation and arrest by the FBI and prosecution by the U.S. Attorney in the Federal courts.

2. **Procedures to Follow:** MSHA procedures require the inspector to leave the scene of any confrontation which appears to be developing into a situation where an apparent violation of Section 1114 or 111 is about to occur. In an attempt to avoid a confrontation, the inspector may now inform the person(s) that an attack on an MSHA inspector is a Federal crime, and they may be subject to investigation and

arrest by the FBI. If an inspector believes that he/she may be subject to physical harm or assault, he/she should leave the property immediately and promptly notify his/her supervisor. If the inspector encounters harassment or delays during a mine inspection, an attempt should be made to complete the inspection, if possible, without further provoking the operator; then the supervisor should be contacted.

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

CHAPTER 4 - SECTION 110 INVESTIGATIONS

A. INTRODUCTION:

Title I of the Federal Mine Safety and Health Act of 1977 establishes the overall enforcement mechanism to ensure compliance with established health and safety standards. These enforcement mechanisms exist at various levels which increase in severity to the point where a violation may be the subject of criminal prosecution. Exhibit 4-1 depicts these various levels of enforcement.

B. LEGAL DEFINITIONS:

In reference to Section 110(c) of the Act, a precedent 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.³

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

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

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

³Secretary of Labor (MSHA) v. Kenny Richardson, Docket No. BARB 78-600-P, July 12, 1979, 4 FMSHRC 874.

The failure to comply with a mandatory health or safety standard is 'willful' if done knowingly and purposely by a mine operator who, having a free will and choice, either intentionally disobeys the standard or recklessly disregards its requirements.⁴

The Fourth Circuit Court of Appeals has defined reckless disregard as:

The closing of the eyes to or deliberate indifference toward the requirements of a mandatory safety standard which standard defendant should have known and had reason to know at the time of the violation.⁵

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

C. INITIATING SECTION 110 INVESTIGATIONS:

1. **General:** Investigations are fact-finding exercises. The investigation of a possible Section 110 violation of the Act is initiated at the request of the District Manager, usually as a result of one of the following circumstances:
 - a. after a mine accident;
 - b. as a result of complaints received alleging possible violations of Section 110(e) (advance notice), 110(f) (false reporting), or 110(h) (equipment misrepresentation); or
 - c. as a result of reviewing citations/orders for possible violations.

Special Investigators (SI's) **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 Administrator. All other special investigations shall be conducted by the District SI's.

⁴U.S. v. Consolidation Coal Co. & Kidd, 504 F 2nd, 1330, 1335 (1974)

⁵U.S. v. Kyle Jones, Gary Neil, 735 F 2nd, 785 (1984)

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

The issuing inspector will complete MSHA Form 7000-20 through the Inspector's Conclusion portion. The inspector and his/her supervisor will review each citation/order jointly. The supervisor will then complete the supervisor's section.

The completed Form 7000-20, and 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 for immediate review. This package will be forwarded separately from any other inspection-generated documents. MSHA Form 7000-20 will be considered confidential, pre-decisional information and not generally releasable under FOIA. These documents shall be maintained only in the special investigation files and shall **not** be maintained in the regular inspection files. Once the Assistant District Manager has completed his/her review and signed and dated the form, the complete package of material shall be forwarded immediately to the Supervisory Special Investigator (SSI).

The SSI shall review each violation based on the MSHA Program Policy Manual criteria, for evidence of a possible knowing and/or willful violation. After the SSI has completed his/her review and signed and dated the form 7000-20, the complete package will be forwarded to the District Manager for review.

Within **30 calendar days** from the date of issuance, a determination must be made by the District Manager, with the assistance of the SSI, whether to initiate an investigation or take no further action. After a determination has been made by the District Manager as to what action will be taken, the appropriate copy (as marked) of each completed Form 7000-20, shall be sent to the Technical Compliance and Investigation Division (TCID) along with a copy of the citation/order, and a copy of any supporting documentation justifying the action taken. If the decision is to initiate an investigation, a copy of the Assignment Control Form 2000-158 will also be sent.

A documentation log (i.e., Exhibit 4-4) shall be established and documentation shall be maintained by the SSI to support whatever action is taken for each citation/order reviewed. If the action initiated is to conduct a special investigation, the documentation will be in the form of the case file and report. If the decision is that no further action is justified, and all reviewing parties have so indicated (i.e., the Inspector's Conclusion is checked "No", the supervisor agrees with the inspector's conclusion, and the reviewing officials have all recommended "No further action"), the completed Form 7000-20 and accompanying materials will be sufficient

documentation. However, whenever there is disagreement among reviewing parties as to what action should be taken and the decision of the District Manager is to take no further action, the SSI will author a memorandum to the file outlining the reasons for not pursuing the issue. A copy of the memorandum shall be sent to all persons involved in the review. The SSI will be responsible for maintaining and controlling the documentation, as specified in the MSHA Program Policy Manual.

3. **Assigning Case Number and Investigator:** Once a determination is made by the District Manager, with the assistance of the SSI, to initiate an investigation, the secretary (CMS&H) or complaint processor (M/NM) shall obtain from the SSI a case number and the name of the SI assigned to the case. A single case number shall be assigned to any group of related citations or orders being investigated. The secretary or complaint processor shall obtain a Mine Activity Data, MSHA Form 2000-22 for CMS&H (Exhibit 2-15) or Inspection/Investigation Data Summary, MSHA Form 4000-40 for M/NM (Exhibit 2-16) and place it in the case folder after filling in the general information about the operator and the mine. It will be the responsibility of the SI to activate the event when the investigation begins. The secretary or complaint processor should then initiate the Investigation Assignment Control Form (Exhibit 7-3), place it in the case file, and distribute the copies as indicated on the Control Form. (Instructions for completion are included in Exhibit 7-4).
4. **Pre-Investigation Research:** Prior to contacting any principals in the investigation, the SI should first determine if there are any prior or current Section 110 or 105(c) cases which may have a bearing on the case. Such information will normally be available from the SSI or from TCID. Both the Department of Justice and the Office of the Solicitor desire that this background information, as well as the violation history and accident and fatality data, 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. SI's should review case law which may have a bearing on the investigation or the manner in which the SI conducts the investigation.

Completed Section 110 case files **containing findings of a violation** shall be forwarded to the appropriate Technical Compliance and Investigation Division within 240 days from the date the citation(s) and/or orders(s) were issued. In instances where the matter under investigation was identified without the issuance of any citation/order, the case should be submitted within 240 days of the date MSHA had actual notice of the subject incident. The maximum time frame for submitting a Section 110 case is 365 days from the date the citation(s) and/or order(s) were issued or 365 days from the date MSHA had actual notice of the subject incident. (See

Chapters V, VI and VII for details on conducting interviews, collecting and storing evidence, and preparing the final report.)

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

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

Inform the accident investigation team leader at the earliest possible moment that a Section 110 violation may have occurred.

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

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

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

The SSI shall notify the District Manager of the need to initiate a special investigation. If the accident investigation team is comprised of personnel external to the district, the accident investigation Team leader and the Chief, TCID, should also be notified and participate in the decision to open a special investigation. With the concurrence of the District Manager, and others as appropriate, the SSI shall initiate a special investigation in accordance with Chapter IV, Section C, "Initiating Section 110 Investigations." It is not necessary to wait for the accident investigation to be completed before beginning the special investigation but the investigations will need to be coordinated.

6. **Special Procedures Relative to Mine Disasters:** Representative(s) from TCID (a "Chief Investigator" and/or "Custodian of Evidence") may be dispatched to the site of all mine disasters and certain other accidents when specifically requested by the Administrator. Their activities will not interfere with the rescue and recovery operation. These individuals will have the following technical responsibilities:

Advise the MSHA official in charge at the site concerning technical compliance matters that may bear upon the issuance of 103(j) or (k) Orders of Withdrawal, obtaining warrants (see Chapter I for MSHA procedures), etc.

Sole responsibility for the collection and preservation of evidence and for maintaining the "chain of custody." Other MSHA officials at the site may identify evidence which they believe should be secured.

Compilation and maintenance of an administrative file of the disaster or accident. Among other things, they will collect daily copies of all notes made by MSHA officials and shall be included in any debriefing or interview sessions.

In order that the accident investigation will ensure that both prosecutorial and due process requirements are met, responsibility for planning the investigation shall be jointly shared by the Chief Investigator and the accident investigation Team leader.

7. **Establishing Jurisdiction:** One of the most important elements in any investigation is to establish that the operation falls under the jurisdiction of the Federal Mine Safety and Health Act of 1977. To establish jurisdiction, there must be documentation to prove that the operation is a mine as defined by the Act and that the mine products enter commerce or that the operations of the mine or its products affect commerce.⁶ If there is uncertainty regarding jurisdiction, the agency representative must gather all related information and relay it to the District Manager. If uncertainty remains, the District Manager should consult with the Administrator and the SOL. Once jurisdiction has been established, the case may proceed.

Some typical questions used to establish jurisdiction are listed below:

To whom is the product sold?

Where is the product shipped?

What equipment is used?

- a. Where was it purchased?
- b. Where was it manufactured?

Are blasting materials used?

- a. What type of blasting materials?
- b. Where purchased?

⁶ See United States v. Arvil Lake, 6th Cir., Nos. 91-6108 and 91-6154

c. Where manufactured?

How is the product moved for sale?

a. Rail

b. Truck

1) What make?

2) Where purchased?

3) Where manufactured?

4) Who owns it?

Who insures the operator's equipment and vehicles?

Who provides telephone service?

Do they conduct interstate calls?

What is the source of their electric power?

CHAPTER 5 - INTERVIEWING

A. INTRODUCTION:

The spoken word is potentially the greatest of all sources of investigative evidence. No investigation is complete until every relevant witness has been interviewed. Proficiency in interviewing will ensure a high degree of reliability in the results achieved and will help prevent surprise testimony from arising later. Exhibit 5-1 is a suggested outline of the steps to be taken when conducting an interview.

Successful interviewing is a skill that must be developed through specialized training and experience. For this reason investigators should use all available resources (i.e., training materials received at MSHA training classes and any other reference sources dealing with interviewing.)

B. PREPARING FOR THE INTERVIEW:

1. **Location:** Statements of each interviewee should be taken separately. In those unusual circumstances where joint statements are taken (for example, representatives from MSHA, the state, the company and the employees jointly conduct the interviews during an accident investigation) and an interviewee desires to give a statement to the MSHA representative in private, it will be permitted. Generally, the investigator should attempt to control the physical conditions where an interview will take place. It is desirable to interview at a location that is private. Witnesses may be interviewed in their homes if there are no disturbing noises or interfering situations present. Where appropriate, witnesses should be interviewed on a prearranged schedule by appointment at a specific time and place. If a witness is no longer employed by the company being investigated, contact through the new employer should be avoided if possible, or made in a manner to avoid the impression that the new employer is the subject of investigation.
2. **Selection of Witnesses:** All persons having information relevant to the case should be interviewed and statements taken, if possible. Each person to be interviewed, whether an hourly worker or a member of management, shall be contacted by the special investigator separately and in private to arrange for an interview. If an interviewee indicates a desire to be interviewed ONLY in the presence of a representative, such as legal counsel, that desire shall be honored.

If an attorney representing the company notifies an SI that he/she is representing (all) members of management and all arrangements for interviews should be made through the attorney, the SI should advise the attorney that because of the possible conflict of interest which may exist, each potential witness will be contacted first to ensure that

each interviewee understands his/her rights and to ensure that each does in fact want to be represented by the attorney.

If the investigator decides that a witness does not need to be interviewed, or a potential witness refuses to be interviewed or refuses to provide any information, information explaining this (usually a memorandum to the file) shall be documented in the case file. Under certain circumstances, a witness may be interviewed more than once.

3. **Participation of Representatives of Witnesses:** Investigators will offer no objections to the presence of an attorney or other representative during the interview of a witness if the witness requests or insists on such presence. Keep in mind that in an interview of a witness represented by counsel, the attorney may likewise represent another party involved in the investigation and the witness should be so advised. It should be emphasized that under these circumstances, investigators shall exercise caution to avoid disclosure of MSHA's case information. Similarly, in interviews conducted in the presence of attorneys, or other representatives, investigators will not engage in arguments as to interpretations of the law, the facts of the case, or matters of procedure. Interviews will be courteously discontinued where the attorney or other representatives seek to take charge and control the scope and progress of the investigation. Attorneys or other representatives may advise their clients, but may not reply for them. When an interview is discontinued under the above circumstances, the investigator will make note of the fact and include it in the investigation report.

C. **PLANNING THE INTERVIEW:**

1. **General:** Establish a goal and prepare a plan or an outline before questioning the witness. Determine the requirements of the law or the particular investigative assignment. For Section 110 investigations, the requirements are determined by analyzing the section of the law involved and identifying the elements that must be investigated. For other investigations, carefully analyze the issues and identify the matters to be explored. When you don't understand the issue of law, check with an attorney from the Office of the Solicitor. Do not try to interpret the law yourself. When you have decided on the probable relationship of an individual to your investigation, you are in a position to determine what details are likely to be known. Each "unknown" is in effect a question to be answered. Therefore, you should outline the "unknown" points in logical order. Be sure to include several points of a general nature to ascertain if the witness has knowledge on unanticipated matters. The outline should cover every topic to be discussed.

As a rule, the items outlined will indicate the issue to be resolved, but will not specifically cover the individual questions that must be asked. During the discussion

of an "unknown," it may be necessary to ask a number of related questions before the matter is resolved or explored satisfactorily. The specific topic question may never be asked at all.

2. **Establishing the Order of the Interviews:** Generally, witnesses who can and will voluntarily give the most complete account of the event and associated background information should be interviewed first. This will give an early overall picture of the matter and provide information of value in interviewing the other witnesses. It is advantageous to corroborate the statement of a witness with statements obtained from other witnesses.

D. CONDUCTING THE INTERVIEW:

Investigators will conduct interviews in a professional manner, without making any threats or promises whatsoever to elicit information. Since questions are the tools of the interviewer, it is essential that questions be clear, communicative, and designed to elicit information. Each witness shall be interviewed separately and in private. If two or more witnesses want to be interviewed at the same time, the investigator shall explain the reason why this would be inappropriate (i.e., the need to get each witness's independent recollection of the incident without having one witness influenced by comments from another witness).

1. Important Considerations:

Witnesses will cooperate much more readily if they are aware of the investigator's authority to interview them. Present your credentials to establish your authority prior to conducting the interview.

Every person who is interviewed must be advised that his/her statement will be kept confidential by the Department of Labor to the extent provided by law. During formal and informal dealings with others, great care should be taken not to reveal, either directly or indirectly, persons who have given statements and/or the nature of the statements.

Only the person interviewed shall be offered a copy of his/her statement unless otherwise advised by the interviewee. It shall be the responsibility of the special investigator to maintain the security and confidentiality of the statements obtained by MSHA.

Never argue with a witness. Start off with easy questions that are readily answered and positive in nature. This approach will help create an environment in which the witness desires to cooperate. Do not ask questions directly related to the matter under investigation until it appears that the witness will respond to such questions.

If, during the interview, there are signs that the witness is becoming unwilling to talk, you should revert the conversation to topics discussed freely; then progress slowly to the desired topic by a different line of questioning.

Use every precaution to avoid false rumors, embarrassment, or character defamation. It should be kept in mind that even the recognized presence of an MSHA investigator may cause speculation.

Ensure that the information comes from the witness and is not suggested by leading questions.

Keep in mind that potentially friendly and cooperative witnesses still may not give desired information because:

They have faulty perception.

They do not remember.

The question was not properly asked.

They are not aware that they possess worthwhile information.

They are reluctant to get involved.

They are reluctant to involve others.

They are not impressed with the importance of cooperating.

They do not feel friendly toward the investigator or the Agency.

They dislike the possible inconvenience of appearing in court.

The time or place of interview may interfere.

They are unknowingly prejudiced.

Their logic or conclusions are faulty.

They mistake inferences, rumors, or hearsay for facts.

2. **Establishing Rapport:**

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

Establish confidence and trust by having a friendly discussion at the start of the interview.

Don't begin the interview, if possible, until the witness appears friendly and cooperative.

Keep conversation informal and easy.

Display pleasant emotional responses and avoid unpleasant expressions.

Urge the witness but never hurry or pressure him/her.

Be interested and sympathetic to the witness's problems.

Don't ask questions that insinuate suspicion of the witness, either by composition or method of asking.

Try to reestablish rapport at any time during the questioning when the witness appears to become reserved or hostile.

Avoid labor-management discussions that appear to put MSHA in the position of advisor.

3. **The Questions:**

As a general rule, start an interview by asking the witness to give a free narrative discussion of what is known about the matter being investigated or about certain specific "unknown details". All "unknown detail" items that have not been satisfactorily covered by the free narrative discussion should be explored by direct examination. Each "unknown" should be explored separately and completed before proceeding to the next.

It will generally be necessary to use a sequence of questions and discussions which should proceed from "general to specific". Each question should be precise. Be sure the witness understands the questions.

Efforts should always be made to test or reconfirm the information given by a questionable witness. An informal cross-examination may be useful to test the completeness or accuracy of the testimony.

Avoid merely trying to get the witness to confirm the information of a previous witness. Obtain the information independently and determine if it does or does not corroborate prior information attained.

If a witness claims no knowledge, ask a number of other questions about the matter. The witness will often unintentionally reveal the information.

When the withholding of information is suspected, rephrase and continue to explore until you get precise answers on every doubtful point. Some indications that a witness has more information are:

Attempts to evade questions

Vague answers

Conflicting information with previous statements

Physical actions and appearance of the witness

Information from other sources indicating the witness has certain knowledge

Circumstances placing the witness in a position to know certain information

4. **Testing Assertions for Truthfulness:**

To test the assertions of a witness, evaluate the conditions under which the information was obtained. First, determine how the information was obtained. For example, if acquired visually, what was the condition of the light? What distance was involved?

Similar questions should be considered when other perceptions or body senses are involved. If the information was related to the witness by someone else, how did the third party get it? How reliable is the word of the third party and what were the circumstances under which it was related? Was it possibly obtained from joking or gossiping? If the information was deduced from circumstances, what facts were the deductions based on? Determine the degree of contact a witness has had with other witnesses, subjects and occurrences.

5. **Verifying the Information:**

After the various phases of the interview are finished, recheck to ensure that all of the "unknown details" on the interview outline have been satisfactorily explored and that the reliability of the information obtained has been tested.

Next, mentally rearrange the information obtained so that the details follow one another in logical continuity. Summarize the testimony for the witness by stating all important details in proper sequence. Stop after each segment of the summary and ask the witness to verify the correctness of your interpretation. If the witness disagrees, correct the discrepancy before proceeding.

6. **Conclusions:**

Do not draw conclusions until you have exhausted all possible sources of information. Be careful not to base reasoning on false assumptions. In the initial evaluation, be skeptical of so-called "facts" until you are satisfied with their authenticity. Even after you are satisfied with the facts, use care in interpreting them.

E. **TYPES OF QUESTIONS:**

1. **Extended-Answer Questions:** Some questions should be framed to require a narrative answer. Questions that can be answered by a "yes" or "no" restrict the information that the witness may be inclined to give. Obviously, answers to these "yes" and "no" questions usually do not supply enough information. Such questions are acceptable when summarizing or verifying the statement with the witness.
2. **Leading Questions:** Leading or suggestive questions are those which:
 - a. suggest the desired answer;
 - b. assume something as fact which has not yet been established as fact; or,
 - c. embody a fact and require a simple "yes" or "no" answer.

When asking for original information, such leading questions should be avoided.

3. **The Seven W's:** The following seven questions are useful in most interviewing situations:

"What?"	(What happened?)
"When?"	(When did it happen?)
"Where?"	(Where did it happen?)
"Why?"	(Why did it happen?)
"How?"	(How did it happen, how much, how many?)
"Which?"	(Which one did it?)

"Who?"

(Who was involved?)

When complete answers to these seven elements are obtained, the issue being explored is usually satisfactorily resolved.

F. NOTE TAKING:

1. **Introduction:** This section describes the legal support for, and the proper means of taking, preparing and preserving contemporaneous notes and written statements. With respect to any and all activities associated with the investigation of a case, investigators should continually bear in mind the importance of documenting the file to support the findings. The extra time spent carefully taking notes and writing memoranda to the file is considered productive time, since documenting activities can later save time, and perhaps the case, when memories fade and issues become unclear.
2. **Contemporaneous Notes:** Contemporaneous notes are the special investigator's documentation of all comments and observations related by the parties involved and recorded as these events take place. These notes may include handwritten comments, daily reports, diaries, tape recordings, scrap paper, internal memoranda and other similar articles pertaining to the investigation.

All of these documents must be retained even if they are later transcribed into official documents. An example of this would be interview notes taken at the time of the interview and later typed into a formal statement. Even though all the information contained in the notes is subsequently included in the formal typed statement, the original handwritten notes must be retained in the case file.

3. **Legal Support:** The legal support for the Agency's retention procedure of contemporaneous notes is based in the "Rules of Criminal Procedures for the United States District Courts". Rule 16 states in part:

“...upon request of the defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant . . . (or) the substance of any oral statements which the government intends to offer in evidence.”

4. **Format:** There is no specific form for the taking of notes required during any special investigation. Exhibit 5-2 illustrates a format which may be used. However, contemporaneous notes must be written in a manner so that they may be interpreted and understood by an individual who is not familiar with the investigation.

5. **Content:** Investigative notes, such as those taken during an interview, should contain elements of the exact words of the witness. It is important that exact words be used so that the investigator may preserve the original intent of the witness. In addition, investigative notes should contain the following elements:

Subject of notes (either person or incident).

Date notes were made.

Place notes were made.

Investigator's signature or initials.

Reference case number.

If a second investigator is present, both should prepare their own notes, or sign or initial the notes of the original investigator.

G. STATEMENTS:

1. **Introduction:** The principle purpose of the interview statement is to obtain all of the information a witness has which will be helpful in resolving the case. Therefore, it is necessary to prepare a permanent record of every interview to be preserved for future use. Every record of an interview shall be carefully reviewed for any typographical errors and for accuracy of context. When the statement is examined by the witness, he/she will be permitted to correct typographical errors or make minor modifications to the testimony. These corrections and/or modifications should be initialed by the witness. The witness may provide additional information modifying or clarifying the original statements.
2. **Use of Statements:** The interview statement may be used to refresh the memory of a witness during a trial or an administrative hearing. It may also be used to impeach a witness on the stand when his/her previous statement is inconsistent with current testimony, or to furnish a basis for prosecution of a witness who testifies at the trial. If the statement constitutes a confession or an admission, the pertinent parts may be submitted as evidence during the trial.
3. **Signatures of Witnesses:** Reference is made in various sections of the Handbook to obtaining signatures on statements. While this is desirable, it is in some cases impractical or not possible. An investigator should not delay submission of an otherwise completed investigation to engage in repeated attempts to acquire signatures. Each witness should be afforded the opportunity to review and correct

his/her statement. If a witness has reviewed his/her statement but has chosen not to initial or sign it, after confirmation from the witness that the statement is an accurate representation of the information he/she presented during the interview, a note on the last page of the statement should be handwritten by the investigator stating that the witness reviewed the statement, that the witness had indicated that the information is an accurate representation of the information provided to the investigator, and that the witness has elected not to sign or initial the statement. If this action by the witness is the result of advice from counsel, this information should also be documented by the investigator.

4. **Types of Statements:** When taking a statement, the investigator may take handwritten notes of what the witness says, or a tape recorder may be used with the expressed advance consent of the witness. Regardless of the format used, each statement shall contain the following information:

Date, time and place where the statement is given.

Name, home address, home telephone number, date of birth and Social Security Number of witness.

Case number to which the statement pertains.

Name and title of the investigator.

Names and titles of all other persons present at the interview (i.e., attorney, wife, etc.); also the reason for each person being present, if not self-evident.

That the statement was made freely and voluntarily, without duress, and that no promises or commitments were made by the investigator.

That the information provided will be held confidential to the extent provided by law.

- a. **Question and Answer**

The "question and answer" statement is a record of the questions asked by the investigator and answers given by the witness (Exhibit 5-3). Each question shall be consecutively numbered.

In addition to those items listed above, the following additional information should be included in a "question and answer" statement:

A statement offering the witness the opportunity to make any other remarks for the record.

A statement telling the witness that he/she will have an opportunity to examine and to sign his/her official statement.

Several advantages to the “question and answer” type of interview statement are:

- (1) The statement is taken in the same manner as testimony taken during a trial or administrative hearing.
- (2) The statement is clear and to the point.
- (3) It is difficult to dispute with claim of misunderstanding.

One disadvantage of this type of interview statement is that it may limit the free flow of information.

b. Unsworn statements

An unsworn statement (i.e., Exhibit 5-4) is not taken under oath but is a written declaration of fact which is signed and dated by the witness. The statement should indicate that the witness read it or that it was read to him/her and that it was understood. If the witness refuses to sign the statement, the investigator should suggest that the witness initial each page of the statement after reading it and ensuring that the information contained within the statement is an accurate representation of the interview. If initialing is also refused, the investigator should ask if the witness is certain that the statement is an accurate representation of the interview. A notation of the witness’s reluctance to sign or initial the statement should be made on the last page of the statement along with a comment that it was reviewed by the witness and is an accurate representation of the interview. If the witness has been advised not to sign the statement, (i.e, by an attorney) this also should be indicated on the last page.

c. Memorandum of Interview

A memorandum of interview is an informal note of something that the investigator desires to fix in memory by the aid of written record. It is a record of what occurred at the interview and may be in the format shown in Exhibit 5-5. The memorandum should contain all relevant information concerning the matter at hand. It should be promptly signed and dated by the investigator.

H. **TRANSCRIBING TAPED INTERVIEWS:**

Tape recorded interviews are preferred when conducting Section 110 investigations. Off-record discussions should be discouraged during a tape recorded interview. The SI is not permitted to transcribe taped interviews. If tape recorded interviews are to be transcribed, this will be accomplished by a clerk trained to transcribe, and trained in the use of transcribing equipment.

CHAPTER 6 - EVIDENCE

A. **INTRODUCTION:**

MSHA special investigators (SI) have no authority to seize evidence which is not voluntarily released. If a piece of evidence is not voluntarily released, a search and seizure warrant would have to be obtained from a U.S. magistrate. Title 28 CFR, Part 60 establishes authorization for federal law enforcement officers to request a search warrant and lists those who are authorized. MSHA SI's **ARE NOT law enforcement officers and DO NOT** have the authority to obtain or execute search warrants but may assist in these activities (see Chapter I for other guidance and restrictions). If during a special investigation, an SI believes a search warrant is needed, he/she shall brief the Supervisory Special Investigator (SSI) on the reasons for needing the warrant. If the SSI agrees that a search warrant is necessary, he/she shall notify the District Manager and Technical Compliance and Investigation Division (TCID) of

the request. TCID will confer with the Solicitor of Labor (SOL) and if it is determined that a search warrant should be obtained, arrangements will be made by the district (with assistance as necessary from TCID and SOL) to present the information to the U.S. Attorney having jurisdiction over the area who will authorize or deny the request to obtain a search warrant.

Every piece of evidence that could have any connection with the case should be collected. Nothing should be rejected because it appears too big, too small 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 so as to connect it to the location where it was found through the use of photographs, sketches, or oral or written testimony. The photographs of the evidence must be carefully documented. The following information should be recorded:

- a description of what is depicted in the photograph;
- where the photograph was taken;
- names of persons present when photograph was taken;
- type of camera;
- type of lens;
- the shutter speed;
- the diaphragm opening;
- kind of film used;
- time of day;
- degree of light and whether natural or artificial;
- details of processing; and,
- chain of custody of negative and prints.

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

B. NATURE AND KINDS OF EVIDENCE:

1. **Forms of Evidence:** There are three forms of evidence: real, documentary, and testimonial. They are defined as follows:
 - a. **Real (Physical) Evidence:** Tangible objects (e.g., roof bolts, equipment, cables, etc.) presented for inspection to the trier of fact, "speaks for itself." It is usually the most trustworthy type of evidence, and, accordingly, policy factors favor its admissibility.
 - b. **Documentary Evidence:** It consists of a writing (e.g., roof control plan, deed, contract, etc.), rather than a tangible object.

- c. Testimonial Evidence: Oral testimony is given in court (or by deposition) by a witness and may be either factual or opinion testimony. Interview statements in which the witness refers to what other individuals told him/her (hearsay testimony) are of limited value. These may serve to indicate others whom the investigator may attempt to interview, but have limited evidentiary value. Problems involving admissibility of such evidence are the concern of the attorney working on the case. Hearsay testimony may be used in a civil case but is not admissible in a criminal proceeding.

If an operator, or any director, officer or agent of a corporate operator, in discussions with an investigator, makes any admission with respect to civil or criminal violations, such admission may be introduced into evidence at a trial. If admissions are obtained, diary entries or memoranda to the file covering the details should be made as soon as possible after the conversation. A permanent record will then be available from which the investigator can refresh his/her recollection, if called upon to testify at a trial.

- 2. **Types of Evidence**: There are three types of evidence which the special investigator may be required to collect:

- a. Direct Evidence: Proves the fact in issue directly; i.e., without any inference or presumption. The sole determination which must be made is whether the evidence is true.

Example: W testifies: "I saw D strike P." This testimony establishes the fact of striking, provided the trier of fact (i.e., Administrative Law Judge) believes the witness.

- b. Circumstantial Evidence: Proves the fact in issue only indirectly; i.e., by proving another fact from which an inference or presumption may arise as to the fact in issue. Here, the trier of fact is required to weigh probabilities as to matters other than merely the truthfulness of the witness.

Example: W testifies: "I heard D admit that he struck P." Such testimony does not in itself establish the fact of striking, but merely that D made an admission, from which an inference of the striking may be drawn. The trier of fact must weigh the probabilities as to whether or not D was speaking the truth when he made the claimed admission, as well as determining whether W is telling the truth.

- c. Cumulative Evidence: Additional evidence to which there is already direct or circumstantial evidence; i.e., evidence which merely repeats or verifies other 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 the evidence. This section describes these procedures. The attorney assigned to the case or TCID will be available to 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 the evidence (usually the SI). This ensures that each item of evidence can be accounted for and positively identified from the time it is taken into custody until it is presented at trial or the case is closed. The Master Log should consist of a stiff-backed bound, ledger-type book having numbered pages with no pages missing. No erasures are permitted. This log is kept to record all the items of evidence which were collected. Its purpose is to show that the evidence was properly handled, to ensure that it is in the same condition as found and was not tampered with or altered.

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

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

There are times when it is necessary to release a piece of evidence, i.e., pursuant to a subpoena. In order to maintain the chain of custody of the object, a Chain of Custody, MSHA Form 2000-200 shall be prepared (see Exhibit 6-4). The investigator shall give the individual providing the evidence a signed Itemized Receipt, MSHA Form 2000-201 for each piece of evidence released to the investigator (see Exhibit 6-5). A copy of the receipt will be retained for the case file. When the evidence is returned, the investigator 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 exhibit in court if the chain of custody has not been maintained or if it has been improperly handled so that it is no longer in its original condition. (See Section 4: Transmission of Evidence, for information on Chain of Custody form.)

2. **Joint Custody:** When the evidence consists of small items, it may be secured in the local MSHA office. However, if large amounts and/or large items are collected, it may be necessary to secure these items in a storage area at the mine site. When this is necessary, "joint custody" is shared by the MSHA custodian and the owner of the evidence. The evidence must be secured in such a manner that both parties (the custodian and the owner) would have to be present to unlock the secured area and have access to the evidence. (For example, two separate locks and each party having a key to only one lock.) The evidence shall not be removed or transferred from the secured area without the written consent of all the joint custody parties listed on the Chain of Custody, MSHA Form 2000-200 (Exhibit 6-4). The only purpose for the transfer would be for examination, analysis, or use in a hearing or trial. When such a transfer occurs, the triplicate copy, Chain of Custody Form 2000-200 shall be completed.
3. **Preservation of Evidence:** All evidence shall be carefully stored under lock and key under the direct control of the MSHA investigator having custody. All information concerning the evidence received or removed shall be recorded in the Master Log. The originals and certified copies or photocopies of documents will be preserved as received and filed for evidentiary purposes. These directions are not intended to restrict laboratory examination of original documentary evidence.

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

4. **Transmission of Evidence:** When evidence is transmitted from one place to another for the purposes of evaluation, laboratory analysis, expert opinion, etc., precautions must be taken to ensure that the evidence is not tampered with, altered, etc., and that the chain of custody is not broken. The evidence must be transmitted in person or by certified-mail. Large items which cannot be mailed or carried will require that special arrangements be made by the supervisory special investigator or other appropriate official. The following procedures must be followed when transmitting evidence. These procedures are not all inclusive, and additional procedures should be considered for every circumstance.

- a. Briefing the Recipient: The custodian of the evidence must brief the recipient (either in person, by memorandum, or both) on the actions he/she must take when the evidence is received and processed. The custodian shall suggest that the recipient pack the evidence as listed in Item c below when returning the evidence. The recipient should be told that he/she may have to testify in court as to the precise actions taken while the evidence was in his/her custody.
 - b. Complete Chain of Custody Form: This triplicate, Chain of Custody form (Exhibit 6-4) is originally completed by the custodian of evidence. The original and both copies will be packed with the evidence and transmitted to the recipient. The custodian of evidence shall make a copy for his/her records. Upon receipt of the evidence, the recipient will fill in the appropriate blocks on the original and both copies of the Chain of Custody form (date received, signature, name, title, and purpose of custody change). The original will always remain with the piece of evidence. A copy will be returned to the custodian after the recipient has filled in the appropriate blocks. When the custodian receives this copy of the Chain of Custody form, a notation will be made in the Master Evidence Log Book as to when and who received the piece of evidence and for what purpose. When the evidence is ready to be returned to the custodian, be sure the evidence is packaged properly, transmitted as directed by the custodian, and that all other measures necessary have been taken to ensure that the chain of custody is not broken. When the custodian receives the returned evidence, it shall be so noted in the Master Log Book.
 - c. Pack the Evidence: Wrap the piece of evidence and the original and both copies of the Chain of Custody form in paper, cloth or other appropriate covering material. Place in a box, envelope, etc., for transmittal. Seal the container with tape or wax. On the outside of this container, place the name, title and address of the person to receive the evidence and the return address of the custodian of evidence. Mark each side of the package with the words "Evidence - to be opened only by authorized personnel", or the equivalent. Give directions such as "Expedite", "Urgent", "Fragile", "Explosive", "Inflammable", "Perishable", or similar notation.
5. **Returning of Material Gathered as Evidence**: No items of evidence are to be finally returned to the owner, their agent or attorney, without the prior written approval of the appropriate MSHA Administrator (see Exhibit 6-6 for sample request letter). However, in the event of an ongoing criminal investigation involving the Department of Justice, evidence shall not be released without the written consent of both the Administrator and Department of Justice (see Section E of this Chapter VI for further details concerning the handling of Grand Jury materials).

D. CERTIFICATION OF DOCUMENTS:

When copies of MSHA documents are submitted as evidence during a legal proceeding under Section 110 of the Act, they must be certified as being an authentic copy of the original document. MSHA Administrative Policy and Procedures Manual, Volume I - Organization, Chapter 349.6, Certification of Documents, (Exhibit 6-7) dated 08/27/96, provides the procedures for certifying and/or affixing an official seal to attest to the source of authenticity of official documents of the Mine Safety and Health Administration.

The Administrators, Deputy Administrators, Technical Compliance and Investigation Division Chiefs and District Managers for Coal and Metal and Nonmetal Mine Safety and Health are redelegated authority for the certification of documents.

The SI should direct his/her request to the District Manager for certification of documents through the SSI.

E. HANDLING OF GRAND JURY INFORMATION:

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

1. **Access: Grand jury information may be disclosed to MSHA personnel deemed necessary by a federal prosecutor to assist the federal prosecutor.** In order to be permitted access to grand jury material, a federal prosecutor, usually an Assistant U.S. Attorney (AUSA), must seek and receive a court order authorizing disclosure to the named Special Investigator (SI) and/or other staff personnel. **ONLY** persons named in the court order (normally referred to as the "6E List") are authorized to have access to grand jury materials. The SI may provide the AUSA with the names of those MSHA personnel who should be authorized access to the grand jury information. The list may include personnel from TCID and SOL. Strict precautions shall be taken by MSHA personnel authorized access, to ensure that grand jury information is not disclosed to any personnel not authorized access to this material, including investigators working on other matters or MSHA personnel who have civil law enforcement functions. The SI authorized access shall be responsible to see that grand jury materials are secured in locked files accessible only by those MSHA personnel identified on the court order authorized access.
2. **Use: Rule 6E does not permit disclosure of grand jury material for civil law enforcement purposes or use of materials for any other investigatory purpose.** Access and use of grand jury material is for the limited purpose of assisting federal

prosecutors in the conduct of the criminal investigation. MSHA personnel shall not use grand jury information for any other purpose. MSHA SI's authorized access must consult with the assigned AUSA before disclosing, discussing or disseminating any grand jury-based information, or any information which may appear to be related to the grand jury investigation or to the grand jury investigatory process, to anyone outside of those authorized. If MSHA SI's are in doubt, material should be considered non-disclosable unless federal prosecutors have advised that it is not within the prohibitions of Federal Rule 6(e).

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

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

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

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

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

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

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

3. Clear and readable copies of all statements and other documents referred to as exhibits in each investigation report shall be numbered sequentially. Each exhibit shall be tabbed on the first page and the tab appropriately marked with an exhibit number (e.g., 1, 2, 3, etc.,). If the exhibit consists of more than one page, each page shall be numbered (using ink) in the lower right-hand corner, showing the exhibit number and page (e.g., 1-1, 1-2, 1-3, etc.,).

The following is a sample listing of exhibits which may be included in the case file. Not all of these documents will be appropriate for every type of investigation, nor will they necessarily be included in this order.

- a. Discrimination Complaint Forms, if 105(c); or Possible Knowing/Willful Violation Review Form or documentation authorizing investigation, if 110;
- b. interview statements and memorandum of interviews;
- c. Legal Identity Report (include for all types of investigations);
- d. Mine Status Report Sheet/Printout;
- e. all evidence relative to the establishment of jurisdiction;
- f. a certified copy of the State records of the Articles of Incorporation, or Certificate of Doing Business, for the corporate operator in the State in which the violations may have occurred;
- g. copies (certified for those cases recommending referral to Justice) of all pertinent citations, orders, modifications, and terminations;
- h. photographs, maps, and/or sketches of area(s) which indicate pertinent locations and/or points;
- i. copies (certified for those cases recommending referral to Justice) of mine plans such as ventilation, methane and roof control plans;
- j. MSHA accident reports relative to the investigation;
- k. technical reports and/or laboratory analyses;
- l. mine records such as preshift examination reports, etc.;
- m. transcripts and/or records of Section 103(b) hearings, joint Federal/State hearings, and arbitrations;
- n. internal memoranda, form letters, or other relevant correspondence;
- o. Inspection and Violation History (MSN 065 Report);
- p. data on accidents and injuries at the mine;

- q. results of any Part 100 safety and health (agent) conference and recommendations resulting from the conference along with any documentation submitted during the conference. (This should be provided with any case for which the District Manager has offered the agent(s) an opportunity to request a conference prior to submitting the completed case file.); and
 - r. any other documents relevant to the special investigation.
4. The investigation report and all exhibits shall be attached to the right side of the case file folder and "post-bound" using the two-prong fastener. If more than one folder is required, each shall be numbered sequentially. Each folder shall have a label indicating the case number and parties involved as described in B.1. and B.2. below.
 5. All special investigative case files shall be stamped "CONFIDENTIAL" on the outside cover and must be kept under lock and key. The Special Investigator (SI) shall be responsible for maintaining the confidentiality and security of all files under his/her jurisdiction. Access to these files shall only be on a need-to-know basis and a record of each access shall be recorded on the Investigation Assignment Control Form (Exhibit 7-3).
 6. When an investigation has been completed, all original work papers and notes used or generated by the SI during the course of the investigation must be inserted in a manila envelope marked with the case number, along with the word "NOTES", and placed in the case file. If later called upon to testify, these notes and work papers may be used to refresh your memory. Personal memoranda or other extraneous notations not related to the investigation SHALL NOT be included among these work papers.

If an enforcement problem or hazardous condition is identified during an investigation, the action taken by the SI and Supervisory Special Investigator (SSI), such as referral to the District Manager, shall be documented in a memorandum to the file (see PPM Vol. I, Sec. 110).
 7. The SSI shall maintain the official (original) file in the district office. The SI may retain an extra copy until a case has been litigated or closed, at which time it will be forwarded to the SSI for disposal.

B. INVESTIGATION REPORTS:

Every investigation report, regardless of the type of special investigation, shall be prepared in the appropriate manner as set forth below. When the investigation report and case file are being reviewed by the SSI for completeness and adherence to policy, changes shall not be

made without first consulting with the investigator who conducted the investigation and prepared the final report. Each investigation report will be written from the investigator, through the supervisory special investigator to the District Manager.

The SI shall forward the completed case file to the SSI to review for completeness and conformance to the procedures set forth in this Handbook. The SSI may return the file for correction or additional investigation.

Once the SSI has completed his/her review, the case file will be forwarded to the District Manager for review and signature. The required number of case file copies (as discussed below) will then be transmitted under cover letter from the District Manager to the appropriate Administrator (see Exhibit 7-5 for Section 105(c) cases and Exhibit 7-6 for Section 110 cases). All files shall be placed in heavy duty envelopes and sent by certified mail, return receipt requested. Transmittal envelopes shall be clearly marked "Special Investigation - Confidential" and addressed to the attention of the Chief - Technical Compliance and Investigation Division.

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

CMS&H
HOPE-CD-97-00
Doe v. ABC Coal Company

M/NM
SE-MD-97-00
Doe v. XYZ Gravel

The original Forms 2000-123 and 2000-124 and copies of notification letters to the complainant(s) and respondent(s), prepared by the complaint processor, shall be inserted under the two-prong fastener.

When a complaint alleging a discharge is received, the complaint processor shall indicate in large red letters on the outside cover of the file folder the word "**DISCHARGE.**" After the case file has been assembled, the complaint processor will release the file in accordance with instructions received from the supervisory special investigator. Case files shall be sent to the investigator assigned to the investigation, by certified mail--return receipt requested, or picked up by the investigator.

The final investigation case file for each 105(c) investigation shall include a cover sheet indicating the date the complaint was received, the deadline for submitting the report to the appropriate TCID office and the date by which the final decision must be made (see Exhibit 7-7). It shall be attached to the inside right cover using the two-

prong fastener provided and will be the first sheet, followed by the Investigation Report, the List of Exhibits page(s), and all other documents properly tabbed as exhibits (see A.3. above).

Each Section 105(c) final investigation report shall include the following information:

- a. **Introduction:** The purpose of this is to quickly orient the reader with the subject matter of the investigation.
 - (1) The parties involved;
 - (a) The name, age, address, home telephone number, job title, and present work status of the complainant.
 - (b) Whether or not the complainant was a miner, representative of the miners, or an applicant for employment; if the complaint was timely filed and, if not, explain why.
 - (2) The incident involved and where it took place. Identify the specific protected activity that the complainant was engaged in at the time of the alleged discriminatory act. When a miner withdraws himself/herself, or refuses to work because he/she believes that a condition or practice is unsafe, indicate whether or not the complainant communicated his/her belief of the protected activity to mine management. If the complainant did not communicate this belief, indicate why not. Describe circumstances which would make a communication to management unnecessary.

Identify the specific discriminatory act that occurred as a result of the protected activity and outline the consequences. Be especially careful to identify any complaint that involves a claim of pretext or disparate treatment.

Such claims need to be carefully documented and require evidence regarding similarly situated individuals.

If the alleged discriminatory act has been a continuous event, present the information in chronological order. Either identify the most recent incident and proceed backwards or present the information beginning with the earliest event and work towards the present. Indicate the complainant's remedy status, i.e., whether seeking immediate reinstatement or has gained other employment (current work status)

or if the complainant seeks only monetary damages (back wages and interest).

- b. **Supporting Evidence and Witnesses for the Complainant:** Identify and obtain originals or copies of any evidence related to the issue that supports the complainant's position and allegations. Identify, by name and occupation, any witnesses who can testify on behalf of the complainant. This section should indicate whether the witnesses can provide direct, circumstantial or hearsay evidence regarding the issue. Reference the exhibit and page number to support this statement.

Example: "John Doe, Continuous-Mining Machine Operator, can testify that he was present and heard Bill Smith, Mine Foreman, order the complainant to install roof bolts without using temporary supports. When the complainant refused, the Mine Foreman told the complainant to get his bucket and leave the mine (see Exhibit 4, Page 1)."

Indicate which witnesses refused to be interviewed and those who stated an unwillingness to testify.

- c. **Supporting Evidence and Witnesses for the Respondent:** Identify and obtain originals or copies of any evidence related to the issue that supports the respondent's position and allegations.

Identify, by name and occupation, any witnesses who can testify on behalf of the respondent. This section should indicate whether the witnesses can provide direct, circumstantial or hearsay evidence regarding the issue. Reference the exhibit and page number to support this statement. Identify which witnesses refused to be interviewed and those who stated an unwillingness to testify.

If appropriate, identify the attorney, firm, street address and telephone number of legal counsel representing the respondent.

- d. **Conclusion(s) and Recommendation:** A short paragraph should be written that identifies each of the elements indicated above.

Example: Evidence in the case file reveals that the complainant, John Doe, Roof-Bolter Operator, refused a direct order from the Mine Foreman, Bill Smith, to install roof bolts without using temporary supports. As a result of this refusal, the complainant was immediately

discharged from employment. Based on the evidence obtained during this investigation, it is the conclusion of this investigator that a violation of Section 105(c) has (or has not) occurred.

- e. **Number of Case Files:** Each original 105(c) case file folder will be retained in the District. The following number of case file copies must be prepared and submitted to the appropriate TCID office. Copies of each 105(c) complaint investigated MUST be submitted to TCID regardless of the findings in the report.

Metal/Nonmetal Mine Safety and Health

<u>Type of Investigation</u>	<u>Number of Case Files</u>
Section 105(c) discrimination complaint cases recommending further action	2 copies
Section 105(c) discrimination complaint cases recommending no further action.	2 copies

Coal Mine Safety and Health

<u>Type of Investigation</u>	<u>Number of Case Files</u>
Section 105(c), discrimination complaint cases recommending further action	2 copies
Section 105(c), discrimination complaint cases recommending no further action	1 copy

- f. **FOR CMS&H ONLY:**
A 2-3 page summary analysis (and diskette) shall be submitted, along with the copies of the case file, for each 105(c) investigation which contains a finding that a violation of Section 105(c) **has occurred** (See Exhibit 7-8 for a sample summary analysis). Instructions for preparing a summary analysis for a 105(c) investigation are contained in Exhibit 7-9.

- 2. **Section 110:** A case file will be established by the secretary or complaint processor for all Section 110 cases. It will consist of a file folder prepared as described in sections A.1. and A.2. above. A label, as in the example below, shall be affixed to the folder:

CMS&H
VINC-CSI-97-00
ABC Coal Company

M/NM
NE-MW-97-00
XYZ Gravel

The Violation Review Form and all supporting information and documentation from the District Manager authorizing initiation of an investigation shall be inserted under the two-prong fastener.

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

Each Section 110 final investigation report shall include the following information although the format may differ from that presented:

- a. **Introductory Statement:** The purpose of this section is to quickly orient the reader to the subject matter of the investigation, the details of which are more fully discussed in the body of the report. The introduction should identify the parties; the size, type and location of the mine, the incident involved and when and where it took place. Indicate whether the mine is affiliated with a parent corporation, a subsidiary of a multi-national corporation, a family operation, or a single ownership.
- b. **Background and Jurisdiction Information:** The following documents, background and jurisdictional information shall be obtained for all types of Section 110 reports. All statements of fact must be referenced to the appropriate exhibits and attached to the final report.

Legal Identity Report;

When the current operator commenced operating the mine;

Number of miners employed;

Whether the mine is union or nonunion and, if union, the identity of representatives of the miners;

Mining method used;

Documents which establish jurisdiction under the Mine Act;

Daily production rate or quarterly man-hours; and,

Anything else which would present a "picture" of the mine for the reader who is not familiar with mining.

The prior history of the mine operator, parent corporation (if any), and the operator of the subject mine, as well as background information on key witnesses (to the extent that this information is readily obtainable). The history of the parent corporation should include a brief description of the length of time it has been operating its mines; the length of time it has been operating the subject mine; its size in terms of number of mines, number of employees, and yearly production or man-hours as compared to other mines in the area (if known); and activities and interests of any affiliated, parent or subsidiary companies which may have a bearing on the case;

If a violation may have been knowingly and/or willfully committed by an operator⁷, or any director, officer, or agent of a corporation, include the following background information for these persons(s): name, addresses (business and home), telephone numbers (business and home), title and description of duties (especially if supervisory), length of time in the present job and previous mining employment, State or Federal certifications or other tests taken, safety training courses attended, and any other information which establishes their knowledge of mine safety requirements. Also include information of previous action(s) against any of these individuals, if known; and,

A history of the compliance record for the subject mine, i.e., previous and ongoing Section 105(c) and 110 investigations and the dispositions thereof; prior violations; Temporary Restraining Orders, injunctions, etc., and the dispositions thereof; and any other similar information.

If the case involves an accident, as defined under Section 3(k) of the Mine Act, a brief description, using photographs, maps, or sketches, shall be given, setting forth the details of any fatality and/or personal injury.

The report shall contain the following three sections (c, d and e) repeated for each citation/order investigated:

⁷ As defined in Section 3(d) of the Mine Act.

⁸ As defined in Section 3(e) of the Mine Act

- c. **Investigative Findings Concerning Citation/Order No.** _____: All of the relevant information gathered during the investigation for the particular citation/order referenced shall be set forth in sequential narrative form. Each item of material information and evidence concerning each violation should be attributed to its source (i.e., a specific statement of a witness, a particular mine record, etc.). In this regard, reference should be made to the appropriate page numbers of interview records and/or other documentary exhibits attached. In Section 110 reports, the location and chain of custody of all physical evidence shall be specified. It is most important to relate the statements of the witnesses and the evidence obtained to the respective violation so that it can be more easily determined which witnesses and items of evidence should be subpoenaed. Finally, if "expert" testimony may be necessary, specify the area of expertise required and the "expert" witness, if known.

The "Investigative Findings" portion of any final report is more than likely complete if the following were taken into consideration and addressed in the report:

Did the narrative statement review the relevant facts of each exhibit?

Were the exhibit numbers referenced after stating the material facts of the case?

Were all the facts from each exhibit mentioned that were relevant to the investigation?

Were the findings limited to the material facts and those facts excluded that were not immediately relevant to the investigation?

- d. **Summary of Relevant Facts:** Summarize in chronological order the relevant facts, based on the available evidence (cite the exhibit and page number to support the findings) to support each alleged violation and who may have been responsible. When there is a conflict in the statement or evidence, point out the conflict.
- e. **Conclusions:** The report should include the investigator's conclusion indicating whether or not a violation occurred and, if so, which individual(s) and/or corporation may be responsible and who or whom would be liable. When stating a conclusion or recommendation regarding a possible violation of Section 110(c), the following must be addressed:

Was the operator a corporate operator?

Does the evidence support the corporate violation cited in the citation or order under investigation?

Was the individual who may be charged under Section 110(c) an agent, director or officer of the corporation, and, if so, which? If an agent, what were his/her responsibilities? Did the individual who may be charged under Section 110(c) knowingly authorize, order or carry out the violation cited in the citation or order under investigation and, if so, which theory of liability is recommended, i.e., did he/she knowingly authorize, knowingly order or knowingly carry out?

Were the conclusions or recommendations limited to the condition or practice in the citation or order under investigation?

- f. **Number of Case Files:** Each original case file folder will be retained in the District. The following number of case file copies must be prepared and submitted to the appropriate TCID office (**MNM and CMS&H**):

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

- g. **FOR CMS&H ONLY:**
Cases Recommending Further Action: A 2-3 page summary analysis (and diskette) shall be submitted, along with the copies of the case file, for each citation/order contained in the Section 110 special investigation case file, for which there is a conclusion that a violation of Section 110 **has occurred**. Examples of a summary analysis for a knowing (civil) violation are contained in Exhibit 7-10. Instructions for preparing a summary analysis of a knowing

(civil) violation are contained in Exhibit 7-11. An example of a summary analysis for a willful (criminal) violation is contained in Exhibit 7-12. Instructions for preparing a summary analysis of a willful (criminal) violation are contained in Exhibit 7-13.

The district will contact the Regional Solicitor to determine the status of any operator contest involving the underlying citation(s) or order(s) so that it can be included in the summary analysis.

- h. **Cases Not Recommending Further Action:** For any Section 110 special investigation case file where there is no evidence of a violation of Section 110 and none of the citations/orders investigated are recommended for further action, the District Managers for both CMS&H and M/NM have been redelegated authority to close the case. Therefore, the District Manager shall author a letter notifying the operator and/or contractor that MSHA conducted an investigation, identifying the citation(s) and/or order(s) involved, and indicating that MSHA has decided not to pursue further action (Exhibit 7-14). A copy of the notification letter shall be sent to TCID.

When responding to requests from the Regional Solicitor to review 110 cases closed by the District Manager, a cover memo shall be prepared by the District Manager similar to that contained in Exhibit 7-15. Regional Solicitors should still direct their request for copies of “go” case files to the SOL Counsel for Trial Litigation in SOL/MSHA Arlington, VA.

C. **HEADQUARTERS (TCID) CASE REVIEW AND ANALYSIS:**

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

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

TCID will do one of the following:

- a. **REFER THE CASE TO SOL AND RECOMMEND THAT THE CASE BE FILED WITH THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION (COMMISSION).**

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

When an investigation file involving a finding of discrimination is recommended for further action by TCID, and SOL does not concur, SOL will advise TCID. SOL will prepare a written analysis describing why they believe the case does not merit litigation. (If this can not be resolved, the issue may be presented to the Assistant Secretary for resolution.) This review and any consultations or requests for additional information will be targeted for completion within the 90-day statutory time frame for responding to discrimination complaints. Once all issues have been resolved, the case either will be filed with the Commission or will be returned to TCID for closing as described in Section 1.c. below.

or

- b. **SEND A MEMORANDUM TO THE DISTRICT REQUESTING ADDITIONAL INFORMATION.**

This will normally require the district to conduct further investigation.

When there is disagreement between TCID and the District, the case will be referred to SOL for resolution. After resolution, those cases which have merit will be filed with the Commission. Those found not to have merit will be returned to TCID for closing as described in Section 1.c. below.

or

- c. **CLOSE THE CASE.**

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

2. **For each 110 investigation case file:**

TCID will do one of the following:

- a. **REFER THE CASE TO SOL AND RECOMMEND REFERRAL OF THE CASE TO THE APPROPRIATE U.S. ATTORNEY'S OFFICE FOR POSSIBLE CRIMINAL PROSECUTION.**

If the case is to be referred to Justice, the case will first be referred to SOL for legal review and analysis. If the Administrator and Associate Solicitor concur, the Assistant Secretary and Deputy Assistant Secretary will be notified. The case will then be referred, under a memorandum jointly signed by the Administrator and Associate Solicitor, to the local U.S. Attorney's Office having jurisdiction over the case or to the Department of Justice as appropriate. MSHA and SOL should jointly make the case presentation where deemed appropriate.

If the Administrator and the Associate Solicitor agree NOT to pursue the case as a criminal matter, the case will be developed into a 110(c) action (see Section 2.b. below) or the case will be closed (see Section 2.d. below).

If the Administrator and the Associate Solicitor do not agree on a recommendation to refer a case for possible prosecution, MSHA or the Office of the Solicitor will further consider the case and, where necessary, request a review of the case by the Department of Justice. Once resolved, the case will be handled as described above.

On a case-by-case basis, review by the Department of Justice will also be sought in sensitive matters where there is agreement not to refer a matter for possible criminal prosecution.

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

- (1) a fatality or serious risk to safety or health occurred and there is strong evidence that deliberate noncompliance is involved in the case;
- (2) the case is significant and there is a reasonable possibility that evidence will be tampered with or documents destroyed;
- (3) no further meaningful investigation can be conducted in the case without resorting to compulsory process; or
- (4) the Department of Justice or a U.S. Attorney has asked for immediate referral of the case.

In a case that meets one or more of these criteria, headquarters approval for referral of the case to the Department of Justice or U.S. Attorney, as appropriate, is required. The District Manager will prepare a memorandum to TCID requesting approval for the expedited referral to the Department of Justice. The levels of review for such referrals are the same as other Section 110 cases, except that the review will be given higher priority.

In exceptional cases, where verbal approval is granted to expedite the referral, the District Manager will still submit a memorandum of the request for expedited referral (see Exhibit 7-19).

or

b. **REFER THE CASE TO SOL AND RECOMMEND PURSUING CIVIL PENALTY ACTION UNDER SECTION 110(c).**

Each case file sent to SOL will be accompanied by a summary analysis. If the SOL concurs, the District Manager will be advised in writing that the agent(s) listed is to be given the opportunity to request a safety and health conference (in those cases where the opportunity for a conference has not previously been offered). The District Manager will promptly notify each person listed that MSHA is proposing to assess a civil penalty pursuant to Section 110(c) of the Mine Act, advising each agent of the opportunity for a conference (either in person or by phone) and the matters to be discussed. This notification may be by phone; however, the District Manager shall send a letter, certified mail--return receipt requested, to each agent confirming each notification (see Exhibit 7-16 or 7-17).

If a conference requested is to be conducted, it will be conducted by the SSI (or the District Manager). The contents of the investigation file shall not be discussed at the conference. During the conference, however, the agent may present any facts and submit any documents he/she believes are relevant. The District Manager shall submit a memorandum to TCID, containing the results of the conference, attaching any documentation submitted during or as a result of the conference. In those situations where the results of the conference change the recommendation of the District Manager, the case will be referred back to SOL for review. Based upon this review and upon final resolve, the case will either be pursued for civil penalty action or will be returned to TCID to be closed (see 2.d. below).

If no conference is requested or is requested but not conducted, the District Manager shall submit a memorandum to TCID, with information that a conference was not requested or was requested but not conducted, explaining why it was not conducted. Regardless of which memorandum is submitted, the District Manager shall include his/her recommendation. The correct home address of each agent for which a civil penalty is being proposed shall be included (see Exhibit 7-18).

When an investigation file involving civil agent penalties is recommended for further action by TCID and SOL does not concur, SOL will notify TCID if it has concluded that the civil penalty against any individual should be dismissed. If TCID disagrees, TCID may contact the SOL to try to resolve the disagreement. The district special investigations staff will be involved in the review of the legal analysis and may prepare a draft response for TCID to use in preparing a written response. Once all issues have been resolved, the case will either be pursued for civil penalty action or will be returned to TCID to be closed (see 2.d. below).

[Note that cases to be pursued for 110(c) civil penalty action will be referred by TCID to the Office of Assessments. Normally, such assessments will be issued within 18 months from the date of issuance of the citation or order. However, if the 18 month time frame is exceeded, TCID will review the case and decide whether to recommend referral to the Office of Assessments for penalty proposal. In such cases, the referral memorandum to the Office of Assessments will be approved and signed by the Administrator];

or,

c. **SEND A MEMORANDUM TO THE DISTRICT REQUESTING ADDITIONAL INFORMATION.**

If this occurs, the District will need to perform additional investigative work.

When there is disagreement between TCID and the District, the case will be referred to SOL for resolution. After resolution, the case will be forwarded for assessment or will be returned to TCID for closing (see 2.d. below).

or

d. **CLOSE THE CASE.**

If this occurs, TCID will issue a letter notifying the operator that an investigation was conducted and that MSHA has decided not to pursue further action. A copy of this letter will be sent to the District.

D. REPORTING OF CRIMINAL PROSECUTIONS:

Grand jury indictments, criminal information, defendant pleas (including pre-indictment, nolo contendere or guilty pleas), convictions, and sentencing should expeditiously be reported by telephone to the Chief, Technical Compliance and Investigations Division (TCID).

In addition 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:

- (1) the indictment and/or information;
- (2) the defendant signed agreement pleas and/or record of court convictions after trial; and,
- (3) the Judgement 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 AUSA.

In cases where there is more than one co-defendant, immediate verbal notification to TCID should occur each time that an individual and/or operating company is charged, pleas, or is sentenced, as outlined above, followed by the timely submission of the supporting court document.

A "Summary of Criminal Proceedings" (Exhibit 7-20) should be prepared and submitted to TCID immediately after conviction or plea by the initial defendant. The Summary should

reflect the date set for sentencing, if scheduled. Revisions to include action against co-defendants should also be prepared and submitted to TCID.

A. INTRODUCTION:

The trial of a case, whether before a U.S. District Court Judge or U.S. Magistrate, or before an Administrative Law Judge of the Federal Mine Safety and Health Review Commission, is a crucial step in the enforcement process. In order to ensure success at trial, careful preparation of the case is necessary, with complete cooperation between the Government attorney and the special investigator.

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

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

B. PLANNING FOR THE TRIAL:

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

The investigator will frequently be asked to aid in the preparation of a trial brief or trial book. If asked, a sheet should be prepared (a copy for the U.S. Attorney and for each person who will assist in the trial) on each witness, showing the name and address; business or occupation; expected testimony; a description of the documents, if any, which the witness will produce or identify; location of the records or documents, if not in the custody of the witness; and data of a derogatory nature (criminal record, etc.), which would be pertinent to the witness' reliability or credibility. Because of the Jencks Act (Section 3500, Title 18, U.S. Code), it is also advisable to list any documents such as signed statements, affidavits, or reports of interview obtained from the witness or prepared by the investigator. The witness sheets may be placed in a looseleaf notebook in the order in which the witnesses are expected to testify. If many witnesses are involved, it is helpful, for reference purposes, to assign each a number and prepare a list of witnesses arranged and numbered in the same order as the witness sheets.

All of the above, however, will be subject to the discretion of the U.S. Attorney and, in all instances, whatever is asked should be provided exactly as requested. Do not be reticent when discussing the case with the U.S. Attorney; it is better to tell him/her too much than to assume that something is not important. The attorney will want to know all of the facts, not just what the investigator considers important.

The investigator should study his/her notes and reports to refresh his/her memory concerning the general phases of the investigation and conferences with the witnesses. Arrange the notes, reports, work papers, etc., in an order which will provide for quick reference when testifying at the trial. Copies of all statements and reports that have any bearing on the investigator's testimony should be available for presentation to the court, if such data is requested by the defense under Title 18 U.S.C. 3500.

The U.S. Attorney may also request the investigator's assistance in providing information on the Government's response to various pretrial motions such as motions to suppress evidence, for a bill of particulars, for discovery and inspection, etc. The U.S. Attorney may also request legal assistance from the Office of the Solicitor which may require the investigator to discuss the case or provide relevant information to the Solicitor's attorney handling the matter. The investigator's full cooperation must be given to the Solicitor's attorney, as well as to the U.S. Attorney.

C. THE TRIAL:

1. **Evidence (Rule 26):** In all trials, the testimony of witnesses is taken orally in open court unless otherwise provided by law or these rules. Also, with certain exceptions which are covered by law or these rules, the admissibility of evidence and the competency and privileges of witnesses are governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.
2. **Sequestering of Witnesses:**
 - a. Some courts, on their own motion or on request of either counsel, will bar from the courtroom all witnesses except the one on the stand. This involves: (1) preventing the prospective witnesses from discussing the case with each other; (2) preventing them from hearing a testifying witness; and, (3) preventing them from discussing the case with a witness who has left the stand. If the order of exclusion is knowingly disobeyed, the court may, in its discretion, disqualify the witness or take other disciplinary measures.

- b. 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 goes first in presenting proof of the offenses charged. It does this by questioning witnesses and introducing documentary evidence. Upon conclusion of the direct-examination of each witness by the U.S. Attorney, the witness is turned over to the defense counsel for cross-examination, if desired. After cross-examination, the Government has the opportunity for redirect-examination as to matters brought out in the cross-examination. This may continue until the Judge rules otherwise. Upon the conclusion of the Government's case, the prosecution rests, and the defendant may then go forward with the evidence. The prosecution may cross-examine defense witnesses and, after the defendant rests, may offer proof in rebuttal.
4. **Cross-Examination:** When the attorney has finished examining the witness, the opposing attorney has the right to cross-examination. The purpose of cross-examination is to test the truth of the statements made by the witness. This is done by questions designed to: (1) amplify the story given on direct-examination so as to place the facts in a different light; (2) establish additional facts in the cross-examining party's favor; (3) discredit the witness' testimony by showing that the testimony on direct-examination was contrary to circumstances, probabilities, and other evidence in the case; and, (4) discredit the witness by showing bias, interest, corruption or specific acts of misconduct. In view of such purposes, the courts allow a wide latitude on cross-examination, and the cross-examiner may ask leading questions. Another method often used is to question the witness in such a manner as to obtain apparent inconsistent statements by going over the same ground covered in the direct-examination.

The general rule in Federal courts with respect to witnesses other than defendants is that questions asked on cross-examination must pertain to matters brought out on direct-examination. The rule is liberally construed and where the direct-examination opens a general subject, the cross-examiner may go into any phase of that subject. If the cross-examiner wishes to obtain from the witness evidence on subjects not opened on direct-examination, the cross-examiner must call the witness as his/her own witness and subject the witness to direct examination on such matters.

The U.S. Attorney will make any necessary objections. If there is no objection, answer the question.

5. **Rebuttal:** After the defense rests, the prosecution may offer proof in rebuttal to explain, counteract, or disprove the defendant's evidence. For example, after a

defendant testified that he made substantial payments to a deceased supplier for services rendered, the Government may put into evidence the supplier's records which did not include any such amount, in order to discredit the defendant's testimony.

D. RESPONSIBILITY AND CONDUCT OF THE INVESTIGATOR:

During the trial, the investigator may or may not be present at the counsel table with the U.S. Attorney. The special investigator 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; and checking to ensure that Government witnesses are present and ready to testify.

The investigator should listen carefully to all testimony and, if asked, make notes from which he/she may alert the U.S. Attorney at the appropriate time (do not interrupt) as to any false, misleading or erroneous statement. The special investigator may also assist in preparing questions to be asked defense witnesses on cross-examination.

The investigator should avoid any direct contact with the defendant at the trial in order to eliminate the possibility of any embarrassing or compromising situations that could arise. Likewise, his/her 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 investigator to associate with a member or members of the jury may cause a mistrial.

E. TESTIFYING:

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

As a witness, the investigator must be thoroughly prepared and have clear, orderly facts; present a neat, professional appearance; testify in a natural, frank and forthright manner; and have a respectful attitude toward the court and jury. The investigator is frequently subject to rigorous and lengthy cross-examination and must preserve an even, courteous manner and refrain from any display of anger, hostility, or evasiveness. Some rules of conduct for the investigator, or any other person on the witness stand, are listed below:

Listen to the question carefully and answer truthfully. If you do not know the answer, say so--do not guess; remember, you are under oath.

Answer the question fully, but do not volunteer information. It may seriously affect the U.S. Attorney's strategy.

Do not answer a question you do not understand. Tell the questioner that you do not understand.

If an objection to a question is raised by either counsel, wait to answer until the court rules. Otherwise, a mistrial may result.

Wait until the question is completed before attempting to answer.

Anticipate the unexpected.

Direct your answers to the jury, but do not ignore the judge.

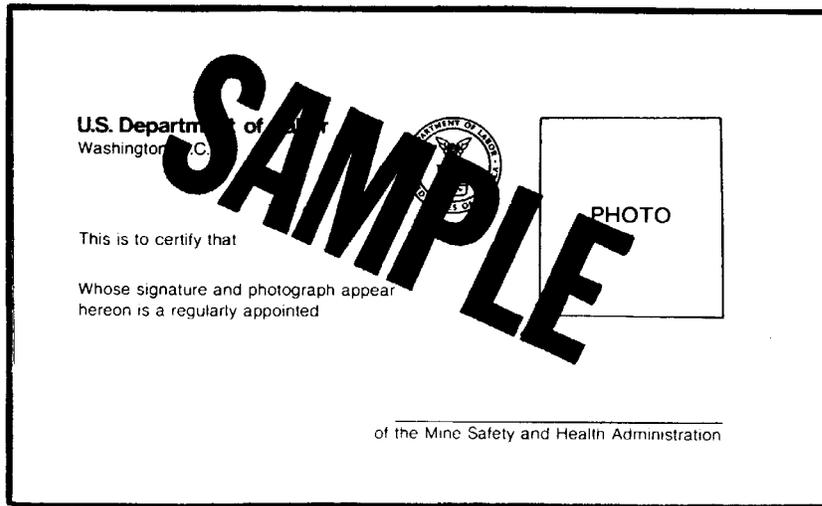
Speak clearly and loudly enough to be heard by the juror farthest removed from the witness stand.

Refrain from any demonstration of personal feeling or bias.

Do not use idioms or language peculiar to the industry unless necessary.

CHAPTER 1 - GENERAL INFORMATION

Exhibit 1-1



DISCRIMINATION COMPLAINT FORM 2000-123
General Instructions for Completion

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

Section A - (To be completed by complaint processor)

Item 1 - District Office

Item 2 - Field Office

Item 3 - Date (complaint was) Filed

Item 4 - Received By (complaint processor)

Case Number - (Assigned by Supervisory Special Investigator.)

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

Item 1 - (a.) Name; (b.) Address; and (c.) Area Code/Phone Number
(Of each Complainant)

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

Item 3 - Date of discriminatory action

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

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

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

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

Item 8 - Average number of overtime hours (Complainant) worked each week -

based on (Complainant's) last 12 months of work

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

Item 1 - Name of company

Item 2 - Address (of company)

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

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

Item 5 - Mine Name

Item 6 - Mine Area Code/Phone Number

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

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

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

Section E - (To be completed by Complainant)

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

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

DISCRIMINATION COMPLAINT FORM 2000-124
General Instructions for Completion

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

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

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

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

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

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

United States Department of Labor
Mine Safety and Health Administration

Notice of Conditions Under Which This Information
Is Requested and Used

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

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

INFORMATION ON BACKPAY FOR MINERS**NOTICE****YOU MAY BE ENTITLED TO BACKPAY**

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

1. PURPOSE OF THIS LEAFLET

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

2. WHAT IS BACKPAY?

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

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

3. ARE YOU EMPLOYED NOW OR LOOKING FOR WORK? (Read what follows very

carefully, it is important)

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

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

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

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

unavailable for work for any period of time during the calendar quarter.

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

4. YOUR INTERIM EARNINGS

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

5. YOUR EXPENSES

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

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

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

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

6. KEEPING RECORDS

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

7. WHEN DO YOU GET YOUR BACKPAY?

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

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

KEEP THIS PAMPHLET FOR YOUR INFORMATION

Letter to Complainant When Inquiry Received
By Mail or Telephone

Complainant's Name
Street Address
City, State Zip Code

Dear Mr./Ms.

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

The forms should be filled in as completely and accurately as possible and returned as quickly as possible, even if you cannot provide all of the requested information.

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

Sincerely,

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

Enclosures: (5)

Complaint Forms 2000-123 and 2000-124
Federal Mine Safety and Health Review Commission Rules of
Procedure
Privacy Act Statement
Information on Backpay for Miners
Claimant Expense and Search for Work Report

Complainant's Name
Street Address
City, State Zip Code

Re: Discrimination Complaint Case Number _____

Dear Mr./Ms.

The discrimination complaint you recently filed with the Mine Safety and Health Administration (MSHA) (copy enclosed) has been assigned to the special investigator whose name appears below. Any questions you have concerning this case should be directed to this investigator.

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

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

Sincerely,

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

Enclosures (2)

Complaint Forms 2000-123 and 2000-124

_____, Special Investigator

Telephone: _____

bcc: Case File

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

Re: Discrimination Complaint Case Number _____
Filed by _____

Dear Mr./Ms.

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

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

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

Sincerely,

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

Enclosures: (2)

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

bcc: Case File

DISCONTINUANCE OF DISCRIMINATION COMPLAINT

CASE NO. _____

My name is _____,

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

versus _____ filed _____.

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

(Signature)

____ Day of _____
(Month/Year)

(Witness)

(Investigator)

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

Subscribed and sworn to before me this ____ day of _____

19____.

NOTARY PUBLIC

Complainant's Name
Street Address
City, State Zip Code

Re: Investigation of Your Discrimination Complaint
Case Number _____

Dear Mr./Ms.

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

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

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

Sincerely,

Chief, Technical Compliance
and Investigation Division

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

bcc: Supervisory Special Investigator
District Manager
Case Files
Headquarters

Complainant's Name
Street Address
City, State Zip Code

Re: Results of Discrimination Investigation
Case Number _____

Dear Mr./Ms.

Your request to withdraw the complaint in the above case has been approved. With this approval, the case is closed.

Sincerely,

Chief, Technical Compliance
and Investigation Division

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

bcc: Supervisory Special Investigator
District Manager
Case Files
Headquarters

ELEMENTS OF A 105(C) INVESTIGATION

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

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

Therefore, a person filing a complaint must provide evidence that he/she was employed as, or acting in the capacity of one of the categories listed above..

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

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

3. **Discriminatory Acts**: Discriminatory acts include, but are not limited to:
- discharge, termination, or laying off;
 - demotion;
 - refusal of employment;
 - reduction in benefits, vacation, bonuses, or rates of pay;
 - change in pay and/or hours of work;
 - interference with the exercise of the statutory rights of miners;
 - subtle forms of interference, (i.e., promises of benefit or threats of reprisal); and,
 - transfer to another position with compensation at less than the regular rate of pay received immediately prior to transfer.

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

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

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

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

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

In cases where the respondent is able to affirmatively defend his/her position, findings of “No violations of § 105(c)” have been issued by ALJ’s and the FMS&HRC.

AFFIDAVIT

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

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

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

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

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

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

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

"_____."
(What was said)

5. I then informed _____ of the Statutory Right of Entry under
(Name)
Section 103(a) of said Act. After _____, I again asked _____ if inspection
(Time Elapsed) (Name)

would be permitted. He/she again refused stating "_____."
(What was said)

I then left the mine property.

(Signed - Inspector)

This Statement was signed and sworn before me on

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

(Seal)

(Notary)

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

Certificate of Service

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

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

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

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

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

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

Action _____.
(Case Number From Order)

By: _____

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

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

INSTRUCTIONS FOR COMPLETING 7000-20 REVIEW FORM

It should be understood that this is not a science. The information is subjective in nature, based upon the issuing inspector's professional interpretation and involves judgment calls. The following types of citations and orders are to be reviewed for possible further action:

- a. each 104(a) citation issued, which contributed to the issuance of a 107(a) imminent danger order of withdrawal;
- b. each 104(d) citation or order which is identified as being significant and substantial (S&S) and the Negligence has been marked "high" or "Reckless Disregard"; and
- c. each citation issued for working in violation of an Order of Withdrawal.

Only a violation of a mandatory health or safety standard or order issued under the "Mine Act," shall be reviewed for possible further action. This includes violations of 30 CFR, Parts 48, 56, 57, 70, 71, 72, 75, 77, and 90. The inspector and his/her supervisor shall first review each citation or order to ensure that the violation has been properly cited. If changes need to be made, issue the appropriate modification(s) before filling out the 7000-20 form. Remember to send all subsequent action sheets with the citation/order being reviewed.

110(f) and (h) Willful Violations

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

Question No. 1:

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

Question No. 1a:

Information provided by the inspector should include the name and occupation of each person who was exposed to the hazard. If all of the names are not known, the inspector should provide at least one name and telephone number (if possible) or possibly the area where the person lives. Comments such as "the entire crew" or "pumpers" or "beltmen" are too general.

Question No. 1b:

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

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

Question No. 1c:

One way to establish how long this condition was present is through entries in the record books required to be maintained by the Mine Act. The inspector could also establish the length of time the condition existed based on his/her own experience of how long it would take for the condition to get to the state it was when it was cited. Comments from miners will also assist in establishing the length of time the exposure to the hazard existed.

Question No. 1d:

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

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

After completing 1a, 1b, 1c, and 1d, you are now able to accurately check "yes" or "no" in response to question number 1.

Question No. 2:

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

Question No. 2a:

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

Question No. 2b:

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

Question No. 2c:

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

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

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

Question No. 3:

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

Conclusion:

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

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

The inspection supervisor will then complete his/her portion of the form by checking whether he/she "Agrees" or "Disagrees" with the inspector. Normally, the inspection supervisor and the inspector will agree. One of the reasons the inspector and his/her supervisor are to conduct each violation review jointly is so that they can work through disagreements. However, once the joint review process has been completed, there is nothing wrong with the supervisor marking that he/she disagrees with the inspector. However, the supervisor shall detail in writing the reasons for disagreeing. This way, the reviewers will have that additional information to consider when each subsequent reviewer makes his/her independent evaluation. Once the inspection supervisor has completed his/her review, the packet should immediately be forwarded to the Assistant District Manager.

These items will normally accompany each completed Form 7000-20 to assist the Assistant District Manager, Supervisory Special Investigator, and District Manager in making a proper determination:

1. a copy of the citation or order reviewed and all subsequent actions;
2. a copy of the Legal Identity Report Form 2000-7;
3. a legible copy of the inspector's notes;
4. copies of maps or sketches;
5. copies of records required to be kept by MSHA;
6. a copy of a plan or the portion of a plan, which deals with the violation [This may be either a plan required by MSHA (i.e., Roof Control, Ventilation and Dust Control, Ground Control, etc.) or one the operator has developed independent of MSHA's requirements];
7. a copy of any Part 100, Health and Safety Manager's conference, and the results; and,
8. the completed multi-page MSHA Form 7000-20. **THIS FORM IS CONSIDERED CONFIDENTIAL - PRE-DECISIONAL - DO NOT KEEP A COPY OF THIS FORM!**

Recommendations:

The reviewers will recommend to the District Manager to either conduct a Special Investigation, or to take no further action.

- A. The Assistant District Manager shall complete his/her review and sign and date the 7000-20 form. When the Assistant District Manager makes a recommendation that differs from that of the inspector and/or supervisor, he/she should provide reasons in writing on the form or on a sheet attached to the form. The violation review packet of material and 7000-20 form will then be forwarded to the Supervisory Special Investigator.
- B. The Supervisory Special Investigator (SSI) shall complete his/her review and sign and date the form. When the SSI makes a recommendation that differs from that of the inspector, inspection supervisor, or the Assistant District Manager, he/she should provide reasons in writing on the form or on a sheet attached to the form. Each violation review packet of material and 7000-20 form will be immediately forwarded to the District Manager with the SSI's recommendation and reasons for the recommended action.
- C. The District Manager will make his/her decision to conduct an investigation or to take no further action based upon the information provided with each citation/order. Where the decision of the District Manager is to take no further action and there was disagreement among the reviewers, the SSI will prepare a memorandum to the file detailing the reasons for not conducting a special investigation. All documentation provided shall be maintained by the SSI in accordance with Chapter IV of this Special Investigations Handbook and the Program Policy Manual.

INTERVIEW OUTLINE

I. INTRODUCTION

- A. Interview: An interview is the questioning of a person who is believed to possess knowledge that is of official interest to the investigator. The effectiveness of an investigation is largely dependent upon the investigator's ability to obtain information from complainants, witnesses, informants and suspects.
- B. Interviewing is both an art and a science, which can be developed and enhanced through practice. Investigators should constantly strive to improve their interviewing techniques.
- C. The greater part of an investigation is usually devoted to interviews. In many cases, interviews are the only source of information.

II. PRE-INTERVIEW

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

- A. Determine what issues need to be addressed. Questions such as those following will help the investigator to focus on the incident or issue being investigated:
 - 1. What was the incident?
 - 2. Where was the incident?
 - 3. When did the incident occur?
 - 4. What was known prior to the incident? What was the intent of those involved in the incident?
 - 5. Who was involved?
 - 6. Why did the incident occur?
 - 7. How did it happen?
- B. Gather background information . The investigator should review documents within MSHA such as:
 - 1. accident reports related to the mine;

2. investigation Reports related to parties involved;
 3. citations/orders issued to the mine or parties involved and related notes;
 4. plans approved for the mine which relate to the incident or issue; and,
 5. copies of any mine records which may have been obtained by the inspector;
- C. Determine who is to be interviewed. The investigator should review all the information available and determine who needs to be interviewed based on the type of case being investigated. Normally you will FIRST interview the complainant [in a 105(c) case], or interview the inspector or person who reported the incident [in a 110 case] to determine who may be a witness and need to be interviewed. Each time the investigator chooses to interview someone, he/she should ask:
1. What is the objective (purpose) of the interview?
 2. What is to be accomplished?
 3. What information might the interviewee (witness) be able to provide and how will it affect the investigation?

The investigator should prioritize the order in which persons are to be interviewed. Persons who witnessed the incident would normally be interviewed before others who did not witness it but this will be determined by the investigator during the pre-interview period when the issues are evaluated. Each witness is to be contacted by the investigator separately in private to arrange the interview. **This is true of both management personnel as well as hourly personnel.** Therefore, the investigator should make every effort to obtain phone numbers and addresses of every person he/she intends to interview. If, when the witness is contacted, the investigator is told that the witness wants the investigator to arrange the interview through some other party, such as a management official, an attorney, or a miner's representative, these wishes will be honored by the investigator.

- D. Schedule the interview
1. **Location of interview:** The investigator should, as a general rule, select a place which will be conducive to a productive interview.
 - (a) The location should be convenient for the interviewee to get to without difficulty, such as at the home of the interviewee or a facility near the home of the interviewee.
 - (b) The location should provide privacy (away from prying eyes).

2. Date and time of interview: Arrange the interview so as to accommodate the interviewee's (work/home) schedule. Schedule the interview as soon as possible after the event. This way:
 - (a) The information about the incident is still fresh in the interviewee's mind.
 - (b) The interviewee doesn't have time to think of the consequences of giving information, such as: time he/she may have to spend in court, loss of money due to time in court, and to the fact that he/she will have to testify in court.

III. INTERVIEW

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

A. Establish rapport with interviewee:

1. Introduce and identify yourself. Show your MSHA credentials and explain the purpose of the interview.
2. The relationship existing between the interviewer and the interviewee usually determines the success of the investigation.
3. The interviewer must endeavor to win the confidence of the interviewee whenever possible, since a completely voluntary offer of information is the ideal result of an interview.
4. Attitudes:
 - (a) Person conducting the interview should refrain from saying or doing anything which will cause the interviewee to be unwilling to talk.
 - (b) Individual being interviewed will be more willing to talk to you if he/she feels comfortable and not threatened but should understand your purpose.

B. Questioning:

Knowing what to ask and when to ask it is critical to any interview. This is where the skills of an experienced investigator pay off.

1. After the interviewee has told the story, the investigator should review the information with interviewee and ask the interviewee to amplify certain parts.
2. The investigator should control the conversation (guide the interview and keep the interviewee from rambling while giving information).
3. Corroborating (information obtained from one interviewee should be corroborated with that obtained from others).
4. Inaccuracies (questionable points should be treated repeatedly by recording queries and additional questions).
5. Technique of questioning:
Questions should not be asked until the person appears prepared to give the desired information in an accurate fashion.
 - a. One question at a time.
 - b. Avoiding the implied answer.
 - c. Simplicity of questions.
 - d. Saving face.
 - e. "Yes" and "no" questions.
 - f. Positive attitude.
 - g. Dominating the interview.
6. Techniques for controlling digression:
 - a. Precise questioning:
The question should be constructed as precisely as possible in order to redirect the range of information which the interviewee can give.
 - b. Shunting:
This technique consists of asking a question which relates the digression to the original line of questioning.
7. Special signs to look for when conducting interviews:
Physiological characters of person being interviewed (Non-verbal communications):
 - a. Sweating.
 - b. Color changes.
 - c. Dry mouth.
 - d. Pulse.
 - e. Breathing.
 - f. Nervousness.
 - g. Evasive facial expressions.
 - h. Embarrassment.
8. Recording statement:
 - a. Written:

The investigator should not take out his/her notebook at the beginning of an interview:

- (1) Listen to interviewee's story first without taking notes.
 - (2) Request permission to take notes before going back over the information that the interviewee has provided. (If permission is not given, make notes of conversation immediately following the conclusion of interview.)
 - (3) If permission is given to take notes and time allows, prepare notes in the form of a statement and obtain interviewee's signature. Otherwise, the notes will have to be rewritten into a statement form after the interview and mailed or hand carried to the interviewee for review and signature.
- b. Tape recorded:
Obtain permission before using a tape recorder.
- (1) If permission is given to use a tape recorder, begin the tape recording by identifying yourself and reference the case number. State the date, time, location and names of persons present. Before asking any other questions, ask the interviewee if he/she is aware that the tape recorder is being used and again ask if he/she is giving you permission to use the tape recorder. Also include on the tape a confirmation by the witness that the information is being given voluntarily and that the interviewee is aware that he/she may stop the interview at any time.
 - (2) If permission is not given, request permission to take notes. If permission to take notes is given, follow a.(3) above. However, if permission is not given, make notes of the conversation immediately following interview.
- c. Have statements signed and/or notarized if possible.

IV. POST INTERVIEW

- A. Review information received.
- B. Re-interview if necessary.
- C. Prepare report.

Special Investigator

EXAMPLE FORMAT FOR QUESTION AND ANSWER STATEMENT

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

Persons present during interview:

John J. Jones, Witness (SSN# and Date of Birth)
Adam Adams, Attorney
Dave Smith, Special Investigator

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

1. Q. Mr. Jones, you were requested to answer questions concerning . . . Do you fully understand this? (If the witness requests clarification either as to his/her rights or the purpose of the investigation, the investigator will give such explanation as is necessary to clarify the matter.)

2. Q. Mr. Jones, do I have your permission to tape record this interview?

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

43. Q. Mr. Jones, is there anything that you expected me to ask, that I did not ask?
A. (Witness may say "no" or offer information).

44. Q. Do you have any questions or comments?
A. (Witness may say "no" or ask question or comment).

45. Q. Have I, or has any other MSHA investigator, threatened or intimidated you in any manner?
A. No.

46. Q. Have I, or has any other MSHA investigator, offered you any rewards, or promises of reward, in return for this statement?

A. No.

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

A. Yes.

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

A. No.

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

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

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

(Signature)

_____ Day of _____
(Month/Year)

(Witness)

(Investigator)

Case No.: ____ - ____ - ____ - ____ **STATEMENT**

I, _____ reside at

_____ in the city of

(number) (street)

_____, county of _____

State of _____, Zip Code _____.

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

I (was) (am) employed by _____,

located at _____.

(number) (street) (city) (state) (zip code)

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

My employment at this location consists of approximately _____ beginning on

(years) (months)

_____ 19 _____. My job classification (was) (is) _____.

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

Interview is started at: _____ (Date/Time).

Date of birth: _____ SSN: _____ - _____ - _____

Present during interview: _____

Location of Interview: _____

Page 1 of _____ (Initial and Date)

STATEMENT OF _____ (Continued)

EXAMPLE OF MEMORANDUM OF INTERVIEW

Case Number: _____

Date and time of interview: Thursday, September 29, 1988
_____ a.m. to _____ p.m.

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

Place: Location of interview

Present: _____ (Interviewee)

_____ (Attorney)

_____ (Others present)

Interview conducted by MSHA Investigator _____

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

I (prepared) dictated this memorandum on _____, 19__, after refreshing my memory from notes made during and immediately after the interview.

Investigator

I verify that this memorandum has recorded in it a summary of all pertinent matters discussed with the interviewee on _____, 19__.

Investigator

PHOTO LOG
General Instructions for Completion

TOP PORTION:

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

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

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

DATE OF PHOTOS: Date photograph(s) were taken

REFERENCE: i.e. "Taken for case number () or accident investigation number ()"

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

PHOTOGRAPHER: Name of person taking photograph(s)

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

PROCESSED AT: Site where photograph(s) were developed

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

CHART:

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

NEGATIVE NO: The number appearing on the negative

TYPE OF CAMERA: Brand name and Model Number of Camera

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

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

DIAPHRAGM OPENING: Aperture or “F” stop

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

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

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

LIGHTING - NATURAL OR ARTIFICIAL: Natural lighting or flash used

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

Evidence Identification Tag

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

1. Unique Identifier _____ 2. Date _____

3. Office Location _____ 4. Exhibit Number _____

5. Description of Article _____

6. Taken From Received From

7. Received By (print or type name) _____

8. Signature _____

9. Witness _____

10. Special Instructions _____

MSHA Form 2000-181, Mar 89

(over)

Evidence Identification (continued)

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

Date:

CMS&H or M/NM Memo No.:

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

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

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

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

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

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

cc: TCID
SSI
Files

MSHA ADMINISTRATIVE POLICY AND PROCEDURES MANUAL VOLUME 1
ORGANIZATION CH 300

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

Redelegation:

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

May be further redelegated.

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

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

349.5 Testimony of Employees

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

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

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

349.6 Certification of Documents

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

MSHA ADMINISTRATIVE POLICY AND PROCEDURES MANUAL
ORGANIZATION

VOLUME 1
CH 300

Redelegation:

Coal/Metal and Nonmetal

Administrators and Deputy
Administrators
Chief, Technical Compliance
and Investigation Division
District Managers

Administration and Management

Director and Deputy Director
Chief, Management Services
Division

Program Evaluation and
Information Resources

Director
Chief, Information Resource
Center
Chief, Office of Injury and
Employment Information

May be further redelegated.

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

349.7 Cooperative Programs

Authority: Approve agreements establishing cooperative programs with educational institutions, State governments, labor organizations, safety associations, mine operators and related industries for the purpose of promoting mine safety and health.

Reservation: Authority is reserved to the Assistant and Deputy Assistant Secretary.

SPECIAL INVESTIGATIONS - COAL

CASE NUMBER CODES FY - 97¹

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

HEADQUARTERS - HQ

DISTRICT 1 - WILK
DISTRICT 2 - PITT
DISTRICT 3 - MORG
DISTRICT 4 - HOPE
DISTRICT 5 - NORT

DISTRICT 6 - PIKE
DISTRICT 7 - BARB
DISTRICT 8 - VINC
DISTRICT 9 - DENV
DISTRICT 10 - MADI
DISTRICT 11 - BIRM

Activities will be coded in the following manner (Example: The third discrimination complaint filed in District 6 during FY - 97 would be PIKE-CD-97-3):

CODE

CD-97-X	Coal - Discrimination Complaint	105(c)
CSI-97-X	Coal - Special Investigation	110(c), (d), (f) or (h)
CDE-97-X	Coal - Denial of Entry	108(a)
CAO-97-X	Coal - Working Against Orders	108(a)
CTI-97-X	Coal - Threats Against Inspectors	108(a)

MIS CODES

AGB - Section 110 Investigations
AGC - Section 105(c) Investigations

¹FY 1997 is used as an example only. The last two digits of the appropriate fiscal year should be inserted in the case number.

SPECIAL INVESTIGATIONS

METAL AND NONMETAL

CASE NUMBERS AND CODES FY - 97¹

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

NORTHEAST DISTRICT - NE	SOUTHEAST DISTRICT - SE
NORTHCENTRAL DISTRICT - NC	SOUTHCENTRAL DISTRICT - SC
ROCKYMOUNTAIN DISTRICT - RM	WESTERN DISTRICT - WE

Investigation activities will be coded in the following manner:

DISCRIMINATION CASE - MD
 KNOWING/WILLFUL - MW

Examples of how they would appear:

<u>Prefix</u>	<u>Case Code</u>	<u>Year</u>	<u>Number</u>
NE	MD or MW	97	01
SE	MD or MW	97	01
SC	MD or MW	97	01

Case numbers will be assigned in numerical sequence, by district, as they are requested.

MIS CODES

11	Section 110 Investigation
14	Section 105(c) Investigation

¹FY 1997 is used as an example only. The last two digits of the appropriate fiscal year should be inserted in the case number.

**INVESTIGATION ASSIGNMENT CONTROL FORM
(MSHA Form 2000-158)**

General Instructions for Completion

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

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

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

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

(Complete Items 9 through 13 for discrimination complaints only):

9. Complainant's Name: The name of the person filing the complaint. If more than one person is filing, you may put the name of the first person and then "et al".
10. Phone: A telephone number where the person filing the complaint can be reached.

- 11. Address: The home address of the person filing the complaint.
- 12. Respondent's Name(s): The name(s) of the individual(s) who allegedly took discriminatory action against the miner. If more than one respondent is named, you may put the name of the first, followed by "et al".
- 13. Date Complaint Received: The month, day and year the person filed the complaint; or the month, day and year the letter or written document alleging a discriminatory action was received in any MSHA or ESA Black Lung office.

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

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

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

Example: On 01/10/97, the complaint processor sent the case file to John Doe, Special Investigator.

Referrals

01/10/97	John Doe, Special Investigator
01/31/97	Bill Smith, Supervisory Special Investigator
02/05/97	Technical Compliance and Investigation Division

- 15. Prior History/Supervisor's Remarks/Event Number: The supervisory special investigator will indicate other complaints filed by the miner or against the respondent, previous violations which were under investigation, or other background information which would aid the current investigation. Also, include the Event Number from Form 2000-22 for CMS&H (Exhibit 2-15) or Form 4000-40 for M/NM (Exhibit 2-16) in this item.

- 16. Attorney Assigned: The name of the headquarters or regional attorney assigned to the case.

- 17. Date: The date the attorney was assigned to the case.

18. Disposition: The special investigation headquarters office will indicate the final results of the case, i.e., "violation, penalty assessed", "case dismissed", etc.

19. Field Office: The location of the field office and the district where the complaint is filed.

Example: Harlan, Kentucky, District 7

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

Date: The date the action occurred.

Action: The particular activity performed, i.e., "interviewed William Jones".

Place: Where the particular activity was performed.

Hours: Time spent on the activity.

Initials: Initials of person performing the activity.

Date:

CMS&H or M/NM Memo No.:

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

FROM: District Manager

SUBJECT: Transmittal of Report of Special
Investigation Case Number _____

Enclosed is the subject report of a special investigation. A review of the information gathered during the investigation indicates that a possible violation of Section 105(c) has (or has not) occurred.

If you have any questions, please contact the supervisory special investigator indicated in the report.

Enclosures (include appropriate number of case files)

Date:

CMS&H or M/NM Memo No.:

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

FROM: District Manager

SUBJECT: Transmittal of Report of Discrimination
Investigation Case Number _____

Enclosed is the subject report of a discrimination investigation. A review of the information gathered during the investigation indicates that a possible violation of Section 110(c) has occurred.

If you have any questions, please contact the supervisory special investigator indicated in the report.

Enclosures (include appropriate number of case files)

REPORT
OF
DISCRIMINATION
INVESTIGATION

Date Complaint Received _____

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

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

Case No. _____

Summary Analysis - 105(c) Discrimination
TCID-CD-95-02

Complainant: Robert O'Malley
Respondent: Center Cut Coal Company (CCCC)
Thomas Green, Safety Director

Protected Class: Complainant O'Malley is a welder employed at the Center Cut Coal Company's (CCCC) surface coal Mine No. 1 (Exhibit 1). On 12/1/94, he was injured, after performing a welding operation from an unsafe position, when he was tossed about inside a front-end loader bucket (Exhibit 3). Other miner witnesses admit their participation in the unsafe welding operation and confirm that the accident occurred as stated by O'Malley (Exhibits 4, 5 and 7).

Protected Activity: O'Malley sought medical attention after his shift was completed on the day of the accident and was advised to not return to work (Exhibit 2). Approximately one week after the accident, O'Malley telephoned Respondent/Safety Director Thomas Green to pursue his workers' compensation claim. O'Malley also informed Green of his intent to report the accident to MSHA, as he was instructed by UMWA Board Member Joe Fitzgerald (Exhibit 3). (Fitzgerald confirms he so advised O'Malley to inform Green of his intent to engage in protected activity by contacting MSHA, because Fitzgerald believes CCCC is not properly reporting all accidents and injuries to MSHA - Exhibit 8.) On 12/7/94, O'Malley informed MSHA Supervisor Johnny Bench of his 12/1/94 accident and injury, which had not been reported as required by 30 CFR Part 50. Subsequently, MSHA issued enforcement actions on 12/15/94 to CCCC for not properly reporting O'Malley's accident and for permitting the unsafe welding operation which resulted in the accident (Exhibit 6). Proposed civil penalty assessments for those enforcement actions are pending issuance as of 4/7/95; therefore, it is unknown whether a notice of contest will be filed.

Discriminatory Act: During their telephone conversation in the week after the accident, Green allegedly threatened O'Malley's job if O'Malley reported the accident to MSHA. O'Malley's claim for compensation for the injury resulting from the accident was declined on 12/14/94 by the We-Pay Casualty Company, due to a continuing investigation into O'Malley's "alleged" injury (Exhibit 9). This denial has caused O'Malley to suffer monetary loss.

Nexus: O'Malley claims that CCCC's opposition to his workers' compensation claim was actually a pretext and was motivated by his protected activity, i.e., notifying MSHA of the accident. Even though witnesses confirm O'Malley's 12/1/94 accident and resultant injuries, and after O'Malley communicated to management his intent to engage in protected activity by reporting his accident to MSHA, the operator still did not report the accident properly pursuant to 30 CFR Part 50 (Exhibits 4, 5, 6 and 7). Subsequently, O'Malley's compensation claim was declined (Exhibit 9).

CCCC is self-insured, providing more reason for Green to discourage reporting, either to compensation or MSHA. O'Malley has, however, returned to "light-duty" work with medical restrictions as of 2/6/95 (Exhibit 10). Pursuit of the contested compensation matter continues.

Operator's Affirmative Defense: Green denies threatening O'Malley's job for reporting the accident to MSHA. Green confirms that he was hollering and was "mad as hell" at O'Malley for "doing such a stupid thing like that," i.e., riding in the loader bucket. Green admittedly told O'Malley that he "didn't give a God-damn who he went to or what he did," but counters that "he never threatened or intimidated O'Malley in any way" (Exhibit 11).

Relief Requested: O'Malley is requesting that Green not be permitted to threaten employees, either himself or others, for exercising the protected activity of reporting an accident. O'Malley wants to be made whole for the monetary loss suffered, and other damages if any, resulting from his inability to return to work until his medical release on 2/6/95 and the contested workers' compensation matter (Exhibits 3 and 10).

Conclusion: A prima facie case has been established. As identified in the attached Administrative Law Judge decision in a case brought successfully on a miner's behalf by MSHA, Secretary of Labor on behalf of Donald B. Carson v. Jim Walter Resources, Inc., 15 FMSHRC 1992 (September 23, 1993), threats constitute subtle forms of interference; this case is on point and references prior FMSHRC precedents on this issue. There is ample supporting evidence to believe the complainant was, in fact, threatened with job loss and intimidated during the conversation when he informed Green that he intended to contact MSHA. CCCC did not report O'Malley's accident until cited by MSHA, but declined O'Malley's compensation claim. The Mine Act is intended to provide miners with an avenue to seek remedy from illegal discrimination. While the key conversation has no other witnesses, based upon the circumstantial evidence, CCCC's track record of non-reporting accidents as required, and the credibility evaluation of the investigator, we conclude that the complainant's version of events is accurate and true.

The investigator has properly requested that a Part 50 audit be conducted since, in his interview, Green related four separate lost-time accidents suffered by O'Malley, but only two have actually been properly reported to MSHA. Additionally, another miner interviewed indicated he had been injured on 1/23/95, but again, no report pursuant to Part 50 has been filed with MSHA and, according to policy, the District Manager has been so informed.

Basic Elements of Summary Analysis of a Section 105(c) Discrimination Case

Protected Class: This section of the summary should address the basis for the complainant(s) coverage under the discrimination protections of the Mine Act. In most cases, this may only require several factual statements to the effect that the complainant is a miner at a mining facility covered under the Act. In some situations, more explanatory information will be necessary. Another common filing is from a complainant who is a representative of miners at the mine. In such cases, be sure to include an adequate explanation of whether the representative is filing the complaint solely on behalf of a miner or miners, or is filing on his/her own behalf, or both. Less frequently filed, but also afforded protection, is the applicant for employment. In this type of case, be sure to include documentation to establish the complainant as following under the "applicant" class. Other cases may be more factually and legally involved, but the purpose remains the same -- state the factual basis for this complaint and complainant to be covered under the Mine Act.

Protected Activity: This section of the summary should address the factual foundation which establishes that the complainant(s) have engaged in activity protected under the Mine Act. Typically, this will include information concerning reporting of violations to management, or to MSHA, or testifying or otherwise cooperating with a Mine Act investigation. It also can include one who did not report a violation, but whom management believed did in fact report violations to MSHA. Where the claim is that a miner or miner's representative has been denied a statutory right under the Act, it is the agency's position that the denial of the statutory right alone is a protected activity.

Discriminatory Act: This section of the summary should address what is the claimed harm which the complainant seeks to have redressed by filing of this complaint with MSHA. Again, in most cases this will be a simple fact easily addressed in a sentence or two. For example, the complainant was fired, laid-off on (date). On other occasions, the discriminatory act will require greater explanation. This is so especially where the complainant has not suffered any actual harm, but is claiming that verbal threats have left him in fear of some type of harm (also commonly referred to as a "chilling effect"). Also, remember that where a complainant contends that the discriminatory conduct constitutes a denial of his/her statutory rights as a miner, the denial of that statutory right is a discriminatory action.

Nexus: This section articulates the factual basis for the conclusion that the adverse action which has occurred was motivated in whole, or in substantial part, because the complaint engaged in protected activity. This section is usually the most important and most complex part of the analysis. Nexus is established by both direct and indirect evidence. However, the evidence is

often circumstantial and the finding of Nexus is inferred from the known facts. Nexus is commonly established by closeness in time, by verbal contemporaneous statements, and/or by disparate treatment of the complainant as opposed to others who have not engaged in protected activity. It is not necessary to establish a nexus where the discriminatory conduct is a claim of a denial of statutory right.

Operator's Affirmative Defense: While the burden of proving discrimination is upon the complainant, it is important to relate what the operator and his/her witnesses have offered as their version of the complaint. This section should articulate the operator's refutations of the claimed act of discrimination. However, the operator is not under any legal obligation to refute the claim.

One common situation where the operator will have a burden of affirmatively defending against a claim of discrimination is where the facts establish a facial claim of discriminatory conduct, i.e., the complainant has engaged in protected activity and has suffered adverse action based on that protected activity. In that situation, the operator may claim that there are independent, non-discriminatory and unrelated grounds which supports the adverse action. This is called a mixed-motive case; the operator has the affirmative burden of proving that it had an independent non-discriminatory motive which was the overriding reason for the adverse action, once it is established a discriminatory conduct occurred based on protected activity.

For example, a miner refuses to operate a truck due to his honest belief that the brakes are inadequate, after operating the truck for nearly all of the shift. The miner communicates to the foreman that he believes the brakes are making the truck unsafe to operate and that he has reported the brake problems over the last few days on the daily equipment check list. The foreman instructs the miner to take the truck to the shop and wait for it to be fixed. At the end of his shift, this miner receives a lay-off notice. On the face of the facts, a prima facie case of discrimination is established. However, the operator comes forward and he concedes that the above facts are so, but insists that the lay-off, which included over half of the miners working, was planned and agreed to at a meeting which occurred the day before the complaint was made and the foreman did not participate in any of the lay-off discussions. Those facts constitute an effort by the operator to establish a separate independent motive for the lay-off. If established, they will negate the claim of discriminatory lay-off which appeared to have occurred.

Relief Requested: This section should contain a brief statement of the relief requested by the complainant at this stage of the proceeding, as well as additional relief which might also be warranted. In case of discharge, the discussion should always include a statement as to whether temporary reinstatement has been and is a current request. Claims for damages need not be specific as to the amounts.

Conclusion: This section of the summary contains the analysis of the claim and is the only section where views and evaluations should appear. Here the miner's evidence of protected activity, adverse harm motivated by retaliation, and the operator's evidence attempting to refute those claims are analyzed and a conclusion reached. The conclusion should be supported by discussion of the evidence found to be credible. The conclusion may also include any other relevant findings or views which are believed to support the conclusions. Finally, other actions to respond to other non-discrimination issues raised by the complaint (e.g., a safety inspection), should be noted for the record. It is not an act of discrimination to have unsafe conditions at a mine, but claims of unsafe conditions contained in discrimination complaints should be forwarded to the District Manager, according to existing MSHA policy, for whatever action is deemed appropriate.

Summary Analysis - 110(c) Civil
TCID-CSI-94-28

Operator: N.B.C. Corporation
Agent(s): Dave Jamison, Mine Manager
Bobby Parsons, Mine Foreman
John Brown, Day-shift Section Foreman
Phil Jones, Evening-shift Section Foreman

Violation: 7772826 issued 07/06/94

Description of matter:

MSHA Inspector Mullens was accompanied by Mine Foreman Blake while conducting an inspection at the Bullet Energy Mine, an adjacent mine to N.B.C.'s No. 6 mine, when he observed that the Bullet mine had been mined into by N.B.C. Blake commented: "Damn, they have cut into us AGAIN." Both mines were restricted, by their respective approved ventilation plans, from mining a 80' barrier block that separated the mines. Mullens stated that loose coal was stacked to the roof in the entry at the cut-through in an attempt to restore proper ventilation to both mines.

Proof the violation was properly cited:

A 104(d)(1) Order was issued on 7/6/94, to N.B.C. Corporation. The proper section of the law cited was 75.370(a)(1). The violation was classified as S&S and rated as high negligence. The operator did not request a Part 100 Conference on this order; therefore, it remains as issued (Exhibit 11). However, the operator's contest of this order is pending. Regional Solicitor Trial Attorney Joe Pleading has been contacted and informed of the potential for agent civil penalty assessment as a result of this investigation.

Proof operator was a corporate operator:

N.B.C. Corporation is registered under the laws of the State of West Virginia. The No. 6 Mine extracts coal from the Pocahontas No. 3 coalbed. The coal enters into and effects interstate commerce (Exhibits 1 and 2).

Proof the individuals were agents:

Mine Manager Jamison, Mine Foreman Parsons and both Section Foremen Brown and Jones acted in supervisory roles at this mine. All four individuals were certified Mine Foremen in the State of West Virginia. Parsons, Jones, and Brown were responsible for conducting preshift (Exhibit 9) and on-shift examinations (Exhibit 10).

Proof of high degree of risk:

N.B.C. mined a block of coal that was supposed to have been left unmined (Exhibit 6). The result was that a cut-through into another mine occurred. In the past, cut-throughs have resulted in deaths by drowning and/or asphyxiation. Since the cut-through was unintentional, it is obvious that the area was not examined, prior to the cut-through, to determine whether harmful gases might have been present. Section 104(d)(1) Order 7772826 was issued as highly likely to result in a permanently disabling injury (Exhibit 17).

Proof agent(s) authorized, ordered, or carried out violation:

Section Foremen Jones and Brown admitted that they instructed their crews to mine coal out of the barrier blocks (Exhibits 12 and 13).

Mine Foreman Parsons admitted that he gave instructions to Jones and Brown to mine part of the barrier block. Parsons said that Jamison authorized the mining of the barrier block (Exhibit 14).

Proof agent(s) knew or had reason to know conduct constituted a violation:

Mullens and State Inspector Northgate traveled to the 001-0 section of the No. 6 mine and were met by Day-shift Section Foreman Brown. Brown told them that he was instructed by Mine Foreman Parsons and Mine Manager Jamison to mine the barrier block (Exhibits 3 and 7).

MSHA Supervisor Rodman stated that during a joint MSHA/State accident investigation meeting on 7/11/94, Brown said that he was instructed by Mine Manager Jamison to mine the block of coal. According to Brown, Jamison had told him that he had applied to MSHA for permission to mine part of the barrier block (Exhibit 4).

MSHA Ventilation Specialist Belle stated that he had met with the two companies on 4/28/94. They had agreed that the barrier block would remain intact, except for one opening to be mined from the No. 6 mine into the Bullet mine for the establishment of a bleeder for the No. 6 mine through the Bullet mine (Exhibit 5).

Evening-shift Section Foreman Jones stated that he directed the miner operator to mine 2 blocks out of the barrier block. He said he was concerned about mining the barrier blocks so he telephoned Parsons on 7/5/94 to confirm whether it was proper to do so. Parsons once again confirmed that Jamison wanted the blocks mined (Exhibit 12).

Day-shift Section Foreman Brown stated that Jamison gave permission to mine the barrier block. Both he and Jones told Jamison that it was wrong to mine the barrier block, but they did as they were told (Exhibits 12 and 13).

Mine Foreman Parsons stated that he checked with Jamison, then directed Foremen Brown and Jones to mine the barrier. Jamison assured Parsons that he was getting permission from MSHA to mine the barrier. Parsons stated that although Jamison was on vacation, the two of them talked each day on the telephone, and Jamison was well aware exactly where they were mining (Exhibit 14).

Position of defense:

Each of the three foremen stated that they were just following orders from their mine manager (Exhibits 12 and 13).

Mine Manager Jamison stated that he had nothing to do with the cut-through into the Bullet mine on 7/6/94. He said he was on vacation at that time. He stated that he only gave permission for Parsons to cut into the head-end of the section, as agreed to with MSHA. He never gave Parsons permission to mine the barrier block or to cut into the Bullet mine (Exhibit 15).

Conclusion:

The clear preponderance of evidence indicates that the mine manager, the mine foreman, and both of the section foremen knew it was a violation of the approved ventilation plan to mine the barrier block. They all knowingly authorized and ordered that violation. Both section foremen were given direct orders, but knew it was not permitted. They all knew that they did not have written approval from MSHA to mine the barrier block. The section foremen were acting upon the word of the mine foreman that the company had filed for permission to mine part of this barrier. The mine foreman had acted upon the word of the mine manager. All knew that MSHA had not granted approval.

Summary Analysis - 110(c) Civil
TCID-CSI-94-28

Operator: N.B.C. Corporation
Agent: Phil Jones, Evening-shift Section Foreman
Violation No: 7772825 and 7772827 issued 07/06/94

Description of matter:

During the investigation of an unintentional "cut-through," MSHA Inspector Mullens discovered that sight-lines were not being installed by Section Foreman Jones in pillar blocks Nos. 21 and 22. The section foreman and crew haphazardly mined the pillar blocks, which substantially reduced the size of the pillar blocks. The approved plan called for centers to be mined on a minimum of 50' blocks. These blocks were measured to be approximately on 33' centers. The illegal mining of a barrier block, coupled with mining without sight-lines (guides to keep entries and crosscuts on course) eventually led to an unplanned "cut-through" into an adjacent active mine. (See also violation 7772826.)

Proof the violation was properly cited:

Two 104(d)(1) Orders were issued on 7/6/94, to N.B.C. Corporation. The proper sections of the law were cited as 75.220(a)(1) and 75.203(b) (Exhibits 16 and 17). The violations were each classified as S&S and rated as high negligence. The operator did not request a Part 100 Conference on these orders; therefore, they remain as issued (Exhibit 11). However, the operator's contest of these orders is pending. Regional Solicitor Trial Attorney Joe Pleading has been contacted and informed of the potential for agent civil penalty assessments as a result of this investigation.

Proof operator was a corporate operator:

N.B.C. Corporation is registered under the laws of the State of West Virginia. The No. 6 Mine extracts coal from the Pocahontas No. 3 coalbed. The coal enters into and effects interstate commerce (Exhibits 1 and 2).

Proof the individual was an agent:

Section Foreman Jones directed the work activities of the section. He conducted preshift and on-shift examinations and recorded the results of such examinations in record books (Exhibit 12).

Proof of high degree of risk:

Jones' failure to install and follow sight-lines when mining substantially reduced the size of the pillar blocks left to support the roof. The blocks were reduced in size to below the minimum acceptable size in the approved roof control plan.

Violation No. 7772827 (sight-lines) was issued as highly likely to result in a permanently disabling injury. Violation No. 7772825 (reduced size of pillars) was issued as highly likely to result in a fatal injury (Exhibits 16 and 18).

Proof agent(s) authorized, ordered, or carried out violation:

MSHA Inspector Mullens and State Inspector Northgate observed that sight-lines were omitted by section foreman Jones yet Jones authorized the mining of coal in violation of 75.203(b) (Exhibits 3 and 7).

MSHA Inspector Mullens and State Inspector Northgate also documented that Jones allowed the mining of coal in such a haphazard fashion that pillars were reduced to below the minimum size allowed by the approved roof control plan, in violation of 75.220(a).

Proof agent(s) knew or had reason to know conduct constituted a violation:

MSHA Inspector Mullens observed the small pillar blocks and that sight-lines were not painted onto the mine roof (Exhibit 3).

Mullens believes that Section Foreman Jones had actual knowledge of the conditions. Jones was an agent of the operator and directed the work activities of the Evening-shift crew.

State Inspector Northgate assisted Mullens in the measurement of the pillar blocks and can attest that the pillars were mined on 33' centers. He also stated that he did not observe any sight-lines in the area where coal had been mined from the pillar blocks (Exhibit 7).

Arliss South, Roof Bolting Machine Operator, can testify that Jones did not have a rule to measure centers or room depths. He stated that Jones "stepped off" the distances (Exhibit 19).

Special Investigator McIntosh believes that Jones failed to paint the sight-lines on the roof because Jones thought MSHA would then hold him responsible for deliberately reducing the size of the pillar blocks. McIntosh stated that Jones knew the area would become inaccessible after the pillars were extracted.

Position of Defense:

Michael Joyce, Continuous-Mining Machine Operator, stated that he did observe sight-lines and that he followed them (Exhibit 20).

Section Foreman Jones stated that the center-lines were marked up by Bobby Parsons, Mine Foreman, and John Brown, Day-shift Section Foreman. Jones said he extended the center-lines utilizing chalk instead of paint (Exhibit 12).

Jones stated that the MSHA and State inspectors were wrong in how they measured the centers for the blocks. The blocks were not driven on 33' centers. He believed that the adjacent mine had driven an illegal entry into the barrier block. The close proximity of their illegal entry to the entry driven by Jones' work crew made it appear that the block was mined on 33' centers.

Conclusion:

The preponderance of evidence indicates that Phil Jones, Evening-shift Section Foreman, knew the violations existed. He knowingly failed to paint the sight-lines and directed his crew to haphazardly mine the pillar blocks. It is also reasonable to believe that Jones knew the pillar blocks had been reduced to smaller than the minimum acceptable size. MSHA should pursue civil action against Section Foreman Jones.

Basic Elements of Summary Analysis of a Section 110(c) Case

Description of matter: This portion of the summary should briefly describe the factual situation which will be discussed. The purpose is to set forth a brief factual setting of the case, which sets out an overview of how the violations were discovered.

Proof the violation was properly cited: This portion of the summary is to review the legal history and current status of the underlying citation or order involved. Additionally, this portion should include information to meet the requirement that the district has contacted the Regional Solicitor to determine the status of the related civil penalty case against the operator and to ensure that the Solicitor is apprised of an ongoing special investigation relative to those violation(s). It should also include any known concerns of the investigator about the legal correctness of the citation. For example, although a citation has not been contested and is final, the investigator may have a concern that the wrong standard has been cited; that concern should be noted in this portion of the summary.

Proof operator was a corporate operator: Section 110(c) requires as a foundation that it be a violation of a corporate operator and case law limits this to a corporation which is the operator of the mine. This section should include a short (usually) statement of the proof that the operator is a corporation. The definition of an operator is in the definitions section of the Mine Act and has been interpreted to include independent contractors and other entities which exercise control over the mine despite not having a daily presence at the mine site.

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

Proof of high degree of risk: This portion of the summary should discuss the available proof of the high degree of risk involved. While not a strict element of proof in such cases, evidence of high degree of risk is often useful in establishing the other elements of Section 110 such as reason to know and authorized, ordered or carried out. This discussion should include, but not be limited to, special evaluation findings which accompanied the initial enforcement action.

Proof agent authorized, ordered or carried out violation: Section 110(c) requires the Secretary to establish that an agent knowingly [see next discussion] authorized, ordered or carried out a violation. This portion of the analysis should specifically state the proof that the agent in fact authorized, ordered or carried out the violation, i.e., miner witnesses interviewed confirm that they were, in fact, directed by Section Foreman _____ to take deep cuts on this date and shift. It is the agency position that if violations are being carried out in the presence of an agent and that agent does not take affirmative actions to cause the conduct or condition which is causing the violation to be eliminated, then the agent is indirectly authorizing the violation to be carried out or the violative hazard to continue to exist without correction.

Proof agent(s) knew or had reason to know their conduct constituted a violation: This portion of the analysis should discuss the evidence which supports that the agent's action(s) in authorizing, ordering or carrying out the violation were done knowingly. Case law supports that an action is done knowingly if done with knowledge or with reason to know. This element is more difficult to establish in situations where the agent did not communicate a direct verbal authorization or order, but rather the case is based on an indirect inference of authorization. As an example, if the evidence establishes that miners are frequently and openly working under unsupported roof, evidence that a section foreman is frequently present on the section and who in the normal observation and assignment of duties knew or had reason to know of this conduct. Apart from the opportunity to observe actual inby travel, evidence such as footprints and work completed prior to proper support also is evidence to establish that an agent knew or should have known of this conduct and tacitly authorized the conduct. On the other hand, a single occurrence of this conduct when the foreman is off the section or in a different entry would not establish that he/she knew or should have known of the violative conduct or condition.

Position of defense: This portion of the report is to summarize what evidence and statements have been provided by the individuals or companies under investigation, and/or any other exculpatory information. These parties have no obligation to provide explanatory defenses to their conduct. However, if they have done so, those statements and documentary evidence should be summarized here.

Conclusion: This portion of the summary should state the conclusion of the investigator as to whether a Section 110(c) action is supportable against an agent based on the evaluation and

discussion of the facts discussed in the summary. The conclusion should be as to each agent and the discussion of the evidence should articulate the separate analysis and basis for the conclusion as to each potential individual to be charged. It is also appropriate, if desired, to set forth the reasons why it is believed successful prosecution of all or part of the case will have a local or nation-wide impact in improving safe working conditions.

Summary Analysis - 110(d) Criminal
TCID-CSI-94-20

Operator: Raleigh County Construction
Agent: Rex Thompson, Owner

Violations: 107(a) Order 7771879 and 104(a) Citations 7771880 and 7771881 issued 2/1/94

Description of matter:

On 2/1/94, MSHA Inspector Robert Wood was traveling past the Raleigh County Construction, No. 17 Mine, when he observed two workers entering into the No. 7 portal entry. Wood further observed loose, unconsolidated rocks on the highwall above the entry and noted that the entry (a new mine opening) was not protected by a canopy as required in the approved roof-control plan (Exhibit 4).

The MSHA special investigation later ascertained that an Ohio State Mine Inspector had "closed" the same portal entry area earlier on that very same day. However, after the Ohio inspector left the mine property, Mine Owner Rex Thompson ordered the two miners to resume their work (Exhibit 5).

Proof the violations were properly cited:

Wood issued a 107(a) Imminent Danger Order 7771879 and related 104(a) Citations 7771880 and 7771881 (Exhibits 1, 2 and 3). Wood properly cited § 75.220(a)(1) for the operator's failure to install the highwall canopy and properly cited § 77.1001 for the existence of the unstable highwall. The operator did not request a Part 100 Conference on these violations; therefore, they remain as issued (Exhibit 11). However, the operator's contest of these violations is pending. Regional Solicitor Trial Attorney Joe Pleading has been contacted and informed of the potential for criminal prosecution as a result of this investigation.

Proof of high degree of risk:

Wood properly determined that the conditions he observed, independent of the Ohio inspector did, in fact, create an imminent danger situation, with inherent risk of a potentially fatal accident, to the two miners. As further proof of the high degree of risk, these conditions were independently classified as hazardous by an Ohio State Inspector a very short time prior to Wood's observations (Exhibits 4 and 5).

Further supporting evidence, expanded upon below, includes a prior fatality, at one of Thompson's other mines, which resulted from a similar fall of materials from a highwall and involved a canopy (Exhibit 6).

Proof of willful disobedience or reckless disregard:

When Wood returned to his duty station, he learned from his supervisor that a fatal accident had occurred within the last year at another mine operated by Thompson. A miner had received fatal crushing injuries when a fall of materials from a highwall buckled the canopy frame and entrapped the miner between the canopy and the frame of the continuous-mining machine he was operating (Exhibit 6).

Wood subsequently learned that, in fact, some of the highwall canopies had been moved from the mine where the fatality occurred to the No. 17 mine. Wood concluded that Thompson should have been keenly aware of the dangers associated with the fall of material from a highwall (Exhibit 4).

Additionally, MSHA's special investigation revealed that, while unknown to Wood when he issued the order and citations on 2/1/94, an Ohio State Inspector had issued a "closure order" approximately 1 hour and 15 minutes earlier that same day to Mine Owner Thompson for the exact same conditions. Thompson intentionally instructed the two miners to work in an area he knew was unsafe and, further, to blatantly disregard the Ohio closure order (Exhibit 5). The two miners corroborated that they were instructed by Thompson to return to work in the No. 7 entry (Exhibits 8 and 9).

Position of defense:

Thompson claims that he personally operated the continuous-mining machine while developing the No. 7 entry. He stated that if he believed there was any danger from the highwall, he would not have operated the machine, thereby endangering himself (Exhibit 7).

He admits that a highwall canopy was not installed in that entry, because of plans to install the mine fan at that location. Thompson justifies his noncompliance with the approved roof control plan requirements by saying he didn't want to install a highwall canopy and then remove it to facilitate installation of the mine fan.

Regarding the prior fall of materials fatality, Thompson stated that, in his opinion, the fatality would not have occurred had the highwall canopy not been installed.

Thompson denied giving any miner a direct order to work in the subject No. 7 entry.

Conclusion:

The evidence indicates that Rex Thompson willfully violated 30 CFR § 75.220(a)(1) and § 77.1001, as cited in violations 7771880 and 7771881, which were contributing factors to the 107(a) Imminent Danger Closure Order 7771879.

The evidence clearly indicates that Thompson displayed total disregard for the safety of the miners when he instructed two workers to enter an area of extreme danger with full knowledge that the State inspector had cited the area as dangerous and the area was "closed" by the State inspector. His disregard for the regulations could have resulted in two miners suffering possibly fatal injuries.

Criminal actions should be pursued against Mine Owner Rex Thompson.

Basic Elements of Summary Analysis of a Section 110(d) Case Referral

Description of matter: This portion of the summary should briefly describe the factual situation which will be discussed. The purpose is to set forth a brief factual setting of the case to assist in the understanding of the charges to be considered, and which sets out an overview of how the violations were discovered.

Proof the violation was properly cited: This portion of the summary is to review the legal history and current status of the underlying citation or order involved, if any. Additionally, this portion should include information to meet the requirement that the district has contacted the Regional Solicitor to determine the status of the related civil penalty case against the operator and to ensure that the Solicitor is apprised of an ongoing special investigation relative to those violation(s). It should also include any known concerns of the investigator about the legal correctness of the citation. For example, although a citation has not been contested and is final, the investigator may have a concern that the wrong standard has been cited; that concern should be noted in this portion of the summary and is very important to bring to the attention of federal prosecutors before the final decisions on the exact charges which might be brought based on the situation presented.

Proof of high degree of risk: This portion of the summary should discuss the available proof of the high degree of risk involved. This discussion should include, but not be limited to, special evaluation findings which accompanied the initial enforcement action. While not a strict element of proof in such cases, evidence of high degree of risk is often useful in establishing the other elements of the case and is often decisive to federal prosecutors evaluating a marginal case.

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

Moreover, the mine superintendent who knew or had reason to know of this misconduct condones the conduct of the shift foreman and the pre-shift examiner and himself has committed a willful violation. Reckless disregard for compliance extends the reach of the criminal provisions of the statute to situations where an individual did not have specific knowledge or intent in a

specific instance, but knew from actions and words that this type of misconduct was occurring. A mine superintendent who denies requests for ventilation or roof support materials and who repeatedly demands high production levels, but who claims to have no knowledge or intent to inadequately support or ventilate a specific area of the mine on a given day can be charged with a willful violation under a theory that he/she had a reckless disregard for compliance with those standards. Please note that a willful or reckless disregard by an individual agent of a company is legally imputed to a corporate operator. Thus, in these examples the conduct of the mine superintendent, the shift foreman and the pre-shift examiner would all support a charge of a willful violation against a corporate operator as well. This principle can differ in the case of a sole proprietorship or partnership.

Not entering a known violative condition in a required record book should be noted for consideration for prosecution as a false statement under Title 18 United States Code.

Position of defense: This portion of the report is to summarize what evidence and statements have been provided by the individuals or companies under investigation. These parties have no obligation to provide explanatory defenses to their conduct. However, if they have done so, those statements and documentary evidence should be summarized here.

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

February 15, 1997

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

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

Dear Operator:

As you may know, the Mine Safety and Health Administration has conducted a special investigation related to Citations 39986116, 39986117 and Order 39986118. We have decided not to pursue further investigative action at this time and the case is closed.

Sincerely,

District Manager

bcc: TCID
MC:SSI:2/13/97

Date:

CMS&H or M/NM Memo No.:

MEMORANDUM FOR: _____
REGIONAL SOLICITOR

FROM: _____
DISTRICT MANAGER

SUBJECT: Section 110 Investigation Case File

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

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

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

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

Enclosures

cc: TCID

Date:

Agent's Name:

Address of Agent:

City, State and Zip Code:

Dear Mr./Ms. _____:

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

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

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

District Manager or Person designated to conduct manager's conference

Address of District Manager or person designated to conduct manager's conference

or you may call him/her at (give phone number of person designated to conduct manager's conference). Otherwise, a conference will not be conducted. Should you not desire a conference, a response is not necessary. Your request for a conference does not affect your right to a formal hearing with the Federal Mine Safety and Health Review Commission.

Statutory criteria for penalty assessment and conference procedures, as outlined in 30 CFR, Part

100, are enclosed.

Sincerely,

District Manager, CMS&H or M/NM

Enclosures: (List number of items enclosed)

cc: TCID

Date:

Agent's Name:

Address of Agent:

City, State and Zip Code:

Dear Mr./Ms. _____:

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

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

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

District Manager or Person designated to conduct manager's conference

Address of District Manager or person designated to conduct manager's conference

or you may call him/her at (give phone number of person designated to conduct manager's

conference). Otherwise, a conference will not be conducted. Should you not desire a conference, a response is not necessary. Your request for a conference does not affect your right to a formal hearing with the Federal Mine Safety and Health Review Commission.

Statutory criteria for penalty assessment and conference procedures, as outlined in 30 CFR, Part 100, are enclosed.

Sincerely,
District Manager, CMS&H or M/NM

Enclosures: (List number of items enclosed)

cc: TCID

Date:

CMS&H or M/NM Memo No.:

MEMORANDUM FOR: Chief, Technical Compliance and Investigation Division

FROM: District Manager--CMS&H or M/NM

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

Based on your memorandum, (CMS&H or M/NM Memo No.), dated (Date of Memo), (Name of Agent) was informed by certified letter (Date of Notification Letter) of his/her right to a Safety and Health (Manager's) Conference concerning the proposed civil penalty assessment. A conference (was/was not) requested.

IF A CONFERENCE WAS CONDUCTED:

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

IF A CONFERENCE WAS NOT CONDUCTED, THEN STATE:

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

IN EITHER CASE, INCLUDE ANY OTHER COMMENTS YOU WISH TO MAKE.

WHEN THE DISTRICT MANAGER RECOMMENDS THAT AN AGENT BE ASSESSED A PENALTY:

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

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

Enclosures: (Number)

cc: Files

SUMMARY OF CRIMINAL PROCEEDINGS

Technical Compliance and Investigation Division
Coal Mine Safety and Health

United States of America

vs.

J & T Coal, Inc.

and

Garry Williams, Sr.

Southern District of West Virginia

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

92-00061-02-B

March 18, 1993

MSHA Case No. NORT-CSI-91-21

REASON FOR INVESTIGATION:

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

CHARGES:

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

On March 18, 1993, J & T, Inc., filed a motion to dismiss 6 counts of the indictment that charged

violations of 30 U.S.C. 820(d) and 30 CFR 75.202(a)-(b), 75.203(a)-(b), 75.220(a)(1), and 75.1200-2(b) claiming double jeopardy. The corporation contended that the government previously assessed civil penalties against it under 30 U.S.C. 820(a) for approximately \$300,000.00 in civil penalties in connection to the accident. The court denied the plea of double jeopardy.

DISPOSITION OF CASE:

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

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

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

SUMMARY OF CRIMINAL PROCEEDINGS

Technical Compliance and Investigation Division
Coal Mine Safety and Health

United States of America

vs.

Diamond C Fuels

and

Leonard Clark

Eastern District of Kentucky

Cr. Nos. 93-28-1

93-29-1

May 24, 1993

MSHA Case No. TASK-ILM-93-13

REASON FOR INVESTIGATION:

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

CHARGES:

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

Later on May 24, 1993, the corporation plead guilty to a 1-count Information. The Information charged the corporation with willfully making and using falsified respirable dust cards and submitting

them to MSHA representing samples taken in the active working areas of the mine (a felony). This act was in violation of Title 18 U.S.C. Sec. 1001.

DISPOSITION OF CASE:

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

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

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