

***Developments in the Law:***  
***Definitions of “Significant and Substantial” and***  
***“Unwarrantable Failure” and***  
***Application of the Part 100 Penalty Criteria***

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There have been a number of major changes in federal mine safety and health law in recent years, not least of which are the new Part 100 penalty assessment criteria, which have dramatically increased civil penalties. This, coupled with the new use of pattern of violation enforcement, has added to operators’ concern with whether the S&S and unwarrantable failure definitions are being appropriately and fairly applied by the agency and the Commission.

This presentation summarizes recent interesting cases concerning the S&S and unwarrantable failure criteria and discusses various issues concerning application of the Part 100 criteria in the penalty assessment process.

1. Recent Cases on “Significant and Substantial”

*Cumberland Coal Co.*, Docket No. PENN 2008-189 (Sept. 2009) (Weisberger, ALJ) (petition for review pending before the Commission).

In this case, the Judge found that violations concerning underground escape lifelines were not S&S because there was not a reasonable likelihood of a fire or explosion occurring that would necessitate an evacuation.

*Wolf Run Mining Co.*, Docket No. WEVA 2008-804 (Feb. 2009) (Feldman, ALJ) (petition for review pending before the Commission).

In this case, the Judge noted that safeguards are “interim mandatory safety standards” under Title III of the Mine Act and found that since the Mine Act’s definition of “mandatory health and safety standards” includes “interim mandatory safety standards,” a safeguards violation could be designated as S&S.

Some recent cases upheld S&S findings for certain electrical violations in which the outer insulation on cables was damaged, but no bare wires were exposed, while at least one case concluded a similar violation was non-S&S.

*Webster County Coal*, Docket No. KENT 2007-451 (Feb. 2009) (Melick, ALJ) (finding violations of 30 C.F.R. § 75.604(b) where there were openings in permanent splices, with no bare wires exposed).

*Excel Mining*, Docket No. KENT 2008-122 (April 2009) (Weisberger, ALJ) (finding a violation of 75.517 where there was a small tear in the outer jacket of a trailing cable in which insulation on internal conductors was still intact).

*Ohio County Coal Co.*, Docket No. KENT 2007-318 (Dec. 2009) (Zielinski, ALJ) (although splice in a trailing cable was damaged, the violation was not S&S because, among other things, the insulation on the internal conductors was still intact, the damage had not reached the point where it presented a shock hazard, and the cable is regularly examined).

## 2. Recent Cases on “Unwarrantable Failure”

*IO Coal Company*, Docket No. WEVA 2007-293 (2009).

In this case, the Commission vacated the Judge’s determination that the violation had not been the result of unwarrantable failure and remanded the case to the Judge for further evaluation and discussion of the unwarrantable failure criteria as applied to the facts.

The case concerned alleged unsupported cracks in the roof and kettle bottoms observed by the inspector. The Judge had found, among other things, that not all the kettle bottoms were unsupported and that the violation was not the result of a “wide-spread and reckless disregard of the requirements of the roof control plan.” The Judge also noted that there apparently had been a disagreement between company management and the inspector that may have contributed to the inspector’s decision to cite this as unwarrantable failure and high negligence.

In vacating and remanding the case to the Judge, the Commission noted that a judge must consider “all relevant factors, rather than relying on one to the exclusion of others.” Although a judge may find that some factors are not relevant, given the facts, all the factors must be considered and at least noted by the judge. The Commission went on to discuss the facts of the case as they apply to each of the factors, discussing among other things, the significance of prior violations to determining whether the operator was on notice that greater efforts toward compliance were needed and the evaluation necessary to determine whether the operator’s disagreement with MSHA over what constituted a violation was an objectively reasonable, good faith disagreement.

*Coal River Mining, LLC*, Docket No. WEVA 2006-196 (2010).

In this case, the Commission again remanded a case to a judge for further consideration of the evidence in light of all the unwarrantable failure criteria. One of the factors the Commission decided needed further examination concerned the duration of the violation. Here the Commission noted, “We appreciate that the state of the record . . . does not permit the judge to make a conclusive finding . . . . Nevertheless, the duration of the violation remains a relevant consideration . . . . Even imperfect evidence of duration in the record should be taken into account by the judge.”

### 3. Part 100 Penalty Assessment Criteria

MSHA's new civil penalty assessment criteria promulgated in 2007 have, as anticipated, resulted in much higher civil penalties for most types of citations. To understand what accounts for the higher penalties, we must first review briefly how penalties for most types of citations and orders are assessed under the new system.

In the regular penalty assessment process, MSHA follows a formula that assigns points for the various criteria used in assessing penalties, such as size of the mine and negligence level attributed to the violation. The points for all the penalty criteria are then totaled. The total points equates to a dollar amount that is the penalty. As the point levels increase, the associated dollar amount geometrically increases. Thus, citations with higher penalty points are assessed dramatically higher civil penalties.

The agency used a similar point system for regular penalty assessments prior to 2007. In 2007, however, the system was revised to allocate the points differently across the penalty criteria and to increase the overall dollar amounts equated to the total penalties at the end of the penalty calculation. The result has been much higher penalties, and, in many instances, penalties that seem completely out of proportion to the facts at hand.

What has become quite apparent with this new point system is that now, more than ever before, *each and every finding* in a citation can have a significant impact on the final penalty amount. In other words, the operator is going to pay for *every finding* the inspector makes. Nearly every box checked on the citation can affect the penalty points and as the total of points rises, each additional point equates to even more dollars.

The following real life example involving a small company is illustrative:

- History of more than 2.1 violations per inspection day
- Inspector findings:
  - Possibility of Injury: “reasonably likely”
  - Expected Consequence: “lost work days”
  - Negligence: “high”
  - Number of Persons Potentially Affected: One
- Penalty: \$3,143

If the inspector had made one or two different findings, the results would have been as follows:

- Possible “Fatal” Injury—Penalty: \$10,437
- Number of Persons Potentially Affected: Ten—Penalty: \$40,180

Under this system, the inspector is making subjective determinations as to the level of negligence or the likelihood of an injury that are directly affecting the amount of money the operator will have to pay. An error or misjudgment on the inspector's part can equate to an

increased penalty in the tens of thousands of dollars. Inconsistency in enforcement from one inspector to another and from one inspection to the next is a bigger concern now than ever. This is one of the reasons many citations that previously would have gone unchallenged are now being contested. Operators are seeking fairness in the findings on the citations as well as correct determinations as to whether a violation occurred in the first place.

In the coming years, we can expect to see further legal challenges to inspector findings that heretofore, frankly, operators had not considered worth litigating, such as expected injury or level of negligence. Now these things matter in real terms and could well be the subject of trial proceedings if a reasonable resolution cannot be reached in settlement.

Another cause for concern is the impact of violation history on the penalty assessment. This is now measured in two ways: the mine's ratio of violations per inspection day and the incidence of repeat violations. The violation history is based on the 15-month period preceding the date of issuance of the citation to be assessed. The citation being assessed will be considered a "repeat" violation if the mine had at least ten citations of any standard and at least six violations of the same citable provision of a safety standard in that 15-month period. If the violation is a "repeat," then additional penalty points will be assigned to the assessment of that violation. (Different statistics apply to independent contractors.)

It is important to note that only citations and orders that have become "final" are included in the violation history calculation. Final citations and orders are those that are assessed violations that have become final orders of the Commission either because the penalties were paid without contest or the contest proceedings have been concluded with the violation having been upheld.

The added penalty points for repeat violations can reach a total of twenty points, depending upon the ratio of the number of repeat violations per inspection day. This can increase the penalty by quite a lot. For example, a violation that otherwise would be assessed a civil penalty of \$2,748, would be assessed a penalty of \$13,609, if it had the maximum number of repeat penalty points added.

Repeat points can creep up on an operation. A given citation may not in and of itself be counted as a "repeat," but it may be the basis for the next one being a repeat. Every citation counts equally in this process, no matter how low the penalty or how minor it may seem.

One frustration operators have with the repeat violation designation is the fact that various MSHA standards are so broadly written that citations which technically are "repeat" because they are citing the same standard, actually concern two completely different types of hazards and, therefore, in reality actually are not "repeats" at all. Examples of such broad standards include 30 C.F.R. § 75.512 (requiring correction of a "potentially dangerous condition" on electric equipment); 77.205(a) (requiring a "safe means of access . . . to all working places"); and 77.404(a) (requiring mobile and stationary equipment to be "maintained in [a] safe operating condition). These are among MSHA's most frequently cited standards.

Even before the 2007 changes, repeat violations were a cause for concern and something to be avoided. Certainly, from a safety standpoint, trends are important to track and address

where appropriate. Where the same safety issues arise again and again, additional training may be needed, equipment may need to be repaired or replaced, or other improvements may be needed in the interest of safety.

With respect to MSHA enforcement, repeatedly violating the same standard can cause an inspector to designate later violations as unwarrantable failure and high negligence. It can also cause inspectors to suspect the quality of the mine's workplace examinations.

Mine operators can keep track of how they are doing on their overall violation history, as well as their repeat violation statistics by going to the Data Retrieval System on MSHA's website. There you can search for mine history statistics that will provide all this information, and much more.

In addition to knowing how an operation is doing, it also is helpful to know what safety standards MSHA inspectors cite most often. This data is also available on MSHA's website and it is classified by types of mines, so it can be quite useful.

One perhaps unintended consequence of the new civil penalty rules is the effect they are having on small operators. Many are getting hit very hard with enforcement never before seen. Small operators are receiving total penalties as great as \$80,000, \$150,000 and \$200,000 for single inspections. Many large operators are also receiving penalty assessments in the six figures for single inspections. With MSHA's having drastically scaled back opportunities for informal conferences which had offered the chance for review of citations and thus appropriate adjustments to be made before penalties were assessed, the only recourse for operators is to contest violations. There is too much at stake with these high penalties and the inspectors have all the power at this point to not only decide what the citation will allege, but also what the civil penalty amount will be.