
From: nathan-roberta [mailto:nathan-roberta@runnells-reed.com]

Sent: Monday, April 18, 2011 10:20 PM

2011 APR 19 A 9:34

To: zzMSHA-Standards - Comments to Fed Reg Group

Subject: RIN 1219-AB73 - Comments on Proposed POV Rule

Mine Safety and Health Administration
Office of Standards, Regulations, and Variances
1100 Wilson Boulevard
Room 2350
Arlington, Virginia 22209-3939

RE: RIN 1219-AB73 - Proposed Rule - Pattern of Violations

Thank you for the opportunity to comment on this proposed rule. Please consider the following comments:

MSHA needs to provide the criteria for POV in order to adequately assess this rule.

Section 104.2 of the proposed rule addresses criteria for Pattern of Violation in only the most general terms, giving the categories that will be considered, but not specific criteria within these categories. Without this information, it is not possible for commentators to thoroughly understand and assess the proposed program.

In other words, one cannot comment on something that does not exist. MSHA should re-propose the rule and include the specific criteria it proposes to use to determine that a POV exists, in order to give effected parties adequate notice and opportunity to comment.

MSHA should restrict or delete the provision whereby POV status is based on issued citations rather than final orders, and should restore PPOV.

The proposed practice to use issued citations, rather than final orders, for determining POV status creates a punitive sanction whereby the operator has not been given an opportunity to have independent review or hearing before the sanctions are imposed, and constitutes a denial of the operator's constitutional right to due process.

The narrative on this rule states that fewer than 1% of citations are reversed. However, it does not discuss how many citations are reduced or modified in some other way. At a minimum, reducing a citation from S&S to non-S&S will have an effect on potential POV status as well, and this number is likely far higher than the 1% quoted for vacated citations, so use of issued citations rather than final order can, in fact, make a difference of whether or not POV status is accurately determined.

In addition, the proposed rule not only removes the protection that requires that only final orders are counted in determining a POV, but also deletes the current provision for "proposed" POV (PPOV) notification, which currently allows the mine operator to sit down with a District Manager and review the basis for the proposed POV. Under the proposed rule there is no assurance that a mine operator would not suffer punitive sanctions of POV status based upon citations that have not been subject to any opportunity for a hearing or other procedural protections required by due process. MSHA can easily make mistakes in assigning POV status, and there are no procedural safeguards in the proposed rule for a "second look" at POV status.

MSHA needs to explain how vacated citations/orders will affect POV status.

MSHA has not clarified in the proposal how it will deal with the situation where "issued" citations/orders

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that form the basis for a POV finding are subsequently vacated while the mine operator is still under POV status. There needs to be an expedited procedure to review POV status once triggering citations/orders are vacated by the agency in settlement or by litigation, and to remove operators from such status if due to the vacating of orders/citations they no longer meet the initial POV criteria.

MSHA should clarify the proposed rule's provisions on mitigating circumstances.

As currently written, the proposed rule is unclear and confusing about how much discretion MSHA would retain in deciding whether a given mine is subject to POV sanctions, and what, if any, objective factors would guide that discretion. Section 104.2(a) of the proposed rule lists seven items to be used as criteria for establishing POV, but provides no detail (like numeric criteria) beyond the initial list itself. An additional criteria, "mitigating circumstances" is also listed, but no detailed information is provided regarding what might be considered mitigating circumstances, which makes it impossible to make comment. It is presumed that effective implementation of an MSHA-approved safety and health management program would be a mitigating circumstance, but no information is provided regarding what would be considered to be an "effective" program.

As written, the proposed rule is vague and does not allow for meaningful dialogue.

The lack of detail provided in the proposed rule suggests that MSHA has not determined the exact processes and criteria it desires to include in this rule. This in turn suggests that the notice of proposed rulemaking and request for comment is premature; the public and other interested parties cannot adequately comment on detail that does not exist. As a result, interested parties are effectively denied their ability (right) to participate in the rulemaking process. In addition, "passing the rule now and filling in the detail later" leaves open the possibility for arbitrary and capricious implementation, WITHOUT the benefit of comment from outside parties.

Because of the lack of information supplied in the proposed rule and due to the potential effects, at the very least, a public hearing should be held prior to taking of any action. More appropriately, MSHA should reissue the proposed rule providing the necessary detail, and allow the public another opportunity to comment on the true detail of the proposal.

Thank you for the opportunity to comment on this proposed rule. Should you require additional information or clarification, please feel free to contact me at this email address.

Sincerely,

Roberta A. Reed, CSP, QEP