



# Mining MSHA – What Is Unwarrantable Failure?

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.*

In our last article, we explored the concept of negligence and how it can impact a citation or order. We continue this series with a discussion of the unwarrantable failure designation. Operators should understand what an unwarrantable failure is and how to avoid an allegation of aggravated conduct. Finally, we will provide operators a list of best practices to avoid this elevated negligence determination.

## The Unwarrantable Failure Designation

Citations and orders with elevated negligence findings are not automatically unwarrantable failures, but they are evaluated for evidence of something more than ordinary negligence – something more than inadvertence or mistake. When discussing unwarrantable failure, we are talking about violations resulting from an operator’s “High” negligence or “Reckless Disregard.” MSHA inspectors are required to evaluate these violations for findings of unwarrantable failure to comply. “Moderate” negligence will generally not support unwarrantable findings.

The Federal Mine Safety and Health Review Commission has defined an unwarrantable failure as “aggravated conduct constituting more than ordinary negligence.” *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995).

When determining whether conduct is “aggravated” in the context of an unwarrantable failure, the Commission has analyzed the facts and circumstances of each case to see if any aggravating factors exist. These factors include:

- The length of time that the violation has existed;

- The extent of the violative condition;
- Whether the operator has been placed on notice that greater efforts are necessary for compliance;
- The operator's efforts in abating the violative condition;
- Whether the violation is obvious or poses a high degree of danger; and
- The operator's knowledge of the existence of the violation.

Essentially, the Commission is looking for factors indicating an operator knew about a violative condition and did nothing to correct it or prevent it from occurring. The Commission has also found that repeated "similar" violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard.

### **Mechanics Of The Unwarrantable Sequence**

Section 104(d) of the Mine Act provides the mechanism for MSHA to issue citations and orders with an unwarrantable failure designation. Section 104(d)(1) provides that if an MSHA inspector cites a condition that is significant and substantial and a result of the operator's unwarrantable failure, the inspector should issue a 104(d)(1) citation. On that same inspection or a subsequent inspection within 90 days after the issuance of that initial 104(d)(1) citation, MSHA can issue a 104(d)(1) order withdrawing all persons from the cited area if another condition resulting from the operator's unwarrantable failure is found.

During inspections within 90 days of the issuance of a 104(d)(1) order of withdrawal, an MSHA inspector may issue a 104(d)(2) order of withdrawal for violations similar to those that resulted in the 104(d)(1) order. This chain of 104(d)(1) citation, 104(d)(1) order, then 104(d)(2) orders is called the 104(d) unwarrantable sequence. An operator remains on the unwarrantable sequence, and subject to 104(d)(2) orders, until MSHA performs an inspection of the entire mine revealing no unwarrantable failures or a period of 90 days goes by without an unwarrantable failure issued.

### **Avoiding An Unwarrantable Failure**

Negligence impacts the unwarrantable failure designation. As discussed above, MSHA inspectors are required to review citations marked as "high" or "reckless disregard" for aggravated conduct evaluating the following factors:

- The violative condition or practice posed a high degree of danger to miners, warranting increased attention from the operator to prevent or correct the hazards created by the violation;
- The violative condition or practice existed for an extended period of time;
- Repeated similar violations were cited at the mine or to the contractor in the recent past;
- An agent of the operator or contractor was in the area or was aware of the existence of the hazard;

- The operator knew or had reason to know the action(s) violated a mandatory standard;
- The violative condition or practice was reported to the operator or contractor who then failed to correct the problem, for an extended period of time;
- The violative condition was a result of a deliberate activity by the operator;
- The individual who committed or allowed the condition or practice to exist was a supervisor or an agent of the operator or contractor;
- Reasonable efforts were not made by the mine operator or contractor to prevent or correct the hazard; and
- Other factors, not identified above, that resulted in a negligence evaluation by the inspector of “high” or “reckless” disregard.

Any one of these factors may constitute sufficient grounds for an unwarrantable failure citation or order.

Operators should be aware that inspectors evaluate these factors during an inspection. Operators should be aware that as conditions are documented on examination records, if the corrective action is not also documented, MSHA inspectors will assume the condition existed since the first time it appears on an exam record. Show inspectors corrective action from the examination books or other records you have. You can also share the following information, as it becomes relevant during an inspection, with an MSHA inspector to mitigate a potential unwarrantable failure finding:

- Recent work orders for repair items;
- Invoices for parts on order;
- Instructions to an hourly employee to fix an issue; and
- Evidence that the cited condition had just occurred or occurred after the most recent examination.

Operators should not underestimate the impact of the unwarrantable failure designation. Unwarrantable failures result in increased penalties. They act as orders of withdrawal for the area affected by the cited condition. They are considered elevated enforcement actions for purposes of pattern of violations calculus. They can lead to special investigations and potential agent liability. These enforcement actions should be taken seriously by all operators and every effort made to avoid allegations of aggravated conduct.

In the next issue, we will cover another important topic – agent liability. 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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