

## **New Civil Penalty Provisions Effective April 23, 2007**

This is an overview of changes to 30 CFR Part 100, Criteria and Procedures for Proposed Assessment of Civil Penalties that became effective on April 23, 2007. The significant changes made to this rule are explained below.

The rule implements procedures regarding the civil penalty provisions of the Mine Improvement and New Emergency Response Act of 2006, also known as the MINER Act, signed by President George W. Bush on June 15, 2006. The MINER Act contains three provisions related to civil penalties:

- **Immediate Notification** - establishes a penalty of at least \$5,000 and up to \$60,000 where an operator fails to notify MSHA within 15 minutes of an accident where a death, or injury or entrapment which has a reasonable potential to cause death, has occurred.
- **Unwarrantable Failure** - Sets a minimum penalty of \$2,000 for any citation or order issued as an unwarrantable failure under section 104(d)(1) of the Mine Act and a minimum penalty of \$4,000 for any order issued under section 104(d)(2).
- **Flagrant Violations** - Establishes a maximum civil penalty of \$220,000 for "flagrant violations".

The penalty provisions in the MINER Act became effective on June 15, 2006, when the Act was signed. In addition, the rule provides for a general increase in civil penalties for violations. It is applicable to all mines and contractors. The scope and major provisions of the rule include:

- **Increased penalties:** Increases civil penalties overall, targeting the more severe health and safety violations.
- **Repeat violations:** Adds a new provision to increase penalties for operators who repeatedly violate the same MSHA standards.
- **Single penalty:** No longer applies. Non-significant and substantial (non-S&S) violations formerly processed as \$60 single penalty will now be processed as regular formula assessments.
- **Special assessments:** Removes the list of specific categories for special assessment. The new rule retains MSHA's authority to specially assess penalties for violations, as appropriate.
- **Health and safety conferences:** Provides 10 days for safety and health conference requests (no change from the previous rule) but

now requires that requests be in writing and contain a brief statement why each citation or order should be conferenced.

**The following is a section-by-section synopsis of the changes in 30 CFR Part 100.**

**100.3 Determination of penalty amount; regular assessment.**

**(a) General.**

Includes language recognizing the new category of violations, flagrant violations, assessed under 100.5(e) may be assessed up to \$220,000.

**(b) The appropriateness of the penalty to the size of the business of the operator charged.**

Maximum penalty points for size of mine and controller have been increased from a maximum of 15 points to a maximum of 25 points.

**(c) History of previous violations.**

This section has been expanded to include two components: total number of violations and the number of repeat violations of the same standard. The time period for determining history has been changed from 24 months to 15 months.

**(c)(1) Total number of violations.**

The maximum penalty points for this criterion have been increased from 20 points to 25 points. Operators who have received a minimum of 10 violations during the 15-month period will continue to be assigned penalty points based on the total number of Violations Per Inspection Day (VPID). For independent contractors, penalty points will continue to be assigned on the basis of the total number of violations at all mines at which the contractors have worked during the 15-month period.

**(c)(2) Repeat violations of the same standard.**

This is a new provision of the total violation history for an operator or independent contractor. This new aspect of the history criterion accounts for a maximum of 20 penalty points. An operator who has received at least six repeat violations of the same citable provision of a standard in the 15-month period preceding the occurrence of the violation will receive repeat violation penalty points penalty. These points will be assigned based on the number of repeat violations per inspection day (RPID).

For independent contractors, penalty points will be assigned on the basis of the number of violations of the same citable provision of a standard in a preceding 15-month period at all mines at which the contractor has worked.

**VIOLATIONS PER INSPECTION DAY (VPID)**- For operators, assessment history is based on the number of assessed Violations Per Inspection Day (VPID) during the 15 months preceding the date the violation occurred. If the operator's ownership of the mine is less than 15 months, the history period is

adjusted to include only that portion of the 15 months that the operator is at the mine.

The 15-month period used to calculate history is 15 months prior to the date the violation occurred. The only exception is if the day of the month 15 months prior does not exist (i.e. the day is the 29th, 30th, or 31st). In that case, the last day of that month is used. For operators, VPID is calculated by adding the violation count, calculating the inspection day count (see below), and then dividing the violation total by the inspection day total. Only violations that have become Final Orders of the Federal Mine Safety and Health Review Commission are included in the operator's history of previous violations.

Inspection days are derived by totaling the MSHA on-site inspection hours entered by Authorized Representatives of the Secretary (AR) for certain inspection activities and task codes and dividing by five (see table below for types of activities that are included). A remainder amount greater than zero increases the count by one. All of the inspectors' time at the mine site is included when calculating inspection days. Travel time to and from the mines is not included.

**CONTRACTOR VIOLATION HISTORY** - For independent contractors, the Contractor Violations in History Period (CVHP) is derived using the same 15-month period as for operators but includes violations issued to the contractor at all mines at which the contractor has worked during the 15-month period. Both VPID and CVHP are converted to penalty points using the respective tables in 30 CFR 100.3. {insert link to penalty tables}

**REPEAT VIOLATIONS PER INSPECTION DAY** - For operators, Repeat Violations Per Inspection Day (RPID) is calculated by dividing the number of repeat violations of the same citable provision of a standard by the number of inspection days in the 15-month period described above. If a Section of the Mine Act is cited in lieu of a 30 CFR cite, then VPID violations citing that Section of the Mine Act are counted. If the number of violations used in the VPID calculation is less than 10 or there are fewer than 6 repeat violations of the same standard no RPID points are assigned.

The following list shows the types of MSHA inspection activities that are counted in the operators' inspection day counts. MSHA Supervisor and Inspector Trainee hours are not counted.

- E01 Regular Safety and Health Inspection
- E02 103(j) Spot Inspection
- E03 103(g) Written Notification Hazard Complaint Inspection
- E04 Verbal Hazard Complaint Inspection
- E06 Fatal Accident Investigation
- E07 Non-Fatal Accident Investigation
- E08 Non-Injury Accident Investigation
- E15 Compliance Follow-up Inspection

E16 Spot Inspection  
E17 Special Emphasis Programs  
E18 Shaft, Slope or Major Construction Spot Inspection  
E19 Electrical Technical Investigation  
E20 Roof Control Technical Investigation  
E21 Ventilation Technical Investigation  
E22 Health Technical Investigation  
E23 Impoundment Spot Inspection  
E24 Other Technical Compliance Investigations  
E25 Part 50 Audit  
E27 Attempted Inspection (Denial of Entry)  
E28 Mine Idle Activity  
E33 Non-Chargeable Accident Investigation

**(d) Negligence.**

Penalty points for the three highest categories of negligence have been increased, reflecting MSHA's intent to target operators who exhibit an increasing lack of commitment to and disregard for miner safety and health. Moderate Negligence penalty points have been increased from 15 to 20 points; High Negligence penalty points have been increased from 20 to 35 points; and Reckless Disregard penalty points have been increased from 25 to 50 points.

**(e) Gravity.**

The possible penalty points for Gravity have been increased from a combined maximum of 30 to a maximum of 88 points. Increased points for gravity are directed at operators whose mines experience the more serious mine safety and health hazards.

**Gravity - Likelihood.**

Penalty points for all but one category of Likelihood of Occurrence have been increased:

- No Likelihood remains at zero points;
- Unlikely has been increased from 2 points to 10 points;
- Reasonably Likely has been increased from 5 points to 30 points;
- Highly Likely has been increased from 7 points to 40 points; and
- Occurred has been increased from 10 points to 50 points.

**Gravity - Severity.**

Penalty points for all but one category of Severity of Injury or Illness if the Event Occurred or Were to Occur have been increased:

- No Lost Work Days remains at zero points;
- Lost Work Days or Restricted Duty has been increased from 3 points to 5 points;
- Permanently Disabling has been increased from 7 points to 10 points; and
- Fatal has been increased from 10 points to 20 points

**Gravity - Persons Potentially Affected.**

The gravity points for the number of persons potentially affected increase gradually as the number of persons actually affected increases. The maximum penalty points have been increased from 10 points to 18 points for this criterion.

**(f) Demonstrated good faith of the operator in abating the violation.**

This criterion allows for a reduction in the penalty amount if the operator has abated the violation within the time set by the inspector. The allowable penalty reduction has been decreased from 30% to 10%. The provision in the existing rule which adds 10 points where an operator does not abate the violation within the specified time period has been eliminated.

**(g) Penalty Conversion Table**

The penalty conversion table that is used to convert total penalty points to dollar amounts has been changed. The points distribution of the table has also been changed. The new range of penalty points is from 60 or fewer to 140 or more. The minimum regular assessment has been increased from \$72 to \$112. However, considering the good faith reduction allowed in paragraph (f) above, an operator may now receive regular assessments as low as \$100 for total points of 60 or less. The penalty points associated with the maximum regular assessment of \$60,000 have been increased from 100 to 140 or more penalty points.

**(h) The effect of the penalty on the operator's ability to continue in business.**

This provision has not been changed.

**Old 100.4 Determination of penalty; single penalty assessment.**

The \$60 single penalty assessment has been eliminated.

**New 100.4 Unwarrantable failure.**

Section 100.4 implements Section 8(a)(1)(B) of the MINER Act related to minimum unwarrantable failure penalties. The minimum civil penalty for a 104(d)(1) citation or order is \$2,000 and the minimum penalty for a 104(d)(2) order is \$4,000.

**100.5 Determination of penalty: Special assessment.**

(a) This provision has been re-written to more clearly state MSHA's authority to issue special assessments when warranted. A list of examples of the types of violations that may be reviewed for special assessments has been eliminated.

(b) This provision has not been changed.

(c) This provision has not been changed.

(d) This provision has not been changed.

(e) This section implements the provision of the MINER Act mandating penalties for flagrant violations. Under the MINER Act, violations that are deemed to be flagrant may be assessed a civil penalty of not more than \$220,000. The new rule, which adopted the definition in the MINER Act, defines a "flagrant" violation as "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

(f) This section implements the provisions of the MINER Act mandating prompt incident notification. Under the MINER Act, an operator who fails to provide timely notification to the Secretary, in the event of a death, or an injury or entrapment with reasonable potential to cause death, under section 103(j) (relating to the 15-minute requirement) shall be assessed a civil penalty of not less than \$5,000 and not more than \$60,000.

**100.6 Procedures for review of citations and orders; procedures for assessment of civil penalties and conferences.** This provision has been changed to require that all requests for a safety and health conference be in writing and to include a brief statement as to why each citation/order should be conferenced. This provision will help parties requesting a conference to focus on the issues that will be discussed. A concise statement about the reasons each citation/order should be conferenced will give the District Manager necessary information before the conference and will help the parties have a more meaningful and effective conference. MSHA does not intend to use this provision to limit discussion at the safety and health conference to the specific points raised in the written statement, but merely to focus the parties on the issues at hand.

**100.7 Notice of proposed penalty; notice of contest.**

This provision includes editorial changes for clarity, but remains substantively unchanged from the existing provision.

(a) is amended to include the equivalent of certified mail as a means of service of the notice of proposed penalty. Although MSHA may continue to use certified mail, the Agency may also use alternative methods of certified delivery that are the equivalent of certified mail, e.g. certified delivery by a commercial package carrier.

(b) Language in previous Section 100.7(b) that addressed MSHA's internal operating procedures has been deleted to allow more efficient methods that use improved technologies. MSHA currently provides a form that lists violations being assessed, instructions for paying or contesting assessments, and MSHA contact information to facilitate an operator's request for a hearing with each proposed assessment. MSHA intends to continue this

practice and will continue to immediately advise the Commission and the Office of the Solicitor of a contest.

**100.8 Service.**

This provision has not been changed.