

PUBLIC HEARING ON MSHA'S PROPOSED RULE ON CRITERIA
AND PROCEDURES FOR ASSESSMENT OF CIVIL PENALTIES

CHICAGO, ILLINOIS

FEBRUARY 12, 2015

REPORT OF PROCEEDINGS taken before GREG S.
WEILAND, CSR, RMR, CRR, at Embassy Suites, 600 North
State Street, in the City of Chicago, Cook County,
Illinois, commencing at 9:06 o'clock a.m., on the
12th day of February, 2015, upon the hearing in the
above-entitled matter.

THE PANEL:

MS. PATRICIA W. SILVEY, The Moderator

MS. SHEILA McCONNELL

MR. BRAD MANTEL

PRESENTATION BY MR. BURGRAFF

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THE PRESENTATION IS ATTACHED TO THE TRANSCRIPT

1 MS. SILVEY: Good morning. My name is
2 Patricia W. Silvey. I am the Deputy Assistant
3 Secretary for Operations for the Mine Safety and
4 Health Administration, and I will be the moderator
5 of this public hearing on MSHA's proposed rule on
6 criteria and procedures for the assessment of civil
7 penalties.

8 On behalf of Assistant Secretary Joseph A.
9 Main, I would like to welcome you all here today.
10 And actually this next thing I don't really have to
11 say because I see that all of you have signed the
12 attendance sheet at the back of the room.

13 I would now like to introduce the members
14 of the MSHA panel. To my right is Sheila McConnell,
15 who is the Acting Director of the Office of
16 Standards; to my left, Brad Mantel with the
17 Department of Labor's Office of the Solicitor of the
18 Mine Safety and Health Division; and in absentia we
19 have our member Jay Mattos, who is the Director of
20 Assessments, who also played a role in the
21 development of this proposed rule.

22 MSHA published its civil penalty proposed
23 rule in the Federal Register, as many of you know,
24 on July 31st, 2014. In response to requests from

1 the public, MSHA is holding public hearings to
2 receive testimony and information that will help us
3 evaluate the proposed changes and develop a final
4 rule that would improve health and safety conditions
5 at mines.

6 This is the fourth and final public
7 hearing. As many of you also know, the first
8 hearing was held in Arlington on December 4th,
9 2014; the second in Denver, Colorado, on
10 December 9th, 2014; the third hearing last week,
11 February 5th, in Birmingham, Alabama; and today is
12 the final hearing.

13 On February 10th, 2015, MSHA published a
14 notice in the Federal Register that clarifies the
15 proposed revision to the Negligence criterion;
16 clarifies the Gravity criterion; clarifies that the
17 alternative good faith reduction of an additional
18 20 percent would not be affected by a request for a
19 pre-assessment conference; and announces the
20 extension of the post-hearing comment period and the
21 close of the rule making record to March 31st,
22 2015. I will provide further details on
23 clarifications later on in this statement. And we
24 also have copies of the Federal Register notice in

1 the back of the room.

2 MSHA's hearings are conducted in an
3 informal manner. Formal rules of evidence do not
4 apply. The hearing panel may ask questions of the
5 speakers. The speakers may ask questions of the
6 panel. And if you have any information, you can
7 also present any information that you have to the
8 court reporter.

9 Most of you are familiar with the civil
10 penalty process. Under the Federal Mine Safety and
11 Health Act, which I will refer to as the Mine Act,
12 requires MSHA to issue citations or orders to mine
13 operators for any violations of safety and health
14 standards, and the Secretary sets the time for the
15 violation to be abated. Under the Mine Act, MSHA
16 proposes penalties, and the Federal Mine Safety and
17 Health Review Commission, I will refer to it as the
18 Commission, assesses penalties.

19 Under MSHA's existing rule, a proposed
20 penalty that is not contested within 30 days becomes
21 a final order of the Commission and is not subject
22 to review by any Court or Agency.

23 The Mine Act requires MSHA and the
24 Commission to consider six criteria in proposing and

1 assessing penalties: First, the appropriateness of
2 the penalty to the size of the business; the
3 operator's history of previous violations; whether
4 the operator was negligent; the Gravity of the
5 violation; the operator's good faith in abating the
6 condition; and the effect of the penalty on the
7 operator's ability to continue in business.

8 The first five criteria are applied to
9 determine the penalty amount. The last criterion,
10 the effect on the operator's ability to continue in
11 business, is applied when requested by the operator
12 after the penalty is proposed. The operator must
13 send in supporting documentation if the operator
14 believes the penalty would negatively affect the
15 company's ability to continue in business. MSHA
16 reviews this information and may adjust the penalty.

17 MSHA's proposal to amend the evaluation
18 factors for determining regular formula penalties is
19 structured to encourage operators to be more
20 accountable and proactive in addressing safety and
21 health conditions at their mine. MSHA was guided by
22 three principles in developing the proposed rule.

23 And I'll probably say this sometime later
24 in this statement, but the proposed rule only

1 affects the regular formula penalties, not the
2 special assessment process.

3 The three principles that MSHA used in
4 developing the proposed rule was, first, an
5 improvement in consistency, objectivity and
6 efficiency in how inspectors write citations and
7 orders by reducing the number of decisions
8 inspectors have to make, which could lead to fewer
9 areas of dispute and earlier resolution on
10 enforcement issues; the second principle, a greater
11 emphasis on the more serious safety and health
12 conditions; and the final principle was an openness
13 and transparency in the application of the Agency's
14 regular formula process.

15 The proposal does not change the process
16 that inspectors use to issue citations. Under the
17 proposal, as they do now, inspectors would make
18 factual determinations with respect to safety and
19 health violations and issue citations and orders.

20 The proposed rule would reduce the maximum
21 number of penalty points that could be assigned from
22 208 under the existing rule to 100. The existing
23 minimum penalty amount of \$112 and the maximum
24 penalty of \$70,000 for non-flagrant violations would

1 not change. The maximum penalty of \$242,000 for
2 flagrant violations would not change.

3 MSHA civil penalty regulations, and I said
4 I did know it was coming, has two methods for
5 proposing penalties, and I refer to the regular
6 formula assessments and special assessments. This
7 proposed rule only affects the regular formula
8 assessment process.

9 The proposed rule involves changes to the
10 citation and order form, MSHA Form 7000-3. And in
11 the back of the room we have copies of the current
12 and proposed MSHA Form 7000-3 and a visual that
13 depicts the percentage of each criterion under the
14 existing rule as compared to the projection of the
15 percentage under the proposed rule. And it was also
16 that projected projection that we used in
17 determining our analysis of the costs under this
18 proposed rule. And I'm assuming that you all have
19 got the form as well as the visual that depicts the
20 existing and the proposed percentages.

21 Under the regular assessment formula,
22 total penalties proposed by MSHA and the
23 distribution of the penalty amount by mine size
24 would generally remain the same as under the

1 existing rule. However, we expect that total
2 penalty amounts for small metal/nonmetal mines would
3 decrease.

4 Minimum penalties for unwarrantable
5 failure violations would increase under the proposal
6 to provide a greater deterrence for mine operators
7 who allow these types of violations, and we have
8 gotten comments on that aspect of the proposal
9 already.

10 At this point, I would like to reiterate
11 some of the specific changes that are included in
12 the proposal. First, MSHA is proposing to change
13 how an operator's overall violation history would be
14 determined and to increase the relative weight of
15 violation history as a percentage of total penalty
16 points, in recognition of the importance of the need
17 for operators to prevent violations from occurring
18 and recurring.

19 An operator's history of previous
20 violations is based on both the number of violations
21 and the number of repeat violations of the same
22 provision of a standard in the 15-month period
23 preceding the date of the violation. Under the
24 existing rule, only violations that have been paid,

1 finally adjudicated, or have otherwise become final
2 orders of the Commission are included in an
3 operator's history. MSHA is proposing to clarify
4 its intent that only violations that have become
5 final orders of the Commission are included in
6 determining an operator's violation history.

7 Under the proposal, MSHA would assign zero
8 points when a mine has ten or fewer inspection days,
9 or fewer than ten violations, over the 15 months
10 prior to the issuance of the citation or order.

11 This provision would benefit smaller mines
12 particularly and result in a more equitable impact
13 of the Violations Per Inspection Day formula on
14 small metal/nonmetal mines.

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

1 safety and health.

2 The proposal would reduce the Negligence
3 criterion's five categories to three. The
4 definition of Negligence would be revised to mean
5 that the operator knew or should have known about
6 the condition or practice. The proposal would
7 remove mitigating circumstances from the definition
8 of Negligence. And we've got comments on that
9 already also.

10 MSHA proposes to combine the existing
11 categories of Low, Moderate and High Negligence into
12 a single category of Negligence. Commenters have
13 expressed concern that violations assessed as High
14 Negligence under the existing rule would be assessed
15 as reckless disregard under the proposed rule,
16 resulting in higher penalties.

17 In our proposed projections, and you heard
18 me earlier say we did an analysis of the impact of
19 the proposal, in our projection, MSHA did not make
20 this assumption. MSHA intends that determinations
21 of Low, Moderate and High Negligence under the
22 existing rule would be placed in the proposed
23 Negligence category and assigned 15 penalty points.
24 Negligence, as I said earlier, would mean the

1 operator knew or should have known of the condition.

2 The definitions of Reckless Disregard and
3 No Negligence, which is Not Negligent in the
4 proposal, would not change.

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

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

16 As MSHA clarified in the notice published
17 on February 10th, 2015, the definition of Gravity
18 should read, "Gravity is an evaluation of the
19 seriousness of the violation. Gravity is determined
20 by the likelihood of an injury or illness, the
21 severity of the anticipated injury or illness, and
22 whether or not persons are potentially affected."

23 The proposed provision would retain the
24 three Gravity factors in the existing rule:

1 Likelihood of the Occurrence, Severity of Injury or
2 Illness if the event occurred or were to occur, and
3 Persons Potentially Affected, but would reduce the
4 number of subcategories associated with each factor.
5 Similar to the Agency's proposed changes to the
6 Negligence criterion, the proposal would simplify
7 the Gravity criterion by decreasing subcategories of
8 each of the factors of Gravity.

9 The first factor is Likelihood. Under the
10 Gravity criterion for Likelihood, MSHA is proposing
11 to reduce the existing five categories to three:
12 Unlikely, Reasonably Likely or Occurred. Some
13 commenters have expressed concern that reducing the
14 subcategories of Gravity would result in violations
15 being placed in a higher category and in higher
16 penalties.

17 The Agency proposes to combine the
18 existing categories of No Likelihood and Unlikely
19 into a single category of Unlikely. Commenters
20 objected to the removal of the existing
21 No Likelihood category. However, as discussed in
22 the preamble, the existing categories of
23 No Likelihood and Unlikely would be combined to
24 improve objectivity and consistency. Violations

1 assessed as Unlikely under the existing rule would
2 remain Unlikely under the proposed rule and would be
3 assigned zero penalty points.

4 Also, to improve consistency, the existing
5 categories of Reasonably Likely and Highly Likely
6 would be combined to a single category of Reasonably
7 Likely in the proposed rule and assigned 14 penalty
8 points.

9 MSHA has clarified that the proposed
10 definitions of Unlikely should read, "Condition or
11 practice cited has little or no likelihood of
12 causing an injury or illness." Reasonably Likely
13 should read, "Condition or practice cited is likely
14 to cause an injury or illness." And Occurred means
15 that the condition or practice has caused an injury
16 or illness.

17 Severity. The proposal would reduce the
18 four categories of Severity to three: No Lost
19 Workdays, Lost Workdays or Restricted Duty, or
20 Fatal. The definitions of the categories would not
21 change. The proposed rule would eliminate the
22 existing Permanently Disabling category, which is
23 often difficult to anticipate.

24 MSHA has clarified that the heading of

1 Table XII, and I guess unless you were looking at it
2 then you don't know what it is, should read
3 "Severity of Anticipated or Occurred Injury or
4 Illness."

5 Persons Potentially Affected: The
6 proposal would change the Persons Affected aspect of
7 the Gravity criterion. Under the proposal, eleven
8 categories would be reduced to two, and as you know
9 now, the inspector can make a determination about
10 the number of Persons Potentially Affected, and that
11 determination can go from zero to ten or over, which
12 is eleven categories. Under the proposal, it would
13 be either No Persons Affected or Persons Affected.

14 MSHA has clarified that Table XIII should
15 read, and you're not looking at that table, but
16 Table XIII should read, "Persons Potentially
17 Affected by the Condition or Practice Cited," and it
18 would be, as I just said, two categories.

19 As stated in the proposal, simplifying the
20 Gravity and Negligence criteria would increase
21 objectivity and clarity in the citation and order
22 process. MSHA would emphasize the proposed changes
23 in inspector training. MSHA anticipates that this
24 would result in fewer areas of disagreement and

1 earlier resolution of enforcement issues with
2 minimal changes in overall penalties.

3 I want to reiterate that we believe that
4 the proposal would be -- that the penalty rule under
5 this proposal would be simplified and that there
6 would be, as I said earlier, minimal changes in
7 overall penalties.

8 The proposal provides for a 10 percent
9 reduction if the operator abates the violation
10 within the time set by the inspector, like the
11 existing rule. However, in an effort to provide for
12 increased operator focus on the prevention of safety
13 and health hazards, MSHA is considering an
14 alternative, as was stated in the preamble to the
15 proposal, that would recognize both prompt operator
16 abatement of safety and health hazards as well as
17 prompt payment of proposed penalties. This
18 alternative would provide an additional 20 percent
19 good faith reduction when neither the penalty nor
20 the violation is contested and the penalty is paid
21 before it becomes a final order of the Commission.
22 Under this alternative, operators who promptly abate
23 and promptly pay would be eligible for up to a
24 30 percent good faith reduction in the amount of

1 penalties.

2 MSHA has also clarified that the good
3 faith reduction would not be affected by a request
4 for a pre-assessment conference on violations. We
5 were asked that question at one of the earlier
6 public hearings. Under this alternative, only
7 penalties that are either not paid or are contested
8 would be ineligible for the additional 20 percent.

9 And also MSHA clarifies that if an
10 assessment grouping, if there's an assessment
11 grouping of violations and only one is not paid
12 within the 30 days or is contested, the remaining
13 citations would be eligible for the good faith
14 penalty reduction.

15 MSHA is proposing to increase minimum
16 penalties for unwarrantable failure citations and
17 orders by 50 percent to provide greater deterrence
18 for operators who allow these types of violations to
19 occur, and we were doing this to hold operators more
20 accountable. As you all know, there is a statutory
21 minimum for unwarrantable failure violations now,
22 and under the proposal that minimum penalty for a
23 citation order issued under Section 104(d)(1) of the
24 Act would be \$3,000, and the minimum penalty for

1 (d)(2), 104(d)(2) citations and orders would be
2 \$6,000, as opposed to the \$2,000 and \$4,000
3 respectively under the existing rule. Several
4 commenters have stated that the 50 percent increase
5 is not necessary, stating that initiatives such as
6 Rules-To-Live-By and impact inspections have worked.

7 In the preamble to the proposal, MSHA
8 offered alternatives related to the scope and the
9 applicability of the rule. To enhance consistency
10 and predictability in the assessment of penalties,
11 MSHA seeks comments on two alternatives that would
12 address the applicability of the proposed civil
13 penalty formula when the Commission assesses civil
14 penalties. A full discussion of these alternatives
15 is in the preamble.

16 The first proposed alternative would be to
17 modify the scope and applicability of the civil
18 penalty regulation so that it would govern both
19 MSHA's proposal and the Commission's assessment of
20 civil penalties. The existing rule applies only to
21 proposed penalties.

22 This alternative would require the
23 administrative law judge, the ALJ, to apply the
24 penalty formula to the facts found by the ALJ when

1 assessing civil penalties according to the six
2 statutory criteria.

3 MSHA's second proposed alternative is
4 similar to the first but would give the Commission
5 more flexibility to depart from the civil penalty
6 formula in appropriate cases. And as I said, a full
7 discussion of those two alternatives is in the
8 preamble to the proposed rule.

9 Finally, MSHA did not prepare a separate
10 regulatory economic analysis for the proposed rule.
11 The analysis is contained in the preamble. MSHA
12 requests comments on all estimates of costs and
13 benefits presented in the preamble, the data and the
14 assumptions that the Agency used to develop the
15 estimates. But as I mentioned, people have always
16 heard me say, please, when you are presenting your
17 comments on the estimates of the costs and the
18 benefits, and if you have it, please provide
19 supporting data and please provide your rationale.
20 If you think our assumptions and data are incorrect,
21 please provide supportable rationale for your
22 conclusion. That would be most helpful to us.

23 MSHA solicits comments that address
24 alternatives to the proposed History, Negligence,

1 and Gravity criteria; the 20 percent good faith
2 penalty reduction, and the unwarrantable failure
3 provisions, and how your suggested alternatives
4 would improve objectivity and consistency in
5 enforcement. In other words, we solicit comments on
6 any and all aspects in the proposal.

7 As you address the proposed provisions,
8 please be as specific as possible, as I just said,
9 to enable proper Agency review and analysis of your
10 comments and your suggestions. You may submit
11 comments today or through the close of the comment
12 period, which is March 31st, 2015.

13 MSHA will make available a verbatim
14 transcript of this public hearing approximately two
15 weeks after the completion of the hearing. You may
16 view the transcripts on MSHA's website, www.msha.gov
17 and on www.regulations.gov.

18 We will now begin today's testimony. If
19 you have a copy of your presentation, please provide
20 a copy to the court reporter and as well as the MSHA
21 panel, and if you would begin, please, by stating
22 your name and organization and spelling your name
23 for the court reporter to make sure that we have an
24 accurate record.

1 And so we have, I have on my list here two
2 speakers, but I have been informed that one speaker
3 has taken himself off, so we have one speaker, and
4 we will now listen to Mr. Barras with
5 Peabody Energy.

6 MR. BURGGRAF: We have an overhead.

7 MS. SILVEY: Okay. So you're telling me
8 you did this to make me --

9 MR. BARRAS: I did, sorry.

10 MR. BURGGRAF: Sorry.

11 MS. SILVEY: That's all right.

12 MR. BARRAS: Can you see now?

13 MS. SILVEY: No. Okay.

14 MR. BURGGRAF: I'm just going to introduce
15 us and have a couple --

16 MS. SILVEY: I would have introduced you.

17 MR. BURGGRAF: I'm Chuck Burggraf, senior
18 vice president of safety for Peabody Americas, the
19 whole company, and this is Chad Barras. He's our
20 safety director for Midwest operations, and he is
21 headquartered in Evansville, Indiana.

22 I would like to thank MSHA for giving us
23 the opportunity to provide comments. I do thank you
24 for taking into consideration some of the changes

1 from some of the previous comments, and, of course,
2 we're going to request more changes.

3 So some of this, you know, we got this two
4 days ago, so some of this is addressing the comment,
5 the changes you already made, but hopefully that
6 will give you more confidence that you made the
7 right decision, okay, but we have additional
8 comments for changes we'd like to see also.

9 So Chad is going to present this, and I'll
10 let you take it away, Chad.

11 MR. BARRAS: I do appreciate the Committee
12 today. I would like to start with a safety contact,
13 something that we do within our company. We're from
14 3 or 400 miles south of here, but I'd like to talk
15 about walking on slick surfaces such as snow or ice.
16 So a lot of people bundle up, stick their hands in
17 their pockets and go out. If you really slip on ice
18 and your hands are in your pockets, the damage is
19 going to be worse. If you can at least control how
20 you hit with your hands, your chances are better off
21 not being injured.

22 I've got five scenarios I want to talk
23 about today. A couple of them revolve around
24 Likelihood, one that deals with history points, and

1 a little bit of repeat points with that. There's a
2 scenario that deals with Negligence, and then
3 there's one on Severity at the end, and we've got a
4 summary after that, and I'd like to go through it.

5 The first one -- and we do appreciate the
6 recent ruling change that came out.

7 MS. SILVEY: Excuse me, if I can just
8 interrupt you. Can we get that PowerPoint as a part
9 of the record?

10 MR. BARRAS: Yes.

11 MS. SILVEY: Okay.

12 MR. BARRAS: But the first one does reduce
13 the number of categories on Likelihood down to
14 three, and one of the things that we've got some
15 concern on is I'm not sure that it's going to
16 improve the objectivity. Actually we believe there
17 may be more subjective arguments in the field, and
18 that's really the perspective I want to talk about
19 today, is a little bit more the interface between an
20 MSHA inspector and a company escort or a miner's
21 rep.

22 Our belief is based on the newly defined
23 criteria in the proposed rule, which is a deviation
24 from numerous years of case law that the Review

1 Commission has put out, and that really revolves
2 around the S&S side of the argument.

3 We believe that the rule is problematic
4 for the inspector as well as the company escort.
5 Both will have to choose between a potential event
6 and real event at the scene of a violation. The
7 definition of event will cause the increased
8 confusion.

9 But our first example really revolves
10 around the Reasonably Likely change, and originally
11 the proposed rule talked about the condition or
12 practice that is likely to cause an event that could
13 result, and from our discussions today we realize
14 that component has been changed, so we do have a bit
15 of a statement after these first couple examples.

16 When you look at the violation we're
17 talking about, and this is a pretty simple violation
18 of a rock dust survey, and it was written on S&S
19 Unlikely Lost Workdays, with the new wording or the
20 previous new wording, it gives us two or three
21 options in the field as to how this could play out.
22 We've tried to keep our comparisons equivalent
23 except for the areas we're talking about. Our best
24 estimate was Moderate as comparable to Negligent,

1 and we tried to keep the rest of the categories the
2 same.

3 But in the field, if we really had to mark
4 this as Reasonably Likely from one of the recent
5 proposals on Likely that there was a tenfold or an
6 eightfold difference in penalty, assuming the
7 10 percent reduction as well as the 20 percent.
8 Going from where we would have been assessed at and
9 were assessed at the \$285, the proposed rule could
10 have went to \$2,400.

11 But the other one that gave the industry I
12 believe heartburn, and I do believe you guys have
13 made a diligent effort to correct that --

14 MS. SILVEY: I was going to say, because
15 since you're doing this by PowerPoint and it may be
16 difficult for me to remember each one of these, I'd
17 like to comment at this point.

18 MR. BARRAS: Okay.

19 MS. SILVEY: Can you go back to that
20 slide, and you help me out. The last slide you had.
21 Right.

22 So if I'm understanding, okay, this under
23 that citation that you showed, it was marked
24 Unlikely, right?

1 MR. BARRAS: Yes, ma'am.

2 MS. SILVEY: And so if you are using
3 comparable, if we're trying to be comparable in
4 terms of the markings under the existing rule and
5 this proposed rule, then it would be Unlikely under
6 this. If you follow what I'm saying, it would be
7 Unlikely under this proposed rule.

8 So it would be your second -- I'm trying
9 to figure out how this last category, how you come
10 up with this last amount, and I find that I'm not
11 following that.

12 MR. BARRAS: Well, the column to the right
13 we actually went up to the Reasonably Likely
14 category for discussion.

15 MS. SILVEY: But that doesn't -- that
16 doesn't make sense. If we're going to be -- you
17 said it was marked Unlikely under the existing rule,
18 so under this proposed rule we're not changing on
19 that one. That was the source of a lot of comment
20 in the Arlington hearing. That's all I'm
21 suggesting. And I want you all to understand, one
22 of the things, and that was the reason we did this
23 second notice, this last notice, we're trying to be
24 as clear as possible, so when we leave, at least

1 people understand what we tried to do. Then you can
2 comment on that.

3 MR. BARRAS: Sure.

4 MS. SILVEY: Okay.

5 MR. BARRAS: But realize this slide
6 presentation was put together before the rule
7 change, that was just two days ago.

8 MS. SILVEY: I understand.

9 MR. BARRAS: And we were still under the
10 Likelihood that it could result.

11 MS. SILVEY: Okay. I'm with you now.
12 I've got it. Okay.

13 MR. BARRAS: The next one is similar in
14 nature, and it really revolved around the Occurred
15 definition, because the initial proposal of
16 Occurred --

17 MS. SILVEY: I've got you, I'm with you.

18 MR. BARRAS: -- is could have resulted in
19 an injury.

20 Our example citation that we were going to
21 talk through on that one, the thing I want you to
22 keep in mind, at that point in time, not since
23 Tuesday, the question in the field was what is the
24 event, and I'd like you to for discussion for the

1 short period keep that in mind. What we were
2 looking at is we had a damaged roller that was
3 present on a conveyor belt, so at that point we were
4 thinking the event could be the roller.

5 If the new proposal really goes through as
6 suggested, then that could clarify that. But we
7 were in debate and we were concerned about in the
8 field the inspector picking an event between the
9 roller or what's the result of a bad roller with
10 some other factors involved, is it a fire.

11 MS. SILVEY: Right.

12 MR. BARRAS: And those were the items that
13 we were wrestling with.

14 MS. SILVEY: Yes, I understand.

15 MR. BARRAS: When you look at the
16 penalties on that, and it's an exaggeration because
17 of did that roller do it, you have helped in the
18 process, I believe, and we've not gotten to study
19 the new rule as well as we would like.

20 MS. SILVEY: I understand. I'm with you
21 now.

22 MR. BURGGRAF: I also said hopefully some
23 of these will give you some confidence that you made
24 the right decision in changes.

1 MS. SILVEY: You did, yes.

2 MR. BARRAS: But you can see why the
3 industry was a bit alarmed at this one. If it
4 really was a different event than the major outcome,
5 it could have went from a couple hundred dollar
6 penalty up to \$2,500 or \$25,000. That's really what
7 caught our eye.

8 But that's really the two that I wanted to
9 talk about on Likelihood. We do know that on
10 Tuesday, the 10th, that the Register came out. As
11 this notice was published just this week, we weren't
12 able to fully evaluate it at Peabody on the effect.
13 However, any effort to address the concerns with the
14 Gravity definition in the initial proposal is
15 welcomed.

16 The next one really gets into a little bit
17 of the history issue on Violations Per Inspection
18 Day as well as repeat, but there's an area that kind
19 of plagues our industry, and there's at least three
20 standards that are wide in scope and that can affect
21 your repeat part. Ventilation plans are all under
22 §75.370(a)(1), roof controls under §75.220(a)(1),
23 and then the §75.400s, they're all wide in scope but
24 they come back to play when you start looking at

1 your repeat violation history, and that's an item
2 I'd like to run through for just a second. The
3 proposed rule, it doesn't address the issue of
4 repeat points. Violations of §75.400 or §75.370 or
5 §75.220(a)(1) cover drastically different functions
6 within the violation category.

7 For example, violation of §75.370(a)(1)
8 can range from a water spray at a belt transfer
9 point to the method roof bolters use to test for
10 methane on extended cuts, neither of which involve
11 similar benefits, and the §75.400 violations involve
12 an even wider scope and involve different control
13 measures for compliance. We believe these standards
14 could be divided into separate categories.

15 I had an example of an accumulation on a
16 diesel piece of equipment, and when we looked at
17 those points, tried to keep everything comparable
18 again, but I will tell you we used a VPID of 1.0 to
19 come up with the history points of 10 and 10.
20 That's out of the new and the old, and everything
21 else is comparable, and we looked at the repeat
22 violation point of the given standard for the
23 violation in question, and there is a significant
24 penalty difference between the proposed Part 100 and

1 the current Part 100, and we used comparable rates.

2 Now, history points are 10 and 10, but we
3 used a VPID of 1, and that's probably an average for
4 the industry to think that an inspector won't write
5 one violation a day. That seems to be closer to the
6 norm on average, and when we do that and look at the
7 repeat portion of the violation, that's what drove
8 us up significantly higher. It's not just a
9 moderate increase. It's almost twofold.

10 The next scenario really revolves around
11 Negligence, and I know that we have reduced it.
12 I've got a couple things I want to make sure we're
13 clear on that one, and it's really down in the
14 comments. We will get through our example in a
15 second.

16 But we believe there could be increased
17 subjectivity to the evaluation and lead to an
18 increase in penalties on that, especially when the
19 evaluation jumps to the next available section
20 between the previous selection. The industry
21 worries we will jump up to reckless, and I know,
22 Ms. Silvey, you made some of those comments in your
23 initial statement.

24 But by eliminating the High Negligence

1 category, it still remains unknown how 104(d)
2 citations or orders are going to be issued since the
3 Review Commission had established that aggravated
4 conduct was really the element that you had to get
5 past for a (d)(1) citation or (d)(2) orders that may
6 follow. We've got some pretty good concerns over
7 that.

8 When you look at it, it's a pretty easy
9 example, but when you start talking about the scale
10 of measurements or categories, it seems like the
11 more divisions you have in those the more accurate
12 you can be, and we've all heard and seen citations
13 that were written float dust black in color, but the
14 fact is, and this is a paint strip from Pittsburgh
15 Paint that renders from white to black, and this was
16 written as float dust black in color. But was it
17 really?

18 And that's our vision. The more divisions
19 you have, the more accurate determinations you can
20 make. I don't see this picture as matching the
21 black.

22 Not only does the current standard provide
23 more options to clarify Negligence, aggravated
24 conduct must be present for these citations, and the

1 proposed standard greatly reduces the number of
2 categories of Negligence and makes it difficult to
3 truly portray the Negligence of the violation.
4 Thus, we believe if you're really the inspector and
5 the escort at the time, it can actually add to
6 confusion at the scene of the violation, and then
7 you're trying to come up with did you pass the
8 aggravated conduct threshold.

9 And our example citation that we used on
10 this was an Unlikely violation that revolved around
11 float dust in a motor area of a coal hauler. And
12 there's a significant difference when you look at
13 the Reckless versus Negligent, and I will say when
14 you look at the middle column of the proposed rule,
15 its penalty would be less than today, but if there's
16 an issue at the site and for whatever reason, it's
17 at the inspector's discretion, he goes to the
18 Reckless category, the penalty significantly goes
19 up. And maybe it's warranted; maybe it's confusion
20 because there's different levels of training and
21 abilities on the escort side as well as the MSHA
22 inspector side, and I believe it can put those
23 gentlemen in a difficult situation at the scene.

24 And the next scenario really revolves

1 around Severity, and it's a pretty simple example.
2 We have a citation that was written as Permanently
3 Disabling on a carbon monoxide detection system, and
4 when you take that category away and you're in the
5 field as the inspector, which way are you going to
6 go with a potentially bad CO alarm? Does that mean
7 that you're expecting the event is going to be a
8 Fatal? And on those and even on the typical
9 respirable dust violations, those are almost always
10 delineated as Permanently Disabling.

11 So one of the reasons the industry has
12 heartburn when you come back on those, is it going
13 to go to Fatal. If it does, it's a significant
14 increase. But I will also say it's in the middle
15 column. If it does not go up and it stays in the
16 Negligent category, it's less penalty.

17 So how are we on some of the scenarios?
18 Are we okay up to that point as far as questions
19 or --

20 MS. SILVEY: Oh, well, I'd like to make
21 two comments, yes, thank you, and my two comments
22 are these: That as I said in my opening statement
23 this morning, and as we've said also in the notice
24 that we issued, the last notice that we issued, that

1 the definition of Unwarrantable Failure or the
2 definition of Reckless Disregard does not change,
3 and I want to reiterate that.

4 And I would also say, and we understand
5 and we have done this with all of our regulations,
6 that if we do make changes, the first thing we have
7 to do is train our staff. So if these, if any
8 aspect of this proposed rule goes through, then we
9 do intend to train all of our inspectors, and I have
10 said that. I have stated that, and that's what we
11 will do. And so we will probably not only train our
12 inspectors but also do outreach to the mine
13 community.

14 So anyway, those are my two comments.

15 MR. BARRAS: You know, when you talk
16 about -- I guess one of our hurdles is when you look
17 at the typical six items you look at getting to
18 aggravated conduct. It's really not defined by
19 Negligent or Reckless or High, and our concern is
20 that there could be an effort to write the violation
21 as Negligent and still pursue aggravated conduct by
22 supplying the information that would clear some of
23 the hurdles of the six normal elements, such as how
24 obvious was the violation or how long has it been

1 there. It makes the industry uneasy at that point
2 in time.

3 All right. I would like to --

4 MS. SILVEY: And excuse me, please. I'll
5 make one other point, and I made this point at the
6 first public hearing. This proposed rule does not
7 change the definition of Significant and
8 Substantial, and I would like to iterate that and
9 reiterate that, that it does not change the
10 definition of significant and substantial either.

11 MR. BARRAS: We're certainly aware that
12 the Review Commission kind of set the hurdle for S&S
13 with Mathies. What I'm not sure of, because we've
14 changed the definition of Reasonably Likely, the
15 definition of Reasonably Likely is involved in part
16 of the Mathies decision. So I'm hopeful, but I'm
17 not going to bet everything I own on that.

18 A couple of the key things I'd like to
19 close out on is on the Negligence side, and there
20 has been some clarification of that, but the first
21 rule would eliminate the mitigating factors. The
22 second item that was noted in the definition was too
23 restrictive relative to the definition of Neglect.
24 If mitigating factors are not considered, the sole

1 consideration in a Negligence determination is
2 whether the operator knew or should have known of
3 the violative condition.

4 Third, the elimination of High Negligence
5 raises significant questions as to the impact on the
6 unwarrantable failure. The elimination of High
7 under the proposed -- excuse me, proposed rule would
8 result in either unwarrantable failure accompanied
9 by findings of neglect or an increase in the number
10 of Reckless Disregard findings to support the
11 unwarrantable.

12 The thing that I haven't talked about
13 today is there is a concern involving Negligence and
14 potential increases in 110(c) investigations. If
15 unwarrantables are written under the Negligent
16 category, this could very well increase the number
17 of 110(c) assessments.

18 The proposed rule increases the impact in
19 areas of violation history and repeat violations.
20 That's significant, and I know we kicked them around
21 in our presentation in the areas such as the
22 §75.370(a)(1), which is the ventilation plan,
23 drastically different control measures in all three
24 of these categories from the §75.400 to the

1 §75.220(a)(1). To use those in a repeat history
2 calculation doesn't seem fair.

3 The proposed rule has a real probability
4 to bring back the backlog contest cases. We believe
5 the new backlog could go on for years with new and
6 unresolved issues when they're settled.

7 We believe the rule to be problematic in
8 the field when determining Likelihood, although I
9 will say there has been some revisions to that since
10 Tuesday, when the MSHA inspector and the escort have
11 to try to understand the potential event or the
12 likelihood of an injury.

13 Safety is a way of life at Peabody though,
14 and our safety vision of zero incidents guides
15 everything that we do. Every employee commits to
16 this vision and is accountable for safe behavior and
17 practices at work and away. The company's ultimate
18 objective is to operate with no incidents.

19 We emphasize safe work practices, open
20 dialogue, and establish and follow and are improving
21 safe standards, and our employee involvement in the
22 safety process is a key element.

23 We do appreciate the opportunity to come
24 up today and discuss our issues. We appreciate the

1 spirited conversations around the topics.

2 MS. SILVEY: Thank you. I have a comment
3 that may not necessarily go to it, and I always tell
4 people don't go off the subject, and I'm kind of
5 violating my own direction, but with respect to your
6 National Mining Association Core Safety Model, you
7 said you have incorporated risk management into your
8 systems.

9 So I take it from that that you have, and
10 you don't have to go into detail about it, but I
11 take it from that that you have at your company then
12 some aspect of a safety and health management
13 program.

14 Am I right there?

15 MR. BURGGRAF: That's true, and because of
16 core safety, I mean, that was the thing that sparked
17 this initiative, and we have done a lot of work, a
18 lot of training, and continue to do it because this
19 is a process that will evolve over years to change
20 our culture, to be more risk-based, and we've done a
21 lot of training of management, and we're going to be
22 rolling that out to our hourly employees.

23 MS. SILVEY: That's what I was going to
24 say. So is it in place?

1 MR. BURGGRAF: It's evolving. We're in
2 the process. It's not totally in place, but we
3 definitely have done a lot of management training
4 over the past year, and later this year we will
5 start training with our supervisors, and that will
6 get the hourly employees involved. We have had
7 hourly employees involved in a lot of our risk
8 assessments and things such as that.

9 MS. SILVEY: Okay. Thank you. I don't
10 think I have any other comments. As you said, some
11 of your comments predated some of the changes we
12 made, and yet we do -- you know, we know you still
13 have -- you said there are some remaining comments,
14 and so we will be looking at that, and we will
15 review in more detail the scenarios you gave,
16 recognizing that some of it has now changed.

17 But still, if you have further specifics,
18 as I said earlier, particularly on the regulatory
19 economic analysis, and this goes for anybody in the
20 room, if you have specific comments on our
21 assumptions and you have specific data or specific
22 actual citations that you want to raise with us that
23 you think show a different story or depict a
24 different scenario than what we projected in the

1 proposed rule, then, please, we'd ask you to provide
2 that to us.

3 Thank you. Then I don't think I have any
4 more comments.

5 Do you have any?

6 MS. McCONNELL: No.

7 MS. SILVEY: So do you all have any more
8 for us?

9 MR. BURGGRAF: No. Just thank you for the
10 opportunity.

11 MS. SILVEY: All right. Thank you all
12 very much, Mr. Burggraf, Mr. Barras. We appreciate
13 you appearing here today and providing us with your
14 comments and testimony.

15 MR. BURGGRAF: Thank you.

16 MS. SILVEY: While he's finishing up with
17 his computer, is there anybody else in the room who
18 wishes to present comments and testimony, make a
19 statement?

20 Well, if there's nobody else here, at this
21 point what I'm going to do is I'm going to
22 tentatively conclude the hearing, and I say
23 tentatively because we are going to stay around
24 until at least 11:00 o'clock or so just to make sure

1 that we don't expect anybody else for this public
2 hearing, but I'm going to go on and do this
3 tentative concluding so that if nobody else comes,
4 then I don't have to reconvene the hearing at that
5 point, and it would just serve as the conclusion of
6 the hearing.

7 So at this point then, I would like to say
8 again that the Mine Safety and Health Administration
9 appreciates your participation in this rule making.
10 As with all of our rule makings, it is only with
11 your participation and your review of the proposals
12 that we present to you that we then can move to a
13 final ruling that reflects some of the needs and
14 concerns of the mining public but also that we think
15 addresses, provides for better protection for the
16 safety and health of miners but does so in a manner
17 that's responsive to the needs and concerns of the
18 mining public, and that's our ultimate goal. And
19 with that in mind, as I said, again we appreciate
20 your participation in the rule making.

21 And I want to say not only for the people
22 who presented testimony here today but to us the
23 fact that you are in attendance here today shows us
24 that you have an interest in the rule making, and

1 that's important to us also, and we know, I know
2 from talking to some of you here this morning that
3 while you did not present testimony today, either
4 through your company or through your organization or
5 through your representative you will present
6 information to us before the rule making record
7 closes, and that is equally as important to us.
8 It's just as important as the information that's
9 presented here in person today.

10 So with that in mind, I want to again on
11 behalf of our Assistant Secretary Joe Main and on
12 behalf of our panel here today, I want to say we
13 appreciate your participation.

14 And the rule making record closes
15 March 31st, 2015. We look forward to other
16 whatever additional comments that you may want to
17 present to us, and this concludes this public
18 hearing.

19 Thank you.

20 (Whereupon, the hearing was
21 adjourned at 11:10 a.m.)
22
23
24


C E R T I F I C A T E

1
2 The within and foregoing hearing was
3 reported in shorthand by GREG S. WEILAND, CSR, RMR,
4 CRR, within and for the County of Cook and State of
5 Illinois, on the 12th day of February, 2015, at the
6 hour of 9:06 a.m., at Embassy Suites, 600 North
7 State Street, in the City of Chicago, Cook County,
8 Illinois.

9 The proceedings were taken down in
10 shorthand by the undersigned, acting as
11 stenographer; and the within and foregoing is a
12 true, correct and complete record of all of the
13 proceedings had at the time and place hereinabove
14 referred to.

15 The undersigned is not interested in the
16 within case, nor of kin or counsel to any of the
17 parties.

18 Witness my signature on this 18th day of
19 February, 2015.

20
21 
22 _____
23 GREG S. WEILAND, CSR, RPR
24 License No. 084-003472

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23:14 28:10,22,23 31:22 32:6 34:17 35:22 36:20 38:9 39:12 40:10,11,13 40:16 42:13 43:2 something 22:13 sometime 6:23 sorry 21:9,10 source 26:19 south 22:14 sparked 39:16 speaker 21:2,3 speakers 5:5,5 21:2 special 7:2 8:6 specific 9:11 20:8 40:20,21,21 specifics 40:17 spelling 20:22 spirited 39:1 spray 30:8 staff 35:7 standard 9:22 30:22 32:22 33:1 standards 3:16 5:14 29:20 30:13 38:21 start 22:12 29:24 32:9 40:5 State 1:11 44:4,7 stated 15:19 16:14 18:4 35:10 statement 4:23 6:24 24:15 31:23 34:22 41:19 stating 18:5 20:21 statutory 17:20 19:2 stay 41:23 stays 34:15 stenographer 44:11 stick 22:16 still 27:9 32:1 35:21 40:12,17 story 40:23 Street 1:11 44:7 strip 32:14 structured 6:19 study 28:18 subcategories 13:4 13:7,14 subject 5:21 39:4 subjective 23:17 subjectivity 31:17 submit 20:10 substantial 36:8,10 such 18:5 22:15 35:23 37:21 40:8	suggested 20:3 28:6 suggesting 26:21 suggestions 20:10 Suites 1:10 44:6 summary 23:4 supervisors 40:5 supplying 35:22 support 37:10 supportable 19:21 supporting 6:13 19:19 sure 20:23 23:15 27:3 31:12 36:13 41:24 surfaces 22:15 survey 24:18 system 34:3 systems 39:8	22:16,17 then 15:2 23:2 26:5 27:1 28:6 29:23 33:6 35:8 39:11 41:1,3 42:4,7,12 there 12:12 16:5 17:20 23:16 25:5 30:23 31:16 35:20 36:1,19 37:13 38:9 39:14 40:13 41:17 there's 17:10 23:1,3 29:18,19 33:12,15 33:20 41:20 these 9:7 17:18 18:14 24:15 25:16 28:23 30:13 32:24 34:22 35:7 37:24 they 7:17 29:24 they're 29:23 38:6 thing 3:10 27:21 35:6 37:12 39:16 things 23:14 26:22 31:12 36:18 40:8 think 19:20 31:4 40:10,23 41:3 42:14 thinking 28:4 third 4:10 37:4 those 19:7 28:12 30:17 31:22 32:11 33:22 34:8,9,12 35:14 38:1 though 38:13 three 6:22 7:3 11:3 12:24 13:11 14:18 23:14 24:20 29:19 37:23 threshold 33:8 through 20:11 23:4 27:21 28:5 30:2 31:14 35:8 43:4,4 43:5 Thus 33:4 time 5:14 16:10 27:22 33:5 36:2 44:13 today 3:9 4:11 20:11 22:12,23 23:19 24:13 33:15 37:13 38:24 41:13 42:22,23 43:3,9 43:12 today's 20:18 together 27:6 too 36:22	topics 39:1 total 8:22 9:1,15 totally 40:2 train 35:7,9,11 training 15:23 33:20 39:18,21 40:3,5 transcript 2:24 20:14 transcripts 20:16 transfer 30:8 transparency 7:13 tried 24:22 25:1 27:1 30:17 true 39:15 44:12 truly 33:3 try 38:11 trying 26:3,8,23 33:7 Tuesday 27:23 29:10 38:10 two 8:4 15:8,18 18:11 19:7 20:14 21:1 22:3 24:20 27:7 29:8 34:21 34:21 35:14 twofold 31:9 types 9:7 17:18 typical 34:8 35:17	30:19 31:8,21 33:7,19 34:15,18 38:24 41:16 upon 1:13 use 7:16 30:9 38:1 used 7:3 8:16 19:14 30:18 31:1,3 33:9 using 26:2
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			W 1:19 3:2 walking 22:15 want 16:3 22:22 23:18 26:21 27:21 31:12 35:3 40:22 42:21 43:10,12,16 wanted 29:8 warranted 33:19 water 30:8 way 34:5 38:13 we'd 22:8 41:1 we're 22:2,13 24:16 24:23 26:3,16,18 26:23 31:12 36:11 39:21 40:1	

we've 11:8 23:3,14 24:22 28:18 32:6 32:12 34:23 36:13 39:20	work 38:17,19 39:17	2	
website 20:16	Workdays 14:19,19 24:19	2,000 18:2	
week 4:10 29:11	worked 18:6	2,400 25:10	
weeks 20:15	worries 31:21	2,500 29:6	
weight 9:14 10:21	worse 22:19	2014 3:24 4:9,10	
WEILAND 1:10	wrestling 28:13	2015 1:7,13 4:13,22 12:17 20:12 43:15 44:5,19	
44:3,21	write 7:6 31:4 35:20	208 7:22	
welcome 3:9	written 24:18 32:13 32:16 34:2 37:15	242,000 8:1	
welcomed 29:15	www.msha.gov 20:16	25,000 29:6	
well 8:19 16:16	www.regulations.... 20:17	285 25:9	
20:20 24:4 25:7	X	3	
26:12 28:19 29:18	XII 15:1	3,000 17:24	
33:21 34:20 37:16	XIII 15:14,16	30 5:20 16:24 17:12	
41:20	Y	31st 3:24 4:21 20:12 43:15	
went 25:10 26:13 29:5	year 40:4,4	4	
were 13:2 15:1 17:5 17:19 25:9 27:9	years 23:24 38:5 39:19	4,000 18:2	
27:20 28:1,3,7,7	yet 40:12	400 22:14	
28:12,13 32:13	your 19:16,19,21 20:3,9,10,19,22	4th 4:8	
44:9	20:22 22:18,18,20	5	
weren't 29:11	22:20 26:8 29:21	50 17:17 18:4	
what's 28:9	30:1 31:22 39:5,7	5th 4:11	
whatever 33:16 43:16	39:11 40:11 41:13	6	
Whereupon 43:20	42:9,11,11,20	6,000 18:2	
whether 6:3 12:22 37:2	43:4,4,5,13	600 1:10 44:6	
which 5:11 7:8 12:3 12:10 14:22 15:11	Z	7	
20:12 23:23 30:10	zero 10:7 14:3 15:11 38:14	70,000 7:24	
34:5 37:22	0	7000-3 8:10,12	
while 41:16 43:3	084-003472 44:22	75.220(a)(1) 29:22 30:5 38:1	
white 32:15	1	75.370 30:4	
whole 21:19	1.0 30:18	75.370(a)(1) 29:22 30:7 37:22	
wide 29:20,23	100 7:22 30:24 31:1	75.400 30:4,11 37:24	
wider 30:12	104(d) 32:1	75.400s 29:23	
will 3:4 4:2,22 5:11 5:17 20:13,18	104(d)(1) 17:23	8	
21:4 22:6 24:5,7	104(d)(2) 18:1	9	
28:23 30:18 31:14	10th 4:13 12:17 29:10	9:06 1:12 44:6	
31:21 33:13 34:14	11:00 41:24	9th 4:10	
35:11,11 38:9	11:10 43:21		
39:19 40:4,5,14	110(c) 37:14,17		
40:14 43:5	112 7:23		
wishes 41:18	12th 1:13 44:5		
within 5:20 16:10 17:12 22:13 30:6	15-month 9:22		
44:2,4,11,16	18th 44:18		
Witness 44:18			
won't 31:4			
wording 24:19,20			
words 20:5			

Advanced Energy



Part 100 – MSHA Docket – 2014-0009 Criteria and Procedures for Assessment of Civil Penalties; Proposed Rule

Date : February 12, 2015

***Presenter name
Chad Barras***

Peabody
ENERGY

Part 100

Example Citation

#1

**Part 100
Gravity: Likelihood**

Criteria Category



Proposed Rule

The proposal would reduce the existing five categories of Likelihood of the occurrence of an event against which a standard is directed to three: (1) Unlikely; (2) Reasonably Likely; or (3) Occurred.

“These proposed changes would simplify the enforcement process, improve objectivity and consistency, ...”

79 Fed. Reg. at 44503 (emphasis added)

**Part 100
Gravity: Likelihood**

Criteria Category



Comments

While MSHA believes this will improve objectivity, it is our view that it will only increase the subjectivity of the evaluation of the citation.

Our belief is based on the newly defined Likelihood criteria in the proposed rule which is a deviation from numerous years of case law set forth by FMHSRC decisions.

With increased subjectivity of the evaluation, this will lead to an increase in penalties and litigation. Both are items which are contrary to the proposed rule's stated intentions.

This rule is problematic for MSHA inspectors as well as the company escort. Both will have to choose between a "potential event" or a "real event" at the scene of a violation. The definition of event will cause increased confusion

Part 100 Likelihood Definition Change #1



New "Reasonably Likely" Definition

"A condition or practice that is likely to cause an event that could result in an injury or illness.

79 Fed. Reg. at 44503 (emphasis added)

This new definition eliminates the reasonable probability requirement that the condition/practice will result in an injury and reduces it to the possibility that the condition/practice could result in an injury.

This will lead to an increase of subjectivity which will in turn lead to further complications and disagreements in regards to enforcement instead of simplification, improved objectivity and consistency as stated goals by the proposal.

Citation Example - Condition or Practice (as written)

The laboratory analysis of the rock dust survey taken on 11/18/2013 in active unit 2 (MMU-003) reports that the incombustible content collected in survey # 0041229AA was only 65.3% incombustible. This condition exists at #2 entry from the cross cut between #2 to #3 entry, at SS 17+50 contained less than the required percent as shown in this attached analytical report.

Standard 75.403 was cited 19 times in two years at mine ##### (19 to the operator, 0 to a contractor)

Let's review the actual citation to see the subjectivity impact of this newly defined criterion.

Part 100

Citation Example #1



Mine Citation/Order		U.S. Department of Labor Mine Safety and Health Administration	
Section I: Citation Data			
1. Date Mo Da Yr 11/26/2013	2. Time (24 Hr. Clock) 1610	3. Citation Order Number	
4. Served To		5. Operator	
6. Mine		7. Mine ID (Contractor)	
8. Condition or Practice		8a. Written Notice (103g)	
<p>The laboratory analysis of the rock dust survey taken on 11/18/2013 in active unit 2 (MMB-C03) reports that the incombustible content collected in survey # 0041229AA was only 6.25 incombustible. This condition exists at #2 entry from the cross cut between #2 to #3 entry, at SS 17-50 contained less than the required percent as shown in this attached analytical report.</p> <p>Standard 75.403 was cited 10 times in two years at mine (to the operator, 1 to a contractor).</p>			
See Continuation Form (MSHA Form 7003-1a)			
9. Violation	A. Health Safety Other	B. Section of Act	C. Part/Section of Title 30 CFR 75.403
Section II: Inspector's Evaluation			
10. Gravity:			
A. Injury or Illness (has) (s): No Likelihood Unlikely Reasonably Likely Highly Likely Occurred			
B. Injury or Illness could reasonably be expected to be: No Lost Workdays Lost Workdays Or Restricted Duty Permanently Disabling Fatal			
C. Significant and Substantial: Yes No (0) Number of Persons Affected: (0)			
11. Negligence (check one): A. None B. Low C. Moderate D. High E. Reckless Disregard			
12. Type of Action: 104(a) 13. Type of Issuance (check one): Citation Order Safeguard Written Notice			
14. Initial Action: A. Citation B. Order C. Safeguard D. Written Notice E. Citation/Order Number F. Dated Mo Da Yr			
15. Area or Equipment			
16. Termination Due: A. Date Mo Da Yr 11/27/2013 B. Time (24 Hr. Clock) 1610			
Section III: Termination Action			
17. Action to Terminate			
18. Terminate: A. Date Mo Da Yr B. Time (24 Hr. Clock)			
Section IV: Automated System Data			
19. Type of Inspection (activity code) F01		20. Event Number	21. Primary or Mit
22. Signature		23. AR Number	

MSHA Form 7003-3 April 2009 (Rev. 09) In accordance with the provisions of the Small Business Regulatory Enforcement Fairness Act of 1995, the Small Business Administration has established a National Small Business and Agriculture Regulatory Ombudsman and 10 Regional Fairness Boards to receive comments from small businesses about federal rule-making or enforcement actions. The Ombudsman annually evaluates enforcement activities and rates each agency's responsiveness to small business. If you wish to comment on the enforcement actions of MSHA, you may call 1-888-REG-FAIR (1-888-734-3247), or write the Ombudsman at: Small Business Administration, Office of the National Ombudsman, 4300 Crystal Street, SW, MSC 200, Washington, DC 20416. Please note, however, that your right to file a comment with the Ombudsman is in addition to any other rights you may have, including the right to contest citations and proposed penalties and obtain a hearing before the Federal Mine Safety and Health Review Commission.

Part 100

Citation Example #1



Assessment Criteria Categories	Current Part 100	Proposed Part 100	Proposed Part 100
Likelihood	Unlikely	Unlikely	Reasonably Likely
Severity	Lost Work Days	Lost Work Days	Lost Work Days
Persons Affected	001	Yes	Yes
Negligence	Moderate	Negligent	Negligent

Assessment Criteria Points & Civil Penalty	Current Part 100	Proposed Part 100	Proposed Part 100
Mine Size Points	15	4	4
Controller Size Points	10	4	4
History Points	10	10	10
Repeated Violation Points	2	1	1
Negligence Points	20	15	15
Gravity Likelihood Points	10	0	14
Gravity Injury Points	5	5	5
Gravity Persons Points	1	1	1
Total Points	73	40	54
Point Penalty	\$317	\$400	\$3,500
Good Faith Penalty	\$285	\$360	\$3,150
Additional Good Faith Penalty		\$280	\$2,450

Part 100

Example Citation

#2

Part 100 Likelihood Definition Change #2



New "Occurred" Definition

"A condition or practice has caused an event that has resulted or could have resulted in an injury or illness.

79 Fed. Reg. at 44503 (emphasis added)

This new definition is contrary to MSHA's Citation and Order Writing Handbook, which directs MSHA inspectors that the Occurred criterion, "can only be checked when an injury or illness has actually occurred."

MSHA Handbook Number PH13-I-1(1), p.11 (emphasis added)

Citation Example - Condition or Practice (*as written*)

A damaged top roller is present on the Unit #3 belt conveyor. The top roller is broken in the center and removed from both outer bearings. The affected roller is in contact with the moving belt. This condition was observed at crosscut #4 of the 3rd panel West.

Standard 75.1731(a) was cited 10 times in two years at mine ##### (10 to the operator, 0 to a contractor).

Let's review the actual citation to see the impact of this newly defined criterion.

Part 100 Likelihood Definition Change #2

Comments

In the upcoming citation there is one question to keep in mind. Is the event the bad roller or is it a potential fire? If it is the bad roller, the violation will be evaluated as occurred. If the event is a potential fire, the likelihood could be unlikely.

This is another point of contention the inspector and the escort will encounter in the field.

The difference in the potential penalties is significant.

Part 100

Citation Example #2



Mine Citation/Order		U.S. Department of Labor Mine Safety and Health Administration	
Section I - Violation Data			
1. Date Mo Da Yr 02/27/2013	2. Time (24 Hr. Clock) 0850	3. Citation/ Order Number	
4. Served To	5. Operator		
6. Mine	7. Mine ID (Contractor)		
8. Condition or Practice		8a. Written Notice (103g)	
<p>A damaged top roller is present on the Unit #3 belt conveyor. The top roller is broken in the center and removed from both outer bearings. The affected roller is in contact with the moving belt. This condition was observed at crosscut #4 of the 3rd panel West.</p> <p>Standard 75.1731(a) was cited 10 times in two years at mine (10 to the operator, 0 to a contractor).</p>			
See Continuation Form (MSHA Form 7000-3a)			
9. Violation	A. Health Safety Other	B. Section of Act	C. Part/Section of Title 30 CFR
			75.1731(a)
Section II - Inspector's Evaluation			
10. Gravity			
A. Injury or illness (has) (is): No Likelihood Unlikely Reasonably Likely Highly Likely Occurred			
B. Injury or illness could reasonably be expected to be: No Lost Workdays Lost Workdays Or Restricted Duty Permanently Disabling Fatal			
C. Significant and Substantial: Yes No			D. Number of Persons Affected: (0)
11. Negligence (check one): A. None B. Low C. Moderate D. High E. Reckless Disregard			
12. Type of Action: 101(a)		13. Type of Issuance (check one): Citation Order Safeguard Written Notice	
14. Initial Action: A. Citation B. Order C. Safeguard D. Written Notice			E. Citation/Order Number
15. Area or Equipment			
16. Termination Due		A. Date Mo Da Yr 02/27/2013	B. Time (24 Hr. Clock) 0915
Section III - Remedial Action			
17. Action to Terminate: The belt was removed from service by the operator and roller replaced.			
18. Terminate		A. Date Mo Da Yr 02/27/2013	B. Time (24 Hr. Clock) 0900
Section IV - Automated System Data			
19. Type of Inspection (activity code) 101	20. Event Number		21. Primary or Mill
22. Signature			23. AR Number

MSHA Form 7000-3, Apr 38 (rev 04) In accordance with the provisions of the Small Business Regulatory Enforcement Fairness Act of 2006, the Small Business Administration has established a National Small Business and Agriculture Regulatory Ombudsman and 10 Regional Fairness Boards to receive comments from small businesses about federal agency enforcement actions. The Ombudsman annually evaluates enforcement activities and rates each agency's responsiveness to small business. If you wish to comment on the enforcement actions of MSHA, you may call 1-866-REG-FAIR (1-866-734-3247), or write the Ombudsman of Small Business Administration, Office of the National Ombudsman, 406 3rd Street, SW, MC 2120 Washington, DC 20416. Please note, however, that your right to file a comment with the Ombudsman is in addition to any other rights you may have, including the right to contest citations and propose penalties and obtain a hearing before the Federal Mine Safety and Health Review Commission.

Part 100

Citation Example #2



Assessment Criteria Categories	Current Part 100	Proposed Part 100
Likelihood	Unlikely	Occurred
Severity	Lost Workdays	Lost Workdays
Persons Affected	001	Yes
Negligence	Moderate	Negligent

Assessment Criteria Points & Civil Penalty	Current Part 100	Proposed Part 100
Mine Size Points	15	4
Controller Size Points	10	4
History Points	10	10
Repeated Violation Points	0	0
Negligence Points	20	15
Gravity Likelihood Points	10	25
Gravity Injury Points	5	5
Gravity Persons Points	1	1
Total Points	71	64
Point Penalty	\$270	\$25,000
Good Faith Penalty	\$243	\$22,500
Additional Good Faith Penalty		\$17,500

Part 100

Example Citation

#3

Part 100 History of Previous Violations #3



Proposed Rule

The proposal would revise 100.3(c), history of previous violations, to increase the penalty points for this criterion as a percentage of total points.

79 Fed. Reg. at 44498 (emphasis added)

Comments

The proposed rule still does not address the real issue with repeat points. Violations of 75.400, 75.370(a)(1), and 75.220(a)(1) cover drastically different functions within the violation category. For example, violations of 75.370(a)(1) can range from a water spray at a belt transfer point to the method roof bolter operators use to test for methane on extended cuts. Neither of which involve similar benefits. 75.400 violations involve an even wider scope and involves different control measures for compliance. These standards should be divided into separate categories or functions.

Citation Example - Condition or Practice *(as written)*

Accumulations of combustible materials are present on the company #512 diesel scoop. Accumulations are in the form of oil pooled to approximately ¼ inch in depth underneath the engine. The company #512 diesel scoop was in service on the Main South travel road.

Standard 75.400 was cited 119 times in two years at mine ##### (119 to the operator, 0 to a contractor).

Let's review the actual citation to see the impact of this newly defined criterion.

Part 100

Citation Example #3



Mine Citation/Order U.S. Department of Labor
Mine Safety and Health Administration

Section I--Violation Data		
1 Date Mo Da Yr 03/25/2013	2 Time (24 Hr. Clock) 1035	3 Citation/ Order Number
4 Served To	5 Operator	
6 Mine	7 Mine ID (Contractor)	

8 Condition or Practice 8a Written Notice (103g)
 Accumulations of combustible materials are present on the company #512 diesel scoop. Accumulations are in the form of oil pooled to approximately 1/4 inch in depth underneath the engine. The company #512 diesel scoop was in service on the Main South travel road.

Standard 75.400 was cited 119 times in two years at mine (119 to the operator, 0 to a contractor).

See Continuation Form (MSHA Form 7000-3a)

9 Violation	A. Health Safety <input checked="" type="checkbox"/> Other	B. Section of Act	C Part/Section of Title 30 CFR	75.400
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Section II--Inspector's Evaluation

10 Gravity

A. Injury or illness (has) (is): No Likelihood Unlikely Reasonably Likely Highly Likely Occurred

B. Injury or illness could reasonably be expected to be: No Lost Workdays Lost Workdays Or Restricted Duty Permanently Disabling Fatal

C. Significant and Substantial: Yes No D. Number of Persons Affected (0)

11 Negligence (check one) A. None B. Low C. Moderate D. High E. Reckless Disregard

12 Type of Action 104(a) 13. Type of issuance (check one) Citation Order Safeguard Written Notice

14 Initial Action A. Citation B. Order C. Safeguard D. Written Notice E. Citation/Order Number F. Dated Mo Da Yr

15 Area or Equipment

16 Termination Due A. Date Mo Da Yr 03/25/2013 B. Time (24 Hr. Clock) 1500

Section III--Termination Action

17 Action to Terminate Accumulations have been washed from the #512 scoop.

18 Terminate A. Date Mo Da Yr 03/25/2013 B. Time (24 Hr. Clock) 1303

Section IV--Automated System Date

19 Type of Inspection (activity code) E:01 20. Event Number 21 Primary or Mill 22 Signature 23 AR Number

MSHA Form 7000-3, Apr 08 (revised) In accordance with the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996, the Small Business Administration has established a National Small Business and Agriculture Regulatory Ombudsman and 10 Regional Fairness Boards to receive comments from small businesses about federal agency enforcement actions. The Ombudsman annually evaluates enforcement activities and rates each agency's responsiveness to small business. If you wish to comment on the enforcement actions of MSHA, you may call 1-888-REG-FAIR (1-888-734-3247), or write the Ombudsman at Small Business Administration, Office of the National Ombudsman, 409 3rd Street, SW, MC 2120, Washington, DC 20416. Please note, however, that your right to file a comment with the Ombudsman is in addition to any other rights you may have, including the right to contest citations and proposed penalties and obtain a hearing before the Federal Mine Safety and Health Review Commission.

Part 100

Citation Example #3



Assessment Criteria Categories	Current Part 100	Proposed Part 100
Likelihood	Reasonably Likely	Reasonably Likely
Severity	Lost Workdays	Lost Workdays
Persons Affected	001	Yes
Negligence	Moderate	Negligent
Repeat/Day	.33	.33

Assessment Criteria Points & Civil Penalty	Current Part 100	Proposed Part 100
Mine Size Points	15	4
Controller Size Points	10	4
History Points	10	10
Repeated Violation Points	17	9
Negligence Points	20	15
Gravity Likelihood Points	30	14
Gravity Injury Points	5	5
Gravity Persons Points	1	1
Total Points	108	62
Point Penalty	\$5,211	\$15,000
Good Faith Penalty	\$4,690	\$13,500
Additional Good Faith Penalty		\$10,500

Part 100

Example Citation

#4

Proposed Rule

The proposal would reduce the five existing categories of negligence to three: (1) Not Negligent; (2) Negligent; or (3) Reckless Disregard. It would also re-define “Negligent” to eliminate mitigating circumstances.

“MSHA believes that reducing the number of negligence categories would improve objectivity and consistency in the evaluation of negligence, resulting in fewer areas of disagreement,....”

79 Fed. Reg. at 44502

Comments

While MSHA believes this will improve objectivity, it is our view that it will only increase the subjectivity of the evaluation of the citation.

With increased subjectivity of the evaluation, this will lead to an increase in penalties and litigation, especially when the evaluation jumps to the next available selection because the previous selection is no longer available. Both are items which are contrary to the proposed rule’s stated intentions.

Also, by eliminating the “High Negligence” category, it remains unknown to how 104 d citations will be issued going forward, since FMSHRC decisions have established that aggravated conduct must be present. Would aggravated conduct be met by “Negligent” or would it require “Reckless Disregard”?

Part 100 Negligence

Criteria Category



- Float dust black in color or is it?
- As with any scale of measurements or categories, more divisions leads to greater accuracy.
- Not only does the current standard provide more options to clarify negligence, aggravated conduct must be present for the issuance of D citations and orders
- The proposed standard greatly reduces the number of categories of negligence and makes it more difficult to truly portray the negligence of a potential violation. Thus adding to the confusion as to whether a violation has surpassed the aggravated conduct threshold.



Part 100

Citation Example #4



Mine Citation/Order		U.S. Department of Labor Mine Safety and Health Administration	
Section I - Violation Date			
1. Date Mo Da Yr 11/27/2012	2. Time (24 Hr. Clock) 1000	3. Citation/ Order Number	
4. Served To		5. Operator	
6. Mine		7. Mine ID	
8. Condition or Practice		8a. Written Notice (103g)	
<p>Floot coal dust and hydraulic oil was allowed to accumulate around the tram motor area on the battery ram car cc.#320 being used on the 001 section. The accumulations ranged from 1/4 to 1/2 inch deep. No heat source present.</p> <p>Standard 75.400 was cited 117 times in two years at mine (117 to the operator, 9 to a contractor).</p>			
See Continuation Form (MSHA Form 7000-3a)			
9. Violation	A. Health / Safety / Other	B. Section of Act	C. Part/Section of Title 30 CFR
			75.400
Section II - Inspector's Evaluation			
10. Gravity			
A. Injury or illness (has) (s): No Likelihood <input type="checkbox"/> Likely <input checked="" type="checkbox"/> Reasonably Likely <input type="checkbox"/> Highly Likely <input type="checkbox"/> Occurred <input type="checkbox"/>			
B. Injury or illness could reasonably be expected to be: No Lost Workdays <input checked="" type="checkbox"/> Lost Workdays Or Restricted Duty <input type="checkbox"/> Permanently Disabling <input type="checkbox"/> Fatal <input type="checkbox"/>			
C. Significant and Substantial: Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>			D. Number of Persons Affected: 001
11. Negligence (check one): A. None <input type="checkbox"/> B. Low <input type="checkbox"/> C. Moderate <input type="checkbox"/> D. High <input checked="" type="checkbox"/> E. Reckless Disregard <input type="checkbox"/>			
12. Type of Action: 104(a)		13. Type of Issuance (check one): Citation <input checked="" type="checkbox"/> Order <input type="checkbox"/> Safeguard <input type="checkbox"/> Written Notice <input type="checkbox"/>	
14. Initial Action: A. Citation <input type="checkbox"/> B. Order <input type="checkbox"/> C. Safeguard <input type="checkbox"/> D. Written Notice <input type="checkbox"/>		E. Citation/ Order Number	F. Date: Mo Da Yr
15. Area or Equipment			
16. Termination Date			
A. Date Mo Da Yr 11/27/2012	B. Time (24 Hr. Clock) 1105		
Section III - Termination Action			
17. Action to Terminate: The accumulations were removed from the ram car.			
18. Terminated			
A. Date Mo Da Yr 11/27/2012	B. Time (24 Hr. Clock) 1105		
Section IV - Associated System Data			
19. Type of Inspector (activity code) FOI	20. Event Number	21. Priority or MII	
22. Signature			23. AR Number

MSHA Form 7000-3, April 09 (revised) In accordance with the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996, the Small Business Administration has established a National Small Business and Agriculture Regulatory Ombudsman and 10 Regional Fairness Boards to receive comments from small businesses about federal agency enforcement actions. The Ombudsman generally evaluates enforcement actions and relay such agency's responses to small business. If you wish to comment on the enforcement actions of MSHA, you may call 1-888-RUG (APRIL) 888-733-3247, or write the Ombudsman at Small Business Administration, Office of the National Ombudsman, 400 3rd Street SW, MC 2120, Washington, DC 20546. Please note, however, that you do not have a contractual relationship with the Ombudsman in addition to any other rights you may have, including the right to contest citations and proposed penalties and obtain a hearing before the Federal Mine Safety and Health Review Commission.

Part 100 High/Med/Low

Scenario



Assessment Criteria Categories	Current Part 100	Proposed Part 100 Scenario - Low	Proposed Part 100 Scenario - High
Likelihood	Unlikely	Unlikely	Unlikely
Severity	Lost Work Days	Lost Work Days	Lost Work Days
Persons Affected	001	Yes	Yes
Negligence	High	Negligent	Reckless Disregard

Assessment Criteria Points & Civil Penalty	Current Part 100	Proposed Part 100 Scenario - Low	Proposed Part 100 Scenario - High
Mine Size Points	15	4	4
Controller Size Points	10	4	4
History Points	10	10	10
Repeated Violation Points	17	9	9
Negligence Points	35	15	30
Gravity Likelihood Points	10	0	0
Gravity Injury Points	5	5	5
Gravity Persons Points	1	1	1
Total Points	103	48	63
Point Penalty	\$3493	\$1,400	\$20,000
Good Faith Penalty	\$3144	\$1,260	\$18,000
Additional Good Faith Penalty		\$980	\$14,000

Part 100

Example Citation

#5

Part 100
Gravity: Severity

Criteria Category



Proposed Rule

The proposal would reduce the four existing categories of severity of injury or illness to three: (1) No Lost Workdays; (2) Lost Workdays or Restricted Duty; or (3) Fatal. It would eliminate the existing "Permanently Disabling" category, which is often difficult to anticipate.

"Consistent with proposed changes for other criteria, MSHA believes that reducing the number of categories would simplify the Severity factor, resulting in improved objectivity and consistency in the enforcement process."

79 Fed. Reg. at 44503

Part 100
Gravity: Severity

Criteria Category



Comments

While MSHA believes this will improve objectivity, it is our view that it will only increase the subjectivity of the evaluation of the citation.

With increased subjectivity of the evaluation, this will lead to an increase in penalties and litigation, especially when the evaluation jumps to the next available selection because the previous selection is no longer available. Both are items which are contrary to the proposed rule's stated intentions.

Part 100 High/Med/Low

Scenario



Mine Citation/Order		U.S. Department of Labor Mine Safety and Health Administration	
Section I - Violation Data			
1. Date Mo Da Yr 08/26/2014	2. Time (24 Hr. Clock) 0920	3. Citation/ Order Number	
4. Served to		5. Operator	
6. Mine		7. Mine ID (Contractor)	
8. Condition or Practice		8a. Written Notice (103g)	

The CO alarm system is not being maintained in proper operating condition. When CO gas of a known mixture was applied to the first sensor outby the Unit #1 belt rail, the unit alarm failed to operate and signal the miners on the unit.

See Continuation Form (MSHA Form 7000-3a)

9. Violation	A. Health Safety <input checked="" type="checkbox"/> Other	B. Section of Act	C. Part/Section of Title 30 CFR 75.1103-5(a)(1)	
Section I - Inspector's Evaluation				
10. Gravity				
A. Injury or illness (has) (is): No Likelihood Unlikely <input checked="" type="checkbox"/> Reasonably Likely Highly Likely Occurred				
B. Injury or illness could reasonably be expected to be: No Lost Workdays Lost Workdays Or Restricted Duty Permanently Disabling <input checked="" type="checkbox"/> Fatal				
C. Significant and Substantial: Yes No <input checked="" type="checkbox"/>				D. Number of Persons Affected: 010
11. Negligence (check one): A. None B. Low C. Moderate <input checked="" type="checkbox"/> D. High E. Reckless Disregard				
12. Type of Action: 104(a)		13. Type of Issuance (check one): Citation <input checked="" type="checkbox"/> Order Safeguard Written Notice		
14. Initial Action: A. Citation B. Order C. Safeguard D. Written Notice			E. Citation/Order Number	
F. Date: Mo Da Yr				
15. Area or Equipment				

16. Termination Date	A. Date Mo Da Yr 08/26/2014	B. Time (24 Hr. Clock) 0940
Section II - Termination Action		
17. Action to Terminate: The wiring was repaired on the warning signal and it operates properly when tested.		
18. Terminate	A. Date Mo Da Yr 08/26/2014	B. Time (24 Hr. Clock) 0930

Section IV - Automated System Data		
19. Type of Inspection (activity code) E01	20. Event Number	21. Primary or MII
22. AR Name		23. AR Number

MSHA Form 7000-3, Apr 08 (revised) In accordance with the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996, the Small Business Administration has established a National Small Business and Agriculture Regulatory Ombudsman and 10 Regional Fairness Boards to receive comments from small businesses about federal agency enforcement actions. The Ombudsman annually evaluates enforcement activities and rates each agency's responsiveness to small business. If you wish to comment on the enforcement actions of MSHA, you may call 1-888-REG-FAIR (1-888-742-7427), or write the Ombudsman at Small Business Administration, Office of the National Ombudsman, 400 3rd Street, SW, MC 2175, Washington, DC 20416. Please note, however, that you will not be a comment with the Ombudsman in addition to any other rights you may have, including the right to contest citations and proposed penalties and obtain a hearing before the Federal Mine Safety and Health Review Commission.

Part 100 High/Med/Low

Scenario



Assessment Criteria Categories	Current Part 100	Proposed Part 100 Scenario - Low	Proposed Part 100 Scenario - High
Likelihood	Reasonably Likely	Reasonably Likely	Reasonably Likely
Severity	Permanently Disabling	Lost Work Days	Fatal
Persons Affected	001	Yes	Yes
Negligence	Moderate	Negligent	Negligent

Assessment Criteria Points & Civil Penalty	Current Part 100	Proposed Part 100 Scenario - Low	Proposed Part 100 Scenario - High
Mine Size Points	15	4	4
Controller Size Points	10	4	4
History Points	10	10	10
Repeated Violation Points	8	4	4
Negligence Points	20	15	15
Gravity Likelihood Points	30	0	14
Gravity Injury Points	10	5	10
Gravity Persons Points	1	1	1
Total Points	104	43	62
Point Penalty	\$8,421	\$6,000	\$15,000
Good Faith Penalty	\$7,579	\$5,400	\$13,500
Additional Good Faith Penalty		\$4,200	\$10,500

Summary



Peabody objects to the Proposed Rule on Criteria and Procedures for Assessment of Civil Penalties for the following reasons which will result in actions contrary to the stated objectives of the proposed rule:

- The proposed Negligence criteria raise several general concerns. First, the rule would eliminate the consideration of mitigating factors. Second, the “Not Negligent” definition is too restrictive relative to the definition of “Negligent”. If mitigating factors are not to be considered, the sole consideration in a negligence determination is whether the operator knew or should have known of the violative condition. Third, the elimination of “High Negligence” raises significant questions as to the impact on unwarrantable failure. The elimination of “High Negligence” under the proposed rule would result in either: (1) unwarrantable failures accompanied by findings of “Negligent” or (2) an increase in the number of Reckless Disregard findings to support unwarrantable failures.
- A concern involving negligence is the potential increase in 110© investigations. With the uncertainty of whether a “Negligent” designation could support an unwarrantable failure, there is a possibility that citations designated as “Negligent” will be investigated for potential 110© assessments.
- The rule will not result in earlier resolution of enforcement issues due to fewer areas of dispute. On the contrary, the rule has the potential to increase the number of disputed violations due to the latitude allowed to the inspector to select the severity levels in the areas of gravity and negligence from a reduced number of options.
- The proposed definition of “Occurred” is most objectionable. The proposed definition of “Occurred” would change the criteria from whether an injury occurred to whether an event occurred. This will result in an increase in “Occurred” designations and increased penalties and disputes. The proposed definition of “Occurred” would also increase subjectivity. Current practice for designating a violation as “Occurred” is based on the objective fact of whether or not an injury occurred. The proposed definition would be based on the interpretation of the inspector as to what an event is, as well as, whether or not the event is one that “could have resulted in an injury or illness.”
- The proposed rule increases the impact in areas of violation history and repeat violations. This is significant in the broad categories of 75.370(a)(1), 75.400, and 75.220(a)(1) violations as indicated on the following slide.

Summary



75.370 (a)(1)

- A spray at transfer points
- Number of water sprays on the continuous miner
- Quantity of air in the last open
- Perimeter mining process
- Measuring points for worked out areas
- Types of respirators
- Designated area locations
- Types of water filters

75.400

- Hydraulic oil on diesel equipment
- Trash at a stopping
- Coal accumulation at a belt tail piece
- Coal spillage on a producing unit
- Float dust on electrical equipment
- Diesel spill at a lube car
- Accumulations in cabs of equipment

75.220 (a)(1)

- Roof bolt installed torques
- Roof bolt spacing
- Pillar dimensions
- Perimeter mining process
- Maximum distance an ATRS can be set beyond the last row of roof bolts
- Roof sounding device must be supplied
- Supplemental roof supports
- Transfer tubes to insert resin into the drill hole
- Angle roof bolt installation procedures

Summary



Peabody objects to the Proposed Rule on Criteria and Procedures for Assessment of Civil Penalties for the following reasons which will result in actions contrary to the stated objectives of the proposed rule:

- The proposed rule is problematic in the field. When determining “Likelihood” MSHA inspectors and company escorts will have to speculate on what the event is. Is it the event at hand such as a bad roller or a potential event such as a belt fire. The definition of an event is non-existent.
- The proposed rule has the real probability to bring back the backlog of contested cases. The new backlog could go on for years while new and unresolved issues are settled.
- The proposed rule that pertains to the assessment of civil penalties exceeds the Secretary’s authority and infringes on the Commission’s authority. The Mine Act deliberately divides authority and for proposing and assessing penalties between the Secretary and the Commission.
- Peabody emphasizes safe work practices; open dialogue; establishing, following and improving safety standards; employee involvement in safety processes and recording; and the reporting and investigation of accidents, incidents and losses to avoid recurrence.
- Based on the National Mining Association Core Safety model, Peabody operations have incorporated risk management systems leading to stronger safety awareness and risk assessment.
- Safety is a way of life at Peabody, and our safety vision of zero incidents guides every action. Every employee commits to this vision and is accountable for safe behavior and practices at work and away. The company’s ultimate objective is to operate without an incident of any kind.