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Review Commission Split On Whether Violation Of Roof Control Plan Constitutes A Significant and Substantial Violation

By: [Nicholas W. Scala](#)

An impending decision by the Federal Mine Safety and Health Review Commission (the Commission) reveals a split among members as to the safety risks posed by violations of a roof control plan, though they agreed the company in question had violated the relevant standard.

This decision will be closely watched for how commissioners address the issue of “significant and substantial” violations of mining standards, which is the larger issue in play that divided commissioners in their Jan. 19 meeting.



“Significant and substantial” violations are an important legal issue for mining companies to observe since the S&S designation can lead to elevated actions if cited repeatedly and can be pre-qualification red flags for contracting companies. How the Commission rules with respect to whether a regulatory violation rises to the level of S&S is crucial. In this case the panel was divided, leading to an unusually tense exchange among members (audio of the meeting [can be found here](#)).

The debate was concerning an administrative law judge (ALJ) ruling in *Consolidation Coal Co.*, in which MSHA found the employer to have violated its control plan. The inspector issued the violation as “significant and substantial,” which the employer challenged to the Commission, where an administrative law judge (ALJ) reviewing the case found the violation did not meet the S&S test.

An S&S violation is defined in statute as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard.” The Commission’s April 1981 decision in *Cement Div., Nat’l Gypsum Co.* designated S&S:

“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.”

Later the Commission, in *Mathies Coal Company*, established a four-part S&S test:

"In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove:

1. The underlying violation of a mandatory safety standard;
2. A discrete safety hazard – that is, a measure of danger to safety – 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."

Satisfying the Significant and Substantial Criteria

This case arises from a partial roof collapse at Consolidation Coal that an MSHA inspector observed in July 2011. The inspector cited a violation of [30 CFR 75.220](#) (roof control plan) after noticing a cut of coal that exceeded 20 feet, which was the maximum the mine's roof control plan allowed. The inspector found the alleged violation "significant and substantial," saying it was reasonably likely to injure miners, and MSHA proposed a \$3,405 penalty.

Consolidation Coal appealed to the Commission. [Administrative Law Judge Priscilla Rae found](#) that some of the elements of the *Mathies* test had been met, but the third was not, thus did not affirm the Agency's designation of S&S.

Judge Rae found that a violation of a mandatory safety standard occurred, satisfying the first *Mathies* element. Because this violation contributed to the discrete safety hazard of a roof fall occurring due to the extended span of unsupported roof at an intersection, the second *Mathies* element was also satisfied, the ALJ found.

However, the third *Mathies* element was not satisfied, Judge Rae found, because MSHA "has not established that a roof fall was likely to result in injury in this case."

It is unlikely that miners would have accessed the area affected by the hazardous condition because they work a substantial distance back from the unsupported roof and are not permitted to enter the "red zone" beyond the next-to-last row of bolts, the ALJ noted.

"Moreover, the mine was employing a tiger bolting pattern in the cited area at the time of the violation, meaning that additional resin bolts had been installed to support the top and to combat any existing adverse roof conditions. ... This supplemental roof support decreased the likelihood that a roof fall originating in the extended cut would be able to spread into or significantly affect the bolted roof areas behind it."

The inspector "provided no explanation as to how a crack or roof fall would work its way back to where miners were located given the supplemental roof support and tiger bolting pattern that was being used," Judge Rae noted.

Assuming that normal mining operations had continued without being interrupted by the issuance of the citation, the hazardous condition "would not have exposed miners to danger for a lengthy period of time because the unsupported roof was already being bolted" by the time the MSHA inspector arrived, the judge found.

Judge Rae's decision revealed a rift among commissioners when it reached their desks. Two of the panel members found that the ALJ had correctly weighed the evidence regarding the third *Mathies* element, but the

other two indicated they would vacate Judge Rae's decision.

Because the Commission currently lacks a fifth member, they could not reach a majority decision, and ultimately agreed to write two opinions. At that point the ALJ decision will become a final order of the Commission, but may still be appealed.

Conclusion

The contentious nature of this debate at the Commission level underscores how important the S&S designation – and how MSHA can use it – remains as a hot-button legal issue. More cases like *Consolidation Coal* are likely to test the Commission's divide on this question.

The split on the panel means this case will not set precedent, but it does show that this is a divisive issue that will continue as a major MSHA enforcement concern going forward. Once the commissioners issue their opinions, what they find will be fodder for more discussion about the *Mathies* test and what actually constitutes an S&S violation.