MAR 31 2015

From: Gary McCollum <Gary.McCollum@arlp.com>
Sent: Tuesday, March 31, 2015 7:09 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: RIN1219-AB72; Comments on Criteria and Procedures for Assessment of Civil Penalties; Proposed Rule
Attachments: Alliance Coal Comments on Part 100 Civil Penalty Criteria.pdf

Dear Sir or Madam:

Attached, please find a PDF file providing Alliance Coal, LLC's Comments on Criteria and Procedures for Assessment of Civil Penalties; Proposed Rule. Please do not hesitate to contact me if you have any questions or concerns.

Gary D. McCollum
Assistant General Counsel
ALLIANCE COAL, LLC
1146 Monarch Street
Lexington, Kentucky 40513
Phone: (859) 685-6345
Facsimile: (859) 223-3057
Email: gary.mccollum@arlp.com

AB72-COMM-80

ALLIANCE COAL, LLC

Gary D. McCollum
Assistant General Counsel
Phone: 859.685.6345
Fax: 859.223.3057
Email: gary.mccollum@arlp.com

March 31, 2015

Via Electronic Mail To
zzMSHA-Comments@dol.gov

Mine Safety and Health Administration
Office of Standards, Regulations and Variances
1100 Wilson Boulevard, Room 2350
Arlington, VA 22209-3939
Facsimile: (202) 693-9441

RE: RIN 1219-AB72
COMMENTS ON CRITERIA AND PROCEDURES FOR ASSESSMENT OF CIVIL PENALTIES; PROPOSED RULE

Dear Sir or Madam:

Alliance Coal, LLC ("Alliance") hereby submits the following comments on the Department of Labor ("DOL"), Mine Safety and Health Administration ("MSHA"), Criteria and Procedures for Assessment of Civil Penalties; Proposed Rule ("Proposed Rule") published within the Federal Register on July 31, 2014.

The record with respect to the Proposed Rule now is replete with factual and legal examples of why the Secretary's Proposed Rule is unnecessary, unwarranted, and unsupportable under the law. Alliance respectfully incorporates, by reference and without limitation, the learned, public written comments of the National Mining Association (filed January 8, 2015), Kentucky Coal Association (filed December 19, 2014), and former Federal Mine Safety and Health Review Commission Chairperson Michael Duffy, et al. (filed November 29, 2014), as well as the concerns raised by Allen Dupree of Alpha Natural Resources, during the course of the public hearing in Arlington, Virginia on December 4, 2014. Based upon those comments, and those presented herein, Alliance strongly encourages MSHA to withdraw the Proposed Rule in its entirety.

ALLIANCE COAL, LLC

Gary D. McCollum
Assistant General Counsel
Phone: 859.685.6345
Fax: 859.223.3057
Email: gary.mccollum@arlp.com

Over a period of more than six years, undersigned counsel for Alliance has represented approximately twenty (20) different federal mine identification numbers, at twelve (12) separate, independent operating subsidiaries, in over six hundred (600) cases filed by MSHA before the Federal Mine Safety and Health Review Commission ("Commission"). The vast majority of Alliance's disputes with MSHA have been resolved via compromised settlement agreements between the parties. Many of those compromises involved an independent operating subsidiary of Alliance withdrawing a contest to a contested civil penalty assessment; by the same token, many of those compromises involved MSHA modifying or vacating a citation within a civil penalty assessment package. In the latter example, every case in which MSHA makes a change to an enforcement action ultimately requires the mine operator to provide an explanation for the change that sufficiently satisfies MSHA, an Administrative Law Judge ("ALJ") of the Commission, or both.

Indeed, consider the statutory obligation MSHA has with respect to enforcement under Section 104(a) of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"):

> If, upon inspection or investigation, the Secretary...believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation[.]

MSHA owes a responsibility to mine operators, miners and the general public to engage in reasonable, objective, and informed evaluations of the conditions or practices observed within the mining environment. Furthermore, MSHA owes a responsibility to mine operators, miners and the general public to avoid making changes to citations that MSHA believes to be accurate, even after a mine operator presents additional information or evidence during the administrative review process. In short, MSHA has no business modifying or vacating enforcement actions unless a legitimate basis or argument exists for doing so on a given citation. At the same time, MSHA needs to modify or vacate enforcement actions when presented with additional information,

ALLIANCE COAL, LLC

Gary D. McCollum
Assistant General Counsel
Phone: 859.685.6345
Fax: 859.223.3057
Email: gary.mccollum@arlp.com

evidence or facts objectively supporting such changes. The enforcement responsibilities of the agency, as well as the good faith discussions that follow any MSHA issuance, can and should be matters of honor, prudent judgment and common sense for the agency, the regulated community, and the miners who the responsible among us are trying to protect. Respectfully, it appears the Proposed Rule undermines these responsibilities.

Within the preamble to the Proposed Rule, MSHA contends, "[i]n developing the proposal, MSHA evaluated the impact of the proposed changes using actual violation data. MSHA analyzed the 121,089 violations for which the Agency proposed assessments under the existing regular formula between January 1, 2013 and December 31, 2013 (baseline), the most recent year of available data. MSHA compared the impact of the proposed changes on individual penalties and on total penalties." However, MSHA's starting point in the analysis is fundamentally flawed and instantly marginalizes the ability of stakeholders to engage in legitimate conversation regarding the necessity, viability and potential impact of this Proposed Rule. According to the Proposed Rule, MSHA asserts that "[u]nder the proposal, total penalties proposed by MSHA would remain generally the same." This begs the question: If the penalties within MSHA's proposed assessments will remain the same under this Proposed Rule, then why does MSHA need to engage in the rulemaking at all?

Many commenters have focused on the fact that MSHA's underlying premise that total civil penalties "will remain generally the same" is based upon an unproven and extremely significant assumption. Commenters have expressed the sound argument that MSHA does not accomplish its goals of improving consistency, objectivity and efficiency in citation and order writing solely by eliminating certain subjective determinations and elevating the importance of the remaining subjective determinations for inspectors to make. Moreover, commenters have provided examples of how, if MSHA's assumptions are wrong, the remaining subjective determinations could result in significantly higher penalties under the Proposed Rule, even if MSHA contends such increases are unintended and the sole result of inadequate MSHA communication and training for inspectors.

Alliance shares those commenters' deep and very legitimate concerns, if based upon nothing more than MSHA's history of failing to appreciate the potential

Gary D. McCollum
Assistant General Counsel
Phone: 859.685.6345
Fax: 859.223.3057
Email: gary.mccollum@arlp.com

consequences and flaws in rulemaking assumptions, to the detriment of the mining industry and miner jobs.

With that said, for the purposes of its comments herein, Alliance takes MSHA's assumptions at face value. Specifically, Alliance recognizes MSHA's assumptions that negligence definitions will not change and that "high," "moderate," and "low" determinations will simply be issued as "negligent." Further, that "no likelihood" and "unlikely" will be consolidated, while "reasonably likely" and "highly likely" mean "reasonably likely" and something short of an actual "occurrence." Finally, that "lost workdays or restricted duty" now encompasses those injuries that are "permanently disabling" in nature, under the Proposed Rule. Respectfully, even if these assumptions are accepted for the purposes of these comments, Alliance still maintains that the Proposed Rule should be withdrawn and an easier and far simpler path exists over the Proposed Rule's systematic overhaul of penalty assessments.

Taking all of MSHA's assumptions under advisement, Alliance began to analyze the potential impact of the Proposed Rule. Undersigned counsel reviewed two hundred and forty-three (243) Section 104(a) citations issued by MSHA to independent operating subsidiaries of Alliance, contested as part of Commission dockets filed by MSHA within Fiscal Year ("FY") 2013, and that were assessed civil penalties under 30 C.F.R. Section 100.3. Under MSHA's current civil penalty assessment process, those two hundred and forty-three (243) citations were initially assessed civil penalties in the amount of $413,754. Under MSHA's Proposed Rule and, again, assuming valid assumptions by MSHA, those civil penalty assessments would have been assessed civil penalties in the amount $267,234.

Of those two hundred and forty-three (243) citations, however, ninety-two (92) of the citations (37%) ultimately were modified through the contest process procedures of the Commission. Interestingly, simply changing those citations to reflect the citation modifications that were agreed upon by **both** MSHA and the mine operator and, then, recalculating the citation under the current civil penalty assessment process would have resulted in total civil penalties in the amount of $267,861. In other words, Alliance contends MSHA could achieve results substantially similar to the end results MSHA claims to desire, simply by withdrawing the Proposed Rule and applying 30 C.F.R.

ALLIANCE COAL, LLC

Gary D. McCollum
Assistant General Counsel
Phone: 859.685.6345
Fax: 859.223.3057
Email: gary.mccollum@arlp.com

Section 100.3's existing civil penalty point table to citations that are modified as part of a negotiated settlement with a mine operator.

Respectfully, the Proposed Rule reeks of minimizing decisions, dissension and dispute from start to finish within the MSHA enforcement process. However, is the health and safety of America's miners not better served through regular, open and detailed discussions of the facts and circumstances that surround MSHA's enforcement actions? Improving the consistency of an MSHA inspector's negligence determinations is not furthered by having the inspector merely determine "negligent" or "not negligent." Similarly, the mine operator does not benefit from an inspector's rigid decision that fails to account for a mine operator's reasoned explanation of how one situation differs – and is potentially safer – from another situation. Finally, today's miners do not become safer when all-or-nothing check boxes result in fewer details being gathered and exchanged by MSHA inspectors and mine operators, alike.

Until the initiation of the MSHA-Solicitor Backlog Project, undersigned counsel rarely, if ever, experienced negotiations in which MSHA placed fixed percentage limitations on civil penalty reductions or, for that matter, issued flat refusals to modify civil penalties for modified citations using the civil penalty tables of 30 C.F.R. Section 100.3. Today, however, this approach has become commonplace. Moreover, it unnecessarily prolongs disputes that could otherwise be resolved quickly through the presentation of additional facts that may have been missed, overlooked or misunderstood by an inspector. For the vast majority of citations, Alliance contends that MSHA following its own civil penalty tables for determining civil penalties of modified citations would: (A) eliminate the need for the Proposed Rule; (B) foster better communication between MSHA, its inspectors, and mine operators; and (C) result in the assessment of civil penalties substantially similar to the end result MSHA anticipates here (assuming, for the sake of discussion, the validity of MSHA's assumptions regarding the application of the Proposed Rule). Alliance also contends the accomplishment of these three goals would benefit the primary mission of the Mine Act – furthering the health and safety of our miners.

While the comment period is anticipated to close in the near future, Alliance encourages MSHA to withdraw the Proposed Rule and to engage in greater discussion with all stakeholders regarding these issues as we move forward.

ALLIANCE COAL, LLC

Gary D. McCollum
Assistant General Counsel
Phone: 859.685.6345
Fax: 859.223.3057
Email: gary.mccollum@arlp.com

Sincerely,

/s Gary D. McCollum, Esq.
Gary D. McCollum, Esq.
Assistant General Counsel
Alliance Coal, LLC