

## § 100.4

ability to continue in business the penalty may be adjusted.

[47 FR 22294, May 21, 1982, as amended at 57 FR 2970, Jan. 24, 1992; 57 FR 60697, Dec. 21, 1992; 63 FR 20035, Apr. 22, 1998; 68 FR 6613, Feb. 10, 2003]

### § 100.4 Determination of penalty; single penalty assessment.

(a) An assessment of \$60 may be imposed as the civil penalty where the violation is not reasonably likely to result in a reasonably serious injury or illness (non-S&S) and is abated within the time set by the inspector.

(1) If the violation is not abated within the time set by the inspector, the violation will not be eligible for the \$60 single penalty and will be processed through either the regular assessment provision (§100.3) or special assessment provision (§100.5).

(2) If the violation meets the criteria for excessive history under paragraph (b) of this section, the violation will not be eligible for the \$60 single penalty and will be processed through the regular assessment provision (§100.3).

(b) Excessive history shall be based on overall history from paragraph (c) of §100.3. Excessive history is defined as 20 penalty points for overall history. Mines having 10 or fewer assessed violations in a preceding 24-month period will be excluded from any excessive history determination. Only violations that are paid or finally adjudicated will be included in determining excessive history. Only citations and orders issued on or after January 1, 1991, shall be considered in determining excessive history.

[57 FR 60697, Dec. 21, 1992; 57 FR 61612, Dec. 28, 1992; 63 FR 20035, Apr. 22, 1998; 68 FR 6613, Feb. 10, 2003]

### § 100.5 Determination of penalty; special assessment.

(a) MSHA may elect to waive the regular assessment formula (§100.3) or the single assessment provision (§100.4) if the Agency determines that conditions surrounding the violation warrant a special assessment. Although an effective penalty can generally be derived by using the regular assessment formula and the single assessment provision, some types of violations may be of such a nature or seriousness that it

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is not possible to determine an appropriate penalty under these provisions. Accordingly, the following categories will be individually reviewed to determine whether a special assessment is appropriate:

(1) Violations involving fatalities and serious injuries;

(2) Unwarrantable failure to comply with mandatory health and safety standards;

(3) Operation of a mine in the face of a closure order;

(4) Failure to permit an authorized representative of the Secretary to perform an inspection or investigation;

(5) Violations for which individuals are personally liable under section 110(c) of the Act;

(6) Violations involving an imminent danger;

(7) Discrimination violations under section 105(c) of the Act; and

(8) Violations involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances.

(b) When MSHA determines that a special assessment is appropriate, such special assessment shall take into account the criteria enumerated in §100.3(a) and §100.4(b). All findings shall be in narrative form.

(c) Any operator who fails to correct a violation for which a citation has been issued under section 104(a) of the Mine Act within the period permitted for its correction may be assessed a civil penalty of not more than \$6,500 for each day during which such failure or violation continues.

(d) Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty which shall not be more than \$275 for each occurrence of such violation.

[47 FR 22294, May 21, 1992, as amended at 57 FR 60697, Dec. 21, 1992; 63 FR 20035, Apr. 22, 1998; 68 FR 6613, Feb. 10, 2003]

### § 100.6 Procedures for review of citations and orders; procedures for assessment of civil penalties and conferences.

(a) All parties shall be afforded the opportunity to review with MSHA each