Vaughn:

Comments on Proposed Assessment of Civil Penalties.

Here are my comments concerning the proposed changes:

1. **Section 100.3 (i). The size of the operator should not be such a deciding factor for the monetary assessment of a citation. For example, an independent contractor working on mine property commits a violation of the Act and is cited. The contractor's penalty could be $112.00 dollars due to its size and history. If MSHA also cites the mine operator for the contractor's violation, the penalty assessed against the mine operator on this citation, depending on how it is written for negligence, gravity, and number of people affected, could be 10 or more times greater than the penalty assessed against the actual offender, the contractor, due solely to the size of the operator as compared to the size of the contractor. This is not fair and does not give the most incentive to the party in the best position to effect change, i.e. the primary offender.**
2. **Section 100.3 (vi). The size of the operator or ability to pay should not be a factor. This scheme bears no relation to the health and safety objectives of the Act, and it actually penalizes mine operators for their success. If the citation is valid, and the gravity, negligence, etc. are marked appropriately, then the monetary penalty amount should be paid. Smaller companies may even gain a competitive advantage going forward due to the lower amount of their civil penalties for serious offenses. Historically, the bulk of the problems involving fatal injuries have occurred at small mines, yet under the proposed system small mines would receive a financial advantage when cited for violations of the Act, as compared to large mine operators. Even if a small mine operator does not pay the penalties assessed, it can remain in business and continue committing flagrant violations, whereas a larger operator will not be able to do this financially. This is really quite remarkable!**
3. **The size of a mine or operating company in production capabilities should not be as significant as the new criterion makes it. For example, one mine operator has a citation assessed for 60 penalty points, due to its size and production (Table XII). Whereas, another mine operator has the same type of citation, same gravity, negligence and number of people affected, but has maximum production under the chart (Table l), would pay over $400.00 dollars more, due to the number of points added based on tons produced. This again is not appropriate and is based on an assumption that the more tons produced, the higher the fines an operator can afford to pay, which is not true or accurate at all. Additionally, (Table ll) even compounds this problem by adding additional penalty points for assessment against the mine operator, due to the parent company's size. Each mine is an economic entity that must stand or fall based on its own success, and thus, each mine must remain open or be closed based on its specific performance, not the overall performance of the corporate parent entity. This system is not rational, in**

that it assigns varying degrees ofpunishment to the child, not based on the actions of the child, but based on the success of the child's father.

4. **Section 100.3 (c). An operator can protest these citations through the legal process under this section and have its history of citations distorted for the length of time that the contest is ongoing. This is not an equitable solution of fairness to everyone, and is especially prejudicial to those operators who cannot afford legal representation.**
5. **Section 100.3 (c) (1). This section establishes violations per inspection days as a factor used to determine penalty points. The problem is that there are no criteria to determine what constitutes an inspection day. If you split shifts is this two days? Is there a means to determine or compare the rates between the operator and MSHA? This is also distorted due to the fact that an operator may incur only 2 violations during an inspection of the mine for one inspection day, and receive the maximum amount of penalty points. Another mine may incur 100 citations over 50 inspections and receive only 2 penalty points. What is fair about this system? How does it further the objectives of the Act?**
6. **Section 100. 3 Table Vlll. Repeat Violations are not dealt with equitably as between different sized mines. For instance, compare a 6 section mine that uses shuttle car haulage (2 shuttle cars per section), and a 1 section mine that uses 2 shuttle cars for haulage. If the small mine received 1 citation per cable on each shuttle car over 3 inspections, it would receive only 1 penalty point. If the other mine received 1 citation for each shuttle car cable per inspection over 3 inspections, it would receive a total of 20 penalty points -- the maximum, yet its performance is identical to the performance of the mine that received only 1 penalty point. What is fair about this? The smaller the mine, the less the fine; yet historically, small mines have been the most dangerous statistically.**
7. **Section 100.3 Table lX Negligence. Negligence is a subjective determination. The inexperience of today's MSHA inspectorate personnel will make this section extremely important and vulnerable to variation from district to district, and inspector to inspector. Once an operator has been cited for negligence, the conference process is the first step in challenging that determination. It is at best antiquated and usually does not result in resolution of the issues. Specific examples of negligence, more definitive other than the broad and ambiguous language currently used under the examples of negligence, would be more appropriate. I think there is just too much weight on the negligence portion. Such weight should be reserved for factors that can be measured against objective criteria.**
8. **Section 100.3 (e). Gravity is another subjective means of assessment, and is likely to vary widely from inspector to inspector in its interpretation, due to the relative lack of experience among MSHA's current force of inspectors. Under Tables X, Xl, and Xll, an inexperienced or unobjective inspector can place up to 88 penalty points on a citation, just because he or she believes that this might have been the outcome. This could be the difference between a $112.00 penalty assessment, when the citation is marked appropriately, a**

penalty assessment up to $60,000.00. Once the citation is written, if the operator feels that the citation or penalty assessment is not well founded, it is extremely difficult to get the matter resolved, short of an ALJ hearing, which requires a lot of patience (may not be heard for six months to a year after the citation was written) and time of production workforce spent away from the mine. More definitive examples of each portion of these tables should be included in the criterion.

9. **Section 100.5 Special Assessments. By eliminating the existing types of events that qualify for special assessment, this now opens a "Pandora's box" for all citations. This could even be used by MSHA as an additional tool that congress did not intend for the agency to have. Also, the fine for smoking underground for an individual is only $275.00, yet the corporate officer fine for a flagrant violation can be up to $220,000.00. How much more flagrant can one who smokes underground be! The strict liability of the Mine Act should be equitably enforced against the miners who flagrantly violate it, not just the operators!**
10. **In Section 100.6, procedures for conferencing, when does the 5 days now allowed start? It would appear that MSHA will use many un-necessary tax dollars now to staff more attorneys for the number of citations that will have to go before an ALJ for resolution, due to the number of conferences that may be denied due to time constraints and internal conflicts of interest (i.e. conference officer passing judgment on the work of his or her co-workers, the inspectors).**

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