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MSHA/OSRV

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Ms. Patricia Silvey **(via Email)**
Acting Director
Office of Standards, Regulations and Variances
Mine Safety and Health Administration
1100 Wilson Boulevard, Suite 2350
Arlington, VA 22209-3939

RE: Proposed Rule on the Assessment of Civil Penalties; RIN 1219-AB51

Dear Ms. Silvey:

Thank you for the opportunity to comment on MSHA's proposal to amend its penalty assessment policies. The USW represents the majority of unionized metal and nonmetal miners in the United States. We have a large stake in this rule.

That stake is best expressed by miners themselves. Earlier this year, in preparation for a Congressional Forum on mine safety chaired by Congressman George Miller, I polled a number of our miners' representatives and other local union leaders in the iron mines of northern Minnesota and Michigan. They generally praised the work of MSHA's mine inspectors, but all of them agreed that the penalties were too low to provide an effective deterrent to violations. Mine operators, they said, simply see the penalties as a cost of doing business – and a minor one at that. Parts of MSHA's proposed rule, along with other provisions of the MINER Act of 2006, would increase the effectiveness of MSHA's penalties, and help restore the confidence of our miners in MSHA's ability and willingness to protect them.

Sadly, some mine operators and their trade associations oppose these changes. For example, some have argued that Congress intended the MINER Act to apply only to coal mines, so the penalty system should remain as it is in metal and nonmetal mines. It is true that Congress explicitly applied some provisions of the Act to coal mines. However, the Act includes no such limitation for the penalty provisions. If Congress had intended to exclude metal and nonmetal mines, it would have said so. Furthermore, even if the MINER Act is incorrectly read to apply only to coal mines, it certainly does

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not prohibit MSHA from extending some of its protections to all miners through notice-and-comment rulemaking.

Some operators and trade associations – in particular the Mining Awareness and Resource Group – have argued that MSHA should forgo changing the penalty structure, and instead appoint a federal advisory committee to study the issue. This is nothing more than a delaying tactic. It does not comport with the spirit, or perhaps the letter of the MINER Act.

More generally, many operators maintain that monetary penalties have no impact on safety. That is true only if the penalties are too low, as they are currently. Were the government to accept the argument that penalties do not deter bad behavior, most of our regulatory, civil and criminal law would be at risk.

In fact, penalties are useful, not just as deterrents, but as fundamental statements about what we value. For example, the penalty for a single environmental violation typically runs to a thousand dollars per day. What is a miner to think when MSHA assesses a penalty of $60 for a violation that puts his or her life at risk?

Let me turn to comments on specific sections:

100.3 Determination of Penalty; Regular Assessment

In general, we agree with the proposal to evaluate all violations on their merits. We agree that the operator's history, negligence, and the gravity of the violation should be included in all such assessments, including those for non-S&S violations and so-called "paperwork" violations. Accurate records are an important tool in mine safety; failure to keep accurate safety records is a serious infraction.

100.3(b) Size of Business

MSHA should make it clear that the "business" in question is the ultimate parent company, not the individual mine or some intermediate entity.

100.3(c) History of Violations

There is no reason to change the time period for considering past violations from 24 to 15 months, and MSHA should not do so. One characteristic of a good safety program is consistency over time. If anything, the time period should be increased.

Nor should MSHA cut its standards too finely in determining what constitutes a repeat violation. The ultimate purpose of a penalty is to induce an operator to fix a faulty safety management system. To use MSHA's own example *(71 FR 53059)*, the underlying factors that cause a violation of 75.202(b) are likely to cause a violation of 75.202(a) as well. Any violation of any part of the full 75.202 standard should be considered in citing a repeat violation.

100.3(e) Gravity *and* **100.3(f) Good Faith**

We agree with MSHA's proposal to increase the number of points assessed for the gravity of the violation, and to reduce the credit for timely abatement. In fact, it is not clear why there should be any credit for timely abatement. Penalties are meant to be a deterrent. Operators should not be rewarded for allowing a hazard to exist until an inspector happens to spot it.

100.3(g) Penalty Conversion Table

We agree that the penalty floor should be raised, although we believe that $112 is still too low a floor. In addition, MSHA should carefully examine the table to ensure that equivalent infractions under similar circumstances do not result in lower penalties than under the old policy.

100.4 (new) Unwarrantable Failure

We agree with this change, which is required by the MINER Act. However the statutory penalties should be seen as floors. Higher penalties should be assessed when indicated by the point system.

100.5 Special Assessments

We are skeptical about removing references to the eight categories of violations that should be considered for a special assessment. If the intent is to speed administrative review, there are better ways to do it. If the intent is to write special assessments under circumstances which do not fall into the eight categories, MSHA already has that authority. Each of the eight criteria proposed for elimination is a good reason why a special assessment should be considered. The current rule usefully requires that they be taken into account. Therefore, we oppose this change. If, however, MSHA goes ahead with the change, its impact should be reviewed in a year or so. It is possible that, by making the evaluation more general, the administrative burden may

actually increase. It is also possible that the penalties for the most serious infractions may decrease. If either of those is the case, MSHA should promptly revise its policy for special assessments. This can probably be done administratively through an internal directive, rather than through rulemaking.

Thank you again for the opportunity to comment. We look forward to the final rule in the hope that it will fulfill the promise of the MINER Act, and give MSHA's dedicated enforcement staff the authority they need to better deter violations of mine safety and health standards.

Sincerely yours,

Mike Wright

Michael J. Wright
Director of Health, Safety and Environment

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