

# Managing Your Mine: Traveling with Inspectors, Dollars and Sense, and Pattern of Violations

Presented by

**Jason M. Nutzman**

Dinsmore & Shohl LLP • Legal Counsel  
Huntington Square, 900 Lee Street  
Suite 600

Charleston, WV 25301

T (304) 357-9938 or (864) 528-5067 • F (304) 357-0919

E [jason.nutzman@dinsmore.com](mailto:jason.nutzman@dinsmore.com) • [dinsmore.com](http://dinsmore.com)



# Topics of Discussion

- **Traveling with Inspectors**

- Why it is important to have your own notes, your own measurements, and your side of the story

- **Dollars and Sense**

- Why not understanding the implications of each box on the citation/order will hurt your bottom line

- **Pattern of Violations**

- What is a POV?



# Traveling with Inspectors

- **Your right to travel with the inspector**

- Section 103(a) of the Mine Act:

- A representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the [inspector] during the physical inspection of any coal mine for the purpose of **aiding such inspection** and **to participate in pre-or post-inspection conferences** held at the mine

- The inspector may limit the number of people in the inspection party to that which is reasonable



# Traveling with Inspectors

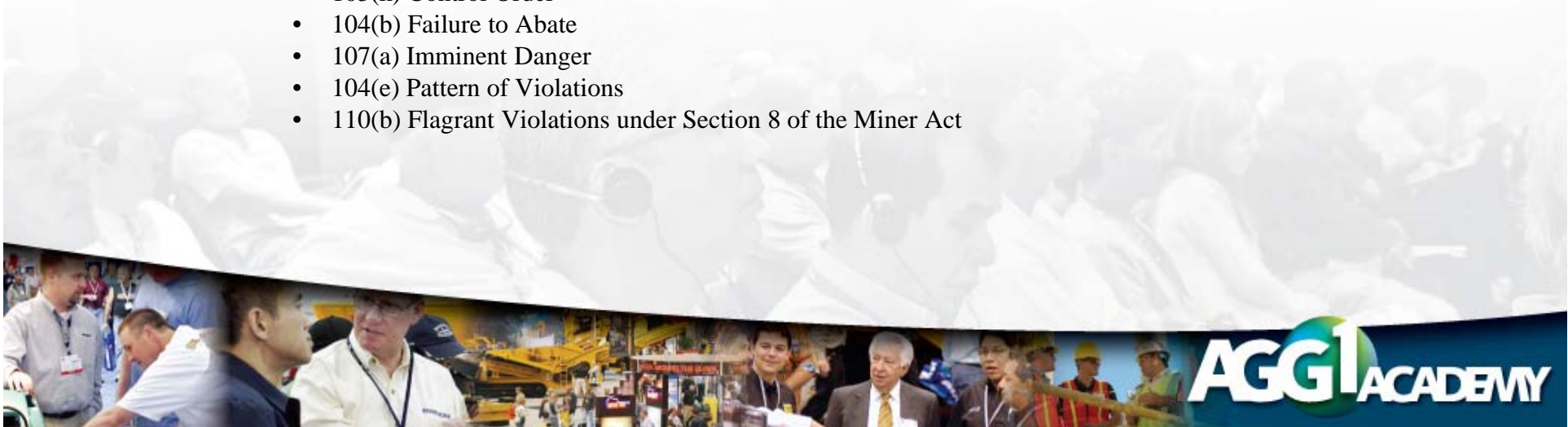
- **Graduated Enforcement System**

- Majority of violations are:

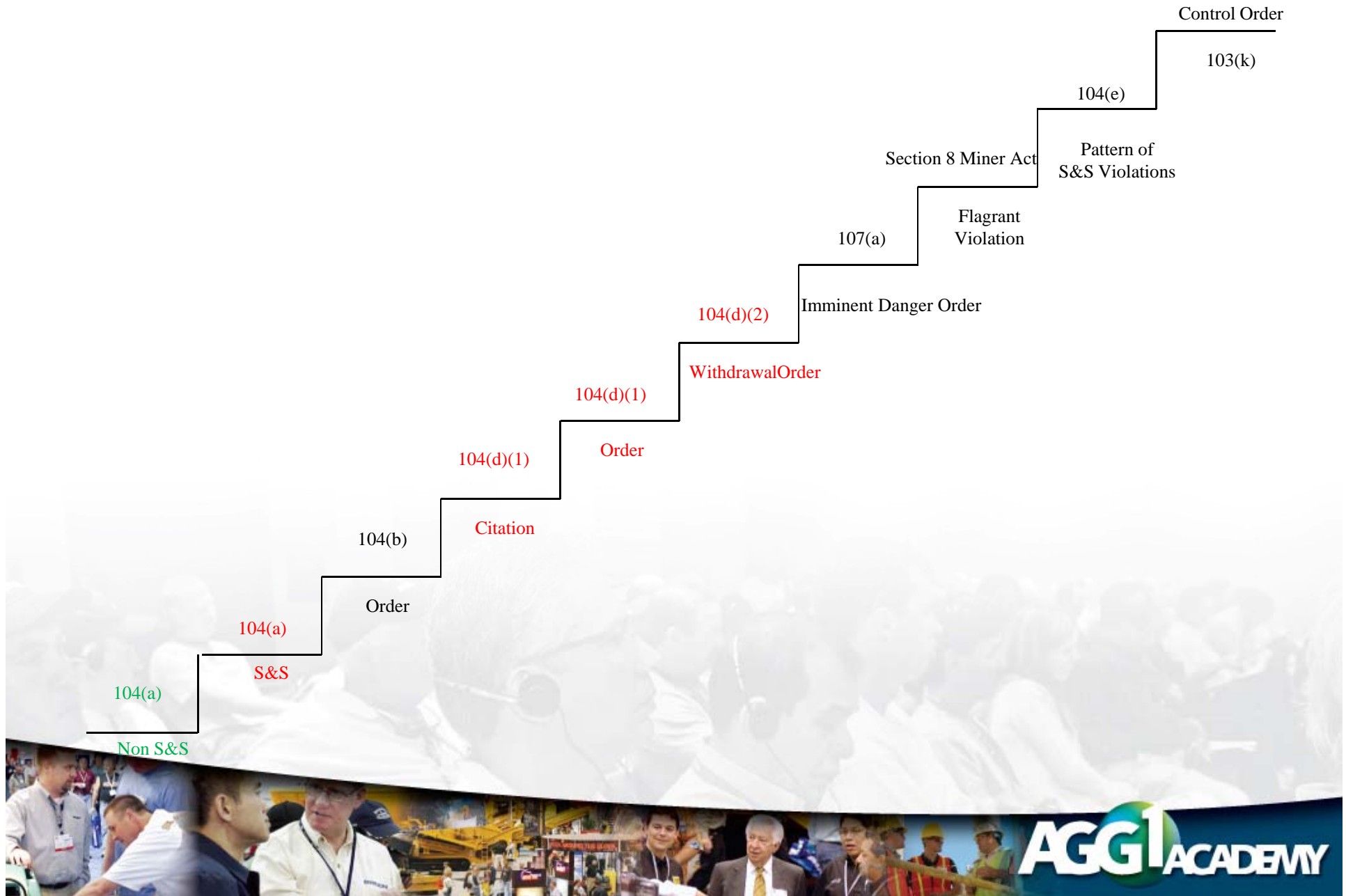
- 104(a) citation (S&S and non-S&S)
- 104(d)(1) citation (citations for unwarrantable failure to comply with mandatory health and safety standards)
- 104(d)(1) order/104(d)(2) order (withdrawal or closure orders for unwarrantable failure to comply with mandatory health and safety standards)

- Other paper written by MSHA includes:

- 103(k) Control Order
- 104(b) Failure to Abate
- 107(a) Imminent Danger
- 104(e) Pattern of Violations
- 110(b) Flagrant Violations under Section 8 of the Miner Act



# MSHA's Graduated Enforcement Scheme



# Traveling with Inspectors

- **Significant & Substantial**

- Definition: The alleged violation could significantly and substantially contribute to a mine safety or health hazard
- MSHA must show, **based on the particular facts surrounding the violation**, that there is a reasonable likelihood that the hazard contributed to by the violation would result in a reasonably serious injury

National Gypsum Company, 2 FMSHRC 1201 (1980)



# Traveling with Inspectors

- **Significant & Substantial**

- Factors to support an S&S Finding:

1. Violation of a mandatory health and safety standard

2. Discrete safety hazard contributed to by the violation

- **“A measure of danger to safety and health contributed to by the violation”**

3. Reasonable likelihood that the hazard contributed to will result in an injury

- Look to fatality and injury or illness frequency generally

- Must evaluate the particular circumstances surrounding the violation at the mine in question

4. Reasonable likelihood that the injury will be of a reasonably serious nature



# Traveling with Inspectors

- **Does the condition meet the S&S standard?**
  - The S&S standard is based on what is “reasonably likely” to occur, and not what “could” or “might” occur
  - The Commission has steadfastly recognized this distinction in evaluating the validity of S&S citations





# Traveling with Inspectors

- **Unwarrantable Failure**

- Unwarrantable failure citations and orders must be based on “aggravated conduct.” If not, they are invalid as a matter of law.
- “Aggravated Conduct” is defined as *reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care*



# Traveling with Inspectors

- **Unwarrantable Failure**

- Factors that define aggravated conduct (defined as reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care):

1. Extent of the violative condition
2. Length of time the condition existed
3. Operator's efforts to abate the condition
4. Whether the operator was placed on notice that greater efforts were necessary for compliance (look to the operator's history of previous citations/orders)
5. Operator's knowledge of the violative condition
6. Danger involved in the citation/order



# Traveling with Inspectors

- **Gravity**
  - Is the injury or illness likely?
  - What is the type of injury or illness that could result?
  - How many persons could reasonably be affected?



# Traveling with Inspectors

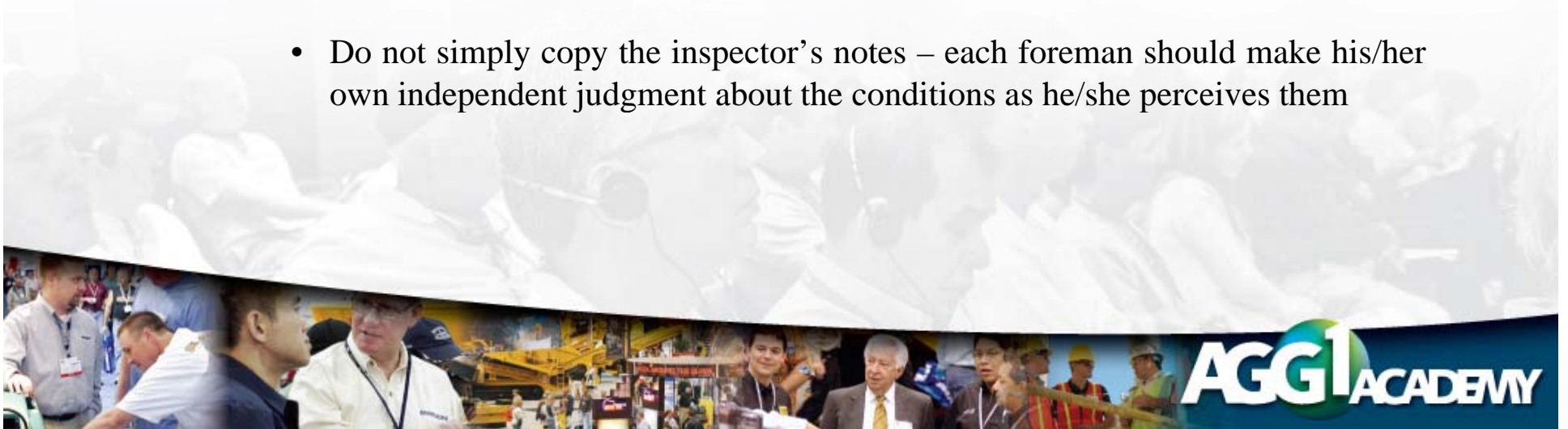
- **Negligence**

- The Mine Act requires operators to take steps to prevent or correct hazards – the operator’s failure to do so is negligence
- “Mitigating Circumstances”
  - What have you done to correct, prevent, or limit exposure to the hazard
  - “Low negligence” – considerable mitigating circumstances
  - “Moderate negligence” – some mitigating circumstances
  - “High negligence”- no mitigating circumstances
  - “Reckless negligence - the operator displayed conduct which exhibits the absence of the slightest degree of care



# Traveling with Inspectors

- **Role of the foreman during the inspection**
  - Gather **FACTS**
    - Being able to defend citations and orders will depend on the facts
    - The inspector is taking notes during his inspection and the foreman must as well
    - Do not simply copy the inspector's notes – each foreman should make his/her own independent judgment about the conditions as he/she perceives them



# Traveling with Inspectors

- **Role of the foreman during the inspection**
  - Follow the lead of the inspector
    - Take the same measurements
    - Take the same air/dust readings
    - Take photographs
    - Document his statements and statements of others involved in the inspection
    - Document time frames – i.e., time of arrival and time of departure at the locations he inspects
    - Note who the inspector talked to during the inspection and the substance of the conversations



# Traveling with Inspectors

- **Role of the foreman during the inspection**
  - Never let the inspector out of your sight
  - It is difficult to try and talk an inspector out of writing a citation or order
    - In fact, it may turn the inspector against you in the future
  - Do ask questions
    - Ask about the S&S standards



# Traveling with Inspectors

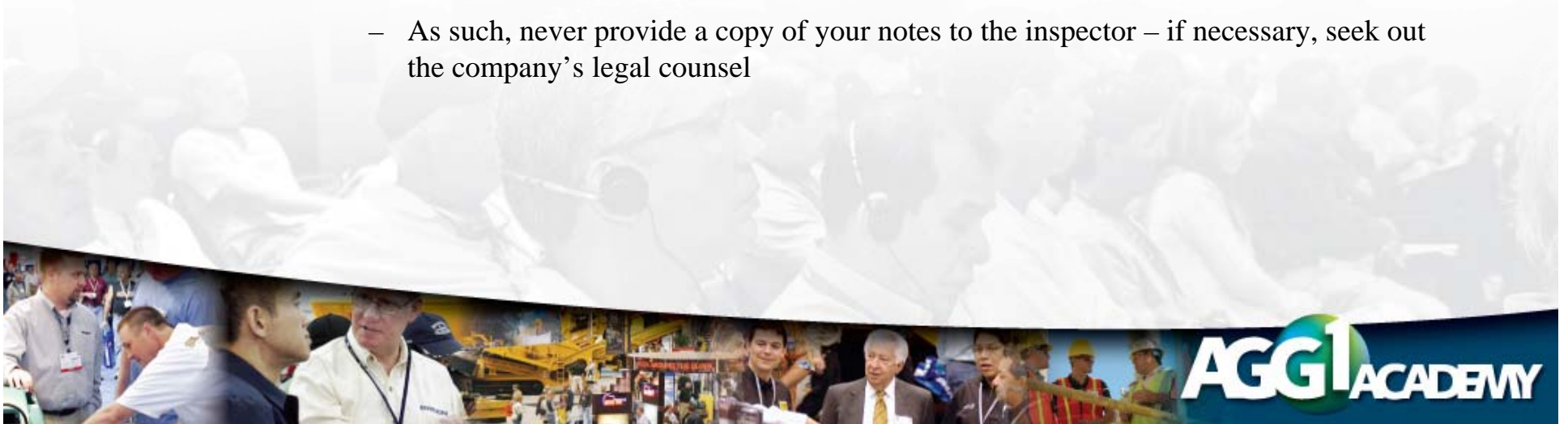
- **Role of the foreman during the inspection**
  - Do not assist the inspector with his job – the foreman is present as a representative and a guide
  - Do not offer information
  - Avoid making any unnecessary admissions
  - Never withhold information – be truthful when asked
  - Never guess – if the foreman does not know the answer to the inspector's question do not speculate and find the answer, if possible





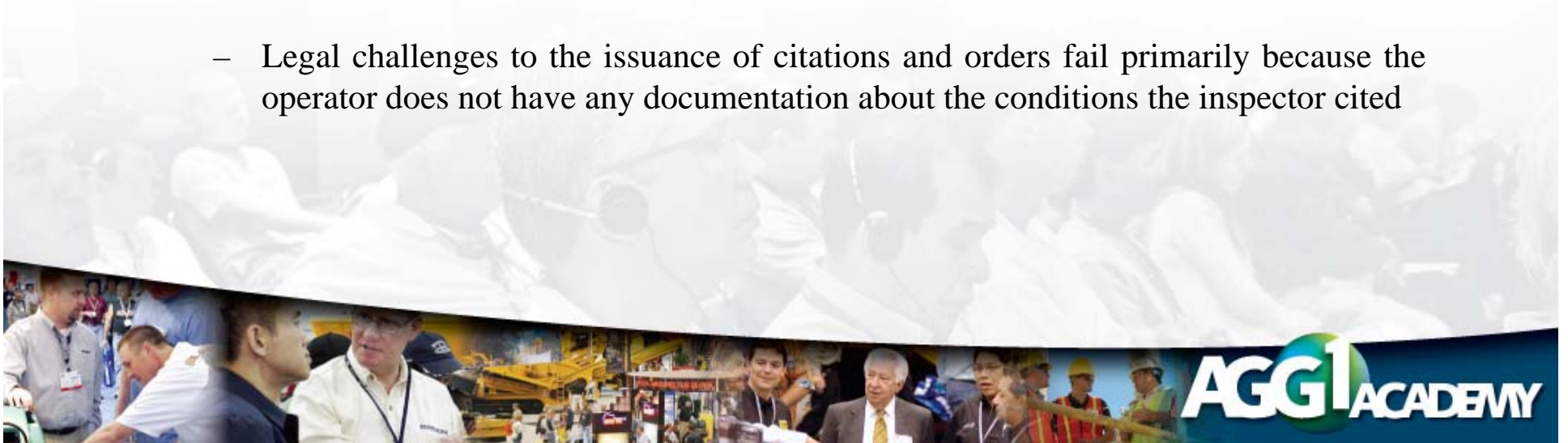
# Traveling with Inspectors

- **Role of the foreman during the inspection**
  - Take notes
    - **FACTS** and not personal opinions
    - These notes are being taken in anticipation of potential litigation and should be guarded as legal work product (privilege)
      - As such, never provide a copy of your notes to the inspector – if necessary, seek out the company's legal counsel



# Traveling with Inspectors

- **Why is the foreman's role so important?**
  - The operator needs to document and understand the facts about what actually happened during the inspection
  - If the operator cannot tell its side of the story the operator will lose – there is a presumption that what the inspector cited in the citation or order was what actually occurred without any contradictory evidence
  - Legal challenges to the issuance of citations and orders fail primarily because the operator does not have any documentation about the conditions the inspector cited



# Dollars and Sense

- **Graduated Enforcement Scheme**

- Increased penalties in proportion to:

- the seriousness of the alleged violation;
    - the degree of the operator's fault; and
    - the operator's *prior citation history* regarding similar safety and health standards



# Dollars and Sense

- **How important is managing each individual citation/order?**
  - Penalties increase for each box checked by the inspector
  - Important to understand up front how each box increases the amount of the proposed penalty
  - More emphasis is placed on notes taking by foreman in order to contest the issuance of the citation/order and the proposed penalty



# Dollars and Sense

- **How important is managing each individual citation/order?**
  - Let's see how this works with a real-world example



Sample Citation



# Dollars and Sense

- **How important is managing each individual citation/order?**
  - Let's see how this works with a real-world example



Sample 1000-179



Sample 1000-179  
(Example 1)

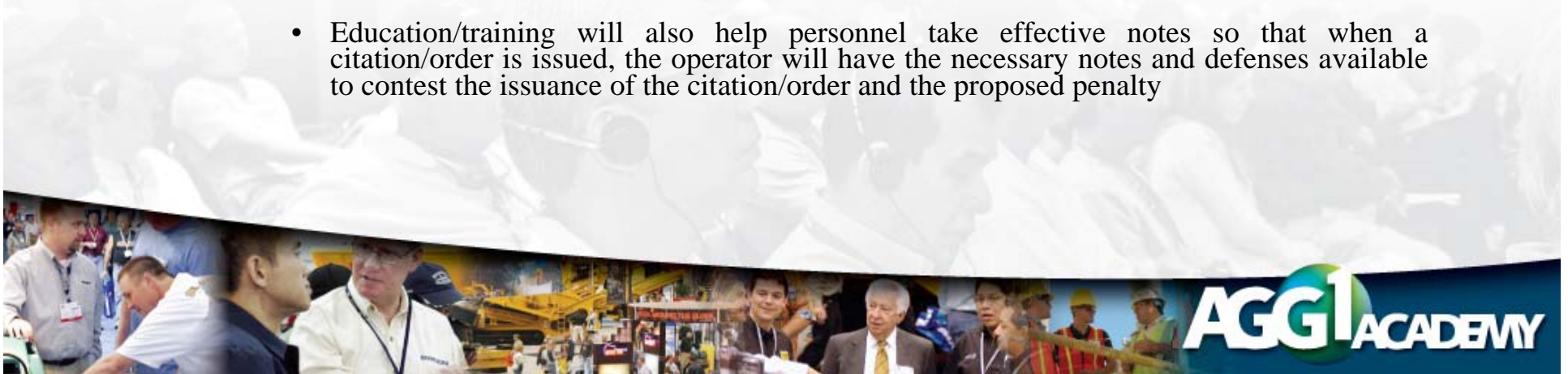


Sample 1000-179  
(Example 2)



# Dollars and Sense

- **What can each operator do to combat the heightened regulatory enforcement scheme that currently exists?**
  - Become proactive at the outset, before a citation/order is issued
  - Pre-enforcement education/training
    - This includes having personnel who will travel with inspectors armed with the necessary knowledge of the regulations, what constitutes an S&S violation, and what constitutes unwarrantable failure
      - Why? MSHA inspectors regularly participate in training classes to help them issue S&S and unwarrantable failure citations/orders
    - Education/training will also help personnel take effective notes so that when a citation/order is issued, the operator will have the necessary notes and defenses available to contest the issuance of the citation/order and the proposed penalty



# Dollars and Sense

- **What can each operator do to combat the heightened regulatory enforcement scheme that currently exists?**
  - Litigation preparation
    - Witness testimony is key – the MSHA inspector will testify to first-hand knowledge and is oftentimes looked upon favorably by Commission judges
    - It is absolutely essential for the operator to provide testimony that refutes the MSHA inspector





# Pattern of Violations

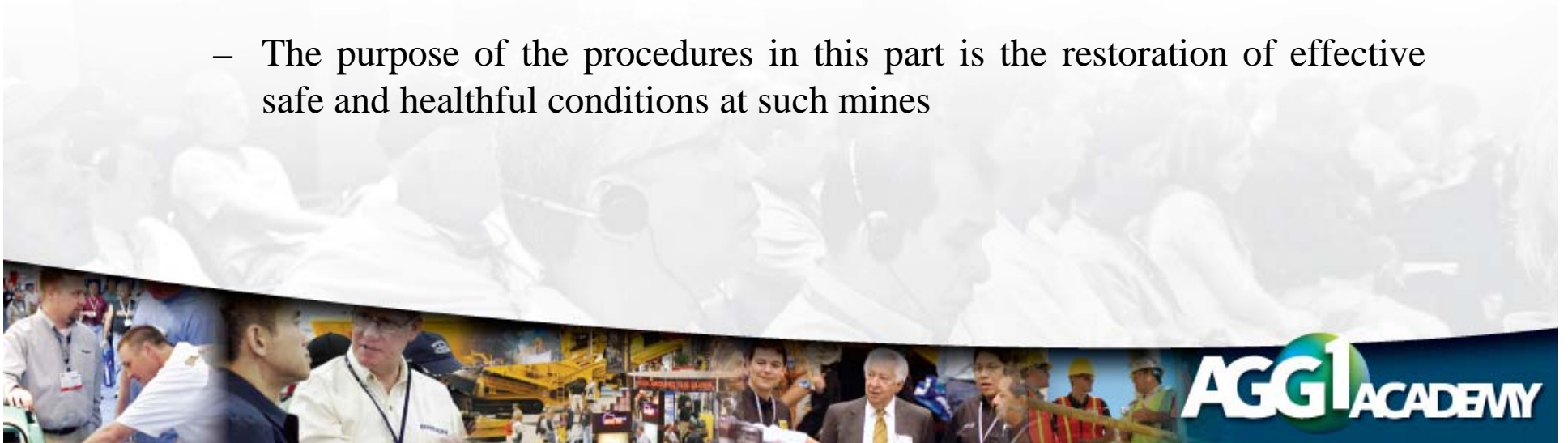
- **A Brief History**

- POV language comes from Section 104(e) of the Mine Act
- Designed to be an additional enforcement tool
- MSHA proposed rules in 1980 only to withdraw the proposed rules in 1985
- MSHA tried again in 1989 and the current final rule was adopted in 1990 (codified at 30 C.F.R. Section 104)



# Pattern of Violations

- **Purpose and Scope (30 C.F.R. § 104.1)**
  - Criteria and procedures for a “pattern of significant and substantial violations at a mine”
  - To identify those mine operators who disregard the health and safety of miners
  - The purpose of the procedures in this part is the restoration of effective safe and healthful conditions at such mines



# Pattern of Violations

- **Initial Screening (30 C.F.R. § 104.2)**

- At least once each year MSHA reviewed the following:

- History of S&S violations
- Section 104(b) closure orders from S&S violations
- Section 107(a) imminent danger orders

- These are all “issued” citations/orders at this stage

- The following are also considered:

- Enforcement measures, other than Section 104(e), which have been applied at the mine
- Evidence of the operator’s lack of good faith in correcting the problem that results in repeated S&S violations
- An accident, injury, or illness record that demonstrates a serious safety or health management problem at the mine
- Any mitigating circumstances



# Pattern of Violations

- **Initial Screening Criteria**

1. At least 50 citations/orders that are S&S that were **issued** in the most recent 12 months;
2. A rate of 8 or more S&S citations/orders issued per 100 inspection hours during the most recent 12 months **or** the degree of negligence for at least 25% of the S&S citations/orders **issued** during the most recent 12 months is “high” or “reckless disregard”;
3. At least 0.5 elevated citations/orders issued under section 104(b)/104(d)/104(g)/107(a) per 100 inspection hours in the most recent 12 months
4. A 12 month Injury Severity Measure (“SM”) for the mine is greater than the overall industry SM for all mines in the same type and classification over the most recent 5 years

OR



# Pattern of Violations

- **Initial Screening Criteria**

1. At least 100 S&S citations/orders issued in the most recent 12 months; and
2. At least 40 elevated citations/orders **issued** under section 104(b)/104(d)/104(g)/107(a) during the most recent 12 months



# 104(e) PATTERN OF VIOLATIONS FLOW CHART

**30 C.F.R § 104.2  
Initial Screening**

**Significant and Substantial  
(S&S) Violations**

**104(b) Violations resulting  
from S&S Violations**

**107(a) Imminent  
Danger Orders**

**Additional Criteria**

**Enforcement measures other than 104(e)**

**Lack of good faith in correcting problems  
by the operator resulting in repeated S&S  
Violations**

**An accident, injury or illness record that  
demonstrates a serious safety or health  
management problem at the mine.**

**Any Mitigating Circumstances**

**Only citations and orders issued after October 1, 1990 shall be considered  
as part of the initial screening**



# Pattern of Violations

- **Pattern Criteria (30 C.F.R. § 104.3)**

- Used to identify those mines with a potential pattern of violation (“PPOV”) – to identify those who have habitually allowed the recurrence of S&S violations

- Specific criteria:

- History of repeated S&S violations of a particular standard;
- History of repeated S&S violations related to the same hazard; or
- History of repeated S&S violations caused by unwarrantable failure to comply

- Importantly, only citations and orders issued after October 1, 1990 that have become **final** shall be used to identify mines with a PPOV



# Pattern of Violations

- **Pattern Screening Criteria**

1. For purposes of POV review at this stage, mines must have at least 5 S&S citations/orders of the same standard that have become **final orders** of the commission during the most recent 12 months; or
2. At least 2 S&S unwarrantable failure violations that became **final orders** of the commission during the most recent 12 months





# 104(e) PATTERN OF VIOLATIONS FLOW CHART

30 C.F.R § 104.3  
Pattern Criteria

Only applies after initial screening is conducted *in accordance* with 30 C.F.R. § 104.2

30 C.F.R. § 104.3 criteria are

History of *repeated* S&S violations of a *particular standard*

History of *repeated* S&S violations of standards related to the *same hazard*

History of *repeated* S&S violations caused by *unwarrantable failure to comply*

Only citations and orders issued after October 1, 1990 and that have become *final* shall be used to identify mines with a potential pattern of violations under this section



# Pattern of Violations

- **Issuance of Notice (30 C.F.R. § 104.4)**

- The DM will notify the operator in writing **and** give the operator a reasonable opportunity, within 20 days, to do the following:
  - Review all documents upon which the POV evaluation is based;
  - Provide additional information to the DM;
  - Submit a written request for a conference with the DM;
  - Institute a program to avoid repeated S&S violations
- If the DM continues to believe that a PPOV exists at the mine, he will submit a report to MSHA
- The Administration will then determine whether the mine is to be issued a notice of a POV



# 104(e) PATTERN OF VIOLATIONS (Continued)

30 C.F.R § 104.4  
Issuance of Notice

District Manager (DM) notifies the operator in writing  
of the pattern of violations.

Within 20 days of the notification operator must:

Review all documents that were evaluated for the  
pattern of violations and provide additional  
information to the DM

Submit a written request for a conference with the  
DM. Conference will be held within 10 days of a  
request.

Implement a program to avoid repeated S&S  
violations. DM may allow additional time, not to  
exceed 90 days, to determine if the effort reduces  
S&S violations. Miners representative shall be  
allowed to discuss the program with the DM.

If DM continues to believe that potential pattern  
violation exists, a report will be sent to the MSHA  
Administrator within 120 days of the notification.

Written comments shall be submitted to the  
Administrator within 10 days from receipt of the  
report by the operator.

Administrator will notify the operator within 30  
days if a notice of pattern will be issued

A notice of a pattern of violations shall remain  
posted at the mine until the notice is terminated  
under § 104.5.



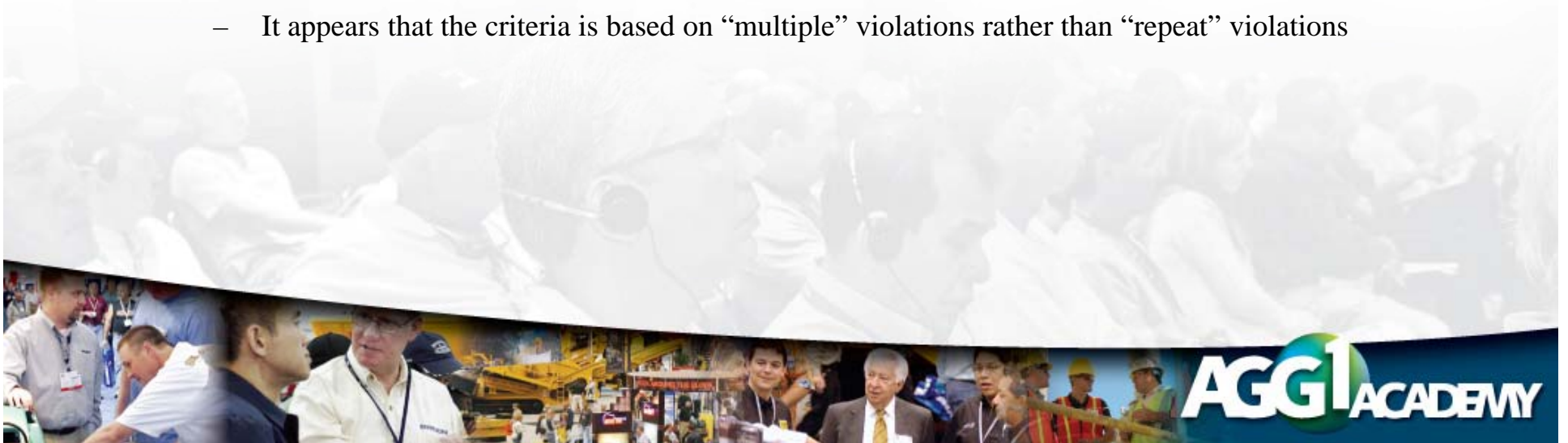
# Pattern of Violations

- **Termination of Notice (30 C.F.R. § 104.5)**
  - This occurs when an inspection of the entire mine finds no S&S violations or if no withdrawal order is issued by MSHA
  - Any S&S citation/order issued within 90 days of the POV notice will serve as a shut-down order for that specific area of the mine or the affected equipment
  - The mine operator may request an inspection of the entire mine or portion of the mine



# Pattern of Violations

- **General Concerns of the Industry:**
  - “Mitigating circumstances” is not defined
  - What is exactly required by a “written safety and health management program”?
  - The current procedure protects miners’ safety and without violating the operators due process rights
  - It appears that the criteria is based on “multiple” violations rather than “repeat” violations



# Pattern of Violations

- **General Concerns of the Industry (continued):**

- Once a mine is placed on POV status, it must achieve no S&S citations/orders for 90 days to be removed from the POV
  - It is rare that a mine will go 90 days without one S&S citation/order being issued
- Consideration should be given to specific mine classifications that do not exist significant safety and health issues



# Pattern of Violations

- **What can each operator do to combat the heightened regulatory enforcement scheme that currently exists?**
  - Become proactive at the outset, before a citation/order is issued
  - Pre-enforcement education/training
    - This includes having personnel who will travel with inspectors armed with the necessary knowledge of the regulations, what constitutes an S&S violation, and what constitutes unwarrantable failure
      - Why? MSHA inspectors regularly participate in training classes to help them issue S&S and unwarrantable failure citations/orders
    - Education/training will also help personnel take effective notes so that when a citation/order is issued, the operator will have the necessary notes and defenses available to contest the issuance of the citation/order and the proposed penalty



# Questions?



Feel free to contact me at  
(864) 528.5067 or at  
[jason.nutzman@dinsmore.com](mailto:jason.nutzman@dinsmore.com)  
with any additional questions

