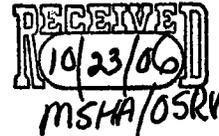


October 20, 2006

Mine Safety and Health Administration
Office of Standards, Regulations, and Variances
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Re: Proposed Changes in 30 CFR Part 100 - MSHA Assessments of Civil Penalties for Violations of Safety Regulations

Greetings,

Cadman, Inc. (Cadman) appreciates the opportunity to comment on the changes proposed by the Mine Safety and Health Administration (MSHA) to 30 CFR Part 100. Cadman began as a sand and gravel operation in the 1940s, and currently produces about 2.9 million tons of aggregate products annually from five sites in the Seattle area. We have about 90 employees working at all of our mines that come under MSHA safety regulations, and about another 215 in our ready-mix concrete business that work under Occupational Safety and Health Administration (OSHA) derived regulations administered by the State of Washington.

Cadman is aware that MSHA must promulgate revised rules in response to the MINER Act (Act) passed by the Congress on June 16, 2006. Furthermore, following the coal mining tragedies at the beginning of the year, Cadman understands, and supports, the need for even more vigorous enforcement of mine safety and health standards.

We have reviewed the proposed changes as published in the Federal Register on September 8, 2006, and believe that MSHA made a good faith effort to meet the requirements of the Act in a balanced and fair manner. However, there are several issues that merit discussion and we recommend a few changes to the language as proposed by MSHA. The three areas of greatest concern to Cadman are:

1. **Subsection 100.4** - Elimination of flat-rate "Single Assessment" fine (currently \$60), which should be retained for simple violations that don't pose a hazard to miners.
2. **Subsection 100.6** - Need for mining company to request a review of a citation within 5 days, rather than current 10, which would abridge an operator's right to due process.
3. **Subsection 100.3(c)(2)** - Extra penalty points for things like repeat violations based on a specific regulatory subpart, not a specific item/problem found at the mine.

I. Cadman accepts the purpose of raising the amounts assessed for penalties as an additional incentive for compliance. Though our company is committed to mine safety and constantly tries to improve, we understand there may be those that need large monetary penalties before they rethink their priorities. We also understand the logic of including almost all infractions under the regular assessment category, currently reserved for the more serious violations, such as S&S.

However, we are seriously concerned with the complete elimination of the flat-rate single assessment fine for even the most minor infractions that do not result in a miner being exposed to any hazard. Examples include incorrectly certifying a training record or not timely recording training given to a miner. Such oversights should not be subject to the proposed point system. Coupled with the larger penalty amounts also being proposed, we are certain that operators will have a real incentive to request citation reviews and other administrative remedies. This will drain resources that MSHA would be better off directing at inspections and other technical support. Therefore;

Cadman recommends that the single penalty assessment be retained for infractions that do not pose a reasonable risk of a miner being exposed to a hazard.

II. Cadman is deeply concerned about the reduction in time allowed to request a review of a citation. Cutting the time in half that an operator has to make a decision, from 5 days to 10 days, significantly impacts the right to due process. The realities of company decision making, intra-company mail, and other administrative and organizational factors, large and small, mean that many citations that merit review would not be challenged. This is not good governance.

Furthermore, MSHA makes the somewhat surprising assertion in the rule preamble on page 53064 of the Federal Register "that the proposed reduction [from 5 days to 10 days] would result in a more effective civil penalty system because penalties would be assessed closer in time to the issuance of the citation." First, based on our experience, MSHA has traditionally used citation reviews both to correct improper interpretation of regulations made in the field and improve consistency, as well as clarify the basis for current interpretations. These are very positive aspects of citation reviews, and key to a fair and effective enforcement system. More to the point, we commonly wait 60 days after the time to request a review has passed before we receive notice of assessed penalty amounts. So, the 5 day reduction being proposed would be a relatively trivial improvement. We must emphasize that while Cadman is supportive of the concept of swift justice, it should not come at the price of restricting the right to due process, especially when the delays in issuing assessment are largely due to the internal workings of the agency. Cadman believes it would be far more appropriate for MSHA to reform and streamline its bureaucratic functions if it wishes to improve timeliness of processing assessments. Therefore,

Cadman strongly urges that MSHA retain the current 10 day time period to request a citation review to better assure due process.

III. Cadman is highly concerned that despite an attempt by MSHA to narrow the definition of what constitutes a repeat violation, the scope is still far too broad. As a result, many companies will be punished more harshly than necessary to achieve the purposes and goals of the Act, and we do not believe that was the intent of Congress. One obvious remedy is to limit the repeat violation aspect to S&S citations.

We are supportive of the concept of treating **repeat violations** as an aggravating factor, as such a pattern of behavior often precedes the occurrence of serious injuries at a mine site. We also agree that mine operators that do not implement changes to avoid repeating the same serious violations should expect increased scrutiny and an attendant increase in penalties assessed. However, a wide range of problems often come under a given regulatory subsection that are actually unrelated as to their physical nature. To further confuse the situation, it is not unusual to find that a given deficiency could be covered by more than one subsection of the MSHA rules, depending on the inspector's interpretation.

At the present time Cadman does not normally pursue citation reviews based solely on whether we agree that the most correct citable standard has been noted by the inspector. If we didn't get something right, that has not been a quibble worth bothering with. Unfortunately, under the proposed rule, such fine points will become very important and contesting citations will likely become more routine; especially if all citations were to be counted and not just those considered S&S. Even so, we would urge MSHA to find a way to better differentiate between infractions to avoid "running up the score" inappropriately. This will allow all parties to keep the majority of their resources focused on preventing and resolving potential safety problems at the mines themselves, rather than on administrative exercises.

Cadman recommends limiting the repeat violation history to S&S citations and find additional approaches to differentiate between the nature of a violation than just using citable standards.

IV. Furthermore, the proposed rule raises several other discussion points that Cadman addresses below.

A. Decreasing the amount of the penalty reduction from 30% to 10%. Cadman disagrees with subsection 100.3(f) as proposed by MSHA, which would substantially decrease the allowed penalty reduction. While MSHA is correct in pointing out that timely abatement is required by law, operators acting in good faith should not be penalized as severely as others. Based on our experience, **we would strongly recommend providing two tiers of penalty reduction, dependent on timeliness and negligence factors:**

- 30% reduction – Violation abated within 2 to 24 hours of citation with no or low negligence.
- 10% reduction – Violation abated within time set by inspector, but is over 24 hours later and/or with moderate negligence or less.

The rationale for this recommendation is that demonstration of good faith is reflected by the nature of the violation, as already recognized by the MSHA criteria for assessing the seriousness of a violation. We would argue that a violation that was non-S&S, can be remedied very quickly, and displayed a relatively low degree of negligence, merits a substantial reduction, especially under the new higher penalties being proposed under the new assessment system. Operators that are making a good faith effort to comply may still have such violations. They should not be unduly penalized, as they are close to compliance and actively striving to avoid violations. Whereas operators that have violations that take a long time to fix or display a high degree of negligence would often have more deep-rooted safety problems, and should expect to take the full brunt of the increased penalty assessments.

B. After reviewing and considering the implications of the new system, the inescapable conclusion is that, despite hopes to the contrary by MSHA, there will be substantially more time and money spent on contesting citations than in the past. This is unfortunate as Cadman strongly supports the agency desire to focus more of its resources on field activities that have a direct and beneficial impact on the health and safety of miners. Cadman is compelled to point out this common thread that emerges from our three specific recommendations and general comments submitted above because it should be of serious concern to MSHA. This adverse impact can be minimized by adopting our recommendations and addressing the other concerns we have raised.

Thank you for considering our recommendations for making the new rule effective, yet fair. Again, Cadman wishes to emphasize our support of the MSHA mission and recognition of the need to make changes in the existing program to increase the margin of safety at mining operations.

Sincerely,



Ivan Urnovitz
Director of Safety & Environmental Services

cc: Barry Meade, GM & VP, Cadman, inc.
Bill Sayer, VP Aggregate Operations, Cadman, Inc.
U.S. Senator Patty Murray (D-WA), Subcommittee on Employment & Workplace Safety