

Pattern of Violations  
Proposed Rule Hearing  
Charleston, WV  
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(UMWA)

The UMWA generally supports the proposed rule. Things that MSHA has proposed which we support include:

- Elimination of initial screening criteria that MSHA has used to provide an operator with an advanced written warning about an operation being vulnerable to a pattern of violations. The operator should have an on-going awareness of the conditions in their mine and whatever shortcomings exist without MSHA having to notify them that they are nearing a Pattern of Violations. Further, MSHA started a new webpage so mine operators can track their own history and whether they meet the criteria for a pattern of violations.
- We also agree with simplifying the POV procedures and making them more transparent. We support the posting on the web of a mine's record which indicates whether it meets the POV criteria. With MSHA monthly updating this information, the mine operator will be able to keep up to date on their POV assessment.
- A critical change to the proposed language concerns the removal of the current limitation that MSHA only consider "final" orders for purposes of POV. The problem with the current system that limits a POV analysis to only final orders is that it can take years to resolve a contested citation. By the time the citation becomes final, conditions at the mine may bear no resemblance to what they were when the citation was originally issued. Further, only considering final orders encourages a mine operator to challenge everything MSHA issues to avoid being placed on a Pattern of Violations. Recent Congressional hearings on the backlog of cases pending before the Federal Mine Safety and Health Administration attest to the problem only considering final orders has created. The UMWA believes that both legislative history of the Mine Act and litigation will support MSHA on this position.
- We agree that the health and safety record of each operation should be reviewed at least every six months to ensure that MSHA is keeping abreast of any deterioration in health and safety conditions. We believe a quarterly review would be better, but agree that a six month review would be adequate considering the other responsibilities MSHA has.
- The UMWA agrees that when a mine has a pattern of violations, a copy of the notice must be posted on the mine bulletin board in order to make sure everyone at the mine is informed that their workplace exhibits substandard health and safety conditions.

Problems we see with the proposal include:

- This proposal anticipates having MSHA periodically revise its POV criteria through informal administrative action. The UMWA opposes that. Instead, we believe the Agency should collect and consider the comments submitted to this proposed rule to set criteria for purposes of a POV. The criteria should be fixed at least until an opportunity for public input on any changes that may be warranted in the criteria. A subsequent notice and comment period should occur to allow public input should the POV criteria be changed.
- The UMWA holds reservations about using injury rates as a weighted criteria for consideration in a Pattern of Violations. Injury reporting depends on the operator's reports and the industry has long known about under reporting of accidents, consequently it would not be a reliable statistic for consideration. Covering up accidents and under reporting seems to be commonplace with some in the industry. We recommend that fatality rates be weighted more heavily than injury rates.
- The UMWA has reservations about a mine being removed from a POV for "mitigating circumstances." Many questions remain open regarding this issue such as:

How will the presence of mitigating factors remove an operation from POV status?

If so, for how long?

Does MSHA contemplate using any sort of probationary status?

If an operation indicates it will pursue certain mitigating practices, but then reneges will it be placed back on the POV?

The Union would at least ask the Agency for clarification of what constitutes a "mitigating circumstance" and examples of such.

This concludes my testimony. I am here on behalf of the UMWA to enter a position into the record. I would ask the panel if they have any questions to reserve those for our Department of Occupational Health and Safety Staff who will testify at the June 15, 2011 hearing in Arlington, VA. Thank you.