



Commission Clarifies S&S Standard for MSHA Citations

Insights

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This post discusses the most recent decision of the Federal Mine Safety and Health Review Commission ("Commission") regarding the appropriate legal standard for significant and substantial ("S&S") designations. Mine operators should make sure they are aware of the Commission's interpretation of the *Mathies* test as it evolves so that they can point out instances when the test is misapplied before an Inspector issues a citation.

The Commission's standard for determining whether a Citation is appropriately designated as S&S, commonly known as the *Mathies* test, requires the Secretary of Labor to prove: (1) an underlying violation of a mandatory safety standard (most of 30 C.F.R., including Parts 56/57); (2) a discrete safety hazard - that is, a measure of danger to safety - 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. The Commission has summarized the test by stating that "A violation is 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." Your safety and health managers should know these factors by heart and be able to recite them during an inspection. However, what is often less clear is what constitutes a "reasonable likelihood" of injury and a "reasonably serious" injury.

Recently, in *Secretary v. S&S Dredging Company*, the Commission reversed the Administrative Law Judge's decision that the Order at issue was not S&S. The Order in this case was issued under 30 C.F.R. Section 56.14100(b), which requires that mine operators correct defects on equipment that affect safety. The Inspector observed that the steps on a loader were in a defective condition because the bottom step hung loosely from chains and was unstable. The Inspector issued a 104(d)(1) Order, designating the Order as S&S and the result of the operator's unwarrantable failure to comply with the safety standard.

The Judge found that the Order should not have been designated S&S because the injuries that may have occurred would not have been reasonably serious and would have been at most "sprains, possibly a broken ankle," but would not require hospitalization, surgery, or a long period of recuperation. Noting that the lower step was only one foot off the ground, the Judge stated that "the height at which these steps are located does not appear to be very significant in terms of a contributing factor to a serious injury."

On appeal, the Commission reversed the Judge, holding that the Judge misapplied the *Mathies* test. The Commission stated that muscle strains, sprained ligaments, and fractured bones are injuries of a reasonably serious nature. The Commission ultimately held that "the Secretary is not required to demonstrate that an injury would result in hospitalization, surgery, or a long recovery period in order to establish that a violation is significant and substantial."

This decision highlights the importance of knowing the correct legal standard for S&S and discussing with the Inspector during the inspection, rather than waiting for court review of the Inspector's designation. Once the S&S box is checked, as many mine operators have discovered, it is much more difficult to remove the designation, even if the facts do not necessarily support the Inspector's findings. At a minimum, it requires some level of contest and possibly legal fees. Especially now that MSHA's new POV Final Rule is effective, and S&S designations are counted against an operator before becoming final orders, mine operators should keep an eye on the continuing evolution of S&S determinations by the Commission.

More information regarding MSHA's interpretation of S&S designations can be found in [MSHA's Program Policy Manual](#) at pages 21-24.