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To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: COMMENT - RIN 1219-AB72

2014 SEP 23 P 5:32

To whom it may concern;

In regards to MSHA's proposed rules to change 30 C.F.R. Part 100, I oppose the proposed rule. Please note that I have already submitted comments on the proposed rule. Please consider this as additional commentary that addresses other portions of the proposed rule.

MSHA has stated that the reason for the proposed rule is to enable operators to more readily address hazards and violative conditions found during inspections by focusing more resources towards safety and hazard prevention/abatement. Even after a cursory reading, the proposed standard does little in this regard as the true purpose for the proposed rule is to reduce citation contests and the ability for operators to seek relief in the courts, perhaps even in the existing informal conference setting.

The proposed rule actually incentivizes operators to NOT contest citations by providing a monetary carrot of a 20% assessment reduction for those citations which are not contested. MSHA couples this with 20%, do-not-contest reduction with violations which are promptly abated. As there is already a 10% good faith reduction for eligible operators, this additional 20% reduction is tantamount to legal blackmail. It flies in the face of the reason that most operators decide to contest citations; fairness and accuracy of findings during inspections. As an operator, it is easy to view this as an insult to our industry to assume that the only or primary reason companies decide to contest a citation is for economic reasons.

Truly, when a company takes the path of contesting a citation, it is rarely an economically wise choice due to the time and effort required to do so. We contest citations because the citation does not reflect conditions or circumstances outlined in the citation. In addition, the proposed rule does not spell out or address if the reduction will be affected by the request for an informal conference, commonly referred to as the "10-day District Conference".

If MSHA's purpose is to encourage operators to focus resources on hazard abatement and accident prevention, I would offer that a larger percentage reduction is promoted for prompt abatement regardless if an operator seeks legal review or not. Such is not the case in the proposed rule.

NEGLIGENCE

The existing negligence categories of; No Negligence, Low Negligence, Moderate Negligence, High Negligence and Reckless Disregard are proposed to be replaced with three new categories of: Not Negligent, Negligent, and Reckless Disregard. Though at first glance, one might assume that "simplifying" the negligence categories into these three categories makes sense. However it is clear upon reflection that all judgment that may be taken into consideration by the inspector or a judge as to why an alleged violative condition or practice existed at all will be taken away. In truth, because of the proposed tossing out of the five categories, most citations would result in an operator to be labeled as "Negligent" regardless of circumstances present at the time of the inspection. Not only does this not reflect the realities found during an inspection, it is simply unfair.

Conditions and practices can vary from mine to mine because no two mines are alike. Inspectors, due to their experience and expertise understand this and call upon both when evaluating alleged violative conditions encountered during an inspection. They understand that there may be mitigating circumstances involved that contributed to the degree of negligence involved. This is currently taken into consideration when they assign the degree of negligence for each violative condition. Furthermore, operators will not be able to use mitigating circumstances when contesting citations under the proposed rule. This can and will lead to higher penalty

assessments (as outlined in the proposed assessment formulas) with little recourse for operators seeking fairness and judicial review.

LIKELIHOOD OF OCCURRENCE

Similar in scope to the proposed changes to Negligence ratings, the current likelihood designations of No Likelihood, Unlikely, Reasonably Likely, Highly Likely, and Occurred are proposed to be changed to three categories of Unlikely, Reasonably Likely, and Occurred. Again, as in the case of the Negligence ratings, an inspector's and judge's expertise and experience would not be able to come into play, nor would an operator be able to provide evidence or other circumstances to counter the findings during an inspection.

At present, the Significant and Substantial (S&S) assignment to citations rests heavily on the current designations as defined through long standing case law. It is unclear how this will be affected but it is reasonable to assume that many more violative conditions which were not previously categorized as S&S would become so. It is also likely that the definition of what is an S&S violation would be done by fiat since no legal definition would apply or indeed exist. If that occurs, MSHA's desire to reduce legal backlog would grow until the Review Commission (even if allowed under the proposed rule) rendered judgment and legal guidance.

In addition, 107(a) Imminent Danger orders could be issued much more frequently. At present, "Highly Likely" designations are necessary for such orders to be issued. Under the proposed rule, it appears that an inspector only needs to assign a "Reasonable Likely" chance of occurrence for the order to be issued. As stated previously, this "simplification" of criteria removes common sense or careful consideration by an inspector when assigning such actions.

SUMMARY

The proposed rule is flawed, seriously so. It attempts to remove judicial oversight, and an inspector's judgment, expertise and experience when evaluating an alleged violation. It substantially inhibits the ability for an operator to seek fairness and objective review of the allegations found in a citation. It attempts to circumvent due process afforded by the existing rule. Despite MSHA's claim that the rule is designed to help operators to focus on activities centered on accident prevention, it is designed solely to reduce contests and disagreements with the Agency.

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