

NEW CHANGES TO 30 C.F.R 100.3(C): WEAKNESSES AND SUGGESTED IMPROVEMENTS IN THE ASSESSMENT OF A MINE OPERATOR'S HISTORY OF VIOLATIONS

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I. INTRODUCTION

The mining disasters of recent years, culminating in Utah's Crandall Canyon collapse,¹ have brought to the public's attention the dangers that face miners everyday. We lament the lack of safety that leaves so many families without fathers, sons, brothers and uncles; typical media viewers ask themselves, "How is it, that today, when we can successfully launch a spacecraft for a nine-month voyage to Mars, when we can communicate electronically even outside the gravitational pull of our planet, we still can't dig some rocks out of the earth without killing those that go down to get them?"² As is so often the case, public exasperation leads our politicians to act. On April 23, 2007 the Mine Safety and Health Administration (MSHA) began to enforce the regulations it amended in response to the Mine Improvement and New Emergency Response (MINER) Act,³ and not more than a year later there is already pending legislation to again strengthen the authoritative statute.⁴

One of the provisions MSHA amended in response to the MINER Act was how an operator's history of violations of mandatory health and safety regulations is assessed to determine the ultimate amount of a penalty under 30 C.F.R. 100.3(c). This note analyzes the potential weaknesses of that important civil penalty provision and suggests how the provision might be made more effective in securing miners' safety.

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¹ See Martin Stolz, *Six Trapped After Collapse in a Utah Coal Mine*, N.Y. TIMES, Aug. 7, 2007, available at <http://www.nytimes.com/2007/08/07/us/07mine.html?fta=y> (last visited Apr. 11, 2008).

² Ironically, this was the case not two days before the Crandall Canyon mine collapsed. Press Release, Lockheed-Martin, Lockheed Martin-built Phoenix Spacecraft Lifts Off for Nine Month Voyage to Mars (Aug. 4, 2007), http://www.lockheedmartin.com/news/press_releases/2007/0804ss_Phoenixlaunch.html (last visited Apr. 11, 2008).

³ 72 Fed. Reg. 13592 (March 22, 2007).

⁴ The Supplemental-MINER Act, H.R. 2768, <http://thomas.loc.gov/cgi-bin/query/D?c110:4:./temp/~c1108FGOHh::> (last visited Apr. 11, 2008).

II. A GENERAL HISTORY OF MINE SAFETY

As is often the case with regulation of an American industry, the first laws regulating the safety of miners appeared in the states and territories, not the federal government.⁵ Generally, these laws were purposely made weak because it was thought that strong regulation would hamper economic growth.⁶ Only when there were major mine disasters did any meaningful state or territorial law make its way past the local legislatures.⁷

One of the first federal measures taken on behalf of miners' safety was the proposal of a Federal Mining Bureau in 1865.⁸ Twenty-six years later Congress passed the "Protection of the Lives of Miners in the Territories" Act of 1891, which required annual inspections of ventilation and safety equipment by a territorial mining inspector.⁹ Noncompliance or failure to correct a violation was punishable by fines.¹⁰ This act was originally intended to apply to all the states and territories, but in order to get it passed, its final version applied only to the states and territories that had no effective local laws in place.¹¹

The following quotes from the floor debate of the Act's passage are indicative of the competing interests at play then and that still exist to a large extent today: Rep. Joseph G. Cannon of Illinois, a coal mining state, stated that "although he had 'every sympathy with any legislation which will protect human life,' he was nonetheless suspicious of any law creating new offices and did not 'see that the necessity is apparent in this case.'"¹² In contrast, Rep. Henry Stockbridge, of Maryland, who was also the chairman of the House Committee on Mines and Mining, stated that "he and his committee 'thought it wise to close the stable door before the horse was out,'" meaning that they shouldn't wait until a disaster occurred to take protective measures for miners.¹³

⁵ JAMES WHITESIDE, *REGULATING DANGER* 55 (1990).

⁶ *Id.*

⁷ *Id.* at 66, 69-71. There are some exceptions to this, like the Colorado coal mine legislation of 1883, *id.* at 57, and the New Mexico legislation of 1882, *id.* at 62.

⁸ S. Rep. No. 95-181, at 1 (1977) (Conf. Rep.).

⁹ WHITESIDE, *supra* note 5, at 63-64. It should be noted that the standards of this act were far below what one would consider adequate today; it covered only the very basics to guard against the most obvious risks inside the mine.

¹⁰ *Id.* at 64.

¹¹ *Id.* at 63, 65-66. Utah was one such state to which the federal regulation applied, at least until similar local measures were passed when statehood was granted. *Id.* at 68. *See also id.* at 62-66 (describing how the nearly complete lack of enforcement authority for New Mexico's local regulations resulted in the application of the federal default regulations).

¹² *Id.* at 63.

¹³ *Id.* at 63-64.

The next major development in the regulation of mining was in 1910 when, in response to a string of mining disasters, Congress established the Bureau of Mines in the Department of the Interior.¹⁴ This entity had the responsibility of:

Diligent investigation of the methods of mining especially related to the safety of miners and the appliances best adapted to prevent accidents, the possible improvement of conditions under which mining operations are carried on, the treatment of ores and other mineral substances, the use of explosives, the prevention of accidents, and other inquiries and technological investigations pertinent to said industries.¹⁵

The existence of such an organization had the potential to become an important step toward increasing the safety of miners, but the agency's formation was merely symbolic in that its purpose was limited to the investigation of what *could* be done, and only at the invitation of the mine owners.¹⁶

Congress sought to give the Bureau more power in 1941 with the passage of Public Law 49, 77th Congress, by authorizing federal inspectors to enter and inspect mines for health and safety hazards.¹⁷ This action still left gaping holes in the Bureau's effectiveness because it didn't have the power to "establish standards for coal mines or to enforce compliance with the standards and recommendations of the Secretary of the Interior."¹⁸

Ironically, but not surprisingly given the trend, it was the death of 119 West Frankfort, Illinois miners in 1951 that spurred Congress to the enactment of Public Law 552, 82nd Congress, in 1951, which bolstered the bureau's means for approaching mine safety.¹⁹ However, as President Truman recognized:

This measure is a significant step in the direction of preventing the appalling toll of death and injury to miners in underground mines . . . Nevertheless, the legislation falls short of the recommendations I submitted to the Congress to meet the urgent problems in this field.²⁰

Over the following years there were several mediocre efforts made to address the failings to which Truman referred, and then on November 20, 1968, there was a mine explosion in Farmington, West Virginia that killed 78 miners.²¹ Between that day and October 13, 1969 there were 120 more miners who died from various other mining accidents.²² In total there were 222 miner deaths in 1967, and 311

¹⁴ H.R. REP. No. 91-563, at 1 (1969) (Conf. Rep.).

¹⁵ S. REP. No. 95-181, at 1-2 (1977) (Conf. Rep.).

¹⁶ *Id.*

¹⁷ H.R. REP. No. 91-563, at 1 (1969) (Conf. Rep.).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

such deaths in 1968.²³ These tragedies were the principle impetus for Congress' passage of the Federal Coal Mine Health and Safety Act of 1969 (the Coal Act).²⁴

The Coal Act made significant improvements in the way of inspection and enforcement authority and it transferred such powers to the Mine Enforcement and Safety Administration (MESA), an independent agency within the Department of the Interior, to carry out these tasks.²⁵ Some of the improvements included provisions that required mines to be inspected at least four times annually without advance warning;²⁶ mines deemed to be "usually hazardous" had to be inspected more often, to the extent of inspecting every five working days;²⁷ upon inspection, violations would be written down by reference to the specific provision violated and reported to the independent agency.²⁸ Finally, and perhaps most significantly:

[If the inspector found that] a condition or practice in a mine which could place miners in an imminent danger of death or harm before such condition or practice [could] be abated, the inspector [was] required to determine the areas of the mine affected by such condition or practice and order the miners in that area removed until the condition or practice [was] abated.²⁹

The Coal Act was more effective at accomplishing its goals than any other previous regime, but there were still problems that needed to be dealt with. On May 16, 1977 the Senate Committee on Human Resources declared that a "[r]eview of the . . . six years of enforcement of the Coal Act, requires the Committee to report that fatalities and disabling injuries in our nation's mines are still unacceptably and unconscionably high."³⁰ Further, the Department of Interior, under which MESA operated, had as one of its goals the "maximiz[ation of] production in the extractive industries, which was not wholly compatible with the need to interrupt production which is the necessary adjunct of the enforcement scheme under the . . . Coal Act[]." ³¹ Thus, Congress sought to remedy these flaws in the Federal Mine Safety and Health Act of 1977 (the Mine Act) by removing the responsibilities of MESA from the Interior Department and establishing an independent regulatory body within the Department of Labor, stating:

[N]o conflict could exist [between the mine regulatory body and its mother agency] if the responsibility for enforcing and administering the

²³ *Id.*

²⁴ *Id.*; Pub. Law 91-173, § 109(a)(1) (Dec. 30, 1969), 83 Stat. 742, 756.

²⁵ S. REP. No. 95-181, at 1-6 (1977) (Conf. Rep.).

²⁶ *Id.* at 5.

²⁷ *Id.* at 5-6.

²⁸ *Id.*

²⁹ *Id.* at 6.

³⁰ *Id.* at 7.

³¹ *Id.* at 5.

mine safety and health laws was assigned to the Department of Labor since that Department has as its sole duty the protection of workers and the insuring of safe and healthful working conditions.³²

This new administration is the one we recognize today as the Mine Safety and Health Administration (MSHA). Shortly after the passage of the Mine Act, MSHA began promulgating its rules, including its civil penalty assessment regime.

Again spurred on by a mine disaster, this time at the Sago Mine in West Virginia, Congress passed the Mine Improvement and New Emergency Response Act of 2006 (the MINER Act), the purpose of which is:

[T]o further the goals set out in the [Mine Act] and to enhance worker safety in our nation's mines. The bill amends the 1977 act to require incident assessment and planning, harness new and emerging technology, enhance research and education, improve safety-related procedures and protocols and increase enforcement and compliance to improve mine safety.³³

It was this amendment to the Mine Act that prompted MSHA to amend the assessment procedure for a mine operator's history of violations, which is the concern of this paper. There is also currently a new amendment to the statute pending before Congress, the Supplemental-Mine Improvement and New Emergency Response Act³⁴ (the S-MINER Act), which attempts to protect miners' safety through strengthening MSHA's authority to shutdown mines that fall far short of meeting health and safety standards.

III. THE DEVELOPMENT OF 30 C.F.R. 100.3(C): A CIVIL PENALTY FOR A PRODUCER'S HISTORY OF VIOLATIONS

The first inklings of a civil penalty for a producer's history of violations began to appear upon implementation of the Federal Coal Mine Health and Safety Act of 1969;³⁵ the 1972 Code of Federal Regulations imposes a penalty for "repeated unwarrantable failure violation[s]."³⁶ The following issue, 1973, simply included a subsection "(c)," and quoted the language of the 1969 Act, saying that an operator's history should be considered, *inter alia*, when assessing civil penalties.³⁷ The next change, which went into effect in August of 1974³⁸ and was

³² *Id.*

³³ S. Rep. No. 109-365, at 1 (2006) (Conf. Rep.).

³⁴ Supplemental-MINER Act, *supra* note 4.

³⁵ Pub. Law 91-173, Sec. 109(a)(1), 83 Stat. 742, 756 (1969).

³⁶ 30 C.F.R. § 100.3(a)(2) (1972).

³⁷ 30 C.F.R. § 100.3(c) (1973); Pub. Law 91-173, Sec. 109(a)(1), 83 Stat. 742, 756 (1969).

³⁸ 39 Fed. Reg. 27558, 27559 (July 30, 1974).

codified in the 1975 edition of the Code of Federal Regulations,³⁹ came as a companion to the adoption of a structured point system.

Under Subsection 100.3(c), a twenty-four month period was established for the assessment of a producer's history of violations.⁴⁰ Violations were assigned points according to the average number of violations per year (of the two years) and the average number of violations per inspection day (VPID) over the two year period.⁴¹ The maximum amount of penalty points that could be imposed under this two-pronged assessment was twenty.⁴² Violations that counted toward a producer's history encompassed any and "all assessed violations which had not been vacated or dismissed, and included those under appeal."⁴³

This assessment regime went undisturbed until 1982 when MSHA sought to distinguish mine operators from independent contractors. It abolished the regime that assigned points to mine operators according to the annual average of total violations but established a separate structure that implemented the same against independent contractors.⁴⁴ It also restricted counted violations to include only those that were paid or finally adjudicated.⁴⁵ The total number of penalty points that could be assigned under the new rule was still limited to twenty, and the period of time assessed was still two years.⁴⁶ Thus, mine operators' points were assigned with total reference to the average number of violations per inspection day, and independent contractors' to the average of total violations per year.⁴⁷

No substantive changes were made to 100.3(c) until the most recent set that went into effect in April of 2007; it now reads:⁴⁸

³⁹ 30 C.F.R. § 100.3(c)(1) (1975).

⁴⁰ *Id.*

⁴¹ 30 C.F.R. § 100.3(c)(1), (2) (1975).

⁴² 30 C.F.R. § 100.3(c) (1975).

⁴³ 47 Fed. Reg. 22286, 22288 (May 21, 1982).

⁴⁴ *Id.* at 22288, 22294 (May 21, 1982).

⁴⁵ *Id.* There was also a change that distinguished significant and substantial (S&S) violations from other less serious violations which were assessed under a single penalty provision; if these were "paid in a timely manner" they were not counted in a producer's history. However, this change was deleted in 1992. 57 Fed. Reg. 2968, 2969 (Jan. 24, 1992).

⁴⁶ *Id.*

⁴⁷ *Id.* at 22294.

⁴⁸ 30 C.F.R. 100.3(c) (2007).

(c) History of previous violations. An operator's history of previous violations is based on both the total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period. Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission will be included in determining an operator's history. The repeat aspect of the history criterion in paragraph (c)(2) of this section applies only after an operator has received 10 violations or an independent contractor operator has received 6 violations.

(1) Total number of violations. For mine operators, penalty points are assigned on the basis of the number of violations per inspection day (VPID)(Table VI). Penalty points are not assigned for mines with fewer than 10 violations in the specified history period. For independent contractors, penalty points are assigned on the basis of the total number of violations at all mines (Table VII). This aspect of the history criterion accounts for a maximum of 25 penalty points.

TABLE VI -- HISTORY OF PREVIOUS VIOLATIONS -
MINE OPERATORS

Mine Operator's Overall History of Violations per Inspection Day	Penalty Points
0 to 0.3	0
Over 0.3 to 0.5	2
Over 0.5 to 0.7	5
Over 0.7 to 0.9	8
Over 0.9 to 1.1	10
Over 1.1 to 1.3	12
Over 1.3 to 1.5	14
Over 1.5 to 1.7	16
Over 1.7 to 1.9	19
Over 1.9 to 2.1	22
Over 2.1	25

TABLE VII -- HISTORY OF PREVIOUS VIOLATIONS -
INDEPENDENT CONTRACTORS

Independent Contractor's Overall History of Number of Violations	Penalty Points
0 to 5	0
6	1
7	2
8	3
9	4
10	5
11	6
12	7
13	8
14	9
15	10
16	11
17	12
18	13
19	14
20	15
21	16
22	17
23	18
24	19
25	20
26	21
27	22
28	23
29	24
Over 29	25

(2) Repeat violations of the same standard. Repeat violation history is based on the number of violations of the same citable provision of a standard in a preceding 15-month period. For coal and metal and nonmetal mine operators with a minimum of six

repeat violations, penalty points are assigned on the basis of the number of repeat violations per inspection day (RPID) (Table VIII). For independent contractors, penalty points are assigned on the basis of the number of violations at all mines (Table IX). This aspect of the history criterion accounts for a maximum of 20 penalty points (Table VIII).

TABLE VIII -- HISTORY OF PREVIOUS VIOLATIONS -
REPEAT VIOLATIONS FOR COAL AND METAL AND
NONMETAL OPERATORS WITH A MINIMUM OF 6 REPEAT
VIOLATIONS

Number of Repeat Violations Per Inspection Day	Final Rule Penalty Points
0 to 0.01	0
Over 0.01 to 0.015	1
Over 0.015 to 0.02	2
Over 0.02 to 0.025	3
Over 0.025 to 0.03	4
Over 0.03 to 0.04	5
Over 0.04 to 0.05	6
Over 0.05 to 0.06	7
Over 0.06 to 0.08	8
Over 0.08 to 0.10	9
Over 0.10 to 0.12	10
Over 0.12 to 0.14	11
Over 0.14 to 0.16	12
Over 0.16 to 0.18	13
Over 0.18 to 0.20	14
Over 0.20 to 0.25	15
Over 0.25 to 0.3	16
Over 0.3 to 0.4	17
Over 0.4 to 0.5	18
Over 0.5 to 1.0	19
Over 1.0	20

TABLE IX -- HISTORY OF PREVIOUS VIOLATIONS -
REPEAT VIOLATIONS FOR INDEPENDENT CONTRACTORS

Number of Repeat Violations of the Same Standard	Final Rule PenaltyPoints
5 or fewer	0
6	2
7	4
8	6
9	8
10	10
11	12
12	14
13	16
14	18
More than 14	20

The rule is analyzed first by reviewing the detrimental effect that the assessment period reduction (from twenty-four months to fifteen months) will have on compliance incentives, and then by suggesting ways in which MSHA could provide greater compliance incentives, like allowing more general categories of repeat violations and excluding repeat violation penalties from the good faith penalty reduction.

IV. REDUCTION OF THE TWENTY-FOUR MONTH ASSESSMENT PERIOD

As stated above, the twenty-four month period for assessing a producer's history of violations, along with the point system that allowed for such an assessment, went into effect in August of 1974⁴⁹ and was codified in the 1975 edition of the Code of Federal Regulations.⁵⁰

As evidenced by the minimal treatment the twenty-four month period received in the rule proposal,⁵¹ and the virtually non-existent treatment it received after the public comment period in the final rule adoption,⁵² it seems safe to assume that at the outset there was no significant dispute as to whether twenty-

⁴⁹ 39 Fed. Reg. 27558, 27559 (July 30, 1974).

⁵⁰ 30 C.F.R. 100.3(c)(1) (1975).

⁵¹ 39 Fed. Reg. 16145, 16146 (May 7, 1974).

⁵² 39 Fed. Reg. 27558 (July 30, 1974). The only time the twenty-four month period is mentioned is in the statement of the rule itself, which comes after any discussion of disputing commenters, etc.

four months was the proper amount of time to consider when assessing a producer's history of violations.

In fact, when MSHA sought to distinguish between mine operators and independent contractors in the 1982 amendment, it also considered and rejected a shortened time period for assessing past violations.⁵³ Ironically, it used the same reasoning that is cited in the most recent changes as an opposing comment;⁵⁴ in 1982, speaking of “mines which [sic] are inspected on a less frequent basis,” MSHA stated that “[i]nformation accumulated over a shorter period may not provide sufficient data to accurately reflect safety and health trends in many mining operations.”⁵⁵

There were no substantive changes made to this particular part of Subsection 100.3(c) until the latest amendment that went into effect in April 2007, which shortened the time period from twenty-four months to fifteen months.⁵⁶ In the rule proposal, MSHA stated:

MSHA is proposing to reduce the 24-month review period to a 15-month review period because the agency believes that a period of 15 months would *more accurately reflect an operator's current state of compliance*. This change would provide MSHA with sufficient data to appropriately determine an operator's compliance record, including any trend, even for mining operations that are inspected on a less frequent basis. *This change would provide an incentive for improving safety and health* to an operator that has a deteriorating safety and health record in the recent past.⁵⁷

In the final rule adoption report MSHA again reiterates its belief that the fifteen-month period will provide “sufficient data to accurately evaluate an operator's compliance record,” which, it clarifies, includes “seasonal or intermittent operations.”⁵⁸ It goes on to offer an explanation for the seemingly arbitrary number of fifteen, saying that, really, a full year is all that is needed to assess history, but because it takes “approximately three months for a penalty assessment to become a final order of the Commission” fifteen months is the optimal time period.⁵⁹ The rule adoption report also bolsters another idea found in the rule proposal, saying:

The shortened timeframe of 15 months provides MSHA with a more recent compliance history than the 24-month period under the existing rule. In addition, MSHA believes that operators who violate the Mine

⁵³ 47 Fed. Reg. 22286, 22288 (May 21, 1982).

⁵⁴ 72 Fed. Reg. 13592, 13603 (Mar. 22, 2007).

⁵⁵ 47 Fed. Reg. 22286, 22288 (May 21, 1982).

⁵⁶ Compare 30 C.F.R. 100.3(c) (2006) with 30 C.F.R. 100.3(c) (2007).

⁵⁷ 71 Fed. Reg. 53054, 53058 (Sept. 8, 2006) (emphasis added).

⁵⁸ 72 Fed. Reg. 13592, 13603 (Mar. 22, 2007).

⁵⁹ *Id.* at 13604.

Act and MSHA's health and safety standards and regulations should receive penalties for those violations as close as practicable to the time the violation occurs *in order to provide a more appropriate incentive for changing compliance behavior.*⁶⁰

Finally, MSHA provided specific examples of the impact the adopted change will have on producers:

MSHA analyzed the data for operator violations that were assessed in 2005 to determine the impact of changing to a 15-month period. For coal and metal and nonmetal operator violations that were assigned history penalty points in 2005, and had a minimum of 10 violations during the 15-month period, the average penalty points using a preceding 24-month period was 7.5 per violation. Using a preceding 15-month period, the average was 7.6 penalty points per violation.⁶¹

A similar comparison revealed that the new standard would have nearly as negligible effect on independent contractors as this one did on coal, metal, and nonmetal operators.⁶²

While MSHA did give some acknowledgement to the new standard's critics by briefly mentioning some of the concerns expressed during the public comment period,⁶³ what MSHA failed to do was effectively apply the critiques to the justifications it gave for the time reduction and to other, very probable hypotheticals.

MSHA's claim that reducing the time period to fifteen months will provide an incentive for producers to change compliance behavior is counterintuitive; it cannot provide a greater compliance incentive than would the twenty-four month period because, simply, there will be less time accounted for in the producer's history. If a producer has a particularly large amount of violations on an inspection day (whether they be general or repeat violations), as time passes and that day moves further toward the end of the time included in a producer's history of violations, it keeps the average number of violations per inspection day higher, providing the producer an incentive to have good inspections days to offset the bad one that is still included in the history period. Alternatively, if a producer has a particularly good inspection day, the lower number serves as a reward (incentive toward compliance) for as long as it is counted in the history period. Thus, the further back in time violations are counted, the greater the producer's incentive will be to comply right now because good days will help him longer and bad days will hurt him longer.

⁶⁰ *Id.* (emphasis added).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 13603.

Admittedly, MSHA's comparison of the two different standards, as applied to the particular twenty-four and fifteen month periods, showed a negligible difference,⁶⁴ but therein is the flaw; the standards were *only* applied to one fifteen month period and one twenty-four month period. It is not at all improbable that the hypothetical described in the previous paragraph would happen in some other fifteen or twenty-four month period, whether in the past or in the future. Basing the time reduction on only one set of fifteen and twenty-four month periods is at best a shortsighted estimation, at worst, a presumptuous and misguided extrapolation.

Moreover, MSHA's wholesale rejection of its own argument, which was used in the 1982 rule amendments to not reduce the history assessment time period, further undermines any attempt to use its analysis of the new and old standards to justify the reduction now. MSHA fails to mention any new development or new assessment procedure that would allow it to provide "sufficient data" to accurately evaluate a seldom inspected, seasonal operator's compliance record where it could not in 1982. It simply ignores its previous rationale for not reducing the time period and states the opposite. The only difference is that this time the rationale is propped up by a narrow statistical analysis that could very likely be invalid when applied to different respective time periods or future circumstances.

Further, MSHA's purported aim to "more accurately reflect an operator's current state of compliance"⁶⁵ is at odds with the very purpose and intent of Congress that MSHA assess "civil monetary penalties . . . [according to, *inter alia*,] . . . the operator's *history* of previous violations."⁶⁶ Even MSHA's desire to penalize "violations as close as practicable to the time the violation occurs,"⁶⁷ while certainly laudable in general, is utterly out of place in a provision that has as its purpose the punishment of a producer's *past* violations.

In sum, the reduction of the twenty-four month assessment period to fifteen months diminishes producers' compliance incentives and is based on a comparison of the old and new standards that was obtained through an application both narrow and limited. MSHA blatantly contradicts its own previous rationale based on this narrow application and gives no other testable reason for the reduction. The other justifications, such as the agency's desire to "more accurately reflect an operator's current state of compliance," are inconsistent with the spirit and intent of the statute authorizing the imposition of civil penalties that Congress adopted. Indeed, the reduction is misguided and is destructive of the incentives that keep miners safe.

⁶⁴ *Id.* at 13604.

⁶⁵ 71 Fed. Reg. 53054, 53058 (Sept. 8, 2006); *see* 72 Fed. Reg. 13592, 13604 (Mar. 22, 2007).

⁶⁶ MINER Act 30 U.S.C. 820(2)(i) (emphasis added).

⁶⁷ 72 Fed. Reg. 13592, 13604 (Mar. 22, 2007).

V. THE NEW REPEAT VIOLATION PENALTY

The new repeat violation penalty is a great step toward increasing incentives for miner safety. In principle, it bridges a divide that separated miners' safety from the effect of civil penalties. The rule proposal states that:

MSHA is proposing this new provision because the Agency believes that operators who repeatedly violate the same standard may indicate an attitude which has little regard for getting to the root cause of violations of safe and healthful working conditions. The Agency believes that these operators show a lack of commitment to good mine safety and health practices by letting cited and corrected hazardous conditions recur . . . MSHA believes that this new proposal will encourage greater operator compliance with the Mine Act and MSHA's safety and health standards and regulations, which is consistent with Congress' intent.⁶⁸

The final rule adoption further describes the need for a repeat violation penalty by reporting that operators are often issued citations for the same safety and health hazards within a specific period of time.⁶⁹ From this data, the Agency deduced that "these operators are correcting that particular condition without addressing the root cause of the problem. This new provision is aimed at preventing these types of occurrences and thereby providing a systemic improvement to miner safety and health."⁷⁰

The reasoning is sound and the purpose commendable, which make it all the more regrettable that the Agency failed to give the new rule the teeth necessary to induce greater compliance than was induced by the previous rule. Most of the supposed additional incentive that would be placed upon producers to avoid repeat violations is undermined by the inflation of the point to dollar table in Subsection 100.3(g), and by MSHA's insistence on limiting its definition of repeat violations to specific citable violations.

VI. POINT TO DOLLAR CONVERSION TABLE

At first blush, it appears that the point assessment under the new rule greatly increases a producer's compliance incentive by more than doubling the potential amount of assignable points; under the old 100.3(c), a producer's history of violations could be assessed only 20 points,⁷¹ compared to the new rule's potential assessment of 45.⁷² However, this significant increase in point assignment is but an illusion when it comes to application of fees because the point to dollar

⁶⁸ 71 Fed. Reg. 53054, 53059 (Sept. 8, 2006).

⁶⁹ 72 Fed. Reg. 13592, 13608 (Mar. 22, 2007).

⁷⁰ *Id.*

⁷¹ 30 C.F.R. § 100.3(c) (2006).

⁷² 30 C.F.R. § 100.3(c) (2007).

conversion table has also been significantly altered. A 20 point assessment under the previous chart would yield a \$72 penalty,⁷³ while a 45 point assessment under the new chart only yields a \$112 penalty.⁷⁴ If MSHA had left the old point to dollar conversion table intact, a 45 point assessment would yield a \$463 penalty.⁷⁵ Granted, an increase from \$72 to \$112 is substantial, but not nearly as significant as indicated by the more than double correlative point increase. This is one aspect of the rule that would only require MSHA to make a slight (re)alteration to have a profound effect on producers' compliance incentive.

VII. THE DEFINITIVE SCOPE OF "REPEAT VIOLATION"

This part of the new rule says that two (or more) violations that are being assessed for a penalty must fall under the same citable provision in order to qualify as repeat violations;⁷⁶ if they are different by even one subsection (i.e. 30 C.F.R. 75.202(a) instead of 75.202(b)) then they cannot be considered repeat violations.⁷⁷ The justification for the narrowness of this definition was given by MSHA when it addressed several of the public comments that criticized its limited nature:

MSHA does not agree that the repeat provision should include broader categories of violations. MSHA analyzed violation data for the 15-month period from January 1, 2005, through March 31, 2006. MSHA's analysis, interpreting "same standard" to mean "same citable provision," showed that 698 of the 10,227 mines with violations had at least 6 violations [the threshold number for imposition of repeat penalties] of the same citable provision of a standard. Further, 99 of the 698 mines had more than 20 violations of the same citable provision during the 15-month period. *Limiting repeat violations to the same citable provision targets those operators who show a repeated lack of commitment to miner safety and health; this is precisely the type of behavior that the Agency seeks to change.*⁷⁸

The last sentence of this excerpt is representative of the assertions that MSHA seems to rely upon to justify its narrow definition, which is odd considering the statement's message is, much like those supporting the time reduction assessment, counterintuitive. How is it that adhering to a narrower definition, which results in less repeat violations, "targets those operators who show a repeated lack of commitment to miner safety and health"? Would not a

⁷³ 30 C.F.R. § 100.3(g) (2006).

⁷⁴ 30 C.F.R. § 100.3(g) (2007).

⁷⁵ 30 C.F.R. § 100.3(g) (2006).

⁷⁶ 30 C.F.R. § 100.3(c)(2) (2007).

⁷⁷ 72 Fed. Reg. 13592, 13608 (Mar. 22, 2007).

⁷⁸ *Id.* (emphasis added).

broader definition more effectively incentivise greater compliance toward “precisely the type of behavior that the Agency seeks to change,” which, MSHA has said, is “[the] operators[’] practice of] correcting [a] particular condition without addressing the root cause of the problem”? Simple adjustments to the definition and perhaps an increase in the penalty threshold (as six would probably be unfairly low if the number of repeat violations increased) are all that would be needed in order to significantly strengthen the repeat violation provision and actually fulfill MSHA’s desire to provide “a systemic improvement to miner safety and health.”

By way of illustration, I include the following provision and analysis:

Communication wires and cables; installation; insulation; support.

(a) All communication wires shall be supported on insulated hangers or insulated J-hooks.

(b) All communication cables shall be insulated as required by §75.517-1, and shall either be supported on insulated or uninsulated hangers or J-hooks, or securely attached to messenger wires, or buried, or otherwise protected against mechanical damage in a manner approved by the Secretary or his authorized representative.

(c) All communication wires and cables installed in track entries shall, except when a communication cable is buried in accordance with paragraph (b) of this section, be installed on the side of the entry opposite to trolley wires and trolley feeder wires. Additional insulation shall be provided for communication circuits at points where they pass over or under any power conductor.

(d) For purposes of this section, communication cable means two or more insulated conductors covered by an additional abrasion-resistant covering.⁷⁹

Under MSHA’s narrow definition, if a certain mine gets cited for violating (a) five times, (b) five times, and (c) five times, all over the span of 15 months, none of the citations in themselves are enough to constitute a repeat violation because the threshold for qualifying is six violations; this, even though the total amount of violations related to communications would make it very clear that there is a more fundamental “root cause” to all the problems. In this way, the narrow definition fails to “correct[] [a] particular condition [by] addressing the root cause of the problem,” which is “precisely the type of behavior that the Agency seeks to change.”

If, however, the same number of violations occurred under a more broad definition, such as one that only referred to 30 C.F.R 75.516-2 (the *whole* provision above), there would be a much greater compliance incentive for operators because each additional violation that had to do with communications support would be counted as a ‘repeat,’ regardless of the subsection classification.

⁷⁹ 30 C.F.R. § 75.516-2 (2007).

Even if MSHA decided to slightly increase the threshold above six violations, a broader definition would still more directly address MSHA's valid concern for the underlying "root cause" that gives rise to the sub-section violations. This is because there would be greater potential for repeat violations under the general provision, making it more economically efficient for the mine operator to address the root cause than to pay for the growing number of violations.

In contrast, under the narrow definition, the incentives stemming from repeat violations are made impotent by segregating them into subsections; besides it being more economically efficient to simply pay for the depreciated amount of individual subsection fees than to address the root cause of the problem, by basing repeat violations on subsections instead of the whole provision, the operator's focus is unwittingly diverted from the "root cause" in a general way; this unintentionally encourages the operator to give an unwarranted amount of attention to the particular sub-section problem rather than the "root cause" that continually gives rise to the problem.

Thus, when analyzed, it becomes clear that a broader definition would more likely serve as a greater incentive for mine operators' compliance with MSHA's health and safety standards because it would more directly address the Agency's desire to identify and eradicate the root causes of sub-section violations, and because a broader definition would avoid unintentionally diverting the operator's attention away from the violation of a system (i.e. a communications system), rather than the outgrowth of that problem in the form of a narrow sub-section violation.

VIII. CONCLUSION

In light of these analyses, one is left to wonder what rationale MSHA is using to unite its seemingly blank assertions to the actual effects of the changes it made to its assessment procedure. Perhaps time and application to real life mine operation will enlighten the rest of us as to what MSHA must already have ascertained, but not shared.