TRANSCRIPT OF PROCEEDINGS

U. S. DEPARTMENT OF LABOR }
OFFICE OF STANDARDS, REGULATIONS AND VARIANCES }
MINE SAFETY AND HEALTH ADMINISTRATION }

AB14-HEAR-TRANSCRIPT-1SS
AB14-HEAR-TRANSCRIPT-1PV

Pages: 1 through 271

Place: Washington, PA

Date: May 6, 2003

HERITAGE REPORTING CORPORATION
Official Reporters
1220 L Street, N.W., Suite 600
Washington, D.C. 20005-4018
(202) 628-4888
hrc@concentric.net

BEFORE THE DEPARTMENT OF LABOR

U. S. DEPARTMENT OF LABOR }
OFFICE OF STANDARDS, REGULATIONS AND VARIANCES }
MINE SAFETY AND HEALTH ADMINISTRATION }

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)

SINGLE SAMPLE/PLAN VERIFICATION PUBLIC HEARING

PUBLIC HEARING

Holiday Inn at the Meadows
340 Racetrack Road
Fireside Room
Washington, PA

Tuesday,
May 6, 2003

Heritage Reporting Corporation
(202) 628-4888

U.S. DEPARTMENT OF LABOR MAY 2003

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)

SINGLE SAMPLE/PLAN VERIFICATION PUBLIC HEARING

HEARING PANEL MEMBERS

1.	MODERATOR	MARVIN NICHOLS, Director, MSHA Office of Standards, Regulations and Variances
2.	BOB THAXTON	Committee Chair and Technical Advisor, MSHA Division of Coal Mine Safety and Health
3.	LARRY REYNOLDS	Attorney, MSHA Office of the Solicitor
4.	GEORGE NIEWIADOMSKI	Mine Safety and Health Specialist MSHA Division of Coal Mine Safety and Health
5.	JON KOGUT	Mathematical Statistician, MSHA Division of Program Evaluation, Information Resources
6.	RON FORD	Economist, MSHA Office of Standards, Regulations and Variances
7.	PAMELA KING	Regulatory Specialist, MSHA Office of Standards, Regulations and Variances
8.	DR. LEW WADE	Associate Director of Mining Research, National Institute for Occupational Safety and Health (NIOSH)
9.	FRANK HEARL	Senior Advisor, Office of the Director (NIOSH)

P R O C E E D I N G S

(8:30 a.m.)

MR. NICHOLS: Okay. Can you hear me in the back? You can't hear? Can you hear me now? Okay, good. Are we on the record? Okay. I want to thank you folks for being patient. I think we misled our court reporter on the starting time. We normally start the public hearings at 9 o'clock, but we anticipated a full day today, so we wanted to start all of our dust hearings at 8:00 a.m., so we're at 8:30, so we're earlier than normal, but we will try to start the remaining five hearings at 8 o'clock sharp.

My name is Marvin Nichols, and I'm the director of the office of standards for MSHA, and I'll be the moderator for today's public hearing. On behalf of assistant secretary Dave Lauriski, for MSHA and Dr. John Howard, director of NIOSH, we want to welcome all of you here today. Today's public hearing is being held to receive your comments on two related MSHA regulatory actions. First, we have reopened the record for comment on the joint MSHA/NIOSH single sample proposed rule that was originally published on July 7, 2000. Second, we have reproprosed the plan verification rule. It was published in the Federal Register on March 6, 2003.

Your comments today will be included in the

record for both proposed rules. The two proposed rules are based upon the 1996 recommendations of the Secretary of Labor's advisory committee on the elimination of pneumoconiosis, and the comments received in response to the previous proposed rule published in 2000. These rules are intended to eliminate black lung and silicosis by eliminating minor overexposures.

They completely change the federal program for controlling, detecting, and sampling respirable dust in coal mines. The emphasis of the new program will be on verified engineering controls, so that miners are protected on every shift. Let me now introduce the panel.

To my right, from NIOSH, and representing the Centers for Disease Control and Prevention are Dr. Lew Wade, associate director of mining research; Frank Hearl, senior advisor in the office of the director. Frank and Lew join us because a single sample rule is a joint effort between MSHA and NIOSH. And at the end of the table is John Kogut, mathematical statistician, office of program policy and evaluation with MSHA; to my left is Bob Thaxton, the technical advisor in Coal Mine Safety and Health; next to Bob is Larry Reynolds, office of the solicitor; and at the end of the table is George Niewiadomski, mine safety and health specialist, Coal

Mine Safety and Health.

We also have Pam King from my office at our sign-in desk, and if you've not yet signed in, we would like for you to do that, to get an accurate representation of the number of people attending. And also, if you wish to speak, I have a sign-up sheet up here, but there's another one in the back, so just start a new one. If you haven't already signed in and you wish to speak, please do that.

Let me first mention how today's hearings will be conducted. As with all of our hearings, the formal rules of evidence do not apply at these hearings, and the hearings will be conducted in an informal manner. Those of you who have notified MSHA in advance will be allowed to make your presentations first. Following these presentations, others who request an opportunity to speak will be allowed to do so. I would ask that all the questions regarding these rules be made on the public records, and that you refrain from asking panel members when we're not in session. The reason we do this is that we want to get all the discussion of these rules on the record.

Following the completion of my opening statement, Bob Thaxton will give an overview of the new proposed plan verification rule. Following Bob's

presentation, we'll take a short break, and then we'll start receiving your comments. A verbatim transcript of this hearing is being taken, and it will be made available as part of the official record. Please submit any overheads, slides, tapes, and copies of your presentations to me, so that these items may be made part of the record.

The hearing transcript, along with all comments that MSHA has received to date on the proposed rule, will be available for review. We intend to post a copy of the transcript on the MSHA web page at WWW.MSHA.Gov. If you wish to obtain a copy of the hearing transcript before then, you should make your own arrangements with the court reporter.

We are also accepting written comments and data from any interested party, including those who do not speak here today. You can give written comments to me during the hearing, or send them to the address listed in the hearing notice. If you wish to present any written statements or information for the record today, please clearly identify them. All written comments and data submitted to MSHA will be included in the official record, and an attendance sheet, I've already mentioned, is in the back.

Due to the requests from the mining community,

the Agency will extend the posthearing comment period for the plan verification proposal from June the 4th to July 3, 2003. The notice announcing the extension will be published in the Federal Register this week. We also anticipate extending the comment period for single sample, but that decision will only be made after a consultation with NIOSH, since it's a joint rule between MSHA and NIOSH.

As you know, we have scheduled five additional public hearings on the two proposed rules. The additional hearings will be in Charleston, West Virginia, on May the 8th; in Evansville, Indiana, on May the 13th; in Lexington, Kentucky, on May the 15th; in Birmingham, Alabama, on May the 20th; and in Grand Junction, Colorado, on May the 22nd. As I mentioned earlier, we plan to start all the hearings at 8:00 a.m., and we'll end the hearings when the last scheduled speaker speaks.

Before we begin, let me give you some background on the two proposed rules. First, the single sample proposed rule, which was originally published on July 7, 2000, would allow MSHA to make compliance determinations on single-sample results. The Agency would no longer use the averaging method to determine if miners are overexposed to respirable dust. Averaging these samples can mask individual overexposures by diluting a high

sample with a lower concentration taken on another shift.

Using single-sample measurements, rather than averaging multiple samples, for compliance purposes, will better protect miners' health. Since samples can identify and remedy excessive dust concentrations more quickly. Single-sample measurements have been used for many years by OSHA, and at metal and nonmetal mines in this country. MSHA AND NIOSH are jointly reopening the rulemaking record for this proposed rule, to provide an opportunity for you to comment on the new information in the record concerning MSHA's current enforcement policy, the health effects, quantitative risk assessment, technological and economic feasibility, and compliance costs, which has been added since July 2000.

For example, we updated the preamble to include the most recent information on the prevalence on coal mine workers pneumoconiosis or CWP, or black lung examined under the miners choice program during the period 2000 through 2002. These findings show that miners continue to be at risk of develop CWP under the current dust control program. The quantitative risk assessment is based on additional and more recent data. None of the new information changes the actual findings published in the Federal Register on July 7, 2000. The single-sample issue has been through a long public

process, which is outlined in the preamble to the proposed rule.

The second regulatory action is the reproposed plan verification rule. This proposed rule supersedes the one published on July 7, 2000. MSHA held three public hearings on the prevented proposed rule here in August of 2000. Many commenters urged the Agency to withdraw the earlier proposed rule and go back to the drawing board. Some commenters believe that MSHA had failed to adequately address their concerns, the reforms in the Federal Dust Program recommended by the Dust Advisory Committee, by NIOSH in its criteria document, and reforms urged by coalminers submitted in the 1970s.

After carefully considering all the facts, issues and concerns expressed by commenters, MSHA is proposing a new rule in response to the comments made to the July 7, 2000, proposed rule. And as I mentioned earlier, Bob Thaxton will now give us an overview of the new plan verification rule. And also, as I mentioned earlier, we'll give Bob's presentation on the screen, and then we'll take a short break, and then we'll start receiving comments.

MR. THAXTON: Okay. Can everybody hear me okay? What we'd like to do is, walk through real quick a briefing on both the single-sample and plan verification

rules. It's combined, because it's a package. So what we'll do is walk through. This package consists of two rules. The significance of the two rules is that, one, it develops effective plans, and it has two components, that is, that were involved in the control of dust, as well as monitoring that effectiveness of those controls.

Under single-sample, the single-sample rule comes out with a new finding that says that the average concentration can be accurately measured over a single shift. That's different from what we've had in the past. This rescinds the 1972 finding on the accuracy of a single shift. That '72 finding said that we should be using the average of multiple samples.

Lastly, the single sample does have a standard that says that the secretary may use single, full-shift measurements to make the determination of the average concentration that a person's exposed to over the shift that we measure. Under plan verification, each underground mine operator must have a verified ventilation plan for dust controls. He must also have a plan that would be verified under actual mining conditions by operator samples.

MSHA will assume the responsibility for compliance and abatement sampling in underground coalmines, and only underground coalmines. This rule

does not affect surface mines. MSHA samples will be used to set reduced standards, due to the quartz. There will be no more operator optional samples or bimonthly samples used to set the standards.

Under the verification of the plan, to get a better understanding of what's changed, we're doing a comparison of what we currently do under the current regs versus what this proposal incorporates. Under current conditions, MSHA sampling is used to approve a plan. The plan is approved based on the average of multiple samples. At the very least, MSHA took five samples on five different occupations over a shift, four multiple samples over multiple shifts.

The samples were full shift, eight hours or less, portal to portal, and they were collected at 60 percent of average production. The 2003 proposed rule shifts that the operator will sample to verify the effectiveness of the plans at underground mines. It does not affect the plans that are approved at surface mines. The sampling that will be conducted will be full-shift samples, production time. That is, the samples will be turned on when you enter onto an MMU. They will be turned off when the miners leave the MMU. MMU being a mechanized mining unit.

They will be sampled at higher-than-average

production, and we'll go into how high the production level will be a little later. There are separate quartz and coal mine dust verification limits. We look at each one separately on each operator sample submitted. It also permits the use of PAPRs or administrative controls on any mining unit, only as a supplemental measure after exhausting feasible engineering controls.

What's in the plan? Under the current rule, MSHA sampling is conducted at 60 percent of the average production, and there are no records of production required to be maintained. So that 60 percent is usually determined by just talking with people, the inspector trying to figure out what's been the average. Then he calculates what 60 percent of that is, and that's what the samples are taken at. If it meets that, they're considered valid.

Under the 2003 proposed rule, we will require the 10th highest production level to verify a plan effectiveness. It also requires the recording of the production, and maintaining those records for six months. Those records will be recorded for each shift, and it's raw tonnage. That is, no matter what type of material is made, it is mined, whether it's rock or coal or something else, it has to be recorded as total tonnage.

What is the 10th highest production? This chart

is a sample of what we're talking about. This is production represented for 30 different shifts on an actual long wall out of district three. That's our Morgantown office. If we did what we're doing right now, MSHA collects samples at 60 percent of average. Well, the average production was 6,295 tons. 60 percent of average brings us down here to just over 3,500 tons. So MSHA would collect samples at this level, and say that they are valid under current policies and procedures. Operator samples that are collected bimonthly are only at 50 percent.

We were asked in the past to move this up to 90 percent of average. Well, you can see that 90 percent of average is still less than the average, naturally, of what the MMU is producing. What we're pushing in this particular proposal is the 10th highest, which pushes us up to the 67th percentile. What that means is that two-thirds of the shifts are going to be less than the 10th highest, one-third of the shifts will be higher. So you're taking samples at a production level that represents a relatively high production for that MMU, and represents more closely to what the maximum that people would be exposed to.

Use of PAPRs, or powered air purifying respirators. Under the current rule, PAPRs or

respiratory protection can be used. Under 72-700, if people follow the -- if operator follow the protection program that's listed there, and they provide people with respiratory protection. It can result in a citation that's being issued for overexposure being designated as non-S&S. That is, that the protection provided by the respirators under a respiratory protection program will lend themselves to say that being are being protected enough that you would not class this citation as significant as substantial, in that you have some reason to believe that the people were protected to some degree, at a lower level than what's represented by the samples.

Under the 2003 proposed rule, it permits the use when all feasible engineering controls have been exhausted. That is a determination that's made by the Agency as to when feasible engineering controls have been exhausted. So we will be making that determination, based on the information that's available for each individual MMU.

Only loose-fitting powered respirators with MSHA and NIOSH approval may be used. At this time there is only one unit that meets that criteria, and that is the Racal 3M Airstream helmet.

You must provide a respiratory protection program as part of the approved ventilation plan. The

approved plan will incorporate all the provisions of a respiratory protection program into that approved plan. It becomes the regulation or law for that particular mine and that particular MMU. Failure to follow any portion of it can result in violations.

It must maintain dust levels as low as possible with feasible engineering controls. When we come in and an operator determines that, I've done all I could, I can't do anything else, if the Agency comes in and says, we agree, you've put in all feasible engineering controls that are possible. All feasible engineering controls are capable of getting the MMU down to, say, 2.5 or 2.8 milligrams. They would be expected to maintain the 2.5 or 2.8. Whatever level that they could get to, it has to be maintained, and then the respiratory protection program would be supplemental to that. So we are not allowing operators to remove engineering controls, just because they put a respiratory protection program in. They must maintain all controls that are considered feasible for that particular MMU, and maintain the dust levels as low as possible with all the controls that are available.

There will be a protection factor assigned between 2 to 4, depending on the ventilating air velocity, assigned to the mining section. We're not

assigning protection factors to the particular respirator. We're taking the stance that we're assigning the protection factor based on where the units are used. The protection factors that we're assigning to these particular units are depending on the face velocity -- the amount of air that's blowing past the respirator. So we take that into account. And so that protection factor is actually assigned to the MMU, and is specified in the approved plan.

If a protection factor of four is used, the protection factor of 4 is used, the protection factor of 4 indicates that the air being breathed by the miner is one-fourth the concentration of the air outside the PAPR. That's all that means.

The sampling requirements. Under the current requirements, operators collect bimonthly sampling at underground mines. And like I said, this only applies to the underground portion of the mining industry. Citations are issued for failure to submit required samples. Citations are also issued for exceeding the applicable standard. Operators collect abatement samples to determine compliance after citations are issued. So it depends on the operator for determining whether an abatement has been accomplished or not.

MSHA quarterly sampling is conducted on MMUs,

section DAs, and Part 90 miners under current procedures. We issue citations for exceeding the applicable standard based on the average of multiple samples taken by MSHA. And currently that requires five consecutive days or five consecutive shifts on our part to get five samples, in order to average to determine noncompliance at this time.

Under the 2003 proposal, the operator will be collecting plan verification samples for the initial approval, and then designated MMUs will collect one sample each quarter, for continued confirmation of the control's effectiveness. And what that means is that the operators will be collecting anywhere from one to five samples to verify their plan, and they have to verify at two different levels -- respirable dust and quartz -- separately. If they meet certain criteria, they may also be required to submit a sample once each quarter, to show that their plan continues to be effective.

There are no citations issued for exceeding the applicable standard, based on those samples. We're in the process of trying to verify the plan's effectiveness, and how effective those controls are. We're not using those samples to determine compliance with the 2-milligram standard. Even though we're not issuing citations for exceeding the applicable standard, the operator must take action to reduce the concentration

where samples exceed the standard. Failure to take corrective action can be a citation under our regulation -- under the proposed regulation.

MSHA collects all samples to determine compliance and abatement of citations. All MSHA determinations will be made an a single full-shift measurement, and citations issued for exceeding the applicable standard. The citation level we'll get into on another slide.

Compliance/noncompliance determinations. Under the current rule, the average of multiple samples are used to make compliance/noncompliance determinations at all coal mines. Under the operators program, five samples collected on an MMU -- DA, DWP if there's a high sample -- those five samples' average are required to determine whether there's a citation or not.

The average of the five samples in five different shifts. If the average concentration exceeds the applicable standard by one-10th or more, a citation is issued because noncompliance is indicated.

Under the 2000 (sic) proposal, we will use single-sample determinations at all coal mines, surface and underground. The single-sample portion of the package applies to both surface and underground mines, and so MSHA will be applying the single-sample

determinations on both surface and underground mine operations.

As an example, the noncompliance level for somebody on a 2-milligram standard is 2.33. The 2.33 or greater would result in a citation for exceeding the 2 milligram standard. The 2.33 gets the Agency to a 95-percent confidence level that the 2 milligram standard has been exceeded on a single sample.

Citation levels that correspond to the 2 milligram and all standards below that are specified in the rule itself. So there is a chart in the rule, whereas the 2000 proposal did not list those. They were only issued as sampling procedures. This time, they are specified in the rules.

The odd shift examination of controls. Under the current rule, there is a requirement that at the beginning of each shift, under part 75, the operator has to go through and check all the respirable dust controls that are specified the plan, to see that they are actually working as specified in that plan. If they do not stop production, they hot seat, then it has to be done within the first hour.

We have not changed that under the current proposed rule. There is no change in this particular requirement. It maintains that. However, we will be

getting plans that we think are more detailed and more involved, so there is going to be a greater impact from doing this beginning-of-the-shift check to make sure those controls are in place and working properly. There is going to be more to that.

Miner participation. Under the current rules, miners have a right to accompany, with pay, MSHA personnel during MSHA sampling. Also, operators notify miners representative of plan submission/revisions. They post them on the bulletin board, and the miners rep can submit comments then to the Agency to consider, while that plan is going through approval.

Under the 2003 proposed rule on miner participation during operator sampling, the operator is required to notify miners of the date and time prior to verification/quarterly sampling, so that the miners know when this is coming. And it has to be done in advance. The miners must be provided an opportunity to observe that sampling, but there is no guarantee of pay, so it can be done at the miners rep's own desire, as to whether he wants to watch it or not. If the miner that's being sampled is watching it, then he's already sitting there. The sample's in his area, so he can watch it.

Miner participation during MSHA sampling. It's the same as current. Miners have the right to accompany

MSHA, with pay, during any MSHA sampling, whether it's compliance sampling or abatement sampling, or any other type. The operator notifies the miners reps, again, of plan submissions, posts them on the bulletin board, and the miners rep, again, has the right, as he does now, to submit comments while the Agency is reviewing a plan to determine whether there's any comments that need to be addressed as far as the miners.

The use of personal continuous dust monitors, or PCDMs, as most people call them. The current rule. There's no consideration for those types of units. Under the 2003 proposed rule, any unit that the Secretary of Labor approves, with a conversion factor that gets it back to the current gravimetric sample technique can be approved to use under this particular rule. Designated miners must wear, for the full shift, portal to portal. If somebody opts to use PCDMs, then those miners that are designated to wear a PCDM must wear it portal to portal, each and every shift.

Permits the operator to use administrative controls without first exhausting engineering controls. Because the PCDMs are monitoring each individual's exposure, it's up to the operator to take those exposure measurements and make adjustments accordingly, to keep people from being overexposed. They can utilize anything

that's available to them at that point that can be administratively.

No citations for overexposure. Again, this is another reading similar to what the verification samples are, but the operator still may be cited for failure to take action to reduce overexposures. So anytime a PCDM indicates an overexposure, it's the same as any other sample result that the operator would receive that shows overexposure. They have to take corrective action. Failure to take corrective action to lower that can result in a citation.

What type of benefits are coming from these particular programs. This rule package, we think, provides plan parameters that reflect actual mining conditions that have been verified at a high production level. No operator-collected samples used to determine compliance. Protection for miners when feasible engineering controls have been exhausted. And it makes provisions for the use of personal continuous dust monitors when they become commercially available.

One of the reasons that we're going through this and trying to put out these two new rules is that there will be a reduction in CWP because of it. The projected benefits for the combination of both single-sample and plan verification being put into place is that we will

have a net reduction of 42 CWP cases, and they're broken down by DO, which the continuous miner operator; sheer operator or somebody like that; the NDOs, which are the shuttle car operators, bratticemen, miner helpers, those types of people; and then RBs, roof bolters, because of their high exposures to silica. So a total of 42 reduced cases, on our conservative estimate of the date that we have available.

As an example of how some of this will work, because in addition to these two rules, the Agency has put on its web page a copy of what we consider our inspection procedures that have been drafted, and if the rules don't change, this is how the Agency would proceed with doing our inspections. So a combination of the information that's in there, how we would do our inspections, along with what's required in the rule, we've come through and prepared a few sampling scenarios that we'd like to walk through.

On the first scenario, the operator collects his first verification sample, gets a concentration of 1.6 milligrams of dust, 72 micrograms of quartz on the miner operator; 1.70 milligrams on the roof bolter, with 92 micrograms of quartz. Under the criteria that's in the regs, we cannot verify the plan based on that first shift of samples. The verification critical values for one

sample is 1.71 milligrams of respirable dust, and 87 micrograms of quartz.

What that does is, it gives us the 95-percent confidence. The same 95-percent confidence we use for writing the violation of 2.33, we apply to the 2 milligram and 100 micrograms of respirable dust in quartz, because on one sample we want to have 95-percent confidence that they are meeting that level to verify the plan.

Because you have the one sample that's at 92 micrograms of quartz from the roof bolter, that means that that shift cannot verify the plan. So the operator would be required to collect another sample. The second sample comes in at 1.63 on the miner operator, 71 micrograms of quartz, 1.69 on the roof bolter, and 91 micrograms. Now the Agency says, you have verified your plan based on two samples. The critical values when you have two samples collected moves the respirable dust to 1.85, and moves the quartz up to 93.

And what we look at is all samples collected. So all four samples have to be looked at, and none of them can exceed those two limits. If that occurs, then we say we have verified the plan with 95-percent confidence that we have met the 2 milligrams and 100-micrograms standard, so that we can say that the plan

will work.

Now, we say 100-microgram standard. We don't actually have spelled out in our regulations a 100-microgram standard for quartz. What the regulations call for is a reduction of standards for respirable dust when you exceed 5 percent. 5 percent of 2 milligrams is the equivalent of 100 micrograms. And that's what we apply to each individual quartz reading.

So we've got an operator now that has verified the plan based on these concentrations. MSHA comes in and collects its first bimonthly sampling according to our inspection procedures. We sample five different occupations, and we get concentrations that are probably hard for you to see, because it's rather small, of 1.62 on the miner operator, with 78 micrograms of quartz; 1.71 on the miner helper; 1.41 on the shuttle car; 2.38 with 138 micrograms on roof bolter operator number 1; 2.42 and 141 micrograms on roof bolter number 2.

Based on that MSHA survey, the operator will receive one citation for the roof bolter occupations, because they exceeded the 2-milligram standard CTV, which is a citation threshold value, and that's where we come up with the 2.33 on 2-milligram standard. They exceeded that 2.33 on the two roof bolter occupations, because both roof bolter occupations are associated with one dust

-- source; one roof bolter, two operators, double-head machine. We write one violation, because actions that are taken in that area to reduce the dust will affect both occupations.

The operator must take the corrective action, and must notify MSHA within 24 hours of that action being implemented. The reason for that is because the Agency will be the ones that have to come back in and collect the abatement samples. We will either collect abatement samples, or, if we see that there has been a sufficient change in the controls that have been necessary on that section, we may put the operator back into verification of a plan, which would have to be sampled by the operator.

MSHA will collect two additional shifts, though, of samples in the next -- it says 30 days here, but this is actually 15 days -- to establish the quartz level and set the appropriate standard. We have a situation of a section where there is no current reduced standard. They're on a 2-milligram standard. We now come in, MSHA collects a sample and says, this entity is exposed to greater than 5-percent quartz, and should be on reduced standard.

We don't wait until we get two additional samples, because all quartz analysis is based on the

latest three MSHA samples. Rather than wait, because we have an indication of potential overexposure, we schedule to come back and collect two additional shifts of samples within 15 days, so that those samples can be sent in quickly, so that we can get the average of three MSHA samples. And we will set a reduced standard that's appropriate for that particular entity.

At the same time, the operator must sample the MMU quarterly, to establish the continued effectiveness of the dust controls in the approved plan. Anytime an operator gets a sample that exceeds the standard, MSHA will designate it then as requiring quarterly sampling, and that the operator then will have to collect a sample once each quarter, and it has to be sampled at the same conditions as what was done for verification. And that sample is submitted to the Agency. We look to see that it still confirms that the plan is effective or not.

Sampling scenario two. We're using the same samples up here. The operator collects the first and second verification samples. These are the exact same numbers we used on the previous example. The plan, again, is verified based on those two samples.

What we've changed here on this one, I've changed the MSHA survey. Now on the MSHA survey, all samples are less than the standard. We have a 1.62 on

the miner operator; 1.61 on the miner helper; 1.21 on the shuttle car; 1.41 on the roof bolter one; 1.48 on roof bolter two. The quartz levels are 78 on the miner operator; 55 on roof bolter one; 47 on roof bolter two. What this indicates is the compliance based on a single shift on all occupations. There are no citations. There's nobody overexposed based on the one shift of samples.

However, there's another level to this. Under our inspection procedures, MSHA needs to determine whether this is an entity that gets sampled the next bimonthly period, or is it one that we would skip, because they are meeting the standard. Your production, though, during MSHA sampling is 750 tons. The VPL -- or the production that's required for the verification -- is 800. Ventilation during MSHA sampling was 10,000 CFM. Plan quantity that's required is 9,800.

What we do is, we do an evaluation of that highest dust concentration, and highest quartz concentration, based on those numbers. So we apply a factor to the concentration of dust and quartz. The 1.62-milligram dust concentration was the highest, so we apply a factor of the tonnage that's specified in the plan, divide it by the tonnage that we found while we were sampling.

If anything, we're going to get lower production during the time that we're sampling, because the VPL is only available one-third of the shifts, and two-thirds of the shifts it's going to be less. That factor results in a factor that's higher than one, so it's going to increase the concentration.

We do the same thing with the ventilation. The plan calls for 9,800. We found 10,000. We come up with a factor for that. It's also greater than 1, so it's going to raise the concentration. Those two factors result in 1.62 milligram respirable dust being raised to 1.75. It results in the 78 micrograms of quartz being raised to 84. Based on those numbers, MSHA bimonthly sampling will be required on a bimonthly basis, because the 1.75 exceeds the critical value of 1.71.

Anytime MSHA collects a sample, we will make those determinations to determine whether people are qualified to be sampled the next bimonthly period or not. When we say that we're going to allow people not -- to skip a bimonthly cycle under the MSHA sampling program, it is only for those operations that truly demonstrate that they've got good controls in place that are going to result on compliance on, essentially, each and every shift.

The third and final scenario is the PAPR use

scenario. Here, we have mine A. For discussion purposes, it's a long wall. They've installed a shearer clearer, shield sprays, pan sprays. They have 500 feet per minute velocity along the face. And they have a production level of 16,000 tons per shift. This isn't saying that this is all the controls that are available for a long wall. We're just using this as an example that they have these things in place, and that we considered that to be all that is feasible at this particular operation.

MSHA makes that determination that all feasible engineering controls are in use. Based on that, the operator submits to use of PAPR appropriately. That means that a full program -- respiratory protection program has to be included with the ventilation plan. So it's going to spell out who has to wear, when they have to be worn, who's going to clean them, who's going to maintain them, who's the person that's in charge of the program at the mine that you can go talk to, what PAPRs are being made available. Anything and everything about the program has to be spelled out in that particular program in writing, and made part of the approved plan.

All miners working in by the shearer must wear PAPRs, in accordance with the approved plan. That's what this plan is going to call for, because it's in by the

shearer where they're going to have the high dust concentrations. The average velocity along the long wall is 490 feet when we go in and do our evaluation. To determine the protection factor that we will assign to this MMU for that, it will be 3.2. It's the quantity 2 times the 800 feet per minute, divided by 490 feet per minute. The 800 feet per minute is the factor that we have built into the rule. The 490 feet is the actual velocity going across the long wall face.

When you take the 2 times the 800 divided by 490, it equals 3.2. 3.2 is the factor assigned to that particular MMU, as long as they have 490 feet per minute velocity on that face. The plan will specify that they have to maintain all the engineering controls that were determined to be feasible by MSHA.

See, we make that feasibility determination. Everything that's on the plan or in place at that time has to be spelled out in the plan, so those controls become the minimum that they have to maintain. The equivalent concentration, if the person wearing the PAPR under these conditions was exposed to 2 milligrams of dust in the mine atmosphere. The equivalent concentration inside the PAPR would be .62 milligrams per cubic meter.

Where are we going with this? Just for your

information and background, we're going from 1970 to 2002. The purple bars indicate the prevalence of CWP, or black lung. This is data that's taken from the NIOSH world report. It's a compilation of the x-rays that are offered through the x-ray department that NIOSH administers. And then for 2002, it represents those x-rays that are initiated through the NIOSH program, as well as the Miners Choice x-ray program that was run for three years.

You can see that the prevalence of CWP has been dropping, but it is starting to level out, 2.9 to 2.8 from '95 to 2002. It's not dropping. And one of the parts of the requirements under our Act is that we want to try to get CWP down as low as possible. And we're not achieving the levels that we should be getting. Based on that, plus the fact that we have -- in the percents here, you'll see, is the percent of samples exceeding 2 milligrams for each year, as well as the bracketed amount is the average concentration of operator DO samples.

All these numbers are based on the percent exceeding 2 milligrams, and the average concentrations are based on the operator samples. You can see that we've started seeing a leveling off of data. We're not getting anywhere. So we're looking at the health side on respirable dust, the same as the administration is

looking at safety, and that we've leveled off. We need to do something else.

The last thing is that we'd like to demonstrate the effect of averaging. Why we think averaging is not getting us where we want to be. This is an example of actual concentrations submitted by an operator for a particular mine. And this is five samples collected on five different shifts on a continuous miner. We have one shift at 3.2 milligrams; the second shift at 1.6; the third shift at 1.5; the fourth shift at .8; the fifth shift is 3.1. The average of all five of those samples is 2.0.

The operator's in compliance. We can't do anything. But yet, we had two out of the five shifts where people were exposed to greater than 2 milligrams. With single-sample and plan verifications, this is what we want to get a handle on and stop. With single-sample and plan verification, we think that what we are proposing will get us to where we don't have those shifts that are exceeding 2 milligrams. That concludes the overview.

MR. NICHOLS: Okay, Bob. Thanks. Could I have your attention? Before we break, I'd like to ask Dr. Wade to give us an update on the status of the personal continuous dust monitors that have been in development

for a while.

DR. WADE: Good morning. I'm Lew Wade, and I work for the Mining and Research program of NIOSH, the National Institute for Occupational Safety and Health. The reason I'm sitting up here on this panel is because NIOSH joins MSHA in moving forward the single-sample rule, but that's not in the context that I'm going to give you this update. The reason I'm giving you this update is that NIOSH in its research program has as one of its goals the development of a personal continuous dust monitor.

Let me give you a little bit of background about what that is. Those of us in and around the industry have long sought a technology that would empower mine workers and mine operators to know, in real time, what their dust exposure was. We have undertaken this development over a number of years. We've now realized a technology that we think offers hope in this area. The technology really is a beam the vibrates, and the frequency of the natural vibration of that beam changes, depending upon the sample, the mass of dust collected at the end of that beam. So this now gives us the ability to look at real-time dust readings.

We've put together a device - we call it the PDM 1 -- that affords us this possibility. What the device

would do, for any shift up to 12 hours, was that at any point during that shift, it would give you an indication of what the dust level had been up to that point. It could let you look at the last 30 minutes. It would also allow you to project forward what the dust reading would be on that whole shift if the remainder of the shift was to see exposure that had been realized up to that point. So this is, again, a device that we see offering tremendous potential to empower mineworkers and mine operators.

Now to the status of where we are in this device. We have developed prototypes, and we've put those prototypes through a rigorous protocol in the laboratory. What we've learned through those laboratory tests is that we're very comfortable with the accuracy of the device, and this is the accuracy of the device, comparing it to the standard sampler that is used now. We've also looked at the effects of temperature variation and water sprays, and durability of the device in the laboratory, and in all cases we're very pleased with what we've seen.

We're now poised to begin the part of the protocol that looks at the underground evaluation. We'll take six of these devices, and we'll put them through their paces in the more rigorous underground environment.

We expect those evaluations to begin this month, May of this year, and proceed for one or two months. That would put us through June into July in terms of the underground evaluations. At the end of that point, we would evaluate the performance that we have seen during those underground tests.

Now, I need to point out to you that we at research are very optimistic about our ability to realize these schedules. Oftentimes things take turns and twists that extend these periods, but I'm giving you our best estimates. We would like the underground evaluations to start in May and be finished in July. An analysis of the data making the data available in an August, September time frame. I will tell you, for the record, that based upon the laboratory work, we are optimistic about the devices and what these devices will do in the underground evaluation. But until we go through the underground evaluation, we can't be sure, so those tests remain in front of us.

At the completion of an underground evaluation that was to be successful, we still have the hurdle of making these devices available from the private sector commercially. Again, NIOSH is not in the business of making such devices available. The private sector will have to step to the plate and determine if there is

sufficient market and interest for them to move forward with commercialization of those devices. So that's as succinct and, hopefully, an accurate an assessment of where we've been and where we are, relative to this elusive goal that we've had for a number of years of a personal continuous dust monitor

MR. NICHOLS: Thank you, Lew. I have 9:25. Let's take a 15-minute break and try to back in our seats ready to go at 9:45. And our first presenter after the break will be Carlo Tarley with the UMWA.

(Whereupon, a brief recess was taken.)

MR. NICHOLS: Okay. Let's try to get started. Our first presenter will be Carlo Tarley with the MWA.

MR. TARLEY: Good morning.

MR. NICHOLS: I failed to mention in my opening statement. Would you mind spelling your name for the court reporter, so we'll be sure to get the record correct?

MR. TARLEY: First name is Carlo, C-A-R-L-O. The last name is Tarley, T-A-R-L-E-Y. And I have a prepared testimony, but just one brief comment on the opening. If I understood right, MSHA says they crafted this new rule in order to heed the wishes of the coalminers, and also in an effort to eliminate black lung. It is our opinion that this rule clearly does

neither. That this rule, in fact, makes things both worse for the miner, and worse for with black lung victims.

And one other point I wanted to make. When Mr. Thaxton was making his presentation, at one point he referred to this as "this little package and what it does." But he didn't make it clear no everybody, although you have handouts, this is the little package. It's very complicated. It's double-sided. As a matter of fact, our technicians within the Mine Workers had to meet with MSHA on a series of meetings that consisted of about six or eight hours, just for them to have an overview of what the rule meant. So I don't want anybody to be misled that this is a simple rule contained in the summary documents that were handed out.

On March 6, 2003, MSHA issued proposed rules that are so highly complicated and confusing that miners and safety professionals could not understand them. They are laced with formulas, exceptions, and language that is nothing short of gimmicks, and is a regulatory nightmare. They have critical provisions hidden in the rules, only to be known by interpreting formulas and definitions. One such change in the rule would outrageously allow mine operators to increase the respirable dust levels in the mine environment where miners work. Four times the level

of the current dust level set by Congress in the passage of the 1969 Coal Mine Health and Safety Act.

AMTSA wants to let dust levels raise to the levels Congress refused to consider over 30 years ago. A number of the proposals in MSHA's rules will have the effect of allowing miners to be exposed to the levels of dust beyond that proscribed by Congress in the passage of the Mine Act. Those proposals include not sampling miners' exposures for the full shift; allowing the margin of error to favor the mine operator, and not the health of the operator before MSHA cites overexposure.

While miners argued to decrease dust levels in the nation's mines, MSHA did the reverse and increased them. When MSHA proposed to overhaul the respirable dust program in 2000, many miners went to public hearings to tell MSHA what they needed to improve the dust sampling program, to end overexposure to the unhealthy coal dust. It is clear from the rules proposed by MSHA on March 6, 2003, that MSHA did not listen to the miners. In fact, several of their new proposals, including the one listed above, were contrary to what miners called for and needed.

While miners called for increased dust sampling, in particular, continuous dust monitoring, the new MSHA proposals substantially reduce the amount of compliance

sampling by 80 to 90 percent in out-by areas and on working sections from that currently conducted. Some mining sections would have as little as three shifts of mining sections sampled a year, and out-by areas would have only one shift sampled a year for compliance.

The MSHA proposals eliminated the mandatory standards, with plans to conduct a few samples through an ever-changing Agency policy. The rules took away any guarantee that compliance samplings of those areas of mines would take place. Instead of substantially increasing the monitoring of dust levels in the nation's mines, MSHA proposed rules that substantially decreased the monitoring of the unhealthy dust.

Overwhelming evidence shows that improvements are needed to protect miners from pneumoconiosis, a disease often called black lung. Tens of thousands of miners have died from the disease, which destroys the lung and the respiratory system. NIOSH studies have shown that over 1,000 die each year from the disease. That's an average of almost eight per hour.

That disease has cost tens of billions of dollars compensating victims who are disabled from a disease. It has left a trail of destruction in communities throughout the coal fields. The latest figure from the Department of Labor shows that 106,519

federal black lung claims will be paid out this month, and another 7,000 by coal companies. Those figures do not include numerous cases of miners with partial disability paid through state programs, where there is not a federal award for compensations.

Studies released in April of this year of working miners' recent x-rays show miners are still getting the disease, with several hundred of those miners diagnosed with the disease. Evidence shows that respirable dust levels need to be reduced in the mine environment. The respirable dust sampling program has been wrought with problems for years. With limited sampling of the harmful coal dust, many mine operators have learned how to manipulate sampling and cheat the system. While many have cheated and got away with abusing miners' health, many have been caught. During the 1990s, over 160 companies and/or individuals were criminally prosecuted for fraudulent dust sampling.

The *Louisville Courier Journal* of Kentucky conducted an in-depth investigation of the dust sampling program in 1998, citing widespread fraud. Evidence shows that frequent sampling of unhealthy mine dust is needed to protect miners from the disease. The Mine Act, the Miners Federal Advisory Committee, and NIOSH have all called for improvements when it comes to coalmine dust.

Numerous provisions contained in the March 6, 2003, proposal are in direct contradiction to those. Several provisions violate both the spirit and the letter of the law. One proposal would have respirators replace engineering and environmental controls. This is not only in direct violation of the Act, but the specific type of respirator MSHA would mandate miners to wear has been faulty. And we find this particularly outrageous that, for over 30 years, we've been able to live with the 2-milligram standard, and to our knowledge, MSHA has not shut down one single coalmine as a result of them not being able to comply with the 2-milligram standard.

And then for today's miner, the level of dust can go as high as 8 milligrams, and this miner is going to be required to wear a helmet in order to protect himself. Keep in mind that this miner is going to be subject to this apparatus. Its failure to success is going to have a direct impact on that miner's health and that miner's life. If that thing's not properly maintained, or if it's faulty, and he doesn't know it, as we know, black lung doesn't reach out and kill you in one day, it goes over long periods of time.

The fact that we would tell anyone that, in order for you to work here, you have to wear this helmet. Otherwise, we know that this environment is so deadly

that you can't work it without this helmet. Therefore, here's this helmet, go in there and do the work. We did that in the 1920s. We're not interested in doing that again. And in rushing the March 6, 2003, proposal at a time when several mine accidents and several other major regulatory actions were ongoing, MSHA did not give those who needed to review the complex and confusing rules enough time to adequately review the newly proposed rule.

MSHA also did not wait for final testing of the device that would solve so many of the ills with the respirable dust program. That device, a worker-friendly continuous dust monitor that miners could wear every shift, every day to record dust levels and keep them out of the dust. That device, supported by labor and government, was going through the final testing following years of work supported by the UMWA, industry, and NIOSH. With final testing due this summer, the device long sought by monitors and promised by the government should have been the centerpiece for reforming the troubled respirable dust program.

Instead, MSHA proposals would let operators use it as an option, and written in a way that the option would not be exercised. Such a device needs to be required in each coal mine, for miners to have to protect themselves from unhealthy coalmine dust. When MSHA

proposed the rules on March 6, 2003, they sided with the mine operators, because the dust levels in the proposed MSHA rules substantially reduce the amount of respirable dust sampling in the nation's coalmines. They sided against the miners in a well-documented history that calls for lowering the dust level in the mine environment, increasing the frequency of sampling to protect miners from the dreaded black lung disease.

Who is the leadership of MSHA making these wrongheaded decisions? Where did they come from? And why are they siding with the mine operators, at the expense of the miners' health? The short answer is, top leaders who control the agency come from industry. Those include the assistant secretary of MSHA; the two top agencies' deputies; the special assistant to the head of MSHA; and the chief of the -- coal, who directly oversee the respirable dust program. The increase in coalmine dust will have other adverse effects. Allowing larger amounts of coalmine dust to be uncontrolled, blown throughout the mine increases the danger of coalmine fire and explosion.

And I understand. I think sometimes the people in Arlington don't believe that the miners understand how a coalmine works, and that this dust thing is too complicated. Well, nothing could be further from the

truth. These coalminers here, most of them are like me, 20 or more years service. We understand dust. We understand how to ventilate. We understand where to put the sprays. We understand the bit patterns. And we're the ones who do the maintenance. We understand dust.

We also understand that, yes, the dust we're talking about is fine dust, but in order to have fine dust, you have to have coal dust. And if you have more coal dust, now you have two problems. You've got a guy with a helmet on, who may contract this dreaded disease simply because of a faulty helmet and being in a bad environment. But you also may increase the float coal dust in the mines. And certainly, we all know what that leads to.

As a matter of fact, on September 21, 2001, a coalmine explosion ripped through the Jim Walters mine, killed at least a dozen miners. Investigators found that coalmine dust was a primary fuel for the explosion. This is a reminder of the explosion that often occurred before Congress created standards to protect miners from those violent and deadly disasters. And I was on the mine rescue team operation at Farmington Number Nine following the 1968 explosion, and I can tell you firsthand what coal dust will do if it's allowed to build up in the coalmines.

The MSHA proposal must be withdrawn and new proposals redrafted that are in tune with the need of the miners. I mean, after all, isn't this about us? Isn't this about us? And if this is about us, let us have some input on this. Because the new rule needs to comply with the miners' needs, the Mine Act, and historical findings.

Those rules need to require continuous dust monitoring at all coalmines, to increase sampling of the unhealthy coalmine dust, and lower the dust levels in the nation's mines. It is high time that MSHA sided with the miners and not with the mine operators, to fix these troubled dust programs.

(Standing ovation.)

MR. NICHOLS: Thanks. You find it outrageous that MSHA is proposing to eliminate this scheme of averaging samples?

MR. TARLEY: So that you understand, we have, as an organization, been fighting for continuous sampling. We agree with you that there's been a lot of cheating going on, on the company side, and that needs to be fixed. But it doesn't need to be fixed in a manner where we just forget about sampling altogether, and we pretend that -- if we don't sample, then we don't know what we have. So all right, let's not have the company do any more compliance sampling, but let's have MSHA do those 30

samples. But MSHA's not going to do them. The operators are not going to do them. And with as little as three samples in a particular year, how do we know what we're in?

Particularly when we have this device, which was spoken eloquently on shortly before I began. And also I've had an opportunity to talk to the manufacturer. This thing is ready to put in our hands. Where's the rush here? If we've got that thing, can anybody up there honestly say that anything -- if that thing works the way it's supposed to, if there could be any better piece of the puzzle for this dust program than that continuous monitoring? I think not.

MR. NICHOLS: How do you like the idea of requiring operators to develop real dust plans, and have them verify the plan that it really works, as compared to what we accept now, that we get a plan that they think will work --

MR. TARLEY: Well, the plan verification part -- and we have somebody that's going to speak on that. I'm not prepared to speak on that at length. It has some good parts, but it's also got some gaping holes in it. And I don't want to speak to something that I can't talk to in its fullest, but I think the next speaker, who is our top gun, can address that in a fuller manner than

what I could. And that's why I didn't speak on it in my remarks.

MR. NICHOLS: Well, you mentioned that you don't know of MSHA citing anybody for not being able to comply with --

MR. TARLEY: No, I did not say that.

MR. NICHOLS: I believe you did.

MR. TARLEY: No. I said MSHA, to my knowledge, has never shut down the mines that couldn't get to the 2-milligram standard, meaning that there is no mines, to my knowledge, that doesn't exist today because MSHA come in and sealed it up because they couldn't met it. Now, am I wrong? I would like to --

MR. NICHOLS: No, but I think you can readily see how some people get to the 2-milligram standard.

MR. TARLEY: What's that?

MR. NICHOLS: I think you can readily see from our presentation how people get to the 2-milligram standard. You'll have two people overexposed, three under, and average it out. I think if we had the single-sample, you would have seen some stronger enforcement action. People can adjust and average these samples.

MR. TARLEY: We're not opposed to single-sampling. When I'm saying this, this plan is clearly, in our opinion, an operator's plan. And think about it.

What is our motive on this side? Is it profits? No. Pensions? No. We just want to have a reasonable chance to go to work and come home safe. We want to have a reasonable opportunity to finish our career at the coalmines, and not be afflicted by some disease that will give us a painful death. That's all we've got in this. And I don't care if comes from MSHA or the operators, or falls from heaven. If there's a way to fix this thing, we'll be the first there to tell you that we like it.

This is not something that's just started. We've been doing this since 1969. To my knowledge, MSHA wouldn't be there if it wasn't for us. To my knowledge, I know the Coal Act wouldn't be there if it wasn't for us. And what's more, it wouldn't be there if tens of thousands of us didn't die. And what's more, what I know is a fact is that there has never been a rule promulgated in Washington that saved us. Every rule that we've got, one of us got killed or injured, or we danced in the streets, and then Washington sat up and said, you know, that's a pretty good idea. I've never seen -- I never woke up, not one single morning, and Washington says, I've got the fix for the coalminers.

And this is the same thing. This rule here didn't flow from the coalmines to Washington, it flowed from Washington here. And everything that flows in that

that direction is always bad for us. And if I'm wrong, somebody can point a law that came from Washington to the coalmines, as opposed to -- and we've got some more we'd like you to enact, quite honestly, but we'll have to hurt a few more, and we'll have to kill a few more. That's how it's done.

MR. NICHOLS: Okay. Thank you.

MR. TARLEY: Thank you.

(Applause.)

MR. NICHOLS: Okay. Joe's already --

MR. MAIN: Yeah. We have a lot of folks here today very concerned about this rule. And forgive me if I take a little extra time, Marvin, but under the circumstances, I think that it's important that that be done. I came here with a prepared text this morning. I've just scrapped it. I'm doing that --

MR. NICHOLS: For the court reporter, he needed to know who you are.

MR. MAIN: My name is Joe Main, M-A-I-N, and I represent coalminers, and I work for the United Mine Workers of America as the administrator of health and safety. And that's my job in life, to represent coalminers, work on their behalf. And as a starting point, there's so many things that's ran through my head this morning. I just really didn't know where to start,

and still don't know where to start, so I'm just going to pick a spot.

I'm probably one of the longest standing people that's in this room that's been working on reforms of the coalmine dust program that I know of. I've looked around the room, and I know I go back to 1976 and the convention in Cincinnati, Ohio, when a bunch of miners, fed up with a dust sampling program, crafted a plan to fix this problem. And that plan was simply, get samplers on these guys 24/7, 365, and we'll get control of this dust. And let's do that on this, and we'll get a system in place where miners can end the exposure to unhealthy dust levels. That was in 1976, the Cincinnati convention, and a bunch of coalminers who knew more about this program than anyone in Washington I have met since.

I got to be a part of that, and listened to miners as they crafted this, and it was the most sound idea that I ever heard then, and since. You know, I've sat back through, over time. I've reviewed the NIOSH criteria document that was issued in 1995 that called for increased dust sampling, that called for lowering of the dust levels in the nation's mines, and many other improvements. I was a participant on the federal advisory committee, and I can speak firsthand as to what that committee recommended as far as actions to fix the

problem.

And we were charged by the Secretary of Labor to develop regulations to eradicate the black lung disease, pneumoconiosis in the nation's coalmines. That was our charge. We spent months putting together a plan. It involved industry participation on that committee, labor participation on that committee, NIOSH, MSHA provided all the evidence and guidance to the committee. We had five neutrals that had no interest in mining, sitting there as part of the decisionmaking body.

And at the end of the day, that committee laid out a framework for reforming the black lung program, the respirable dust program in the mining industry. The sad reality is that when MSHA went to rulemaking, they ignored the 1995 criteria document issued by NIOSH, Lew Wade's crowd, they issued -- or they ignored the federal advisory committee recommendations outright.

But you know, worst of all -- I mean, there's historical findings there that tells this Agency what you need to do. Increase sampling, decrease dust levels, increase sampling, decrease sampling, increase sampling, decrease dust levels. Laced through all of those recommendations. But when the miners showed up, when the miners showed up in 2000 to lay out their case, I was at every hearing. I heard what miners had to say. They

said the rule was wrong, it took the wrong approach. What miners asked for was increase the dust sampling in the nation's coalmines, decrease the dust levels, and give us continuous dust monitoring.

Now, that 1976 idea of the miners has taken a lot of form over the years. In 1980, when we were finishing up the reform of the dust program, and revising the sampling schemes, MSHA admitted, look, we haven't got this right yet, and what we want to do here is, build this continuous dust monitor and use that as a tool. They made a promise to coalminers in 1980 that they would work to build that device. What's happened since, a lot of pretty things, a lot of things not so pretty, with respect to the development of that device.

I take my hat off to NIOSH, who has helped spearhead the development of the device that we now have at hand, that gets what miners said in 1976, and gets what the government promised in 1980, and has us at the very edge of having that as the tool to fix this dust sampling problem. What can we do with that device if we get it? Real simple. We can put it on every miner in a high-dust occupation, on Part 90 miners, on miners throughout the mine, and every day and every shift get data on what they're exposed to, for the government's use to help determine the compliance with the dust levels.

We can give miners a tool of empowerment like they've never seen before. Miners can put on the device, look down at it, and find out how much dust they were in up to that part of the shift, whether it's in two hours, three hours, or four hours. Miners can project, if they stay in that dust level, what it's going to be, and if they're going to be overexposed before the end of the shift. We can do this for the full shift.

We can have, for the first time, full-shift sampling in the nation's coalmines, constant sampling, immediate information, not waiting for a sample to be taken out, and question whether or not an operator has tampered with that sample before it ever goes to the feds to get analyzed, and the data gets back.

You know, there's a ton of things we can do. Plan verification, Marvin, I'll tell you straight up, you put a dust sampler on those guys 24/7, 365, you won't Mickey Mouse around with a system that just don't work. You know, as Carlo said, we met several hours with MSHA to get to the root of these rules, what they are. We couldn't figure them out. You know, I've been dealing with this for years. I could not figure them out. I think three meetings, somewhere around six to eight hours total, just to walk through the complications. I challenge anybody to tell me within five or ten minutes

what they saw on the screen today. It's complicated. It's over people's heads. It's over miners' heads.

But the worst part of it is, these rules are so confusing, and they're deceiving, as well. I did not know, until Bob Thaxton told me, that the dust levels in the mine environment in a coalmine, under this rule, could go up to 8 milligram. Didn't know that. Not until Bob told us. Had no clue that that was the case. I said, Well, Bob, where in this rule can I find that standard? It is not in the rule. You've got to understand the formulas and factors to get you there. And that's outrageous. I mean, there's a lot of miners that have no clue that there's a rule about ready to come down, that is going to allow mine operators to elevate dust levels to that height.

We asked, okay, this quarterly sampling program, which is a plan verification, how does it work? What's going to happen? We were told that, in terms of the followup plan verification, that about 85 percent of the mining units in this country would not be doing it. We asked, okay, that mine operator on that 8-percent standard, what would trigger a quarterly inspection by that mine operator under those circumstances? Well, as we told, Bob, I think it was 6.67 to trigger that. Am I close?

MR. THAXTON: Close.

MR. MAIN: Okay. You know, does anybody that read this rule see 6.67 that trigger a plan verification at a quarterly sampling? If you see it in the rule, tell me. It ain't there. The 8 milligram. You know, I've been taking a beating. Joe, you don't know what you're talking about. There is no way that they can jack up the dust levels to 8 milligram in the mine atmosphere in a working area, active areas of the coalmine. Oh yes, there is, because Bob Thaxton told me they could. But it's not in the rule. These miners don't know that.

MR. NICHOLS: Did you tell Joe that?

MR. MAIN: I'm telling you the facts of what the case is, Marvin? This is things that should have been in that rule. We challenged MSHA when we had those meetings. You can't go out there and explain this rule, and hide these things from the miners. It ain't fair. It ain't right. And it ain't the truth. That 2-milligram standard that you see laced through there? That's not 2 milligram. That could be anywhere from, as I understand it, less than 1 milligram up to 8 milligrams, by the information that was provided to us as we questioned this rule.

We ask for this rule to be withdrawn for two reasons, and we still have that standing request,

although I've been informally told the answer is no, I'm telling you the right thing to do in this case is to withdraw that rule. One is, it was dropped in the middle of a large number of mining accidents. The most that I think I've ever had on my hands to deal with at one time.

Everybody thinks the mining industry is safe. We had a -- indentation that almost killed three miners from Kentucky on January the 3rd. On January the 6th we had the mine fire destruct the 84 mine, closed it down, and rescue workers had to go back in and save the mine. We had the explosion at the McElroy mine in January, around January 22nd. We had the closure of the Loveridge mine because of a major mine firestill closed. Other than the fact that we're in trying to recover the fire area. And we've had to take all of our resources to respond to those. Plus we have investigations of all of those ongoing, in addition to the wrap-up of the investigations of the Jim Walters mine.

Now, how in your right mind can people who have to preoccupy themselves with those kinds of important issues delve into, and understand, and prepare to respond to such a complicated, confusing, and basically outrageous rule? You can't. And we're struggling to do that, and we're going through this learning process,

learning from you guys as we go. I challenge you to give this document to any miner on their own. And the document's, as Carlo pointed out, that thick. Give them two days, and let me test them on what's really on that rule. And I'll give them a 20 percent pass rate, too. It is that complicated of a rule.

I don't know how people expect miners to understand the complexities of that, but based on all of those -- and MSHA launched another rulemaking, which was the belt air rule, that would eliminate protections for miners as far as the best being forced to coal faces that's been in effect since 1969. We're struggling to try to respond to that. We have, I think, a June 30th deadline.

And we had a number of mine fires that just recently happened, and belt injuries. We're going back to see how that even fits with this rule. You know, I think it's safe to say that those on this side of the table are underwater, and we pleaded with this Agency to understand that. You know, I'm sorry they didn't. We've been out rushing, trying to get our hands around this and get information out to the miners, and we have not been too successful about that. There's a lot of miners that just understands bits and pieces.

But I think when you explain this rule, you have

to explain it in a way that really gets to the meat of it. And when you get to the meat of it, the bottom line is that it violates the Mine Act in a number of ways, it is totally contrary to the federal advisory committee findings, contrary to the NIOSH findings, and contrary to the needs and wishes expressed by miners clearly to this Agency that won't listen. And that's something we're struggling -- how do we get people to listen here?

If you look at the construction of that rule, there's only one thing that can be done. Withdraw it, go back to the table, build it around something that does work. And I think it's time, because this whole issue comes down to which side are you on, the side of miners protected from the dust, or the side of operator interest and needs. Miners want the dust levels lowered. Miners want sampling full-time in these coalmines. Some mine operators want to get you guys out of the mines and no sampling. And mine operators want to raise the levels of dust in the coalmines. That is wrongheaded and it's wrong.

But that's how this whole thing's shaking down. Which side are you on? Fixing this on behalf of the miners, or fixing it to the interests of the mine operators? Given what we saw so far in the document, it's very obvious to us that the miners lost in that

argument, despite pleas to this government time and time again. The rule in its entirety is so flawed that it doesn't meet the job, and it violates so many recommendations of the Mine Act to do that the rule must be withdrawn and recrafted.

There's some other clarifications I'd like to make, too, and just for the record, I understand that, Lew, you said that MSHA participated in the rulemaking. Did you guys participate in the rulemaking part that deals with the plan verification and the sampling under part 70, 75, and part 90? As far as having authorship of this rule that's before us? That would be other than the single-sample.

DR. WADE: Joe, NIOSH was completely involved in all aspects of the single-sample rule. That includes an economic analysis, a quantitative risk assessment. Some of those documents, such as the economic analysis and the quantitative risk assessment are part, also, of the dust plan verification package, so in that sense, we were involved in the economic analysis and the qualitative risk assessment. We were not involved in the framing of the dust plan verification rule itself.

MR. MAIN: The reason I ask that is --

MR. REYNOLDS: There's a legal reason for that, as well. I mean, NIOSH does not have rulemaking

authority, and that's why the rules were structured the way they were. That's why you have two rules.

MR. MAIN: The subject of my question, though, is that being a person that has read the NIOSH criteria document that I've never seen NIOSH back off of, the rule proposed is totally contrary, in many ways, to the findings of NIOSH as to what needed to be done to protect the miners. And I just wanted to determine whether or not they were any part authors of the specific regulations that exist in part 70, part 90 -- or 75 and part 90. And I understand the answer to that is no, as far as the authorship. Okay.

With regard to plan verification, as it was explained to us -- and we have probably a step beyond what a lot of the folks do in this room, because we had a chance to sit down and ask a lot of questions that they haven't had -- but as I understand it, the plan verification process goes something along this line. The company submits a provincial (sic) plan, of which MSHA would basically accept if it looked good enough to pass the acceptance test, that would be in effect for a certain period of time. I think it's within 45 days they would have to begin sampling of that plant. One sample could get approval of that plan for the operator to use. By taking one sample. That's correct? One to four.

MR. THAXTON: It's one shift of samples.

MR. MAIN: Okay. But I'm saying, one sampling day, one sampling shift, whatever you want. But one sampling event could gain approval of the plan; is that correct?

MR. THAXTON: That would be the minimum.

MR. MAIN: Yeah, but is that correct? They could do that --

MR. THAXTON: As the minimum, yes. It could be up to five.

MR. MAIN: And once they do that plan verification, the only requirements that they would have to go back and do quarterly plan verifications is if MSHA required it? Required the operator to do that?

MR. THAXTON: That's correct

MR. MAIN: Okay. And in this mine that I talked about, let's say that you have this factor of four, you're at a mine environment measured the same way we do now, reading 8 milligrams --

MR. NICHOLS: Let's deal with that 8 milligrams. Did you tell Joe that mine operators could go to 8 milligrams?

MR. THAXTON: What we talked about, Joe, is that there is no 8 milligrams actually specified in the rule.

MR. MAIN: That's right.

MR. THAXTON: We said it's a protection factor that would be assigned could, theoretically, allow somebody to go up to a maximum of 8 milligrams.

MR. MAIN: When I asked you the specific question, Bob, okay, how much dust, when you do that formula, that factor of four, how much dust would you be actually measuring?

MR. THAXTON: That's why I said --

MR. MAIN: It could go up to what?

MR. THAXTON: It could go up to a maximum of 8 milligrams.

MR. MAIN: 8 milligram. Okay. Now, I mean, that's -- and the thing of it is, Marvin --

MR. NICHOLS: Joe, we've been through this before. MR. MAIN: Marvin, let me speak, and then I'll take any questions, if you don't mind.

MR. NICHOLS: All right.

MR. MAIN: The point of it is, the law explicitly says, In the mine environment, in the active workings, 2 milligram is max. Congress set that in 1969. And they said, fellows, that's it. You've got to meet that standard. And you're not going to meet it by using respirators. Very clear. Now, as I understand the rule, and those discussions from Bob, as I'm understanding

today, with that PAPR on and that sampler on the side, they could legally go up to 8 milligrams of dust on that factor four standard, measured on that dust sampling. Am I wrong?

MR. THAXTON: Can I respond?

MR. MAIN: Am I wrong?

MR. THAXTON: Can I respond to the whole thing?

MR. MAIN: No, no, no. Just -- see, we're trying to establish, can the dust levels actually measured in the mine go from 2 milligram up to 8 milligram, as measured off that sampler in the same place we're measuring it now? Can that reach 8, and they still be legal? Yes or no?

MR. THAXTON: With the way you're phrasing it, no. if they were at 2 milligrams, they cannot be allowed to go to 8 just because they wear a PAPR. If the operator is able to maintain two, they will stay at two. If they are able to maintain 2.5, they will have to stay at 2.5.

MR. MAIN: Well, this gets me to another issue of trust. We'll get to that one, Bob, okay? I'm just saying, under the law, is it legal now for an operator to have a dust level up to 8 milligram? Yes or no? Measured in the mine environment on that sampler, yes or no?

MR. THAXTON: Theoretically, yes. It can go as high as 8 milligrams.

MR. MAIN: Okay. Now --

MR. THAXTON: There is no --

MR. MAIN: You know, let's be honest here with these fellows and what it is. I mean, here is what the truth of this proposal does. As we understand it from those discussions, a mine operator can request to get PAPR use in their mines. They can claim, we've exhausted our engineering controls, we just can't do it, and we need to increase the dust levels. They have made those requests to MSHA before. Trail Mountain. Dave Lauriski's own former mine being one of them, which you and I worked on, Bob. Jim Walters, a person that worked on that back in the nineties. We can't do it, you got to give us these PAPRs. We went in and we showed them how to engineer their coalmines, didn't we?

MR. THAXTON: Yes.

MR. MAIN: And they had the standard in place that says, you have no escape here. You're not getting a respirator to replace your controls. What this rule does is to give them that escape. And we have to rely on the trust of the government to do the right thing, as opposed to a regulation that says, no, you're not. That's the difference. Now, there's a lot of things we can walk

through here as a trust issue, and you have to make determinations for miners who express their opinion on this rule whether or not we trust this Agency.

In the last two years, on respirable dust issues alone, there has been a number of things happen. December 2001, MSHA made a decision to withdraw the rule that would have led to lowering the dust standards in the nation's coalmines. December 2001, MSHA made a decision to withdraw action on a rule that would have dealt with requiring continuous dust monitors in coalmines. Last year MSHA revised the dust sampling program.

We know we had the Excel decision, and you had to do some things on how you did the followup inspections, which, we understand that side of the equation, but beyond that, what MSHA did that they didn't have to do, with the Excel decision, was, they changed the whole enforcement scheme by reducing from six dust sampling inspections per year to four. And by the way, those four compliance enforcement samples was no longer enforcement samples. They were called -- what was the word? Targets?

MR. NICHOLS: No, trigger.

MR. MAIN: Trigger. Target. The operator could violate the law and not even get cited on those four. Outrageous. Outrageous conduct, I think, on the part of

this government, when we have so many people getting the black lung disease. Then, last year what the Agency did was, eliminated the program that Carlo talked about here that just found that over 800 coalminers have the disease that's working in the coalmines today. After examining about 31,000 coalminers, the program ended, over our objections. It was producing the evidence and information we needed, to fix this problem.

Areas like Eastern Kentucky, we believe, were basically missed with that study. And if anybody doesn't believe that problem is as bad in East Kentucky as anywhere in the country, I think that you have to read the history books of the mining industry. But these are actions that this government took with, regard to dust reform issues alone, since December.

Now, what is it? We should trust MSHA to do the right thing whenever that operator who has no miners rep comes to the district manager's door and says, I've exhausted my engineering controls, and if you don't give it to me, I've got to shut down your coal mine? Do we honestly believe that we're going to have stiff-backed Agency folks saying, no, and we're going to go show you how to do it, at a time whenever the prohibition that would stop them would be eliminated, which you choose to do under this law? I am telling you straight out, on

behalf of the miners, it is illegal, it will reduces protections afforded miners, and it's the wrong thing to do.

If you go back to the proposal of the miners, and we just sit back and listen a minute about how we need to fix this program, you put a dust sampler on a coal miner 24/7, the truth's coming out, fellows. And they're going to have to do something to keep those dust levels down. That will do more to do plan verification than any single thing that I can think of. Why do it one time? And under your proposal, Bob, as I understand it, with 85 percent of the mining units not being subject to further plan verifications, those quarterly ones are going out the window, and leaving a possibility of a mining unit, under your rules, to be sampled for plan verification by that operator one time. That is a possibility laid out by you guys.

Now, it makes all the sense in the world. Let's don't do it one shift in a year, let's do it every day of the year and have constant plan verification. Real simple math there. We'll have all the data and information. You know, miners have argued, which is part of a lawsuit for full-shift sampling, one of the beauties of this device is that it will let you do full-shift sampling up to 12 hours, like that. That's the way it's

designed, what it'll do. We can have full exposures of miners, as opposed to those fellows working 12 hours in the middle of the dust, oh, the dust pump's come off, okay, fellows, we can go a little -- you know, we don't have to put the line curtain up now. Whatever the case may be at some of these mines, that has happened.

You know, there's a history of dust fraud that is just about as deep as any kind of immoral act that you could think of in this mining industry. In the 1990s alone, over 160 companies and/or individuals was criminally prosecuted for fraudulent dust practices. We think that that case should never have happened. We think what those miners said in '76 should have been listened to. Put them dust pumps on there. Let's have 24/7, 365 collection of data, and let's do it the best way we can to prevent the tampering. That solves that problem.

So we have in this scheme, at the end of the day, under the plan verification, the opportunity for an operator to get a plan verified and continued verification with one shift sampled. And as far as the MSHA sampling, you know, we have a rule that guarantees if we don't like it. And we think that the operator control of the dust compliance program should have been eliminated years ago. We said. We said it. We said it.

But what we haven't said is, oh, eliminate the mine operator dust sampling requirements, and take what little bit you guys do, and tinker with it in a way that, so maybe it'll be just a hair more than what you're currently doing, and some may get less. Because at the end of the day, under your sampling, as you've told us Bob -- and that's the reason that these folks need to understand this -- that there are mines in this country that could see only three compliance shifts sampled in a year's time.

And out-by areas in coal mines? That's far worse. One shift is your proposal. One shift out-by coal mines. And we're going to measure the whole exposure of all the coalminers in that coalmine on one shift of sample. That is ludicrous. You know, we are frustrated. We're frustrated, because we came here and said the same darn thing in 2000, Bob, Marvin. We said the same thing five years ago, ten years ago, twenty years ago, and nobody's listening.

It is not for the bureaucrats in Washington that this issue be resolved. It is for the coalminers. There's a way to fix it for them. There's a way to empower those miners so they have control over the dust levels, and in a way that there's going to be some real accountability here.

Now, if there's a fear of accountability of these operators when that dust sample comes out at the end of every shift that says 2.5, if you're worried about that, you better not be. That's not your job. Your job is to make sure that that's less than what the standard is.

MR. NICHOLS: We weren't too worried about that, Joe. We prosecuted those 160 dust fraud cases that you mentioned, and this Agency supports the use of personal continuous dust monitors. This rule allows for that. What we're not going to do is sit and wait a few more years for the development of them, like we have the last two years, and let these miners continue to breathe dust.

MR. MAIN: Marvin, two problems with what you just said. One is, do you know how we got in the mess that we did with the fraud? MSHA backed off inspecting coal mines. They went down to -- after this promise was made to miners in 1980 -- and the record will bear this out -- after that promise was made, MSHA cut back to two inspections in coalmines, and set back and let the operators really control the program, and then it all caught up with you guys. And the second thing is, Marvin -- and I'll finish, and then you can make your point. The second thing is -- you're here to hear from us, okay?

The second point that I'll make is that you

backed off of dust inspections again. And I'm sitting here thinking, we just went to Congress, we just went to the world saying we need to improve dust sampling in this country. And I was totally appalled last summer when I saw that goofy policy come out of MSHA that says, we're going back to four, and we're going to call them -- what is the word there, Bob? It's not "target," it's "trigger"? I mean, where the heck are we at?

I'm telling you, it is wrong. It's wrong for the nation's miners. And what we need to do is put this thing -- they can't trust you guys. They can't trust the operators. I mean, there's 25 years of history. You've done some changes. You've done some improvements. But you've failed to really get the case closed, to protect these guys, and that's what we're down to.

Do we reduce the dust levels in the nation's mines, and increase sampling? Or do we increase the dust levels and reduce sampling? If you look at your proposal, it cuts along those lines. The miner says you're dead wrong. The operators probably support you. I know there is operators that have supported some of that stuff.

MR. NICHOLS: How many do you think support single-sample?

MR. MAIN: Single-sample on one shift in an out-

by area coal mine, to measure the full measure of that miner's exposure is totally ridiculous and outrageous. Full shift sampling every day? We buy that argument, but you guys won't do it.

MALE VOICE: Plus it's controllable.

MR. NICHOLS: How many operators do you think support single-shift sample and eliminating the chance average samples here?

MR. MAIN: Marvin, I'll tell you one thing. I've been in this business for a long time. That is the goofiest, most complicated proposal. I still don't understand it all, and I've been through three courses. What you got here is a totally confused, complicated rule that I challenge you to figure out. Go out and find out who understands this thing first. Then ask what it means. But if you do that on a sporadic basis, it means nothing. If you do it on a constant basis, it means something. And that's the difference.

You can't take a sample -- does anybody in here really believe that you can measure the full exposure of a miner working on that belt line, by taking one sample once a year? Does anybody honestly believe that?

MR. NICHOLS: Do you believe that the number of samples that are being collected now can do enough?

MR. MAIN: No. That's what we said at -- we

have answered that question time and time again. We have said that the sampling that you guys were doing in 2000 was not enough. That was the total compliance samples on the section was what, then, 36? We're down now to 34, and 4 of them's only this trigger deal, okay? We said then it wasn't enough, and we said we need to get these continuous dust monitors. Now Marvin, I want to respond to the continuous monitors thing, because you raised it, you know, holding up, holding up.

You know, I've been working on this project with industry and with NIOSH, I mean, night and day, trying to get this thing done. We've all been beating on the doors. Not as much MSHA, I will say, and that has been a little frustrating. They've been in and out of the picture. But there's a lot of folks put a lot of pressure on getting this instrument built, leaning on the manufacturer to get it done, so we could get a rule that would do this.

And it just struck me just very suspiciously why, on the verge of getting the final test done, which we expect in August or September, and getting the full measure of what this thing would do, do we rush a rule out in a time with all these mining accidents, with all these other rules, the belt air rule, the rule on emergency evacuation that totally had the industry

preoccupied? It's very suspicious, Marvin.

And I'll tell you one thing, it does not give fairness to these miners, who have a right to know what's really going on, and what can be done. Why did MSHA rush this rule out, knowing that this PDM was coming down the pike?

MR. NICHOLS: This rule has been worked on at least for four years, and maybe ever longer than that. There is no rush to get this rule out. There's been a timetable for ever since this administration got here.

MR. MAIN: There is a train that was coming down a track, that was going to deliver the kind of things I just said that was at hand, for anybody that paid attention. And there's only two conclusions I can draw. With this ready to go late summer, rushing the rule out to beat it to the path is very suspicious. But when you look at it as a broad sense, why would the Agency not wait four months? I mean, delay -- I mean, really, reforms of this thing since the mid-seventies. Four months to get the full details on this and build something around it.

In terms of your proposal, you want to give it to A.T. Massey to decide if he wants to let his miners have that, under an optional program, but the option will never be exercised, because what, instead of the

quarterly program, Bob? Instead of quarterly sampling?

MR. NICHOLS: I don't understand what you're asking.

MR. THAXTON: I don't either.

MR. MAIN: Using PDM 1's --

MR. NICHOLS: This rule allows for personal dust --

MR. MAIN: This rule allows A.T. Massey to decide if they want to put those on their miners. Does anybody in this room believe that A.T. Massey on their own is going to put those on? Raise your hands?

MALE VOICE: Hell no.

MR. MAIN: Okay. Does anybody believe that an operator will take a course of putting a sampler on once, to get a plan verification if they're successful, or say no, I'm not going to do that? What I'm going to do, fellows, is, I'm going to put this voluntarily on them. I'm going to go out and buy them, and put them on every coalminer on every shift, 365, 24/7. Now, who believes that? Stand up in this room. It is a fraud, Marvin.

There is no personal dust sampler for coalminers to have in any meaningful way in this rule, and everybody knows it. And that's the frustrating part about this. Don't sell us something. Tell us the truth. Tell miners the truth. There is an 8-milligram standard in this

rule. There is a standard in here that allows that dust to be jacked up, and you guys, I know you're in a box now, because it doesn't look good here to let the Congress know and everybody else know that what you're going to do is wipe out that 2-milligram standard and replace it with an 8-milligram standard through fuzzy formulas that people can't understand. That's exactly where we're at.

MR. NICHOLS: We're not going to do that, Joe. And every time you speak on this, you keep mischaracterizing what we're trying to do with PAPRs.

MR. MAIN: I heard what you're going to do with PAPRs, and let us figure out if what you're telling me now is the same as what Bob told us the other day.

MR. NICHOLS: I don't expect to change your mind, but here's the way the enforcement process works. The primacy of controlling dust is the engineering controls. If that can be done, PAPRs never come into play. If PAPRs come into play, the protection factor for PAPRs has nothing to do with the 2-milligram standard. Just wait a minute. If operators cannot meet the 2-milligram standard, as Bob says, if they can meet the 2.5, that's what's going to happen. They're not going to be allowed to go to 8. I don't know anyplace in this country, based on our 30 years of experience, where

people can't engineer the problem down way below any 8-milligram standard. I mean, --

MR. MAIN: But that's beside the point, Marvin.

MR. NICHOLS: But you keep mischaracterizing it.

MR. MAIN: No, I'm not. I'm telling you the truth. Let me tell you a case in history. I was there. Jim Walters Resources, 1990. Came to MSHA, says, give us PAPRs, we can't meet the law. Came to me, said the same thing. MSHA was weak-kneed getting ready to do it until we said, you do it or we're suing you, okay? You know what we did? We went in that coal mine, made them put shield sprays that other operators had. We made them redesign the way that the shearers cut. The water sprays on the shearers. The way they controlled the water at the stage loader. The dust out in the best entry that was being dumped on the face was jacking up the dust.

We did all those things that wasn't there before. And that operator -- and I've seen the weak-kneedness of this Agency so many times, it scares the hell out of me. We do not trust this Agency to hold the line, giving away the one control they have under the law, that says, no operator, you can't do it. Because what you just told me that you plan to do, you can't do that under the current law.

MR. THAXTON: Didn't the Jim Walters situation,

Joe, also allow that miners were only permitted specific amounts of time to work on the shearer? That they actually couldn't work the whole time?

MR. NICHOLS: I remember the situation. What you done was come up with a Rube Goldberg way of sampling downwind, where you passed this pump off. You didn't know what you had downwind.

MR. MAIN: We had a mess on our hands, because the government sat on their butt and let dust control get out of that coalmine until the truth came out, and we had to go in and fix it. And we fixed it with engineering controls straight out. And if it wasn't for the strength of the mineworkers, I can tell you, honest to God, Marvin, that this Agency would have backed off and figured out a way to let them do what they wanted, to keep that mine running without engineering controls. And it would have been the wrong thing to do, because those miners had been sitting in 8 milligrams of dust.

Now, a question I have for you. I mean, this is a rule, and let's don't kid ourself. You can sugarcoat it and say it doesn't mean -- it means, straight up, that you can put a PAPR on a guy, you can jack that level up, approved by MSHA, up to 8 milligram in the coalmine that you can't do now.

MR. THAXTON: You cannot do that. You cannot

jack up dust concentrations, Joe. The rule will not allow them to jack up the 2-milligram standard to 8 milligrams.

MR. MAIN: And what stops them?

MR. NICHOLS: If you've got control of A, B, C and D, you're not going to be able to take C and D off and use the PAPR. You see? If you're getting 2.5 with A, B, C and D, you're going to maintain 2.5.

MR. MAIN: Is there a law that says they can't do that? Or is that based on a judgment of MSHA based on observing what they think the operators are telling them?

MR. NICHOLS: That's based on longstanding enforcement policy that this Agency has always used for primacy of engineering controls.

MR. MAIN: Now, is this the same enforcement policy that the government had in place that said, we're increasing dust levels because we're concerned -- or dust inspections because we're concerned about the infrequent dust sampling in coalmines, but then, within a short change, says, oh, we changed our mind. Well, we really don't need to do six. We're going to do four now. And by the way, we're not going to even consider those as enforcement samples? Is this the same Agency, Marvin?

MR. NICHOLS: This is the same Agency that scrapped up $1.7 million to give miners free chest x-

rays, not an action, I think, of an Agency trying to cover up the dust problem. This is the same agency --

MR. MAIN: Is that still going on, Marvin?

MR. NICHOLS: This is the same Agency that, up until early to mid nineties, coalminers had no protection over collering and drilling holes on the surface with.

MR. MAIN: There is some modest improvements, but when you give me two bucks and take a hundred dollars, I'm the loser. Let's go back to the centerpiece here. This is what this debate's all about. Do we decrease dust levels? And do we increase sampling in this mine? Or do we increase the dust levels in the mine and decrease sampling? The center of the whole debate.

And what you guys propose to do is, allow dust levels to be increased in the coalmines, in the mine environment and active workings, and substantially reduce sampling in coal mines to where you have one out-by compliance sample a year, and three section samples at -- all mines, one sample out-by, and at some mines, only three compliance sampling sections a year, as a policy.

MR. NICHOLS: But Joe, those three -- those sections that you say will only get three MSHA inspections, you need to be clear your people that the only way they get to that point is because they have demonstrated that they have controlled dust to such a low

level that we have good confidence that those areas are protected. And that way it frees up our resources to go to the areas where we think that there is overexposure --

MR. MAIN: In your theory, if you had an honest industry and we all trusted what the operators was doing during those very infrequent days, it may mean something. I can tell you --

MR. NICHOLS: Those are unannounced inspections by the Agency --

MR. MAIN: I can tell you that you guys have been in these coalmines, you have been sampling, under your noses they have cheated. When you're gone, they've really cheated. And that must end. And we're saying, take the goofiness out of this, Bob. Give these guys a personal dust sampler that they can wear 24/7, and let's take the mystery out of it, and let's try to clear up this cheating and the unknowns. Now, do you agree that miners would be better off if they had 24/7, 365 sampling or not?

MR. NICHOLS: If every miner was provided with a constant readout, and you allowed them to adjust their schedules -- because you're going to use administrative controls then to control the --

MR. MAIN: Well, see, that's -- the thing of it is --

MR. NICHOLS: Then you would have that, because you're looking at each individual exposure at that point.

MR. MAIN: A miner would be in a position to stay out of the unhealthy dust, because he would have a device that would tell him there every day?

MR. NICHOLS: It would tell him what his concentration is up to that point, and he could say that I'm about to exceed it, and I need to get away from it.

MR. MAIN: And if the operator didn't do something to keep him out of that dust, what happens to the operator, provided you guys enforce the law?

MR. NICHOLS: Well, if what's proposed right now, we would say that you have to remove the person from the exposure, take corrective action.

MR. MAIN: Over maybe three shifts on the section in some of the mines, one shift out-by, versus 365, 24/7.

MR. NICHOLS: The vast majority of MMUs will be sampled bimonthly, with what we have proposed right now. What's in the draft MSHA inspections procedures. Like we told you, the vast majority of MMUs cannot --

MR. MAIN: Maybe this is the best way for me to do this. We understand there's pieces of the law, and we understand the total confusion of this law that people cannot understand, really, until you get down and ask a

lot of questions. Over these miners' heads, over our heads, it took you guys to come in three meetings and explain this stuff to us, is how complicated. And you expect the miners and the mining community to understand this goofy rule? And that's what it is. Complicated, confusing. It's a bureaucratic nightmare that's going to sink under its own weight, and you won't listen to what miners have to say.

Hold the fort, why can't we get a rule here that says we're tired of this cheating out here, we're tired of this sampling system that doesn't give us accuracy, we're tired of this infrequent sampling system that we have to come up with all these gimmicks and crazy schemes that people don't understand, to try to get you in compliance? We're just going to do something here that's just grandiose. We're going to just sample you every day, and make you live by the standard every day.

It seems like the simple solution to me. Why can't we get there? Why can't you listen to the miners, and do what they've asked to do for twenty some years? The number of people dying from this disease, I've got personal friends that died. You know, I seen Mike South struggle through the last years of his life with his lungs chewed up. That's what this is about. We're trying to get these guys out of the dust. Not through

bureaucratic, confused rules and gimmickry, but really.

And as Carlo said, that's our motive here. We want to end this disease in the mining industry, get these guys out of the dust, and end this problem. Not for you guys to figure out from the bureaucracy how you want to handle it, but for these miners. Give them the power. Give them the understanding, and give them the ability to get out of the dust. And your proposal don't do that.

MR. NICHOLS: Well, it allows for it. If the personal dust monitor is developed, this rule allows for that. What we're not going to do is, wait and still accept compliance of these dust plans at 60 percent production. And we're not going to average these samples any more to disguise compliance.

MR. MAIN: Baby step. It doesn't fix the problem. And if you'd have waited six months, or -- I mean, get some courage about you. Just say, industry, you're going to do this. We've got all the evidence the darn thing works. Get a little bit of courage there. Technology-driven is the way the rules are supposed to go. Do you have no courage to step up to the plate and say, look, operators, you've had your way for 20 some years, we're going to change the dynamics here, you're going to sample 24-7, 365, and you're going to keep it at

the standard, and when you overexpose -- and not these 2.33s, but you go over the standard, you're in trouble, you're going to get these miners out of the dust? A real simple approach.

The other question I have, too, Bob. We haven't figured this out. If you have a sampler on, you've got the PAPR on, and it shows up 8 milligrams. When does MSHA actually cite?

MR. THAXTON: We do not cite on the continuous dust monitor, if that's what you're --

MR. MAIN: No, no. On the PAPR. Oh, you don't cite on that?

MR. THAXTON: Not on continuous dust monitors, no. MR. MAIN: Oh. Okay.

MR. THAXTON: It's right there in the thing.

MR. MAIN: Okay. I missed that one.

MR. THAXTON: And I believe we said that one in our discussions with --

MR. MAIN: But I'm interested in the PAPR issue, because it's confusing. Because when I look through the formula, what it says is, multiply by a factor of four, which if you're -- you know, two becomes eight, okay, with a factor of four.

MR. THAXTON: We actually say divide by four. Take the --

MR. MAIN: Or the --

MR. THAXTON: Take the concentration determined by the respirable dust sample, divide it by four, and that's an equivalent concentration that you've determined.

MR. MAIN: If that dust --

MR. THAXTON: That tells you what the concentration would have been inside the PAPR. That's the environment in the mine.

MR. MAIN: You just answered my question. I'm trying to figure out -- okay, I've got the PAPR on, I'm on this factor four standard, okay, whatever. My dust pump says 7.5 milligram. Would I be cited?

MR. THAXTON: I can't tell you, because I don't know what the conditions were that were approved when the operator asked for the --

MR. MAIN: Let's say that the conditions were approved in the plan that operator said. You got 7.5. Would I be cited?

MR. THAXTON: I'm asking, though. We don't know what the conditions were. When MSHA comes in, we're going to look at all controls that are in place, whatever level they can attain with all these engineering controls has to be maintained.

MR. MAIN: So every standard requires a

determination by the Agency, even to get to the point of issuing the standard? Let's assume, like I say, that they say that the controls were in place that were satisfactory, and it says 7.5. Would they be cited under the law?

MR. THAXTON: Well, let me ask you, do we have a section right now that you think that if they applied all the controls, that we have a place right now that's at 7.5?

MR. MAIN: That's not the -

MR. THAXTON: If you don't --

MR. NICHOLS: That is the issue.

MR. MAIN: No, it isn't the issue.

MR. NICHOLS: It is the issue.

MR. MAIN: It's what the operators are going to do, Marvin. It is -- no. I have seen this Agency be reluctant to move ahead to force technology-driven controls, and my fear is that -- what happens when we get into this, what's feasible, all these kinds of things -- the question I posed to you is -- under this rule, I can tell you right now, if they're in excess of 2 milligram -- actually, what, 2.33 now that you guys are using them. I'm confused on what that may be, but let's say 2.33. You would cite the operator?

MR. THAXTON: No.

MR. MAIN: Okay.

MR. THAXTON: On our samples, yes, they would be cited.

MR. MAIN: Okay. Now, what I'm asking you, on this proposal, let's say you've got one that gets to the 8 milligram, and it says 7.5 on that factor of four, would he be cited?

MR. THAXTON: That's what I'm telling you. I can't tell you, because --

MR. MAIN: Is it possible for them to not be cited?

MR. NICHOLS: He's asking you for a theoretical --

MR. MAIN: Is it possible for them not to be cited?

MR. THAXTON: You have not provided a complete picture of the section, Joe. I can't tell you, because the section -- if you say right now that there's no place that has 7.5 --

MR. MAIN: Okay. I'm going to try this from a different end, so we clearly understand this, Marvin. Just bear with me a minute. What the law says right now, you can't exceed 2 milligrams on that section sample. Is that law still in effect that says that operator can't exceed that 2 milligrams on that dust sample that he just

measured?

MR. NICHOLS: Yes.

MR. MAIN: So it's illegal. So what you're telling me, if that dust sampler on that miner who's got that PAPR on shows up at 2.5, he's a violation and you issue a citation?

MR. THAXTON: If he has a PAPR on and he's at 2.5, and he has exhausted all feasible controls, and that 2.5 has been determined by the Agency to be the level that they can maintain with a protection factor, we will not cite him, because they are providing a supplemental protection to the --

MR. MAIN: Okay. So they wouldn't be cited under the law at 2.5. All right. Let's just go up. Let's go to 3.5.

MR. THAXTON: Well --

MR. NICHOLS: Well, before you do that. George, what's the highest dust levels you're seeing on people working farthest downwind on long walls?

MR. NIEWIADOMSKI: Well, if you measure -- if you're looking at --

MR. NICHOLS: Don't give me a bunch -- I mean, just tell me a number.

MR. NIEWIADOMSKI: Well, we have isolated cases where you're going to have 10 milligrams or higher. You

could have, okay. But those are isolated cases, all right? The fact is this, okay, I mean, what's being -- the way it's being characterized that the Agency would allow an environment to be 8 milligrams in 2003.

MR. MAIN: Well, you've done that.

MR. NIEWIADOMSKI: We never allow that.

MR. MAIN: You have so, George.

MR. NIEWIADOMSKI: On a consistent basis, we would never allow that.

MR. MAIN: You have allowed it.

MR. NIEWIADOMSKI: We have -- I --

MR. MAIN: Until we get in and clean things up -- were you involved in the dust study at Trail Mountain?

MR. NIEWIADOMSKI: I was not.

MR. THAXTON: No. I was.

MR. MAIN: Okay. What was the dust levels that we found in there when we went in and put the microscopes on the place, Bob? Do you remember what some of the upper reaches was?

MR. THAXTON: No, I don't remember the upper reaches.

MR. MAIN: Do you remember 11? Do you remember 12? Do you remember the operators saying, gee, I cannot comply with this standard, I need PAPRs? Do you remember that? That was their initial approach?

MR. THAXTON: Well --

MR. MAIN: And do you remember us going in that coalmine, and showing this mine operator who couldn't figure it out for themselves how to change the air flows, how to change sprays on belts, how to change the sprays on shearers to get that mine level down? Do you remember that?

MR. THAXTON: Trail Mountain's request was not to use PAPRs. Trail Mountain's request to the Agency was that they had exhausted all feasible engineering controls, and they asked us to come in and take a look, to determine whether they had or not.

MR. MAIN: Because they wanted to use PAPRs. I have the documents.

MR. THAXTON: That would probably be the next step, that they would come in and ask for that.

MR. MAIN: They made it clear.

MR. THAXTON: They did not get to that point, because we did go in, Joe, and we did walk down the long wall, and we checked everything out. We said, no, you have not put in all feasible controls. And that's exactly what will happen in this. We will go through, and we will check each person that gets to that point. Each section. And if they have not --

MR. MAIN: But you had the law that said they

couldn't, because I recall the discussions. I know there was some weak-kneedness in that Agency whenever that proposal came down again, Bob. And that's why -- I mean, I have these experiences. Some folks was like, gee, what are we going to do here? What are we going to do? How come that existed? Why wasn't MSHA catching it? If we would have had continuous dust monitors on those miners 24/7, those miners would never have been exposed the way they are, and got away with it.

MR. THAXTON: You have to realize, at Trail Mountain they were demonstrating compliance for the most part, because of the sampling system that was in place, that you could average samples, and they were collecting the samples on the shearer operator.

MR. MAIN: It didn't work, did it? And these changed.

MR. THAXTON: Well, you had people working downwind. Just as we showed on that example, Joe, we had three shifts sampled that are below the standard, two shifts above it. Those two shifts that are above, that mine operator may have all feasible controls in place.

MR. MAIN: You guys are --

MR. THAXTON: And the average shows compliance.

MR. MAIN: I understand. You guys get caught up in all these theories --

MR. THAXTON: Those two samples, though, still showed that people were being exposed to high concentrations.

MALE VOICE: Is this I debate or a public hearing?

MR. NICHOLS: Yes.

MALE VOICE: I'd like to hear from the miners rep.

MR. THAXTON: So the two samples that are there, we're saying that if you've got those conditions going on, and that people are being exposed, why not do something to protect the people, if that is as far or as good as the controls can get. Not that we're going to give up and walk away from it --

MR. MAIN: I think we've rolled into a debate, sucking us into the same flawed program, and I think we need to get out of it, and understand two simple things again. What this proposal does is, it increases dust levels, and it decreases the frequency of sampling in coalmines. The wrong thing to do. What miners have said, that you won't listen to them, says, increase dust sampling, get us continuous monitors, and lower the dust levels of exposures.

It is our firm belief that we put on these dust samplers that are at hand, that we should go back to the drawing table. We got enough information now to build

the rule from, and by the time this test is done, we can be out.

MR. REYNOLDS: Joe. In that regard, I wanted to interrupt here. One of the things that we've done in the proposed rule is, we've asked a long series of questions about how you want personal continuous dust monitors used, and we really need to elicit some information from the UMWA and the miners and the operators about what that would look like, how we would use that. And I just wanted to call your attention to the sections there.

I don't know if it would be Tim, or whoever would be looking at this, but there are a bunch of questions that we ask on page 10827 about how would you want that program to work, what actions should MSHA take based on what readings we get from the continuous dust monitors.

MR. MAIN: I can give you some simple --

MR. REYNOLDS: Okay. But I'm just saying that --

MR. MAIN: Let me apologize, Larry, for not getting to those questions. We are so far behind --

MR. REYNOLDS: Okay. I was just saying that I just want to bring it to your attention and everybody here that we are asking for that. And I think that's part of the reason -

MR. MAIN: 24/7, you sample, full shift, you sample. The standard is the standard. We work at lowering that standard instead of increasing that standard. The miner would not be permitted to be in -- as the Mine Act said. Follow the principles of the Mine Act.

MR. REYNOLDS: I understand --

MR. MAIN: That data would be recorded at the end of the shift, it would be electronically downloaded to MSHA, so MSHA would have that as a database for all samples.

MR. REYNOLDS: Okay. But they're even more detailed questions that we're asking.

MR. MAIN: We'll get into the more detailed questions, but I think the first -

MR. REYNOLDS: but I'm just trying to elicit that from you.

MR. MAIN: We haven't got to the point -- we've got to the framework that you're giving these miners, and we haven't got to the framework that you're even contemplating sampling 365 days at 24/7.

MR. REYNOLDS: Right. I just want to make sure, though, that we went -- you know, in the last proposal, we also asked the same questions, and I just wanted to make sure. This is where we really need that kind of

detailed information in the rulemaking record.

MR. MAIN: I'm going to end end this, because there's a lot of miners here that needs to be heard. But I'll tell you, I think it's totally unfair the way you guys put this rule out, and I think it's unfair the way you hid this whole gimmickry of the quarterly sampling program. Really, it ain't there. You know, one operator -- an operator, one shift a year on plan verification. If he figures out a way to slide the program. You set him up to say, gee, I ain't got engineering controls, make me do it, MSHA. I mean, there's a whole lot of just difficult things. It undercuts the Mine Act in so many areas. Adverse to miners in so many areas. Fails to listen to the historical record and the miners. The wrong thing to do. We need increase in sampling, decrease in the dust levels to protect these miners, so we don't find, like we did 800 and some miners in this last round, and just, what, the last three-year study, 800 and some miners with evidence of pneumoconiosis. You know, we need to end that. We need to quit monkeying around with the program.

Thank you very much. And I'll be at the other hearings to talk more about these rules. As I learn more about them, and as we try to educate our miners, I'm scared to death they haven't got a clue about what's

ready to hit them as far as this freight train. And we do ask for the rule to be withdrawn.

MR. NICHOLS: Thanks, Joe.

(Applause.)

MR. NICHOLS: I'm going to have to step up and take a break, but we need to keep going, I think. Our next presenter is Joe Marcinik. Did I pronounce that name right? M-A-R-C-I-N-I-K -- with the UMWA? Okay. Okay, Randy Becilion?

MR. BEDILION: Hi, my name's Randy Bedilion. I'm a UMWA rep, local 2300 Cumberland Mine. I'm on the safety committee. My last name, B-E-D-I-L-I-O-N. I've been involved in these hearings before now, many of them. I've been able to read rules before, but as Joe and Carl, they touched on this, this is the most confusing rule I think I've ever read, or tried to read in the amount of time we had. Like I said, I've been in the mine for 28 years, and I always hoped that every day things would get better, but some of the things I read in this rule, it looks like we're going backwards.

The only thing I can see is that it jeopardizes the safety of us, the working miners, and more or less just benefits the company. In raising the standards, as to the milligrams, they don't have to stay under compliance, which saves them money, which costs our

safety and health. That's one of the things that bothered me in reading this rule, the parts I did understand. And in the end, the monitors, we'd more or less get screwed again. Our safety has been dramatically reduced by the wording in this rule, and the number of samples of dust in the air that we have to breathe. By lowering the samples, the only thing that's going to do is you're going to raise what we're breathing.

If you don't -- we need sampling. Joe, I can't -- those two acts I'm following, they're kind of hard to follow, Joe and Carlo. But I guess what I want to leave you with, in the past there was a statement made by the UMWA that we'll not go back. And if this rule passes, we've taken not only a huge step backward, but again, jeopardizing the health and safety of the miners. And that's all I really got to say, but other than being confused, and still confused, and seeing that this rule stinks.

(Applause.)

MR. THAXTON: Thanks. The next presenter. Paul, is it Cutter?

MR. CLUTTER: My name is Paul Clutter. It's C-L-U-T-T-E-R. I'm with the local 1197. I work there in the 84 mine. I find this new reg that you're working up here very hard to understand. I've gone over it three or

four times myself. Can't make any sense out of it. What I do see is, I'm a 30-year coalminer. I've watched loved ones, friends suffer and die from black lung. I held my uncle's hand while he breathed his last breath. Now you're telling me you're going to permit the standard for dust to be raised?

I'm a candidate for black lung myself. And you're going to permit the standard to be raised? You call yourself MSHA, Mine Safety and Health. I would like to see you enforce that safety and health, and not let the operators kill us. I don't know if any of you have ever witnessed someone dying of black lung. It's not pretty. My uncle sat up to sleep, and feared sleep because he thought he might stop breathing while he was sleeping.

I have seen firsthand what this dust can do to the lungs. On the side I've worked in emergency medicine and stuff. I've observed autopsies and everything. I've seen firsthand what this black lung can do to the lungs. It deteriorates them. They're just like dust. They fall apart in your hands as you hold them. And now you want to increase the dust that was in the mines. Why? Why are you permitting the abuse of human life? I ask you, as you are called MSHA, to enforce your own title, and enforce safety and health.

MR. NICHOLS: Okay, Paul. Thanks.

(Applause.)

MR. NICHOLS: Is John Masonik back yet? Okay. John Palmer, UMWA. Other room? Harry Powell, UMWA. Barry Cox, UMWA.

MR. COX: Hello, my name is Barry Cox, C-O-X. I'm safety committeeman at local 2258. I'm a 30-year coalminer, too. I've lived through my grandfather living and working in the coalmine, my father working in the coalmine. Both of them both died from black lung. My dad had 37 years in the coalmine, always at the face. He was either running a machine or roof bolting. He had to quit work at 57. He couldn't breathe. I lost him at the age of 61. I'm real close to that. He had 37 years in the mine. I got 30. What do I got? Do I got 7 more years to live? We don't know.

We can send men to the moon. Why can't they come up with some kind of a detection, a dust detection to put on the machines, just like your methane detector. When it reached 2 milligrams, shut the machine off. Fix the controls. That seems pretty simple to me. I don't know. That's about all I have to say.

MR. NICHOLS: You would think it would be simple, but it's been a long time in the process. At the last one, the last comments we had during the 2000

hearings, well, it's just around the corner. And the corner is back -- the Agency -- as I said earlier, these rules allow for the personal dust monitors, but we're not going to be sitting and waiting another two years to allow people to keep averaging these samples, where you've got two miners overexposed, three under, and people call that compliance. That's --

MR. COX: But I think until we get to that point where we do get some kind of electronic machine to put on the machines, to take care of that situation, once you get to 2 milligrams, shut the power off the machine. You fix your ventilation controls. Then we need to take as many samples as we need to do to keep the guys safe.

MR. NICHOLS: Did you say you work at Cumberland Mine?

MR. COX: I work at Emerald.

MR. NICHOLS: Emerald. Okay. How would you rate the dust conditions at Emerald?

MR. COX: We have a good mine, but I've worked in some mines. I've worked in a nonunion mine. I worked 15 years in a union mine. I couldn't get a job when they closed it down. I got a job at a nonunion mine. That's when things opened my eyes, and I've been a committeeman ever since then. And that's been for the last 13 years.

MR. NICHOLS: Okay. Thank you, Barry.

MR. COX: Okay.

MR. NICHOLS: Ralph Serian? UWMA? Is Ralph here? Floyd Campbell?

MR. CAMPBELL: My name is Floyd Campbell, C-A-M-P-B-E-L-L. I work at Emerald Mine. I have 27 years in the mine. I'm in the safety committee there. And I just can't believe you want to raise the dust standards in the mine. It's inconceivable to me. I have 27 years, and in three more years I'm eligible for retirement. I didn't want to be subjected to a more dangerous environment. I'm a fire boss. I've seen times on our mine built when we had to pull the cord and shut it down, because the dust would be so heavy in the air.

So you asked about the conditions of the dust there. At times it's terrible. I really didn't have a lot more to say. I just don't understand why you want to ram this through.

MR. NICHOLS: Well, we're not going to raise the dust levels. Now, it's apparent that we haven't probably done a good job of explaining that, and we're going to have to keep working on it, but the dust levels are not going up. MR. CAMPBELL: I work the long wall for six years. I wore a PAPR. I can't imagine anyone roof bolting in them, because you can't tilt your head back, because they dig into the back of

your neck when you wear them. They get smeared. You have to wipe them off. And I would say the whole preference to this plan is that they keep that closed the whole shift, and there's no way you can keep it closed the whole shift. They're going to open them up. And then when you do, you're into the environment outside it, and that's not going to be a 2. Is that correct? I mean, if you're wearing a PAPR, the environment is going to exceed 2.

MR. BEDILION: Well, if they're in an area where it's required that they wear the PAPRs, you have wear them as approved, with your face shield down. The only way that you can raise the face shield is if they remove you from that area.

MR. CAMPBELL: You can't work all shift long. I mean, you're going to get -- we use wet-head bolts, ten feet back from the monitor. You're going to have dust coming over, and water and mud coming down. And you can't see --

MR. NICHOLS: Do we have any wet-head bolters out of compliance of the 2-milligram standard?

MR. CAMPBELL: I don't know. I'm a fire wall, so I'm --

MR. NICHOLS: I don't think we do. And a wet-head bolter ain't gonna see no PAPR.

MALE VOICE: How's he supposed to know? He don't wear no monitor. The company's get their dust monitors.

MR. NICHOLS: We sample. MSHA samples.

MR. CAMPBELL: I can see it coming with this plan. I'm afraid they will, and if they do, I'm telling you, a bolter can't bolt with that helmet on. Because I wore it on one wall, and when the long wall got loaded, you couldn't wear it all the time.

MR. NICHOLS: It ain't gonna happen. If people can engineer out the problem, it ain't gonna happen.

MR. CAMPBELL: But there's no incentive for the companies to engineer the problems out if they're allowed to use the PAPRs.

MR. NICHOLS: No. The rule actually states -- and it's actually written in the regs that the operator has to maintain all feasible engineering controls.

MR. CAMPBELL: Meaning that he has to use all the known controls out there now?

MR. NICHOLS: He has to use all controls that are available right now. Anything that's feasible for that particular mine, it has to be used, before we will even consider a PAPR, and they have to demonstrate that, even after they use all that, that exceeds the standard.

MR. CAMPBELL: I'm afraid I'm with the rest of

the members. I don't have the faith in the companies that you do.

MR. NICHOLS: Well, I mean, we have a pretty good presence at these mines, and you know, we're there inspecting four times a year, and some of these big mines almost have resident inspector programs. But to get back to your example, a person's not going to be able to take a wet-head bolter and take the water off of it if they want it --

MR. CAMPBELL: Or the water in it is going to get on his face shield. That's what I'm saying. Or the dust or the mud --

MR. NICHOLS: But he ain't gonna be wearing a PAPR. He don't need it.

MR. CAMPBELL: Well, I'll believe it when I see it.

MR. NICHOLS: Okay. All right, Floyd, thanks. Chuck Hayes?:

MR. HAYES: My name is Chuck Hayes. I work at Federal Number Two, H-A-Y-E-S. I've been employed 29 years. I don't have a whole lot to say either, but I just can't believe this is 2003, and we're still fighting for a dust-free environment. I'm like the brothers that came before me. I just can't understand why you want to increase the dust on our sections. We want a dust-free

atmosphere.

And reduce the sampling. That's another thing. Why reduce it? We need more sampling. And the mine operator, I don't know how you can let them verify the dust control plan, because like the brothers in the past have said that they have cheated, they've caught a lot of them cheating on their dust samples. And like the brother said, MSHA stands for Mine Safety and Health. I can't see where we're at with the health and safety here. We're clear out in the lost ballpark here. I just don't understand where you're coming from.

I see my brothers come out of the mines every day, their faces as black as a man's jacket. I mean, there's dust in the mines. I mean, it ain't going nowhere. It's still there. It's not going nowhere at all. I'm just at a loss for words. I just can't understand why you would want to increase the dust in the coalmines, the sampling. It's sad. It's a sad day in the coal fields. That's all I have to say.

MR. NICHOLS: Okay. Dennis O'Dell.

MR. O'DELL: Good afternoon, my name is Dennis O'Dell, D-E-N-N-I-S O-D-E-L-L. I'm an international health and safety representative with the United Mine Workers of America, and I have 26 years of experience in the coal industry. Before I begin today, I would like to

thank this panel for the opportunity to speak here today on such an important issue. One that will affect the miners' health and safety for years to come. I pray that, once again, my comments do not fall on deaf ears as it did in August of 2000, and you will go back to the well and do what is right for the miners, who, as the Act has always defined, are our most precious resource.

I took a couple parts of this rule and looked at it. And I'd like to first begin by speaking on 70.218, "Violation of Respirable Dust Standard, Issuance of Citation, Action Required by the Operator in Determination of Citation." This section sets forth requirements for actions following compliance dust sampling by MSHA. As a result of the complex formulas and exceptions in the rule, it almost reads like the U.S. tax code.

For example, if you look at 72.18(a), it begins with "If a valid equivalent concentration measurement for any occupation sampled by MSHA meets or exceeds the citation threshold value listed in table 72 that corresponds to the applicable dust standard in the threshold value listed in table 72 that corresponds to the applicable dust standard in effect, the operator will be cited for that violation of 70.100 or 70.101."

The complexities and hidden ramifications of the

proposed dust rule are evident in this single one provision that's listed in this rule. One almost needs a Philadelphia lawyer or someone who can interpret or figure out when a citation for overexposure of unhealthy coalmine dust would be issued. Also, if you look in this new proposed rule, there is no longer a straightforward 2-milligram standard as required by the Mine Act.

Under this proposal, if the standard is exceeded, what the operator is cited for, it could be much greater than the 2-milligram. To determine what is to be cited, you have to understand first what "valid" means, and how equivalent concentration measurements are determined. After this is figured out, then you have to determine what a citation threshold is. Then you must calculate what the applicable standard is, which involves a number of formulas, including quartz levels, along with verification factors and air flow rates where PAPRs and other administrative control factors are used.

That calculation has now raised the 2-point milligram standard, as required by the Act, if I figured it out right -- and I'm just a regular guy with a degree in elementary education, and things are quite simple, but when you sit down and you figure that out, it comes out to a whopping 8.1 milligram of respirable dust in the mine area. And guess what happens then. The mine

operator may not even be cited at that point, according to what I've read. Dust levels could even be higher than this, since the sampling for the plans are only on an eight-hour basis, and our average miners are now working twelve-hour shifts.

We have now elevated the dust exposure four times to what the Mine Act allows, and if that doesn't scare you, I don't know what will. I hope that we are all prepared not only for more miners to die of black lung, but now we have just loaded our coalmines up with enough float coal dust to blow every mountain side off from here to kingdom come.

I want to examine section 70.212(b), which specifies what occurs if and when a citation is issued. It requires the mine operators to make respiratory protection available to the miners. This is something that is currently already required by the Mine Act. The operator is then required to determine the cause, and take corrective action to reduce the equivalent concentric of respirable dust to within the applicable standard.

They are then to revise the dust control plan parameters if the corrective action indicates they are inadequate for the current operator conditions. At this point they must notify the Agency within 24 hours after

implementing corrective action. At that point, the mine operators can apply for PAPRs or administrative controls of the means for vacating this violation. This is what I understand.

Under 70.218(c) it states that the "citation on overexposure will be terminated when MSHA abatement samples now show compliance with the applicable standard. All changes to achieve that must be placed in the dust control plan where the revised plan has been verified for the current operating conditions."

That means, MSHA will not sample to verify compliance. The operator will actually do the sampling, and they're going to report their findings to the Agency. This proposed rule now allows MSHA to accept the word of the operator without even checking the conditions, plan changes, or even conduct an abatement sample when a citation is issued for noncompliance with dust standard. That is the way I read it.

Let's look at table 70-2, "Citation Threshold Values (CVT) for Citing Respirable Dust violations Based on Single-Shift Measurements." It is my understanding that this table is used to help determine at what level the violation will be cited. An example. And I think Mr. Thaxton had spoke about this, and if I'm repeating what you have already said, or if I say something wrong,

please correct me. Applicable dust standard would be 2 milligram. The CVT would have to be 2.33 milligrams before MSHA could issue a citation from a single-shift sample.

This rule permits the mine operator to exceed the standard by a set margin before MSHA would cite the operator. In this case, miners would now be exposed to 15 percent more dust than legally required, before the operator would be cited. Instead of lowering the dust standard to reduce miners' exposure, as intended by the Mine Act and recommended by the federal advisory committee, NIOSH, miners and others, MSHA's proposal increases the amount of dust allowed in the mine environment. This is, however, only the beginning of increased dust allowance.

Through the complicated formulas and exceptions contained in the rule, that is deceiving. The 2 milligram contained in the table under "applicable dust standard," is not that level, and dust levels would not be the 2 point milligram before MSHA cites the operator, because the formulas and exceptions MSHA uses in the rule to convert dust levels of samples showing concentrations from 2.3 milligrams to over 9 milligrams in the active working of the mine environment could exist before MSHA issues a citation. And I believe this is something that

George had spoke to, and even said it could possibly go up to 10 milligrams.

As pointed out in section 70.218(a), the rule would allow respirable dust levels to increase dramatically in the mine atmosphere and active workings. This is noted contrary to the protections contained in the Mine Act, numerous findings and recommendations, as well as the common sense that we've all forgotten to use.

70.218, "Personal Continuous Dust Monitors." I've heard much argument and debate about this already, and we've just started these hearings. This section allows the use for personal continuous dust monitors which falls far short of that recommended and needed. These devices long sought by miners are in the final research, development and testing stages, If I understand Mr. Wade correctly. Testing is to be completed by late summer, and expectations are that the devices will be commercially available by next spring.

The UMWA, industry, and NIOSH has supported the research and development of these devices. They have been developed to fit into cap-light battery housing, using advanced battery technology, leaving the cap-light battery housing, the dust sampling unit about the same size and weight as the current cap-light battery that monitors use today. So it's not something that would be

extra bulky for the monitors or uncomfortable for them to use. This device will provide, as I understand it, instantaneous and continuous respirable dust measurements throughout a full shift of sampling.

The MSHA proposed rule, however, has decided to show the average dust concentrations as the shift proceeds, and allows the monitor to protect the dust concentrations for the remainder of the shift. The device, which has been designed to be worker friendly and comfortable, also allows the data to be quickly downloaded. This data could be electronically transmitted to MSHA at the end of the sampling shift, and the devices were developed to allow monitors to know what dust levels they're in. It just makes good sense to do this.

The MSHA proposed rule does not require their use. I heard Mr. Nichols say that we didn't want to wait two years before this was properly developed. Instead, now it's up to the mine operator if they choose to use them, in lieu of the operator quarterly plan verification sampling. As noted, MSHA expects about 15 percent of the mining units in the country to be required to conduct a quarterly sampling, and with so many loopholes and exceptions, there are many more ways for operators to legally avoid the sampling.

Despite the government promise to have these devices built in 1980, and despite the overwhelming recommendations for their use, the intent of Congress to have dust concentrations continuously maintained at or below legal levels, MSHA has ignored all that, and left the decision to the use in the hands of the mine operator.

A revision of the dust rules must require continuous dust monitoring at each underground mine, each shift, each day of all designated occupations, part 90 miners, specific out-by areas and other locations in the mine where unhealthy dust levels can occur, and where miners request for those to determine what their dust levels are. The regulations must also require the capabilities previously outlined, regarding information including on dust levels during the shift and the end of shift, to download the data to the miners and to MSHA.

70.220(b) stipulates that "If a mine operator chooses to use the PCDM devices, they must include administrative controls in their dust control plans," and those do not have to be approved by MSHA. It also stipulates that the operators' proposed rule or plan "must include engineering and administrative controls to be used, and the method for the operator in which they will employ to ensure such controls are complied with

each shift." The miners are occupations that will be wearing the PCDMs each shift, and procedures to ensure no miner will be exposed above the applicable dust standard." And I still don't know what the applicable dust standard is.

It was pointed out that if the dust cannot be reduced by the engineering controls, as I heard you speak earlier, that Airstreams -- I'm sorry, if the dust could be controlled be engineering controls, the Airstreams would not be allowed. The problem is that the operators have already been laying down the groundwork to overcome this for some time. For some time now, under ventilation and dust plans submitted by the operators, the operators have argued against increased air and increased water as a part of their plan.

And we all know that these are the two main means to control dust. Now, what they've argued is that too much water and too much dust will actually -- I'm sorry, too much water and too much air will actually increase the dust. And if you talk to the district managers, they'll tell you that they've heard that argument time and time again from the operators.

So what happens? A company goes out of compliance, the district manager tries to get them to implement more air, more water, the company comes back --

even if they have the capability to do so, they come back and they say, sorry, but we've reached a point to where we think it is no longer productive to add air or water, it now becomes counterproductive. So we're saying we're not going to do it. This is all we can do. Even if we have the capabilities to go beyond that, we're not going to do it.

So the next step is that they're going to be given Airstream helmets. When listening to previous testimonies by Carlo Tarley, Joe Main and others, and no disrespect, but when questions were being asked or points were being made, you defended the proposal as it is written. The district president from Ohio was sitting beside me, Mr. Larry Ward, and he asked me, why are we even having public hearings if you're not willing to be open to what our comments are? If you're not willing to listen to what our needs are? If you want to argue the rule, then it sounds to us like you're dead set and already for what you've proposed in this rule.

Mr. Nichols, you said you didn't want to wait two years for the development of the PDM, but I have to wonder which is worse. Is us waiting two years for the development of the PDM or us working under a dust standard, a flexible dust standard that can reach 9 milligrams worse?

On August 7, 2000, in Morgantown, West Virginia, I was given the opportunity to do the very same thing I am doing today, and that's speak on the rule. At that time, I had asked the committee to please address the very same things I've addressed here today, as well as other issues. Some of these issues that I and others had asked you to look at were, to make the rule less complicated, and it appears as if the rule is more complicated.

We have asked fixing the flexibility of the operator to be allowed to be in excess of 115 percent of the quantities specified in the plan, and exceeding the production levels by 33 percent before it triggers the operator to submit a new plan verification. This wasn't fixed, but was made worse, which is what I need to also mention at this point is, to the discretion of the district manager. I, as well as others, had asked if you would please look at fixing the provisional plan approval, and that process allows the operators to send this in, via fax or e-mail. And it's our fear that these plans will go on for months before the inspector actually gets to the mine to check it out, to see if it's adequate or not.

Prior notification to the sample on the plan approvals still exist in this rule, If I understand it.

Minor participation during operator sampling is still not mandated. The training and certification issue for minors failed to be addressed properly. The Airstream helmet issue actually got worse, as now it looks like miners will be forced to wear Airstream helmets in lieu of fixing the dust problems. And after testing at several mines, these Airstream helmets still failed to work properly.

Not only do they not work properly, but now with this rule, you will have monitors wearing inadequate helmets in excessively explosive, dusty atmospheres. We have far too many mine fires already today without raising the dust levels allowed under this rule. I personally have been on a dead run since 1999, chasing mine fires and fatalities one right after the other. And it sickens me to think that this will elevate to even more mine fires and fatalities if this rule is allowed to pass.

I would like to resubmit my comments from the August of 2000 with my comments today. Miners deserve better than what we have got thrown back at us. The individuals that wrote this rule should sit back, relook at it, and maybe even go into a coalmine for a month or two and work, and see what it's actually like to have to breath, eat with this dust, and work.

The rule is still too complicated and has too many loopholes. The rule actually encourages operators to use Airstreams in lieu of controlling the dust levels. More dust will not only be sucked through our lungs, but will gather on the mine floor and ribs, as well as being suspended in the air to cause more ignitions, and even worse, more mine fire explosions.

I watch this crowd today, as you guys have given some of your explanations, and as Mr. Thaxton gave the initial explanation before the meeting started. This crowd behind me is a representative of the mining industry, and what I saw was confusion, not only on the miners' faces, but the operators and other MSHA personnel, as well, are as confused about this rule as we are. I did not see one single person stand up in applause after the presentation was made by Mr. Thaxton. This tells me that the crowd here today believes that this rule is a poor performance, a bad show, and therefore, it got bad reviews from the real experts, which is the people that actually have to work under this rule, and whose health will be affected. You need to listen to the real experts, take our comments back, and fix the mess.

I would like to see you come back with a realistic rule, as all good shows, and as all good

reviews, and it will get the applause that it deserves when it's right. This rule needs to do the same with the miners. I'm asking everybody in this room to stand up. Coalminers please stand up. Anybody in the coal industry please stand up. Anybody that works in a coalmine please stand up. Anybody that has to go underground please stand up. I need you to take a good look at this crowd.

You control the future of their lives, to exist and function as normal, healthy human beings. Take a good look at their faces. Look into their eyes. Do the right thing. Make this standard work for the miner. Keep the environment clean. Thank you.

(Applause.)

MR. NICHOLS: Thank you, Dennis. Any questions of Dennis? Thanks a lot. Mark Sergetti? Chuck Junoski.

MALE VOICE: I have a gentleman that would like to testify, but he's got to leave. Can I put him on now?

MR. NICHOLS: Yeah, bring him on up. Who is it? Come on up.

MR. EALY: How you doing?

MR. NICHOLS: Good. How are you doing?

MR. EALY: My name is John Ealy, E-A-L-Y.

MR. NICHOLS: Yeah, I've seen you before.

MR. EALY: You remember me, huh?

MR. NICHOLS: Yeah. I've seen you last year.

MR. EALY: Here we are again. Health and safety committee representative, local 2300, Cumberland mine. I've got about 26 years experience underground, and been working with the mineworkers now for the past several years, and I'll be brief here, because a lot of this stuff we're hearing is basically redundant, but it needs to be said probably over and over again, because evidently, it's not maybe being heard.

You know, when you take two of anything, let alone something you didn't want to start with, and you make it into eight, it's not good. And as I see it, the mineworkers in particular, we want to keep what we have, if not make it better. We want more samples. We want less milligrams of dust. And it seems as if we're going to more milligrams of dust, with less samples. And it's kind of like the company/union thing. And what's sad at this point in time, it seems like the government's buying into the side of the company.

And it's not a personal attack on anyone whatsoever, but it's just the way I feel. And it's pretty obvious that that's what's going on. And I know a lot of it's linked to politics. There's a lot of various reasons why it is like it is, but what I'm saying is, let's look at the best interest of everybody in general

here, and come up with a way that we can all live, and live to see our grandchildren and what not, you know.

Because like I said, we're still killing people at the 2-milligram level, and I'm really not sure, but I've been trying to understand. I really don't know why anybody would even propose something to go to more than that. Because I know at our particular facility, we've set records on mining coal for 26 years at 2 milligrams. And it's just a matter of putting the right engineering controls.

And one of the things, too, we work for a good company. You know, I like working for RAG. We do have our differences, but for the most part, they're willing to work with us and uphold the safety standards. In fact, we've got one of the best safety records in the industry right now, which I'm proud of to be part of that. And we want to be kept on a level playing field with the small renegade operators.

And something like this actually opens the door for them, because we're going to hold our companies accountable for the standards that we want for our people, but these small operations, you don't see any of your nonunion people here today fighting for this rule, nor did you see them fight when the Act went, nor do you see them fighting any other time, because they're not

allowed and they're scared. We have representation, and we're proud of who we are and where we come from and where we're going. And we're proud of what we're going to keep.

And I feel that this is the opportunity for your renegade operators to go out there and do what they want to do, and kill who they want to kill. And like I said, they're willing to change coal for blood. And at one point in time back in the fifties, that's exactly what happened in the industry. Then the mineworkers came along, and we're not going to tolerate that anymore. So we have to stand up for what we believe. Any questions?

MR. NIEWIADOMSKI: You know, we all are trying to achieve the same goal, kind of. The problem is -- and apparently, as Marv indicated, we're not being able to convince you, or you really don't fully understand that the approach that we're trying to use to get to that objective. And one of the things that I want to mention is, just to let you know something, why we feel that what our approach is trying to get to what you guys want to do is, eliminate overexposure. So let me just throw you a number, okay?

MR. EALY: Sure.

MR. NIEWIADOMSKI: For example, in 2002 -- and we think this is -- we can't tolerate this -- in 2002,

looking at operator samples, we had 2,681 sampled shifts. That's 11 percent of the shifts that the operators sampled -- that's in the DO -- were above the standard. Exceeded the standard. And that's during sampling, okay?

MR. EALY: No doubt.

MR. NIEWIADOMSKI: So you can imagine, if that's during sampling, you probably have similar overexposures during nonsampling periods.

MR. EALY: Absolutely. In fact, you probably have more.

MR. NIEWIADOMSKI: Right. Now, MSHA, we go out there, and 14 percent of our samples exceeded the standard. And so we've had that over the last three years, okay? And the problem is -- and let me just tell you that what we're looking at is, what is the best way to try to attack that? Because right now, we don't have the tools, okay? Now I'll just tell you that in last year, 2002, we sampled over 1,100 mechanized mining units. We issued only 33 citations. And so we've got these overexposures that aren't citable, okay, because what happens, we're taking averages and so forth.

And the thing is, what we want to attack is, we want to make sure that -- what we're looking for is raising the bar, okay, on the plans. And I don't know. I wanted to ask your opinion about it. What's your

opinion of plans? Whether or not you feel that plans are good. That the current plans, the way we approve them right now, they're probably pretty weak, okay? And we recognize that, because we have these overexposures on individual shifts. And in order to eliminate the disease, we've got to eliminate these on each and every shift. And that's the objective. That's what we basically are trying to do.

And our approach is to make sure that we have a plan that's really designed to eliminate that. And let me just say this. And you know, right now when we go out there, we approve plans, and our criteria is the minimum production level at which we're going to say we got a valid sample is 60 percent of the average. Now, true, that's not to say that every sample we collect is at 60 percent. Some of them are higher. But we're basically saying, hey, that's too low. Let's make sure we upgrade those plans. We want to make sure we get better plans.

And that's why we've raised that production bar to where it's the 10th highest production in the last 30 shifts. Now, if you think about that, that's very high production, which means, when an operator's going to test that plan, and we're going to target -- you know, the thing is this, while the operator's going to be doing the sampling, we're going to be targeting operations to make

sure that they're doing it right. But the fact is this, what we expect, we expect a significant upgrade of all the plans that are out there.

Because what happens right now, we feel, is, when we go out there, the operator is exceeding the parameters by 100, 200 percent. We want to make sure. We test those plans at what is specified at those high production levels. And that's the way we feel. And those plans, as you all know, they have to be checked on each and every shift. I don't know how much confidence you have on that, or whether or not that's really being done, because what we're basically saying is, it's pointless to do the on-shift.

I mean, you're doing it, but if you got a bad plan, what are you checking? So the question is, if you designed that plan that really works, and you check it every shift to make sure it, in fact, is in place, that's going to protect people. Now, do you feel that that's the wrong approach? That's not going to do it?

MR. EALY: You asked me a lot of questions there, but --

MR. NIEWIADOMSKI: Initially, what I pointed out is, I just threw out these overexposures. What we want to do is, we want to eliminate those. That's what we're proposing. We're not raising any standards. We feel

that this is too high. That's what's causing the disease to continue.

MR. EALY: What's too high?

MR. NIEWIADOMSKI: The number of overexposures that we're getting right now.

MR. EALY: Okay. But when you're talking about a plan, you're talking about your parameters for your pressure sprays and everything --

MR. NIEWIADOMSKI: Yes sir. And you think you have good plans now.

MR. EALY: Right. And like I said, we hold our company accountable, and they want to be accountable. But once again, it's going to go back to these people that don't even know what a spray bar is, probably, on a miner. But nevertheless, back to what you were saying, I mean, Mr. Joe Main asked a question, I believe it was, do you really believe that one sample out-by in a year on a person on a belt line is enough to get a representative of what that person's breathing in a year's time? I don't understand how you consider that's raising the bar. I don't understand that.

MR. NIEWIADOMSKI: No, I --

MR. EALY: Isn't that, in fact, the way it's going to work? I don't understand this plan either, but I've just been hearing about it, so --

MR. NIEWIADOMSKI: Let me comment on that, okay? You know, we look at this data, and we basically -- if, in fact, we think there's a problem, we're going to go out there more frequently. We're setting minimums, okay?

MR. EALY: I know, but I've been around long -- not to interrupt, but I've been around long enough to know. I know what minimums mean. Minimums mean that's what you're going to get.

MR. NIEWIADOMSKI: But let me --

MR. EALY: And I'm not being smart with you, but unless it's black and white -- this thing is so complicated, there's so many loopholes in this thing. I just can't buy into it. I'm sorry to interrupt you.

MR. NIEWIADOMSKI: No, no, that's okay. What I'm trying to explain to you is, the data that we've got here on our samples, on the operator samples that shows people are being overexposed. And we want to stop that, okay?

MR. EALY: And I appreciate the fact that that's what you want to do, because that's what we should do.

MR. NIEWIADOMSKI: Not only on the shift that's being sampled, because you assume that's the best conditions when sampling is taking place. We want to make sure that happens on the majority of the shifts, which are not sampled. And so just like plans, roof

control plans, other plans are intended to protect people, we're looking at trying to upgrade every single underground mine ventilation plan, to make sure it's going to work at the highest production levels.

MR. EALY: I don't know if that's really a yes or no answer, but I'll make two more points, and I'll get out of here. When you think about -- we talk about making things optional. If you make the use of the Airstream helmet optional, it's like when we went through it with the hearing. You use your engineering devices.

Well, we all know it's hard to put Teflon onto a continuous miner chain than it is to maybe do some engineering problems with the fan just for noise or whatever, that type of thing. But this is a whole different scenario. I know that didn't go a lot of places. We do wear ear plugs. It's a weird scenario, but when you have to wear a helmet, and we give the company the option of saying, okay, you can wear that helmet, but you are allowed to work in the overexposed amount of dust if, in fact, you've used all the engineering devices that we feel that you've done.

Now, right there, we're leaving too much of a gray area. I don't like that. I think that's a loophole that's very gaping. And I'm afraid that would lead to a lot of -- there's no teeth in it. That's my opinion.

MR. NIEWIADOMSKI: But in the proposal, that decision is not made by an inspector, that decision is going to made up by a team of experts that are going to even include NIOSH to decide, really, including the mine visits, to assess the condition and determine whether or not you, as an operator, has really implemented all feasible engineering controls.

MR. EALY: Well, I know our particular mine. We've mined coal for 26 years and set production records and everything else in 2 milligrams. And we're still killing people at that. I don't see why we have to go the other way. I'm going to wrap up. There's a lot of people talking. Unless you got a specific question. I'm being redundant here.

MR. NICHOLS: No, we'll keep trying to explain ourselves better. I think Dennis makes -- somebody mentioned we were argumentative.

MR. EALY: Well, I don't want to get into that --

MR. NICHOLS: We don't mean to be. I know Joe gets frustrated when he talks about personal dust monitors. But when we try to explain, we're not going talking about raising the 2-milligram standard, sometimes we may come across as argumentative, but we don't intend to be.

MR. EALY: Well, that's one more thing I would like to get on the record. I do support those tremendously. I believe that those are a very valuable asset, but at this point in time we're out of time. We've got to quit meeting like this, Mr. Nichols.

MR. NICHOLS: All right, John. Thanks.

MR. EALY: Thanks.

MR. NICHOLS: Mark Sergetti? Chuck Denowski. I hope I got that last name right.

MR. CIENAWSKI: Senofski. That's spelled C-I-E-N-A-W-S-K-I. I'm a member of 1501 local, mine health and safety rep at our mine, Consol Energy. I represent the union. I've been with Consol and the union for 27 years. This proposal, I feel, is probably the worst in the history of the time I've spent with the company, worked with Consol with this dust ruling that I'm seeing proposed. I'm asking you to drop this proposal and start all over again.

We need lower dust levels, and higher sampling time, not the reverse, which is what I'm seeing. Coalminers need MSHA to protect the coalminers from respirable dust, and not to help the coal operators to increase their production, because that's what it's boiling down to. We need to lessen the liability, and it'll also lessen the liability of the coal operators by

doing this, is the way I feel.

This proposal will cause an increase in the coal dust-related deaths, by increasing explosions, and increasing black lung. Our lives as a coalminer will be sacrificed by this proposal. Rules can be only changed by you, fellows, and I hope you can consider that. And if you don't, the coal operators will be the ones that benefit, and the miners will be sacrificed by giving their lives, and then it'll go back to the 1930s.

We need to change the dust regs to where we have less milligrams of dust intake, not more. And only the Mine Safety and Health Administration can do that, and you guys have that responsibility. Thank you.

MR. NICHOLS: Thank you, Chuck. Any questions of Chuck? Thanks. Glen Coleman? Jeff Muhallick.

MR. COLEMAN: Yes sir. I'm Glenn Coleman. I'm a member of local union 2058 at Emerald Mines, and I'm just going to reiterate what everyone else is saying about the confusion of the proposed dust rules. The common, as you will, rank and file coalminer is not going to understand it. I don't fully understand it. I do understand what everyone's been saying and telling you guys, that more dust and less inspections is not the answer.

I think we need to take a long look at that again and change it. I agree with you on the average,

that the dust averaging is not the way, because just like George said, it doesn't -- you have a lot of shifts that you work the whole shift at overexposure level. And that's pretty much what I've understood about it, other than it's just too complicated for us people at the local level to sit down, and go back and try to explain to our people what this is going to encompass. We just can't do it. You know, we rely on other people to tell us what it means, and to MSHA to come in and enforce the stuff, but with the loopholes that we feel is in this proposal, we feel that the operators are going to take full advantage of it.

And right now I work every day on a CM section, and I know, just as well as you people know, that there's still dust in the coalmines. I don't care where you go. There is dust there. And in a perfect environment there underground, if you could ever get that, whereas, I mean, everything's watered, all the sprays are working, all the ventilation controls are in place, you're still going to have a certain amount of this. But I think it can be at a level that we can live with, without having to use these Airstream helmets and things that are just nonfunctional. I mean, they may work at times, but at times, they don't work. That's all I have to say.

MR. NICHOLS: You know, we've heard a lot of

testimony about cutting operators some slack. If we were intending to cut slack, would you agree, we wouldn't be doing away with that averaging business? I mean, --

MR. COLEMAN: I'm in agreement with you on that, Mr. Nichols, about the averaging thing, but I still don't think that one sample will give you the information you want, because when -- and I've been involved in some dust sampling in past years. I was 28 years in the mines. A lot of down in Southern West Virginia. And when I came up here, I have had to work some nonunion operations and I know how they operate. And it's not a healthy environment, I can sit here and tell you that. And I think all you guys would probably know that.

But they know when and where they're going to dust sample, and a lot of things, preparatory work goes on as far as before the sample is taken, and it's going to happen again under this plan. I mean, the roadways are going to be watered. I everything's going to be in place. The ventilation's going to be there right on top of the fan. The whole nine yards to get that sample to where they want it.

And I feel that the continuous sampling way, that the personal dust sampler, that is the way. It would be pretty much -- if you could ever get to a foolproof plan, I think that that would be the closest

thing you could get to, to where you could get a true reading of what the atmosphere is constantly.

MR. NICHOLS: I don't think we disagree with that, but as we say in Tennessee, we ain't got it yet. I mean, it ain't here yet.

MR. COLEMAN: Yes sir, I understand that, but it is there, and I think that with just a little bit of testing, from what Mr. Wade testified, that they're fairly optimistic that that is going to work. And that will be in the near future.

MR. NICHOLS: Okay. Well, Lew knows more about it than I do, but I can just tell you, the last comments we had at the last public hearings we had in 2000 from some industry folks, it's just around the corner, and we ain't turned the corner yet.

MR. COLEMAN: I don't have any information on that.

MR. NICHOLS: All right. Thanks.

MR. COLEMAN: All right. Thank you.

MR. NICHOLS: Jeff Mihallik?

MR. MIHALLIK. Jeff. The last name's Mihallik, M-I-H-A-L-L-I-K. I work for RAG Cumberland. I'm a health and safety rep for the union. I've been there underground for 15 years, 13 of that as face equipment. Probably most of that has been roof bolting. And I don't

want to sit here beat this to death, but I can just picture people trying to work with these Airstream helmets, trying to put a roof bolt in, or trying to run this monitor with the tubing you have. Sometimes we have to have it on both sides, because the methane's so bad. And that's some things I thought about.

But going from the 2 milligrams to the 8 milligrams standard, that's just boggles the mind with this. You know, I'll tell you, I'm just going to bring up one point. I go with the inspectors that come around, and one instance on the midnight shift, this was back in April 11, 2000. We had an MSHA inspector show up, and a guy from the health department. And I have their names here. And they did like a -- they'd see a spot. They were checking long walls on dust. Now, the company didn't know they were coming. Nobody knew they were coming. And they came on the midnight shift. And I'll tell you, that was probably the worst example of dust sampling.

We gave everybody dust samples and it was so bad, we came out of there, I think that's the dirtiest I've ever been. And to take away dust sampling to eliminate it, I think we need to increase it, and to lower the milligrams. I believe this proposal is company driven. I just can't see it any other way. Coal mine

dust led to tens of thousands of deaths of miners, and billions of dollars in cost of this disease. And I wish you'd go back and start over again.

MR. NICHOLS: Thanks. Jerry Kosco, UMWA?

MR. KOSCO: My name's Jerry Kosco, K-O-S-C-O. I have 27 years underground. I'm with local 1248, Maple Creek Mine. I roof bolt there. And I've seen people, I know people who have black lung. They walk around with oxygen bottles, take a couple steps, and they don't -- they breathe pretty hard. I don't understand this rule very much, and the only thing I can see is that we're dropping the sampling from what we have now. I think we got to have 24/7, 365. If you didn't hear us in 2000, don't ignore us now. That's all I got to say. I just hope that we get this rule taken care of.

MR. NICHOLS: Thanks, Jerry.

MR. KOSCO: Thank you.

MR. NICHOLS: Mike Smith, UMWA?

MR. SMITH: My name is Mike Smith. A member of local 2258. S-M-I-T-H. I'm from Southern West Virginia. I came to Pennsylvania two or three years ago to go to work at Emerald Mine, probably one of the better mines I've ever worked in out of the 24 I've been in. I almost have 30 years at the face. I've never worked out-by, but I've always been at the face. I'm a miner operator by

trade. I guess I've been through hundreds of these dust sampling procedures, and about all I've seen, it's they try to get everything near perfect as they can, just to get by the pumps. You know what I'm saying? And which that's understandable, that's the way the system works. That's the way it works.

The reason I came to Pennsylvania is to get away from A.T. Massey, which you touched on renegade operators. When I ran a miner for them, you wouldn't see the shift foreman or mine foreman in the mine ever, unless you were running pumps. They would hang curtain up on both sides, or whatever they had to do. Tell you, slow down buddy, don't try to break no record today, you know? And get everything perfect. Get rid of that pump, but as soon as the pump's gone, get it, get it, get it, you know?

And like I said, as bad as the sampling is now, and the dust I have to eat now, with this proposal you're proposing, all I can see is increased dust levels, less sampling, and me breathing more dust at the face. And that's about all I'd like to comment on. It's just I don't see why we have to go from less sampling, you know, even as bad as the dust is now, to take it down another level or two. And it's not going to help my health at all. That's all I have to say.

MR. NICHOLS: Go ahead.

MR. KOGUT: I think that one way of summarizing what we were trying to propose in this rule, is that we want to ensure that those controls that you were talking about, the curtains and everything else that they did on sampling days, that those would become part of the plan, and they would have to be, in effect, every day, not just on days that you're sampling. So I've heard quite a few of you talk about continuous monitoring, and this is a type of continuous monitoring, too.

It's true that we're not focusing here on continuously monitoring the dust directly, but by monitoring the controls that you have in place, that's something that the miners that are working at the face, they can see if that curtain's there, they can see whether those controls are in place. And that's another way of continuously monitoring what's going on. So do you see any loopholes in that approach?

MR. SMITH: Yeah. I see a lot of loopholes in that approach, because who's going to be there to monitor that? I work at Emerald now. I've got pretty good protection under UMWA and them people try to do a good job as can be done in a hostile environment. But at A.T. Massey, who's going to be down there. I'm not just singling those people out. At any nonunion operation,

small operation, who's going to be there to make sure those controls are in place? You know what they tell you when you want to -- they have told me, when I went down and tried to pick up me some air so I could see to load the car, I have to shine my light on the boom with the miner so the car man can see to pour the chain.

You go down there and try to pick your air up, you don't have no help from a miner down there. You don't have hardly just enough men to run the coal. And you go down there to try to get you some air, and the boss say, what's the matter? I was telling him what, I can't hardly see up there, I need a little bit of air. If you like your job, you better get back up on there and kick some of that coal out. I'll get you some air. He might hang one curtain. He might not. You know what I'm saying? You have no protection, and you have no monitoring.

I don't see who's going to be monitoring that situation now. Are you going to be there to hang my curtain? Or have MSHA there every day to make sure that curtain's in place? I don't think so. When the man's not there, it ain't gonna happen.

MR. THAXTON: Wouldn't you say the same thing's going to be true, though, of a continuous dust monitor? I mean, if somebody doesn't want to use a continuous dust

monitor properly, then you're not going to get readings off of that either.

MR. SMITH: How do you mean, not use it properly?

MR. THAXTON: What's to tell an operator that he has to use a continuous dust monitor appropriately, the same as not putting up the curtains when you are not there?

MR. SMITH: Well, I think that if you had that monitoring device, that personal monitoring device, the way it's been explained to me, that nobody would have to monitor it. It would give you an actual reading of the dust in that area at that time, and it would be on your side just like a cap light.

MR. THAXTON: But what's to make the mine operator say, yes, I'm going to put that on everybody on every shift, if we're not there to see it?

MR. SMITH: What's going to make them?

MALE VOICE: Make it a law.

MR. SMITH: By making a law. Somebody passing a law to --

MR. THAXTON: And we're passing a law now, trying to say on this proposal that you have to have those controls in place, which is what he says you can look at.

MALE VOICE: Get a lawyer.

MR. SMITH: I'm for the personal monitoring device, but like I say, the system we got now is bad, but the one you're proposing is much worse, from my viewpoint at the face. That's all I have to say.

MR. NICHOLS: Okay, Mike. Thanks. Jim Lamont?

MR. LAMONT: Good afternoon, I guess. My name is Jim Lamont, L-A-M-O-N-T. I'm an international representative of the United Mine Workers of America. After listening to a lot of testimony a lot of the folks had to say here, and just after Mr. Smith, a lot's being talked about the personal dust monitor, and it's my understanding that NIOSH has brought that today. And I would like to at this time ask if they could show this group the PDM 1, and maybe explain a little bit about it.

MR. THAXTON: Are you saying, show it to the panel?

MR. LAMONT: To the folks in this room, the panel, everybody here.

MR. THAXTON: He's talking about the miners.

MR. LAMONT: I know a lot of our folks have not seen this thing. A lot of people have heard about it. But I think it would be good, if it is here, if we could get a little understanding of what it looks like and what it will do.

MR. NICHOLS: Who's got it?

MR. VOLKKWEIN: My name is John Volkwein. I'm a research scientist with NIOSH. V as in Victor, O-L-K-W-E-I-N. As you've heard Dr. Wade mention, we've been working on this development for several years. The idea was to get something that would fit into a cap light battery case, that would also give you an accurate, continuous measurement of your dust exposure from the time you put it on till the time you take it off.

It's designed to tell you, on a continuous basis, through a readout, what your dust concentration is from the time you start your shift to any point in time. It will also tell you what the dust concentration you have been in for the last 30 minutes has been. And it will also tell you -- it's programmed from a computer on the surface, so you have no control of turning it on or turning it off. Once it's programmed, it's going to start at a set time and it's going to finish at a set time. Your program shift.

If you program it for your shift duration, it will also project what your end-of-shift exposure is going to be, based on the amount of mass that it's seen to that point in time. So you can sort of see ahead as to whether or not you're going to meet a certain standard or not. The device is worn just like a cap lamp. This

goes on your belt. The inlet for the dust is in your breathing zone. It's right here in the side of your cap lamp. The sample travels parallel to the cap lamp cord, into the instrument.

The device that determines whether it's respirable or nonrespirable dust is located right here. It's a cyclone. It separates the dust. The dust is then transported to a small filter that's located inside of the device. It's a small filter in here. And the beam, the vibrating beam that Dr. Wade mentioned is a part of that filter device there. It measures the amount of mass that's been deposited on that filter. Its battery capacity is such that it will operate for 12 hours. The cap lamp battery is separate from the dust monitor batteries. They're two independent power sources in here, so you don't have to worry about one interfering with the other.

It also has a port for the remote control for your miner. The remote control functions. Since all remote controls are not universal, you don't have all the different attachments to connect one to the other, but this is the PDM. As I said, it weighs about as much as a cap lamp battery, and it weighs less than your regular cap lamp battery and a dust pump, if you had to wear them both together.

MALE VOICE: Does it work now?

MR. VOLKWEIN: This model does not. We are expecting delivery of six units that will work next week.

MALE VOICE: So it's not two years down the line?

MR. VOLKWEIN: I will put a caveat in that, in that we've done the laboratory testing on it and it looks very promising. But you guys know, more than any of us, that when you take something from the laboratory and try to put it underground, lots can go wrong. We've tried to design this with a lot of years of underground experience in mind. We've had Joe Main and Joe Lamonica from BCOA. They've all gone over this with a fine tooth comb, and we've really worked hard at developing a mine-worthy package for this. And so we're optimistic, but I don't want go out and say it's ready tomorrow to go into a mine. We're close. We're very close.

MR. NICHOLS: All right. Thanks.

MR. LAMONT: I would like to address a few sections of the proposed rule, starting off with 7201, "Sampling; General and Technical Requirements." The operator sampling requirements are outlined in this section. The Agency has specified that a certified person must perform such sampling, and the individual must pass an MSHA examination on sampling of respirable

coal mine dust.

There are also requirements for various sampling parameters, including where the device is to be worn; how it is to be operated; the existence and utilization of a control filter; meeting or exceeding the verified production level; maintaining the approved dust control parameters at levels that do not exceed 115 percent of the specified quantities; the application of sampling procedures when PAPRs are required; and when the Agency will void samples.

The operator must also notify miners and the representatives when such sampling will occur, in the event that they would like to observe the process. Finally, the operator must, at the district manager's request, submit the date and time such sampling is to begin to the Agency."

A review of the text in this section reveals so many exemptions exist that it is almost impossible to follow. There are at least six separate occasions where the subsection is excluded from application, based on the impact other areas of the proposed rule would have. This serves no other purpose but to confuse the issue. There is no attempt by the Agency to adhere to a plan language format, as required by law. Example. 7201(h) says, "Paragraph D of this subsection does not apply if

sampling to conform with the requirement of 7215 or 7220(d)."

Go through 7215(a) through (c) where 7215(c) sends you to the CTV citation threshold value listed in table 70-2, that corresponds to the applicable dust standard that takes more of a degree than most of us possess. 7201(h) then sends you to 7220. 7220 sends you to 7206(a) (b) (d) and (e). And then all around the proposal.

Why didn't the Agency just simplify the whole issue by mandating the personal dust monitor for its intended use? The dust advisory committee recommended miners be given a greater role in dust sampling programs. They reported, "The miners should have the right to participate in sampling activities that will be carried out by the employer for verification of dust controls, at no loss of pay."

The committee also recommended that "miners representatives should receive training to conduct respirable dust sampling, paid by the employer. Including this in the rule would have addressed two issues miners have raised for years; more sampling and greater participation by miners." The Agency did not incorporate either into this proposed rule.

NIOSH also urged a greater role in the sampling

program for miners. In the criteria document they stated, "Miners must be actively involved in ensuring their health is protected through proper work practices and compliance with applicable law. Their active involvement should increase their confidence in the effectiveness of the dust control program." The Agency has done just the opposite. They have managed to reduce sampling and undermine the confidence of miners in this single proposal.

Moreover, the language, while setting sampling parameters, does not require the operator to actually take any respirable dust readings. In fact, the rule itself does not require the operator to take any dust sample, with the exception of a verification sample, unless the Agency finds the operator to be out of compliance with the approved dust control plan. The resulting action in that event would be for the operator to take quarterly samples to demonstrate compliance.

The Agency's preliminary regulatory economic analysis establishes that 85 percent of mine operators will not be required to perform such sampling requirements. Therefore, from a health and safety perspective, the proposed rule is ineffective. The Agency need not hide behind an elaborate set of mandates that carry no weight in enforcement. The presumption by

miners should be that this section of the proposed rule will never apply in their operation.

Likewise, requiring an operator to notify the miner or the representative of their plan to conduct sampling is of little significance, unless they suffer no loss of pay, as described in section 103(f) of the Mine Act. Neither miners nor their representatives are compensated for observing such procedures, and a proposed rule does not offer to initiate such a requirement. The financial loss alone represents a hurdle too large for miners to become involved in any meaningful way. The full participation that miners have demanded in the dust sampling process at countless hearings is not achieved by this Agency gimmick.

7202. "Approved Sampling Devices, Maintaining and Calibration." Again, the Agency is giving the option of using the personal dust monitor. I see no incentive for any operator to use a personal dust monitor. With all the work and expense of taxpayers' dollars, why didn't the Agency just simplify the whole issue by mandating the dust monitor for its intended use?

7202(b) says, "Sampling devices not approved." Sampling devices. That's just a little change. 204, "Demonstrating the adequacy of dust control parameters specified in a mine ventilation plan. Verification

Sampling." This section establishes the requirements for verification of the ventilation and dust control plan. It requires that the dust control parameters for each MMU be included in the plans, and be verified to control respirable dust through sampling. The parameters for dust control are currently contained in a number of plans.

The sampling verification has to demonstrate that the plan parameters are adequate, through a complicated set of formulas, tables, and dedications which are with a high level of confidence that the equivalent concentration of respirable dust and respirable quartz can be maintained at or below the verification limits, as determined by meeting the critical values of table 71 of the rules.

This overly complicated and deceiving process means that an operator's plans can have dust levels at ranges from less than 1 milligram up to 8 milligrams in the approved dust plan. Under the rule, the plans could be approved using environmental, engineering controls, or PAPR respirators and/or administrative controls if MSHA approves those in lieu of the environmental engineering controls.

The proposal states that the operator will do the sampling for the verification plan. This represents

a complete change from MSHA's 2000 proposal, which required MSHA to conduct a sampling to verify the dust control parameters, with paid miners' representatives traveling during the verification.

Proposed 7204 states that "the operator must show, with a high level of conference, that the equivalent concentration of respirable coal mine dust and respirable quartz dust can be mined at or below the verification limits." 70.2 offers no definition for what a "high level of confidence" is. That is contained in a preamble.

The plan verification sampling process is far different than recommended by the advisory committee and miners, and the results can be contrary to the regulations of the Mine Act and other findings, including NIOSH. The recommendations of miners and the advisory committee was that MSHA, not the operator, conduct the initial plan verification. Miners, the advisory committee, NIOSH, and the Mine Act called for lowering the dust levels in the mine atmosphere, with 2 milligrams being the maximum in any case, not increasing the dust concentrations, as this proposal does.

The complicated formulas, which were opposed in the rulemaking in 2000, need to be replaced with straightforward process. Meaning, if a standard is 2

milligrams for a mining unit, the plan should be approved at a safety margin below that level, such as 1.67 milligrams, and 2 milligrams should not be allowed to really be 8 milligrams in any deceiving way, as the proposed rule does.

This is clearly an area where continuous dust sampling should be required to help resolve a plaguing problem. Continuous dust monitoring devices could be employed to track dust conditions on each shift, and quickly enable the plan verification process to have needed information to determine if the parameters are working, or need change before the plan is approved.

7205. "Verification Sampling when Required. Time For Completing." Proposed 7205 establishes requirements for when the operator sampling would have to be verified. Following implementation of the rules, operators would have at least 12 months from the date of the rule to complete verification sampling in all previously approved ventilation plans.

New MMUs would be required to be verified through a two-step process. First, the operator would receive a provisional approval from MSHA, by a phone call or an e-mail. Second, the operator would have 45 days after provisional approval to verify the adequacy of the plan through the operator, not MSHA sampling.

MSHA can also grant 30 additional days to complete the sampling. If a district manager determines that the approval plan parameters are no longer inadequate, MSHA may require additional controls or another verification plan. Under this proposal, operators would have 12 months to gain approval of the dust plan on that MMUs, and over two and a half months for new MMUs. It allows MSHA's absence from the mine.

This verification process is far too long. If continuous dust monitors were used, this process could be expediated. The considerable data available from these devices would allow for faster and better determinations about dust control efficiency. Most importantly, miners could be protected from unhealthy dust each shift, while adequate controls are being put in place.

I wanted to thank you for showing the PDM 1 to the group here and with the explanation, and I know all the folks behind me, and all the folks you people will be seeing during the next several hearing. All work in coalmines, all have a substantial amount of years in the underground coalmines. They know what it's all about. They know what it's like breathing dust. They know what it's like working in low coal versus high coal. And some of these proposals are just ludicrous.

I would like to ask this panel here how many of

you, and how many people that were instrumental in writing this proposal, how much mining experience you actually have. MR. NICHOLS: Well, Jim, if you ask how much mining experience we can draw on, that's different from asking the panel how much mining experience they have. I've got about 40 years worth of mining experience, counting my MSHA time.

MR. VOLKWEIN: Or working underground in a coalmine.

MR. NICHOLS: In a metal and nonmetal mine. And I was the administrator for coal for 10 years, and traveled a lot underground. The leadership of the organization probably has a combined total of 100 years of mining experience.

MR. VOLKWEIN: What I'm talking, Marvin, is actual time, down and dirty, getting black, breathing this dust, putting a lifetime in the mine, looking forward to retirement, and get to that point in time and not have any health. That's the whole issue here. I mean, this whole group is out to protect the most precious valuable resource. That's the miner himself. That's what you people are charged to do. And I find it a little disturbing and difficult to see how someone, if you haven't spent a considerable amount of time underground, knowing what the people behind me go through

on a day-to-day basis, and I can say I know, because I've put 23 years in underground. It's a living. It's a good living. It's a tough living.

I watched my dad die from lung disease. I stood over his bed while he died. I don't want to see anybody ever in my lifetime have to go through that again. And to see something like this, in this day and time, with the technology we have, and have this rule shoved down our throat in such an expedient time frame, it baffles me. The taxpayers out there, they put a lot of money into this effort to get this PDM 1 put out there. I know NIOSH with Lew. I know the BCOA. I sat in on these meetings. The coal operators. Everybody wanted this thing, and its intended use, 24/7, 365 days a year.

But now what's in this rule, it's not mandating it. It's an option. And if I was a coal operator right now with these renegade operators, I sure as hell wouldn't want it with the option that's out there. This thing is almost ready to be put in use. Why can't we just take a few steps back, and wait, go back and revisit this rule and do it over again, and satisfy the demands that the miners have been asking for the last 20 plus years? And that's all I have to say.

MR. NICHOLS: Okay. Thanks for your comment. Larry has an issue on the demonstration of a dust monitor

that we need to get something in the record on.

MR. REYNOLDS: Yeah. I just wanted to say, we need to find out exactly what monitor that was, and get a picture of it or something, so when somebody who was not in the room is going back over the transcript, we'll know exactly what equipment we were talking about, and where it was in the research process.

MR. NICHOLS: It's 12:30. We started with 33 folks signed up to give comments, and we have 12 people left. We could take a break, or just keep going. Take a lunch break. Anybody? I'd be inclined to keep going, but I know some of the folks have asked for lunches to be prepared, so you can go. Feel free to go get the food you ordered, if you want to, but we'll keep taking comments here. I think I have more than 12. Okay. Gary Bellitz. Does the court reporter need to take a break? Okay, let's take a 10-minute break, but let's be started back here at 20 to 1:00.

(Whereupon, a brief recess was taken.)

MR. NICHOLS: Okay. Let's get started back.

MR. BILLETZ: Hi. My name's Gary Billetz, that's B-I-L-L-E-T-Z. I'm a member of local union 2258. I work at RAG Emerald Mine, and I'm a mechanic on the long wall. And I'd just like to start off. Well, I say that the dust sampling today -- and the one you propose

is even worse than the one we have today because it does not give an accurate measurement of the dust that I eat every day. The day you're there, maybe conditions are better. Maybe the belt line ain't as dusty that day. Maybe the shields ain't putting out as much dust that day. So we get a good sample. -- comes by, we get a bad sample. What happens? Well, we got to keep retesting these guys until we get a good sample. The variations on the long wall change so dramatically from pass to pass, the only way you're going to get an accurate sample of how much dust I eat every day is to sample me every single day, because if the belt goes down, just to take an example. The belt goes down 30 minutes. When it starts off, now since we have high velocity belter come up to the face, it's so dusty you can't see till the belt gets wet again. And more on the face breathing now. And maybe you're not sampling that day, so you don't see that. And then the shields set for 30 minutes. Well, they get dry on top. You start pulling shields, it's so dusty you can't see either.

But you miss this when you only take a sample just now and then. You're never going to pick it up. Maybe if you're lucky enough the day it happens, you get it. Well, nothing happens. Well, let's resample again till we get a good one. Well, then they make sure all

conditions are right. They make sure the belt's flooded with water. They make sure out-by people does not trend (phonetic) the scoops into the track heading (phonetic) to create more dust to bring down on us so we can pass our sample and everything is correct. They want to make sure everything's perfect. Well, once we pass it, it's back to square one again. Well, it's so-so, we'll see if we can -- tell y'ins come back again, and maybe we get a bad sample again and something's done. But nothing ever changes.

The only way we're ever going to get a true accurate sample of how much dust I can eat, every one you y'ins I'm looking at here, is to test me every single day, and then you can get an average. The one or two samples, one time the inspector gives me a pump, that's no average. That's just a little short window in a whole year of what I took in for one little day. The variables could have been great that day. Another day they could have been miserable. So the only true way you're ever going to test me accurately is every single day.

So that's why I don't like your dust parameters now, and I don't like your proposal ones at all, because it's fewer testing, and that's not going to prove how much dust I really eat. You put a pump on me every day, I'll show you how much dust I eat every day. Y'ins don't

understand. There's too many variables in the mine that happens every single day that cause the dust to be different. Maybe the air's dryer that day. Maybe when the shearer's cutting, the coal's actually dryer, because it actually dries out sometimes, and it gets wetter in other places going through the mine. You might be cutting on a shear one day, and that dust is just terrible, you can't see nothing. The next day, it might not be too bad, depending on the wetness of the coal seam.

So there's a lot of variable factors that go into how much dust I actually take in every single day. And unless you test me every day, you're not going to find out what that is. And especially when the MSHA only comes like once every couple of months and says, here's a pump one day. Well, maybe I had a good day, maybe I have a bad day. Well, if I have a bad day, we just keep retesting till I get a good day. So that don't prove to me that it's working.

MR. NICHOLS: You don't think you can design a mine plan that would ensure compliance each day?

MR. BELLITZ: No. The reason being as there's too many variables. The company tries to do the best they can, but you don't know how dry the coal is that day, you don't know if the belts going to go down, and

then that belt starts up since you forced the belt error on us now, and when that belt first fires up, okay, sir, belt's 10,000 feet long. You got 10,000 foot heading of dust coming down on the miners on the long wall face, because you wanted it that way. And until the belt gets wet, we got to breathe that dust until that belt gets wet again. Then it's okay again.

Then, like I told you about the shields, then you got the shields. They dry out all the time. You start pulling shields to dust the spores off of them. Maybe we got slight toxic dust ain't too bad that day, because the slate's up there, and the rock does not grind up as easily as the coal dust from the shields pulling in. So there's a lot of factors. Maybe the operator runs faster that day. Maybe its bits are dull that day. There's a lot of factors go into it.

If you ever wanted a true sample, I don't know why y'ins ain't tried to test somebody every day for a month or two months, just to see what the results would be, instead of just coming out and saying, well, we'll just take one dust sample now, and that'll do it. The operator can verify he's in compliance that one time, and everything's okay. Well, that ain't the way it works in the coalmine. It would be if we was in this room where the variables rarely change, but in a coalmine it's an

ever-changing atmosphere.

I don't know if y'ins ever been on a long wall and actually seen it operate, but if you go down on pass on a shearer and you don't hose the face, there's that much float dust laying on every tow, so tell me how much dust is actually on that face. One sample ain't gonna give it to you.

MR. NICHOLS: Okay. Under your scenario, if we sample every day we're going to know where you're at. Then what's the answer?

MR. BELLITZ: That's where you're the enforcement agency that's supposed to enforce what we can do to get us in compliance.

MR. NICHOLS: That's what we're trying to do, is develop plans that would give us some reasonable assurance that all these variables you're talking about are covered.

MR. BELLITZ: Well, you can't do it then by sample once every quarter, like you got proposed there. Ain't that what you got proposed? If your district manager mandates it. So how's that going to prove to how much dust I actually took in, if I get sampled once in a quarter? There's just no way. The variables in a mine are too great to do it that way. It is.

MR. NICHOLS: You guys got any questions or

comments? Okay. Thanks.

MR. BELLITZ: Okay. Thank you.

MR. NICHOLS: I have a name that looks like Leon Musconi. I know I mispronounced that.

MR. MOSCALINK: Good afternoon. Director Nichols, panel, my name is Leon J. Moscalink, Junior, M-O-S-C-A-L-I-N-K. I'm the chairman of the mine health and safety committee of the UMWA local 1248, which represents classified employees at Maple Creek Mining, Inc. I'm here to talk today about the newly proposed dust rule. Coal dust has been killing coal miners for over a century. The latest killing was in Alabama on September 23, 2001, at the Jim Walters Number Five mine, in which 13 miners died in two methane explosions fueled by coal dust.

Coal dust was what eventually brought about the Federal Mine Safety and Health Mine Act of 1969. In that decade, this area of the country witnessed two horrific methane explosions at coalmines, in which 115 coalminers died because of coal dust fueling methane explosions. I'm referring to the Robena 1962 explosion, and the Farmington Number Nine 1968 explosion.

The Mine Safety and Health Administration, MSHA, was formed and became part of the Department of Labor after the Farmington mine disaster shook this nation so

hard that Congress enacted the Act, and began that Act stating that "this nation must protect our most precious resource, the miner." As I stated in the year 2000 hearing before this panel, our most precious resources, the miners, are the ones that go down. We bring that precious fuel up out of the ground. We're the ones that operate the machines. We're the ones that breathe the dust. The black dust that, once it's in, it stays in.

One of us dies every six hours. One of us pays the ultimate price every six hours. Think about it. Every six hours in these here United States, a coalminer dies from black lung. In Beckley, West Virginia, this country built the MSHA Academy to train miners who had become and have become state and federal inspectors. And that academy has trained myself, a representative of the miners at one of our nation's underground coalmines. I have been very fortunate to have received training at the MSHA Academy.

At the academy displayed on its walls are pictures of mining disasters. The Farmington disaster of 1968 is by itself, as you go to the cafeteria. This new proposed dust rule, with its hidden and complicated formulas for determining respirable dust levels is not what Congress enacted in 1969 to protect our most precious resource, the miner.

This new proposed dust rule will allow coalmine operators to raise the respirable dust limits to more than double the maximum of 2 milligrams of respirable dust that Congress set when it enacted the Act in 1969. This will be done when the coal operators tell MSHA that they've exhausted all their engineering controls. And it doesn't take a rocket scientist that allowing respirable dust to increase, you're going to allow float coal dust to increase.

What do you want? Another Jim Walters? Another Robena? Another Farmington? What do you want? At the hearing on the dust rules in August of 2000, Mr. Ron Schell spoke of PAPRs being rated by NIOSH as having a protection factor of 25. Mr. Schell said that he would accept that, and said he'd give it a factor of 2, thus allowing 4 milligrams of respirable dust downwind of the shearer operator on the long wall. More float coal dust to go along with the increased respirable coal dust. Now MSHA's going by a factor of four, and let 8 milligrams of respirable coal dust be suspended in the mine atmosphere where the miners are going to be working.

That was the level of coal dust in 1969, when the Act was enacted by Congress. I guess we're going to fall backwards in safety instead of leaping forwards. This is not protecting the most precious resource, the

miner. The administrative controls in this proposed dust plan will not only affect the miners working on the long wall sections, but will also be shifted to the continuous miner sections, beltline, and outby areas of the coalmine.

When the UMW testified on August 7, 2000, at the hearing of the dust rule, you, Mr. Nichols, said that you believe in other areas of the coalmine, engineering controls could be applied to eliminate overexposure of respirable dust. Plus you said that you were talking about only persons downwind from the shearer on the long wall. Can you imagine a shuttle car operator having to operate a shuttle car with an Airstream helmet on? Imagine a roof bolter bolting a cut with an Airstream helmet on, when he has to be looking at the top, the ribs. It's absurd if one would even think about using administrative controls on a continuous miner section.

The only way to keep us, the miners, out of harmful respirable dust is the PCDM or the PDM. That is just about ready for use, and we've discussed that and we've seen a prototype of it today. The PCDM will let a miner know exactly how many milligrams of respirable dust he's breathing. This will protect our most precious resource, the miner. But MSHA, as I understand, in this new rule is going to let the coal operators choose if

they want to like the miners use them? What is this? You're going to let the miner operators decide if they're going to let us use the PDM?

The last time we testified, I commented on the full-shift testing. As every other coalminer today working on the ground, nine and a half to ten hours of mandatory being underground is the norm. Not eight hours. Nine and a half to ten hours. Not only for face workers either. Out-by people. To sample four, six, or eight hours is not a true sample of what we're breathing in on the ground at our workplace.

So that is what I testified at the last hearing. I have yet to see loading crews getting sampled while cutting overcast, guys up on the bench cutting wall. I have yet to see that. This is where the PCDM will come in crucial in letting the miners know how many milligrams of respirable dust we're in while cutting overcast. Before I close, I'd like to reflect on some testimony that three of my brothers testified to the 2000 dust hearings.

My brother Larry Kuharcik asked you to do the right thing back then. He asked you if you would go back to the table, sit down at the table and rewrite the proposal. Obviously, you went to the table, but forgot to do the right thing. You forgot about protecting our

most precious resource, the miner.

My brother Tim Rhobluck asked you back in 2000, if you were to leave, and leave this industry, would you leave it in a better condition than you found it? Brother Rhobluck stated that that's what he's trying to do, leave this industry in a better condition than he found it. This new dust rule is not going to leave this industry in a better condition.

And brother Mike Caputo, a member of the West Virginia legislature, reverberated in 2000, stating that "the dust rule is a tool that's supposed to protect miners' health and safety. It's not a tool to protect the operator's bottom line." And I'm going to repeat that. "The dust rule," brother Caputo said, "is a tool to protect the miners' health and safety." Any rule that comes down by MSHA should be a tool that protects the most precious resource, the miner, not protecting the coal operators' bottom line. That's what Congress enacted in 1969. Thank you.

MR. NICHOLS: Thank you.

MR. KOGUT: I just wanted to address one of your comments about the extended shifts, but also bring in something else you said about the complicated formulas that are in the rule. Now, sometimes the reason that there are some formulas in the rule that might appear

complicated are to address things like extended shifts.

For example, in the verification sampling, we tried in the proposal to take account of extended shifts by adjusting the concentration to get at the equivalent dose that would be obtained over eight hours, but recognizing that when a person is working ten hours, he or she is accumulating more dust in his lungs than he would if he was working at the same concentration for just eight hours. So what we're doing in the verification part of the sampling is adjusting the concentration that you get over that ten-hour shift. And for verification sampling, it is a full-shift sample, so we'd be sampling for the full ten hours.

But that concentration, say that concentration comes out to be exactly 2.0. Okay. The problem is that even though the concentration is 2.0, that miner, if he's working for 10 hours, is accumulating more dust in his lungs at that 2.0 concentration than he or she would be if they worked only 8 hours at that concentration. And so the reason for that somewhat complicated formula in converting to an 8-hour shift equivalent is that what we're effectively doing is adjusting the measured concentration that we get upwards by 25 percent. Because what we want to be regulating is the total dose that the miner receives over that extended shift.

So the effect of it is like if you measure over a 10-hour period the average concentration as being 2.0, we would actually be adjusting that measurement upwards by a factor of 25 percent, which is 10 divided by 8, and multiplying that by the concentration that we get for that full shift, so that the concentration that we'd be looking at then is 25 percent greater than 2.0. And so that would not meet the verification limits, and so we would make sure that the plan was effective at a lower concentration than that.

So in other words, what we're doing by that formula is being more protective, and the reason for it is exactly what you said, the person is working a longer period of time at a given concentration.

Mr. MOSCALINK: Yeah, but now the inspector is putting dust pumps on the miners, we're coming in, by the time the inspector gets here they're still not loading coal.

MR. KOGUT: No. I'm talking about in the proposal, though.

MR. MOSCALINK: In the proposal, right.

MR. KOGUT: On the sampling days where the plan has to be verified, those would be full-shift samples. And moreover, they would be adjusted to reflect the fact that a miner working for 10 hours is accumulating more dust in his lungs than a miner working at the same

concentration for 8 hours.

MR. MOSCALINK: Yeah. Like I said, right now we should be testing 10-, 12-hour shifts. We're not. Now you're saying in this new proposed rule, that's what you're going to do, because of the verification plan.

MR. KOGUT: Yeah. The verification samples will be taken over a full shift, and all of the concentrations will be adjusted to reflect the higher dose that you get over an extended shift.

MR. MOSCALINK: I can't comment on anything else.

MR. NICHOLS: We're going to have do some more work.

MR. MOSCALINK: A lot of work, Marvin. A lot of work. A lot of work.

MR. NICHOLS: We set the level up here for plan verification, but because we're not sampling full shift here, you need a lower standard. Is that what you're saying?

MR. KOGUT: No. I was just saying that when you're doing the verification sampling -- the basic point I was making is that under the proposal, we are trying to address the concern that you raised about extended shifts, which we feel is not being adequately addressed under the current regulation. Under the proposal, we are

trying to address that concern about the extended shifts and the higher dose that you get when you're working an extended shift.

But in order to do that, that's what gives rise to some of the complications that you also expressed a concern about. So in other words, in trying to address one of your concerns, in order to do that, we're adding some complication, and that's another one of your concerns,

but --

MR. MOSCALINK: It's just the brother before me said, when he comes down that pan line, he sees the dust on the shield. You know, we're coalminers. And not to go ahead and hack on you about your formula, what we see is what we see. We see coal dust. We see coal dust on shields, we see coal dust on the belt line, we see coal dust on the equipment. When the pumps go out, we're still eating and sucking that dust. That's the main thing, you know.

And now you're going to go ahead and you're going to allow me to suck more dust, to make sure that we have it right. I mean, you know I'm sucking 2 milligrams of dust. Now you want me to suck four more hours of dust. Once you know that I'm sucking 2 milligrams, you shut it down, and you go ahead and you cite, and you fix

it. That's what coalminers understand. When I'm overexposed, don't keep overexposing me. You know I'm overexposed. Stop it. And this rule isn't going to do that. It's not going to do that. Because you're going to overexpose me up to 8 milligrams. If you can't get it with engineering controls, you're going to go with administrative controls. And you're going to bring in more float coal dust. Do you understand that?

MR. KOGUT: I understand your point, yeah.

MR. MOSCALINK: Okay.

MR. KOGUT: I don't think that that's -- that's certainly not the intent of the proposal, though, to increase your exposure. The intent of the proposal is really to decrease your exposure. If you have reasons to think that it's not going to do that, that's what we want to hear, but the intent is certainly to bring the exposures down, not to increase them.

MR. NICHOLS: Okay. Thanks. Bob Santella?

MR. SANTELLA: My name is Bob Santella. That's S-A-N-T-E-L-L-A. I'm on the safety committee of local 2258 at RAG Emerald Mine. I've been in the coalmines for 28 years. I would just like to start off saying that I'm extremely concerned that MSHA's proposal to allow mine operators to increase the respirable dust levels in coal mines to four times their level by Congress in 1969.

For example, the long wall today. The long walls in coalmines today are becoming larger every year. Long wall faces and sections are over 12,000 feet long and over 1,200 feet wide, exposing miners to greater amounts of dust, and being relieved at the face with the terminology "hot seat changeout." Long wall belts are becoming longer and wider to accommodate the amount of coal the long wall produces, causing more dust and more methane because of the ventilation regulation sections with belt air.

The Airstream helmets provided by management are not the answer. Those helmets do not stop the small amount of particulates and dust. And in some instances, the helmet does not -- in some instances, some helmets do not even have filters, because management failed to order them when the supplies ran out.

On the full shift, the full shift sampling and continuous dust monitoring that miners are wanting, MSHA samples shut off after eight hours and let the mine operators decide if they want to continue dust monitoring. Mining sections and full face mining machines cut sixteen foot wide and eight foot high. These machines cut coal almost continuously every day, subjecting miners to greater amounts of dust, because miners are supporting the roof. By supporting the roof

on these machines, within feet of the miner is it's cutting coal, these miners also are relieved at the face due to the oncoming shift exceeding the eight hours sampling.

In closing, I'm extremely disappointed in MSHA's reform of the dust control plans, and I hope that you think of miners' lives instead of companies' inability to comply with the existing laws. I thank you very much.

MR. NICHOLS: Thank you, Bob. Gene Davis? Larry Kuharik?

MR. KUHARCIK: Hello, my name is Larry Kuharcik, K-U-H-A-R-C-I-K. I work out of the local 1702 of the United Mine Workers of America. I worked underground for the past 32 years. I didn't prepare a speech today, but I appreciate the opportunity to speak to gentlemen. I spoke to this panel in the year 2000. I know some of you was on it. I don't believe all of you were. Marvin, if you recall, I presented this panel with 48 U.S. Department of Labor documents from local 1702 to cover the nine-month period where 48 of my brothers and sisters went to Charleston, West Virginia, and was diagnosed with black lung. From 5 to 20 percent. Do you remember that, Marvin? I gave you those documents.

The average age of those coalminers was 45 to 50 years old. That was 48 miners from local 1702 in a nine-

month period was diagnosed. And gentlemen, we were talking about 2 milligrams at that point in time. Now, just think, 48 -- approximately 48 in nine months, at 2 milligrams, and now we want to raised the dust levels in the coalmine. What will that do for the black lung?

I thought for sure when I gave that testimony, and the panel realized that was just one local of the United Mine Workers, and the thousands of men and women in the mine throughout the country, how many would there be across the country, and that would really make a difference and make you think of what we're breathing, but apparently it didn't. I'm sorry to say, apparently it didn't, or we wouldn't be here with, I believe, worse proposals today.

Another issue I'd like to talk to you about is space helmets. We call them space helmets. You call the air helmets. In the coalmine we call them space helmets. I personally have worn one. I worked on a long wall pulling dally shields for one year, six days a week, and we had the helmets. The helmets aren't the answer, gentlemen. There's many problems. In an atmosphere sitting in this room, you might be able to put that helmet on and breathe.

When you're down in the coalmine, you're sweating. I wear corrective lenses. Sweat's running

down your glasses. Your face shield get greasy on the long wall. You can't see out of it. You're wiping it with your arm and hand, and your dirty shirt, your wet shirt. It just smears. Next thing you know, your shield's up because you can't see, so your protection's gone. The filters plugged up on them. Another problem on them. And keeping the battery charged was a problem on them. You had the battery in the back of the helmet with the little motor that ran the fan that blew the air up over if you remember that and down across the face shield. We had problems. We couldn't wear them.

My buddy Roy Acres and I was the last two in our coalmine to wear them. Everybody else gave up on them long before we did. It got to the point we just went back to the regular respirator so we could see, and at least we could breathe, because the filters are plugged up, the motors would run down. Airstream helmets are not the answer.

The PDM 1, which is near perfection, I believe, is the way we need to go, where you don't have to wear an Airstream helmet to breathe in coalmine. You can breathe because the air is clean enough that it's not going to harm you. So that's where our goal should be. That's what we ought to be aiming for. Not air helmets and levels of four and eight in a coalmine with air helmets.

We're going the wrong direction, in my opinion.

Another thing, we're putting more dust particles in the atmosphere of the mine. Do we stop and realize how many mine fires we have had in the past several years? I work for Consolidation Coal Company. As we speak, the Loveridge mine is burning right now as we set in this room. The second time in a couple-year period. Right down the road here about five miles from where we sit, the 84 mine was on fire several months ago. In the fall of last year, my mine, Blacksville Number Two, we got called out at nighttime, our mine was on fire. Just three weeks ago, I testified on another issue in front of Marvin, as we spoke we had a mine in Virginia on fire.

Do you guys realize the mine fires we've been having and putting more coal dust particles in the air during a fire, and an explosion with coal dust particles, more of them in the air or the atmosphere of a coalmine? Gentlemen, we're going the wrong direction. We need to turn around. In the year 2000, Marvin may remember, I challenged this board to do the right thing. We did the right thing by backing MSHA, and we got some good MSHA inspectors, but I challenged this board to do the right thing and go back and take the advisory committee's recommendations and make it better.

Gentlemen, we didn't make it better. We're not

making it better. We can make it better. We have the knowledge, testimony from the union and the people that work in the coalmines. So we're down in that coalmine six, seven days a week, eight, ten hours a day. When we testify what we need, we know, *we know* what we need. We live it. It would be nice if we could all wear suits and three-piece suits and go to an office and work, but we can't. We're down there crawling in that coalmine in the mud, water, in the conditions we crawl in, and we need fresh air. We don't need more coal particulates in the air to breathe.

Now I'm asking this board again to go back and take care of the coalminers. The men and the women in this country that's working in these coalmines. Protect them. That's our responsibility and our job. That's what MSHA was formed for. I personally think, and this is my own opinion, and I'm getting disgusted. I think that we're looking at more of the cost and the expense for the coal operators more than the health and safety of the men and women in the coalmine. And we shouldn't be doing that.

And I ask you to think and consider the health and safety of the men. My career's about over, but I have a lot of younger brothers and sisters that's going to remain that I want them to live healthy. And in

today's days and age, there's no reason we can't. But it's your panel, your decisions that got to make those decisions for us. You have the control and the power when the laws are passed, to make the decisions to protect us. And I believe that's what the purpose of MSHA is.

Gentlemen, I thank you for hearing me, because I'm not a speaker, I'm a coalminer, but I wanted to talk to you today. And I thank you for the opportunity.

(Applause.)

MR. NICHOLS: The next presenter is John Gallick, RAG Emerald Resources.

MR. GALLICK: My name is John Gallick, G-A-L-L-I-C-K. I'm the safety manager for RAG Emerald Resources, LLP, and affiliate of RAG American Coal Holding, Inc. Emerald Mine Number One is a Pittsburgh seam long wall mine employing approximately 540 people, operating five MMUs, up to seven days per week. The operation produces approximately six and a half million clean tons per year. RAG American Coal Holding will be submitting written comments on this proposed regulation. We intend to address the specifics of this rule at that time. My presentation today will address those rules in a more general manner.

First let me say that this rule appears to

closely parallel the previous proposed rules that were soundly rejected by all the stakeholders. I cannot understand why MSHA has not listened to the stakeholders, and actually attempted to develop a rule that the stakeholders could support. Both industry and labor, albeit for different specific concerns, said to MSHA at the last round of public hearings that MSHA needed to start this rule all over, rather than attempt to modify it.

These new proposed regulations appear to be a tweaking-of-the-edges approach. I regret that we will need to go through this again before we can, hopefully, arrive at a reasonable, supportable final rule. I'd like to address single samples first. I give the Agency credit for one thing on this subject, obstinance. You just won't let a bad idea go away.

(Applause.)

Over the years, single-sample concepts have been rejected by the courts. Science and engineering studies have also questioned it. I'll only talk to the practical considerations that make single samples a bad idea. Let me begin with, first, a basic assumption. That assumption is that on respirable dust sampling, there's one thing that MSHA, labor and industry all agree. That agreement is that no one trusts the others when

respirable dust is involved. MSHA continues to paint the entire industry with a brush of distrust, when the reality is that most operators continue to operate legitimate respirable dust sampling programs.

Industry distrusts MSHA's lab protocols. For example, one area of mistrust is oversized particles, which are only tested on samples with weight gains above six milligrams, and where inspector samples are not inspected for oversized particles with any stricter protocol than the operator samples. Also, operators do not believe that MSHA applies appropriate void codes in all circumstances.

Finally, most of labor questions the respirable dust program altogether. You heard enough of that this morning. Credibility in this program is a problem, and any new program will need to be deemed credible if it's to succeed. Using single samples will not help the credibility of this program. I say that because, with all the variables involved in sampling in a coalmine environment, using samples that are easily capable of having oversized particles counted as respirable dust, for example, one sample does not make sense. Frankly, to me, I prefer a system where at least seven samples are taken, and the high and the low samples are thrown out. The other five samples would then be used to average the

results to achieve a more valid number.

One of the reasons for distrust in the system is the samples that appears to be unusually high or unusually low. Credibility requires a reality check when an oddball result is obtained. By not using the high and the low from each sampling cycle, some of this concern would be at least minimized. Clearly, from an operator's perspective, the major impact of respirable dust citation is not only the monetary fine, but the respirable dust control plan changes that will be required. Single-sample enforcement is a bad idea that should just not go forward.

My next comments concern plan verification. As proposed, practical application of these rules will be difficult, frustrating, and costly to comply with. Requiring the operator to sample at no more than 15 percent above sample minimums would be extremely difficult to do in a perfect world. In the real world, it just won't happen. I say this because as I read the proposed rules, the combination of tonnages needed for a valid sample, and the actual respirable dust levels necessary for a valid sample can result in several weeks of off and on again sampling. During this time, the operator is faced with a Hobson's choice of staying at the minimum, or changing the parameters for each shift,

preparing for additional verification sampling.

For example, our continuous miner sections are ventilated for methane, as well as respirable dust. Based upon our history of sampling results, I believe we could clearly reduce to the present parameters in our plan and achieve compliance. With methane as a factor, I doubt if we would choose to consistently do this. I say, "consistently" because each quarter we'd be required to reduce parameters or face increases in our plan of minimums. I would expect that even in our continuous miner sections that are well below the 1.71 milligram per cubic meter threshold critical value, our plan minimums will be much higher than they are now in place.

I note an example, in fact, where one of our mines had a 50-percent increase in its minimum plan for an MMU, because they couldn't cut back the air quantity due to methane concerns. The proposed 115-percent plan verification system will be even a greater problem on long walls. Air quantities, water pressures, et cetera, are more difficult to plan for and execute on a long wall than a continuous minor. The amount of air on a long wall required to be dumped in order to achieve minimum plan parameters may even constitute an air change.

As proposed, the plan verification system will inevitably lead to a practical quandary, whereby the

operator will be faced with an ever-rising minimum plan standard, due to not necessarily the respirable dust control needs, but because the operator was unable or unwilling to cut back to plan minimums each quarter, when samples are to be taken. MSHA may believe that it is not a burden to make plan adjustments to reach the minimum plan parameters each quarter, but these practical considerations are, in fact, real.

In addition, I haven't read anywhere what shift length is required for the plan verification process, when multiple shift lengths are employed. For example, we operate with three different shift lengths each week. We operate a standard eight-hour shift length, a hot seat extended shift, and a weekend crew that works a twelve-hour shift on a Saturday and a Sunday. Clearly, the majority of our shifts are the extended shifts involving hot seat changes, which are nominal nine-hour shifts, whereas the twelve-hour shift is only on one section for two shifts per week.

Under the proposed rule, will I be required to develop a respirable dust control plan to meet a 2-milligram per cubic meter standard for the twelve-hour shift? Or do I propose three different plan minimums for the various shift lengths? I haven't seen this discussed, but it affects both plan minimums and reaching

the 10th shift tonnage levels for a compliance sample.

I'd like to also add some additional comments on MSHA's proposal to add the length of production shifts and the verification production levels into the ventilation plan. In my opinion, this is a waste of time and resources, with nothing to be gained. The operator is required to make available the tonnage reports for the previous six months, and will be required to sample initially, and in each subsequent quarter, at a level matching the 10th highest production shift out of the last 30 shifts. It appears to me that if MSHA wishes to crosscheck tonnage levels per MMU, and shift lengths for each MMU, this can easily be checked by MSHA at the mine site, rather than having the operators submit plan updates when each quarter samples for each MMU is taken.

My final comment on plan verification is that the plan verification process is, in my opinion, a stalking horse to force operators into having plan standards that are much more stringent than necessary for complying with the 2-milligram standard. I expect that this ratcheting-up effect will be ongoing and an operator will have a major battle to submit for a lower plan parameter when a recalibration of the respirable dust plan becomes necessary.

My next comment involves the use of the 060

code. Isn't it time that we do away with this code? Particularly when MSHA is rewriting the entire respirable dust regulations? 060 has been an artificial code from the beginning of its use. No one is actually exposed to respirable dust levels since it's a combination of multiple jobs and people. If MSHA intends to rewrite a rule and to have the operator conduct sampling anyway, why not require sampling on the entire crew, and gain a true picture of exposure?

As noted in the preamble, most long wall crews practice a quasi-administrative controls system of switching and changing work locations. 060 code sampling ignores these realities. It's time for MSHA to get rid of 060 codes, and quite possibly the 036 code, and have sampling done on the actual occupations. I believe that MSHA should eliminate all methods of sampling that involve trading off the pump.

Another reason to eliminate DOs, an replace the DO samples with actual person sampling is a need to realistically address administrative controls and powered air-purifying respirators or PAPRs. As presently written, the use administrative controls or PAPRs cannot be incorporated into a respirable dust control plan until all feasible engineering controls are used. Since MSHA hasn't attempted to define "feasible," and has not

attempted to provide much in the way of guidance or examples of the levels of feasible engineering controls or their limits, maximum velocity, for instance, I am not sure when, or if, an operation can use administrative controls or PAPRs.

The cynic in me sees this as another set of logical options for the legitimate responsible dust control that will never be enacted. The PAPRs are already extensively being used on long walls, and have been for 20 years. Administrative controls and a form of employee switchouts on long wall occupations, place change miner operator and helper switches, and other examples are already in use.

Apparently, the workers are ahead of MSHA when it comes to understanding personal respirable dust control. Maybe the Agency needs to look at the realities of administrative controls and PAPRs, and provide for a better method to incorporate these systems into any proposed regulation. These systems do, in fact, protect employees, and are long-established good industrial hygiene practices. Let's use them.

Finally, I'd like to address personal dust monitors, or PDMs. I didn't know a lot about them before I came here, and I learned a little bit today, and that's really my point of this part of my talk. Why not hold

this proposed regulation until we have experienced some actual time with these units? As presently written in the proposed rules, I don't anticipate many operators implementing them. As I read the rule, an operator would have to have enough PDMs to sample each crew, each shift of each day, every day of the year. That doesn't make sense to me, and I doubt very much if anyone can comply with that.

I appreciate in the preamble the Agency is soliciting comments on PDM usage. I hope that there is enough field experiences with PDMs prior to the record closing, to allow for real-life comments, rather than just commenting on the supposition that PDMs will work. I personally believe that PDMs, if they work in a manner as I've been told they do, will change the entire respirable dust sampling system. This section of the proposed rule clearly needs to be rewritten to become the linchpin and not an add-on to respirable dust sampling.

In my opinion, personal dust sampling puts the burden of respirable dust on a daily basis, or some factor basis that will allow people to look at their sample, know where they stand, and make the adjustments on the site by themselves or with their supervisor. That, in principle, sounds like an answer to a lot of the problems that we've talked about and heard. I just don't

know enough about the unit, and that is my concern.

I can't help but add one last comment. The Agency and labor both complained about the industry doing respirable dust sampling for years. Those of us that have been involved in respirable dust sampling over the years have been accused of lying and cheating whenever this rhetoric suits people. Why do these rules still have the operator, me, continuing to submit legally binding samples?

MSHA was to take over the program, lock, stock and barrel. Please do so, and let the operator in a position where we can sample for our own in-house purposes only. You've wanted it. Take it. But remember one other thing when you take it. It'll be your program, it'll be your responsibility to produce a dust sampling program that is legitimate sampling results, that is considered credible by between the operators and labor. Take the burden over, gentlemen. Thank you. That's all I have.

MR. NICHOLS: You were gigging us in our persistence to chase single samples. Did you catch our presentation earlier?

MR. GALLICK: I've heard everything today.

MR. NICHOLS: Okay. But did you see the graphic there? Or the overhead that showed averaging we sampled?

MR. GALLICK: I understand that concern, Marvin. That's why I said it should actually be a larger number, and throwing out -- I said seven. I'm not a statistician, and I'm not going to debate that subject, but my belief from day one when I first was involved in sampling, back in '76 or whatever, was that you should be throwing out some percentage of the highs and lows, and those that remain should have some kind of a statistical value. To me, a single sample loses that credibility.

MR. NICHOLS: I mean, it's fairly well proven in other industries.

MR. GALLICK: So are personal protective equipment and administrative controls, but you guys aren't doing that. Other industries use both. You know, I have a problem with this individual single sample, when I know that the units that we presently have, have their own problems, one of which is oversized particles. I know you don't weigh oversized particles until they're well over the violation limit. I heard several gentlemen here talk about the variabilities in coal mining on a day to day basis. I mean, all the stuff is real. And that's why I think a single sample is a mistake. I'm sorry, go ahead.

MR. THAXTON: Actually, the Agency does look at any sample that exceeds 2 milligrams for oversized

particles. It is a visual observation of the filter. The only thing that we don't do until we get to 6 milligrams is to actually do a physical, microscopic examination where we count particles. You have to realize the definition for the respirable dust samples that we have says that any dust that that sampler collects is considered a valid sample.

Part of the respirable dust sampling system that we use, there will be some oversized particles in that sample. And that is legal to have those in there. It's the number when you exceed it that may become a concern and that makes the sampling valid. That's why we do screen all samples that exceed the 2-milligram standard at 2 milligrams or greater, because we are looking visually to see if it looks like there's an overabundance of oversized particles, which then indicates that there is a potential problem with that filter. And then it would go under microscope examination.

It's mandatory that all samples that exceed 6 milligrams have microscope examination, because then it is conceivable that there could be something wrong with that sample that we would want to look at. But we do screen all samples that exceed the standard of 2 milligrams.

MR. GALLICK: Well, I --

MR. THAXTON: That's been in place for several years, since '92 at least. Four or five years.

MR. GALLICK: I guess -- go ahead, I'm sorry.

MR. NIEWIADOMSKI: The other thing that you mentioned when you talked about clarifying about the single samples, which you're opposed to the proposal that MSHA make a noncompliance determination on a single sample, correct?

MR. GALLICK: I don't believe -- I believe that MSHA, when they do a single sample -- I think we're both saying the same thing. That you then can trigger additional samples done by MSHA for compliance. If you have a problem with what you see on a single sample, come in and sample to your heart's content.

MR. NIEWIADOMSKI: Yeah, but what you're indicating, your testimony was that you are opposed to MSHA making a noncompliance determination based on a single sample.

MR. GALLICK: Oh, yes. That's correct.

DR. WADE: While I understand your testimony, and we need to look at it, the reason that NIOSH advocates single sample is that we are concerned, given the fact that we see a continuation of the disease in the workforce, if we take a number of samples and average them to make a judgment as to compliance, we stand the

risk of certain dose exposure or oversampled existing. And that's really what brings us to this point.

MR. GALLICK: I recognize that, and I appreciate some of the concern. I do. I also heard a discussion, this last discussion over shift sample. I do believe, though, that the whole basis of the respirable dust program was lifetime exposure, and I don't believe that we're really discussing -- part of the average sampling was the variabilities of mining, the variabilities of the samplers. As Bob says, they don't collect only five microns. I guess that was a 1970 some decision or '80 decision over the fact that they -- and the rule was, well, then whatever they collect, we'll consider respirable. That's how we get around that, the failure of the sampler to actually do what it's supposed to do.

But I think, as a group we're also missing the lifetime exposure dose issue. It's more than just individual shifts, it's other variables. And I frankly think that's a mistake on all of our parts. And that's why, if the PDM rule was written in a manner that is doable, and if the units work as we've heard, I think that changes the whole approach to respirable dust sampling, and all the other issues that we're talking about. I would expect the most credible sample we could have would be one that anyone could look at during the

shift, and recognize where we're at. And the most simplest administrative control can be done right on the spot.

And I believe that both the labor, management and MSHA understand that the PDM can be a paradigm shift of sampling, but I don't believe that, as you've written the regs, that can possibly happen. Now, Larry, I do appreciate -- I saw you waiting. I do appreciate --

MR. REYNOLDS: Tell us --

MR. GALLICK: That there's almost columns worth of questions in the preamble, and we propose to address those in writing, on how we would --

MR. REYNOLDS: Where you want us -- how you want to do it.

MR. GALLICK: How we would support a PDM program.

MR. REYNOLDS: And the specifics of how you would like to do that, or what you think would work?

MR. GALLICK: Right. And we've chosen, or I've chosen, and my company has, not to discuss it, for me to try to guestimate how we would do it. This is the first time I've actually seen the unit, which was an hour ago. So I've been learning a lot about it from Mr. Lamonic and others, but I don't feel comfortable that I know enough about how -- not so much how -- let's assume the

unit works properly.

MR. NIEWIADOMSKI: Can I ask a hypothetical question? Just a situation. If the PDM was proven to be mine-worthy, and an operator, for example, could adopt or use that in lieu of having any plan verification or whatever, would, for example, your operation, would be willing to purchase such a device for each and every miner?

MR. GALLICK: I have no idea what they cost. And I have no idea how long they last.

MR. NIEWIADOMSKI: So that would be --

MR. GALLICK: And I also question -- as a practical matter, you would have -- of the 500 and some employees at the mine, there's a realistic number that would need to be sampled on a very routine basis. There are others that would need sampled on a statistically valid less-than basis, hierarchally down until some people that may need no sampling at all or whatever, that are working in jobs that are not -- there's no dust exposure. To me, that is the type of program that has to be looked at. Because I assume you guys aren't going to buy these units for us.

MR. NICHOLS: You got that right.

MR. GALLICK: Okay. And I assume that the technology that's in them says that they're going to be

fairly expensive. I have no idea what they are. Also, practically, if I'm understanding right, not only would we probably have to take it in the mine and it would have to be programmed for each shift, and it would have to be downloaded with some computer system at the end of each shift in some manner, by somebody. I mean, this is a fairly extensive -- that's why we're saying we're not ready for -- we don't understand enough about the PDM practicalities to implement it.

MR. NIEWIADOMSKI: Well, let me tell you what we're faced with.

MR. GALLICK: Okay.

MR. NIEWIADOMSKI: Your discussion on the PDM is just about where we left it in 2000. In fact, I almost remember the exact term. This is the bridge to the 21st century.

MR. GALLICK: I remember that also.

MR. NIEWIADOMSKI: Right. Now this is 2003, and we've seen a prototype circulating around here. We've seen prototypes before that may or may not work, so I don't think the Agency's going to wait another several years to deal with some of these other dust control issues.

MR. GALLICK: Well, if the Agency isn't, then in my opinion, two things have to happen. There has to be

some modifications to the proposed rules, unrelated to PDMs, and the PDM rule has to be written in such a manner that when they do become feasible on site able to be used, the rule itself doesn't shut down its use before it can get off the ground. As I read it today, I don't think you could sell a hundred of them. You know, today.

But if you write the rule in a manner that's open enough, has enough latitude and flexibility to be implemented, then technology can catch up. But I read the rule today, and I say it's an add-on, not the linchpin, and that bothers me. I think it should be the linchpin.

MR. NIEWIADOMSKI: Are you, in fact, proposing that we mandate such a device?

MR. GALLICK: No.

MR. NIEWIADOMSKI: Okay. So you're not proposing a --

MR. GALLICK: No. I can't propose something that's never been off -- I'll use Marvin's comment, has never left the lab.

MR. NIEWIADOMSKI: But assuming that in four months it's proven to be mine-worthy, are you recommending that the Agency mandate the use of such a device, or do you have to build in certain options, alternative approaches?

MR. GALLICK: The reality is that you probably have to have options and alternatives, but I'll tell you this, we'll write your proposal on how to implement them. If you want to take that one and use it, it'll probably make some headway.

MR. NIEWIADOMSKI: Yes sir.

MR. HEARL: I was wondering, is your objection to the single-shift enforcement proposal, that the single shift doesn't represent the long-term mean average exposure? Is that -

MR. GALLICK: As a practical matter, I object to it because I know that the variables that happen in a coal mine are such that -- again, a single shift enforcement. The citation itself is one thing. But every time we've dealt with single shift, we've also dealt with plan changes based on that sample. And that is my biggest concern. Whenever you're dealing with -- that I have a 2.34 on some unit, okay? I have been faced in the past with having to change plans based on the sample, when the reality check says, why did that happen? Why is it different than all the other samples that we've done over time? And it's frustrating.

And frankly, you know, we talk about credibility in this program. You've heard a lot of people testify, and you'll hear more testify about their lack of faith in

the operator sampling. And those are the kinds of things that operators look at and say, where did this sample come from? How did it happen? It seems to me that the average -- now, I understand the concern of the average. That's why I said, throw some out. But it seems to me the average, by throwing a couple out on each end, takes away some of the ones that you scratch your head and say, how did this happen? Both high and low. I've seen samples come in low, frankly, also, where you ask yourself how did it happen. And you don't know.

MR. NIEWIADOMSKI: Can I ask one final question? I don't mean to put you on the spot, but given -- assuming you accept the proposal as written, what it's trying to accomplish is to design and implement plans that will be effective at higher production levels that they are right now. If, in fact, they are verified and meet those critical values at the 10th highest production level, would you then expect, when MSHA went out and sampled, that we would have situations where we'd by citing the operator based on single samples? Or do you think those conditions wouldn't exist then?

MR. GALLICK: That's a good question. That's a good hypothetical, because the reality -- I can only speak for myself, but I believe the reality is that you would not see that many 2.33 single samples. And my

concern is, when I do see one, is there a reality check made prior -- the rule, I'm sure, would be that I would be cited for that, regardless of the reality check, okay. My plan change has me as concerned, if not more so, because again, I believe, as I said earlier in my testimony, that I will not be able to go to the 115 percent numbers every quarter for every sample that I take.

I really think, frankly, that the rule ought to be that you guys do the sampling on verification sampling, if that is an issue. I think I'd change the whole approach to that, but if you're going to do them, come and sample as is, and look at it in a manner of -- with a practical reality check. Is this sample, as it's sampled at the tonnages I've gotten, at the velocities I'm using, at the water sprays I'm using, what are the results, and can I make a rational judgment that the plan as written protects employees.

I've done this with cutbacks before, you know, where you have to cut back your system, and it's not as easy as all that.

MR. NIEWIADOMSKI: So what you're proposing really is -- what you're saying is, you don't want to be forced to cut back, you want to be able to have somebody make some sort of an engineering judgment based on

guidelines of whether or not -- that the minimum parameters that are specified would indeed be protective?

MR. GALLICK: I would like to have in writing -- I would like to see in the rules, when they finally come out, a statement to that effect, that I have the right to either cut back or operate at parameters, and then with an engineering judgment as to whether they comply. Whether we'd meet compliance based on those numbers. I just do not believe that I should -- I don't believe that I could practically cut back every time, and I believe I would just see this ratcheting effect, until the point where I'd have to come back to you and say, I got to start over again.

MR. NIEWIADOMSKI: Marv, just one final question. I don't mean to put you on the spot, it's just another hypothetical. The proposal as written, do you feel if you were involved, and you were verifying your plan, that you would have to significantly upgrade your parameters to be able to meet the criteria to have that plan approved by MSHA, based on the criteria that's in the proposal right now?

MR. GALLICK: I guess the short answer would be no. The long answer would be that I don't know what plans you guys are talking about, because district two plans are pretty detailed. I've --

MR. NIEWIADOMSKI: I'm talking about --

MR. GALLICK: No, I mean, what I'm saying, George, is, you guys are saying the plans are weak, they aren't detailed. The district two respirable dust plans are -- at least the ones that I've worked on are pretty detailed on velocities, on angles of sprays, number of sprays. Now, we always operate above it. I'll be very candid. We operate well above it, if possible. But I believe, if you factored it back, you'd see that we'd still be in compliance anyway.

MR. NIEWIADOMSKI: Yeah. What I was asking was, if you were to test your plan at the 10th highest production, would you need to upgrade your parameters? Or could you meet those critical values at the 10th highest production, using the parameters that are currently in effect right now?

MR. GALLICK: I feel very comfortable saying yes on the CMs. And I would say on the long wall, it would be, I'll use the term, "marginal." As I said earlier, I believe that you concentrate on the areas of concern, and in our case, it would be the long wall.

MR. NIEWIADOMSKI: I appreciate your response to that.

MR. NICHOLS: Okay, John. Thanks.

MR. GALLICK: Thank you.

MR. NICHOLS: Okay. Our next presenter is Nick Molnar with the Pennsylvania black lung association.

MR. MOLNAR: My name is Nick Molnar, M-O-L-N-A-R. I'm president of the Pennsylvania Black Lung Associating. In my prior life, I was president of district two, international auditor, internal organizer, so I've been around for a few years. I want to thank the committee for holding these hearings today. I wasn't here in 2002, and I'm getting quite an education back there in the back on all the things that are being said.

I've testified before hearings before, and I get really cautious when I watch your committee function here, because you all are really defensive of the proposal. And it's fair-cut that you've already entrenched yourself in and wrapped around so this is the best thing we can do. But also as a member of the Black Lung Association, we have the dubious distinction of being the folks that people come to that are suffering from black lung and silicosis, and we get to try to help them through, to gain not the benefits but the compensation that they're entitled to once they are to the point where they can't function. And for anybody that's ever watched a person die from silicosis or black lung, you know what kind of a horrific disease it is, and how demeaning and how it takes a strong, strong person

and turns him into a helpless individual.

I want to say right up front that the Pennsylvania Black Lung Association stands in opposition to the proposals. Anytime where you increase the exposure to coal dust in the mines in the proposal -- and I heard Joe Main here earlier this morning try to pin you folks down, can you be cited for the eight-tenths of a milligram or whatever, and all the response back was, well, it depends. And I don't think that the life of a coal miner should be based on a "depends." I think that we have to take a realistic issue.

I've never seen the personal monitor that NIOSH is working on, on the experimental side. It's supposed to be here in a couple months. And I also question why, all of a sudden, this change here is coming about. After all the years I've spent in and around the mineworkers, and going through gold mines in South Africa and coal mines in Germany and in working with nonunion coalminers in Ohio, Pennsylvania and West Virginia, I'm very cautious as to when things start moving real fast. It makes me nervous to think that there's something in the woodpile that I can't see.

The Pennsylvania Black Lung Association hasn't put together a formal proposal or response to this proposal, because we didn't get it until yesterday or the

day before, but it was in the mail Saturday. But we will. I would like to see the current proposal maintained the way it is. Mr. Nichols said a couple times today, well, what about the averaging? The averaging is where the problem's at. Well, if that's what the problem is, deal with the averaging problem, and not throw out the whole program. I mean, if you have a flat tire on your car, you don't run out and flatten the rest of your tires just to make the average. You know, it just doesn't make any sense.

But with that, I'd just say that the Pennsylvania Black Lung Association is in opposition to your proposal.

MR. NICHOLS: Okay. As I said earlier, we don't mean to come across argumentative.

MR. MOLNAR: Well, you have.

MR. NICHOLS: Well, we do when people accuse us of not having the health and safety of the miner at heart here. I mean, some of us -- wait a minute -- some of us have spent our whole career trying to improve the life of the miners. And reasonable people can disagree --

MR. MOLNAR: And it has. And it has improved. And it has improved on the backs of the working people here. I mean, these guys are the ones that were sitting out there in the front, getting exposed to the dust and

the silica. Now, these are the guys that are getting blown up in the mines, and torn up by equipment. This committee here didn't happen because Mr. Nichols felt like it was a good deal to get involved the mining thing. It was because of the outcry of the people in the communities saying, there has to be something done, we can't be having 30, 40, 50, 100 people blown up in a coalmine at a time.

MR. NICHOLS: Also, when it's presented that we're going to allow operators to take off well-established dust controls, and just go to personal protective equipment --

MR. MOLNAR: You'll have to speak up. I'm hard of hearing. I was a coalminer.

MR. NICHOLS: Maybe we need to get real close. I was a metal miner. When you talk about allowing operators to take off well-established dust controls, and go into personal protective equipment, that's not what this rule does. And that's been repeated over and --

MR. MOLNAR: Is it in the rule?

MR. NICHOLS: No.

MR. MOLNAR: I rest my case.

MR. NICHOLS: Well --

MR. REYNOLDS: Actually, it is, Marv. We repeatedly say that all the engineering controls have to

me maintained. That's clearly --

MR. THAXTON: It's actually written in the regs that you have to maintain all feasible engineering controls in the plan, as they're stipulated before we even make our determination of all feasible controls exhausted.

MR. MOLNAR: That's interesting, because I got one guy saying, no, two guys saying yes.

MR. NICHOLS: No, that's your problem. I can't hear either. But you know, when that's portrayed that we're going to allow controls to come off and PAPRs to come on, that's not what this rule does. It still has the primacy of engineering controls.

MR. MOLNAR: Are you trying to sell me this program now? Is that what you're trying to do? Or are you taking testimony? That's the question.

MR. REYNOLDS: I don't think that's really what's going on. I think what's happening is, we don't -- it's not clear to us that we understand each other, and I think we may appear to be defensive, but I think what Mark is trying to do is, explain the details. We understand this is complicated. And it's very difficult. I think Marv frequently sounds argumentative when we're trying to explain the provisions. And you just told us you haven't had a chance to read it. And Marv is trying

to explain it without you having read it, so at times it gets awkward.

But with regard to what the rule says, and every step of the rule it does say that all feasible engineers -- the controls have to me maintained. The engineering controls have to me maintained. And if you read the preamble, we go into great depth explaining why we believe that. And it's good industrial hygiene that you always maintain all the engineering controls before you consider anything else. And that's throughout the skeleton of the rule, if you read it. And I just didn't want you to be confused about that. That's very important for everybody to hear.

MR. THAXTON: And actually, the regulatory language itself under 70.210 does spell out exactly what the operator has to do before they can use PAPRs, and part of that is that they have to "include all feasible engineering controls capable of reducing the concentrations of respirable dust on every occupation where a PAPR is required, as low as achievable, and maintain other occupation environments at or below the verification limits."

MR. MOLNAR: Well, I'll reiterate what one of the gentlemen was saying back it the back. I worked on one of the first long walls that was in the United

States, at North American at the Blacklick portal, and we wore the helmets there, and they didn't function well. I mean, for anybody that's had any experience. That was going back 20 years ago. Things have changed, and I haven't seen the newer helmets, if there is such a thing, but the helmets that they had at that point in time weren't worth the plastic that they were made out of.

MR. REYNOLDS: One thing I wanted to ask you is, your organization believes we should just maintain the status quo. In relationship, there's the whole -- there's the information about what we found in the Miners Choice data in terms of the rate at which miners are still getting black lung. Does that affect your opinion on that at all? I think we all agree that something needs to be done, it's just --

MR. MOLNAR: I don't think that anybody's going to be satisfied with the status quo, when you have one miner a day die from black lung. I mean, there's just no way that that's -- that's unconscionable, it shouldn't be happening. I remember in the seventies when the ventilation plans -- when we went through the first major revision with the coal operator, and this is at North American, not a small company.

They came in and they were screaming up and down, you damn miners want the air better inside the mine

than it is outside today. And I'm standing there thinking, well, why not? You know, why can't we work 20 years in this coalmine and not come out of there with black lung? I mean, it's not perfect. And one person dying from black lung is one too many. One person dying from silicosis is one too many.

MR. THAXTON: We agree with you completely on that. That is our intent, is to eradicated or get rid of the disease.

MR. NICHOLS: Okay. Thanks. I had called some guys earlier that were out of the room, so I'll start back through the list. Joe Marsonik? Is he gone? John Palmer? Perry Powell? Who's the other guy, Joe?

MR. KOGUT: Joe Reynolds. I thought I saw him.

MR. NICHOLS: Yeah, we've got another list. I was going back and trying to pick up the guys that we missed earlier.

MR. POWELL: Good afternoon. My name is Harry Powell, P-O-W-E-L-L. I'm a health and safety representative at district two, local 2300, RAG Cumberland Mine. I'm basically going to say the same thing that everyone else has said earlier, but it's going to be a little bit different wording. MSHA is an organization that is viewed by miners such as myself as a protector, the one to go to, highly respected, full of

knowledge, and last but not least, trusted. Being a representative for the miners, I have spent a lot of time with federal inspectors, and close friendships have developed. That is the old MSHA.

This new, sleek, low profile, quick, elusive MSHA, the one who introduced this dust rule proposal, is a stench in the nostrils of the nation's miners. This is 2003, and miners are still dying of black lung, and yet MSHA would prefer to set the coal industry back at least 50 years. Raising respirable dust levels also raises float dust levels, as if we have not already had enough fires and explosions and deaths already.

I have worn an Airstream helmet for 11 years, and that is not the solution to controlling respirable dust. It appears MSHA has given up. It is as if health and safety is not its forte anymore. It is time they seek help from the nation's miners. MSHA dust rule proposal would do one thing, kill more miners. Thank you.

MR. NICHOLS: Thank you, Harry. Ralph Serian? Mark Sagetti? Gene Davis? Joe Reynolds?

MR. REYNOLDS: My name is Joe Reynolds, R-E-Y-N-O-L-D-S, and the burning question on everybody's mind, I don't believe that myself and Larry Reynolds are related. Just to make that clear.

MR. REYNOLDS: We're not sure.

MR. REYNOLDS: Can't be sure about everything. I work at the Eastern Federal Two mine. I've been there about 26 years. I chair the mine committee, and I'm also the recording secretary for local 1570. I've just got in on the back end of this rule. I'm not as fully informed as I should be, but I will continue to educate myself on it.

A few remarks I'd like to make to you that I sent out over the internet the other night to some of the local papers. My granddad was a coalminer. My dad was a coalminer. I had several uncles that was coalminers. In that time, I've seen a lot of tragedy in the coal fields. At the age of 12 I witnessed the grief of my fellow classmates who lost their fathers in the Farmington Number Nine mining disaster in 1968. When I was 17, the task fell to me to take my girlfriend, her three sisters and their mother to find out the fate of their father, who was covered up in a roof fall. I would like for each member of the panel to try to imagine what it felt like when I had to go back to that car and tell them their father was dead.

Through my early adult life I watched my father, a veteran of 38 years in the coalmine, slowly die, day by day, from black lung disease, a process that caused him

immeasurable suffering for over a period of 30 years. The day my dad died, I watched him struggle for air like a fish that had been pulled from water on a hot day, and there was nothing I could do to help him. However, during this period there was great strides made in the coalmine safety.

The '69 Health and Safety Act was passed as a direct effect of the Farmington Number Nine mine explosion. And shortly after I entered the coal fields, this Act was amended again in 1977 to add an extra measure for our nation's miners. But now, to me it seems that everything has come full circle. At a time when coal production has reached record levels, the Mine Health and Safety Administration has proposed horrifying, insane, and ridiculous new rules that increase the levels of respirable dust four times higher than what they are now.

One coalminer dies every six hours from black lung. That's four miner a day. 120 every month. 1,440 every year. In easier terms to grasp, the Titanic sinks every year in America's coal fields. MSHA's solutions to the higher dust levels is to give everyone an air helmet. This is a questionable solution in the least, as current air helmets struggle to maintain clear air at the current dust levels for an eight-hour shift. At the proposed

increased dust levels, they would be quickly rendered useless, and give the wearer a false sense of protection.

Even if adequate helmets were to be provided for the miners, there is still the question of the extreme amounts of dust that will be released into the mine atmosphere. This dust is, and would be, very similar to gunpowder and, at four times the current level, would be impossible to render harmless. At current levels, my operators are cited daily for excessive dust levels that adds to the explosiveness of methane gas. When coal dust is suspended in the air, it can be even more explosive than methane gas. Increasing dust levels four times from what they are now will coat the entire area the mine with this explosive mixture. This is simply a formula for tragedy in the coalfields that would be unprecedented.

Currently MSHA is in charge of monitoring dust levels in order to avoid setting the stage for such catastrophes. Until now, that is. Another part of the new proposed dust rules is that the mine operators themselves would be in charge of dust sampling. The operators tried to regulate theirselves in the 1990s. As a result, over 160 different coal companies were convicted in court of criminal fraud for submitting falsified dust samples.

Although I've barely scratched the surface, it's

very easy to see that these new proposed rules, to me, at least, are a thinly veiled attempt by MSHA to deregulate the coal industry in order to increase profits for the company, without regard to the miners' health and safety. In the 20th century, over 100,000 miners died on the job. Another 200,000 are dying from black lung disease today, just like my dad. It wasn't until the coal states and the federal government passed regulatory controls in the 1970s that this horrific trend began to reverse itself. The numbers don't lie, and MSHA has the records to prove my statement.

As we stand at the dawn of the 21st century, I thought great new strides were being made in America, but I have questions. Are we digressing to a point in our past where profits were put ahead of the health and safety of the miners? Is this the same type of rhetoric that former WBU football coach Don Needham spoke about when he said that we had to be competitive with China, we have to get rid of some of these doggone regulations so the men can mine some coal?

Could this be an example of compassionate conservatism, a term coined by the Republican party. After all, the current assistant secretary of MSHA is David Lauriski, who was appointed by President Bush. On MSHA web page, there is a statement that Lauriski had a

vision designed to enhance the miners health and safety. If this is his vision of enhanced health and safety, it's a miner's nightmare.

Some may claim this is a union versus nonunion issue. This is nothing more than a sad, poor joke. Yes, I am a union miner, but I go to work with the same goal that every miner goes to work with every day, and that's to do my job as safely as possible, look out for myself and my buddies, and come back home to my family every day, just like you do.

Every year my union brothers give me the opportunity and responsibility as chairman of the committee for the Farmington Number Nine memorial service. This service each November honors the sacrifice of the 78 heroes who died in the Farmington Number Nine mine. We must never forget them, for if we do, I fear there will be more gray black monuments in the coalfields with more names on them. That's something I never want to see.

Every coalmine safety law that's ever been written was because somebody was maimed, crippled or killed. We can't stand idly by and allow profits to come before the safety of our miners. As far as the complication of your rule, in my time as chairman of the mining committee, I've learned that the more pages, the

more complicated a rule is, the harder it is to enforce, the more loopholes there are.

And you spoke earlier about engineering controls. Some of those, like anemometers, PETO tubes, water gauges, the average water working miner doesn't have control of. It's pretty evident to today that the PDM is the way to go. We can't let the mine operators submit dust levels, because that's lunacy.

We've seen from today's testimony that they can't submit, they can't be trusted to police theirselves. I'd urge you to go back and rethink this rule, bring it down into a term where the miners can live under it. Let's go forward in mine safety, and not back to the 18th century. Thank you.

MR. NICHOLS: Thanks for your comments. Victor Alvarez?

MR. ALVAREZ: Victor Alvarez, A-L-V-A-R-E-Z. I'm a member of local union 1570, and I've been employed at the Federal Number Two mine for Eastern a little over 28 years. For 28 years I've been going underground five to six days a week, and every second of every hour of them days, there is a certain amount of dust in the air. You can see it from the time you go in till the time you come out. Anybody that says there is no dust in certain areas of the mine is wrong. It exist everywhere, and we

breathe it every day, all day.

I don't like the term "acceptable limits," which the 2 milligrams is, because I don't think there's an acceptable limit of something that's bad for you. I think we need to work to, at some point down the road in the near future, eliminate respirable dust in the mines altogether. A lot of things the things I have I've just got to today, because I've not really been involved in it, but as far as the rules being complicated, I've listened. People closer to it than me can't understand it.

I'm sure, as a representative at the local level, I cannot take the information back and give it to our people and say, hey, this is what we got, this is what we're going to do. If they can't get it, I sure can't. And tomorrow when I go back to the mine, I'm the guy they're going to ask, hey, what's that thing say? And I can't tell them. The only thing I can tell them when I go back is that, my understanding of what we got is that under certain conditions, we are going to be asked maybe to work in respirable dust limits four times the amount we have now. And they don't like what we have now.

We've always looked to the agencies to protect us and help us with what we need, and for the most part,

we got that. Right now, I don't feel, as everybody here, that we're getting that support or that help, or that we will get it on this issue. But like everybody else, I think that what we have now does work, to an extent, better than what you all are proposing. And I think we'd be much better off to stay with that.

I have been involved with the union for quite a lot of years. I've seen members and our retirees that, when they go to mall or the grocery store, they're dragging an oxygen bottle. They can't breathe. Can't do nothing. We had a member here in the last year or so that was a rotary dump operator. He went underground with an oxygen bottle until he couldn't take it anymore, and he had to retire. This is what we're looking at. So we know the problems.

And like some of the other brothers have said, that when dust pumps go in the mine, there's extra precautions taken on the section, like the ventilation controls, water in the roads, things like that, you've heard it all today. I'm here to reiterate that that does happen. It's not right, but it goes on. If I had the device that they're talking about, the personal monitoring device every day, then I would know where I was at. And if they took the precautions to keep me out of that so they didn't get a bad sample, then we've

accomplished what we've tried to do, and I don't have to worry about being in that atmosphere. That, to me, is where we need to go.

I have listened to both sides here today, and I've listened to your side, and you sit and you tell me that -- some of you have said it, I don't remember which ones right off -- that in your opinion, the dust levels can't go up in the mine, or won't go up, for whatever reason. From what I've heard, I disagree. If that happens to be the case, then I'm not sure why we're having these hearings. If they can't go up or won't go up, then we should possibly just say, hey, they need to be where they're at. We can live with it until we can improve those levels.

MR. NICHOLS: We want them to go down.

MR. ALVAREZ: I agree 100 percent.

MR. NICHOLS: We still have a 2.8, 3 percent prevalence rate of black lung, and we want them to go down.

MR. ALVAREZ: I'm like a lot of the other people here. I agree that one-shift samples may be a good thing, because like the gentleman talked about the conditions on the long wall, yeah, every day they change. Three days a week you may have horrible conditions. One or two day a week you may not. It just so happens maybe

that day that somebody shows up with a dust sample, they take the extra precautions, and most of the time the samples come back in compliance. There's a lot more of that that goes on than anybody imagines. I've been there, and I've seen it.

Other than that, like I said, I just want to reiterate to you people what everybody has said today, to know how important it is to us, how much over the years I depend on the agencies and everybody else does, to do the right thing to help us, because the operators do not do anything to help us. We look to you, what you people know and what you can do, and what our people can help us do, as far as maintaining a safe level in the mine.

MR. NICHOLS: Thanks, Victor.

MR. ALVAREZ: Thank you.

MR. NICHOLS: Tim Baker?

MR. BAKER: My name is Tim Baker. It's B-A-K-E-R. and I've listened for a long time, and I've heard a lot of people say a lot of the same things. I disagree with a lot of characterizations that have been made, and I guess because it was stated that assertions are being made that are just aren't true on our side, I want to clarify at least a couple of things. There are a lot of assertions being made.

And to start off, when you create a system that

builds in the potential for dust to increase in the mine, you know, you don't -- and it's as simple as this. You don't go out and buy a car with electric windows and not anticipate using them. If you are going to create a system that allows, or possibly allows, increased dust levels to 8 milligrams, trust me, it's going to happen. Just like I have got to sit here, and have gone to the meetings with Bob, and Bob has been extremely helpful, I will give him that, and had him tell me, trust me, the inspections are in a policy manual, and we're going to follow that policy manual. Although I'll give Bob a lot of credit, he hid happen to say, now, those policy manuals are subject to change anytime the administration decides they want to change them.

So there's a lot of "trust me" stuff going on, but the assertions are clear. The assertions that are being made on that side, the dust levels won't go to 8. Then you should never put any condition in the rule that would possibly even conceive that idea. Because if you build it, they're going to use it. We've been in the mining industry long enough to understand that.

And you know, there are operators who sat in this room, who I truly believe -- and I have dealt with some of them -- would do whatever they could to protect their workers. There are a whole lot out there, given

the opportunity, they're going to go to 8. And we've used the example, well, you know, sometimes we'll just -- the operator standard will be 2.5. I'm here to tell you, you do not have that right. You, on this panel, and your agency do not have the right to increase dust levels beyond 2 milligrams, for any reason at all.

You've overstretched your authority. Congress clearly mandated, and I'm going to read it because it's just a few sentences. "Effective three years after the date of the enactment of this Act, each operator shall continuously maintain the average concentration of respirable dust in the *mine atmosphere*," not what's behind the helmet -- "in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2 milligrams of respirable dust per cubic meter."

You do not have a right to increase that by any stretch. Not by -- you can't go to 2.1, guys. Because Congress said you can't. Now, you have the right to promulgate rules, and we can argue that, and we'll make our case based on what we believe to be in the Act in current regulations. But you don't have a right to circumvent Congress, and that's what this rule does. So I just want to kind of make that point clear.

And the other thing is, I do take offense that

we're being told that it'll never get to 8. Then by God, don't put any mechanism in there that allows it to, even in the wild blue yonder, ever approach that. Don't put it in there.

I'm going to start with some specific written comments, and then I am going to continue to comment on some of the things that I've heard to this point. And I'll to be brief, but sometimes that's not easy. And I really do want to start with some of the definitions, because the definitions are going to set, generally speaking, the basis for what we understand to be the rule. And some of them are straightforward, and I understand some of them have not changed since either the current regulation or they have not changed from the 2000 proposal.

But we do begin to depart on some of these issues that we need to look at, and "approved sampling device" is one of those issues that -- and it may be nothing, and maybe you can tell me if it's nothing. But this term was not contained in the 2000 proposed rule. Part of the language under number 1 of the definition was included under "respirable dust" of the current rule.

However, references to devices approved by the Secretary of the Interior or Secretary of Health Education and Welfare have been eliminated. And I don't

know if that's significant or if it's not, but it's no longer in there. I got to be honest with you, when things either appear or disappear from what we're used to, it raises concerns in our minds. And some of those concerns can be --

MR. REYNOLDS: Do you want an answer?

MR. BAKER: I'm not --

MR. REYNOLDS: It's because they don't exist anymore, and Interior -- MSHA moved over from Interior to Labor.

MR. BAKER: But some of those are still in use? Or are you saying they're not?

MR. REYNOLDS: At --

MR. BAKER: Then see, you need to explain these things. Okay?

MR. REYNOLDS: Okay.

MR. BAKER: Then I need to know that. I was told the purpose for the elimination of some of these nuances within the definition was that the Agency has crafted a section that will allow equivalent concentrations to be used, and that was for approved sampling devices, and that personal dust monitors were now part of the picture. And we'll got into that argument a little bit later. But if that's the case and they're no longer in use, then see, I don't have a

concern with that particular issue. So we can move on to -- the definition of "district manager" hasn't changed. Unfortunately, the power placed by this Agency in this role in the district manager is, in our opinion, extreme.

We have district managers out there who will require certain specific parameters be followed. We have others that I don't believe will make the first effort to ensure that they are followed. And clearly, the rule falls to the district manager. The district manager will say, hey, Marv, you know what, you're a good guy and you used all your engineering controls. Got to got to PAPR. That's clearly the way I understand the rule, and that's clearly a problem. And I did hear somebody say that a panel of experts --

MR. REYNOLDS: It's not the district --

MR. BAKER: Okay. Will a panel of experts do this? Because if it's the same panel of experts that wrote the rule, I'm not interested in that panel. I'd like a new one.

MR. REYNOLDS: No, it would be --

MR. BAKER: Okay?

MR. NIEWIADOMSKI: Mind you, the district manager's not going to make a decision on whether or not you've exhausted all feasible engineering controls. On that panel you're going to have -- I mean, the

administrator makes the determination to file a determination. Okay. So he's going to be provided with information from a panel that's going to consist of an individual from that district where the affected mine's located. He's going to involve technical support. It's going to involve somebody from headquarters. It should involve somebody from another district.

And at times we're also going to involve NIOSH, because of their technical expertise in controls. They, in fact -- probably it's going to depend on that particular group. They will, in fact, make a mine visit to make their own visual assessment of whether or not an operator has indeed implemented all feasible engineering controls. Once that panel, that group gets together and makes the determination, they will recommend to the administrator whether or not an operator has indeed implemented all feasible engineering controls. That's how it's supposed to work.

MR. BAKER: But let me ask you this. Where's that in here? This is the rule. The simple hard copy of the rule. Because if it's not in there, where am I assured that that's going to occur?

MR. NIEWIADOMSKI: It's in it section by section.

MR. BAKER: I'll be honest with you, maybe I

missed it, but I don't see all those people listed in this. I don't see them listed. I have read something about it in the preamble.

MR. REYNOLDS: It's on page 10818, in the center column about halfway down.

MR. BAKER: 108?

MR. REYNOLDS: Yeah.

MR. BAKER: 108?

MR. REYNOLDS: It says, "When the administrator receives such a request, guidance will immediately be solicited from a panel of experts specifically established to address such matters.

MR. BAKER: 108? I'm sorry, Larry, I didn't get the page.

MR. REYNOLDS: 10818.

MR. BAKER: That's in the preamble, is that correct?

MR. REYNOLDS: Right.

MR. BAKER: That doesn't do me any good. It's not in the rule. We've had this discussion previously. If it's in the rule, I understand that it's enforceable. I understand that. If it's in a policy or if it's in a preamble, I'm not so --

MR. REYNOLDS: This is contemporaneous guidance issued with the rule, which is legally -- has legal

effect.

MR. BAKER: We've been there.

MR. REYNOLDS: We've been down there before.

MR. BAKER: We've had this discussion before. We've been there on other rules. Those things change with time. My concern is, if it's not in these pages, it's not real. And we've experienced it. These guys have experienced it. It's not real if it's not in the rule. And I understand what you're saying. It's in the preamble. The preamble reads real well, but I gotta tell you, and Joe talked about this earlier, it's a lot of "trust me." And if it's not written in black and white in the rule, where an inspector can get to it --

MR. REYNOLDS: Okay. Then you would like to see it in the preamble to state who it was that would make the determination?

MR. BAKER: Well, who's going to make those determinations. And if, in fact, you're going to have a panel of experts that's going to do this, we should be able, without shuffling through 90 double-sided pages to figure that out. I mean, it's massive. So that is a problem. That is a concern. We've, in essence, vested a whole lot of power in some people that we're not even sure who they're going to be at this point.

MR. NIEWIADOMSKI: Actually, the rule says that

it's the administrator --

MR. REYNOLDS: Actually, it says, "The administrator of the coal mine." It would be the administrator --

MR. BAKER: That gives me one.

MR. NIEWIADOMSKI: And it's the administrator's call.

MR. BAKER: So that would fluctuate. It could be this group this time, and that group the next time? Is that what you're telling me?

MR. NICHOLS: It may change from time to time who he wants advice from --

MR. BAKER: That's the problem that I have.

MR. NICHOLS: I mean, the administrator --

MR. BAKER: And we understand. We've been told that a real catalyst for this rule is the new administration. We've been told that straight up in the meetings that we had. So you know, I guess it could get worse, or it could get better, based on whoever's sitting in the seat.

MR. NICHOLS: Currently that's Ray McKenney.

MR. BAKER: No. No. We were told the leadership of MSHA was the catalyst for making this rule. And I'm assuming the leadership got to be Dave.

MR. NICHOLS: The person that makes the cut on

engineering controls is Ray McKenney.

MR. THAXTON: That's the administrator for Coal Mine Safety and Health.

MR. BAKER: You sat in the meeting, and I'm not going to get into a whole argument on this, because I got a whole lot more, but you sat in the meeting where it was the leadership of MSHA, the administrative leadership changed, and that's why the rule is what the rule was. That's exactly what was said in the meeting.

MR. NIEWIADOMSKI: Well, we're talking about two different things. What Marv is talking about as to who makes the determination of whether or not an operator has used all feasible engineering controls, and you're talking about who's the driving force behind this rule.

MR. BAKER: Well, I thought that's where we got to. Okay then, that's my fault if I'm talking two subjects at the same time. But you got to remember that what I'm looking at, if I don't have people named in this rule, I don't know who it's going to be. And it should be a consistent forum.

MR. REYNOLDS: But Tim, you also realize, you know, we've heard a lot of comments that this rule, the way it's written right now, it's complicated.

MR. BAKER: It sure is.

MR. REYNOLDS: By adding more and more, it's

going to be much more complicated, okay?

MR. BAKER: I can simplify it for you. I can simplify it for you. Let's do personal continuous dust monitors. Let's mandate those dust monitors. Let's not say to operators, gee whiz, if you feel like using them, you can. Let's say, listen, you got miners going underground? Give them the personal dust monitor. We'll know exactly what you got every day. We'll be able to verify it every day. We'll know where the problems are every day. And you know what? Let's stay with 2 milligrams or less, and we can go from there. But that solves the problem.

MR. REYNOLDS: So you're, in fact, proposing -- to clarify, you're proposing to shift from occupational sampling, which the Act dictates, to personal sampling?

MR. BAKER: No, what I'm saying is, you would have the ability, if you wanted to solve the problem entirely, you could -- well, you could mandate those for the DOs for what the Act requires. Or you could have operators sampling everybody. What would be more ideal than that?

MR. REYNOLDS: We really would like your -- we're soliciting comment on that. We'd like to know what you think. Tell us. Do you want us to do --

MR. BAKER: Hey, listen, I think --

MR. REYNOLDS: Occupations? Do you want us to do --

MR. BAKER: The device that was here --

MR. REYNOLDS: Everybody?

MR. BAKER: The device that everybody saw, which is close and it's around the corner. And if a rule is supposed to be -- as legislative history says, if a rule is supposed to be technology *driving* -- not driven, *driving*, then the best solution would be to have everybody wear one. I mean, then I'm monitored, Dennis is monitored, and Gary's monitored. We all know what we're exposed to today. That would be --

MR. THAXTON: That's what we're asking for --

MR. REYNOLDS: We're asking --

MR. THAXTON: If you have those comments --

MR. REYNOLDS: Yeah, we would like to --

MR. THAXTON: We would like to hear that from you.

MR. BAKER: Well, you got it.

MR. THAXTON: As to how you want it done, who should wear it, how many people should wear it, how often should they wear it --

MR. REYNOLDS: Who has the authority to deal with the --

MR. BAKER: You have the authority to promulgate

a rule that says you got to do this stuff.

MR. REYNOLDS: No, no, no. I'm talking about the actual details of how you would use the monitors. That's what we need --

MR. BAKER: No. You know what, let's stick with this, and I'll tell you why. Because we've gotten into this -- we're going to get into a whole new area, and the fact of the matter is, the last time everybody sat in the same room and gave comments, it appears that we weren't paid attention to then. So we can deal with that. Let's dispense with this. And then we can deal with that. Because if we don't dispense with this, we're never going to get to that.

MR. NIEWIADOMSKI: Our intent is not to be argumentative, okay? But the last proposal, and I mean, we went through this before, and we asked for specific detailed comments on the use of continuous monitoring technology. How would that -- what would that program look like. And officially, really, other than, you guys need to use it, there were no comments that were presented to actually outline exactly how this strategy would work, okay?

I mean, we've asked for them, and that's why we made the best cut at exactly how this should work. But what we're also asking is, yes, we may not have hit it

right, okay? And that's what we're asking. Should it be in lieu of plan verification? Should everybody be sampled? How would you actually use something like that?

MR. BAKER: But that's not necessarily true, George. The fact of the matter is that almost to a person, the individuals that testified from our organization, at one time or another, talked about personal dust monitors. Whether that was just a cursory, we need to use these things, or whether it was an in-depth, here's what we're looking at. If you're saying that you took a cut at it based on that information, that information is not in this rule.

This is a voluntary plan that, in fact, the plan itself cripples the use of those -- a voluntary program. I mean, we heard one operator sit here and say he can't foresee anybody using those if they're not required. And I give him credit. I mean, he was being truthful. The plan, as written, actually cripples the use of those personal dust monitors. It does. It does.

MR. NIEWIADOMSKI: But you also heard him say is when I posed the question, do you want MSHA to mandate their use, and what was his response?

MR. BAKER: Do they want MSHA to mandate roof bolting? Does anybody want any government agency to mandate anything? If you're in the business world, I

guess the easiest way is to have nobody mandate anything, and you can do your own thing. That's not our option. That should never be an option, from either side of this table. Sometimes people are going to get hit with mandates that protect individuals who work for them, whether they like it or they don't. And that's just life. That is just life. But we will get into a longer outline of how the PDM 1 will work, our vision of that. And I should probably let individuals who have worked on it longer. But you will get that information from us.

But if we can move on, and I'll try to be a little bit quicker. I'm a little confused, too. We have an "equivalent concentration." This is not contained in the current regulation, and it was not contained in the 2000 rule. Under the proposed rule, it establishes an eight hour or less sampling time, regardless of the duration of the miner's shift at the operation they are working. Again, what we have is, the Agency has created a formula to determine what the concentration would be, based on what the sample says, and then you do a formula that gets you to an eight-hour shift.

The concern there is obvious. If we had the ability to monitor individuals over the entire shift, under the current scheme with the current sampling devices, why we would resort to formulas to get an

answer. Our concern is, why wouldn't we just sample them for as long as they're going to be there? And that's a concern that we have. And we believe that the language in subsection --

MR. KOGUT: Can I address that? Say you had a personal continuous monitor, and you monitored somebody and he worked 12 hours, and the concentration -- the average concentration, or the concentration that came out on this personal monitor over that 12-hour shift was 1.9 milligrams per cubic meter. That person would be receiving a dose of dust in his lungs that's substantially greater than a person who worked an 8-hour shift at 2 milligrams per cubic meter, or an 8-hour shift at 1.9. Do you understand what I'm saying?

MR. BAKER: I understand where you're going.

MR. KOGUT: Yeah. So the point of this is to make an adjustment in that concentration, to reflect the fact that that person is working at that 1.9 milligrams per cubic meter for longer than 8 hours. He's received a higher dose of dust than he would be if he was working for just 8 hours. That's the point of the formula. And you'd have to make that -- you'd want to make that sort of adjustment, I think, regardless of whether you're using the current sampler or a personal continuous sampler.

MR. BAKER: Well, I would suggest that that's not what we're talking here. I mean, what I'm saying is, you go ahead and sample him for that 12 hours, and make those adjustments, and we can get into that later. But you sample him for the entire shift, if that's 8 or that's 10 or that's 12, and you make those basic assumptions, but to make adjustments up or down -- for instance, if I go into an MMU and I'm only there for five hours, you're going to adjust that up? Or if --

MR. KOGUT: No, no. If you're looking at this definition, we're talking about cases where you're working longer than an eight-hour shift.

MR. BAKER: I understand that.

MR. KOGUT: And then what this definition is saying is that to get to the equivalent eight-hour concentration, you adjust that concentration upwards.

MR. BAKER: Well, I'll tell you what --

MR. KOGUT: You're multiplying by --

MR. BAKER: Then at least let's do this. Let's make a little more clear, because that's not the way that thing reads.

MR. KOGUT: Well, it says --

MR. BAKER: And I'm not -- you know what, and if I'm going to get an explanation on every one of these, then we're going to be here a long time, and I don't mind

that, but that's not the way it reads. To the layman out there reading it, that is not the way it reads. I'm telling you right now. The language in subsection 3 is a departure from the sampling procedures that we currently do understand, and it includes the use of PAPRs. Now, that's what subsection 3 and equivalent concentration deals with.

The required use of PAPRs by miners would allow dust levels to be raised based on a protection factor. For example, a unit with a protection factor of two would be permitted to -- would permit the operator to force miners to work in a mine environment containing 4 milligrams of dust per cubic meter. Respirable dust per cubic meter. Likewise, a factor of 4 would permit 8 milligrams of respirable dust.

And we get into a broader explanation of it later, but the concern that we have here is that part of this section, and part of the reason for a definition like this is to allow those things to occur. And it does. In fact, in the definition it talks about those things. So that is a concern that we have. That's what that definition, in our estimation, does.

"Powered air-purifying respirator." This is not contained in the current regulation. The agency has altered the definition of "PAPR" in the proposed rule,

moving away from the previous determination in 2000 that this device would be a "loose-fitting helmet that delivers filtered air to the miner." The Agency has now decided that the PAPR must form a partial seal with the miner's face. And there is a difference. There is a difference. And we've talked about problems with those PAPRs.

This is contrary to the testimony in the 2000 dust hearings. At those hearings, miners and industry *representatives*" -- and I must say that clearly, Miners *and industry representatives* explained to the Agency that respirators currently in mining operations could not be worn as approved while performing the duties of the job. MSHA ignored those observations, and is now requiring a more cumbersome unit be worn. The BCOA has admitted the current respirators do not function properly, they do not supply adequate air, users frequently over-breathe the units, and miners cannot wear them with the neck skirts attached.

The BCOA has asked for a lessening of the requirement for approved respirators, so that they can be used as they currently are, not in compliance with the standard. And they have asked for that in a meeting we had with NIOSH that I am sure that you have the information on.

And if we move on to the next one. If we move to "protection factor" -- and I think we're beating a pretty dead horse here, but I'm going to going through it anyhow. It's a new term under the rule. This is the level of protection miners could *presumably* receive from a particular respirator based on the velocity of the air being used to ventilate the work area. The formula used by the Agency would assign a protection factor of 4, to areas ventilated with 400 feet per minute or less. This equates to an 8.0 milligram of respirable dust in the mine atmosphere, and could potentially lead to that.

Where there is a velocity of 800 feet per minute, the respirator would be assigned a protection factor of two. This allows miners to work in an atmosphere containing four milligrams per cubic meter of respirable dust. PAPRs used in different work areas of the mine would be assigned protection factors based on the air velocities. The respirable dust levels would be based on those factors. Now, that's my understanding of the definition.

What we're doing is, we're reversing the respirable dust standard mandated in the 1969 Mine Act, and raising dust levels in coal mines is not the approach, and that is not the approach that should be taken. This is contrary to the law. It diminishes

workers protections, and we will not permit those things to occur. The dust levels MSHA would approve are far greater than those permitted by Congress, and we've already had a brief discussion on that.

The union is concerned that this will encourage operators to set air velocities at low levers, and offer administrative controls and PAPRs. The proposal indicates that MSHA will not require operators to boost air to levels necessary to lower dust under the current standard. That would be in conflict with the section 303(b) of the Mine Act, and this signifies a significant departure from engineering controls.

"Verification limits." The proposed rule determines dust concentrations as an equivalent factor based on an eight-hour exposure. There are no longer references to any full-shift sampling by the Agency. The Agency claims to base compliance sampling on 2.0 milligrams of respirable dust, and 100 micrograms of quartz. However, because of the mathematical formulas, confidence in the levels that you have laid out there are not that high among miners. There's a real concern there. There's a level of uncertainty on the part of the miners that they can confidently believe that you're going to do that."

If I can go quickly into section 7100,

"Respirable Dust Sampling when Quartz is not Present." This section mandates that the average concentration of respirable dust must be maintained by the operator at or below 2 milligrams per cubic meter in active workings. The operator is further required to maintain the average dust concentration of respirable dust within 200 feet outby the working face of each section's intake airway at or below 1 milligram. The application of these sections of the proposed rule do not support the position outlined in 7100.

These sections appear to require operator compliance with the proscribed respirable dust limits. However, once the operator conducts verification sampling, there will be virtually no additional sampling by the operator to assure compliance. The Agency has described levels of 2.0 and 1 milligram for active workings and intake airways, respectively, under the pretense that these are hard and fast enforceable standards.

The reality is, these numbers will mean nothing with regard to the levels of dust the miners will be exposed to in the course of their routine duties. The miners will never be measured over an entire shift. Instead, the Agency has created a calculation based on mathematic formulas and determining exposures of eight

hours. These are not real measurements of exposures, or actual exposure times.

They represent an estimated exposure based on the limited information that a sampling device may or may not collect under the proposed rule. The equivalent concentration is, therefore, not a true reading of the atmosphere the miner is working in during the entire shift. The Agency's use of citation threshold values, CTV, will allow operates to force miners to work in concentrations above 2 milligrams, without the threat of a citation. A citation requires a confidence level of 95 percent before action is taken.

For miners this means respirable dust levels based on a 2.0 standard will be permitted to be as high as 2.32 milligrams without any enforcement action, without any citation issued. This is contrary to the recommendations of the dust advisory committee, which clearly stated, there should be no upward calculation based on measuring sampled incorrectness. They clearly made that argument. And MSHA's criteria document reiterated that.

The approval of PAPRs places the miners at even greater risk for dust exposure. Based on MSHA's writing of the rule, PAPRs with a protection factor of 4 would allow respirable dust levels at the mine -- could allow

dust levels in the mine atmosphere to reach 8 milligrams. Considering the required confidence level of 95 percent, would this not allow miners to work in concentrations possibly at 9.31 milligrams per cubic meter of respirable dust without any citation being issued, based on the 95 percent confidence level?

The Agency's action regulation this rule is contrary to the recommendations of the dust advisory committee. In November of 1996, that commitment recommended that MSHA should consider lowering the exposure of coal mine dust. MSHA has proposed the opposite. The advisory committee recommended, in *unambiguous* terms, that MSHA should make no upward adjustment to the PEL to account for measurement uncertainties. MSHA has proposed the opposite.

The dust advisory committee recommended that MSHA should adjust the PEL to account for extended work shifts and work weeks. MSHA does not propose this. In September of 1995, the National Institute of Occupational Safety and Health, NIOSH, issued its report on occupational exposure to respirable coalmine dust, the criteria document. That report makes critical recommendations for protecting miners' health. NIOSH recommended respirable coalmine dust be limited to 1 milligram per cubic meter as a time-weighted average.

Concentrations up to 10 hours per day in a 40-hour week. MSHA has determined to increase respirable dust in the mine atmosphere, and have disregarded any suggestions of sampling beyond 8 hours. Increasing respirable dust levels in the mine atmosphere, utilizing any means contained in the proposed rule is a violation of the Mine Act.

The Act clearly requires dust levels be maintained at their lowest possible level, and at no time are they to exceed 2 milligrams per cubic meter. There is no consideration given to any increases, even with PAPRs, equivalent concentrations, citation threshold limits, or confidence level, or any other Agency terminology that may be out there.

MSHA has, however, overreached its authority, and is infringing on the powers of Congress by proposing this rule. The union would submit that sampling of enforcement schemes permitted by *this proposal* would turn the clock back to the days when miners did not have to fear the possibility of contracting black lung, but they only had to wonder at what age they would be stricken by the horrible disease.

Miners have railed for years that dust levels in mines must be brought under control. During the previous dust rule hearings in 2000, they advocated a reduction in

the current 2.0 milligrams per cubic meter standard. MSHA has proposed the opposite. The use of personal continuous dust monitors can address many of the dust problems the proposed rule fails to do. These devices would allow for the continuous monitoring of all designated areas of the mines, at least, and at all miners, at best. they would provide data on the dust conditions miners are exposed to -- and you've heard it many times already today -- 24 hours a day, 365 days a year. The technology is in the final testing phases, and should be permitted to be completed, so that an adequate rule can be built around that device.

"When quartz is present." Section 7101. This section establishes or would establish criteria MSHA will utilize to determine a reduced respirable dust standard for an MMU. It also specifies a sampling scheme the Agency will use to base that determination. The Agency will predicate a reduced dust standard for an MMU on the average data received from the three most recent samples obtained under this section.

These are all MSHA samples and all supposedly gathered within 30 -- I thought it was 30, but Bob, you said today, 15 days -- of any sample that reveals a concentration of 5 percent or more quartz. The requirement for taking these samples is not contained in

the proposed rule, and will not become part of the standard. The Agency will exercise their option to take the samples in the prescribed time frame, based on the current coalmine health inspection procedures handbook.

The handbook is not part of the rule, and will be subject to change at the direction of Agency policymakers. This could allow samples for respirable dust, including respirable quartz dust, to be reduced to as few as three times per year. The union has determined the proposed rule, if enforced as written, would not require the Agency to implement a reduced dust standard for months, due to infrequent sampling.

The practice of averaging dust samples to determine the magnitude of the hazard, especially a known hazard such as quartz, has no place in a rule presumably designed to protect the health of the miners. The union has consistently demanded single samples, and continuous monitoring for determining dust concentrations. Yet on such an important issue, the Agency has chosen a less protective means to determine health standards.

Criteria for determining the amount of quartz present in the mine atmosphere is also extremely complicated. And it is complicated when you look at it on a surface level. The agency's formula is based on percentages. And I think Bob and I have had this

conversation before. The Agency's formula is based on percentages. The percentage of quartz found during sampling. However, enforcement is based on micrograms. The decision to use both of these measurements can be for no other reason but to confuse the process. And I realize it's gone on for years.

The miners and their representatives will, given relevant data, either in percent of quartz or micrograms, be able to determine the relative hazard that is presented. However, a conversion from one measurement to the other is not practicable for their purposes. Nor is it helpful in the enforcement. The Agency needs to determine which way they want to present the information, and be consistent. The dust advisory committee recommended MSHA cause the lowering of silica exposure of miners.

The committee made a determination, based on those findings, that 25 percent of mechanized mining units, 75 percent of roof bolters sampled bimonthly by coal operators are required to comply with the more stringent dust standard, due to the presence of quartz. The Agency ignored those facts, and is proposing to increase quartz level -- because when you increase respirable dust, you're going to increase quartz. It's going to happen -- and require the use of PAPRs. The

Agency has also -- recommendations by the committee to adjust PELs for extended work shifts and work weeks.

I would like to move on to the use of supplementary controls, types and conditions for use. That's 7209. The proposed rule in this section contains provisions that allow mine operators to replace environmental and engineering controls with respirators, known as PAPRs. Section 7209 states that "if the verification limit is exceeded and the operator believes that the MMU is using all feasible engineering and environmental controls during the operator sampling, under 7206 they can request supplemental controls in the form of PAPRs. These will be used in lieu of engineering and environmental controls."

Depending on the circumstances, that would allow the operator to increase respirable dust levels in active working up to 8 milligrams. This could apply to all mining sections. At mines where miners have a representative, they would be notified of the operator plan, send comments to MSHA, but have no legal right to stop the plan approval.

Operators could gain approval to place everyone in a PAPR on a mining section for the full 8, 10, or 12 hours. Once approved by MSHA, miners could be mandated by the operator to wear PAPR respirators. The operator

is permitted to use the PAPR and/or administrative controls until feasible engineering controls become available, or MSHA revokes the plan for failure to comply.

This proposed rule is much worse than the proposed rule of 2000, which was soundly rejected by miners. The 2000 proposal would have only allowed PAPRs and administrative control plans for long walls and maximum dust levels of 4 milligrams per cubic meter. This one goes twice that high.

The Mine Act of 1969 prohibited the replacement of engineering and environmental dust controls with respirators and administrative controls. It is very specific regarding that restriction. Section 202(b)(2) of the Act says unequivocally "within three years from the effective date of the 1969 Act, each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2 milligrams of respirable dust per cubic meter."

Section 202(h) said that "approved respirators shall be made available to all persons whenever exposed to concentrations of respirable dust in excess of the levels required to be maintained under the Act."

The Mine Act went on to state, "the use of respirators shall not be substituted for environmental control measures in the active workings." The legislative history of the 1969 Mine Act further states, "the committee bill expressly prohibits as a general policy the use of personal protective devices, including respirators, as a substitute for environmental controls."

The type of PAPR that MSHA is seeking to have mandated on miners for their use has been found to be faulty. MSHA is aware, but it has chosen to ignore it. There is *considerable evidence* that the only PAPR approved for use in underground mines cannot be reasonably be expected to be worn in its approved state, given the conditions of the underground mine.

A number of miners and their representatives made this clear to MSHA during the public hearings of 2000. Miners complained about the bulky PAPR respirators, they are difficult to use in various areas of the mines, such as weaving around Jackson hoses on long walls. Miners complained that when they were used as approved, which would result in the enclosure of the head, they fogged up easily. Miners must remove the neck skirts or seals in order to adequately breathe. This voids the approval and leaves the miner breathing outside contaminated and unhealthy coal dust.

They complained about the face shields becoming grimy from dirt and humidity, and a loss of vision. With a dirty environment, they try to wipe the face shields with their dirty sleeves or glove, making things worse. The face shields scratch much too easily to try to consistently clean it throughout the day. Lifting these shields would then again void the approval for the device.

The filters in the PAPR respirators are so restrictive that miners have difficulty breathing through them, and some have -- and in the last round of hearings, I was present when they testified to replacing the filters with socks and rags. These void the approval of the units and results in miners breathing unhealthy dust. These were the problems the framers of the Mine Act sought to avoid.

The acknowledgment of the problem with PAPRs normally comes from miners. They came from the industry, as well. Even in the mine once operated by Assistant Secretary of Labor for MSHA, who proposed this rule, the following were excerpts of two questions posed by Randy Tatten, the top safety official of Energy U.S. Mining, by NIOSH official Mr. Hewitt, and Mr. Grayson at the MSHA public hearing in 2000.

Mr. Hewitt asked, "what would your opinion -- or

your professional opinion regarding height limit situations and the use of PAPR and other type of similar respirators?" Mr. Tatten replied, "Certainly, as heights decrease and space becomes more confined, it becomes more difficult to wear that apparatus."

Mr. Grayson asked, "With respect to the use of PAPRs, in your mind, in what condition are they being used? In what position are they being used? And in an approved condition or a modified condition? Even if it's the miners who may modify it at times?"

Mr. Tatten replied that he would "have to answer honestly and say that they were being used in a modified condition. Miners, some, you know, have typically removed the shroud, or I don't know the term of it, of course, when you say that they are properly used, I think NIOSH -- to that I would mean, do they keep the face pieces down at all times? No, they don't. They raise the face piece so that they can communicate."

"Have you had problems with them fogging up?" Mr. Tatten responded, "We have had that problem recently, Larry. Since we've been required to use the new version of the filter" -- and I believe this is the new HEPA filter -- "there has been what seems to be reduced flow in the units, and there has also been resulting fogging. And we are really working hard to try to correct that."

During the same hearing, the administrator for Coal Mine Health and Safety, Mr. Nichols, questioned a top safety official from the National Mining Association about PAPRs, and the numerous complaints. Here's what Mr. Watzman had to say. "Mr. Nichols. Well, generally we've had a lot of testimony that they're too heavy, they don't work, they fog up. Miners use rags and whatever for filters. And are you aware of any major problems with the Airstream helmets currently in use?"

Mr. Watzman responded by saying, "I know that there was a problem, as we have discussed with NIOSH regarding the new filters that are used in the helmets. The HEPA filter, as opposed to that filter that we used previously. I know that there have been some problems that have resulted, but I also know that there are efforts underway to come up with a solution."

So back in 2000, it wasn't just miners who were talking about the problems with these Airstream helmets, it was the operators. I'll be brief on this one also, as brief as I can. The following is what a top industry safety official said at a national public hearing held just this year on April 10th conducted by NIOSH, to discuss the standards for PAPR respiratory devices.

He cited that several years ago NIOSH changed the regulations on the filters for PAPRs to a high-

efficiency filter. The safety official said, that as a result, the device could no longer serve the purpose of getting the job done. He noted that the changes also resulted in more weight for the miner to carry. He cited that, on one PAPR device, the miner was not comfortable and removed the shroud. This, of course, voids its approval.

What this means is that the same problems cited in 2000 continue to exist today. MSHA rules of supporters and PAPRs want to mandate miners to use these leaky helmets while they ignore the engineering and administrative controls. While doing this in the air miners currently are exposed to, they could raise levels to four times the 1969 level set under the Act.

With that, what I would like to do -- and I heard a lot of comments, and I know you're as anxious to get out of here as I am. The only good part about that is, I am the last speaker. I heard several comments being made, and I also would like to, before I forget, enter into the record the April 17, 2003, letter from Joe Main of the International Union requesting that this rule be withdrawn.

I think we've covered some of these things, but I just want to reiterate some of the notes I've taken while other people were talking, so that I can have this clear

in my mind, and it's clear for the record.

There is a possibility that many mines or MMUs will only be sampled three times a year. This is an extreme concern. And I shouldn't say it's a possibility. Under this rule, that is going to happen at certain locations. I think that's a given. I think the preea (phonetic) that we discussed that was part of this rulemaking, which is part of this mess here, clearly defines that there is going to be a certain amount of mine operators that only see a compliance inspection three times a year.

You've heard it before. That is not enough. We should be doing more sampling. The rule retards the development and the use of a PDM. Historically, rules -- or I should say, when the Act was being debated, those individuals in Congress made their point clear that any rule that comes into existence should force technology. This clearly retards that technology. With technology so close, and right around the corner, we should be encouraging it. This rule does not do that.

I heard George mention earlier that there are some limited areas where they have found 10 milligrams per cubic meter, and I'm assuming that's outby on the long wall. I'm here to tell you that if we're finding it once in a while, it's there on a more frequent basis, and

continuous monitoring is something that really needs to be applied here.

We've talked about, but I want to reiterate one more time, that when a rule comes out, no matter who's doing the sampling, the miner's representative should be there. It's as simple as -- and especially, what I think boggles the mind, with the reduction in the number of samples that's being proposed, why at the same time you wouldn't say, well, gee, since we're only going to do it the maximum, 10, that's less than what would have been done before. Every one of them should have a miner's rep present, and they should be paid for that time. But they should be present at all times.

There is a definite lack of confidence, and I think that was expressed probably most articulately by John Gallick, who said, we don't trust you, labor doesn't trust us, and we don't trust anybody, and nobody trusts anybody here. And I think that I'll just kind of put this on with his comments as part of his, to add on to that. This rule does nothing to adjust that. This rule does nothing to build confidence in any individual or any group. As a matter of fact, it erodes that that much further.

I think, in closing, what I'm going to say is that, at some point in time, we've got to assess this

situation probably more carefully. And the people from the Agency have got to realize that sometimes, whether we like it or not, and sometimes, whether you like individuals or not, the people sitting on this side of this table in this room are your best friend. We truthfully are. We go with the inspectors when they're at the mine. We make sure that if there's a question on what was seen or what was not seen, that our individuals are there to support that inspector.

So in many respects, these guys are your best friends. And we may come here today and disagree with the rule. We may come here and tell you that, frankly, it's got to be redone. And just, I guess, as a closing, do us one favor. When you come back with the next one, make sure you take care of your friends, because we've been there for you, and we'll continue to be, but when you make the rule, next time think about us. Think about us first. I'll take any questions if you have any questions.

MR. REYNOLDS: Tim, I have one question with regard to single sample. You do support that?

MR. BAKER: Yes.

MR. REYNOLDS: The use of single samples?

MR. BAKER: Yes. I think that's been made clear. And I think it's the right direction to go,

absolutely.

MR. NICHOLS: Okay. Tim was the last person we had signed up. So is there anyone else? Anyone else we missed?

MR. MAIN: I'm going to be really short, because we're still going through this rule, understanding that it is very complex. Short period of time for us to have evaluated it. And we learn a lot from the sessions we had. Had we not had those, we wouldn't understand as much about the rule as we do today. Having said that, there is a lot of miners and other folks in this country that's affected by this rule that has not had that.

And on their own, I think the rule collapses under its own weight of misunderstanding and confusion. And we're very honest about that. It is a complex rule that is not crafted for the normal miner to understand and read. And that's one of the downfalls of the rule from the outset. You know, some things, well, if we put that in there, it's going to more stuff. Well, if it's the right stuff, plain English that describes things in a very straightforward way. I mean, we appreciate that, and support that.

One of the big difficulties we have in this rule overall, and we're going to be getting into this more as these hearings go on, but this "trust me" approach that

you expect miners to take a rule favorably that removes protections that's currently either in the Mine Act or in the regulations, and rely on the trust of this government to do the right thing. And that's a lot to ask of a bunch of miners. Many of them -- I mean, we're talking about tens of thousands that's died from a disease here, and we're talking about more miners being exposed every day.

And I think the government has to understand that this is not said to offend any individual here, it's just a matter fact that we don't take this "trust me" thing lightly. And given the past actions of the Agency over time, we've learned not to trust the Agency fully. As I said, I remember the hearings back in 2000 and the events leading up to that, where there was a commitment made to increase dust sampling in the nation's mines. And we supported that.

We went to the Hill and helped support monies to get that done, only to wind up last year to see this God awful proposal come out of the sky that ratcheted that down to the point that we had actually, if you look at it, true value, not one compliance sample being done straight out. We only had four samples being conducted in the mines. Those were -- and I keep getting the words confused, and I apologize for that -- targeted or

whatever they're called. You know, it wasn't even a real sample that the Agency would enforce the law over them.

And I keep questioning, how did we get here? How did that policy decision get made? Who made that decision to do that? And was that in the best interest of the miners? I'm going to tell you straight out, it absolutely was not. When an operator sees you coming to the door, the very few samples you do come there to make sure they're in compliance, and walk away and say, oh, by the way, we're not going to cite you, boys. That is a wrong approach in this industry to take, particularly with tens of thousands of people that have died from a disease because of the very thing that you're trying to protect them against. So this "trust me" stuff doesn't go very far here.

As I sat back and listened to the discussion today over a critical issue in this rule, and that is whether or not there's a bar lifted here that allows operators to go over 2 milligrams. I am totally convinced, sitting here, that what I was told in those meetings is correct, that that bar is lifted under this rule. I think I've got that from you guys today, although, the last part, there's some qualifiers to that, but right now under the law, under the regulations it is a 2-milligram standard that we have.

And as I understand the way you guys have to enforce the law, if you go in and you find, through the averaging thing, which we all agree is a bad apple to begin with, and needs to be fixed, not made worse but fixed, with that average, 2 milligram is the standard. As I understand this rule, as explained to me by Agency folks over the meetings, and as I sat here today and still listened, I find that this rule has made some substantive changes that scraps protections and barriers that's in the current law and the rule, that allows that to change to where operators can now -- whether you think they will or not, they can now go up to 8 milligrams.

We were told that. That's the way we read the rule. And as the last speaker said, you put it on the table, you bet your butt there's going to be an operator grab a hold of that and challenge you to get up to 8 milligrams. It's going to happen. And it's a question, as I see it now, of bypassing standards and protections that exist in the law that says, operator, you can't do that right now, but we're going to make some changes here to let you do that with these proposals coming down the pike.

So you know, you got to sit back here and understand one thing. As we see this this anomally completely different than what you're expressing the

issue for that table. And I the real centerpiece of this whole argument is, well, we got these feasibility requirements in the rule, and that's what you're going to have to meet. *Subject now* to a determination of an administrator in whatever panel that they would create under the rule. But that bar just left. This would be the new standard.

And yes, operators can make application under this rule to go up to 8 milligram of dust, and claim that they've exhausted their engineering controls, and a dogfight is on here as to whether or not this Agency has the stiff back to say, no, you're not, you're going to put the engineering controls in. We don't have to worry about that now. The standard is there. That standard will be removed.

I mean, let's just put in the characterization of the truth here. And what we gotta do is "trust me" to the Agency, trust you guys, that you'll have that stiff back and tell that operator, no, you're going to jack up the air. Oh, wait a minute. Well, there's a standard in here that says if you only have, what is it, 400 feet a minute, you can base your standard on that. You don't have to go to 800 feet a minute.

And I think there's a provision under the Act -- we're going to get into more of these details -- that

basically directs them to put enough air in there to dilute and carry away the dust and the gasses in the mine. You know, and we say, what does that mean? And we're going to get another expiration of that, because that air standard, tied with that factor of four means something, and it means a cap, if you look at it from that end, on what the Agency would demand that operator to have in that coalmine.

Now, other coalmines can put 800, 900 in, but this one, they're going to be able to adjust their protection factor to a ventilation level that's less than other operators have. Well, you're just not going to make them put down air shafts to get the air in, or air openings. I mean, that's the simple end of this. At the end of the day, you have a provision in place that does not exist now, that allows operators to go up to 8 milligrams, as you guys have said.

And when we get into this quarterly sampling thing -- there's another discussion -- once they get to this level, whatever it is, if it's six milligram of four milligram or seven milligram or 2.5 or 3, then comes back on the back side of that two other important factors that are triggered by this rule. One is, when does an operator have to do the quarterly sampling? And the question we posed to you folks about two weeks ago -- and

I thought it was six on an 8-milligram standard, and I understood the answer to be, Bob, it was 6.67.

MR. THAXTON: I don't remember the calculation right --

MR. MAIN: Was that close?

MR. THAXTON: That's close.

MR. MAIN: Okay. And that means something in this rule. And when you get the one figure that we haven't heard yet, that we would surely like to hear from you guys. I'm this operator. I convinced Marvin Nichols, who may be the administrator, or some operator hired to fill one of those jobs in Washington as administrator, has made this decision to let this operator go to 8 milligram.

And now comes the time MSHA's got to cite him. We haven't figured that one out, but Tim laid out what we think it is. And we want to get a clarification on that one. If you're at 8, that's the operational standard, what is the standard of which MSHA would issue a citation based on the 95-percent confidence factor? Would it be 9.1? I'd like an answer to that. If it's 8, would it be --

MR. KOGUT: Take the concentration measurement. If there's a protection factor of four, you take the concentration measurement, whatever it is, outside

of PAPR --

MR. MAIN: Yes.

MR. KOGUT: If there's a protection factor of four, you would divide that by four, and then use that same table that's in there, so that you would compare it against the 2.33.

MR. MAIN: Okay. So that would really be -- I mean, I'm just trying to figure this out, guys, because we haven't figured it out yet. Would this be 9.1?

MR. THAXTON: No, 9.32.

MR. MAIN: 9.32? Is that what you said, Bob?

MR. THAXTON: Yes.

MR. MAIN: Okay. Now, Marvin, you know, I'm going to tell you, you're going to be down to the nuts and bolts. I've asked you guys to honestly explain this rule, and I'm telling you, folks need to know out there that this could happen. I hear what you're saying, we're not going to let it, we're going to hold a stiff back here, and we're going to make them use those feasible engineering controls, as defined on a case-by-case basis. So I just want to clear the record. Nine point what?

MR. THAXTON: 9.32 if you're -

MR. MAIN: 9.32 would be -- now, that's the max they can do?

MR. THAXTON: That's the conditions that you

stipulated.

MR. MAIN: Okay. With the PAPR on, the mine environment measurement like we take today, factored in, 9.32. Okay.

MR. REYNOLDS: One thing I wanted to ask, Joe.

MR. MAIN: Okay. Let me just -- and I'll let you ask. Because we're trying to understand this, what this rule does, and you guys know it, and we're going to take the luxury while we have you here today to pull your --

MR. REYNOLDS: Okay. I was just going to say it's a protection factor we're talking about, and I think what you're saying is, it's much too high. You're talking about 8 milligrams, and we have asked in here for your comments, if you think four is too high, if you want to go back to two, if you want to play with the velocity of the air. There are other factors involved here. And rather than focusing on what the maximum would be under what we proposed, this is the proposal.

MR. MAIN: Well, how did you get the 8?

MR. REYNOLDS: Well, NIOSH said 25. I mean, --

MR. MAIN: No, how did you guys -- this was not in the last proposal.

MR. REYNOLDS: Yeah. And it was a different proposal. At that time it was two. But we specifically

asked them here for comments on this.

MR. MAIN: Well, I think --

MR. REYNOLDS: I think what I'm hearing from you is that you believe it's too high, but I was trying to --

MR. MAIN: Oh, absolutely.

MR. REYNOLDS: Just hear it. Okay. It would be really helpful for going forward and working on the rule, if we could get comments in terms of the protection factor for the use of PAPRs, rather than --

MR. MAIN: The law set two standards. That's what we're trying to tell you. That's what we told you guys straightforwardly in 2000. The law said that within three years, all mines had to be down to -- let me finish -- a two-milligram standard. And that's it. And you had to get it with engineering controls, environmental controls. And what the law said is, you're not using respirators to achieve that, okay? And those are the two eggs that's getting broke here with what you're doing, okay?

Now, one step further. I think this whole debate about these PAPRs that was in one environment here over the last few years has now shifted to another debate that none of is prepared to even think about yet, because it's so outrageous. The debate that we've been in is, how do we build a worker-friendly air-purifying system

that works to protect miners in the current standards in terms of the exposure levels, okay? And we've been working to try to achieve that.

What I can tell you is, we have a serious problem here, and nobody will listen to us. Marvin Nichols, you knew directly from the testimony that came out of Salt Lake City that these things was problematic. Anybody that stayed close to the issue over the last three or four years knows that the same problem that existed then exists today. The neck skirts come off, it voids the approval. The shields go up when they get greasy and grimy from all the dusty conditions on the long wall. What does that do? It breaks the approval, right, Bob? Correct?

MR. THAXTON: They would be in violation of the rule.

MR. MAIN: When you change that filter out and put some other device in, like a sock or a rag or something else to breath through, what does that do? It breaks the approval, correct? Now, this is not me making this case. This is evidence that has been collected. And when we have the top people in the industry telling you guys this, this means something. I mean, miners know it's happening. They've laid this case out. But now we have this dilemma, because we're taking this flawed and

failed system that we've been trying to fix to work in a two-milligram standard that wants to be taken to this next level and use it in up to 8 milligrams.

Dead wrong. We will not support it. And it's an outrageous to do rulemaking. And talking about not listening, I mean, I think that's a classic case. I have challenged this Agency to go out and take a look at what's happening out there, because this is a real problem. And miners should not be provided with a device that is being used to satisfy part of this law, when they do go through those excursions, to have that as their protective system that is faulty and flawed, and fails to meet the approval.

And I'm telling you, you know it, and I know it. That's going on today. And it just baffles me, the Agency three years later, not even dealing with that, and now it wants to put it in a rule. I mean, I can't figure that out.

MR. NICHOLS: I just heard you mention excursions. Would you agree that there are times where you can't engineer out the problem?

MR. MAIN: Marvin, here's my answer to you. I will agree that there is times in coalmines that operators are putting miners into dust that exceed the dust level. The excursions is a problem that needs to be

dealt with by not saying, we're going to legitimize it. The problem needs to be dealt with by putting a personal dust samplers on miners, setting a standard, and saying to the Agency, pal, you got to get them out. I don't buy into your argument. It is a band-aid that don't fix the problem.

MR. NICHOLS: And it's your position that every situation in a coalmine can be engineered out, all the time?

MR. MAIN: It is my opinion that the law was correct when the crafters of those documents that said to the industry, you either engineer it out or go get another line of business. I totally agree with that. Congress was right. It's been a law that's been in effect for quite some time. I can tell you some operators do a better job than other companies do.

And I can give you case and case where companies have not employed it because they didn't want to, didn't want to spend the money, or maybe they were ignorant about what could be done. I have been involved specifically in cases where that's happened. Dave Lauriski's own coalmine. We went out there in the one that he previously operated. We had to go out and show them how to ventilate their mine, to get the dust controls down. They said they couldn't do it. They

could do it. And what me made them do is, do whatever other operators do.

And that's the problem here, and that's why we say, if you'll listen to the miners, look, you sample that 24/7, you keep a track of those dust levels, Energy West would have been doing something a long time ago, and they wouldn't have had to push us up. And they came to us wanting Airstreams. That was the whole issue there, pushing for the Airstream helmet. And they wanted to show us that they really couldn't do it, to get the Airstreams.

Thank God we had the law that says you can't get it, or under this proposal, I'd be scared stiff about what would happen out there. But those excursions, Marvin? You don't legitimize them. You make them fix them. And you put this industry on a standard that, when you go by that long wall -- and I've been in cases, too, where they've sent miners to the long wall factory to help design the controls in it, including water sprays and dust controls, which was at the North River mine in Alabama.

They sent their guys over. They dropped the dust levels down. Why? Because they made it -- we're going to fix this problem. It's what's getting us in trouble by saying, gee, there's a problem here, and we

need to fudge this system a little bit to let the dust levels be there. We're saying, no. Get them under control. And the operators, you know, there's testimony you're probably going to hear, you may have heard some of it today.

I've heard from miners, you know, under today's schemes, give them an Airstream helmet without filters in them. I mean, let's get real here. If they're saying that these things need to be fixed, why isn't there more responsiveness out there to fix these kind of problems? I think that the people come here with a bad case. Using a fair (phonetic) of their own, not fixing the problem, and say, now, gee, give us a break. And I think that's what we all have to understand here.

But on these critical issues I would caution this panel, as you talk to people, to explain the full details here. And the "Trust me" stuff? There is a change here that is very, very serious when it comes to controlling dust in coalmines, that today they can't do the two milligram because of the bars that's there. What you're proposing, they can exceed that. And you do have different standards out there. I mean, the cute thing about those tables is that everybody believes that, well, they can't get over two. They can't get over -- yes, they can get over two.

But if you read your documentation, you have wiped all that out. It's hidden. If Bob Thaxton hadn't told me that. Bob, swear to God -- or Marvin, swear to God, I wouldn't even have known that this thing could go up to 8 milligrams. That was a total shock. Why isn't that in that rule? You have to have a lot of other testimony, a lot of other things as we plow through this. We're trying to get miners up to speed.

I can tell you this is the God awfulest rush to judgment on a rule so complicated as I ever seen in my life, and we're doing the best we can to keep up, but I think this is not good for miners, and it's not good for the Agency, and it's not going to fix this problem. And as Tim said on these PDM 1's, I don't think you're going to see a whole lot of operators saying, impose one of those on me.

But after about tens of tens of thousands of dead people out there, I think the government ought to be stepping up to the plate and saying, don't care what you got to say, we're going to get some stiffness in the back, and you're going to use them, 24/7 365. We will have some more time to look through the proposal and answer the questions you guys have raised on some of the specifics of the personal dust monitors as we go through, but we fully intend to explain this case.

I just pray that the government acts on behalf of the miners that's out there, and gets the full details, and makes it clear what this proposal can do. Not what you intend to do, but what the proposal can do. Thank you very much. If you've got any questions.

MR. NICHOLS: Thanks, Joe. Lew wanted to make a comment.

DR. WADE: No. Joe can finish that. Questions for Joe?

MR. THAXTON: One thing, Joe, I need to clarify. When you talk about our current sampling scheme that reduced us to four quarterly samples, as opposed to bimonthly, and you say we go to the one shift and we go out and collect four or five samples, and we don't --

MR. MAIN: Well, it's the one sampling event.

DR. WADE: Right. And we don't write a violation, even though we find high dust on that one day?

MR. MAIN: Yep. That's what you call the target or the --

DR. WADE: That's the initial sampling period. And we target -- we trigger samples based on that. The reason we can't write violations on that is because the courts told us it's illegal.

MR. MAIN: To write on that first inspection?

DR. WADE: That first inspection. That is the

Excel decision. We had written a violation for an operator exceeding the standard, based on the average of multiple samples collected on one shift. The court ruled that we couldn't do that. So that's why we take that survey to find out if there's a problem. And if there is, then it locks us into five consecutive shifts or five consecutive days. That's what the court ruled for us. And so it wasn't our choosing to put that in place. That is the court ruling in relation to --

MR. MAIN: There's a difference of opinion on that one. We understand the followup inspections, that you had the additional inspections, and you chose five, I guess because that's what the operators was doing, but you actually went to six, with that one being --

DR. WADE: Because the information given to us that we had to mimic five consecutive days, five consecutive shifts, same requirement as --

MR. MAIN: Our lawyers don't read that trigger like you do.

DR. WADE: I mean, there's usually a 10- to 15-day time period between the one-day sample that we collect on all occupations until we find out whether we're locked in to do the additional samples. So that time lag was giving our attorneys a problem, in that we would start then with five consecutive days or shifts

once we started our surveys.

MR. MAIN: I guess two differences here. One is that we don't view that targeting to be that concrete that you cannot use that as one of the compliance samples. The second thing is, nothing in that Excel decision said we had to go from six to four that I've ever seen.

DR. WADE: There was nothing in there that said to go from bimonthly sampling to quarterly sampling. The Agency used the same FTE and resources. It's divided out. If you look at the number shifts that we collect the five samples, and add that to the number of shifts that we collect quarterly samples, it totals up to the same number of shifts that we would have used under bimonthly sampling.

MR. MAIN: The point I was making, Bob, on that one is, the Agency made a conscious decision to change that policy, going from six to four.

DR. WADE: True.

MR. MAIN: That was not mandated by any lawsuit. There was no attempt to even go to congress to get more money, which Congress has been helpful in the past. A straight up decision. The "Trust me" decision. We went from six to four. And now we're down to targets or whatever.

DR. WADE: It was strictly made to stay within the confines of the current resources that were available at that time.

MR. MAIN: That's another dispute, because there's a question of whether or not you guys is spending the money that you had allocated to Congress in 2000. The 2002 continuing resolution, which we're looking at now, and that's another story.

MR. NIEWIADOMSKI: Joe, let me mention something, too, about that. I mean, it's frustrating to us, and in fact, we had to change our procedures because what's happened as a result of that, we're doing as much -- as I said earlier, we're talking about sampling over 1,100 MMUs, and as a result of all those resources we put forward, as I said earlier, last year in 2002, we end up, as a result of that, citing an operator based on our samples only 33 times. 33 times, okay?

MR. MAIN: Yeah. But let me tell you the problem I have. And I'll end it on this. It's the PDM 1. I sat up here, and you know, I've been working with this PDM 1 and the whole continuous dust monitors directly, because it was in the interest of our institution, kept up to speed, knew we was about ready to finish mine, and it just seems to me like on one side of this table, there's a disconnect on what's been going on

with that one, Marvin, that there was not an up to speedness about where we were at on the development of this thing.

And your frustrations that you laid about, here we go again. I'll tell you one thing, I was totally frustrated as we was moving to the benchmark on the continuous machine mounted. Still think it's needed. The government is the one that stopped the progress on that, claiming it was all they could do. There's been no action to force that technology out.

We asked that the Agency consider in terms of, hopefully, a recrafted rule here, the use of machine-mounted continuous dust monitors, but the development of the PDM 1, I remember when there was arguments about refusal of MSHA to even bring money to the table to cover the PDM 1. I was involved in those. And I've seen some reluctance. And it's bothersome that there has been this disconnect, when all the rest of sitting over here knew we was moving right down to this finish line, getting ready to have a device out, final tested out at the mines by late summer, and whoosh, okay.

This is not some Johnny come lately. This is something that took a lot of hard work, spun off of the continuous dust monitoring. A lot of efforts. And we got something that I just hope does what everybody says

it will do, too, but we're as close to that finish line as we've ever been in our life, and before we got there, somebody cut the rope. I don't understand that. There seems to be a disconnect here.

DR. WADE: This is Lew Wade with NIOSH. Just a couple of closing comments. First of all, for myself and for John Howard, the director of NIOSH, I'd like to thank you for your time, I'd like to thank you for your passion, for the energy that you bring to the topic of miner health and safety. I think what happened in this room is a terribly important thing, and we certainly will listen to the comments that you've made. I work for NIOSH. That's the agency that has taken on this task of developing the continuous personal dust monitor. It is a task we take very seriously. I'm very proud to work for an agency that's taken that on.

I do apologize for the fact that it has taken a lot longer than we might have liked. The only thing I can tell you is, we will do it as quickly as we can, but we will do it right. And I think that, in the long term, serves the miner health and safety community. We'll continue to put our shoulder to that, and we'll continue to let you know where we stand on that activity.

I would remind you again that there are two rules that we're discussing. The single sample and dust

plan verification. While they often come together, I think at times it's worth thinking about them separately, as well. And again, I'd just thank you for your willingness to share your passion with us. Thank you.

MR. NICHOLS: Thanks, Lew. Okay. Thanks for showing up. I'm pretty sure I'll see some of you down the road here. Thanks again.

(Whereupon, at 3:34 p.m., the hearing in the above-entitled matter was concluded.)

//

//

//

//

//

//

//

//

//

//

//

//

//

1 //

REPORTER'S CERTIFICATE

DOCKET NO.: N/A
CASE TITLE: Office of Standards, Regulations & Variances
HEARING DATE: May 6, 2003
LOCATION: Washington, PA

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
Mine Safety and Health Administration.

Date: May 6, 2003

_____

_

Joel Rosenthal
Official Reporter
Heritage Reporting Corporation
Suite 600
1220 L Street, N.W.
Washington, D.C. 20005-4018

1

2

3

4