PUBLIC SUBMISSION

As of: December 03, 2014
Received: December 02, 2014
Status: Posted
Posted: December 03, 2014
Tracking No. 1jy-8fts-tn3m
Comments Due: December 03, 2014
Submission Type: Web

Docket: MSHA-2014-0009
Criteria and Procedures for Assessment of Civil Penalties, 30 CFR Part 100

Comment On: MSHA-2014-0009-0001
Criteria and Procedures for Assessment of Civil Penalties

Document: MSHA-2014-0009-0055
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General Comment

See attached file(s)

Attachments

Comments of the United Mine Workers of America on the Proposed Rule for Criteria and Procedures for Assessment of Civil Penalties RIN 1219-AB72

Comments of the United Mine Workers of America
On the Proposed Rule for
Criteria and Procedures for Assessment of Civil Penalties
RIN 1219-AB72

§ 100.1 Scope and Purpose
This part provides the criteria and procedures for the proposal and assessment of civil penalties under §§ 105 and 110 of the Federal Mine Safety and Health Act of 1977 (Mine Act). The purpose of this part is to provide a fair and equitable procedure for the application of the statutory criteria in determining penalties by both MSHA and the Commission, to maximize the incentives for mine operators to prevent and correct hazardous conditions, to encourage the consistent and predictable assessment of civil penalties, and to assure the prompt and efficient processing and collection of penalties.

And

§ 100.2 Applicability
The criteria and procedures in this part are applicable to the proposal and assessment of civil penalties for violations of the Mine Act and the standards and regulations promulgated pursuant to the Mine Act, as amended.
(a) MSHA shall review each citation and order and shall make proposed assessments of civil penalties.
(b) When MSHA elects to make a regular formula assessment, the Federal Mine Safety and Health Review Commission shall determine whether MSHA has met its burden to establish the facts required to sustain each proposed assessment and shall assess a penalty in accordance with the civil penalty formula established in §§ 100.3 and 100.4 of this part.

OR

§ 100.1 Scope and Purpose
This part provides the criteria and procedures for the proposal and assessment of civil penalties under §§ 105 and 110 of the Federal Mine Safety and Health Act of 1977 (Mine Act). The purpose of this part is to provide a fair and equitable procedure for the application of the statutory criteria in determining penalties by both MSHA and the Commission, to maximize the incentives for mine operators to prevent and correct hazardous conditions, to encourage the consistent and predictable assessment of civil penalties, and to assure the prompt and efficient processing and collection of penalties.

And

§ 100.2 Applicability
The criteria and procedures in this part are applicable to the proposal and assessment of civil penalties for violations of the Mine Act and the standards and regulations promulgated pursuant to the Mine Act, as amended.

COMMENT

In the discussion on this rule MSHA points out that it is considering two alternative proposals to the Scope §100.1 and Applicability §100.2 sections of the rule. The first consideration would be to modify the scope and applicability of part 100 so that §100.3 is a legislative rule that governs both MSHA's proposal and the Commission's assessment of civil penalties. This alternative would require the Commission to apply the penalty formula when assessing civil penalties according to the six statutory criteria. The Union does not support the first proposal because it would serve to restrict the Commission's ability to alter the penalty based on any extenuating circumstances that would warrant an upward or downward departure from MSHA's formula when necessary. To require the Commission to use MSHA's criteria to assess the penalty would be repetitive and restrictive to the judicial process. The ALJ's underlying decision could review these issues and address them. To make the Commission consider the same formula again when assessing civil penalties seems counterproductive. The Commission must be provided the flexibility to make a determination based on the arguments presented to it. If the Commission feels the criteria was not properly applied, it has the ability to remand a decision back to the ALJ for reconsideration. The Commission should not be required to repeat the criteria evaluation for the third time. Therefore, the Union does not support MSHA's first proposal.

The second proposal indicates that MSHA would use a different approach by requiring the ALJ to make findings of fact under each of the six penalty criteria. Under this approach the ALJ would determine if the Secretary meets the burden to prove the penalty-related facts alleged are correct and if so, assess the MSHA proposed penalty. If the Secretary has not met his burden of proof, the judge would apply part 100's penalty formula to the adjudicated facts to arrive at a new assessment. Under this proposal the Commission would not be bound by the penalty formula. This proposal would give the Commission flexibility to depart from the Part 100 penalty formula if circumstances warrant. MSHA points out that the district court judges were authorized, in limited circumstances to depart from the Sentencing Guidelines before the Supreme Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005). Under this proposal the Commission would be able to grant an upward or downward departure from MSHA's formula when it feels justified. The Commission must have the flexibility to weigh the evidence presented to it and change a penalty when it finds mitigating or aggravating circumstance that would warrant such change. If the Commission feels the Secretary or the ALJ below have misapplied the six penalty criteria, it would have the ability to remand the decision back to the ALJ for limited consideration to address this.

As pointed out by MSHA, the Sentencing Reform Act of 1984 contemplated that district court judges would grant a departure for "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating these guideline." To determine whether the Sentencing Commission had adequately considered a

circumstance, Congress instructed courts to consider the Sentencing Guidelines, policy statements, and official commentary of the Sentencing Commission. The Commission's Manual elaborated on the concept of departures by explaining that departures were warranted in unusual or atypical cases and described such cases as "one[s] to which a particular guideline linguistically applies but where conduct significantly differs from the norm." The Union would be supportive of this approach. Under this proposal, the Federal Mine Safety and Health Review Commission would be provided the flexibility to make an upward or downward departure from MSHA's formula when it feels circumstances warrant such a change. Therefore, the UMWA would recommend that the second option proposed by MSHA for revisions to §100.1 and §100.2 be adopted in the new rule.

§ 100.3 Determination of penalty amount; regular assessment.

* * * * *

(b) *The appropriateness of the penalty to the size of the business of the operator charged.* The appropriateness of the penalty to the size of the mine operator's business is calculated by using both the size of the mine cited and the size of the mine's controlling entity. The size of coal mines and their controlling entities is measured by coal production. The size of metal and nonmetal mines and their controlling entities is measured by hours worked. The size of independent contractors is measured by the total hours worked at all mines. Penalty points for size are assigned based on Tables I through V of this section. As used in these tables, the term "annual tonnage" means tons of coal produced by the mine in the previous calendar year and "annual hours worked" means total hours worked by all employees at the mine in the previous calendar year. In cases where a full year of data is not available, the coal produced or hours worked is prorated to an annual basis. This criterion accounts for a maximum of 8 penalty points.

Table I—Size of Coal Mine

Annual tonnage of mine	**Penalty points**
<50,000	1
>50,000 to 500,000	2
>500,000 to 1,000,000	3
>1,000,000	4

Table II—Size of Controlling Entity—Coal Mine

Annual tonnage	**Penalty points**
<200,000	1
>200,000 to 700,000	2
>700,000 to 3,000,000	3
>3,000,000	4

Table III—Size of Metal/Nonmetal Mine

Annual hours worked at mine	**Penalty points**
<5,000	0
>5,000 to 200,000	1
>200,000 to 1,500,000	2

>1,500,000 to 3,000,000	3
>3,000,000	4

Table IV—Size of Controlling Entity—Metal/Nonmetal Mine

Annual hours worked	**Penalty points**
<50,000	0
>50,000 to 300,000	1
>300,000 to 2,000,000	2
>2,000,000 to 5,000,000	3
>5,000,000	4

Table V—Size of Independent Contractor

Annual hours worked at all mines	**Penalty points**
<5,000	0
>5,000 to 10,000	1
>10,000 to 30,000	2
>30,000 to 70,000	3
>70,000 to 200,000	4
>200,000 to 500,000	5
>500,000 to 700,000	6
>700,000 to 1,000,000	7
>1,000,000	8

COMMENT:

The proposed §100.3 (b) would reduce the penalty points for operators and contractor size. MSHA points out that under the provision, it proposes to reduce the penalty points for mine size and controlling entity and decrease the number of points for operators and independent contractors. The maximum number of penalty points would decrease from 15 to 4 for mine size, from 10 to 4 for size of controlling entity, and from 25 to 8 for size of independent contractor. MSHA points out that the proposed change will decrease the maximum points for this criterion, but offers no explanation for the reason. One would assume because the points will increase in other areas, this is compensation to reduce the overall penalty points because of those increases. We would ask for an explanation for the reason behind this change. Simply stating that this change is being proposed does not explain why. If it is to balance the other changes being proposed to reorganize the penalty point formula, the Agency should state their case. The Agency's reason these penalty points under the current regulation are assigned based on production for coal and hours worked for metal/nonmetal and independent contractors is to propose a penalty in accordance with the operator's income and ability to pay. The larger the operator and controlling entity would equal a greater ability to pay a larger penalty, however the

hazardous condition cited is the same as at larger mine. The UMWA would ask the Agency to present a case for this change, because they offer no explanation in the Section-by-Section Analysis why small Metal/Nonmetal operators should receive special penalty assessments.

As pointed out in the UMWA's comments on the previous proposed rule in 2006 we do not support exempting small mines or providing a lesser fine simply because of the mine size. To recount our position on this issue our previous comments were as follows:

This section is flawed. It will either completely exempt the smaller operator or require lesser fines, no matter what the violation, simply because of the mine size.

This presents two unique problems. First despite the serious nature of a violation, the operator, based on nothing more that the annual tonnage produced, automatically is held to a lower assessment standard. This does not induce compliance or protect miners at these operations. Secondly, the size of a particular mine is not necessarily indicative of the overall size or financial resources of the operator. Small mines are very often subsidiaries or contract operations of larger employers.

Offering what amounts to a "sale price" because of mine size is inappropriate. Violations must be cited and assessed in an even-handed manner. Compliance with the nation's mining laws should apply equally to all stakeholders. This includes equal assessments of penalties. The Union would compare this to enforcement of other laws administered at various levels of government. Speed limits on the nation's highways carry a penalty structured to fit the violation. Credit or reductions are not offered based on type of vehicle or the ability of the operator to pay. The Agency must take that approach here to protect all miners.

The proposed regulations states, "...consistent with the Mine Act's requirements to consider size of the operation when assessing penalties. MSHA believes penalties are under assessed under the existing regulations are often too low to be an effective deterrent for noncompliance at some of the largest operations."

The Union agrees with the premise of this statement and supports issuing penalties that are significantly greater than is currently the case. However, to tie this increase in the penalty to "large operators" is inappropriate. The Agency has been aware for some time the unique health and safety problems that inherently plague the small operators. The Union is convinced that any operator who uses the small mine size and therefore lesser resources to insure compliance as an excuse to either avoid the application of the Mine Act or pay a lesser penalty should not be permitted to remain in operation.

Miners at all mines regardless of size must be required to comply with the law, no one should be permitted to opt out or be assessed at a lower penalty for noncompliance. The Agency created the small mine division within its internal structure because of the higher rates of noncompliance, increased accident rates and greater number of fatal accidents at these operations in proportion to the overall workforce. The penalty scheme must take these issues into account. The Congressional mandate to take the size of the operation into account has been in place for many years, (the legislative history does not dictate how the Agency is to view small mines or enforce the Mine Act at these operations) the data obtained during that time should

indicate these small operators need greater attention than do some others. Enforcement and penalties must be proportional to the accidents and injuries attributable to the portion of the industry that exposes workers to the greatest risk.

Looking at the 2014 fatal statistics makes one wonder what justification the Agency has for offering penalty reductions to small Metal/Nonmetal operations. The Coal industry has had fourteen fatalities to date in 2014, but Metal/Nonmetal has had twenty fatals in the same period. To add further concern, over half of those fatalities at Metal/Nonmetal operations have occurred at mines employing less than fifty. So it appears that small Metal/Nonmetal operations have been responsible for the most fatal accidents in the industry this year. It would appear that these operations would warrant more scrutiny and punishment when they don't comply with the regulations, not less. The Agency offers no logic for this change.

§ 100.3 Determination of penalty amount; regular assessment.
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(c) *History of previous violations.* An operator's history of previous violations is based on both the total number of violations and the number of repeat violations of the same citable provision of a standard in the 15-month period preceding the occurrence date of the violation being assessed. Only assessed violations that have become final orders of the Federal Mine Safety and Health Review Commission will be included in determining an operator's violation history.

COMMENT

The Agency is proposing to clarify that only "violations that have become final orders of the Commission" are included in determining an operator's violation history. The existing rule states that only "violations that have been paid, finally adjudicated, or have become final order of the Commission" are included in determining the violation history. It is understandable why the Agency took this approach. So many mine operators are increasingly delinquent in paying their penalties, requiring the Agency to take legal action against them to collect. As long as the penalty is not paid, it cannot be considered in the history of previous violations, thereby allowing the delinquent operator to unfairly avoid penalty points because they have not paid. The UMWA agrees with this change and agrees that only "violations that have become final orders of the Commission" should be included in determining an operator's violation history. To make this work the Agency needs to reinstate the history period back to 24 months as it was practiced prior to the reductions of 15 months made by the Agency in 2006.

§ 100.3 Determination of penalty amount; regular assessment.
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(1) *Total number of violations.* For mine operators, penalty points are assigned for violations per inspection day based on Table VI of this section. Penalty points are not assigned for mines with fewer than 10 violations or 10 or fewer inspection days in the specified history period. For independent contractors, penalty points are assigned for the total number of violations at all mines based on Table VII of this section. Penalty points are not assigned for independent

contractors with fewer than six violations in the specified history period. This aspect of the history criterion accounts for a maximum of 16 penalty points.

Table VI—History of Previous Violations—Mine Operators

Overall history: Violations per inspection day	Penalty points
<0.3	0
>0.3 to 0.5	2
>0.5 to 0.7	5
>0.7 to 0.9	8
>0.9 to 1.1	10
>1.1 to 1.3	11
>1.3 to 1.5	12
>1.5 to 1.7	13
>1.7 to 1.9	14
>1.9 to 2.1	15
>2.1	16

Table VII—History of Previous Violations—Independent Contractors

Overall history: Total violations at all mines	Penalty points
0 to 5	0
6 to 7	1
8 to 9	2
10 to 11	3
12 to 13	4
14 to 15	5
16 to 17	6
18 to 19	7
20 to 21	8
22 to 23	9
24	10
25	11
26	12
27	13
28	14
29	15
>29	16

COMMENT:

The Agency has proposed to change the Violations Per Inspection Day formula to reflect conditions at the smaller Metal/Nonmetal operations. MSHA points out that existing rule results in relatively high violation history points that do not reflect conditions at the smaller Metal/Nonmetal operations. The discussion goes on to explain that at these mines, a small

number of violations over a one or two day inspection can result in a relatively high Violations Per Inspection Day rate. The Agency points out that during the baseline period, 12 percent of the Metal/Nonmetal violations received the maximum 25 points compared with one percent of the coal violations. MSHA notes that the propose rule would provide for a more equitable impact of the Violations Per Inspection Day formula on small mines. The UMWA thinks the Agency could have done a better job explaining why Metal/Nonmetal small mines receive the maximum 25 penalty points compared to coal. It is understandable that there is much less area to cover in a small mine, therefore the inspector will complete his/her inspection in fewer days as opposed to inspection of a large mine. The violations issued by the inspector would be compressed into fewer inspection days, therefore increasing the ratio of violations per inspection days at small operations. However, if this is the explanation for higher penalty points for small metal/nonmetal mines, why is it not also the case for small coal mines? A small coal mine would also take fewer days to inspect as opposed to a large coal mine. Shouldn't the same result be found at small coal mines too? What makes small Metal/Nonmetal operations unique? MSHA offers no explanation why this is the case. The Union can understand the rationale behind the theory that small coal mines would have fewer inspection days and result in a higher violation per inspection day rate. The Agency should not create policies or regulations that specifically include or exclude any segment of the industry, and the Mine Act does not support such selective enforcement. The Agency claims to recognize the unique problems at small operations, but offers them a "pass" on enforcement activity. This type of action will encourage a climate of noncompliance at these operations. Mine operators must all play by the same rules, and as a regulatory agency MSHA must apply its enforcement efforts in a non-biased manner, requiring all mines to comply with the Mine Act equally regardless of size.

§ 100.3 Determination of penalty amount; regular assessment.
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(2) *Repeat violations of the same standard.* This section applies only after an operator has a minimum of 10 violations and more than 10 inspection days or an independent contractor has a minimum of six violations in the specified history period. Repeat violation history is based on the number of violations of the same citable provision of a standard. For coal and metal and nonmetal mine operators with a minimum of six repeat violations, penalty points are assigned for the number of repeat violations per inspection day (RPID) based on Table VIII of this section. For independent contractors, penalty points are assigned for the number of repeat violations at all mines based on Table IX of this section. This aspect of the history criterion accounts for a maximum of 10 penalty points.

Table VIII—History of Previous Violations—Repeat Violations for Coal and Metal/Nonmetal Operators With a Minimum of Six Repeat Violations

Number of repeat violations per inspection day	Penalty points
<0.01	0
>0.01 to 0.02	1
>0.02 to 0.03	2
>0.03 to 0.05	3

>0.05 to 0.08	4
>0.08 to 0.12	5
>0.12 to 0.16	6
>0.16 to 0.20	7
>0.2 to 0.3	8
>0.3 to 0.5	9
>0.5	10

Table IX—History of Previous Violations—Repeat Violations for Independent Contractors

Number of repeat violations at all mines	**Penalty points**
<6	0
6	1
7	2
8	3
9	4
10	5
11	6
12	7
13	8
14	9
>14	10

COMMENT:

MSHA points out that the changes proposed to the History of Repeat Violations would lower the value at which a mine operator would receive the maximum penalty points for Repeat Violations Per Inspection Day from >1.0 under the existing rule to >0.5 under the proposed rule because a history of repeat of violations demonstrates a lack of concern for the safety and health of miners. Higher penalties for these operators would serve to encourage them to be more proactive in their approach to safety and health and prevent safety and health hazards before they occur. The Union agrees with this approach completely and supports this change. If an operator has such disregard for mine health and safety by having multiple violations of the same standard throughout the mine, a higher penalty is justified. Repeat violations of the same standard in multiple locations shows a total disregard for mine health and safety and carry more weight in assessing a penalty.

§ 100.3 Determination of penalty amount; regular assessment.

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(d) *Negligence.* Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, a mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure of a mine operator to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points for the

degree to which the operator failed to exercise a high standard of care based on conduct evaluated according to Table X of this section. This criterion accounts for a maximum of 30 penalty points.

Table X—Negligence

Standard of care	Penalty points
Not Negligent: (The operator exercised diligence and could not have known of the violative condition or practice.)	0
Negligent: (The operator knew or should have known of the violative condition or practice.)	15
Reckless Disregard: (The operator displayed conduct which exhibits the absence of the slightest degree of care.)	30

COMMENT:

The Agency has proposed revision to the Negligence categories from five to three. The existing rule used five categories to evaluate the degree of negligence involved in a violation:

(1) *No Negligence* means that the operator exercised diligence and could not have known of the violative condition or practice.
(2) *Low Negligence* means that the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.
(3) *Moderate Negligence* means that the operator knew or should have known of the violative conditions or practice, but there are mitigating circumstances.
(4) *High Negligence* means the operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.
(5) *Reckless Disregard* means the operator displayed conduct that exhibits the absence of the slightest degree of care.

To simplify the choices the inspector must make and operator citation contest due to disagreement regarding this category, the Agency has proposed to limit the negligence to three categories:

(1) Not Negligent;
(2) Negligent; or
(3) Reckless Disregard.

MSHA points out that providing less choices, eliminates confusion over the degree of negligence. As indicated in the majority of contested cases before the Commission, the issue is not whether a violation occurred. Rather, the parties disagree on the gravity of the violation, the degree of mine operator negligence, and other criteria. Limiting the choices may or should eliminate the disputes regarding the degrees of negligence also. We agree that there is no negligence, negligence the operator knew existed, or total disregard for the law and intentional negligence. The previous choices were confusing and required the inspector to try to gauge the

degree of mitigating circumstances and how much the operator knew. The proposal should simplify and streamline the negligence categories and eliminate differences of opinions about judgment calls to fight over. The Union agrees this proposed change would be beneficial. The issue of allowing for mitigating circumstances were not addressed in this proposal as in the current rule where it is considered under Low, Moderate and High Negligence. If the Agency removes these three choices, then it also should never consider any mitigating circumstances to the remaining three choices.

§100.3 Determination of penalty amount; regular assessment.

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(e) *Gravity.* Gravity is an evaluation of the seriousness of the violation. Gravity is determined by the likelihood of the occurrence of the event against which a standard is directed; the severity of the illness or injury if the event has occurred or were to occur; and whether or not persons are potentially affected if the event has occurred or were to occur. The gravity criterion assigns penalty points based on Tables XI through XIII of this section. This criterion accounts for a maximum of 36 penalty points.

Table XI—Gravity: Likelihood

Likelihood of occurrence	**Penalty points**
Unlikely: (Condition or practice cited has little or no likelihood of causing an event that could result in an injury or illness.)	0
Reasonably Likely: (Condition or practice cited is likely to cause an event that could result in an injury or illness.)	14
Occurred: (Condition or practice cited has caused an event that has resulted or could have resulted in an injury or illness.)	25

Table XII—Gravity: Severity

Severity of injury or illness if the event has occurred or were to occur	**Penalty points**
No lost work days: (All occupational injuries and illnesses as defined in 30 CFR Part 50 except those listed below.)	0
Lost workdays or restricted duty: (Any injury or illness which would cause the injured or ill person to lose one full day of work or more after the day of the injury or illness, or which would cause one full day or more of restricted duty.)	5
Fatal: (Any work-related injury or illness resulting in death, or which has a reasonable potential to cause death.)	10

Table XIII—Gravity: Persons Potentially Affected

Persons potentially affected if the event has occurred or were to occur	**Penalty points**
No: (No persons are affected by the condition or practice cited.)	0

Yes: (One or more persons are affected by the condition or practice cited.) 1

COMMENT:

As with the negligence category, MSHA has streamlined the choices to be made in determining the gravity of a violation. Gravity has three factors: Likelihood, Severity; and Persons Potentially Affected which would be retained under the proposal. The Agency has proposed to reduce the number of subcategories associated with each factor to decrease subjectivity and improve objectivity and consistency. The Union acknowledges that simplifying choices an inspector must make should make the penalty process easier and provide fewer reasons to argue over in litigation. Because there are three factors under the Gravity category we will address each individually:

Likelihood: The proposal would reduce the existing five categories of Likelihood of the occurrence of an event against which a standard is directed to three: (1) Unlikely; (2) Reasonably Likely; or (3) Occurred. Like the Negligence category, under the existing rule this category offers too many, confusing choices that leaves decision making to the inspector and issues to challenge and argue in court. The existing rule offers five choices of: (1) No Likelihood; (2) Unlikely; (3) Reasonably Likely; (4) Highly Likely and (5) Occurred. Streamlining the choices to three should simplify and improve objectivity and consistency of enforcement. Limiting the choices to "It would probably not happen" (Unlikely); It probably would happen" (Reasonably Likely) or "It did happen"(Occurred) only makes sense and eliminates the confusing options that were available under the existing rule. The Union would support this change.

Severity: The proposal simply eliminates one subcategory for Severity. The Permanently Disabling subcategory has been removed, leaving the proposal with three choices for Severity: (1) No lost work days; (2) Lost work days or restricted duty; or (3) Fatal. Limiting this category to three options – No lost work days; Lost work days or restricted duty and Fatal narrows the selection of objectivity and consistency of enforcement. Therefore, the Union does not support this change. There are occasions when miners are injured on the job and as a result of that injury he or she may become permanently disabled years or months later, if not immediately. There are occasions that the inspector has had to amend a citation to reflect his/her misjudgment on the severity of the injury at a later date when an injury became permanently disabling. Because there is a history of this occurring in the industry, MSHA must not eliminate the permanently disabling category.

Persons Potentially Affected: The change proposed in this section makes perfect sense. This removes the judgment call required of the inspector to figure out how many people could potentially be in harm's way. The proposal simply requires the inspector to determine if one person is affected and then apply this penalty. The Union believes that this is one area where the Agency has almost always failed to recognize the true number of miners that may be affected. If MSHA adopts this change then the penalty points should reflect the current choice of 10 or more persons affected with a charge of 18 penalty points for all cases. This is a more realistic number that would cover small mines and large.

§100.3 Determination of penalty amount; regular assessment.
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EXISTING STANDARD
(f) *Demonstrated Good Faith of the Operator in Abating the Violation.* This criterion provides a 10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector.

COMMENT

MSHA is proposing to provide an additional 20 percent Good Faith reduction in proposed penalties when neither the penalty nor the violation is contested and the penalty is paid before it becomes a final order of the Commission. Under this alternative operators that promptly abate safety and health hazards and promptly pay the penalties associated with the violations could be eligible for up to a 30 percent overall Good-Faith reduction in the amount of the penalties. MSHA points out that it is interested in comments that address this alternative, including other alternatives that would encourage operators to resolve enforcement issues quickly and increase resources allocated to improving the safety and health of miners.

After Congress passed the Mine Improvement and New Emergency Response Act of 2006 (MINER ACT) which mandated penalty increases as an incentive for mine operators to prevent and correct violations, MSHA revised Part 100 to reflect those mandated changes. The result of those changes clearly were reflected in the proposed penalties. In CY 2006 MSHA cited 140,000 violations and proposed $35.1 million in penalties; in CY 2007 the Agency cited 145,000 violations and proposed $74.5 million in penalties; and in CY 2008 a total of 174,000 violations were cited with proposed penalties of a high of $195.2 million. The proposed penalties increased over five times in a matter of three years. At the same time mine operators were challenging citations at a record rate, creating an overload of cases before the Commission. The incentive was great for the operators to challenge because the penalty payment is not required until final adjudication. If the cases under challenge are great enough to overwhelm the system, the final adjudication is delayed and therefore the penalty payment is also delayed. The Union strongly disagrees with this change. The mining community has had more than 40 years to acclimate itself to federal regulations and take the necessary actions to comply with the law. Any failure to do so cannot be determined to be "accidental or the result of confusion", because the Mine Act has been in effect since 1969. There should be no additional reductions above the allowed 10% and the penalty upheld as initially written.

During the previous public hearing held on this proposed rule, mine operators commented that doing away with or reducing the reduction for "good faith" is punitive and therefore ineffective. Operators routinely punish miners for violating the mining laws or company policy. There is no "good faith" reduction in their penalty – they are disciplined or discharged. The Mine Act and regulations have been in effect for over 40 years now, so the industry should know what is expected of them. There should be no reduction in penalties.

§100.3 Determination of penalty amount; regular assessment.
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(g) *Penalty conversion table.* The penalty conversion table is used to convert the sum of penalty points assigned for a violation (in paragraphs (b) through (f) of this section) to a civil penalty amount in dollars ($).

Table XIV—Penalty Conversion Table

Points	**Penalty ($)**
31 or fewer	112
32	118
33	124
34	150
35	175
36	200
37	250
38	300
39	350
40	400
41	450
42	500
43	600
44	700
45	800
46	1,000
47	1,200
48	1,400
49	1,600
50	1,800
51	2,000
52	2,500
53	3,000
54	3,500
55	4,000
56	5,000
57	6,000
58	7,000
59	8,000
60	9,000
61	10,000
62	15,000
63	20,000
64	25,000

65	30,000
66	35,000
67	40,000
68	45,000
69	50,000
70	55,000
71	60,000
72	65,000
73 or more	70,000

COMMENT:

The Union has no comment on this section.

§100.3 Determination of penalty amount; regular assessment.
* * * * *
(h) *The effect of the penalty on the operator's ability to continue in business.* MSHA presumes that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. The operator may, however, submit financial information to MSHA's Office of Assessments, Accountability, Special Enforcement and Investigations at 1100 Wilson Boulevard, 25th Floor, Arlington, Virginia 22209, concerning the financial status of the business. If the information provided by the operator indicates that the penalty will adversely affect the operator's ability to continue in business, the penalty may be reduced.

COMMENT:

As the Union commented in previous comments on this proposal in 2006, it vigorously opposes consideration of an operator's ability to continue in business for a penalty reduction. The Agency must focus on even-handed enforcement that protects the health and safety of all miners, regardless of the size of the mine or its financial position. An operator that cannot afford to produce his product in compliance with MSHA regulations should not operate at all. The miners of the nation cannot afford to work at operations that do not meet MSHA's regulations. Society as a whole does not consider a person's ability to pay when imposing judgment for crimes committed. If a driver gets a speeding ticket, there is no reduction for consideration of their ability to pay – they are simply fined and if not paid, those penalties increase up to and including jail time. Why should mine operators be treated differently.

§ 100.4 Unwarrantable failure and immediate notification.
(a) The minimum penalty for any citation or order issued under § 104(d)(1) of the Mine Act shall be $3,000.
(b) The minimum penalty for any order issued under § 104(d)(2) of the Mine Act shall be $6,000.

COMMENT:

The Union supports the automatic minimum fines for unwarrantable failure orders. We understand and expect that higher fines will be assessed in uniformity with the point system and this provision simply sets a floor for all unwarrantables.

§ 100.9 Commission Review of the Secretary's Proposed Regular Assessments
(a) When MSHA elects to make a regular formula assessment, the Federal Mine Safety and Health Review Commission shall determine whether MSHA has met its burden to establish the facts required to sustain each proposed assessment and shall assess a penalty in accordance with the civil penalty formula established in §§ 100.3 and 100.4 of this part.

(b) Notwithstanding § 100.9(a), if the administrative law judge (ALJ) finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Secretary when formulating the penalty regulations, the ALJ may assess a penalty other than that indicated by the formula so long as:
(1) The ALJ considers the penalty regulations in part 100, the relevant regulatory history, and MSHA's policy statements when determining whether the Secretary adequately considered the circumstance.
(2) The ALJ provides a statement of reasons for assessing a civil penalty that is higher or lower than the penalty indicated by applying §§ 100.3 and 100.4 to the penalty-related facts as found by the ALJ.
(3) The ALJ considers the statutory penalty criteria and the purposes of this part identified in § 100.1.
(4) The ALJ assesses a civil penalty that is consistent with statutory minimum and maximum penalties.

COMMENT:

The Union does not agree that the Commission should be bound by MSHA's penalty point formula therefore, we would not agree to this proposal. See our comment on §100.1 and §100.2 above.