United Mine Workers of America
Comments
on the
Mine Safety and Health Administration's
Proposed Rule
Civil Penalty Assessment

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The United Mine Workers of America (UMWA or Union) is pleased to have the opportunity to offer these comments on the Mine Safety and Health administration's (MSHA or Agency) *Criteria and Procedures for Proposed Assessment of Civil Penalties; proposed Rule*. The Union will attempt to place its comments on the record in a manner that corresponds to the Agency's writing of the Proposed Rule.

The Union would like to, once again, offer its condolences to the families and friends of the miners who have lost love ones in the recent mining tragedies. It is truly unfortunate that the mining industry that employs these men and women and the regulatory agency charged with protecting their health and safety fail to act until major mining disasters occur. The miners of this nation have witnessed countless years of apathy and appeasement on the part of MSHA. Too often MSHA struggled to meet the needs of industry while ignoring the plight of miners. The recent tragedies are the unfortunate result of MSHA's failed policies. The Union intends these comments to be the beginning of a new and sustained push so the Agency will finally address the needs of miners.

The UMWA is not pleased with this attempt by MSHA to revise the civil penalty structure and hold mine operators accountable for violating the nation's mining laws. This proposed rule is geared more to protecting the Agency from liability than protecting miners and holding operators liable for violating the law. The UMWA will do all in its power to reverse this trend a force MSHA to fulfill its Congressional mandate, to protect the health and safety of the miner.

The Union and its members have attended several of the public hearings offering their views on the proposed regulation. During these hearings it became apparent that the proposal was extremely difficult to understand by both labor and industry. Because it raises more questions than answers, the Union would suggest that MSHA reissue the rule in a new format that succinctly outlines the intent and application of the Agency's assessment program.

Because of the confusion created by language contained in current proposal the Union and most health and safety advocates testified that the Agency was eliminating the largest segment of it enforcement program, the single assessed penalty. Based on the explanations offered by several members of the panel the Union is now satisfied with this component of the proposed rule. However, the language of the proposal must be changed to reflect the explanations they offered.

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The Union, based on the panel's assertions, now understands the proposal to mean that the citations currently issued as non significant and substantial are not assessed through the current assessment mechanism. Rather, they are issued as a "flat rate" $60.00 penalty or single assessed penalty. The new proposal will eliminate the single assessment category and instead require that all citations issued are assessed based on the "regular" assessment process. This should, according to MSHA, increase the baseline penalty and induce compliance by mine operators.

In theory, the Union can support such a starting point if the explanation is accurate. However, we still believe the baseline fine is too low to motivate operators to comply with the law.

From this point the Union's comments will track the outline of the "Proposed Rule" to the extent practical.

Part 100 § 100.1 Scope and purpose

> The Agency states "The purpose of this part is to provide a fair and equitable procedure for the application of the statutory criteria in determining proposed penalties for violations, to maximize the incentives for mine operators to prevent and correct hazardous conditions, and assure the prompt and efficient processing and collection of penalties."

The Union does not find that to be an accurate assessment of this rule. The U.S. Congress recently instructed MSHA to revise its penalty assessment program in a way that would force all mine operators to comply with the Mine Act and regulations. The Agency, contrary to this directive, has offered a plan that separates the assessment program into several different and inequitably applied schemes. The Agency's proposal will permit small mine operators to avoid appropriate fines for violating the law, while holding large mine operators to much higher standards and penalties. The Agency also proposes tolerating a more relaxed set of criteria at metal/non-metal operations. This approach does not enhance the health and safety protections for the nation's miners and will not force large segments of the industry, that obviously need additional inducements, to take necessary action to comply with the law.

Part 100 § 100.2 Applicability

The Union understands this to be the language requiring all penalties be assessed through the regular assessment process. As stated previously, the Union does support such a method of assessment, but believes the baseline penalty is too low to demand compliance.

The Agency must consider if the potential for a penalty is sufficient to force an employer to correct an existing problem prior to the arrival of an agent of the Secretary. In particular, at small operations that do not receive frequently enough inspections, management will not be induced ta take a proactive approach to health and safety based on this proposal. In real terms does this cause the small

operator to replace a worn tire when it becomes hazardous without intervention by the Agency? Or on the other hand will it permit them to continue, as in the past, to operate the hazardous equipment because the ultimate fine will be $100.00 and a new tire costs $20,000? The penalty must fit the violation and in some instances that requires greater enforcement sanctions by MSHA, including removing such hazardous equipment from service until it is repaired, whether at a large or small operation.

Part 100 § 100.3 Determination of penalty amount; regular assessment.

Sub-part (a) lists the six criteria forth in the Mine Act for assessing penalties, these are:

(i) The appropriateness of the penalty for the size of the business of the operator charged;
(ii) The operator's history of previous violations;
(iii) Whether the operator was negligent;
(iv) The gravity of the violation;
(v) The demonstrated good faith of the operator charged in attempting to achieve rapid compliance after a notification of a violation; and
(vi) The effect of the penalty on the operator's ability to continue in business.

The Union believes the Agency's 30 years of experience in gathering information on mine operator violations and assessing penalties is sufficient to apply the mandate of Congress in a far more targeted manner.

Based on this information MSHA should be able to determine what operations require special attention. It has become clear that small mines generally do not offer their miners the level of protection as larger operations. To some extent the Agency has identified these areas of special concern, initiating the tri-state initiative and the small mine department. The Agency must now use this knowledge to more effectively protect miners employed at small mines.

The Union believes the baseline penalty for all citations of a similar nature should be identical without regard to any mitigating factors. The Agency should then consider increasing the size of the penalty based of the immediate conditions of the violation. The appropriate criteria should include:

a) The operator's previous violation history (over the past 24 months);
b) The degree of operator negligence;
c) The gravity of the violation; and
d) The number of persons who were or would have been affected by the condition had it been permitted to continue to exist.

There should be no circumstances or factors that are permitted to mitigate the amount of the assessment. This must include giving no consideration to the size of the penalty in reference to the size

of the operator, any demonstration of good faith to correct a cited condition or the affect on the operator ability to continue in business. The Union is convinced that efforts to create a structure that induces operator compliance with MSHA regulations would be detrimentally impacted by the application of these factors to the civil penalty scheme for the following reasons:

A) Considerations with regard to operator size when determining penalty amounts are flawed and create an unfair bias in the system. The practice of permitting lower fines for operators based on the size of the mine or mining company reinforces the idea that poor practices and less than adequate compliance are acceptable for "small" operators. This enforcement scheme reinforces the stigma that the smaller operators are either not required to abide by the letter of the law and therefore may subject their employees to a lesser degree of safety, or they cannot be expected to understand and follow the requirements others in the mining community must. The duel enforcement scheme must be stopped and all operators must be required to abide by all regulations or suffer the same initial penalty.

   It has been clear for some time to all parties that the assessment scheme has favored small operators, by requiring them to pay lesser fines than large operators for the same violations. This two-tiered penalty system is further exacerbated under the new assessment proposal. While the Union has advocated increasing penalties as a method to increase compliance, it must be stated that we support an even-handed approach that requires penalty assessments to be based on the particular violation, not <u>other</u> factors. The proposal does not do that and will <u>not</u> increase compliance among the operator group who should be most targeted, the small operators.

B) Credit for good faith abatement efforts offer a deterrent to on-going compliance. The operators' focus with regard to regulatory compliance must be pro-active in design. Offering a reward for correcting a condition that is already in violation of a regulation represents bad policy. The Union believes that the initial fine should be firm and no reduction should be offered with regard to abatements efforts.

C) MSHA should not be in the business of determining if penalties it assesses will result in a loss of business or a default of the business in violation. This is true because MSHA's concern with business survivability is inconsistent with enforcement. In fact the opposite should normally be true. Secondly MSHA must acknowledge that accounting practices can make a financially healthy operation or company look otherwise.

The Union believes that these changes in the current and proposed regulation are necessary in order to enforce the Mine Act and regulations in an evenhanded and compliance driving manner.

The Union would also point out that the Agency has the ability, as it has demonstrated in the past when it sanctioned belt-air despite the statutory prohibition to adjust the statutory requirements of

the Mine Act. While the Union does not advocate such a practice in most cases (and would reiterate its objections to the use of belt air and alternate seals) a change in the Agency's treatment of small mines and the affect of penalties on the operators ability to remain in business would be substantially different from other deviations. Unlike the others this practice would strengthen enforcement and offer a greater degree of protection to miners.

Part 100 § 100.3(b) Size of coal mine

(Table 1)

This section is flawed. It will either completely exempt the smaller operator or require lesser fines, no matter what the violation, simply because of the mine size.

This presents two unique problems. First despite the serious nature of a violation, the operator, based on nothing more that the annual tonnage produced, automatically is held to a lower assessment standard. This does not induce compliance or protect miners at these operations. Secondly, the size of a particular mine is not necessarily indicative of the overall size or financial resources of the operator. Small mines are very often subsidiaries or contract operations of larger employers.

Offering what amounts to a "sale price" because of mine size is inappropriate. Violations must be cited and assessed in an even-handed manner. Compliance with the nation's mining laws should apply equally to all stakeholders. This includes equal assessments of penalties. The Union would compare this to enforcement of other laws administered at varies levels of government. Speed limits on the nation's highways carry a penalty structured to fit the violation. Credit or reductions are not offered based on type of vehicle or the ability of the operator to pay. The Agency must take that approach here to protect all miners.

The proposed regulation states, "...consistent with the Mine Act's requirements to consider size of the operation when assessing penalties. MSHA believes penalties under assessed under the existing regulations are often too low to be an effective deterrent for noncompliance at some of the largest operations."

The Union agrees with the premise of this statement and supports issuing penalties that are significantly greater than is currently the case. However, to tie this increase in the penalty to "large operators" is inappropriate. The Agency has been aware for some time the unique health and safety problems that inherently plague the small operators. The Union is convinced that any operator who uses the small mine size and therefore lesser resources to insure compliance as an excuse to either avoid the application of the Mine Act or pay a lesser penalty should not be permitted to remain in operation.

Miners at all mines regardless of size must be required to comply with the law, no one should be permitted to opt out or be assessed at a lower penalty for noncompliance. The Agency created the

small mine division within its internal structure because of the higher rates of noncompliance, increased accident rates and greater number of fatal accidents at these operations in proportion to the overall workforce. The penalty scheme must take these issues into account. The Congressional mandate to take the size of the operation into account has been in place for many years, (the legislative history does not dictate how the Agency is to view small mines or enforce the Mine Act at these operations) the data obtained during that time should indicate these small operators need greater attention than do some others. Enforcement and penalties must be proportional to the accidents and injuries attributable to the portion of the industry that exposes workers to the greatest risk.

The Agency has the ability to view mine size in a unique way according to the Mine Act, the Agency has been doing it backwards for too long.

Size of Controlling Entity (Table II)

The Union does not object inherently to the use of this information when determining the penalty to be assessed. However, the UMWA would caution that by doing so the Agency will be creating a system that could be beyond its ability to administer. The nature of the industry is so fluid that tracking such information may be all but impossible.

The Agency has already expressed its desire to eliminate certain requirements of the current regulation because they are too labor intensive and burdensome. The Union believes undertaking this initiative may prove to be more challenging than the Agency understands. We would be interested in learning from MSHA exactly how it intends to enforce this requirement and manage the data it generates.

Part 100 § 100.3(c) History of previous violations.

The Union opposes MSHA's proposal to reduce the time frame for reviewing a mine's history from 24 to 15 months. This time frame is too short and will not permit an adequate assessment of the conditions and operation of the mine. It should be understood that to the extent higher penalties may be assessed, the new fine scheme will likely generate more conferences, appeals and legal actions by operators. These actions will slow the final dispensation of many citations, thereby excluding them from consideration of the mine's "history" if the relevant period is reduced as proposed. Shortening the time frame for inclusion in the history will further limit the amount of available information, lowering assessments even though the operation may have many prior citations.

Part 100 § 100.3 (c)(1) Total number of violations.

MSHA's decision to base this calculation on the number of violations per inspection shift is inappropriate based on the Agency's current inspection practices. The Agency must first reevaluate these practices and insure that inspections occur with the same regularity and intensity at all mining operations. The number of inspection days at small mines should be proportionally equivalent to the

time spent at large operations. The Union does not believe this to be the current practice and testimony from several mine operators has reinforced this understanding.

The Union does take exception to MSHA assertion that, "...small operations are not, however, necessarily the ones which MSHA is targeting in this aspect of criteria... MSHA believes small operators should not receive points under this aspect of the criteria." The Agency should not create policies or regulations that specifically include or exclude any segment of the industry, and the Mine Act does not support such selective enforcement. The Agency claims to recognize the unique problems at small operations, but offers them a "pass" on enforcement activity. This type of action will encourage a climate of noncompliance at these operations.

Mine operators must all play by the same rules, and as a regulatory agency MSHA must apply its enforcement efforts in a non-biased manner, requiring all mines to comply with the Mine Act equally. The Agency must reevaluate this part of the rule and include small operations in this aspect of the penalty scheme.

From a practical aspect mine inspections, regardless of a mine's size, should take the same number of inspection shifts. In particular, mmu's that operate the same basic type equipment at separate operations should require the same time to inspect. A mine with 400 employees should receive the same inspection proceeders as one with ten employees an the process should take the same number of days to complete. The Union understands that the larger operation will take longer to inspect in toto than the smaller, the time spent at each should be proportional.

Therefore, the Union would recommend that a system be put in place that insures inspection days for all mines regardless of size are proportionally equal.

Part 100 § 100.3(c)(2) Repeat violations of the same standard.

The Union supports the Agency's decision to include additional points for repeat violations of the Mine Act. The Union believes this will be a significant aspect in forcing operators to comply with the law. Because it is so important to the overall penalty scheme, the Agency must look at all citations issued, including non S&S. In so far as MSHA's data shows 2/3 of all violations are non S&S, it would be counterproductive to eliminate them when calculating an operator's overall effort to comply with the law.

The Union would, however, oppose the Agency's proposal to dissect each particular regulation into subparts when assessing this component of the assessment program. Many of the regulations in 30 CFR pertaining to mining are very specific and to tie a repeat program to such a narrow evaluation would dilute its force. For instance, violations for combustible materials, 30 CFR Part 75.400 should not need to be specific as to the nature of the combustible material when considering its repeat status; paper, coal dust, wood and other materials should not be looked at individually, but combined to enhance penalties for multiple violations.

Part 100 § 100.3(e)(3) The number of persons potentially affected.

For some time, the Union has sought to refocus the Agency's attention when making determinations on this particular matter. The Union has seen far too many citations issued that indicate one person was affected when it was obvious that many more were affected.

For example, the Jim Walters #5 Mine disaster in 2001, the Agency listed most of the citations, including those determined to have contributed to the explosion as having affected only one person. The Agency determined this despite the fact that over 30 miners were underground at the time of the explosion and thirteen were actually killed. The fact that MSHA showed only one person as potentially affected demonstrates a disconnect between MSHA and the reality in the industry that must finally be corrected.

The Union has always supported the use of this criteria in determining the severity of the penalty. It is clear the Agency has an opportunity to use this tool effectively with the writing of this proposal, however, unless it is are written differently there will be no change in the penalties despite the new tables. The Union would request MSHA revisit this section and offer a concrete method for determining who would potentially be affected by a violation. Violations should be deemed a repeat if the same overall regulation was previously cited (without being limited to the same subsection) within the prior 24 months.

Part 100 § 100.3(f) Demonstration of good faith.

The Union has expressed its opposition to this aspect of the assessment proposal in this document and at the public hearings. The mining community has had more than 30 years to acclimate itself to federal regulations and take the necessary action to comply with the law. Any failure to do so cannot be determined to be "accidental or the result of confusion", therefore, no reductions should be offered. The citation and its penalty must be upheld as initially written and assessed, if enforcement is to be enhanced.

The Union would also like to address comments by several operators during the public hearings that reducing the reduction for "good faith" is punitive and therefore ineffective. This is certainly one of the most disingenuous arguments ever placed in the record. Operators routinely punish miners, either monetarily or with loss of work, for violating mining laws or company policy. They should not be afforded the opportunity to argue these two competing ideals with impunity. They cannot argue it is unfair to their business interests when they apply it to their miners.

Part 100 § Part 100.3(g) Table XIII - Penalty conversion table.

The Union agrees with the Agency's decision to increase the number of points that can be assigned to a citation. However, based on the exclusions and preferential treatment afforded to small operators, the point system (and therefore the fine assessed) will be disproportionally higher for the

larger operators.

The Agency must identify all areas in the proposed rule that are discriminatory, including those identified in these comments, and change the proposed language so that the fines apply equally to all operators.

Part 100 § 100.3(h) Effect on operator's ability to continue in business.

The Union vigorously opposes consideration of an operators ability to continue in business. The Agency must focus on even-handed enforcement that protects the health and safety of all miners, regardless of the size of the mine they work at, or its financial-footing. An operator that cannot afford to produce his product in compliance with MSHA regulations should not operate at all: the miners of this nation cannot afford to work at operations that do not meet MSHA's regulation in their entirety.

Part 100 § 100.4 Unwarrantable failure.

The Union supports the automatic minimum fines for unwarrantable failure orders. We understand and expect that higher fines will be assessed in uniformity with the point system and this provision simply sets a floor for all unwarrantables.

Part 100 § 100.5 (a).

The Agency is proposing to, "Remove the limit on the types of violations that MSHA will review for possible special assessment by removing the list of specific categories." They also state that, "MSHA has the discretion to waive the regular assessment formula if it determines that conditions warrant a special assessment for any type of violation." At first blush this would indicate the Agency has a desire to evaluate more violations, based on the conditions discovered, for special assessment. However, the following statement contradicts MSHA assertions. It states, "The existing list of eight categories, although not intended to be exclusive, resulted in a time-consuming and resource-intensive process." Moreover at some of the hearings MSHA representatives asserted that the Agency's intent "was to actually reduce the number of special assessments" and ...looking at the 2005 penalties, there were 3,189 special assessments. We estimate that under this proposal that number would decline from that to 491..." Salt Lake City Hearing, October 4, 2006 at pp 29, 32.

Since the Agency offers no evidence to support its allegations that the process is burdensome the Union is being asked to accept MSHA's determination without question. The UMWA is not willing to make such an accommodation. The eight categories now referred to for special assessment consideration are all very important and should not be deleted. The UMWA opposes this proposed change as unwarranted and unwise.

Part 100 § 100.5(c).

The Agency has stated in the preamble that "If the operator does not abate in the time required MSHA may:"

A) Extend the abatement time;
B) Issue a withdrawal order; or
C) Fine the operator up to $6,500 per day until the condition is corrected.

The Union does not believe any abatement time should be extended, unless extreme condition prevented operator compliance. Rather, a withdrawal order should routinely be issued and <u>only</u> work to correct the cited condition should be permitted when the abatement time is not met. The maximum penalty of $6,500 should also be assessed while the abatement work is being done and applied every day until work all such is completed.

In this proposal the Agency has not taken full advantage of the regulatory authority Congress has granted. The use of increasingly greater sanctions to force compliance by some operators is necessary. The Agency must utilize all these tools if it is to induce compliance by the mining community. MSHA's determination to minimize the use of withdrawal and closure orders sends a message to mine operators that the Agency will not hold them accountable for violating the law.

Part 100 § 100.5(f).

The MINER Act of 2006 requires "prompt" notification, "within 15 minutes" from the mine operator to MSHA in the event of a death or an injury or entrapment that has a reasonable potential to cause death. The proposed rule would permit a penalty of not less than $5,000 or greater than $60,000 for failure to notify.

This notification is critical to initiating rescue and recovery efforts. While the Agency has proposed in the regulation the language adopted by Congress, it is important to understand that the non- or late notification of such an event was meant as a deterrent. The Union understood Congress to be seeking the maximum penalty of $60,000 when notification does not occur as prescribed. Therefore, it must be understood that only extreme circumstances should be considered mitigating factors.

Part 100 § 100.6(b).

The UMWA opposes MSHA's proposal to reduce the number of days within which it may request to conference a citation. The right to make such a request is an important component of the assessment process. Because of this, miners' representatives must take sufficient time to discuss the citations with other representatives and miners who have first hand knowledge of the condition cited. These efforts may take time and require additional investigation on the part of miners' representatives. Therefore, shortening the time from ten to 5 days could negatively impact miners health and safety. Also, it could induce miners and operators to seek more conferences because the would have to

routinely request conferences whenever the deadline would approach before they could evaluate the citation on its merits

Further and contrary to MSHA's assertions, the time reduction will not result in citations moving to final assessment much faster, as the initial conference request period is only one small part of this process. The proposed change would have little positive effect on the overall procedures.

Part 100 § 100.7

The UMWA as well as many health and safety advocates have expressed their concern regarding the collection of assessed penalties. There are numerous listings on MSHA website of mine operators whose fines are delinquent, yet they continue to operate with impunity.

The Agency has the opportunity to create as system within this rule to correct this problem. It is not sufficient for MSHA to state that after 90 days uncollected fines are sent to the U.S. Department of the Treasury as required. It would appear from MSHA's previous action regarding these matters that they do not feel compelled to take any further action. This is certainly contrary to the statements by MSHA that its intention is to induce operator compliance. Uncollected fines sends the message to all mine operators that the Agency is not serious about enforcing the Mine Act.

The Agency must include within this proposal a mechanism to force mine operators to pay the assessed penalty. MSHA, once learning that an operator is delinquent or in default of the fine must move to halt all mining activity at the operation. This process could be accomplished by issuing a closure order or repealing approval of the mining plans. Operators who do not pay their fines must not be permitted to continue in operation. This type of enforcement action clearly falls within the scope of this proposed rule.

To this point in calendar year 2006, forty-two miners have died in the nation's coal mines, a loss of life not seen in the industry since 2001(unfortunately there are still two months remaining). The Union has expressed it deep concern in recent years that; lax enforcement, insignificant penalties and regulations geared to production rather than health and safety would require miners and their families to pay an intolerable price. The recent mining tragedies are indicative of an administration more concerned with profits than protection and a regulatory agency less concerned about miners health and safety than production. The Agency has been charged once again by Congress to correct the health and safety problems of the mining industry, unfortunately this proposal does not meet that mandate.

The facts are apparent to everyone, the mining industry must be closely regulated. It is clear that, left to their own devices, mine operators cannot be trusted to protect miners. Unfortunately, a closer look will tell a more chilling story. Miners who work for "small operators" are much more likely to suffer a debilitating injury or death than those who work at larger operations. However, the Agency prefers to ignore this fact. Instead of holding <u>all</u> operators equally culpable for the accidents and fatalities at their mine they choose to ignore and reward small operator for their lack of compliance.

This is unacceptable.

Since January 1,2002 a total of 149 coal miners have lost their lives working in the industry. Unfortunately, a disproportionate number have died in small mines, the very segment of the industry MSHA is seeking to shelter from enforcement in this proposed rule. The Union believes that based on the lax reporting requirements of MSHA national fatality rates are the only reliable numbers the Agency can review the determine the condition of a mine.

According to MSHA's own data 69 miners have died in mine that employ over 50 workers, 43 have died at mines employing between 21 and 50 workers and 37 miners have perished in mines where the workforce is less than 20. Based on this data (90 fatal accidents at mine employing fewer than 50 workers) it should be apparent that while the entire industry is not meeting the minimum threshold for protecting miners, small operations are extremely dangerous. Therefore, the Union demands that the Agency abandon its proposal to appease small mine operators with a lesser enforcement program. Miners must be certain that the protection demanded by the federal government applies to each of them, no matter where they are employed. The Mine Act must be applied without regard to any outside factors; mine size, hours worked, good faith and other considerations should not be considered.

The "goal" is to insure that every miner can go to work each day to support their family and more importantly return home at the end of the shift to be with their family. This proposal does not do that.