



EFFECTIVE DATE: 10/26/06

EXPIRATION DATE: 03/31/08

PROCEDURE INSTRUCTION LETTER NO. I06-III-04

FROM: RICHARD E. STICKLER
Assistant Secretary for
Mine Safety and Health

A handwritten signature in cursive script that reads "Richard E. Stickler".

SUBJECT: Procedures for Evaluating Flagrant Violations

Scope

This Procedure Instruction Letter (PIL) applies to all Coal and Metal and Nonmetal Mine Safety and Health enforcement personnel.

Purpose

The purpose of this PIL is to establish uniform procedures for Coal and Metal and Nonmetal Mine Safety and Health enforcement personnel to properly evaluate flagrant violations of mandatory safety and health standards as provided in the Mine Improvement and New Emergency Response Act of 2006 (MINER Act).

Background

With passage of the MINER Act, a civil penalty of up to \$220,000 may be assessed for a flagrant violation. The MINER Act states that a flagrant violation is:

“...a **reckless or repeated failure** to make reasonable efforts to eliminate a known violation of a mandatory safety or health standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.”

While conducting inspections and investigations, MSHA inspectors observe violations of mandatory standards and, as a result, issue citations and orders. During that process, inspectors evaluate a mine operator’s negligence regarding their knowledge of those violations, from “none” to “reckless disregard.” Agency inspectors also have knowledge of citations and orders that were previously issued to a mine. Based on the facts and their observations, inspectors now have the opportunity to designate a violation as flagrant. Some basic statutory requirements must be met for a violation to receive this designation. These violations shall be reviewed thoroughly at every management level in the District and by the Administrator prior to being forwarded for proposed civil penalty assessment.

Procedure

1) Flagrant violations cited by Mine Safety and Health Administration (MSHA) inspectors must meet the following evaluation criteria for **reckless failure** or **repeated failure** violations:

For violations that are the result of **reckless failure** to make reasonable efforts to eliminate a known violation -

1. Citation or order is evaluated as significant and substantial,
2. Injury or illness is evaluated as at least permanently disabling,
3. Citation or order is evaluated as an unwarrantable failure, and
4. Negligence is evaluated as reckless disregard.

For violations that are the result of **repeated failure** to make reasonable efforts to eliminate a known violation -

1. Citation or order is evaluated as significant and substantial,
2. Injury or illness is evaluated as at least permanently disabling,
3. Type of action is evaluated as an unwarrantable failure, and
4. At least two prior "unwarrantable failure" violations of the same safety or health standard have been cited within the past 15 months.

In addition, if the violation meets the above criteria it must also be evaluated to determine if it **proximately** caused, or could have reasonably been expected to cause death or serious bodily injury. A proximate cause is one which directly produces the injury or death and without which the injury or death would not have occurred.

In addition to the serious or aggravating circumstances already referenced on the MSHA Special Assessment Review (SAR) Form, the inspector and reviewing supervisors should also document any mitigating circumstances. Examples of mitigating circumstances might include new mine ownership or new safety officials at the mine who have shown an increased commitment to improving compliance.

2) All flagrant violations will be specially assessed. To initiate the special assessment process, the inspector must complete a SAR Form for each proposed flagrant violation cited, clearly identifying it as potentially flagrant. The above criteria must be addressed on the form. The SAR Form has been revised to include a check box to be used to identify violations as flagrant. Inspectors and higher level reviewers must consider all factors and circumstances and check the "flagrant violation" box in their respective section (section 10 through 13) of the SAR Form before forwarding the SAR Form to the appropriate Administrator for review. All SAR Forms for violations that meet the numbered objective criteria outlined above must be submitted to the Administrator even if the District Manager does not recommend a flagrant violation special

assessment because of the absence of proximate cause or the presence of mitigating factors. The Administrator will forward the completed SAR Form along with the underlying citation or order to the Assessment Center in Wilkes-Barre, Pennsylvania.

3) When possible and appropriate, MSHA District Managers should notify mine operators and miners' representatives if a mine's enforcement history makes it eligible for issuance of flagrant violations. However, MSHA's failure to notify mine operators and miners' representatives of this eligibility does not preclude issuance of these types of violations.

Authority

The Mine Improvement and New Emergency Response Act of 2006, Section 8

Filing Instructions

This procedure instruction letter should be filed behind the tab marked "Procedure Instruction Letters" in the Coal Mine Safety and Health and Metal and Nonmetal General Inspection Procedures Handbook.

Issuing Office and Contact Person

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Distribution

Coal Mine Safety and Health enforcement personnel

Metal and Nonmetal Mine Safety and Health enforcement personnel

Assessments