

M. Kennedy

1 or 12s. I would also urge you if possible we're requesting
2 the right to maintain our walk around rights when the
3 company does their verifying also.

4 I'm not going to hit on the airstream helmets
5 because I've tried to wear them before, too. They're bad.

6 Thank you very much. I appreciate it.

7 MR. NICHOLS: Thank you.

8 (Applause.

9 MR. NICHOLS: Is Russell Thompson back yet? Okay.
10 He's history.

11 Max? Max Kennedy?

12 MR. KENNEDY: Mr. Chairman, members of the panel,
13 my name is Max Kennedy, M-A-X, K-E-N-N-E-D-Y.

14 First of all, I live in the State of Virginia. I
15 hold a first class underground mine foreman certification,
16 among other Virginia coal related certifications, and I want
17 to mention this one panel because later I'll refer to it.
18 I've served on the M S W panel under the direction of Jack
19 Tysdale to provide input on clear and gob ventilation
20 systems training modules now used at the mine academy.

21 I've been involved in several coal mine
22 explosions, mine fires and too many fatal investigations.
23 For the past ten years, I've been appointed by three
24 successive governors to serve on Virginia's Coal Mine Safety
25 Board. That board is the regulatory work group for the

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1 Department of Mines, Minerals and Energy for the development
2 or revision of any of the state's regulations.

3 That poses -- it's similar, but different, because
4 it's state. It's not federal, but in rule making the rules
5 that we develop are similar with public hearings. We
6 consider all comments and address those comments in a rule
7 making process.

8 I won't hit on that again about the advisory
9 committee. I don't understand why. That's between you and
10 the outcome.

11 The reason I mentioned the panel that developed
12 that training model for bleeder systems and gobber is it
13 leads me to a question, and I don't think Ron quite answered
14 that question as far as one an operator exhausts all
15 engineering administrative controls for bringing a long wall
16 in compliance below the two milligram standard, he can
17 petition the Administrator of Coal for the interim use of
18 PAPRs.

19 Now, in your commentary it says the effectiveness
20 is in dispute as far as testing that's been done at lower
21 velocities versus velocities that are above 500 feet per
22 minute. Is that clear? Do I understand that they are more
23 effective in lower velocities, and once you get to 500 feet
24 per minute then that was the decision that you all signed,
25 the protection factor of two? Okay.

1 What about the extreme velocities that was
2 testified here today of 2,000 feet per minute? Is that
3 going to be still a fair protection factor for that unit?

4 MR. NICHOLS: I don't know.

5 MR. KENNEDY: Well, let me rephrase that. Let me
6 rephrase that. Are you going to accept or approve those
7 devices at those levels of velocities? It isn't clear in
8 the preamble commentary whether you will or whether you
9 won't. It only mentions the 500 feet, and then it's silent
10 as to whether or not you will or you won't above that.

11 MR. SCHELL: We would. They've been determined to
12 be effective above 500 feet for the protection factor of
13 two.

14 Max, in reaching that protection factor of two we
15 factored in raising the shield of velocity, so the way this
16 proposal is written if you had exhausted all engineering
17 controls for those workers working downwind of the 044, they
18 could go to either administrative controls or PAPRs. There
19 was nothing in this proposal that limited, put an upper
20 limit, on PAPRs because of the velocity.

21 MR. KENNEDY: It's still unclear in the
22 commentary. It insinuates that the approval was based --
23 you know, because of the high velocities, it just says
24 they're effective up to 500 feet per minute. It doesn't --
25 to me, you know, that's what I'm reading. I don't know if

1 I'm confused.

2 MR. NICHOLS: Did you want to comment on that?

3 MR. KENNEDY: What my question is is will you
4 approve them no matter what the velocity is?

5 MR. NICHOLS: We don't know.

6 MR. KENNEDY: Okay.

7 MR. NICHOLS: Let's talk about it.

8 MS. ROPER: If you look on page **42137**, we talk
9 about some of the summary statistics for some of the studies
10 that we used, and we do talk about **1,200** feet per minute,
11 **1,400** feet per minute, but we can look at the upper values
12 because there were higher velocities that were observed in
13 the studies with respect to estimating the protection
14 factor. We'll address that issue.

15 MR. KENNEDY: So that means that you will if
16 everything is exhausted and they can't get below the two
17 milligrams? Then you will consider any velocity?

18 MR. NICHOLS: I think that's right

19 MR. KENNEDY: Okay. I think you have solicited
20 for comments on that protection factor, but, first of all,
21 I'd like to know how you arrived at two when there were
22 testing done. You know, you still -- it mentions the
23 highest was I think she said **1,400** feet per minute.

24 MS. ROPER: That wasn't necessarily the highest.
25 That's how we chose to characterize it.

1 MR. NICHOLS: Do you know how we arrived at that?

2 MR. SCHELL: No.

3 MR. NICHOLS: Is your question how we arrived at
4 the two?

5 MR. KENNEDY: Yes. You know, I want to comment.
6 It says you're soliciting comments on that number for the
7 protection factor.

8 MR. NICHOLS: Yes.

9 MR. KENNEDY: I'm saying it's too high at two
10 because of the higher velocities.

11 MR. NICHOLS: Does anybody know how we arrived at
12 the two?

13 MR. NIEWIADOMSKI: The basis for us selecting two
14 is explained in here, and it's basically a factor of safety
15 built in. Based on the best information we have, we decided
16 we're going to limit it to a protection factor of two. It
17 was based on the highest velocity, so all the data that
18 we've had, all the studies that we've done.

19 Now, you're going to hear others indicate that
20 there should be a much higher protection factor, but we
21 decided we'll go with a factor of safety with the lowest,
22 which is two, and that's based on all the data that we have,
23 okay?

24 MR. KENNEDY: I'm still --

25 MR. NIEWIADOMSKI: **So** it's ten times lower than

1 what NIOSH is recommending.

2 MR. KENNEDY: Well, the high level -- the
3 testimony here today was that a long wall in my area from
4 Danny Sparks was 2,000 feet per minute down that long wall.
5 The commentary doesn't mention velocities that high for a
6 protection factor of two, and I'm asking that question.
7 Does two fit all, all the long walls out there?

8 My assertion is when you ask for a comment on that
9 protection factor, I'm saying that you can't fairly, and
10 you're saying of this best evidence that you have, assign
11 any protection factor until you have the data and the
12 figures for the higher velocities before you can do that.

13 MR. NIEWIADOMSKI: Max, that's a fair comment.
14 We'll look at that. I can tell you what we did was
15 summarize that data. We'll go back and take a look at that
16 data in light of your comment.

17 MR. KENNEDY: There is one thing that I'm glad,
18 and really I'm really not glad, but if you decide to proceed
19 with this rule as written and you do have this provision for
20 PAPRs and you assign a velocity factor or protection factor
21 and you limit that and only long walls with lower velocities
22 will be given the opportunity to apply for this, then you
23 may create an incentive for long walls that now have complex
24 bleeder systems that maintain pressures on the face line to
25 control the methane and the gob to go with lower velocities

1 on that face to gain this approval, which will create
2 another monster in that gob as far as ventilation goes.

3 So don't, you know, create a hazard for methane
4 build up by creating an opportunity for an operator who may
5 manipulate the system in order to gain this approval without
6 utilizing all administrative and environmental controls.
7 That's a point I need you to understand.

8 I'm not going to dwell on what's been testified
9 to, and I don't want to take up a lot of time **of** the miners
10 here that do have concerns. They sincerely ran across those
11 concerns as they did before the advisory committee, so this
12 is the second testimony that they've given on the same
13 issue.

14 It's still unclear to me and also to a lot of the
15 miners in the room of some of the answers given of the
16 questions that they asked validly, and that was one of the
17 questions the answer that was given was about the
18 verification production as far as the percentage **of** the
19 production for the verification sample was higher than the
20 recommendation made by the advisory committee.

21 That is what I perceived the answer to be for that
22 question that was asked. Can you clear that up for us so
23 that we all understand that?

24 MR. SCHELL: I'm going to try, Max.

25 MR. KENNEDY: Okay.

1 MR. SCHELL: I think part of that is probably my
2 fault for confusing production level during compliance
3 sampling with the production level during verification
4 sampling. What we are proposing for compliance sampling is
5 60 percent of the average. Right now operators use 50. We
6 use 60.

7 What I was trying to say is that when it comes to
8 verification sampling, we are looking at a production level
9 that is significantly above the average. We are not looking
10 at 60 percent of the average or 90 percent of the average.
11 We are looking at a number that is above the average.

12 Now, to try to quantify that, if you were to have
13 a continuum of zero percent to 100 percent and let's say 50
14 percent was the average --

15 MR. KENNEDY: Okay.

16 MR. SCHELL: Okay. On verification sampling, we
17 would be looking at the 70 percent level, not the 100
18 percent of the 50 percent level.

19 MR. KENNEDY: Okay. I thank you for making that
20 clear, and I hope that that clears it up for the rest of the
21 miners here.

22 The other question and the other answer. This
23 horse has been beat to death today, and that is the 4.0
24 milligrams. You've stated that this is not a 4.0 milligram
25 standard, but in essence it's a 3.9.

1 MR. NICHOLS: What I said was it's not a 4.0
2 standard for the entire long wall face.

3 MR. KENNEDY: Right. Right.

4 MR. NICHOLS: That's the impression you get of
5 hearing the comment. What I said was that you're looking at
6 the protection factor for the miners. For these miners that
7 are working downwind of the shear operator, it will protect
8 up to four milligrams. That's a far sight from saying we're
9 going to just carte blanche raise the dust standard four
10 milligrams.

11 Let's say somebody is overexposed at 2.7, and
12 there's absolutely no other way to get it down to two.
13 Well, that's not a four point standard. That's not a -- the
14 airstream helmet would protect in that case, but it wouldn't
15 be four milligrams.

16 Do you understand what I'm saying? The protective
17 factor of the airstream helmet --

18 MR. KENNEDY: And I think that's still in question
19 as far as that number, as far as the velocity.

20 MR. NICHOLS: Well, wait a minute. You're talking
21 about something different there. I'm talking about --

22 MR. KENNEDY: If you do assign that to that --

23 MR. NICHOLS: Yes?

24 MR. KENNEDY: If you assign to the protection
25 factor --

1 MR. NICHOLS: Right.

2 MR. KENNEDY: -- then in essence if they say that
3 I did all that I can do and now I'm going to submit this to
4 the Administrator of Coal, and if that number is two and you
5 decide it's two for all velocities then in essence in the
6 interim while the operator continues to demonstrate that
7 he's working on his administrative controls, he's working on
8 his engineering controls and then he utilizes the PAPRs,
9 then he does have a 3.9 milligram standard, and if he
10 doesn't exceed to the 4.0 he won't be cited.

11 If he is 3.9 when sampled, when compliance
12 sampling, he won't be cited, as I understand this. This is
13 a 3.9, and he is in compliance.

14 MR. NICHOLS: Well, that's correct, but you can't
15 take that and make a carte blanche that MSHA is raising the
16 dust standard to four milligrams on the long wall face.

17 MR. KENNEDY: For those long walls that have
18 applied and gotten approval for those persons working
19 downwind of the shear --

20 MR. NICHOLS: That's correct.

21 MR. KENNEDY: -- they are and will, if this is a
22 final rule, with that number two protection factor assigned
23 to that airstream helmet then that individual, his working
24 environment is and can go up to 3.9 --

25 MR. NICHOLS: That's correct.

1 MR. KENNEDY: -- and be in compliance.

2 MR. NICHOLS: That's correct, but a lot of the
3 testimony was just open ended that MSHA is raising the dust
4 level to four milligrams on the long wall face, and that's
5 not correct.

6 MR. KENNEDY: I think that everybody understands
7 what was said just then, and they understand that individual
8 on that long wall, his exposure will be increased, but he'll
9 have a protection factor if it's two.

10 MR. NICHOLS: Only after all the other controls
11 have been exhausted.

12 MR. KENNEDY: Okay.

13 MR. NICHOLS: All right.

14 MR. KENNEDY: Now, will all available data be
15 gotten to these operators to utilize these engineering and
16 administrative controls, all data that is present and in the
17 future before such approval is gained such as water infusion
18 if they don't water infusion at this time on the panel, such
19 as wet heads on the shear drums?

20 Will those be incorporated or required prior to
21 the extremes as the Mine Act says that those are time tested
22 and proven? Will that occur?

23 MR. NICHOLS: Well, yes. We've put together a
24 list of controls. We've circulated it for --

25 MR. KENNEDY: It says all feasible. You know,

1 this was printed. It's time tested proven, scientific data,
2 okay? It should be incorporated prior to any approval that
3 all methods should be exhausted prior to approval of
4 respiratory protection, just as the Mine Act says. Am I
5 right, or am I wrong?

6 MR. NICHOLS: Well, that's what the rule says that
7 all feasible engineering controls shall be exhausted.

8 MR. KENNEDY: There's one other thing I want to
9 clear up, and then I'll hush and let the miners speak, and
10 that is verification sampling and 103(f) rights.

11 You're saying that miners will be afforded 103(f)
12 rights when MSHA comes and does verification sampling. What
13 guarantee that they will have those rights and they won't be
14 challenged and they won't be stopped from traveling with
15 MSHA?

16 MR. NICHOLS: Well, it would be our intention to
17 put it in the rule and also, like anything else, I mean,
18 we'd issue citations.

19 Anybody got anything different?

20 MR. KENNEDY: The last thing I'll say is this is
21 the only part that an ALJ looks at when an operator contests
22 a citation. This they throw in the trash, so whatever your
23 comments are, they only look at the rule, so when you go
24 back whatever the rule is going to be, that's the only thing
25 a miner can hang his hat on.