Bloomberg BNA

Occupational Safety & Health Reporter™

VOL. 42, NO. 27 JULY 5, 2012

ENFORCEMENT

MINE SAFETY

When federal mine inspectors issue citations for mine safety violations, they must indicate whether the infraction is one that ''could significantly and substantially contribute to the cause and effect of a mine safety or health hazard,'' according to the Federal Mine Safety and Health Act (Pub. L. No. 91-173). Congress never defined or offered guidance on what the phrase ''significantly and substantially'' actually means, leaving it instead for the courts to decide. The analysis used by the courts to determine if a violation is significant and substantial has been largely unchanged in the last 40 years. The author argues that two recent decisions by the Federal Mine Safety and Health Review Commission have expanded the scope of what violations would be considered significant and substantial.

Evacuation Standards Case Leads to Broad Shift in 'Significant and Substantial'

By Maxwell K. Multer

Maxwell K. Multer is an associate in Dinsmore & Shohl's Labor and Employment Department and is a frequent writer and speaker on topics in mine safety litigation.

The phrase ''significant and substantial'' first appeared in the 1969 Federal Coal Mine Health and Safety Act (''Coal Act'').[1] Congress mandated that when a federal mine inspector issues a citation for a violation of a mandatory health or safety standard, he

[1] Pub. L. No. 91-173, 83 Stat. 742 (1970).

 ISSN 0095-3237

must indicate whether the violation is one that ''could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.''[2] This mandate was carried over when Congress later amended the Coal Act through the passage of the Federal Mine Safety and Health Act of 1977 (''Mine Act'' or ''1977 Mine Act'').[3]

However, in choosing that statutory language, Congress conspicuously omitted any binding definition or even meaningful guidance as to what ''significantly and substantially'' actually meant. Without such guidance, it was left to the courts to construe the language, and to determine what type of violations Congress intended it to apply to. In turn, the idea of significant and substantial would be interpreted by the courts to refer to a particular class of violations which were in some way more serious than a simple violation of the letter of the regulation. As a designation used to denote such violations, significant and substantial has evolved to become one of the cornerstones of the graduated enforcement scheme implemented by the Mine Safety and Health Administration (MSHA) to police America's mines. With repeated issuances, these more serious violations give rise to progressively more severe sanctions and penalties.

Each day, an army of federal mine inspectors around the country travel into the mines to examine various areas and equipment for compliance with the mandatory safety and health standards promulgated by the Secretary of Labor. When an inspector identifies conditions that he believes to be a violation of a mandatory safety or health standard, he issues a citation in which he is required to make a series of substantive designations to communicate both the seriousness of the violation and the level of negligence attributable to the mine operator (''operator''). One of the designations to be made by the inspector is whether a given violation is ''significant and substantial.''

While the inspector who issues a given citation makes an initial judgment as to whether he believes the violation is significant and substantial, his conclusion is subject to review by an Administrative Law Judge, and may be appealed to the Federal Mine Safety and Health Review Commission, to the U.S. Court of Appeals for the District of Columbia Circuit, and to the U.S. Supreme Court. The analysis applied in the courts to determine whether a violation qualifies as significant and substantial has been largely the same for the last 40 years. The enduring construction of significant and substantial was established by the Federal Mine Safety and Health Review Commission (''FMSHRC'' or ''Commission'') in *Cement Div., National Gypsum*.[4] Three years later, in the Commission's 1984 opinion in *Mathies Coal Company*, it distilled that construction to four required elements, which had to be present for a given violation to qualify as significant and substantial.[5] This test came to be known as the *Mathies* significant and substantial test, which, although it has been reconfigured, continues to be the legal framework applied today.

Once the Commission established that framework in the early 1980s, the analysis, although refined several times over the following 10 years or so, remained for the most part constant until the Commission issued its 2010 opinion in *Musser Engineering, Inc. and PBS Coals, Inc.*[6] The Commission's application of significant and substantial in *PBS Coals*, which it discussed *very* briefly, not only represented a significant departure from prior jurisprudence, but was wholly inconsistent with a great deal of long relied-upon and firmly established precedent. What started as a one-off anomaly in *PBS Coals* became established with the Commission's subsequent decision in *Cumberland Coal Resources, LP*, in which there was significantly more justification and analysis.[7] Although the Commission maintained in *Cumberland* that they were not changing the *Mathies* test, they proceeded to fundamentally alter the existing legal analysis, greatly expanding the scope of what violations would be considered significant and substantial in the future. They did this by reinterpreting their own holdings from *National Gypsum* and *Mathies* in a way that is fundamentally and demonstrably inconsistent with the vast majority of precedent between 1984 and 2010.

I. Significant and Substantial—The Relevant Statutory Language of the 1969 Coal Act and the 1977 Mine Act

The ''significant and substantial'' language at issue first appeared in the 1969 Coal Act. While the statute and legislative history made clear Congress's intention that certain more serious violations be designated as such by an inspector issuing a citation, they provided minimal guidance as to the precise scope of what violations should be included, much less any kind of analytical framework to apply to different factual scenarios in order to determine if a given situation qualifies as one of those more serious violations. Indeed, the near totality of Congress's guidance came from the language which became the statutory language itself.

Section 104(c)(1) of the 1969 Coal Act reads as follows:

> If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substan-

[2] *Id.*

[3] P.L. 95-164, 91 Stat. 1290, (1977).

[4] *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822 (Apr. 1981).

[5] *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

[6] *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1237 (Oct. 2010).

[7] *Cumberland Coal Resources, LP*, 33 FMSHRC _ (Oct. 2011)

  OSHR ISSN 0095-3237

tially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any notice given to the operator under this Act.

With the enactment of the Coal Act, containing the above language, it was left to the Secretary of the Interior and the courts to determine both the bounds of the authority bestowed by Congress, and what type of enforcement tools were intended. As may be clear from a review of the above quoted language from Section 104(c)(1), the statutory language was something less than a model of clarity. As a result, it would take a number of years to establish an enduring interpretation, and the scope of the significant and substantial clause would broaden and narrow a number of times over that period. That process of interpretation would continue after the passage of the 1977 Mine Act and the replacement of the Interior Board of Mine Operations Appeals (IBMA) with the Commission. The Mine Act, in Section 104(d)(1), contained language identical to the significant and substantial language from the Coal Act, quoted above; the Mine Act's legislative history was similarly lacking in guidance as to what Congress intended by it.

II. PBS Coals and Cumberland Coal Resources—The Clarification That Is 'Not Changing Mathies.'

By way of two recent decisions, the Commission has drastically changed the way the significant and substantial analysis is conducted. In doing so, not only did the Commission not acknowledge that it was changing the significant and substantial test, but it in fact affirmatively argued that it was not changing the analysis that had long been applied under *Mathies Coal Co.*, which established the four requirements that must be present for a violation to be significant and substantial over 40 years ago. The first of these two cases, *Musser Engineering, Inc. and PBS Coals, Inc.*, (''*PBS Coals*'')[8] arose as a result of the mine inundation that occurred in 2002 at PBS's Quecreek No. 1 Mine. However, the events that constituted the violation in *PBS Coals* occurred long before the breakthrough into the nearby abandoned mine, which resulted in the inundation.

There were several abandoned mines in the vicinity of the Quecreek No.1 Mine.[9] One of these abandoned mines was the Harrison No. 2 Mine.[10] In the 1990s, another company had begun the permitting process to open the Quecreek Mine, prior to the mine's being purchased by PBS. PBS acquired the mine prior to the completion of the permitting process, and contracted with Musser Engineering Inc. (''Musser''), to prepare the necessary permit application. Both PBS and Musser made diligent efforts over a multi-year period to locate final maps of the nearby abandoned Harrison No. 2 mine to use during the process.[11] While they were able to procure maps from multiple sources, including the Pennsylvania Department of Environmental Protection (''DEP'') and Consolidated Coal Co. (''Consol''),[12] depicting different stages of development, they were unable to locate any maps purporting to be final.[13] As a result, Musser and PBS simply adopted the map which had the most development depicted as representing the final map.[14] However, despite never locating a map marked as ''final,'' and thus having reason to suspect that the map used may not have been complete, neither PBS nor Musser made any notations or disclaimers of any sort on any Quecreek No. 1 maps that would reveal that the location of the Harrison No. 2 Mine was uncertain.[15] In July of 2002, the miners at Quecreek No. 1 broke into the old works of the Harrison No. 2 mine, which the official Quecreek No. 1 map reflected as being an additional 450 feet away at the time.[16] It was through a combination of luck and the perseverance of mine rescuers that all nine miners who had been trapped were able to come out alive.

MSHA conducted an investigation into the events that occurred at Quecreek No. 1, and determined that the mine inundation was a result of using the inaccurate map, which allowed the Quecreek miners to accidently mine into the adjacent and flooded Harrison No. 2 Mine.[17] Accordingly, MSHA issued citations to PBS and Musser under 30 C.F.R. 75.1200, which requires the maintenance of an up-to-date map and mandates the inclusion on that map of, among other things, ''adjacent mine workings within 1,000 feet.''[18] The citation was for the ongoing failure to maintain a map that accurately reflected the adjacent Harrison No. 2 Mine.[19] The citations for each entity were designated significant and substantial.[20] In its decision, the Commission determined that while Musser was subject to its jurisdiction under the Mine Act, Musser's activities in preparing the map used in the permit application some years earlier were too attenuated to sustain the violation of 75.1200.[21] It held that PBS, on the other hand, had clearly failed to fulfill the requirements of 75.1200 by using a map which proved to be inaccurate, and thus had violated the regulation.[22] PBS argued, among other things, that the violation was not significant and substantial.

In considering whether the violation was significant and substantial, the Commission began by briefly discussing its construction of the significant and substantial analysis established in *Cement Division, National*

[8] 32 FMSHRC 1257 (Oct. 2010).
[9] *Id*. at 1259.
[10] *Id*.
[11] *Id*. The Double C Coal Company had initiated the application process with the Pennsylvania Department of Environmental Protection in 1994, but sold the mine to PBS before it was completed.
[12] Consol owned the mineral rights to the Harrison No. 2 Mine and, as it was ultimately discovered, was in possession of a final map as well.
[13] *Id*. at 1260.
[14] *See Id*. at 1260-1261.
[15] *Id*. at 1264.
[16] *Id*. at 1258, 1263.
[17] *Id*. at 1263.
[18] 30 C.F.R. § 75.1200 provides: ''The operator of a coal mine shall have in a fireproof repository located in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, an accurate and up-to-date map of such mine drawn on scale. Such map shall show: (a) The active workings; . . . (h) Adjacent mine workings within 1,000 feet; . . . .''
[19] *See PBS Coals*, at 1263.
[20] *Id*.
[21] *Id*. at 1269, 1276.
[22] *Id*. at 1274-1275.

Gypsum Co.[23] and *Mathies Coal Co.*[24] It cited *National Gypsum* for the proposition that a violation is significant and substantial ''if, based on 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.''[25] It continued by reciting, with approval, the *Mathies* significant and substantial test, that

> ''. . . 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.''[26]

In the initial decision in *PBS Coals*, the Administrative Law Judge (ALJ) had considered and upheld MSHA's significant and substantial designation based his application of the *Mathies* test to the circumstances at issue; the Commission agreed with the Judge's findings with regard to the first two *Mathies* requirements—that the regulation had been violated when an inaccurate mine map was produced, and that the violation contributed to the discrete safety hazard that ultimately resulted in an accident, the danger of a breakthrough into an adjacent mine.[27]

PBS's principal arguments related to the third *Mathies* requirement, whether there was a reasonable likelihood that the hazard contributed to would result in an injury. PBS argued that substantial evidence did not support the Judge's decision because the Secretary failed to produce ''an analysis . . . of situations where mining was conducted without a final map . . . and the number of times that resulted in a breakthrough and the number of times that resulted in injuries.''[28] It was in dispensing with PBS's arguments regarding the third *Mathies* requirement that the Commission made the analytical departure that is the subject of this paper.

'Violation' and 'Hazard.'

The Commission began its discussion on this issue by stating that PBS had confused the words ''violation'' and ''hazard'' in the *Mathies* test.[29] It elaborated:

> ''the test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., the danger of breakthrough and resulting inundation, will cause injury. The Secretary need not prove a reasonable likelihood that the violation itself will cause injury, as PBS argues.''[30]

In finding that the third *Mathies* requirement had been met, it noted the testimony of the Secretary's expert witness that ''miners who broke through into a flooded mine would face numerous dangers of injury: drowning, blocked escapeways, disrupted ventilation, [etc.] . . .''[31]

The Commission's discussion of the third *Mathies* requirement in *PBS Coals*, though brief and conspicuously missing any citations to supporting legal authority, made clear the Commission's new position that the inquiry under the third *Mathies* requirement should consider whether an injury is reasonably likely to occur, *assuming that the contemplated hazardous event has occurred*.[32] This had the practical effect of moving the starting point for consideration for whether an accident was reasonably likely to occur. Rather than looking at the circumstances at the time of the violation and asking, ''is an accident reasonably likely to occur going forward assuming continued normal mining operations,'' a fact-finder, based on *PBS Coals*, is now directed to start from a situation in which the hazardous event has already occurred, then asking ''now that the contemplated accident has occurred, is an injury reasonably likely to result?'' This ''clarification'' by the Commission on the third *Mathies* requirement was not limited in scope in any way. The Commission's discussion was framed as though it were simply correcting PBS's misinterpretation of the existing significant and substantial test under *Mathies*.[33] *PBS Coals* was the first time the Commission made any such proclamation; however, the following year, the Commission would reaffirm its new construction of the significant and substantial analysis in its disposition of *Cumberland Coal Resources*.

Cumberland Coal Resources[34] was the perfect case for a more enforcement-oriented Commission to cement this analytical change, which was briefly introduced in *PBS Coals*. In *Cumberland*, MSHA had issued four citations for alleged violations of a mandatory safety standard relating to escapeways.[35] The particular standard at issue requires such escapeways to be provided with a durable, continuous lifeline that ''shall be located in such a manner for miners to use effectively to escape.''[36] On an inspection in late 2007, an MSHA inspector examined the primary and secondary escapeways in several locations at Cumberland's Cumberland Mine.[37] In all of the areas, the lifeline was suspended from the roof at an approximate average height of seven and a half feet.[38] It was suspended at that height with J-hooks, which were not all turned the same way.[39] The inspector issued citations for four violations of the regulation over a period of several days.[40] On the first day, he examined the secondary escapeway for a distance of approximately 6,500 feet. He alleged that in addition to the height of the lifeline and placement of

[23] *Cement Div., Nat'l Gypsum,Co.*, 3 FMSHRC 822, 825 (Apr. 1981).
[24] *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).
[25] *PBS Coals*, at 1279-1280.
[26] *Mathies Coal Co.*, 6 FMSHRC at 3-4.
[27] *PBS Coals*, at 1280- 1281.
[28] *PBS Coals*, at 1281.
[29] *Id*., at 1280-1281.
[30] *Id*. at 1281.
[31] *Id*.
[32] *See Id*.
[33] *See Id*. at 1280-1281.
[34] *Cumberland Coal Resources, LP*, 33 FMSHRC _ (Oct. 2011).
[35] *Id*. at 1.
[36] 30 C.F.R. § 75.380(d)(7)(iv). The lifeline is a continuous, directional cord with reflective tape and reflectors which extends all the way to the portal of the mine through both the primary and secondary escapeways.
[37] *Id*.
[38] *Id*. at 1-2
[39] *Id*. The hooks used were four-inch long hooks shaped like the letter ''J.'' These hooks ''were attached to the mine roof at the top, were open- sided, and curved upward at the bottom to hold the lifeline.''
[40] *Id*. at 2.

  OSHR ISSN 0095-3237

the J-hooks, there were several additional cables hung from the roof just under the lifeline, which would prevent a miner from flipping the lifeline off of the J-hooks and would hinder miners' use of the lifeline.[41] The next day, the inspector examined the primary escapeway, finding that for a distance of approximately 450 feet, the lifeline was routed over various pieces of track equipment, all of which were at least seven feet wide, and between three and five feet tall.[42] A few days later, during a spot inspection, the inspector examined the primary escapeway in a different area of the mine, finding that the lifeline was run over track equipment in several places, similar to the previous citation.[43] The next day, he issued the fourth citation, having observed similar conditions in the primary escapeway in yet another area of the mine.[44]

In the initial hearing before the ALJ, the Secretary argued that the third element of the *Mathies* test ''must be viewed in the context of continuing mining operations and of an emergency necessitating use of the escapeway, and by analogy, the lifeline.''[45] At the hearing on the merits, the ALJ disagreed, characterizing the third element of the *Mathies* test as inquiring whether there was a reasonable likelihood of an injury-producing event, and concluding that the Secretary had failed to carry her burden in proving that such a reasonable likelihood existed.[46] In so finding, the Judge noted that the ''Secretary has failed to adduce the existence of facts that, in normal mining operations, would have tended to establish that there was a reasonable likelihood of a fire or explosion[,]'' and thus had failed to establish the reasonable likelihood of an injury-producing event.[47]

Labor Secretary Appeals Judge's Findings.

The Secretary of Labor appealed the Judge's findings that the four violations were not significant and substantial. She argued that in evaluating whether the violations at issue were significant and substantial, the Judge ''should have assumed the occurrence of the sort of emergency contemplated by the standard.''[48] In addition, she argued that the Judge's approach would lead to the absurd situation that violations of emergency standards[49] alleged by MSHA would rarely, if ever, be found to be significant and substantial, and would be ''effectively immunized from the Mine Act's graduated enforcement scheme,'' in spite of their ''especially high capacity for producing catastrophic injuries.''[50] Cumberland's position was that the Judge had correctly applied the significant and substantial analysis as set forth in *Mathies*, that the *Mathies* criteria must be viewed based on the particular facts surrounding the violation, and thus that it was improper to assume the existence of an emergency situation.[51]

Before turning to conduct its analysis regarding whether the violations were significant and substantial, the Commission engaged in a brief discussion of the legislative and regulatory history of the mandatory safety standard at issue, Section 75.380.[52] The overwhelming emphasis of the Commission's two-paragraph discussion was on the grave dangers faced by miners in emergency situations, and on the Mine Improvement and New Emergency Response Act of 2006's (''MINER Act's'') (including 75.380) stated principal aim of increasing the safety of miners in such emergency situations.[53]

The Commission began its analysis with a brief discussion of the established meaning of significant and substantial under *National Gypsum*, *Mathies*, *U.S. Steel I* and *U.S. Steel II*.[54] It is of note that although it cited *U.S. Steel II* in its discussion, the Commission did not refer to the long-accepted language therein that directly spoke to the central issue, that the third Mathies element ''. . . requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury[,]''[55] rather it cited *U.S. Steel II* for the less specific proposition that ''it is the contribution of the violation to the cause and effect of a hazard that must be significant and substantial.''[56] It noted with approval the ALJ's findings regarding the first two *Mathies* elements.[57] The Judge had concluded that the first element was satisfied by his determination of the four violations of 75.380(d)(7)(iv), and that the second element, the discrete safety hazard contributed to by the violations, was ''miners not escaping quickly in an emergency with attendant increased risk of injuries due to a delay in escape.''[58] The Commission further noted that ''the hazard contributed to by defectively placed lifelines necessarily involved consideration of an emergency situation.''[59] The Judge's construction of the discrete safety hazard under the second *Mathies* requirement was one of the aspects of *Cumberland* that gave the Commission the window necessary to confirm and reinforce its newly established position in *PBS Coals*.

Clarifying the Third Mathies Element.

It was the third element under *Mathies* that was the most contentious issue in *Cumberland*. As stated above, the central disagreement between Cumberland and the Secretary was whether it was proper to assume the existence of an emergency situation in the context of the third *Mathies* requirement in the significant and substantial analysis. The Commission made several references in support of its agreement with the Secretary's

[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] *Id*., at 3, citing *Cumberland Coal Resources, LP*, 31 FMSHRC 1147, 1163-1164 n.6 (2009) (ALJ).
[46] *Id*.
[47] *Id*.
[48] *Cumberland*, 33 FMSHRC at 3.
[49] Regulatory standards setting forth requirements relating to escapeways, lifelines, and other emergency preparedness obligations required under the Mine Improvement and New Emergency Response Act of 2006, Pub. L. No. 109-236, 120 Stat. 493 (''MINER Act'').
[50] *Id*., citing Sec. Br. at 12.
[51] *Cumberland*, 33 FMSHRC at 4.
[52] 30 C.F.R. § 75.380(d)(7)(iv) provides that ''Escapeways shall be. . . (7) Provided with a continuous, durable directional lifeline or equivalent device that shall be. . . (iv) Located in such a manner for miners to use effectively to escape. . . .''
[53] *See Cumberland*, at 4.
[54] *Id*..
[55] *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836.
[56] *Cumberland*, at 5, citing *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836.
[57] *Cumberland* at 5.
[58] *Cumberland* at 5, citing *Cumberland*, 31 FMSHRC at 1163 (emphasis added by Commission).
[59] *Cumberland*, at 5.

position. First, the Commission discussed its recent decision in *PBS Coals*, stating that ''importantly, we clarified that the Secretary need not prove a reasonable likelihood that the violation itself will cause injury.''[60] Indeed, the violations at issue in *Cumberland* were undeniably significant and substantial when looked at through the analysis crafted in *PBS Coals*. But the Commission did not stop with its reference to *PBS Coals*, perhaps because its discussion in *PBS Coals* regarding the third *Mathies* element was light on analysis, or more likely because the shift in the significant and substantial analysis was so significant that it wanted to be sure that the change stuck. The Commission also noted a proposition that it had adopted on several occasions, that ''the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of significant and substantial.''[61]

Interestingly, the Commission proceeded to characterize Cumberland's, and the Judge's, position as requiring the imposition of an additional test not set forth in *Mathies*, ''a test of whether emergency conditions would likely occur at the mine.''[62] It explained, ''[we] have never required the establishment of the reasonable likelihood of a fire, explosion, or other emergency event when considering whether violations of evacuation standards are significant and substantial.''[63]

The Commission placed great emphasis on this concept of ''evacuation standards,'' and explained that ''[e]vacuation standards are different from other mine safety standards. They are intended to apply meaningfully only when an emergency actually occurs.''[64] The passage and purpose of the MINER Act also played a role in the Commission's adoption of the Secretary's rationale.[65] The Commission noted that Congress's principal rationale in passing the MINER Act was to ensure ''safe and effective evacuations in emergency situations,'' arguing that ''it would be incongruous for *major violations* of evacuation standards not to be significant and substantial unless an inspector also happens to observe conditions that are reasonably likely to cause a fire or explosion.''[66] Although the Commission did not define, discuss in depth, or limit its holding to ''evacuation standards,'' it is clear that its analysis and holding were significantly influenced by, if not compelled by, the fact that the violations at issue were of such a type. The Commission further argued that adopting Cumberland's position ''would lead to the absurd result of defeating the purpose of the standard.''[67]

It is worth noting the magnitude and variety of justifications put forth by the Commission in reaching its holding regarding the third *Mathies* requirement in *Cumberland*. It referenced its prior holding in *PBS Coals*, the legislative and regulatory history of the 2006 MINER Act and 75.380(d)(7)(iv), and argued that evacuation standards are special and different from other standards. Yet, at the same time, it argued that ''the Commission is not changing *Mathies*.''[68] Rather, it continued, it was simply ''focusing on the specific discrete safety hazard at issue here, as required by the second element of the *Mathies* test.''[69] With this, the change in the significant and substantial analysis was both complete, and crystal clear: when considering the third element of the *Mathies* significant and substantial test, the now-proper question is whether an injury is reasonably likely to occur—assuming that the hazard contributed to by the violation has actually manifested in the particular accident or event contemplated.

With that issue settled, the Commission handily dispensed with Cumberland's remaining argument that, even assuming an emergency, an injury would not be reasonably likely to occur.[70] On this point, the Commission referenced the Judge's agreement with the inspector's testimony regarding the hazards that would be encountered in an emergency situation with poor visibility.[71]

As a preface to its endorsement of the *PBS Coals* significant and substantial formulation, the Commission noted the well-established precedent that ''the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of significant and substantial.''[72] This innocuous proposition is a far cry from the sea change the Commission has adopted with *PBS Coals* and *Cumberland*. Indeed, the central holding in the two cases cited by the Commission on this point are simply that the lack of prior accidents or injuries resulting from situations similar to the alleged conditions *do not preclude* a finding of significant and substantial.[73] This proposition is uncontroversial and completely consistent with the existing precedent. The only decision that truly supports the Commission's treatment of the third *Mathies* element in *Cumberland* is *PBS Coals*, which was unsupported when issued a single year earlier by the same sitting Commission.

There is some existing Commission precedent that arguably supports the proposition that violations of evacuation standards should be considered in the context of an emergency event. While that proposition has never been explicitly addressed or adopted by the Commission, it is at least not clearly inconsistent with several Commission decisions, and moreover has some level of intuitive appeal. However, *this is not the proposition that was adopted by the Commission in PBS Coals and Cumberland*. The holding in these two cases is that the third requirement in the *Mathies* test should

[60] *Id*., citing *PBS Coals*, 32 FMSHRC 1257, 1281 (Oct. 2010).

[61] *Id*., citing *PBS Coals*, 32 FMSHRC at 1281 (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

[62] *Cumberland*, at 7.

[63] *Id*.

[64] *Id*.

[65] P. L. 109-236, 120 Stat. 493 (2006). In fact, the Commission several paragraphs of its opinion to discussion of the legislative history and purpose of the MINER Act and § 75.380(d)(7)(iv). *Cumberland* at 4.

[66] *Cumberland*. at 8 (emphasis added).

[67] *Id*.

[68] *Id*.

[69] *Id*.

[70] *Id*. at 9.

[71] *Id*.

[72] *Id*. at 5, citing *PBS Coals*, 32 FMSHRC at 1281 (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

[73] *Elk Run Coal Co.*, 27 FMSHRC at 907; *Blue Bayou Sand & Gravel, Inc.*, at 856-857. An argument made in the past by operators was that it was the Secretary's burden to put on evidence of prior accidents at the same mine or at similar mines in order to prove that a given violation was reasonably likely to result in an injury-producing event. This argument has been advanced and rejected a number of times. In fact, it was advanced and rejected in *PBS Coals*. *PBS Coals*, at 1281.

  OSHR ISSN 0095-3237

be treated in this way *for all alleged violations*, not just those alleging violations of evacuation standards. What is equally eyebrow-raising is that the Commission's language in both opinions suggests that this is the way the *Mathies* test was constructed all along.[74] But is that really the case?

It is reasonable to wonder how the Commission was able to make such a drastic change in the significant and substantial analysis in *PBS Coals*, while at the same time putting forth an argument that its analysis was consistent with the accepted construction established long ago in *Mathies*. The Commission was able to make that claim by overlooking the substance of *Mathies* and other cases, instead focusing on a small linguistic ambiguity in the *Mathies* decision.

In *Mathies*, and all the cases that cited it thereafter, the third significant and substantial criterion was defined as ''a reasonable likelihood that the hazard contributed to will result in an injury.''[75] Because of the verbiage used, it is possible to superimpose different meanings onto the stated requirement. One possible meaning is the one advanced by the Commission in *PBS Coals* and *Cumberland*. This question—whether the identified hazard contributed to by the particular violation at issue would be reasonably likely to result in an injury if that hazard were to actually occur—is consistent with the language quoted above from the third element of the *Mathies* significant and substantial test.

However, there is an alternate construction that is also consistent with that language. This interpretation of the language requires us to frame the question in the context of whether this identified hazard is of the type that we would actually expect to result in an injury in absolute, real-life terms, looking forward from the present. Notably, this latter construction has been applied almost uniformly over the past 40 years.

The meaning of the third element now put into effect by the Commission creates the additional layer of assumption—that, somehow, circumstances have aligned such that the violation has resulted in the contemplated injury-producing event. Adding this assumption into the analysis renders the third *Mathies* requirement nearly meaningless, an effect which itself is inconsistent with the fact that since *Mathies* was decided, most disputes in mine safety litigation regarding whether a violation is significant and substantial have revolved around the third *Mathies* requirement. It also renders meaningless the established contour that circumstances are to be considered in the context of ''continued normal mining operations.'' Continued normal mining operations are hardly relevant if we are considering a situation in which the contemplated event has already occurred. The practical implication of the Commission's position, that the analysis in *Cumberland* is what the Commission meant in *Mathies* all along, is that mine safety lawyers, including current and former Administrative Law Judges and Commissions, have simply been getting it wrong for 40 years.

III. The Commission's 'Clarification' in PBS Coals and Cumberland is a *Change* and a Significant Expansion in Scope.

For all the discussion in *Cumberland* about evacuation standards, the change in the significant and substantial analysis that came out of *PBS Coals* and *Cumberland* is in no way restricted to situations involving alleged violations of this subclass of mandatory safety standards. Rather, the Commission's framing of the issue as a ''clarification'' of the existing significant and substantial analysis under *Mathies* serves to establish the proper analytical framework for determining whether an alleged violation of any mandatory safety or health standard is significant and substantial.

It is interesting to note some of the language used by the Commission in *Cumberland*. When addressing Cumberland's arguments that to adopt the Secretary's position would be contrary to *Mathies*, the Commission explains that it is not changing *Mathies*. The verbiage it used in doing so is telling: ''this method of analysis—focusing on the clear identification of the discrete safety hazard in the second element of the *Mathies* test . . . .'' One could argue that the Commission's use of the phrase ''this method of analysis'' implies that the method being discussed is in some way new or different. Indeed, while the third *Mathies* element has long been the central point of contention in litigation regarding significant and substantial before the Commission, with the decision in *Cumberland*, the second element, whether the alleged violation contributes to a discrete safety hazard, will likely become much more important.

That shift in importance is bad for operators, because every violation contributes to some kind of discrete hazard. The fact that a mandatory safety or health standard has been promulgated on a subject should be indicative of whether the violation of that standard contributes to some type of hazard. Indeed, both the Interior Board of Mine Operations Appeals and the Commission explicitly reached this conclusion. The IBMA recognized it in *Zeigler Coal Co.* when it acknowledged that ''by definition, the violation of any mandatory safety standard could significantly and substantially contribute to the cause and effect of a mine safety or health hazard,''[76] while the Commission stated the same in *National Gypsum* when it opined that ''the violation of a standard presupposes the possibility, however remote, of contribution to an injury or illness.''[77] This simple recognition is likely why the Commission established the third *Mathies* requirement in the first place.

The change to the significant and substantial analysis made by the Commission in *PBS Coals* and *Cumberland* further serves to effectively eliminate the Secretary of Labor's burden in establishing the third *Mathies* element, that the hazard contributed to is reasonably likely to result in an injury. It is difficult to imagine many violations aside from those relating to recordkeeping (and even many of those), where the hazard contributed to, if it occurred, would not be reasonably likely to result in an injury.

This fact is what makes *PBS Coals* and *Cumberland* so clearly inconsistent with the last 40 years of precedent regarding significant and substantial and the *Mathies* test. Take the example of a violation of 30

[74] *See PBS Coals*, at 1280-1281; *Cumberland* at 8-9.
[75] *Mathies*, at 3-4.
[76] *Zeigler Coal Co.*, 82 I.D. at 229.
[77] *National Gypsum*, at 825.

C.F.R. 75.202(a), which provides, in pertinent part, that ''the roof, face and ribs where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to [the same].''[78] Under *PBS Coals* and *Cumberland*, for any alleged violation of 75.202(a), the finding of the violation is going to be synonymous with a finding of significant and substantial. The standard would not be violated if the conditions were not such that a roof, face or rib hazard was contributed to. What is the discrete safety hazard then? The hazard would have to be ''the danger of a miner being struck by roof material or a rib outburst.'' Under *PBS Coals* and *Cumberland*, the next question is whether such a hazard, if it occurred, is reasonably likely to result in an injury. Clearly, this is no question at all. It is practically beyond argument that such an event would cause injury. Of course, this effect is not limited to 75.202(a). An entire swath of mandatory safety and health standards will now be almost presumptively significant and substantial. Many violations which before would have been almost certainly non-significant and substantial, will now be undeniably significant and substantial.

Facts in Mathies.

Consider, for example, the very facts from *Mathies*—the existence of unsecured oxygen and acetylene tanks underground. But instead of the tanks being present in a frequently traveled roadway with very limited clearance for mobile equipment, imagine that the tanks are in a crosscut where no persons or equipment travel. No one except for the maintenance person who placed the tanks there will ever be in the area. Under the pre-*PBS Coals Mathies* test, there is a very high likelihood that most judges, and indeed the Commission, would determine that such a violation is non-significant and substantial because under these particular circumstances, an injury-producing event is not reasonably likely to occur. Is there a violation? Of course; 30 C.F.R. § 75.1106-3 requires any such tanks to be secured to prevent tipping over.[79] Does the violation contribute to a discrete safety hazard? It does; because the tanks are standing and not secured, there is now a possibility that they could either fall over on someone or get damaged and become projectiles. Now the third *Mathies* element—is the hazard contributed to reasonably likely to result in an injury? Under the old analysis, we would say probably not. There is very minimal exposure. The only person who would be in the area already knows that the tanks are there and are unsecured. The likelihood of an injury is negligible. But under the *Cumberland*-style analysis, the answer is quite the opposite. The tanks are heavy, if one fell on a miner, it is reasonably likely to break his foot. Certainly, if a cylinder was launched and struck a miner as a projectile, injury is a near-certainty. As for the fourth element, the broken bones and lacerations which could be expected from such an incident will always be considered to be reasonably serious. Under the new framework, many violations that in reality have only a remote, speculative chance of culminating in an accident will be cited and will remain significant and substantial violations.

The Commission explained in *PBS Coals* and *Cumberland* that the respondent in each case had conflated the terms ''violation'' and ''hazard'' as they are used in *Mathies*. While the terms ''violation'' and ''hazard'' are indeed different, those terms have been used interchangeably in the context of the significant and substantial analysis under *Mathies* and *National Gypsum* over the last 40 years. Yet, in justifying its drastic departure from precedent, it is the Commission that has confused one of the elements of the *Mathies* test. The second element of the *Mathies* test is whether the alleged conditions contribute to a discrete safety hazard.[80] In rejecting Cumberland's arguments that the Commission's new approach would result in nearly all violations of evacuation standards being significant and substantial, the Commission stated that

> ''if the violations [in this case] had instead been relatively minor in nature and scope, a fact-finder may well not have found that the violations contributed to the hazard of miners being delayed in escaping from the mine in an emergency under element two of *Mathies*.''[81]

While not three pages earlier in its opinion in *Cumberland* the Commission suggested that the respondent had imposed an additional burden on the Secretary not present in *Mathies*, the Commission itself imposed an additional burden with the preceding statement regarding the second *Mathies* element. In *Cumberland*, the Commission has clearly confused the concept of ''contributing to a discrete safety hazard'' with ''*significantly* contributing to a discrete safety hazard''—the latter, of course, not being a requirement under *Mathies*. Closer evaluation of the Commission's quoted statement above in the context of the alleged violations and particular regulatory standard cited in *Cumberland* quickly reveals this inconsistency.

The mandatory mine safety standard cited in the four violations at issue in *Cumberland* requires lifelines ''to be located in such a manner for miners to use effectively to escape.''[82] It is not possible to have a violation of that standard which would not contribute in some increment to the hazard of ''miners being delayed in the event of an emergency.'' Indeed, the standard is not violated unless the lifeline is not able to be used effectively to escape. Consequently, there can be no situation where Section 75.380(d)(7)(iv) is violated but the conditions do not contribute to the discrete safety hazard identified earlier in this paragraph. While that particular safety standard happens to be the one that was at issue in *Cumberland*, similar results will follow with respect to most standards in the way demonstrated through the examples above.

Also worthy of discussion is the fact that in the Commission's desire to justify its agreement with the Secretary that an emergency situation should be assumed when considering whether violations of evacuation standards are significant and substantial, it argued that to adopt the construction urged by Cumberland would lead to what it characterized as the absurd result that

[78] 30 C.F.R. § 75.202(a), Protection from Falls of Roof, Face and Ribs

[79] 30 C.F.R. 1106-3 provides that: (a) Liquefied and nonliquefied compressed gas cylinders stored in an underground coal mine shall be: . . .(2) Placed securely in storage areas designated by the operator for such purpose, and . . . in an upright position, preferably in specially designated racks, or otherwise secured against being accidently tipped over.''

[80] *Mathies* at 4.

[81] *Cumberland*, at 9.

[82] 30 C.F.R. 75.380(d)(7)(iv).

  OSHR ISSN 0095-3237

violations of evacuation standards would rarely be significant and substantial, and would thus defeat the purpose of the standard.[83]

This contention inherently takes the position that if violations of a particular standard are unlikely to be designated significant and substantial, then the standard is somehow not fulfilling its purpose. This position ignores several important characteristics of the Mine Act's enforcement scheme. First, once an inspector identifies a violation of an evacuation standard, or any standard, significant and substantial or not, if the operator does not abate the violation by correcting the identified condition within the time period prescribed by the inspector, the operator is subject to a Section 104(b) withdrawal order for its failure to do so.[84] Moreover, if a Section 104(d)(1) predicate unwarrantable failure citation is in place, an inspector has the ability to issue unwarrantable failure withdrawal orders for non-significant and substantial violations if he believes that the operator is not taking its obligations regarding the evacuation standards seriously.

In the same vein, if an operator were not putting forth a good faith effort towards compliance, MSHA has the ability to levy significant penalties beyond the standard formulation under 30 C.F.R. 100.5.[85] These special assessment powers provide MSHA with all the flexibility it needs to provide meaningful consequences for violations of evacuation standards.

While it is unclear in exactly what way the Commission believed the standard would be rendered ineffective, its discussion of the issue implies that the significant and substantial designation is the only meaningful tool in MSHA's arsenal, which simply is not true. The only way this situation would affect the impact of violations of such evacuation standards is in their effect on the pattern of violations analysis, which relies on significant and substantial citation issuances and final orders, among other factors, as screening criteria. Even so, the pattern of violations screening takes other safety and compliance parameters into account which *would* be affected by severe non-significant and substantial violations of evacuation standards, such as the issuance of 104(b) withdrawal orders and 104(d) unwarrantable failure citations and orders.

In *Cumberland*, the Commission placed a great deal of emphasis on the fact that the violations at issue were ''evacuation standards.'' It devoted several paragraphs to discussing the legislative and regulatory history of these standards, explaining that ''evacuation standards are different from other mine safety standards[,]'' and are ''intended to apply meaningfully only when an emergency actually occurs.'' Yet, for all of its emphasis and discussion regarding the MINER Act and evacuation standards, the holding in *Cumberland* was not limited to evacuation standards, or limited in any way at all. While the Commission definitely overshot the mark with its holdings in *PBS Coals* and *Cumberland*, it is possible to make an argument that evacuation standards should be given some kind of special consideration.

IV. The 'Evacuation Standards' of Cumberland Coal Resources—Maybe They Should be Treated Differently.

It is not necessarily an unreasonable position to argue that for alleged violations of ''evacuation standards,'' the third element of the *Mathies* significant and substantial test should be treated differently. This is not the problem with *Cumberland*. As the Commission forcefully explains in *Cumberland*, evacuation standards *are* different than other mine safety standards.[86] Moreover, the fact that many of these obligations only came into existence after the passage of the 2006 MINER Act, a piece of legislation specifically enacted to increase miner safety in emergency situations, lends support to the position that these standards may be appropriately treated differently than other safety and health standards.

The proposition that emergency standards should be considered in the context of an emergency has some intuitive appeal. The Commission's holding in *Cumberland* made some very reasonable and persuasive points in this regard. However, it is inaccurate to state that these standards are ''intended to apply meaningfully only when an emergency actually occurs.''[87] The existence of these standards creates an obligation for compliance at all times. Failure to achieve rapid compliance when cited, or repeated failures to maintain compliance, can subject an operator to withdrawal orders and significant civil penalties at MSHA's discretion. Thus, these standards apply meaningfully at all times. On the other hand, it is certainly correct to say that evacuation standards only *provide observable benefits to miners* in the event of an emergency. The Commission's statement is akin to arguing that car insurance only protects you when you have an accident. The policy is in effect and protects the insured at all times; however, it only pays out when there is an accident.

Nonetheless, the two cases the Commission cited to support its position that it ''never required the establishment of the reasonable likelihood of [an emergency] when considering whether violations of evacuation standards are significant and substantial,'' while not making any such broad-based proclamation as in *PBS Coals* or *Cumberland*, do give some support to this approach for evacuation standards.[88] However, review of these cases, *Maple Creek Mining, Inc.* and *Rushton Mining Co.*, reveal that they do not stand for this proposition as clearly as the Commission suggests.

Maple Creek Mining, Inc. involved a fairly unique set of circumstances.[89] The Maple Creek Mine had such a significant water percolation and seepage problem that the operator was pumping out between 1.2 million and 2 million gallons of water *per day* to maintain production.[90] It was established that there existed in the cited escapeways a water accumulation of such a magnitude that miners would have to walk a narrow passageway

[83] *Cumberland* at 7-8.
[84] P.L. 95-164, 91 Stat. 1290, (1977).
[85] 30 C.F.R. 100.5, *Determination of Penalty Amount; Special Assessment* provides that ''(a) MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment. (b) When MSHA determines that a special assessment is appropriate, the proposed penalty will be based on the six criteria set forth in § 100.3(a). All findings shall be in narrative form.''
[86] *Cumberland*, at 7 (emphasis added).
[87] *Id.*
[88] *Id.*
[89] *Maple Creek Mining, Inc.*, 27 FMSHRC 555 (Aug. 2005).
[90] *Id.* at 556.

along the right rib to avoid the 6- to 17-inch mud and muck accumulation that existed in the remainder of the escapeway.[91] The Judge concluded that the conditions created a hazard that would prevent miners, including those that might be carrying a stretcher, from swiftly negotiating the escapeway.[92] Notably, the very shift before the subject order was issued, a miner had slipped and been injured while walking the narrow path; this was not in any sort of emergency situation.[93] One very significant observation made by the Commission, which indeed makes the Commission's reference in *Cumberland* to *Maple Creek* of questionable import, is that ''the Judge found, and Maple Creek did not dispute, that the mine had been experiencing methane and ventilation problems when the withdrawal order issued.''[94] Thus, it is quite possible that the Commission may have based its determination of reasonable likelihood based on a combination of the pervasive nature of the conditions and the presence of circumstances which made the use of the escapeway reasonably likely. It is also interesting to note that the *Maple Creek* language referenced by the Commission in *Cumberland* was in relation to the analysis of the fourth *Mathies* requirement regarding the severity of the injury, not whether an injury was reasonably likely to occur.[95]

Rushton Mining Co. involved a situation in which the operator had designated an escapeway route that MSHA alleged was not ''the safest and most direct practical route to the nearest mine opening suitable for the safe evacuation of miners,'' within the meaning of 30 C.F.R. 75.1704-2(a).[96] The Judge agreed, finding that the escapeway designated in order to abate the violation was more direct and less than one third the distance of the operator's cited escapeway.[97] He also determined that the violation was not significant and substantial because the inspector had not been able to provide persuasive testimony regarding the hazardous nature of being forced to use the operator's escapeway.[98] The sole issue on appeal to the Commission was whether the Judge erred in determining that the violation was not significant and substantial.[99]

The Secretary argued, much like she did in *Cumberland*, that ''the seriousness of Rushton's violation of the escapeway standard must be evaluated within the context of the occurrence of an emergency and in comparison to the escapeway subsequently designated.''[100] The Commission began by briefly summarizing its case law regarding significant and substantial. However, not only did the Commission not directly address the Secretary's very specific assertion that the significant and substantial analysis should be conducted assuming an emergency, but in fact it proceeded to find that the Secretary had failed to establish that the violation contributed to a discrete safety hazard as required to fulfill the second *Mathies* requirement.[101] It explained: ''. . . the Secretary has failed to show that the distance, travel time, or any inherent qualities of the cited route posed a discrete safety hazard.''[102] Accordingly, while the Commission did go on to *very briefly* discuss the third and fourth *Mathies* elements together at the same time, the remainder of the opinion is dicta. Even so, the language employed does actually suggest that the Commission may have looked upon the Secretary's position regarding the assumption of an emergency favorably. Nonetheless, in its brief discussion regarding the third and fourth *Mathies* elements, the Commission did state that the Secretary failed to show that the new route posed a reasonable likelihood of injury ''*in the event of an evacuation*.''[103]

Despite the above discussion of how these two cases do not completely support the Secretary's and the Commission's position, the language used by the Commission therein does leave open the issue of whether an emergency situation could be assumed.

The movement to an assumption of an emergency situation for violations of evacuation standards has potential to create some significant problems for mine operators. Significant and substantial violations play a large role in MSHA's pattern of violations screening criteria. Indeed, all three screening criteria take significant and substantial violations into account. Among the parameters contained in the screening criteria are significant and substantial issuances in both absolute number and rate per 100 inspection hours, significant and substantial final orders of the same mandatory standard, and significant and substantial unwarrantable failure final orders.[104] No matter what the Commission says, it is clear that under the *Cumberland* framework, nearly all violations of evacuation standards are going to be issued, and are likely to remain, designated as significant and substantial. What this means is that more operators are going to fulfill the pattern of violations screening criteria because of significant and substantial violations of evacuation standards.

While there is thus some indirect support in 40 years of precedent for the argument that one should assume the existence of an emergency when considering whether a violation of an evacuation standard is significant and substantial, it is crucial to note again that this is not the holding in *PBS Coals* and *Cumberland*. These cases held that the third *Mathies* element should be considered assuming that the hazard has occurred, and were not limited to evacuation standards. With the state of the law as it is now with the *Cumberland* construction of the significant and substantial test applying to violations of all standards, mine operators are going to experience increased significant and substantial issuances and final orders across a broad spectrum of safety and health standards.

V. Conclusion

Although the scope of ''significant and substantial'' has stayed largely constant since the Commission's decisions in *National Gypsum* and *Mathies*, it has been dramatically broadened with the Commission's recent decisions in *PBS Coals* and *Cumberland Resources*.

[91] *Id*. at 560.
[92] *Id*.
[93] *Id*. at 564.
[94] *Id*.
[95] *Id*. at 564, n.5. ''The potential for slips and falls would therefore be even greater during a mine evacuation. Consequently, the miners' everyday travel over the escapeway route is of little relevance to the fourth Mathies element.''
[96] *Rushton Mining Co.*, 11 FMSHRC 1432 (Aug. 1989).
[97] *Id*. at 1434.
[98] *See Id*.
[99] *Id*. at 1435.
[100] *Id*.
[101] *Id*. at 1436.
[102] *Id*.
[103] *Id*. at 1437 (emphasis added).
[104] *Id*.

  OSHR ISSN 0095-3237

Where the test under the third *Mathies* requirement had long been interpreted to inquire as to whether an injury-producing event was reasonably likely to occur under continued normal mining operations, the appropriate inquiry after these recent cases is much different. Now, rather than looking forward from the time of the violation, the question has essentially been changed to ask whether an injury is reasonably likely to occur, *assuming the occurrence of the contemplated hazardous event*. This change represents a significant and largely unsupported departure from past jurisprudence.

While the Commission, in reiterating its new position regarding the third *Mathies* requirement in *Cumberland*, placed a great deal of emphasis on the fact that the violations at issue related to ''evacuation standards,'' its holding regarding the third *Mathies* requirement was not so limited. Rather, the language used by the Commission in *Cumberland* clearly establishes that this analytical approach represents the appropriate significant and substantial analysis for alleged violations of all mandatory safety and health standards. This is not to say that it would be unwarranted to apply a different analytical approach when determining whether violations of evacuation standards are significant and substantial. These standards are indeed different from other safety and health standards. Moreover, there is some support for the application of a different approach in past jurisprudence. However, this is not the holding of *PBS Coals* or *Cumberland*.

If the Commission continues to employ the approach established in these recent cases, mine operators will experience significant consequences. The practical effect will be a much larger proportion of alleged violations being issued and remaining significant and substantial. This will in turn result in increased civil penalties and more operators contending with the specter of the pattern of violations treatment. One thing is certain: While many mine operators may not yet be aware of the changes wrought by the Commission through *PBS Coals* and *Cumberland*, they will be—and soon.