

## **The Times (and Penalty Criteria) They Are A Changin'**

By: Matthew Korn, Fisher & Phillips LLP

Recently, MSHA announced a Proposed Rule to revise the criteria and procedures for assessment of civil penalties under the Mine Act. The Proposed Rule will significantly alter the evaluation of citations and will have an impact on all mine operators that receive citations. Some of the proposed changes summarized below will likely benefit the mining community, especially small operators; however, the Proposed Rule fails to address areas that could use more attention.

**Relative Weight:** The Proposed Rule would affect the relative weight of certain criteria used to determine penalty amounts, meaning certain criteria will have a greater, or lesser, impact on the total penalty than under the current rule. The relative weight assigned to mine size would decrease significantly, which will likely have a negative impact on smaller mine operators, as their size will have less impact on the penalty amount (however, this may be balanced by the inspection day threshold for history points, described below). The relative weight assigned to violation history will increase, with an important change discussed below that could be beneficial to M/NM mine operators. The relative weight assigned to negligence will increase significantly. The relative weight assigned to gravity will decrease overall, but the relative weight assigned to severity (e.g., lost workdays, fatal, etc.) will increase significantly. Overall, MSHA estimates that total penalties will remain about the same under the Proposed Rule.

**Mine Size Points:** Mine size points under the Proposed Rule would be assigned less weight than under the current rule. For example, a M/NM operator with more than 5,000,000 annual hours worked at the mine, would receive 4 points (out of 100, or 4%) under the Proposed Rule, versus 15 points (out of 208, or 7.2%) under the current rule. By assigning less weight to this criteria, MSHA's Proposed Rule would reduce the significance of the mine size to the total

penalty assessed, while increasing the weight of other factors as discussed below. Therefore, this change may have a slightly negative impact on small operators as their size has more impact under the current rule than the proposed rule.

**History of Previous Violations Points:** Though the Proposed Rule increases the relative weight assigned to history of previous violations, MSHA included an important caveat that is expected to reduce the burden on M/NM operators. Under the Proposed Rule, history of violation points would not be assigned if a mine has either fewer than 10 violations or 10 or fewer inspection days over the 15-month period preceding the violation being assessed. Under the current rule, a M/NM operator that receives 10 citations over 4 inspection days would receive 25 history points, but under the Proposed Rule, the same operator would not receive any history points based on the limited number of inspection days. This inspection day threshold will be a significant benefit to smaller operators that have fewer than 10 inspection days per year.

**Negligence Points:** One of the more significant changes proposed would be to reduce the current negligence categories (no negligence, low negligence, moderate negligence, high negligence, and reckless disregard) to three new categories: (1) **Not Negligent** (The operator exercised diligence and could not have known of the violative condition or practice); (2) **Negligent** (The operator knew or should have known about the violative condition or practice); and (3) **Reckless Disregard** (The operator displayed conduct which exhibits the absence of the slightest degree of care). This change will resolve some of the subjectivity with respect to whether a violation is attributable to low, moderate, or high negligence, but will also significantly increase the weight given to this category with respect to the total penalty assessed. Under the current rule, a Moderate Negligence designation is 9.6% (20/208 points) of the total penalty assessment, but under the Proposed Rule, a Negligent designation will account for 15%

(15/100 points) of the total penalty. This change will likely result in higher penalties under the revised criteria, as MSHA rarely designates "No Negligence" when assessing violations.

**Gravity Points:** Another proposed change to the penalty criteria would be a shift from the current likelihood categories (no likelihood, unlikely, reasonably likely, highly likely, and occurred) to three new categories: (1) **Unlikely** (Condition or practice cited has little or no likelihood of causing an event that could result in an injury or illness); (2) **Reasonably Likely** (Condition or practice cited is likely to cause an event that could result in an injury or illness); and (3) **Occurred** (Condition or practice cited has caused an event that has resulted or could have resulted in an injury or illness). The relative weight given to likelihood, however, remains about the same under the Proposed Rule.

The more significant change under the Proposed Rule would be the modification of the current severity categories (no lost workdays, lost workdays or restricted duty, permanently disabling, and fatal) to three new categories: (1) **No Lost Workdays** (All occupational injuries and illnesses as defined in 30 CFR Part 50 except those listed below); (2) **Lost Workdays or Restricted Duty** (Any injury or illness which would cause the injured or ill person to lose one full day of work or more after the day of the injury or illness, or which would cause one full day or more of restricted duty); and **Fatal** (Any work-related injury or illness result in death, or which has a reasonable potential to cause death). Not only would the Proposed Rule eliminate the permanently disabling category, it would significantly increase the relative weight assigned to severity. Under the current rule, a LW/RD designation is 2.4% (5/208 points) of the total penalty, versus 5% (5/100 points) under the Proposed Rule.

**Persons Affected Points:** The Proposed Rule would simplify the persons affected points, which would be assigned a Yes/No designation, with 1 point for one or more persons affected and 0 points for no persons affected.

**Good Faith Reduction:** Under the current rule, mine operators who abate a 104(a) citation within the timeframe set by the Inspector receive a 10% reduction in penalty for good faith. The Proposed Rule would retain the 10% reduction, and would offer an additional 20% reduction in penalty when the mine operator chooses to pay the penalty without contesting the violation or the proposed penalty. Therefore, mine operators who decide to pay the penalty for a citation within 30 days of the proposed penalty would be eligible for a 30% overall reduction in penalty. It is unclear whether this reduction would apply to specially-assessed penalties, or only penalties that are regularly-assessed.

There may be some criticism of this change from the industry, which may see this proposal as a “bribe” to discourage operators from exercising their due process rights. However, most operators that decide to contest citations are not contesting simply to obtain a reduction in penalty. If an operator does contest for a reduction in penalty only, this proposal will eliminate some of the time and resources that would be allocated to that contest. Operators that decide to contest MSHA’s S&S or unwarrantable failure designations will not likely forgo their due process rights to achieve a 20% reduction in penalty.

**Unwarrantable Failure Penalties:** MSHA's Proposed Rule includes a 50% increase in penalties for unwarrantable failures. Under the Proposed Rule, the penalty for a 104(d)(1) Citation would be \$3,000, and the penalty for a 104(d)(2) Order would be \$6,000.

**Special Assessments:** MSHA has stated that the Proposed Rule will not directly impact the special assessment process, currently found at 30 C.F.R. § 100.5(a), which provides "MSHA

may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment." MSHA has increasingly used special assessments over the past few years, even for 104(a) citations that were not the result of a fatality or willful violation, as an enforcement tool to penalize mine operators. MSHA's regulations provide that a specially assessed penalty will be "based on the six criteria set forth in § 100.3(a)," but provide little clarity or transparency regarding the process used to determine an appropriate specially-assessed penalty.

MSHA had an opportunity in the Proposed Rule to provide more clarity regarding both (1) the circumstances that will result in a special assessment; and (2) the formula used for calculating a special assessment, but MSHA decided not to address this important issue in the Proposed Rule. Instead, if the Proposed Rule is adopted in its current form, MSHA will continue to have broad discretion to specially assess penalties where MSHA "determines that conditions warrant a special assessment." Hopefully, MSHA will take a second look at the special assessment process and provide some guidelines for operators to help increase transparency and improve compliance.

**Judicial Review of Penalties:** Under the current rule and Commission precedent, once a mine operator contests a citation or order, the Administrative Law Judge has *de novo* review and may assess a penalty from \$100-\$70,000 based on consideration of the six statutory criteria. MSHA's Proposed Rule offers three alternatives to the current system, which can be summarized as follows: (1) ALJ's must apply penalty criteria abide by point system; (2) ALJ's must generally follow point system, but may deviate with explanation; or (3) maintain the current system.

**Example:** There is a lot of information to digest in the Proposed Rule, and if you're not a numbers person, it can be hard to make heads or tails of the Proposed Rule. Here's an example of

how the penalty structure could play out for a S&S (RL, LW/RD), Moderate Negligence citation to a M/NM operator with 75,000 annual hours worked at one mine and 150,000 hours worked at all mines, and 15 citations over 10 inspection days during the past 15-months:

- Current Rule: Mine Points = 5, Controller Points = 2, History Points = 14, Negligence = 20, Likelihood = 30, Severity = 5, Number of persons affected = 1, TOTAL POINTS = 77, \$436 penalty
- Proposed Rule: Mine Points = 1, Controller Points = 1, History Points = 12, Negligence = 15, Likelihood = 14, Severity = 5, Number of persons affected = 1, TOTAL POINTS = 49, \$1,600 penalty

If the same operator had fewer than 10 inspection days over the past 15 months, however, the total penalty under the Proposed Rule would be \$250.

**Conclusions:** There is a lot of information to digest and numbers to crunch when considering the Proposed Rule. Based on an initial review, there are some changes that appear to be beneficial to the mining community, especially M/NM and small operators, including the revision to the history point calculation. There are, however, several issues that have not been fully addressed, including MSHA's broad discretion to propose special assessments. If you're concerned about some of the proposed changes, you should consider submitting a comment. Anyone can submit comments to MSHA before September 29, 2014, by visiting MSHA's website and following the links to the Proposed Rule.



# Workplace Safety Wednesdays:

## MSHA's Proposal to Modify Penalty Criteria

Matthew Korn

[mkorn@laborlawyers.com](mailto:mkorn@laborlawyers.com)

(803) 255-0000

[www.workplacesafetyandhealthlaw.com](http://www.workplacesafetyandhealthlaw.com)

LinkedIn – MSHA Regulatory and Enforcement Updates

# Background to Proposed Changes

- MSHA's objectives:
  - Promoting consistency and objectivity
  - Efficiency in proposed assessment of penalties
  - Facilitate resolution of enforcement issues
  - Greater emphasis on more serious health and safety conditions

# How Are Penalties Assessed Now?

- 208-point scale (10% good faith)
  - 60 or fewer points = \$112
  - 144 or more points = \$70,000
- Size of Operator (tonnage/hours)
- History of Violations (VPID/RVPID)
- Negligence
- Gravity (Likelihood, Severity, # Aff.)

# Relative Weight

- **Proposal includes reducing the total penalty points to 100**
- **Changing relative weight of criteria**
- **Reducing options to contest**

# Mine Size Points

- Mine size is given less relative weight under proposed rule
- Based on current data, relative weight of size criterion will reduce from 20.1% to 13.2%
- Impact on small operators?

# History of Previous Violations Points

- History of Previous Violations is given more weight under proposed rule (11.6% to 15.5%)
- Current rule = 10/6 violations
- Proposed rule = 10 inspection days

# Negligence Points

- Negligence is given more weight under proposed rule (30.1% to 39.3%)
- Current categories: None, Low, Moderate, High, Reckless Disregard
- New categories: Not Negligent, Negligent, Reckless Disregard

# Gravity Points - Likelihood

- Likelihood is given less weight under proposed rule (23.1% to 12.0%)
- Current categories: No Likelihood, Unlikely, Reasonably Likely, Highly Likely, and Occurred
- New categories: Unlikely, Reasonably Likely, and Occurred

# Gravity Points - Severity

- **Severity is given more weight under proposed rule (12.2% to 17.0%)**
- **Current categories: No LW, LW/RD, Permanently Disabling, and Fatal**
- **New Categories: No LW, LW/RD, and Fatal**

# Change to S&S Standard?

- Current rule:

- Violation of mandatory health or safety standard
- Discrete safety or health hazard
- Reasonable likelihood that the hazard contributed to will result in an injury or illness
- Reasonable likelihood that the injury or illness in question will be of a reasonably serious nature

# Gravity Points – Number Affected

- **Not a significant change in relative weight (2.9% to 3.0%)**
- **Current rule: 1 person = 1 point, 10+ persons = 18 points**
- **New rule: 1+ persons = 1 point, 0 persons = 0 points**

# Good Faith Reduction

- Current rule: 10% reduction for “good faith” abatement (except orders)
- Proposed rule: Additional 20% reduction if operator pays penalty without contesting

# Unwarrantable Failure Penalties

- **50% increase in penalties**
- **104(d)(1) Citation/Order increases from \$2,000 to \$3,000**
- **104(d)(2) Order increases from \$4,000 to \$6,000**

# Special Assessments

- **Section 100.5(a)**
- **When do “conditions warrant a special assessment?”**
- **No proposed changes or transparency?**
- **RTLB, Accidents, 104(d), etc.**

# Judicial Review

- Current rule: *de novo* review
- Proposed options:
  - ALJ must apply points rigidly
  - ALJ must generally apply points, but may deviate with explanation
  - Status quo

# Conclusions / Questions

- **Pros and cons to proposed rule**
- **Impact on mining community**
- **Create criteria for special assessments and make process more transparent**

## 110(c) Individual Liability

- **“Any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment...”**
- **Aggravated Conduct – High Negligence?**

# Flagrant Violations

- **“Reckless or repeated failure to make reasonable efforts to prevent a known violation of a mandatory standard that substantially or proximately caused, or reasonably could be expected to cause, death or serious bodily injury.”**
- **\$242,000 maximum penalty**

# Thank You!

**Matthew Korn**

**mkorn@laborlawyers.com**

**(803) 255-0000**

**[www.workplacesafetyandhealthlaw.com](http://www.workplacesafetyandhealthlaw.com)**

**LinkedIn – MSHA Regulatory and  
Enforcement Updates**