DEPARTMENT OF LABOR

Mine Safety and Health Administration

The ''Significant and Substantial'' Phrase in Sections 104(d) and (e) of the Federal Mine Safety and Health Act of 1977; Interpretative Bulletin

The Interpretative Bulletin published below sets forth a statement of the Secretary of Labor's Mine Safety and Health Administration's (MSHA's) interpretation of the ''significant and substantial'' phrase contained in sections 104(d) and (e) of the Federal Mine Safety and Health Act of 1977 (Mine Act), an interpretation which will be implemented in accordance with a Program Information Bulletin attached as an appendix to this Interpretative Bulletin. This Interpretative Bulletin provides an explanation of the Secretary's interpretation of the statutory phrase and the rationale supporting this interpretation.

The Secretary of Labor is responsible for interpreting and applying the statutes which she administers. Interpretation and application of statutory terms to particular factual circumstances is an ongoing process. Publication of all interpretative positions taken by the Secretary is impossible, but from time to time the Secretary has found it useful as a means of notifying the public in general, and interested segments of the public in particular, to publish Interpretative Bulletins or other material setting forth the Secretary's general interpretative positions on particular provisions of certain statutes.

Purpose of This Interpretative Bulletin

The purpose of this Interpretative Bulletin is to provide notice of the Secretary's interpretation of the statutory phrase ''significant and substantial'' appearing in sections 104(d) and (e) of the Mine Act, an interpretation which the Secretary will utilize in enforcing the Mine Act. The Secretary's interpretation of the ''significant and substantial'' phrase is that a violation must be found to be ''significant and substantial'' as long as it is shown to present a hazard that is more than remote or speculative.

This Bulletin is also meant to provide notice that the Secretary intends to challenge the interpretation of the ''significant and substantial'' phrase set forth and applied in the existing case law of the Federal Mine Safety and Health Review Commission (Commission).

Under the Mine Act, which is enforced by MSHA, the importance of the ''significant and substantial'' phrase is that if a violation of a mandatory health or safety standard is found to be ''significant and substantial,'' the operator may be subject to increasingly severe enforcement actions under sections 104(d) and (e) and to higher civil penalties under section 110.

The Commission's existing interpretation of the ''significant and substantial'' phrase is that a violation may be found to be ''significant and substantial'' only if it is shown to present a hazard that is reasonably likely to result in a reasonably serious illness or injury. The Secretary intends to challenge the Commission's interpretation of the ''significant and substantial'' phrase because, after conducting a careful review of the Commission's decisions and the language, history, and purpose of the phrase, the Secretary has concluded that the Commission's interpretation is legally incorrect.

The Commission's Interpretation of the ''Significant and Substantial'' Phrase, and the Secretary's Disagreement With the Commission's Interpretation

The Commission has determined that a violation is ''significant and substantial'' if, ''based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.'' *Cement Division, National Gypsum Co.,* 3 FMSHRC 822, 825 (1981). *Accord Mathies Coal Co.,* 6 FMSHRC 1, 3–4 (1984). The Secretary has concluded that the Commission's interpretation of the ''significant and substantial'' phrase as requiring the Secretary to establish a ''reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature'' is inconsistent with the plain language, legislative history, and remedial purpose of the Mine Act, and that the Commission's application of its interpretation of the phrase over the years has increasingly impeded MSHA's attempts to improve health and safety by imposing meaningful sanctions for violations of the Mine Act's mandatory standards.

For example, the Commission has in recent years vacated the MSHA inspectors' significant and substantial determinations in a series of cases involving permissibility violations [1] or violations posing ignition or explosion hazards. *Texasgulf, Inc.,* 10 FMSHRC 498, 501–503 (1988); *Eastern Associated Coal Co.,* 13 FMSHRC 178, 184 (1991); *Energy West Mining Co.,* 15 FMSHRC 1836, 1838–1839 (1993). *Texasgulf* involved three violations of 30 CFR 57.21078, the permissibility standard for metal/nonmetal mines. The hazard presented was that the violation would result in a methane ignition or explosion. In analyzing whether there was a reasonable likelihood that the hazard would result in an ignition or explosion, the Commission stated that there must be a ''confluence of factors,'' including a sufficient amount of methane in the atmosphere surrounding the impermissible gaps and ignition sources, to support a significant and substantial determination. *Texasgulf,* 10 FMSHRC at 501. At the time of the citation, methane measured .009%, methane had never been detected in the explosive range at the trona mine involved, and the geologic formations at the mine were not such as to result in high methane liberation. On that basis, the Commission concluded that there was not a reasonable likelihood that the hazard would result in a mine ignition or explosion. *Texasgulf,* 10 FMSHRC at 502–503. The Commission made this determination despite evidence that the mine liberated 50,000 to 90,000 cfm methane daily and that sudden methane liberations could occur.

The Commission subsequently applied its ''confluence of factors'' formulation of the ''reasonable likelihood'' element of its significant and substantial interpretation in two other cases involving ignition and explosion hazards. *Eastern, supra; Energy West, supra.* An analysis of these cases establishes that the Commission's interpretation of the ''significant and substantial'' phrase and its application of the ''reasonable likelihood'' ''confluence of factors'' analysis requires the Secretary not only to establish the presence of combustible material or methane in large or dangerous amounts and the presence of potential ignition sources, but also to establish that the ignition sources are sparking either because of normal use, as with a continuous miner, or because of a malfunction. For this reason, the Commission's interpretation and application of the ''significant and substantial'' phrase to ignition and explosion hazards effectively equates a ''significant and substantial'' violation with an imminent danger. In other

[1] Methane is a flammable gas found in underground mining. In order to prevent methane from coming into contact with an ignition source, electrical equipment used in many underground mines must be permissible. Permissible means that the equipment has been approved by MSHA for use underground. Permissible equipment is designed so that the air in the mine atmosphere cannot enter the electrical components of the equipment.

words, the Commission may, under its interpretation, require close to a certainty that the hazard contributed to will result in an injury-causing event to support a significant and substantial finding for violations presenting ignition or explosion hazards. All of the foregoing cases involved ignition or explosion hazards, which are among the most serious hazards encountered in mining.

More generally, the Commission's narrow interpretation of the ''significant and substantial'' phrase as applying only to violations which present hazards that are virtually certain to result in injury-producing events impedes MSHA's ability to improve health and safety conditions in mines in a broad variety of other cases because it effectively removes the ''significant and substantial'' tool from MSHA's enforcement arsenal. A review of the decisions issued by the Commission and its administrative law judges indicates a decline in the percentage of significant and substantial citations affirmed by the Commission in the years since the Commission's 1988 decision in *Texasgulf.* Similarly, a disturbing number of decisions issued by Commission administrative law judges in recent years demonstrated a restrictive and unrealistic application of the ''significant and substantial'' phrase. In addition, the Commission's narrow interpretation has resulted in recent years in an increasing amount of unnecessary and unnecessarily complicated litigation. *See United States Steel Mining Co.,* 18 FMSHRC 862, 868–867 (1996) (Commissioner Marks, dissenting) (calling for reexamination of the Commission's interpretation and concluding, *inter alia,* that that interpretation has ''only serve[d] to fuel a constant stream of unnecessary litigation that results in a diminished level of Congressionally mandated protection to our nation's miners and puts an unacceptable financial strain on operators and the government''). Most importantly, as discussed below, the Commission's interpretation of the ''significant and substantial'' phrase is inconsistent both with the plain language of the Mine Act and with its legislative history.

The Plain Language of the ''Significant and Substantial'' Phrase

The Federal Mine Safety and Health Act of 1977 (Mine Act) amended and replaced the Federal Coal Mine Health and Safety Act of 1969 (Coal Act). The ''significant and substantial'' phrase which appeared in section 104(c) of the Coal Act (the unwarrantable failure provision) was carried over unchanged to section 104(d) of the Mine Act. The phrase appears in section 104(d) of the Mine Act as follows: ''such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard * * *.'' In addition to appearing in the unwarrantable failure provision of section 104(d), the ''significant and substantial'' phrase appears in the pattern of violations provision of section 104(e) of the Mine Act, which was a new provision.

In each section, the ''significant and substantial'' phrase describes the type of violation which, when cited under the respective sections in conjunction with other factors, results in the possible imposition of further sanctions on the offending operator.[2] The words ''significantly and substantially'' are adverbs modifying the verb ''contribute.'' Therefore, it is the contribution of the violation to the cause and effect of a hazard which must be ''significant and substantial.''

Although the term ''hazard'' is not defined in the Mine Act, it is a common word which has been defined as ''* * * a thing, or condition that *might* operate against success or safety; a *possible* source of peril, danger, duress or difficulty * * *.'' *Webster's Third New International Dictionary* (1966 ed.) (emphasis added). The language of section 104(d) does not indicate that any particular degree of hazard is required to support a significant and substantial finding.

Similarly, nothing in section 104(d) requires that the violation actually contribute to a hazard. On the contrary, the ''significant and substantial'' phrase begins with ''*could* significantly and substantially contribute to the cause and effect of * * * (a) mine * * * hazard'' (in sections 104(d)(1) and 104(e)(2)) and ''*could have* significantly and substantially contributed to the cause and effect of* * * (a) mine * * * hazard'' (in section 104(e)(1)). Therefore, the statutory language precludes application of the ''significant and substantial'' phrase to those violations which present no hazard or present a hazard that is only remote or speculative in nature. Conversely, the statutory language mandates application of the ''significant and substantial'' phrase to violations which present hazards that have a realistic possibility of occurring.

In addition, the Secretary's interpretation of the ''significant and substantial'' provision of the Mine Act is consistent with the legislative history and with the enforcement scheme of the Mine Act.

The Legislative History of the ''Significant and Substantial'' Phrase

In enacting the Mine Act, Congress specifically addressed the meaning of the ''significant and substantial'' phrase as Congress understood and intended the phrase to be applied. In discussing the meaning of the ''significant and substantial'' phrase as it had been interpreted under section 104(c) of the Coal Act, the Senate Committee report on what became section 104(d) of the Mine Act harshly criticized the holding of the Commission's predecessor, the Interior Board of Mine Operations Appeals, in *Eastern Associated Coal Corp.,* 3 IBMA 331 (1974), as an ''unnecessarily and improperly strict view of the 'gravity test' * * * (which) has required that the violation be so serious as to very closely approach a situation of imminent danger.'' S. Rep. No. 95–181, 95th Cong., 1st Sess. at 31, *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 614 (1978). The Committee then noted with approval its understanding of the IBMA's subsequent *Alabama By-Products* decision, stating that in *Alabama By-Products Corp.,* 7 IBMA 85 (1976), the Board had ''ruled that only notices for purely technical violations could not be issued under section 104(c)(1) (of the Coal Act).'' The Committee then stated:

> The Board's holding in *Alabama By-Products Corporation* is consistent with the committee's intention that the unwarrantable failure citation is appropriately used for all violations, whether or not they create a hazard which poses a danger to miners(,) so long as they are not purely technical in nature. The Committee assumes, however, that when ''technical'' violations do pose a health or safety danger to miners, and are the result of an ''unwarrantable failure'' the unwarrantable failure notice will be issued.

S. Rep. No. 95–181 at 31, *reprinted in Legislative History* at 632.[3] The Secretary's interpretation of the ''significant and substantial'' phrase is consistent with the explicit statements

[2] Under section 104(d), the other factors are that the conditions created by the alleged violation were caused by an unwarrantable failure of the operator to comply with mandatory health or safety standards. Under section 104(e), the other factor is a previously issued written notice from the Secretary to the operator alleging that a pattern of significant and substantial violations exists.

[3] The significant and substantial phrase appears in Section 104(d) of the Mine Act which also includes the unwarrantable failure provision. Thus, this provision is sometimes referred to as the unwarrantable failure citation.

in the legislative history addressing the phrase, and the Commission's is not.

The Purpose of the ''Significant and Substantial'' Phrase in Promoting Health and Safety

The Secretary's interpretation of the ''significant and substantial'' phrase is also consistent with the underlying purpose and the enforcement scheme of the Mine Act. Mining is one of the Nation's most hazardous occupations. The ''significant and substantial'' phrase reflects the fact that Congress was attempting to root out and prevent significant and substantial contributions, both actual and potential, to mine health and safety hazards. *See* sections 2(c) and (e) of the Mine Act. Congress' concern in preventing potential mine hazards, or at least eliminating them before they result in accident, injury, or illness, is the reason Congress established a low threshold for finding a violation to be significant and substantial. Applying the ''significant and substantial'' provision to all violations which present a hazard that has more than a speculative or remote chance of occurring is fully consistent with the Mine Act's enforcement scheme.

Moreover, in addition to attempting to prevent significant and substantial contributions to mine safety and health hazards, the ''significant and substantial'' provision also acts as a trigger for additional, stronger enforcement tools available to MSHA to address more serious operator conduct. For example, the unwarrantable failure provision in section 104(d) addresses violations resulting from an operator's indifference or other aggravated conduct in permitting a violation to occur or in refusing to correct a known violative condition, and provides for increasingly severe consequences for repeated unwarrantable violations, including a withdrawal order requiring all miners to be withdrawn from the area until the hazardous condition is corrected. The first citation issued to an operator under section 104(d)'s unwarrantable failure provision must allege that the violation is both significant and substantial and the result of the operator's unwarrantable failure to comply with the mandatory health or safety standard. Subsequent unwarrantable failure violations are not required to be significant and substantial. Thus, to trigger the unwarrantable failure provision, the initial violation must be significant and substantial.

In addition, the significant and substantial provision is important for section 104(e)'s pattern of violations notice, which is issued to an operator who establishes a pattern of recurrent significant and substantial violations, i.e., the habitual violator. The Secretary has promulgated regulations for the application of section 104(e)'s notice of pattern of violations at 30 C.F.R. part 104. Those regulations ensure that even with a broader interpretation of the significant and substantial provision, the pattern provision is remedial and not onerous. It is only if the extensive corrective efforts and procedures outlined in 30 C.F.R. part 104 are not successful or if the operator declines to institute such a program that the mine may actually receive a pattern notice. Even if those efforts are not successful, a pattern notice is not issued until after higher level review by the appropriate MSHA administrator. However, if the Secretary's attempts to assist the operator to correct the recurrent violations are unsuccessful, the pattern of violations notice permits the Secretary to order the withdrawal of miners until the hazardous condition is abated.

The Secretary acknowledges that she has refrained from challenging the Commission's interpretation of the ''significant and substantial'' phrase for a number of years. However, the Commission's increasingly restrictive application of that interpretation over the years has, as discussed above, led the Secretary to reevaluate the Commission's interpretation. After reevaluating the Commission's interpretation of the ''significant and substantial'' phrase, the Secretary has concluded that the Commission's interpretation is inconsistent both with the plain language of the Mine Act and its legislative history, and with the effective enforcement of the Act.

Dated: January 30, 1998.

J. Davitt McAteer,

Assistant Secretary for Mine Safety and Health.

U.S. Department of Labor

Mine Safety and Health Administration, 4015 Wilson Boulevard, Arlington, Virginia 22203–1984

NON-MANDATORY APPENDIX
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PROGRAM INFORMATION BULLETIN NO. P98–7

FROM:
MARVIN W. NICHOLS, Jr., Administrator for Coal Mine Safety and Health
EDWARD C. HUGLER, Acting Administrator for Metal and Nonmetal Mine Safety and Health

SUBJECT: Significant and Substantial

Scope

This program information bulletin is for all Mine Safety and Health Administration enforcement personnel, mine operators, and independent contractors.

Purpose

The purpose of this bulletin is to inform MSHA enforcement personnel, mine operators, and independent contractors of how MSHA intends to enforce and litigate its interpretation of the ''significant and substantial'' phrase which it set forth in the Interpretative Bulletin published along with this Program Information Bulletin in today's **Federal Register**.

Information

The Mine Safety and Health Administration's (MSHA's) enforcement personnel will continue to cite violations as ''significant and substantial'' in accordance with existing practices as outlined in the Agency's Program Policy Manual.

For all ''significant and substantial'' findings which are then litigated before an administrative law judge, the Solicitor's Office will assert that the violation is ''significant and substantial'' both under the interpretation of the ''significant and substantial'' phrase announced in the Secretary's Interpretative Bulletin and under Commission case law until there is a definitive judicial decision regarding the validity of the Secretary's interpretation.

In the interest of administrative and judicial economy, the Secretary will litigate a small group of cases until there is a definitive ruling on the validity of the Secretary's interpretation of the ''significant and substantial'' phrase.

Background

Along with this Program Information Bulletin, in today's **Federal Register**, the Secretary published an Interpretative Bulletin which set forth the Secretary's interpretation of the ''significant and substantial'' phrase in Sections 104(d) and 104(e) of the Mine Act. As the Secretary explained in the Interpretative Bulletin, after conducting a careful review of the language, history, and purpose of the ''significant and substantial'' phrase as well as a review of the Commission's ''significant and substantial'' decisions both prior to and after *Texasgulf, Inc.*, 10 FMSHRC 498 (1988), the Secretary has concluded that the Commission's existing interpretation of the ''significant and substantial'' phrase is incorrect.

Authority

30 U.S.C. 814(d) and 814(e).

Issuing Offices and Contact Persons

Coal Mine Safety and Health,
Robert A. Elam, 703/235–1140
Metal and Nonmetal Mine Safety and Health,
Claude N. Narramore, 703/235–1565

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