Don’t make it worse!

Challenges and Strategies for Investigating Near-Misses and Accidents

Prepared for IMA-NA by
Avi Meyerstein
Husch Blackwell LLP
I was working on the other side of the plant when I heard the call on the radio. I overheard people talking last week. They said a supervisor told them not to lock out equipment if a repair job would be quick. It didn’t sound right. I heard rumors about a new “profits first” campaign to spend less time and money on safety. I should have told someone. If I had, this wouldn’t have happened.
MSHA individual civil penalties

MSHA operator civil penalties

Mine Act criminal

Criminal false statements

Criminal obstruction

Insurance claims

Worker's comp

Third-party civil actions
Martha’s legal fashion tips

“That cover-up is not a good look!”
“If you can't measure it, you can't improve it.”

- Peter Drucker
Investigations that make sense

1. Protect the privilege.
2. Do (only) what’s necessary.
3. Involve (only) the right people.
4. Build a record carefully.
Privilege

Work product
- Protects trial preparation
- Not ordinary course of business
- Prepared in anticipation of litigation

Attorney-client communications
- Communication – client to lawyer
- In confidence
- For purpose of legal advice/services
- Invoked and not waived
Who takes lead?

Outside counsel leads

Outside counsel directs

In-house counsel

No counsel
When it really matters...

- Fatality or serious injury.
- Targets supervisor / potential agent.
- High negligence or worse.
- Special impact on other issues.
Site preservation / physical evidence

1. Get what you need for safety and defense.
2. Comply with agency orders.
3. Avoid spoliation.
   - Protect site. Safe storage.
   - Notify insurance, third parties.
   - Document and map.
   - Chain of custody.

WARNING
AUTHORIZED PERSONNEL ONLY

CAUTION
Witness interviews

- Who? Has information? Government target?
- Limit participants and avoid group interviews.
- Comfortable timing and location.
- Build trust and look out for people:
  - How are they?
  - Help them see it’s not their fault.
  - Help them sort through confusion or uncertainty.
  - Help them see the big picture and context.
- Explain the investigation process and rights.
- Take appropriate, selective, factual notes.
Witness statements

- Know why you’re getting each statement.
  - What’s the purpose?
  - How does it help?
  - How could it hurt?
- Know where you’d like to go / what to avoid.
- Do you own interview first.
- Do not include speculation or hearsay.
- Include positive background – training, experience, safety precautions.
I was working on the other side of the plant when I heard the call on the radio. I overheard people talking last week. They said a supervisor told them not to lock out equipment if a repair job would be quick. It didn’t sound right. I heard rumors about a new “profits first” campaign to spend less time and money on safety. I should have told someone. If I had, this wouldn’t have happened.
I’ve been a maintenance mechanic here for 31 years. I’ve had extensive safety training – when I started and every year. We have policies requiring lockout/tagout. This has always felt like a safe place to work.

On the day of the accident, I heard the call on the radio. I was on the other side of the plant. I’ve worked with Jack for 15 years. He’s always careful. He trains new guys on how to do the job right. Every time we’ve worked together, he’s followed the lockout/tagout rules.
Internal reports / presentations

- Will a summary and oral report suffice?
- Use a company template? What to include? Weigh evidence?
- Be clear about unknowns, uncertainty.
- Include context, good facts.
- Limit circulation and redlines. To or by counsel?
- Use draft and privilege stamps and disclaimers.
- Facts and conclusions → admissions?
- Don’t reference privileged material.
Government reports – MSHA 7000-1 (50.20)

- “Describe fully the conditions contributing to the accident injury or illness”
- “Quantify the damage or impairment”
- “Describe what happened and the reasons therefor”
- “Identify the factors which led or contributed”
- “shall clearly specify the actual cause” and “shall include” whether involved:
  - “any aspect of compliance with rules and regulations”
  - “mine equipment or the mining system”
  - “job skills and miner proficiency, training and attitude”
  - “protective items relating to clothing, or protective devices on equipment”
On March 14, 2018, mechanic Jack Smith suffered amputation injuries when he was working on equipment that was not locked out. A supervisor, George Rogers, told him not to lock out for short jobs. The supervisor was trying to impress the plant manager, who was about to reveal a “profits-first” campaign to reduce production time lost due to overly burdensome safety procedures. Supervisor Rogers discovered the idled machinery and became annoyed that his shift was losing production. He figured Jack probably had finished the repairs, so he energized the equipment. The company believes this was a violation of the lockout/tagout rules and probably an unwarrantable failure.
Government reports – MSHA 7000-1

- More detail is not necessarily “more” compliance.
- Don’t go beyond what you know.
  - Do you have conflicting information?
  - Are you waiting for expert analysis?
  - Toxicology? Autopsy?
  - Have you interviewed everyone?
  - Are there multiple possible causes?
- Don’t admit violations.
- Don’t increase negligence.
- Don’t describe confidential info.
Near-miss reports

- Scrub and anonymize. Use a trade association?
- Enough detail to teach your team, not inspectors.
- Distribute to the right people.
- Special care with higher-risk events.
- Be ready for inspector questions.
Stay updated!

Subscribe to Safety Law Matters for OSHA law updates, strategies and tips:

www.safetylawmatters.com/subscribe
Questions?

Avi Meyerstein
avi.meyerstein@huschblackwell.com
O: (202) 378-2384
M: (240) 481-8068