From: Jane E. Bowles <JBowles@spilmanlaw.com>
Sent: Tuesday, March 31, 2015 3:26 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Cc: chamilton@wvcoal.com
Subject: RE: MSHA RIN 1219-AB72; Docket No. MSHA 2014-0009
Attachments: 2015-03-31 WVCA - Letter to Sheila McConnell, MSHA re Comments on proposed rule.PDF

Attached are comments of Chris Hamilton of the West Virginia Coal Association on the proposed rule "Criteria and Procedures for Assessment of Civil Penalties" under C.F.R. Part 100.

Your assistance in this matter is appreciated.

Jane E. Bowles
Legal Secretary
304.720.3407 - office
jbowles@spilmanlaw.com

West Virginia Coal Association

PO Box 3923, Charleston, WV 25339 ■ (304) 342-4153 ■ Fax 342-7651 ■ www.wvcoal.com

March 31, 2015

Via E-Mail and U.S. Mail

Ms. Sheila A. McConnell
Acting Director
Office of Standards, Regulations and Variances
Mine Safety and Health Administration
1100 Wilson Boulevard, Rm. 2350
Arlington, VA 22209-3939

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

Dear Director McConnell:

The West Virginia Coal Association ("WVCA") submits the following comments on the proposed rule "Criteria and Procedures for Assessment of Civil Penalties" under 30 C.F.R Part 100. WVCA is a trade association representing more than 90 percent of the state's underground and surface coal mine production. Its purpose is to have a unified voice representing the state's coal industry as well as increased emphasis on coal as a reliable energy source to help the nation achieve energy independence. WVCA is committed to making West Virginia mining the safest in the country and U.S. mining the safest in the world.

WVCA has numerous objections to MSHA's proposed changes to civil penalty assessment procedures. The Proposed Rule is not supported by any need or documented problem. Both fatalities and accident rates have steadily decreased in the last four years. There is no evidence that increased penalties are needed to address any lack of compliance. There is no evidence, studies, nor analysis in the rule that it will improve the safety and health of miners.

MSHA presented no evidence as to how the proposed rule furthers the agency's statutory objectives and responsibilities. Indeed, it appears as if the proposed rule is designed solely to make it difficult for operators to contest the penalties, obscure the reasoning for the inspectors' assessment, and to increase penalties.

Not only do these changes significantly undermine Commission case law regarding "significant and substantial" violations through change to the definition of reasonably likely and new negligence levels, but it will only lead to increased inefficiencies and backlogs due to operator challenges at the expense of coal mining jobs and safety. Further, these changes will not and cannot satisfy the agency's stated objective of enhancing "consistency and predictability in the assessment of civil penalties[.]" The lack of detailed guidance for inspectors in this

proposed rule will result, at best, in *more* subjectivity on the part of the inspector and, at worst, more opportunities for the abuse of power.

The most obvious result of the proposed rule is substantially increased levels of penalties and the inability of operators to effectively challenge assessments due to the lack of objectivity in the proposed penalty assessment scheme. Given that the new penalty scheme now removes the incentive for lower penalties based upon good faith efforts to prevent and address possible safety risks, an increase in safety and compliance is not likely to occur.

Penalty Increases Will Lead to Further Declines in a Critically Weakened Industry

Since the agency's most recent incarnation of the penalty assessment scheme took effect in 2007, penalties in coal went from $17.4 million in 2007 to $120 million in 2009. While penalties increased, the number of coal mines continued to decline. In 2007, there were 2,030 coal mining operations in the U.S. As of 2013, that number reduced to 1,701. This trend continues as each month another mine closes due to financial hardship.

While MSHA claims that the projected average penalty overall will decrease for coal mines, this is questionable considering the historical data surrounding MSHA's prior penalty increases. Specifically, when the agency determined that penalties should be increased in 2006, it predicted penalty assessments for all mine sizes and types to be $69,345,662. This projection turned out to be far below the actual penalties assessed. In 2013 alone, despite the decreased number of active mines, the penalties assessed were $82,517,640, which was ***$13,171,978 more*** than the agency represented in 2007.

By MSHA's own assessment in the comments to the final rule, the total penalties assessed for minimum violations, which comprised 28% of the violations in 2013, will increase by $495,040. Penalties ranging in the $1001 to $5,000 range, comprising currently 15% of the violations, are expected to also increase by $1,415,205. Penalties for violations in the $5,001 to $10,000 are expected to increase by $2,100,124 as a result of the changes.

In sum, the proposed penalty scheme will result in much higher penalties, just as the prior revisions of Part 100 criteria did.

The Proposed Rule Lacks Statutory Authority

Currently, Part 100 applies to the MSHA's assessment of the proposed penalty. The Commission exercises independent review of the proposed penalty once it is contested and is free to affirm the penalty, lower it or even increase it. This independent power is granted to the Commission by statute. 30 U.S.C. § 820(i) and (k). The WVCA disagrees with both of MSHA's proposals which take away the independent review authority of this statutory body.

WVCA endorses and adopts the comments recently submitted by Former Commissioners Duffy, Nease, Lastowka, Doyle, Ford, Holen, Riley, Veherggen, Beatty, and Suboleski. WVCA agrees that the proposed rule does not comport with the laws of Congress and exceeds the statutory powers granted to the agency. As noted by the former Commissioners, the Mine Act delegates to the Commission exclusive and full authority to assess all civil penalties. 30 U.S.C. § 820(i). The proposed rule is a blatant attempt to circumvent and usurp the independent role of the Commission and, therefore, is constitutionally and statutorily unauthorized.

The Proposed Increase for "Unwarrantable Failure" Violations is, itself, Unwarrantable.

The present statutory minimum violations were set by Congress in 2006. MSHA, through rule-making, now seeks to increase the minimum penalties for unwarrantable failures from $2,000 to $3,000 for a citation or order issued under Section 104(d)(1) and from $4,000 to $6,000 for an order issued under Section 104(d)(2). MSHA states this proposal to increase the minimum penalties by 50 percent is "to provide greater deterrence for operators who allow these types of violations to occur." 79 Fed. Reg. at 44507.

Such an increase is not authorized by law and exceeds the authority granted to the Secretary by Congress. The Federal Civil Penalties Inflation Adjustment Act of 1990 and the Debt Collection Improvement Act of 1996, allow the Secretary to utilize the rulemaking process to increase penalties pursuant to those statutes authorize increases to legislatively-set penalties based on *inflation.* Here, MSHA has not claimed that the proposed 50% increase is justified based on inflation during the last eight years. It acknowledges that the increase is for policy reasons.

Even if the Secretary is empowered to increase Congressionally-established penalties for policy reasons, MSHA not provided any evidence or data that supports its claim that a 50% increase will serve as a more effective deterrent than do the existing penalties. Indeed, MSHA has not even alleged that the number of unwarrantable failure violations has increased at all. MSHA's utter failure to provide any empirical support for this rule is arbitrary and capricious.

MSHA's Proposed Conflation of Negligence Levels Leads to Less Objectivity and De-incentivizes Safety Efforts

In the Proposed Rule, 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. While MSHA's recent revision assures operators that the definition of "Reckless Disregard" will not change and still remains distinct from the concept of "High Negligence," this does nothing to change the fact that inspectors will no longer have to critically assess each violation for an operator's culpability. Additionally, this oversimplification of the negligence levels provides no guidance to operators on how to evaluate

potential hazards at their mine, nor will they be able to understand the inspector's assessment of a violation as it relates to a particular mine's conditions.

Moreover, these conflated negligence levels take away the inspector's ability to recognize mitigating circumstances or the operator's efforts to exercise due diligence. Expanding the definition of "Negligent," and eliminating the category of "Low Negligence" (and its consideration of mitigating factors) will result in a finding of liability in every instance, regardless of the efforts the operator has taken to prevent the hazard. In turn, the operator's incentives to be proactive and vigilant are, in actuality, discouraged because it no longer is a factor that MSHA deems important.

This change does nothing to further safety. It is designed to eliminate the ability for operators to challenge inspector decisions by shrouding them in nebulous and broadly defined categories.

Weakening of the "Significant and Substantial" Standard

WVCA agrees that MSHA has attempted somewhat to restore the statutory and Commission law on the "significant and substantial" standard in its recent Proposed Rule revision. However, the proposed rule still substantially weakens the definition by omitting the requirement that the injury or illness "be of a reasonably serious nature." This does not comport with the Congressional intent behind "significant and substantial" violations.

It was Congress, not MSHA, who chose to create a category of the more serious violations called "significant and substantial." This terminology is found in Section 104(d)(1) of the Mine Act and is defined by Congress as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). (emphasis added) This has been the law for over 33 years.

By making any injury or illness subject to a "significant and substantial" designation, MSHA's proposed rule effectively invalidates Commission law in this regard.

Proposed Rule Will Lead to Increased Operator Challenges

These changes will likely result in increased litigation due to the changes in established case law regarding gravity, negligence and "significant and substantial" violations.

MSHA's stated goals of the amended civil penalty regulation is to (1) improve "consistency, objectivity, and efficiency in how inspectors write citations and orders by reducing the number of decisions needed;" (2) simplify the 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."

MSHA does not explain how any of these goals are met by eliminating certain critical factors and melding together other distinctly and conceptually different ones or why shielding an inspector from explaining his decisions is sound public policy. The factors impacted by this rule, namely the negligence levels and likelihood assessments, assist in objective analysis and rational decision making. The agency's proposed changes will necessarily result in less critical thinking on the part of the inspectors. This is not openness and transparency. In fact, it is the antithesis of this.

MSHA's claim that the proposed rule is "structured to encourage operators to be more accountable and proactive in addressing safety and health conditions" is also unreasoned. In a system that is already strict liability for operators, taking away an operator's ability to show no, low, or moderate negligence cannot lead to them being "accountable and proactive." In fact, as noted by other commenters, the operator now has no incentive to take proactive action as it plays little to any role in the new rule. Indeed, operators will automatically be charged with high negligence regardless of what steps they take to eliminate and prevent safety hazards. How does this further the goals of the Mine Act or lead to a safer work environment?

Since the tragic events of Upper Big Branch, operators have been taking extraordinary measures to reduce the workplace risks and keep their employees safe from harm and illness. Accident and fatality rates are among the lowest ever.

In conclusion, the WVCA requests that the agency take these comments under consideration and withdraw the proposed rule. At a minimum, more time and reflection should be given to the proposal to determine whether the proposed rule, in fact, is warranted and/or serves the protective purposes of the Mine Act.

Sincerely,

Chris R. Hamilton

Chris R. Hamilton
Senior Vice President

CRH/jeb