
From: Dave Heidorn [mailto:dheidorn@asse.org]

Sent: Monday, April 18, 2011 3:18 PM

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To: zzMSHA-Standards - Comments to Fed Reg Group

Subject: ASSE Comment on Pattern of Violation Proposed Rule (RIN 1219-AB73)

Please include in the record of MSHA's Proposed Rule *Pattern of Violation* (RIN 1219-AB73) the attached comments of the American Society of Safety Engineers.

<<041211MSHAPOVcomment2 esig.docx>>

Thank you for your time.

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AB73-COMM-75



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April 18, 2011

Joseph A. Main
Assistant Secretary of Labor
Mine Safety and Health Administration
c/o Office of Standards, Regulations, and Variances
1100 Wilson Boulevard, Room 2350
Arlington, Virginia 22209-3939

By email to zzMSHA-comments@dol.gov

RE: Proposed Rule *Pattern of Violation*;
RIN 1219-AB73

Dear Assistant Secretary Main:

On behalf of the members of the American Society of Safety Engineers (ASSE) engaged in helping miners return home safe and healthy from their work each day, we respectfully ask that you consider the following comments offered in response to the Mine Safety and Health Administration's Proposed Rule *Pattern of Violation* (76 Federal Register 5719; February 2, 2011).

Our members agree that the provisions in 104(e) of the Mine Safety and Health Act (Mine Act) concerning pattern of violations (POV) are important in allowing MSHA the flexibility to identify mines with a recurring pattern of violations that lend justification toward a higher degree of oversight. POV allows for greater resource utilization on the part of the agency and, when

properly applied, satisfies the regulatory intent of pursuing those mine operators who are not committed to protecting workers while establishing an effective incentive for other operators to avoid a pattern of violations that might land them on this list.

Much of the direction MSHA proposes to take in strengthening its POV program is positive. ASSE would like to support MSHA's efforts through proposed Section 104.2 to specify the general criteria MSHA would use to identify mines with a pattern of violations. Developing a clear quantitative rubric can help operators understand the agency's expectations and make adjustments in their efforts to provide safe and healthy workplaces. ASSE also would like to support MSHA on its effort to provide transparency in the POV program in Proposed Section 104.2(a). With specific criteria, posting to the Internet those mines that have been found to have a pattern of significant and substantial (S&S) violations would give operators, miners, families and interested groups access to a mine's performance with regard to attaining or working its way off of POV status. With open access to such information, management can develop plans that will correct their deficiencies before being placed under a POV, and interested parties can ask educated questions or offer targeted recommendations. Transparency not only adds credibility to the process, it also creates an avenue for interested parties to become involved in improving conditions in the mine. However, as our following comments detail, the effectiveness of this effort will depend on criteria that are meaningful and based on MSHA approaches that both encourage operator commitment to safety and health and provide tough enforcement for those who ignore that commitment.

In general, ASSE is not opposed to expanding the enforcement actions that can be considered in determining a POV. Considering a mine's S&S violations [Proposed Section 104(a)(1)], closure orders under Section 104(b) [Proposed Section 104.2(a)(2)], unwarrantable failure citations and withdrawal orders issued under sections 104(d)(1) and (d)(2) [Proposed Section 104.2(a)(3)], Section 107(a) imminent danger withdrawal orders [Proposed Section 104.2(a)(4)], 104(g) orders [Proposed Section 104.2(a)(5)] and other enforcement measures than Section 104(e) [Proposed Section 104(a)(6)] are acceptable considerations to be included in making POV determinations.

ASSE, however, cannot support including enforcement actions that have not reached final action in order to determine POV status and opposes eliminating the existing requirement in Section 104.3(b) that only citations and orders that have become final are to be used to identify mines with a potential POV. Our members are fundamentally opposed to the idea that a mine operator, the vast majority of whom have a well meaning intent to have safe and healthy mines, could under any circumstances be considered guilty of a citation without the opportunity to contest that citation fully. Safety and health professionals dedicate considerable resources in working with MSHA directly to help see that a mine adheres to MSHA standards. More often than is commonly understood, the actions our members need to take in response to MSHA's concerns are an effort to address situations that are not violations under the standards and are questionably beneficial to a mine's safety

effort. Their view is that the time they have to take to address such situations takes away from their ability to do work that can contribute to a mine's overall safety effort. When citations that could end up being rejected through the legal process could be used in further enforcement efforts, they view such a result as an especially frustrating affront to their good faith effort to work with MSHA and mine operators to help ensure safe and healthy mines.

To be sure, ASSE shares MSHA's concern that the current delays between detection of a violation through final decision now being experienced prohibits MSHA from being able to develop a timely and appropriate pattern of violations. It is not surprising to our members that the elimination of pre-contest conferences using Conference and Litigation Representatives (CLR) procedures has resulted in less violations being settled early in the process and a greater number of cases falling into the hands of attorneys working to represent both operators and the agency and a reported backlog of 19,000 cases sitting before the Federal Mine Safety and Health Review Commission. However, the answer to the current problem is not to base MSHA actions on a legally questionable approach as a means to avoid the problem. Rather, we urge MSHA to work, perhaps with the National Institute for Occupational Safety and Health (NIOSH), to compare the effectiveness of the process before and after the CLR procedures were changed and measure the effect these changes and the resulting delays have had on mine deaths and injuries. If decreasing deaths and injuries is the goal we all share for mines, then the MSHA's resources should go to ways that actually address safety and health in mines and not the legal process. Our members fear that focus is being lost in the debates that have become more and more legal arguments and less and less about mine safety and health.

ASSE is similarly concerned with the open-ended nature of important issues in the Proposed Rule. No criteria for the numbers of citations, orders and elevated actions that would trigger POV status are given. Proposed Section 104.2(a)(7) would allow "(o)ther information that demonstrates a serious health or safety management problem at the mine such as accident, injury or illness records" to be considered in making POV determinations. Regardless of how broadly Congress may have intended for MSHA to develop POV criteria, there is no suggestion that the criteria go beyond "pattern of violations" to a "pattern of injuries and illnesses." Mine safety and health professionals encourage employers to report injuries and illnesses in order to help us help operators determine where risks in a mine exist and measures to address those risks. We preach taking ownership of safety. Subjecting that very basic safety and health strategy to enforcement could have the unintended consequence of encouraging avoidance of appropriate reporting among some operators, making our job that much more difficult in the very mines where injuries may be occurring and most is to be gained by learning from those injuries in order to stop them. Injuries occur for many reasons. Injuries do not equal violations. Including them in POV determinations can only diminish the value of the POV in identifying truly dangerous mine operations.

ASSE is also deeply concerned with Proposed Section 104.2(a)(8) concerning mitigating circumstances. MSHA should be applauded for its recent efforts to ensure that mine operators institute safety and health programs. Establishment of a safety and health program that first identifies risks and then establishes a plan to address those risks is the way our members help employers in every industry manage safety and health. It is the most effective tool in helping develop a commitment to safety and health to which both employers and employees can be committed. In most cases, an effective program results in risk-based efforts that go far beyond regulatory standards or enforcement concerns. For that reason, we must strongly oppose the requirement here that operators who may be approaching a POV level have a written safety and health management program approved by a District Manager.

We cannot imagine a better way to trivialize and make ineffective a safety and health program than to require operators to develop a program simply to meet outside requirements. A safety and health program only works if the mine operator and miners are involved in its development and implementation. Ownership of identified risks and the means to address them makes a program work. This measure takes that ownership away. If included in the final rule, MSHA will establish a wholly detrimental precedent that safety and health programs are merely compliance, increasing greatly the chances that programs will sit on a shelf ignored in the very operations where the best understanding of a program's value is needed most. Instead of this measure, we would like to support the development of expertise in MSHA staff to work cooperatively with mine operators nearing POV status so they can themselves develop safety and health programs. Anything short of such a measure demeans the value of a safety and health program.

Thank you for the inclusion of ASSE's comments in the record of this rulemaking.

Sincerely,

A handwritten signature in cursive script that reads "Darryl C. Hill".

Darryl C. Hill, Ph.D., CSP
President