



A publication of the
Oregon Independent Aggregate Association
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www.oraggagate.com

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Oregon Independent Aggregate Association Newsletter

March 2019

Just a quick reminder this month – Please send us written comments and experiences you have had from recent MSHA inspections. We are actively collecting statements to communicate our concerns as an industry and for our members. Your active participation is needed! We need your input by April 3rd. Please send them via email to memberreply@oraggagate.com. Please put MSHA comments in the subject section.

We have to communicate what the problems are if we want things to change.

Thanks,

Erick Staley
Chairman

The following article has been provided by Matt DeAtley of DeAtley Law PLLC

Uncovering S&S

Perhaps the most recognizable and feared box on any citation is the “Significant and Substantial” (S&S) designation. Many mine operators and their miners believe that S&S citations are a higher level of citations. Often the S&S designation is the primary issue that operators want removed when contesting a citation. While it is important to not have S&S violations on your record, the S&S designation is more a stepping off point for MSHA to issue greater, more serious citations in the future. In this article, I will review the Mine Act’s definition of S&S, the consequences of an S&S citation, and how mine operators can reduce the likelihood of receiving an S&S citation.

What is S&S and how is it Interpreted?

When an inspector checks the “S&S” box, they are saying that “the violation is such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard and such hazard has a reasonable

likelihood to result in a reasonably serious injury or illness.”¹ While this is somewhat convoluted, it can be broken down into four main parts: 1) there must be a violation of a health or safety standard; 2) the violation must contribute to a *discrete* safety hazard; 3) there must be a *reasonable likelihood* of injury, and; 4) should the accident happen, the injury will be *reasonably serious*.²

It is helpful to know a few facts regarding S&S citations before interpreting the four requirements. First, an S&S designation has nothing to do with the negligence of the violation. Instead, S&S designations are based primarily on the gravity of the citation — the likelihood of an accident resulting from the violation and the seriousness of the injury should the accident occur. Second, an S&S citation cannot be issued for anything other than a violation of a mandatory health or safety standard. This means that only violations under 30 C.F.R. 46, 47, 48, 49, 56, 57, 58, 62, 70, 71, 72, 75, 77, and 90 may be designated S&S. Lastly, an inspector cannot issue an S&S citation for exclusively a paperwork citation. For example, a citation issued for failure to record a pre-trip inspection of equipment where the equipment does not have safety defects cannot be designated S&S.

Now that we know when an inspector cannot issue S&S citations, we look to how the courts interpret the four requirements of S&S as set out in *Mathies Coal*. The first requirement is relatively easy to satisfy — it is satisfied if there is a violation of a standard that can be written as S&S. The second, third, and fourth requirements, however, have been subject to much more judicial debate. The most recent interpretation of the application of the *Mathies Coal* S&S requirements determined that the second requirement — that the violation contributed to a discrete safety hazard — requires MSHA to show that the violation is at least somewhat likely to result in harm.³ This means that it is the second prong where MSHA must show that the violation is likely to result in an injury, and if they cannot, then MSHA failed to satisfy the requirements of S&S. Moving to the third requirement — that there must be a reasonable likelihood of injury — is not whether an accident is reasonably likely to occur, but whether it is reasonably likely that a serious injury would result from the hazard.⁴ In other words, the courts interpret the third requirement as the likelihood of injury, assuming the event occurred. Finally, the courts interpret the fourth requirement— that the injury is reasonably serious — also assuming the accident occurred. Under this requirement, however, the courts are considering the seriousness of the injury, now assuming now that the injury occurred.

So, You Were Issued an S&S Citation...

Assuming the citation you received meets the above requirements and is valid, what are the consequences? In general, mine operators have a tendency to think that receiving an S&S citation is some extra citation — that the operator was especially at fault for the violation. But remember that an S&S citation has nothing to do with negligence. An inspector can issue an S&S citation even where mine operator negligence is low. All the issuing of an S&S citation means is that there is a reasonable likelihood of an accident and should that accident occur, it is reasonably likely to result in reasonably serious injuries. An S&S designation on a citation will also not affect the amount of the fine for the citation. S&S designation is not a category MSHA uses to calculate fines.⁵ Therefore, two citations that are the same gravity and negligence will result in the same fine regardless of whether one of them is S&S.

From a purely MSHA standpoint, there are two main areas where an S&S designation is important. First, only S&S violations count toward Pattern of Violation (POV) monitoring under MSHA. Once a mine has reached a certain number of S&S violations,⁶ the mine operator will be on notice that any further S&S citations will result in a withdraw

¹ 30 U.S.C. § 814(d)(1).

² *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

³ *Knox Creek Coal Corp. Sec. of Labor, MSHA*, 811 F.3d 148, 164 (2016); see *Sec’y of Labor v. Black Beauty Coal Co.*, 34 FMSHRC 1733, 1741 n. 12 (2012).

⁴ *Id.* At 161.

⁵ 30 C.F.R. § 100.3.

⁶ Test One: (1) At least 50 S&S citations in the most recent 12 months; (2) a rate of 8 or more S&S citation per 100 inspection hours OR negligence of high or reckless disregard on 25% of the S&S citations of the past 12 months; (3) at least ,5 elevated citations and

order until the violation is abated. The only way to have the POV notice removed is by having no withdraw orders for 90 days or an MSHA inspection of the entire mine finds no S&S violations.

The second, and more applicable, reason S&S violations are important is that they are a requirement for 104(d) citations and orders. 104(d) citations are the “unwarrantable failure” citations where MSHA can issue personal fines. For MSHA to issue a 104(d) citation, the violation must be designated S&S and at least high negligence.

Pushing Back Against an S&S Designation

While there are no extra monetary penalties for a 104(a) citation that has been designated S&S and it is a high standard for a mine operator to be on POV notice, receiving an S&S citation may have other consequences that are detrimental to your business. Even more significant, knowing the right questions to reduce an S&S citation may keep a mine operator from receiving a 104(d) citation. If you receive an S&S citation, ask the inspector why he feels the hazard is reasonably likely to result in injury and whether the injury is expected to result in lost workdays, restricted duty, or higher. Both categories of gravity are based on the inspector’s judgment of what accident would result from the hazard, so simply asking these questions may make an inspector realize the hazard may not be as likely to result in an accident as he initially thought. Even if the inspector sticks to his initial analysis of the gravity, a mine operator should document what the inspector says and why the mine operator disagrees with the gravity. Having these notes documented from the time of the inspection is extremely helpful in reducing an S&S citation if the mine operator chooses to contest.

About the Author:

Matt DeAtley is the fifth generation in a mining family and founded DeAtley Law, PLLC with the specific goal of assisting mine operators and contractors with MSHA Disputes. You can contact Matt at www.deatleylaw.com or by calling (208) 816-0625.

¹ Test One: (1) At least 50 S&S citations in the most recent 12 months; (2) a rate of 8 or more S&S citation per 100 inspection hours OR negligence of high or reckless disregard on 25% of the S&S citations of the past 12 months; (3) at least ,5 elevated citations and orders (under Section 104(b), 104(d), 104(g), or 107(a)) issued per 100 inspection hours during most recent 12 months; and (4) an Injury Severity Measure (SM) for the mine that is greater than the overall industry SM for all mines in the same mine type and classification over the most recent 12 months.

Test Two: (1) At least 100 S&S citations in the last 12 months; and (2) at least 40 elevated citations and orders issued during the most recent 12 months.



This year's part 46 training was again a huge success. Adele Abrams and Josh Schultz did a remarkable job providing the required training to the group with a twist on the First Aid portion of the training. The Roseburg class had a Trauma Nurse speak and the Albany class had a refresher on CPR.



*CPR training part of our Part 46 First Aid Training Albany class
Photo curtsey of Bill Ruchti- J. Davidson & Sons*

Roseburg Class attendance this year was 68 and Albany class attendance was 57. Thank you to all of you that registered early to make the class set up easier.

SafePro by Dean Beam

The June 2019 SafePro Law class is going to be a great class. We only have 15 spots open. Our block of rooms with the Hilton Garden Inn in down town Savannah can only be held to April 17. If you are new in leadership in the mining industry or been a miner for some time and need a refresher the SafePro Law class should not be missed. This class will give you the knowledge coupled with your mining experience that allows you to be prepared for the imminent MSHA inspection. The Institute information will help you avoid bad citations and the knowledge to comply with the law. You will add value to yourself and your company by attending!

Spouses are welcome if your company allows you to bring them. Shopping in Savannah is considered excellent. Malls and quaint shoppes are within easy walking distance from the hotel. Walking and riding tours of the city can be arranged during the week you are here. If you have any questions or wish to register, just contact us at safeproinc.com. We want you to have a good time as well as a great learning experience. I look forward to seeing you Savannah Ga.

Yours in Safe Production

Dean

2019 Board Meeting Schedule

*Our next meeting will be held on April 17th at 10AM
KPD Office Springfield, Oregon*

2019 Board of Directors

Erick Staley – Chairman
Roy Garrison – Vice Chairman
Mary McNatt- Treasurer
Kellie Ramar – Secretary
Melissa Mullins
Jerry Davidson
Bill Ruchti
Andrew Siegmund
Jim Jeffries
Dan Kauffman

Attention!!

We are looking for a few board members to replace those that we will be losing in 2019. If you are interested or would like more information on becoming a voice of your association please contact Chairman Erick Staley.

VISIT OUR WEBSITE AT WWW.ORAGGREGATE.COM

Our 2019 Scholarship application is attached. Please pass along to your employees and families.



***THE OREGON INDEPENDENT AGGREGATE ASSOCIATION 2019
Davis Creek Rock Quarry Scholarship***

Oregon Independent Aggregate Association (OIAA) is proud to offer two annual scholarships to any deserving students pursuing a career related to the construction, aggregate and forestry industry. Areas of study are to include construction, construction management, engineering, geology, architecture, land use planning, forestry, heavy equipment repair and welding. This year's scholarship is named in honor of Mary McNatt, our Past Chairman and current Treasurer, who founded and continues to own Davis Creek Rock Quarry located in Silverton, Oregon.

Who May Apply?

The OIAA Scholarship is open to all current members, employees of current members and their families studying in the required fields as indicated above.

The academic institution may be a university, community college, private college or a trade school with recognized related courses of study. Scholarships will be applied toward full or part-time tuition and or educational material costs within one calendar year.

Your Personal Statement is the most important part of your application! When you prepare your Personal Statement, it's very helpful to tell the OIAA scholarship selection committee about your career goals in the required industries, personal goals, reasons for applying for this particular scholarship, and personal financial circumstances that pertain to your financial need. Your statement should be a minimum of one page and not more than two pages.

The OIAA Selection and Award Process

Applications will be directed to the scholarship selection committee. Scholarship recipients will be notified in writing by the OIAA and the recipient's name will be listed on the OIAA website. Those who do not receive scholarships will also be notified by mail.

Unless otherwise noted, the scholarships shall be in the amount of \$ 2,500.00 each as a onetime award.

All recipients will be required to write a short letter of thanks to the OIAA and present it in person at a designated Board Meeting. By attending such meeting you indicate your acceptance of the award and the terms of the scholarship.

Scholarships shall be awarded in compliance with applicable Oregon laws and OIAA policies related to non-discrimination on the basis of sex, race, age, color, national or ethnic origin, marital status, disability, religion, sexual orientation or veteran status.

Scholarship Application (2019)



(Office Use Only) Application Number _____

PERSONAL INFORMATION: (PLEASE PRINT OR TYPE)

Applicant's Name: _____

Date of Birth: _____

Address: _____

City: _____ State: _____ Zip code: _____

Phone: (____) _____ Alternate phone number (____) _____

E-mail address: _____

I. ACADEMIC INFORMATION: (PLEASE PRINT OR TYPE)

Name of High School: _____

Year of High School Graduation: _____

Current University, College or Trade School: _____

Address: _____

City: _____ State: _____ Zip Code _____

Phone (____) _____

Overall GPA: _____ Major: _____ Minor: _____

When do you expect to graduate? _____

II. Extracurricular and or Community Information:

List honors, awards, prizes or recognition you have received: _____

List school and or group activities (sports, clubs, committees, offices) that you have participated in:

List and describe your hobbies and interests: _____

III. WORK EXPERIENCE (INCLUDE ON A SEPARATE SHEET OF PAPER IF NEEDED)

What work experience have you had? _____

Would you be interested in work with a construction, aggregate projects or forestry company?

YES _____ NO _____ PART-TIME _____ SUMMER _____

IV. Remember to attach the following:

_____ A transcript of grades through the last grading period prior to the date of application.

_____ A letter of recommendation from a teacher, employer or other relevant acquaintance.

_____ Your Personal Statement as required in the Scholarship Guidelines.

I certify that the information on this application is complete and accurate to the best of my knowledge and belief.

Signature: _____ Date: _____

Please return you application to the attention of the application committee

Oregon Independent Aggregate Association

P.O. Box 571

Stayton, Oregon 97383

Application Deadline: September 15, 2019

Applicant will be selected for the school term starting September 2019