

TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
PUBLIC HEARING ON PROPOSED)
RULE)
)
CRITERIA AND PROCEDURES FOR)
PROPOSED ASSESSMENT OF)
CIVIL PENALTIES)

Pages: 1 through 121
Place: Charleston, West Virginia
Date: October 17, 2006

HERITAGE REPORTING CORPORATION

Official Reporters
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IN THE UNITED STATES DEPARTMENT OF LABOR

IN THE MATTER OF:)
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PUBLIC HEARING ON PROPOSED)
RULE)
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CRITERIA AND PROCEDURES FOR)
PROPOSED ASSESSMENT OF)
CIVIL PENALTIES)

Hawk's Nest Conference Room
Charleston Marriott Town
Center
200 Lee Street East
Charleston, West Virginia

Tuesday,
October 17, 2006

The parties met, pursuant to the notice, at
9:10 a.m.

BEFORE: PATRICIA W. SILVEY
Moderator

APPEARANCES:

- WILLIAM CROCCO, Office of Coal Mine Health and Safety
PETER MONTALLI, MSHA's Office of Metal and Nonmetal Mine Safety and Health.
JACK POWASNIK, Esquire
ROBERT STONE, Chief Economist with MSHA's Standards Office
KEITH WATSON, Deputy Director, Office of Assessments
GERI GUNN, Office of Standards, Regulations, and Variances, MSHA

P R O C E E D I N G S

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(9:10 a.m.)

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MS. SILVEY: Good morning. My name is Patricia W. Silvey, and I am the Director of the Office of Standards, Regulations, and Variances for the Mine Safety and Health Administration.

I will be the moderator of this public hearing today on MSHA's proposal concerning civil penalties.

The members of the panel are, to my right: Keith Watson, who is the Deputy Director of the Office of Assessments. The acting Director of the Office of Assessments, Jay Mattos, who was the Chair of the Civil Penalty Committee was not able, unfortunately, to be with us at this hearing.

To his right, Peter Montali, who is with MSHA's Office of Metal and Nonmetal Mine Safety and Health.

To my left, Jack Powasnik, who is our attorney on the committee. To his left, Robert Stone, the Chief Economist with MSHA's Standards Office, with my office. And to Robert's left, William Crocco, who is with the Office of Coal Mine Health and Safety.

We have another member of the committee in the room, Geri Gunn, and Geri right now, she is with

1 my office, and she's in the back at the registration
2 table.

3 This is the fifth of six hearings on this
4 proposed rule. The first hearing was held in
5 Arlington; the second in Birmingham, Alabama; the
6 third in Salt Lake City; the fourth in St. Louis; this
7 one today; and the final hearing will be on October 19
8 in Pittsburgh.

9 The comment period for the rule, as many of
10 you know, will close on October 23. And that becomes
11 an important date, because, in accordance with the
12 Miner Act, MSHA must issue regulations to implement
13 the provisions of that Act by December 2006. We will
14 accept documents today that you would like to submit
15 for the record.

16 The hearing will be conducted in an informal
17 manner. As many of you who participated in these MSHA
18 hearings know, members of the panel may question
19 witnesses, and witnesses may ask questions of the MSHA
20 panel. Scheduled speakers will make their
21 presentations first, after which time others will be
22 allowed to speak. The transcript of this hearing will
23 be posted on the MSHA website within a week.

24 Before I discuss the provisions of the
25 proposal, I want to give you a very short overview of

1 the civil penalty process, beginning with the
2 clarification of four terms that are used throughout
3 the proposal.

4 The first is citation. The inspector issues
5 a citation, as many of you know, for a violation of
6 any MSHA standard, rule, order, safeguard, or
7 regulation. The inspector sets the time to abate the
8 condition.

9 The second is an order. The inspector
10 issues an order under several circumstances. One,
11 when a violation is not abated within the time allowed
12 by the inspector. Two, when the inspector finds a
13 violation caused by an unwarrantable failure of the
14 operator. Or three, when the inspector determines
15 that an imminent danger exists.

16 An order requires withdrawal of affected
17 miners until the violation is abated. It does not
18 necessarily require that the entire mine be shut down,
19 only that area affected by the violation.

20 The third term is significant and
21 substantial, or, as we refer to it in MSHA, S&S. An
22 S&S violation is one that is reasonably likely to
23 result in a reasonably serious injury or illness. The
24 inspector makes the S&S determination at the time of
25 the issuance of the citation.

1 Finally, unwarrantable failure. This has
2 been defined by case law to be aggravated conduct
3 constituting more than ordinary negligence.

4 Under the Mine Act, MSHA proposes penalties,
5 and the Federal Mine Safety and Health Review
6 Commission, or I might refer to it as the Commission,
7 assesses penalties. A proposed penalty that is not
8 paid or contested within 30 days of receipt becomes
9 the final order of the Commission. Penalties that are
10 contested before the Commission are reviewed de novo.

11 We will use the term "assessment" to refer
12 to MSHA's proposed assessments, as well as assessments
13 of the Commission.

14 The Mine Act requires MSHA and the
15 Commission to consider six criteria in assessing civil
16 penalties: The size of the business, the operator's
17 history of previous violations, whether the operator
18 was negligent, the gravity of the violation, the
19 operator's good faith in abating the violative
20 condition, and the effect of the penalty on the
21 operator's ability to continue in business.

22 The first five criteria are applied to
23 compute the penalty amount. The final criterion is
24 applied after the penalty is proposed upon request by
25 the mine operator, and the mine operator must send in

1 supporting documentation if the operator believes that
2 the penalty will negatively affect the company's
3 ability to continue in business. MSHA will review
4 this information and may adjust the penalty.

5 MSHA published the proposed rule in the
6 Federal Register on September 8. A copy of the
7 proposal was placed on MSHA's website. Basically, the
8 proposed rule does two things: It revises MSHA's
9 existing civil penalty program to increase penalty
10 amounts, and to improve the effectiveness of MSHA's
11 civil penalty process. These changes are intended to
12 induce greater mine operator compliance with the Mine
13 Act and MSHA's safety and health standards and
14 regulations, thereby improving safety and health for
15 miners.

16 Second, the proposal implements three
17 provisions of the Mine Improvement and New Emergency
18 Response Act of 2006, which I will refer to as the
19 MINER Act.

20 The proposal does not change the way
21 inspectors issue citations. Under the proposal,
22 inspectors will make factual determinations with
23 respect to safety and health violations, and will
24 issue citations and orders as they do now.

25 Also, please note that while both the Mine

1 Act and the MINER Act contain provisions for criminal
2 fine, this rule concerns only civil penalties, as the
3 name implies.

4 Under the existing rule, MSHA has three
5 types of assessments: single, regular, and special.
6 I will address each type of assessment.

7 I'm going to begin with the single penalty.
8 And at this point I want to clarify for the record
9 what we have done with respect to the single penalty.

10 The existing rule provides for a \$60 single
11 penalty for non-S&S violations that are timely abated,
12 and where the operator does not have an excessive
13 history of violation. The agency proposes to delete
14 the single penalty. But in so doing, the agency will
15 replace it with the regular formula. And by that I
16 mean the non-S&S violations will now be computed
17 through the regular, under the proposal, would be
18 computed through the regular formula assessment.

19 And it does not mean that MSHA would not
20 assess penalties for non-S&S violations. The agency
21 believes that eliminating the single penalty and
22 processing those non-S&S violations through the
23 formula system will cause mine operators to focus
24 their attention on preventing all hazardous
25 conditions.

1 The second aspect of the proposal are
2 regular assessments. Regular assessments are derived
3 by assigning points for the statutory criteria, then
4 converting the total points to a dollar amount.
5 Regular assessments are computer-generated through
6 MSHA's management information system.

7 The proposed rule would make a number of
8 changes to the process, and to the tables for
9 determining penalty amounts.

10 The first change is a change to the size
11 criterion. The size criterion includes operator size
12 and controller size. For coal mines, operator size is
13 measured by tonnage of coal produced by that mine
14 during the previous calendar year. For metal and
15 nonmetal mines, operator size is measured by hours
16 worked at the mine during the previous calendar year.
17 And size for independent contractors is measured by
18 total hours worked at the mine.

19 Under the proposal, the maximum number of
20 points for operator size would increase from 10 to 20.
21 The proposal would continue to assign no points for
22 the smallest operators, and those are coal mines that
23 produce up to 15,000 tons of coal; metal and non-
24 metal, with 10,000 or less hours worked; and
25 independent contractors who have worked up to 10,000

1 hours at all mines.

2 Please note a clarification to the preamble
3 of the proposal with respect to the size of existing
4 coal mines. The preamble stated that according to
5 2005 data, nearly half of the existing coal mines had
6 annual tonnage of up to 15,000 tons. But this figure,
7 however, included 463 surface facilities that do not
8 produce coal. So if you were to exclude those non-
9 producing facilities from the total number, we would
10 get a more accurate number, which would be one fourth
11 of producing coal mines had annual tonnage of up to
12 15,000 tons.

13 The proposal makes no changes to size points
14 for controlling entities. In the proposal we
15 solicited comments on whether, in considering the size
16 of the operator, greater weight should be placed on
17 the size of the controlling entity.

18 I invite you to address this issue at this
19 public hearing, or in your written comments.

20 History of violations. The proposal
21 includes several changes to the history criterion. It
22 would shorten the time period for determining
23 violation history, change independent contractor
24 history from an annualized number to the total number
25 of violations, and add a new component for repeated

1 violations of the same standard. And overall, we
2 would increase the maximum number of history points.

3 Under both the existing rule and the
4 proposal, only violations for which the penalty has
5 paid or finally adjudicated, or included in
6 determining an operator's history. Also under the
7 proposal, the time period for determining history
8 would be shortened, from 24 months to 15 months. MSHA
9 believes that the shorter time period would more
10 accurately reflect an operator's current state of
11 compliance.

12 Both the existing rule and the proposed rule
13 base history for production operators on violations
14 per inspection day. Under the existing regulation,
15 history for independent contractors is based on the
16 average number of violations over the past two
17 calendar years. The proposed rule would change this,
18 and use the total number of violations during the
19 previous 15 months. The agency believes that there is
20 no need to annualize the number of violations, since
21 history would be based on 15 months.

22 In the proposal MSHA solicited comments on
23 this approach to determining violation history. That
24 is, whether an annualized average should continue to
25 be used.

1 I invite you to address this issue, also.
2 The maximum number of penalty points for this
3 component of violation history would be increased from
4 20 to 25.

5 Significantly, the proposal adds a new
6 component to the history criterion for repeat
7 violations of the same standard. Under the proposal,
8 penalty points are added for more than five repeat
9 violations of the same standard during the preceding
10 15 months.

11 Under the proposal, repeat violations would
12 be determined according to the way the standard in
13 cited. And under the proposal, we used the paragraph
14 basis for citing standards. For example, a violation
15 of Section 56.14101(a)(1) would not be considered in
16 determining a repeat violation of 56.14101(a)(2).

17 MSHA solicits comments on this approach to
18 determining repeat violations. And in the proposal,
19 MSHA also solicited comments on two additional aspects
20 of repeat violations: whether penalty points should
21 be based on the total number of repeat violations, or
22 on the number of repeat violations per inspection day.
23 And whether repeat violations should include all
24 violations, as was the case in the proposal, or only
25 S&S violations. The new component of violation

1 history -- i.e., repeat violations -- would add up to
2 20 penalty points.

3 The next criterion is negligence. The
4 proposed rule would retain the existing five levels of
5 negligence, and would double the maximum number of
6 penalty points that could be assigned for negligence
7 from 25 to 50.

8 Under the proposal, penalties would increase
9 proportionately for operators who exhibit increasingly
10 higher levels of negligence.

11 Gravity. The proposal would retain the
12 three proponents of gravity -- likelihood, severity,
13 and number of persons potentially affected -- but
14 would increase the maximum number of penalty points
15 from 30 to 88.

16 Good faith in abating the violation. The
17 existing rule adds 10 penalty points if the operator
18 does not abate the violation within the time specified
19 by the inspector, and reduces the total penalty by 30
20 percent if the violation is timely abated. The
21 proposed rule would decrease the reduction for timely
22 abatement from 30 percent to 10 percent, and no
23 penalty points would be added for violations that are
24 not timely abated.

25 The penalty point conversion table. The

1 dollar amounts on the existing conversion table range
2 from \$72 to the \$60,000 maximum. The minimum regular
3 assessment is \$60, as stated earlier. The proposed
4 rule provides a maximum of 208 penalty points, and
5 would begin with \$112 to the statutory maximum of
6 \$50,000. The dollar amount of the penalty increased
7 steadily under the proposal as the number of penalty
8 points increased. The maximum penalty of \$60,000 is
9 reached at 140 points.

10 Special assessments. Special assessments
11 are processed where the violation is of such a nature
12 that an appropriate penalty cannot be determined using
13 the regular formula. The existing rule lists certain
14 categories of violations, such as fatalities or
15 serious injuries, that must be reviewed by the agency
16 to determine if a special assessment is appropriate.

17 The proposed rule would remove this list.
18 By so doing, however, MSHA would retain its discretion
19 to determine which types of violations would be
20 reviewed for special assessment without being limited
21 to a specific list.

22 MSHA anticipates that the proposed regular
23 assessment provision would provide an appropriate
24 penalty for most types of violations. And this change
25 would allow the agency to focus its enforcement

1 resources more on field enforcement activities, rather
2 than administrative review activity.

3 The proposal would shorten the time allowed
4 to request a health and safety conference with a
5 district manager. We've received a lot of comment on
6 this provision throughout this, at each one of the
7 public hearings, we've received a lot of comments.

8 Under the existing rule we allow 10 days to
9 make this request. The proposal would shorten the
10 time to five days.

11 Finally, the proposal implements the civil
12 penalty provisions of the MINER Act. Although these
13 provisions are included in the proposal, the
14 provisions were effective at the time that the MINER
15 Act became effective. In addition, the agency has
16 issued a procedural instruction letter to MSHA
17 personnel which contains information for processing
18 violations consistent with the MINER Act. And I will
19 discuss those three provisions separately.

20 The first one is unwarrantable failure
21 citations and orders. Under the MINER Act there are
22 minimum penalties of \$2,000 and \$4,000 respectively
23 for unwarranted failure citations and orders. The
24 proposed rule includes these two provisions. And
25 basically, under the existing procedures, any

1 citations, unwarrantable failure citations and orders
2 consistent with the MINER Act are either processed
3 through the regular assessment or a special
4 assessment, and will be given those minimum penalties.

5 Penalties for flagrant violations. The
6 MINER Act established a new penalty of not more than
7 \$220,000 for flagrant violations. And the MINER Act
8 defined flagrant violations as those involving a
9 reckless or repeated failure to make reasonable
10 efforts to eliminate a known violation of a mandatory
11 health or safety standard that substantially and
12 proximately caused, or reasonably could have been
13 expected to cause, death or serious bodily injury.

14 As stated earlier, these are processed
15 through a special assessment, and under the proposal
16 would be processed as special assessments.

17 Failure to notify. The MINER Act
18 establishes a penalty of not less than \$5,000, not
19 more than \$50,000, for failure to timely notify MSHA
20 in case of death or injury or entrapment with a
21 reasonable potential to cause death, as these are
22 processed as special assessments.

23 Please sign the attendance sheet in the back
24 of the room before you leave, if you haven't done so.
25 And as I stated earlier, we will post transcripts of

1 the public hearings on our website. The transcript
2 will include a full text of the opening statement and
3 the specific issues for which the agency seeks
4 additional comment.

5 We will now begin. And if you would please
6 begin your presentation by stating your name and your
7 organization clearly for the reporter. And before I
8 call the first witness, I do want to also add that we
9 have another member of the Civil Penalty Rule-Making
10 Committee with us here today, and inadvertently I
11 forgot to introduce her. And that's Linda
12 Weitzershausen, and she's in the back of the room. I'm
13 sorry, Linda.

14 MS. WEITERSHAUSEN: That's all right.

15 MS. SILVEY: Now we can begin, having done
16 that. Our first witness will be Dick Homko with Ohio
17 Valley Coal Company. Mr. Homko.

18 MR. HOMKO: Good morning.

19 MS. SILVEY: Good morning.

20 MR. HOMKO: My name is Richard Homko, and I
21 am the Mine Safety Director of the Ohio Valley Coal
22 Company. I would like to thank MSHA and this panel
23 for the opportunity to provide comments on the
24 proposed civil penalty rule, a rule which will have a
25 widespread effect on the industry in auditing the

1 matter that MSHA seeks.

2 At the Ohio Valley Coal Company Number Six
3 Mine, it's an underground coal mining operation in
4 Ashtabula, Ohio. We employ 507 people. The mine has
5 one long-haul section and four continuous-miner
6 sections operating at this time. We mine five million
7 tons of coal annually.

8 We take the safety of our employees as our
9 absolute top commitment. It is our moral and ethical
10 responsibility to protect the health and safety of our
11 employees.

12 The proposed rule would be very harmful to
13 the safety efforts of responsible operators. Civil
14 penalties are not an incentive to safety, nor do they
15 have any positive effect on our or any other
16 responsible operator's safety efforts. We strongly
17 urge MSHA to significantly modify the proposed rule
18 and return to the prior penalty system, to the extent
19 possible.

20 Some of the provisions of the proposed rule
21 are statutory-based and cannot be affected by rule-
22 making procedures. Our comments will be more aimed at
23 the changes in which MSHA has some discretion, or
24 otherwise statutory, but subject to the
25 interpretation.

1 The changes as a whole are a misguided
2 attempt to increase safety by punitive actions against
3 operators. The result will be greatly increased civil
4 penalties, in effect tripling them.

5 Our specific comments are as follows:
6 100.3(b), appropriateness of the penalty to the size
7 of the operator's business. MSHA has proposed to
8 increase the penalty points to the size from an old
9 maximum of 10 to 20 for the mines over two million
10 tons of production.

11 MSHA contends that it is to make the
12 monetary penalties proportional, and therefore
13 increase compliance. This view is seriously flawed
14 and discriminatory. Large operations are inherently
15 safer. This proposed change has a reverse effect of
16 punishing size, which is generally a safety
17 enhancement.

18 The series of mine disasters that led to the
19 MINER Act were at smaller mines. This is typical of
20 the proposed rule, and shows the disconnect between
21 the reality at the mining operations and the MSHA
22 bureaucracy.

23 100.3(d), negligence. The old five-tier
24 system determining points to be assigned for
25 negligence was effective, and has been retained by

1 MSHA. But the points of the upper three tiers
2 increased and doubled at the level of reckless
3 disregard.

4 Our view is that the increase should not
5 apply to moderate negligence, as this is not a
6 volatile stage of culpability and is subject to a wide
7 variation of interpretation.

8 100.3(e), gravity. MSHA has increased the
9 potential from a maximum of 30 points under the
10 previous rule to 88 penalty points under the proposed
11 rule. Historically, the gravity portion of a citation
12 is the most frequently contested item by our company
13 in the health and safety conferences conducted with
14 the agency. This is primarily due to the inspector's
15 determination of the gravity being speculative in
16 nature and subject to individual interpretation. This
17 excessive increase in penalty points is unwarranted,
18 and potentially subject to variance.

19 100.3(f), demonstrated good faith of the
20 operator in abating violations. In this misguided
21 section, MSHA actually decreases the beneficial effect
22 of timely abatement of violations by operators.

23 Previously, an operator could receive a
24 reduction of 30 percent for timely abatement. Now it
25 is only 10 percent, a disincentive rather than an

1 incentive to timely compliance.

2 100.3(g), the penalty conversion table.

3 This now sets a floor of \$112 per penalty. It is
4 inappropriate to set such a floor for non-significant
5 and substantial penalties in mere paperwork
6 violations. This is the purpose for which the single-
7 penalty assessment was designed. This has also been
8 eliminated at Section 100.4 of the proposed rule.

9 The deletion of the single penalty and the
10 floor of \$112 will have an effect of merely increasing
11 bureaucracy and inefficiency, and will not have any
12 real effect on safety compliance.

13 The concentration of MSHA and the operators
14 should be on the elimination of potential S&S
15 violations. The elimination of the single penalty
16 causes the intent to be blurred. Lumping all
17 violations, both S&S and non-S&S, into one category
18 actually diminishes the emphasis on S&S. This is a
19 further example of the lack of a practical approach of
20 MSHA to the real issues.

21 100.4, unwarrantable failure. Much of the
22 proposed rule in this area is designed to implement
23 the statutory requirement of the MINER Act. As such,
24 there is little discretion possible.

25 It is difficult to gauge the effect of one

1 proposed change, the elimination of the list of
2 specific categories that can be the basis of a special
3 assessment. Our view is that this has not been a
4 problem before, so why change it; and that any change
5 would probably lead to an increase in special
6 assessments which, if blatant, can be assessed at
7 \$220,000. This is an unacceptable combination and
8 provides MSHA too much discretion.

9 100.6, procedures for review of citations
10 and orders. The timely period for requesting a health
11 and safety conference has been reduced from 10 days to
12 five days. There is no reason for the change.

13 The rule goes on to incorporate certain
14 statutory disclosures. MSHA predicts that for each
15 10-percent increase in penalty for violations, there
16 will be a three-percent decrease in the probability of
17 the occurrence. This appears bogus, as compliance at
18 responsible operations is not driven by penalty costs,
19 but by other motivations. This is a cynical attitude
20 by MSHA, and indicates a punitive mindset rather than
21 a safety-mindedness.

22 Further in the disclosure portion, MSHA
23 states that the proposed rule is economically feasible
24 for the mining industry, because the anticipated
25 expected increased in penalties will be \$15.9 million,

1 equal to seven percent of the coal mine sector revenue
2 of \$22.1 billion in 2004. This again shows a
3 disconnect between the economic challenges faced by
4 especially the underground coal mines and the
5 understandings of MSHA.

6 I thank you. I'll be glad to answer any
7 questions.

8 MS. SILVEY: Thank you, sir. I have a few
9 comments.

10 First of all, just to say for the record --
11 and probably if one were to look in the transcript of
12 the hearing so far they would find it replete in the
13 record -- and that is, we've heard a lot of comments
14 that these penalties, the proposal was punitive in
15 nature. And of course, you know, I guess one could
16 look at it one way or another.

17 But primarily what we are doing is making,
18 we issued a proposal to change the existing rule, and,
19 as you stated in your comments to me, implement the
20 provisions of the MINER Act. And the penalties in the
21 Mine Act and the MINER Act, the ones that are involved
22 in this proposal, are civil penalties. And they are
23 not meant to be punitive in nature.

24 Now, you know, I guess it depends on what
25 side of the fence, from what side of the fence you are

1 looking at. And you can say that you can construe
2 them as punitive. But I would suggest to you that
3 they were not intended, when the Congress passed the
4 Mine Act, to be punitive in nature. And when we
5 issued the proposal, we did not intend for them to be
6 punitive in nature, but civil in nature, but also to
7 induce compliance with the MSHA safety and health
8 standards.

9 And then that leads me to the second point,
10 the deletion of the single penalty, and your comment
11 about the non-S&S and the mere paperwork violation.
12 And some of the people here have heard me discuss
13 this.

14 Clearly, the non-S&S violations were meant
15 to cover mere paperwork violations. But the non-S&S
16 violations were also meant to cover some violations
17 that probably the inspector did not feel should fall
18 in the category of S&S, but if they were left
19 uncorrected they might lead to an S&S violation. So
20 it was with that purpose in mind, quite honestly, that
21 we felt like the single penalty should be deleted, and
22 everything should be rolled into the formula system.

23 As a matter of fact, I've heard a lot of
24 testimony so far about open, lids not on trash cans
25 and broken light bulbs, and things like that. And I

1 did ask some of the commenters if they would send some
2 of those violations to me. I wanted to look at them
3 so I could see exactly what our inspectors were doing
4 out there. So I anticipate that I would -- and I know
5 I have some MSHA people in the audience here today,
6 and I suspect they would like to see some of what our
7 inspectors are doing, too.

8 With that in mind, though, as we go forward
9 with this hearing today, I would like all of you who
10 are here to just let you all know that that sort of
11 par report led the agency to do what it did in issuing
12 the proposal.

13 On the special assessment, one of the
14 things -- and maybe it didn't come through like the
15 agency intended. One of the things on the special
16 assessment that we intended to do by deleting it, I
17 believe there were eight categories. I'm not sure,
18 there were eight. By deleting the specific eight
19 categories that were under the special assessment, we
20 really intended that there would be fewer violations
21 processed through special assessment, and more would
22 be processed through the regular formula system.

23 And hence, my statement that by doing so, we
24 wouldn't spend so much administrative time on the
25 special assessments, and that would free up our field

1 enforcement resources to do enforcement activity. And
2 I think it hasn't come across like that. It seems
3 like by deleting the categories and giving MSHA the
4 discretion, people are assuming that more violations
5 would be processed under the special assessment. But
6 that wasn't our projection of what was going to
7 happen. Because we felt that by increasing the
8 penalties under the regular formula system, the
9 regular formula would more appropriately take care of
10 more penalties.

11 And I really just have some clarifying
12 comments. One of the things I did want to ask you,
13 Mr. Homko. And that is, you made a statement that
14 large operations are inherently safer. And I have
15 heard that throughout these hearings, also. And I
16 don't know that I would disagree with you with respect
17 to that.

18 But on that particular statement, do you
19 have safety and health data that you could provide on
20 that statement, when you say they're inherently safe?

21 MR. HOMKO: I already feel that with a
22 larger mine, you have more resources to use to
23 contribute to the health and safety of employees.
24 Some of the things that we can do at our mine, at the
25 beginning of every week, review all violations that

1 were issued the previous week. We go over the
2 accidents that were issued the previous week. We have
3 a safety talk, you know, that we discuss with each
4 shift at the beginning, before they go into the mine.
5 That probably takes anywhere from 20 to 30 minutes.

6 But we're a larger operation; we can afford
7 to do that. We have other crews in the mine that we,
8 what you call hot-seat, and they stay at the mining
9 operation until those guys get in.

10 We have an opportunity to put more people in
11 the safety department. I worked in the safety
12 department for years when we only had two people who
13 were here. In the past year we've increased that; we
14 now have four people in the safety department that are
15 able to do safety audits, do inspections, watch people
16 work, do job safety analysis, you know. Watch a
17 boulder face, make sure he's got his hands off the
18 steel, make sure he's not riding his hand on top of
19 the boulder or settled at the head.

20 I think that a larger operation has the
21 opportunity to do these things, where some of the
22 smaller operations you've got people doing two or
23 three jobs. And they might be the safety director,
24 the personnel manager, the mine foreman, all rolled
25 into one. In a larger operation you have the

1 opportunity to specialize in certain areas and work on
2 those things. That's just the way I feel.

3 MS. SILVEY: Okay. Okay, thank you. Next
4 we have William Snyder, RRPS, Inc.

5 MR. SNYDER: I'm William Snyder. I am with
6 RRPS, Inc., limestone quarry in Worcester, West
7 Virginia. We've owned and operated a small limestone
8 quarry for over 40 years, my family has.

9 Recently had a visit from the Small Mine
10 Office. And I was real impressed with this fellow.
11 He came down and had lots of great resources that are
12 certainly going to help me prevent accidents and
13 injuries and other problems in our quarry. And we do
14 have problems in our quarry. We're a small quarry; we
15 have 11 employees, 11 miners.

16 Really, he had a lot of great material, but
17 none of it addressed a lot of issues that confronted
18 us, like burnt-out taillights and small, minor type of
19 violations. There's really nothing you can do to help
20 me with that; that's something that just happens in
21 the course of our business.

22 The problem with this is it makes even those
23 violations, those minor violations, pretty significant
24 to me. I've looked at the SBAREFA analysis, and
25 that's just kind of ridiculous, that SBAREFA. It says

1 that it's going to increase my average penalty by
2 \$179, if you look back there at Table 6-5. Percentage
3 increase in total average of proposed civil penalty
4 assessments. If you look there, like amount size four
5 is six to 19. We're looking at for metal/nonmetal,
6 \$179 increase in penalties.

7 And I'll write the check right now. That
8 would be great, if that's all it's going to increase,
9 \$179. But government tends to expand to the limits of
10 its authority. And these penalties, when I see, when
11 I've gone back and looked at penalties we've had and
12 kind of calculate them under the new system, I think
13 we're going to go from \$60 to \$1300 or \$1500 a
14 penalty. So something that is kind of a minor thing
15 that was costing \$60, like a broken taillight or a
16 broken, not even a brake light, a taillight, a \$60
17 penalty, is going to cost me \$1300 to \$1500.

18 And this brief analysis, when you start
19 reading it, it is just ridiculous. Somebody has
20 concocted these numbers to justify the analysis, and
21 to allow it to extend to people like me. It's crazy.
22 These numbers are just jumbled up, contrived things.

23 A good way to think of it maybe, when you
24 start looking at how much it's actually going to cost
25 me to pay these increased penalties, is in what does

1 it cost in tons of product. Because that's a pretty
2 average thing.

3 And there's becoming a big disparity between
4 coal mines and metal/nonmetal limestone guys like me.
5 It takes me, if I have to pay a \$1300 -- I'm sorry,
6 let's back up.

7 The disparity between coal mines and other
8 mines continues to widen. Limestone quarry size is
9 determined by hours worked. Coal mine size is
10 determined by tons produced. That means if I do more
11 maintenance, more training, things like that, I'm
12 being penalized, because those are hours worked for
13 miners.

14 In coal mines, they can do all the
15 maintenance and training they want, and they're not
16 penalized any for that. The more I train and
17 maintain, the higher the size element of my penalty is
18 going to be.

19 If you consider how many tons it takes to
20 pay the average MSHA projected penalty for a 6-to-19-
21 miner site is \$294 for coal mines. And that requires,
22 I'm sorry -- for limestone, a \$294 average penalty is
23 going to require 59 tons of my product to go through
24 the gate to pay for that penalty.

25 A similarly sized coal mine, a size like me,

1 with an average penalty of \$252, they're only going to
2 have to sell five tons of coal to pay that penalty.
3 And that's a big difference.

4 I guess my, if I could hone in on anything
5 here, it's that SBAREFA analysis. It's just
6 defective, and it needs to be looked at. It should
7 not stand to justify changing these rules. You need
8 to keep a single-penalty assessment. It's a valuable
9 tool for minor infractions.

10 Calculating the history, that's a whole new
11 element that can add, what is it, 80 points? I mean,
12 those are points that are just added in, that weren't
13 there before. And if you're going to do that, do it
14 on significant and substantial violations. Because
15 it's hard to keep some of these minor things from
16 occurring fairly routinely. And they always seem to
17 happen when an inspector shows up.

18 And even then some of our violations are
19 under the general-duty clause, which can have dozens
20 of different actual violations all captured under
21 general duty. So here you're going to have a general-
22 duty-type violation where we might have a pretty good
23 history of those, but they're all different
24 violations, all heaped under general duty. So if
25 you're going to start calculating history of general-

1 duty violations, that's going to get high very
2 quickly.

3 That's about all I've got right now. Thank
4 you.

5 MS. SILVEY: Thank you. Would you explain
6 to me again your comment on general duty? Tell me
7 what you said. I didn't understand.

8 MR. SNYDER: Well, we get violations like
9 housekeeping, or wastebaskets overflowing, or things
10 like that. And it just comes down under general duty;
11 that's what the violation is for.

12 And you know, you can have a bunch of
13 different violations under that standard that are
14 different things. But if they're heaped under one
15 classification --

16 MS. SILVEY: Well, you were calling them
17 general duty, but you were saying, but it is obviously
18 with MSHA, because MSHA doesn't have a general duty
19 clause. It's a specific standard. But you see it,
20 you see this particular standard, the housekeeping
21 standard, as a general-duty-type standard.

22 MR. SNYDER: Right. That's, yes.

23 MS. SILVEY: That's what you're saying.

24 MR. SNYDER: Yes.

25 MS. SILVEY: Okay. Yes. On this SBAREFA

1 analysis, because a lot of your comments went to that.
2 And you did give, you even provided some comment
3 today on the SBAREFA analysis.

4 And clearly, in doing this analysis, because
5 we have to comply with the government requirements for
6 proposing a rule, we made certain assumptions in that
7 amount system. And as I said, you gave me some
8 comments here today.

9 But what I would suggest that you do, if
10 there are parts of that analysis that you disagree
11 with, and you can specifically cite to the provisions
12 that you disagree with and why, that would be very
13 beneficial to us as we move forward to developing the
14 final rule. That would help us.

15 MR. SNYDER: Definitely.

16 MS. SILVEY: Like one of the things you
17 said, you talked about the hours worked versus the
18 tonnage for coal.

19 Now, historically that's how we've done it
20 in metal versus coal, primarily because of the nature
21 of the industry. I mean, metal is so diverse in terms
22 of the metal/nonmetal industry. It's so diverse in
23 terms of the items, products produced.

24 But if you could be specific on some of the
25 assumptions that we -- and when you read through that,

1 the assumptions that we made, whether we were right or
2 wrong in making the assumptions -- if you disagree
3 with them, then tell us. And if you would substitute
4 something; tell us specifically what you would
5 substitute. That would be useful for us.

6 And I will say that for everybody who's
7 here, also.

8 MR. SNYDER: You know, the SBAREFA analysis
9 is just a conflict from the beginning, because it
10 requires that you demonstrate that the proposed rule
11 won't negatively affect my business, my small
12 business. But the whole purpose of a penalty is to
13 negatively affect your small business.

14 And so what they've done here is they
15 figured out a way to make it look like it's not.
16 They're talking about a .1 percent increase in
17 penalties. And, you know, I think that everybody
18 knows that given the opportunity to increase the fine
19 from \$60 to \$1300, I think everybody knows which way
20 this is going to go. It's going to go to \$1300 or so.

21 MS. SILVEY: Oh, not necessarily. And in
22 the SBAREFA analysis, as I said, we have to show
23 certain things. And so we made certain assumptions
24 when we did this analysis.

25 Now, one of the things, it is not to show

1 that whether the penalties negatively affect your
2 business. That really isn't the basis of what we have
3 to show.

4 MR. SNYDER: You have to certify that the
5 proposed rule would not have a significant economic
6 impact on a sanctioned number of small entities.

7 MS. SILVEY: Right. That's right.

8 MR. SNYDER: I can tell you this will have a
9 significant impact on my small entity. Absolutely.

10 MS. SILVEY: Yes. But what we do is, we
11 make that certification in the aggregate. Now, and as
12 you say that to me, that's fine. But I would ask you
13 then if it would have a significant economic impact on
14 your small business then, if you provide us some
15 written comments, and you show us exactly how it will
16 significantly -- data-wise, based on the data --
17 affect your small business.

18 Did you want to add something to that?

19 MR. STONE: Yes, let me say a couple things.
20 I'm probably the person who concocted that analysis
21 that you referred to in SBAREFA.

22 It is possible that you have a particular
23 citation that would have gone from \$60 to \$1500,
24 \$1300. But I believe that's highly unlikely. And I
25 will say that we have received at least one comment on

1 the books in order to provide an increase of that
2 scale, \$60 to over \$1,000. At least that one example
3 we received was not very high. -- on the way back
4 down to, I mean it was higher than \$60, but it was, I
5 believe, \$200.

6 I would invite you to submit the citations
7 you have and your calculations as to how it would have
8 gone up by that percentage. It's possible. But like
9 I say, on the average, I would stand by our estimates.

10 And so if you have a particular case, or
11 even a better variety of your single penalties, if you
12 could provide us your recalculations for a set of
13 them, we'd like to see those. We'd be surprised if
14 you had a variety of them that went up to over \$1,000.
15 I'd be surprised, but it's possible.

16 The other thing is that, I guess as Pat
17 said, in doing this SBAREFA analysis, we do what we
18 call a threshold test, against whether it's a
19 significant impact on a substantial number of small
20 entities. And we do a threshold test of one percent
21 of revenues. And it is smaller than that; in this
22 case, substantially smaller than that.

23 It's not that we won't be impacted, but that
24 maybe it's not what we do to meet the threshold to be
25 a significant impact on a substantial number. We had,

1 unlike many agencies, we actually break it down into
2 more than one category. Traditionally for the mining
3 industry, the Small Business Administration calculates
4 the small activities being 500 or fewer entities. And
5 we do a test for that.

6 Because historically MSHA has viewed mines
7 with fewer than 20 employees as having characteristics
8 that are different than mines with close to 500.
9 We've done a secondary special analysis like we did
10 here. But again, the numbers for us, at least on the
11 average, we're nowhere closer to it.

12 In your case, we're accurate, as I say, for
13 going from \$60 to \$1500, and if this were
14 representative of the industry, then obviously our
15 calculations would be seriously in error. But I don't
16 believe they are.

17 MR. HOMKO: I'll bet the truth is somewhere
18 in the middle there. I'll bet they're higher than you
19 think, and probably lower than I can project.

20 MR. SNYDER: Well, you might be right, but
21 I'm not so sure that's true, either.

22 MS. SILVEY: One of the things I'll go back
23 and say, this analysis is an aggregate analysis. And
24 so therefore, we don't portend that it would
25 accurately reflect, if I were to take a violation from

1 the 2005 data, which is the data that we used, that it
2 would be that, that it would be exactly what we say it
3 is in the average aggregate for that particular
4 violation. So it might be a little different for one
5 particular violation, because it's an analysis in the
6 aggregate.

7 But what I suggest everybody do is when you
8 read the assumptions that we made, and I have gone
9 through those assumptions, and maybe later on during
10 this public hearing today it might be that I might
11 need to do that. But when you read the assumptions of
12 how we took the data, all violations for 2005, and how
13 we applied the existing penalties to them under the
14 existing rules, and then penalties under the new
15 proposal, and the numbers that we got. And then at
16 each stage, what we did at the next stage, and then
17 how finally we got the numbers that are in the, as you
18 call it, the SBAREFA analysis.

19 And at each stage of the process we made
20 certain assumptions. And there the mining public
21 might disagree with our assumptions. And I have said
22 to people, if they disagree with our assumptions, then
23 provide us your disagreement, the basis on which you
24 base your disagreement, and we will take that into
25 consideration.

1 MR. SNYDER: Thank you. The other thing, I
2 hope there are some more limestone people in here,
3 because I want to hear what they have to say. But
4 please remember, it's a five-dollar product for me,
5 and a \$50 product for coal, or better, you know, when
6 times are good. And that makes a big difference.
7 That's something that really needs to be considered.

8 MS. SILVEY: Okay.

9 MR. SNYDER: Thank you.

10 MS. SILVEY: We appreciate your comments.
11 Thank you.

12 The next speaker will be Matthew Bonner with
13 Mulzer Crushed Stone.

14 MR. BONNER: Good morning.

15 MS. SILVEY: Good morning.

16 MR. BONNER: My name is Matt Bonner, and I'm
17 with Mulzer Crushed Stone. We are a limestone, third-
18 generation, a family-owned company. We've got 13 MSHA
19 locations with the greatest number of 50 people, and
20 the fewest number of three, at one location, with an
21 average of about 20 employees per site, as an average.

22 The gentleman who spoke earlier, I'm in
23 complete agreement. Took a lot of the thunder out of
24 talking about this, per se. We have written comments
25 that we'd like to submit. They go into the details of

1 it.

2 But my heart goes out to the guy back here,
3 as well as to the people within our industry. And
4 rather than talk about specific numbers, talk about
5 what this means to the mine community where we are in
6 southern Indiana. I know that we're up here in coal
7 country, and it's a complete different business
8 grouped into the same pot, and that's a different
9 argument altogether.

10 We see that the penalty portion of what is
11 being done is kind of reactive, rather than being
12 proactive. And what I mean by that is, we give our
13 employees complete buy-in to our safety program, using
14 behavioral-based studies and giving them ownership to
15 run the safety within our organization. And when they
16 get a penalty or get a citation, it is direct, it goes
17 directly back to the employee, and they take it to
18 heart.

19 The gentleman who spoke earlier about a
20 large operation having more buy-in or being a safe
21 location, it may be the effect at his location; but at
22 ours, we're allowed to do the same thing, within a
23 small group of people.

24 We have not seen any data that supports that
25 the dollars in penalties increase or improve safety

1 within where we are. We have a mutual respect with
2 MSHA in our area, that we don't have the problem with
3 picking up the phone and talking to them directly.
4 It's a great organization where we are, and our people
5 respect them, as well.

6 In regards to the penalty itself, we want it
7 to be enforced consistently. And I'll go as far as
8 even saying I wouldn't necessarily have a problem with
9 what is being proposed if the standards or the codes
10 that are written are objective, rather than
11 subjective. In our notes here I've actually got a
12 picture of an S&S citation at one of our sand-dredge
13 operations that I'll pass along to you guys
14 afterwards. But what it is, it's a floating dock
15 that's pushed up next to the bank that the dredge
16 operator climbs onto at the beginning of a shift and
17 at the end of a shift, to ride a jumboat out to the
18 dredge.

19 The employee had bought new Redwing boots to
20 wear to work. And rather than to step in the wet mud
21 or the wet sand -- we call it mud -- he put a piece of
22 the catwalk down across that bridgeway, and the
23 inspector cited it as an S&S for no handrails. We're
24 talking about 16 inches down to no inches, just to
25 avoid getting his new boots dirty.

1 And when we see penalties like this, it
2 tends to lead us to, first of all, the employee
3 becomes upset because he's directly responsible for
4 the safety of the program in his location. And we see
5 that this automatically puts a wedge between MSHA and
6 Mulzer Crushed Stone, or within other industries. And
7 we see this as just one of many within where we are is
8 in southern Indiana, in regards to the subjective
9 nature of the citations that we deal with.

10 We contested this one, and the person we
11 contested it with, not mentioning names, his exact
12 words were he had to take into consideration the
13 opinion of the inspector. Opinion of the inspector.

14 In regards to repeat violations or penalties
15 on repeat, we see there are a lot of standards that
16 are grouped together that have the potential within
17 some of our larger locations to be problem areas. I
18 mean, the guy mentioned earlier housekeeping, but I
19 looked at safe access, catwalks regarding toe boards
20 and openings in elevated walkways and things of that
21 nature. It's a broad spectrum of areas that get
22 grouped into one single standard that is cited. And
23 that is an issue that we face on an ongoing basis
24 within Indiana.

25 In regards to conferencing, reducing the

1 time frame to five days, we go from Griffin, Indiana,
2 which is four miles from the Illinois border, all the
3 way to Charlestown, Indiana, which is on Ohio's
4 border. And our office is in the middle of that, and
5 it takes sometimes two days to deliver inter-company
6 mail, and then for us to go back and sit down with the
7 safety committees and address these things, five days
8 is not feasible to giving the ownership of our safety
9 program to our employees.

10 We feel that the trend that is current is
11 adequate. And we've even come close in some
12 situations to feeling if we can contest a citation
13 based on that time frame. And I want to make sure
14 that was, you know.

15 When it comes to this type of stuff, it's
16 basically we're at the mercy of the inspector when
17 it's subjective, and the penalties get increased.

18 I don't have a problem if the penalties get
19 increased, as long as the standards and the programs
20 are more objective. It's hard to train an employee or
21 teach an employee what exactly the standard says, when
22 it's based on the interpretation of the inspector as a
23 whole.

24 I don't think that money is ever a solution
25 to problems. I see the Fortune 500 companies and

1 larger companies. They would be very upset if their
2 philosophy was let's just throw money at the problem,
3 whereas there are better, more practical solutions to
4 addressing the safety of our miners today.

5 Getting employees to buy into the safety
6 culture and addressing the issues is the key. You
7 know, if it was all about penalties to keep companies
8 in the straight with safety, then that money could
9 easily be put back into the mining organization and
10 say, okay, show me a receipt where you spent this
11 money on safety of your employees, where that isn't an
12 option.

13 But when you look at the overall picture of
14 what limestone is, and that's at \$5 -- he gets better
15 than we do; around \$4 where we are -- compared to what
16 other metal/nonmetal as well as coal receive in the
17 community. We just don't want to see this drive a
18 wedge between our employees here completely taking a
19 proactive approach in their safety program, to
20 becoming defensive and not wanting to participate or
21 allow MSHA to be the respectful organization that we
22 deal with and enjoy.

23 MS. SILVEY: Okay, thank you. I do have --
24 okay. Why don't you, you are the next speaker, why
25 don't you do yours? And then I'll have the rest.

1 I'm sorry. Brian Peters, Mulzer Crushed
2 Stone.

3 MR. PETERS: My name is Brian. I am with
4 the Safety Department of Mulzer Crushed Stone. As
5 Matt, my co-worker said, we're a small family-owned
6 mining business, been in the business for about 50
7 years. We operate 13 mine sites. Some are sand, some
8 are gravel, some are stone; all limestone. And one is
9 an underground small new start-up underground stone
10 mine.

11 We have less than 300 employees spread out
12 over those different sites, with the smallest site
13 having three people, and the largest site having
14 around 50 people.

15 The company is founded and based on family
16 owned and operated. The owners of the company stand
17 hand-in-hand every day with the co-workers. They have
18 the direct management over it. The average length of
19 an employee working in our company is over 10 years.
20 You know, people come to work for us; they work for us
21 for their lives. They stay with us. It's a good
22 company to work for. They are part of the process.
23 There's profit-sharing that goes on with the
24 employees. They have ownership in what they do every
25 day, and they are dedicated to safety.

1 It's hard to, one of the points that you
2 said, it's hard to explain to an employee when their
3 profit-sharing check is going to go down for a month
4 because an MSHA fine went up, that it's not a punitive
5 fine. You know, that's directly affecting them. They
6 take it personally when they get a citation. They
7 work to not get those citations. They do their best.
8 The people working with them are friends and family.
9 It's not uncommon we have more than one instance
10 where we have grandfather, father, and son working at
11 the same facility, and they don't want to see those
12 people hurt. It's not an adversarial role between us
13 and them at all.

14 But to them it's punitive when you increase
15 the number of fines. And a couple of examples I want
16 to give was, in the eight years that I've been with
17 the company we have had two orders issued to us. And
18 one of the orders was for first-aid cards at one of
19 our locations that had four employees in a small sand
20 pit. And it was over the issue of the inspector
21 required that one of the employees have a first-aid
22 card on him at the time of inspection. Okay?

23 We provided the inspector with training
24 information that proved that every one of the four
25 employees had annual safety training and first aid

1 training. But the inspector wrote an order saying no,
2 they had to have a physical card; our training records
3 weren't good enough. Now, this was before we had to
4 call Duluth to get a conference, and we called the
5 Office of Field Supervisor. And the Field Supervisor
6 said no, your inspector is wrong, don't issue it. So
7 they did not execute that order.

8 But in today's world, where it would go to
9 Duluth, there would be no way to avoid that, or it
10 would have been executed, and that fine for that site
11 might have been a \$15,000, \$20,000 order. Shutting
12 down that mine for something that we had proof of
13 training for. Goes back to the subjectivity of the
14 inspector there.

15 Another example. A second order was at one
16 of our other sites that has approximately 30
17 employees. And the inspector found that we were short
18 by two hours on our annual safety training. We had
19 provided six hours. It was January 30 of the current
20 year. Our annual safety training was scheduled a few
21 days later in February. The year before we had done
22 the annual safety training in January; this year it
23 had gotten scheduled erroneously for February. But we
24 do ongoing safety training throughout the year. They
25 had six hours of the safety training already.

1 Well, that resulted in an order, because we
2 did not have the eight hours of annual safety
3 training. Even though it was only eight days later
4 than the year before. It would have been a year and
5 eight days since the training would have occurred.
6 They had six of the eight hours, and that was also a
7 \$500 fine for the order. Under today's penalties,
8 that would be approximately a \$17,000 fine for that
9 order. And I just feel that if that's not punitive,
10 I'm not sure what is.

11 I understand we messed up. We missed it by
12 those eight days. And they said if it would have been
13 in the same calendar month, that would have been okay.
14 You know, in fact, we were told that if you had
15 trained the year before on January 1, this year on
16 January 31, you're okay. That's a year. But January
17 30 and February 7 wasn't okay. That wasn't a year,
18 even though it was less than the time frame that was
19 acceptable.

20 And things like that would result in huge
21 penalties that would have a serious adverse condition
22 on our company.

23 And lastly, I don't think that I agree with
24 some of the other people who spoke today also, that
25 increasing the fines leads to more safety for the

1 workers. You know, in the past, with NSSGA, we
2 partnered, and we've had this partnership with MSHA.
3 We signed this statement and hung it on our wall a few
4 years ago, here's the new NSSGA, Natural Stone, Sand
5 and Gravel Association, partnership with MSHA. We're
6 working together. We've gone through slam risk in the
7 last two years. We have this great relationship and
8 we're working together. But I think increasing the
9 fines just leads to more of an adversarial role of you
10 against us, and does not lead to more partnership or
11 directly leads to more safety for our workers, which
12 is our ultimate goal.

13 MS. SILVEY: Thank you. I will start back
14 with a couple of comments.

15 First of all, I was going to ask you when
16 you were making your comments, Mr. Bonner, that
17 graphic you showed of the dredge. And you said that I
18 was going to ask you, did you request a safety and
19 health conference, but you said you contested it.
20 What do you mean when you say you contested it? Did
21 you request a safety and health conference? Or did
22 you do the formal contesting?

23 MR. BONNER: We called to Duluth, which is
24 our regional office.

25 MS. SILVEY: That's your district, yes.

1 MR. BONNER: And dealt with him. And he's
2 the one that told me, he said the inspector had sent
3 pictures in, as well, and looked at it. And he said
4 he had to take the word of the inspector's opinion
5 over the pictures and documentation of it.

6 MS. SILVEY: So what are you saying, then?
7 That nothing was done with that being at the district
8 office?

9 MR. BONNER: That is correct. That is
10 correct.

11 MS. SILVEY: And what happened then?

12 MR. BONNER: Brian and I made a phone call.
13 We spoke with him in Brian's office regarding this,
14 and he told us that he would get back with us and let
15 us know what we needed to do next. And we didn't hear
16 anything about it.

17 And then going on probably for a little over
18 a month, then we made phone calls. And they said it
19 was too late to do anything else from that point
20 forward. So we just paid the citation.

21 MS. SILVEY: You just paid --

22 MR. BONNER: Paid the penalty.

23 MS. SILVEY: The penalty, okay. But you
24 want to submit that for the record.

25 MR. BONNER: Yes. Yes.

1 MS. SILVEY: Okay. One of the things, and
2 we have heard a lot of this also, and this is a
3 different hearing, so to speak. But I understand
4 people saying that because the actions of the
5 inspectors are what lead to the penalty, to the
6 citations, and then to the subsequent penalties.

7 And I've heard a couple things throughout
8 these hearings. One being that you know, everything
9 would be fine. We asked you for some consistency, we
10 know that you have standards that are subjective, that
11 lead to subjective interpretation.

12 And I would say, knowing both sides of MSHA,
13 metal/nonmetal side and the coal side, the standards
14 are probably -- not probably, strike probably -- the
15 standards are more subjective on the metal side. And
16 part of that is because of the nature of the industry.

17 As I said earlier, the metal industry is a
18 much more diverse industry and a much wider industry
19 to come up with standards that kind of cover a lot of
20 different situations in and of -- the standards are
21 more performance-oriented. And so therefore they lend
22 themselves to more subjectivity. The coal standards
23 are more design-oriented and more specification-
24 directed, and a little bit less subjectivity there.

25 But what does an agency do in a situation

1 like that? The agency will try to train the
2 inspectors and work with the supervisors, and what we
3 try to do. And that's all we can promise. You work
4 on it, and you try to increase consistency, and to
5 minimize the subjectivity. And that's what we -- and
6 even we are doing that now. We heard comments about
7 the number of persons potentially affected that the
8 inspectors write with respect to a citation.

9 So those are the kinds of things that we can
10 try to do. We will take, if you will give us that at
11 the end, and we will look at that.

12 I'm glad to hear you say about your -- and
13 we would today commend your company for your
14 commitment to safety, and the employees buy in, both
15 of you have said that the employees buy into safety
16 and health. Because I think we in MSHA believe that
17 only through the commitment of the company and the
18 employees, and MSHA, will we achieve our ultimate
19 goal, which is complete health and safety.

20 The issue that you had with the first aid
21 card, that issue was resolved. But the second issue
22 was the two hours. That's the issue. You all paid
23 the penalty on that one.

24 MR. BONNER: Right.

25 MS. SILVEY: Okay. I don't have any more.

1 Do any of you have anything?

2 MR. MONTALI: One question. You did say
3 that you reviewed some citations where you had a \$500
4 penalty, which would have increased to approximately
5 \$17,000?

6 MR. PETERS: Seventeen thousand, that's
7 right.

8 MR. MONTALI: Could you provide us that
9 citation, so we can look at that? Because I realize
10 that the penalties will increase, but I wasn't aware
11 that they would increase that much. And I'm not
12 saying you're wrong, but I would like to see that
13 citation so we can actually put it through the formula
14 to see exactly if that is the case.

15 MR. BONNER: Okay. That was the order that
16 I was talking about. We provided that to NSSGA, and
17 they ran it through for us. Some of us figured out
18 what it would be, and that was the number we got back.

19 MS. SILVEY: Was that unwarrantable? That
20 one was not unwarrantable? Or was it?

21 MR. BONNER: No.

22 MS. SILVEY: Okay.

23 MR. BONNER: You know, we did have some
24 information that was brought to our attention, and
25 some comments, where there were some penalties where

1 they had an increase, a dramatic increase, and we
2 actually went through them. And it was an increase,
3 but it wasn't nearly as much that was given to us.
4 And that's one reason I'd like to see that citation.
5 If you can provide us with it, we'd appreciate that.

6 MR. SNYDER: One clarification. Are you
7 saying that NSSGA said that when they ran it, that the
8 penalty itself went from \$500 to \$17,000? Or is that
9 the cost of the down time as a result of the order?

10 MR. PETERS: No, that didn't include down
11 time. Down time was, I went out and pulled all the
12 people in and we did two hours of training after we
13 argued that -- well, there was a side issue we had to
14 argue that we could include the word "or" in our mine
15 training plan. We just had "and," and we had to add
16 that. But we did two hours of training, we went back
17 to work. We had two hours down time. That was not
18 included.

19 MR. BONNER: I had one question, in fact,
20 for you all. And that was, is there data that's
21 provided to the industry that shows or supports that
22 the penalty changes will affect the safety of the
23 miner? Do we have anything that we can get our hands
24 on that will validate or show that this has been
25 looked into, or something? That we're not trying to

1 see if it works, but to actually see that this is an
2 effective means of making the employee safer.

3 MS. SILVEY: Yes, I would say with some
4 humor that I'm glad you asked that. But in a way, I
5 am glad.

6 I had written a comment down here to myself,
7 but I didn't follow up on it. And it was while you
8 were testifying, too. That what our analysis provides
9 is a qualitative assessment of the benefit of civil
10 penalties.

11 Now, granted -- and I'll say this to
12 everybody here -- it does not provide a quantitative
13 assessment of the benefits. And in providing the
14 qualitative assessment -- you all might look at me
15 funny when I say this -- we went beyond what's
16 required for regulations for a regulatory proposal
17 type of accounting.

18 When we do a standard, when MSHA proposes a
19 change to a standard, then we have to, we have to do
20 an analysis of the projected costs of the industry
21 compliance with that standard.

22 But what penalties are, penalties are the
23 cost of non-compliance. So basically -- and it's not
24 treated the same as doing a regulatory provision or
25 standard regulatory provision.

1 But when we did this penalty proposal, we
2 still did the analysis that Robert spoke of earlier,
3 and that you all, certain ones that you referred to.
4 And even those penalties are the direct result of non-
5 compliance.

6 And in so doing, we qualitatively projected
7 that increased penalties -- and using the same basis
8 which the Congress used when it put the Mine Act in
9 place in 1977 and included the penalty provision -- we
10 used the assumption that penalties, when appropriate,
11 would provide an effective inducement for mine
12 operator compliance.

13 Now, what we did is, in providing the
14 qualitative benefits, we did certain assumptions, and
15 we assumed that when the penalties would go up a
16 certain amount, that operators would, because of the
17 high penalties, would expend more money and improve
18 compliance. And that that improved compliance would
19 ultimately then result in reduced violations and
20 reduced penalties over time. That's what I said I
21 might end up giving you that full assumption.

22 Now, some people might disagree with us, but
23 those are the assumptions that we used when we did our
24 analysis. And the assessment is a qualitative
25 assessment, clearly. I would say that to all of you.

1 We don't have direct data in the record that shows
2 these penalties will go up 250 percent, and we'll have
3 a 20-percent improvement in fatality rates and injury
4 and illness rate. No, we don't have that. But we do
5 have a qualitative assessment.

6 MR. BONNER: Is that documentation public?

7 MS. SILVEY: That's what is included in the
8 analysis. That's all in that regulatory economic
9 analysis. And all of the assumptions that are in
10 there. And that's why, say if you have disagreements
11 with the assumptions in there, just let us know, and
12 any specific disagreements you might have.

13 MR. PETERS: I had one comment on that point
14 there. I would suggest that if the point of the
15 penalty is to help compliance and into safety more
16 that the agency look at what other similar agencies,
17 like Environmental Protection Agency, does, and be
18 willing to take part of that penalty assessment and
19 let you spend that money on abatement safety issues,
20 rather than just being a monetary penalty page of the
21 agency.

22 MS. SILVEY: Okay. I'm glad you said that,
23 I truly am glad you said that. And that would be
24 something that Congress would have to do, by the way,
25 and which, you know, might be a good idea.

1 But the penalty that is leveled upon the
2 mining sector because of violations of the Mine Act,
3 that penalty goes to the Treasury. It doesn't come to
4 the agency, it goes to the U.S. Treasury. And
5 therefore, into the general fund of the United States.
6 So, you know.

7 MR. BONNER: Understanding that, still, you
8 know, if you could take like the gentleman's example
9 earlier, if he got a \$1300 fine for a taillight and he
10 was able to spent \$300 of that to fix his taillight
11 and pay his mechanic, you know, that would solve the
12 problem as well as taking some of that money is not
13 just punitive.

14 MS. SILVEY: Correct.

15 MR. BONNER: And the last comment I would
16 have also was that I would suggest also -- I know this
17 isn't part of this rule -- that you look at changing
18 that policy of having to go to a district office for
19 the conference, versus in the past we used to be able
20 to go to the field office supervisor who had more
21 direct dealings with and understanding of our
22 operations, rather than having to go a hundred miles
23 away to someone that you've never seen, never faced,
24 and doesn't understand your operations.

25 MS. SILVEY: Okay.

1 MR. MONTALI: I have one comment on that.
2 Previously you were correct that under MSHA's
3 jurisdiction for metal and nonmetal mining industry,
4 that the field office supervisors would handle the
5 conferences. And this was changed for the reason that
6 they wanted more consistency, you know, with the
7 conferences, and they wanted one individual that was
8 not in that particular field office that had that
9 jurisdiction for that particular mine.

10 Therefore, they would be more consistent with the
11 decisions that were made, you know, throughout that
12 whole district. And actually coal mine health and
13 safety has been doing this for a number of years since
14 the early nineties in that particular way, so we
15 wanted to be consistent with metal and non-metal and
16 coal also, and be consistent with the decisions that
17 were coming out. So all the field office, it would
18 apply to all the field offices the same.

19 MS. SILVEY: Thank you. You know, I guess
20 we should have a break. Thank you. You can see how
21 reluctant I am. Maybe we should take a 10-minute
22 break, but 10 minutes, please.

23 (Whereupon, a short recess was taken.)

24 MS. SILVEY: Okay. At this time we will
25 hear from Gary Trout, United Mine Workers of America.

1 Oh, excuse me. Before we hear from you, Mr.
2 Trout, I need to make a statement that I didn't make
3 in my opening statement this morning, for the record.

4 And this is, the proposed rule -- I spoke
5 about that -- included a requirement that requests for
6 health and safety conferences be in writing.

7 MSHA is considering adding a requirement
8 that the conference request include a brief statement
9 of the reason why each citation should be conferenced.
10 MSHA believes that this change will assure that
11 parties requesting a safety and health conference
12 focus on the issue to be conferenced, and this will
13 help expedite the conference process by providing the
14 district manager with necessary information prior to
15 conducting the conference. MSHA solicits comments on
16 this change.

17 And with that read into the record, Mr.
18 Trout, thank you.

19 MR. TROUT: My name is Gary Trout. I am the
20 Health and Safety Representative of the United Mine
21 Workers of America. And I would like to thank MSHA
22 and this panel for holding this public hearing and
23 allowing me to speak. My comments today will be brief
24 and to the point.

25 As I read the rule for proposed assessments

1 of civil penalties, I found it to be somewhat
2 confusing, to say the least. The proposed changes are
3 intended to induce greater mine operator compliance
4 with the Mine Act by improving health and safety of
5 miners.

6 How can this be accomplished when you, one,
7 eliminate single-assessment violations; two, show
8 favoritism towards small mines; three, reduce from 24
9 months to 15 months the violation history; and four,
10 reduce penalties for certain operators?

11 MSHA states that in 2005 there were 75,394
12 single penalties, up from 69,078 in the year 2003.
13 Using MSHA's numbers for 2005, single-penalty
14 assessments represented approximately two thirds of
15 all violations. So eliminating them means eliminating
16 two thirds of all penalties.

17 The proposed regulation is not clear. Does
18 this mean that MSHA inspectors will no longer write
19 these types of violations? MSHA needs to enforce all
20 the Mine Act, not just parts of it.

21 With the increase in coal prices, numerous
22 small mines have started up here in West Virginia.
23 Many large companies not only have large mines, but
24 also have one-unit small mines. No consideration
25 should be given to operator size when determining

1 penalty amounts. To do so would create a flawed and
2 biased system. In order to have a level playing
3 field, all operators, large and small, should be
4 treated the same.

5 As for history of violations, MSHA proposes
6 reducing the relevant time period from 24 months to
7 15. By doing so there will be fewer violations that
8 will have to --. MSHA claims that the reduction more
9 accurately reflects an operator state of compliance,
10 but I disagree. An operator may have numerous
11 violations appealed in the courts in a shorter time
12 frame, but would not do an adequate job of identifying
13 chronic problems, which is the purpose behind levying
14 higher fines for repeat violations.

15 In closing, I would like to read an excerpt
16 from "Criteria and Procedures" from "Proposed
17 Assessments to Civil Penalties," part 103, which
18 states, "The effect of the penalty on the operator's
19 ability to continue in business will not be affected
20 by the assessment of a civil penalty. The operator
21 may, however, submit information to the district
22 manager concerning the financial status of the
23 business. If the information provided by the operator
24 indicates that the penalty would adversely affect the
25 operator's ability to continue in business, the

1 penalty may be reduced."

2 Panel members, I thought those days were
3 gone. But has MSHA already forgotten about Sago and
4 Elm? I believe fines should be increased for repeat
5 violators, and the assessment of civil penalties must
6 be evenly applied to all mine operators to assure they
7 understand and comply with the system. The effect on
8 the operator's ability to continue in business should
9 not be taken into consideration.

10 The union is convinced that efforts to
11 create a structure that considers operator size along
12 with the ability to continue in business will be a
13 flawed and biased system. And I thank you.

14 MS. SILVEY: Thank you, sir. I would like
15 to clarify for the record, Mr. Trout?

16 MR. TROUT: Yes.

17 MS. SILVEY: If you wouldn't mind for a
18 minute. I would like to comment on your statement on
19 the single penalty, and again clarify for the record
20 what the agency did in the single penalty, with the
21 single-penalty provision.

22 We would delete or eliminate the single
23 penalty, the \$60 single penalty, under today's rule,
24 but replace it with all non-S&S violations, which
25 would still be designated non-S&S. They would be

1 processed through the regular formula system. And by
2 so doing, they would receive a higher penalty. So it
3 would not be at all that we would be, will MSHA
4 inspectors no longer write these violations. Yes, the
5 answer to your question, yes, MSHA inspectors will
6 write these violations. And they will be subjected to
7 penalties. They would be, under the proposal,
8 subjected to higher penalties. They would be
9 subjected to penalties through the form of assessment,
10 through the regular assessment process.

11 So by deleting the single penalty, it's
12 really, as I said in my opening statement, it's
13 deleting the single penalty, and replacing it with the
14 regular formula system for assessing those penalties.

15 Just for clarification, too. In terms of
16 consideration to size, we've gotten a lot of comments
17 on the size criteria. But in my opening statement I
18 mentioned the six criteria that the statute includes,
19 that MSHA and the Review Commission must apply when
20 assessing penalty. Size is one of those criteria. So
21 that's why the agency takes into consideration size.

22 We proposed to make some changes to size.
23 And that is, to take into consideration less of a
24 difference with respect to size. But the statute does
25 say we should take into consideration the size of an

1 operator's business. As well, the statute says the
2 effect of the operator's ability to continue in
3 business.

4 And as I explained that, that's sort of an
5 after the fact. We do not take into consideration the
6 effect on the operator's ability to continue in
7 business in computing the penalty. We only take that
8 into effect if, once the operator is sent the penalty,
9 the operator says that the penalty would negatively
10 affect his or her ability to continue in business.

11 But then the operator has to submit
12 supporting data, data which supports that contention.
13 So that is the way the process works. And just so
14 that everybody knows the things that tie it to the
15 statute, and the things that we have to do.

16 MR. WATSON: I've been in assessments for
17 five years, okay, the last five years. And during
18 that time, that provision about an operator's ability
19 to remain in business -- you know, that they can
20 request it through the district or directly through
21 us -- has always been there. And I would say there's
22 probably less than two dozen cases in the last five
23 years where an operator has actually made that claim
24 to us.

25 And out of those two dozen cases, maybe one

1 or two of them proved that it would affect their
2 ability to stay in business, because they have to
3 provide financial information to support their claim,
4 and it is rare for them to get a reduction as a result
5 of that.

6 MR. TROUT: But if you have two operators,
7 regardless of the size, why should you penalize one
8 and not the other? We should have a level playing
9 field out there.

10 MS. SILVEY: Because of size.

11 MR. TROUT: Pardon?

12 MS. SILVEY: Are you saying size?

13 MR. TROUT: Yes.

14 MS. SILVEY: But on the size, the main
15 reason we take that into consideration as a factor is
16 because the Mine Act says we must take it into
17 consideration as a factor.

18 But we've got comments from everybody that
19 we should not take it into consideration. We've
20 gotten that not just from you; we've gotten comments
21 from other members of the public.

22 MR. TROUT: And if an operator is not
23 fiscally responsible enough to take care of the
24 operation, why should he remain in business?

25 MR. WATSON: Well, that's the operator's

1 choice, to stay in business or not, based on --

2 MR. TROUT: I understand that. But if he's
3 not financially capable of doing that, if he's got an
4 operation that is safe, and his employees have a safe
5 place to work, he doesn't have a problem. But if he
6 don't, he's got a big problem.

7 MR. WATSON: Yes.

8 MS. SILVEY: Anybody else?

9 MR. CROCCO: Say Gary, before you go, you
10 heard what Pat said about the proposal sending all of
11 the violations through the regular penalty formula,
12 and getting rid of the single penalty. Now that you
13 understand that better, do you have an opinion as to
14 whether it would be preferable to use the regular
15 assessment formula for everything, or still have a
16 single penalty?

17 MR. TROUT: I think we really need the
18 single penalty to stay in our view, and I'll tell you
19 why. I think if the inspectors go out and does their
20 jobs, they'll have a tendency not to write certain
21 violations because there's no penalty there, and maybe
22 deal more with the compliance assistance -- and say
23 well, if you fix this, we're not going to issue any
24 payment, or there's not going to be any effect if they
25 do issue a payment. That's just my opinion, looking

1 at it from a glance.

2 To be honest with you, I read the summary
3 about two or three times. It's very confusing to me
4 to try to understand it. It's pretty confusing. I
5 know it is to all of our committee people, because
6 we've had them to read it. And even the ones that's
7 not going to speak here today made the comment that it
8 was very, very confusing.

9 But again, getting back to that, I think we
10 could be headed down a road to having some problems
11 with it. Unless we get it across to the inspectors
12 that this is really going to help, I think you're
13 going to find a lot of inspectors who won't write
14 violations. They're going to write the S&Ss.

15 MS. SILVEY: I want to say to everybody, the
16 inspectors will still write the S&S violations like
17 they do today.

18 Helping us here from the Coal Mine Health
19 and Safety, Pete's here, Bill's here. The inspectors
20 will still write the S&S violations, and they'll write
21 the non-S&S violations. The only difference is the
22 non-S&S violations won't get the \$60 single penalty
23 under this proposal. Right here, under this proposal,
24 the non-S&S violations won't get the \$60 single
25 penalty; but instead, they will be processed through

1 the regular formula system, in the assessment database
2 management system. They will be processed through
3 that system, and will get a higher penalty than the
4 \$60 penalty.

5 And that is the basis of the proposal, and
6 that is the basis of all of the analyses in the
7 proposal. But if after this hearing is over there are
8 those of you who want to discuss that in more detail
9 with me, because I don't want to leave here, I don't
10 want to leave Charleston without everybody
11 understanding this proposed rule and the effect on the
12 single penalty.

13 Okay. Thank you, sir. We will next hear
14 from Roger Horton, United Mine Workers of America.

15 MR. HORTON: Good morning.

16 MS. SILVEY: Good morning.

17 MR. HORTON: My name is Roger Horton. I'm a
18 United Mine Workers member, and proud of that fact.
19 And I'm here today to visit this distinguished panel,
20 and to give comment.

21 I first came here pretty much unaware of the
22 entire content of the provisions. You have somewhat
23 explained in detail the proposal in regards to a
24 single assessment and how it's to be determined, and
25 where it's to be placed. That is offensive to me.

1 But I began my mining career in 1974, some
2 time back. I worked in a small operation. It was a
3 conditional section. Then we progressed to a
4 continuous miner section, and then from there I
5 progressed to the surface, and also some conversion
6 time. So I've seen MSHA interacting in a big, big
7 mining application.

8 And they had done a very good job, the
9 inspectors that I've been associated with, with the
10 tools that had been given them. And I understand it's
11 your responsibility to give them those tools in order
12 to comply with the Acts in themselves.

13 But to put it simply, today the industry has
14 done this: it has progressed tremendously. And
15 MSHA's inspectors have done this: they have
16 diminished. It is not uncommon for an inspector today
17 to not be able to comply with the Act as far as a
18 number of inspections are concerned. He cannot do the
19 complete number of mines that he has been assigned to.
20 And it's going to be very difficult, at best, for them
21 to complete their inspections this year.

22 As the industry grows at such a rapid pace
23 with the constant need of coal, inspectors are under
24 tremendous amounts of stress and time constraints to
25 complete their assigned tasks.

1 I am very concerned that the proposal will
2 have a negative effect, in that they will be hard-
3 pressed to understand it. How can you determine who,
4 and how do you propose to instruct these inspectors to
5 carry these new provisions out? That is really my
6 concern. How will they understand to do that? That
7 is the question I have.

8 MS. SILVEY: Well, the inspectors basically,
9 and I think I said that in my opening statement, these
10 regulations will cause no changes to the way the
11 inspectors do their business. They have been trained
12 now at the Mine Academy for new inspector training.
13 They go to refresher training in the prescribed
14 period, and they have training in the districts. And
15 they will inspect and issue citations, and mark the
16 citations -- and that is, make an assessment of the
17 conditions at the mine site -- in the manner in which
18 they do that right now. So that aspect of the
19 inspector's job won't change.

20 MR. HORTON: Okay. In regards to the
21 operator if he doesn't abate in the time required with
22 MSHA-made mine standards within the abatement time,
23 issue a withdraw order, or fine your operator up to
24 \$6,500 per day until the condition is corrected. We
25 do not believe that any abatement time should be

1 extended unless extreme litigation conditions will
2 bring an operator into compliance. And withdrawal
3 should immediately be issued, and only work to correct
4 the cited conditions should be permitted. A penalty
5 of \$6,500 should be assessed while the abatement work
6 is being done, and applied every day until work is
7 completed.

8 The AC specifies the six statutory criteria
9 used to determine the amount of the fine. These
10 include the appropriateness of the penalty to the size
11 of the business, the operator's history of previous
12 violations, whether the operator was negligent, the
13 gravity of the violation, demonstrated due faith on
14 the part of the operator to correct the condition
15 rapidly, and the effects of the operation's ability to
16 continue in business.

17 The assessment of civil penalties must be
18 evenly applied to ensure the operators understand and
19 comply with the decision. Therefore, all citations,
20 all violations of a specific regulation carry the same
21 baseline penalty for operators regardless of other
22 conditions or factors.

23 For instance, the citation issue for a
24 violation of 77400, combustible materials, carries a
25 fine of \$800, or an operator of 20 to 500 miners must

1 be applied the same amount through all the operations,
2 regardless of size. Put simply, the initial
3 assessment should take no more factors into
4 consideration.

5 The union also believes that the fines
6 should be increased, and base that decision upon
7 application of certain other conditions or factors.
8 These will include, A, the operator's previous
9 violation history over 24 months, the degree of
10 operator negligence, the gravity of violations, and
11 the number of people who were or would have been
12 affected by the existence of such conditions being
13 permitted to continue to exist.

14 There should be no circumstances or factors
15 that are permitted to mitigate the amount of the
16 assessment. This must include giving no consideration
17 to the size of the penalty in reference to the size of
18 the operator. And in this -- of good faith to correct
19 a cited condition, or the effect of the operator's
20 ability to continue in business.

21 We agree that the union is convinced that
22 efforts to create a structure that includes proper
23 assignment of MSHA regulations will be detrimentally
24 impacted by the application of these factors in the
25 civil penalty scheme for the following reasons.

1 A. Consideration with regard to operator
2 size in determining penalty amounts are flawed and
3 create unfair bias in the system. In practice, from
4 the lower fines for operators based on the size of the
5 mine for a mining company reinforces the idea that
6 poor practices and less-than-adequate compliance are
7 acceptable for the small operators. This enforcement
8 scheme indicates that smaller operators who are not
9 responsible to abide by the letter of the law, and
10 therefore can subject themselves to a lesser degree in
11 safety, or they cannot be expected to understand the
12 penalty requirements others in the mining community
13 must follow. This dual enforcement must be stopped,
14 and all operators must be required to abide by all
15 regulations, or suffer the same initial penalty.

16 B. Freedom for good faith abatement efforts
17 offer a deterrent to compliance. The operator's focus
18 with regard to regulatory compliance must be proactive
19 in design. Offering a reward for correcting a
20 condition that is in violation of a regulation, and
21 therefore should not have existed, is ineffective.
22 The union believes that the initial fine should be
23 firm, and no reduction should be offered with regard
24 to abatement efforts.

25 MSHA should not be in the business of

1 determining if penalties assessed will result in a
2 loss of business or a default of the business in
3 violation. This is most true because the statements
4 of business survivability do not lend themselves to
5 adequate enforcement. In fact, the opposite will only
6 be true.

7 Secondly, there must also be some
8 realization that an accounting practice can make a
9 financially healthy operation or company look
10 otherwise.

11 The union believes that these changes in the
12 current proposed regulations are administered in order
13 to enforce the Mine Act and regulations in an even-
14 handed and compliance-driving manner. The union would
15 also point out that the agency has the ability, as it
16 has demonstrated in the past, to alter the statutory
17 requirements of the Mine Act to eliminate the criteria
18 listed above. While the union does not advocate such
19 a practice in most cases and reiterates its objection
20 to the use of -- air, alternative seals and --
21 substantially different from others MSHA has approved.

22 Unlike the others described to us with
23 stringent enforcement and offer a great degree of
24 protection to miners. The union supports the portions
25 of the proposed regulation that reformulates and

1 increases the numbers of points assigned with regards
2 to violations. However, based on the union's proposal
3 to eliminate some of the criteria to be considered in
4 assessing penalties, the agency will need to
5 reevaluate the proposal to reflect this new criteria.

6 The union believes the end result of such
7 review would demand higher culpable penalties to be
8 assessed, without reductions or other factors,
9 mitigating circumstances.

10 The agency notes that 69,078 of 116,731
11 citations issued -- I'm sorry, 116,731 citations
12 issued in 2005 were single-penalty assessments.
13 MSHA's proposal to eliminate the single-penalty
14 assessment provision indicating that doing so will
15 increase the amount of fines the operator is required
16 to pay for violations.

17 We aren't able to determine, based on the
18 text of the proposal, how this is possible contrary to
19 the agency's assertion. Throughout the proposal many
20 changes were made to clarify the rule and make it
21 reader-friendly. That is not the case of this issue.

22 In the preamble MSHA has reevaluated the
23 single-penalty provision, and believes the proposed
24 rule takes a more appropriate and effective approach
25 to achieving the Congressional purpose with respect to

1 single penalties. The union's concerned that MSHA has
2 issued a statement on belief, rather than a statement
3 of fact. The union requests that the agency provide
4 the data used to make such a determination.

5 The union would request a thorough
6 explanation as to how the proposal to eliminate the
7 single assessment will increase the amount of
8 penalties, or that will be essentially able to
9 demonstrate how it's changed miner safety.

10 The agency is proposing to remove the limit
11 of the top violations, that MSHA will review for
12 possible special assessment by moving the list of
13 specific categories. They also state that MSHA has
14 the discretion to waive the regularly assessed formula
15 if it determines that conditions warrant special
16 assessment for any type of violation.

17 At first blush this would indicate the
18 agency has the desire to evaluate more violations,
19 based on the conditions discovered per special
20 assessment. However, the following statement
21 contradicts MSHA's assertions. It states, "The
22 existing list of eight categories, although not
23 intended to be exclusive, resulted in a time-consuming
24 and resource-intensive process."

25 Since the agency offers to lend its support

1 to this allegation that the process is burdensome, the
2 union is being asked to accept MSHA's determinations
3 without question. It is not willing to make such an
4 accommodation. It is clear that this process is
5 taking too much time and wasting resources, if clearly
6 you are seeking to eliminate the burden of reviewing
7 pure violations for special assessment.

8 This action, in light of the stated reasons
9 for updating the penalty assessment, is unacceptable.
10 The union would agree on eliminating the categories
11 for special assessment only if there are assurances
12 that the numbers considered for such actions do not
13 increase, as is alluded to in the proposal.

14 The MINER Act of 2006 requires prompt
15 notification within 15 minutes from the mine operation
16 through MSHA in the event of a death or an injury or
17 an entrapment that has a reasonable potential to cause
18 death. The Act permits a penalty of not less than
19 \$5,000 nor greater than \$60,000 for failure to notify.
20 This notification is critical to initiating resource
21 and recovery efforts.

22 While the agency has probed the regulation
23 language adopted by Congress, it is important to
24 understand that the non- or late notification of such
25 an event was meant as a deterrent. The union

1 understood Congress to be seeking a maximum penalty of
2 \$60,000 when notifying, when notification does not
3 occur as prescribed. Therefore, it must be understood
4 that the only extreme circumstances should be
5 considered mitigating factors; and therefore, lower
6 the penalty in this case only.

7 The agency intends to use the size of the
8 controlling entity when assessing the penalty.
9 Obviously, the larger the parent company, the larger
10 the fine to be assessed. The union established owner
11 entity information can be useful in many instances.
12 However, it is clear that this information is
13 difficult to verify and track to assure accuracy.

14 There is also concern that the quickly
15 changing nature of the industry would create a paper
16 chase that is almost impossible to keep up with. The
17 union is interested in hearing MSHA entities on how
18 this information will be collected initially, and what
19 efforts will be used to assure accurate, up-to-date
20 data. The union is not ruling out the potential use
21 for this, but needs additional information.

22 MSHA's proposed rule states that the
23 proposed size schedule will result in penalties that
24 are, on average, more than twice the size of the
25 smallest one to five employees in coal mines, that

1 metal and nonmetal assume a size four times higher at
2 coal mines in the prior-to-1940s size range --

3 The decision by MSHA to propose a penalty
4 assessment scheme that works differently in violation
5 of metal/nonmetal mines -- in this case, coal mines --
6 is incorrect. Miners who have worked at mines other
7 than coal should not be subjected to a regulation that
8 applies a lesser incentive for the operation to
9 comply.

10 The 1969 Coal Mine Act was admitted in 1977
11 to protect all miners, no matter resource was being
12 extracted. The agency must apply the new higher
13 penalties equally to all industries.

14 The proposed regulation phase consistent in
15 the Mine Act's requirement to consider size of the
16 operation when assessing penalties. MSHA believes
17 penalties that are assessed under the existing regs
18 are often too low to be an effective deterrent for
19 non-compliance at some of the larger operations.

20 The union agrees with the premise of this
21 statement, enforced compliance, and supports issuing
22 penalties that are significantly greater. That is
23 currently the case. However, to tie this increase in
24 penalties to large operations is inappropriate. The
25 agency has been aware for some time of the unique

1 health and safety problems that inherently plague the
2 small operators.

3 The union is convinced that any operator
4 that uses small mine size, and therefore less
5 resources, to ensure compliance as an excuse to either
6 avoid the application of the Mine Act or pay a lesser
7 penalty should not be permitted to remain in
8 operation.

9 Miners of all mines, regardless of size,
10 must be required to comply with the law. No one
11 should be permitted to opt out or be assessed a lower
12 penalty for non-compliance.

13 The agency created the Small Mine Divisions
14 within its internal structure because of the higher
15 rates of non-compliance. Increased action placed a
16 greater number of fatal accidents at peak operation in
17 proportion to the overall work force.

18 The penalty scheme must take these issues
19 into account. The Congressional mandate to take the
20 size of the operation into account has been in place
21 for many years. The data obtained during that time
22 should indicate these smaller operations need greater
23 attention than do others. Enforcement and penalties
24 must be proportionate to the accidents and injuries
25 and violations, and attributable to the portion of the

1 industry that exposes workers to the greatest risk.

2 The agency has the ability to view mine size
3 in a unique way according to the Mine Act. The agency
4 has been doing it backwards for too long. The
5 practice of looking at a mine operator's violation
6 history is an appropriate means for determining their
7 commitment to comply with the law.

8 The determination to use such data to
9 increase penalties for repeat violations is also
10 appropriate. However the decision changed, and time
11 -- from 24 months to 15 months is not correct. The
12 union sees no benefit from the change that MSHA has
13 offered, and MSHA has offered no information to
14 support this decision. And we'd request the agency
15 make this data it used to make this determination
16 public, so we can review it.

17 Until such a review is conducted and the
18 data is either confirmed or refused, MSHA claims, no
19 change is warranted.

20 The agency also reasserts its policy of
21 assigning field enforcement to citations based on the
22 number of assessed violations per inspection data.
23 The union endorses this concept in theory. However,
24 there must be an even-handed inspection policy for it
25 to work properly. The concept as outlined by the

1 agency to automatically exempt small operators is a
2 dangerous approach to enforcement.

3 -- citations of a mine, regardless of the
4 mine size, should take the same number of --, in
5 particular that mine that offered the same basic
6 equipment at two separate mining operations, and with
7 10 employees and the other with four employees, it
8 should take about the same number of days to complete
9 the investigation. I understand that a larger
10 operation will take longer to inspect in total than
11 the smaller, but the time spent at each should be
12 proportionate.

13 And I thank you.

14 MS. SILVEY: Thank you. Before you leave
15 there are a few comments that I want to make, Mr.
16 Horton.

17 First of all, on the special assessment. We
18 have gotten comments from both the industry and the
19 labor sectors on this special assessment, on the
20 proposal on special assessment, and our proposal to do
21 away with the categories that are listed in the
22 existing rules for special assessment. And you
23 accurately read, Mr. Horton, in your testimony exactly
24 why the agency did that.

25 And the why was that we felt by so doing, we

1 would divert more by enforcement resources to doing
2 field enforcement activities. It's funny, we got
3 comments from both sectors which said that we should
4 keep those categories for special assessment.

5 All of those eight categories that were in
6 there, we felt like in each case we had, the field
7 people had to -- you said we provided no supporting
8 figure. But in those eight cases that were listed for
9 review, we felt like the district people had to keep
10 so much information on citations violations with
11 respect to those eight categories. And sometimes that
12 resulted in special assessments, a lot of times it
13 didn't.

14 And so we felt if we just gave MSHA the
15 authority to special assess without listing those
16 categories, that would be a more effective and
17 efficient way of processing the system.

18 Now, you know, and I hope that we sort of
19 articulated that to you. But we've gotten comments
20 from both the labor and the industry side that says we
21 should keep those eight categories that we have
22 included in the special assessment. But we issued
23 this proposal to try to create a more effective
24 system.

25 The second thing on your comment on

1 controlling entity. I would submit to you that we
2 kept the points for controlling entity in the proposal
3 the same. We increased the weight that would be given
4 to a controlling entity. But by so doing, I think I
5 would submit to you, and agree with you in part in
6 your comments on that, that sometimes getting data on
7 controlling entities is difficult to do. And that's
8 one of the reasons why we give more weight to the mine
9 ownership to date than to the controlling entity.
10 Because oftentimes getting the data on the controlling
11 entity, sometimes it can be difficult to do.

12 Did you want to talk back to 24
13 specifically?

14 MR. WATSON: Well, maybe comment. You know,
15 when we decided to switch to the 15-month or proposed
16 the 15-month --

17 MS. SILVEY: From the 24.

18 MR. WATSON: -- we did analyze the data for
19 24 months. We also included an 18-month period and a
20 15-month period. And basically, we determined that
21 the 15-month period provided us with adequate
22 information to make the determinations of history and
23 repeat violations.

24 So we may not have explained that as
25 completely as we should have in the writeup, but we

1 did make those analyses and comparisons.

2 MR. MONTALI: Just to add on what Keith
3 spoke about, we felt that using the 15-month would
4 give us an accurate picture of that mine status, and a
5 compliance. Whereby if the mine was issued more
6 citations during that period of time, it would show
7 that they would have a higher assessment.

8 And also, on the other side of the table, if
9 that mine received higher citations during the, you
10 know, previous two years, but they basically cleaned
11 up their act and they received less citations, that
12 would indicate that for that mine also, they're making
13 big improvements towards the safety of miners. And
14 therefore, you know, the VPID, violations per
15 inspection date, would reflect that.

16 MR. HORTON: May I ask, though, once they
17 have stepped up to the plate and began making their
18 conditions better, does that not take them out of the
19 special assessment category seven months sooner? Is
20 that also a thought, in re 24 months versus 15? And
21 then they're back in good standing again? Is that
22 also the case?

23 MR. MONTALI: Well, the special assessments
24 is actually different on that, because each special
25 assessments actually goes through the penalty process

1 on its own merit.

2 MS. SILVEY: It's different. The special
3 assessment process is different. That doesn't have
4 anything to do with the special assessments. That's a
5 general --

6 MR. HORTON: That's what's known as --

7 MS. SILVEY: Yes, sir.

8 MR. CROCCO: Hey, Roger? Before you go, I
9 think one time on the mine size you said that the
10 point scale was backwards. Were you suggesting that
11 the most points ought to go to the smallest operators,
12 and the fewest to the large?

13 MR. HORTON: Well, a lot of our small
14 operators -- and there have been many, many instances
15 where they have been fly-by-night operators -- will
16 not comply with the law no matter what you do. So to
17 take a look at it in that aspect, I think you should
18 do that, in all respects. You know, they're here
19 today, gone tomorrow.

20 MR. CROCCO: Okay.

21 MR. HORTON: Those who have a history of
22 complying with the Act and complying with the law
23 should be given the greatest benefit. Those who don't
24 are normally those who are the small operations who
25 just want to make a buck and run away from it.

1 MR. MONTALI: I have one other comment
2 regarding the statement you said, well, how will the
3 inspectors carry out their duties, and you say they
4 can't complete their inspections now. Well, Coal Mine
5 Health and Safety has historically completed the high
6 nineties -- 98, 99 percent -- of their required
7 inspections, you know, each year.

8 And also to address this is, you know, Coal
9 Mine Health and Safety is also in the process of
10 hiring a number of new inspectors, you know, this
11 coming year to ensure that we can complete the
12 inspections at all the mines.

13 MR. HORTON: That's good information. You
14 see, the district that MSHA represents our area, we
15 have a large amount of inspectors who are relatively
16 old, and they're about to retire and move out. And
17 I'm not seeing the young ones being brought in. They
18 made a little movement here recently, but not enough,
19 I think, to comply with the actual --

20 MR. STONE: Just to add one point to amplify
21 what the panel said to you about that --

22 The logic for treating some of the
23 structural penalties as, special assessments as
24 regular assessments is because I believe, under this
25 new structure, that regular assessment will be able to

1 give an accurate reflection of the amount of the
2 penalty, so we don't have to go to a special
3 assessment.

4 It ends up, from our estimation looking at
5 2005 penalties that were special assessments, that
6 those that became regulars for those penalties
7 alone -- there were about 2500 of them that had become
8 regulars, regular assessments. With those, the
9 penalty as a regular would be 84 percent higher, on
10 average, than those penalties that had been treated
11 under special assessments.

12 So it's not that going from special
13 assessment to regular assessment will decrease; it
14 will increase it.

15 MR. HORTON: It's difficult to understand.

16 MR. STONE: Okay.

17 MS. SILVEY: If anybody wishes to talk to us
18 after the hearing, you know, however long it takes for
19 more information or explanatory information, feel free
20 to come up to me and let me know.

21 Next we will have Deborah Hammer, United
22 Mine Workers, Sago families.

23 MS. HAMMER: Thank you.

24 MS. SILVEY: Thank you.

25 MS. HAMMER: I'd just like to clarify, I'm

1 an associate member of the UMWA, and I lost my husband
2 in the Sago disaster on January 2.

3 MS. SILVEY: We're sorry.

4 MS. HAMMER: Thank you. I just want you to
5 know I don't come as an expert to speak to you today.
6 I just, I don't understand all these proposed rules.
7 I just come today to speak to you on a personal
8 level, as a widow that gave the ultimate: my husband.

9 To me, this all should be simple. Better
10 enforcement, better regulations to ensure the safety
11 of our miners. Our miners should be able to go to
12 work and expect to come home after that day's work.
13 And they depend on MSHA to ensure that they can do
14 this.

15 MSHA should be in the business of protecting
16 our miners' safety and health, and not be responsible
17 for making sure a company stays in business.

18 The fines, to me, should not be reduced
19 according to the size of a business. And by the same
20 token, fines for similar violations, no matter the
21 size, should be the same. These fines should also be
22 fitting, the fines must be fitting to the violation,
23 and fixing the problem should be cheaper than paying
24 the fines. And operators that are habitual abusers
25 should have the fear of being shut down.

1 The size of the mine should not be
2 considered as a factor in the inspections.
3 Inspections should be based on the sections, the
4 equipment, and not the employees at the mines.

5 You know, I had no idea ICG was a habitual
6 violator until after the disaster, and I reviewed
7 their violation records. To me, there was no justice
8 in the amount of the fines that they were charged, or
9 that Sago wasn't shut down. I don't understand how a
10 company can kill 12 miners, and then go on and still
11 win a safety award.

12 On January 15 of this year, the day that the
13 memorial service for the miners was held in Buchanan,
14 I had a chance to meet Wanda Blevins. She's the widow
15 of David Blevins that was killed in the Jim Walters
16 Mine explosion in 2001, in Alabama. And at that time
17 she handed me a UMWA report of that disaster, with
18 recommendations to MSHA.

19 I read these recommendations, and it became
20 apparent to me that had those regulations been
21 implemented, Sago may not have occurred.

22 My fear is that if MSHA doesn't do their job
23 and hold operators accountable, who's going to be next
24 in line for a Sago disaster?

25 Thank you.

1 MS. SILVEY: Thank you, Mrs. Hammer. I
2 would like to say that, before you leave, that on
3 behalf of my panel and me, and all of MSHA, again we
4 express our condolences to you. I'm sure we've done
5 so in the past, and not only on behalf of the miners
6 who died at Sago, at Alma and Darby, but all of the
7 miners who died this year, and all of the miners who
8 died from the beginning working in this nation's
9 mines.

10 So we want you to know you have our deepest
11 sympathy. And we appreciate your courage in coming
12 here and testifying.

13 MS. HAMMER: Thank you.

14 MS. SILVEY: Thank you. Our next witness is
15 Sara Bailey, UMWA Sago Family.

16 MS. BAILEY: My name is Sara Bailey, and my
17 dad is George, Jr., Hammer, one of the miners killed
18 on January 2 at the Sago Mine.

19 I would like to say that it is disheartening
20 for me to see MSHA is still not working diligently to
21 ensure penalties are developed that force coal
22 operators to comply with safety laws, and deter them
23 from violating laws, especially following one of the
24 deadliest years in coal mining history.

25 No one should have to die, or worry about

1 dying, at work because a company repeatedly violates
2 safety laws.

3 This system is biased, based on the
4 operator's size. Fines should be firm, and no
5 reduction should be offered. Otherwise they do not
6 serve as sufficient deterrents.

7 MSHA may need to consider going back to the
8 drawing table to formulate penalties that will serve
9 as real deterrents, and will encourage operators to
10 correct current problems.

11 The Jim Walter Mine in Alabama was fined
12 \$350,000 following the investigation on the September
13 2001 disaster. The fine was then reduced to \$3,000,
14 and then later it was thrown out by a judge. And the
15 reason for that was the judge stated that MSHA's work
16 was shoddy.

17 What can you do to ensure us this will not
18 be the final result after the Sago investigation is
19 completed? MSHA was developed to ensure the safety of
20 our nation's coal miners, and not to set penalties
21 that favor the industry.

22 The MINER Act of 2006 requires prompt
23 notification within 15 minutes from the operator to
24 MSHA, in the event that there is a death, or an
25 injury, or entrapment that could cause death. The

1 penalty for not complying with the notification rule
2 is between \$5,000 and \$60,000.

3 The notification is critical to initiating
4 rescue and recovery efforts. A fine for violation of
5 the notification requirement should not be lowered.
6 And Sago, ICG did not notify MSHA for 90 minutes after
7 the explosion. The rescue teams were not able to
8 arrive at the site for approximately two hours after
9 that. By the time the rescue team members were ready
10 to enter the mine, the level of methane had risen to
11 amounts that prevented them from doing this.

12 MSHA needs to propose more stringent
13 penalties for operators who violate safety laws. No
14 matter how harsh these penalties are viewed by coal
15 operators, nothing is more harsh than paying with your
16 life.

17 Coal operators who continually violate
18 safety laws should be shut down. ICG was a habitual
19 violator of safety laws. If their operations were
20 shut down for non-compliance, I ask you, would the
21 explosion on January 2 that took my dad and the other
22 good men's lives that day have occurred at all?

23 MS. SILVEY: Thank you, Ms. Bailey. Again,
24 we want to express, on behalf of MSHA and the panel,
25 to you, Ms. Bailey, we express our condolences to you

1 for the loss of your father. And we understand how
2 painful that must be for you. And it was with a goal
3 of improved health and safety in mines that we issued
4 this proposal. And it is with that same goal that we
5 are taking the comment and testimony today.

6 And I want everybody to know here that with
7 respect to our purpose, we take our purpose very
8 seriously. And every day we take the goal of assuring
9 that every miner comes home from work, comes home safe
10 to his or her family. We take that very seriously.

11 And again to Ms. Bailey, I want to reiterate
12 our sympathy and our condolences to you.

13 Next on our speaker we have J. R. Patsey,
14 UMWA.

15 MR. PATSEY: I'm glad to have the
16 opportunity to come here today and express my opinions
17 over these new proposals.

18 I've looked at it. It's very complicated
19 for me to really understand. And I don't know if you
20 all have this where their attorneys draw this up, but
21 it's really complicated for me to just read it and see
22 what it means.

23 You said you was talking about doing away
24 with single assessments, you know. Why couldn't you
25 put something in here to explain exactly the

1 intentions on the, you know, on how it is going to
2 flow on down, as you said a while ago. Because I've
3 read, I don't see it, where you're getting the
4 assumption that's the way it's going to be.

5 It's just like you've heard from two young
6 ladies here that's lost loved ones. And it was purely
7 due to the lack of enforcement, any way you want to
8 cut it, on MSHA's part.

9 You know, it's hard to look at them young
10 ladies when you see that somebody didn't do their job.
11 It was the mine operator, for sure. I don't know how
12 many inspections MSHA made there. You know, somebody
13 should have seen something.

14 The same way when we get down to Alabama,
15 the miners that lost their life down there. History
16 of repeated violations, known recorded, was fined
17 tremendous amounts of money. And then they go to
18 court, and it's just practically nothing, \$3,000 or
19 something like that.

20 Like I said, I can't really get the full
21 understanding of this. And I'm just going to say a
22 few more things, then I'm going to go. Roger said a
23 lot of what I was going to touch on.

24 But on this, you know, I heard what you said
25 a while ago, but I'm still a little bit confused. But

1 anyhow, on considerations with the size of, you know,
2 the operators. To me, you know, the law is the law,
3 whether you got 10 people or 300 people, you know. If
4 that's what the law says, then it ought to be applied
5 even across the board.

6 I've got 10 people here, it don't apply to
7 me. I've only got to pay this amount. It ought to be
8 an equal playing field for everybody, not just because
9 you got the least people.

10 And another one here, good faith abatements.
11 I've never heard of such. I mean, it's no different
12 from me going down the highway getting a speeding
13 ticket. I can tell the officer well, the speed
14 limit's 35; I was just doing 42. You know, it's a
15 violation of the law. I knew what the speed limit
16 was, sort of like operators.

17 So how can you reward somebody who knowingly
18 violated the law, and give them good faith efforts on
19 abatement? I just don't see it.

20 I'm going to just leave it at that right
21 there.

22 MS. SILVEY: Thank you. Our next witness is
23 Clyde Childress, UMWA.

24 MR. CHILDRESS: My name is Clyde Childress,
25 I'm with Baer Technologies. I'm a UMWA

1 representative. I just have a statement and one
2 question.

3 Single assessment of penalties should not be
4 removed, nor should the assessment be changed from one
5 type of mine to another. Single-assessment penalty is
6 a great tool for training of our youth and young
7 miners.

8 As the inspector cites the companies, and
9 it's posted for each to review, this helps the young
10 miners to understand the law. Some companies have
11 outside safety coordinators instead of a safety
12 director on site. Therefore, the young miner never
13 gets the chance to have the first-hand experience of
14 how an inspector conducts the inspection, and what he
15 looks for and the type of violations.

16 And the thing of the 10 to five days. A lot
17 of small companies which I worked for have oftentimes
18 escaped it. In this type of schedule, it will not
19 allow enough turn-around time from the time you work,
20 to the time off, to the time you're back.

21 If an inspector finds an unsafe condition
22 where someone is in danger of being injured, it should
23 not make any difference whether it's a large company,
24 small company, metal, non-metal. Safety should always
25 come first.

1 And my question to you is, why is it
2 necessary to change the rules that we already have?

3 MS. SILVEY: As I stated in the opening
4 statement, MSHA, we proposed changes to these rules to
5 increase the civil penalties, to improve the civil
6 penalty process, and to implement the civil penalty
7 provisions, three provisions of the MINER Act. And by
8 so doing, we believe that we, this proposal would
9 create a more effective inducement for mine operators
10 to comply with the mine safety and health laws and
11 regulations, and to improve the safety and health of
12 miners.

13 And so the bottom line, cut through all of
14 that, under this proposal the civil penalties will be
15 an increased an average, in excess of an average of
16 over 200 percent, give or take different categories of
17 the analysis laid out, the categories of penalties,
18 based on various operators and contractors and that
19 type of thing.

20 But basically, that was MSHA's overall
21 purpose in proposing and issuing the proposal.

22 MR. CHILDRESS: When you say you believe
23 these proposals will do all this, before you make
24 changes you should say I know these proposals will do
25 this, instead of believe. Believing will get me

1 either the carrot and the stick, or the stick and the
2 carrot, either way you want to look at it.

3 MS. SILVEY: Well, it was a belief based on
4 pretty much a qualitative assessment, as I have said.
5 I think it was a pretty fair, a pretty strong belief.

6 It was just, as I said earlier, it wasn't
7 that we had quantitative data, per se, to back up
8 everything. But it was a pretty strong assessment
9 that the increased penalties would lead to greater, a
10 greater inducement for safety and health.

11 MR. CHILDRESS: If this is implemented, then
12 we do have increased penalties. How long do you think
13 it will take before you know whether it's effective or
14 not?

15 MS. SILVEY: Well, we would hope to know
16 within some months, I would hope. At least within a
17 six-month time span, or something like that. I think
18 it would take some short period of time. But I think
19 we would hope to know fairly soon.

20 Thank you. Tim Baker, United Mine Workers
21 of America.

22 MR. BAKER: My name is Tim Baker, that's B-
23 A-K-E-R. I'm the Deputy Administrator for
24 Occupational Health and Safety for the United Mine
25 Workers. And we've heard an awful lot of comments,

1 and some I will review and try to get into some
2 specific details on. Others I think the panel
3 understands as to themselves, and you've heard the
4 comments of a lot of the miners.

5 I would like to say first of all that, while
6 I don't claim to be an expert on regulation or writing
7 of regulation, generally speaking, I do have the
8 ability to understand most of the regulations that
9 MSHA does propose. Whether I agree with them or not
10 is another thing.

11 My problem with this particular proposal is
12 it is extremely confusing. I know there are several
13 areas or several times that the agency has reiterated
14 that, you know, you changed this to clarify, you
15 changed this to make it more reader-friendly. Quite
16 frankly, that is not the case.

17 It is confusing, and it appears -- and the
18 preamble is very important, and I think we all know
19 that, because that's where we pull a lot of
20 information. It appears just to jump from area to
21 area, and I had a hard time piecing this together.

22 I think I have a better understanding of the
23 single assessment. And while I will say I have a
24 better understanding, I'm also saying, as I have told
25 mine operators when we meet, those fines are not stiff

1 enough to act as a deterrent.

2 And if I may give an example. If I have an
3 individual or an operator who runs a mine of any size,
4 and it doesn't matter for the purposes of this
5 exercise, but they had tires on their vehicles that
6 are no longer in compliance and should be taken out of
7 service. But they choose not to do that. And an MSHA
8 inspector shows up on property and issues a citation
9 for \$174, and gives them 10 days to obey.

10 The incentive really isn't there to look at
11 the situation and say gee, do I pay the penalty of
12 \$174, or do I change the tire with a \$20,000 tire?
13 Now, I'm not suggesting that you fine them \$20,000 for
14 the tire, but I'm suggesting that that machine
15 shouldn't move. That machine should not move until
16 that is repaired.

17 I think that the agency has missed an
18 important element of the discussions that occurred.
19 And maybe that's not the agency's fault, because you
20 weren't necessarily part of some of those discussions.
21 But they have missed the opportunity when assessing
22 the situation to look at the operator and say you can
23 no longer operate this piece of equipment, this
24 particular section. I realize that we just found the
25 violation, but you're not going to run. You're not

1 going to run until it's fixed. There's no, you know,
2 you don't get 10 days or five days or three days to
3 obey; the condition warrants immediate correction, and
4 it has not occurred.

5 Often enough you had the opportunity in this
6 regulation to make that happen. Unfortunately, the
7 agency didn't seek to do that. And I would suggest
8 that that has got to be a major element of the new
9 system, scheme, or however you want to phrase this.

10 Another thing that I think I need to
11 elaborate on is, because there's some discussion here
12 about what's statutory and what's regulatory. It is
13 specifics with the six criteria that were used to
14 determine mitigating circumstance, or a lesser
15 penalty, because that's what it amounts to when we
16 talk about small mines and those kind of things.

17 The union does not very often -- as a matter
18 of fact, I don't know that I've ever sat on a panel
19 that said we would request that you change the
20 statutory language of the Mine Act. However, the
21 agency has in the past sought to do that, and done
22 that successfully, when, in our opinion, it benefitted
23 mine operators. And that's the use of belt air,
24 that's the use of alternative fuel material, that is
25 other issues that in our opinion aided production.

1 Did not benefit safety, but aided production.

2 We would suggest that changing the criteria
3 to eliminate any consideration because of the size of
4 the mine operator. And we've got to be careful when
5 we talk about size of the mine operator, because Mom
6 and Pop are really hard to find out there. Mom and
7 Pop now consist of a mine of five people to 20 people,
8 in the opinion of the agency, but that doesn't
9 necessarily take into consideration how large that
10 entity really is. Is it a contract mine for a large
11 company? Those kind of things need to be taken into
12 consideration in the overall picture. Controlling
13 entity may be one way to do it, but I suggest that's a
14 paper chase.

15 So when you look at the criterion, some of
16 these things should go away. The ability for the
17 operator to stay in business is a contention that we
18 have looked at, or is an issue that we have looked at,
19 and we have argued over these points many, many times.
20 If an operator cannot, despite size, offer a basic
21 level of protection that is contained in the Mine Act
22 and in the regulation, that operator has no business
23 being in the mining business. The safety of the
24 individual miner, because of size, because of ability
25 to stay in the industry, should not be lesser than

1 someone else, simply because it's small. Simply
2 because they can make the argument.

3 And I would suggest to you, with all the
4 objections raised by industry about increasing fines,
5 and I know Keith, you said there were only about a
6 dozen or two that had requested that's going to
7 change. That's going to change. And I would suggest
8 that that should be taken off the table. We don't
9 need to look at that particular issue any longer.

10 And just to comment on some of the folks
11 that were here earlier and made their comments. I
12 don't necessarily look at the penalty system to be
13 punitive in and of itself. You know, it is like J. R.
14 Patsey said, if you go down the road speeding, it
15 doesn't matter if I'm a millionaire or if I make
16 \$20,000 a year, my fine is my fine. And you can
17 always say well, you know, the police officer was real
18 punitive when he issued it, but the fact of the matter
19 is you violated the law.

20 So I don't necessarily look at it as
21 punitive, but I don't think that operators should be
22 permitted to look at it as simply the cost of doing
23 business. What's expedient here? Do I just pay the
24 fine and continue on because I can roll it into the
25 cost? And if that's the case, then, first of all,

1 it's punitive, and secondly, it's not effective. If
2 that's all it is. So we need to revisit those issues.

3 Some of the other comments that I do have.
4 I think it was one of the other members who was up
5 here who went through a long list of what they saw as
6 problems, so I won't go into all of that, or reiterate
7 what they said.

8 But there's got to be an understanding that
9 the penalty is assessed because of the violation
10 because you didn't comply. The 10-percent discount,
11 although it was 30 percent before and we realize that
12 needs to go away, it is like a speeding ticket.
13 Whether I go to court or whether I don't, just because
14 I show up doesn't mean somebody gives me a break and
15 says well, you get to pay less because you're here.
16 So that needs to go away.

17 It's not an incentive to do the right thing,
18 it really isn't. I mean, the violation should not
19 have existed. If the operator reasonably should have
20 known about it, the violation should have been
21 corrected before an MSHA inspector ever showed up on
22 site.

23 Another point of concern is when we talk
24 about -- and I'm not exactly sure how this works, but
25 when we talk about violations per inspection shift.

1 There is a realization out there that some mines get a
2 lot more attention than others; and that despite the
3 fact that in a particular section in a mine that has
4 one mine and two shuttle cars, and a scoop, and a
5 bolter, that in some mines it takes eight or 10 shifts
6 to inspect that particular operation. Where across
7 the street, it takes a day or two.

8 There's got to be some understanding that if
9 we're all running the same equipment, generally
10 speaking, we're doing electrical inspection, it should
11 take about the same time. So despite size, we should
12 have the same number of shifts spent in each mine.
13 Understanding that if I've got a five-unit mine, I'm
14 going to have a lot more air courses to run in those
15 outlying areas. And conditions may warrant from time
16 to time that additional shifts are spent there. But
17 by and large, there should be some proportional
18 understanding that you get the same kind of treatment.

19 And I don't believe that that is the case at
20 this point. And that needs to be looked at. Because
21 under this proposal, inspections or violations for
22 inspection shifts are going to be very important. So
23 we need to look at how those things apply.

24 As far as the one commenter saying that, you
25 know, if you fine somebody and you allow them to put

1 at least some of that money back into repairs, I would
2 suggest if you put the money into repairs to begin
3 with, you wouldn't have the violation. So the
4 argument, I guess, I can turn around and make look
5 differently. And you know, I'm as good as anybody
6 about saying how taking the five-dollar fine and
7 making it \$45,000 or in reverse, which is what I
8 normally do. But I am unaware of a taillight being
9 out, or some miner is in this condition where the
10 agency has been so abusive that, you know, you fine
11 them \$17,000 or \$18,000 or \$20,000. I don't find that
12 to be the case. I'd be interested in seeing those.

13 We are concerned about going from 24 months
14 to 15 months on the history, especially now that
15 histories play a different kind of role, at least if
16 I'm reading this correctly. But also if I'm reading
17 this correctly, there are some aspects to this that
18 small operators get out of. And we will meet after
19 this, I hope, so that I can get a better
20 understanding.

21 But there are some aspects of the
22 regulation, and it's in the preamble, that says you
23 don't intend to enforce this on small operators. I
24 need to know exactly what those are. I need to know
25 exactly what those are, because I don't think there's

1 anything that should be exempt for anybody.

2 And we can pull it out after.

3 MS. SILVEY: Yes, because I just want to
4 clarify, you know, I'm glad you made that point. That
5 the rule, the penalties will be assessed equally
6 against small and large operators. I say "equally;" I
7 mean the final penalty, they will get a final penalty
8 assessment.

9 In computing that assessment, I think there
10 was some conversation in the preamble about size. And
11 operators under a certain size -- it was 15,000 tons a
12 year in the previous calendar year for coal mines,
13 10,000 hours in the previous calendar for metal/non-
14 metal mines, and 10,000 hours for contractors at all
15 mines -- got no points for size. And so that was the
16 only thing.

17 But if you recall, that point table included
18 five criteria. They just got no points for size, but
19 for negligence and gravity and history and -- what's
20 the fourth, good faith -- and good faith, they would
21 get consideration for that. But it's just that it was
22 no points for size.

23 But we are hearing from people that, you
24 know, that we should maybe relook at that. And that
25 was, by the way, let me just say to everybody, that

1 was no change from the existing rule. That's the way
2 it is in the existing rule, by the way. Have I got
3 that right? Tell me if I'm wrong.

4 MR. BAKER: You're right.

5 MS. SILVEY: Okay.

6 MR. BAKER: And you know, there are some of
7 those issues that really need to be fleshed out,
8 because it is in some instances very confusing. Like
9 I say, I'm getting the grasp on single sample, or
10 single assessment.

11 MS. SILVEY: Single sample?

12 MR. BAKER: No, that's the next rule. I'm
13 sorry. But a couple other things.

14 We are looking at, and I noticed somebody
15 saying, you know, there's a problem completing
16 inspections, and there is that problem out there and
17 they're hiring new inspectors. But possibly not fast
18 enough, probably not in the numbers that need to be.
19 And to be quite honest with you, if it hadn't been for
20 Senator Byrd forcing the issue through the DOL, I
21 doubt that anybody would be hired at this point. You
22 know, just so we can lay all these things on the table
23 and look at them kind of objectively.

24 So we need to hasten this process along,
25 because there are a lot of inspectors who've done a

1 lot of good work over a lot of years, and it is time
2 for them to leave. And I hope they have long and
3 happy retirements, but they're going to be going. So
4 the 200 that are projected to be hired over the course
5 of the next year or so may not be sufficient to fill
6 the gaps of those who are leaving.

7 Your work force at MSHA is no different than
8 our work force in the mines. A lot of people are
9 getting ready to leave. So we need to look at that
10 beyond just this year. I believe that will be an
11 important issue in whatever we come to in this final
12 rule, and however we put these things together.

13 The other thing is we would ask for some
14 more specific data. And I know that I sit here and
15 say the union believes this, we believe that. But a
16 lot of this rule tells me what you believe. And I
17 know you said you've got quantitative data on certain
18 things; you know, the 15 months to the 24. But I
19 didn't have the chance to look at that data. What
20 you're looking at, why it's the same.

21 And so on those areas where you believe, you
22 know, you believe the proposal will enhance compliance
23 or force compliance, I'm not so sure I see that.

24 What I see is what I said before, is I see
25 operators saying I can't afford this. The little ones

1 get away, and the big ones pay, and that's not the
2 system that we need to look at.

3 I guess, in closing, what I'm trying to say
4 is basically what many of the members of the Mine
5 Workers, including myself, have tried to reiterate:
6 There needs to be a balance here. MSHA didn't create
7 the Small Mines Division because they didn't recognize
8 there was a problem with small mines. MSHA didn't
9 have the tri-state initiative because they didn't
10 realize that small mines in tri-state Kentucky, West
11 Virginia in that area, and Virginia didn't have a
12 problem. That's what those were about. Those are, in
13 some instances -- not always, but in some instances --
14 problem children. They need compliance in many
15 instances much more than the larger operators.

16 Now, that needs to be looked at. And if
17 somebody mentioned before, they said, are you
18 suggesting we find them harder? If they can't comply,
19 you fine them as hard as you can. No consideration,
20 no special carrots. You fine them as hard as they
21 can. And if they stay in business, they stay in
22 business. Because quite frankly, if they can't afford
23 to pay the fine, they can't afford to operate safely.
24 We need to look at those issues.

25 I've never been shy, whether it's in open

1 meetings or whether it's for the operators telling
2 them I don't mind spending their money on new
3 equipment or fines. It doesn't matter to me, I'll
4 spend their money, it's easy for me. But that goes
5 for small operators, too. They need to be held to
6 exactly and precisely the same standard. And we would
7 hope that we would be able to accomplish that through
8 this rule.

9 Finally, collection of penalties. You
10 missed the opportunity. There are operators out
11 there, and you know, I used to go to the anthracite
12 region on a frequent basis. And I'm not sure they
13 understand why we inspectors give them a piece of
14 paper, because most of them don't pay anyhow. You
15 know, they tack it up on the bulletin board, and
16 that's the end of it.

17 We have some operators in Kentucky that I
18 know you initiated a lawsuit against at least one.
19 But in this rule you had the ability to put some teeth
20 in it and say if after the assessments are final, and
21 after we have gone through the process, if you don't
22 pay your bill, you don't run coal. Or you don't run
23 whatever product you're producing.

24 Now, that can be done in many ways. You can
25 simply say you're not going to run any more, or you

1 can say you don't have a ground control plan that's
2 approved any more, you don't have a ventilation plan.
3 However you want to do it is fine with me. But
4 there's got to be some way to say the operators who
5 basically thumb their nose after the process is done,
6 you get that money. That's what they understand.
7 I've made that argument on many, many different rules.
8 That's what they understand. If they're not in your
9 pocket, they don't care if you're there.

10 That's unfortunate, but that's reality. You
11 know, in many instances the only thing that keeps us
12 from being in 1940 again is the 1977 Mine Act. And
13 that's the reality.

14 And I'll be happy to take any questions or
15 try to give another shot here or there if I can.

16 MS. SILVEY: I don't have any questions. I
17 have one comment. In your comment, one of your
18 earlier members had said so, too, when we ask for
19 information on the controlling entity. And one of
20 your earlier members had said that might be difficult
21 to do to get information. And you called it like a
22 paper chase.

23 And the only thing I wanted to ask you was,
24 do you envision or see any alternative as another way
25 of getting at getting more information on controlling

1 entities? You mentioned a mom-and-pop contractor for
2 A&M Coal Company -- I'm making up the coal company --
3 but I think we agree with that, that that is sort of
4 like difficult to get some of that information on
5 controlling entities. And if you found another way
6 that we might get that information on controlling
7 entities.

8 MR. BAKER: And for a lot of different uses
9 we attempt, in the union, to collect that information.
10 That is extremely difficult information to -- and
11 especially with the nature of the industry right now,
12 because there are mergers and there are spin-offs.
13 And so those things become difficult.

14 MS. SILVEY: Right.

15 MR. BAKER: And I think you work from both
16 ends. And I'm not sure what the answer is. I will
17 certainly talk to some of the folks in our contract
18 department. They have a lot more experience.

19 MS. SILVEY: Yes. And the other thing, on
20 connections. We have, how should I say it? Keith can
21 say it better than I can say it. We have been very
22 active, for lack of a better word, in the collection
23 department with respect to forwarding the civil
24 penalties that are over 180 days, in accordance with
25 the Debt Control Improvement Act, DCIA, and forwarding

1 that to the Treasurer. And then we forward it to the
2 Treasury, and the Treasury will take over then.

3 But we have been, if I'm not mistaken, very
4 active, and have been successful in getting a lot of
5 it over to Treasury.

6 MR. BAKER: And I understand that. I
7 understand that. I come from the perspective of once
8 you get it over to the Treasury, that doesn't
9 necessarily mean they're going to pay the bill.
10 Because, you know, as you go through the process --

11 MS. SILVEY: That's true, that's true.

12 MR. BAKER: -- you see delinquencies on the
13 whole thing.

14 MS. SILVEY: That's right, that's right.

15 MR. BAKER: So the question becomes is there
16 not the ability -- and I believe there is. I believe
17 that there is a real tough mandate set out from
18 Congress saying there's something wrong here, and we
19 need to reevaluate a whole lot of things, including
20 penalties and assessments and all those things.

21 And I think there is the ability here based
22 on that to have the agency say to Treasury then, okay,
23 if you're unable to collect after a certain period of
24 time, we need to be notified. Because we're going
25 back to the operator and saying the ballgame's over.

1 You don't want to pay your bills, that's not a
2 problem; you're not going to mine either.

3 MS. SILVEY: Yes, I understand.

4 MR. BAKER: So I mean, there's got to be
5 some back-and-forth. Because as you know, if you go
6 on the website in data retrieval, you can find
7 delinquencies. And it's not all. It is those, it's
8 almost like you get that 20 or 25 that really don't
9 care, and they're just not going to pay.

10 And that's fine. They don't have to pay if
11 they don't want to. The agency should have the
12 ability to say you don't have to pay, but you're not
13 going to continue to operate. So that's pretty basic.
14 You know, if you don't pay your bills, you're losing
15 your house, I guarantee you that. The bank's not
16 going to care. We should operate under kind of the
17 same, the same mandate.

18 And I will take some of the questions that
19 I've heard from the panel and other things and
20 hopefully have some answer in a couple of days in
21 Pittsburgh.

22 MS. SILVEY: Okay. Pittsburgh, okay.

23 MR. BAKER: But I appreciate the
24 opportunity. And I know I don't say this often
25 enough, but you have a tough job, especially the guy

1 that's supposed to sit on the panels, because you get
2 beat up routinely. And we do appreciate the
3 opportunity to speak. We do appreciate your
4 willingness to listen. And we do appreciate the fact
5 that we can disagree and continue on to the next
6 subject, and maybe agree on those things.

7 But we would like to see some more teeth to
8 this.

9 MS. SILVEY: Thank you.

10 MR. BAKER: Thank you.

11 MS. SILVEY: And we appreciate your coming
12 and providing your testimony, too.

13 Before you leave, though, I had one comment
14 I wanted to make to Ms. Bailey. I had it written
15 down, and then I didn't say it. And that is, with
16 respect to -- Ms. Bailey, can you hear me?

17 MS. BAILEY: Yes.

18 MS. SILVEY: With respect to the Jim Walters
19 case. Because we were discouraged by what the ALJ did
20 in that case, too, with the reduction of the penalty.

21 And as you may know now that the case was
22 appealed, and the case has been remanded back to the
23 judge, too. And I don't know exact directions that
24 the judge gave, has been remanded back to that
25 administrative law judge to issue, to review, to look

1 at the citations and the penalties that were issued in
2 that case, and to make a new finding. Is that
3 basically it?

4 MR. WATSON: Reevaluate.

5 MS. SILVEY: Reevaluate. To make a
6 reevaluation. So at least the administrative law
7 judge who did it, they have to look at it again. So
8 that's not saying how it's going to come out, but it's
9 been remanded back to that administrative law judge
10 for further evaluation.

11 MR. BAKER: But it is my understanding that
12 of the contributory violations, not all of them were
13 remanded. It was only the two that were assessed for
14 \$3,000. That was my understanding. Maybe I'm correct
15 that the other five that he threw out are gone.
16 That's my understanding, from reading the decision.

17 MS. SILVEY: Yes, I think it was the ones
18 that were assessed, right. But that's still something
19 that he's got to look back at.

20 MR. BAKER: Sure. And I mean, it's a shame.
21 It's a shame, because 13 miners.

22 MS. SILVEY: Okay, thank you.

23 MR. BAKER: Thank you.

24 MS. SILVEY: All right. That is the persons
25 and organizations who requested to speak. Is there

1 anybody in the audience who wishes to speak? Anybody
2 in the audience who wishes to speak?

3 Well, if nobody in the audience, nobody
4 remains who wishes to speak, then at this point, on
5 behalf of the Labor Department, I want to express our
6 sincere appreciation to all of those of you who came
7 today, and who provided your comment and testimony on
8 the agency's proposal.

9 I also want to give our appreciation to
10 those of you who came and just showed an interest in
11 the proceedings, but did not provide testimony. We
12 appreciate that, also. We appreciate your interest in
13 mine safety and health.

14 And I want to particularly again express our
15 condolences to and our appreciation to the members of
16 the Sage families who came and provided their
17 testimony, and continue to provide input into mine
18 safety and health.

19 As I stated earlier, we will be in
20 Pittsburgh on Thursday, October 19. The record will
21 close on the 23rd. And anything that you heard today
22 that you want to provide additional comment and
23 testimony to us, feel free to send it to me, give it
24 to me.

25 And with that, the proceeding is concluded.

1 Thank you very much.

2 (Whereupon, at 12:13 p.m., the hearing in
3 the above-entitled matter was concluded.)

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REPORTER'S CERTIFICATE

DOCKET NO.: n/a
CASE TITLE: Public Hearing on Proposed Rule
HEARING DATE: October 17, 2006
LOCATION: Charleston, West Virginia

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Department of Labor.

Date: October 17, 2006

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