

MAR 31 2015

---

**From:** Mark ESLINGER <mark@moesling.com>  
**Sent:** Tuesday, March 31, 2015 8:31 PM  
**To:** zzMSHA-Standards - Comments to Fed Reg Group  
**Subject:** RIN 1219-AB72  
**Attachments:** Assessment Rule Comments.docx

Comments attached.

Thank you,

Mark O. Eslinger

MSHA RIN 1219-AB72  
Department of Labor  
Mine Safety and Health Administration  
30 CFR Part 100

Criteria and Procedures for Assessment of Civil Penalties

The following comments are submitted by:

Mark O. Eslinger, P.E.  
P.O. Box 451  
Vincennes, Indiana 47591-0451

812-881-7010

§ 100.3(b).

Table I is not appropriate to determine points to assess penalties. Each penalty point added can make a significant difference in the amount assessed. At the upper end of the proposed penalty scale one point makes a difference of \$5,000. The tonnage produced should have less of an effect on the penalty. The sale price of coal varies significantly across the country. Gross sales would be a better metric of the "Size of Coal Mine." Better yet would be the number of hours worked. This would correlate to the exposure of the miners and the effort needed to produce the coal.

The Act states "In assessing civil monetary penalties, the 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 person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors." This is unfortunate.

The tonnage produced should have less of an effect on the penalty.

MSHA RIN 1219-AB72  
Criteria and Procedures for Assessment of Civil Penalties

Mark O. Eslinger, P.E.

Table II is not appropriate to determine points to assess penalties. Each penalty point added can make a significant difference in the amount assessed. At the upper end of the proposed penalty scale one point makes a \$5,000 difference. The tonnage of the controlling interest should have less of an effect on the penalty. The sale price of coal varies significantly across the country. Gross sales would be a better metric of the "Size of Controlling Entity - Coal Mine." Better yet would be the number of hours worked. This would correlate to the exposure of the miners and the effort needed to produce the coal. Additionally, a safe well-run compliant mine's penalties should not be affected by the tonnage of other mines in the Controlling Entity. A mine should stand on its own. The "Size of Controlling Entity - Coal Mine" table should be eliminated.

§ 100.3(c)(1).

The violations per inspection day (VPID) should include the number of hours that an inspection supervisor spends at the mine. Presently, these hours are not included. When and inspection supervisor accompanies an inspector, the number of violations cited rises significantly. This is due to two main reasons. First, a second set of eyes are looking for violations. Second, the inspector feels the presence of a supervisor looking over his shoulder.

The VPID should include the number of hours that an inspector trainee spends at the mine. Presently, these hours are not included. When a trainee accompanies an inspector, the number of violations cited rises.

§ 100.3(c)(2).

The repeat violations per inspection day (RPID) should include the number of hours that an inspection supervisor spends at the mine. Presently, these hours are not included. When and inspection supervisor accompanies an inspector, the number of violations cited rises significantly.

The RPID should include the number of hours that an inspector trainee spends at the mine. Presently, these hours are not included. When a trainee accompanies an inspector, the number of violations cited rises.

MSHA RIN 1219-AB72  
Criteria and Procedures for Assessment of Civil Penalties

Mark O. Eslinger, P.E.

The RPID unfairly gives the impression of the repeated failure to comply with a standard. Section 75.370(a)(1) is the most often cited standard at the mine or the second or third most cited. The ventilation plan is often more than 100 pages of requirements that must be complied with. One of the goals of the 1992 rewrite of the ventilation regulations was to reduce the size of the ventilation plan. Over the recent years the size of the plan has grown significantly. Often, mandatory standards are required to be included in the plan allowing the inspector to cite the violation under the ventilation plan and not under the standard where it is written. Many plan requirements are unrelated to the other requirements in the plan yet the total number of violations makes it appear that the operator is repeatedly violating the standard. A requirement might be violated only once in the 15-month period yet it gets grouped in with all the other plan violations. The ventilation plan violations need to be separated out by plan requirements, §75.371 Mine ventilation plan; contents (a) through (yy).

The RPID unfairly gives the impression of the repeated failure to comply with the roof control plan also. Section 75.202(a) is an often cited standard at the mine. It also needs to be broken down by the plan requirement and not the plan in general.

Another standard that is at or near the top of the RPID list is § 75.400. A mine might have an excellent record of maintaining diesel-powered equipment free of combustible material. Yet, because of problems elsewhere in the mine, a cited violation on a piece of equipment might cause a higher assessment than is warranted. Section 75.400 violations need to be broken down into affected areas.

§ 100.3(d). Negligence.

The assignment of negligence is highly subjective. Inspectors do not generally make an effort to determine how negligent an operator is. They do not work to determine how long the

MSHA RIN 1219-AB72  
Criteria and Procedures for Assessment of Civil Penalties

Mark O. Eslinger, P.E.

condition existed or who knew about it. They just check a box. Sometimes now the inspector will put an operator on verbal notice of "High Negligence" and declare that all violations of a certain standard from now on will be evaluated as "High Negligence." Often, upper management will be unaware that this determination has been made because it is "verbal" in nature. Only when citations are written does upper management become aware that a "Verbal Notice of High Negligence" has been issued. An operator will have no chance to challenge this determination and can only challenge the violations when assessed. This might occur several months down the road. Often the inspector will not conference the citation or order when written. A request for a conference is met with the reply that "You have ten days to request a conference." Often when an operator makes a formal request for a conference, it is denied. This is unfair and costly. Litigation could be avoided if pre-assessment conferences were granted when requested and the conferences were removed from the oversight of the District Manager. The conference has to be done independent of those persons responsible for enforcement and shortly after the issuance of the citation or order. The assignment of negligence should be removed from the citation writing process. The change to three tiers of negligence from the present five will not change the system. Inspectors will almost never declare that an operator is "Not Negligent."

§ 100.3(e). Gravity: Likelihood.

The assignment of likelihood is highly subjective. Inspectors do not generally make an effort to determine how likely an event is. "Reasonably likely" is often marked though there is no research to prove the likelihood. Inspectors evaluate this as though it is probable that accident could occur, not reasonably likely. The likelihood of the accident should be removed from the gravity assessment procedure.

"Could have" have must be removed from "Occurred." Either it occurred or it did not.

MSHA RIN 1219-AB72  
Criteria and Procedures for Assessment of Civil Penalties

Mark O. Eslinger, P.E.

§ 100.3(e). Gravity: Severity.

The inspector often overrates this part. The severity is rated on potential and not history.

§ 100.3(g). Penalty Conversion Table.

The table should be linear. Each point should add the same amount. The last points should not be worth \$5000.

The operator should get a 50% reduction for abating the condition in the time set if the operator does not contest. If the operator does contest he should get a 10% reduction for abating the condition within the time set. Currently no deduction is given for violations of the Act. This has never been explained.