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Mark N. Savit
Cotton Day & Doyle

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CRIMINAL SANCTIONS, PERSONAL CIVIL PENALTIES, AND SPECIAL INVESTIGATIONS UNDER THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977: A PRACTITIONER'S APPROACH

MARK N. SAVIT*

I. INTRODUCTION

The current system of criminal and civil penalties which may be imposed against individuals for knowing and willful violations of the various statutory and regulatory requirements regarding mine safety and health originated in the Coal Mine Health and Safety Act of 1969.¹ However, there was not an organized effort to investigate or prosecute such violations until 1973,² when the Mining Enforcement and Safety Administration ("MESA") established a separate special investigation group made up of coal mine inspectors who had received investigative training. Procedures for the conduct of the investigations (which form the basis for the current special investigation procedures) were developed and special investigations were conducted in a formal, organized fashion. Neither the statutory provisions, nor the investigative procedures, however, were applicable to non-coal mines until 1977 when the statutory provisions relating to criminal and civil penalties were adopted verbatim in the Federal Mine Safety and Health Amendments Act of 1977³ ("Mine Act" or "the Act") and made applicable to all mining.⁴

II. STATUTORY FRAMEWORK

The Mine Act provides for criminal penalties⁵ for "[a]ny [mine] operator who *willfully* violates a mandatory health or safety standard, or *knowingly* violates or

* Partner, Cotten Day & Doyle, Washington, D.C.; B.A. 1970, University of Southern California; J.D. 1976, Georgetown University Law Center. Former Staff Assistant, Special Investigations, Mining Enforcement and Safety Administration.

¹ Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801-960. (1976), *amended* by 30 U.S.C. §§ 822-962 (1982).

² The investigation and prosecutions which led to *United States v. Finley Coal Co.*, 493 F.2d 285 (6th Cir.), *cert. denied*, 419 U.S. 1089 (1974), was engendered by a massive explosion, multiple fatality accident. The investigation was conducted by the Solicitor's Office, U.S. Department of the Interior. The investigation and prosecution which led to *United States v. Consolidation Coal Co.*, 504 F.2d 1330 (6th Cir. 1974), was initiated by congressional request and also conducted by the Solicitor's Office.

³ Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. §§ 801-962 (1982).

⁴ *Id.* at § 803 (1982).

⁵ *Id.* at § 110(d), 30 U.S.C. § 820(d) (1982) (penalties range from a maximum of one year in jail and a \$25,000 fine for the first offense to a maximum of five years in jail and \$50,000 fine for subsequent offenses).

fails or refuses to comply with any order issued under section 104 [30 U.S.C. section 814] and section 107 [30 U.S.C. section 817]"⁶ of the Act and certain other orders incorporated in final decisions. It also allows for the imposition of criminal penalties against any person who gives advance notice of a mine inspection,⁷ makes a false statement in any document required by the Mine Act,⁸ or knowingly sells, distributes, or delivers any mining equipment falsely represented as complying with the applicable statutes or regulations.⁹ The Mine Act also provides for criminal penalties against "any director, officer or agent" of a corporate mine operator who knowingly authorizes, orders, or carries out a violation of the mandatory health and safety standards or fails or refuses to comply with certain orders issued under the Act.¹⁰ This provision for imposition of criminal penalties against directors, officers, and agents of corporate operators provides that, for the same offenses, those individuals are subject to civil penalties of the same type for which mine operators are liable pursuant to section 110(a).¹¹ The Mine Act also assesses civil penalties of not more than \$250 against miners who violate the standards relating to smoking or carrying various smoking materials.¹²

III. BACKGROUND

The content and applicability of the statutory provisions described above are addressed fully in an excellent article which appeared in this law review in 1983.¹³ That article dealt with the legal evolution of several concepts underlying the enforcement system. Notably, it analyzed the judicially evolved definitions of "knowing" and "willful" as used in the statute. It also considered an unsuccessful constitutional challenge to the distinction between incorporated and unincorporated mine operators. Finally, the article discussed the Mine Safety and Health Administration ("MSHA")¹⁴ special investigation policies. With minor exceptions, the law regarding the topics covered in the article is unchanged and need not be expanded upon here.

Having dispensed with the need for a detailed exegesis of the law and its interpretation, this Article will focus on common problems which arise when coun-

⁶ *Id.*, 30 U.S.C. § 820(d) (emphasis added).

⁷ *Id.* at § 110(e), 30 U.S.C. § 820(e) (1982) (six months or \$1,000 fine or both).

⁸ *Id.* at § 110(f), 30 U.S.C. § 820(f) (1982) (five years or \$10,000 fine or both).

⁹ *Id.* at § 110(h), 30 U.S.C. § 820(h) (1982) (five years or \$10,000 fine or both).

¹⁰ *Id.* at § 110(c), 30 U.S.C. § 820(c) (1982).

¹¹ *Id.* at § 110(a), 30 U.S.C. § 820(a) (1982).

¹² *Id.* at § 110(g), 30 U.S.C. § 820(g) (1982).

¹³ Ryan & Schell, *Criminal Sanctions Under the Federal Mine Safety and Health Act of 1977*, 85 W. VA. L. REV. 757 (1983).

¹⁴ MSHA is the successor agency to MESA. MESA was an agency of the Department of the Interior, but the Mine Act transferred all MESA responsibilities to MSHA in the Department of Labor.

sel must advise a client confronted with a special investigation and subsequent criminal or civil penalty proceedings. Many of the issues that arise in this context are matters of strategy, tactics, and style. The approach will vary as much based on the style of the practitioner as with the particular facts of the case. Thus, this Article cannot provide concrete guidance as to the best action to be taken in every situation. Rather, it will attempt to set out principles or guideposts which can be used by the practitioner when he is confronted with a special investigation.

IV. DISCUSSION

In order to advise a client as to an investigation, it is imperative that the practitioner determine as much as he can about the event which has triggered the investigation. This should be done as soon as possible. A special investigation may be triggered in three ways.

First, it is MSHA policy to conduct a routine investigation of all accidents, including some in which no injuries have occurred, with special emphasis on fatalities. In all cases involving serious accidents, a "special investigator" will accompany the accident investigator to the site. After completing this investigation, the special investigator will determine whether it is likely that a knowing or willful violation has occurred, and after obtaining required approvals, will conduct any further investigation which may be necessary.

Second, all serious violations cited by mine inspectors are reviewed independently by the special investigation staff. Generally, all withdrawal orders based on imminent danger¹⁵ or unwarrantable failure¹⁶ are reviewed routinely, but any citations can be reviewed if the inspector has reason to believe that a knowing or willful violation has been committed. These reviews usually are cursory—limited to an assessment of the facts stated on the face of the citation—but also may include an informal discussion with the issuing inspector. Furthermore, respirable coal dust samples and other self-reporting materials are routinely screened to insure no blatant frauds or obvious misrepresentations occur on the face of the form or in the contents of the samples.

Third, a special investigation can be triggered by a written or an oral complaint. Such a complaint can come from any party, including mine inspectors, miners, company officials, and even the general public. However, two sources instigate quite a few investigations. First, disgruntled employees are likely to complain orally to inspectors who are on mine property, particularly when labor-management tension exists at the site. Second, special investigators and inspectors, like any other law enforcement personnel, use informants to keep them apprised of conditions they otherwise would be unable to determine on their own. Infor-

¹⁵ Mine Act § 107(a), 30 U.S.C. § 817(a) (1982).

¹⁶ *Id.* at 104(d)(1), 30 U.S.C. § 814(d)(1) (1982).

mation from an informant who has demonstrated high credibility probably will trigger a special investigation if it is warranted by the facts.

The origin of an investigation is easy to determine generically. However, the identity of the informant or other source is often impossible to ascertain. It is very important to learn as much as possible about the source of the investigation to gauge whether it will develop into a full-fledged criminal prosecution. It also may be helpful for the operator to review routinely all citations issued to him to decide whether any could trigger a special investigation. Often, the special investigation will not be initiated until long after the time has closed to contest the violation. If the operator can identify those citations likely to engender further action, he can institute contest proceedings and perhaps vitiate any liability on behalf of his employees¹⁷ or, at the very least, build a record which might dissuade MSHA from initiating a special investigation in the first place.

By far, the majority of issues arising for the practitioner begin following the appearance of the special investigator. Often, by the time counsel is informed of a problem, the investigator already has appeared at the mine site and asserted his authority to begin the investigation immediately.

If the company officials at the site have requested time to contact their counsel, the investigator's virtually invariable first response will be that the company is obstructing the investigation. The pressure exerted by the investigator undoubtedly will clash directly with every practitioner's natural disposition to attempt to (1) completely inform himself about the incident before he begins advising his client, and (2) attempt to control the flow of information from his client to the investigator.

This problem bears examination in several respects. Special investigations are authorized by section 103(a) of the Mine Act.¹⁸ Thus, obstruction of the investigation can be considered a violation of the Act.¹⁹ In *United States Steel Corp.*,²⁰

¹⁷ Employees of corporate operators are liable for criminal or civil penalties only if the corporate operator has violated a health or safety standard. See Mine Act § 110(d), 30 U.S.C. § 820(d) (1982). Thus, if a citation is contested and the operator wins, the issue of violation is foreclosed and no further prosecution against the employee is possible; however, the converse is not true. It is not necessary to obtain a separate judgment of violation against an operator before proceedings can be initiated against the employee. Everett L. Pritt, 8 Interior Bd. of Mine Operations Appeals 216, 84 Interior Dep't 960 (1977).

¹⁸ Mine Act § 103(a), 30 U.S.C. § 813(a) (1982).

¹⁹ Furthermore, the investigation itself is considered a "proceeding" within the meaning of 18 U.S.C. § 1505 (1982). This section makes it a felony to obstruct deliberately an administrative proceeding. While simply delaying access by the inspector to witnesses or the site is unlikely to trigger such a result, any attempt to provide false or misleading testimony, or withhold or alter evidence could result in a proceeding far more serious than the special investigation itself. See, e.g., *United States v. Tallant*, 407 F. Supp. 878 (N.D. Ga. 1975); *United States v. Browning, Inc.*, 572 F.2d 720 (10th Cir.), cert. denied, 439 U.S. 822 (1978). For a good general exposition of 18 U.S.C. § 1505, see generally, Annot., 8 A.L.R. FED. 893 (1971).

²⁰ *United States Steel Corp.*, 6 F.M.S.H.R.C. 1423, 3 Mine S. H. Cas. (BNA) 1424 (1984).

the mine operator would not allow an inspector already on the premises to proceed directly to the site of an accident, but offered to let him inspect pictures of the scene and interview witnesses. The operator also insisted that one of his lawyers be present at an interview with one of his foremen, but on two occasions would not commit to provide the attorney by any specific date. The Commission ruled that *both* the refusal to *allow* the inspector to proceed to the accident site and the failure to provide an attorney by a specific date constituted violations of section 103(a). However, a shorter delay to allow for attorney preparation has been held not to be a violation of that section.²¹

In any case, an inspector or investigator has a virtually absolute, warrantless right of entry to any mine site for any purpose authorized by section 103.²² Thus, it is imperative that the operator allow the inspector such access as he is permitted (assuming he wants it) if for no other reason than as a gesture of good faith or a first step in building a record indicating no intent to obstruct the investigation, but merely the need to consult counsel in the matter.²³

At some point, hopefully after counsel has had an opportunity to learn enough about the facts to make informed decisions, the investigation will begin. Undoubtedly, the investigator will want to examine records and interview witnesses. Once again, the issue of obstruction of the investigation comes into play. Its application differs depending on the activity in which the investigator wishes to engage and is analyzed accordingly.

It has never been seriously disputed that the inspector or the investigator, like his right of entry, has the virtually unfettered right to inspect books, records, and reports required to be maintained and kept open for inspection or public view by the Act.²⁴ The warrantless seizure of such records in connection with an

²¹ Compare *Gulf Mineral Resources Co.*, 6 F.M.S.H.R.C. 1156, 3 Mine S. H. Cas. (BNA) 1455 (1984).

²² *Donovan v. Dewey*, 452 U.S. 594 (1981); *Marshall v. Texoline Co.*, 612 F.2d 935 (5th Cir. 1980); *Marshall v. Nolichucky Sand Co.*, 606 F.2d 693 (6th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980); *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3d Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980).

²³ "Walkaround" rights, the right of miners' representatives to accompany inspectors conferred by Mine Act § 103(f), 30 U.S.C. § 813(f) (1982), apply only to the "physical inspection" of a mine. In one case, "walkaround rights" were upheld regarding the physical inspection phase of a "special investigation" of a methane ignition. *United States Steel Mining Co.*, 6 F.M.S.H.R.C. 2325, 3 Mine S. H. Cas. (BNA) 1655 (1984). However, there is some doubt as to whether such rights would be granted in a full blown investigation of knowing or willful violations. Furthermore, although there apparently has never been a ruling on the subject, walkaround rights have no place in the interview phase of the process.

²⁴ The inspector, however, may *not* rummage through the files in an office during a warrantless inspection or investigation. See, e.g., *Nolichucky Sand Co.*, 606 F.2d 693; *Texoline Co.*, 612 F.2d 935.

investigation and their subsequent use in a criminal trial has been upheld.²⁵

Often the records and books required by the Act are incomplete, missing, or simply wrong. Even if they have been completed correctly and contain no objectively damaging information, such records can create the erroneous impression that the investigator's allegations are accurate. In addition, company records not required by the Act or the regulations may contain information either damaging to or supportive of the company's position.

As a matter of general concern, employees, especially non-legal personnel, may be tempted to alter, withhold, or destroy records perceived as damaging to the company's position. Records which admit or appear to admit the existence of violative conditions often may be less damaging than at first may be thought. Moreover, any attempt to alter or destroy records would form a basis for prosecution under 18 U.S.C. section 1505, a consequence which may be far more serious than the underlying violation.²⁶

The situation is more complex with regard to simply withholding records. Obviously, withholding from the access of the investigator records which are required to be made available to him is a type of obstruction. However, absent a warrant, the production of records not required to be kept by the Act is entirely at the discretion of the operator. A decision must be made after thorough review whether to produce records voluntarily or require the investigator to seek a warrant. This decision depends on a number of considerations. The investigator may never see company records containing beneficial material unless they are produced voluntarily. Obviously, records should be volunteered if they could turn the investigation in the company's favor or vitiate the investigation entirely. Furthermore, as long as production is voluntary, control of the records to be produced rests with the company. Should a warrant be issued, the company will not have discretion to produce the most beneficial categories of records. The decision also should take into account whether the inspector is aware of the existence of any company records or already has requested them. If the investigator is unaware of such records and they are damaging to the company, information of their existence need not be volunteered but any question as to the existence of such records must be honestly and completely answered.²⁷

²⁵ *United States v. Blue Diamond Coal Co.*, 667 F.2d 510 (6th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982). The potentially limited applicability of this decision is discussed at length in Ryan & Schell *supra*, note 13. When possible, the mine operator should attempt to require the investigator to obtain a warrant before seizing records. *See also* *Peabody Coal Co.*, 6 F.M.S.H.R.C. 183, 3 Mine S. H. Cas. (BNA) 1234 (1984).

²⁶ Of course, this is as equally true of nonrequired records as it is for required records.

²⁷ Production of records in response to the investigator's request, at worst could constitute a waiver of objection to his warrantless search. It also may lead to increasingly burdensome and irrelevant requests placing the company in an awkward position if it should decide to stop production of documents.

Witness interviews and the role of counsel for the company in these interviews present a wide array of considerations for the practitioner. In view of the possible consequences for attempted obstruction, and the inferences that might be drawn by an overzealous investigator, it is critically important that counsel exercise care in his dealings with both management and nonmanagement employees during the course of an investigation. A genuinely charitable offer of legal assistance from "the company lawyer" may be misinterpreted as a veiled attempt to sway views, influence testimony, or obstruct the government's investigation. Once MSHA believes that such an attempt has occurred or is in progress, the consequences may be serious and can lead investigators to focus on the lawyer himself as a target in an investigation for obstruction of justice, fraud, perjury, or conspiracy.²⁸ Referrals of such cases to the Department of Justice have occurred and, under some circumstances, have been made when it was ultimately determined there was no apparent violation of MSHA regulations.

The investigator may conduct his interview at the home of a witness (generally a rank and file employee) or a target (generally a management employee), or he may attempt to conduct the interviews at the mine itself. On occasion, the investigator already will have conducted his witness interview at the employee's house before the company even is aware or has been notified that an investigation is underway. On the other hand, the investigator may request that various employees, including both management and rank and file, be available on the mine site so that he may interview them.

Before counsel can make any intelligent choices as to how the interviews will be conducted, at least to the extent he has any say in that matter, he must make a number of important determinations. The company must decide whether it wishes to disassociate itself from the conduct of the target employees. That is, the company must consider whether it wants to claim that the target employees were acting contrary to stated company policy or in derogation of direct orders or instructions from a superior. Such a decision depends on both company policy and an objective assessment of the possible liability of the company as a result of the conduct in question. If the decision is made to disassociate the company from the employees, counsel for the company should take no further active role in the investigation vis-a-vis the witnesses. However, if the company chooses not to disassociate itself from the employees, counsel must then determine his role regarding the management employees.

Counsel should meet with each of the management employees and learn as much as possible about their conduct. If he determines that any of them may have exposure to individual criminal charges or civil penalties, he should rec-

²⁸ This actually happened to "house counsel" in a case in which the author was retained. Of course, no crime was committed and no action was taken against the lawyer.

commend that they retain independent counsel of their own.²⁹ Obviously, if they retain counsel, then such counsel will guide them in the matter. If they decide not to seek independent counsel, company counsel may offer limited advice at the preliminary stage of the investigation but must discontinue such advice as soon as any appearance of a conflict of interest arises.

All decisions as to interviews are ultimately up to the employee. As a matter of right under the first amendment, a person is not required to participate in an interview or talk with an investigator. However, should an employee decide to cooperate, counsel may request that he be allowed to be present during the meeting. The investigator probably will object to this procedure but, as stated, such a decision is entirely the choice of the witness.³⁰ Frequently, the investigator will accede to a request to sit in on interviews if the company agrees to make management employees available for questioning on mine property during working hours.

The overall decision to cooperate voluntarily with the investigation must be reevaluated at this stage. Numerous investigations have foundered because the witnesses were unwilling to cooperate and the government was unwilling to compel testimony through grants of immunity. If the government already has arrived at a well-formed and supportable conclusion as to violative conduct, cooperation, assuming the testimony is favorable to the company, may be the only possibility the company has to avoid the time, trauma, and expense of prosecution on criminal charges or in a civil penalty action. At the conclusion of the investigation, if counsel believes that the investigator has not gathered those materials helpful to his client, he should not hesitate to submit favorable materials to the appropriate MSHA officials along with a simple explanation of the relationship of the materials to the investigation.

Finally, the decision is made to proceed either in a civil penalty or criminal proceeding. If MSHA decides not to proceed, neither the company nor the targets will be notified. On the other hand, if MSHA institutes a criminal proceeding, the information will be transmitted to the local United States Attorney's office for grand jury proceedings at which time the targets will be notified.³¹ In the

²⁹ The company should be encouraged to have in place a policy as to whether counsel fees for management employees will be paid by the company. This is permissible as long as it is not used as a method to withhold testimony or conspire to obstruct the investigation. Thus, if counsel fees are paid at all, they must be paid even for management employees who plead guilty or otherwise cooperate with the investigation.

³⁰ Since the witnesses will create the impression of an obstruction if they will not talk, the witnesses who desire not to cooperate usually need repeated assurances that their conduct will not inure to their detriment. *See, e.g.,* Minerals Exploration Co., 8 F.M.S.H.R.C. 477, 484, 3 Mine S. H. Cas. (BNA) 2146, 2151 (1986).

³¹ Apparently, MSHA evaluates a number of criteria, including the operator's accident and injury rate and record of previous violations in addition to the facts of the case, before making a referral to the U.S. Attorney or Department of Justice.

event the proceedings are dropped by the United States Attorney, there will be no notice.

If MSHA decides to seek a civil penalty against any individual, the individual will be notified and provided an opportunity for an informal conference with the MSHA district manager. This conference is often conducted by telephone and is the "last best chance" to avoid a full-fledged civil penalty proceeding. Clearly, such a consideration should be explored when there is any possibility that a proceeding can be avoided or that it can be settled on acceptable terms. Following the conference, the matter may advance no further and be disposed of without any notice or develop into a civil penalty proceeding similar to a normal proceeding pursuant to section 105(a) of the Act.³²

V. CONCLUSION

The representation of individuals or mine operators in the situations discussed in this Article presents a challenging array of problems and solutions to the practitioner. Absent catastrophic circumstances, it is often impossible to evaluate adequately the potential liability of the client before making choices which could set the tone for the entire investigation. Such choices can be simplified if the practitioner's overriding goal is to avoid any further proceedings. If this is impossible, then his goal must be to emerge from the investigation with the best possible record for use by the defense in any subsequent proceedings.

As in any area of law, the key to effective representation in investigative situations is preparation. A practitioner never can be too prepared for the situations addressed in this Article. Such advance preparation is especially recommended to reduce pressure on those who must make critical decisions. The more familiar the practitioner is with the facts of the case, the context in which it arose, the rules and regulations governing the suspect conduct, and the investigatory procedures of MSHA, the less complicated his choices will become prior to and during the course of the investigation.

³² Mine Act § 105(a), 30 U.S.C. § 815(a) (1982).

