
From: Roger Metcalf [mailto:rlm42@aol.com]
Sent: Friday, April 15, 2011 6:27 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: RIN 1219-AB73

2011 APR 15 P 6:31

Dear Sir/Madam:

Please see our letter below regarding RIN 1219-AB73 - MSHA Proposed Rule on Pattern of Violations (POV)

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April 15, 2011

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Mine safety and Health Administration
Arlington, Virginia

Re: RIN 1219-AB73 - MSHA Proposed Rule on Pattern of Violations (POV)

Dear Sir/Madam:

We have been in the aggregate producing business for over 60 years. We have had our aggregate producing equipment inspected by MSHA inspectors since they decided to expand from the coal industry into the aggregate industry. On a side note, we do not believe our safety operations should be assessed under the same rules as the coal mining industry since they are so vastly different from our industry, with the exception of maybe a coal strip mine. We do not operate underground. We believe that the accidents and fatalities that have occurred in underground mines have caused increased scrutiny, and rightly so on underground mining, but surface mining such as ours has not experienced the accidents and fatalities to the magnitude of underground mining. We believe this difference in mining has made it difficult for MSHA to apply a "standardization" when it comes to inspections, the application of codes, and issuance of citations for violations.

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This creates a real problem for the mine operators because every inspector seems to have a different idea of what the code or standard should be. Rather than be a professionally conducted and informative inspection, each individual inspector causes great disruption to operations and seems to operate based on personal opinion rather than concrete codes. For instance, one inspector will "approve" the guarding on a conveyor but the next inspector tells us that it is not adequate and will give us a citation. There are no specific standards as to what is acceptable and what is not. When we have complained about this lack of standardization, we have been told by the supervisors that they cannot be responsible for their inspectors' interruptions. We have also been told that if we did not receive a citation/violation from the previous inspector, that we should have. This is the main reason why we are against the Proposed Rule on Pattern of Violation (POV) as we can be cited multiple times because a new inspector has a different opinion on what is acceptable for guarding. This has actually happened to us. We recently received a citation for a guarding not being acceptable. The fine on that citation amounted to \$4,689.00. In the past a guarding citation would typically be a fine of approximately \$200.00 to \$300.00. The fine was increased 15 to 23 times the normal amount because MSHA claimed we had a POV. However, the only reason we had a POV was because MSHA kept changing the rules as to what was acceptable guarding. This is the problem with a POV penalty, it is totally in their discretion. If there was some standard that said if you guard this way you will be deemed safe and will not be cited, we could live with that kind of a system because there would be a standard and not be at the discretion of the inspector.

We have always operated in a safe manner and want to continue to do so. There is absolutely no way that we want any of our employees to be injured. Our employees, no matter what capacity they are employed in, have always had strict orders (no matter how small the unsafe condition is), that is they see an unsafe condition, to shut down the whole operation until repairs can be made. Our company is not unsafe now and never has been in its 60+ years of existence. Again, we are always deeply concerned about the safety and health of our employees. The problem comes from that we feel we have provided a safe environment for our employees to work in but MSHA believes that their ideas about how to provide a safe environment are better. Let me give you another real life example. The purpose of guarding should be to prevent accidental contact with a moving part. We had an inspector cite us on a guarding point where he lay on his back and reached up under a conveyor and said he can make contact with the moving part. This should not have been a citation because no one would "accidentally" lay on their back and stick their hand up that far to reach the moving part while the conveyor is running. And again, the guarding that we had on that conveyor had been like that for many years and no previous inspector had a problem with it. This makes the situation totally out of our control. How can we be expected to stay in compliance with any safety standard if that is how the inspectors operate?

From our standpoint, it appears that the impetus behind MSHA's motives may be financially motivated rather than one that is motivated by safety concerns. According to information we have received, the number of penalties increased from 128,000 in 2005 to 199,000 in 2008 and the dollar amount of penalties increased from \$25,000,000 in 2005 to \$194,000,000 in 2008. That is an increase of almost 8 times the dollar amount in 3 years. It is our opinion that in the past 10 years or so, what was intended to be beneficial in terms of safety for the industry, has expanded into an expensive nightmare. Our non-crushing operations, our vendors, and our customers have been pulled into this bureaucratic oversight, thus causing considerable turmoil for all involved. If MSHA's concern was really for safety on not for more dollars, they would still be operating the way they did 30 years ago when at the beginning of each year, before we started the crushing plants after winter shutdown, we would call MSHA for an inspection to make sure everything would be in compliance. We are not allowed to do that anymore. When we have asked MSHA about that, we were told they can't do that anymore. If they come out to your site and see anything not right, they are required to issue a citation – even if you ask them to come out and inspect your equipment. How is that helping to improve safety if that is their real goal?

In summary, we are against this rule change and any rule change that gives MSHA any more power than it already has. We believe they are totally out of control now. A small aggregate operation on the west coast is most likely four to five employee, and we can guarantee this proposed rule change will have a significant economic impact on those businesses. In MSHA's summary of their POV Rule, they also stated that they believe the new rule will not have a significant economic impact on small mines. We're not sure how they define a significant economic impact but a \$4,689.00 penalty for one guarding citation is a very significant impact to this small mine. With this proposed rule change, MSHA will be able to shut down small operations because the operators can't afford to pay the excessive fines that can be manipulated by MSHA by just writing multiple citations for issues like guarding that are totally at their discretion and then claim the operator has a POV problem.

We would welcome the opportunity to have further discussions with you on this subject.

Sincerely,

Tigard Sand & Gravel LLC

Anthony J. Urbanek
President