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Comment On: MSHA-2014-0009-0090

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

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General Comment

Please find the revised comments from the MSHA Fairness Coalition.

Attachments

2015-0331 Final Comments on the Proposed Penalty Rule Part 100

AB 72 - COMM - 72



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March 31, 2015

Ms. Sheila McConnell
Acting Director
Mine Safety and Health Administration
Office of Standards, Regulations, and Variances
1100 Wilson Boulevard
Room 2350
Arlington, VA 22209

Re: RIN 1219-AB72 – Criteria and Procedures
for Proposed Assessment of Civil Penalties

Dear Ms. McConnell:

The MSHA Fairness Coalition (“Coalition”) submits the following comments in response to the Proposed Rule “Criteria and Procedures for Assessment of Civil Penalties under 30 C.F.R. Part 100” (79 Fed. Reg. 44494 (July 31 2014)) (“the Proposed Rule”) and the definition clarifications provided in the Extension of the Comment Period and Close of Record (80 Fed. Reg. 7393 (Feb. 10, 2015)) (the “Clarifications”). The Coalition represents mine operators in various sectors of the mining industry.

For the reasons described below, the Proposed Rule must be withdrawn because it imposes inequitable penalties, would not promote safety and health, is contrary to the provisions of the Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the “Mine Act” or “Act”), and does not achieve the results sought by the Mine Safety and Health Administration (“MSHA”). The Coalition has significant concerns with the anticipated effects of the Proposed Rule, specifically its inconsistent, disproportionate assessment of penalty points not only against small businesses, but also those operators and contractors with better-than-average compliance history. The changes contemplated in the Proposed

Rule would be arbitrary and capricious because, among other reasons, the proposal lacks data-driven analysis and reasoning to justify the disparate effects that will occur.

Overview of MSHA's Proposed Changes to Part 100

In the commentary accompanying the Proposed Rule, MSHA asserts that its proposed changes will (1) improve objectivity and consistency in how inspectors write citations and orders; (2) result in earlier resolution of enforcement issues due to fewer areas of dispute; (3) result in greater emphasis on more serious safety and health conditions; and (4) provide increased openness and transparency in the application of the regular formula penalty. 79 Fed. Reg. at 44495.

Substantively, the proposed regulations seek to amend the existing Part 100 regulations. The existing regulations utilize a formula to determine civil penalties for MSHA to propose that Operators pay for citations and orders, issued by inspectors (not proposed as "special assessments under 30 C.F.R. § 100.5). *Id.* The proposed penalties are based upon allegations made by inspectors based on the inspectors' observations of conditions at the mine and the inspectors' belief regarding the perceived gravity of the alleged condition or practice and the operator's alleged degree of negligence regarding the alleged condition or practice. The inspectors document their beliefs regarding gravity and negligence by marking the "check boxes" on the MSHA citation form, MSHA Form 7000-3.

With the Proposed Rule, MSHA intends to reduce the number of gravity and negligence categories, revise the definitions of key terminology within those categories and modify the degree of emphasis for the parameters used to calculate the proposed penalties. 79 Fed. Reg. at 44495. In addition to the specific changes proposed by MSHA, the agency requested alternatives to its proposed changes in order to accomplish the goals it seeks to achieve by the Proposed Rule. The key elements of proposed Part 100 changes, as described by MSHA, are as follows:

- Increased emphasis on violation history (including repeat violations), negligence and the "severity" factor of the gravity criterion.
- Less emphasis on mine size, controller/contractor size and the "likelihood of occurrence" factor of the gravity criterion.
- The "Negligence" criteria would be reduced from five categories to three: "Not Negligent", "Negligent" and "Reckless Disregard;" eliminating the existing "Low Negligence" and "High Negligence" categories.
- The "Likelihood of Occurrence" categories would be reduced from five to three: "Unlikely," "Reasonably Likely" and "Occurred;" eliminating the existing "No Likelihood" and "Highly Likely" categories. We appreciate MSHA addressing our earlier comment in the Clarification which revised the proposed definition of "occurred," to exclude conditions or

practices that do not result in an injury or illness, but we continue to be concerned with other terms in the proposal as described below.

- The “Persons Affected” category would be reduced from 11 categories to two: only “No Persons Affected” and “One or More Persons Affected.”
- The penalty calculation formula, which calculates the total penalty points assessed for all factors considered in setting a penalty, changes from a 208-point scale to a 100-point scale. The conversion of penalty points to dollar amounts is also changed. The existing regulations impose a \$112 penalty for any citation or order with 60 points or fewer, and a \$70,000 penalty for any citation or order with 144 points or greater. These minimum and maximum penalties would now be associated with penalty point totals of “31 or fewer” and “73 or more,” respectively.
- Minimum penalties for unwarrantable failures would be increased by 50%. The minimum penalty for a 104(d)(1) citation or order would be raised to \$3,000 and the minimum penalty for a 104(d)(2) order would be raised to \$6,000.
- Two alternatives are under consideration by MSHA to limit the discretion of the Federal Mine Safety and Health Review Commission (“Commission”) in departing from the penalty MSHA proposes. Currently, the Commission exercises independent authority in assessing penalties.
- MSHA also requested comment on a potential, additional 20%, good faith penalty reduction, if the citation and penalty are accepted as issued, without contest.

Analysis

A. The Proposed Rule’s Impact Will Be Broader Than MSHA Admits And Will Not Be Based On A Documented Rationale

The Coalition disagrees with MSHA’s description of the scope of the rule. MSHA states that the Proposed Rule “involves changes to MSHA’s regular assessment penalty formula only.” 79 Fed. Reg. at 44495. MSHA performs the special assessment penalty calculations manually and claims that special assessments are used in a small number of cases, such as those involving fatalities or willful violations. *Id.* However, in the same paragraph, the agency admits that “MSHA considers the inspector’s evaluations of the criteria in proposing penalties, [and] the Proposed Rule also may have an indirect impact on special assessments.” *Id.*

The Coalition is concerned with MSHA’s inconsistent statements regarding special assessments because, contrary to MSHA’s assertions, the use of special assessments has not been limited to fatalities or allegations of willful conduct – special assessments are far more common. For example, MSHA itself has made it clear that all “Dues to Live Do’s” (see MSHA selected list of regulations for focused

enforcement) will be considered for special assessments. Citations issued in conjunction with Section 107(a) orders, or Section 104(b) orders are generally specially assessed. Statutory violations, involving alleged impeding inspections or advance notice are almost always specially assessed. Citations alleging these conditions are likely to become more common in light of MSHA's expanding stance regarding its authority to access almost all mine operator records. MSHA's stated intention to curtail consideration of mitigating factors will expand significantly the number of special assessments by increasing negligence findings. Thus, the Proposed Rule will have a substantial effect on special assessments, in addition to the regular assessment penalty formula. MSHA has not quantified this impact nor analyzed its effect on safety and feasibility.

MSHA asserts that the Proposed Rule is structured to "encourage operators to be more accountable and proactive in addressing safety and health conditions at their mines." *Id.* However, MSHA does not provide any data or evidence to support this conclusion. Instead, MSHA points to the initiatives and rules the agency has implemented in the last four years as evidence that the current enforcement efforts are already accomplishing those goals. For example, MSHA claims that its "Rules to Live By" and "Impact Inspections" have reduced the total number of citations and orders assessed pursuant to Part 100. *See* 79 Fed. Reg. at 44495. MSHA also notes that the number of contested citations and orders decreased by six percent between 2010 and 2013. 79 Fed. Reg. at 44495.¹ MSHA declares that a reduction in citations and orders "does not preclude the need for improvement in the civil penalty assessment process." 79 Fed. Reg. at 44495. Strikingly, MSHA fails to elaborate on this conclusory statement and instead proposes a rule that will increase citation severity, penalty amounts, and the number of contested cases, as described below. The Proposed Rule is utterly silent regarding an identifiable problem or concern that would be remedied by these changes.

B. The Proposed Rule Does Not Comport with the Mine Act Nor Accomplish MSHA Goals

In Section 110(i), the Mine Act requires that:

(T)he Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

¹ MSHA incorrectly calculated the percentage of the reduction in contested violations, and states that: "(a)lthough the total number of mining operations in the United States decreased by approximately 0.5 percent from 2010 to 2013 (from 13,830 in 2010 to 13,760 in 2013), the number of violations for which MSHA proposed a regular formula assessment decreased by approximately 26 percent (from 164,500 in 2010 to 121,100 in 2013) and the percentage of violations contested decreased by approximately 6 percent (from 26 percent in 2010 to 20 percent in 2013). Reduced numbers of violations, however, does not preclude the need for improvement in the civil penalty assessment process." The actual reduction in the contest rate was more than 23% under the current civil penalty system, not the 6% reported by MSHA, and there are no data presented to support the conclusion that there is "a need for improvement in the civil penalty process," particularly the proposed changes.

30 U.S.C. § 820(i). MSHA is required to consider the same criteria in proposing penalty assessments. 30 USC § 810(b)(1)(B). The Part 100 formula system for proposing civil penalties was developed in 1974 and was said to have two goals: 1) the timely processing of the high volume of cases generated under a mandatory penalty scheme and 2) the fair and consistent application of the statutory criteria described in Section 110(i) of the Mine Act. *See* Notice of Proposed Rulemaking, 45 Fed. Reg. 74444 (Nov. 7, 1980). MSHA's proposal departs from these goals.

In addition, one of MSHA's stated goals is to avoid punishing mine operators with good records for the errors of mine operators who habitually fail to comply with MSHA standards. As Asst. Secretary Main stated in his written testimony to Congress on March 31, 2011, "We also understand that MSHA's effective enforcement of the law should create a level playing field, so that operators who play by the rules and provide safe mine conditions do not have to compete against operators that cut corners on safety." *Hearing Before the Comm. On Health, Education, Labor and Pensions*, 112th Cong. 2 (2011) (statement of Hon. Joseph Main, Asst. Secretary of Labor, MSHA).

MSHA states that their proposal to amend § 100.3 is guided by four key principles:

- (1) Improvement in consistency, objectivity, and efficiency in how inspectors write citations and orders by reducing the number of decisions needed;
- (2) Simplification of penalty criteria, which should lead to fewer areas of dispute and earlier resolution of enforcement issues;
- (3) Greater emphasis on the more serious safety and health conditions; and
- (4) Openness and transparency in the application of the Agency's regular formula penalty criteria.

79 Fed. Reg. at 44495. MSHA contends that by simplifying the gravity and negligence criteria, increased emphasis will be placed on the more serious hazards. *Id.*

The Coalition disagrees with MSHA's contentions and conclusions. In fact, the Coalition's research indicates the Proposed Rule will produce results that are opposite to those sought by MSHA. The proposed changes will increase the penalties assessed against operators who have had good compliance records and typically receive "less-serious" violations *at a greater rate*, than the increased penalties assessed against operators with sub-par compliance records or recipients of "more serious" violations. The proposal, at best appears to be a change for the sake of change, and at worst seeks to ease the Secretary's burden of proof on enforcement actions using terminology and citation form changes, thereby increasing penalties without a safety rationale.

MSHA concludes that there would be no material change in assessments, but admits that it "made assumptions about how the inspector would evaluate degrees of negligence and gravity. By so doing, it allocated proposed penalty points so that the aggregate civil penalty amount proposed under the Proposed Rule would be comparable to the aggregate civil penalty amount proposed under the existing rule." 79 Fed. Reg. at 44496. The Coalition disagrees that the penalty amounts would be comparable under the existing rule and the Proposed Rule.

The Coalition requests that MSHA publish all of the data or evidence related to the Proposed Rule, along with the analysis of that data. The Coalition is concerned with MSHA's conclusions not only because the Coalition's analysis indicates results opposite to those predicted by MSHA, but also because MSHA has not identified a need to change Part 100 or safety benefits from the changes.

C. The Proposed Rule Increases Subjectivity and Limits Contest Rights

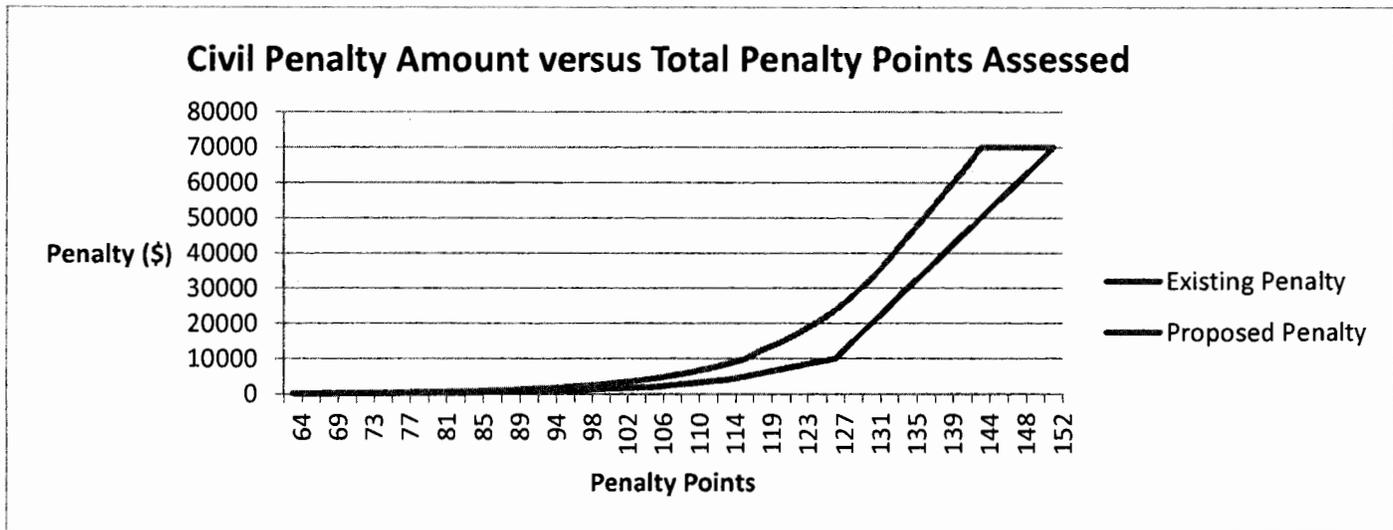
The Coalition is concerned with the Proposed Rule's adverse impact on contests of violations. The existing rule properly includes variable levels of mitigation in order to accurately assess levels of negligence. Mitigating circumstances are well recognized by the legal system in general and MSHA case law in particular as reducing negligence. But, the Proposed Rule eliminates mitigating circumstances and reduces the degrees of negligence available for inspector selection, thereby limiting the inspectors' findings and an operator's ability to challenge or settle negligence determinations. The proposal forces an operator's alleged conduct into one of the three new buckets, which may not reflect the correct level of negligence. The incorrect assertion of negligence by an inspector, once generated, creates a burdensome and costly process for an operator that will be counterproductive to amicable resolution of citation disagreements and safety improvements.

Importantly, the Coalition concludes that the Proposed Rule will increase, instead of decrease, inspector subjectivity and bias when issuing alleged violations. Subjectivity is the result of inconsistent interpretation of regulations, significantly differing paradigms and perspectives, as well as differing human personalities. This subjectivity is evidenced by the violation rate disparity between Metal/Non-Metal ("M/NM") operators and Coal operators. Per MSHA's own admission, "the data revealed that M/NM mine inspectors assessed "High Negligence" in 10 percent of the violations while inspectors in coal mines assessed "High Negligence" in five percent of the violations. An even larger difference exists with the inspectors' evaluation of injury severity. M/NM mine inspectors evaluate the potential injury to be "Fatal" in 24 percent of the violations cited compared to 11 percent for Coal mine inspectors." 79 Fed. Reg. at 44512. Overall, the introduction of less flexible policies that are still susceptible to subjective interpretation will likely increase the bias that is inherent in the application of standards to Metal/Non-Metal operators. MSHA has not analyzed this counterproductive impact of the Proposed Rule nor sought to cure it.

D. MSHA's Proposed Rule Benefits Bad Actors and Creates a Randomized Distribution of Penalty Amounts

The Proposed Rule changes the maximum penalty points that can be assessed against an operator from 208 to 100 penalty points. Because the maximum points for the Proposed Rule decreases by 52%, the relative weight of each penalty point has a commensurate increase in significance. Algebraically speaking, the transition from a 208 point scale to a 100 point scale means that the relative value of each penalty point under the Proposed Rule has increased by 108% from the existing rule.

The graph below plots the civil monetary penalty amounts against the total penalty points assessed for the existing and Proposed Rules. To allow for a side-by-side comparison, the penalty amounts for both rules have been normalized to a common point scale, and depict the \$70,000 civil monetary penalty maximum being reached at 143 penalty points for the existing rule and the equivalent of 152 penalty points (73 on a 100 point scale) for the Proposed Rule.

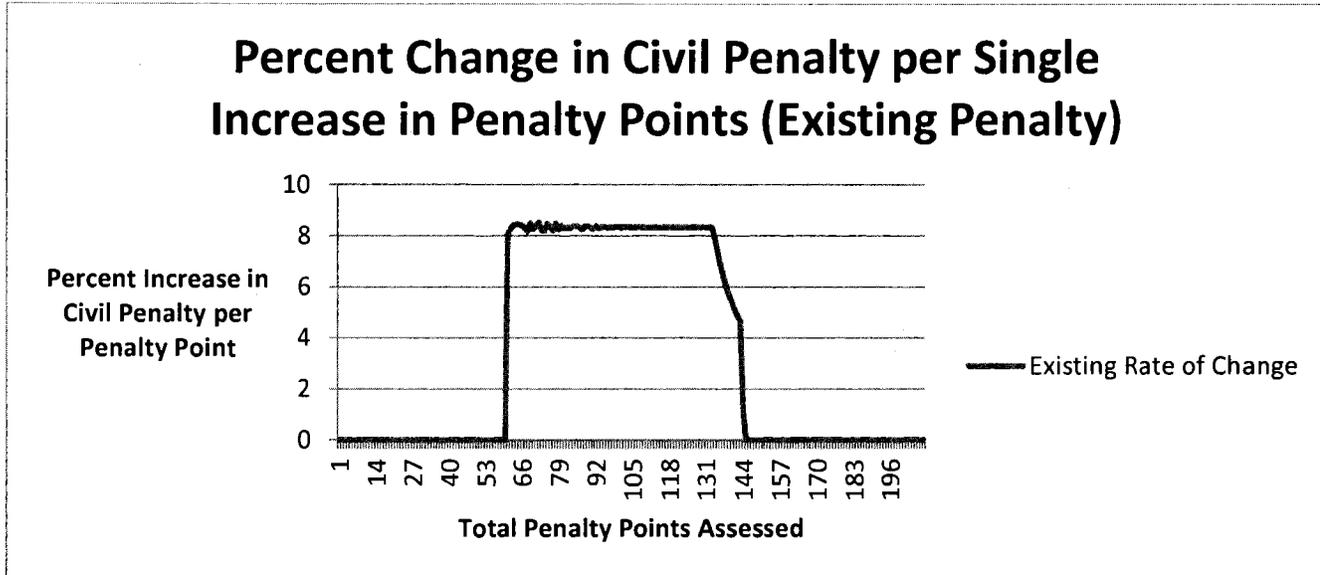


The fact that the Proposed Rule imposes a slower rate of increase in civil monetary penalties issued to operators receiving more severe citations and orders is evident by the fact that higher penalty point assessments are required under the Proposed Rule to reach the equivalent monetary penalties under the existing rule. This result is inconsistent with MSHA’s stated objective to place increased emphasis on more serious hazards. 79 Fed. Reg. at 44495.

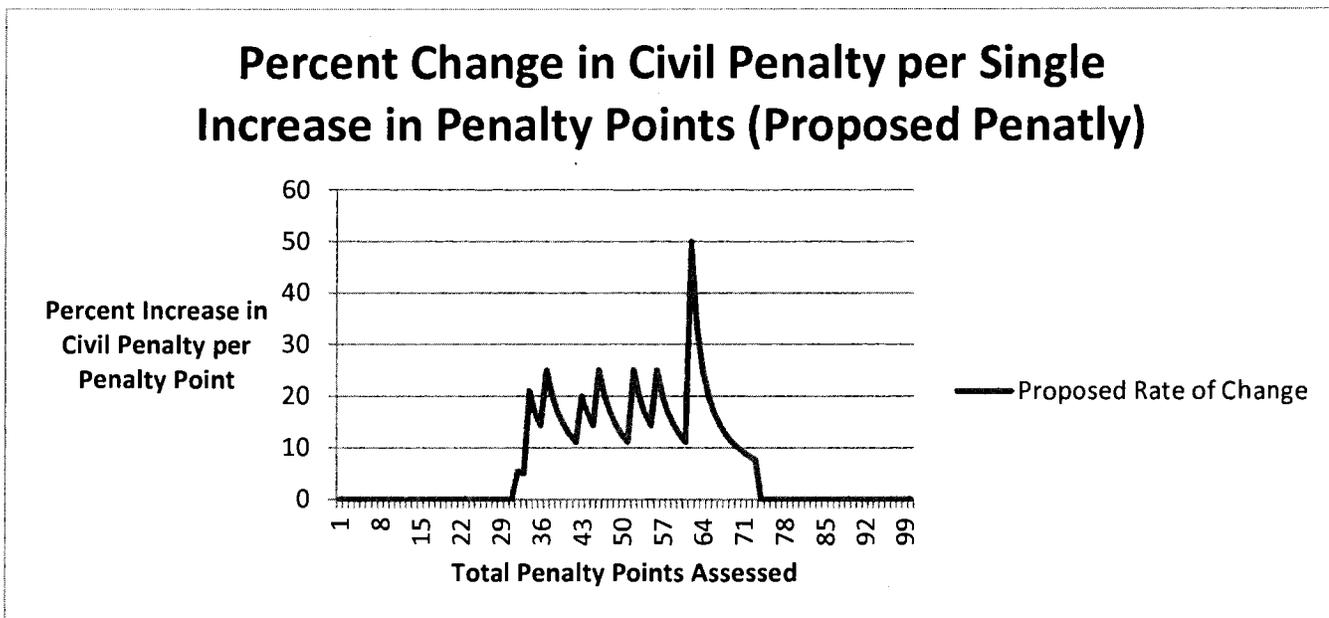
Also, MSHA intends for the aggregate civil monetary penalty amounts assessed under the Proposed Rule to be comparable to the aggregate civil penalty amounts assessed under the existing rule. 79 Fed. Reg. at 44496. Based on the difference between the two curves in the graph above, and the fact that certain criteria (e.g. mine size; violation history) are fixed values, the only ways to offset the apparent gap between the two curves would be for MSHA to (a) increase the negligence and gravity determinations for the citations issued, or (b) issue a greater quantity of citations and orders than the agency currently issues. Both scenarios punish the operators who (a) historically do not receive Significant and Substantial (“S&S”), or High Negligence citations, or (b) are historically in compliance with MSHA’s standards.

The Proposed Rule also implements random changes to the increase in the civil monetary penalty per penalty point formula. Under the existing rule’s penalty point conversion system, the civil monetary penalty increased at a near-constant rate of 8% per penalty point. However, under the Proposed Rule’s penalty point conversion, the civil monetary penalty increase per penalty point is completely arbitrary, with fluctuating increases across the newly proposed penalty point scale. The following two graphs depict the percent change in civil penalty per single increase in penalty points. Under the existing rule,

the penalty increases at just over 8% per penalty point until the total penalty points approach the maximum penalty.



Under the Proposed Rule, the civil monetary penalty amounts would increase anywhere between 11% and 50% per point.



The graph for the Proposed Rule shows arbitrary peaks and valleys at various intervals across the 100 penalty point scale. These peaks and valleys indicate that MSHA’s proposed monetary penalties do not uniformly increase in severity as a function of the total penalty points assessed. For example, if a citation receives 37 penalty points, the monetary penalty is 25% higher than a citation receiving 36 penalty points. But if a citation receives 42 penalty points, the monetary penalty is only 11% higher than a citation receiving 41 penalty points.

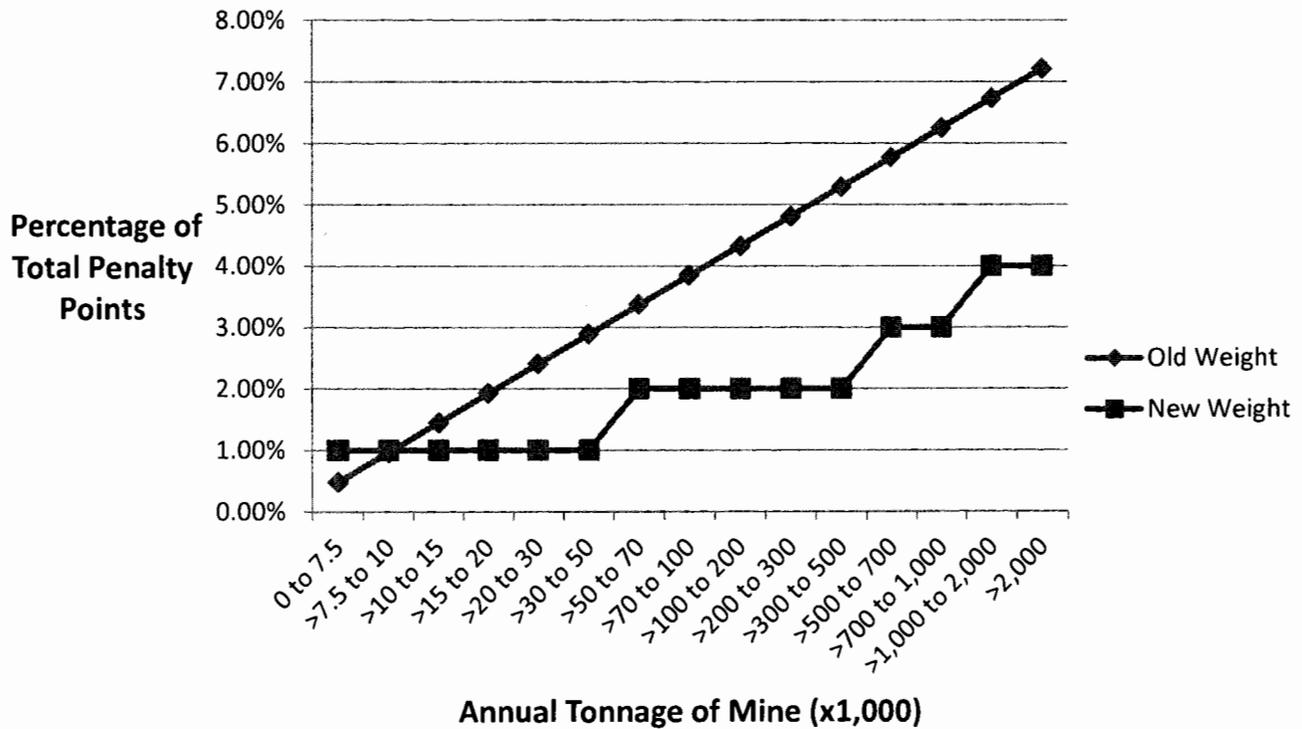
E. The Proposed Rule's Allocation of Penalty Points Based on Mine Size Creates Inconsistent and Unfair Results for Small Mine Operations

The proposed changes regarding size of mine and size of controller do not comport with statutory requirements or make sense from a regulatory standpoint. As noted above, the first of six criteria in the Mine Act used to determine civil penalties is, "the appropriateness of the penalty to the size of the business operator charged." According to MSHA, the proposal would place less emphasis on mine size but the distribution of the penalty amount by mine size would remain generally the same. However, an examination of the proposed changes for size of mine and size of controller shows that MSHA has failed to correctly: (1) account for the size of a given mine or company, and (2) analyze the impact on different sized mines.

For example, the smallest coal mines and controlling entities receive one penalty point for size under the current rule and would receive one penalty point for size under the Proposed Rule. However, there are less than half the total penalty points under the Proposed Rule as there are under the current rule. This means that the smallest coal mines and controlling entities will receive over a 100% increase in point percentage under the Proposed Rule. This increase is seen in the following graph. The size of the coal mine now accounts for 1% of the penalty points for the smallest coal mines, when it used to only account for .48%.

In addition, contrary to MSHA's contention that the distribution of the penalty amount by mine size would remain generally the same, the new stair-step approach to point distribution disproportionately affects each mine. MSHA has not provided any data to explain why the agency adopted this stair-step approach, or why the benchmarks for penalty point increases were set at 50 tons, 500 tons and 1 million tons.

Size of Coal Mine: Percentage of Total Penalty Points



In comparison with the previous linear distribution, the smaller mines at the beginning of each group see less of a benefit than the larger mines at the end of each group. For example, while mines that produce >50 to 70 tons (“group A”) and mines that produce >300 to 500 tons (“group B”) each would receive 2 points, the reduced weight of those points is not equal. Group 1 receives approximately a 40% reduction and group 2 receives approximately a 62% reduction compared to the existing rule. It is unclear, how this new distribution is appropriate or remains “generally the same.” Graphically and algebraically, large mines would undoubtedly receive a much greater reduction under the Proposed Rule than small mines, not only within each size group that receives the same point assessment, but across the industry. Arguably, larger production numbers are associated with operations comprised of larger geographical areas, employee groups and equipment inventories to monitor. However, larger operations also tend to have greater resources to dedicate towards compliance efforts. The Coalition disagrees with the replacement of the existing rule’s linear model with the proposed stair-step approach.

This tendency is repeated throughout the Proposed Rule for each production category. The smaller mines receive less of any perceived benefit for the Proposed Rule’s reduced-emphasis assessment categories. For example, under the Proposed Rule, metal/nonmetal mines working from >5,000 hours to 200,000 hours receive one penalty point. Under the existing rule, those mines received points ranging from 1 (for >5,000-10,000 hours worked) to 6 (for >100,000 – 200,000 hours worked) points. The smaller mines that work 6,000 hours annually would receive over 100% more penalty

impact under the Proposed Rule than the current rule because of the transition from a 208 point scale to a 100 point scale. The largest mines in the category, that work 190,000 hours annually, would enjoy a 66% reduction in the penalty impact for mine size compared to the existing rule. This means that the Proposed Rule actually penalizes the smallest mines in each category and benefits the largest mines. These disparate penalty assessments, particularly against small mine operators, were not contemplated by Congress when it passed the Mine Act, and continue to be contrary to the government's general socio-economic objectives. *See* 79 Fed. Reg. at 44499.

F. 100.3(c) History of Previous Violations

MSHA claims that the Proposed Rule increases the importance of the history of overall violations and repeat violations. However, similar to the size criteria, the Proposed Rule increases the penalties at a greater rate for the mines with good violation histories than it does for mines with poor violation histories. This effect contradicts MSHA's stated purpose for the Proposed Rule, which is another reason the Proposed Rule must be withdrawn.

Additionally, although the mining industry has experienced a decrease of approximately 23% from 2010 to 2013 for contests of citations and orders, that favorable trend may be short-lived. Contrary to MSHA's belief that the Proposed Rule will lead to fewer areas of dispute, the significant increase in the importance of these categories, along with collapsing categories, exemplifies the increased incentive for operators to contest more citations and penalties.

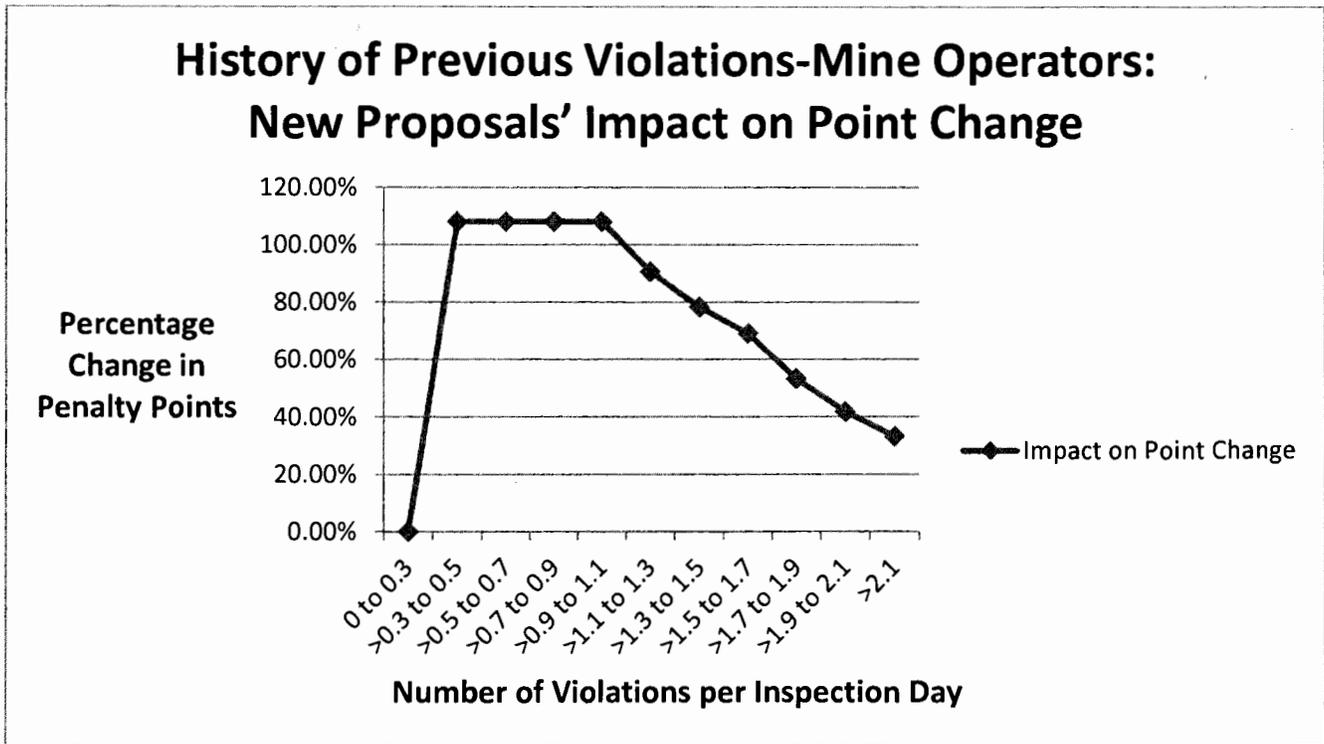
1. History of overall violations

The proposed history of violations criterion increases the penalties against operators with the best records more so than those with the worst records. As previously discussed, because the maximum point value has dropped from 208 to 100, the relative weight of each penalty point for the Proposed Rule would be more than twice the penalty point's current value. As indicated in the preamble, the proposed changes would increase the relative weight for the History of Violations criterion penalty points from 11.6% of the total penalty points under the existing rule to 15.5%. As a result, this increased emphasis, coupled with the change in scale, equates to a 34% increase in the weight of the penalty points.

As outlined in the charts provided, the proposed point allocation system for history of overall violations disproportionately penalizes the mines with the best histories. Here, MSHA indicated that the "Proposed Rule would provide for a more equitable impact of the violations per inspection day formula on small mines." 79 Fed. Reg. at 44499. However, MSHA failed to note that the Proposed Rule penalizes operators receiving fewer Violations Per Inspection Day ("VPID") more heavily than the operators committing more VPID.

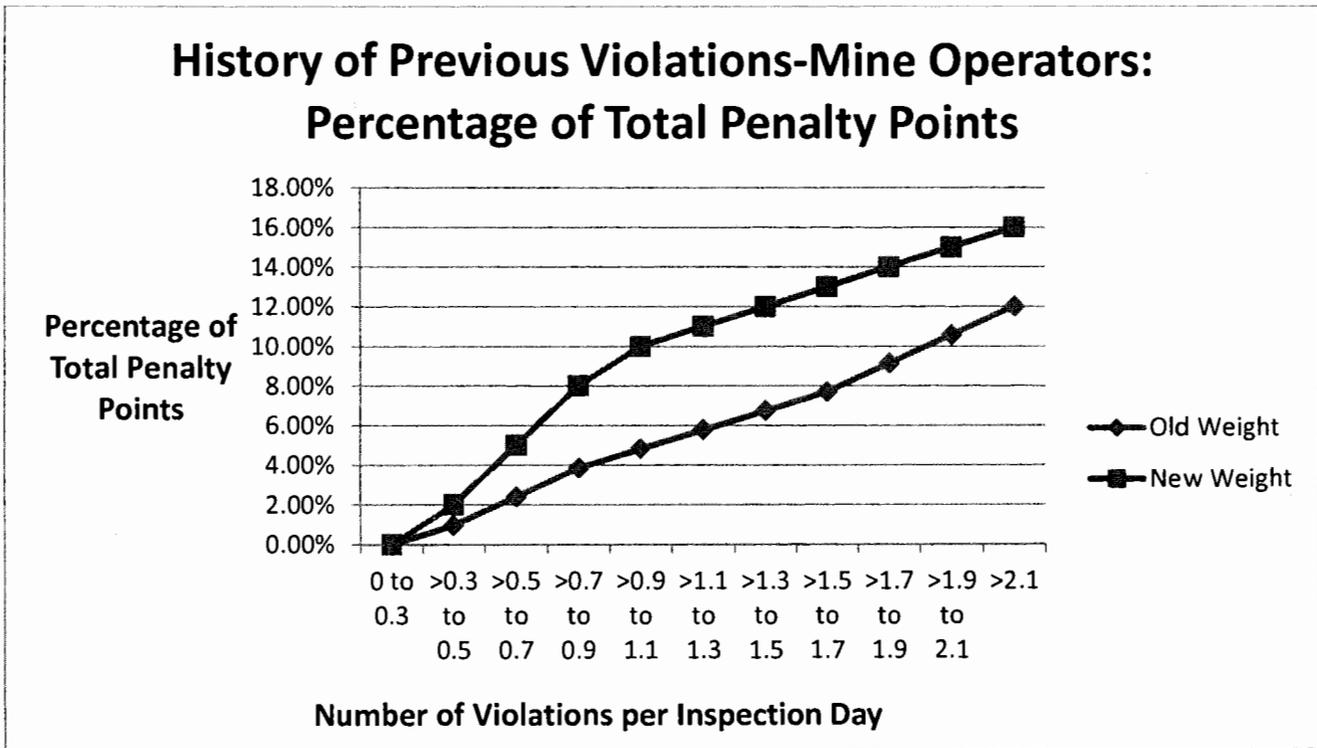
The graph below shows the Proposed Rule's unfair impact on mine operators with very low VPID rates. An operator who exceeds a VPID rate of 0.3 sees more than a 100% change in penalty points, with that rate holding constant or decreasing as the VPID rate increases. The horizontal line

(points 2 through 5) and the downward slope on the graph show the counter-intuitive impact of the Proposed Rule. While mines with 0 to 0.3 VPID receive no points under both the existing and Proposed Rules, any history over that is increased, but with the mines with the best histories getting the most severe penalties compared to the prior rule.



Mines with histories from >0.3 to 1.1 VPID get the same number of points under the Proposed Rule as they do under the existing rule. However, as with the size criterion, the points under the Proposed Rule are worth twice as much, so those mines are essentially penalized at double the existing rate. At rates greater than 1.1 VPID, the difference between the existing and Proposed Rules gradually drops such that the Proposed Rule penalizes the mines with the worst violation histories (>2.1 violations per inspector day) 33% more than the existing rule. In order to accomplish MSHA's goal, these increases would have to be reversed, with mines having the best VPID history being penalized less in comparison to the existing rule, and the corresponding increase from the Proposed Rule getting more pronounced as VPID worsens.

The following graph also displays the disproportionate and inappropriate effect of the Proposed Rules.



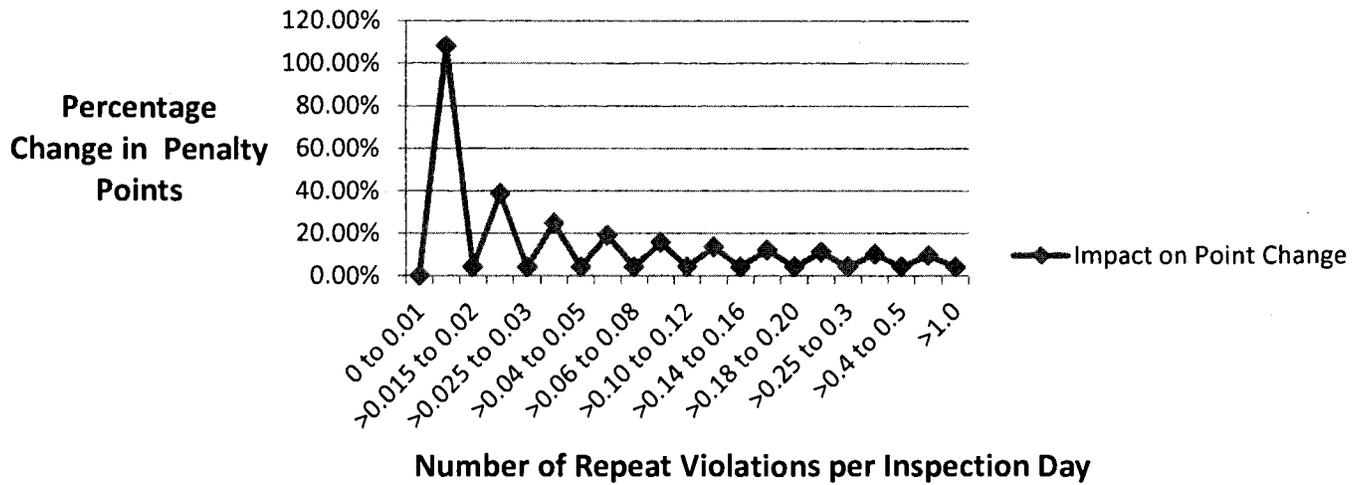
Under the Proposed Rule, the weight of the point for history of previous violations increases logarithmically; wherein the weight of penalty points increase faster for mines with the lowest VPID rate than for mines with a higher VPID rate. If MSHA wants to accomplish its goal of penalizing bad actors and deterring the occurrence of violations, the slope of the new line should increase exponentially, which would cause mines with the highest VPID to receive a larger penalty increase than mines with lower VPID. As currently proposed, the rule fails to meet MSHA’s objective.

Collectively, the added emphasis on overall violation history, the mathematical increase in the value of each penalty point and the associated increase in the penalty amount are likely to spur operators to contest citations and orders with greater frequency in order to minimize the risk of increased penalties during future inspections.

2. History of Repeat Violations

The Proposed Rule’s treatment of History of Repeat Violations also has a disproportionate and improper effect on operators with better compliance history. In the case of operators and contractors, the Proposed Rule doubles the penalty increase at the lowest level of repeat violations and that discrepancy drops to zero at the highest level. In other words, like the history of overall violations, relative to the existing rule, the Proposed Rule applies the highest rate of penalty increases to operators with the best records.

History of Previous Violations-Repeat Violations for Mine Operators: New Proposals' Impact on Point Change



Because the Proposed Rule penalizes operators with the best records comparatively more than those with the worst records when compared to the existing rule, it cannot possibly accomplish MSHA’s stated goal of encouraging “operators to be more accountable and proactive in addressing safety and health conditions at their mines.” 79 Fed. Reg. at 44495. While the weight of both history of overall violations and history of repeat violations is increased as a part of the total penalty scheme, the Proposed Rule effectively gives a penalty discount to operators with the highest Repeat Violation rates compared to their competitors with better compliance records just as it does with VPID. By doing this, the proposal operates essentially opposite of the goals MSHA seeks to achieve.

G. The Proposed Rule Will Increase Citation Inaccuracy and Citation Contests

The Coalition is troubled by MSHA’s conclusion that reducing the number of negligence categories would improve objectivity and consistency in the evaluation of negligence, resulting in fewer areas of disagreement, thereby facilitating resolution of enforcement issues. 79 Fed. Reg. at 44502. This conclusion is wrong because combining low, moderate and high negligence into one category will not improve safety, incentivize compliance, or reduce disagreements with inspectors. Instead, the change will make the process less transparent and easier for MSHA’s inspectors, while hindering operators’ ability to challenge inspectors’ allegations. Simply put, the Proposed Rule likely will yield counter-productive results with respect to dispute resolution and timely enforcement because of the decrease in transparency of inspector decisions.

H. The Proposed Rule Fails to Account for Mitigating Circumstances, Potentially Decreases the Penalty for High Negligence While Increasing the Penalty for Low Negligence

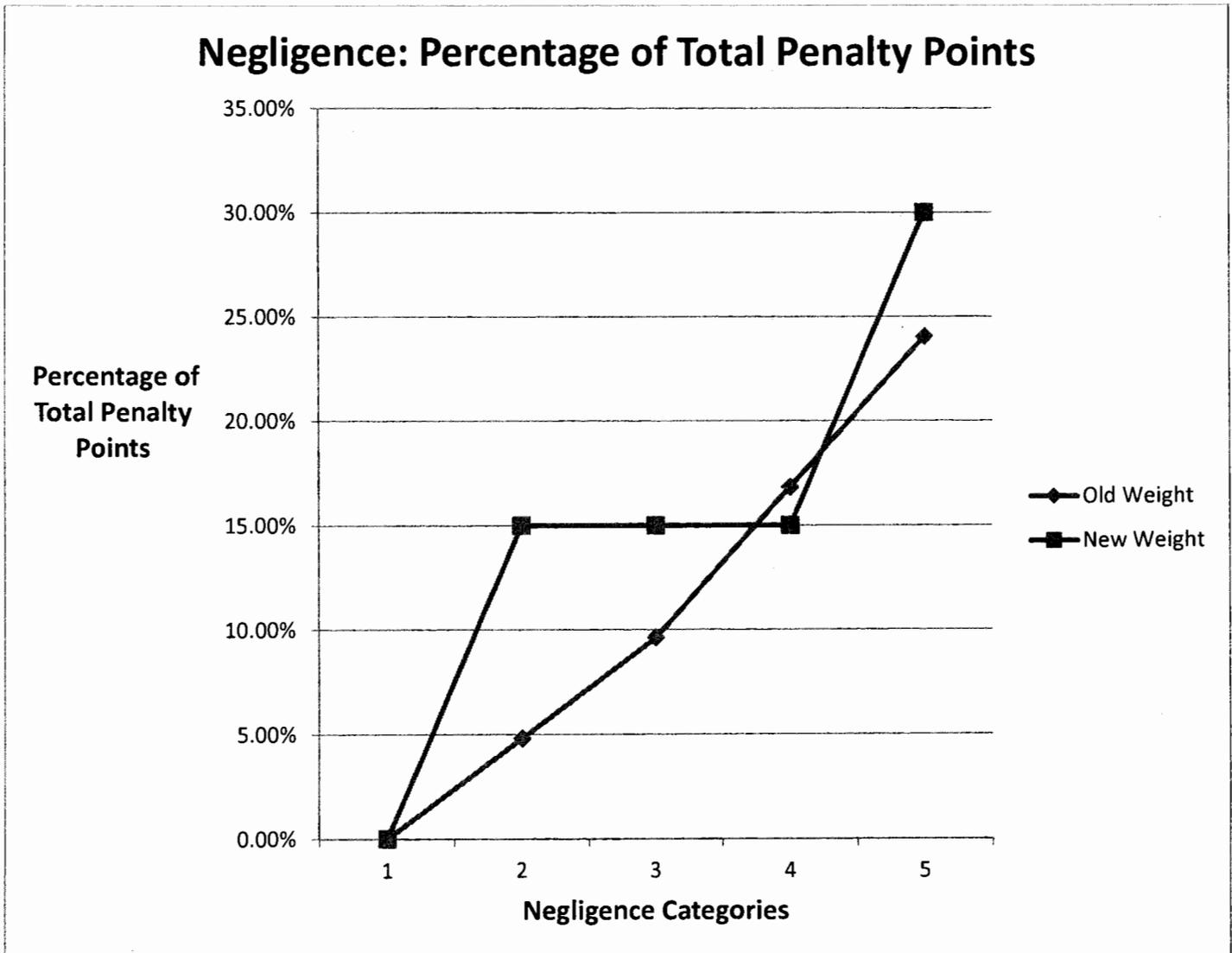
The Proposed Rule unrealistically and improperly fails to take the circumstance surrounding the violation into account by eliminating mitigating circumstances from the assessment of negligence. This is impermissible both under the Act and under the case law precedent established under the Act. In addition, the Proposed Rule would increase the impact of negligence from a possible 24% of total maximum penalty points under the current rule to a possible 30% of total maximum penalty points under the Proposed Rule.

An example of mitigating circumstances eliminated by the Proposed Rule is an aggressive operator hazard elimination program, combined with a training program to emphasize the importance of following a critical safety rule, with inspections and audits to find and correct violations, and employee disciplinary programs to penalize rule violations fairly. With these elements in place, an operator should not be classified as negligent for an unforeseeable employee caused violation of their safety rule that is the subject of these hazard elimination efforts. Yet, the Proposed Rule will eliminate these and all other mitigating circumstances that reduce or eliminate negligence findings and allegations.

In addition to the improper elimination of mitigating circumstances in negligence classifications, in its February 10, 2015, Clarification to the Proposed Rule, 80 FR 7393, MSHA stated that the agency intends for the existing criteria of “Low,” “Moderate” and “High” Negligence to be consolidated into a single category – “Negligent,” which would receive 15 penalty points on the new 100 point scale. These changes are depicted on the chart below. Because there are now only 3 categories for negligence instead of 5, the percentage of total penalty points significantly increases for all violations formerly designated as “Low” or “Moderate” Negligence and “Reckless Disregard” while *decreasing* the total penalty points for a condition or practice previously designated as “High” Negligence.

One topic that MSHA has not addressed in the Proposed Rule is how allegations of negligent conduct will be treated for Section 104(d) determinations. MSHA’s Citation and Order Writing Handbook (PH13-I-1(1)) states that an unwarrantable failure can be based upon either “aggravated conduct constituting more than ordinary negligence,” or other factors that resulted in a negligence evaluation by the inspector of “high” or “reckless disregard.” PH13-I-1(1) at p. 23-27. It is not clear from the preamble to the Proposed Rule whether a 104(d) Citation or Order will be based on the new “Negligent” conduct classification. If so, then contrary to MSHA’s assertions regarding special assessments discussed above, the Proposed Rule will have a bearing not only on special assessments but also will expand Knowing/Willful Violation “special investigations”, and allegations and penalties, because inspectors are required to complete those review forms for each Section 104(d) enforcement action issued to an operator. *Id.* p. 27.

Of greatest concern are violations that would have been marked as low negligence under the existing system. Under the Proposed Rule, these violations would likely be lumped with “Moderate” and some “High” negligent violations. and would have a point increase of roughly 212%.



By combining three negligence categories into one and eliminating consideration of mitigating circumstances in negligence allegations, MSHA has created a disincentive for expanding voluntary efforts. By equalizing all degrees of negligence, MSHA is penalizing progressive, safe operators that institute voluntary programs and add equipment and training to identify and prevent hazards. This counterproductive impact of the Proposed Rule was not analyzed by MSHA.

Overall, the new negligent category definitions are ill-suited to the broad range of behaviors occurring in a complex work environment. Moreover, the new, broader negligence categories will not resolve and reduce disputes. To the contrary, the new classifications will lead to increased negligence allegations and increased disputes.

The importance of this adverse result from the Proposed Rule is best illustrated by examples involving both a single violation, and an entire mine’s history of violations. First, a violation of an identical regulation (i.e. §§ 56/57.14100(b) or §§ 75.1725 and 77.404(a)) shows that under the existing rule, the negligence determination would take into account a number of factors including the duration of the violation, whether and when the violation had been discovered and reported to management, the

nature of the alleged defect and other factors associated with the operation of the equipment. Under the Proposed Rule, however, all of those factors would become irrelevant. That is, the Proposed Rule becomes virtually an “all or nothing” alternative to a rule which actually purports to account for variations in circumstances encountered in day-to-day operations.

Second, for the Rule’s impact on negligence findings for an entire mine, we looked at a large metal/nonmetal operator’s total violation history over two years. During that period, they accumulated approximately 900 citations, of those, approximately 2% were rated “no negligence,” 24% were rated “low negligence,” 68% were rated “moderate negligence,” 6% were rated “high negligence” and none were rated “reckless disregard. What this means is that approximately 98% of citations would be rated “negligent” under the Proposed Rule with a 50% greater negligence penalty for those rated “moderate negligence” and an increase of over 212% for those originally rated “low negligence.” The 6% that were originally rated “high negligence” would see a net increase of approximately 78%.

I. The Proposed Rule Impermissibly Muddies Statutory & Case Law Definitions

According to MSHA, the Proposed § 100.3(e) would revise the existing gravity criterion to reduce the overall impact of this criterion, but increase the aspect of the criterion as it relates to more serious hazards. 79 Fed. Reg. at 44502. Instead, the Proposed Rule will have the opposite effect by proposing:

TABLE XI—GRAVITY: LIKELIHOOD (80 Fed. Reg. 7394)

Likelihood of Occurrence	Penalty Points (out of 100)
Unlikely (Condition or practice cited has little or no likelihood of causing an injury or illness)	0
Reasonably Likely (Condition or practice cited is likely to cause an injury or illness)	14
Occurred (Condition or practice cited has caused an injury or illness)	25

MSHA acknowledges that the likelihood of an event occurring, and causing injury, and the severity of such injury, are important factors for miners’ safety and health and the administration of the Mine Act. However, the Proposed Rule would change controlling law by directing inspector findings to accomplish a redefinition of the term “likely,” and its use in defining Significant and Substantial violations and setting penalties. Rather than retain the current Part 100 use of settled case law, the Proposed Rule seeks to lead an inspector away from a non-S&S finding, and reduce MSHA’s burden of proof, by improperly limiting “unlikely” to “little or no likelihood.” While “unlikely” encompasses these low levels of likelihood, it is far broader, also encompassing circumstances that are less than 50% likely, or not probable, even though possible of causing injury or illness.

MSHA's proposal to improperly limit "unlikely" constitutes an impermissible redefinition of statutory terms that will broadly expand S&S findings, and resulting penalties. MSHA has not analyzed the impact of its proposal, nor its resulting dilution of safety resources to improperly focus enforcement and penalties on non-serious violations.

While we appreciate MSHA's Clarification and deletion of its earlier draft's inclusion of "could" in the criterion for "Occurred" and "Reasonably Likely," MSHA continues to propose unsupported and counter-productive changes that require analysis and correction. The Proposed Rule eliminates proper recognition or prioritization of hazards that are more likely to contribute to a serious injury as compared to hazards that are less likely to do so. MSHA's removal of this risk analysis process is not accidental. Consider the 2010 written testimony by Patricia Smith, Solicitor for the Department of Labor, regarding the meaning of the phrase Significant and Substantial:

MSHA and the Solicitor's Office believe the phrase [S&S] applies to all violations that have a reasonable possibility of resulting in injury, illness or death, and excludes only violations that either present no hazard or violations in which the hazard is speculative or remote. We believe this interpretation is consistent with the legislative history of the Mine Act. Unfortunately, the Federal Mine Health and Safety Review Commission does not agree and has established a four-part test for S&S, which in our view has hampered enforcement for many years.

Miner Safety and Health Act of 2010: Hearing on H.R. 5663 Before H. Comm. On Education and Labor, 111th Cong. 19-20 (2010) (statement of Hon. M. Patricia Smith, Solicitor of Labor, U.S. Dep't. of Labor) ("Hearing Testimony") (emphasis added).

Although the term "Significant and Substantial" appears in the Mine Act, it is not defined in the Act or in MSHA's regulations. The Commission established a definition and legal test for S&S citations shortly after the Mine Act was passed, at a time when MSHA characterized almost all violations, except technical ones, as S&S. The Commission held that the Congress meant to distinguish between serious and non-serious violations and that citations and orders are properly designated as S&S "if based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to **will** result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (Rev. Comm. Apr. 1981) (emphasis added).

In 1984, the Commission provided additional clarity to its *National Gypsum* decision, requiring the Secretary of Labor to prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to **will** result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984) (emphasis added). The Commission's definition of S&S has been the cornerstone of Commission and federal court opinions for more than three decades, as well as the foundation for millions of Part 100 penalty determinations for over 30 years.

Notwithstanding this well-settled legal test, MSHA and the Solicitor's office have called for a change in the S&S definition to one "in which there is a reasonable possibility that such a violation could result in injury, illness or death." Hearing Testimony p. 18 (emphasis added). Following the Hearing Testimony, Congressman John Kline asked Asst. Secretary Main and Ms. Smith if the agency had taken into account the anticipated contest rate that would be associated with a new definition of S&S. Ms. Smith admitted that there were no statistics available from which to make that determination and that DOL hopes to reduce the contest rate. Ms. Smith testified that the existing four-part definition is difficult to prove and that the existing definition leads to counterproductive litigation as to whether an alleged condition is S&S or not. *Id.* at 19, 36.

Congressman Kline wisely advocated caution before designating everything but paperwork citations as S&S violations, because "if everything is bad, then sort of nothing is bad." *Id.* at 37. As noted by the Commission in *National Gypsum*, "[i]f the Secretary were correct that almost all violations are of a significant and substantial nature, most mines would never be relieved of withdrawal order liability under the pattern provisions, particularly large mines, no matter how diligent in improving safety practices, for as a practical matter an inspection of the entire mine will rarely, if ever, disclose no violations." 3 FMSHRC at 826. In addition, "[t]he Secretary's mechanical approach would leave little, if any room for the inspector to exercise his own judgment in evaluating the hazard presented by the violation in light of the surrounding circumstances." *Id.* at 824. Thus, the Commission declined to accept the Secretary's position that, "only purely "technical" violations or those with only a remote or speculative chance of any injury [or] illness occurring could not be cited as a significant and substantial." *Id.* at 823. The Coalition urges MSHA to heed Congressman Kline's advice and the Commission's decision in *National Gypsum* – the suggested definition for "Reasonably Likely" in the Proposed Rule opens the door to increased speculation over the degree of certainty needed to show that the "condition or practice cited is likely to cause an injury or illness." 80 Fed. Reg. at 7394 (emphasis added).

The Proposed Rule does not incentivize the pursuit of safety perfection. To the contrary, the dilution of the term "Reasonably Likely" will blur the distinctions between hazards that generate a likely risk of serious injury and hazards that generate only a possibility of injury. This overly broad definition runs counter to one of the Secretary's stated purposes for the Proposed Rule – to improve objectivity and consistency.

The Coalition appreciates the fact that MSHA and Ms. Silvey, the Deputy Assistant Secretary, issued a clarification to the proposed definition of the term "Occurred" in order to address some of the concerns raised during the public hearings. Nevertheless, for the reasons discussed throughout these Comments, the proposed changes to the use of the terms "Negligent" and "Reasonably Likely" remain unworkable and contrary to law.

J. MSHA Improperly Seeks to Equate Discounted Penalties with Waiver of Rights and Safety Improvements

Although this topic was not codified in the proposed regulations, MSHA is considering a provision that would grant operators a 20% reduction in assessed penalties if the operator accepts a citation 'as issued' and agrees to contest neither the citation nor the penalty. MSHA believes this will improve safety and act as an incentive to abatement of violations, but has not provided any data or analysis to support this theory. In fact, abatement is completed independent of the presence or absence of a contest and almost always before a penalty is assessed, in accordance with Mine Act Sections 104(a) and (b).

K. MSHA Suggestions To Restrict Review Commission Assessment of Penalties Is Improper and Contrary to the Mine Act.

Any attempt by MSHA to eliminate, restrict, or change the authority of the Commission to assess civil penalties is wholly improper and inconsistent with the express direction of Congress that the independent Commission has the sole authority to assess penalties. In Section 110(i), the Mine Act states that the Commission has the authority to assess civil monetary penalties under the Act, and Section 105 limits the role of MSHA proposing a penalty. Any MSHA action that seeks to change these clear statutory roles would violate the authority MSHA was delegated by the Congress.

Conclusion

In sum, the Proposed Rule is not based on an identified problem and is lacking in statistical or empirical data to support its provisions and its contention that the proposal would improve safety and health. MSHA has not demonstrated a statistically significant relationship between citation histories, penalties and accidents and injuries that support its Proposed Rule. In contrast, there is clear evidence that the Proposed Rule will increase enforcement and penalties inappropriately and result in increased litigation due to inequitable and arbitrary results, not envisioned or authorized by Congress.

Sincerely,
JACKSON LEWIS P.C.



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On Behalf of the MSHA Fairness Coalition