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MSHA/OSRV

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Patricia W. Silvey, Acting Director
Office of Standards, Regulations and Variances
Mine Safety & Health Administration
US Department of Labor
1100 Wilson Blvd., Room 2350
Arlington, Virginia 22209-3939

22 October, 2006

Subject: RIN 1219-AB51

Dear Ms. Silvey,

Hanson Building Materials America (HBMA) appreciates the opportunity to submit comments for the record regarding the Mine Safety and Health Administration's (MSHA) "Criteria and Procedures for Proposed Assessment of Civil Penalties" rule proposed on September 8, 2006.

Based in Irving Texas, Hanson is North America's third largest producer of Aggregates employing approximately fourteen thousand employees in the aggregates and building materials industry.

Hanson is committed to safety and health in mines. Safety is, and will continue to be, a high priority in all our endeavors. Apart from the moral imperative, ensuring worker safety and health offers a significant financial advantage to the safe producer over the less caring producer. We recognize our employees as our most valuable asset. Our commitment to worker health and safety is exemplified by our industry leading low incidence rates and our presence on many state and national association safety committees. We are active on the Joseph A Holmes program and have more winners of the NSSGA J. M. Christie Safety Professional of the year than any other mining group. We are in fact demonstrably committed in word and deed to the welfare of our workforce.

We are concerned that adequate time was not provided to industry for proper analysis of the rule or for adequate preparation to attend and speak at the hearings. We understand that the Mine Improvement and New Emergency Response (MINER) Act requires MSHA to implement civil penalty changes by December 2006. MSHA's proposed rule, however, goes significantly beyond what the MINER Act requires. The short comment period is insufficient for industry to prepare a comprehensive and thorough response. The first of six hearings began on September 26 with only three speakers present. The limited participation at this hearing was not due to lack of interest, but to lack of adequate preparation time.

AB51-COMM-56

We request the withdrawal of the elements of this rule that are not specifically noted in the MINER Act of 2006. In addition, we ask MSHA to mirror the Occupational Safety and Health Administration's (OSHA) advisory panel process, by tasking an advisory panel to analyze the portions of the proposed Part 100 rule that extend beyond the MINER Act. A carefully designed rule could provide incentive to companies to be proactive and meet the standard. In addition, an advisory panel could prepare a rule which focuses on continuous improvement in accident prevention and on providing a safe and healthy workplace for miners.

Introduction

We recognize that some of the proposed revisions contained in the rule are required by the MINER Act of 2006. The items which could most adversely impact the stone, sand and gravel industry include the following:

- a civil penalty of $5,000-$60,000 for failing to report an incident/accident which poses a reasonable risk of death within the first 15 minutes of occurrence;
- a minimum penalty for 104 (d)(1) of $2,000;
- a minimum penalty for 104 (d)(2) of $4,000 and
- the addition of "flagrant violations" with an assessed civil penalty of not more than $220,000.

The balance of the rule proposes changes that are significantly beyond those required by the MINER Act. These items include the following:

- an increase of penalty points in all categories (size of operation, history, negligence and gravity);
- the decrease of the "good faith reduction" from 30% to10%, and the elimination of the addition of 10 points for failure to abate;
- reduction of mine site history from a 24-month period to a 15-month period;
- addition of a new history of repeated violations category;
- the minimum penalty for regular assessment of $112, the maximum penalty of $60,000;
- removal of the single penalty assessment;
- removal of the excessive history for non-substantial and significant (S&S) violations;
- removal of the criteria for when to use special assessments; and
- reduction of time to request a conference from 10 to 5 days.

NSSGA believes that some of the rule's proposed changes could penalize the vast majority of the industry by diverting focus from assuring a safe workforce to penalty assessments or appeals due to the larger economic impact of contested citations, for the actions of a few. This leads to confrontation which does not improve safety. There are no established data to suggest that increased penalties will drive improved safety performance within the overall mining industry, to the contrary, in the UK the controlling agency, the HSE, increased penalties in an attempt to reduce workplace injuries to no avail. Only with the introduction of the collaborative "Hard Target Initiative" which sought to reduce workplace injuries did they see progress, a remarkable 50% reduction in 5 years following 10 years of stagnation and confrontation.

Availability of Economic Data

The statistics and tables provided in the proposed rule information are insufficient to analyze or confirm MSHA's assumptions. The majority of the data presented is divided between coal and the metal/non-metal industries. The stone, sand and gravel industry accounts for approximately 92% of the metal/non-metal operations. The stone, sand and gravel industry, however, accounts for only 38% of the revenue in the metal/non-metal sector. The proposed penalty increases may have a significant impact on the stone, sand industries' businesses because of the larger number of operations across the country that are subject to mandatory inspections. In addition, the majority of the revenue data used to justify the metal/nonmetal penalty increases is not in the stone, sand and gravel sector.

While the MSHA Act and the MINER Act seem to assert that higher penalties will drive compliance, experience in operations does not bear this assumption out. It is NSSGA's concern that the money used to pay resulting penalties may divert resources that could otherwise be used to enhance overall safety and health of miners. MSHA provided no hard data to support its stated position of driving safety improvement by significantly increasing penalties for violations. We request that MSHA provide the public with the sources of data used to conduct its varying analyses.

Definition of "Small Mine"

MSHA's definition of a "small mine" is different from the Small Business Administration's definition of "small mine," which is defined as having "less than 500 employees". There are approximately 11,000 aggregate operations in the United States, employing on average fewer than twenty employees per location. In the crushed stone, sand and gravel industry, most mines are small mines. MSHA should be consistent with SBA definitions of small mines for the purposes of determining regulatory impact, meeting the analytical requirements of SBREFA and in determining the affect of proposed penalties without creating unfair competitive advantages in local markets.

Mine Site versus Controlling Entity

MSHA specifically requested comments on whether "in considering the size of the operators greater weight should be placed on the size of the controlling entity." We recommend that MSHA continue to look only at the individual mine site and not to place greater weight upon the size of the controlling entity. Although we are a considerably sized controlling entity, many of our mines have achieved many years, some over 20, without a lost time injury, and these and others often pass consecutive inspections without citations. To treat these entities the same as an operation with a less than stellar performance is a disservice to the miners at the exemplary sites and in effect imposes collective punishment with a chilling effect on exemplary sites. The stone, sand and gravel industry consists of numerous plants, each in its own local market. To look at issues on a company-wide basis would create a financial disadvantage to small operations owned by large companies and promote an adverse competitive environment in local markets. It is essential to ensure that all operations are treated equally with respect to violations and penalties that directly affect safety.

Single Penalty Assessment Criteria

We urge MSHA to retain the single penalty assessment. Operators must eliminate all hazards and legitimate violations, but the enforcement of the regulations by agency personnel is not even-handed or consistent. Removing the single penalty may result in higher penalties for citations erroneously issued, more contested citations and the diversion of resources away from improving safety and health in the mine. Removing the single penalty has the potential to create a more adversarial relationship between MSHA and operators without making mines safer and more healthful for miners.

It is important to recognize that such citations are subject to interpretation and one site may be considered in full compliance with MSHA requirements while another receives a citation where a minor hazard might exist if the condition is allowed to continue into the future. Often, these involve housekeeping (e.g., small amounts of material on a walkway that is rarely accessed, uncovered trash cans, minor holes in guards where there is no access to the area and defects of equipment which has not been inspected prior to being used for the day and is not in service).
Other categories of Non-Significant & Substantial (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 likelihood of injury" and "low" or "no" negligence.

Under OSHA's penalty system, similar violations may be classified as "other than serious" or "de minimis" and it is common that no penalty is assessed. It is sensible that, if MSHA must issue a penalty, the single penalty assessment be maintained for these low/no hazard technical violations. We do not 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. MSHA already has authority to make special assessments for violations considered "high" negligence non-S&S citations. Therefore, the proposed deletion of the single penalty is unnecessary.

Regular Assessment Criteria

We support the Violation Per Inspection Day (VPID) criteria because it discourages high rates of citations. In addition, we would also support establishing a minimum number of citations for the use of these criteria, as proposed in the rule, which would be 10 or more finally adjudicated citations in the preceding 15-month period. It is critical to have a de minimis number of citations to trigger this penalty point factor, insofar as small operations may not have sufficient overall inspection days to offset even a relatively small number of citations. We also recommend that the same minimum VPID criteria should apply to independent contractors at mine sites. Many small businesses use such contractors and harsher treatment of contractors may deter them from being willing to perform necessary services at mine sites (e.g., electrical work, construction activities).

We urge MSHA to revise its Part 100 criteria so that Non-S&S citations will not count toward a mine operator or contractor's "history of violations." A large percentage of such citations involve paperwork violations that have no likelihood of injury and would result in no lost workdays. Moreover, MSHA historically issues multiple citations for the same category of paperwork violation (e.g., if quarterly hour reports are improperly tallied, MSHA will issue separate citations for each of the preceding 12 quarters; if Material

Safety Data Sheets are missing, a separate citation can be issued for each missing MSDS; if fire extinguisher tags have not been dated when a visual inspection was done, each extinguisher is separately cited even where they are all fully charged). This can quickly place an otherwise compliant and safe mine into a high VPID position.

It is also important that this rule clarify what constitutes an "inspection day" for this purpose, as MSHA has appears to use different criteria for coal than for some metal/nonmetal operations. A clear cut option would be that whenever an inspector comes to the mine site as an authorized representative (AR) of the Secretary, this should count as an "inspection day" regardless of its duration in terms of hours. In the past, some AR inspections were not counted in tallying inspection days if the visit lasted less than five hours. However, for small operations or portable plants, a wall-to-wall inspection may be accomplished in fewer than five hours. Therefore, we urge MSHA to state specifically in the rule that inspection days will be determined by calendar days in which an AR was on site, without regard to the duration of the visit. If an inspection or investigation involves multiple ARs, then the inspection days for each should be separately counted.

The five-fold increase in penalty points for those citations classified as "unlikely" to result in injury or illness does not appear to be justified. This effectively eliminates the distinction between Significant & Substantial (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). The current penalty points for gravity should be maintained.

In the interest of the industry in general we oppose reducing the good faith penalty from 30 percent to 10 percent. Reducing the percentage may be a disincentive for some operators to abate in a timely fashion.

Repeat Violation Criteria

MSHA has demonstrated no rationale to include "Repeat Violation" criteria in its Part 100 penalty point system, and it should be deleted. The "repeat violation" category is redundant with the "history of violations" criteria and results in a double-counting of selected citations. Moreover, because of MSHA's subjective standards, inspectors use a single section number to cover a multitude of unrelated conditions (e.g., the "safe access" standard for metal/nonmetal – 30 CFR §§ 56/57.11001 – can apply to mobile equipment, stationary equipment, water-based operations such as dredges and boats, and even walkways or interiors of trailers). Therefore, having "Repeated" violations under this or similarly ambiguous standards (which are adjudicated under a "reasonable miner" standard of interpretation) does not imply that a mine operator is having the same condition constantly reoccur. To use a citation history in this manner for penalty purposes creates highly arbitrary criteria.

Simply having a "history" of repeated citations under 56.11001 does not mean that the identical condition is recurring. MSHA inspectors can use a single standard to cover a multitude of unrelated conditions, thereby creating an artificial history. In addition, we have observed first hand that standards regarding training, proper use of equipment and tools, unsafe access, hazard communication, and barricading and posting signs warning against entry have been subjectively interpreted throughout the country.

Another concern occurs when violations are not grouped into a single citation, but are covered by a "blanket citation" often exercised by other federal agencies, such as OSHA. If an operator missed inspecting fire extinguishers by a few days and is in technical violation, a separate citation likely will be written for each fire extinguisher on the mine site. It would easily be possible to acquire 10 or more citations for this during a single inspection under this scenario. MSHA's paperwork standards are 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).

As noted in our comment on the regular assessments, there also is a trend toward issuing multiple violations (during the same inspection) for paperwork violations. This can result in setting an operator up for "Repeat" penalty findings despite having a safe workplace. MSHA should not establish a system of punitive civil penalties for what should rightfully be considered de minimis violations – the type for which MSHA's sister agency, OSHA, may impose no penalty at all and which carry no history findings for purposes of OSHA "Repeat" violations.

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 also should be considered (with an exemption for small operations that have relatively few inspection days, as noted above for the VPID criterion).

Finally, MSHA has proposed using a 15-month look-back period for determining whether the repeated violations warrant imposition of additional penalty points. If MSHA persists in including "Repeat" criteria in this rule, the criteria should take effect only prospectively. Only citations and orders issued after the publication of the final rule should be eligible for inclusion in this category. There is a legal presumption against retroactivity of laws[1] and many mine operators would, no doubt, have filed notice of contest on even minor penalty citations had they been aware that the citations/orders could trigger much higher penalties for subsequent violations of the same standard. Because MSHA has not yet determined what criteria it will use (e.g., whether non-S&S citations would count toward repeat violation findings) there is still no actual or constructive notice to guide litigation decisions. Therefore, with the effective date of the new rule, all operators should be given a clean slate and their past history should not be utilized for the Repeat criteria.

Special Assessment Criteria

The current criteria MSHA intends to use for special assessments are needed. Though not intended, removing the eight criteria could potentially expand the use of special assessments, increasing demand on company and MSHA resources. As stated previously, agency personnel frequently interpret regulations in an inconsistent and subjective manner. Removing standard criteria would further decrease the objectivity of the special assessment process. Without specific criteria, discretionary special

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[1] Statutes are disfavored as retroactive when their application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Products*, 511 U. S. 244, 280 (1994). A statute is not given retroactive effect "unless such construction is required by explicit language or by necessary implication." *United States v. St. Louis, S. F. & T. R. Co.*, 270 U. S. 1, 3 (1926).

assessments will drive operators to contest more violations, increasing workload for both the operator and MSHA.

Conference Requests

Hanson recommends that MSHA retain the status quo and provide mine operators and contractors with a 10-day window in which to request an informal conference. The proposed reduction to five days will unnecessarily increase the need to file formal Notices of Contest with the Federal Mine Safety and Health Review Commission (FMSHRC) and will impose economic costs on operators, MSHA, the Department of Labor's Office of the Solicitor, and the FMSHRC. The informal conference is a valuable tool insofar as it provides an opportunity for an operator to present mitigating information that may result in a reduction of gravity or negligence (eliminating many contests) or may result in vacating of citations if it turns out that the inspector was mistaken about factual matters or misapplied a standard.

Although MSHA has justified the proposed change by stating that this will expedite assessment of penalties and the adjudication process, this is simply not the case. The five-day difference at the front end is not the cause of delays in the system. Even requests that are currently made within a five-day period are often met with delays on MSHA's end due to the case load carried by the agency's Conference and Litigation Representatives (CLR) – a case load that will surely increase in light of the heightened penalties.

The solution is not to truncate the time period, making it more difficult for operators to exercise the conference option, but to add CLRs if that is where the bottleneck occurs. As it stands now, often the CLR will not schedule a conference until close to or even after the 30-day Notice of Contest deadline, or will not return their findings to the operator until the 30-day contest window has closed. This is inappropriate and, again, already results in needless litigation and diversion of resources for both the operator and the Agency.

The proposed five-day period will be infeasible for all but the smallest of operators to satisfy. Most large operations – as well as those independent contractors who must handle nationwide MSHA citation review from multiple worksites through a central office – will have to include involvement of regional or corporate safety managers in conference activities and decisions and it may take more than five days for paperwork on citations to be received/reviewed at a central location. The system must be improved, but shortening the request period is not the answer.

Finally, MSHA has taken the position that informal conferences are at the discretion of the District Manager. This permits abuse of the process by certain MSHA personnel who may have animosity toward selected operators. Because informal conferences are an inherent part of the ACRI process, they should be available upon request by all operators and contractors on a non-discretionary basis. We at Hanson have never supported or encouraged contesting of "good paper" but have used the informal conference to bring to light additional facts or mitigating circumstances on citations that in good faith we have felt failed to meet the intent of the cited standard.

Conclusion

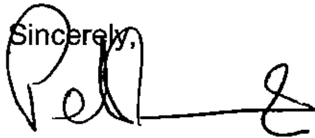
In summary, we would prefer to see the provisions not explicitly mandated by the MINER Act given additional time for study prior to incorporation into the Part 100 revisions. The use of an advisory panel to evaluate the economic issues, data supporting the assumption that increased penalties drives safety performance and the effects of the penalty assessment process on improving safety and health could lead to proactive improvements for this industry. The following issues are significant to the our industry:
Give our opinion credence, value and weight on the Part 100

- retaining the single penalty assessment;
- eliminating the controlling company consideration in penalty assessment;
- clarifying the Violations Per Inspection Day criteria;
- elimination of the new "repeat violation" criteria;
- retaining the current special assessment criteria;
- retaining the 10-day conference request period; and
- ensuring that the conference process is fair to all operators.

We believe that our track record as safety and health leaders in the aggregate business, our willingness to work with and partner with the Agency on many issues.

Thank you for the opportunity to make the concerns of NSSGA known to MSHA. We look forward to a satisfactory resolution to these issues during the standard setting process.

Sincerely,



Peter F. Ward

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