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CRIMINAL SANCTIONS UNDER THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977

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I. INTRODUCTION

The Federal Coal Mine Health and Safety Act of 1969 (Coal Act)[1] substantially strengthened the role of the federal government in improving health and safety in American coal mines. Among other things, the Coal Act placed responsibility on government to develop and promulgate health and safety standards[2] and to conduct a minimum number of inspections for all underground coal mines.[3] Further, the Coal Act established civil and criminal penalties for violations of its provisions.[4] In 1977, the Coal Act was amended by the Federal Mine Safety and Health Amendments Act of 1977 to include all mining under one statute.[5]

Since passage of the Coal Act in 1969, there have been approximately thirty criminal prosecutions under the criminal provisions of the statute.[6] Although the total number of prosecutions has been few, in recent years the success of the government in pursuing criminal sanctions has increased.[7] This has resulted in the mining industry becoming increasingly aware of these sanctions, and accordingly, has heightened apprehension as to how they are to be employed. As a result, representatives in the mining industry, of both management and labor, are increasingly seeking additional information as to how the federal government interprets and administers these criminal provisions. The purpose of this article is to address this need for additional information by outlining the various criminal provisions in the Federal Mine Safety and Health Act of 1977 (Mine Act)[8] and by describing the enforcement process the

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[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 (Supp. IV 1980) [hereinafter referred to as the Coal Act].

[2] *Id.* at § 811.

[3] *Id.* at § 813(a).

[4] *Id.* at § 819.

[5] Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 803 (Supp. IV 1980).

[6] SUMMARY OF CRIMINAL PROCEEDINGS—OFFICE OF TECHNICAL COMPLIANCE AND INVESTIGATIONS, COAL MINE SAFETY AND HEALTH, MSHA. *See also* MSHA Annual Reports to the Congress.

[7] For example, during the ten years the Coal Act was in effect, there were six criminal prosecutions, two of which resulted in criminal sanctions. Since passage of the 1977 Amendments Act there have been over twenty-five prosecutions, all of which resulted in convictions or pleas. *Id.*

[8] Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-962 (Supp. IV 1980) [hereinafter referred to as the Mine Act]. The Federal Mine Safety and Health Act of 1977 combines both the Federal Coal Mine Health and Safety Act of 1969 and the Federal Mine Safety and Health

Mine Safety and Health Administration (MSHA) utilizes to investigate these cases.

II. Penalty Provisions of the Mine Act

A. *Civil Penalties*

Because the Mine Act provides for both civil and criminal penalties, a basic understanding of the civil penalties will serve as a useful foundation for a later discussion of the criminal provisions in the Act. Section 110 sets forth the basic penalty provisions of the Mine Act.[9] There are three civil penalty sections; 110(a), 110(b), and 110(g).[10] Section 110(a) mandates that a civil penalty of up to $10,000 be assessed against a mine operator for each violation of the Mine Act committed by such operator.[11] This is the primary penalty section utilized under the Mine Act. Section 110(b) allows the Secretary of Labor to assess a discretionary penalty of not more than $1,000 per day against an operator who fails to correct a violation within the period permitted.[12] To date, this provision has been employed rarely because most violations are promptly abated. Further, in those instances where the hazard has not been corrected, an order of withdrawal is issued directing that all persons are to be removed from the affected area and prohibiting them from returning until a federal mine inspector determines that the violation has been abated.[13] Therefore, the length of time that the condition remains uncorrected is normally not relevant so long as miners are not exposed to the hazard. The primary benefit of the 110(b) penalty from an enforcement standpoint is in those few instances where a withdrawal order is ineffective, e.g., operating in defiance a withdrawal order. Finally, section 110(g) imposes a fine not to exceed a $250.00 against any miner who willfully violates any mandatory safety standard related to smoking materials.[14] In addition to these civil penalties, there are five criminal penalty provisions in section 110.[15]

B. *Criminal Penalty Provisions*

1. Willful Violations—Section 110(d)

The Mine Act provides a criminal penalty for mine operators willfully violating mandatory health and safety standards.[16] Specifically, section 110(d) states:

> Any operator who willfully violates a mandatory health or safety standard, or

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Amendments Act of 1977. Future references will be made to the Mine Act and the reader is reminded that the Mine Act encompasses both statutory enactments.

[9] 30 U.S.C. § 820 (Supp. IV 1980).

[10] *Id.* at §§ 820(a), 820(b), 820(g).

[11] *Id.* at § 820(a).

[12] *Id.* at § 820(b).

[13] *Id.* at § 814(b) (Supp. V 1981).

[14] *Id.* at § 820(g).

[15] *Id.* at §§ 820(c), 820(d), 820(e), 820(f), 820(g) (Supp. V 1981).

[16] *Id.* at § 820(d) (Supp. V 1981).

> knowingly violates or fails or refuses to comply with any order issued under Section 104 and Section 107, or any order incorporated in a final decision issued under this title, except an order incorporated in a decision under subsection (a) or Section 105(c), shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this Act, punishment shall be by a fine of not more than $50,000, or by imprisonment for not more than five years or both.[17]

In determining whether possible sanctions should be imposed pursuant to this provision of the Mine Act, two factors are considered. First, the agency must conclude that there has been a violation of a mandatory health or safety standard.[18] Title 30 of the Code of Federal Regulations sets forth the rules which govern health and safety matters in the mining industry.[19] These rules involve two different kinds of requirements; mandatory standards and regulations. Mandatory standards must be promulgated pursuant to the provisions of section 101 of the Mine Act,[20] while regulations are promulgated pursuant to section 508.[21] As a result, many of these rules are not mandatory health and safety standards and subsequently, a failure to comply with these rules would not be subject to 110(d) sanctions. Many of the regulations promulgated under Mine Act, for example, involve such items as approval of mine equipment and supplies to be used underground;[22] reporting requirements relating to accidents, injuries, illnesses, employment and production in the mines;[23] rules for processing requests for modifications to safety standards;[24] and procedures for handling hazardous condition complaints.[25] As a general rule, only those matters involving alleged violations of Part 48 (Health and Safety Training);[26] Parts 55, 56, and 57 (Mandatory Health and Safety Standards for Metal and Nonmetal Mines);[27] and Parts 70, 71, 75, 77 and 90 (Mandatory Health and Safety Standards for Coal Mines)[28] of the Code of Federal Regulation are considered for possible prosecution under section 110(d).[29] Section 110(d) applies

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[17] *Id.*

[18] *Id.* This would not be the case if the matter involved the failure to comply with an order issued under the Mine Act. Past experience demonstrates, however, that most section 110(d) criminal and civil investigations involve violations of standards, not the failure to comply with an order.

Section 3(l) of the Mine Act defines mandatory standards as the interim standards set out in the Act and any improved standard promulgated under section 101 of the Mine Act. Mine Act § 3(l), 30 U.S.C. § 802(l) (Supp. IV 1980).

[19] 30 C.F.R. §§ 1.1-100.8 (1982).

[20] 30 U.S.C. § 811 (Supp. IV 1980).

[21] *Id.* at § 957.

[22] 30 C.F.R. §§ 31.1-36.50 (1982) (regulations for tesing the suitability of mechanical equipment for use in mines); 30 C.F.R. §§ 18.1-.99 (1982) (regulations for testing the permissibility of using various electrical equipment in the mines); 30 C.F.R. §§ 15.1-.24 (1982) (regulations for testing permissibility and suitability of the use of explosives and related articles in mines).

[23] 30 C.F.R. §§ 50.1-.41 (1982).

[24] *Id.* at §§ 44.1-.52.

[25] *Id.* at §§ 43.1-.8.

[26] *Id.* at §§ 48.1-.32.

[27] *Id.* at §§ 55.1-57.26.

[28] *Id.* at §§ 70.1-.805, 71.1-.805, 75.1-.1808, 77.1-.1916, 90.1-.220.

[29] These Parts of the Code of Federal Regulations basically codify Titles II and III of the

to all such standards whether they were statutorally enacted or promulgated through the rulemaking procedures of the Mine Act.

Section 110(d) sanctions can also be applied to operators who fail to comply with the provisions of certain plans they are required to adopt under the statute or rules. In particular, operators are required under the Mine Act to develop detailed plans dealing with such items as roof control and mine ventilation.[30] These plans specify the procedures to be followed in the mine when dealing with a particular health or safety matter. Congress required the development of these plans in the interim safety and health standards that were enacted in the 1969 Coal Act because of their concern that they could not adopt regulations which would deal with all the various hazards that might be found in a particular mine.[31] Once the plan is submitted by the operator and approved by MSHA, that plan is enforced as though it were a mandatory safety standard.[32] During the past three years, numerous mine operators have been criminally prosecuted for willfully failing to comply with their own plan.[33]

In determining whether to pursue criminal sanctions for violations of mandatory health or safety standards, consideration is also given as to whether the alleged violation involves a coal standard promulgated by the Secretary of Interior under the provisions of the 1969 Coal Act. Most of the existing standards currently in effect were enacted by the Congress as interim standards when the 1969 Coal Act was passed.[34] Since that time, other standards have

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Mine Act, as well as other mandatory standards promulgated pursuant to the rulemaking procedures of the Mine Act. Titles II and III of the Mine Act impose substantive requirements on the mine operator and the miners. Title II establishes minimum mandatory health standards while Title III sets the minimum mandatory safety standards. These minimum standards established in the Mine Act may not be reduced in the promulgation of regulations and as "a practical matter, all of the provisions in Titles II and III have been adopted verbatim by the agency (MSHA). . . ." M. HEENAN, UNDERSTANDING MSHA 7 (1982). Title II has been codified in 30 U.S.C. §§ 841-846 (Supp. IV 1980). Title III has been codified in 30 U.S.C. §§ 861-878 (Supp. IV 1980). Both Titles relate solely to coal mining and are applicable to all affected coal mines until they are superceded in whole or in part by improved standards promulgated by the Secretary of Labor pursuant to section 101 of the Mine Act. Mine Act § 101, 30 U.S.C. § 811 (Supp. IV 1980).

[30] *See* 30 U.S.C. §§ 862, 863 (Supp. IV 1980). In Zeigler Coal Co. v. Kleppe, the Court of Appeals for the District of Columbia sustained the government's position that approved operator plans were mandatory standards and thus subject to the enforcement mechanism of the Coal Act. Zeigler Coal Co. v. Kleepe, 536 F.2d 398 (D.C. Cir. 1976).

[31] Appendix to Legislative History, 127-32; Zeigler Coal Co., 4 IBMA 30 (1975).

[32] *See supra* note 30 and accompanying text. This area is of particular interest because enforced self-regulation is a type of flexibility that some commentators have recommended when discussing new approaches to regulating industry. *See, e.g.*, Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. L. REV. 1466 (1982); M. Connerton & M. MacCarthy, *Cost Benefit Analysis and Regulation: Expressway to Reform or Blind Alley?*, NATIONAL POLICY PAPERS, Oct. 1982.

[33] *See, e.g.*, United States v. Westmorland Coal Co., No. 82-20085 (S.D.W. Va., plea entered Nov. 12, 1982); United States v. Wyatt, No. 81-00029 (W.D. Va., plea entered April 29, 1981); United States v. Vanhoose Coal Co., No. 81-4 (E.D. Ky., plea entered April 15, 1981); United States v. United Castle Coal Co., No. 80-00093 (W.D. Va., plea entered April 9, 1981); United States v. J & P Coal Co., No. 80-00060 (W.D. Va., plea entered Sept. 8, 1980).

[34] Titles II and III of the Mine Act contain these Interim Mandatory Standards. Most of these standards have been adapted verbatim in Part 30 of the Code of Federal Regulations. However,

been introduced through the formal rulemaking process outlined in section 101 of the Coal Act.[34a] Certain of these later standards have been the subject of controversy in the Federal Judiciary.

In *United States v. Finley Coal Co.*,[35] the Sixth Circuit Court of Appeals affirmed the lower court's ruling that the Department of Interior had failed to follow the specialized rule-making provisions of the 1969 Coal Act when it adopted regulations requiring that a program for regular clean-up and removal of coal and float coal dust, loose coal and other combustibles be established and maintained.[36] As a result, the court dismissed one count of a pending twenty-four count criminal indictment against the operator for willfully violating mandatory health and safety standards.[37] In issuing its ruling, the court specifically expressed no view concerning the validity of other regulations contained in Part 75 of the Code of Federal Regulations.[38] The decision is strictly limited to the standard in question and the circumstances surrounding its promulgation. No other standard has since been successfully attacked on the basis of the *Finley* rationale. However, some United States Attorneys have expressed concern over prosecuting cases involving violations of standards that were similarly promulgated during that time frame. Accordingly, this issue may become a factor in certain areas in determining whether to prosecute certain violations.

The Mine Safety and Health Administration (MSHA) views the *Finley* decision as having limited applicability. The agency's position is based on two major points. First, the court found that the promulgated regulation in question went beyond the interim standard codified in Title III of the Coal Act and thereby amended and revised the interm standard.[39] MSHA had contended that the requirement to clean-up accumulations of loose coal and coal dust inferred and anticipated a clean-up program. The *Finley* court disagreed.[40] In most instances, regulations adopted by the MSHA during that time period did not have this effect, but were clearly designed to implement interim standards as expressly authorized by section 301(d) of the Coal Act.[41] As such, they are not subject to the defect found in *Finley*. Second, with knowledge of the *Finley* ruling, the Secretaries of Interior and Labor have been careful to avoid any possible problems in promulgating standards subsequent to the *Finley* decision.

The second factor to be considered in determining whether to impose sanctions under section 110(d) is whether there is any evidence that the viola-

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the Secretary of Labor has promulgated some new mandatory standards. *See supra* note 29.

[34a] *See* 30 U.S.C. § 811(a) (Supp. IV 1980).

[35] 493 F.2d 285 (6th Cir.), *cert. denied*, 419 U.S. 1089 (1974).

[36] *Id.* at 291. The regulations in question in the *Finley* case are codified at 30 C.F.R. § 75.400 (1982).

[37] *Id.* at 286.

[38] *Id.* at 291 n.6.

[39] 493 F.2d at 290.

[40] *Id.* at 288.

[41] *See* 30 U.S.C. § 861(d) (1976).

tion was willfully committed.[42] The Sixth Circuit Court of Appeals has defined "willful" as "the failure to comply with a mandatory health or safety standard . . . if done knowingly and purposely by a mine operator who, having a free will or choice, either intentionally disobeys the standard or recklessly disregards its requirements."[43]

It is important to note in discussing willful violations that section 110(d) sanctions can be brought only against the mine operator.[44] Although the operator alone is subject to criminal action under this section, willfulness can be imputed to the operator through the actions of its agents, if such agents are acting within the scope of their express or apparent authority.[45] Express authority is that specifically given to the agent by his superiors, while[46] apparent authority is that which outsiders would normally assume that the agent would possess judging from his position with the operator and the circumstances surrounding the agent's past conduct.[47] When an agent's criminal conduct is within the scope of his apparent authority, the operator may be held legally responsible even if such conduct is contrary to actual instructions.[48] As Chief Judge Cardozo stated in the leading case of *People v. Sheffield Farms-Slawson-Decker Co.*:[49]

> The employer does not rid himself of that duty because the extent of the business may preclude his personal supervision, and compel reliance on subordinates. He must then stand or fall with those whom he selects to act for him. He is in the same plight, if they are delinquent, as if he had failed to abate a nuisance on his land. It is not an instance of respondent-superior; it is a case of the non-performance of a non-delegable duty.

For the purpose of the Mine Act, an operator is defined in section 3(e) as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construc-

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[42] *See supra* note 17 and accompanying text.

[43] United States v. Consolidated Coal Co., 504 F.2d 1330, 1335 (6th Cir. 1974).

[44] *See* 30 U.S.C. § 820(d) (Supp. IV 1980).

[45] *See, e.g.*, United States v. Consolidated Coal Co., 504 F.2d 1330 (6th Cir. 1974). In this case, Consolidated Coal Company and Donald M. Kidd (foreman) were tried jointly and convicted by jury trial in the district court for violating two Interim Mandatory Safety Standards embodied in section 862(a) (roof support standards). Consolidated was charged in counts I and II for willfully failing to properly support a roof and for willfully failing to adopt a suitable roof control plan. Donald Kidd was charged in counts III and IV for knowingly carrying out and authorizing the violations charged to Consolidated in counts I and II. Thus, defendant Kidd was charged individually and Consolidated was deemed responsible for the violations by Kidd because his actions were imputed to the company due to his representative status. *Id.* at 1331-32.

The court of appeals reversed the district court for two reasons. First, the court of appeals felt that the district court's jury instruction defining willfullness for the purpose of criminal sanction was inappropriate. Second, the court held that the evidence failed to show defendant Kidd knowingly authorized or ordered the violations alleged in counts I and II.

[46] *See* RESTATEMENT (SECOND) OF AGENCY § 7 comment c (1958).

[47] *Id.* at § 8 comment a.

[48] *See, e.g.*, New York Central & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909); Continental Baking Co. v. United States, 281 F.2d 137 (6th Cir. 1960); United States v. George F. Fish, Inc., 154 F.2d 798, 801 (2d Cir.), *cert. denied*, 328 U.S. 869 (1946).

[49] 121 N.E. 474, 476 (N.Y. 1918).

tion at such mine."[50] An agent is defined as "any person charged with responsibility for the operation of all or part of a coal or other mine."[51] Historically, MSHA has established that occupations such as firebosses, section foremen, safety inspectors, and dust technicians are agents within that definition. Thus, a mine operator is responsible for the actions of its employee in contravention of mandatory safety and health standards when such employee is acting within the express or apparent scope of his delegated authority to operate the mine operator's mine. Prior to leaving this discussion of section 110, it should be noted that the scope of this article is limited solely to the criminal provisions of the Mine Act. Accordingly, the observation that only the mine operator can be charged with a violation of this section is made. All persons involved in the industry should be aware, however, that anyone can be liable for a violation of any criminal law of the United States as an aider or abettor of the person or entity legally liable under the statute.[52]

2. Agent Cases—Section 110(c)

In the previous discussion of section 110(d), it was noted that while the express or implied authority of agents could subject a mine operator to criminal sanctions, the actual imposition of any penalty was limited to the operator.[53] The same is generally true with regard to the assessment of the civil penalty under section 110(a).[54] In other words, only operators are subject to the monetary penalty of up to $10,000 for each violation of the Act.[55]

In section 110(c), however, Congress produced a major exception to this general philosophy of holding only the operators liable.[56] Section 110(c) states:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).[57]

Congress, in enacting the 1969 Coal Act, was concerned that corporations may isolate certain individuals from liability.[58] Accordingly, Congress enacted this relatively unique provision which allows the federal government to pierce the

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[50] 30 U.S.C. § 802(d) (Supp. IV 1980).

[51] *Id.* at § 802(e).

[52] 18 U.S.C. § 2 (1976).

[53] *See supra* note 44 and accompanying text. *See also* 30 U.S.C. § 820(d) (Supp. IV 1980).

[54] 30 U.S.C. § 820(a) (Supp. IV 1980). Section 820(a) relates that "[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard . . . shall be assessed a penalty by the Secretary which penalty shall not be more than $10,000 for each such violation." This section refers exclusively to the operator.

[55] *Id.*

[56] *Id.* at § 820(c).

[57] *Id.*

[58] S. REP. No. 411, 91st Cong., 1st Sess. 39 (1969).

corporate veil and directly assess civil and/or criminal penalties against certain agents, officers, and directors of corporations. This provision of the Mine Act applies only to those operators that have incorporated.[59] It is not applicable to sole proprietorships or to partnerships.[60] Simply stated, if it can be demonstrated that an officer, agent, or director of a corporation either authorized, ordered, or carried out a violation of a mandatory health or safety standard or a violation of the Mine Act, the government can assess a civil penalty directly against that agent, officer, or director,[61] or can seek to apply the criminal sanctions in section 110(d) against that individual.[62] These penalties are normally in addition to the actions taken against the operator.

This provision allowing direct sanction of corporate officers or agents has recently come under constitutional attack. In October of 1982, the Sixth Circuit Court of Appeals upheld the constitutionality of this provision in *Richardson v. Secretary of Labor*.[63] The defendant in *Richardson* was employed by Peabody Coal Company (a corporation) as a master mechanic. In the course of repairing certain strip-mining equipment, one worker was killed. As the result of a special investigation into the accident, the Secretary of Labor concluded that Mr. Richardson had knowingly violated a mandatory safety standard and proposed to assess an individual civil penalty against him in the amount of $500.00.[64]

Mr. Richardson challenged the constitutionality of section 110(c) on the basis that the distinction between agents of corporate operators and agents of non-corporate operators violated the equal protection clause of the fifth amendment.[65] In upholding the constitutionality of the provision, the court stated:

> The legislative intent . . . was to assure that the decision-makers responsible for illegal acts of corporate operators would also be held personally liable for violations. S. Rep. No. 411, 91st Cong., 1st Sess. 39 (1969). In a practical sense, any non-corporate mining operation is going to be relatively small, and the probability is that the decision-maker is going to fit the statutory definition of "operator." In a larger, corporate structure, the decision-maker may have authority over only a part of the mining operation. [Section 110(c)] assures that this makes him no less liable for his actions.
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> In a noncorporate structure, the sole proprietor or partners are personally liable as "operators" for violations; they cannot pass off these penalties as a cost of doing business as a corporation can. Therefore, the noncorporate operator has a greater incentive to make certain that his employees do not violate

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[59] 30 U.S.C. § 819(c) (1976) as amended in 30 U.S.C. § 820(c) (Supp. IV 1980). This section refers exclusively to "corporate operator" and "any director, officer, or agent of such corporation" as the responsible parties in connection with section 110(c) liability.

[60] *Id.*

[61] *Id.*

[62] *See supra* notes 16-51 and accompanying text.

[63] 689 F.2d at 632 (6th Cir. 1982).

[64] *Id.* at 634. The court affirmed both the ALJ's finding that the plaintiff had violated a mandatory safety standard and the subsequent fine of $500.00. If the Department of Justice had determined that the violation was willfull, criminal action may have been brought.

[65] *Id.* at 633.

> mandatory health or safety standards than does the corporate operator. [Section 110(c)] attempts to correct this imbalance by giving the corporate employee a direct incentive to comply with the Act. *See Cowin & Co. v. Federal Mine Safety & Health Review Commission,* 612 F.2d 838 (4th Cir. 1979).[66]

Although section 110(c) has survived constitutional challenge, it has encountered additional problems. Unfortunately, in drafting section 110(c) Congress used the terms knowingly and willfully interchangeably.[67] Further, section 110(c) provides for both civil and criminal penalties.[68] Because of the inherent distinction between criminal and civil violations, there has been some confusion as to the type of conduct that would result in criminal sanctions as opposed to that which would involve civil penalties.[69] The agency's position has been to recommend imposing criminal sanctions under section 110(c) if the conduct of the agent, officer or director was willfull. As in section 110(d), willfullness is defined with respect to section 110(c) as that which occurs when one "intentionally disobeys the [mandatory] standard or recklessly disregards its requirements."[70]

In the event a determination is made not to proceed criminally, but rather to impose a civil penalty against an individual, the government would still have to demonstrate that the agent, officer, or director *knowingly* authorized, directed, or carried out the violation.[71] The term knowingly as used in the Act has been defined as follows:

> [T]he term "knowingly" as used in the Act . . . does not have any meaning of bad faith of 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.[72]

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[66] *Id.* at 633-34.

[67] 30 U.S.C. § 820(c) refers only to knowing but references § 820(d) willful violations. *See* 30 U.S.C. § 820(c) (Supp. IV 1980).

[68] *See supra* note 57 and accompanying text.

[69] *See, e.g.,* United States v. Consolidated Coal Co., 504 F.2d 1330, 1335-36 (6th Cir. 1974). The *Consolidated* Court explained the necessity of distinguishing between conduct establishing criminal liability and that leading to civil liability. The Court stated:

> Since Congress provided both a civil penalty and a criminal liability for violations of mine safety standards, it considered that such violations could have very serious results. Consequently there should be a very clear distinction between the type of violation that would incur only a civil penalty and one that would rise to criminal liability. Obviously, it was not intended that such a violation as would give rise to a civil penalty should be alternatively a criminal offense. The statute uses the term "willfully violates." We are of the opinion that this would contemplate an affirmative act either of commission, or omission, not merely the careless omission of a duty.
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> The instruction on willfulness as given was not a sufficiently clear definition of the crime contemplated by the statute.

[70] United States v. Consolidated Coal Co., 504 F.2d 1330, 1335 (6th Cir. 1974).

[71] 30 U.S.C. § 820(c) (Supp. IV 1980).

[72] Richardson, 4 FMSHRCD 874 (July 12, 1979). Mr. Richardson was deemed responsible for failing to keep a piece of equipment in safe operating order. The boom of the particular machine collapsed during repairs, killing one welder and injuring others. Defendant Richardson was charged as an agent of an operator who "knowingly authorized, ordered or carried out" violations of the

To establish that a violation was "knowingly authorized, directed or carried out," the plaintiff must establish this element by a preponderance of the evidence.[73]

3. False Reporting—Section 110(f)

A third criminal penalty provision in the Mine Act is embodied in section 110(f).[74] This section is designed to prevent the falsification of reports and other written materials required to be maintained by the Mine Act.[75] Specifically, section 110(f) reads:

> Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Act shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than five years, or both.[76]

It should be noted that section 110(f) is one of two provisions in the Mine Act solely involving felony sanctions.[77] The other provision deals with distributing unapproved equipment into commerce and will be discussed later.[78] In this regard, it should be recognized that any operator who is convicted more than once of violating section 110(d) will also face felony consequences.[79]

From a health and safety standpoint, section 110(f) is very significant because many of the requirements of the Mine Act and the accompanying regulations rely heavily upon operator-certified programs. For example, operators are required to sample coal mine respirable dust levels at periodic intervals and submit those samples to the federal government for analysis.[80] Likewise, they are required to periodically sample and report noise readings[81] and to conduct safety training programs and certify that such safety programs were in fact given.[82] As with most programs of this type, the potential for abuse can be high. Accordingly, the government has placed a high priority on investigating and prosecuting cases that involve falsification of records associated with the dust, noise and training requirements. Moreover, experience to date indicates

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Act.

[73] *See* 5 U.S.C. §§ 556, 557 (1976).

[74] 30 U.S.C. § 820(f) (Supp. IV 1980).

[75] *Id.*

[76] *Id. See, e.g.*, United States v. Westmoreland Coal Co., No. 82-20085 (S.D.W. Va. 1981). In *Westmoreland*, the operator agreed to pay over one million dollars in fines after entering a pre-indictment plea agreement with the United States Attorney's Office. The company was charged with 5 felonies and 11 misdemeanors. Included among the charges were several counts of knowingly making false enteries in methane and ventilation examination books and on mine maps.

[77] The second provision is codified in 30 U.S.C. § 820(h) (Supp. IV 1980). Section 820(h) makes it a felony to distribute mining equipment that does not comply with requirements in the Mine Act.

[78] *See infra* notes 96-101 and accompanying text.

[79] *See supra* note 17 and accompanying text.

[80] *See* 30 U.S.C. § 842(a) (Supp. IV 1980); 30 C.F.R. §§ 70.100-.220, 71.100-.220 (1982).

[81] *See* 30 U.S.C. § 846 (1976); 30 C.F.R. §§ 70.500-.511, 71.800-.805 (1982).

[82] *See* 30 U.S.C. § 825 (Supp. IV 1980); 30 C.F.R. §§ 48.1-.32 (1982).

that the potential for successful prosecution in such cases is extremely high. This likelihood of success is due in part to the substantial probability of employees reporting such violators to the government.[83] The success in cases of this nature is due primarily to the fact that in most instances not only are the operators or their agents required to certify that the sampling or training was given, but the miner involved must also verify that such activity was undertaken.[84] From an agency standpoint, it must be emphasized that violations of this type are normally flagrant and are actively pursued.

Application of section 110(f) is not limited solely to the three areas discussed above. Rather, the provision relates to the falsification of any report that is required to be maintained under the Mine Act or its accompanying regulations.[85] This encompasses reports required to be filed under Part 50 of Title 30 of the Code of Federal Regulations;[86] preshift and onshift books required under Part 75 of Title 30;[87] and, legal identity reports required under Part 41 of Title 30.[87a] In this connection, it should be noted that in addition to prosecuting persons under section 110(f) of the Act, United States Attorneys have also successfully prosecuted these types of violations by utilizing the general fraud provisions of Title 18 of the United States Code.[88]

In the discussion above of section 110(c) and 110(d), it was observed that those provisions were only applicable to operators and, in the case of corporations, to agents, officers and directors of those corporations.[89] The sanctions imposed under section 110(f), however, are applicable to any person who knowingly makes a false report including independent contractors providing services to mine operators, miners, and the public.[90]

4. Other Criminal Penalties Under the Mine Act

There are two remaining criminal penalty provisions under the Mine Act, section 110(e) and section 110(h).[91] Section 110(e) makes it a misdemeanor of-

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[83] *See supra* note 6.

[84] The miner is required to sign his training certificate. This verifies whether the operator in fact trained the miner. *See* MSHA form 5000-23.

[85] 30 U.S.C. § 820(f) (Supp. IV 1980). *See supra* note 76 and accompanying text.

[86] *See* 30 C.F.R. §§ 50.1, 50.20-.41 (1982).

[87] *Id.* at § 75.1802.

[87a] *Id.* at § 41.20.

[88] 18 U.S.C. § 1001 (1976). *See, e.g.*, United States v. B & W Coal Co., No. 81-00106-A (W.D. Va., plea entered Feb. 28, 1982); United States v. Triangle Research Corp., No. 81-00063 (W.D. Va., convicted Jan. 11, 1982); United States v. Clinchfield Coal Co., No. 80-00088 (W.D. Va., plea entered Dec. 4, 1980); United States v. Westmoreland Coal Co., No.80-50012 (S.D. W. Va., plea entered Oct. 16, 1980).

[89] *See supra* notes 44, 53-66 and accompanying text.

[90] 30 U.S.C. § 820(f) (Supp. IV 1980). *See supra* note 76 and accompanying text. Section 820(f) applies to "whoever knowingly makes any false statement" and thus explicitly applies to anyone making false statements or reports.

[91] *Id.* at §§ 820(e), 820(h). Section 820(e) states:

> Unless otherwise authorized by the Act, any person who gives advance notice of any inspection to be conducted under this Act shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or both.

fense for any person to give advance notice of an impending federal health and safety inspection.[92] This is the only section 110 criminal violation which is not investigated by the special investigators in the various districts.[93] When such allegations arise, MSHA's policy requires that they be forwarded directly to the headquarters office.[94] This policy was adopted because these allegations may involve MSHA's personnel and the agency is strongly opposed to special investigators reviewing the conduct of their co-workers. If a determination is made to investigate the matter, it will be conducted by MSHA's headquarters internal affairs group.[95]

The purpose of section 110(e) is to prevent any person from deliberately notifying the operator of an inspection and thus allow the operator time to correct violations prior to the inspector's arrival. This does not mean, however, that every time an operator is aware that an inspection is forthcoming there will be violation of this section of the Mine Act. In the normal course of inspecting mines there will be times when the operator will know that an inspector is scheduled to be present at the mine. Moreover, there may be times when it is, in fact, necessary to notify the operator that an inspection is planned. For example, if an operator has been given five days to abate a violation which was cited in an inspection, it is reasonable for the operator to expect that the inspector will return on the fifth day to determine if the condition has been corrected. Likewise, if an inspection is planned which requires that the mine be shut down, (e.g., an inspection of the main power supply) the inspector may arrange to conduct the examination at a time when no miners are underground.

The fifth and final provision, section 110(h), makes it a felony for anyone to sell or distribute mining equipment which purports to comply with the requirements of the Mine Act, but which does not conform to the Act.[96] MSHA has several regulations which require that mining equipment and supplies be tested and certified prior to being used underground.[97] These requirements re-

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Section 820(h) states:

> Whoever knowingly distributes, sells, offers for sale, introduces, or delivers in commerce any equipment for use in a coal or other mine, including, but not limited to, components and accessories of such equipment, which is represented as complying with the provisions of this Act, or with any specification or regulation of the Secretary applicable to such equipment, and which does not so comply, shall upon conviction, be subject to the same fine and imprisonment that may be imposed upon a person under subsection (f) of this section.

[92] *Id.* at § 820(e).

[93] *See infra* notes 102-139 and accompanying text for an explanation of the special investigation process. *See* MINE SAFETY AND HEALTH ADMINISTRATION, SPECIAL INVESTIGATIONS FIELD OPERATIONS MANUAL, 05-4 (1981).

[94] *Id.* at 05-4.

[95] *Id.*

[96] 30 U.S.C. § 820(h) (Supp. IV 1980).

[97] *See, e.g.*, 30 C.F.R. §§ 11.1-.208 (1982) (regulations requiring pre-testing and certification of respirators prior to use in mines); 30 C.F.R. §§ 15.1-.24 (1982) (regulations for certification of explosives required prior to use in mines); 30 C.F.R. §§ 18.1-.99 (1982) (regulations dealing with approval of electrical euqipment, lamps and methane detectors for use in the mines).

late to such items as permissible explosives,[98] intrinsically safe electrical equipment,[99] and flammability of materials.[100] Any manufacturer or supplier who represents that an item of mining equipment has been so tested and certified when it has not been, is subject to the possibility of being criminally charged under this section.[101]

In summary, there are five basic criminal provisions. MSHA is charged with the responsibility of investigating the possible violation of these five sections. An analysis of MSHA's enforcement process will be useful to an understanding of the possible implications of the criminal sanctions codified in the Mine Act.

II. MSHA Investigative Policies and Procedures

Internally, the Mine Safety and Health Administration (MSHA) is divided into two major program areas: one is responsible for Coal Mine Safety and Health[102] and the other is responsible for Metal and Non-metal Mine Safety and Health.[103] Each of these major program areas have headquarters and field personnel who are concerned with special investigations.[104] For example, within Coal Mine Safety and Health there are approximately forty special investigators, all of whom are authorized to conduct special investigations under the Act. These special investigators are coal mine inspectors who have been given specialized training in investigative procedures. These special investigators run the special investigations program which encompasses all matters involving willful violations, agent cases and complaints filed pursuant to section 105(c).[105]

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[98] *Id.* at §§ 15.1-.24.

[99] *Id.* at §§ 18.1-.20.14.

[100] *Id.* at §§ 16.1-.18.

[101] 30 U.S.C. § 820(h) (Supp. IV 1980). Section 820(h) explains that "upon conviction, [the defendant will] be subject to the same fine and imprisonment that may be imposed upon a person under subsection [820(f)] of this section." The criminal sanctions for making false statements and reports are codified in section 820(f). *See supra* notes 74-90 and accompanying text. *See, e.g.*, United States v. Commonwealth Bolt Co., No. 79-00114-R (W.D. Va., plea entered Nov. 13, 1979). In *Commonwealth*, two federal inspectors found a large supply of roof bolts that were labeled as being 36 inches. However, the bolts were actually just 12 inches. Following a special investigation, the manufacturer was charged with violating section 110(h). On November 13, 1979, the manufacturer waived indictment and plead guilty to two felony counts for knowingly manufacturing and selling roof bolts 24 inches shorter than required by federal law.

[102] *See* [Reference File] M.S.H. Rep. (BNA) 21:1201 (1982); M. Heenan, Understanding MSHA 11-20 (1982) [hereinafter referred to as Understanding MSHA].

[103] *Id.*

[104] *See* Mine Safety and Health Administration, Special Investigations Field Operations Manual, 01-3 (1981). Understanding MSHA at 31. For the most part, policies and practices within the special investigations units are the same. However, there are some minor differences. This section of the article only describes special investigation in the Coal Mine Safety and Health program area.

[105] Mine Safety and Health Administration, Special Investigations Field Operations Manual, at chs. 05, 06 (1981) [hereinafter cited as Field Manual]. Section 105(c) allows miners, representatives of miners, and applicants for employment to file a complaint with the Secretary of Labor if they believe they have been discriminated against for exercising rights granted them under the Act. The Secretary has 90 days to investigate these complaints and to determine if the

A. *Authority and Purpose of Special Investigations*

The authority for MSHA to conduct criminal investigations is derived from section 302(a) of the Mine Act.[106] That section authorizes the Assistant Secretary for MSHA to carry out all functions of the Mine Act except those specifically directed elsewhere.[107] The Assistant Secretary has subsequently delegated authority to the two respective administrators for the major program areas to conduct special investigations.

It should be emphasized that a special investigation by MSHA is primarily an initial factfinding effort focused on a particular event. The purpose is to provide an in-depth analysis of certain occurrences for the express purpose of determining whether the operator should be prosecuted criminally, or whether any individual should be assessed a civil penalty or be subjected to criminal prosecution.[108] The fundamental and most important task of the special investigator is to gather facts, facts which may be used to fully evaluate the circumstances involved in a particular situation and, where applicable, facts which may be used as evidence if it is subsequently determined a violation of the Mine Act occurred. These factfinding efforts are particularly important in mine disasters where congressional and public attention is focused on the occurrence and the potential for third party tort action is likely.

Because of the possible serious consequences that can arise from a special investigation, the program also serves the purpose of heightening the awareness of sanctions and the importance of complying with the law. Moreover, a special investigation demonstrates the commitment the Mine Safety and Health Administration has to improving health and safety in the mines.

B. *Authorizing Special Investigations*

There are ten district managers in MSHA having jurisdiction over various portions of the United States.[109] These managers are responsible for carrying out nearly all aspects of the Act including inspections, education and training,

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Department should file a complaint on the miners' behalf before the Federal Mine Safety and Health Review Commission. (codified at 30 U.S.C. § 815(c) (Supp. IV 1980)).

[106] Section 302(a) states:

> There is established in the Department of Labor a Mine Safety and Health Administration to be headed by an Assistant Secretary of Labor for Mine Safety and Health appointed by the President, by and with the advice and consent of the Senate. The Secretary, acting through the Assistant Secretary for Mine Safety and Health, shall have authority to appoint, subject to the civil service laws, such officers and employees as he may deem necessary for the administration of this Act, and to prescribe powers, duties, and responsibilities of all officers and employees engaged in the administration of this Act. The Secretary is authorized and directed, except as specifically provided otherwise to carry out his functions under the Federal Mine Safety and Health Act of 1977 through the Mine Safety and Health Administration. (codified at 29 U.S.C. § 557(a) (Supp. IV 1980)).

[107] *Id.*

[108] FIELD MANUAL at 05-1.

[109] *See* [Reference File] M.S.H. REP. (BNA) 21:1203-04 (1982).

health and safety conferences, and investigations.[110] District managers are also responsible for making the actual decision to conduct a special investigation.[111]

There are three basic ways in which a particular violation or incident can become the subject of a special investigation. First, MSHA's Field Operations Manual requires that special investigators accompany all fatal accident investigation teams.[112] The investigator's function is to observe all pertinent conditions and monitor all statements.[113] If during the course of monitoring the accident investigation, the special investigator finds, and the district manager concurs, that a possible violation of section 110 may have occurred, a special investigation may be initiated.[114] Second, special investigators are required to review independently all serious violations that are cited by mine inspection personnel.[115] Based on that review, the special investigator may request authority from the district manager to open an investigation.[116] Finally, a special investigation can be initiated based on either written or oral complaints.[117] Historically, these complaints have come from inspectors, supervisors, miners and the general public.

In determining which violations or instances should actually result in a special investigation, serious consideration is given to the overall impact the activity can have on the general health and safety in the mining community.[118] Once a determination has been made that a special investigation should be initiated, the special investigator is required to assign the matter a case control number.[119] The investigation itself is then initiated.[120]

C. *Conduct of Investigations*

The MSHA special investigations normally involve three major activities: an evaluation of the physical situs where a possible violation occurred;[121] a review of appropriate records;[122] and the interviewing of witnesses.[123]

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[110] MINE SAFETY AND HEALTH ADMINISTRATION, MANAGEMENT MANUAL (1982).

[111] *See* FIELD MANUAL at 05-5, 8.

[112] *See* FIELD MANUAL at 05.5.

[113] *Id.*

[114] *Id.* at 05-6.

[115] *Id.* at 05-7. Generally, the review would encompass withdrawal orders issued under section 107(a) (imminent danger situations) and citations and orders issued under section 104(d) (based on finding that the violation was unwarrantable). Federal Mine Safety and Health Act of 1977, §§ 107(a), 104(d), 30 U.S.C. §§ 817(a), 814 (Supp. IV 1980).

[116] FIELD MANUAL at 05-8.

[117] *Id.* at 05-4.

[118] *Id.* at 05-8.

[119] *Id.*

[120] *Id.* at 05-9.

[121] *Id.* at 05-5.

[122] *Id.* at 02-1.

[123] *Id.* at 03-2.

1. Evaluation of Physical Situs

The examination of the situs of a violation most often occurs during the course of accident investigations. This examination assists in making the determination whether to initiate a special investigation.[124] In conducting this examination, MSHA special investigators have the same authority as MSHA mine inspectors, including the right of a warrantless entry upon or through the mine and the right to examine any records required to be maintained pursuant to the Act or regulations.[125] MSHA's right to make warrantless inspections has been held constitutionally permissible because the overall mine inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant.[126] The right to warrantless inspection, however, is not entirely unfettered. Neither the Mine Act nor the accompanying regulations authorize the government to inspect or copy operator records not required to be kept under the Act without a valid search warrant.[127] However, a search warrant issued according to administrative standards is sufficient even though criminal charges may result.[128]

2. Review of Appropriate Records

While MSHA investigators do have the right to examine records required to be maintained by the Mine Act, serious questions have arisen as to the right to seize those records absent a warrant. In reversing a district court order suppressing mine records seized during the course of a rescue and recovery operation following an underground mine explosion, the Sixth Circuit Court of Appeals reasoned that the company knowingly exposed these records to public scrutiny as required by the Act, and that the company did not have a reasonable expectation of privacy.[129] The court further held that the inspector in question did not go beyond the ambit of his authority because he went only to the records in question and did not rummage or further intrude once inside the

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[124] *Id.* at 05-5.

[125] 30 U.S.C. § 813(a) (Supp. V 1981).

[126] *See* Donovan v. Dewey, 452 U.S. 594 (1981). *See also* Marshall v. Texoline Co., 612 F.2d 935 (5th Cir. 1980) (warrantless entry to gravel pit mine constitutionally permissible); Marshall v. Nolichuckey Sand Co., 606 F.2d 693 (6th Cir. 1979) (no warrant required to make routine inspections of a sand and gravel operation), *cert. denied,* 446 U.S. 908 (1980); Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3rd Cir. 1979) (right to warrantless inspection included company preparation plant), *cert. denied,* 444 U.S. 1015 (1980).

[127] Sewell Coal Co., 1 MSHC 2117 (1979). The commission held that an inspector may not examine "additional records or documents which are not required to be kept by the statute and which may not contain information not related to 30 CFR Part 50 requirements" even if some of the information in the records is related to accidents, injuries and illnesses reportable under Part 50. *Id.* at 2118.

[128] United States v. Consolidated Coal Co., 560 F.2d 214 (6th Cir. 1977), *vacated and remanded,* 436 U.S. 942 (1978), *aff'd on remand,* 579 F.2d 1011 (6th Cir. 1978), *cert. denied,* 439 U.S. 1069 (1979). The Sixth Circuit "upheld the warrants based upon 'a lesser showing of probable cause comparable to that required to obtain a warrant to perform a periodic administrative inspection of a commercial establishment.'" 579 F.2d 1012 (quoting United States v. Consolidated Coal Co., 560 F.2d 214, 218 (6th Cir. 1977)).

[129] United States v. Blue Diamond Coal Co., 667 F.2d 510 (6th Cir. 1981).

company's office.[130] The court stated:

> We need not adopt here a mode of analysis by which the constitutionality of the inspector entrance into the mine is to be judged by his purpose for entry. The inspector did not carry on an offensive search. He entered the mine office during reasonable hours and went only to areas where records were maintained in part for MESA inspection. It was an entry to which the mine operator had always consented.[131]

The court did hold, however, that the seizure was improper. Although the government argued that the exigent circumstances of the rescue and recovery operation brought the seizure within the scope of warrant exceptions, the court's rulings on warrantless entry and lack of fourth amendment protection for the records made it unnecessary for the exception question to be reached. The court refused to suppress the evidence despite the improper seizure.[132]

Absent emergency circumstances, MSHA investigators are instructed to obtain physical evidence not voluntarily released through the legal process.[133] This may be accomplished through the Office of the Solicitor or the United States Attorney's Office.[134] This use of the legal system seems most prudent in light of Judge Wiseman's concurrence in *United States v. Blue Diamond.* Judge Wiseman explained that "[g]overnment agents who might view the Court's holding as general authority for random seizures of personal property

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[130] *Id.*

[131] *Id.* at 518.

[132] *Id.* at 518-20. The court explained that as a general rule warrantless searches and seizures are viewed as *per se* unreasonable under the fourth amendment. Further, the court agreed with Blue Diamond that the records were not public property and that the records were derived from the efforts of company employees. Although the court agreed the seizure was improper, it refused to suppress the evidence. The court stated:

> This panoply of interests leads us to conclude that it was not proper for the mine inspector to have removed the records in the absence of specific consent or an administrative warrant authorizing such action. We do not feel, however, that the operator's interest in the records requires their suppression, particularly in light of the statutory regulation which applies to the coal mining industry.
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> . . . The coal operator knowingly exposes the records to public scrutiny. They are open for inspection not only by the regulatory agency, but by interested persons, a term Congress intended to broadly include the public at large. H.Rep.No. 91-563. The operator in this case does not even pretend that it intended to preserve the contents of the record books as private.

Id. at 519-20. *See, e.g.,* Mincey v. Arizona, 437 U.S. 385 (1978) (four day warrantless search of murder suspect's apartment could not be justified under the "murder scene exception"); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (warrantless search of defendant's automobile violated fourth amendment even though in some circumstances the police can seize evidence in plain view if such discovery of evidence is inadvertent); United States v. Miller, 589 F.2d 1117 (1st Cir. 1978), *cert. denied,* 440 U.S. 958 (1979) (allowing the seizure of evidence in drug related case found to be in plain view).

[133] The means that can be utilized to obtain evidence are varied. For example, a special investigator can go to the U.S. Attorney's Office to pursue a grand jury subpoena or for the purpose of obtaining a probable cause search warrant.

[134] *Id.*

that might be susceptible to warrantless inspections do so at their peril."[135]

3. Witness Interviews

The statements of witnesses are at the heart of all special investigations. When conducting these interviews, MSHA investigators are instructed to identify themselves, inform the persons they are interviewing of the purpose of the interview and notify them that the interview is entirely voluntary in nature and can be terminated at any point.[136] If, during the course of the interview, it is necessary to compel the witness to testify, MSHA investigators can turn to the Office of the Solicitor or the United States Attorney's Office for assistance.[137] Further, investigators have no authority to take individuals into custody and thus, there is no requirement to give Miranda type warnings.[138]

Most employee interviews are conducted away from mine property and the employee being interviewed is given a pledge of confidentiality which is contingent on the case not becoming involved in litigation. This pledge of confidentiality is necessary to protect the witness from retaliation, preserve the government's case, and protect the ability of the government to conduct future investigations. Interviews of company officials are handled in the same manner except they are usually conducted on mine property.

D. *The Decision to Prosecute*

Following completion of the investigation, the investigative report and accompanying case file are reviewed and analyzed by the district manager and subsequently forwarded to the appropriate program administrator.[139] Based on a joint review with the Office of the Solicitor, a decision is made to either close the case, assess an individual civil penalty against an agent, officer, or director of a corporation, or refer the matter to the Department of Justice with a recommendation that criminal action be initiated against an operator or individuals.

Where it appears that a criminal violation did occur, the district manager may request authority from the program administrator and the Office of the Solicitor to directly refer the case to the United States Attorney. Likewise, if it is determined that investigative assistance will be required to complete the investigation, the district manager may request direct assistance from the Office of the Solicitor or request authority to go directly to the United States Attorney. Investigative assistance includes such matters as obtaining subpeonas, compelling testimony, and general guidance on how the investigation should be pursued.

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[135] 667 F.2d at 521.

[136] FIELD MANUAL at 03-7.

[137] *See supra* note 133.

[138] *See* Beckwith v. United States, 425 U.S. 341 (1976) (statements made to IRS agents admissible even though no Miranda warning).

[139] FIELD MANUAL AT 08-4.

In making a final determination as to whether the agency should recommend to the Justice Department or the Office of the Solicitor that criminal sanctions be taken against an operator or agent, several factors are considered. First, a thorough review of the case file must be made to insure that the basic elements outlined in the first part of this article are present. That is, the necessary factors required to establish a violation have been established, *e.g.*, a mandatory standard was involved, the operator is a corporation, the record was required to be maintained by the operator under the Mine Act or regulations, etc.

Second, the agency will review the case file to determine if sufficient evidence exists to reach a finding that the action was taken willfully or knowingly. Finally, it would be unrealistic not to include in the evaluation such factors as the severity of the violations, the past history of the operation, the extent of any injury or illness which resulted from the violation and the recommendation of the district manager.

IV. Conclusion

The Federal Mine Safety and Health Act gives the government a wide array of tools to utilize in fostering a safer and healthier work environment for America's miners. However, the efforts of the government alone cannot insure that the goal of an injury and illness-free work place will be achieved. A conscientious effort by all parties involved to work jointly toward this objective is required. Accordingly, the major portion of the government's efforts in this area are directed at helping those mine operators and mine workers who have demonstrated through their behavior that they are committed to health and safety. Strong enforcement sanctions such as those outlined in this article should and will be applied only against those who demonstrate a lack of such commitment.

The success of the government's efforts cannot be judged solely by the number of violations cited, orders of withdrawal issued, or the number of convictions obtained. It must be reflected by a reduction in the number of deaths, injuries and illnesses among miners.