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General Comment

The Mine Safety and Health Administration (MSHA) proposes to amend 30 C.F.R Part 100. Section 100.3 of Part 100 states the criteria used to determine the amount of a proposed, civil penalty. The amendments to Section 100.3 drastically change the regulation and eliminate many ground for mine operators to argue for a lesser penalty. As a result, the proposed changes are harsh and force mine operators to pay the proposed assessment rather than exercise their rights to challenge the assessment and violation.

Please see the attached memorandum for a full analysis.

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Attachments

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MEMORANDUM

December 2, 2014

The Mine Safety and Health Administration ("MSHA") proposes to amend 30 C.F.R Part 100. Section 100.3 of Part 100 states the criteria used to determine the amount of a proposed, civil penalty. The amendments to Section 100.3 drastically change the regulation and eliminate many ground for mine operators to argue for a lesser penalty. As a result, the proposed changes are harsh and force mine operators to pay the proposed assessment rather than exercise their rights to challenge the assessment and violation.

MSHA's Stated Objective for the Amendment:

"The Mine Safety and Health Administration (MSHA) is proposing to amend the civil penalty regulation to simplify the criteria, which will promote consistency, objectivity, and efficiency in the proposed assessment of civil penalties and facilitate the resolution of enforcement issues. The proposal would place greater emphasis on the more serious safety and health conditions and provide improved safety and health for miners. MSHA is also proposing alternatives that would address the scope of its civil penalty regulation."

Changes to Section 100.3:

Subsection (d) of the current regulation uses five degrees of negligence to determine the amount of the proposed penalty. The language of the levels are as follows:

- (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 condition 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.

The proposed regulation changes the degrees to (1) Not Negligent; (2) Negligent; and (3) Reckless Disregard. The fewer degrees of negligence impede a mine operator's ability to challenge the violation and be assessed a lesser penalty. The result will be higher assessments and less challenges to citations, but the challenged citation will likely be litigated all the way to hearing.

Subsection (e) of the current regulation uses five gravity-likelihood levels to determine the amount of the proposed penalty. The titles of those levels of gravity are as follows:

- (1) No Likelihood
- (2) Unlikely
- (3) Reasonably Likely
- (4) Highly Likely
- (5) Occurred

The new regulation would eliminate levels (2) and (4). Similar to the effect of lesser degrees of negligence, the mine operators will have less grounds to challenge violations and be assessed lesser penalties.

Subsection (f) of the current regulation uses four gravity-severity levels to determine the amount of the proposed penalty. The language of those levels of gravity are as follows:

- (1) No lost work days.
- (2) Lost workdays or restricted duty.
- (3) Permanently disabling.
- (4) Fatal.

The new regulation would eliminate the gravity level (3). Again, eliminating ground by which a mine operate can challenge a violation and the proposed penalty.

The proposed changes include incentives to settle a proposed assessment without challenging the violation or the assessment. MSHA proposes a "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." This amendment evidences MSHA's real goal. Force mine operators to pay the proposed penalties and abandon their right to challenge the violation and the proposed penalty.

By removing all these elements from the regulation, MSHA will create a statutory scheme eliminating many grounds on which a mine operator can challenge citations and proposed civil penalties. It also incentives mine operators to pay the penalty without challenging the violation or the proposed penalty. The stated purpose of eliminating these grounds is to facilitate the

resolution of enforcement issues. Unfortunately, MSHA's proposed amendment will not forward its stated goal. In fact, it will force mine operators to litigate high value citations even more aggressively since less grounds to mitigate citations exist. Better procedures exist to facilitate the resolution of enforcement issues.

Alternative Procedures

MSHA should institute an alternative dispute program with early mediation options. The current regulatory structure could easily be amended to add these programs. These programs have been instituted in other forums, and it was determined that the procedures facilitate early resolution of claims.

One example is the Early Mediation Pilot Programs introduced by the Judicial Council of California in 1999. Four trial courts referred civil litigates to early mediations. As a direct result of participating in the mediations, 58% of cases valued at more than \$25,000 and 71% of cases value at less than \$25,000 settled. MSHA cases are amendable to the same type of procedure.

MSHA already offers mine operators the health and safety conferences available pursuant to 30 C.F.R. 100.6. MSHA could amend this regulation to require the conference. The conference could be held within 30 days of issuance of the citation and proposed penalty. This timeframe would allow mine operators to conduct their own investigation, prepare any potential defense and retain legal counsel if necessary. It would also allow MSHA to conduct a further review of the proposed assessment and assign an attorney from the Secretary of Labor to the matter. The additional time and involvement of counsel will provide for a fuller analysis of the violations and proposed assessments which will lead to more productive discussions in the health and safety conferences.

MSHA should also disclose its inspector's reports and supporting documentation to mine operators at the time the citations and proposed assessment are served on the mine operators. This will encourage the mine operators to review MSHA's evidence and consider that evidence prior to challenging the violation or the proposed assessment.

To allow time for further settlement discussion and, if they choose, for the minor operators to challenge the violation and proposed assessment, MSHA must also amend the 30 C.F.R section 100.7 deadline to contest the violation and proposed penalty. The deadline should be extended from 30 days to 60 days.

This alternative dispute procedure will forward MSHA's goal. Mine operators can fully assess the proposed penalty and violations. They then will meet with MSHA before initiating any administrative proceedings. This will resolve the citations instead of challenging them.

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