

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

UNITED STATES OF AMERICA

DEPARTMENT OF LABOR

MINE SAFETY AND HEALTH ADMINISTRATION

CRITERIA AND PROCEDURES FOR PROPOSED ASSESSMENT

OF CIVIL PENALTIES PUBLIC HEARING

THURSDAY, FEBRUARY 5, 2015

The above-entitled matter was held at the Sheraton Hotel, Conference Rooms G-I, 2101 Richard Arrington Jr. Blvd North, Birmingham, Alabama, at 9:00 a.m., Patricia W. Silvey presiding.

1 PANEL MEMBERS: Patricia W. Silvey
 2 Sheila McConnell
 3 Jay Mattos
 4 Brad Mantel

7 SPEAKERS:

8 Randy Clements 24

9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21

22 **No submissions were submitted to the court
 23 reporter.

1 MS. SILVEY: Good morning. My name is
2 Patricia W. Silvey and I am the Deputy Assistant
3 Secretary for Operations for the Mine Safety and
4 Health Administration and I will be the moderator
5 at this public hearing on MSHA's Proposed Rule on
6 Criteria and Procedures for the Assessment of
7 Civil Penalties.

8 On behalf of Assistant Secretary of Labor
9 for Mine Safety and Health, Joseph A. Main, I
10 would like to welcome all of you here today. If
11 you have not already done so, and I think most of
12 you have, please sign the attendance sheet at the
13 back of the room so that we will have an accurate
14 record of the participants.

15 I would now like to introduce the members of
16 the panel. And to my left is Jay Mattos who is
17 the Director of Assessments and Accountability
18 and the Chair of the Civil Penalties Rulemaking
19 Committee. To my right is Sheila McConnell,
20 Acting Director of the Office of Standards,
21 Regulations and Variances; and to her right is
22 Brad Mantel who is with the Department of Labor,
23 Office of the Solicitor, the Mine Safety and

1 Health Division.

2 As many of you know, MSHA published its
3 civil penalties proposed rule on July 31st, 2014.
4 In response to requests from the public, MSHA is
5 holding two additional hearings to receive
6 testimony and information that help us evaluate
7 the proposed changes and develop a final rule
8 that will improve safety and health conditions at
9 mines.

10 This is the third public hearing. The first
11 one was December 4, 2014 in Arlington, Virginia.
12 The second hearing was December 9, 2014 in
13 Denver, Colorado. This is the third hearing, and
14 the fourth hearing will be next week, February
15 12, 2015, in Chicago.

16 MSHA will publish in the Federal Register
17 within a week a notice that: (1) clarifies some
18 proposed revisions addressing the negligence and
19 gravity criteria, and I will go into that today;
20 (2) clarifies that the alternative Good Faith
21 reduction of an additional 20 percent would not
22 be affected by a request for a pre-assessment
23 conference; and (3) announces an extension of the

1 post-hearing comment period and close of the
2 rulemaking record until March 31st, 2015. MSHA
3 will accept written comments and other
4 information for the record from any interested
5 party, including those not presenting oral
6 statements.

7 The hearings, as many of you also know, will
8 be conducted in an informal manner. Formal rules
9 of evidence do not apply. The hearing panel may
10 ask questions of the speakers and the speakers
11 may ask questions of the panel. And if you have
12 any information, you may present that to the
13 reporter for inclusion in the rulemaking record.

14 Most of you are familiar with MSHA's civil
15 penalty process. The Mine Act requires MSHA to
16 issues citations or orders to mine operators for
17 violations of mandatory health and safety
18 standards. The inspector sets a time for a
19 violation to be abated.

20 I want to begin by reiterating the
21 definition of several terms that are used
22 throughout the rule that will not change. First,
23 significant and substantial or, as we call it,

1 S&S, continues to mean a violation that is
2 reasonably likely to result in a reasonably
3 serious injury or illness. The inspector makes
4 the S&S determination at the time the citation is
5 issued. That definition will not change. We
6 heard some comments at our public hearing in
7 Arlington from commenters who said this proposed
8 rule changed that definition. But as I reiterate
9 here today, that definition does not change.

10 Unwarrantable failure continues to mean
11 aggravated conduct constituting more than
12 ordinary negligence by a mine operator. That
13 definition does not change.

14 Reckless disregard continues to mean conduct
15 exhibiting the absence of the slightest degree of
16 care. That definition does not change.

17 No negligence continues to mean that the
18 operator exercised diligence and could not have
19 known of the condition or practice. That
20 definition does not change.

21 MSHA is proposing to group low, moderate,
22 and high negligence into a single category,
23 negligence. I will discuss the negligence

1 criteria in more detail when I address the
2 specific proposed provisions.

3 Under the Mine Act, MSHA proposes penalties
4 and the Federal Mine Safety and Health Review
5 Commission -- I will refer to this agency as the
6 Commission -- assesses penalties. Under MSHA's
7 existing rule, a proposed penalty that is not
8 contested within 30 days of receipt becomes a
9 final order of the Commission and is not subject
10 to review.

11 The Mine Act requires MSHA and the
12 Commission to consider six criteria in proposing
13 and assessing penalties: The appropriateness of
14 the penalty to the size of the business; the
15 operator's history of previous violations;
16 whether the operator was negligent; the gravity
17 of the violation; the operator's good faith in
18 abating the condition; and the effect of the
19 penalty on the operator's ability to continue in
20 business.

21 The first five criteria are applied to
22 determine the penalty amount. The last criteria
23 -- that is, the effect on the operator's ability

1 to continue in business -- is applied when
2 requested by a mine operator after a penalty is
3 proposed. The operator must send in supporting
4 documentation. He sends that documentation in to
5 Jay's office to support why the operator believes
6 that the penalty would negatively affect the
7 operator's ability to continue in business. MSHA
8 reviews that information and may adjust the
9 penalty.

10 MSHA's proposal to amend the evaluation
11 factors for determining regular formula penalties
12 is structured to encourage operators to be more
13 accountable and proactive in addressing safety
14 and health conditions.

15 MSHA was guided by three principles in
16 developing the proposed rule. The first one was
17 improvement in consistency, objectively, and
18 efficiency in how inspectors write citations and
19 orders by reducing the number of decisions
20 inspectors have to make, which could lead to
21 fewer areas of dispute and earlier resolution of
22 enforcement issues. The second principle was
23 greater emphasis on the more serious safety and

1 health conditions. And the third principle is
2 openness and transparency in the application of
3 the Agency's regular formula criteria.

4 The proposal does not change the process
5 that inspectors use to issue citations. As I
6 said earlier, inspectors make factual
7 determinations with respect to safety and health
8 violations and issue citations and orders just as
9 they do now.

10 The proposed rule would reduce the maximum
11 number of penalty points from 208 under the
12 existing rule to 100. The existing minimum
13 penalty of \$112 and the maximum penalty of
14 \$70,000 for non-flagrant violations would not
15 change. The maximum penalty of \$242,000 for
16 flagrant violations would not change.

17 MSHA's civil penalty regulations provide two
18 methods for proposing penalties, as most of you
19 know, under the regular formula assessments and
20 special assessments. Under the regular
21 assessment formula, MSHA applies the civil
22 penalty formula to each violation and believes
23 that it provides an appropriate proposed penalty

1 for most violations. Under the special
2 assessment formula, MSHA manually applies the
3 criteria. That special assessment process is not
4 affected by this proposed rule.

5 The proposed rule would change the citations
6 and order form; that is, MSHA form 7000-3. And
7 we heard comments about that at the first hearing
8 in Arlington, and we have copies of the current
9 and proposed MSHA form in the back of the room.

10 Using the regular assessment formula, total
11 penalties proposed by MSHA and the distribution
12 of the penalty amount by mine size under the
13 proposed rule would generally remain the same as
14 under the existing rule. However, we expect that
15 total penalty amounts for small metal/nonmetal
16 mines would decrease. Minimum penalties for
17 unwarrantable failure violations would increase
18 to provide a greater deterrent for mine operators
19 where there are unwarrantable failure violations.

20 At this point, I would like to reiterate
21 some of the specific changes that are included in
22 the proposed rule and clarify some of the
23 concerns that we've heard thus far.

1 First, MSHA is proposing to change how the
2 operator's overall violation history would be
3 determined and to increase the relative weight of
4 the violation history criteria as a percentage of
5 total penalty points, in recognition of the
6 importance of the need for operators to prevent
7 violations from occurring and recurring.

8 We have copies of a visual that depicts the
9 percentage of each criteria under the existing
10 rule as compared to the projection of the
11 percentage under the proposed rule. And this is
12 a circular graph, and I think we have copies in
13 the back of the room that you could get to see
14 it.

15 An operator's history of previous violations
16 is based on both the total number of violations
17 and the number of repeat violations of the same
18 provision of a standard in the 15-month period
19 preceding the date of the violation. Under the
20 existing rule, only violations that have been
21 paid, finally adjudicated, or have become final
22 orders of the Commission are included in
23 determining an operator's violation history.

1 MSHA is proposing to clarify its intent under the
2 existing rule that only violations that have
3 become final orders of the Commission are
4 included in determining an operator's history.

5 Under the proposal, MSHA would assign zero
6 points when a mine has 10 or fewer inspection
7 days, or fewer than 10 violations, over the 15
8 months prior to the issuance of the citation or
9 order. This proposed provision would benefit
10 small mines and result in a more equitable impact
11 of the violations per inspection day formula,
12 particularly on small metal/nonmetal mines.

13 The proposal would revise the negligence
14 criteria to increase accountability for operators
15 who either knew or should have known of safety
16 and health hazards at their mines. The proposed
17 rule would restructure the point table of the
18 proposed categories to reflect an increase in the
19 relative weight of the negligence criteria. And
20 MSHA believes that this proposed change would
21 result in penalties that appropriately reflect
22 actions under the control of operators that have
23 a direct impact on miner safety and health.

1 The proposal would reduce the negligence
2 criteria's five categories to three. Under the
3 proposal, the definition of negligence would be
4 revised to mean that the operator knew or should
5 have known about the condition or practice. The
6 proposed rule would remove mitigating
7 circumstances from the definition of negligence.

8 MSHA clarifies that under the negligence
9 criteria, MSHA proposed to combine the existing
10 categories of low, moderate, and high negligence
11 into a single category of negligent.

12 Commenters have expressed concerns that
13 violations assessed as high negligence under the
14 existing rule would be assessed as reckless
15 disregard under the proposed rule, resulting in
16 higher penalties.

17 In its proposed projections, and we said
18 this in the Arlington hearing also, MSHA did not
19 make this assumption. As stated in the public
20 hearings to date, MSHA intends that
21 determinations of low, moderate, and high
22 negligence under the existing rule would be
23 placed in the proposed negligent category and

1 assigned 15 penalty points.

2 The definitions of reckless disregard and no
3 negligence ("not negligent" in the proposal)
4 would not change.

5 Reckless disregard will continue to mean
6 conduct exhibiting the absence of the slightest
7 degree of care and is distinguishable from the
8 proposed definition of negligent. Reckless
9 disregard is also distinguishable from the
10 existing definition of high negligence, which is
11 that the operator knew or should have known of
12 the violative condition or practice, and there
13 are no mitigating circumstances.

14 Not negligent would continue to mean that
15 the operator exercised diligence and could not
16 have known of the condition or practice.

17 MSHA is clarifying that the definition of
18 gravity in the proposed rule should read:
19 Gravity is an evaluation of the seriousness of
20 the violation. Gravity is determined by the
21 likelihood of an injury or illness, the severity
22 of the anticipated or occurred injury or illness,
23 and whether or not persons are potentially

1 affected by the condition or practice.

2 The proposed provision would retain the
3 three gravity factors in the existing rule: (1)
4 likelihood of the occurrence; (2) severity of
5 injury or illness; and (3) persons potentially
6 affected, but would reduce the number of
7 subcategories associated with each factor.

8 Similar to the Agency's proposed changes to
9 negligence, the proposal would simplify the
10 gravity criteria by decreasing the subcategories
11 of each of the factors.

12 Likelihood, I will go through the factors
13 now. Likelihood: Under the gravity criteria for
14 likelihood, MSHA is proposing to reduce the
15 existing five categories to three which would
16 read (1) unlikely; (2) reasonably likely; or (3)
17 occurred.

18 Some commenters have expressed concern that
19 reducing the subcategories of gravity would
20 result in violations being placed at a high
21 category and would result in higher penalties.

22 MSHA clarifies that the Agency proposes to
23 combine the existing category of no likelihood

1 and unlikely into a single category of unlikely.
2 Commenters objected to the removal of the
3 existing no likelihood category. However, as
4 discussed in the preamble to the proposal, the
5 existing categories of no likelihood and unlikely
6 would be combined to improve objectivity and
7 consistency of enforcement.

8 Violations assessed as unlikely under the
9 existing rule would remain unlikely under the
10 proposed rule and would be assigned zero penalty
11 points.

12 Also to improve consistency, the existing
13 categories of reasonably likely and highly likely
14 would be combined to a single category of
15 reasonably likely in the proposed rule and
16 assigned 14 penalty points.

17 MSHA is clarifying that the proposed
18 definitions of unlikely should read condition or
19 practice cited has little or no likelihood of
20 causing an injury or illness. Reasonably likely
21 should read condition or practice is likely to
22 cause an injury or illness. And occurred should
23 read condition or practice cited has caused an

1 injury or illness.

2 Severity: The proposal would reduce the
3 four existing categories of severity to three:
4 (1) no lost workdays; (2) lost workdays or
5 restricted duty; or (3) fatal. The definitions
6 of the categories would not change. The proposed
7 rule would eliminate the existing permanently
8 disabling category, which is often difficult to
9 anticipate. MSHA is clarifying that the heading
10 of Table XII should read Severity of Anticipated
11 or Occurred Injury or Illness.

12 Under Persons Potentially Affected, under
13 the existing rule you can -- the persons
14 potentially affected, the inspector would make
15 potentially 11 decisions. Under the proposal, 11
16 categories would be reduced to two: (1) either
17 no persons are affected; or (2) persons are
18 affected. And the inspector would not go through
19 making a determination of whether it were zero,
20 one, two, three, four, five, six, seven, eight,
21 nine, ten or more.

22 As stated in the proposed rule, simplifying
23 the gravity and negligence criteria would

1 increase objectivity and clarity in the citation
2 and order process. MSHA would emphasize the
3 proposed changes in inspector training. MSHA
4 anticipates that this would result in fewer areas
5 of disagreement.

6 I want to reiterate, as stated in the
7 proposed rule, that simplification will enable
8 MSHA to be more consistent. The rule was
9 structured to have minimal changes in overall
10 penalties. However, the proposal does place an
11 increased emphasis on operators who continue to
12 allow violations to occur.

13 The proposal would provide, like the
14 existing rule, for a 10 percent reduction in the
15 penalty amount of the regular assessment where
16 the operator abates the violation within the time
17 set by the inspector.

18 In an effort to provide for increased
19 operator focus on the prevention of safety and
20 health hazards, MSHA is considering an
21 alternative that would recognize both prompt
22 operator abatement of safety and health hazards,
23 as well as prompt payment of proposed penalties.

1 This alternative would provide an additional 20
2 percent good faith reduction in proposed
3 penalties when neither the penalty nor the
4 violation is contested and the penalty is paid
5 before it becomes a final order of the
6 Commission.

7 Under this alternative, operators that
8 promptly abate and have paid the penalty would be
9 eligible for up to 30 percent overall good faith
10 reduction.

11 MSHA would also like to clarify that the
12 good faith reduction would not be affected by a
13 request for a pre-assessment conference on
14 violations, as some who have testified earlier
15 thought. Under this alternative, only penalties
16 that are either not paid within the 30 days or
17 are contested would be ineligible for the
18 additional 20 percent. And MSHA would also like
19 to clarify that if an assessment grouping
20 includes multiple citations and only one is not
21 paid within 30 days or is contested, the
22 remaining citations would be eligible for the
23 good faith penalty reduction. In other words,

1 the operator would pick and choose under that
2 alternative which ones to contest and which ones
3 to pay in a group of violations.

4 MSHA is proposing to increase the minimum
5 penalty for unwarrantable failure citations and
6 orders by 50 percent to provide greater
7 deterrence for operators who allow these types of
8 violations to occur. And the proposed rule is
9 doing this in an effort to hold operators
10 accountable as well as to encourage more diligent
11 compliance.

12 The minimum penalty under the proposal for a
13 citation or order issued under 104(d)(1) would be
14 \$3,000 and for an order under 104(d)(2) of the
15 Mine Act would be \$6,000.

16 Several commenters have stated that the 50
17 percent increase in unwarrantable failure
18 penalties is not necessary, stating that
19 initiatives, such as Rules-To-Live-By and impact
20 inspections, have worked.

21 Finally, in the preamble, MSHA offered
22 alternatives relative to the scope and
23 applicability of the rule. In doing so, MSHA

1 seeks comments on two alternatives that would
2 address the applicability of the proposed civil
3 penalty formula when the Federal Mine Safety and
4 Health Review Commission assesses civil
5 penalties. A full discussion of these
6 alternatives is in the preamble to the proposed
7 rule. But essentially under the first proposed
8 alternative, MSHA would modify the scope and
9 applicability of the regulation so that it would
10 govern both MSHA's proposal and the Commission's
11 assessment of civil penalties. The existing rule
12 applies only to proposed penalties.

13 And this alternative would require the
14 Administrative Law Judge to apply the penalty
15 formula to the facts found by the ALJ when
16 assessing civil penalties according to the six
17 statutory criteria.

18 MSHA's second proposed alternative is
19 similar to the first, but would give the
20 Commission more flexibility to depart from the
21 penalty formula in appropriate cases.

22 MSHA did not prepare a separate regulatory
23 economic analysis. Rather, the analysis was

1 presented in the preamble to the proposed rule.
2 MSHA requests comments on all estimates of costs
3 and benefits presented in the preamble as well as
4 the data and assumptions the Agency used to
5 develop estimates.

6 MSHA solicits comments on all the
7 clarifications and all the proposals that you
8 heard me mention here today: (1) the
9 alternatives to history, negligence, gravity,
10 criterion; (2) the alternative related to the
11 additional 20 percent good faith reduction; as
12 well as (3) the unwarrantable failure provision;
13 and (4) how your suggested alternatives would
14 improve objectivity and consistency.

15 As many of you have heard me say many times,
16 please submit detailed rationale and supporting
17 documentation for any of your suggested
18 alternatives.

19 As you address your provisions, please be as
20 specific as possible. You may submit comments
21 following this public hearing through the close
22 of the comment period. And you heard me earlier
23 say we are going to publish another notice that

1 includes many of the clarifications I mentioned
2 today, and that notice will provide for a close
3 of the comment period up to March 31st, 2015.

4 We will make available a verbatim transcript
5 of this public hearing approximately two weeks
6 after the completion of the hearing and you may
7 find that transcript on our website, www.msha.gov
8 and on the Federal Regulatory website,
9 www.regulations.gov.

10 We will now begin today's testimony. Rather
11 than be any more specific than this, at this time
12 I will ask if there is anybody here today at this
13 hearing who wishes to speak? If there is nobody
14 who wishes to speak, what I'm going to do is take
15 a break until approximately 10:30 unless we get
16 somebody who wishes to speak before 10:30, and
17 then we will make a decision.

18 Thank you. We have a break right now.

19 (Break.)

20 MS. SILVEY: As we promised, at this time,
21 we will reconvene the Mine Safety and Health
22 Administration's Public Hearing on the Proposed
23 Rule on Criteria for Civil Penalties. And at

1 this time I would like to ask is there anybody
2 who wishes to make a statement or a comment?

3 Thank you, Mr. Clements, just come forward.

4 MR. CLEMENTS: Randy Clements with the
5 Drummond Company. I want to welcome y'all here
6 to Alabama.

7 MS. SILVEY: Thank you.

8 MR. CLEMENTS: The question I have is under
9 the proposed rule that's going to do away with
10 the high negligence, what effect does that have
11 on the pattern of violation, because one of the
12 criteria under the pattern of violation is how
13 many high negligence have you had.

14 MS. SILVEY: Thank you, Mr. Clements, for
15 that question, and we were asked a similar
16 question at the public hearing in Arlington,
17 Virginia. And as all of you know, there are --
18 as Mr. Clements said, there are -- we have
19 criteria for pattern of violations and for
20 reviewing a mine or a potential mine for pattern
21 of violations, and one of them is, as he said,
22 high negligence. I think the category is called
23 elevated issuances, of which high negligence is

1 one of them among several others; right, Jay?

2 MR. MATTOS: That's right.

3 MS. SILVEY: As we mentioned too when the
4 question was asked in Arlington, we will
5 definitely have to look at that and review that
6 and whether it will cause us to just -- because
7 if this rule were to go through -- let me preface
8 it with that -- if this proposed rule were to go
9 through and there would be no category of high
10 negligence, then obviously there would be no high
11 category of negligence to count. So at that
12 point we would look at the pattern of violations
13 criteria and determine what we would do and
14 whether that would mean recreating new criteria
15 just deleting high negligence or however we do
16 it, we would have to do that. But if you all
17 would call when we issue the pattern of
18 violations final rule in the preamble, we said if
19 we changed any of the criteria we would post the
20 changes and give the public an opportunity to
21 comment on it, so we intend to -- we would do
22 that, honor that.

23 MR. CLEMENTS: Thank you.

1 MS. SILVEY: Is that it?

2 MR. CLEMENTS: That's it.

3 MS. SILVEY: Thank you. Anybody else have a
4 question or a comment? Nobody else? At this
5 point then, I am going to conclude the Mine
6 Safety and Health Administration's Public Hearing
7 on the Proposed Civil Penalty Rule. I want to
8 thank you all for coming here today. And as you
9 have heard us say many times, we appreciate your
10 participation in our rulemaking process. We
11 appreciate all of your comments. We appreciate
12 comments that you may have said here today, and
13 you heard that we got one. But equally, we
14 appreciate the ones that you send to us in
15 written form to our office in Arlington. We do
16 believe that your participation improves the
17 rulemaking process and it's only through you
18 letting us know what you feel about our proposals
19 that we are able to be responsive to the needs
20 and the concerns of the mining public. So as I
21 said earlier, we will be issuing a clarification
22 notice very soon that will extend the comment
23 period to March 31st. And we encourage you to

1 get any comments, concerns, suggestions, and
2 alternatives, to us at our office in Arlington
3 either by email or regular mail prior to the
4 close of the comment period and the close of the
5 record.

6 Having seen no other persons who wish to
7 comment, then I will conclude this hearing today.
8 Thank you very much.

9 (Hearing concluded at approximately
10 10:43 a.m.)

11
12
13
14
15
16
17
18
19
20
21
22
23

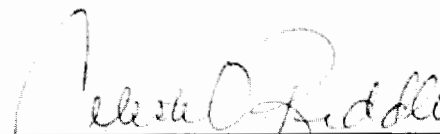
REPORTER'S CERTIFICATE

1
2
3 I, CELESTE O. RIDDLE, RPR, RMR, CCR, and
4 Notary Public, State of Alabama at large, do
5 hereby certify that the said proceedings were
6 taken in machine shorthand by me at the time and
7 place aforesaid and was thereafter reduced to
8 typewritten form; that the foregoing is a true
9 transcript of the proceedings had.

10 I further certify that I am not employed by,
11 related to, nor of counsel for any of the parties
12 herein.

13 IN WITNESS WHEREOF, I have affixed my
14 signature and seal this 9th day of February 2014.

15 My commission expires 5-7-16.

16
17 

18 Celeste O. Riddle, RMR, RPR, CCR
19 ABCR #127 - Expires 9-30-15

