

**Comments on Mine Safety and Health Administration
Proposed Rule Revising Part 100 Penalty System
By Adele L. Abrams, Esq., CMSP
Law Office of Adele L. Abrams P.C.
4740 Corridor Place, Suite D
Beltsville, MD 20705
301-595-3520 * safetylawyer@aol.com**

The following are my comments concerning the Mine Safety and Health Administration's (MSHA) proposed rule that revises the agency's civil penalty system, as published in the September 8, 2006, Federal Register (71 Fed. Reg. 53054). I am an attorney who focuses on mine safety and health, as well as being a Certified Mine Safety Professional. I also hold an MSHA Contractor ID number, due to my training and site audit activities, and am therefore subject to MSHA enforcement and penalties under the proposed rule.

Although many of the proposed revisions are required in order to conform to the statutory changes implemented in Public Law 109-236, the Mine Improvement and New Emergency Response (MINER) Act of 2006 amendments to the Mine Safety and Health Act of 1977 (Mine Act), which was signed into law in June 2006, this proposal goes far beyond what is necessary to meet its obligations under the new law. The proposal has several significant flaws that must be addressed before the rule is finalized. These are outlined below.

When Congress amended the 1977 law this year in the MINER Act, a new maximum penalty for "flagrant" violations was set at \$220,000, and certain statutory minimum penalties were designated for Section 104(d) citations/orders as well as for violations of the "immediate reporting" requirement in 30 CFR Part 50.10. Although MSHA has no discretion to deviate from these statutory minimums and must also implement the \$220,000 maximum penalty for flagrant offenses for those citations issued after June 16, 2006, the agency has gone beyond the directives from Congress in ways that are punitive, violative of due process rights and some of the proposed modifications will adversely affect prompt abatement of alleged violations. Moreover, the changes to the special assessment procedures are arbitrary, capricious and set the stage for abuse of discretion by District Managers and other MSHA personnel.

Single Penalty Assessment (Part 100.4): MSHA's proposal to delete entirely the "Single Penalty Assessment" (currently \$60) for non-Significant & Substantial (non-S&S) violations is misguided. It is important to recognize that such citations often occur for highly subjective conditions where one inspector may find a situation in full conformity with MSHA requirements, while another issues a citation because he/she speculates that a minor hazard might exist if the condition continued to exist in the future. Often, these involve housekeeping (e.g., small amounts of material on a walkway that is rarely accessed), dirty toilets, uncovered trash cans, minor holes in guards where no one has

access to the area, and equipment defects where the equipment has not been preshifted yet for the day and is not in service.

Other categories of non-S&S citations include paperwork (e.g., late filing of a 7000-2 quarterly hours report), failure to note an inspection date on a fully-charged fire extinguisher, or faded labels or other technical violations of MSHA's hazard communication standard (30 CFR Part 47). Often, these are rated as "no likely of injury" and "low" or "no" negligence.

Under OSHA's analogous penalty system, similar violations are classified as "other than serious" (sometimes as "de minimis") and it is common that no penalty at all is assessed. It is sensible that, if MSHA must issue a penalty, that the single penalty assessment be maintained for these low/no hazard technical violations. Few would object to the single penalty being raised to the minimum penalty under the revised Part 100 criteria, or \$112 per citation, for those non-S&S citations that are rated as involving no, low or moderate negligence, and MSHA already has authority to specially assess "high" negligence non-S&S citations. Therefore, the proposed deletion of the single penalty is unnecessary.

Regular Assessment Criteria (Part 100.3): There does not seem to be any logic to having more onerous burdens on small coal operators than on comparable metal/nonmetal operators and the current penalty point system, addressing operator and controlling size, should be continued.

It is appropriate to reduce the history of violations period from the previous 24-months to the previous 15-months and to clarify that this refers only to those citations/orders that have been finally adjudicated. However, there are legal and procedural problems with the proposed "repeat violation" criteria (discussed in more detail below). The VPID criteria achieves the goal of discouraging high rates of citations and should be continued in its present form. I support including a minimum number of citations (10 in the preceding 15 months, under the proposed rule) to trigger "history" points because many small operations may not have sufficient overall inspection days to offset such a relatively low number of citations.

The same criteria should also apply to contractors working at mines (zero points should be assessed up to 10 citations during a 15-month period, rather than capping zero points at 5 citations). I disagree with enhancing history penalty criteria for contractors as MSHA seems to miss the point that many contractors have a single MSHA Contractor ID number for nationwide operations. If a contractor is working daily at 50-plus mine sites, it is likely to be inspected far more frequently than the average mine operator and can easily get more than 50 citations in a 15 month period (especially if the citations are non-S&S, for things like missing paperwork while working at another company's worksite). This does not reflect a poor safety performance or attitude but simply enhanced inspection oversight and/or the difficulties in dealing with MSHA's many paperwork burdens in a transient work environment. If MSHA is going to "crack down" on contractors in this rule, it perhaps can consider excluding non-S&S citations from the contractor's history of violations so that only those violations involving actual safety hazards are considered.

If MSHA is going to penalize companies for repeated violations and for their past history, the agency should issue new mine/contractor ID number where a mine or company is purchased by a new, unrelated entity. It is inequitable to require the new owner to inherit an adverse history of violations for which it bore no responsibility – especially where there have been significant changes in the internal mine management personnel under the new ownership – and to be forced to pay heightened penalties for the next 15 months based on conditions over which it had no control. The current practice of refusing to issue new ID numbers (which has no statutory basis and conflicts with past practices) is arbitrary and capricious, and must be eliminated.

There does not seem to be any valid basis (other than trying to justify higher penalties) for the five-fold increase in penalty points for those citations classified as “unlikely” to result in injury or illness. This effectively eliminates the distinction between S&S and non-S&S citations from a penalty perspective (a non-S&S citation classified as unlikely/fatal would have 30 penalty points for gravity whereas an S&S citation classified as reasonably likely/lost workdays would carry 35 penalty points for gravity). Since the gravity findings by an inspector are highly subjective and since far fewer citations will be conferenced in the future if this proposed rule is adopted (due to the truncated conference period), many non-S&S citations will have to proceed to trial if these heightened penalties are adopted. The current penalty points for gravity should be maintained.

I do not oppose the modification of points for “persons potentially affected” but does encourage MSHA to be realistic about the application of this criterion. Some inspectors routinely put down “one miner” for this (which is not be realistic in all circumstances) while some go to the other extreme (counting every employee as potentially affected, even where they never go into the cited area of the mine or work near defective equipment). Some guidance to the regulated community – and to compliance officers - as to how this should be interpreted is required.

I oppose reducing the good faith penalty decrease from 30 percent to 10 percent, as this is a disincentive to prompt abatement and seems contrary to the letter and spirit of the Mine/MINER Acts.

Special Assessment Process (Part 100.5): I oppose the revision of the special assessment process because it removes virtually all constraints against use of this potentially punitive power against operators in an arbitrary manner. MSHA should not have unfettered discretion to specially assess any citations it chooses as this can be used to selectively target operators who are critical of MSHA, or who exercise their due process rights under the law. The existing list of eight categories where special assessment is permitted should be retained, as should public guidance that clarifies how special assessment computations are obtained. Any action to the contrary violates mine operators rights under the Fifth Amendment and the Administrative Procedure Act.

With regard to the statutory minimum penalty for immediate notification, in Part 100.5(f), only those citations issued for failure to notify of death or an accident with a

reasonable likelihood of resulting in death should receive such a penalty. Other Part 50.10 violations (e.g., failure to report a fire or hoist problem) should not be subject to the \$5,000 minimum penalty as that goes beyond the intent of Congress in the MINER Act.

Repeat Violations: There is no need to include a “repeat violation” category in the regular assessment penalty point scheme and it should be deleted. This is redundant with the “history of violations” criteria and considers the same citations twice, in many cases, solely for the purpose of imposing punitive civil penalties. Moreover, because many of MSHA’s standards are subjective, rather than objective, MSHA inspectors can use a single standard to cover a multitude of unrelated conditions (e.g., “safe access” under 30 CFR 56.11001 can relate to everything from a bent ladder step to a cable across a walkway, to having to step over a barrier to access a screen, to a method of accessing a dredge, to having a method of greasing a conveyor that an inspector does not like). Therefore, simply having a “history” of repeated citations under 56.11001 does not mean that the same condition is occurring over and over. Similarly, equipment defects cited under 56.14100(a) can range from a missing railing on a haul truck to a broken come-along. Housekeeping is another standard that often is used in unpredictable ways by inspectors.

Another problem is that, unlike OSHA, MSHA does not “group” violations into a single citation. Therefore, if an operator missed inspecting its fire extinguishers by a few days and is in technical violation, it will find that it gets a separate citation for each fire extinguisher on the mine site. It would easily be possible to acquire 10 or more citations for this under a single inspection. MSHA’s paperwork standards are also easily prone to multiple citations under a single standard (e.g., the HazCom standard, under which a separate citation is issued for each missing MSDS, faded label, or substance that was inadvertently omitted from a chemical inventory list). In recent years, there was a trend toward scrutinizing 7000-2 quarterly hour reports and, if the inspector disagreed with how hours were computed, he would issue separate citations for each quarter going back three years (for a total of 12 citations). Such a scenario would, under the proposed criteria, trigger 7 “repeat” points for future inspections.

Until MSHA can ensure consistency in its enforcement and unless it switches from performance oriented standards to objective criteria, the repeat citation criteria should be rejected. At a minimum, only S&S citations should be included under the “repeat” criterion and the number of inspection days should also be considered (with an exemption for small operations that have relatively few inspection days, as noted above for the VPID criterion).

Finally, this criterion should only be prospective in nature and should not consider any citations that were issued prior to the rule’s effective date. There is a legal presumption against the retroactivity of laws. In this situation, operators would be penalized for citations that they accepted and paid for economic/administrative convenience before they had actual or constructive notice that they could be used for up to 15 months in the future to trigger heightened penalties for violations of the same standard. No doubt many such cases would have been adjudicated if this information had been available. Because

mine operators are precluded from reopening cases that have closed (through payment or settlement) simply because of the proposed rule, the repeat penalty criterion must be limited to prospective application.

Conference Requests: It is illogical to shorten the period for requesting an informal conference, as this seems designed to thwart early settlement attempts and to encourage protracted and expensive litigation. Although MSHA indicates this will avoid delays, most occur at the district office level – where the CLRs currently are unable to process the volume of conference requests within 30 days despite timely requests by operators. This does cause notices of contest to be filed where they might otherwise be avoided. Rarely is operator delay the cause of this. If MSHA cannot handle the volume of requests, it should hire more CLRs, more carefully scrutinize citations before issuing them, or both.

MSHA needs to understand that for many larger companies (production operators and contractors), citations may be received at the mine site – which can be a small satellite facility such as a portable plant or local office. It may take a week or more for the citations to be forwarded to the appropriate person within the larger corporate safety department of the company, where citations are processed and reviewed to determine whether to dispute the allegations. In some cases, mail must be forwarded if a mine operates intermittently, seasonally or is a portable operation. In some cases, MSHA inspectors have been known to leave a contractor's citations at the mine office, rather than delivering them to the contractor itself. This can further delay the ability to request a conference within the allotted time.

By reducing the time to request a conference from 10 days to 5 days, this may preclude utilization of the conference process entirely for a large number of citations and operators. Because litigation costs often come out of a safety department's budgets, this approach is also harmful because it will reduce resources that could otherwise be dedicated to training programs, purchase of safety equipment etc. The 10-day conference request deadline should be maintained.

Cost of the Rule: MSHA itself estimates that penalties would increase across-the-board from \$24.8 million to \$68.5 million per year (given continuation of current citation rates). MSHA has grossly underestimated the economic impact of this rule because elimination of the single penalty assessment, tightening of conference opportunities, and the higher penalties will likely lead to fewer settlements or accepted citations/penalties and will result in increased litigation. The costs of this litigation, in terms of attorney fees and costs as well as lost production due to mine personnel being involved in different phases of the litigation process (depositions, trials, etc.) must be added into the equation.

MSHA itself will also have its resources adversely impacted because more inspectors, field office and district office personnel will be involved in hearings and this will diminish their availability for mine inspections and compliance assistance. Thank you for your consideration of my perspective on this proposed rule. Please let me know if I can provide any additional information.