

Statement of Thunder Basin Coal Co MSHA's Proposed Rule – 30CFR Part 104 Pattern Of Violation (POV)

Introduction - Members of the panel, my name is Tim McCreary. I am the Safety Manager at the Thunder Basin Coal Company in Wright WY. I want to thank you for the opportunity to address the panel concerning Thunder Basin's views on the proposed rule regarding Pattern of Violation or POV.

I'm fortunate to be working at Thunder Basin Coal. That's because Safety is a core value at Thunder Basin. We have a strong commitment to safety starting with the CEO of the company. Thunder Basin implemented a Behavior Based Safety Process about 4 years ago. We've seen over the past 30 years or so that more Rules and Regulations will only get you so far in terms of safety. The Rule is only as good as the behavior that drives compliance. For these reasons I don't believe Thunder Basin will be affected by this section of the Mine Act.

Having said that, we at Thunder Basin can't sit by when there are fundamental problems with this proposed rule that affect the very foundation of our society.

Proposed - Section 104.2 Pattern Criteria

This section states it would "specify the general criteria" that MSHA would use to identify mines with a pattern of violations. MSHA has asked for comments on how the agency should obtain comment during the development of and periodic revision to, the POV screening criteria.

Obviously this tells us the Agency expects the POV regulation to be a moving target. Since the latest "retooling" of the criteria, it's difficult to believe that the agency doesn't already have a desired criteria formula in mind. The current rule has specific benchmarks in each category. If the agency intends to adjust those numbers and formulas, there should be a public comment period prior to this being put into action.

Transparency has been touted as a cornerstone of this administration. This proposed rule is anything but transparent.

MSHA must normalize the formulas for each category. By using whole numbers cut offs to determine the weigh points, the size of the operations is overlooked. There must be a formula to normalize the equation to keep every size of operation on a level playing field.

As far as pattern of violation of the same standard is concerned; our largest citation category is 77.404(a) which is a catchall standard for mobile and stationary equipment. When no other standard fits, violations are written under 404(a). At a large operation with more than 400 pieces of mobile equipment, a quick glance by the standard number might indicate a pattern of repeat violations. But if you dig in a little deeper and read the description of the violation, they are nearly all written for totally different conditions. Does this truly reflect a pattern of violation? I don't think so!

MSHA needs to spell out specific criteria and allow for a public comment period on that criteria before a final rule is developed.

The proposed rule would eliminate the existing requirement in 104.3(b) that only citations and orders that have become final orders are to be used in the POV calculation. The agency states that due to the large number of contested citations and the time to process them, that only using final orders hinders MSHA's ability to enforce the Mine Act.

Let's be perfectly frank here, the agency intends to eliminate due process if this rule becomes final.

When George Mason forged out the Bill of Rights, he intentionally put in place what we know as the 5th amendment to the constitution. This amendment prevents individuals from being deprived of life, liberty or property without due process.

Due process extends to all persons and corporate entities to protect against abuse of government authority. Our system of justice has always worked on the premise that a person is innocent until proven guilty! I think the past 235 year history of our country proves that it's been an extremely important part of our constitutional rights. By allowing an

MSHA inspector to issue a citation or order without the possibility of due process as to validity of the citation or order, will allow the inspector to become the judge, jury and executioner for an operation that is nearing POV status! Inspectors are not right every time!

MSHA also needs to consider the reasons for the large number of citations under contest. I believe in large part that it's due to "regulatory creep". That is when inspectors in the field continue to stretch the reach of the regulation. The industry has done a good job over the years at eliminating violations and the inspectors seem to feel a need or pressure to write more citations. Therefore we find a stretch of the meaning of the regulation to find something to write.

Understanding that the Secretary has been given broad discretion to develop these rules, no one should ever believe that the congress had any intent to eliminate our constitutional rights in the process. Due process is a basic right of a democratic society.

MSHA must reinstate the provision that only final orders be used in determination of a Pattern of Violation.

Proposed - Section 104.3

The agency states in the proposed rule that all references to a PPOV or Potential Pattern Of Violation would be deleted. Recent months have shown this to be a very valuable tool for MSHA to have in their toolbox.

As MSHA stated in an April 12, 2011 press release, major reforms to the POV process have been implemented, "including a new screening criteria and a new review process that improves the agency's ability to identify problem mines".

Between November and December last year, the agency put 14 mines on a potential pattern of violation. 10 of those operations have made enormous improvements in their S&S rates. One operation had an 87% reduction. The least improved in this group showed an improvement of 39%. This is a tremendous success story! With these types of results, why wouldn't MSHA want to keep this tool?

Is MSHA's mission to improve safety in our nation's mines or is to close down mining operations? A large underground mine might well be handed a "death sentence" if not allowed the notice of the potential to be placed on POV. MSHA has proven that notifying mining operations of their "potential" is extremely effective. The agency must keep the Potential Pattern Of Violation notice in the toolbox.

Although the current rule has some misgivings, it has recently proven its effectiveness.

Summary –

We appreciate the opportunity to share our views on this important topic. The POV tool could be crafted to be extremely effective in dealing with chronic and persistent violators of safety and health laws.

To be effective, the Final Rule needs to be transparent by involving all stakeholders on the "specific criteria". It must afford mine operators due process and "fair notice" with opportunity to make meaningful improvements.

Thanks for your time and consideration in this matter.