



Kentucky Coal Association

Leadership for the Coal Industry

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April 4, 2011

Ms. April Nelson
Acting Director
Office of Standards, Regulations, and Variances
Mine Safety and Health Administration
1100 Wilson Boulevard, Room 2350
Arlington, Virginia 22209-3939

Re: RIN 1219-AB73; Comments on MSHA's Proposed Rule for Pattern of Violations

Dear Ms. Nelson:

The Kentucky Coal Association (KCA) would like to submit these comments to the Mine Safety and Health Administration (MSHA) regarding its proposed rule for "Pattern of Violations" (POV) under 30 CFR Part 104.

KCA is the state's leading organization dedicated to advancing the interests of the coal industry across Kentucky. KCA's member companies are drawn from throughout Eastern and Western Kentucky, from underground as well as surface producers. This diversity enriches the Association and allows it to build consensus as we work to resolve the complex problems confronting the 21st Century coal industry. Now, more than ever, the KCA is critical to maintaining the visibility of Kentucky's coal industry and, thereby, the economy of our Commonwealth.

KCA recognizes the importance of safety in the workplace. Kentucky has been mining coal for more than 175 years, and in that timespan mining has become a high-tech modernized industry. When analyzing data associated with Kentucky's coal mining industry, fatalities have dramatically decreased over the last several decades. In 1950, Kentucky recorded 81 deaths in mining, but in 2007 recorded only 2. Most importantly about 2007, Kentucky's underground coal mining sector recorded zero deaths for the first time. Please know that zero fatalities remain our goal.

In the current system established by Congress, the POV process can only be established after a "citation or order" has been adjudicated and a potential pattern of violation(s) is affirmed. The current process will be changed to allow for a mine operator to be found guilty of a specific MSHA violation before he/she has a chance to

due process. This lack of appeal would give MSHA absolute power that creates a horrific legal quandary.

Under this new proposed rule, MSHA inspectors would be given the power to shut down an entire, or parts of an operation, at his/her own discretion. An inspector could concoct enough citations or orders to meet the criteria and establish a "Pattern of Violation." After an operation uses its appeals process and an administrative law judge vacates a previous citation or order, the company is still being punished as having a previous status of POV. In essence, the company is treated as a guilty defendant before a final judgment is issued.

Another damaging aspect of this proposed rule is deleting the requirement for an operation to receive written notice of MSHA's consideration that it might be placed on POV status. Currently, if an operation does receive a letter stating MSHA's perceived determination that it's under consideration to be placed on POV status, that operation then can evaluate and correct those designated citations. No prior notification would further eliminate an element of transparency by MSHA.

Unchecked federal authority will create a heightened level of uncertainty throughout the mining community. Under the proposed rule, an operation that is placed on POV status, will find no mechanism in place that allows them to dispute MSHA's finding. Furthermore, a ninety day window is created, in which any inspector that might find any significant and substantial (S & S) violation within that timeframe can/will issue an "order of withdrawal" for all individuals in a designated area and order cessation of operations at that time. In the current regulatory mindset of MSHA inspectors, it is regarded that all mine inspectors view most violations as S & S regardless of the situation. Hence, the likelihood that any operation could go ninety days without an S & S violation is highly unlikely.

The Kentucky coal industry always sees a need for improvement but that commitment always needs a high degree of transparency from those regulatory agencies that monitor all activities. The Fifth Amendment under the U.S. Constitution defines a level of checks and balances and this proposed rule is viewed as an encroachment of individual/property rights. This level of security afforded by the Constitution is sometimes referred to as unalienable rights. This due process afforded to every individual would be greatly diminished under the proposed rule. The current POV rule allows for mediation during the process and to do away with that would empower the executive branch with unchecked power. This is unacceptable.

In conclusion, the mining community does believe that more power should be allotted to the Department of Labor. The laws and regulations set forth by the United States Congress are sufficient to maintain and regulate all coal mining in the United States. Coal mining had an unfortunate tragedy in 2010. But industry experts state that MSHA already possesses the power to shut down a mine if an "imminent danger" is deemed present. And the current backlog of cases currently being adjudicated is a greater hindrance versus MSHA needing additional executive powers.

In Kentucky, we currently have more than 17,000 miners employed in our industry, and for every one job created three are created indirectly. The coal industry in Appalachia has been drastically hampered by the Federal regulatory uncertainty created during the last three years by the EPA. Coal mining permits have been trickling through but most are still caught in a regulatory blackhole, which stifles production. Ultimately, our goal is a continued level of cooperation between industry employees and those regulators at the state and federal level. MSHA's new proposed rule on POV moves everyone in the wrong direction. It creates a further exacerbating opinion that the administration in Washington D.C. is trying to slowly bankrupt the Appalachian coal industry by adding additional regulations. KCA believes this new rule is a major step in the wrong direction.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Bissett", with a long horizontal flourish extending to the right.

Bill Bissett

President

Kentucky Coal Association