

U.S. Department of Labor

Office of Inspector General—Office of Audit

**REPORT TO THE MINE
SAFETY AND HEALTH
ADMINISTRATION**



COVID-19: MSHA FACES MULTIPLE CHALLENGES IN RESPONDING TO THE PANDEMIC

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BRIEFLY...

COVID-19: MSHA FACES MULTIPLE CHALLENGES IN RESPONDING TO THE PANDEMIC

July 24, 2020

WHY OIG CONDUCTED THE AUDIT

On March 28, 2020, the Department of Homeland Security labeled mining among critical infrastructure industries that states should consider keeping open to help in the United States' response to the Coronavirus Disease of 2019 (COVID-19) Pandemic. Since mines continued to operate, the Mine Safety and Health Administration (MSHA) continued to perform mine inspections and investigations.

As part of phase 1 of the OIG's Pandemic Oversight Response Plan, this report presents the results of our audit of MSHA's initial response to the pandemic.

WHAT OIG DID

Given the risks to both miners and MSHA's workforce, we conducted an audit to answer the following question:

What plans and guidance has MSHA developed to address challenges created by COVID-19, and to what extent have these challenges affected MSHA's ability to protect the safety of miners and its workforce?

To answer this question, we interviewed MSHA officials and union representatives; and reviewed guidance, states' executive orders, and related documentation.

READ THE FULL REPORT

<https://www.oig.dol.gov/public/reports/oa/2020/19-20-006-06-001.pdf>

WHAT OIG FOUND

We found that MSHA faces a number of current and potential challenges related to COVID-19. While it has taken actions to address some of the concerns, more is required to ensure the safety of its workforce and the mining industry.

On March 26, 2020, MSHA posted an information sheet on its website as guidance to its workforce and to the mining industry, such as maintaining social distancing. However, unless it issues an emergency temporary standard, MSHA cannot enforce this guidance. More action is needed to determine if the agency should issue a temporary standard. While MSHA plans to suspend or reduce some of its activities to reduce unnecessary contact, such actions could impact miner health or safety as well as result in a backlog of work. MSHA will need to develop a plan to address the potential backlog once operations resume.

For mandatory inspections, MSHA faces challenges in completing the work timely while ensuring the safety of its inspectors. Workforce reductions, due to inspectors sidelined because they self-identified as high risk for COVID-19, and safety concerns by miners may challenge MSHA's ability to complete enforcement activities. Further, shortages of personal protective equipment, such as N-95 masks, complicate the safety of its personnel.

Additionally, states issued various executive orders, such as stay at home orders, which led to 18 canceled and postponed mine rescue contests that provide critical training to mine rescue personnel.

WHAT OIG RECOMMENDED

We recommended MSHA monitor the:

- Potential backlog of suspended and reduced enforcement activities and develop a plan to manage the backlog once full operations resume.
- COVID-19 outbreaks at mines and use that information to reevaluate its decision not to issue an emergency temporary standard related to COVID-19.

MSHA agreed with both recommendations.

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INSPECTOR GENERAL'S REPORT

David Zatezalo
Assistant Secretary
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This report presents the results of the Office of Inspector General's (OIG) audit of the Mine Safety and Health Administration's response to the COVID-19 Pandemic. This audit was part of phase 1 of the OIG's Pandemic Oversight Response Plan.

On January 31, 2020, the Secretary of Health and Human Services declared a public health emergency in response to the Coronavirus Disease of 2019 (COVID-19) pandemic. As the pandemic spread throughout the United States, industries not otherwise deemed essential began to temporarily close for business. On March 28, 2020, the Department of Homeland Security labeled mining among 17 critical infrastructure industries that states should consider keeping open to assist in the United States' response to the pandemic. The mining industry is a key resource for our energy and construction industries, so it is important that we keep our miners and MSHA inspectors safe.

Given the risks to both miners and MSHA's workforce, we conducted an audit to answer the following question:

What plans and guidance has MSHA developed to address challenges created by COVID-19, and to what extent have these challenges affected MSHA's ability to protect the safety of miners and its workforce?

To answer this question, we interviewed MSHA officials and union representatives; and reviewed MSHA guidance, public laws, and states' executive orders related to COVID-19. In addition, we reviewed COVID-19

guidance issued by other federal government agencies, such as the Centers for Disease Control and Prevention (CDC).

We found that MSHA faces a number of current and potential challenges related to COVID-19 and it has taken actions to address some of them, which MSHA felt was to the maximum extent practical. While the agency has taken action to address some of the concerns, more is required to ensure the safety of its workforce and the mining industry.

RESULTS

Our review of MSHA's initial response to COVID-19 identified the following current and potential challenges to completing its mission while protecting the health and safety of its own workforce:

- Suspended or reduced enforcement activities
- Unavailable inspectors
- Delayed inspections due to safety concerns by the mining industry
- Personal protective equipment (PPE) shortages
- Canceled and postponed mine rescue training due to restrictions in states' executive orders for COVID-19
- Unenforceable CDC and MSHA COVID-19 guidance

In addition, MSHA posted an information sheet on its website as guidance to its workforce and to the mining industry, such as maintaining social distancing (Exhibit 1).

SUSPENDED OR REDUCED ENFORCEMENT ACTIVITIES

MSHA is reducing unnecessary contact during the COVID-19 pandemic by temporarily suspending or reducing a number of enforcement activities. While this effort should help to reduce the spread of COVID-19, changes in the frequency or timing of enforcement activities could impact miner health or safety. For example, MSHA suspended its safety and fatality initiatives that normally involve the gathering of miners on-site to discuss powered haulage, electrocution, and contractor safety under its Accident Reduction Program. Suspending these initiatives reduces potential transmission of COVID-19, but could also result in more mine accidents, injuries, or deaths at the mines. Similarly, reducing some enforcement activities, such as "spot" inspections, may

result in unsafe mine conditions going unidentified and unmitigated. Further, reductions in accident investigations could delay efforts to identify and implement corrective actions for the causes of those accidents.

As of May 2020, MSHA had suspended five of its enforcement activities, including its accident reduction program. Further, MSHA had reduced the capacity of how it conducted 13 activities, such as mine emergency operations. MSHA was still conducting 15 activities at full capacity, such as its fatal accident investigations and the regular safety and health inspections. As reported by MSHA in May 2020, table 1 indicates the level to which it continued to perform its various activities.

TABLE 1: ENFORCEMENT ACTIVITY STATUS

Suspended (5)	
Other Contacts	
Program in Accident Reduction/Compliance Analysis Program	
Accident Reduction Program	
Training Plan Approval and Revisions (Field)	
On-site Training Program Evaluation (Field)	
Conducted in a Reduced Capacity (13)	
Activity	Reduction
Non-Fatal Accident Investigation	Only serious/life threatening injury accidents
Non-Injury Accident Investigation	Limited to serious mine accidents
Mine Emergency Operations	Training activities postponed
Petition for Modification Investigation	Only if already at mine for other activity
Compliance Assistance Visit	Only potentially high hazardous conditions
Spot Inspection	Only potentially serious conditions, as needed
Special Emphasis Programs	In conjunction with E-01 inspection
Electrical Technical Investigation	Limited to serious issues
Roof Control Technical Investigation	Limited to serious issues
Ventilation Technical Investigation	Limited to serious issues
Health Technical Investigation	Limited to serious issues
Impoundment Spot Inspection	Limited to high hazard impoundments
Other Technical Compliance Investigations	Limited to serious issues

Conducted at Full Capacity (15)
Regular Safety and Health Inspection
103(i) Spot Inspection
103(g) Written Notification Hazard Complaint Inspection
Verbal Hazard Complaint Inspection
108 Injunctive Actions or Other Special Investigation Activities
Fatal Accident Investigation
105(c) Discrimination Investigation
110(c) and 110(d) Investigations (Willful or Knowing Violations)
Re-opening Inspection
Compliance Follow-up Inspection
Shaft, Slope or Major Construction Spot Inspection
Part 50 Audit
Attempted Inspection (Denial of Entry)
Mine Idle Activity
Non-Chargeable Accident Investigation

Source: MSHA

The reductions or suspension of these activities may result in a backlog for MSHA to address, as the Federal Mine Safety and Health Act of 1977 (Mine Act) or MSHA's own policies require them. As such, MSHA will need to monitor the potential backlog of suspended and reduced enforcement activities and develop a plan to manage the backlog once full operations resume.

UNAVAILABLE INSPECTORS

The pandemic has reduced the number of inspectors available and the number of mines to inspect. Yet, MSHA still has to meet requirements to inspect mines.

According to MSHA's website, it inspected nearly 13,000 mines employing over 330,000 miners in 2019. Each quarter, MSHA assigns mines to its inspectors to help meet the inspection requirements in the Mine Act.

Section 103(a) of the Mine Act mandates an inspection of each mine in its entirety a minimum of four times a year for underground mines and a minimum of two times a year for surface mines. These are called mandatory E-01 inspections. MSHA's internal policy is to conduct an average of one inspection every quarter for underground mines and an average of one inspection every six months for surface operations. These E-01 inspections are critical to identify and correct hazards at mines to ensure a safe working environment. If MSHA must delay these mine inspections or cannot complete them timely, it could prolong

the time before an inspector identifies potential hazards. Not identifying potential hazards puts miners at risk.

Two key factors in meeting this requirement are the number of mines to inspect and the number of inspectors available to inspect them. According to MSHA, as of May 21, 2020, approximately 100 of its 750 inspectors (13 percent) self-identified as high risk. As a result, those inspectors were teleworking full-time or on leave. While putting high-risk inspectors on telework or leave is necessary for the safety of the inspector, it reduces the number of inspectors available to inspect mines. This reduction in the available number of inspectors means other inspectors must work overtime to cover those gaps.

MSHA has also seen a reduction in the number of mines to inspect, as some mine operators have decided to suspend operations due to operator concerns for COVID-19 or a temporary lack of demand for their product. For example, two operators announced layoffs totaling 300 mining jobs due to cuts related to ongoing coal market pressures made worse by the economic shutdown COVID-19 has caused. In addition, news articles indicate a number of mines shut down temporarily due to miners testing positive for COVID-19. MSHA does not inspect idle mines, so these closures reduce the number of mines that MSHA will need to inspect during the pandemic. Because MSHA was still in the middle of the third quarter (e.g., April through June) during our May interview, it was unknown if the decrease in the number of mines to be inspected aligns with the decrease in the number of inspectors.

MSHA is also delaying inspections at mines with positive COVID-19 cases. Inspections of those mines resume when mine operators inform MSHA that the suspected individuals report negative results or individuals who tested positive are no longer contagious.

To complete its mandatory E-01 inspections by the end of the quarter, MSHA personnel told us that some inspectors may have to work overtime. However, it may also push some inspections to the next quarter since the Mine Act does not impose a quarterly requirement. Instead, the Mine Act only requires inspections four times per year for underground mines and two times per year for surface mines.

DELAYED INSPECTIONS DUE TO SAFETY CONCERNS BY THE MINING INDUSTRY

Inspections help to ensure a safe working environment for miners. However, because a single inspector travels to various mines and encounters various miners, mine operators and personnel may fear transmission of COVID-19 from inspectors to themselves. As a result, they may be resistant to inspectors entering their mines during the pandemic. This could lead to delays affecting MSHA's ability to inspect a mine timely. Any delay in performing a mine inspection results in the delayed identification and correction of any hazards at that mine and could jeopardize the health and safety of miners working there.

Based on our interviews and a review of MSHA's guidance, we learned MSHA had taken various actions to limit potential COVID-19 transmission between inspectors and miners. These actions include:

- Incorporating social distancing by inspectors to the extent feasible.
- Encouraging inspectors to participate on a voluntary basis in screenings or questionnaires conducted by operators.
- Limiting the number of inspectors sent to a mine for regular inspection proportional with the mine's operations, to the extent feasible if the mine operator alerts MSHA to changes in production at a site.
- Modifying the dust sampling process so inspectors clean and disinfect the dust pumps before and after each use. Instead of inspectors placing the dust pump directly onto the miner, they now exchange it by placing the pump onto a table and providing instructions to the miner on how to put the pump on. After sampling is completed, they use a table exchange process again.
- Discussing violations with the mine operator or their designee over the phone instead of holding an in-person conference.
- Reviewing some mine records outside of the mine office to limit contact with mine office personnel.
- Shipping PPE to its district and field offices for its inspectors.

Nonetheless, there are two likely situations where mine operators could impact inspections due to fear of COVID-19 transmission. First, operators may try to impede an inspector's entry into the mine. MSHA told us about a situation where an operator had requested the inspector to self-quarantine for two weeks before coming to the mine, as required by the state's executive order for people entering the state. Second, operators may try to prohibit inspectors from riding together with them in mantrips that transport miners in and out of the mines, elevators, or vehicles throughout the mine. This would delay the inspector's progress and

could mean the inspector has to find an alternative means of transportation, such as walking. MSHA leadership was not yet aware of this occurring, but did tell us an operator had asked them whether an inspector could ride in the bed of a pickup truck to avoid close contact with the driver. Although MSHA has been able to resolve reported situations quickly, these types of impediments could affect MSHA's ability to complete its inspections timely.

PPE SHORTAGES

The CDC has promoted PPE as a critical part of keeping people safe from COVID-19. PPE has been in high demand, and therefore difficult to obtain in sufficient supply. Without sufficient PPE, MSHA's enforcement personnel could be at a higher risk of COVID-19 exposure.

When the pandemic reached the United States in January 2020, PPE shortages began to appear for items such as medical masks, N-95 masks, disinfectants, and hand sanitizer. As the infected population increased, PPE was prioritized for healthcare and other front-line workers. This led to challenges obtaining necessary PPE for other "essential" workers, such as MSHA inspectors.

Starting March 3, 2020, MSHA headquarters began purchasing and shipping PPE supplies to its offices. This included disinfecting wipes and spray, hand sanitizer, gloves, and tissues. In addition, it shipped N-95 masks to offices that requested them during MSHA's daily calls with Regions and made subsequent shipments on April 2 and 8. Some of the latter shipments also included elastomeric respirators and cartridges.

While district and field offices were also purchasing supplies locally, not everything was available locally to meet their needs. For example, two districts were able to obtain hand sanitizer from local distilleries. These districts shipped them to other MSHA offices across the country. MSHA told us in May 2020, PPE shortages were still a challenge for specific items, such as disinfectant wipes.

Because of the challenges in obtaining N-95 masks requested by inspection personnel, MSHA advised them to use their elastomeric respirators because they are durable, reusable, and already on hand. By contrast, the N-95 masks are intended for one-time use. MSHA personnel told us the elastomeric respirators provide a higher level of protection (99 percent) compared to N-95 masks. Both N-95 masks and elastomeric respirators require that wearers be fit-tested and clean-shaven for an effective seal. However, it is difficult to communicate when wearing an elastomeric respirator and they can be uncomfortable if worn for long periods. In addition, the inspector needs to clean and disinfect the elastomeric respirator on a regular basis and regularly change and properly dispose of its

cartridges. If the elastomeric respirator has an exhalation valve, there is a risk of contaminating others through the unfiltered air exhaled by a wearer who has COVID-19.

CANCELED AND POSTPONED MINE RESCUE TRAINING DUE TO RESTRICTIONS IN STATES' EXECUTIVE ORDERS FOR COVID-19

30 Code of Federal Regulations (CFR) Section 49.11 requires coal mine rescue team members to participate in at least two local mine rescue contests annually. These contests are designed to sharpen skills and test the knowledge of team members who respond to a mine emergency. The contest requires team members to solve a hypothetical problem while being timed and observed by judges. These contests are an essential part of the training for mine rescue teams to ensure teams receive hands-on exposure to a range of potential hazards and mine emergency scenarios. Without this vital training, mine rescue teams may not be sufficiently trained to handle an actual mine emergency.

During the pandemic, states have issued executive orders or mandates requiring people to shelter in place (unless exempt), maintain social distancing, and refrain from large gatherings of people. In addition, states issued executive orders, or mandates, requiring individuals entering their state to self-quarantine for two weeks. Because a mine rescue contest is a large gathering of people from various states and it would be hard to implement social distancing, these various state restrictions led to mine rescue contests being canceled or postponed. Based on our review of MSHA's mine rescue website on June 12, 2020, for coal or metal/nonmetal contests in 2020, we found 16 mine rescue contests canceled and 2 contests postponed until 2021.

As states reopen, they will lift restrictions. However, it is unknown if states will lift all restrictions or whether they will need to implement some or all of the restrictions again later in the year. Future restrictions could lead to more mine rescue contests being canceled or postponed.

As of May 21, 2020, MSHA had no plans to waive the annual training requirement. MSHA believes state restrictions will lighten or be lifted later in the year, allowing mine rescue contests to resume. MSHA leadership did not believe the temporary suspension and postponement of the contests will significantly increase the risk to miners or mine rescue teams because most team members have a large amount of experience to rely upon already.

UNENFORCEABLE CDC AND MSHA COVID-19 GUIDANCE

On March 26, 2020, MSHA posted an information sheet titled “MSHA Response to COVID-19” on its website as guidance to mine operators and miners on how to minimize the spread of COVID-19 and actions MSHA was taking to do the same (see Exhibit 1). The guidance recommended avoiding close contact, cleaning and disinfecting equipment, washing hands, and staying home if sick. In addition, MSHA’s guidance directed readers to the CDC’s prevention website. Mine operator compliance with CDC and MSHA’s COVID-19 guidance, however, is voluntary as MSHA does not have enforcement authority for measures discussed in them.¹

MSHA’s inspectors write citations and orders when mine personnel violate the Mine Act or a regulation. Recently, stakeholders have called for MSHA to issue an emergency temporary standard with enforceable requirements to mitigate the risk of COVID-19 infections. They cite concerns such as miners being high risk due to age or pre-existing conditions, such as black lung disease, that make them more vulnerable if they test positive for COVID-19.

MSHA has decided to not issue an emergency temporary standard because it cites a number of regulations it could apply during a pandemic. However, the regulations do not appear to cover all the aspects of a pandemic, such as cleaning and disinfecting all equipment before use, wearing necessary PPE for pandemics, and social distancing in locker rooms, elevators, mantrips, or vehicles. Having the proper enforcement tools to enforce a safe working environment is a critical component of protecting miners from COVID-19.

Section 101(b) of the Mine Act² provides MSHA with the authority to issue an emergency temporary standard. Specifically, MSHA can issue an emergency temporary standard if it determines: (A) that miners are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, or to other hazards, and (B) that such emergency standard is necessary to protect miners from such danger.

MSHA leadership informed us that it had not issued an emergency temporary standard for three reasons. First, many mine operators have already implemented controls at their mines to mitigate the risk of miners’ exposure to COVID-19. Second, MSHA was not aware of any mines where a COVID-19

¹ MSHA guidance “MSHA Response to COVID-19” was posted on the agency website March 26, 2020.

² Title 30 United States Code Chapter 22 Section 811.

outbreak has occurred that met the threshold level required to issue an emergency temporary standard. Third, MSHA believes it has enough regulations already available to enforce a safe working environment for miners during the pandemic.

In addition to MSHA's guidance on March 26, 2020, there are existing regulations that MSHA believes it can apply during a pandemic. Officials said those regulations address issues such as maintaining sanitary facilities and proper ventilation, having appropriate PPE for specific occupations or mine areas, and conducting examinations by mine personnel to identify hazardous conditions, such as overcrowded areas and inadequately sanitized surfaces. In addition, MSHA stated the Mine Act allows it to address imminent dangers and for miners to file hazard complaints. For example, MSHA told us on May 21, 2020, that it had investigated 119 hazardous condition complaints for COVID-19 related issues, resulting in 115 negative findings and 4 positive findings of violations. During the same interview, MSHA told us inspectors had issued 62 citations since March 1, 2020, for COVID-19 related issues, such as unsanitary conditions.

MSHA is facing considerable pressure from mining unions, Congress, and others to exercise its authority and issue an emergency temporary standard. In addition to their concerns regarding miners being high risk due to age or pre-existing conditions, such as black lung disease, that make them more vulnerable if they test positive for COVID-19, there were concerns that some miners reside in communities where medical facilities are limited. We identified the following requests made to MSHA in 2020 requesting the issuance of an emergency temporary standard:

- On March 24 and April 28, two mining unions³, and on April 17, a group of eight Senators requested that MSHA issue an emergency temporary standard.
- On March 31, the National Coalition of Black Lung and Respiratory Disease Clinics wrote a letter to MSHA expressing support for the union request for an emergency temporary standard.
- On May 13, a group of eight Senators introduced legislation⁴ requiring the Department of Labor to issue an emergency temporary standard within seven days after enactment of the legislation.

³ United Mine Workers of America (UMWA) union, and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).

⁴ S. 3710 titled "COVID-19 Mine Worker Protection Act."

- On June 15, the United Mine Workers of America union and the United Steelworkers union jointly filed a petition in the U.S. Court of Appeals against MSHA for its decision to not issue an emergency temporary standard. The petition requested the Court direct MSHA to issue an emergency temporary standard.

The noted legislation has not yet been enacted and the petition before the U.S. Court of Appeals is pending. MSHA leadership told us it does not intend to issue an emergency temporary standard for COVID-19 until it determines the need arises.

MSHA will need to monitor the status of outbreaks at mines to determine if further measures to protect miners, such as an emergency temporary standard, are required. Using this information, MSHA should reevaluate its decision not to issue an emergency temporary standard related to the COVID-19 pandemic so it can better protect both miners and its workforce.

CONCLUSION

Overall, MSHA faces a number of current and potential challenges related to the COVID-19 Pandemic. Challenges include unavailable inspectors; potential safety concerns by the mining industry; PPE shortages; canceled and suspended mine rescue contests; and unenforceable CDC and MSHA COVID-19 guidance. MSHA has issued an information sheet as guidance, adjusted operations, and implemented safety measures to try to address these challenges to the maximum extent MSHA feels practical. However, more action is needed to address any potential backlog created by the pandemic and the need for an emergency temporary standard.

OIG'S RECOMMENDATIONS

We recommend the Assistant Secretary for Mine Safety and Health monitor the:

1. Potential backlog of suspended and reduced enforcement activities and develop a plan to manage the backlog once full operations resume.
2. COVID-19 outbreaks at mines and use that information to reevaluate the decision not to issue an emergency temporary standard related to the pandemic.

SUMMARY OF MSHA'S RESPONSE

MSHA agreed with both of our recommendations. MSHA's response provides clarifying points for the tracking of COVID-19 and its statutory requirements. MSHA also discusses recent updates related to the petition for an emergency temporary standard, which occurred after our fieldwork. MSHA's response is included in its entirety in Appendix B.

We appreciate the cooperation and courtesies MSHA extended us during this audit. OIG personnel who made major contributions to this report are listed in Appendix C.



Elliot P. Lewis
Assistant Inspector General for Audit

EXHIBIT 1: MSHA GUIDANCE RESPONDING TO THE COVID-19 PANDEMIC

To help minimize the spread of COVID-19 and discuss actions it is taking for the pandemic, MSHA has posted an information sheet on its website as guidance and explaining the way some of its operations are carried out during the pandemic.

MSHA POSTED ONE GUIDANCE DOCUMENT FOR COVID-19 ON ITS WEBSITE FOR MINERS AND ITS WORKFORCE

People need guidance to understand how to protect themselves and others during a pandemic. Without guidance, people may be unaware of proper ways to act, and thus may endanger themselves and/or others.

Multiple agencies, like the CDC and the Occupational Safety and Health Administration (OSHA), issued COVID-19 guidance. Their guidance discussed various ways to prevent or minimize COVID-19 exposure, such as good hygiene, social distancing, face coverings, cleaning and disinfecting equipment, and PPE.

MSHA posted an information sheet titled “MSHA Response to COVID-19” on its website on March 26, 2020, as guidance to mine operators and miners on how to minimize the spread of COVID-19 and actions MSHA was taking to do the same. Its guidance to mine operators and miners was to avoid close contact, clean and disinfect equipment, wash hands, and stay home if sick. In addition, it pointed readers to the CDC’s prevention website.

For actions that MSHA was taking, the guidance said MSHA was abiding by the President’s Coronavirus Guidelines for America, as well as CDC guidance. In addition, it said MSHA would do the following:

- Continue to perform its essential functions, including mandatory inspections, serious accident investigations, and investigations of hazard complaints (imminent danger or serious in nature).
- Suspend Education Field and Small Mine Services visits, as well as special safety and fatality initiatives that normally would gather groups of miners on-site to discuss powered haulage, electrocution, and contractor safety.
- Have inspectors maintain distance from miners while performing inspections, to the extent feasible.

- Work with mine operators when comes to recertifications. For four specific types of certifications, MSHA would extend due dates but not grant exemptions.
- Encourage inspectors to participate on a voluntary basis in screenings or questionnaires conducted by operators.
- Identify MSHA inspectors or other employees exhibiting symptoms through self-identification or potential exposure, asking them to quarantine at home.
- Clean the relevant offices following CDC guidelines.
- Limit the number of inspectors sent to a mine for regular inspection proportional with the mine's operations, to the extent feasible if the mine operator alerts MSHA to changes in production at a site.

MSHA's guidance also notes that it does not have jurisdiction to enforce or implement any emergency orders issued by state or local governments for closure or shelter in place for citizens and businesses. For example, if a state's stay-at-home order requires residents to stay home. MSHA inspectors could not enforce that requirement against mine operators or miners because it is not a violation of a CFR standard or the Mine Act.

In addition to the guidance posted on its website, MSHA has also provided verbal guidance to both mine personnel and its workforce.

For mine operators and miners, MSHA made phone calls with mining personnel and its inspectors provided verbal guidance during inspections or investigations. In addition, MSHA holds quarterly stakeholder calls. COVID-19 questions came up during the April 16, 2020 call. MSHA provided five suggestions to listeners during this call:

- Follow social distancing requirements of six feet wherever possible and wear the appropriate PPE. This includes not crowding personnel carriers, hoists, elevators, and other means of transportation at the mine site.
- Clean and disinfect any frequently touched surfaces, especially on equipment.
- Wash hands more frequently than before. If soap and water are not readily available, use a hand sanitizer that contains at least 60 percent alcohol.
- Avoid touching face, nose, and eyes with hands.
- Stay home if feeling sick.

MSHA also told us it was working with the National Institute for Occupational Safety and Health to develop a pandemic guidance flyer for miners. However, the document was not available because it was still in the clearance process.

For its workforce, MSHA used a variety of methods. MSHA leadership posted a video on its website on April 24, 2020, discussing changes to its operations and protections for its workforce. For example, its leadership video discussed stopping targeted inspections, shipping PPE to the field, and implementing a daily call with Regional Administrators and District Managers to hear concerns from the field and discuss actions headquarters was taking. The daily calls started on March 19, 2020, with topics covering any individuals that self-identified as high risk, concerns about completing inspections, PPE availability, and challenges created by restaurant and hotel closures around the mines being inspected. In addition, MSHA told us it provided verbal or email guidance to its workforce.

APPENDIX A: SCOPE, METHODOLOGY, & CRITERIA

SCOPE

We started this audit on April 29, 2020. Our scope was the guidance issued, challenges experienced, and actions taken by MSHA through May 2020 in response to the COVID-19 pandemic.

METHODOLOGY

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Due to the quick reaction nature of this audit, we relied solely on testimonial evidence and a review of limited documentation to identify MSHA's potential challenges and actions toward those challenges. In some cases, we had requested corroborating evidence from MSHA but did not receive it prior to writing this report. Therefore, quantities listed may be inaccurate such as the number of inspectors that self-identified as high risk or the number of violations written or hazard complaints received related to COVID-19. However, those inaccuracies would not change our conclusions.

To answer our audit objectives, we:

- Interviewed MSHA headquarters personnel to learn about guidance developed for a pandemic, challenges faced during the COVID-19 pandemic, and actions it took for those challenges.
- Interviewed representatives from the United Mine Workers of America union and the National Council of Field Labor Locals union to hear concerns from miners and MSHA inspectors.
- Reviewed MSHA guidance related to the pandemic and its inspection and investigation activities.
- Reviewed public laws issued for COVID-19 or MSHA operations.
- Reviewed COVID-19 guidance issued by other federal government agencies, such as the CDC.
- Reviewed states' executive orders related to COVID-19.
- Reviewed news articles discussing mine closures due to COVID-19 and PPE shortages within United States.

CRITERIA

We used the following criteria to answer our audit objective:

- Federal Mine Safety and Health Act of 1977, as amended (Mine Act).
- Title 30 United States Code Chapter 22 Section 811.
- Title 30 Code of Federal Regulations.
- MSHA's Program Policy Manual Volume I.
- MSHA's General Inspection Procedures Handbook (PH19-IV/V-1, December 2019).
- MSHA's Hazardous Condition Complaint Procedures Handbook (PH15-I-08(1), May 2019).
- MSHA's Special Investigations Procedures (PH05-I-4, August 2005)
- MSHA's Accident/Illness Investigations Procedures (PH11-I-1(2), May 2016).
- MSHA's Citation and Order Writing Handbook for Coal Mines and Metal/Nonmetal Mines (PH13-I-1(1), December 2013).
- MSHA guidance titled "MSHA's Response to COVID-19" posted on its website.
- CDC guidance titled "Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020."
- OSHA Guidance on Preparing Workplaces for COVID-19 (OSHA 3990-03 2020).
- Cybersecurity & Infrastructure Security Agency's Guidance on the Essential Critical Infrastructure Workforce (March 28, 2020).

APPENDIX B: AGENCY'S RESPONSE TO THE REPORT

U.S. Department of Labor

Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, Virginia 22202-5452



JUL 16 2020

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

FROM: *Hayne D. Palmer for*
DAVID G. ZATEZALO
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.

APPENDIX C: ACKNOWLEDGEMENTS

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