
From: Joseph Riney <joseph@nevadaminig.org>
Sent: Tuesday, December 23, 2014 5:53 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: RE: Docket No. MSHA-2014-0009, RIN 1219-AB72
Attachments: MSHA-Part-100-comments-final.pdf

Greetings,

Attached please find comments regarding proposed changes to Part 100, docket No. MSHA-2014-0009, RIN 1219-AB72 on behalf of the Nevada Mining Association.

Thank you



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Submitted via Electronic Mail: zzMSHA-comments@dol.gov

RE: Docket No. MSHA-2014-0009, RIN 1219-AB72

To whom it may concern:

The Mine Safety and Health Administration (MSHA) is proposing to amend its 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 agency further claims "this proposal would place a 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 and applicability of its civil penalty regulation.

The Nevada Mining Association (NvMA) supports, facilitates and values the cooperative relationship that has been established between member companies and MSHA. We work diligently to ensure that all miners return home to their families safe and sound every day. Members strive to be proactive in their assessment of safety and health risks and attempt to go beyond what is required by the regulations. The Part 100 proposed changes were reviewed and approved by the NvMA Safety & Health committee comprised of safety professionals who work with inspectors on a daily basis as well as legal counsel.

In its proposal MSHA states that "its efforts have worked" then claims that what they are doing "doesn't preclude the need for improvement in the civil penalty assessment process."

NvMA suggests that MSHA reconsiders their proposal to increase the civil penalties and get back to the primary focus of the Agency. During discussions with miners across the State the comments from many of them have been that MSHA has strayed from their mission of protecting the safety and health of the miners and is solely focused on writing citations to collect money. If, as the agency claims, current efforts are working there is no need to make changes to the current system.

Member companies have compared current assessments to the proposed changes. Despite what MSHA has stated about this proposal we estimate increases in

assessed penalties from 30 to 60 percent. If a citation is improperly written, evaluated or assessed our member companies will still challenge the citations.

An increase in the number of citations issued will increase the number of citations contested, despite the attempt by MSHA to offer reductions for not contesting. Over the last two years, one member company has seen a \$435,000.00 reduction in fines by contesting citations and nearly 70 citations (approximately 14%) were vacated because of citations that were improperly written. Half of these flawed citations are written by a single inspector. We are proud MSHA shares the industry's goal of sending miners home safely every single day, without exception. But improperly issued citations contribute to system of uneven regulation and enforcement and are harmful to this partnership.

In order to decrease the number of contested citations, MSHA has proposed a 20% reduction in assessments if companies do not contest a citation. In doing this, MSHA is attempting to create economic incentive for a wrongfully-cited operator to "go along" with the system in exchange for a discount on the corresponding fines. Furthermore, they are giving an appropriately-cited operator a discount, regardless of the operator's fault in the matter. These changes will not solve the problem MSHA is seeking to address; instead, it will encourage a system of uneven and inconsistent enforcement. If the agency truly wants to limit the number of violations, the solution is to improve the system with transparency and independence, not discounts. If these inherent flaws are addressed, MSHA will see better enforcement and a higher success rate in its citations.

To address these issues, NVMA suggests that an independent ethics review board be established to provide an independent review of the actions exhibited by some inspectors and field office supervisors. A transparent system of accountability should be established to help control inspectors who are writing bad paper and elevating evaluations because operators question why they are writing a citation.

History of Previous Violations

The proposed rule puts the operator in the position of deciding to accept an improperly-written citation in favor of some sort of economic discount. This would inappropriately increase the impact of History of Previous Violations which will cause a significant increase in the penalty amounts. While it is important not to have repeated violations of any standard, MSHA's practice of using catch-all standards such as 56/57.14100(b), 56/57.14205 and 56/57.12030 to write citations that do not fit other criteria, will result in unfair assessments of relatively minor violations.

MSHA states that a "history of repeat violations demonstrates a lack of concern for the safety and health of miners." In the case of specific safety violations on a mine site, this is absolutely true. However, use of a catch-all standard provides the alleged violator no clear path to improve the situation, and therefore does not increase safety on a mine site going forward. MSHA needs to address the use of catch-all standards if it truly wants to address the concern of repeat violations.

Negligence

Changing the negligence criteria from five choices to three will not help the inspectors make better decisions regarding the negligence of a particular violation and will restrict industries right to offer mitigating circumstances. While one of the options is "not negligent," history shows MSHA inspectors are unlikely to mark a citation as not negligent. Inspectors are then left with two choices: negligent and reckless disregard. Restricting an inspector to two harsh options will trigger more unwarrantable failure citations and orders. MSHA in the new proposal has defined negligent using the same basic language used to define "unwarrantable failure." Instead of changing the criteria for evaluating a citation, MSHA would be better served by establishing set guidelines with input from

the industry for each of the five existing criteria and then providing training for their inspectors to ensure consistent evaluation of negligence.

Likelihood of Occurrence

The concerns with the changes to Likelihood of Occurrence are similar to those listed for negligence. MSHA's proposed changes restrict industries ability to offer mitigating circumstances as to the likelihood that a violation will result in an injury. Inspectors have no set guidelines for determining likelihood. Many times inspectors will evaluate likelihood based on speculative and subjective opinion that something may happen in the distant future. Frequently, inspectors base the determination on whether or not he/she has been challenged on a previous citation. MSHA and the Industry would be better served by jointly collaborating on specific criteria for determining likelihood and leaving the current rule in place.

Severity

Severity is currently determined solely upon how serious an inspector feels an accident will be. MSHA has no criteria to base their determination on, only what they feel will be the extent of injury. Inspectors are not trained to understand modern occupational medicine and are not qualified to determine whether or not an injury will result in restricted duty or lost time. MSHA should leave the current ratings in place and again work with industry representatives to set criteria for evaluation of a potential injury that is based on medical history not on whether or not an inspector thinks a serious injury will occur.

Review Commission

MSHA's attempt to limit the powers of the Administrative Law Judge and the Mine Safety and Health Review Commission is in direct opposition to the intent of Congress to balance the power of MSHA and provide a neutral process for ensuring that MSHA and the Industry are treated fairly under the Mine Act. MSHA may believe the contesting process is exacerbated by the Industry, or that lower penalties will result if citations are contested through the Commission, but neither is true. Contested citations have come from an uneven and broken enforcement mechanism, not from a procedural failing. Mine operators contest citations when the citation itself is inappropriate or unjust or when a citation has an effect on a mine's business. This process is critical and must not be dismantled because of differences between the Commission and MSHA.

To recap the Nevada Mining Association Health and Safety committee does not support the proposed part 100 changes. Further we do support the comments provided by the National Mining Association and agree that changing past precedent established through existing case law will have a destabilizing effect on the enforcement of the Mine Safety and Health Act.

The Nevada Mining Association thanks MSHA for allowing the mining industry the opportunity to provide comments on the proposed changes to Part 100.