

October 20, 2006

Ms. Patricia Silvey
Acting Director
Office of Standards, Regulations and Variance
Mine Safety and Health Administration
1100 Wilson Boulevard, Suite 2350
Arlington, VA 22209-3939

SUBJECT: Proposed Rule on Assessment of Civil Penalties
71 *Federal Register* 53054 published September 8, 2006

Dear Ms. Silvey:

As a former mine health and safety law enforcement attorney for the State of Pennsylvania (1972-1975), as a law professor (1975-present)¹ and as one who has authored and edited numerous scholarly articles on coal industry issues for more than 30 years including the five volume treatise *Coal Law and Regulation*² --- I am in a unique position to objectively analyze the proposed Civil Penalty rule as well as criticisms of the proposal. I base my comments on 34 years of experience with coal industry and mine safety issues.

Newspapers have recently reported the public hearing comments of representatives of mining companies, asserting that higher monetary penalties are unnecessary. In evaluating coal industry public comments on this rule I urge you to recognize that mining companies and their trade associations have a enormous economic interests in low monetary penalties. They will profit if MSHA maintains the status quo and will argue to keep it. The current system does not have a deterrent effect and monetary penalties must be increased substantially in order to create the deterrent and change mine operators' behavior.

Assume without having had an opportunity to review the rulemaking *docket* that miners and their families, who have the most to gain or lose by MSHA's action, do not have the resources available to mining interests to participate in the rulemaking process. I hope you will consider the quality and reasoning of the comments submitted, not just the quantity.

Miners, especially not represented by a union, would place their jobs in jeopardy by commenting in support of the agency's proposal to increase monetary penalties for

¹ West Virginia University College of Law

² *Coal Law and Regulation* (included one volume dealing exclusively with coal mine health and safety).

mine operators. Because MSHA does not hear from individual miners about this proposal to increase penalties, does not mean that miners do not support it. After all that happened at the Sago Mine, the mine operator has received \$60 penalties for violations of their ventilation plan (6/6/06), ventilation controls (7/17/06), escapeways (7/12/06), escapeway maps and drills (7/12/06). I agree with MSHA's proposal to eliminate the single penalty.

Some argue that the penalty changes should not apply to metal and non-metal (non-coal) mines. All miners, whether they work in coal, salt, gold or stone mines deserve equal protection of their health and safety under the law. MSHA needs a strong penalty system to protect ALL miners equally.

Some mine operators, including members of the Mining Awareness and Resource Group (MARG Coalition), recommend that MSHA appoint an advisory committee to study the issue. I urge MSHA to reject such an approach as any advisory committee on MSHA's penalty system would be inappropriate if it included mine operators or their representatives, who have inherent and irreconcilable conflicts of interests..

Comments on Specific Sections:

100.1 Scope and Purpose

I endorse MSHA's statement that the purpose of monetary penalties should be "to maximize the incentive for mine operators to prevent and correct hazardous conditions." We disagree with comments submitted by mining companies asserting that monetary penalties do not have a positive effect on safety. There is substantial evidence in related fields demonstrating that increased penalties and enforcement deter unlawful behavior.

100.2 Applicability

No comment.

100.3 Determination of penalty amount; regular assessment

I agree with MSHA's proposal to delete the "single penalty provision" and thus evaluate all violations, including non-Significant and Substantial (S&S), for either regular or special assessment. In my view the end of the \$60 single penalty is long-overdue, and I agree with MSHA's proposal that every regular assessment, including those for non-S&S should consider the mine operator's history, negligence, and gravity of the violation. Violations are not "only paperwork" mistakes. One of the many lessons of the Sago disaster is that the mine operator did not accurately maintain safety records. As a result, mine management could not determine promptly which self-contained self-rescuers were expired, when the units were last inspected.

(a) General

No comment

100.3(b) Appropriateness of penalty to size of business

Calculation of “size of business” would mean that a violation at the Sago Mine would take into consideration all of the mines owned by International Coal Group, and not just those affiliated with Wolf Run Mining Company. The parent company for the purposes of considering “size of business” should be International Coal Group.

100.3(c) History of previous violations

I disagree with MSHA’s proposal to reduce the time period from 24 months to 15 months for considering an operator’s history of violations. I believe the 24 month period should be retained because at surface mining operations, which can be seasonal with respect to the mining operations itself and the nature of violations as well, a 24-month period is necessary to assess a mine operator’s history of safe or unsafe work practices.

(c)(2) I disagree with MSHA’s proposal to bifurcate standards for the purpose of determining repeat violations. If an operator is cited for a violation of 75.202 “Protection from falls of roof, face and ribs,” their roof and rib control system is involved. It should not matter for purpose of repeat violations whether they were cited under 75.202(a) or 75.202(b). If they were cited for a violation of any subsection of 75.202, another violation of that standard should be considered a repeat violation for the purpose of assessing the operator’s history. In addition, any operator who has a repeat violation of the same standard (e.g., 75.202) should not be eligible for any good faith credit.

100.3(d) Negligence

I agree with MSHA proposal to assign more penalty points for moderate negligence, high negligence and reckless disregard.

100.3(e) Gravity

I agree with MSHA’s proposal to increase the potential number of points assessed for gravity from 30 to 88. This change will give MSHA a significantly greater ability to assess higher penalties, in particular for violations with a high likelihood of causing harm and potential to cause severe injury or illness. This this change is reasonable and necessary.

100.3(f) Demonstrated Good Faith for Abating Violations

I agree with MSHA's proposal to reduce from 30 percent to 10 percent the "credit" given to mine operators for abating a hazard in a timely manner. Further, I recommend a further change: providing no "credit" for timely abatement. Mine operators should not have permitted the hazard to exist in the first place; they are already required by law to make a timely correct of the violation. Mine operators should not be given any reduction in penalty amount for doing what they are already legally required to do?

100.3(g) Penalty Conversion Table

I agree with MSHA's decision to increase the minimum penalty amount from \$72 to \$112, but I disagree with comments submitted by officials from mining companies who state it is inappropriate to set a floor of \$112 for non-S&S and "mere paperwork" violations. Keeping accurate records on equipment, safety checks, and training are not "merely paperwork," but instead are a reflection of a company's commitment to a comprehensive safety and health program. A mining company That is sloppy with recordkeeping, demonstrates its' disregard and disrespect for the health and safety of its employees.

100.4 Unwarrantable failure

I recognize this change is required by the Mine Improvement and New Emergency Response Act of 2006 (MINER Act, Public Law 109-236) and requires MSHA to assess a minimum penalty of \$2,000 and \$4,000 for citations and orders issued under sections 104(d)(1) and 104(d)(2) respectively, of the Mine Act. I urge MSHA to interpret this provision in the context of its regular or special assessment point system. That is, the minimum \$2,000 or \$4,000 penalty should not be the default, but rather, after considering the points, the penalty assessed should be either the minimum or the point-converted amount, whichever is greater. Unwarrantable failures must be taken seriously by mine operators and MSHA.

100.5 Determination of penalty amount; special assessment

I agree with MSHA's proposal to remove the list of eight categories of violations to which special assessments may be applied. MSHA should not be restricted by a specific list of categories when the safety and health violations or the history of the mine operators' performance deems that a special assessment is in order. I further agree that there are circumstances in which a regular assessment would not provide an appropriate penalty and therefore a special assessment is necessary. However, I do not agree with MSHA's suggestion that the number of special assessments should necessarily be reduced. I encourage MSHA to consider special assessments for all manner of serious violations --- not only when a fatality has occurred. Special assessments should so as to prevent serious injuries and fatalities, not just as a penalty after a miner has lost his life because of his job.

100.6 Procedures for review of citations and orders; procedures for assessment of civil penalties and conferences

I agree with MSHA's proposal to reduce the time, from 10 days to 5 days, to request a meeting to discuss a citation or order or to submit additional information to MSHA. A mine operator does not need 10 days to decide whether to request a meeting with MSHA; 5 days is sufficient. I agree the penalty system would be enhanced if the time between receiving a violation and receiving the penalty amount is shortened.

100.7 Notice of proposed penalties; notice of contest

No comment

100.8 Service

No comment

In sum, the proposed civil penalty regulatory changes are, with the exceptions I have noted above, calculated to effectuate the Congressional goal of deterrence of mine operator violations which can endanger the health and safety of miners.

Thank you for the opportunity to comment.

signed

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