

Chapter 17

Developments in the Requirements for Unwarrantable Failure and Significant and Substantial Under the Federal Mine Safety and Health Act of 1977

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§ 17.01. Introduction.

The importance of significant and substantial (“S&S”) and unwarrantable failure findings that are included in the citations and order(s) that the Federal Mine Safety and Health Administration (MSHA) issues has increased in the last several years. It seems that as many mines are on the unwarrantable failure chain now as in the days when the lesser standard for unwarrantable failure of “should have known” was applied. The importance of significant and substantial findings has become magnified with the use of the pattern of violations sanctions.

The Secretary of Labor and MSHA appear also to be attempting to reshape these sanctions. They have indicated that as part of their agenda that they want to overturn the fundamental case law on S&S in particular. The use of inexperienced attorneys in the backlog project with no knowledge of the Mine Act has exacerbated this trend. This chapter attempts to highlight some of the recent cases to address what is changing in these areas of the law.

§ 17.02. Section 104(a).**[1] — Section 104(d) Requires the Application of a Mandatory Standard.**

Section 104 of the Federal Mine Safety and Health Act of 1977 (Mine Act)¹ provides for the issuance of citations and orders for violations of the Act or of a mandatory health or safety standard, *or* of any rule, order, or regulation promulgated pursuant to the Mine Act.² The authority to make S&S and unwarrantable findings is set out in Section 104(d)(1). Such authority is limited to those violations involving mandatory safety and health standards. Section 104 (d)(1) states as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary *finds that there has been a violation of any mandatory health or safety standard*, and if he also

¹ Section 104 of the Federal Mine Safety and Health Act of 1977, 30 USC § 801 (“Mine Act”).

² *Id.* § 814.