
**TESTIMONY OF**

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**ON BEHALF OF**
**NATIONAL MINING ASSOCIATION**

**BEFORE THE**
**COMMITTEE ON EDUCATION AND LABOR**

**OF THE**
**UNITED STATES HOUSE OF REPRESENTATIVES**

**February 23, 2010**

## INTRODUCTION

Mr. Chairman, members of the Committee, I am Bruce Watzman, Sr. Vice President, Regulatory Affairs for the National Mining Association (NMA). Thank you for providing us this opportunity to share our thoughts regarding the Mine Safety and Health Administration (MSHA) and Federal Mine Safety and Health Review Commission (Commission) citation and assessment process. Before turning to the specific topic for this hearing, we thought it would be appropriate to discuss the progress the industry continues to make to achieve the goal that all of us share – eliminating accidents and illness in the industry.

In the last four years the industry has embarked on an aggressive, multi-faceted program to foster continued improvement and excellence in mine safety and health performance. We continue to see the benefit of these efforts as American mines operated all of 2009 with fewer fatalities than ever before. Perhaps significantly, 2009 was the second consecutive year of record mine safety performance, besting the previous record set in 2008. Additionally, 86 percent of U.S. mines operated the entire year without a single lost-time accident. This is an important indicator as fewer serious injuries typically lead to fewer fatalities. We continue to make progress, but recognize that continuous improvement is the only acceptable goal for an industry dedicated to excellence and to the health and safety of every worker it employs.

Some are already asking what brought about this improvement, and how do we continue this trend. Some point to the agency's more rigorous enforcement, but most agree that citations alone cannot instill a safety culture that makes accident prevention a top priority throughout mining. Others point to enactment of the MINER Act but that action, while important, dealt largely with post-accident requirements, not with measures to prevent accidents.

We believe the more convincing explanation for improved mine safety lies closer to home. It began with the mining community's thoughtful review and response to the very visible tragedies in 2006 that resulted in multiple fatalities. No longer did industry leaders believe that business-as-usual safety practices would bring every miner home safely after every day. Rather, they concluded that we needed to add to our previous safety and accident prevention process with new thinking about safety, as well as an even stronger commitment to safety. This began early in 2006 with the creation of the independent Mine Safety Technology and Training Commission, which was designed to study mine safety practices both here and abroad. The Commission concluded that a new safety paradigm was necessary -- one based on better risk management. The model was simple: identify the high-risk areas of each mine, and then allocate safety resources and training based on those risks.

Building on the Commission's recommendations, we've worked with companies to foster the implementation of risk management processes, and we've launched a risk-based safety awareness campaign targeting known hazards. We initially

focused attention on selected areas of mining operations with the highest accident rates, and then built voluntary awareness programs around each one. The effort began last year with three separate safety awareness programs highlighting the importance of staying alert, the dangers of moving machinery and the hazards of unsafe driving. The program features a variety of tools to build awareness of each high-risk area. Interestingly, these match some of Assistant Secretary Main's concerns in his recently announced "Rules to Live By" initiative.

Going forward we envision a larger effort to ensure that best practices and procedures and information on promising techniques and technologies for reducing accidents on the job are shared throughout mining. For example, we're exploring how to catalogue and share the programs and procedures employed by the winners of the annual Sentinels of Safety awards – the oldest known occupational safety award competition, jointly sponsored by MSHA and NMA.

**ENFORCEMENT POLICIES AND ASSESSMENTS**

Mr. Chairman, as reflected in the scheduling of this hearing, the rate at which mine operators have been formally contesting enforcement actions, including citations and withdrawal orders issued by MSHA has and continues to garner increased scrutiny. Some believe this higher rate reflects an attempt by some operators to backlog the adjudicatory system and delay the payment of civil penalties. Still, others maintain this is an expected outcome of the changes MSHA has implemented since 2006—changes that have dramatically altered the enforcement landscape. While honest and reasonable people can disagree as to the underlying cause for this, one fact that is not in dispute is that these actions in no way jeopardize miner safety and health.

Section 104(a) of the Federal Mine Safety and Health Act of 1977 requires the Secretary to issue a citation to an operator when he or his authorized representative "believes that an operator … has violated this Act, or any mandatory health or safety standard…" More importantly, the section requires the inspector to "fix a reasonable time for the abatement of the violation," and Section 104(b) requires the inspector to issue a closure order if the operator fails to abate an alleged violation within the time set by the inspector. This requirement is distinct from an operator's decision to challenge the validity of the citation, and any challenge in no way relieves the operator's obligation to abate the condition that gave rise to the citation. Importantly, from the perspective of miner safety and health, the conditions that gave rise to issuance of the citation have been corrected long before the operator is given his day in court and in spite of the outcome from the litigation. A mine operator's duty to abate alleged violation, before legal review of the validity of the citation, stands in stark contrast with the suspension of that duty for all other employers who are covered by the Occupational Safety and Health Act and given a day-in-court before contested violations are abated.

As you are well aware, the number of enforcement actions issued to mine operators by MSHA has risen significantly, and the penalties for violations have as well. The

regulations upon which inspectors base enforcement actions are predominately comprised of performance based standards. These standards are interpreted using "a reasonably prudent person standard." As a result, the interpretation of the standards is based on individual circumstances and can vary from inspector to inspector. The interpretation may also vary the between inspector and operator based on the facts peculiar to the alleged infraction. The penalty amounts assessed are not only based on the exercise of the inspector's enforcement discretion in alleging a violation of a standard, but also on the inspector's conclusions with respect to a number of other factors (all of which are discretionary based his or her interpretation of the circumstances surrounding an alleged violation). These factors can have a profound impact on penalty amounts, and include likelihood of occurrence, severity of injury, degree of negligence, and the, number of persons affected by the allegations, to mention only a few of the penalty calculation factors. (See Items 10 and 11 on the Mine Citation/Order form, Attachment 1).

Beyond the interpretive differences that may exist between and operator and inspector, we believe that clear policy choices made by the previous Assistant Secretary for MSHA are the major contributors to the dramatic increase in the Commission's caseload. These administrative actions created an irrational process which increased the number of citations at the same time it eliminated an informal procedure for contesting them, forcing operators into a time-consuming, expensive adjudicatory process that does nothing to increase mine safety. The actions leading to this are detailed on the timeline attached to this statement (Attachment 2). In sum these are:

- The new Part 100 civil penalty rules (See attachments 3&4 which illustrate the magnitude of these changes);
- Failure to maintain an effective "close-out" conference at the end of each inspection day;
- The loss of an effective safety and health conference process;
- The loss of an independent conference decision process;
- Timing and grouping of proposed assessments; and
- MSHA's heightened Pattern of Violation criteria and focus.

## I. History of Enforcement Actions (The Initial System)

Mine Safety and Health Administration regulations in 30 C.F.R. Part 100.6 provide for an informal resolution of questions regarding enforcement actions. This history timeline begins with the adoption of the Alternative Case Resolution Initiative (ACRI).

In 1994, during the Clinton Administration, ACRI was developed with MHSA and the Office of the Solicitor joining together and designating Conference/Litigation Representatives (CLR). The CLR was an inspector trained by the Solicitor to handle the informal conferences that the District Manager was required to conduct. (As a practical matter, the previous conferences were usually conducted by a field

supervisor, who represented the District Manager.) By 2001, the CLRs were handling all the safety and health conferences and about 35 percent of the total number of cases that operators contested (the Solicitor placed limits on what type of cases the CLRs could handle). An MSHA Fact Sheet (95-9) has the following quote:

> Mine operators may also seek informal conferences following the issuance of the citation or order under 30 C.F.R. Part 100.6. The CLRs in Coal Districts and Supervisory Mine Inspectors in Metal/Nonmetal Districts primarily serve on behalf of the District Manager and meet with the operator to attempt an informal resolution of the dispute before a civil penalty is assessed.
>
> This widely recognized and highly commended program is one of the few times that non-lawyers have represented a Cabinet-level official in a legal proceeding. As of Aug. 30, 2001, MSHA has trained over 100 enforcement personnel to act as CLRs for the ACRI program and there are CLRs designated in each MSHA district office. The CLRs are currently responsible for processing approximately 35 percent of the total number of cases contested by mine operators.
>
> **MSHA and the mining community are reaping the benefits of the ACRI program. The CLRs efforts have reduced formal litigation, improved relations between MSHA and the mining community, improved communications between MSHA's inspectors and the legal community, and has permitted the dedication of legal resources to more complex and serious cases.** (Emphasis added)

As noted, this system worked reasonably well. Some key points as to why the conferences seemed to work include:

1. The request for a safety and health conference had to be made within a 10-day period.
2. Most CLRs did not require the operator to list in writing the arguments to be presented at the conference.
3. Non-Significant & Substantial (non-serious) violations were assessed at a set dollar value regardless of the inspector evaluation. Few non-S & S violations ever went to conference and very few ever were entered in the ALJ system.
4. In many instances the CLRs were used by the District Managers as “instructors of the law” so that changes in evaluations were passed through the MSHA system as a teaching tool to reduce improper enforcement. Conversely, the same applied to operators who learned why a violation was appropriately evaluated in a certain manner and how its

impact on safety could be used to train employees on preventative actions...

5. The CLR made decisions based on the facts of the case presented at the safety and health conference.

Unfortunately, despite these positive attributes, this system was abandoned in favor of one that has fostered the outcomes that gave rise to this hearing.

## II. The Interim System

Beginning early in the last decade, MSHA embarked on a "new hiring" process to replace retiring inspectors. This, combined with decisions made in response to criticism of the agency's failure to meet its statutory obligations, resulted in the issuance of countless enforcement actions of questionable validity. In sum the agency initiated several actions that, when viewed in total, wrecked the previous safety and health conference system and gave rise to the situation we find ourselves in today. The following timeline of administrative actions shows the evolution of today's flawed system:

### Oct. 26, 2006

- MSHA publishes the standard that is intended to be used for determining flagrant violations. (PIL I06-III-04 now released as PIL I08-III-02) Repeat history is defined as the third allegation of unwarrantable failure of the same standard in 15 months.

### April 27, 2007

- The new Part 100 civil penalty regulations are released. Assessments for violation are dramatically increased. In addition the single price penalty for non-serious, non-S&S violations is dropped. (Attachments 2 and 3 document the significance of these changes for hypothetical, but routinely issued violations, under the old and new penalty formulas).

### June 14, 2007

- MSHA issues its first list of Pattern of Violation (POV) mines. Two of the many selection requirements are: two elevated

enforcement actions and 10 (surface) or 20 (underground) S &S violations in a 24-month period.

- Note that on Dec. 7, 2007; June 17, 2008; March 16 2009; and Oct. 7, 2009, additional lists of mines that were categorized as potential POV mines were released.

**Oct. 4, 2007**

- MSHA announces the "100 percent" plan for meeting mandatory inspection requirements. CLRs, who were already postponing citation conferences, were now assigned to inspections.

**Feb. 4, 2008**

- MSHA issues PIL I08-III-1. This PIL essentially formalizes the end to manager's conferences. Informally, prior to this date, and for most of 2007, conferences were not being scheduled. After this date, all the previously requested but unscheduled conferences were placed in the administrative system.

**III. Other Informational Dates**

- During the time the system for conferencing violation was being abandoned by MSHA the following actions were occurring in the field:

| | **2005** | **2008** |
|---|---|---|
| o Enforcement Actions | 69,072 | 174,473 |
| o Assessed penalties | $15.4 | $194.3m |
| o Elevated enforcement actions | 1905 | 6081 |

In sum, the amount of enforcement time at the mines increased, resulting in more violations at the same time MSHA dropped its conferencing system.

So, at the same time that the agency increased enforcement it initiated and published its "Pattern of Violation" evaluations, essentially terminated the informal conferencing system, transferring all outstanding conference requests to the Commission and forcing operators to follow one new path forward – a formal hearing with the Commission for all newly written enforcement actions.

Essentially, the agency abandoned its 30-year history of seeking early, informal discussion and resolution of enforcement actions at a time when penalties and enforcement severity was increasing.

## IV. Present System

On March 27, 2009, MSHA published a new model for conferences. Rather than conducting an informal conference prior to receiving an assessment and filing with the Commission, the new system requires the operator to wait until an assessment is received and file after the enforcement action in question is docketed. Now all conferences will take place only after civil penalties are proposed and timely contested. This means that an operator eager to avoid litigation through the conference process must contest the citation, file a written request for a conference within 10 days, wait for a period of at least four to six weeks, receive the proposed penalty assessment, contest the penalty within 30 days of receipt and then have a conference within 90-days, unless an extension is requested (usually by MSHA).

In short, all of the enforcement actions that in the previous conference system would not have reached the Commission are now included as part of the total number of docketed enforcement actions and each such case will remain on the list of contested cases until resolved. The delay created by MSHA's changes to the contest system increases the number of cases that are being challenged through the ALJ system, and it's likely that this number will continue to increase.

The system also creates other bottlenecks that need to be addressed:

- The new system requires the operator to wait for the assessment and to formally contest those violations with which he disagrees. The Solicitor is then required to respond, and the operator may then be required to formally respond (generally through attorneys). In some districts, the CLR routinely asks for a 90-day stay so that an attempt to settle the case can be made, as is contemplated in the new conference system.

- All of the enhanced conferences require some type of legal paperwork to the Commission to finalize whatever agreement is reached. Again, the more informal pre-assessment system did not include this requirement. Clearly the informal system allowed for a more nimble system where the operator and CLR could resolve a larger amount of cases without burdening the Commission.

- The requirement to contest a citation(s) within 30 days of receipt of the penalty often results in operators' challenging all of the enforcement actions issued by an inspector within a docket due to

the sheer volume and the limited time available to examine the allegations underlying each enforcement action and the components that affect penalty assessments.

**Conclusion**

The conditions that gave rise to the "back-log" necessitating this hearing can be fixed administratively without legislation. However, doing so requires all parties to recognize that:

- **All conditions affecting mine safety are abated by the operator within the time set by the inspector and prior to adjudication of the dispute.**

- The convergence of increased enforcement actions, coupled with the unofficial and then official cessation of safety and health manager's conferences, set in motion a significant increase in litigated cases. Unfortunately, operators today have no option but the Commission for contesting enforcement actions. That was the unfortunate but inevitable result of a policy decision made by MSHA to enable CLRs to assist in fulfilling the prior Assistant Secretary's "100 percent" inspection plan.

- During the time conferences were unavailable (February 2008 to March 2009) MSHA issued a policy on flagrant violation standards, four patterns of violation cycle letters and a new penalty system under Part 100. Also, we believe an evaluation of violation in many districts would show a pattern of increased gravity that subsequently increased the penalties to a point where a challenge was necessary. Filing for a formal hearing using attorneys and cluttering the "Commission" system is the only avenue available for an operator.

**Changes Should be Made in the System**

The following are suggested changes that would help unlock the logjam at the "Commission":

o MSHA should improve the training of inspectors and enforcement authorities for recognizing and evaluating a violation. The number of enforcement actions being modified is a clear indication that inspectors are not being properly trained or supervised on how to evaluate a citation.

  While we have not seen 2009 end-of-year data, we are aware that information provided to the Committee illustrates that through June 2009 a significant percent of enforcement actions and their accompanying assessments were being reduced via the settlement

process. This indicates to us the need for better training and supervision of the inspectorate.

Putting this into perspective, if police in your Congressional districts were writing traffic citations that were incorrectly evaluated at a fairly significant rate you would likely be question the training for these officers and stress the need to correct the system. You would not be questioning why your constituents were requesting hearings in traffic court. The industry situation is much the same. MSHA is not using the changes in evaluations as a teaching tool for inspectors. Frustratingly, operators are forced to re-contest many of the same factual situations that were originally cited or evaluated incorrectly and after challenge by the operator at great time and expense. Unfortunately, operators often endure a costly and time-consuming adjudication process only to be re-cited or misevaluated again.

- Revert to the informal conference (pre-assessment). This conference was timelier and, because it was informal generated minimal paperwork compared to the more time-consuming, formal system in place today. Unfortunately, many current cases are now handed to counsel due to the requirement for a timely response to a "Commission" deadline.

- Provide the CLRs autonomy from the managers in their district. We have long advocated a different reporting scheme for the CLRs. Having them report, as is currently the case, to the District Manager introduces unnecessary conflict. MSHA should create a separate office where the CLR could report to a more independent review.

- Provide more realistic timeframes for operator's to respond to agency notices. The current 30-day response time is insufficient, necessitating operators to initiate enforcement action challenges merely to protect themselves from responding to individual actions because time has expired. Concurrent with this MSHA should reform the manner in which it bundles dockets to ensure they include only the enforcement actions and related proposed civil penalties from the same inspection.

- Mandate that the CLR and ALJ decisions be used as training tools for inspectors so that better evaluations are completed by inspectors. Having to "re-litigate" settled issues because information is not shared on a timely basis across the agency unnecessarily adds to the Commission backlog and drains scarce resources.

Mr. Chairman thank you again for providing us the opportunity to appear.

Attachment 1

Mine Citation/Order

**U.S. Department of Labor**
Mine Safety and Health Administration

Section I-Violation Data

| 1. Date Mo Da Yr | 2. Time (24 Hr. Clock) | | 3. Citation/ Order Number |
|---|---|---|---|
| 4. Served To | | 5. Operator | |
| 6. Mine | | 7. Mine ID (Contractor) | |
| 8. Condition or Practice | | 8a. Written Notice (103g) ☑ | |

See Continuation Form (MSHA Form 7000-3a) ☐

| 9. Violation | A. Health ☐ Safety ☑ Other ☐ | B. Section of Act | C. Part/Section of Title 30 CFR |
|---|---|---|---|

Section II--Inspector's Evaluation

10. Gravity:

A. Injury or Illness (has) (is): No Likelihood ☐ Unlikely ☐ Reasonably Likely ☐ Highly Likely ☐ Occurred ☐

B. Injury or Illness could reasonably be expected to be: No Lost Workdays ☐ Lost Workdays Or Restricted Duty ☐ Permanently Disabling ☐ Fatal ☐

| C. Significant and Substantial: Yes ☐ No ☐ | D. Number of Persons Affected: |
|---|---|

11. Negligence (check one) A. None ☐ B. Low ☐ C. Moderate ☐ D. High ☐ E. Reckless Disregard ☐

| 12. Type of Action | 13. Type of Issuance (check one) Citation ☐ Order ☐ Safeguard ☐ |
|---|---|

| 14. Initial Action A. Citation ☐ B. Order ☐ C. Safeguard ☐ D. Written Notice ☐ | E. Citation/ Order Number | F. Dated Mo Da Yr |
|---|---|---|

15. Area or Equipment

| 16. Termination Due | A. Date Mo Da Yr | B. Time (24 Hr. Clock) | |
|---|---|---|---|

SectionIII-Termination Action

17. Action to Terminate

| 18. Terminated | A. Date Mo Da Yr | B. Time (24 Hr. Clock) | |
|---|---|---|---|

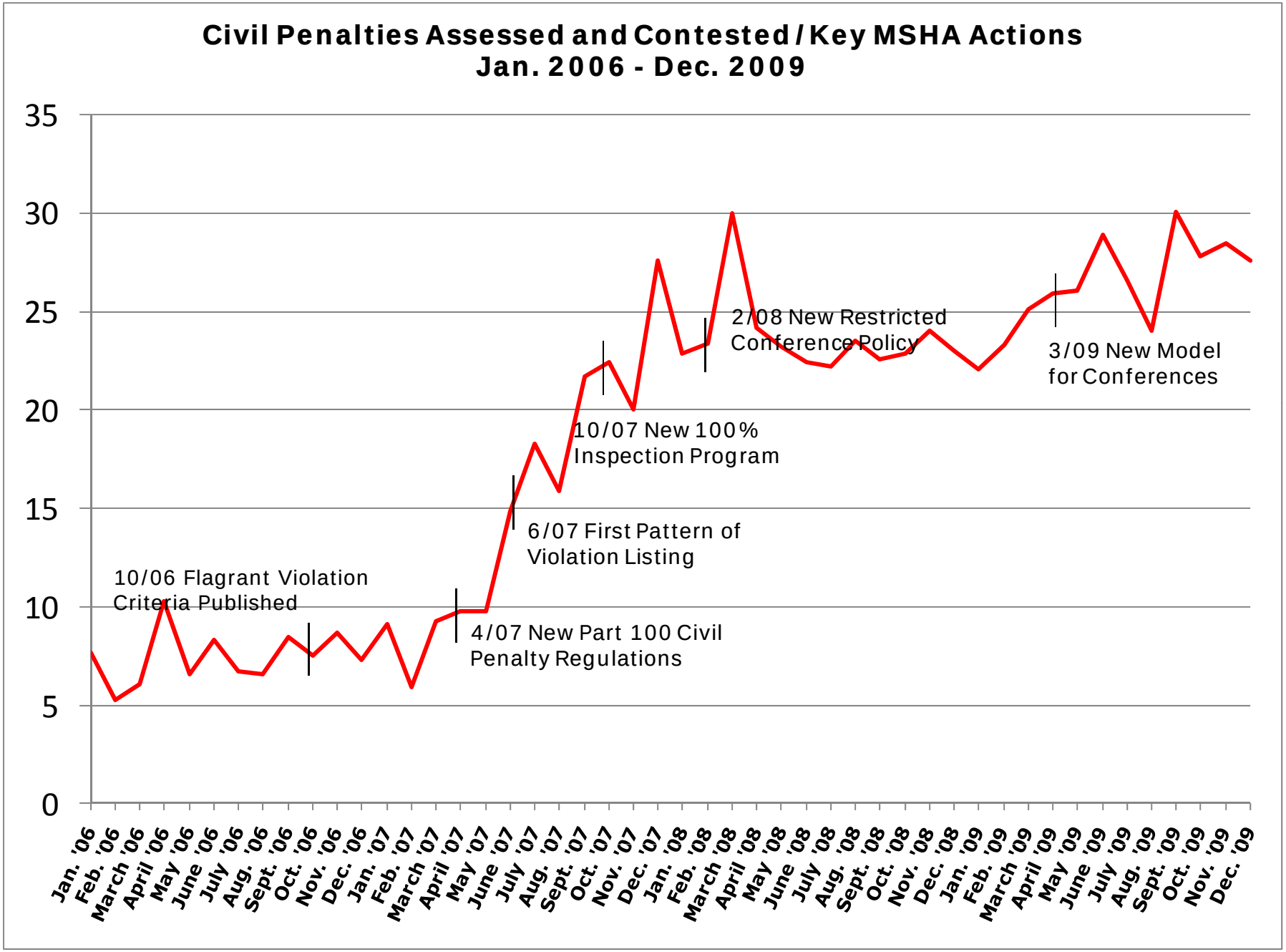
Section IV-Automated System Data

| 19. Type of Inspection (activity code) | 20. Event Number | 21. Primary or Mill | |
|---|---|---|---|

| 22. Signature | 23. AR Number |
|---|---|

MSHA Form 7000-3, Mar 85 (Revised)

Attachment 2



Attachment 3

## Hypothetical non-S&S violation of 30 CFR § 75.400 - Accumulation of combustible materials.

*Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel- powered and electric equipment therein.*

| **Penalty point categories from 30 CFR § 100.3:** | | **Old Civil Penalty Rule** *Penalty Points* | **New Civil Penalty Rule** *Penalty Points* |
|---|---|---|---|
| Table I | Size of Coal Mine | 10 | 15 |
| Table II | Size of Controlling Entity – Coal Mine | 5 | 10 |
| Table VI | History of Previous Violations – Mine Operators | 20 | 25 |
| Table VIII | History of Previous Violations – Repeat Violations | *n/a* | 20 |
| Table X | Negligence | 15 | 20 |
| Table XI | Gravity: Likelihood | 2 | 10 |
| Table XII | Gravity: Severity | 7 | 10 |
| Table XIII | Persons Potentially Affected | 8 | 16 |
| | *Total Penalty Points* | *67* | *126* |
| | **Civil Penalty Assessment** | **$5,342** | **$21,993** |

Assumptions used in this example:

(1) This is a Section 104(a) citation that is regularly assessed.
(2) Table I – The coal mine is producing more than 2,000,000 tons per year.
(3) Table II – The coal mine's controlling entity is producing more than 10,000,000 tons of coal per year.
(4) Table VI – The mine operator has an overall history of Violations Per Inspection Day (VPID) that is greater than 2.1.
(5) Table VIII – The mine operator's number of Repeat Violations Per Inspection Day (RPID) is over 1.0.
(6) Table X – The mine operator's negligence is evaluated as "**moderate**."
(7) Table XI – The likelihood of occurrence is evaluated as "**unlikely**".
(8) Table XII – The severity of injury *if the event were to occur* is evaluated as "**permanently disabling**."
(9) Table XIII – The number of persons *potentially affected if the event were to occur* is evaluated as "**9**."
(10) The 10% reduction in penalty for the demonstrated good faith of the operator in abating the violation has been ignored.

Attachment 4

## Hypothetical S&S violation of 30 CFR § 56.20003(a) - Housekeeping.

*At all mining operations-- (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly;*

| **Penalty point categories from 30 CFR § 100.3:** | | **Old Civil Penalty Rule** *Penalty Points* | **New Civil Penalty Rule** *Penalty Points* |
|---|---|---|---|
| Table III | Size of Metal and Nonmetal Mine | 10 | 11 |
| Table IV | Size of Controlling Entity – Metal/Nonmetal | 5 | 10 |
| Table VI | History of Previous Violations – Mine Operators | 20 | 25 |
| Table VIII | History of Previous Violations – Repeat Violations | n/a | 20 |
| Table X | Negligence | 20 | 35 |
| Table XI | Gravity: Likelihood | 5 | 30 |
| Table XII | Gravity: Severity | 3 | 5 |
| Table XIII | Persons Potentially Affected | 1 | 1 |
| | *Total Penalty Points* | *64* | *137* |
| | **Civil Penalty Assessment** | **$4,521** | **$50,787** |

Assumptions used in this example:

(1) This is a Section 104(a) citation that is regularly assessed.
(2) Table III – The mine has 1,500,000 hours worked per year.
(3) Table IV – The mine's controlling entity has more than 10,000,000 hours worked per year.
(4) Table VI – The mine operator has an overall history of Violations Per Inspection Day (VPID) that is greater than 2.1.
(5) Table VIII – The mine operator's number of Repeat Violations Per Inspection Day (RPID) is over 1.0.
(6) Table X – The mine operator's negligence is evaluated as "**high**."
(7) Table XI – The likelihood of occurrence is evaluated as "**reasonably likely**".
(8) Table XII – The severity of injury *if the event were to occur* is evaluated as "**lost work days or restricted duty**."
(9) Table XIII – The number of persons *potentially affected if the event were to occur* is evaluated as "**1**."
(10) The 10% reduction in penalty for the demonstrated good faith of the operator in abating the violation has been ignored.