



# RockLaw

## D-paper D-ciphered

Prior violations can have lasting repercussions that only begin with unwarrantable failure citations.

by Peter S. Gould

**W**ith Mine Safety and Health Administration (MSHA) enforcement efforts ramped up to levels seldom before seen, more and more 104(d)-paper is being issued to the mining and crushing industries. MSHA writes a citation or order under section 104(d) of the Mine Act if the agency discovers a violation of a safety or health standard that it believes resulted from an operator's unwarrantable failure to comply with that health or safety standard.

What is an unwarrantable failure? The Mine Safety and Health Review Commission, MSHA, and operators have been trying to figure that out since the Mine Act's passage in 1977. Each 104(d) citation or order presents a unique set of circumstances. Prior to 1988, under the *Ziegler Coal* case, MSHA could consider an operator's *ordinary negligence* an unwarrantable failure. In other words, if an operator knew or should have known that violative conditions or practices existed, MSHA could issue the operator d-paper.

In December 1987, that changed when the Commission [in *Emery Mining*, 9 FMSHRC 1997] concluded that an unwarrantable failure means an operator's *aggravated conduct* constituting more than ordinary negligence. Aggravated conduct is describable by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "a serious lack of reasonable care," and can only be properly determined by looking at the "totality of the circumstances," taking into account several factors to determine whether the operator's conduct exceeded ordinary negligence [see

*Eagle Energy Inc.*, 23 FMSHRC 829, 835 (FMSHRC 2001); *Mountain Coal Co.*, 26 FMSHRC 853, 869 (ALJ 2004)]. Those factors include:

- The length of time the violation existed;
- The extent of the violative condition;
- Whether the operator had been placed on notice that greater efforts were necessary for compliance;
- The operators' efforts in abating the violative condition;
- Whether the violation was obvious or posed a high degree of danger; and
- The operator's knowledge of the existence of the violation.

The Commission considers prior similar violations to be one of several factors that lead to a determination of unwarrantable failure to comply with MSHA standards. Prior similar violations lend weight to a finding of an unwarrantable failure, but only if the Commission or one of its administrative law judges finds that the prior violations would have "placed the operator on notice that greater efforts are necessary for compliance." The Commission has held, however, that prior violations alone do not give rise to an unwarrantable failure.

For example, in one case where MSHA cited the operator of a "very wet" coal mine for water accumulations of up to 15 inches in an escape way, the Commission determined that violation was an unwarrantable failure after considering that: (1) the operator could have abated the accumulation of water by running a 1,000-foot discharge line from the escape way, but the operator decided not to attempt that means of discharge; (2) the operator made no attempt to abate the water accumulation, and even those options within

*Citations issued under 104(d) of the Mine Act can have widespread and lasting repercussions.*

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the operator's control were not attempted; (3) the danger of 110 feet of 15 inches of water was obvious; and (4) the operator had been previously cited for and warned of chronic water accumulation in the mine. In this case, prior violations were only one of several factors that led the Commission to a determination of unwarrantable failure [see *Eagle Energy*, 23 FMSHRC at 831-33].

In another case, where an underground coal mine operator was cited for excessive respirable dust levels, an MSHA inspector issued an unwarrantable failure citation on the basis of prior citations in an effort to induce future compliance despite the operator's efforts to abate the dust problem. The judge affirmed the unwarrantable failure citation, finding that the operator's compliance history created a rebuttable presumption that the violations were due to an unwarrantable failure. The Commission reversed the judge's opinion and held that the violation did not constitute the operator's unwarrantable failure merely because the operator had been previously cited for similar violations; stating that Commission "case law does not recognize a presumption of unwarrantable failure based on an operator's history of non-compliance," that a violation did not rise to the level of an unwarrantable failure merely because the operator had been previously cited for similar violations [see *Peabody Coal Co.*, 18 FMSHRC 494, (Review Commission 1996)].

If, however, a violation constitutes notice to the operator that "greater ef-

forts are necessary for compliance," then the history of non-compliance weighs against the operator in an unwarrantable failure determination. The types of violations that will put an operator on notice generally are those that are similar to the violation at issue, although identical circumstances are not required to establish substantial evidence of notice to the operator. The Commission has further held that in "evaluating evidence of prior warnings as a part of the unwarrantable failure analysis, the Commission has not required the previous condition involve materials identical to those involved at issue" [see *Enlow Fork Mining Co.*, 19 FMSHRC 5 (Review Commission 1997)].

### Implications of d-paper

Unwarrantable failure findings can have significant economic consequences, both in terms of penalties and orders that can halt an operator's production. They are also evaluated for special investigations and are one of the criteria the agency considers in determining whether a pattern of violations exists.

In certain extreme situations, prior violations of the same health or safety standard and, in turn, unwarrantable failure findings may give rise to a flagrant violation, defined by the Mine Improvement and New Emergency Response Act of 2006 [the MINER Act] as "a reckless or repeated failure to make reasonable efforts to elimi-

nate a known violation of a mandatory safety or health standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." Flagrant violations can also be assessed a civil penalty of up to \$220,000, if determined to be the result of a repeated failure to eliminate a known violation. This occurs if: the violation is S&S; the injury or illness is determined to be at least permanently disabling, and the type of action is determined to be an unwarrantable failure and the operator had been charged with two or more prior unwarrantable failure violations of the same health or safety standard within the past 15 months. If the violation meets those criteria, it is then evaluated to determine whether it proximately caused, or could have reasonably expected to cause, death or serious bodily injury.

### Conclusion

Issuance of a citation or order under 104(d) of the Mine Act can have widespread and lasting repercussions, and repeat or similar prior violations can and do contribute to unwarrantable failure findings. Thus, it is imperative to ensure that your operation has strategies in place for (1) preventing and correcting violative conditions once discovered, thereby improving safety and precluding aggravated conduct determinations; and (2) resolving improperly issued d-paper to avoid large fines, closures orders, and problematic and costly special investigations down the road. **AM**