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# Post-Accident Investigations: Tips For Working With MSHA

*Presented by:*

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# Fisher & Phillips LLP

- The Workplace Safety and Catastrophe Management Practice Group
  - Edwin G. Foulke, Jr. immediate past Assistant Secretary of Labor for Occupational Safety and Health
  - Howard J. Mavity has handled over 300 OSHA fatality investigations
- Fisher & Phillips offers assistance with:
  - Representation during Government inspections
  - Litigation of citations
  - Self-audits and inspections,
  - Training,
  - Record-keeping,
  - Crisis management, and
  - Media relations

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# Recent Kentucky Fatality

- Sliding Material Fatality at a crushed stone operation in Princeton, Kentucky on January 17, 2009.
  - Second non-coal fatality in the country this year.
  - There were 22 fatalities in all of 2008.

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How would you have reacted to  
this happening at your facility?

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# First Things First

- Call 911, AND
- Immediately contact MSHA.
  - 1-800-746-1553
  - Call no later than 15 minutes from the time you know that an accident has occurred.
- There is a \$5,000 to \$60,000 fine for failure to do this!

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# Communicating With The Deceased Employee's Family

- How will you communicate with the deceased employee's family?
  - The news will come as a shock.
  - They will blame you.
  - Grief can take many forms.
  - Have one contact person to whom the family can turn.
- Offer the family grief counseling or help them get in touch with their pastor.
- How often will you contact the family?

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# Communicating With Employees

- How will you communicate the loss of an employee to his coworkers?
- Offer grief counseling to your workers.

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# Communicating With The Media

- How will you communicate the news of a fatality to the media?
  - No comment is insufficient and makes it look like you have something to hide.
  - Having a single source of information is important

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# Communicating With Law Enforcement

- Who is designated to speak with law enforcement officers?
- What is the difference between a warrant and a subpoena?
- When do you need to call your attorney?
- What information is privileged and protected from discovery?

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# MSHA On-Site Investigation

- Investigations usually begin within 24 hours of notification.
- The operator's contact should be the highest ranking official, or his designee, on site.

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# MSHA On-Site Investigation (Cont.)

- Opening conference will give you an overview of how the investigation will proceed.
- Operators have a right to accompany MSHA personnel during the physical examination.
- Keep your own notes and take your own pictures.

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# MSHA On-Site Investigation (Cont.)

- A Section 103(k) Order means that you cannot enter the affected area.
  - Do not disturb any part of the accident scene, and
  - Do not remove items without prior MSHA permission.
- MSHA may supervise and direct rescue and recovery activity under Section 103(j).

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# MSHA On-Site Investigations (Cont.)

- A close-out conference concludes the on-site examination.
  - Both Management and labor representatives are present
  - Purpose is to discuss future investigative procedures and, if appropriate, the preliminary findings and conclusions
- MSHA will not likely issue any citations at this point. But do not think you are out of the woods once MSHA leaves!

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# Witness Interviews

- Witness interviews usually occur after an on-site examination.
- MSHA may bring its attorney to assist.

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# Witness Interviews (Cont.)

- Interviews may seem informal, but they are not.
- Nothing is “off the record.”
- Copies of witness statements may be included in the official accident investigation file and are generally available to the public after the investigation is closed.

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# Witness Interviews (Cont.)

- Witness interviews are voluntary
- Interviewees have a right to representation of their choice.
  - Management employees should have the company's counsel with them.
  - Non-management employees may chose anyone to be their representative.
- You and the interviewee's representative will have an opportunity to ask questions.

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# Witness Interviews (Cont.)

- What should you say as a witness during an interview?
- TELL THE TRUTH
- Avoid:
  - Making false statements
  - Obstructing an investigation
  - Destroying evidence

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# Public Hearings

- They are rare but may occasionally occur.
- MSHA can subpoena an individual to testify (unlike a witness interview).

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# Investigation Report

- The purpose is to determine the root cause(s) of the mine accident and prevent similar occurrences in the future.
- A Preliminary Report of Accident will usually be prepared within 48 hours.
- The final report is issued 45 days after the initiation of the investigation.

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# Operator's Report

- Mine operators must investigate each accident and develop a report.
- A copy of the report must be submitted to MSHA at its request.
- This report is not the same thing as the MSHA Mine Accident, Injury and Illness Report Form 7000-1, which must be completed and submitted to MSHA within 10 business days of the accident.

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# Legal Realty – Generally

Supervisors may have individual liability

- under labor laws
- under MSHA
- for gross negligence or intentional conduct, including under criminal law
- for intentional conduct outside of the scope of employment
- “duty” and responsibility varies according to the position

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# Understand The Different Roles Of A Supervisor

- Represent and protect the assets of the employer, including its employees
- Supervise employees
- Produce the employer's services or products
- Be an advocate of employees
- Serve as a first line of legal defense

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# Ways To Develop A Strong Defense

- Establish work rules designed to ensure safe work and to avoid MSHA violations
- Communicate the work rules to employees
- Train the employees as needed
- Take appropriate steps to discover violations
- Effectively enforce the rules and practices when violations are discovered; and
- Document the above actions

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# Action Points

- Review your written policies
  - Emergency response
  - Response to press
  - Response to investigations
  - Disciplinary procedures
- Develop specific forms and checklists

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# Double Dip

- Use efforts to improve workplace safety as a means to improve employee:
  - Communication
  - Involvement
  - Morale
- These efforts can lead to less litigation, whistleblower claims and union conflicts

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You many have time during the first few months of the Obama administration to develop missing written materials

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# QUESTIONS?

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*These materials do not constitute legal guidance. Facts and law vary. Consult counsel.*

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