

ability to continue in business the penalty may be adjusted.

[47 FR 22294, May 21, 1982, as amended at 57 FR 2970, Jan. 24, 1992; 57 FR 60697, Dec. 21, 1992; 63 FR 20035, Apr. 22, 1998]

§ 100.4 Determination of penalty; single penalty assessment.

(a) An assessment of \$55 may be imposed as the civil penalty where the violation is not reasonably likely to result in a reasonably serious injury or illness (non-S&S) and is abated within the time set by the inspector.

(1) If the violation is not abated within the time set by the inspector, the violation will not be eligible for the \$55 single penalty and will be processed through either the regular assessment provision (§100.3) or special assessment provision (§100.5).

(2) If the violation meets the criteria for excessive history under §100.4(b), the violation will not be eligible for the \$55 single penalty and will be processed through the regular assessment provision (§100.3).

(b) Excessive history shall be based on overall history from paragraph (c) of §100.3. Excessive history is defined as 20 penalty points for overall history. Mines having 10 or fewer assessed violations in a preceding 24-month period will be excluded from any excessive history determination. Only violations that are paid or finally adjudicated will be included in determining excessive history. Only citations and orders issued on or after January 1, 1991, shall be considered in determining excessive history.

[57 FR 60697, Dec. 21, 1992; 57 FR 61612, Dec. 28, 1992; 63 FR 20035, Apr. 22, 1998]

§ 100.5 Determination of penalty; special assessment.

(a) MSHA may elect to waive the regular assessment formula (§100.3) or the single assessment provision (§100.4) if the Agency determines that conditions surrounding the violation warrant a special assessment. Although an effective penalty can generally be derived by using the regular assessment formula and the single assessment provision, some types of violations may be of such a nature or seriousness that it is not possible to determine an appropriate penalty under these provisions.

Accordingly, the following categories will be individually reviewed to determine whether a special assessment is appropriate:

- (1) Violations involving fatalities and serious injuries;
- (2) Unwarrantable failure to comply with mandatory health and safety standards;
- (3) Operation of a mine in the face of a closure order;
- (4) Failure to permit an authorized representative of the Secretary to perform an inspection or investigation;
- (5) Violations for which individuals are personally liable under section 110(c) of the Act;
- (6) Violations involving an imminent danger;
- (7) Discrimination violations under section 105(c) of the Act; and
- (8) Violations involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances.

(b) When MSHA determines that a special assessment is appropriate, such special assessment shall take into account the criteria enumerated in §100.3(a) and §100.4(b). All findings shall be in narrative form.

(c) Any operator who fails to correct a violation for which a citation has been issued under Sec. 104(a) of the Act within the period permitted for its correction may be assessed a civil penalty of not more than \$5,500 for each day during which such failure or violation continues.

(d) Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty which shall not be more than \$275 for each occurrence of such violation.

[47 FR 22294, May 21, 1992, as amended at 57 FR 60697, Dec. 21, 1992; 63 FR 20035, Apr. 22, 1998]

§ 100.6 Procedures for review of citations and orders; procedures for assessment of civil penalties and conferences.

(a) All parties shall be afforded the opportunity to review with MSHA each citation and order issued during an inspection.

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(b) Upon notice by MSHA, all parties shall have 10 days within which to submit additional information or request a safety and health conference with the District Manager or designee. A conference request may include a request to be notified of, and to participate in, a conference initiated by another party.

(c) It is within the sole discretion of MSHA to grant a request for a conference and to determine the nature of the conference.

(d) When a conference is conducted, the parties may submit any additional relevant information relating to the violation, either prior to or at the conference. To expedite the conference, the official assigned to the case may contact the parties to discuss the issues involved prior to the conference.

(e) MSHA will consider all relevant information submitted in a timely manner by the parties with respect to the violation. When the facts warrant a finding that no violation occurred, the citation or order will be vacated.

(f) All citations which have been abated and all orders will be promptly referred by the District Manager to the Office of Assessments.

(g) The Office of Assessments will use the citations, orders, and inspector's evaluation as the basis for determining the appropriate amount of a proposed penalty.

§ 100.7 Notice of proposed penalty; notice of contest.

(a) A notice of proposed penalty will be issued and served by certified mail upon the party to be charged and by regular mail to the representative of miners at the mine after the time permitted to request a conference under § 100.6 expires, or upon the completion of a conference, or upon review by MSHA of additional information submitted in a timely manner.

(b) Upon receipt of the notice of proposed penalty, the party charged shall have 30 days to: (1) Pay the proposed assessment (acceptance by MSHA of payment tendered by the party charged will close the case); or, (2) notify

MSHA in writing of the intention to contest the proposed penalty. The Office of Assessments shall provide a return mailing card with each notice of proposed penalty to be used by the party charged to request a hearing before the Federal Mine Safety and Health Review Commission under section 105 of the Act. Such a request must be sent to the address listed on such notification. When MSHA receives the notice of contest, it shall immediately advise the Commission of such notice, and shall promptly forward the case to the Office of the Solicitor. No proposed penalty which has been contested before the Commission, shall be compromised, mitigated or settled except with the approval of the Commission.

(c) The failure to pay or to contest the proposed penalty within 30 days of receipt of notice thereof shall result in the proposed penalty being deemed a final order of the Commission and not subject to review by any court or agency.

§ 100.8 Service.

(a) All operators are required by 30 CFR part 41 (Notification of Legal Identity) to file with MSHA the name and address of record of the operator. All representatives of miners are required by 30 CFR part 40 (Representative of Miners) to file with MSHA the mailing address of the person or organization acting in a representative capacity. Proposed penalty assessments delivered to those addresses shall constitute service.

(b) If any of the parties choose to have proposed penalty assessments mailed to a different address, the Office of Assessments must be notified in writing of the new address. Delivery to this address shall also constitute service.

(c) Service for operators who fail to file under 30 CFR part 41 will be upon the last known business address recorded with MSHA.

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