Comment: RIN-129-AB 72 MSHA 2014 0009

In response to MSHA's proposal to change the Part 100 and the reduction in the likelihood categories to 3 instead of the current 5, and the negligence from 3 to 5, the 20% discount for immediate acceptance and payment of assessments and the ability contest and to present mitigating factors before a judge, I feel that many are missing the main point of the proposed change. These proposed changes in effect will remove due process of law. For years I have seen MSHA use citation language to modify or reinterpret the standards. Consider the Standard .14000(a) Self-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator shall be inspected before being placed into operation on that shift. The standard states the pre-shift inspection is to be done before being placed into operation. Inspectors now write citations if the pre-shift identifies a defect and the equipment operator downs the equipment. Example, the equipment operator is requested to conduct a pre-shift inspection by the MSHA inspector on a piece of parked equipment. The equipment operator begins his pre-shift and identifies a defect and notes it and cannot complete the pre-shift inspection because of the defect. The equipment operator does not put the equipment into operation and the Inspector then issues a citation. Where is that in the standard? The purpose of the pre-shift inspection is to identify any defect to prevent defective equipment from being in placed into service until the defect is corrected. That is a no win for the Mine Operator. The standard was complied with. Just because a defect was identified during the pre-shift does not warrant a citation. Yet inspectors now issue citations against .14000 making an assumption that since the defect existed and assume the equipment 'may' be put into operation.

These proposed changes would allow inspectors to interpret the standard at will, issue citations with no reasonable recourse by the Mine Operator. No agency should have that ability to exercise power. The last time in history a policing agency had that type of power and authority was in World War II, and that agency was the SS. Does MSHA desire that unchecked power. If that is the case, perhaps the proper emblem for MSHA should be MSSHA-let's call it what it is. Due Process of the Law was built into our Constitution to afford the people the right to challenge and to have a voice in the law and its interpretation. The people include Mine Operators as well as the employee. Changing the manner in which citations are written and the ability to challenge them in a fair and impartial manner is an abuse of power. The system of government we have is built with checks and balances to prevent the abuse of power or abuse of the law. Removing that ability undermines a fair and equitable system. That would be no different than a police officer arriving at your door, arresting you, charging you at the police station, and placing you in jail for a term determined by the police officer because the police officer believed you violated the law. The police officer would then offer you an overnight stay if you agree to accept his interpretation or perception. You would forfeit your right to contest it just to get out of a longer term, but your record would indicate that you committed a crime that you may not have. The next time that officer believed you violated the law, you now have strike 2 and so on. If you decided to object and want your case heard, you would stand before other police officers called the commission and plead your case. Unfortunately, the record that would be introduced as fact would be what the police officer wrote as the crime.

Let's examine the proposal of changing the negligence level from the current 5 to 3. MSHA is conditioned to fault the Mine Operator for all violations of the standard except for .4100 which an individual employee can be cited and fined. At which point is an individual employee held accountable to the standard for knowing and willfully violating a standard. Let's examine .15005 for example. The standard says the safety belts shall be worn when persons work where there is a danger of falling. The Mine Operator provides the employee with a safety belt, provides them with the training to use the safety belt, and trains them on the company's policy as well as the standard. The employee makes a conscious decision to not use the safety belt and the inspector writes the citation. Generally it is written as moderate or high negligence always against the Mine Operator. If the Agency (MSHA) was actually a partner, if the agency was actually working to fulfill its mission of protecting employee health and safety, then they would recognize that individual s need to be held responsible and accountable for not following the standard. What MSHA does in effect would equal a highway patrolman issuing a ticket to the car manufacturer for a person speeding because the manufacture designed and built the car with the ability of exceeding the speed limit. That would be written as reckless disregard. To the point, as long as MSHA views the Mine Operator as fully responsible for violations, they will always write citations as negligent or reckless disregard. To take it further, if there is not ability to present mitigating factors before an impartial judge; then the MSHA inspector becomes Judge and Jury. This is a violation of a constitutional right. How will the criteria be defined for Not Negligent, Negligent, and Reckless Disregard? In my experience, that will be determined by the inspector and with their conditioning it will always be negligent or reckless disregard.

What about likelihood. With the current 5 categories of likelihood the number of citations written with no likelihood is rarely seen. To attempt to narrow down to the 3 categories would put more citations written at reasonably likely at the discretion of the inspector. The proposal provides information on the point system assigned to each of the current 5 categories, but does not define what is unlikely, or likely for that matter. Consider the following illustration; if a person does not chock their vehicle, but has the transmission in park and the park brake set the potential or likelihood for that vehicle to move is unlikely. But if the inspector sees the vehicle without chocks, in most cases, they will consider that if the transmission in park fails and the park brake fails it is reasonably likely that the vehicle will move. In actuality, it is highly unlikely that both of the other controls will fail. The biggest problem with likelihood evaluation is the criteria used to determine it is not well defined. To the inspector, the likelihood is determined as if there are no other controls and the citation is written in that manner and presented as fact. By reducing the number of categories, the consideration of mitigating factors is reduced in the determination of likelihood and present the citation as fact and the burden of proof is not on the Inspector, but on the operator.

Severity is another area where reducing the number of categories does not satisfy the mission of protecting safety and health. I agree it is difficult to determine if an injury would be permanently disabling and the removal of that would be beneficial. The addition of a category of No injury would be better than removing one to satisfy the goal of reducing to three categories. Example, during an inspection a ladder is found lying down on the ground with an obvious defect. No one is using the ladder at the time and because of its location and condition and availability of other ladders in the area, it is not

likely to be used. It is a violation, but since no one is using it the violation in actuality is one that no injury occurred because it was identified (That is no different than perceiving that because there are screwdrivers in a room that has electrical outlets a person could be electrocuted if a person sticks a screwdriver in an outlet). The ladder is removed and hazard is eliminated. The citation however would be written as Lost Work Days or Fatal in the severity and back to likelihood, it would probably be written as reasonably likely because the ladder was there. The citation would then appear as fact and the burden of proof would be on the operator that no injury occurred and that the ladder was not in use. Rather than reduce the number of severity categories, they should be redefined and criteria established that would more accurately identify the actual violation, not a perceived outcome in the assessment of the violation.

In conclusion, Citations that are written with reasonably likely or High negligence usually contain the language 'Company personnel engaged in aggravated conduct...' the very language insinuates that a confrontation occurred. Eliminating some of the categories for likelihood and severity would increase the number of citations that bear that type of language. Citations give the perception that all mine operators disregard health and safety when in fact many mine operators have very proactive safety programs. Citations are public record and give the public a false representation of a mines attitude towards the safety and health of its employees. If MSHA's mission is actually to protect employee safety and health and wants to work with mine operators to that end, why not add categories to the citation form such as: Mine operator has a Policy or Procedure for the standard, Mine operator has conducted training, Mine Operator provides the equipment, Mine Operator has programs to enforce compliance to standard and apply point reductions for those items. Allow those to also be part of the public record and the assessment. MSHA penalizes Mine Operators who proactively approach health and safety as if they do nothing. MSHA seems to foster an adversarial relationship with poorly written citations. Changing the rules again will only further that relationship. I am reminded of a recent conference I attended where the Sentinels of Safety awards were given. 4 hours were spent presenting these awards that recognized mine operators for their safety programs. There were no speeches, just a rapid progression of Mine Operators that were recognized. Immediately following that presentation, a high level representative of MSHA delivered a presentation that said Mine Operators do not care about employee health and safety and that MSHA has to hit them harder. Changing the rules and reducing or removing due process is not the answer. Defining the criteria better and recognizing the strides the mining industry has made is a more constructive manner of obtaining the same result that both MSHA and the Mine Operator has: "Every one home safe and healthy every day."

Signed

An anonymous miner