

APPENDIX B: AGENCY'S RESPONSE TO THE REPORT

U.S. Department of Labor

Mine Safety and Health Administration
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JUL 16 2020

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: *David G. Zatezalo*
DAVID G. ZATEZALO *for*
Assistant Secretary of Labor for
Mine Safety and Health Administration

SUBJECT: Response to the Office of the Inspector General's (OIG) Draft
Audit Report, *COVID-19: MSHA Faces Multiple Challenges in
Responding to the Pandemic*

The Mine Safety and Health Administration (MSHA) appreciates the opportunity to comment on the work the OIG did evaluating MSHA's guidance provided and actions taken in response to the coronavirus (COVID-19) pandemic.

MSHA agrees with OIG recommendations to develop a plan to manage the potential backlog of suspended or reduced activities, once full operations resume, and to monitor COVID-19 outbreaks at mines and to use that information to reevaluate our decision not to issue an emergency temporary standard related to the COVID-19 pandemic. It should be noted that MSHA currently does not have a backlog of statutorily mandated enforcement activities and the Agency anticipates meeting such requirements for FY2020.

MSHA offers the following comments in order to clarify some positions presented by the OIG:

Tracking COVID

MSHA has mechanisms in place to capture and track COVID-related information gathered from the field for both mines and MSHA personnel. On a daily basis, MSHA field personnel report to headquarters management issues related to COVID including mine operators that reported any suspected or confirmed cases and how operators and miners are addressing those situations.

MSHA's Statutory Requirements

As long as miners continue to work at a mine, MSHA will continue to perform its statutorily required essential functions within the parameters of the President's and Department's guidance, as well as that of the Centers for Disease Control and Prevention (CDC). Although MSHA had to reduce some of its activities in an effort to reduce unnecessary contact and to mitigate transmission of the virus, we continued to perform essential statutory functions to ensure the health and safety of our mines.

These functions included investigating fatalities and serious accidents, responding to reports of imminent dangers, investigating cases of alleged discrimination against miners, conducting regular and spot inspections, and responding to miners' hazard complaints. To demonstrate that MSHA has continued to meet its mandate, as of March 30, the close of the first half of FY 2020, MSHA completed 100 percent of its regular inspections, and is on pace to meet requirements for the remainder of the fiscal year. The pandemic has reduced MSHA's inspection requirements because there is less mining activity and MSHA does not inspect mines when they are shut down with no miners working. Additionally, not all accidents/injuries are required to be investigated. Under MSHA's essential functions, only accidents/injuries related to fatalities and serious accidents are required to be investigated.

MSHA continues to perform its statutory requirements related to mine inspections, but in cases of mines with suspected COVID-19 cases, MSHA only inspects areas of the mine not impacted by the virus. For example, surface miners at three mines in MSHA's Western Region tested positive for COVID-19. As a result, the MSHA inspectors avoided the areas where affected miners worked until those areas of the mine, including equipment, were cleaned and disinfected.

Emergency Temporary Standards

MSHA has the authority to issue an ETS but only if the Agency: 1) determines miners are exposed to grave danger, and 2) such an emergency temporary standard is necessary to protect the miners from such danger. MSHA is monitoring mines for evidence of COVID-19 and has regularly scheduled COVID-19 conference calls with MSHA field personnel to discuss MSHA's response to the virus, COVID-related information, as well as established regular communication with its mine operators, miners, and other stakeholders, offering guidance and best practices related to COVID-19. MSHA understands the seriousness of the pandemic. However, the Agency must determine the need for an ETS based on facts and evidence, and currently, MSHA has determined that no grave danger exists at mines to warrant an ETS.

For example, under the Mine Act, mine operators must comply with mandatory safety and health standards that MSHA promulgates. These standards cover important and relevant safety and health practices such as sanitation, workplace examinations, personal protective equipment, training, and safeguards. During regular inspections, MSHA inspectors look for compliance with all mandatory standards, including standards that protect miners from COVID-related hazards. From March 1, 2020 – May 15, 2020, MSHA cited operators for 62 COVID-related violations. MSHA believes that the protections required by these standards, together with inspectors' regular presence at mines, allows the Agency the opportunity to respond appropriately and in a timely fashion.

The OIG report only discusses one set of stakeholders, labor, which requested that MSHA issue an ETS to address COVID-related hazards, and subsequently went on to petition the U.S. Court of Appeals to require MSHA to issue such a standard¹. However, with respect to the unions' suit

¹ On March 24, 2020, United Mine Workers of America sent a letter to MSHA's Assistant Secretary David Zatezalo requesting MSHA to immediately issue a safeguard/emergency temporary standard to protect miners.

for mandamus filed with the Court of Appeals, it is important to note that two separate amicus briefs were filed by industry associations with the Court of Appeals, supporting MSHA's position. It appears that the OIG did not include feedback from these industry associations. To assure a more balanced and accurate report, MSHA includes this information in its response. The OIG report does not include feedback from groups who filed Amici Curiae: the National Mining Association; National Stone, Sand, and Gravel Association; Portland Cement Association; Industrial Minerals Association--North America; Kentucky Coal Association; West Virginia Coal Association; West Virginia Coal and Energy Alliance; all of whom have submitted petitions to the court opposing the issuance of an ETS².

MSHA appreciates the opportunity to provide the OIG with information about actions the Agency has performed during this pandemic to protect the Agency's workers and the miners that the Agency is dedicated to protecting under the Mine Act. MSHA also appreciates the opportunity to comment on the report. If you have any questions or need further information, please contact Patricia W. Silvey, Deputy Assistant Secretary for Mine Safety and Health.

On April 17, 2020, a group of eight senators sent a letter to President Trump requesting MSHA to exercise its authority to issue an emergency temporary standard to safeguard miners as the nation continues to grapple with the COVID-19 pandemic.

On April 28, 2020, American Federation of Labor and Congress of Industrial Organizations sent a letter to Secretary of Labor Eugene Scalia requesting to take immediate action to protect the safety and health of workers from exposure to COVID-19 by issuing an emergency temporary standard.

On May 20, 2020, United Mine Workers of America sent a letter to MSHA's Assistant Secretary David Zatezalo renewing the union's request for MSHA to issue an emergency temporary standard to protect miners from COVID-19-related hazards.

² Brief of Amici Curiae the West Virginia Coal Ass'n, et al., In re: United Mine Workers of Am., No. 20-1215 (D.C. Cir. July 1, 2020), ECF No. 1849845.

Brief of Amici Curiae Nat'l Mining Ass'n, et al., In re: United Mine Workers of Am., No. 20-1215 (D.C. Cir. July 1, 2020), ECF No. 1849865.