



Mining MSHA - What Is “Significant And Substantial”?

Insights

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Welcome to “Mining MSHA,” a regular series of posts focusing on mine safety fundamentals – but designed for both new and experienced mine safety professionals. This series will help safety professionals develop their MSHA legal knowledge, as we explore over 40 years of case law developed by the Federal Mine Safety and Health Review Commission and its bench of Administrative Law Judges. You will want to share this series with your safety personnel at all levels, because understanding what MSHA can and cannot legally do is the first step in managing your relationship with this enforcement agency. Join your Fisher Phillips Mine Safety team as we mine legal knowledge from the body of Federal Mine Safety and Health law.

So far, in this series, we have discussed the process for conferencing and contesting citations and orders. Next, we turn our attention to one of the most common reasons for challenging a citation or order: gravity.

Gravity is the evaluation of the seriousness of an alleged violation, and is generally determined by considering three factors found in 30 C.F.R. Section 100.3(e):

1. Likelihood of occurrence of the event against which a standard is directed;
2. Severity of the expected illness or injury if the event has occurred or was to occur; and
3. The number of persons affected if the event has occurred or were to occur.

Gravity designations of a citation or order encompass likelihood, injury/illness, number of persons affected, and “Significant and Substantial” (S&S) designations.

Evaluating Likelihood, Injury Or Illness, And Number Of Persons Affected

Evaluating likelihood is a fact-based inquiry to determine whether the condition or practice falls under one of five designated categories: no likelihood, unlikely, reasonably likely, highly likely, or occurred. To start, evaluating likelihood considers the timeframe of the existence of a condition or practice and the frequency of exposure of miners to such condition or practice. Evaluating likelihood often considers the location and extensiveness of the condition or practice as well as the number of miners exposed to the condition or practice. Determining likelihood must also include an assumption that the alleged violation would continue to exist under normal mining conditions.

Given these considerations, generally, inspectors will usually find an increased likelihood the longer a condition or practice existed, and the more frequently miners are exposed to it. Similar to likelihood, assessing the type of injury or illness and the number of persons affected are both fact-based determinations which should be made independently of the likelihood.

Evaluating Significant And Substantial

Tied closely to likelihood is S&S. A violation is only properly designated as S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature.

In 1984, the Federal Mine Safety and Health Review Commission developed the legal test for determining S&S, commonly known as the *Mathies* test, which requires the Secretary of Labor to prove the following by a preponderance of the evidence:

1. The underlying violation of a mandatory standard;
2. The existence of a discrete safety hazard contributed to by the violation;
3. A reasonable likelihood that the hazard contributed to will result in an injury; and
4. A reasonable likelihood that the injury in question will be of a reasonably serious nature.

Secretary of Labor v. Mathies Coal Company, 6 FMSHRC 1 (Rev. Comm. Jan. 1984). This means that, after determining whether a violation of the cited standard exists, the S&S evaluation must (1) determine and define the specific hazard the standard is aimed to prevent, and (2) determine whether based upon particular facts of that violation, there existed a reasonable likelihood of the occurrence of the hazard against which the mandatory standard is directed.

What constitutes a “reasonable likelihood” of injury and a “reasonably serious” injury is often up for debate because, while all mandatory safety or health standards intend to prevent an injury or illness, many standards encompass a myriad of conditions and contemplate many types of injuries or illnesses. In any event, a proper S&S evaluation should consider what injury or illness a cited standard aims to prevent based on the specific facts surrounding the alleged violation. But in doing so, it is necessary to evaluate the actual potential of the proffered event as opposed to what would be theoretically possible.

An S&S evaluation must also assume the existence of the violation during continued normal mining operations. Operators, therefore, must consider both the time the condition existed before the issuance of the citation or order and the time it would have existed during future normal mining operations. This analysis involves considerable speculation given the multitude of examinations and corrective measures performed by operators throughout the workday.

Conclusion

In sum, both S&S and likelihood determinations should not be based exclusively on speculation of what an inspector theorizes *could* happen. Rather, a proper evaluation must first focus on the

What an inspector sees is what happens. A proper citation must not focus on the specific hazard the standard aims to prevent and whether that hazard existed. If so, is it reasonably likely the hazard would occur given the particular facts surrounding the violation. If the answer to some or all of those questions is no, we advise contesting the citation or order, especially given the increased enforcement potential posed by receiving S&S citations and orders.

In the next issue, we will cover another commonly contested designation: negligence. Stay tuned, and don't forget to reach out to your mine safety lawyer, or [any attorney in our Mine Safety & Health group](#), for specific questions and guidance on any of the topics covered in this series.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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