

# MSHA's Use of Pattern of Violations

Robert H. Beatty, Jr., with co-author F. Thomas Rubenstein, Dinsmore & Shohl, LLP, gave a presentation to the West Virginia Coal Symposium on MSHA's Paragraph 104(e) Pattern of Violation Enforcement Scheme entitled *Your Past Is Not Necessarily Behind You*.

A Section 104(e) Pattern of Violation is an extremely powerful, yet rarely used, weapon in MSHA's enforcement arsenal. In mid-June 2007, MSHA notified eight mine operators of their intention to potentially place their operations on a pattern of violations. Assistant Secretary Stickler stated that "the ultimate goal is to restore effective safe and healthy conditions at these mines, and MSHA will not hesitate to use all the tools available to ensure compliance with the law." In December 2007, MSHA sent out a second wave of potential pattern notification letters to approximately 21 mining operations. It is anticipated that there will be a new wave of potential pattern violation notifications each quarter.

Section 104(e)'s historical roots stem from the 1977 Amendments to the Mine Act. In 1980, MSHA proposed rulemaking to establish the procedure they would follow to issue a notice of a Pattern of Violation. On February, 8, 1985, the proposed rule was withdrawn. During this same time period, the definition of S&S was in active litigation before the Commission, along with a review of MSHA's civil penalty regulations. In February 1985, MSHA also announced advanced notice of proposed rulemaking again, regarding Section 104(e). The final rule passed in July 1990.

The purpose of Section 104(e) Pattern of Violations is to implement Section 104(e) of the Federal Mine Safety and Health Act of 1977. It was designed to address mines with an inspection history of recurrent S&S citations, which MSHA believes demonstrate the mine operator's disregard for the health and safety of miners. Following an initial screening, if the agency believes a mining operation has a pattern of violations of mandatory health or safety standards, a written notice will be given that such pattern exists. If within 90 days after the issuance of the notice MSHA finds an S&S violation, they will issue a withdrawal order requiring that persons be removed from the area affected by the violation. The withdrawal order will remain in effect until the violation is abated. If a clean inspection of the entire mine does not reveal any S&S citations, the pattern notice will be terminated. It can also

terminate if MSHA does not issue any withdrawal orders within 90 days of the issuance of the pattern notice. However, mines which have implemented a successful corrective action plan during the 90-day evaluation period will be considered along with all other mines, for a potential pattern of violations during the next and subsequent review cycles.

The pattern of violations process involves four basic steps: Initial Screening (30CFR Paragraph 104.2), Criteria for Implementing the Pattern (30CFR Paragraph 104.3), Issuance of the Pattern Notice (30CFR Paragraph 104.4), Termination of the Pattern Notice (30 CFR Paragraph 104.5). Unfortunately, these regulations provide little detail on how MSHA determines which mines should be placed on a Pattern of Violation notice.

Under Initial Screening, MSHA is required by regulation to review compliance records of mines annually to determine if a pattern of violations exists. During this Initial Screening, MSHA considers the following undefined factors: S&S violations; Section 104(b) closure orders resulting from S&S violations; Section 107(a) imminent danger orders; and enforcement measures other than 104(e), which have been applied at the mine. MSHA also considers evidence of the operator's lack of good faith in correcting the problem; an accident, injury, or illness record that demonstrates a serious safety or health management problem at the mine; and any mitigating circumstances. Only citations or orders issued after October 1, 1990 shall be considered. Nowhere in the regulations is MSHA obligated to advise a mine operator of what they think the Initial Screening reveals about the operation. The 104(e) Pattern of Violations flow chart is shown in **Figure 1**.

The Pattern Criteria is only applied after an Initial Screening conducted in accordance with Paragraph 104.2. It is different than the criteria used in the initial screening under Paragraph 104.2. The only similarity between the Initial Screening and Pattern Criteria is that they are both set forth without detail or definition, and they are used by MSHA to identify mines with a potential Pattern of Violations. The Pattern Criteria are as follows: history of repeated significant and substantial violations of a particular standard; history of repeated significant and substantial violations of standards related to the same hazard; or history of repeated significant and substantial violations caused by unwarrantable failure to



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comply. Only citations and orders issued after October 1, 1990 that have become final shall be used to identify mines with a potential pattern of violations. This differs from the Initial Screening criteria under Paragraph 104.2 where MSHA can take into consideration any citation or order, regardless of finality.

Under Issuance of Notice, when a potential Pattern of Violations is identified, the District Manager will notify the mine operator in writing. MSHA will then provide the mine operator with an opportunity to take the following steps within 20 days: review all documents upon which the pattern is based, provide additional information, submit a written request for a conference with the District Manager, which will occur within ten days of the request, and institute a program to avoid repeated S&S violations. After submitting the program, the District Manager may allow a 90-day period to evaluate the program to determine if it actually reduces S&S citations. Following the 90-day period, the District Manager makes a recommendation to the Administrator of Coal Mine Safety and Health. The mine operator will be provided a copy of the report ten days before it is submitted to the Administrator, and may submit written comments to the Administrator. Within 30 days of the Administrator's receipt of the District Manager's recommendation he is required to issue a decision regarding the Pattern of Violations. If a Pattern of Violations is issued, the mine operator must post the notice at the mine until the notice is terminated. The continuation of the flow chart is shown in **Figures 2, and 3**.

The Termination of Notice occurs when an inspection of the entire mine by MSHA finds no significant and substantial violations, or

if no withdrawal order is issued by MSHA within 90 days of the issuance of the Pattern Notice. The operator may request that inspection of the entire mine, or part of the mine. No advance warning will be given, and MSHA will determine the scope of the inspection. Partial mine inspections given within 90 days shall constitute an inspection of the entire mine.

The rules regarding the Initial Screening, and the Pattern Criteria, are being created by MSHA as they go along, and with notice and comment rulemaking. Very little, if any, of the criteria being used by MSHA can be found in Section 104(e) of the MINE Act, 30 CFR Paragraph 104, or the 1990 rule implementing the Regulations. In June of 2007, the Pattern of Violations Screening Criteria and Scoring Model were seen. The following criteria are used to perform Initial Screening under 30 CFR Paragraph 104.2. Mines meeting all of the following criteria are further screened under 30 CFR Paragraph 104.3: at least ten S&S citations/orders at surface mines during the 24-month review period; at least twenty S&S citations/orders at underground mines during the 24-month review period; at least two elevated enforcement actions 104(b), 104(d), or 104(a) during the most recent twelve months of the review period; the ratio of S&S citations/orders issued in the most recent twelve months review period to the number of S&S citations/orders issued during the previous 12-month review period is 70% or greater; the mine rate of S&S citations/orders issued per 100 inspection hours during the 24-month review period is equal to or greater than 125% of the national rate; the number of S&S citations/order issued for 100 inspection hours during the last two quarters is greater than the industry average, or the number of elevated enforcement actions per 100 inspection hours during the last two quarters is greater than the industry average.

The following criteria are required by the 2007 Pattern of Violations Screening Criteria and Scoring Model for the pattern screening under 30 CFR Paragraph 104.3; minimum of two elevated enforcement final orders of the Commission 104(b), 104(d), or 107(a) during the 24-month review period; at least one 104(d) final order of the Commission during the last 24-month review period; at least ten S&S citations/orders at surface mines that are final orders of the Commission during the 24-month review period; at least 20 S&S citations/orders at underground mines that

are final orders of the Commission during the 24-month review period; at least five S&S citations of the same standard that are final orders of the Commission during the most recent 12 months.

There are a number of issues with the Pattern of Violation process. These include the absence of notice and comment rule-making regarding the standards MSHA is using to identify potential candidates for the Pattern of Violation Notice, and the lack of definitions for key terminology used in the Pattern of Violation Screening Criteria and Scoring Model. Other issues include the use of final orders of the Commission before being placed on the Pattern of Violations. The Initial Screening looks at all citations and orders. The Pattern Criteria only looks at final orders. The Pattern Notice is based upon allegations of violations.

Beatty said that there are a number of things that can be done now: strict compliance with MSHA regulations; employee awareness regarding impact of the potential for a Pattern of Violations; identify problem areas and reoccurring conditions at the mining operation and implant procedures to eliminate S&S violations in these areas; effective management of MSHA citation history through the implementation of a pre-enforcement awareness program.

The elements of an effective pre-enforcement awareness program include a number of items: education and training of the workforce and management personnel who accompany MSHA inspectors; comprehensive plain English training on the S&S, and unwarrantable failure standards; training on the importance of note taking while traveling with MSHA inspectors; training on effective informal conferencing techniques; vigorous pursuit of informal conferences on all S&S citations, 104(d) citations and orders, and other elevated enforcement actions; vigorous pursuit of legal challenges to MSHA enforcement matters when appropriate.

Beatty summarized by giving a number of Pattern of Violation Notice pointers: understand your S&S citation history; conduct an audit of your S&S citations over the past 24 months; use the audit to identify potential problem areas and develop strategies for better compliance in these areas; share these ideas with MSHA inspectors; and begin logging MSHA inspector hours immediately.

For further information visit [www.coallaw.com](http://www.coallaw.com).

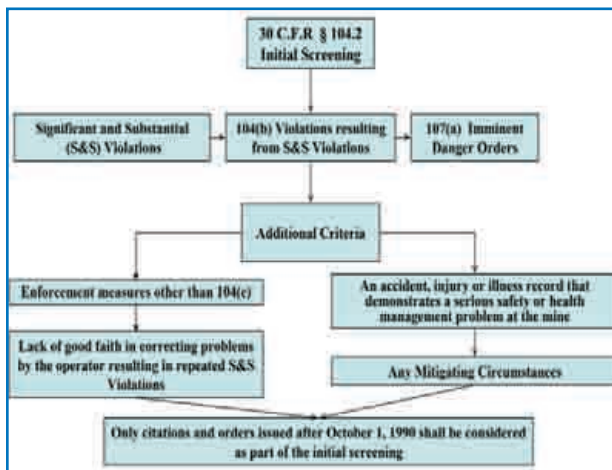


Fig 1 104(e) Pattern of Violations Flow Chart

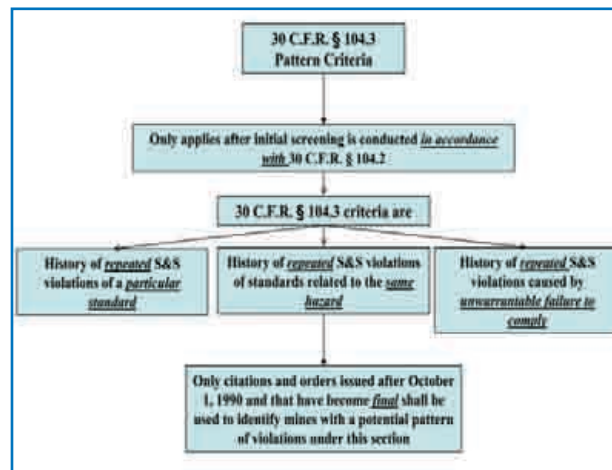


Fig 2 Continuation of the Flow Chart

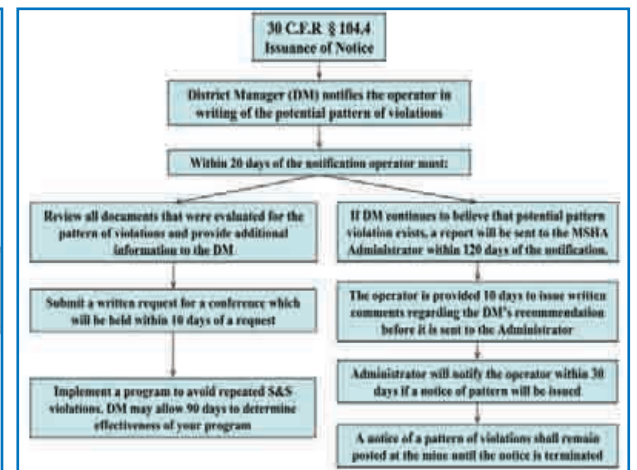


Fig 3 Remainder of the Flow Chart