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Criteria and Procedures for Assessment of Civil Penalties, 30 CFR Part 100

Comment On: MSHA-2014-0009-0090

Criteria and Procedures for Assessment of Civil Penalties, Proposed rule; extension of comment period; close of record.

Document: MSHA-2014-0009-0114

Comment from Debra Satkowiak, Institute of Makers of Explosives

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General Comment

See attached file.

Attachments

MSHA-2014-009 RIN 1219-AB72 31JULY 2014

AB72-Comm-71

IME

institute of makers of explosives

The safety and security institute of the commercial explosives industry since 1913

March 31, 2015

Mine Safety and Health Administration
Office of Standards, Regulations, and Variances
1100 Wilson Boulevard
Room 2350
Arlington, VA 22209-3939

Re: Docket No. MSHA-2014-0009
RIN 1219-AB72
Mine Safety and Health Administration¹

Dear Sir or Madam:

The Institute of Makers of Explosives (IME) appreciates the opportunity to submit additional comments on the proposed changes to the criteria and procedures for assessing civil penalties proposed by the Mine Safety and Health Administration (MSHA). IME has concerns that overall, the proposed changes will result in increased penalty assessment points for the same violations that occur under current standards. However, IME does support proposed changes to certain areas of the penalty assessment.

Interest of IME

IME² is a nonprofit association, founded in 1913, to provide accurate information and comprehensive recommendations concerning the safety and security of commercial explosive materials. IME represents blasting companies that provide explosive materials and services for mining and drilling. Some IME member companies work over 400,000 hours annually in hundreds of mines coast-to-coast. In this capacity, IME members are subject to MSHA's civil penalty procedures.

Background

MSHA policy requires independent contractors to operate at all locations across the country with one identification (ID) number.³ On the other hand, mines are entitled to obtain a unique ID number at every mine location. This policy creates an uneven playing field between mines and contractors. It punishes contractors more severely than mining companies with similar or greater resources who commit the same violations. Citation penalty assessments for categories such as size of entity, history of violations, and

¹ Federal Register Vol. 79 No. 147, July 31, 2014

² <http://www.ime.org/>

³ The number of mines at which IME member companies conduct contract services ranges from one facility to 60 facilities.

repeat violations are tied to ID numbers, resulting in higher penalties to contractors than mines for similar violations.

MSHA's policy of issuing each contractor one ID number for all operations hinders communication between mine inspectors and the local contractor's management on health and safety matters by forcing communication to the corporate level. Contractor representatives at a headquarters level may be far away and unfamiliar with the site-specific conditions at hand, making resolution of the issue less efficient.

It is the experience of IME member companies that MSHA inspects blasting contractors significantly more often than mine sites. One IME member company reported that it is inspected by MSHA approximately 40 times per year. According to the Mine Act, a typical surface mine would only be inspected two times per year. IME believes that the separate metrics that MSHA uses for mines (violations per inspection hour at the mine) and contractors (total violations across the whole country) in the history of violations area predisposes contractors to higher point totals than mines. MSHA should explain why it uses different metrics and why it believes that the two different scales are equivalent. IME believes that if contractors were measured by the number of violations per inspection hour (the same scale mines are measured by) then they would receive significantly fewer penalty points than they do now.

Many times over the years, IME has communicated its concerns to MSHA over the agency's policy to issue one ID number to contractors and all their subsidiaries. We hope that dialog may continue on this matter and we are prepared for further discussions with MSHA on this policy. Although we have much more information and specific examples to discuss, IME recognizes that MSHA's policy of issuing one ID number for contractors while issuing multiple ID numbers for mines is outside the context of this rulemaking. We encourage MSHA to take our comments into consideration recognizing the excessive burdens MSHA's policy of assigning single ID numbers places on contractors who conduct blasting and drilling services.

Discussion of the Proposed Rule

IME has the following comments on the proposed rule.

1. Shifting from Five Categories to Three Categories

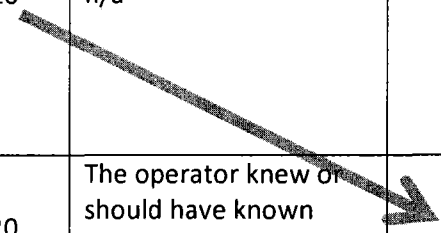
MSHA proposes to shift from five possible categories of penalty points in the respective areas of negligence and likelihood to three possible categories of penalty points. MSHA inspectors operating in the field have the authority and discretion to assign categories and points and IME firmly believes that MSHA will "round up" in these areas, resulting in significantly more penalty points to IME members than compared to the current system. We base our expectations on real experiences incurred by member companies. In one particular example, a member company received a citation in the "high negligence" category for an administrative violation that had no impact on safety.⁴

IME member companies are particularly concerned with the proposed changes to the area of negligence which is relatively more critical than other areas under the proposed system. MSHA stated during public hearings on these proposed rules that their intent was to collapse "low," "moderate," and "high negligence" into one category, "negligent." IME member companies conducted individual reviews of violations received from MSHA, ranging from one to three past years. During the periods reviewed, IME member companies received no citations categorized as "no negligence," most likely because the definition of "no negligence" implies that MSHA failed to communicate the requirement. They further reported that the citations received most often were "low negligence" and "moderate negligence."

⁴ A violation of 30 CFR 50.30(a) received 35 negligence points.

Under this proposed rulemaking, violations that would have previously been categorized as “low negligence” would be assessed as “negligent,” increasing IME member company point assessments from an average of 10 to 15. This is a significant increase considering that points have generally been cut in half in all other areas.

	Current Regulation	Current Points	Proposed Rule	Proposed Points
No or Not Negligent	The operator exercised diligence and could not have known of the violative condition or practice.	0	The operator exercised diligence and could not have known of the violative condition or practice.	0
Low Negligence	The operator knew or should have known about the violative condition or practice, but there are considerable mitigating circumstances.	10	n/a	n/a
(Moderate) Negligent	The operator knew or should have known about the violative condition or practice, but there are mitigating circumstances.	20	The operator knew or should have known about the violative condition or practice.	15



In regards to prior violations categorized as “moderately negligent,” as written, members would ideally receive a reduction in points from 20 to 15. However, for reasons previously discussed, IME member companies have no confidence and no assurance that inspectors will not choose to subjectively cite violations at a higher category.

In the area of likelihood, IME is concerned that current violations categorized as “unlikely” will be categorized as “reasonably likely” under the proposed system. In citations reviewed, IME member companies rarely or never received citations categorized as “no likelihood.” IME notes that the clear language in the proposed regulation indicates that the majority of current violations categorized as “unlikely” should be categorized as “unlikely” under the proposed system. During the hearings on this proposal, MSHA stated that “no likelihood” and “unlikely” would become “unlikely” and that “reasonably likely” and “highly likely” would become “reasonably likely.” Despite these assertions by MSHA, the past experiences of IME member companies lead us to firmly believe that inspectors will default to issuing violations in the higher category.

2. Changes to Tables V and VIII

IME supports the proposed changes to Table V, Size of Entity and Table VIII, Number of Persons Affected. We believe that these changes address some of our concerns over the inequity of MSHA’s policy to issue contractors one ID number. The changes lessen the effect of MSHA’s harmful and discriminatory policy to contractors who conduct blasting and drilling services.

3. Consistency and Objectivity

During public hearings hosted by MSHA on these proposed rule changes, the agency stressed that it would be conducting training for inspectors to ensure consistency in application of the new criteria. Given the

results of the violations reviewed by IME member companies (see item 1 above), IME is rightfully concerned that inspectors will subjectively assign violations into higher categories. Therefore, IME supports the training that MSHA has announced and further encourages the agency to implement follow-up measurement tools to ensure that the training results in sustained consistency and objectivity.

4. Loss of Ability to Contest

MSHA has included in its proposal an additional 20% credit that would be awarded if there is no contest to the citation or the penalty, and the penalty is paid within 30 days, which is before it becomes a final order of the Federal Mine Safety and Health Review Commission ("Commission"). IME member companies support this proposal in principle but have concerns that MSHA may limit their due process in the final rule. MSHA should clarify what constitutes "contesting" a citation. IME believes that "contest" involves a formal conference with the district office and any informal communications before the conference should not be considered a "contest to the citation." We are concerned that an action, such as simply calling the district office or field office for an explanation of certain specifics related to the citation, will be received as a "contest to the citation" and it is critical that IME member companies have access to informal discussions with MSHA officials to assist in understanding a citation and making decisions about a citation. IME will oppose any measures that forfeit a contractor's ability to contest violations as well as block the ability of the Commission to determine if MSHA has met its burden of proof.

Conclusion and Recommendations

IME believes that, as compared to the current methodology, the proposed changes to the penalty assessment process will result in a significant increase in penalty amounts for the same violations. IME firmly believes that MSHA will "round up" in the category for assessment of negligence, resulting in significantly more penalty points to IME members. This will compound the detrimental effect of MSHA's policy of assigning one ID number to each contractor. We offer the following summary comments and suggestions to improve the proposal.

1. IME suggests that MSHA retain the current five-tier system and not change to the proposed three-tier system for negligence and likelihood.
2. IME supports the proposed changes to Table V—Size of Independent Contractor and Table VIII—History of Previous Violations.
3. IME supports training to be conducted by MSHA in order to ensure sustained consistency and objectivity of violations issued by inspectors.
4. IME supports MSHA's proposal to increase the good faith credit to 30 percent total but opposes any loss of due process that might limit discussion before conference with the district office.
5. IME continues to urge MSHA to amend its policy of issuing single ID numbers to contractors.

We appreciate your consideration of our comments as submitted.

Respectfully,



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President
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