

Coal Mining Safety and Health Act 1999: Managing Investigations

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Managing Investigations

A safety incident at your coal mine can give rise to a range of complex issues.

In this paper I set out some practical tips and approaches you might want to consider for your organisation.

I cover:

- Investigations – what power inspectors have and the purpose of investigations.
- What companies can do to manage the investigation process in a way which will protect their interests and the interests of directors, managers and employees.

1. Investigations

1.1 Functions of inspectors

The Act provides for the appointment of inspectors and inspection officers. Inspectors must have a professional engineering qualification and appropriate competencies whereas inspection officers need only have appropriate competencies.

The functions of inspectors and inspection officers include:

- (a) to enforce the Act;
- (b) to investigate serious accidents and high potential incidents;
- (c) to investigate complaints about matters relating to safety or health;
- (d) to monitor safety and health performance;
- (e) to inspect and audit coal mines;
- (f) to provide advice and information; and
- (g) to check that safety and health management systems and procedures are in place.

(section 128 of the Act)

1.2 Entry and other investigation powers of inspectors and inspection officers

Inspectors and inspection officers have broad powers to:

- (a) enter and search coal mines and other places;
- (b) inspect, measure, test, photograph or film any part of the place or anything at the place;
- (c) take things or samples of things for analysis or testing;
- (d) require persons to produce and certify documents;
- (e) take copies of documents;
- (f) seize evidence (other than documents);
- (g) obtain names and addresses of persons who are suspected of committing offences against the Act;
- (h) require persons to answer questions to help ascertain whether or not the Act is being or has been complied with;
- (i) require persons to provide reasonable help; and
- (j) require persons to attend before an inspector and answer questions.

(sections 133, 139, 143, 152, 154 and 157 of the Act).

1.3 Inspectors' powers to issue directives

Inspectors (and in some cases, inspection officers) also have powers to direct that:

- (a) mine operations be suspended where the inspector believes that risk is not at an acceptable level;
- (b) corrective action or preventative action be taken to prevent the risk reaching an unacceptable level;
- (c) the site of a serious accident or high potential incident be isolated or preserved;
- (d) a particular task only be carried out by a person with a particular competency;
- (e) tests be carried out to determine whether the risk from coal mining operations is at an acceptable level;
- (f) a safety and health management system or principal hazard management plan be reviewed; and
- (g) an independent engineering study about risks arising out of coal mining operations, the safety of any plant, building or structure at the mine or a serious accident or high potential incident at the mine.

(sections 164 to 172 of the Act).

A person to whom a directive is given must comply with it as soon as reasonably practicable. Penalties of up to \$300,000 for corporations and \$60,000 for individuals apply and individuals may be imprisoned for up to 2 years for failing to comply (section 174 of the Act).

1.4 Industry safety and health representatives

Industry safety and health representatives have broad functions and powers which can be used to prompt or assist an investigation.

Industry safety and health representatives have the following functions:

- (a) to inspect coal mines to assess whether risk is at an acceptable level;
- (b) to review procedures in place at coal mines to control risk so that it is at an acceptable level;
- (c) to detect unsafe work practices and conditions at coal mines and to take action to ensure risk is at an acceptable level;
- (c) to participate in investigations into serious accidents and high potential incidents and other matters related to safety or health at coal mines;
- (d) to carry out their own investigations into complaints from coal mine workers regarding safety or health at coal mines; and
- (e) to help in relation to initiatives to improve safety or health at coal mines.

(section 118 of the Act).

Industry safety and health representatives have the following powers:

- (a) to make inquiries about the operations of coal mines relevant to the safety or health of coal mine workers;
- (b) to enter any part of a coal mine at any time on reasonable notice to carry out the representative's functions;
- (c) to examine any documents relevant to safety and health held by persons with obligations under the Act;
- (d) to copy safety and health management system documents, including principal hazard management plans, standard operating procedures and training records;
- (e) to require the person in control or temporarily in control of a coal mine to give the representative reasonable help in the exercise of the representative's powers; and
- (f) to issue a directive to suspend operations where there is an unacceptable level of risk.

(section 119 of the Act).

An industry safety and health representative must not unnecessarily impede production at a coal mine when exercising the representative's powers or performing the representative's functions (section 120 of the Act).

Industry safety and health representatives are required to advise an inspector if the representative believes a safety and health management system is inadequate or ineffective and that the site senior executive is not taking the action necessary to make the system adequate and effective. The inspector must then investigate the matter and report the results of the investigation in the mine record (section 121 of the Act).

1.5 Site safety and health representatives

Site safety and health representatives also have broad powers which could be used to prompt or assist the investigation.

Site safety and health representatives have the following functions:

- (a) to inspect the coal mine to assess whether the level of risk to coal mine workers is at an acceptable level;
- (b) to review procedures in place at the coal mine to control the risk to workers so that it is at an acceptable level;
- (c) to detect unsafe work practices and conditions at the coal mine and to take action to ensure the risk to coal mine workers is at an acceptable level; and
- (d) to conduct their own investigations into complaints from coal mine workers at the mine regarding safety or health.

Site safety and health representatives have the following powers:

- (a) to enter any area of the coal mine at any time upon reasonable notice to carry out the functions of the site safety and health representative;
- (b) to examine any documents relevant to safety and health held by the site senior executive under the Act, if the site safety and health representative has reason to believe the documents contain information required to assess whether procedures are in place to achieve an acceptable level of risk;

- (c) to stop or suspend coal mining operations if the representative reasonably believes a danger to the safety or health of coal mine workers exists because of coal mining operations; and
- (d) require the senior site executive and supervisors at the coal mine to give the representative reasonable help in carrying out the representative's functions.

(sections 99-101 of the Act).

A site safety and health representative must not unnecessarily impede production at a coal mine (section 104 of the Act).

1.6 Purpose

What is the purpose of an investigation by an inspector?

Clearly, it is safety related. The inspector is looking at assisting to help deal with safety issues wherever the accident or incident has occurred, however, it is often easy to lose sight of the fact that a legal process is also involved. When conducting an investigation, an inspector is gathering evidence which is likely to be used to assess whether a prosecution is to be launched.

A brief will be prepared and material will be sent to the inspector's legal adviser for assessment.

2. Obligations to assist an inspector

2.1 Help

Senior site executives must provide any help to an inspector or inspection officer which the inspector or inspection officer requires the senior site executive to provide to assist them in the performance of their functions, unless the senior site executive has a reasonable excuse (section 142 of the Act).

A failure to comply with this obligation is an offence. The maximum penalty for failing to provide help is \$7,500 for an individual and \$37,500 for a corporation.

2.2 Reasonable help

Persons at coal mines or other places must give an inspector reasonable help (as required by the inspector), unless the person has a reasonable excuse. Failure to comply with this obligation is an offence. The maximum penalty for failing to provide reasonable help is \$7,500 for an individual and \$37,500 for a corporation (section 140 of the Act).

Persons in control or temporarily in control of a coal mine must give industry safety and health representatives reasonable help in the exercise of the representative's powers unless the person has a reasonable excuse. The maximum penalty for failing to comply with this obligation is \$7,500 for an individual and \$37,500 for a corporation (section 119 of the Act).

2.3 Provide name and address

A person suspected of committing an offence under the Act must provide their name and address to an inspector or inspection officer when asked unless the person has a reasonable excuse. A failure to comply with this obligation attracts a maximum penalty of \$3,000 for individuals and \$15,000 if the request is made in respect of a corporation.

(sections 152 and 153 of the Act).

2.4 Answer questions

Persons at coal mines must answer questions put by inspectors or inspection officers to help them ascertain whether or not the Act has been complied with. A failure to answer questions is an offence unless a person has a reasonable excuse. The maximum penalty for failing to answer a question is \$3,000 for an individual and \$15,000 for a corporation (section 141 of the Act).

A person must answer questions about a serious accident or high potential incident asked by an inspector unless the person has a reasonable excuse. The maximum penalty for failing to do this is \$3,000 for an individual and \$15,000 for a corporation (section 159 of the Act).

2.5 Attendance to answer questions

A person must attend before an inspector and answer questions unless the person has a reasonable excuse. A failure to comply with this obligation is an offence. The maximum penalty for failing to comply with this requirement is \$3,000 for an individual and \$15,000 for a corporation (section 157 of the Act).

2.6 Documents

A person who has a safety and health obligation under the Act must, upon request, produce documents to an inspector or inspection officer to which the person has access and that relates to the person's obligations under the Act unless the person has a reasonable excuse (section 154 of the Act). The maximum penalty for failing to produce a document is \$15,000 for an individual and \$75,000 for a corporation (section 155 of the Act).

A person upon whom a document certification request is made must comply with the requirement unless the person has a reasonable excuse. The maximum penalty for failing to certify a document is \$7,500 for an individual and \$37,500 for a corporation (section 156 of the Act).

If an industry safety and health representative requires documents from person with an obligation under the Act with access to the documents, the person must produce them as soon as reasonably practicable after being asked, unless the person has a reasonable excuse. The maximum penalty for failing to comply with this obligation is \$7,500 for an individual and \$37,500 for a corporation (section 119 of the Act).

2.7 Site safety and health representatives

A coal mine operator, senior site executive, contractor or other supervisor must not prevent or attempt to prevent a site safety and health representative from performing his or her functions or penalise a representative for performing his or her functions. The maximum penalty for failing to comply with this obligation is \$15,000 for an individual and \$75,000 for a corporation (section 105 of the Act).

A senior site executive must tell a site safety and health representative about certain things including any injuries, illnesses or high potential incidents happening at the mine, any proposed changes to the coal mine or plant or substances used at the coal mine, the presence of an inspector at the coal mine and a directive given by an inspector, inspection officer or industry safety and health representative about a matter. The maximum penalty for failing to comply with this requirement is \$3,000 (section 106 of the Act).

2.8 Interference with site

A person must not interfere with a place at a coal mine that is the site of a serious accident or high potential incident, without the permission of an inspector. The permission must not be

unreasonably withheld. The maximum penalty for failing to comply with this obligation is \$15,000 for an individual and \$75,000 for a corporation.

2.9 General offences

- (a) a person must not obstruct an inspector, inspection officer or industry health and safety representative in the exercise of a power, unless the person has a reasonable excuse. This offence is likely to be used to enforce those powers of an inspector for which there is no specific offence, such as the powers to enter and search places, seize evidence and take copies of documents etc.
- (b) a person must not say anything to an inspector or inspection officer the person knows is false or misleading in a material particular.
- (c) a person must not give an inspector, inspection officer or industry safety and health representative a document containing information the person knows is false or misleading in any material particular.

Maximum penalty for these offences is \$7,500 for individuals and \$37,500 for corporations.

(sections 179 to 181 of the Act).

2.10 Excuses

Persons are not required to comply with many of their obligations in the context of investigations if they have a reasonable excuse. Generally, an inspector must warn the person that it is an offence to fail to comply with the requirement unless the person has a reasonable excuse.

What constitutes a reasonable excuse will depend upon the nature of the obligation and the request from the inspector. For most obligations, it is a reasonable excuse not to comply with the obligation if complying with the obligation might tend to incriminate the person.

The exceptions to this are:

- questions in respect to serious accidents or high potential incidents (section 159 of the Act).

However, if a claim for privilege is made before the question is answered, the answer (and any information, document or other thing obtained as a result of the person giving the answer) cannot be used in a proceeding against the person, other than in a proceeding in which the falsity or misleading nature of the answer is relevant; and

- where a document production requirement is made (section 155 of the Act).

However, if a claim for privilege is made before any document is produced, the document (or anything obtained as a result of the person's producing the document) is not admissible in any other proceeding for an offence against the person.

Of course, answers and documents produced can be used as evidence in proceedings against other persons.

3. **What can companies do to manage the investigation process?**

3.1 **Introduction**

On the one hand inspectors have quite broad powers and there is an obligation not to refuse to comply, an obligation not to be misleading or give false information and an obligation to give help. What can companies do to manage the investigation process in these circumstances?

Keep in mind that it is up to the prosecuting authority to prove its case beyond reasonable doubt. It is not a matter for any company or individual facing a prosecution to help prove the case against it or them. It is up to the inspector to carry out the investigation.

So what can be done to manage the investigation process?

Clearly the best approach to take will vary from company to company and will depend upon the facts of each case. Some companies may wish to volunteer all relevant information and give to the inspector everything the company has or produces; other companies may not wish to co-operate at all. In our experience, more and more, companies are taking a middle ground approach which involves ensuring proper communication and co-operation with an inspector at all times, while at the same time managing the legal process and taking steps to protect the company's legal position and the legal position of its directors, managers and employees.

Here are some practical tips.

3.2 **Streamline contact**

Take steps to streamline contact with the inspector, for example, set up an agreed procedure with the inspector for the making of communication and contact – there might be a single contact point in the company for the inspector to contact to arrange visits by the inspector and to arrange interviews with workers.

Similar steps should be put in place for contact with Site and Industry Safety and Health Representatives. Managing information from Site Safety and Health Representatives in particular presents a real challenge for companies.

3.3 **Internal document control**

Be very careful about generating reports about the accident – often this occurs without full consideration and may include material, views and speculation about the accident which may be damaging, misleading, plainly wrong or all of these things.

Ensure employees do not produce e-mails or other written documents in relation to the accident without prior approval of the manager. Often e-mails and memos dealing with the accident and possible causes are produced in circumstances where details about the accident and causes are perhaps not clear – those e-mails and documents may be damaging to the company's legal position and the legal position of its directors, managers and employees.

3.4 **Client legal privilege**

Documents produced for the purpose of obtaining legal advice or in anticipation of possible prosecution may be subject to client legal privilege. This means there is a basis to say those documents do not need to be produced to the inspector or to a court or tribunal.

The legal department within a company or outside lawyers can be instructed to give legal advice about the accident and documents produced for the dominant purpose of the lawyer providing advice may be able to attract client legal privilege.