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HEAVY CIVIL & MINING CONSTRUCTION

HEADQUARTERS

23 October 2006
VIA Certified Mail

RECEIVED
10/26/06
MSHA/OSRV

Ms Patricia W. Silvey,
Acting Director Office of Standards, Regulations and Variances
US Department of Labor
Mine Safety and Health Administration (MSHA)
1100 Wilson Boulevard, Room 2350
Arlington, VA 22209-3939

Dear Ms. Silvey,

We submit herewith our comments on the proposed Amendment to CFR30 Part 100 to implement the MINER Act as well as many other changes relating to the structure of penalties for violations of MSHA's regulations.

We look forward to continued dialogue with MSHA regarding the enhancement of safety in mines.

Sincerely,

Robert A. Pond
Executive Vice President

Enclosure (5 pages)

Copies: Safety Department
Human Resources Department
Mining Group Manager & Assistant Manager
Executive Department
Association of Bituminous Contractors c/o William H. Howe
Mining Awareness Resource Group c/o Henry Chajet

AB51-COMM-78

Before the Mine Safety and Health Administration

Re: **RIN 1219 - AB51**

MSHA proposes to amend 30 CFR Part 100 to increase civil penalty amounts and to implement the Mine Improvement and New Emergency Response Act of 2006 (MINER Act), all as published in the Federal Register on September 8, 2006.

Frontier-Kemper Constructors, Inc. has been engaged in the construction and equipping of shafts, slopes and similar underground works for the coal, non-metal and metal mining industries for more than 35 years, and holds the first Contractor ID number issued by MESA, A-01. Historically, and depending on the economic state of the coal industry, we have between 5 and 15 coal mine development projects active at any one time. We do not engage in any production activities.

Our representatives attended the Hearing held in St. Louis on 6 October and offered oral comment at that time. Herein we present written comments:

Currently, citations received at the project are forwarded to our headquarters for review by the relevant corporate officials, who make a determination on the merits of each citation whether or not to seek a conference. This often requires more than five days due to availability of appropriate reviewers. The proposed five-day rule will require that we immediately seek a conference on every citation, and then withdraw that request when we determine that a conference isn't needed. This unnecessarily increases paperwork and management time for both parties. MSHA should not impose the five-day requirement.

Currently, when Assessment documentation is received, we make a rational determination comparing the proposed penalty and the nature of the alleged offense to the likely cost of contesting it before the Commission. For our Company at least, comparatively few Citations are contested. However, with the proposed substantial increase in penalties, and the heightened importance of repeat violations, we will be forced to contest many more Citations than we do now, not only unnecessarily increasing paperwork and management time for both parties, but also further clogging an already clogged system. It is reasonable to assume that all parties subject to the MSHA regulations will do likewise.

MSHA proposes to assure compliance with the 15 minute notice requirement of the MINER Act. The 16^{th} minute has a very high proposed penalty, but the proposed rule does not provide any criteria for determining when Minute Zero is. Presumably, MSHA will implement a system of logging all incoming calls, noting the exact time and the name of the caller, before the call is transferred to an official. Indeed, considering that MSHA's jurisdiction spans a number of time zones, MSHA should also implement a standard clock. More importantly, many of our projects are rather small, and the responsible staff on site may be just one or two persons. These people should (and do) have as their first priority the rescue of affected persons and administering first aid as it may be required. The time required to do so should not count in determining compliance with the 15 minute rule. Instead, the rule should toll the 15 minute period for the time needed to perform immediate rescue operations and provide first aid wherever site staff is not in a position to reasonably do both these and notify MSHA.

It is our experience that inspections are not uniform in their scope and manner of conduct, nor does every District interpret the regulations in the same way. The Program Policy Manual has helped in this regard, but has not solved the problem. For those of us who work in multiple districts, we have to learn over and over the particular interpretations each District and each District Director as they get re-assigned. Moreover, inspectors can and do vary widely in how each citation is characterized. Some few call everything S&S with high negligence, whereas others are more careful with characterizations. It is not unusual for otherwise identical situations to be cited for different standards at differing levels of seriousness. Given the increased importance, with respect to penalties, of repeat violations of the same standard, and assuming that the differences from one inspector to another are human nature issues and thus not really solvable, we urge MSHA to tread very lightly on the repeat violation rules.

The proposed use of ultimate owner size as a criterion for penalty assessment apparently assumes that the ultimate owner meaningfully influences compliance with the regulations by its subsidiaries. The ultimate owner may be, and often is, several "rungs on the corporate ladder" above the operator or contractor being cited. The ultimate owner may change as mergers and divestitures are implemented. The ultimate owners of many Companies subject to MSHA jurisdiction are diversified conglomerates with no influence at all on compliance. MSHA does not say how it intends to discover who the ultimate owner is, when disclosure of such ownership is not now otherwise required, or is contained within confidential legally- protected records. Moreover, as a simple matter of fairness, if the ultimate owner size is a part of the assessment process, will MSHA consider a wealthy private individual majority shareholder in the same light as a corporate entity? Such persons may in fact have far greater influence on compliance than a distantly upstream corporation. Finally, it is a long-standing principle of American civil and criminal law that the offense, not the offender, determines the penalty. MSHA should abandon this part of its proposed rule.

The proposed rule makes determining the size of virtually all citation penalties a subjective process, whereas MSHA should be striving for a more predictable and reliable formulaic process. The current single penalty provision should be retained. Non- S&S citations, especially those for technical violations (such as a no-smoking sign two feet closer to a fuel tank than required) carrying a modest single penalty can be disposed of swiftly and without cumbersome process. Curiously, while suggesting that many of the proposed changes will reduce its administrative time, MSHA wants to add the thousands of non-S&S citations issued annually to its administrative burden.

In the St. Louis hearing, MSHA advanced the idea that some penalty assessments could be discounted for excellent prior safety performance or increased for poor past performance. In our view, this concept has a great deal of merit and would be readily accepted by industry provided that the standard for measuring “good or bad” was appropriate.

Every employer is required to provide worker’s compensation coverage for its employees and for each employer the National Council of Compensation Insurance annually establishes an Experience Modifier Rating comparing the employer’s loss history during the preceding five years to that of others similarly situated. It is expressed in a number system wherein a 1.00 Rating indicates past five year losses equaling an industry norm, a less than 1.00 Rating (such as 0.75) indicates better than the norm and a greater than 1.00 Rating (such as 1.25) indicates loss experience worse than the norm. There are some philosophical flaws in the EMR system due to significant differences in wage and medical costs from region to region, but it is a national standard.

Frequency and Severity ratings are calculated annually and can be evaluated on a project-by-project basis or for a company as a whole. These ratings are more “real time” than the EMR, and not subject to regional variances in wage and medical cost. Because the number of recordable and lost time injuries is expressed in terms of number per 200,000 man-hours, larger companies with larger work forces tend to have better rates than smaller ones.

We also objected to many of the other “new formula” criteria. Instead, we offered that the assessment of good faith and negligence should be measure against frequency / severity rates, with discounts given for good stats and added cost assessed for bad stats.

We continue to question in what way the higher penalties will enhance miner safety. The assumption that operators and contractors don't comply with the rules because MSHA's stick isn't big enough is false. If MSHA's logic is applied in another way, the death penalty would be a true deterrent to murder.

True safety is not simply a matter of compliance. In fact compliance plays a minor role in true safety. The focus of our Company, and of most employers in the industry, is preventing unsafe acts by miners, because these are by far the major cause of accidents, whether injuries are caused or not. Training bears fruit, but we note that MSHA not yet promulgated CFR 48 Part C for construction while decrying lack of training as a primary cause of construction accidents. If MSHA genuinely believes that fines will prevent accidents, then it should more widely exercise its existing right to cite individual miners for violations, just as is done in Canada and several countries in Europe.

Finally, MSHA states that if the new penalties were applied to the 2005 experience, added penalty revenue of $44 million will result, and suggests a lesser, but still increased revenue from assessments in issued once the proposed rule becomes law (if it does). We understand that the United States Treasury is by law the recipient of all funds generated by paid assessments. We urge MSHA to join us in lobbying Congress to devote any increased revenue to miner training and cooperation with industry to develop a "best practices" approach to improved safety performance. MSHA's current role of policeman, regardless of the penalty structure, must become a secondary role to becoming a true partner with miners and employers in work toward improving miner safety.