



CONN MACIEL CAREY

Toolkit: Prepare for and Manage MSHA Inspections

The Mine Safety and Health Administration (MSHA) has warrantless search authority to conduct workplace inspections and issue citations against employers found in violation of safety and health standards. The Agency is required to conduct at least two inspections per year at surface mining operations, and at least four inspections per year at underground mines, although these are often the starting point for MSHA visits. MSHA gathers virtually all of its "discovery" during inspections, taking photographs and maintaining general field notes of observations and statements from employees. Therefore, it is critical for employers to prepare, assert their rights, and manage the flow of information during inspections.

MSHA has increased enforcement to levels never seen before, from more compliance inspections to higher civil penalties, more citations characterized as "Significant & Substantial" (S&S) and/or "104(d) unwarrantable failure" and more civil and criminal investigations into individual company agents of management. MSHA has also introduced more aggressive strategies during inspections conducted pursuant to the Mine Safety and Health Act of 1977, creating a challenges for all production operators and independent contractors. The consequences for being caught ill-prepared for an MSHA inspection are more dire now than ever.

This MSHA Inspection Toolkit is a guide for employers to prepare in advance for MSHA inspections, and once an inspection begins, to manage it to a successful outcome. The Toolkit highlights key issues, such as employers', employees' and MSHA's inspection rights, the various stages of MSHA inspections, and tips and strategies for how best to manage each stage. This MSHA Inspection Toolkit reflects the collective experience of Conn Maciel Carey's national MSHA • Workplace Safety Practice Group, which has counseled and assisted clients nationwide through countless of MSHA inspections. The Toolkit provides tips and suggestions, but does not proscribe a one-size-fits-all approach to all MSHA inspections.

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Prepare for an MSHA Inspection

DEVELOP AND IMPLEMENT A COMPREHENSIVE SAFETY AND HEALTH PROGRAM

- Develop written safety policies that are current, accurate, site-specific and fully compliant.
- Ensure your written safety policies are implemented in the field as written.
- Develop a program for employees to report injuries and safety concerns.
- Establish a Safety Committee that includes both employer and employee representatives, to:
 - evaluate safety programs as written and implemented;
 - audit the workplace for potential hazards; and
 - review and discuss workplace incidents and near misses.
- Review mine inspection and enforcement history on MSHA Mine Data Retrieval System to evaluate trends from prior inspections.

AUDIT THE WORKPLACE FOR SAFETY ISSUES AND COMPLIANCE WITH SAFETY POLICIES

- Audits, whether conducted by the Safety Committee, safety or operational managers, or third party safety consultants or counsel, should be conducted at the direction of in-house or outside legal counsel to protect the audit findings under the attorney-client privilege, whenever possible.
- Review prior safety audits and audit recommendations have been addressed and documented, and problem areas are not ongoing concerns.
- Ensure new audit recommendations are addressed and the steps taken to address the recommendations are

TRAIN STAFF

Understand the MSHA Basics

Employers' representatives need to understand:

- MSHA standards applicable to the employer's mining process and workplace.
- Enforcement initiatives from MSHA and each specific mining operations MSHA enforcement history for at least the past two years.
- The employer's safety and health programs and procedures.

Employers' MSHA Inspection Rights

Employers should understand that they have a right to:

- An Opening Conference (see Opening Conference, page 5).
- A copy of formal employee complaint, if applicable.
- The opportunity to escort the MSHA inspector, a/k/a the Authorized Representative (AR) during inspections of the workplace, often referred to as the "walkaround rights" (see Walkaround Inspection, page 6).
- Participate in management employee interviews (see Employee Interviews, page 7).
- Protect trade secret and confidential business information from public disclosure by MSHA after the inspection.
- A Closing Conference (see Closing Conference, page 8).
- Contest alleged violations and citations (see Post-Citations Considerations, page 8).

Employees' MSHA Inspection Rights

Employers should understand that their employees have a right to:

- File a safety or health complaint with MSHA.
- Participate in the MSHA inspection process, including designated miners' representative participation in:
 - Opening Conferences;
 - Request to join in AR walkaround inspection;
 - Private interviews with MSHA;
 - Closing Conferences; and
 - Informal Settlement Conferences.
- Receive all necessary and appropriate training or retraining.
- The right to refuse to work under conditions an employee believes to be unsafe.
- Protection from retaliation and discrimination for exercising these rights, and interference by an employer to prevent an employee from exercising these rights.

MSHA's Inspection Rights

Employers should understand that MSHA has rights during inspections, including the right to:

- Utilize warrantless search authority, under the Mine Act of 1977, to conduct inspections of a mine at any time.
- Conduct a minimum of two inspections/year for surface mines and four inspections/year for underground mines.
- Decline to provide advance notice of inspections.
- Demand copies of all required records, as stated in MSHA regulations.
- Collect physical evidence; for example, air or noise samples and photographs
- Conduct employee interviews.

ESTABLISH AN INSPECTION TEAM AND INSPECTION PROTOCOLS

-  Prepare a notification plan, identifying who must be informed (and by whom) of the arrival of an MSHA AR, including:
 - senior management;
 - field supervisors; and/or
 - outside MSHA counsel.

-  Designate an inspection team and assign the following responsibilities (one person can fill multiple roles and not all may apply):
 - team leader (management spokesperson and MSHA point of contact, a site-safety director or other manager);
 - Mine operator representative (escort MSHA throughout the inspection);
 - document production manager (manage the document control system);
 - photographer (take side-by-side pictures of the AR's pictures);
 - sampler (coordinate industrial hygiene sampling and take side-by-side samples of the AR's samples);
 - contractor liaison (coordinate inspection activities with contractors);
 - union liaison, if applicable (coordinate inspection activities with the employees' union);
 - interview representative (prepare employees for interviews and participate in management interviews); and
 - Opening and Closing Conference participants (generally only the inspection team leader, mine operator representative and document production manager).

-  Equip the inspection team with the following materials:
 - contact list;
 - camera;
 - template for document production log;
 - labels for designating documents as trade secret or business confidential; and
 - MSHA's regulations, 30 C.F.R.

-  Designate walkaround routes for each area of the facility. In doing so:
 - plan route to inspection area that most safely and efficiently moves the inspection party through the mine;
 - facilitate transportation for MSHA AR and accompany AR at all times on site;
 - avoid providing advanced notice of the inspection site to the entire mine site, especially before the inspection begins;
 - make AR aware of areas of the mine that are closed, abandoned, or not in service; and
 - do not allow AR to direct workforce, or modify operations unless ordered to as a result of safety and health demand.

-  Designate in advance the location where the Opening Conference and any employee interviews will be held, and where the AR will be permitted to work.

-  Establish Interview and Document Protocols (see Best Practices During Opening Conference, page 6).

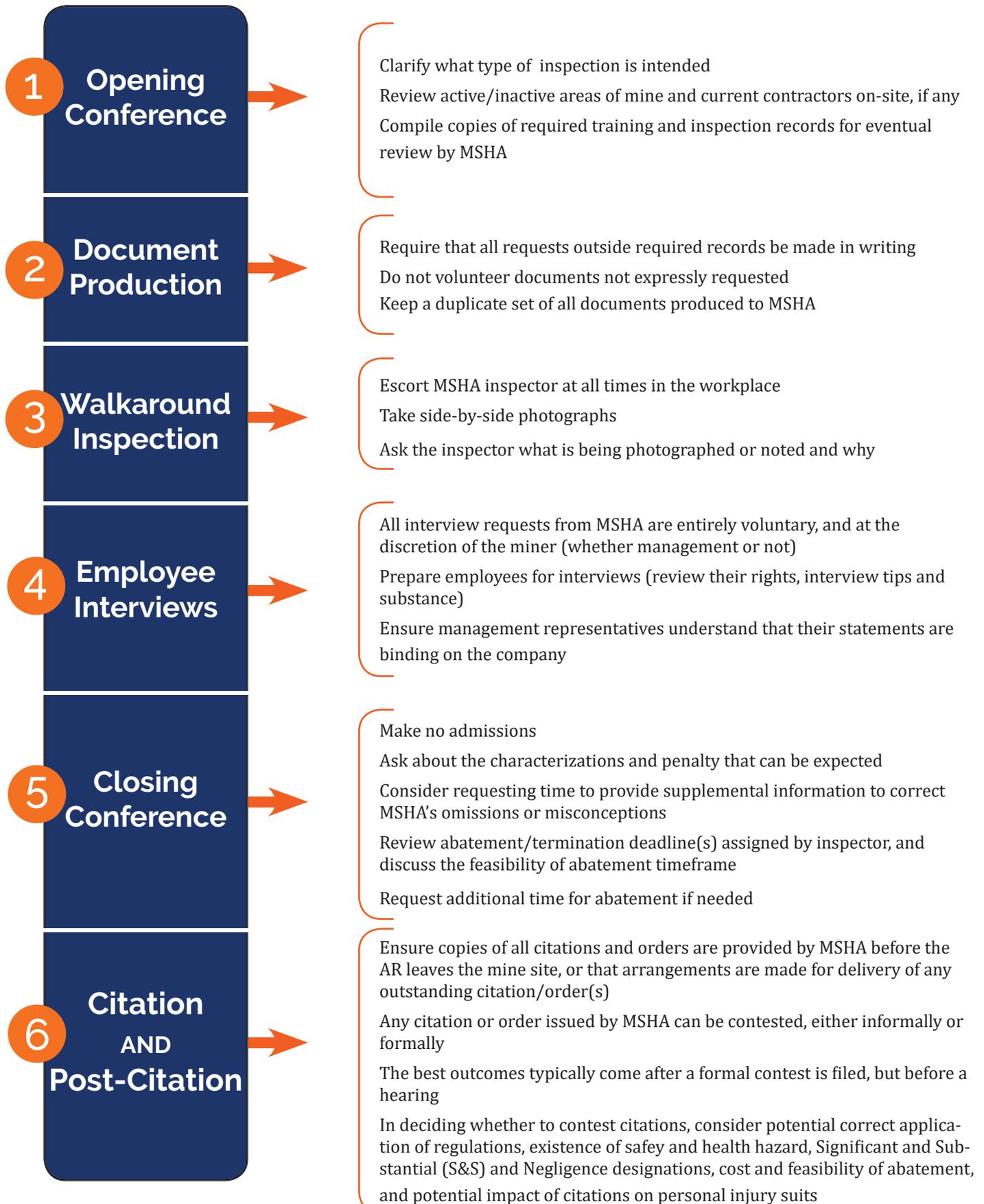
Preliminary Inspection Issues

PROTECT EMPLOYER INTERESTS WHEN MSHA ARRIVES

- When the MSHA AR arrives, notify your team leader, MSHA counsel and others in your notification plan.
- If the team leader is unavailable, ARs must wait a “reasonable” amount of time (normally not to exceed an hour) management to arrive. Employers should understand and exercise their right to have a representative of their choosing present during the inspections:
 - Section 103(f) of the Mine Act provides: “a representative of the operator and a representative authorized by his miners [if applicable] shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine”; and
 - MSHA’s Program Policy Manual provides: “The intent of Congress was to provide an opportunity for both the representative(s) of the miners and the representative(s) of the operator to accompany inspectors during the physical inspection of a mine for the purpose of aiding enforcement and to participate in the pre-inspection and post-inspection conferences held at the mine.”
- Determine whether anyone else, such as a miners’ representative, plans to accompany the AR during the inspection.
- Discuss the purpose and scope of MSHA’s visit to the mine site, specifically what type of inspection/investigation will take place, such as:
 - Regular safety and health;
 - Compliance follow-up;
 - Hazardous condition/complaint;
 - Accident investigation; or
 - Special investigation into agent of management liability.

“Every reasonable effort is to be made to provide both parties with an opportunity to participate in the physical inspection of the mine and in all pre-inspection and post-inspection conferences.”

Overview of an MSHA Inspection



Document Production

ADHERE TO BEST PRACTICES FOR DOCUMENT PRODUCTION

1. Label all documents produced with unique identifying numbers for tracking and future reference during settlement negotiations and litigation.
2. If the employer produces trade secret or confidential business information (CBI) to MSHA:
 - label information as trade • secret or CBI; and
 - produce documents under cover sheets invoking the protection of the U.S. Trade Secret Act (18 U.S.C. § 1905).
3. Redact personally-identifiable medical records (except if MSHA obtains medical access order).
4. Make and keep duplicates of every record produced to MSHA.
5. Track all documents produced on a Document Control Log.

AVOID COMMON DOCUMENT PRODUCTION MISTAKES

1. Do not generate non-privileged documents during an inspection.
2. Do not leave documents or information in plain sight (for example, file away binders and loose documents, and erase whiteboards from earlier meetings).
3. Do not volunteer information that MSHA did not request.

Walkaround Inspection

The AR will conduct a “walkaround” inspection of the facility looking for violations of the Mine Act and MSHA’s standards.

UNDERSTAND THE CSHO'S ACTIVITY DURING A WALKAROUND

During the walkaround, the AR may:

- Take photographs.
- Conduct industrial hygiene monitoring (testing and recording employee exposures to health hazards).
- Conduct brief “stop and talk” interviews with non-management employees.
- Take handwritten notes of potential violative conditions.
- Identify alleged hazards and suggest corrective actions.
- Be cordial and professional, but assert your rights.
- Gather intelligence about the AR’s focus by tracking:
 - where the AR asks to go;
 - the topics of the AR’s questions;
 - what the AR photographs; and
 - the subjects of the AR’s written notes.
- Take detailed notes about everything the AR says, does or asks.
- Pay close attention to how sampling or air monitoring is conducted and what activities monitored employees are doing.
- Take side-by-side photographs, videos and samples.
- Ask the AR what is being photographed and why.
- Immediately correct alleged hazards identified by the AR without admitting a violation.
- Do not demonstrate work tasks or the operation of equipment not otherwise scheduled to be performed in the ordinary course of business.

EMPLOYER STRATEGY DURING THE WALKAROUND

During the walkaround, the employer should:

- Escort the AR at all times while at the facility.
- Require the AR to abide by all employer safety rules (including use of required PPE).

Employee Interviews

The AR will conduct employee interviews of managers and hourly employees.

UNDERSTANDING THE AR'S ROLE IN EMPLOYEE INTERVIEWS

During inspection interviews, the AR may:

- Demand privacy for hourly employee interviews. This right, however, belongs to the miner, not MSHA. Any interview request from MSHA AR is entirely voluntary, and a miner (whether management or not) can accept or decline an interview request and have anyone of their choosing sit in on the interview. MSHA does not have the right to demand a private interview.
- Take handwritten interview notes.
- Ask to audio or video record the interviews.
- Ask witnesses to write statements, or review and sign the AR's notes
- Ask questions about documents (for example, written programs, training records, or operating procedures) that have been produced during the inspection.

UNDERSTAND THE EMPLOYER'S ROLE IN EMPLOYEE INTERVIEWS

- Must never discriminate against employees for agreeing to be interviewed or for anything they say to MSHA in an interview.
- Should attempt to schedule interviews in advance.
- Should object to impromptu interviews in the work area that last more than approximately five minutes.
- Does not have a right to participate in non-management employee interviews, unless the employee requests it without coercion.
- Can request alternative times and locations for an interview if the interview unreasonably hinders business.
- Should prepare all employees for their interviews.

PREPARE ALL EMPLOYEES FOR INTERVIEWS

The employer should prepare employees for MSHA interviews by:

- Using experienced MSHA defense counsel.
- Not coercing or intimidating employees into:
 - refusing an interview;
 - providing specific answers; or
 - requesting a manager be in the interview.
- Informing employees that the interview is entirely voluntary.
- Describing employees' interview rights:
 - to have any representative of the employee's choosing with them;
 - to conduct the interview alone;
 - to decline the interview request;
 - not to be video or audio recorded;
 - not to write out or sign a statement or sign the AR's notes;
 - to demand a copy of a statement if one is written or signed;
 - to examine documents that are subject of interview questions; and
 - to take a break at any time for any reason.
- Offering employees interview tips:
 - always tell the truth;
 - listen carefully to the question;
 - answer only the question asked;
 - give short, concise answers and wait for the next question (do not fill awkward silences);
 - stick to the facts and provide only firsthand knowledge; do not guess or speculate;
 - do not guess or speculate;
 - "I don't know" and "I don't remember" are appropriate if true;
 - be positive and confident; and
 - do not let the AR put words in your mouth.
- Reminding employees of applicable safety rules and safety training they have received. Use records to refresh their memory.

CAUTION

Inform management representatives that MSHA treats them as agents of the employer and their statements, admissions and knowledge bind the company. Also, that MSHA pursue criminal or civil (financial) penalties against management employees under Section 110 of the Mine Act.

Closing Conference

CLOSING CONFERENCE

At the conclusion of each inspection, MSHA must conduct a "Closing Conference." A Closing Conference is held at the conclusion of the inspection and an opportunity to review any citations/orders issued, abatement deadlines, and/or other follow-up actions.

Prior to the Closing Conference, the AR:

- Reviews:
 - documents
 - interview notes;
 - sample results; and
 - other physical evidence collected during the inspection.
- Researches:
 - standards;
 - interpretations; and
 - compliance directives.
- Writes proposed:
 - citations; and
 - abatement requirements.
- Gets the citations approved by the AR's superiors.

At the Closing Conference, the AR generally:

- explains the employer's post-citation rights.
- communicates MSHA's findings, including:
 - standards allegedly violated;
 - bases for alleged violations; and
 - possible abatement and abatement dates.

During the Closing Conference, the **employer** should:

- Listen carefully and take detailed notes.
- Make no admissions.
- Identify for the AR any alleged violations that have already been corrected.
- Make no abatement or abatement date promises.
- Ask the AR about characterizations and potential penalty amounts.

Citation and Post-Citation

ISSUANCE OF CITATIONS

Employers should be aware that:

- All citations/order should be provided to the employer by the time of closing conference.
- MSHA may send additional citations or amendments by mail or email.
- It is critical to retain the date of receipt for all citations or amendments.

Any citation or order issued by MSHA can be contested, however contest procedures vary depending on the type of issuance.

POST-CITATION CONSIDERATIONS

After receiving an MSHA citation, employers may:

- Pay the fine and accept the citation. **This is rarely the best option.**
- Resolve citations at an informal (10-day) settlement conference. **This has become a less effective option.**
- Contest the citation and negotiate a formal settlement with MSHA's counsel. **This is usually the best option.**
- Contest the citation and proceed to a hearing before an administrative law judge under the Federal Mine Safety and Health Review Commission.

In deciding whether to contest citations, employers should consult with MSHA defense counsel and consider:

- Are the alleged violations accurate?
- Does the citation expose the employer to future violations with increased severity, negligence, penalties or Unwarrantable Failure designations?
- Could the alleged violations lead to further investigation into agent liability?
- Are proposed penalties excessive?
- Is the required abatement action clear and feasible?
- Are the employer's sister facilities able to conform to the required abatement?
- Does the proposed citation qualify the employer for the Patterns of Violations Program?