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MSHA weighs in—sort of—on what constitutes a Significant & Substantial (“S&S”) violation

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On July 13, 2026, MSHA filed its brief on appeal in a case that could have major implications for mine operators facing “significant and substantial” (or “S&S”) violations, but the agency’s position on brief leaves questions unresolved.

Significant and Substantial Violations

Under the Federal Mine Safety and Health Act, MSHA inspectors can designate certain violations as “significant and substantial,” or “S&S”. The S&S designation represents an inspector’s judgment that a violation is more likely than not to cause serious harm. And S&S violations can have potentially major consequences: they usually have higher penalties, they can lead to increased enforcement scrutiny and activity by the agency, and if a mine accumulates too many S&S violations, the mine can qualify for MSHA’s Pattern of Violations program, MSHA’s most serious enforcement sanction.

Since the 1980s, stemming from the Federal Mine Safety and Health Review Commission decision in *Mathies Coal Company*, 6 FMSHRC 1 (Jan. 1984), the law was basically settled that a violation is S&S if there is a *reasonable likelihood* that the violation contributed to a hazard that is *reasonably likely* to cause serious injury. Essentially, making part of the analysis whether miners are reasonably likely to be exposed to an allegedly violative condition or practice. MSHA inspectors are (and have been) [trained to use this standard](#) when evaluating violations. And for at least the last 20 years, the rate of S&S violations was not more than 30%; recently it has been trending downward, to under 20%.

But last September, in *Consol Pennsylvania Coal Company*, 47 FMSHRC 793 (Sept. 2025), a two-Commissioner majority dropped a bombshell of a decision, upending this framework. The two Commissioners threw out the longstanding test for S&S, instead replacing it with a broader standard of what constitutes S&S that MSHA had pushed during the Biden administration: a violation is S&S if it *could* make a significant and substantial contribution to a hazard.

While FMSHRC is intended to have five commissioners, the panel currently, and for much of 2025 has only had three commissioners active. And next month, August 2026, the terms of two of the three remaining Commissioners will expire, leaving the Commission without a quorum and unable to act on cases until more Commissioners are nominated and confirmed.

Case on Appeal to the Third Circuit

That case is now on appeal to the U.S. Court of Appeals for the Third Circuit, in Philadelphia. The mine operator, with the support of several industry groups, argues that the decision is incorrect and should be thrown out. They raised concerns about how the new standard could lead to many more S&S citations, with all the enforcement consequences they can carry. They also argued that the Commission's approach was simply wrong and that the issue of the S&S test was improperly inserted into the case by the two Commissioners on their own.

A major question was whether MSHA would agree with the Commission's new test, as it had done under the Biden administration, or whether the Trump administration would take a different view. After obtaining several extensions, on July 13, MSHA filed its long-awaited brief.

It did not clearly take a side.

MSHA did not state whether it agreed or disagreed with the new S&S test. Instead, MSHA minimized the case, calling it a "routine mine safety case" based on straightforward facts. (MSHA did at least acknowledge that changing the test could result in many more violations being S&S.)

MSHA argued that the court should not decide which S&S test is right, because under either test, the violations at issue were both S&S. It did urge the court not to decide "whether the Commission's longstanding *Mathies* test need be evaluated," suggesting that MSHA may think the *Mathies* test should remain the law. But the brief was certainly not a clear rejection of the new S&S test.

Reading Between the Lines

Our reading of the brief leads us to some impressions into the agency's thinking and how this issue may play out, outside of this case.

MSHA calls the issue of S&S a policy question—one that the agency, not the courts, should resolve. MSHA asserts its "prerogative" to set this policy independent of the Commission and the courts. This is not surprising; MSHA has frequently asserted its policy-setting authority in recent years (especially in the areas of POV and settlements of contested cases). But a policy-based choice could be perilous for the industry, because a policy-based choice can change. What the Trump administration's MSHA thinks S&S means could be very different from what a future MSHA thinks it means under different political leadership.

Some comfort to the industry is that MSHA asserted that it "intends to address any perceived S&S issue through policy means, where decisions like this should be made." MSHA committed that it "intends to ... elicit the sort of guidance from all interested stakeholders that this Court, in its appellate capacity, cannot so elicit[.]" That certainly sounds like the agency plans to engage with stakeholders, whether through rulemaking or other initiatives. (For now, MSHA's [regulatory agenda](#) does not list any S&S rulemaking.)

MSHA also signaled that it views the court's decision as specific to the Third Circuit only—that it would not apply outside that court's geographic jurisdiction. In other words, even if the court endorses the Commission's new test, MSHA appears to take the view that it would apply only to mines in Pennsylvania, New Jersey, Delaware, and the U.S. Virgin Islands. Needless to say, having one set of rules for those mines, and one set of rules for

everyone else, would be a challenge.

Staying Engaged

We will be closely monitoring this case as litigation continues. We also intend to hold MSHA to its commitment to consider stakeholders' views as it develops its S&S policy, and we will ensure that mine operators have a voice while the agency considers this important issue.