

U.S. Department of Labor

Office of Inspector General—Office of Audit

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



**MSHA CAN IMPROVE ITS PRE-
ASSESSMENT CONFERENCING
PROGRAM**

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BRIEFLY...

MSHA CAN IMPROVE ITS PRE-ASSESSMENT CONFERENCING PROGRAM

September 23, 2019

WHY OIG CONDUCTED THE AUDIT

We received several hotline complaints alleging irregularities in MSHA's pre-assessment conferencing program, which affords mine operators the opportunity to present evidence challenging a violation. The complaints included allegations that MSHA did not consider evidence in conferences before assessing penalties.

Absent a safe working environment, miners can be injured or killed. MSHA enforces safety and health rules in mines. To that end, MSHA inspectors write citations and other instruments requiring mine operators to fix violations of safety laws and regulations. As part of this process, MSHA can offer mine operators a chance to challenge citations in informal conferences.

WHAT OIG DID

Because of the importance of the conferencing process and the hotline complaints we received, we conducted an audit to answer the following question:

Has MSHA properly managed the pre-assessment conferencing program?

Our work included interviewing MSHA personnel, reviewing a statistical sample of conference files, and analyzing MSHA Standardized Information System (MSIS) data covering all conferences from 2013 to early 2017.

WHAT OIG FOUND

MSHA had not properly managed aspects of the pre-assessment conferencing program, in three broad areas:

MSHA did not consistently document specific reasons for conference decisions in which it modified or vacated a violation. We found this in 75 percent of the files in our sample. Not including a clear and specific reason made it difficult to determine why MSHA made the decision to modify or vacate a violation.

MSHA did not consistently provide feedback to its workforce regarding conference results, so it was missing opportunities to point out errors in the way inspectors were writing violations and improve their quality.

MSHA did not effectively monitor its systems to ensure it had complete and accurate conference data, and did not use data it collected to identify potential issues.

We determined insufficient training, guidance, system controls, and oversight caused these issues. Consequently, these issues led to inconsistent processes among districts and potential inconsistencies in the quality of future violations. In addition, these issues reduced assurance that MSHA was making well-supported decisions.

WHAT OIG RECOMMENDED

We made nine recommendations such as providing additional training, updating two system controls, revising a handbook, and reviewing district processes.

In its response, MSHA agreed with seven of our nine recommendations and has already started taking some action. For the two recommendations where MSHA disagreed, it provided an alternative action to meet the intent of our recommendation.

READ THE FULL REPORT

<http://www.oig.dol.gov/public/reports/oa/2019/05-19-001-06-001.pdf>

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INSPECTOR GENERAL'S REPORT

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This report presents the results of our audit of Department of Labor's Mine Safety and Health Administration's (MSHA) pre-assessment conferencing program.

Among other things, MSHA inspects mines to ensure they are safe for miners. These inspections often result in violations¹ such as notices, citations, and orders to mine operators for violations of safety and health laws and regulations. Violations frequently carry fines, which mine operators can challenge in court. Court challenges are time-consuming and costly for both MSHA and mine operators. In an effort to put forward more sound violations and reduce the number taken to court, MSHA, around 1978, created a pre-penalty conferencing program. This allowed operators an opportunity to present evidence to MSHA challenging a violation in an informal setting to reach a conference decision that modifies or vacates the violation, and avoids a court challenge.

By the end of 2010, however, several factors combined to create a backlog of almost 90,000 cases waiting to be heard in court. Prior to this, MSHA had changed the conferencing process so it occurred after it assessed the penalty and the operator submitted a notice to challenge the violation in court. In addition, MSHA testified before the House Committee on Education and Labor that factors contributing to the backlog were increased penalties on violations from the passage of the MINER Act in 2006 and an increase in the number of citations written by inspectors.

¹ We use the term "violation" throughout this report to refer to any type of citation, order, or notice issued by MSHA to a mine operator.

After MSHA re-established the pre-assessment conference in 2011, the backlog of cases began to drop. However, the OIG received several hotline complaints alleging that the pre-assessment conference program was not working as intended. For example, one complaint alleged that evidence supporting changes to violations was being ignored by MSHA, and another alleged that violations were frequently being reversed in court later.

Our own risk assessment process identified several risk areas, such as the risk that MSHA could reach incorrect decisions in pre-assessment conferences and that the program may not have an effective feedback loop. We were also concerned that mine operators might conference violations with MSHA but still go on to challenge the same violations in court, thus ultimately increasing MSHA's costs and workload.² Given our concerns, we conducted an audit to answer the following question:

Has MSHA properly managed the pre-assessment conferencing program?

We concluded that MSHA has not properly managed aspects of the pre-assessment conferencing program. Specifically, we found MSHA could improve how it documented and communicated conference decisions, monitored its systems to ensure that personnel entered complete and accurate information, or used system data to identify potential issues and improve the program's performance.

To answer our audit question, we interviewed MSHA personnel, reviewed a statistical sample of 186 conference files, and analyzed the MSHA Standardized Information System (MSIS) data covering all conferences from 2013 to early 2017. Our sample included 8,713 conferences initiated between January 1, 2013, and February 1, 2017. The data showed mine operators requested conferences for 22,707 violations during this timeframe. More than one violation can be discussed in the same conference, so there are many more violations than conferences in our sample.

RESULTS

While MSHA properly managed the initial phases of the pre-assessment conferencing process by notifying mine operators of their rights to conference

² MSHA started a pilot project in 2019 in which operators would relinquish their rights to contest violations that had been modified in the conference process.

and properly granting and scheduling conferences, MSHA could improve its management of the following aspects of the program:

1. MSHA did not consistently document specific reasons for pre-assessment conference decisions where it modified or vacated a violation. In 67 of 89 conference files in our sample, we found MSHA did not document in the conference file or on the violation form (or both) a specific reason why it modified or vacated a violation. As a result, it was unclear why MSHA made a particular decision.
2. MSHA did not consistently provide feedback to the workforce on conference results in all of the districts we visited or in our sample. As a result, MSHA did not take full advantage of the opportunity to improve its operations.
3. MSHA did not effectively monitor its data systems to ensure that personnel entered complete and accurate information or use the data to identify potential issues and improve performance.

These internal control issues led to inconsistent processes among the districts as well as potential inconsistencies in the quality of future violations. In addition, these issues reduced the assurance that MSHA's Conference Litigation Representatives (CLR or "representative"), the officers charged with conducting the conferences, were making well-supported recommendations and created a risk that incorrect precedents would be set for future conferences.

To help us draw our conclusions about MSHA's pre-assessment conference program, we used the Government Accountability Office's (GAO) *Standards for Internal Control in the Federal Government*, 30 Code of Federal Regulations (CFR) 100.6, and MSHA guidance to identify the following attributes of a properly managed conferencing program:³

- Clear, published policies and guidance
- Transparent communication with external and internal stakeholders
- Appropriate internal controls, such as approval and oversight processes
- Documentation of critical processes

³ A more detailed list can be found in Exhibit 1.

- Performance monitoring that collects, analyzes, and evaluates pertinent performance data to help manage the program

During the audit, we saw some positive actions by MSHA related to these attributes. For example, MSHA had published policies and guidance that were generally clear, incorporated transparent communication techniques into its process, both externally and internally, included some relevant internal controls into the conference process, and developed a system to collect conference data.

MSHA DID NOT CONSISTENTLY DOCUMENT REASONS FOR CONFERENCE DECISIONS

Seventy-five percent of the conference files we reviewed lacked adequate documentation explaining why the violation was changed. Of the 89 conference files in our sample with a violation that changed, only 22 had sufficient documentation explaining the specific reasons why MSHA modified or vacated the violations. Notably, in its post-accident reports assessing some recent mining disasters, MSHA itself found that its representatives were not properly documenting files.

After a pre-assessment conference, MSHA may modify or entirely vacate violations in response to new evidence brought to the conference table by the mine operators. Thus, MSHA's representative is able to reconsider the original violation in light of new evidence. Key, however, to maintaining transparency and accountability is good documentation. GAO's *Standards for Internal Control in the Federal Government* requires federal agencies to maintain appropriate documentation of all transactions. This means that, after reviewing any new evidence, the CLR should properly document in the file the actions MSHA took so that it is clear to any reader what the evidence was, how it affected the facts of the violation, and why MSHA modified or vacated the violation.⁴

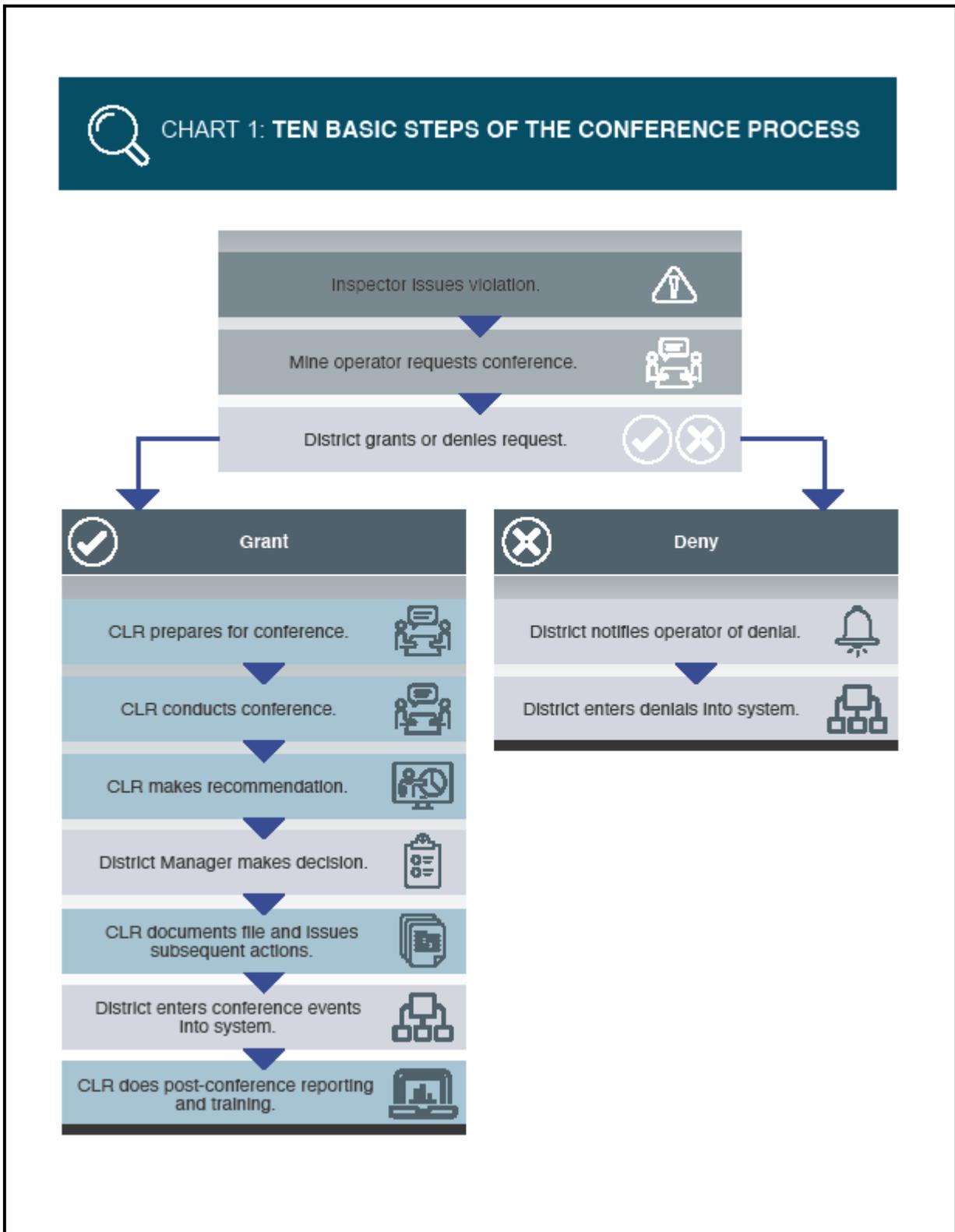
MSHA also has its own internal policies that require proper documentation of transactions, as follows:

- Program Policy Manual Volume I requires personnel to state the reason for vacating an issuance on the violation form. In addition, it requires the inspector and supervisor to file notes that describe in detail the reasons and circumstances involved.

⁴ For the purpose of this report, the term "violations" collectively refers to a variety of situations, including citations, orders, and safeguards, among others. Violations could include a mine's failure to follow its approved ventilation or roof control plans, dangerously faulty equipment, or other situations that are defined by law or regulation.

- The Citation and Order Writing Handbook for Coal Mines and Metal and Nonmetal Mines (referred to as the Citation and Order Writing Handbook) provides guidance in preparing the violation forms (MSHA form 7000-3a) and requires personnel to state specific reasons for vacating an issuance on the violation form.
- The Alternative Case Resolution (ACR) Handbook provides guidance for conducting pre-assessment conferences. This handbook states the CLR **shall** (emphasis added) document their decisions and their reasons for modifying or vacating violations. In addition, it required personnel to modify or vacate violations in accordance with other MSHA guidance, such as the Citation and Order Writing Handbook or Program Policy Manual.

See Chart 1 for a graphical overview of the conference process.



We obtained a statistical sample of 186 conferences from MSIS (MSHA’s enterprise-wide system for recording and keeping track of its activities). For those 186 conferences, we identified the conference result for each of the 515 violations in those conferences (see Table 1). We reviewed 89 files containing the 163 violations that resulted in a modification or vacated violation to determine if CLRs documented clear and specific reasons in the conference files (which would include any subsequently modified or vacated violation forms) for those conference decisions.

We found MSHA representatives did not document clear and specific reasons for modified or vacated violations in 67 of the 89 conference files we reviewed.⁵ Based on our sample, we project that there would be 4,182 conferences with a modified or vacated violation from the 8,713 conference files within our scope, of which 3,136, or 75 percent, would not contain clear and specific reasons why a violation was modified or vacated.

**Table 1: Types of Conference Decisions in
OIG Sample**

Conference Decision	Violations
Upheld	269
Modified	130
Vacated	33
Other	83
	515

Source: OIG Data Sample

These files contained either no reason or a vague reason, or insufficient evidence supporting the reason stated for the actions MSHA took. Below are full text examples of the justifications MSHA included in conference files. In addition, we did not observe any other evidence within the conference files supporting these statements:

- “Modify to low negligence based on information brought forth at conference related to the citation.” (see Charts 2 and 3)
- “The information provided to the mine operator was inaccurate.”
- “MSHA notes this citation was issued in error and it will be vacated.”

⁵ In this instance, the term “representative” could include both CLRs and any MSHA officials tasked with conducting conferences.

- “The company argues this violation should be vacated. Based on a review of all the facts, photographs and relevant case law, it has been determined a violation of this standard did not occur. This citation will be vacated.”
- “As a result of a Part 100 Health and Safety Conference and due to mitigating circumstances that were presented, this Citation is modified as shown above. This modification was approved by the District Manager and an opportunity was provided to the Issuing Inspector and the Field Office Supervisor to provide additional information prior to its issuance.”

Below is a photo of the documentation in the conference file for one of our five examples above of vague reasons.

Chart 2: Example of Vague Conference File Decision

Viol #	Issue Date	Type Iss	Type Action	Sect of Act	30 CFR	S&S	AR Name
8048511	11/20/2013	Citation	104(a)		75.403	N	

VIOLATOR POSITION: Event No: **6266531** Violation No: **8048511**
 Violator requests the citation be modified to low negligence as it is not possible for an examiner to visually determine the difference in 70 or 80% incombustible content.

MINERS' REP POSITION:

INSPECTOR POSITION:
 , field office supervisor-samples from 70% to 80% should be evaluated as low negligence.

CONFERENCE OFFICIAL'S DECISION:
 Modify to low negligence based on information brought forth at conference related to the citation.

In addition, below is a photo of the violation form for that same example. Neither documentation in the conference file nor on the violation form provided us a clear and specific reason for the conference decision.

Chart 3: Example of Vague Violation Form

Change	From	To
11. Negligence	Moderate	Low
Reason	Mitigating factors were brought forth at conference that showed the negligence should have been properly evaluated as low.	
During a Safety and Health Conference conducted on January 8, 2014, the operator provided additional information related to the citation.		

MSHA’s internal review teams found similar issues in 2001 and 2006 when they reviewed accidents at Sago, Darby, and the No. 5 Jim Walter mines. The internal review teams found the CLRs:

- made incorrect conference decisions and inappropriate changes based on the available evidence,
- did not properly document a justification or explain mitigating circumstances for conference decisions,
- did not properly use MSHA guidance to form conference decisions, and
- did not properly document justifications on the violations forms.

See Exhibit 2 for extracts from these reports showing the internal review teams’ findings.

We found this generally occurred due to insufficient training and a lack of oversight. MSHA disagreed with the need for specificity in its reasons, and asserted the five examples represented adequate reasons why a violation would be modified or vacated. We disagree. Merely indicating “this citation was issued in error,” for example, does not make clear to the reader what the error was.

There are benefits gained when providing specific reasons. First, a specific reason provides transparency why MSHA made a conference decision and why it did not make other decisions. This not only helps ensure the conference decision was fully supported, but also helps ensure other choices (e.g., new evidence) were fully considered. This may also help reduce the number of changes made to a violation in court where MSHA previously upheld or modified that same violation in a conference.

Second, another reader needs this information to be able to come to the same conclusion. We believe if an independent reader reviewed the files as part of their oversight duties, the reader would have the same challenges as the OIG in determining whether MSHA made a correct conference decision because the conference files did not contain enough information for another reader to come to the same conclusion.

The lack of specific reasons reduced the assurance that CLR's were making supported recommendations and created a risk that incorrect precedents would be set for future conferences. For example, we could not confirm that MSHA's actions were appropriate when the conference file and violation form lacked sufficient support. This lack of information can create conflict among CLR's and the issuing inspectors or supervisors, while also leading to decreased morale among the workforce. If the inspectors do not get an explanation of the conference results from the CLR and are not able to read the reasons in the documentation, they will likely not understand why someone changed their citation and may believe the changes were inappropriate.

Additionally, we noted MSHA did not require districts to document reasons when a conference resulted in upholding a violation. This means an independent reader would not be able to understand what new evidence the operator provided and why the new evidence did not persuade MSHA to change the violation. The reason for an uphold decision should explain why any new evidence presented by the operator at the conference did not persuade MSHA to change the violation. Without such information, it is unknown whether MSHA made the correct decision.

Unsupported decisions can be a contributing factor why operators end up contesting some of those same violations again after a conference and lead to the court system later changing the violation, which was an issue raised as a concern in hotline complaints we received. Because MSHA's guidance does not require CLR's to document the reason(s) they upheld a violation, we did not test conference files for this particular situation. Requiring justification for any type of conference decision would be a desirable internal control to help ensure MSHA districts make well-supported decisions.

MSHA DID NOT CONSISTENTLY PROVIDE FEEDBACK ON CONFERENCE RESULTS

We determined MSHA was not consistently providing feedback about conference results to inspectors and other relevant personnel. Feedback is a crucial tool in helping to train MSHA's workforce to apply guidance correctly and consistently. Proper training can help MSHA inspectors consistently write sound violations and, consequently, reduce court challenges.

MSHA's ACR Handbook requires CLR's to provide feedback on conferences using three methods:

- Communicating the reasons for actions taken to modify or vacate violations based on current Commission decisions, recurring evidence deficiencies, etc., to the enforcement personnel in order to achieve uniform application of regulations to improve consistency.
- Providing to management, supervisory, and enforcement personnel in the district a monthly summary report briefly describing conference decisions that resulted in changes to the violations.
- Participating in staff meetings and district training sessions for inspection personnel by discussing a topic(s) with district personnel to help ensure MSHA staff are consistently applying the CFR and various MSHA guidance, or describing the violation accurately and completely on the violation form.

This feedback loop became a tool for improving inspectors' violation writing skills, helping train inspectors and supervisors to write and review violations more consistently and accurately. Also, this feedback loop allowed inspectors and supervisors to learn about the issues that are most prone to court challenge and to spot developing contentious issues.

We based our conclusion that the feedback loop was not operating properly on **three tests**.

First Test: Evidence of Communication

In our statistical sample of 186 conference files, 163 violations had been modified or vacated. We were unable to find evidence that CLR's communicated the reasons why a conference decision led to modifying or vacating a violation in 41 percent of those files. We looked for documentation (e.g., typically email) where the CLR told the inspector and supervisor there was a change (e.g., modify or vacate) to their violation(s) and the reason why the change occurred. This feedback to the inspector and supervisor is important because it helps them learn why there was a change and gives them an opportunity to apply that lesson learned when writing and reviewing future violations. We did not see this evidence for 67 of the 163

Table 2: Feedback by Type of Action

Action Type	No Evidence of Communication	Total in Sample
Modify	57	130
Vacate	10	33
	67	163

Source: OIG Data Sample

subsequent actions we reviewed in conference files (See Table 2).

If the CLR communicated the results verbally or the CLR did not file the email in the conference file, our test would not capture those results. However, our interviews with the CLRs, supervisors, and inspectors at six MSHA districts confirmed that CLRs did not always communicate every conference result with the issuing inspector and supervisor. During the period covered by our audit, MSHA conferenced 22,707 violations. Based on the 41 percent error rate in our sample, we project that there could have been as many as 9,310 missed opportunities to provide valuable feedback to inspectors.

MSHA's internal review teams found similar issues in 2001 and 2006 when they reviewed accidents at Sago, Darby, and the No. 5 Jim Walter mines. The internal review teams found the CLRs did not provide feedback, did not provide the type of feedback needed to improve performance, and were not consistent in providing feedback. See Exhibit 3 for extracts from the three internal reviews related to MSHA's feedback loop.

Second Test: Evidence of Monthly Reporting

We checked whether the CLRs at the six districts we visited were providing monthly reports to their offices that described conference decisions. A monthly report describes any conference decisions that resulted in changes (e.g., modify or vacate) to violations. Monthly reports are important because they provide the entire district an update on conference results covering a specific period (e.g., month) so the workforce can identify trends, ask questions to the CLR, and receive additional training on how to make their violations defensible from attacks by an operator in a conference.

We found CLRs at five of the six districts did not consistently provide the monthly reports, or the reports they provided related to contested cases instead of conference results. In its own internal review report on the Sago accident, MSHA listed a similar issue when it stated, "Monthly reports and feedback to enforcement personnel were not always given, or were not provided in a timely manner."

Third Test: Participation in Staff Meetings

We checked whether the CLRs at the six districts we visited participated in staff meetings or training sessions for inspection personnel. These staff meetings and training sessions are important because they give CLRs an opportunity to teach the entire district on a topic(s) to help ensure everyone is consistently applying the CFR and various MSHA guidance, or describing the violation accurately and

completely on the violation form. In three of the six districts, we found that they were not.

At the three Coal districts we visited, the CLR participants participated in monthly staff meetings and training sessions, but in the Metal/Nonmetal (MNM) districts we visited, they did not. At one district, the CLR participated only if something abnormal occurred. While at the other two, the CLR participants did not participate.

CLR participants either felt their practice of talking individually with inspectors to discuss changes to violations was sufficient or expressed concerns that briefing conference results to the whole group could create embarrassment or conflict if an inspector felt the CLR was pointing them out among the group. This appeared to be a long-standing issue, as MSHA's internal review report for the Darby mine stated, "[s]ome inspectors felt humiliated by CLR modifications, stating that operators later used such modifications to question their judgments."

Overall, we concluded the feedback loop was not working effectively. MSHA's internal review teams found similar issues in 2001 and 2006. These breakdowns in the feedback loop generally occurred because of a lack of communication, unclear guidance, and inconsistent processes among districts. The breakdowns affected the training and development of inspectors and supervisors, which ultimately hindered MSHA's ability to achieve consistency in writing violations in its workforce.

MSHA DID NOT EFFECTIVELY MONITOR ITS DATA SYSTEMS OR USE DATA TO IMPROVE PERFORMANCE

We found MSHA did not use data in MSIS to spot potential problems and improve the performance of the conferencing program. Moreover, the data in the system was incomplete and inaccurate.

The data MSHA created through the pre-assessment conference program was mainly comprised of dates of key conference events and decisions made through the conferences. While MSHA employees populated data in the system, MSHA headquarters personnel or district management did not monitor the data to ensure it was complete and accurate. In addition, those same MSHA levels did not analyze the data they did gather to identify problems and improve operational performance.

GAO's *Standards for Internal Control in the Federal Government* provides management criteria for designing, implementing, and operating an effective

internal control system. Principle 13 of the Standards requires management to use quality information to achieve the entity’s objectives, stating:

Reliable internal and external sources provide data that are reasonably free from error and bias and faithfully represent what they purport to represent.

In addition, the Standards state:

Management uses the quality information to make informed decisions and evaluate the entity’s performance in achieving key objectives and addressing risks.

We analyzed data for 8,713 conferences initiated between January 1, 2013, and February 1, 2017, the entire population of conferences listed in the system for that timeframe. The data showed mine operators requested 22,707 violations to be conferenced during this timeframe. In addition, we traced a statistical sample of 186 conference decisions listed in the system to supporting documentation in the conference files to verify accuracy of the system entries.

Completeness Test

In our test to determine if MSHA personnel had fully populated MSIS for eight key date fields from 2013 to early 2017, we found one was blank 85 percent of the time, while two others were blank between 42 and 47 percent of the time (see Table 3).

Table 3: Blank Entries in MSIS Conference Fields

Field description	Blanks	%	Population*
Date District notified the mine operator	16,545	85	19,558
Date the CLR communicated results	8,173	47	17,495
Date the DM reviewed conference results	7,433	42	17,495

*19,558 is the number of completed conferences with any type of decision. 17,495 is the number of completed conferences with an “uphold,” “modify,” or “vacate” decision.

Source: OIG data analysis

The blank entries occurred because MSHA did not provide sufficient oversight to ensure the fields were fully populated or emphasize the importance of filling in all data fields during training to the districts. In addition, the system did not have controls to ensure district personnel were entering data for all key fields. An example of a missing system control was not requiring personnel to enter a date

for communicating the conference result to the issuing inspector and supervisor when there was a conference result of upheld, modify, or vacate. Instead, MSHA had provided the workforce with a user manual that provided only general instructions on how the system worked.

Accuracy Tests

In a correlation test⁶ to determine if MSHA personnel had correctly entered key conference event dates, we found over 10,000 dates in incorrect sequences (see Exhibit 4). For example, we identified 381 instances in which MSIS showed a conference decision had been made before the district had even held a conference with the mine operator. Overall, we found an issue with almost every comparison we performed. These results demonstrated that MSHA personnel did not fully understand how to enter data into the system.

In another correlation test, we found over 2,900 cases in which MSHA personnel had entered incorrect or inconsistent data into MSIS. For example, we found 404 cases in which MSIS showed the district cancelled a conference when, in fact, the comments in the file showed MSHA had denied the mine operator the opportunity to discuss specific violations at the conferences. This type of error understated MSHA's conference denial rate. Although the number of errors in each test were not always material, our overall results indicated that no one was verifying the entries into the system.

Finally, we found 60 cases in which MSHA personnel either had not entered the conference decision into the system or had entered it incorrectly, which translated to a 12 percent error rate, based on our statistical sample of 186 files.

Overall, the incomplete and inaccurate conference data in MSIS occurred because MSHA did not properly train personnel on how to adequately populate MSIS, provide adequate oversight, and two key system controls were missing. Consequently, management could not sufficiently rely on the conference data to manage the pre-assessment conference program, affecting MSHA's ability to monitor and report on the program's performance. For example, we found errors leading to inaccurate reporting of the number of instances where MSHA denied mine operators a conference, which can provide an incorrect impression on how many conferences that MSHA was actually granting. We also found inaccuracies with the conference decisions as well as blanks in various date fields, which affects the "conference status" field in MSIS. MSHA includes the conference decision and conference status field in a dataset titled "Conferences" that it

⁶ A correlation test is a check of whether the data is presented in the correct order based on the association of the data field to each other. In this case, the events in the conference process should occur in a specific sequence each time so the data should reflect that sequence.

makes available to the public. Therefore, these inaccuracies may affect any conclusions the public may draw using this publically available data pulled from MSIS.

Had the system contained complete and accurate data, MSHA would have been able to use the data to effectively monitor the program and improve the performance of its districts. For example, the blank fields for communication dates may indicate that some CLR's were not communicating conference results to the workforce. However, incomplete data makes it hard to know whether the CLR's did not communicate results in all those instances or whether the districts simply did not populate some dates.

The data suggested there was a lack of communication from the CLR to the inspector and supervisor that we substantiated by our analysis. With sufficient system controls and monitoring, MSHA could have used the MSIS data to identify the communication gap in real time and made corrections to improve performance. A proactive approach like this would have ultimately helped to ensure the health and safety of miners through improved MSHA operations.

OIG'S RECOMMENDATIONS

We recommend the Assistant Secretary for Mine Safety and Health:

1. Provide training to Conference Litigation Representatives and district management on how to write specific supporting reasons for conference decisions in conference files and violation forms.
2. Provide training to district management on how provide effective oversight over the pre-assessment conference program. The training should focus on reviewing the conference file and the system data for completeness and accuracy.
3. Review each district's process to ensure Conference Litigation Representatives consistently, in a way that does not create embarrassment or conflict, communicate the reasons they modify or vacate violations with supervisors and issuing inspectors and participate in staff meetings and at district training sessions for inspection personnel.
4. Develop MSHA Standardized Information System reports showing a summary of conference decisions that Conference Litigation Representatives can use as their monthly report and changes made to

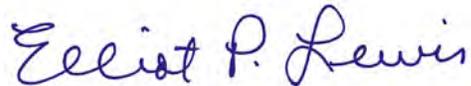
violation form attributes through conferencing decisions that MSHA can use to identify high-risk attributes and research the root causes for trends.

5. Revise the Alternative Case Resolution Handbook to require districts to document reasons supporting conference decisions to uphold a violation. The reason for an uphold decision should explain why any new evidence presented by the operator at the conference did not persuade MSHA to change the violation.
6. Revise the Alternative Case Resolution Handbook to clarify requirements for CLR monthly reporting. For example, the guidance should address the method(s) allowed and the minimum level of detail that CLRs should describe in the report.
7. Provide training on how to populate MSHA's Standardized Information System from the conference files and the importance of the importance of filling in all data fields. The training should focus on defining the required conferencing fields in MSIS to populate, identifying what documentation in the conference file to use when populating each field, and defining appropriate times to cancel a conference.
8. Update MSHA's Standardized Information System with two system controls that require users to populate all required fields and prevent personnel from entering dates in the wrong order.
9. Perform periodic reviews of MSHA's Standardized Information System data to ensure that districts are accurately populating it and marking conferences as completed in a timely manner.

SUMMARY OF MSHA'S RESPONSE

In its response, MSHA agreed with seven of our nine recommendations and has already started taking some action. For the two recommendations where MSHA disagreed, it provided an alternative action to meet the intent of our recommendation. We included management's response to our draft report in its entirety in appendix B.

We appreciate the cooperation and courtesies MSHA personnel 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: ATTRIBUTES OF PROPERLY MANAGED CONFERENCING PROGRAM

We previously provided an overview of the attributes we considered a properly managed conferencing program should include. Below we provide a more detailed list of the actions involved with a properly managed conferencing program.

- 1) Establishes guidance that describes how the conferencing process works and includes internal controls to execute the program effectively.
- 2) Provides mine operators with necessary information:
 - a. Informs mine operators of their right to conference when the inspector issues a violation.
 - b. Provides the mine operator with a specified number of days to submit additional information or request a conference.
- 3) Schedules conferences effectively:
 - a. Verifies the mine operator's request is in writing and includes a brief statement of the reason why each violation should be conferenced.
 - b. Notifies the mine operator timely, in writing, about whether or not MSHA granted the conference request, and lists which violations it will discuss at the conference.
 - c. Grants a large percentage of conferences that meet requirements; under the assumption that the more violations MSHA can settle in a conference, the fewer it will have to defend in court.
- 4) Conducts the conference with the operator in accordance with MSHA guidance:
 - a. Documents the inspector's position, CLR's position, and district manager's decision, and the justification for each decision on the conference worksheet (MSHA form 7000-12) or alternate form. Personnel should make decisions based on the Mine Act, CFR, MSHA guidance, and relevant court decisions.
 - b. Issues any subsequent modifications or vacated actions resulting from the conference on MSHA form 7000-3a by the CLR and lists specific reasons for each change on the form.

- c. Communicates the conference results to the MSHA inspector and MSHA supervisor and explains why the CLR modified or vacated their violations.
- 5) Uses data to improve performance of the program:
- a. Enters the various conference data completely and accurately into MSIS.
 - b. Monitors the completeness and accuracy of the data.
 - c. Uses conference data to manage the conference program effectively.
- 6) Completes post-conference actions:
- a. Reports the conference data accurately within MSHA and to external parties.
 - b. Trains the other management and enforcement personnel on why the CLR's modified or vacated violations including identifying recurring evidence deficiencies, relevant court decisions, and changes in industry.
 - c. Provides supervisory oversight over the conference decision and the conference file.

EXHIBIT 2: EXTRACTS FROM MSHA INTERNAL REVIEWS
RELATED TO DOCUMENTING CONFERENCES

Three MSHA internal reviews discussed problems with MSHA documenting justifications in the conference files or on the violation forms.

Conference Files

We extracted excerpts specifically related to CLRs not properly documenting in the conference files. For example, MSHA's Sago report stated:

In the remaining case, the CLR's conclusion was erroneous. Moreover, the CLR did not provide proper justification for the subsequent actions on the conference worksheet. Conclusive statements provided on the conference worksheet (or other documentation of a health and safety conference) do not offer enforcement personnel the type of substantive feedback that is required to ensure that they understand precisely what evidentiary deficiencies were lacking, or in what respect issuance of the citation or order contravenes case law, statutory or regulatory authority, or MSHA's policy and procedures.

[and]

The CLR did not explain the mitigating circumstances that justified his reduction in negligence, nor did he provide any information rationalizing the reduction in number of persons affected. Moreover, the CLR did not explain why he discounted the fact that the operator had been cited previously for failure to conduct an examination, or why the agent's marking of the record book was discounted.

Additionally, MSHA's Darby report stated:

The conference worksheets did not always include supporting statements from inspection handbooks, Program Policy Manual, and prior decision of the Commission and Administrative Law Judges. Justifications on the worksheets were frequently a summary of the mine operators' statements.

[and]

Citations were modified during conferences by reducing the seriousness of the violations based on abatement action that was taken after the citation was written. The CLR's relied on post-citation abatement activity in making the decision to reduce significant and substantial findings.

[and]

CMS&H headquarters did not provide sufficient oversight to ensure that actions of the district conference litigation officers were consistent with ACR guidelines, and Commission and Appellate Court decisions. In addition, the CLR's did not utilize the Agency reference material such as the 2-year violation history, the MSHA Program Policy Manual, the Citation and Order Writing Handbook, and controlling case law. District management did not provide effective oversight of the ACR program to ensure that CLR decisions were consistent with Agency policy, guidelines, and appropriate Commission case law. The CLR decisions were not reviewed by management and had an adverse effect on the level of enforcement in District 7.

Finally, MSHA's No. 5 Jim Walter report stated:

The CLR used a conference worksheet for documentation purposes. However, the documentation did not always provide reasons for modifying or vacating the citation or order. A general statement was often used such as '*Based upon further review of the facts and circumstances surrounding this issuance, the following modification will be made*'.

Violation Forms

We also extracted excerpts related to CLR's not properly documenting justifications on the violation forms. For example, the Sago report stated:

The internal review team found pervasive problems with CLR's not properly documenting the reasons for subsequent actions, a general lack of oversight by District management, and subsequent actions that were inappropriate given the available information.

Additionally, the Darby report stated:

Justification for the modifications by CLR's were also lacking on Form 7000-3a (Mine Citation/Order Continuation form). CLR's merely stated the modification being made without providing a detailed explanation.

Finally, the No. 5 Jim Walter report stated:

The CLR did not always follow MSHA procedures when citations and orders were modified or vacated as a result of Safety & Health conferences.

**EXHIBIT 3: EXTRACTS FROM MSHA INTERNAL REVIEWS
RELATED TO MSHA'S FEEDBACK LOOP**

Three MSHA internal reviews discussed problems with MSHA's feedback loop for conferencing. For example, the Sago report stated:

Conclusive statements provided on the conference worksheet (or other documentation of a health and safety conference) do not offer enforcement personnel the type of substantive feedback that is required to ensure that they understand precisely what evidentiary deficiencies were lacking, or in what respect issuance of the citation or order contravenes case law, statutory or regulatory authority, or MSHA's policy and procedures.

[and]

Interviewees also stated that they did not always receive feedback from CLRs to communicate why certain subsequent actions were taken.

[and]

Although some previous CLRs, as well as one current CLR, had on occasion travelled to the District field offices and provided instruction and feedback to enforcement personnel, this was not a general practice.

[and]

Pre- and post-conference communication between inspectors and CLRs was not consistent, and was frequently strained.

Additionally, the Darby report stated:

It should be noted that, while CLRs communicated their findings regarding the modification to field enforcement personnel, they provided limited explanation or constructive references to appropriate policy and controlling case law. A lack of second level review of the conference process allowed this practice to go uncorrected.

Finally, the No. 5 Jim Walter report stated:

In such instances, the field office supervisor would require the issuing inspector to modify or vacate the citation or order prior to a conference, at the recommendation of the CLR or Assistant District Manager. As a result, the inspectors were not always included as part of the communication link and, in many instances, were not provided reasons for decisions made to modify or vacate citations or orders.

[and]

Often, the inspectors and their supervisors did not receive a full explanation of the actions taken by the CLR, and did not receive guidance as a result of ineffective communication.” The report also stated “Following safety and health conferences in which the CLR determined that a modification was necessary, the issuing inspector was required to modify the citation or order without the benefit of a full explanation from the CLR. The CLR merely informed the supervisor or the inspector that the citation did not meet the criteria.

EXHIBIT 4: INACCURATE MSIS ENTRIES

MSIS Data Showing Incorrect Sequence of Conference Events	
Incorrect Sequence Identified	Instances
Date conference scheduled precedes date operator requested conference	13
Date conference convened precedes date operator requested conference	10
Date conference convened precedes date conference scheduled	5
Date conference process completed precedes date operator requested conference	14
Date conference process completed precedes date conference scheduled	4
Date conference process completed precedes date conference convened	5
Date MSHA notified operator of grant or deny decision precedes date operator requested conference	2
Date MSHA notified operator of grant or deny decision precedes date conference scheduled	5
Date conference convened precedes date MSHA notified operator of grant or deny decision	2
Date conference process completed precedes date MSHA notified operator of grant or deny decision	3
Date CLR communicated conference decision results to inspector and supervisor precedes date operator requested conference	2
Date CLR communicated conference decision results to inspector and supervisor precedes date conference scheduled	143
Date CLR communicated conference decision results to inspector and supervisor precedes date conference convened	203
Date conference process completed precedes date CLR communicated conference decision results to inspector and supervisor	1,227
Date CLR communicated conference decision results to inspector and supervisor precedes date MSHA notified operator of grant or deny decision	4
Date conference results decided precedes date operator requested conference	21
Date conference results decided precedes date conference scheduled	234
Date conference results decided precedes date conference convened	381
Date conference process completed precedes date conference results decided	202
Date conference results decided precedes date MSHA notified operator of grant or deny decision	10
Date CLR communicated conference decision results to inspector and supervisor precedes date conference results decided	2,281

Date DM reviewed conference results precedes date operator requested conference	2
Date DM reviewed conference results precedes date conference scheduled	237
Date DM reviewed conference results precedes date conference convened	253
Date completed precedes date DM reviewed conference results	427
Date DM reviewed conference results precedes date MSHA notified operator of grant or deny decision	1
Date CLR communicated conference decision results to inspector and supervisor precedes date DM reviewed conference results	2,166
Date conference results decided precedes date DM reviewed conference results	2,910
Date DM reviewed conference results precedes date operator requested conference in "Violations" table	3
Date completed in "Violations" table precedes date DM reviewed conference results	6

APPENDIX A: SCOPE, METHODOLOGY, & CRITERIA

SCOPE

Our scope for this audit was MSHA's 8,713 health and safety conferences listed in MSIS from January 1, 2013 to around February 1, 2017. These conferences occurred prior to the operator receiving the penalty assessment from MSHA. We did not look at any of MSHA's "enhanced" conferences also listed in MSIS during this timeframe because they were a different type of conference that occurred after the operator received the penalty assessment.

For some tests, we statistically sampled 186 conferences from all MSHA districts. We selected our statistical sample using a random number selection methodology of the 8,713 conference numbers in MSIS from January 1, 2013 to around February 1, 2017. Our sample had a 90 percent confidence level and 10 percent precision rate, with an anticipated error rate of 20 percent.

At MSHA headquarters, we interviewed personnel in various program areas: Coal Mine Safety & Health; Metal and Nonmetal Mine Safety & Health; Education Policy and Development, Program Evaluation and Information Resources, and the Office of Assessments.

We did site work at three Coal Districts (5, 7, and 10) and three Metal/Nonmetal Districts (Northeastern, Rocky Mountain, and Western). At the districts, we interviewed the District Managers, Assistant District Managers for Technical Division, Assistant District Managers for Enforcement Division, Field Office Supervisors, inspectors, and specialists.

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 objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

To answer our audit objective, we:

- Interviewed MSHA headquarters and district personnel to learn about MSHA's conferencing program.
- Interviewed people who submitted hotline complaints to the OIG related to MSHA's conferencing program.

- Interviewed a representative from the United Steel Workers union, United Mine Workers of America union, the Solicitor’s Office within the Department of Labor.
- Analyzed MSIS conference data for the 8,713 conferences listed in MSIS from January 1, 2013 to around February 1, 2017.
- Reviewed MSHA conference files for our statistical sample of 186 conferences.
- Reviewed MSHA internal review reports for various mines, such as Sago mine, No. 5 mine, and Darby mine.
- Two MSHA evaluations developed in 2011 and 2016 related to MSHA’s conferencing program.

We assessed the reliability of computer-processed data. Through our testing, we found the MSIS conferencing data was incomplete and inaccurate. There were three key date fields with missing information. In addition, there were incorrect conference decisions, incorrect use of cancelled status, and dates that were out of sequence when compared to the conference process. We addressed these issues in our report and made a recommendation to correct these data reliability issues going forward.

CRITERIA

We used the following criteria to answer our audit objective.

- Title 30 of the Code of Federal Regulations, Part 100.6
- MSHA’s Program Policy Manual Volumes I and III
- MSHA’s Alternative Case Resolution Handbook (AH14-III-5 March 2014 and AH08-III-3 March 2008)
- MSHA’s Program Instruction Letter I11-V-11 effective December 20, 2011 with subject titled “Part 100 Safety and Health Conference Procedures”
- MSHA’s *Citation and Order Writing Handbook for Coal Mines and Metal and Nonmetal Mines* (PH13-I-1(1) December 2013)
- MSHA’s *Coal Mine Safety and Health General Inspection Procedures Handbook* (PH16-V-1 June 2016 and PH13-V-1 February 2013)
- MSHA’s *Metal and Nonmetal General Inspection Procedures Handbook* (PH16-IV-1 June 2016 and PH13-IV-1 April 2013)

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



SEP 20 2019

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

FROM: 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, *MSHA Needs to Better Manage Its Pre-
Assessment Conferencing Program*

The Mine Safety and Health Administration (MSHA) appreciates the opportunity to comment on the work the OIG did evaluating MSHA's pre-assessment conferencing program. MSHA understands the importance of the program and has proactively taken steps to improve it. Some of these improvements already address the spirit of the OIG's recommendations.

MSHA offers the following comments in response to the OIG recommendations.

Recommendation 1: Provide training to Conference Litigation Representatives (CLRs) and district management on how to write specific supporting reasons for conference decisions in conference files and violation forms.

In October 2018, MSHA provided a two-day training that can address this recommendation. CLRs and their clerks attended this training. The training focused on three-years' worth of conference files, specific to attendees' field offices, emphasizing on ways in which documentation could be improved. Going forward MSHA will provide annual online refresher training.

Recommendation 2: Provide training to district management on how provide effective oversight over the pre-assessment conference program. The training should focus on reviewing the conference file and the system data for completeness and accuracy.

Although the two-day training, referenced under MSHA's response to recommendation 1, was provided to CLRs and their clerks, going forward MSHA will include district management in the online refresher training and include a module on review and oversight.

Recommendation 3: Review each district's process to ensure Conference Litigation Representatives consistently, in a way that does not create embarrassment or conflict, communicate the reasons they modify or vacate violations with supervisors and issuing inspectors and participate in staff meetings and at district training sessions for inspection personnel.

Prior to issuance of the OIG's report, MSHA started developing the requirements for a MSHA Standardized Information System (MSIS) report. This report will establish a process for districts and CLRs where reasons violations were either modified or vacated are consistently communicated. This report will summarize key data points in the conferencing process, emphasizing sections of the 30 CFR to which violations were either modified or vacated. By doing so, users of the report will be able to highlight trends or target emergent issues.

Recommendation 4: Develop MSHA Standardized Information System reports showing a summary of conference decisions that Conference Litigation Representatives can use as their monthly report and changes made to violation form attributes through conferencing decisions that MSHA can use to identify high-risk attributes and research the root causes for trends.

Prior to issuance of the OIG's report, MSHA started developing the requirements for a MSIS report. See MSHA's response to recommendation 3 for additional details.

Recommendation 5: Revise the Alternative Case Resolution Handbook to require districts to document reasons supporting conference decisions to uphold a violation. The reason for an uphold decision should explain why any new evidence presented by the operator at the conference did not persuade MSHA to change the violation.

MSHA will not revise the Alternative Case Resolution (ACR) Handbook to require districts to document reasons for upholding a violation. Chapter 2 – Part 100 Safety and Health Conferences, Section E of the Handbook already contains prescriptive documentation requirements. Specifically, Section E requires CLRs to document their decision on the conference worksheet, and maintain all documentation relevant to the case in the conference file. However, MSHA will incorporate a module about conference file documentation, emphasizing the need to document instances of violations being upheld, as part of the online refresher training referenced in MSHA's response to recommendations 1 and 2.

Recommendation 6: Revise the Alternative Case Resolution Handbook to clarify requirements for CLR monthly reporting. For example, the guidance should address the method(s) allowed and the minimum level of detail that CLRs should describe in the report.

MSHA will not revise the ACR Handbook to clarify requirements for CLR monthly reporting. The Handbook is prescriptive in its guidance by requiring CLRs in their 30-day report to *briefly* (emphasis added) describe conference decisions that result in

changes to violations. The Handbook also requires the information be communicated to management, supervisors and inspectors. The vessel in which this information gets communicated is immaterial as long as the information is communicated and documented, as per current requirements. Nonetheless, MSHA believes the MSIS report under development, as referenced in MSHA's responses to recommendations 3 and 4, will address the spirit of this recommendation by provisioning for the minimum level of detail that CLR's are to report.

Recommendation 7: Provide training on how to populate MSHA's Standardized Information System from the conference files and the importance of the importance of filling in all data fields. The training should focus on defining the required conferencing fields in MSIS to populate, identifying what documentation in the conference file to use when populating each field, and defining appropriate times to cancel a conference.

The MSHA provided in October 2018 addresses this recommendation, see MSHA's response to recommendation 1. Going forward MSHA will provide an annual online refresher training course.

Recommendation 8: Update MSHA's Standardized Information System with two system controls that require users to populate all required fields and prevent personnel from entering dates in the wrong order.

MSHA agrees with this recommendation and will develop data validation measures within the MSIS ACR Conference module.

Recommendation 9: Perform periodic reviews of MSHA's Standardized Information System data to ensure that districts are accurately populating it and marking conferences as completed in a timely manner.

MSHA agrees with this recommendation and will develop a report that identifies conferencing records needing to be corrected or marked as complete.

We appreciate 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 the Mine Safety and Health Administration at (202) 693-9414.

APPENDIX C: ACKNOWLEDGEMENTS

Key contributors to this report were:

Nicholas Christopher (Audit Director), Christopher Wenthold (Audit Manager), Jennifer Dunbar, and Katie Mitomi.

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