

MSHA UPDATE

Assessments, Flagrant Violations, and Pattern of Violations

**Prepared for Kentucky
Professional Engineers in Mining Seminar
Lexington, Kentucky
August 29, 2007**

**Mark E. Heath, Member
Phone: (304) 340-3843
mheath@spilmanlaw.com
Spilman Thomas & Battle, PLLC
P.O. Box 273
Charleston, WV 25321-0273
Fax: (304) 340-3801**



Introduction

- 1. Introduction and Overview of the Current Safety Climate**
- 2. Miner Act II?**
- 3. Flagrant violations**
- 4. Immediate Reporting Requirements under the Miner Act**
- 5. New Penalty Assessment Regulations**
- 6. Pattern of Violations**
- 7. Conclusion**

August 29, 2007





1. Current Climate

- Events of January 2 and January 19, 2006
- State legislative activity 2006 and 2007
- Congressional Activity
- Pressure on MSHA and state regulatory authorities
- Media's use of enforcement history
- All these items have created a new, highly charged environment for Mine Safety
- Senate oversight hearings
- Possible Congressional Action in 2007
- Utah Accident and Indiana triple fatal may lead to new Congressional action
 - Speed up of Miner Act requirements?
 - Additional rescue options?
 - Dust could go to 1.0 standard?
 - Penalties could go up again



Coal - Total Violations Issued and Inspection Data

CY 2007 Qtrs. 1-2

District	Total Citations and Orders Issued	On-Site Inspection Hours	Regular Inspections
C01	531	6,561.75	204
C02	1,906	18,688.25	250
C03	3,228	18,447.50	178
C04	7,924	30,786.25	271
C05	4,309	17,456.25	281
<u>C06</u>	<u>5,885</u>	<u>29,326.25</u>	<u>485</u>
<u>C07</u>	<u>7,123</u>	<u>23,753.75</u>	<u>403</u>
C08	3,209	14,924.25	69
C09	2,507	12,953.50	133
<u>C10</u>	<u>1,743</u>	<u>7,809.75</u>	<u>57</u>
C11	1,572	9,075.75	82
Totals	39,937	189,783.25	2,413

Coal - Total Violations Issued and Inspection Data

CY 2005 Qtrs. 1-4 vs. CY 2006 Qtrs. 1-4

	Total Citations and Orders Issued		On-Site Inspection Hours		Enforcement Site Events*		Regular Inspections	
District	CY 2005	CY 2006	CY 2005	CY 2006	CY 2005	CY 2006	CY 2005	CY 2006
C01	1,008	1,138	11,262.00	11,871.75	1,146	701	338	309
C02	3,448	3,866	42,436.50	40,178.50	2,002	1,422	616	581
C03	6,594	7,215	41,172.00	47,432.75	1,873	1,786	447	414
C04	11,138	13,123	67,892.50	80,455.25	2,765	2,532	1042	851
C05	7,117	7,419	47,155.50	45,102.50	1,997	1,552	585	533
<u>C06</u>	<u>12,311</u>	<u>12,888</u>	<u>71,565.5</u>	<u>66,187.0</u>	<u>2,811</u>	<u>2,236</u>	<u>1038</u>	<u>1023</u>
<u>C07</u>	<u>10,062</u>	<u>12,427</u>	<u>52,417.5</u>	<u>57,410.2</u> <u>5</u>	<u>1,465</u>	<u>1,309</u>	<u>800</u>	<u>758</u>
C08	6,060	6,795	33,849.00	32,775.75	956	929	199	206
C09	4,187	4,901	31,791.50	30,920.25	1,614	1,246	347	250
<u>C10</u>	<u>3,492</u>	<u>4,290</u>	<u>19,988.5</u>	<u>20,273.75</u>	<u>418</u>	<u>374</u>	<u>118</u>	<u>122</u>
C11	3,661	3,732	19,647.00	22,996.75	1,155	1,148	144	149
Totals	69,078	77,794	439,177.50	455,604.50	18,202	15,235	5,674	5,196



2. Miner Act II

- Miner Act I was first revision of Mine Act since 1977
- Miner Act II wants to:
 - Strengthen pattern of violations
 - Increase penalties
 - Regular violations, \$500 to \$100,000
 - SS - \$1,000 to \$150,000
 - 105c - \$10,000 to \$100,000
 - Lower dust to 1.0 standard
 - Increased use of proximity devices
 - Lightening studies

On Sept. 5, Senate Hearing scheduled on Utah Disaster

August 29, 2007



3. FLAGRANT VIOLATIONS

\$220,000

- The Miner Act adds a new category of violations know as Flagrant.
- Defined as 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.
- This category may be assessed a civil penalty of not more than \$220,000.
- Issued in Pennsylvania fatal from last fall.





FLAGRANT VIOLATION PROCEDURE

Reckless Failure

PROCEDURE INSTRUCTION LETTER NO. 106-111-04.

For violations that are the result of reckless failure to make reasonable efforts to eliminate a known violation:

1. Citation or order is evaluated as significant and substantial,
2. Injury or illness is evaluated as at least permanently disabling,
3. Citation or order is evaluated as an unwarrantable failure, and
4. Negligence is evaluated as reckless disregard.



FLAGRANT VIOLATIONS

Repeated Failure

For violations that are the result of repeated failure to make reasonable efforts to eliminate a known violation.

1. Citation or order is evaluated as significant and substantial,
2. Injury or illness is evaluated as at least permanently disabling,
3. Type of action is evaluated as an unwarrantable failure, and
4. At least two prior "unwarrantable failure" violations of the same safety or health standard have been cited within the past 15 months.





FLAGRANT VIOLATIONS

Proximate Cause

- In addition, if the violation meets the above criteria it must also be evaluated to determine if it proximately caused, or could have reasonably been expected to cause death or serious bodily injury. **A proximate cause is one which directly produces the injury or death and without which the injury or death would not have occurred.**



FLAGRANT VIOLATIONS

Mitigating Circumstances

- MSHA required to examine mitigating circumstances. **Examples of mitigating circumstances might include new mine ownership or new safety officials at the mine who have shown an increased commitment to improving compliance.**
- **When possible** and appropriate, MSHA District Managers should notify mine operators and miners' representatives if a mine's enforcement history makes it eligible for issuance of flagrant violations. **However, MSHA's failure to notify mine operators and miners' representatives of this eligibility does not preclude issuance of these types of violations.**



FLAGRANT VIOLATIONS

- A number of flagrant orders have been issued in the last few months:
 - Pa. Blasting Accident
 - Illinois roof control violations
 - Kentucky Mine case

MSHA issues \$874,500 in fines to R&D Coal Co.

Mine is first to be fined under flagrant violation provision of MINER Act

ARLINGTON, Va. – The U.S. Department of Labor’s Mine Safety and Health Administration (MSHA) has issued \$874,500 in fines to R&D Coal Co. for safety violations contributing to the Oct. 23, 2006 accident causing the death of one of its employees. Dale Reightler, 43, was killed in a methane blast initiated during an explosives detonation at the underground anthracite coal mine in Schuylkill County, Pa. The penalties levied against R&D mark the first violations assessed under MSHA’s new flagrant violation procedures.

“Mine operators that show reckless disregard for the well-being of their workers must be held accountable for their actions,” said Richard E. Stickler, assistant secretary of labor for mine safety and health. “MSHA will not hesitate to assess stiff penalties against coal companies that fail to comply with safety and health regulations.”

During the accident investigation at R&D, investigators identified and cited 10 violations that directly contributed to the cause of the accident. Five of these violations received special assessments under the flagrant violation provision of the Mine Improvement and New Emergency Response (MINER) Act of 2006. A sixth, non-contributory flagrant violation was issued under a regular inspection after the accident investigation.

A flagrant violation is defined as “a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory safety and health standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.” Under the MINER Act, a civil penalty of up to \$220,000 may be assessed for each flagrant violation.

The following contributory violations, with one noted exception, were assessed as flagrant violations:

- Failure to stem the boreholes prior to blasting as required: \$145,300
- Failure to follow the provisions of the MSHA-approved roof control plan: \$145,300
- Failure to assure that volume and velocity of air current was sufficient to eliminate harmful gases: \$116,350
- Failure to maintain entry development with temporary ventilation controls to no more than 600 feet: \$145,000
- Failure to conduct a proper pre-shift examination of the mine prior to the start of the work shift: \$116,350
- Failure to maintain an accurate and up-to-date map of the mine (non-contributory): \$127,000

TOTAL FLAGRANT PENALTIES: \$795,600



FLAGRANT VIOLATIONS

U.S. Department of Labor's MSHA issues \$761,000 in fines for flagrant violations against mine operator in Harlan County, Ky.

ARLINGTON, Va. – The U.S. Department of Labor's Mine Safety and Health Administration (MSHA) has assessed \$761,000 in fines against Stillhouse Mining LLC for safety violations found during a recent inspection of the company's Mine No. 1. Four citations issued during the inspection were cited as "flagrant violations" under the Mine Improvement and New Emergency Response (MINER) Act. "Mine operators that show reckless disregard for the well-being of their workers must be held accountable for their actions," said Richard E. Stickler, assistant secretary of labor for mine safety and health. "It was highly likely that a miner would have been seriously injured if these conditions were allowed to persist, so the purpose of this enforcement action is to prevent accidents and injuries from occurring in the first place." A flagrant violation is defined as "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory safety and health standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." Under the MINER Act, a civil penalty of up to \$220,000 may be assessed for each flagrant violation. The four citations that were determined to be flagrant violations and their penalties are:

- • Failure to comply with main mine fan stoppage requirements: \$212,700
- • Failure to comply with requirements for intentional changes in the ventilation system: \$212,700
- • Failure to comply with the approved roof control plan: \$177,600
- • Failure to perform a pre-shift examination of the workplace prior to the start of work: \$158,000

TOTAL FLAGRANT PENALTIES: \$761,000



4. Immediate Reporting Requirements under the Miner Act

- MSHA Reporting Number:
1-800-746-1553
- One call does not do it all, must call the state. Kentucky is 1-877-MINE-911.
- On second and hoot owl shifts, assign someone to help make the calls

5. New Penalty Regulations

- Published in Federal Register on March 22, 2007, effective April 23, 2007
- Serious increases in penalties and a general tightening of enforcement
- Take what you paid last year and triple it (at a minimum) or more.
- Also, must factor in the increase in the number of citations and orders being assessed, regardless of regulation change.

Changes to Abatement Provision

- Section § 100.3(f) decreases the amount of reduction **from 30% to 10%** where an operator abates a violation within the time set by the inspector.
- MSHA deleted the existing provisions which assessed 10 additional penalty points where an operator did not abate the violation within the specified time period.

Deletion of Single Penalty Assessment

- The \$60 single assessment provision in § 100.4 is deleted. New minimum assessment is \$112.
- The agency believes that the primary focus of the Act is on the prevention of volatile conditions before they occur.
- MSHA argues that deleting the SPA will cause mine operators to focus their attention on preventing all hazardous conditions before they occur.



Unwarrantable Failure Penalties and Conference Requests

- Increases the minimum penalty to **\$2000** for any 104(d)(1) citation.
- Increases the minimum penalty to **\$4000** for any 104(d)(2) orders.
- Section § 100.6(b) in the final version was kept the same – operators have **10 days**, to submit additional information or request a safety and health conference.
- Must list reasons conference is requested or MSHA will deny conference request

ASSIGNING PENALTY POINTS

- MSHA increased the points assigned for Negligence:
 - **Moderate Negligence** from 15 points to **20 points**.
 - **High Negligence** from 20 points to **35 points**.
 - **Reckless Disregard** from 25 points to **50 points**.
- MSHA increased the points assigned for Likelihood of Occurrence:
 - **Unlikely** from 2 points to **10 points**.
 - **Reasonably Likely** from 5 points to **30 points**.
 - **Highly Likely** from 7 points to **40 points**.
 - **Occurred** from 10 points to **50 points**.



ASSIGNING PENALTY POINTS

- MSHA increased the points assigned for Severity:
 - Lost Work Days from 3 points to 5 points.
 - Permanently Disabling from 7 points to 10 points.
 - Fatal from 10 points to 20 points.
- MSHA increased the points assigned for Persons Potentially Affected:
 - 5 persons is 8 points
 - 6 persons is 10 points
 - 7 persons is 12 points
 - 8 persons is 14 points
 - 9 persons is 16 points
 - 10 or more persons is 18 points
(additional categories were added)

FY2005 75.400 Violations Issued to Peabody Energy Coal Mines Receiving Maximum Size Points	Existing Rule		Proposed Rule		Final Rule	
	Average Points		Average Points		Average Points	
	Non S&S	S&S	Non S&S	S&S	Non S&S	S&S
Average of Mine Size Points	9	10	20	20	15	15
Average of Controller Size Points	5	5	5	5	10	10
Average of Violation Per Insp Day Points	7	6	7	5	8	6
Average of Repeat Violation Points	0	0	19	17	13	12
Average of Negligence Points	15	15	20	20	20	20
Average of Gravity Likelihood Points	2	5	10	30	10	30
Average of Gravity Injury (Severity) Points	3	3	4	5	4	5
Average of Gravity Persons Points	2	2	2	3	2	3
Average Total Points*	43	47	87	106	82	102
Average Proposed Penalty*	68	576	874	3,996	586	2,902
*Average points and penalty amounts for existing rule are based on actual point and penalty amounts.						
*Average points and penalty amounts for proposed/final rules are based on proposed changes in points and penalty amounts.						
*All proposed rule and final rule penalties are assumed to get good faith reductions						

Galatia Mine Makes MSHA's 'High Dollar' Fines List

The American Coal Co.'s Galatia Mine in Galatia, Ill., has accumulated over \$1 million in MSHA civil penalties since April 30 for violations found at the mine.

Controlled by Robert E. Murray, MSHA records show that the company has \$1,137,139 in assessed penalties in a 58-day period from April 30 - June 27, and has been assessed a total of \$1,461,450 since January of this year. Twenty-nine of the penalties since April 30 are over \$10,000. Overall, the penalties range from \$176 to \$54,000.

Of the 29 violations that are over \$10,000, 15 are for alleged violations for accumulations of combustible materials (\$75,400) – eight of which MSHA considered to be S&S. The penalties for the Combustible materials violations range from \$13,268 to \$54,000.

According to MSHA, the company has seven penalties listed as delinquent. MSHA's data base also shows the company has had an above-average accident rate for 10 years. This year the mine has reported 31 accidents, giving it an accident rate of 6.16 compared to the national average of 4.51. Two contractors have also been injured at the mine.

The mine has shown some progress in decreasing accidents every year. In 2001, it had an accident rate of 15.84, followed by 13.48 for 2002; 14.16 in 2003; 8.37 for 2005 and 2005; and 7.55 for 2006 when the National average was 4.90. In 2006, the Galatia Mine received 958 citations and orders and so far this year 869. It is contesting the majority of the alleged violations.

Mine Safety and Health News, July 30, 2007, page 301.



6. Old Enforcement Tools Reborn: Pattern of Violations

What is impact of a pattern?

If, upon any inspection within 90 days after the issuance of a Notice of Pattern of Violation, an inspector finds any "S&S" violation of a mandatory health or safety standard, the inspector shall issue a 104(e)(1) withdrawal order. The withdrawal order shall remain in effect until MSHA determines that the violation has been abated.

Additional 104(e)(1) withdrawal orders will be issued if any further violations of an "S&S" nature are also observed during the course of the same inspection.

If a 104(e)(1) withdrawal order has been issued, a 104(e)(2) withdrawal order will be issued when an inspector finds an "S&S" violation of a mandatory health or safety standard upon any subsequent inspection if the operator has been placed on the 104(e) series.

August 29, 2007



Pattern of Violations: How mine gets a Pattern

Regulations for Pattern were enacted in 1990.

30 CFR § 104.2 Initial screening.

At least once each year, MSHA shall review the compliance records of mines. MSHA's review shall include an examination of the following:

(a) The mine's history of--

(1) Significant and substantial violations;

(2) Section 104(b) of the Act closure orders resulting from significant and substantial violations; and

(3) Section 107(a) of the Act imminent danger orders.



How a mine gets on a pattern:

- (b) In addition to the compliance records listed in paragraph (a) of this section, the following shall also be considered as part of the initial screening:
- (1) Enforcement measures, other than section 104(e) of the Act, which have been applied at the mine.
 - (2) Evidence of the mine operator's lack of good faith in correcting the problem that results in repeated S&S violations.
 - (3) An accident, injury, or illness record that demonstrates a serious safety or health management problem at the mine.
 - (4) Any mitigating circumstances.



Pattern of Violations

30 CFR § 104.3 Pattern criteria.

(a) The criteria of this section shall be used to identify those mines with a potential pattern of violations. These criteria shall be applied only after initial screening conducted in accordance with §104.2 of this part reveals that the operator may habitually allow the recurrence of violations of mandatory safety standards or health standards which significantly and substantially contribute to the cause and effect of mine safety or health hazards. These criteria are--

- (1) A history of repeated significant and substantial violations of a particular standard;
- (2) A history of repeated significant and substantial violations of standards related to the same hazard; or
- (3) A history of repeated significant and substantial violations caused by unwarrantable failure to comply.



Recent pattern developments

- On June 14, 2007, MSHA notified 6 coal mines and two metal/non metal mines that based on a review of citations and orders in a 24-month period, the mines were eligible for a pattern of violations finding
- The mines had 20 days to develop a response and after a four-month period, MSHA will decide if a pattern is warranted.

Most Commonly cited Surface Mine Citations in 2006

- **Surface Coal 01/01/2006 - 12/31/2006 Statistics were compiled February 7, 2007**

Total Violations for this type of operation: 8,667 , # of Viols. Percent *Standard and Title Compliance

- **408 16.25% 77.404(a) Machinery and Equipment; Operation and Maintenance**
- **613 7.07% 77.1605(d) Loading and Haulage Equipment; Installations**
- **575 6.63% 77.1104 Accumulations of Combustible Materials**
- **476 5.49% 77.1606(c) Loading and Haulage Equipment; Inspection and Maintenance**
- **409 4.72% 77.1110 Examination and Maintenance of Firefighting Equipment**
- **352 4.06% 77.410(c) Mobile Equipment; Automatic Warning Devices**
- **312 3.60% 77.502 Electric Equipment; Examination, Testing, and Maintenance**
- **241 2.78% 77.1605(b) Loading and Haulage Equipment; Installations**
- **239 2.76% 77.400(a) Mechanical Equipment Guards**



Top 20 Surface Violations continued

- **219 2.53% 77.410(a)(1) Mobile Equipment; Automatic Warning Devices**
- **176 2.03% 77.1109(c)(1) Quantity and Location of Firefighting Equipment**
- **173 2.00% 77.1605(a) Loading and Haulage Equipment; Installations**
- **144 1.66% 77.1605(k) Loading and Haulage Equipment; Installations**
- **140 1.62% 72.620 Drill Dust Control at Surface Mines and Surface Areas of Underground Mines**
- **115 1.33% 71.208(a) Bimonthly Sampling; Designated Work Positions**
- **112 1.29% 77.1606(a) Loading and Haulage Equipment; Inspection and Maintenance**
- **104 1.20% 77.205(a) Travelways at Surface Installations**
- **98 1.13% 77.205(b) Travelways at Surface Installations**
- **89 1.03% 77.1000 Highwalls, Pits, and Spoil Banks; Plans**
- **73 0.84% 77.202 Dust Accumulations in Surface Installations**
- *** Percent of total violations written at this type of operation.**

Most Commonly Cited Prep Plant Citations in 2006

- **Plants - Coal 01/01/2006 - 12/31/2006; Statistics were compiled February 7, 2007**

Total Violations for this type of operation: 5,967

of Viols.Percent *Standard and TitleCompliance

- **496 8.31% 77.404(a) Machinery and Equipment; Operation and Maintenance**
- **393 6.59% 77.400(a) Mechanical Equipment Guards**
- **372 6.23% 77.1104 Accumulations of Combustible Materials**
- **316 5.30% 77.1605(d) Loading and Haulage Equipment; Installations**
- **256 4.29% 77.205(b) Travelways at Surface Installations**
- **221 3.70% 77.1605(b) Loading and Haulage Equipment; Installations**
- **210 3.52% 77.202 Dust Accumulations in Surface Installations**
- **187 3.13% 77.502 Electric Equipment; Examination, Testing, and Maintenance**
- **153 2.56% 77.200 Surface Installations; General**
- **145 2.43% 77.410(c) Mobile Equipment; Automatic Warning Devices**

20 Most Commonly cited

- **133 2.23% 77.1606(c) Loading and Haulage Equipment; Inspection and Maintenance**
- **124 2.08% 77.516 Electric wiring and equipment; installation and maintenance**
- **115 1.93% 77.1110 Examination and Maintenance of Firefighting Equipment**
- **115 1.93% 77.216(d) Water, Sediment, or Slurry Impoundments and Impounding Structures**
- **111 1.86% 77.1109(c)(1) Quantity and Location of Firefighting Equipment**
- **110 1.84% 77.205(e) Travelways at Surface Installations**
- **99 1.66% 77.1605(k) Loading and haulage equipment; installations**
- **89 1.49% 77.205(a) Travelways at Surface Installations**
- **77 1.29% 77.400(c) Mechanical Equipment Guards**
- **76 1.27% 77.1606(a) Loading and haulage equipment; inspection and maintenance**

Most Commonly cited Underground Mine Citations in 2006

Total Violations for this type of operation: 62,921

# of Viols.	Percent	*Standard and Title
• 8,2011	3.03%	75.400 Accumulation of Combustible Materials
• 3,601	5.75%	75.503 Permissible Electric Face Equipment; Maintenance
• 3,138	4.99%	75.370(a)(1) Mine Ventilation Plan; Submission and Approval
• 2,338	3.72%	75.202(a) Protection from Falls of Roof, Face and Ribs
• 1,899	3.02%	75.220(a)(1) Roof Control Plan
• 1,566	2.49%	75.1725(a) Machinery and Equipment; Operation and Maintenance
• 1,426	2.27%	75.512 Electric Equipment; Examination, Testing and Maintenance
• 1,363	2.17%	75.517 Power Wires and Cables; Insulation and Protection
• 1,063	1.69%	75.403 Maintenance of Incombustible Content of Rock Dust

* Percent of total violations written at this type of operation.



Top 20 Underground Violations continued

937	1.49%	75.333(h) Ventilation Controls
932	1.48%	75.1722(a) Mechanical Equipment Guards
749	1.19%	75.1403 Other Safeguards
733	1.16%	75.604(b) Permanent Splicing of Trailing Cables
718	1.14%	75.1100-3 Condition and Examination of Firefighting Equipment
599	.95%	77.1104 Accumulations of Combustible Materials
561	0.89%	75.1100-2(b) Quantity and location of firefighting equipment
542	0.86%	75.342(a)(4) Methane Monitors
502	0.80%	75.515 Cable fittings; suitability.
499	0.79%	75.904 Identification of circuit breakers
466	0.74%	75.807 Installation of High-voltage Transmission Cables



7. Other issues

- Snapshot rule
- Supervisors need to take notes
- Be prepare to contest citations and orders
- Know your rights and exercise them
- Know what are the legal duties of your job and carry them out.
- Dual Citations are back!

495283

August 29, 2007

