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CAREY

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***Illinois Association of Aggregate Producers
Annual Convention***

***Requirements & Limitations of
MSHA Citations & Orders***

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Nick Scala is a Partner and Chair of the national MSHA • Workplace Safety Practice at **Conn Maciel Carey** and a Certified Mine Safety Professional. He focuses on all aspects of mine safety and health law:

- Represents mine operators and independent contractors in inspections, investigations & enforcement actions involving MSHA
- Advises clients in all phases of involvement with MSHA, particularly guiding companies through contest proceedings before the Federal Mine Safety and Health Review Commission
- Prepares clients for and manages incident, fatality, and special investigations conducted by MSHA, and defends company representatives in section 110 proceedings

104(a)

- MSHA primary enforcement mechanism
 - ❖ Citations are classified by determining:
 - ✓ A standard/regulation/section of Mine Act
 - ✓ Gravity
 - ✓ Severity
 - ✓ Significant and Substantial
 - ✓ Negligence
 - ✓ Number of Miners Affected
 - ❖ Inspectors will assign abatement (or termination) deadline.

104(a)

- Gravity – known as likelihood of injury
- Severity – the type of injury MSHA anticipates
- Significant and Substantial (S&S)
 - ❖ At least Lost Workdays or Restricted Duty injury
 - ❖ At least Reasonably Likely to occur

“Is it reasonably likely to result in a reasonably serious injury?”



Section I--Violation Data

1. Date Mo Da Yr 10/30/2017	2. Time (24 Hr. Clock) 0841	3. Citation/ Order Number
4. Served To ct	5. Operator	
6. Mine	7. Mine ID	(Contractor)
8a. Written Notice (103g) <input type="checkbox"/>		

On September 20, 2017 a serious accident occurred which resulted in a fatality when the miner succumbed to his injuries the following day. The Contractor Company did not contact MSHA at once without delay and within 15 minutes at the too-free umber 1-800-746-1553 once the contractor company knows or should know that an accident has occurred involving an injury of an individual at the mine which has a reasonable potential to cause death. The accident occurred at 11:25a.m. and the call was not made until 2:55p.m.

See Continuation Form (MSHA Form 7000-3a)

9. Violation	A. Health Safety Other <input type="checkbox"/>	B. Section of Act	C. Part/Section of Title 30 CFR
			50.10b

Section II--Inspector's Evaluation

10. Gravity:					
A. Injury or illness (has) (is):	No Likelihood <input type="checkbox"/>	Unlikely <input type="checkbox"/>	Reasonably Likely <input type="checkbox"/>	Highly Likely <input type="checkbox"/>	Occurred <input checked="" type="checkbox"/>
B. Injury or illness could reasonably be expected to be:	No Lost Workdays <input type="checkbox"/>	Lost Workdays Or Restricted Duty <input type="checkbox"/>	Permanently Disabling <input type="checkbox"/>	Fatal <input checked="" type="checkbox"/>	
C. Significant and Substantial:	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	D. Number of Persons Affected: 001		
11. Negligence (check one)	A. None <input type="checkbox"/>	B. Low <input type="checkbox"/>	C. Moderate <input type="checkbox"/>	D. High <input checked="" type="checkbox"/>	E. Reckless Disregard <input type="checkbox"/>
12. Type of Action	104a	13. Type of Issuance (check one)			
		Citation <input checked="" type="checkbox"/>	Order <input type="checkbox"/>	Safeguard <input type="checkbox"/>	Written Notice <input type="checkbox"/>
14. Initial Action	E. Citation/ Order Number			F. Dated Mo Da Yr	
A. Citation <input type="checkbox"/>	B. Order <input type="checkbox"/>	C. Safeguard <input type="checkbox"/>	D. Written Notice <input type="checkbox"/>		
15. Area or Equipment					

16. Termination Due	A. Date Mo Da Yr 11/07/2017	B. Time (24 Hr. Clock) 0800
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Section III--Termination Action

17. Action to Terminate		
18. Terminated	A. Date Mo Da Yr 11/07/2017	B. Time (24 Hr. Clock) 1211

Section IV--Automated System Data

19. Type of Inspection (activity code)	E16	20. Event Number	21. Primary or Mill	M
22. AR Name				23. AR Number

MSHA Form 7000-3, Apr 08 (revised) In accordance with the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996, the Small Business Administration has established a National Small Business and Agriculture Regulatory Ombudsman and 10 Regional Fairness Boards to receive comments from small businesses about federal agency enforcement actions. The Ombudsman annually evaluates enforcement activities and rates each agency's responsiveness to small business. If you wish to comment on the enforcement actions of MSHA, you may call 1-888-REG-FAIR (1-888-734-3247), or write the Ombudsman at Small Business Administration, Office of the National Ombudsman, 409 3rd Street, SW MC 2120, Washington, DC 20415. Please note, however, that your right to file a comment with the Ombudsman is in addition to any other rights you may have, including the right to contest citations and proposed penalties and obtain a hearing before the Federal Mine Safety and Health Review Commission.

Significant and Substantial

- To establish S&S, MSHA must prove
 1. the underlying violation of a mandatory standard;
 2. the existence of a discrete safety hazard 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.

Significant and Substantial

- Why does S&S matter?
 - ❖ Flagged by MSHA as more serious violations for operator/contractor
 - ✓ Reviewed prior to inspections
 - ❖ Pre-qualification red flag for contract bidding
 - ❖ Largely subjective - Inspector's designate largely based on individual opinion or field office mandate

103(a)

- Denial of Entry or Advanced Notices
 - ❖ When operator will not let MSHA enter a mine site – with or without existing mine ID.
 - ❖ May result in MSHA returning to site with law enforcement.
 - ❖ MSHA likely to prepare for litigation immediately.
 - ❖ Should be contested as soon as received via Notice of Contest to Federal Mine Safety & Health Review Commission (FMSHRC).

103(a)

➤ Impeding the Investigation

- ❖ More common usage of 103(a) and frequently threatened by inspectors if they feel mine operator is delaying or interfering with inspection/investigation.
- ❖ Beware of inspectors using to demand documents not required to be maintained or produced under the Mine Act.
 - ✓ Weigh the risk/benefit of producing any such documents.

103(j) & 103(k)

- 103(j) – verbal issuance
- 103(k) – same order reduced to writing
 - ❖ Issued to protect and preserve accident scenes. Although, MSHA should not issue solely to preserve accident evidence, must be issued to protect the health and safety of miners (or any other person possibly affected).
 - ❖ No exceptions to continue work to eliminate a hazard or continue rescue operations unless specifically stated.

104(b)

- Failure to abate hazard identified in previous citation or order
- Immediate withdrawal orders for area of mine or equipment subject to order
 - ❖ Can be assessed at \$8,605/day, but typically unassessed
 - ❖ File Notice of Contest with FMSHRC within 30 days

Inspector must determine there is “No Reasonable Basis” for extending the abatement date.

104(d) Citations & Orders

➤ 104(d)(1) Citation:

A violation is caused by an unwarrantable failure if it is determined that the mine operator or contractor has engaged in aggravated conduct constituting more than ordinary negligence.

104(d) Citations & Orders

➤ Aggravated Conduct

❖ MSHA will look at multiple factors including:

- ✓ How long condition existed
- ✓ How widespread was the condition
- ✓ Was management in the area
- ✓ Was management on notice that greater care was required
- ✓ Had management taken steps to correct or abate condition
- ✓ Did management KNOW or SHOULD HAVE KNOWN of condition

104(d) Citations & Orders

➤ 104(d) Orders

❖ 104(d)(1) Order:

must be issued within 90 days of 104(d)(1) citation for unwarrantable failure

❖ 104(d)(2) Order:

issued for any unwarrantable failure observed during any subsequent inspection under entire mine inspected without unwarrantable failure observed

104(d) Citations & Orders

- Notice of Contest should be filed with FMSHRC
- When unwarrantable failure is issued, if possible, the named supervisor should NOT participate further with MSHA, such as:
 - ❖ Remainder of inspection; or
 - ❖ Closeout conference.
 - ❖ Statements made could be used during special investigation.

104(d) Citations & Orders

- 104(d)(1) Citation/Order
 - ❖ Minimum penalty is \$2,648
 - ❖ Statutory maximum under 100.3 - \$79,428
 - ❖ Flagrant designation maximum 100.5(e) - \$291,234
- 104(d)(2) Orders
 - ❖ Minimum penalty \$5,293

104(d) Orders are withdrawal orders for area, equipment or activity subject to that order.

104(d) Citations & Orders

➤ The “D-Chain”

Withdrawal/shutdown of
area/equipment
Require MSHA approval of abatement
before restarting operation

104(d)(1) Citation
S&S & High Negligence

Within 90 days

104(d)(1) Order
S&S & High Negligence

104(d)(2) Orders

104(g)(1) Training Orders

Withdrawal order for untrained miners, until the required training is completed. Untrained miners under the following categories are subject to 104(g)(1) order:

- ❖ *new miners;*
- ❖ *experienced or newly-hired experienced miners;*
- ❖ *miners assigned to perform a task for which they have had no previous experience;*
- ❖ *miners whose annual refresher training is not up-to-date; and*
- ❖ *miners or applicable persons working on mine property who have not been given hazard training.*

Flagrant Citations and Orders

➤ Issued under Section 110(b)(2) and eligible for significant penalties up to \$291,234

❖ Two Types:

- ✓ Reckless Failure
- ✓ Repeated Failure

A reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

Flagrant Citations and Orders

- Flagrant violations that arise from a mine operator's **reckless failure** must have:
 1. been evaluated as **significant and substantial**;
 2. been evaluated with an expected injury of **at least permanently disabling**;
 3. been marked as an **unwarrantable failure**; and
 4. been evaluated with a **negligence level of reckless disregard**.

Flagrant Citations and Orders

- Flagrant violations that arise from a mine operator's **repeated failure** must have:
 1. been evaluated as **significant and substantial**;
 2. been evaluated with an expected injury of **at least permanently disabling**;
 3. been marked as an **unwarrantable failure**; and
 4. **two prior "unwarrantable failure," S&S violations of the same safety or health standard cited within the past 15 months.** The 15-month time period includes violations cited previously on the same day or during the same inspection as the flagrant violation

For repeated failure evaluations, prior citations/orders must be **violations of the same safety or health standard citing the same subsections**

107(a) Imminent Danger Orders

“The existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.”

- Immediate withdrawal from the service area, equipment or activity subject to order.
- ❖ With the exception of miner(s) and activity to abate the condition.

110(g) Notices

- Issued to a miner found willfully violating standards related to smoking.

To find a willful violation of the safety standard relating to smoking, the inspector must have evidence that the miner actually smoked in an underground coal mine or smoked in a restricted area in an underground metal or nonmetal mine or surface area.

- Mine operator or contractor will also be issued citation(s) or order(s).

Contact Information



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Questions?

