TRANSCRIPT OF PROCEEDINGS

U. S. DEPARTMENT OF LABOR }
IN RE: SINGLE SAMPLE & PLAN VERIFICATION }
MINE SAFETY AND HEALTH ADMINISTRATION }

Pages: 1 through 267

Place: Lexington, Kentucky

Date: May 15, 2003

AB14-HEAR-TRANSCRIPT-4
AB18-HEAR-TRANSCRIPT-4

HERITAGE REPORTING CORPORATION
Official Reporters
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BEFORE THE
DEPARTMENT OF LABOR
MINE SAFETY AND HEALTH ADMINISTRATION

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IN RE: SINGLE SAMPLE & PLAN VERIFICATION }
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Sheraton Inn Suites
2601 Richmond Road
Lexington, Kentucky

May 15, 2003

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P R O C E E D I N G S

MR. NICHOLS: Good morning, my name is Marvin Nichols and I am the Director of the Standards Office for MSHA. I'll be the moderator for today's public hearing. On behalf of Dave Lauriski, the Assistant Secretary for MSHA and Dr. John Howard, Director of NIOSH, we want to welcome all of you here today. You may have to come up front. I'm doing the best I can do here. Go off the record for a minute. I think we might have done something...

(Off the record.)

MR. NICHOLS: 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 the 7th, 2000.

Second, we have reproposed the plan verification rules. It was published in the Federal Register on March the 6th, 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 rules in 2000.

These rules are intended to eliminate black lung and silicosis by eliminating miner overexposures. They completely change the federal program for controlling, detecting and sampling for 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 introduce our panel. To my left is Bob Thaxton. Bob is technical advisor in coal mine safety and health. Larry Reynolds, seated next to Bob, is with the Solicitor's Office. George Niewiadomski is a health and safety specialist in coal mine safety and health.

To my right is Frank Hearl. Frank is senior advisor in the Office of the Director of NIOSH. Next to Frank is Jon Kogut. Jon is a mathematical statistician with the Office of Program Policy Review with MSHA. And at the end of the table is Ron Ford. Ron is an Economist with the Standards Office.

We also have two other MSHA individuals, Pam King, in the back of the room, is a reg specialist. Hold your hand up, Pam in the Standards Office. And also Rodney King is with us. Rodney, I apologize for that. Rodney Brown. Rodney, come in and raise your hand. I will try to make some kind of further amend to you,

Rodney, for doing that. But it's been a long week. I can't believe I done that.

Let me mention how today's hearings will be conducted. 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 been notified -- those of you who have notified MSHA in advance will be allowed to make your presentations first. Following those presentations, others who request to speak will be allowed to do so.

I would ask that all the questions regarding these rules be made on the public record and that you refrain from asking the panel members questions when we're not in session. The reason we do this is that we want all of the discussion concerning these rules on the record.

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

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 of the

documents 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're also accepting written comments and data from any interested party, including those who do not speak 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.

Due to requests from the mining community, the Agency will extend the post hearing comment period for both the plan verification proposal and the single sample reopening from June the 4th to July the 3rd.

We expect to publish a notice in the Federal Register stating just that soon. We're in the process right now of getting the joint signatures on the single sample rule.

As you know, we have scheduled two additional

public hearings to address these two proposed rules. They will be held in Birmingham, Alabama on May the 20th and in Grand Junction, Colorado on May the 22nd. The hearings will begin at 8:00 o'clock each day and end after the last scheduled speaker.

Let me give you some background on the two proposed rules. First, the single sample proposed rule, which was originally published on July the 7th, 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 were being overexposed to respirable dust.

Averaging 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. Single samples can identify and remedy excessive dust conducts more quickly. Single sample measurements have been used for many years by OSHA and at metal and non-metal mines in this country.

MSHA and NIOSH are jointly reopening the rule 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, health

effects, quantitative risk assessment, technological and economic feasibility and compliance costs, which has been added since July of 2000.

For example, we updated the preamble to include the most recent information on the prevalence of pneumoconiosis or CWPE, or black lung in coal miners examined under miner's choice program during the 2000/2002 period.

These findings show that miners continue to be at risk of developing black lung 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 finding published in the Federal Register on July the 7th, 2000. The single sample issue has been through a long public process which is outlined in the preamble of the proposed rule.

The second regulatory action is the reproposed plan verification rule. This proposed rule supersedes the one published on July the 7th, 2000. MSHA held three public hearings on the previous proposed rule during August 2000. Many commenters urged the Agency to withdraw their 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 coal miners since the mid 1970's.

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 7th, 2000, proposed rule.

Now, Bob Thaxton will now give us an overview of the new plan verification proposed rule. And we're also posting Bob's presentation on the web site for future reference.

We would ask that you hold any questions regarding Bob's presentation until you come up to give us your comments. And then we'll deal with those at that time.

MR. THAXTON: Okay, I'm going to try to walk through a general overview of what we see as far as the single sample and the plan verification rules. Can you hear me in the back okay? I'll try to speak loud because I can't get the mike over here to me.

The first thing that I'd like to bring out is why are we doing this? We see a need for doing something with the respirable dust program because if you can look at what we've seen over the past twenty years or so, we're seeing black lung from 1981 through 2002. This has

a very little decrease. We had 4.1% prevalence of black lung in 1981 and we're at 2.8% under the current data that we have for 2002. That data in 2002 is a combination of MSHA and NIOSH data.

If you remember, MSHA was conducting and providing free chest x-rays for miners for about a three year period. During that three year period, over 20,000 x-rays were collected. That was combined with the data that NIOSH receives from the voluntary program that is administered by underground miners through underground operations, the mine operators, and the combination of those two sources of data produced the 2.8% prevalence rate that we see for 2002.

At the same thing though, in the black boxes you'll see a number that says 13% down to 8% in 2002. That is the percent of samples that are exceeding the 2.0 mg standard each of those periods.

The number that's in the parentheses is the average concentration based on operator designated occupation samples. Those are samples that are collected on a continuous miner operator, longwall operations, either shearer operator or the person that's working furthest down wind.

So you can see that we're not seeing much of a change in the prevalence of black lung but we're still

seeing a significant percentage of samples that are exceeding the 2.0 mg standard.

This package consists of two rules, the single sample and the plan verification. They go together. What are we getting out of them. Well, we want -- these rules are designed to develop effective plans, provide for control of dust and the monitoring of the effectiveness of those controls.

The single sample rule provides for a new finding. That finding is that the average concentration can accurately be measured over a single shift, contrary to what we currently have is that we have to average multiple samples.

This rescinds the 1972 finding on the accuracy of single sample. It does also add a new standard where the Secretary may use a single full shift measurement to determine the average concentration over the shift that we collect the sample.

Plan verification. Under plan verification, each underground mine operator must have a verified ventilation plan for the dust control portion. The plan will be verified under actual mining conditions by operator samples. MSHA assumes the responsibility for compliance and abatement sampling at underground mines. And it's important to realize that plan verification only

effects underground mines. Surface mines are not effected by this particular rule.

MSHA samples will be used to set reduced standards due to quartz. There will no further use of operator samples at underground mines to effect a reduction in standard due to the presence of quartz.

Under the verification of the plan what I want to do is compare what we currently have under the rules that are in effect right now, versus what the 2003 proposal will provide for.

On verifying a plan, currently MSHA samples are used to verify or approved the plan. That plan is based -- is approved based on the average of multiple samples. Those are full shift samples that are taken for 8 hours or less, portal-to-portal and they are taken at a minimum of 60% of average production.

Under the 2003 proposed rule, we changed this to where operator samples are used to verify the effectiveness of a plan at underground mines. Those samples will be full shift samples. That's production time. What that means is that the samples will be put on people, they will be turned on when the miner reaches the section or the MMU, and will not be turned off until the miners are leaving the section. So if the production time on a section is 9 hours, those samples will be run

for 9 hours. If it's 7 hours, they will be run for 7 hours. Whatever time that the miners spend on the section, when they get off -- when they get to the MMU and when they exit the MMU is how long those samples will be running.

They will be run at higher than average production. We're going to get into the production a little more. We're going to be going to what we call the VPL. VPL is an acronym that stands for verification of production level. That is a level that we're going to insist on for these samples that will be more representative of what we consider normal operations.

The operator samples will be compared and they will have to meet separate quartz and coal mine dust verification limits. We have a table in the rule that stipulates that if the operator collects one shift of samples, what level they have to meet.

What these samples are designed to do is to provide 95% confidence that the 2.0 mg standard for respirable dust and the 100 micrograms for quartz are met. If the operator gets one shift of samples, those samples must meet, for example, 1.71 mg for respirable dust and 87 micrograms per cubic meter on quartz. Those two numbers, when you apply statistics, gives us a 95% confidence that those samples shows that and would meet

the 2.0 mg standard and the 100 microgram standard.

They also provide for the use of PAPRs or administrative controls on any mining unit only as a supplemental measure after exhausting feasible engineering controls.

Now the key here is is that they have to exhaust feasible engineering controls. There would be no controls removed from mines because people want to use some other type of controls such as a PAPR or administrative controls. Mine operators will be required under this program to maintain their engineering controls that they have in place.

Plan information. Under the current rule, like I said, MSHA sampling is conducted at 60% of the average production. And there are no records of production required to be maintained by a mine operator. We determine 60% of average production usually by just talking with miners, through talking with mine operators, determining somehow that -- you know, what they normally produce and then we take 60% of that and that's what our people look for in order to determine that their samples are valid.

Under the 2003 proposed rule, it requires the 10th highest production level to verify plan effectiveness. The 10th highest production in the last

30 shifts. I'll show you a chart as an example of how this works and what level we will say actually collecting samples at.

It also requires the recording of production and maintaining those records for a period of six months. The operators will now be required under this proposal to record production on each and every MMU and maintain those records then for a six month period so that they can be reviewed by MSHA and representatives.

Those records for production is for actual production, not clean coal. It's for coal, rock, whatever is mined. They have to -- they have to report the total production, raw tonnage for that particular section.

When we say the 10th highest production, what is that? What's it equate to? This is an example of a longwall in northern West Virginia. The last 30 shifts of production are represented by each of the little ovals. If we come in and look, the average production was shown to be 6,295 tons over those 30 shifts. Under the current regulations, MSHA collects samples to approve a plan at 60% minimum. So instead of 6295 tons we would approve a plan at about 3700 tons. That would indicate valid samples to us.

We were asked at one time to bump our approval

of production up to 90% of average. Well, 90% of average still wouldn't get you but to about 6600 tons, so -- I'm sorry, 5600 tons. So we're still below the average.

What the proposed rule does, it says the 10th highest. And the 10th highest production on this particular example is about 7500 tons. So you can see from the example that we're showing is that we're looking for operators to collect samples to prove that their plan works at much greater than what the 60% of average that we currently use, even greater than what the average is. It goes to the 10th highest.

What that means is that we end up at the 67 percentile. That is, two-thirds of the shifts that miners operate, production is going to be less than that number. One of the third of the shifts it will be higher.

So we're faced -- we think with this that we are getting more representative samples that truly will show whether the controls are in place and the samples show that they are in compliance, that those controls really are working to maintain control of the dust.

Use of PAPRs, or powered air-purifying respirators, everybody calls them PAPRs. Under the current rule, the current rule allows the use of this type of respirator. If it's used in accordance to a

respiratory detection program as spelled out under 72.700 of the current regulations, then an operator can get credit for any citation that's issued to be classed as a non-S&S violation. And what that effectively does is it lowers the penalty to a much lower level and because it assumes that there are -- there is a degree of protection provided to the miner.

Under the 2003 proposed rule, this proposal permits the use of PAPRs when all feasible engineering controls have been exhausted. Again, like I said, only after they have exhausted all feasible engineering controls. And that's a determination that will be made by the Agency at the highest levels. Currently that is written into the rule that the Administrator for Coal is the person that would actually make that.

Only loose-fitting powered respirators with MSHA and NIOSH approval may be used. Currently that is one unit. It's referred to as the 3M Raytel helmet. No other unit has both approvals and fits this criteria.

If the operator opts to do this, they must provide a respiratory protection program as part of the approved ventilation plan. The approved plan will incorporate the respiratory protection program. That respiratory protection program has to have elements that says who's in charge of the program. One person at that

mine has to be responsible for it. Who's going to take care of the units, who's responsible for cleaning it. How often do they have to be cleaned? Who checks the filters? How often are the filters replaced? Which filters are being used? Who's going to go in and disinfect the units? Is the helmet assigned to individuals as opposed to multiple people? If it's assigned to an individual, how is it marked? How are they stored in between shifts?

All that is spelled out in the approved respiratory protection program that becomes part of the plan. That means it's part of the plan, it's part of the regulations for that particular mine. And anybody that doesn't follow those, the operator is subject to a violation.

You must maintain the dust levels as low as possible with feasible engineering controls. Before you're allowed to use respirators, as far as the PAPR, the operator will have to go through a series of testing by putting engineering controls in place and seeing what the test results are. Once we get the dust levels to the lowest attainable level, then we'll have exhausted all feasible controls at that point, all those controls have to be maintained. The operator cannot remove anything just because he's going to use a PAPR program. So

whatever levels of control -- ventilation, whatever levels of water, sprays, scrubbers, whatever else is being put into that MMU to control dust, whatever is able to get it down as low as possible, has to be maintained from that point forward.

The use of a PAPR has a protection factor of 2 to 4. It's depending on the ventilation air velocity assigned to -- and it's assigned to that particular mechanized mining unit.

We assign the protection factors to the MMU, not to the class of respirator. That is because this particular type of respirator is effected by the ventilating air quantity on the face. The faster the velocity of air going down the face, the less the protection afforded by the PAPR. So they give a lower protection factor.

The protection factor, what does that mean? Well, the protection factor of -- as an example of 4, is an indication that the air being breathed by the miner inside the PAPR is one-fourth the concentration of the air outside the PAPR. So if you're exposed to outside the PAPR at 2.0, as an example, the air inside the PAPR would be .5.

Sampling requirements. Under the current rule, operator bimonthly compliance sampling at underground

mines. Again, like I said, we're only looking at underground mines here. This has no effect on the surface mines.

The operators are cited for failure to submit the required samples. And there can be citations issued for exceeding the applicable standard.

Operators collect abatement samples to determine compliance after citations are issued under the current program.

And MSHA conducts quarterly sampling at this time on MMUs, section DAs and Part 90 miners. Citations can be issued those for exceeding the standard as well.

Under the 2003 proposed rule, the operator will be required to collect plan verification samples for initial approval. And in the designated MMUs will be collected one sample each quarter for a confirmation that the controls continue to be effective.

What that amounts to is that the operator will be collecting samples to verify their plan. When they initially submit it to the Agency, they'll have to show that that plan is capable of working.

Those areas where MSHA finds a potential problem, that is, we find a sample that exceeds the applicable standard, those entities or those MMUs will be designated that they will have to collect a sample each

quarter to prove to the Agency that their plan is still effective in controlling dust.

There will be no citations issued for exceeding the applicable standard based on any of these operator samples. The operator, however, is required to take action to reduce concentrations when any sample exceeds the standard. And that corrective action has to be recorded so the Agency can review it then during our inspections. Failure to take that corrective action can result in a citation.

This mirrors what we do currently and have for a number of years on such things as methane readings that the operator is required to take on themselves. They take a reading, find high methane, they have to report it and record what corrective action they've taken to get rid of that high concentration. Failure to take corrective action on their own can be a violation. We did did not cite high methane content, we cite the fact that they failed to take corrective action to address that situation. It's the same thing we would do now for dust samples.

MSHA collects all samples to determine compliance and abatement of citations. All MSHA determinations will be made on a single full shift measurement and the citations issued for exceeding the

applicable standard. I won't get into what levels we issue citations at and how these determinations are made, but the key word is -- here for us is that all MSHA determinations will be made based on single samples, single full shift measurements. Not the average of multiple samples.

Compliance and noncompliance determinations. Under the current rule we've used the average of multiple samples to make compliance/noncompliance determinations at all coal mines, surface and underground. It's basically the average of 5 samples on 5 different shifts. If the average concentration exceeds the applicable standard by 0.1 or more, than that's an indication of noncompliance. But we're looking at the average of 5 samples on 5 shifts to make that determination.

Under the 2003 proposed rule, single sample determinations at all coal mines. This effects both surface and underground. The single sample provision is for all coal mines. So the single sample determinations will be applied uniformly across.

Noncompliance or a citation level is, for example, on a 2.0 mg standard, would be 2.33 mg per cubic meter. That means if we take a sample, one single sample, one shift, if it's 2.33 and they're on a 2.0 mg standard, that indicates noncompliance. That level of

2.33 gives us a 95% confidence that the 2.0 mg standard has been exceeded based on one sample.

Now remember the previous ones that were 5 five samples on 5 shifts and averaging them to come up with the same level of confidence that you'd exceeded the standard by 0.1.

The citation levels for all standards, 2.0 mg all the way down, are specified in the rule itself. There is a table in there, so there's no calculation that you have to go through. You can look. If you're on a 1.5 standard, you can go across and see what the citation level would be for that particular standard.

Why are we looking at averaging and trying to get rid of it? Well, this is an example of an actual series of samples that were submitted to the Agency. It's an operator samples, 5 different samples submitted on a continuous miner operator. You can see we have the first sample at 3.2; the second sample at 1.6; third at 1.5; fourth at 0.8; fifth sample of 3.1. You average those 5, it comes out to 2.0. The operator would be considered in compliance, no actions taken whatsoever to address the two samples that show over 3.0 mg.

We can see from this example that we currently are finding people being overexposed on individual shifts. That overexposure on individual shifts if what

we want to address with these particular rules. We think it's important that we try to control exposures on each and every shift. Controlling exposures on each and every shift will bring the prevalence of black lung down, so that we have fewer people getting the disease.

When you have those situations, that's currently, the operator has engineering controls in place right now. But yet the samples that we collect and that the operator collects, while we're showing the average as being in compliance, we're showing that people are actually being exposed to higher dust levels, but it's okay because the average is in compliance.

Under this situation, if we took, for example, that this was -- the operator was doing everything possible, there were no further engineering controls available to them, we would still insist that they look at these results and we would say, okay, we've gotten this amount of dust, we've got good compliance on three situations, but two situations here we can see that it's not.

We want to try to drive that as low as possible. Now, we've got all the engineering controls in that are possible right now, we recognize that there's nothing else available, therefore, they put something, say a PAPR program in place. That PAPR program provides a degree of

protection to the miners in those situations so that they are not being exposed to those high dust concentrations.

In the meantime, the Agency will still continue to review what the operator is doing, the engineering controls, the situations in that mine as to how they operate. And as any additional controls become available, that operate will be required to put those controls in place to drive those concentrations of 3.2 and 3.1 down to the 2.0 mg standard whenever possible.

Those plans will be reviewed every six months by the Agency to insure that we are checking every place to find out if those additional controls or additional changes in the mine system that we've allowed controls to be used.

We've made it a point that the controls that are being put in place are important. We want to verify that controls indeed are capable of maintaining compliance. Controls are only as good as long as they're actually there and working.

Under the current rules, under Part 75, there is a requirement that every mine operator has to examine the dust controls that are listed in his plans at the beginning of each shift. Now is that the beginning of the shift before production starts, or if it's a hot-seat operation where they don't stop production, then it has

to be done within the first hour of a shift.

Those controls have to be looked at, have to determine whether they're producing -- they're putting enough air up there, enough water, the water spray is working, the scrubber is working, the dust collection system or roof bolter is working. All those things have to be checked at the beginning of each shift.

Under the 2003 proposed rule, we're maintaining that requirement. However, it becomes a little more important now because we are going to get plans that are going to have to be verified. Those controls that are in the plan are going to be more representative of what's actually necessary to maintain compliance at all times.

Miner participation. Under the current rule miners have a right to accompany, with pay, MSHA personnel during MSHA sampling. If an operator is submitting a plan, the operator notifies the miners' representative of plan submission, revisions and posts it on the bulletin board. The miners' reps may submit comments during the answer review then for consideration.

Under the 2003 proposed rule, miner participation during operator sampling. Remember now, we're saying that the operators will be required to collect verification samples and some operations will be required to collect quarterly samples.

The operator has to notify miners of the date and time prior to the verification or quarterly sampling. So they'll be -- it could be posted on the bulletin board, it can be announced. Somehow they're going to have to notify miners before the date and time that the sample is to be collected under these conditions.

The miners must be provided an opportunity to observe that sampling, but there is no guarantee of pay. There's no special pay provisions for that.

This mirrors what's in the current noise regulations which says that miners have the right to observe noise samples being collected but there is no guarantee of pay.

Miner participation during MSHA sampling, there is no change. MSHA comes in to collect samples for compliance or abatement sampling, the miners' rep has the right to accompany MSHA with pay.

The requirements for plan submissions for -- initial or revisions, remain the same. They will be posted. Miners' rep has the right to submit any comments to the Agency while we're doing the review of that plan.

Use of personal continuous dust monitors or PCDMs as -- the acronym. Personal continuous dust monitors that are a technology that's under development. It's not currently commercially available. The current

rule has no consideration for those units. They're not permitted to be used. Only an approved sampling device approved under the regulations can be utilized for sampling at a coal mine at this time.

The 2003 proposed rule stipulates that any unit that the Secretary of Labor approves with a conversation factor will be acceptable. What this means is that the units that are under development right now, if they are approved, the Secretary of Labor develops a conversion factor that is related to the current sampling technique, then it would be allowed to be used.

What it amounts to is that you see the units that are used right now have a formula for calculating what's called an MRE equipment. The original dust standards were set up under an MRE instrument. The current sampling devices have a conversion factor that converts what concentrations are determined from that to the MRE equipment.

Any new instrument that comes out would have to have a similar conversion factor that would bring you back to the same standard that we originally started with.

Under the use of personal continuous dust monitors, designated miners must wear the full shift, portal-to-portal. Anybody that comes under the program

to utilize these -- miners assigned to wear a PCDM would be required to put the unit on the beginning of the shift, wear it for a full shift and not take it off until the end of the shift. It's portal-to-portal, full shift.

Use of that instrument though permits the operator to use administrative controls without first exhausting engineering controls. Because they're now taking a sample on an individual for the full shift. So moving people around can be done without effecting an approval from the Agency first. Because you're doing continuous monitoring of that individual.

There would still be no citations for overexposure. Because again, it's an operator sample. But they may be cited for failure to take action to reduce overexposures. Anybody that uses personal continuous dust monitors, they would be required to record those readings at the end of each shift. Any indication of an overexposure that is not addressed could be cited. Because the operator has to take corrective action any time they're notified of an overexposure.

What are the benefits of those two rules as a package? One, plan parameters that reflect actual mining conditions that have been verified at high production levels. Again, we're trying to get all the controls in place that are actually necessary to maintain compliance.

The operator then has to collect those samples at that high production level, submit them to the Agency and they have to meet the criteria for the sample results under both the respirable dust and quartz to show that that plan truly provides control of the respirable dust in that section.

No operator collected samples used to determine compliance. It's been a thorn in everybody's side for a long time. That the operator collects samples, they turn into the Agency. This does away with that. All compliance determinations, all compliance sampling will be performed by the Agency.

Provide protection for miners when feasible engineering controls have been exhausted. We have situations as I showed you in that example where we make -- we have engineering controls in place right now and the average shows the compliance. But we see that there are people being exposed to high concentrations. If that example is an example also of all feasible controls being in place, then we ought to do something to protect those people while they're in those situations. And that's what this rule provides for is some protection when they've exhausted those controls.

It also has provisions for the use of personal continuous dust monitors. It's a technology that's

coming out. It is not available at this time, it's not commercially available, has not been proven. However, if it does become available and is proven in the future, then we wanted to have something in here that would at least allow them to start coming into the mine industry.

The effect of this rule package is that we see that there will be a reduction in the prevalence or the number of cases of black lung. Now, we used a very conservative estimate for the simple reason there's not a lot of data available that reflects what the new rules would provide. So we used data that we have currently available. And from that we've projected a reduction of 42 cases of black lung. Forty-two may not sound like a whole lot but if you're one of those 42 that's important.

We have broken that down for the number of DO, which are designated occupations, the people that are continuous miner operators, shearer operators, the person working the furthest down wind on a longwall shearer. NDOs, other people working in the face. Roofbolters. And a total for all those occupations combined of 42.

The combination of these two rules, there's a lot of little nuances that you can go through. What does that mean? So we put together three scenarios here that we'd like to walk through that will take you through and give you an indication of what this will mean.

As an example, you've got an operator that's going in to verification of his plan. The first verification sample is collected. Now it's not one sample. It's multiple samples collected on one shift. So the operator collecting on this particular one, the miner operator and the roofbolter. The miner operator's first sample is 1.6 mg on dust, roofbolter 1.7. The miner operator gets 72 micrograms of quartz, the roofbolter gets 92.

Remember, I said that there are critical values for both respirable dust and quartz that the operator has to meet to verify their plan. The critical values for one shift of samples is 1.71 in respirable dust and 87 micrograms on quartz. Well, they meet the 1.71 for respirable dust but you can see the roofbolter quartz level exceed the 87 micrograms. This indicates that the plan has not been verified on one shift of samples.

The operator then gives notification. He takes a second shift of samples. Samples the same occupation and you get the same readings, dust and quartz. And you can see now that we get 1.63 and 1.69 on the dust and 71 micrograms and 91 micrograms on quartz.

Now, the 91 still exceeds the 87. But we've got two shifts of samples now. And just by this table it will show you for two shifts of samples the two critical

values have to be at or below 1.85 on respirable dust now and 93 micrograms on quartz. All four reads, the two shifts of samples, are at or below those two critical values. So, therefore, the Agency determines based on that that the plan has been verified. The controls that the operator has in place will result in compliance with 95% confidence.

We've got a verified plan in place, now MSHA comes in collects the first bimonthly series of samples. We collect give samples normally, miner operator gets 1.62 on dust, 78 micrograms on quartz; miner helper gets 1.71 mg on dust; the shuttle car operator gets 1.41, excuse me that it's not in the right column; roofbolter number 1 gets 2.38 on dust, 138 micrograms of quartz; roofbolter 2 gets 2.42 on respirable dust, 141 micrograms of quartz.

The Agency writes one citation for the roofbolter occupations exceeding 2.0 standard, citation threshold value of 2.33. Because the roofbolters exceeded the 2.33. If both roofbolters exceeded, we only write one violation because the roofbolter is one dust generating source. Whatever the operator does to address the dust concentration for that particular machine is going to address both occupations. So we only write one violation.

But it's based on one shift of samples, not the average of five shifts.

The operator has to take corrective action and then notify MSHA within 24 hours that the action has been taken. The notification within 24 hours of the completion of the corrective action is so that the Agency then can schedule to come in and collect abatement samples if necessary.

That doesn't mean at the end of the 24 hours that the Agency's automatically going to be there. So it's not prior notification to the Agency. It's just the operator's way of telling us that they have completed the corrective action that's necessary. They have to maintain that from that point forward. The Agency may come in a week later to do the abatement sampling. It still will be an unannounced inspection.

MSHA collects the abatement samples in this situation. We determine -- we will determine compliance and noncompliance and will terminate the citation.

At the same time though, we have indicated here that this is beyond the 2.0 mg standard. We have an indication of high quartz exposures, greater than five percent, because of that the Agency needs to make sure -- find out what the people are exposed to truly so that we can get an appropriate standard in place that will

protect people from the high quartz.

Typically with the -- the determination of quartz is based on the last three MSHA samples collected on each occupation. If we come in and do a bimonthly series of samples, we're only collecting one sample. You would think that you may need to wait two additional bimonthly periods before MSHA will get three samples that can be averaged in this situation. However, the Agency has put in a document into -- onto our web site that represents our inspection procedures that are in draft form as to what we expect to do when these two rules go out.

What we've said in that draft document is that because of this situation of an indication of exposure to high levels of quartz, we think it's very important to go out and get those additional samples and quickly so that we can establish whether there truly is an exposure to high levels of quartz and get an appropriate reduced standard in place.

So what we do is we collect two additional shifts of samples in the next 15 days. Those samples will be utilized then as the true samples total to establish whether there is a problem with quartz and we will set an appropriate standard based on that.

Now the next thing is is those samples are also

full shift, just like you'd normally collect. But it's two additional shifts of samples. They will all be looked at for compliance, noncompliance. So it's a full investigation on dust and quartz.

Because of these high sample results, the operator also exceeds the criteria that we have set for doing quarterly sampling. The quarterly sampling because we look -- we're taking single shift samples. One shift of samples. We use the criteria levels of 1.71 on respirable dust and 87 micrograms on quartz. Any sample by MSHA that exceeds either one of those two numbers, kicks the operator into quarterly sampling of their own to verify the plan. As you can see from these readings, the operator exceeds that, so this particular MMU would be required to submit quarterly samples to show that the plan continues to be effective in monitoring and protecting people.

I made a slight change in that scenario. Number 2. The first samples that are collected up here for verifying the plan are identical to the first scenario. So we still are verifying the plan on two results. Do we have a verified plan in effect?

MSHA comes in and collects bimonthly samples. This is where I make a change. Here we show all samples collected by the Agency are below 2.0 mg. The quartz

levels are 78 micrograms as the high, down to a low of 47 micrograms. We are showing on this single shift of samples that this entity is in compliance. There is no overexposures found.

However, like I said, we have an inspection procedure that we put out at the same time that we put these two rules out so that people could look at them. Under that inspection procedure, we have a situation where we say a person is able to maintain compliance below the critical values for single samples, which is the 1.71 on respirable dust and 87 micrograms on quartz, on a series of MSHA samples, then we would skip the next bimonthly period. We didn't need to expend manpower to sample that entity again because we think it's well within compliance.

We make that decision because MSHA is only collecting samples for eight hours, portal-to-portal and it's not necessarily the full time that you're on a production shift. And because, like I said, the samples that the operator collects to verify their plan have to be in the 10th highest production or higher. Two thirds of the shifts are going to be below that. So it's likely when the Agency comes in to collect its samples, that we're probably going to have lower production than what the plan was verified at.

At the same token, mine operators usually say, okay, this is my air quantity that's in the plan. They usually put a little more in there because they don't want to be right on the minimum, they want to have a cushion so that they're not in violation.

So we want to take those things into account and we do a conversion, relational factors, so we can address -- add that to our dust concentrations before we make a decision whether that entity actually qualifies to be skipped the next bimonthly period.

Under this particular one, I'm going to show that the verification was conducted at 800 tons production, when MSHA collected the samples there was 750 tons. We show that the air quantity for verification is at 9800 cfm and MSHA's sample was collected at 10,000 cfm. We do a relational factor between the 750 and 800 and the 9800 and 10,000 and we come up with factors of 1.06 for the production and 1.02 for ventilation air quantity.

We take the highest dust concentration, the highest quartz concentration, multiply it by those factors. From that we see that the 1.62 highest dust concentration goes to 1.75 and the 78 micrograms of quartz goes to 84 micrograms.

Remember, I said for them to get us to skip the

next bimonthly cycle for sampling, they have to meet the 1.71 and the 87 microgram limits.

So you can see automatically the 1.75 that we calculate exceeds the 1.71. This entity does not quality to be skipped the next bimonthly period. They will be sampled the next bimonthly period by MSHA.

We will only skip those entities that we feel highly confident are maintaining good and highest dust practice. So that's why we -- we do not want to take samples at lower production and higher plan quantities and saying that you meet the qualifications to skip a cycle. We want those related back to the verification numbers as close as possible.

The third scenario is the use of PAPRs. For a PAPR use scenario we've taken a Mine A, it's a longwall. We're saying that they have installed a shearer clearer, shelf sprays, pan sprays. They have a maximum air velocity of 500 feet per minute along the longwall face and their verification production level is 16,000 tons per shift.

For argument sake and for demonstration, we're going to say that this is the only controls and the maximums that this particular entity can put in place. And because of that, the operator goes in, collects their verification samples and it's not just one set of

samples. You're going to see this go through -- the operator's going to have to go through probably multiple sets of time to verify a plan, with appropriate controls.

Once they have gone through this entire scenario, just for demonstration purposes and showing that the concentration found for the shearer operator during all the verification sampling came out to 1.9 mg of dust, 130 micrograms of quartz. For the 060 occupation, which is the person working furthest down wind on the longwall face, was 2.0 and 145 micrograms of quartz.

We're showing now that -- MSHA has determined that you cannot -- this plan cannot be verified. It's not meeting the 2.0 mg levels and 100 microgram level. So we've -- but we've also made the determination now that all feasible engineering controls are in place or in use. So there's nothing else that can be required under the engineering side.

So the operator says I'm going to go to a PAPR program. He does that. That full program has to be included with the ventilation plan. When he says it becomes the law for that particular MMU, just like the ventilation plan becomes the law for that mine at this time. This will be rolled in as a part of that approved plan and has to be complied with at all times.

All miners working inby the shearer must wear a PAPR in accordance with the approved plan. On this particular one we're showing that down wind from the shearer operator on, there's a problem with compliance. So we're saying on this particular plan, anybody that works from the shearer operator inby, has to wear a PAPR at all times.

If the Agency comes in and does an inspection and somebody's not wearing their PAPR, the PAPRs are not being used in accordance with the approved plan, that is, the full respiration protection program, they're in violation of the plan and citations will be issued. And the operator risks losing that particular provision of his plan.

On this particular longwall the average velocity across the longwall face was found to be 490 feet per minute. The protection factor assigned to the MMU will be 3.2. Remember I said protection factors can be somewhere between 2 and 4. 2 is the minimum, 4 is maximum. It can be inbetween there, based on the velocity of air going across the face.

On this particular longwall we have 490 feet per minute as the average velocity across the longwall face. To calculate the protection factors the formula of 2 times the quantity of 800 divided by whatever velocity is

found on that particular entity. So in this case it's 800 divided by 490. That formula results in a 3.2 protection factor.

The plan that's submitted must maintain all engineering controls that were determined to be feasible by MSHA. All those controls as far as the velocities, the water sprays, scrubbers, anything else that's found to be able to reduce dust to some extent on that longwall, at that point we'd say, okay, have you exhausted all feasible engineering controls? All engineering controls in place at that time must be included on the plan and must be maintained from that point forward. They cannot reduce them or take anything off.

The equivalent concentration of 2.0 mg would be 0.62. Remember, we said it's -- the equivalent concentration is for somebody wearing a PAPR. It's the protection factor divided into the concentration outside. So you take 2 and divide by 3.2. It's equivalent to .062 millimeters per cubic meter. That would give you the equivalent concentration for that particular miner working down there.

That concludes the overview.

MR. NICHOLS: Okay, Bob, thanks. As I mentioned in my opinion statement, MSHA and NIOSH are partners on

the single sample rule. And Frank Hearl would like to make a statement and give us an update on the development of the personal dust monitor parameters.

MR. HEARL: Thank you, Marvin. Good morning. The National Institute for Occupational Safety and Health, NIOSH, joins MSHA at the table today to hear your comments on the proposed rule for single full shift measurement of respirable coal mine dust. This proposed rule amends Section 72.500 in Title 30. That the Secretary may use a single full shift measurement to determine the average concentration of respirable dust on a shift.

The Mine Act made this provision a joint action by NIOSH and MSHA, which is why I'm at this table today.

I'm also here to provide you with a brief update on research that's being conducted by our Pittsburgh Research Laboratory on a continuous -- personal continuous respirable dust monitor and a research that's ongoing.

The device that we are currently testing as a prototype looks like this and I'll pass these pictures around for you. But essentially it's an integrated monitor that's integrated with the CAP lamp. The device has -- works on the principle that's called a TEOM, which stands for tapered element oscillating microbalance. And

that language means that basically there's a device inside that's vibrating and the degree that it vibrates at or the rate that it vibrates at is based on the amount of -- or the mass of that thing, how much weight it has.

As the device samples, it picks up mass from the respirable dust in the environment and that rate change for that amount of mass that's being picked up is -- causes a rate change in the vibration of the element that's inside it. And that can be related to the amount of dust that's in the environment.

It records the concentration of dust instantaneously and accumulates that reading in the processor inside the instrument. So that a miner could look down and see what the instantaneous dust concentration is, what -- how much he has accumulated in exposure over his shift and also can give you a projection as to what the final dust load would have been over the full shift if they continue to be exposed at that rate of dust concentrations.

The device right now has undergone lab tests and was successfully tested in the laboratory to be able to measure dust equivalent to what is now done by the conventional filter and cyclone pump sampler. For the next two months, starting in May actually and running through August, the device is going to be actually taken

out into underground mines. This hasn't happened yet but it's starting basically this week actually.

If the device passes the field test, then it would be ready for commercialization from that point on and testing for acceptability under the approval for equivalent instrument.

So that's where we are at with the device right now. Like I said, it's successfully passed its lab tests and it's just beginning to be tested in the field. How that will come out we don't know. Whether there might be other adjustments that might need to be made, that's a possibility because as you know things don't always perform in actual -- in the coal mining environment in the same way they might perform in the lab. But the tests to date have been successful.

So that's where we're at right now.

MR. NICHOLS: Thank you, Frank. I have about 9:15. Let's take a short break until 9:30 and we'll start back up then with taking comments.

(Off the record.)

MR. NICHOLS: Our first presenter will be Joe Main, the Administrator for Occupational Safety and Health, United Mine Workers. And if you would, since we use different court reporters in different hearings, if the presenters would please spell their names for the

court reporter.

MR. MAIN: Yes, my name is Joe Main, M-A-I-N. And I represent coal miners and as pointed out, I'm the Administrator of Health and Safety for the United Mine Workers of America.

And I'm here today representing a lot of coal miners that couldn't be here. And as I pointed out earlier in my testimony in previous hearings, we're learning more about this rule as we go and it is very complicated and complex rule that was launched by MSHA in the midst of a number of activities that are very draining on those of us in the mine or in the health and safety field. A number of mine accidents and the investigation is still ongoing in those, the rule making, one which involves overhauling the standards which we want to make appropriate in reducing air belt increase in coal faces. And what is concerning to us is that it actually ties into this proposal that we finally realized.

What I want to do today is -- I just got a copy of the new document that MSHA put out due to these rules, which is called prudently asked questions. And there's some information in here that's now being provided to the public and it actually begins to interpret some of the rule making that we want to address as part of my

testimony this morning.

I haven't had a chance, just only briefly, to look at this, so we'll probably have some more questions with regard to that later.

I also want to address some issues and -- as we try to clear up the confusion here about this rule. And this is a complicated rule that miners or us, the safety professionals, can't understand. I'd like to begin this morning, if I could, with some questions to NIOSH regarding the proposed rule.

And one of the things I think is a problem here, there's no clear addressing of what this rule actually does. And I think the public and miners deserve that. And I'm concerned about some of the messages coming out about this rule, what it does or doesn't do. It does not really address the true nature of it and I hope to help clear some of that up today for all of us.

With regard to the rule making, and part of this rule making as I indicated, involves the 1995 NIOSH criteria document that was submitted by NIOSH to MSHA for rule making, as proposed recommendations for standards. Addressing some of the very issues engaged in this type of rule making.

In looking at that NIOSH document, it explicitly said that they recommended to MSHA to introduce a

standard to reduce the respirable dust standard from the existing 2.0 mg that's been in the Mine Act since 1969, to 1.0 mg and taking into account extended work days and work weeks. Does NIOSH still stand behind that document?

MR. HEARL: NIOSH hasn't changed -- or has no new evidence to suggest that we wanted to change our document. So that is our current policy.

MR. MAIN: So NIOSH does recommend a 1.0 mg standard as laid out in the NIOSH document?

MR. HEARL: Yes. And you need to also recognize that NIOSH does have different mandates than MSHA has in coming up with recommendations --

MR. MAIN: Let's be sure that -- yes, we'll clear the record, what NIOSH has recommended.

Now, NIOSH did an extensive study of the mining industry, of miners' exposure, I understanding in developing that document. By monitors, by x-rays that the Agency has taken and looked at, in a natural picture on miners' exposure. They've clearly done a thorough job of trying to assess the current state of affairs when it comes to miners getting pneumonoconiosis and what the standards appear to be and was leading to that, based on the data that was available. Is that a fair assumption?

MR. HEARL: Yes.

MR. MAIN: Okay. Now, as I read the proposal

that MSHA has issued, and there is some differences here which we'll get into about what this rule does or doesn't do, and we've got -- getting from some of you guys from the Agency itself. But as we read the rule, there is a significant change in terms of the dust, respirable dust levels, in the coal mines. As we read the rule, the standard basically says that the respirable dust levels in the --

MR. REYNOLDS: Joe, I just wanted to clarify where you're going here. And that the purpose of the hearing was to hear testimony. NIOSH's rule here was --

FROM THE FLOOR: Could you speak up?

MR. REYNOLDS: I just wanted to clarify where we're going with this. NIOSH's rule in this public hearing is to hear testimony on the single sample measurement proposal. That's the role of --

MR. MAIN: This gets to part of that --

MR. REYNOLDS: Okay, but this -- I just want to clarify for everybody here that NIOSH has no rule making authority and the reason they're here is for the single sample measurement, the proposal which would determine that we could determine the level of respirable dust in a single shift.

MR. MAIN: That he believes --

MR. REYNOLDS: And that they have no authority

for the plan verification proposal. They're not involved in that rule.

MR. MAIN: I do believe you've used NIOSH data as a foundation that you are concerning as part of this. The --

MR. REYNOLDS: NIOSH data as well as compliance data, okay? Which they do not have.

MR. MAIN: And what we're trying to do is just get an understanding --

MR. NICHOLS: Well, how much more will you have on NIOSH, Joe?

MR. MAIN: I know you guys don't want me asking questions of NIOSH and I think it's important to the public and to the miners that we just get -- get the truth, whatever it is, about how this rule has actually impacted and how that comports with some stated findings of the Agency which you guys feel is part of the rule making.

And I plan to go on through the number of questions here that I think will help clear -- you know, clear some of the issues up.

In that regard we feel that the proposal does -- this gets into what the whole intent of this single sample is and where all this stacks up. The proposal, as we read it, allows the dust levels in active work places

to be increased up to 3.0 mg, 4.0 mg, 6.0 mg and even up to 8.0 mg. And MSHA has confirmed that that would be allowed under this rule. Whether they do it or not, you know, we understand there's a debate there with regard to the Agency's stated intentions.

Now, I just have to raise a series of questions of here with regard to this rule making that you have submitted -- your Agency has submitted to MSHA referencing the 1.0 mg as the standard.

Does the 4.0, 6.0, 8.0 mg of dust that would be allowed under this rule conform or conflict with that 1.0 mg proposal?

MR. HEARL: I think with regards to the dust plan verification part of the rule that MSHA is proposing, NIOSH is in fact studying that and from that side of the table will be submitting our comments on how the implementation of rule relates and, you know -- with respect to our evaluation of it. And we'll be submitting our comments to the record on that later in writing.

MR. MAIN: Well, I --

MR. REYNOLDS: I also wanted to interject here that MSHA has addressed the NIOSH document within the preamble on pages 10788 and 10789 and explained to the public how we have dealt with all of those recommendations within the rule, in detail. So you can

refer to that for a response.

MR. MAIN: Well, People, this is a very voluminous document and I know a lot of coal miners have had time to read it -- scanned it and I've scanned it and I have great difficulties as well. So I'm just trying to sort of like get some clarifications on some key issues here.

MR. REYNOLDS: I just want to clarify that that would be the Agency's response as explained in the preamble at those pages.

MR. MAIN: Well, in regard to the question that we're raising here though, and I'll clarify this, and this appears to bring out that NIOSH has recommended that the 2.0 mg standard be reduced to 1.0 and we have standards that goes to up to 8.0, that that's a clear conflict. And I understand that you want to more thoroughly respond to that. But, you know, just as a lay person here, you just have to draw that simple conclusion. 1 is 1, 4 is 4, 6 is 6 and 8 is 8.

Now, on to the next question. MSHA announced that NIOSH was a party to the single sample rule. Did NIOSH participate in the decision, as part of that single sample rule, to increase the dust levels to 2.33 -- yes, to 2.33 before an operator could be cited? Which is part of the application in your sample rule.

MR. REYNOLDS: What I can read to you directly --

MR. MAIN: Could I have the -- I mean NIOSH is the --

MR. REYNOLDS: Okay, I'm just reading what NIOSH has stated in the document. NIOSH does support efforts by MSHA and anyone else that will reduce miners' exposures to dust and also eliminate or at least reduced significantly the incidence of disease. And that is their official comment on --

MR. MAIN: That doesn't really answer the question. I want to --

MR. NICHOLS: Frank has answered your question. NIOSH stands by its criteria document.

MR. MAIN: It's a very simple question and I would appreciate an answer from NIOSH who's part of the rule making, which was announced to us. Did NIOSH participate in the decision to increase the 2.0 mg standard to 2.33 before an operator can be cited, yes or no?

MR. REYNOLDS: That's not a part of the single sample proposal, Joe. That's in the --

MR. NICHOLS: That's correct.

MR. MAIN: So you're saying they were not part of that decision?

MR. REYNOLDS: They are not part of the plan verification rule.

MR. MAIN: Okay.

MR. REYNOLDS: The plan -- the protection factor which you're referencing is in the plan verification proposal.

MR. MAIN: I want to ask a real simple question and it would be helpful to clear this up if we could get a simple answer.

My question is, did MSHA participate -- did NIOSH participate in a decision to allow the dust levels to go to 2.33 before an operator would be cited, yes or no?

MR. NICHOLS: You can answer that question.

MR. MAIN: Thank you.

MR. HEARL: Our participation in the rule making that's going on today was limited to the determination that an average concentration during a shift can be accurately measured using a single sample. And that --

MR. MAIN: But did NIOSH participate in the decision to increase that to 2.33 --

MR. HEARL: Okay, no.

MR. MAIN: Thank you very much.

MR. REYNOLDS: And the answer is they would not have had the authority to get involved in that, Joe.

It's not their rule.

MR. MAIN: There's a reason I asked that. Because it clearly, again, conflicts with what the NIOSH criteria document recommends in terms of reducing exposure to miners. I'm just trying to get the answer clear, Fellows. That's why we're here.

NIOSH approves the PAPRs that's used in mines as I understand. Would that be part of NIOSH's --

MR. HEARL: That's correct.

MR. MAIN: And the Mine Act currently requires miners to be provided with respirators approved by NIOSH to protect them from the effective dust. Is that correct, Marvin? I'll just ask you that question.

MR. HEARL: That's correct only when there is an overexposure determined.

MR. MAIN: Okay. But for -- I'm just trying to establish that those respirators have to be approved that are used. If they aren't --

MR. HEARL: They do need to be NIOSH approved and made available to the miners at the times when overexposures are present.

MR. MAIN: Okay. Now, if a different filter is used -- let me just get this clear. I think this has been stated by the panel before. I understand there's only one PAPR unit that has been approved for use by

NIOSH, is that correct?

MR. HEARL: No. As I understand it, we -- NIOSH approves a number of PAPRs but I believe there's only one PAPR that's approved that also has MSHA approval, which would also be required.

MR. MAIN: Okay. So, in essence, there's only one PAPR that is approved for use in mines by both NIOSH and MSHA, is that correct?

MR. HEARL: The proposed rule says that they have to meet both MSHA and NIOSH approval.

MR. MAIN: I'm saying currently --

MR. HEARL: The current rule requires both NIOSH and -- requires that a NIOSH approved respiratory be made available.

MR. MAIN: Okay.

MR. HEARL: The proposed rule requires both the NIOSH and MSHA approved loose fitting respirator, which is only the one PAPR at this time.

MR. MAIN: Okay. So the rule then would address that one PAPR as far as the one that is approved.

MR. HEARL: That's correct. At this time there is only one unit that meets those criteria.

MR. MAIN: Now, if -- in the approval of these PAPRs, if a different filter is used than what was approved or a different substance was used in the filter

that was approved, or if the neck skirt was removed from the PAPR, which I understand is a part of that approval, and if the face shield is raised on that PAPR, does that maintain the approval status of that PAPR?

MR. HEARL: Actually -- I'm going to say that, first up, we certify the PAPRs and approval and certification makes a difference. But we do certify the units. Any modification to the unit from what was originally certified voids the certification.

But I don't think that the last item that you had of raising the shield would not void the certification of it. That wouldn't provide the protection that one would expect from using the PAPR if it's not being used properly. But as far as the certification of the unit, using a non-certified filter would void the certification of the unit.

MR. MAIN: By the design of the units, all of those pieces are apparently all connected to have the PAPR perform as it was intended to, the face shield down, the neck skirt on and proper filter in, is that --

MR. HEARL: That's correct.

MR. MAIN: Okay.

MR. REYNOLDS: One thing I think we ought to interject just to clarify is what would be the protection -- the protection factor that NIOSH would have assigned

to an approved PAPR?

MR. HEARL: Well, it would be -- right now according to the NIOSH --

MR. MAIN: Is this a defense question here for the panel?

MR. REYNOLDS: No, I think it's something that we need to just explain so people understand. What protection factor would the -- would NIOSH have assigned to the PAPR?

MR. HEARL: For general industry use the respirator decision logic offers a protection factor of 25 for an approved factor.

MR. REYNOLDS: And what is it that MSHA assigned, Bob?

MR. THAXTON: The protection factor maximum is 4 from the Agency.

MR. REYNOLDS: And were there reasons why MSHA chose 4 rather than 25? This is all described in the preamble on page 10802 and 10803.

MR. MAIN: If you want me to come to it when you finish your questions, I'll do that.

MR. REYNOLDS: I'll continue to --

MR. NICHOLS: Yeah, we're having a full discussion package.

MR. REYNOLDS: It's really necessary that

everybody in the hearing understand, you know, the question.

MR. MAIN: Just don't throw me off here early.

MR. THAXTON: The protection factors that the Agency established are based on the data that was available through the testing that showed that velocities along the longwall face where the PAPRs are being used, effects the protection factor that can be generated. Also the way the PAPRs are used in mining effects that protection factor. So the test data reflected only up to a maximum of 4.

MR. MAIN: To follow up on my questions, with regard to the testing that has been done on these PAPRs, in real life use, and let's say the last three or four years, are you aware of any testing that's done to determine the use of those PAPRs in the factors that you folks lay out here. Whether or not they conform to those factors or not.

MR. HEARL: I'm not aware of any right now, personally.

MR. MAIN: I'm not aware of any either but I mean -- I didn't know if you folks had been --

MR. REYNOLDS: For that reason we specifically ask for comments in this area and ask the public to provide us any information they may be aware of. But

we've asked for that information because the information we have is limited.

MR. MAIN: Because over the last three or four years there's been a lot of information put on the record showing that these PAPRs are not used in their approved state. That the filters are a problem, the neck skirts come off of these because of conditions that miners work in. The face shields were black. And that's not new information. That's something that's been known for some time. As a matter of fact, it was a part of the rule making record in 2000. And I was just curious to see if either MSHA or NIOSH had done any investigations in this important information to determine what the real safety factor or whatever factor you want to call this.

MR. THAXTON: I think you've asked this question at a previous hearing, Joe, in a different manner. But there has been no checking of the current use of PAPRs in the mining industry as to determine whether they're being used as approved. For the simple reason they're not being required as part of an approved respiratory protection program.

As such, to my knowledge, no unit has been utilized in a manner that would meet the requirements in order to say that it is an approved respiratory protection program. That's why we're saying it's so

important in this proposed rule that anybody that does elect to use them, just incorporate an improved respiratory protection program as a part of their plan, so that that way it becomes requirements for that mine.

It does cover all the issues that you're bringing up. That the units have to be maintained with the neck skirts, that they have to have the proper filter in them, they have to be cleaned, maintained, disinfected if they're used by multiple people. They have to be utilized in certain areas. And if they fail to follow all those provisions, then there would be a violation of the plan.

MR. REYNOLDS: And in the preamble at 10863 and 10864 and 10865, we had an example of the stringent requirements we would expect in a protection program. And most of those requirements would address the -- from what I've heard, the information about the problems with the PAPRs. A lot of those are maintenance, proper use, keeping them clean, the sanitary problems that they had, being able to see. A lot of those would be addressed within the PAPR protection program that would be required of any operator that was given -- was allowed to use PAPRs.

MR. MAIN: Let me go back to my question. I have a thought track I've been trying to stay on here.

Bob, you said that these are not required to be that -- I believe under the current standard. And I'm going to step back. Mine operators know that they're put in high or low levels of dust if they get a citation for exceeding the dust standard. Aren't they required to provide the miners approved respirators?

MR. THAXTON: The current requirements under the current regulations do require that an approved respirator be made available. Not that they have to wear it and it's not the point it has to be used. In most cases where we have PAPRs being used that are considered in an unapproved state, there are approved respirators that are available to miners to utilize. So that, therefore, the operator meets the requirements of the regs at that point.

So there is no requirement that we have to go out and see that a particular respirator is in an approved condition. The law only requires that approved respirators be made available to miners at any time there is an overexposure.

MR. MAIN: So at those mines where they're providing these respirators, as I understand you said about 50% of the longwalls at some point in time, that they're currently using these. And if those respirators that miners have that they're using to protect themselves

from this dust currently aren't meeting those standards, you're saying that's not a problem under the law, current law?

MR. THAXTON: It's not a violation under the current regulations, that's correct.

MR. MAIN: So the operator --

MR. THAXTON: It would be under the current -- under the proposed rules if an operator has a PAPR protection program. Situations as you've discussed with skirts being torn off, face shields not working right, not having the proper filter, those would be violations of the approved plan if -- under the 2003 proposal if an operator has a PAPR use program as part of his --

MR. MAIN: I'm going to go back to my question here because I'm a little bit confused.

Mine operator A provides miners with a PAPR currently. That operator goes in and out of dust levels that may exceed the standard. A situation where you would use a citation. That's the so called respirator protection that the miners have given to -- the operators have given to the miners to wear.

In situations where they have been claimed to be faulty by industry, by labor, you're saying that that is -- even though they don't --

MR. REYNOLDS: Joe, I think we're trying to -- I

mean our purpose here was to take testimony on the 2003 proposal and I --

MR. MAIN: This has to do with the 2003 proposal.

MR. REYNOLDS: You're talking about the existing program.

MR. MAIN: Yeah, it's an existing program that has a standard that has to be met now. That our concern is that they're faulty, people know it, they don't --

MR. REYNOLDS: But you're talking about the existing program. We are here to talk about the --

MR. MAIN: The same kind of PAPR with beefed up, mind you, standards. But falling into the same kind of problems we have.

The simple one is when you put all that gear on, the --

MR. REYNOLDS: Well, the major difference in the 2003 proposal is that there would be incorporated in their ventilation plan. All of that would be part of the plan and they would be required to follow these requirements.

MR. MAIN: That's not being followed, that's our point. But to clear up a point that you've raised, one of the complaints that miners have is that because of the design of these, they fog up. That's one of the main

points that I've heard. And that is a creature of the unit that causes of the some problems that requires -- you know, at times, the face shield, the neck skirts to come off. And that's a practical problem with these units that has been in existence for some time and would be believed to be continued in regardless of what's in the plans for the future.

Let me just shift gears here for a second on -- those are minor issues. Because we do have some real concerns about these PAPRs and the fact that MSHA has condoned the use of these faulty PAPRs over the years that we've complained about. And we're still setting with the same problems from three years ago in permitting mine operators to provide those faulty respirators to the miners that isn't working.

And we're getting ready to say that we can now take those respirators, the same respirator that's used, and use it in this proposed rule.

MR. REYNOLDS: Joe, might I point out that we had response to virtually identical comments on page 10801 in the third column. It's almost word for word the things that you're saying now. Where we've responded to those comments.

MR. MAIN: For the 2000?

MR. REYNOLDS: It's in response to problems with

the shroud and --

MR. MAIN: But it is an ongoing problem the Agency had an obligation to fix and they haven't.

Let me go on to another question on the PAPRs because as I -- and I'm going to ask a few questions on this sheet. And I apologize, I just got them this morning.

Now, let's take these miners that you said was wearing these PAPRs currently on these longwalls. Under this rule, with the current use of those PAPRs under the 2.0 mg standard, will any of those miners face the risk of having, through the use of that PAPR, the dust levels increased through the proposed rule?

MR. REYNOLDS: We've been through this before. I think under the proposed rule --

MR. MAIN: Well, your question here is a little confusing and I'm just trying to -- is the dust and the air that miners breathe who is currently wearing PAPRs, won't they have an increase in the respirable dust levels under this rule? Yes or no?

MR. REYNOLDS: What is your question? Are you talking about under the proposed rule or are you talking about --

MR. MAIN: Miners today working on -- let's say longwall A, we have miners today working with a PAPR on -

-

MR. NICHOLS: Which question are you working off of?

MR. MAIN: Those would be off of question -- well, they're not numbered. It's on the back side. By allowing the use of PAPRs with protection factor of 4 -- oh, it's probably the one right before. There's about two or three PAPR questions I had on this.

My question is, this is sort of connected with these to the extent that -- it actually gets into the following answering to the next question. It's real simple. I don't mind today working with a PAPR on. The maximum exposure is 2.0 mg. Does this rule do anything to increase the dust exposure on this longwall I'm working on today with this same PAPR on, to increase the dust that's going to be coming into my environment, beyond the 2.0 mg? Can it go up to 2, 3, 4, 5, 6, 7 where I'm currently working with a PAPR on today?

MR. REYNOLDS: So just to clarify, you're on page 2 of the question and answers, with the questions on the left hand side, is that where you're --

MR. MAIN: Yeah, it's one of the questions. Because I went through it and was confused about what all this does or doesn't do. I just believe that what we have here is a situation where miners are using these

PAPRs today, is that the dust levels in those areas can't be increase above the 2.0 mg level. And just a simple question, will the rule allow the dust levels to be increased in those locations or could it be increased in those locations where miners are currently wearing the PAPRs today?

MR. NICHOLS: At our previous four hearings we've been through the enforcement policy of MSHA on numerous occasions. And it goes kind of like this. The 2.0 mg standard remains in place.

MR. MAIN: By your assertions, I understand that.

MR. NICHOLS: The 2.0 mg standard remains in place. In reality, 44% of the underground mines today operated on a reduced standard because of the quartz content.

Now what our enforcement people do now and they'll do with this new rule is insist on all engineering controls being applied in every area in an underground mine.

Now, once that's done, if there's a situation that's been determined where the operator cannot engineer the problem out to below the 2.0 mg standard or the reduced standard because of quartz, a determination will be made as to whether they can use supplemental controls.

That decision will be made by the Agency's experts and a final decision will be made by the Administrator for Coal Mine Safety and Health, who is a career employee. That is currently Ray McKinney.

If the Agency considers allowing supplemental controls, it has made the determination that the 2.0 mg standard or the reduced standard cannot be handled by engineering controls. That does not mean that our enforcement people are not going to require these areas to be maintained to the lowest level possible.

MR. MAIN: I'll ask my question again. And I think it's an important one for miners who are now working in the coal mines so they understand what this rule does. I'm working on a longwall. Right now I've got a PAPR on, the same one you're talking about. And the standard is currently 2.0 mg. As a miner working, do I expect any change in this rule that will allow the operator to increase that same dust level of 2.0 mg up to 2 or up to 3, 4, 6 or 8, yes or no?

MR. NICHOLS: We're not going to talk about extreme hypotheticals. I have laid out what this package is intended to do. Now if it's not clear, we need to try to clarify that.

MR. MAIN: That's what I'm trying to do. There's miners back here that's going to be working on

longwalls. There's miners setting back there that have PAPRs on now and they've been wearing them for the full shift, Marvin. The only question is a real simple minded one. Under this rule can those -- can an operator get approval to raise that dust level up in the same environment that PAPR is in from 2.0 mg to 4, 6 or 8 mg? Is that possible for that to happen under this rule, yes or no?

MR. NICHOLS: If the miner cannot -- if the mine operator cannot engineer out the problem and the final call is the Agency's, it's not the operator's it's the Agency's. Then the operator can request to use supplemental controls. The Agency will take that into consideration.

MR. MAIN: Well, let me ask a question. It's on the record that yes they can do that, they can do it up to 8 mg, and according to what we were told by the panel on Tuesday, that could actually rise to 9.33 before a mine operator was cited. Which, in our opinion, diminishes the protections afforded miners and conflicts directly with the recommendations that NIOSH made and the others have made about reducing the overall dust standards in the nations' mines.

Now, along this same path, there's a question in this -- and it's on this back sheet. It says by allowing

the use of PAPRs with a protection factor (PF) of up to 4, is the Agency allowing miners to be exposed to dust levels up to 8.0 mg?

I'm going to just change that question, which I don't want to ask it directly in conformity with the Mine Act, which I think is what we need to be doing under the regulations. And I'm going to ask the question this way. Because you've got to ask the right question to get the right answer here I guess.

By allowing the use of PAPRs with a protection factor (PF) of up to 4, could the dust in the mine environment, in active workings, increase above the mandated 2.0 mg set by Congress up to 8.0 mg?

MR. NICHOLS: The 2.0 mg standard is in place. And operators will have to resolve all engineering controls.

Now, if it cannot engineer the problem -- the concentration to below 2.0, then I think we've made it clear this proposal allows for them to ask for supplemental controls. Which means that the dust will be above 2.0.

MR. MAIN: Could it be up to 8.0?

MR. NICHOLS: You're confusing a protection factor with what --

MR. MAIN: No, no, no, no. Here's what I'm

trying to do, Marvin. I apologize for asking the question wrong. The Mine Act -- and just let me read it because I think it's probably better to do that.

I'm just trying to figure out how this conforms or don't conform with the Mine Act. Because that question was a little confusing the way it was drafted and I think that if you look at it in direct terms of the Mine Act, it's not asked right and I'm going to try to ask it right.

Because here's what the Mine Act says. It's under Section 202(b)(2). Effective three years after the effective date of the enactment of this act, each operator shall continuously maintain the average concentration of respirable dust in the mining atmosphere during each shift to which each miner in the active workings that such miner is exposed, to at or below 2.0 mg of respirable dust per cubic meter.

Now, as I read that question, it didn't direct itself to the actual requirements of the Mine Act, okay? Now what I'm asking you is, and I'll do it a different way here. Would this basically say at the end, effective three years after the effective date of this Mine Act each operator should continuously maintain the average dust concentration of respirable dust in the mine atmosphere during each shift in which each miner in the

active working will subsequently be exposed to up to 8.0 mg of respirable dust per cubic meter or greater. Isn't that what we're doing here?

Because what this standard says, in the mine atmosphere in active workings. And the concern I have with the way that this is drafted, it does not address what the current direction of Congress was and where that dust has to be maintained at, at what locations and what number.

MR. NICHOLS: I've done the best I can do. I'll let one of the technical experts here have a go at it.

MR. THAXTON: Part of what you read, Joe, you said -- you know, it's the dust to which each miner is exposed.

MR. MAIN: I read straight from the Mine Act.

MR. THAXTON: But part of what you read was to which each miner is exposed, the dust which each miner is exposed. If you read the proposed rule, we calculate the concentrations through equivalent --

MR. MAIN: Well, but that's --

MR. THAXTON: -- concentrations.

MR. MAIN: So --

MR. NICHOLS: I'm going to allow some back and forth here but --

MR. MAIN: Okay. That is not answering my

question. Go ahead though, answer the question. I'll set back here and relax.

MR. NICHOLS: We won't interrupt you. You don't interrupt us.

MR. MAIN: Go right ahead.

MR. THAXTON: The determination of the equivalent concentration that the miner is actually being exposed to is what we're calculating under the 2003 proposal, is that we're taking into consideration as much as what we can get in a reduction with the engineering controls that are available and then we're applying the supplemental controls. And it doesn't necessarily have to be a PAPR, it can be administrative controls, that they can float people in and out.

It's still what the miner is actually being exposed to in his work environment. And what we're saying is that if you've gone to as much as what you have -- I mean right now mine operators are producing and we have situations where we have high dust concentrations on an individual shift, as we've shown with the samples that we've seen and you've seen.

We know that there are situations out there with today's actions, with engineering controls being relied on, and people saying right now that the engineering controls are the only thing that's being used and you're

saying that you're meeting the 2.0 mg standard.

We've shown what the sample -- the results that was showed on the example this morning. Two out of the five shifts, people were overexposed. But because it's an average, it looks okay. What we're saying is that we need to look at each of those individual shifts, protect people on each of those shifts, push the engineering control envelope as far as we can and get it as low as possible today and then allow the use of either administrative controls or PAPRs to protect people in those situations when they're being exposed to those levels. And the same token, every six months go back and look and if there's any changes in the mining system or additional controls that have been developed through experimentation or work with NIOSH, that those controls then will be pushed to push those concentrations down even further.

But we should be protecting people and evaluating the concentrations that miners are actually breathing and being exposed to so that we can get them protected from being exposed to concentrations that are likely to cause lung disease.

MR. MAIN: I'll ask you the question and you can either say I'm wrong or right. But you've already answered this before, but it's a different style than

this question and answer thing that came out.

But as we read the clear language of the Section 202(b)(2), it is very clear that you cannot raise the dust levels in the mine environment active workings above 2.0 and you're going to raise it under this rule in circumstances up to 8.0 mg, okay? And we believe that conflicts with that. It's a little confusing the way that the rule was -- or this question and answer was laid out here. Because I don't think it really gives a full measure of what's happening.

Now, just on this whole issue, and just try to understand where we're all at here because I think there is a lot of confusion. Under the current rule and the law, can they jack that dust level up to this factor of 4 and use respirators in the circumstances you're talking about? Under the current rule.

MR. THAXTON: Under the current rule they can have a high concentration of 8.0 mg on one shift and the samples on the other four shifts be .5. That would still be on an average of 2.0 mg and they would be in compliance. There would be no requirement for any additional controls whatsoever.

MR. MAIN: Then I will ask the question in this way. Can they legally raise the dust exposure levels beyond 2.0 mg and have PAPRs on miners as an approved

means of raising those dust levels up under the current law?

MR. THAXTON: Under the current regulations if the average concentration of multiple samples collected on the five shifts was greater than 2.0 mg, we would not accept respirators as a means of compliance.

MR. MAIN: That's not --

MR. THAXTON: It would not be accepted as a means of compliance.

MR. MAIN: So we are changing the law here?

MR. THAXTON: That's why we have a proposed rule, yes. We are changing regulations --

MR. MAIN: And we're changing the law in a way that will allow the dust levels in a mine environment, the active workings, to increase above them 2.0 mg, yes or no?

MR. NICHOLS: Only if they can't be -- if the problem cannot be engineered away. At some point here we need to move on.

MR. MAIN: Well, again, just yes or no. So I mean -- I know it's going to take a little time to ask some questions, Marvin, and I apologize for maybe the confusion in some of the questions, but it's pretty straightforward. The law says you can't use respirators in place of engineering controls and essentially you

can't allow above 2.0 mg in the mine environment, the active workings, and the rule quite frankly is contrary to both of those standards. And, you know, that's the point that we're trying to get cleared up here.

With regard to the changes that's coming about or would come about with this rule, which would allow the use of respirators where there is a claim the operator has exhausted the engineering controls and MSHA would approve that, and in looking at the 1969 Mine Act, because I've been spending a lot of time reading that and how Congress crafted that, what's puzzling is that in 1969 we had much dustier mines to deal with. We had less controls. We didn't have shield spray, we didn't have the different controls we have today. What is so different today that would allow the replacement of engineering controls that are claimed to be exhausted with respirators and what Congress looked at in 1969? I think that's something we're all setting here puzzled about.

And Congress clearly said in 1969 in those dustiest mines with less controls, you're not going to do what you're saying that you're going to do with the proposed rules. And that's -- you know, and I take it you could understand, you know, how people's having a hard time trying to figure this one out. It just does

not make sense. It violates the Mine Act.

MR. NIEWIADOMSKI: I'd like to respond to you, Joe. In 1970, and apparently this is being ignored because we're talking about a very important variable here which has changed significantly since 1970. I'll take longwalls because that's -- when you talked about PAPRs, all the PAPRs -- the last survey we did, the only PAPRs that are being used is on longwalls.

In 1970, true, there were very few longwalls. The average production was 520 tons per shift. And this is in the record. That's 520 tons. In 2002, that's 5,500 tons per shift. That's that a significant, significant increase.

And one of the things we've said is, and this is something that I was going to pose a question to Joe, since he's asking the panel and the panel has an opportunity to ask Joe a question, is that assuming that we have a situation where, as I just said, we've had this significant increase in production since 1970. Unfortunately, as you well all know, is that control technology has not kept up with that. And there's a detailed explanation in the preamble that we know of no new developments in engineering controls that have been implemented in the past ten years.

And so we've got a situation here where an

operator is implementing all available controls and which we in fact -- our position is to try to control the mining environment. But when you get to a situation where you cannot continuously control the environment at the applicable standard, as is the current situation out there, because you are well aware that we have thousands of shifts where we've got overexposures. That's during sampling periods we're talking about. The best conditions.

So now we're in the situation where -- whether it's a hypothetical situation or real case situation where you know the operator is using everything and the MSHA experts and NIOSH experts conclude that, yes, there's absolutely nothing else that can be implemented.

Then the question is, what do we do? We have to protect individual miners that have to work in these certain locations. That's our charter. We're trying to protect -- initially, we want to control the entire environment. That was the intent. That's the ideal situation. Then it doesn't matter where a miner works, he's being protected. But if we don't have that assurance, we don't have the technology to provide that, then the question is what do we do?

Do we require that production be totally reduced? Do we in fact shut down the section, whatever?

The question is, when we have a situation like that, what's the alternative.

MR. MAIN: I think the alternative is, and I think you answered a question that sort of lines up where we think this rule is going, to allow increased production and take the cap off the 2.0 mg and allow mine operators to implement mining systems that doesn't have the dust controls with them. It gives them the break that, the dust level is already up, so they can increase production.

I disagree with you 100% your whole theory, George. I can tell you this, that if it wasn't for the stand we had to make, we wouldn't have sprays on longwalls now, we wouldn't have a lot of things.

But the industry understands this, we have a standard that has 24/7 monitoring and we have the real evidence about what's best on this to fix this for these miners. Change the rule, put some more pressure on them. If you take the pressure off by developing engineering controls, they will develop them.

Since you raised the question, I just want to have the opportunity to answer here and just tell you that, you know, you've laid out a case. You're saying okay, let's take the hamper off of these engineering controls for future mining operations to increase

productivity and jack up the dust levels.

Now there's a whole ton of ways to fix this problem. Just because the mine operator wants to produce 30,000 tons a shift and jack the dust up, should they be allowed to do that or should they be required to -- whatever system we're going to build to keep that dust level in conjunction with the 2.0 mg standard set by Congress. That's the whole debate here.

You know, our whole view is if you're going to build it for the mining of coal and you're going to build to keep in compliance with this standard, that the miners -- as NIOSH pointed out, to lower that dust level and as the miners have pointed out, we need continuous monitoring to double check that system every day.

I'm fearful the way this rule is drafted, it's already taken operators off the hook with regard to having sufficient ventilation in the mine. You have this ventilation standard that triggers the use of these PAPRs at the highest levels. If a mine operator doesn't exceed what's permitted, they would be eligible for the upper levels.

And as one of the commenters pointed out the other day and a thing that concerns us, for Peabody may develop the air shaft, the entries, and the sub-veins to supply the air. Operator decided not to do that and so

when you get up on the section you haven't got enough air and guess what, you've already condoned it and set us all to -- you know, to raise the standard.

And MSHA in the past has been reluctant to require mine operators to put sufficient air in these mines. And what your proposal is about ready to do is set a standard here that's going to encourage operators not to put in enough air, that would enable them to go to higher dust standards. I mean that's, you know, pretty clear to us.

As far as the speed of the shearer -- you know, let's talk about this feasibility. The speed of that shearer has a lot to do with the dust concentrations and that can be controlled. The depth of the cut, the speed of the pan line. Putting your belt air on -- you know, on sections which are proposed to do with high velocities. Where are we going with this? If you don't use those as

-- you know, if an operator wants to mine coal, as Congress said in '69, get with the program here.

We are setting up a stage to really liberalize the dust levels in a coal mine to increase productivity and we are not aiming at what NIOSH aimed at, lowering the dust levels in these coal mines to get the miners out of the dust.

And we think it's that simple. And we think you've laid out a case to support that concern.

With regard to -- you know, I'm probably going to save a number of these questions. I think this question, the last thing, is somewhat favoring -- embracing of a rule as opposed to some real truisms here that people need to understand about what this rule is about. And we do take exception to the way that this is crafted. That it doesn't really ask the whole questions that we would ask.

But, you know, I'll part with this last question. Why is it that you're proposing to remove the miner operator responsibility to do dust sampling six times a year? And why is MSHA not bidding to take as many samples as the operators are taking now? It says, the proposal still calls for mine operators to take dust samples only the purpose is different, to verify that their dust control plans will control the dust as required. Then it also says MSHA also intends to take samples for compliance purposes at least every two months. Without the cumbersome system of averaging, we will not need as many samples and will be able to determine compliance more quickly and efficiently. Single sample determines make it possible for MSHA inspectors to conduct more spot check inspections.

What's not stated in here is a couple things and I just want to be clear to make sure I'm right on this. The current proposal does have specific requirements, regulatory requirements that compliance has to be met.

For sections, the thought here is, where is it in the new rule that I can find the specifics of the requirements for those dust standards? Sections or outby areas. Where specifically in the rule can I find that?

MR. THAXTON: For the sampling?

MR. MAIN: For the compliance of sections and outby areas?

MR. THAXTON: As I stated earlier, Joe, during the summary, the requirements for sampling are in MSHA's inspection procedures which are not part of the rule. They're on the web site now as a draft for people to look at in conjunction with the rule.

MR. MAIN: So those standards are no longer in the regulations?

MR. THAXTON: There are no standards in the regs because there is no operator requirement for sampling at that point. The Agency does not write standards -- the compliance sampling is going to be taken -- that function will be taken by the Agency.

MR. REYNOLDS: We mentioned this before, but the Agency decided that the enforcement procedures and

policies should be in their inspection handbook. And it's in Chapter 1 of the inspection handbook, which is available along with the proposed rule for people to look at.

MR. MAIN: Which --

MR. REYNOLDS: And I think we've taken your -- and I think we understood it was your position that you think this should be within the CFR text.

MR. MAIN: We say that. I think we told the panel very clearly that the last time in 2000, which didn't get too much of an ear.

Now, this policy which is subject to change, is that correct? The policy on dust sampling subject to change without regulatory action.

MR. REYNOLDS: Again, it's in the inspection handbook which the Agency could change, yes.

MR. MAIN: Yes, okay. And in that policy, as I understand, which is no guarantee, what MSHA plans to do as far as sampling is on some sections as little as three samples, three samples a year, is that correct?

MR. THAXTON: As we showed in the presentation this morning, Joe, in those scenarios, is that certain MMUs, if they qualify with low dust levels, then they can be skipped every other bimonthly period. It doesn't mean that you only get three a year. Each bimonthly period

stands on its own.

At this point we've also only projected that about 10% of the current MMUs would qualify under that program, which is only about 80 MMUs throughout the country at this time. Eighty out of 800.

MR. MAIN: But there is mining units that would only have three -- by policy, three compliance samples a year, is that correct?

MR. THAXTON: Only if each of the samples that we do collect meets the critical values that we've stated. So each -- if we take one bimonthly period sample and it's low enough, then, yes, we would skip the next. But if we come back the next one and it's high, they're back to every bimonthly period.

So it's not necessarily if somebody skips one is not only going to get three. They may skip one and get four. They may skip two, they may skip three. Only the very best ones are going to get to skip three in a year.

MR. MAIN: The point I'm trying to make is, just so some miners understand this, some miners, probably miners set in this room, may wind up with only three compliance samples on their section a year.

MR. THAXTON: If they do, it will be on sections that we have shown through sampling as having very good controls in place that result in compliance at 95%

confidence.

MR. MAIN: Okay. With regard to outby sampling, as I understand what MSHA claims they're going to do, they would do one sample a year in outby areas, is that correct?

MR. THAXTON: The proposed inspection procedures do call for us to sample outby areas once a year.

MR. MAIN: And with regard to the NIOSH criteria document by the Federal Advisory Committee, and NIOSH could dispute this if they want to, but it seems to me that the plan actions of sampling fall far, far short of that recommended or anticipated by either of those two recommendations.

But it appears what we're going to do here is determine a miner's exposure to unhealthy coal dust in these outby areas and one sample is taken a year.

Now, with regard to the questions here on how to insure samples --

MR. NICHOLS: Joe, we have Q's and we have A's. So I think these stand on their own.

MR. MAIN: But the questions --

MR. NICHOLS: We've got -- okay, but we've spent a lot of time at the last four hearings and you're going to be at the next two hearings. We've got 25 miners signed up --

MR. MAIN: I understand.

MR. NICHOLS: -- that I'd like to hear from. And as soon as we can here, I'd like to kind of move on.

MR. MAIN: I know. And I think what miners have told us recently -- they really what to understand what this rule does and, you know, I think there's some real concern here whether these questions ask -- but I'll hold those off and ask them later. I want to do two quick things here.

One is, at the first hearing there was discussions about the dust fraud in the industry and claims that the -- that those were rhetoric. And I just want to clear the air that those are not rhetoric. And just provide for the record --

MR. NICHOLS: I don't remember the rhetoric.

MR. MAIN: It was one of the witnesses from the industry that testified that -- I believe he used that word. At least that's what my memory is.

MR. NICHOLS: Yeah, but I hope I've made it clear that the Agency takes full credit for prosecuting those.

MR. MAIN: No, I didn't say that MSHA said it was rhetoric. I want to make that clear. It was one of the witnesses.

And we do appreciate that action, Marvin. The

action didn't have to be taken and we view MSHA's policy to reduce dust sampling in coal mines, that we've said things about that, but opened up the door for these kind of activities to take place.

In any event, I want to put in the record a list of criminal cases that were prosecuted for fraudulent dust sampling practices and these came from your own Agency. I received these some time back, in the summer of '99. It's not even a total inclusive list.

And I did say in my testimony that there was about 160. After refining this list, actually there appears to be about 200 -- I think 199 cases in total of dust fraud. One was in Kentucky here by the way.

And I want to put that in the record. There is a ton of companies, a ton of individuals here that have been prosecuted for conducting fraudulent dust sampling.

And there was another case in particular which was the Triangle case, which is -- which was prosecuted by Glibner, that involves a sampling company and a number of mine operators. And what is concerning about this, when you look at the 200 that I mentioned doesn't even get to the depths of the problem --

MR. REYNOLDS: Joe, could I clarify that you're putting this in the record to show your support of MSHA doing all the compliance sampling under the new proposal?

MR. MAIN: I'm putting this in the record for a number of reasons. Thank you for asking the question.

MR. REYNOLDS: I mean is that the purpose of it?

MR. MAIN: The purpose of it is to establish a fact that we have had a major problem in this industry with fraudulent dust sampling. Where operators have tried to hide the dust that miners were exposed to --

MR. REYNOLDS: Under the 2003 proposal MSHA would be doing all the compliance sampling.

MR. MAIN: The limited compliance sampling, okay. Now this gets to a bigger point here. The compliance sample proposed by MSHA doesn't do the trick and I want to explain here.

But there was 33 companies -- and I won't take the time now, but 33 companies was identified by this one case. It's not part of the 200. But this thing is widespread, far beyond what these numbers show. That there is people in companies that have been prosecuted for violating that law and exposing miners to dust conditions.

And the theory is, or where the regulations fall short is that -- while the cat's away, the mice will play. And if there isn't constant surveillance of that dust in those mines, verify any plan that you want, it doesn't make any difference when MSHA's not there. If

you look at the thrust of what these cases tell you, the dust control is not in place.

And in many of these mines it was miners that had no miners representative to speak out.

MR. REYNOLDS: I have a question. Is the logical that during sampling the operators do something different, is that what you're trying to tell us?

MR. MAIN: Well, let me put it this way, I think there's been a ton of miners come here that recognize that and hopefully you've heard --

MR. REYNOLDS: We've never gone through this process but let's talk about the intent of the rule. The intent of the rule was to require the operators to do all those things that everybody says they do during sampling, all the time. I mean I think we've never gone down this street, but the purpose of the rule is to impose an obligation on the operator to do everything that they do when the sampling is going one. Which means put all the controls in place all the time on all shifts. And to beef up the requirements for the ventilation plan so that they have to do that on every shift.

We've never talked about that. The sampling -- I mean what we're hearing -- what we hear is that during sampling the operators take -- they do things that they don't ordinarily do. And the purpose of the plan

verification proposal is to make them do that on every shift. To put all those requirements in the ventilation plan and they have -- instead of sampling, to go in and make sure that the controls are there and that they're in place on every shift.

MR. MAIN: I think the point -- we're talking about two different issues here and let me explain what my issue is and what these court cases, criminal cases, has taught us. Is that when the samplers are gone, verify anything that you want, those controls are not in place. Line curtain is not put up, water pressure not checked --

MR. REYNOLDS: What I'm saying is, under the plan verification rule there would be -- the operator would have to have those up all the time. That would be the focus of MSHA's enforcement, making sure that controls are there.

MR. MAIN: But you're missing my point here. I'm trying to explain to you, if you give me just a second, that the plan verification doesn't work in these schemes. Verify the best plan that you want. When you walk away from there the plans, as verified, are not being followed, okay? And what's happened is that miners are exposed to dust levels and there needs to be a better way to deal with that. The MSHA proposal on plan

verification does not fix that problem. And what does fix the problem, there's only one or two things that we saw is have an MSHA inspector there fulltime where you have these widespread kind of problems to identify, or have a continuous monitor there to monitor -- build it as tamper proof as you can to prevent those practices. Because at the end of the day, we believe that that group of miners is the most harmed here.

And that's one of the arguments that's been raised for years about getting the continuous dust monitors in the mines. Plan verification don't fix that problem.

But I'll introduce in the record the criminal cases and the cases from Triangle Research, which had a lot of companies involved as well.

One final thing and then I'll get off of here. Is I just want to read a section out of the law. Now this is the legislative history on the Mine Act dealing with respirators, which Congress soundly rejected as being used as an alternative to engineering controls. And this was what the original language, which states that basically this was a committee report with regard to that. This is on page -- I'll give you my book but this --

MR. REYNOLDS: Okay, this would be in regard to

substituting respirators for engineering controls?

MR. MAIN: That's primarily what it says --

MR. REYNOLDS: Okay, and under the proposal we're talking about supplementing and exhausting all feasible engineering controls.

MR. MAIN: A play of words, substitute or exchange. In any event, Congress wouldn't let -- would not allow to be done what you're trying to do in this rule. But I'm going to read this.

The use of respirators. The committee expressly prohibits as a general policy the use of protection, personal protective devices, including respirators, as a substitute for environmental control measures. Both the Public Health Service and the Bureau of Mines consider such a device to be neither desirable or practical for rigorous physical operations involved in coal mining.

Admittedly, certain types of respirators such as those built with built-in air supplies were attached to a source -- a filter -- fresh air commonly called supplied air respirators can provide virtually 100% protection. Use of this equipment has been for emergency situation for persons exposed to -- which have a rapid effect on life or health after short periods. And for non-emergency situations which control measures or other measures -- means of minimizing the exposure are not

practical, the mechanical -- respirable filter respirator, a more compact device, which might be used in a coal mine situation, present special problems. The medical testimony raised serious doubts as to the abilities of the filter to trap the particulates and respirable dust which cause pneumoconiosis.

Secondly, the Department of Interior reported the use of such devices significantly reduced the ability of miners afflicted with pneumoconiosis to breathe.

The ability of air to pass through the filter decreases with the increase of contaminates. There is a resulting possibility that the worker will remove the filter and not replace it, thereby negating the protection he's been provided.

In the case of supplied air respirators, the possibility of carbon monoxide going into the supply line also cannot be -- the record demonstrates that there are extreme difficulties in obtaining cooperation from workers asking about personal protective equipment.

It should also be noted that with regard to respirators and similar devices, a comprehensive maintenance problem is necessary to keep them effective.

Unlike the miners' health and safety goggles, respiratory protection equipment may be defective, although there's no obvious external indication.

Respiratory equipment requires careful fitting and there must be a continuous technical effect to clean, inspection and maintenance.

Accordingly, it is the view of the committee that this type of equipment cannot be used as a substitute for environmental control measures but rather should be used only in those specialized occasions -- or capable situations specifically authorized in the bill.

And I think it's pretty well straightforward on that. And when you say that, gee, we're going to let them get out of putting engineering and administrative controls on respirators, call it anything you want. It does what Congress prohibited under the Mine Act. Thank you very much.

MR. NICHOLS: All right, thank you, Joe. Let's take a ten minute break and then we'll pick up with Linda Chapman.

(Off the record.)

MR. NICHOLS: Okay, our next presenter will be Linda Chapman.

Hey, back in the back there, could you close that door and if you need to talk, how about stepping outside.

Okay, Linda, go ahead.

MS. CHAPMAN: Thank you. My name is Linda

Chapman, C-H-A-P-M-A-N. My husband's name was Carson Chapman, better known as Bear.

I was at the meeting in Charleston a week ago and addressed the panel. They was gracious enough to be patient with me while I talked to you and I thank you for that.

But since we met here and there a week ago, there's 32 new widows. That's how devastating this disease is. Every six hours we lose a new miner and there's a new widow.

I've been hearing a lot about this continuous monitor that the miners are really excited about and what they think that it will do for them.

I was told that what is maybe really the issue is the cost of these monitors. And that this monitor could run as high as $7,000 a unit, per miner. Let's look at the cost of this disease for just a minute, from my perspective, from my level.

Now, the last ten years of this disease that my husband endured, believe it or not the cost -- the medical cost went over $1 million. Now, a lot of us would think now that's just ridiculous, there's no way. But it does.

I can give you another example. A miner by the name of Mike Self died at the age of 51 years old. A

lung transplant that failed. What did that lung transplant cost? Mike got in a helicopter going back to Pittsburgh because he was in trouble. His lungs was filling. Even the new lung failed. What was the cost?

If each miner's disease has a medical cost of $1 million, that would buy 143 units. That would buy 143 units a $7,000 a pop.

If we lost 32 miners since last week when we met in Charleston, that would purchase -- if their cost went to an average of $1 million in medical cost for each miner that died, that would buy over 4500 units. And we could measure the dust. We would know whether they were safe in the air qualities that they were breathing.

If we only check one time, one sample, to cut out all this averaging, I don't think we're going to save miners' lives doing that. You know, I heard that if they would save 42 miners lives, and I think, Bob, you said that's not much. I think that's a lot, to save 42 miners lives. So 42 other women don't have to walk the walk I walk every day.

I just told you a little bit about the medical cost. Once this miner contracts this disease and he's been diagnosed, one of the first things he does, he files a claim. And there a new battle begins. A new cost factor is figured in. Administrative law judges, law

firms, doctors being hired to say the miner doesn't even have the disease. The bounty on a miner right now, I call it a bounty because I've been through this process for ten years. When that company sends that miner to one of his hired doctors, it's $500 a pop. And he's paid to tell that coal company that miner doesn't have this disease. And this is a practice that goes on every day. Every day.

On March the 6th, '96, the company sent my husband to their doctor. And I took a day off from work and took him. We got there and the doctor says, you know, I think your husband is in congestive heart failure, I won't examine him today. And I said, what? He said I won't examine your husband today. As a matter of fact, I think he needs to see his heart doctor.

And Carson's heart doctor happened to be in the same medical building, so we just went straight upstairs and did that. That doctor called this doctor back and said, listen, he's in some congestion but you need to go ahead and do your test. He'll be okay, you can do your test. He refused. He says I won't do the test. I don't think I'll get the results that I need to get.

And then later when we went to court before an administrative law judge, there was a 72 page report on where he examined my husband that day.

So then I had to get busy and prove that he didn't even examine my husband, which I was able to do that. Had this doctor disqualified. But he got paid to examine my husband for an examination that never even took place. That's what we face every day out there.

Eight to ten year battle is what the average coal miner will fight the system to try to get benefits once he's been diagnosed with this disease. What's the cost factor in that?

And after an eight to ten year battle, 7% are awarded their money. Do you know what usually happens before that 7% are awarded? He dies.

And then by the law that Reagan passed in '81, the widow starts all over, proving again that her husband had the disease. They won't go off of his proof. She has to go back to court. There's the cost.

And her battle, if she can live long enough, is eight to ten years. She's not successful. The miner's not successful in court. Because the Labor Department says we can't hire lawyers.

If you can't hire a lawyer, he's not going to represent you. I went before an administrative law judge, asked my husband six months before he died, where's your representation, Mr. Chapman? He says, we can't get representation. He says I find that hard to

believe.

What world is he living in? He's an administrative law judge, he sets there every day looking at miners that don't have representation. Do they think we're in it just for the fun of it? What's the cost there?

I fight a law firm, 243 strong. That's how many lawyers is in the law firm that the coal company that fights me every day has on their side. And I go to court without representation. There's only 16 lawyers taking federal black lung cases in the United States. Did you know that?

You know, we've been talking about a lot of numbers here today. Sixteen lawyers. If you had 1500 lawyers die a year -- or miners die in a year from this disease, how many of them are actually being represented? How many is actually going to fight for them? Nobody.

Two nights after my husband passed away, we didn't go to the funeral home because he'd been sent off for an autopsy. You're usually at the funeral home the second night. When they finally brought him back, we went to the funeral home that night -- the night before I was crying, I couldn't sleep. And I had a little nephew who's three years old. He come up and he patted my arm and he said, it will be all right. Aunt Linda, it will

be all right. And I picked him up and I hugged him and I said, no, honey, I lost my bear.

Now I didn't know the impact I was having on that young child when I said that. The next night when we went to the funeral home, my mom tapped me on the shoulder. I was standing up by the casket. My mom tapped me on the shoulder and he said look back there. And I turned around and Sam was coming through the back door dragging his favorite teddy bear. He brought it up front and he said, Aunt Linda, you can have my bear, you don't have to be sad any more.

Now here was a child three years old was living the scripture where it tells us to take up the cause of the widow and comfort her. That little child was doing that.

And you all have an opportunity to fix some of these rules. You don't lower -- or higher the numbers up. You go lower. Keep them safe so there won't be any more widows.

I know a man by the name of Charlie Harman. He's a businessman in our town. Charlie was in World War II and he told me of an incident where he was trapped behind enemy lines. His whole company had been slaughtered. And he said when he heard the first missile coming from an air strike, he said he only had time to

say three words of prayer, Please, God, no.

When the shock from the shell hit him, he said he doesn't remember how far he was thrown through the air. But he survived that attack. 173 of his comrades did not. Seventy-one more died later.

And the point Charlie was making with me was, that was World War II and they were killed by friendly fire. Something we didn't hear of back then. Friendly fire was something that we became known to us during the Vietnam war.

The reason I bring this point up is, it's your job to keep these men safe. And I think you try very hard. I really do. I think you're trying to be true to what you do. But I think if you start lowering the bar, are you going to be killing men? Will it be friendly fire on your part? You know, ask yourself that.

I do think we're trying to save lives here. I really do. But we need a continuous monitor going so that the numbers can't be fixed and they can't be falsified. Because that's what the operators do. And they're looking for loopholes. They constantly look for loopholes, how they can get around the standards that you're setting.

And I think this new rule, this one sample rule, is exactly what that is. It's a loophole. And we can't

afford to lose any more miners.

You know, when our birthdays come around, my husband and I we would really make that a special day for each other. You know, a nice dinner, a gift, a card. He would get me roses, maybe a box of candy. I miss that. I really do. And I miss it a lot. I shouldn't maybe, but I do, I miss it. And I miss doing things for him.

The miner that dies from this disease, it's a horrible death. It's not quick and sudden and peaceful. It's horrendous. It's like living your life with a sock in your mouth and a clothespin over your nose. There's no quality of life.

Today is my birthday. There will be no roses, there will be no special dinner. There will be no card.

So then I'd have to ask the question, what's my cost? How do I measure my cost of loss?

I just beseech you, you know, just keep those rules stiff. Keep these operators measured. Don't let them pull the wool over anybody's eyes. You know, they do trick you, they do pull the wool, they do find the loopholes. But the bottom line is, they're not fooling anybody. The miners are still dying.

You tell us if the levels are 2.0 mg that we're cutting it back, we're saving lives. The miners are still dying. NIOSH knows that, that's why they're saying

maybe we ought to go lower. You know that, too, the numbers are there.

I don't see how I could say anything more to get my point across, I really don't. It's a cost -- I know you can't measure cost. I mean I gave you some measures here today but you really can't measure the cost. Thank you.

MS. NICHOLS: Thank you, Linda. Bob Cox?

MR. COX: My proper name is Robert Cox, but living in a small town everybody calls me Bob. I guess because that -- you know, if you get mixed up and spell it backwards, it's still okay.

But anyways, my concern here today, being a 35 year underground coal miner, doing that every day of my life for 35 years, as well as representing the men I work with at the mines, the six mines that I've worked at in my long career has taught me one thing about coal mining underground. You don't do anything before you weigh the cost. You don't flip the switch just to see if the light's going to come on.

Once you flip that switch, if that light does come on or don't come on, it can set off a reaction that cannot be stopped by no one. And a lot of times coal dust is involved in what I'm talking about, stuff of that nature.

I've watched a lot of my friends and neighbors die with years from black lung as this lady previously noted. And it's not a pretty sight. And I think probably some of you all have seen it. If you come from mining communities, most people that's involved in mining comes from mining communities or families that was involved in mining.

And I appreciate you all's concern about the safety of the miner. You all are about all we have got to keep us alive. I worked for 35 years knowing every day that I might die at any minute. And that's a terrible burden on you. But it's still in the back of my mind where I might die from related causes also.

But I still don't want to see any more of my friends and neighbors do it. And that's why I traveled some 200 miles today. I live down in western Kentucky, a little town called Beaver Dam, a little mining community, next to Muhlenburg County, it's Ohio County where I live.

But I can't for the life of me -- you know, I consider myself modern and I don't fight all the changes. Especially if they're for the good. But I can't imagine raising the dust limit in the mines and that being good. Because the first thing that hits my mind is, even outside of black lung, you've got fires, you've got explosions, everything is related to coal dust in a coal

mine.

And when you talk about putting an Airstream helmet on someone, I never even seen one of them. And I heard people talk about them and I was at the hearing in Evansville the other day and I heard a little about that. I mean to me that's looking backwards. You need to eliminate the problem, not try to leave the problem there and work within it. That would be like putting a deep sea diving outfit on a baby to give it a bath. Just don't put so much water in the pan, you know.

The same way about the coal dust. Just don't put so much dust in the mines. That way you don't have to put a helmet on somebody like they're fixing to play football or something.

And, you know, just taking simple terms like that. Because that may be the reason I'm still alive to be here today, too.

Always, like I said, before I do anything I always think about, well, what's this going to cost? What's this going to do? You know, and that's why I really want to impress upon you all is to really consider, you know, what you're looking at, what you're going to do here.

Just like on the single sample thing there, well, you know what, that sounds real good. You know,

just going to do it one time and it's going to eliminate all this stuff and everything and we won't have to do it four or five times. That sounds real good, you know. But it's not. Because I'll tell you why. They only have to worry about it one day then. They can be good one day and comply and they're all right. They're home free for a long time.

The way it is now, it's not perfect now. But you've still got some things in place. And by the way, I have traveled with many, many inspectors over my 35 years and been a mine examiner myself, that's what I've done the last 16, 18 years, been a mine examiner. Traveled with the inspectors. I've been trained in dust sampling and I'm certified to do dust sampling and -- generally speaking, you know. It's changing every day, getting above me even now on all this.

But doing the single sample, I want you all to really think on that hard and everything because I don't see that as being a plus to the miners. And, you know, it's the little things like the miner has the right to be present when the inspector is making his inspections and this, that and the other. It shouldn't be that he has the right, it should be that he has a responsibility to be there. Because you're talking about peoples' lives and safety and health and the whole deal, you know. We

don't want to cut out anything that -- people being involved in the process at the mines. There's enough things at the mines that's not known now that's killing people every day.

And I don't very, very much about it at all, but that personal continuous sampler that I've heard you talking about, seen pictures of, I believe really ought to let them get that thing refined and really do the job and I really believe that that could be a benefit to everybody in the future. Not only the miners, the operators.

I'm sure, you know, operators don't want to have to fight this battle every day over this dust and over these laws and all this. And we need to run our mines.

But my goodness, we've got so few coal miners any more, less than 100,000 they tell me. And a whole lot less than that even working. That's counting supervision, management, everything. You could get them all at a NASCAR race, every one of them.

But the importance of them -- I say that, you know, because they're important. Look what they produce. Look what they provide for America, 50 some percent of the power.

And they're worth taking care of. And, you know, we've got to have the industry but we've got to

have the people to work within the industry, too.

And then my concern is that you all will take all this in consideration and don't do anything, you know, to get something changed too quick before you know what the reaction might be. If there is a better way out there, then look at it. Don't flip that switch too quick.

And, Gentlemen, I thank you for your time.

MR. NICHOLS: Thank you, Bob. David Jones.

MR. JONES: Good morning, I'm David Jones. That's J-O-N-E-S. I haven't changed it. I wrote down a few things I wanted to say.

You know, I strongly urge this panel to reconsider this proposed rule. And it's been several years since I've worked in the coal mines. And to allow the coal companies to raise dust levels in mines will kill more miners.

Miners get black lung and many die. I know black lung kills because it's near and dear to my heart. I lost my father when he was 49 years old. And I urge you to scrap this proposed rule. And, you know, this kind of sounds like this is corporate greed versus the coal miners' needs is what it sounds like to me. Thank you.

MR. NICHOLS: Thank you. Tom Sweeten.

MR. SWEETEN: Good morning again, Mr. Nichols.

MR. NICHOLS: Good morning.

MR. SWEETEN: Panel. My name is Tom Sweeten, S-W-E-E-T-E-N. And I represent Local Union 1545 of the United Mine Workers.

I thank you again for the opportunity to speak to you. I was in Evansville and as I mentioned in Evansville, I wasn't fully up on the issues of this and I'm still not fully up on it. I had mentioned that we had a mathematician here and after reading this, it looks like you may have had a few statisticians stuck in a room with him, too, because there's a lot of mathematics and statistics in there that I'm not really qualified to comment on.

So I'll hold most of my comments to how I feel about this rule, and I think I made that clear the last time. But again I'd say that I think this rule should be -- shouldn't be implemented until some more input is given from the coal miners themselves.

My comments come from myself. Mr. Main is a real good friend of mine, but I'm a free thinker and I form my own opinions on this. I wasn't influenced by anyone in the Union or MSHA or management or anything, it was just on me.

The math formulas might as well have been

written in sandscript as far as I was concerned. I don't know where it goes up to 8%, I don't know if it stays at 2.0 or 2.33. I know what has been -- the testimony that's been given. I do know that it says when you have to go to the PAPRs, that it will -- it has to be as a result of increased dust, or that would be my understanding of it.

I'm still confused, as I said before. Marvin mentioned about -- when I mentioned I was confused about the mathematics and the figures and everything, he said that when Bob Thaxton gave his speech or his presentation, that that clarified it for him. Well, Marvin's heard this presentation I know three times and probably more than that. Not in a public hearing but by having it explained by Mr. Thaxton and other people from his office.

But 99% of the people, the miners that this effected, won't hear Mr. Thaxton's speech. I've heard it and I read his handout and I still don't understand it. And I think that this strengthened what my stand was, that this rule is not understandable by the regular coal miner, the regular safety committeeman or the miners' representative.

Because, as Marvin said, he had to have this explained by Mr. Thaxton in order to understand it. And

again, Mr. Thaxton's not going to get to explain this to most of these people.

I guess even by reading this proposal that economics is an underlying issue. I think George at the end there, I think one of the questions he asked Mr. Main probably reinforced my feeling of that.

Well, I don't have to have economics explained to me, Folks. I was laid off July the 8th of 2001 and I ain't worked a day in a coal mine since. In twelve days, they're closing my mine down. So I understand economics.

Consolidation Coal is one of the largest coal companies in the United States. And they didn't close that mine because of anything in the Act or anything in 30 CFR. They've never said that they was closing that mine for having to obey the regulations and laws. It was a downturn in the economy and it was because that they weren't being profitable at that mine. And we did everything we could to make it profitable. But it was just a downturn of the economy. It wasn't because of the laws or anything else.

As I said before, I'd like to comment quite a bit on the use of these PAPRs or P-A-P-Rs, what we call Airstream helmets, because I've used them. There's a couple of us in here that's used them. And what the result would be if this part of the rule is enacted, and

then after that I've got some questions when I get done, a couple questions, that I couldn't glean out of this.

On page 10787, paragraph 3, and I assume this is in the preamble, and I quote here, Under the proposed rule if a ventilation plan cannot be verified using all feasible engineering or environmental controls, the mine operator may be permitted to use either powered air-purifying respirators, PAPRs, or verifiable administrative controls, or a combination of both, as a supplemental means of control. And then it says see section III.D. Hierarchy of Dust Controls. MSHA may, under certain conditions, approve such use only after the Administrator for Coal Mine Safety and Health has determined that all feasible engineering or environmental controls have been adopted in the ventilation plan, but miners continue to be at risk of overexposure.

Now, again, that's where I would base my fact -- my feelings that overexposure would probably mean over 2.0 or 2.3 mg.

And I believe this is directly against the Act. Now, this will have to be hash out somewhere else besides here. And no where in here did I read, and I haven't read word for word, but I've gone over it and I haven't had anything specifically said to me that says 3, 4, 5, 8 mg. But I think that it's implied and that's one

of the examples.

In another statement in the preamble regarding the frequency of outby sampling, the justification for only sampling the outby areas once per year is that if you have a lower concentration of respirable dust at the face, it makes sense that you're going to have a lower concentration of respirable -- and by the way, float dust, on the outby areas, if it's reduced in the source.

Then the concentration may go up and require the use of PAPRs but no mention is made of increasing the outby testing. It would seem -- and let's use the -- let's use a 4.0 mg standard. Let's say that your respirable dust went up to 4.0 mg, by the thinking in the preamble then your outby float dust and respirable dust would have to also go up. That's the thinking from the preamble.

So I don't understand why if there's a use of PAPRs in here, at least you don't increase the use of outby testing. Either management or the operator or MSHA. It seems to me like there's a conflict in there.

Also on page 10787, and this is a second quote from this page, it's the paragraph after that -- or it's in the same paragraph. District managers may also approve the use of supplemental controls for limited periods of time when unusual or intermittent adverse

conditions can result in miners not being fully protected by the approved dust control plan.

Let me interrupt myself here just a minute. What is the limited amount of time there?

MR. THAXTON: Thirty days?

MR. SWEETEN: Pardon me?

MR. THAXTON: The regulation says no more than 30 days.

MR. SWEETEN: Thirty days, okay. I interpret this to mean that the District manager has the discretion to -- and without comment from the representative of the miner, no comment from the miner?

MR. THAXTON: It would be part of the operator's plan that's submitted, which the miners' rep does have the option to submit comments when that plan is being reviewed for approval.

MR. SWEETEN: So then they would -- they would have to submit a plan, it wouldn't just be to go to, let's say, Jim Oaks in District 8 and say, Mr. Oaks, we're coming up on an anomaly and we will need 30 days to get through this?

MR. THAXTON: No, they have to spell out in their plan and have that supplementary control -- supplemental controls spelled out in their plan and how they're going to use them, where they're going to be

used. And like I said then, they would only be able to use them for a maximum of 30 days without --

MR. SWEETEN: Where is this stated?

MR. REYNOLDS: It's actually in the part of the rule that would be in the 75 CFR.

MR. SWEETEN: Okay, I can find it. It's not in the preamble then.

Okay, as it's in the plans now, and there's been numerous -- as a matter of fact, the standard operating procedure for some districts, that they say they cannot maintain their air velocity and their quantity on the longwall face until they achieve a major roof fall or a certain amount of distance has been gone. Let's say 1 to 5 or -- I don't even know what each plan specifies.

And then they are not -- until that's achieved after the initial start up of a longwall, they're not responsible to carry -- let's say if you have to have 300 feet velocity and they're not under any kind of quantity for that period until they get a fall. Will the PAPR plan be the same way then?

Let's say -- and I don't see anything in here and, again, I haven't read the rule, I apologize for that, I didn't find it. But let's say that it's just in the ventilation plan and we have a right to comment on it, that it's in the ventilation plan that for the first

250 to 500 feet or until a major roof fall has occurred, then PAPRs will be worn, regardless of what the dust tests have shown for.

MR. THAXTON: If I'm understanding what you're asking, when you first start out a longwall panel, there are going to be sufficient -- there are going to be certain engineering controls that have to be present.

From previous practice, the District will understand what's common or what's useful in their area for that particular mine. Those controls will be required to be in place. The operator can also submit that I'm unable to assure that the ventilating air current is going to go completely across the face and do what I want it to do because I don't have a fall yet. Until I get that first fall, I can't assure that.

I want to use powered air-purifying respirators as a supplement for the beginning of this panel until I get my first fall. That would all be included in the proposed plan. The miners' rep would have the opportunity to submit comments in relation to that during the review by the Agency.

MR. SWEETEN: Okay, why I'm bringing this up, because before when it said that PAPRs would only be approved after the Administrator, after it went to the Administrator, and now we've changed it to where the

District manager can do it and it doesn't have to go any higher than that.

MR. THAXTON: You're looking at two different situations. Supplemental controls for less than 30 days is not something where we're saying that we've exhausted all feasible engineering controls. This is a short duration exposure that we're trying to put something else in to account for that short term exposure.

When they have to go through the Administrator, that's when an operator has exhausted all feasible engineering controls. There are no methods available to them to maintain that entity. And at that point, the evaluation is made by the Agency and it goes to the Administrator for Coal Mines. So the operator cannot utilize that supplemental control program for more than 30 days without exhausting all feasible engineering controls and putting it as a permanent fixture in the plan.

MR. SWEETEN: But it could be used multiple times. I'm saying the multiple time would be each start up of a longwall until you get a major roof fall. But what if that's over 30 days? And that's possible to be over 30 days.

MR. THAXTON: If it's over 30 days the operator has to resubmit a plan that spells out the respirator

protection program and stipulating that the Agency would have to determine that they have exhausted all feasible engineering controls.

If there are other controls that the Agency thinks would be applicable to reduce the exposure, the operator would be forced to do that before they would be approved.

MR. SWEETEN: I'm not understanding here. Maybe I'm not phrasing this right. If you put it in the plan and you just mentioned you could, that PAPRs will be required -- I mean -- this is a scenario, this isn't written in stone. And this plan says PAPRs will be worn until you get your first roof fall or -- and there's a footage in there also, let's say 500 foot, if you don't get attain the first roof fall of 500 feet within 30 days, then they have to resubmit that? Because it's already in their ventilation plan that it gives -- it doesn't give a time limit, it gives an event.

MR. THAXTON: But the use of supplemental controls without exhausting feasible engineering controls is only permitted for 30 days. After that point the regulation requires that the operator has to go through verification of the plan, establishing that all feasible engineering controls have been put in place before they would be allowed the use of PAPRs or administrative

controls to gain compliance.

MR. SWEETEN: So that --

MR. THAXTON: That's under -- I mean there's two sections that you need to look at in the reg itself. 70.209 under the proposed rules and 70.212, both go to supplementary controls, when they can be used and how they can be used.

MR. SWEETEN: Okay, thank you. So then even though it is in the approved ventilation plan, the miner has a chance to look at it. If there's any comments or anything, PAPRs are approved till, like I said, an event as opposed to a time line. It doesn't matter if that event isn't reached in 30 days, they still are -- they still -- PAPRs still can't be used on that face then?

MR. THAXTON: Yes. For only 30 days, period, that's it. That's written actually in the reg itself.

MR. SWEETEN: I shouldn't have interrupted myself. One thing, and the supplements -- or like the supplements on a plan like that, if your air goes out on your belt and some mines do. Most of them with longwalls will bring the air in the belt, but some of them go out. That's also going to increase your dust in the outby area, especially at your transfer points and at your regulators and everything, where people have to work on the belt line and everything. Having that outby areas

tested once a year is just -- I disagree wholeheartedly with that.

MR. NIEWIADOMSKI: Can I just make a comment? That right now all outby areas that's not within 200 feet of the face are 2.0 mg. I believe that the belt air provision requires it to be maintained at 1.0 mg, which is much more stringent than we currently have. And there's no more limit -- you know, for example, right now if it's outby 200 feet, it's 2.0 mg. And it doesn't matter now, we're going to be requiring from 1.0 mg for cubic meter as the standards --

MR. SWEETEN: If you don't test it but once a year, how are you going to know it's 1.0 mg?

MR. THAXTON: Well, we're going to be checking it. And of course that -- so -- well, we realize now if intake air is used on the belt, belt intake air is used for -- intake air is part of the MMU. It's sampled each time we sample the MMU, if that's the case.

MR. SWEETEN: I'm cognizant of that but I didn't say that.

MR. THAXTON: Outby -- and you're saying if the air is going out the belt line --

MR. SWEETEN: Correct.

MR. THAXTON: -- as exhausting as opposed to intaking, and that's true. Under the current procedures

that are proposed in our inspections, we would only take samples outby once a year.

However, if the data that has been presented and available to us since we've had these regulations in -- the dust samples, does not show inspections in the outby areas, if you have data that indicates that there is going to be higher concentrations in certain areas outby, then I encourage you to submit that information to the committee so that it can be reviewed and determined whether there's -- adjustments need to be made.

MR. SWEETEN: How am I going to get data without a dust --

MR. THAXTON: The current data, we -- I mean the operators are required to sample outby areas that are designated areas six times a year. MSHA also samples once a year currently.

Like I said, we've reviewed the data for the last -- since 1981 on looking back and sampling results. Most recently we've looked at 2002 as the latest data available. We do not see high dust concentrations being shown in outby areas on operator or MSHA samples collected. That's the basis of part of our determination on the frequency of sampling that's needed.

If you have information that would, you know,

show otherwise, like I said, I would encourage you to bring that to the committee in written form so that you have it to present it to us.

MR. SWEETEN: I don't have the information, of course, because right now supposedly we're on a 2.0 mg rule. However, if other people are right on this and we go up to 5, 6, 7, 8 mg, like I said before, common sense is going to tell you if you're that much on respirable dust, your float dust is going to follow. And we're not going to have the data because there is going to be sampling once a year.

I mean you're asking me to compare apples and oranges here. You're asking me to give you data under a 2.0 mg rule when we're going to be under raised milligrams, if this is correct. If what we say is correct, I mean I can't give you any data when we're under a 2.0 mg rule on a 6.0 mg, what's going to happen on that. There's just no way I can do it. And you're not going to collect your data except one time per year.

MR. NIEWIADOMSKI: The operator -- there is no change in the provision that requires an operator to establish designated areas outby, to maintain those designators -- designated areas at or below the applicable standard. He has to identify the controls you're going to be using. We're not raising any

standards. He's going to have to control levels outby.

MR. SWEETEN: Okay, I think we've about got that poor old horse on his knees now, so we'll quit that.

MR. NICHOLS: Do you think we can keep him down there?

MR. SWEETEN: I believe he's wanting a drink. And I'm just going to hit on this just a little bit on the outby and like I mentioned before, if you do increase your float dust on the outby areas, it's been shown through tests at -- or a demonstration at the Academy at Beckley and of course by a disaster down in Alabama that killed 13 miners, that any increase in float coal dust is definitely, definitely hazardous to the health of the miners and to the property of the mine.

Mr. Main and even this rule has gone ahead and they're -- everyone, and myself included, advocating the use of the PDMs, the personal dust monitors. And I am, too. I know that in the question, and I don't have it with me the question and answer sheet that you handed out this time, it was mentioned that the cost was forbidding. And I believe it was from seven to fifteen thousand dollars, that's on the back there. Per unit.

I don't think cost was a figure -- was a factor when we went into our SESRs and MSHA required every person there to carry an SESR or in my case, at the mine

I worked at, we had a storage plan. I can't dispute the figures that it's seven to -- I mean the research cost and everything else. I would like to see the use of the PDM. I think there was another thing mentioned in there and correct me if I'm wrong, but I believe it was -- you're wanting to get on with this and to protect the miner. But we've been kind of hashing this out for a good while. So I believe -- I don't know when this would be ready. I think someone said probably by September to have a working model of this. Now, I don't know if it's in production or not. But again, I'd advocate the use of the PDMs strongly to detect how much dust that we all are breathing.

I don't need a PDM to tell me when I leave for vacation on a Saturday and by Tuesday I'm still -- pardon me for being indelicate, but blowing my nose and hacking up coal dust for three to four days and it gets in the corner of your eyes for three or four days. I don't have to be a -- have a degree in medical science to know that I'm getting a lot of dust down there, Folks. I don't have to have a PDM to tell me that. But I do have to have a PDM to implement and enforce the laws.

I believe in the Act. It's helped me quite a bit. I filed numerous 105(c)s and 103(g)s under the Act when I felt that was required. I just got done with a

103(g) that went all the way to the Solicitor's office.

MSHA can solve -- other coal companies disagreed that you should have two escapeways in the coal mine. Even if that mine is idle. I wrote a 103(g) on it and the Solicitor's office, by using the Act and by the law, determined that, yes, that was correct. So I believe in it.

I believe that this rule changes the Act. And I don't like to see it changed. It's not perfect but it's all we've got now and it's worked for me quite a bit. It's kept my job.

This will probably go to court if it's determined and that will be between attorneys and the Solicitor's office and I definitely don't want to get in the middle of that any more.

On the PAPRs, one other time, and I brought this up in Evansville, but I think it's important enough to bring it up again. As I said earlier in this presentation, I am a past PAPR user. It sounds kind of like I'm a drug addict or something, but I'm a past PAPR user and I'm trying to quit now. But I mentioned they hurt your neck. They are terribly uncomfortable.

We have a lot of weight on our heads anyhow because of the hard hat and the hearing protection and your light. And again, you can't wear -- and under the

new ones maybe you can, but on ours -- maybe the gentleman from NIOSH could comment, can you wear ear protection with these? Can you wear the muffs along with the plugs?

MR. HEARL: I'm not sure.

MR. SWEETEN: I don't know on the newer -- I know we couldn't. And see, in there, under the new -- the previous hearing regs, we have some miners that have to wear dual ear protection to stay in compliance because of their test and they have hearing damage. And it is required that they wear -- so here we go, we've got a PAPR on and now we've got plugs in and we don't have this.

And I will add that that PAPR does magnify sound. It condenses it in there and it does magnify sound. So, you know, this is kind of going against itself right there.

They fog up of course, even the spray doesn't work on them. They're unsanitary. As I mentioned, you might have four on a section. We change out at the face. If a guy does -- is able to go change his filter up at the work station and clean them out, they just use spray. And if someone has perspiration or some kind of cut or open sore on his face, the other guy has to put it on right over it. The threat of hepatitis and things like

that's pretty bad. The filters plug up. If you're in a heavy dust atmosphere -- now I know that I can get 20.0 mg of dust in a shot. And then if I took a test I still wouldn't be over 2.0 mg. A lot of times that filter will grab that. It also gets moisture in there and it plugs them up, makes it hard to breathe. The face shelf gets dirty. You try to wipe them off, you can't see.

So I've got a proposition for you guys. You're going to go to Birmingham and you're going to go to Colorado I think, two more meetings, is that correct?

When you're setting up there listen, put a PAPR on and set the whole time. Just put one on and use the air. Every once in a while have somebody come by and throw a little coal dust on the front of it. Try to communicate, as close as we are here, with me -- well, I won't be in Birmingham, but with the person at the desk.

Take that filter and stop it up to 50% efficiency because that's what you're going to have after about four hours. Now I don't have any math or statistics to back that up but I'd say that's probably what it is.

And then when you're setting here and everything, about three hours into the presentation with the guy next to you to switch them over. And hopefully he's got a fever blister or something. Because that's

what we have to do at the face.

I'm trying trying to flip on this. That's exactly what happens. And these guys are working down there, they have to work for sometimes ten hours on the face there. At least eight hours. If they work ten hour shifts -- or at our mines we worked 12 hour shifts, we changed out at the face with the guys that had been working ten hours on the face. That's reality.

You set there and it wouldn't hurt if you took these back to the office -- make it a five and a half foot ceiling, too. So you've got to lean down with that thing on your neck.

I mean we're talking something here -- and the reason I'm bringing this up, Folks, these guys ain't going to wear these PAPRs. I can tell you right now. Well, I don't think they will. I don't know, but I don't think -- I know what happened in the application that I'm familiar with.

MR. REYNOLDS: Mr. Sweeten, I just wanted to ask you one thing. I may not wear a PAPR in my office for a while, but I did actually go --

MR. SWEETEN: Yes.

MR. REYNOLDS: On 10863 and 10864 I know there's a lot on that in the rule. But there is what we expect the operator to do to address a lot of the things that

you've brought up here. And I just wanted to mention that, you know, if you have any other suggestions for them to -- I know you don't want us to --

MR. SWEETEN: Well, I've got some suggestions where you can put them.

MR. REYNOLDS: If there's anything in there that we missed in all the list of requirements that we would impose on the operator to address some of the concerns about fever blisters and -- I mean in here we would expect to have a PAPR for each miner and to identify the PAPR for that miner and to do all the maintenance and to avoid the clogging and some of the things that you mentioned.

MR. SWEETEN: Okay.

MR. REYNOLDS: And if there's anything we missed, we'd appreciate it if you'd look at it and let us know. Other than I understand you don't want to use PAPRs, but just in case you slip and put one -- you know, what would you expect somebody using them.

MR. SWEETEN: If I slip and put one back on my head, they're going to have to reopen the coal mine. That's probably not going to happen.

What was that page number again, please?

MR. REYNOLDS: It's 10863.

MR. SWEETEN: Thank you. Mr. Nichols, during my

presentation in Evansville two or three times you mentioned the single sample rule, reading that, when I started railing against the companies and everything.

And I said I'd read it. The single sample rule is an improvement. It has to be, rather than using the averaging. But I must give you an example of this or how I feel about it.

Let's say that we was out in the hall drinking a cup of coffee and I mentioned my car was going to quit on me. And I said the brakes aren't any good and it's not running right and I said I've got to get a decent car. And you said, Tom, I've got a car, let's go out and look at it.

We went out there and I said, Marvin, the engine's blowed up in it, the transmission is laying on the ground and all the windows is blowed up. And you said, yeah, but, Tom, it's got good brakes on it. Now that's kind of how I look at that.

This rule has got a whole lot of bad with it, but it's just got one good thing about it that I could see. And again, you've got -- I haven't read the whole thing.

I have one other question that I forgot to bring up a while ago. And what is the exact time of the sample time? Under MSHA, as I understand it, it's 480 hours --

or I'm sorry, minutes, correct? How about under the operator?

MR. THAXTON: The operator sampling that's required is verification sampling or quarterly sampling. Both of those are full shift production time. The sample is turned on when the miners reach the MMU, and the sampler is turned off when the exit the MMU at the end of the shift. That's what I was saying this morning, if they actually spend nine hours on the section, not counting their travel time, then the pump has to run the nine hours.

MR. SWEETEN: Okay, so it's not actually portal-to-portal then. It's production time on the MMU then.

MR. THAXTON: Correct. And we say it's the time that the miners step foot off and get onto the MMU and when they leave the MMU.

MR. SWEETEN: Okay.

MR. THAXTON: So it's not when they actually start turning the drums over or anything. It's when they actually show up on the MMU.

MR. SWEETEN: Okay. Okay, thank you. That's all I have.

MR. NICHOLS: Okay, Tom. You wouldn't be opposed to us sampling at a higher rate of production either, would you? Rather than the 60% that's required

now, you'd like the idea of us requiring a higher level, wouldn't you?

MR. SWEETEN: I'm glad you mention that. I'd have to figure out -- and this happened at my place. It's kind of like these mathematician things. You really don't know what figures you're getting. Because sometimes we would sample under raw production and sometimes we sample under clean coal. And I'll give you an example of how that happened. I'm on a section, let's say -- and I'm going to use a driving section as opposed to a longwall section. And how many shuttle cars did you get? A hundred. Well, there's ten ton. We go to a thousand ton.

That's not how sometimes they figure that. They'll take the mine wide and say -- well, they go by footage any more but I'm used to shuttle cars, ten shuttle cars, this means 600 ton because mine wide. Well, we've got the longwall thrown in there and I know this is getting complicated and believe me, I've got enough crap running around in my head to get complicated.

And they used the longwall and everything, mine wide. Unless they need more or less production and those figures can be wiggled.

So as your question, I really don't have an opinion to where you have more production or less

production. I know how it worked at our place for a while. And it was changed.

MR. NICHOLS: Okay, Tom, thanks. Okay, Gerri Penski Mohr. And I hope I got that name right.

MS. MOHR: I am Gerri Penski Mohr. That is M-O-H-R. And I am a coal miner with 20 years experience. Eighteen at the face, 16 on a roofbolter.

I can tell you with some certainty that when the coal operators were conducting a dust sample, they were not taken in compliance. We were asked to do our -- it was suggested that we should have to do such things as hang our sampler in the intake. We -- if we were on a miner, we were told to be sure and stand behind the curtain. And on many occasions we would have the belts to go down mysteriously when we were carrying the pump.

So if the operators did not comply with the way things are now, we certainly cannot expect them or trust them to comply with any new regulations. And I personally do not see how one sample could ever be faulty, knowing the way that they do their sampling now.

I have not ever used one of the PAPRs. I know when I was working I would not use another miner's gloves. I would certainly not put on his boots. So I don't think that if they asked me to put on his respirator that I would feel very comfortable doing that.

I know that you can contract bronchitis, flu. Those are minor. What happens to the man that contracts hepatitis, TB or even worse, HIV. Anyone that's worked in the coal industry knows that the coal operators only do what they are required -- what they are made to do. The fact that you have written in there things that they have to do to keep the PAPRs clean and sanitized is not going to happen.

You're going to come in to change at the face and your boss is going to say you do not have time to go sanitize your PAPR, put it on and get to work. This comes from experience with other areas that they tell you that things have to be done. You have to -- on a unit where you're running a diesel car, you have to change your filter or clean your filter. No, we do not have time to do that. You will do that if the belt goes down or if the miner goes down.

So I know personally that the coal operators cannot be trusted now nor in the future. So I would be very concerned about using a PAPR.

Also, we are still having cases of black lung every day. One of the gentlemen said that the outby area is normally very clean for us to breathe. However, I have a very good friend that just was -- well, not just diagnosed, she has recently gotten her award for federal

black lung. Most of her 22 years was spent outby. I would like for someone to tell her that our outby air does not need to be monitored regularly. Explain to her how she got black lung from outby air.

I definitely would advocate the PCDMs. And there is no reason, no reason, why with the advent of manual technology research why these cannot be researched and provided, cost effective, for every coal miner.

And I think that that is the answer to our problems. We need 24/7, 365 days of air monitoring. That is the only way we are going to get rid of black lung. Thank you.

MR. NICHOLS: Thank you, Gerri. As with our three previous hearings, we're going to work through lunch and not take a lunch break. Our next presenter will be Russ Stilwell.

MR. STILWELL: It is good afternoon by a minute I think. Good afternoon. My name is Russ Stilwell. I appreciate coming down here and I'm going to be very brief.

And I just want to say for the record -- and I listened to the testimony over in Evansville and it amazes me of the years I've been in the mining industry, it just amazes me and I hope that that is caught with this panel as well, when we get coal miners coming out of

the mines to testify before these hearings, that they really tell it so simple and so clearly and so pungent that it's crystal clear on what needs to be done. I really hope that you all understand that. Because it just does amaze me when I hear these gentlemen and ladies before me tell their story of what it's like in a coal mine.

And I think the one person that summed it up as well, and I think it deserves repeating, and it was a bit funny but it really made the point come home. I don't recall his name but when you're giving a baby a bath you don't put deep sea scuba diving gear on a baby, you just lower the level of the water in the tub. Now that makes sense where we come from in coal communities. I know that makes sense where you come from.

And I think the same thing. And I think in reference to the PAPRs, it's like we can do the mining and product the miner at the same time but requiring these PAPRs. But I think also from what Mr. Main said earlier, that a proposal was that if we take the milligrams from 2.0 mg to 1.0 mg, that that's kind of like lowering the water for the baby getting a bath. I think that's what he was saying. I think we all understand that. That if we're not getting the job done -- and this lady, I think it was Ms. Chapman, talked

about the human cost, talked about the financial cost, talked about all the costs associated.

And then with these personal monitors. That to take that into consideration is something that I think this Agency needs to do. And I started in the mines in 1970 and I really didn't realize how unsafe it was until I left the mines in the '80s because it was a dramatic improvement for the better, without question, without doubt. Without MSHA, the Act came in in '69, and the real implementation probably hit my mind in the very early '70s, without doubt did a marvelous job, without doubt have saved a lot of lives with the safety enforcement you have in MSHA. I think it's a wonderful Agency and the mine workers and many others would probably agree with that. That it's a strong agency and it's a strong enforcement.

However, when we look at the occupational diseases and dust control, we need to make it equally as strong as we can.

And then I think lastly here, and I just looked at these questions this morning, referring to -- the one I always like to look at because I said the other day I do have an opportunity from time to time that we get to make laws in what I do in my job over in Indiana.

MSHA looks forward to availability of personal

devices and have incentives for their use. Don't know when they're going to be available. But then the thing that concerns me moreover, the units that are projected cost a lot of money, 7,000 to 15,000 or whatever that case may be. It's uncertain when we can expect the industry to make a complete transition. That's number one.

Number two, I think we've heard so many miners, at least in Evansville, I assume in the other locations, I don't know, I assume, that this is the best methodology to determine dust in the mines.

And I hear here that, well, we're not sure when they're going to be available but I think I heard from the gentleman from NIOSH yesterday that they're in a test case now and it's reasonably likely but not guaranteed, reasonably likely at least some point this year if the tests in the field are indicative of the test in the labs, these things will be commercially available in very short order. Unless I -- I think I heard something similar to that.

MR. HEARL: What I said was I think that the -- the testing in the field is beginning this month and it's going to run through August. And then commercialization would follow. But that's actually for a matter for the private sector to do that.

MR. STILWELL: Okay, sure. Well, I didn't hear that clearly. Thank you very much.

But it's uncertain when we can expect the industry to make a complete transition to the device. And I would suggest -- or I guess number one, I think the rule's inappropriate and probably need to come back and make a new rule, including this and other comments made.

But it wouldn't be uncertain to expect the industry to make a complete transition to this device, it would not be uncertain if you required the industry to do that. It just wouldn't be uncertain. It would be certain. Much like I said the other day, and that was just one example, I suspect there would be thousands of examples of government agencies saying this is not going to be allowed any more. Miles per gallon for a vehicles. It's pretty high now. Twenty years ago it wasn't very high. Air bags or seatbelts and on and on and on. It doesn't become uncertain when an agency says, no, it is going to be certain. And then when you have rationale to back it up because -- why it will be uncertain. I don't know which person you go back to. I guess I could go back to Ms. Chapman for -- the rationale is, we all want the same thing. I know the Agency wants that. I have no doubt, the Agency wants to eradicate the dust and black lung in the mines. I have no doubt you all feel the same

way, I have no doubt whatsoever that you feel exactly like I do.

Let's start that process. I think the Agency -- you've got the teeth to do this here and I think you've demonstrated in other aspects of this Agency, you've got the teeth to be real strong. You've saved a lot of lives, this Agency has, over the years.

I think it's time when we get into the dust monitoring and how that you implement these standards. And I understand the productivity. And we want the mines to be productive. My God, they're productive today beyond imagination of 30 years ago. With a whole lot less coal miners. But we're still losing a thousand miners a year, more or less, if you will, to black lung. And it's unacceptable.

But this Agency, and I implore upon you, to use these personal devices and require them. And it won't be uncertain whatsoever. It won't be uncertain whatsoever. I would suspect that the industry and others really fought the '69 Act in a big way. I wasn't part of that debate but I suspect they really didn't like it a lot.

I also suspect that many things that MSHA has required that the industry didn't like, and for the good of the miners. And ultimately for the good of the industry. And I implore you to do the same thing on

this, is -- hopefully, that you review coming out with this rule and that we don't see statements -- and I know this is just a Q and A, it's not part of the record, I understand that. But don't say that it's uncertain when we can expect the industry to make a transition. Come out with a rule that says this will happen so that the miners will have the peace of mind that it is certain at a given time when we'll have these devices so that they can monitor on a daily basis, on a 24/7 what's going to occur. I think that's probably in the best interest of the miners throughout this country.

Ultimately it's probably in the best interest of the industry. Sometimes we have to force an industry to do something they say they can't do. And without doubt it's in the best interest of this Agency to continually protect the interest of the miners. So I appreciate putting this on the record and appreciate you coming to Lexington.

MR. NICHOLS: Paul Newton.

MR. NEWTON: I'm Paul Newton, N-E-W-T-O-N. I look up there at your panel here and I realize that probably you would have a really good job if it wasn't for coal miners. And I thought, well, maybe I could get a job with -- half of you have gray hair and I have gray hair. I don't know whether that's a criteria, probably

not, but I just realized that there's a lot of differences in the way we feel.

There's a couple things that I'd like to ask about and I don't understand, I'd like to ask Frank. On these dust monitors that you're talking about, this one here that you gave me the picture to, my question is, are they effective in measuring the quartz that's in the air? You said that they measure just -- what I understood -- let me explain what I understood and maybe I didn't understand it all, but that it just measures the amount of dust and it vibrates to that and that vibration is what measures that amount of dust that comes down to this instrument.

Then does it measure the amount of quartz that's in that dust?

MR. HEARL: Quartz would have to be measured separately because the only way to really analyze quartz, the way it's done now in mining, is with an infrared device. It's back in the laboratory basically. There are no sample -- there are no instruments now that measure quartz directly.

MR. NEWTON: Okay, that's what I was wondering, if that instrument did that.

I've heard and I've never wore the helmet. I wore other things in the mine, I've had to wear masks at

different times, and when I was doing a lot of the clean up, falls and grinding up the rock and getting it out of the entry, especially the belt entries, tremendous amount of dust, tremendous. And we wore masks. And setting there on the miner just pulling the levers, keeping that thing going, wasn't a real big issue physically.

But when you got out and you had to do something else, where you moved a cable, where you had to prepare other things, it become impossible to breathe. It become impossible to really get your air, because you're limited on air anyway and then you limit again by putting something on your face. And even if it didn't stop up, even if you had a fresh filter, even if you had a brand new one, in just a little bit you were sweating profusely, you couldn't see with your goggles. I mean it was just impossible.

And the first thing you do when you can't breathe, is fix it so you can. And you just pull it off. And that's what's going to happen with these PAPRs. When you can't breathe, you're going to have to remove them. So you're going to breathe.

MR. THAXTON: Are you talking of a negative pressure respirator that you actually had to seal to your face --

MR. NEWTON: Right, right.

MR. THAXTON: And this was done how many years ago?

MR. NEWTON: Several years ago, several years ago. Before these PAPRs even came out. And I realize they're more of a loose fitting, it's got more air volume. But even when you restrict air to your face or to your head, you're going to get hot. You're got to get hot immediately if you start working very hard at all. You're going to get hot even if you don't have anything on and you're working hard. But it adds to that.

MR. THAXTON: But you're expressing what happened when you were wearing --

MR. NEWTON: Right.

MR. THAXTON: -- the negative pressure respirator.

MR. NEWTON: Right. Yes, okay. One question -- one thought that I had also is with George here. I think George said it pretty well. That we're talking about production. And I thank you, George, for your honesty. Because you talked about that the production has increased. The production has increased tremendously over the years. The production now is much greater than it was when I was in there.

But what happens is, if we throw away safety because of production, and you guys never have agreed

with that, but it seems at this point you're kind of agreeing with that. You think that production should be -- we can get production -- it's okay and we can let dust rise because we've got to keep production going.

But there's so much that we can do. If we can put a man on the moon, can't we -- can't we bring the standards of dust control up in our mines? If it's a forced issue, you know, if they said we have to do it -- you guys say they have to do it, they're going to do it. And then the personal monitors is a must. This dear lady, birthday today without her husband, I wish I had a rose to give to her today. And I think the statement she made was, and the way I feel about these issues, is please, God, no. Please, God, no. Thank you.

MR. NICHOLS: David Owen.

MR. OWEN: Good afternoon. I'm David Owen, O-W-E-N. And I'd like to ask the panel a few questions. First, in previous hearings a lot of emphasis and time was spent on the example given and your explanation of the 3.2 and the single sample. On how the miners experience the 3.2 mg of dust would be better off because he or her company would receive a citation.

Number one question is, how does this lessen what that miner is breathing for that day, or for the days in between from the time the sample was taken till

the reports get back? How does that lessen what he is breathing?

MR. THAXTON: The results of that sample result in a citation which requires corrective action. So the plan parameters would probably be increased, actions would have to be put in place that would prevent that from happening again. So that you're actually preventing that exposure then in the future.

MR. OWEN: In the future. Until the next sample is taken and it's out of compliance. What about the time frame between the time that the sample is taken and the time that --

MR. THAXTON: You have to realize, too -- I mean in comparison to what you have today, they're having to take five samples and waiting for those analysis to come back, so it takes longer. So you're not able to take action quicker. The single sample allows us to recognize and determine the overexposures in a faster time frame because you're only relying on one sample. And based on that sample, then we're going to require the operator to take corrective action and get those actions in place quicker.

So you're going to reduce the amount of time that a miner would be exposed to those higher concentrations.

MR. NIEWIADOMSKI: Let me add to that. Okay, what -- which is kind of important, is that we recognize that. We recognize that single samples by itself is a tool for us to identify overexposures. Once an overexposure occurs, whether it's a sample the way we sample right now or through a PDM one, it's took late, okay? People have been overexposed.

So what we're trying to do, which is the so called -- the cornerstone of this rule making is to design a plan that has to be in place each and every shift to prevent that from happening. And what we're saying is, we're going to raise the bar on production, not on 60, let's raise it to what is normally produced and let's design the plan to make sure that people aren't going to be overexposed on non-sampling shifts, okay?

So that's our -- what Bob was trying to identify is, by using single samples we would in fact take action. But what we want to do is, we don't want to take -- as far as we're concerned, if we design a plan and it's implemented and you have to check on it to make sure it's being followed before production begins, that we're not going to have those instances. And that's what the problem we have right now is, all those instances add up and over the years you're going to develop the disease. That's what we're trying to prevent.

MR. OWEN: Well, in response, your answer does not address -- where in this proposal does it address those issues?

MR. THAXTON: Which issues?

MR. OWEN: The issues that you say that you are wanting to guarantee every day compliance. There is nothing in this proposal that guarantees them every day compliance.

If they take -- and my second question is, what about the other 360 days that he's not being sampled? What about those days where they come in and they follow their plan and they control their dust and they keep it down to 1.5. What is to say -- then he's done for the next year.

What happens to those days in between when you're not there? There's nothing in this proposal anywhere that guarantees, and this is what you're saying that you're wanting to do, you're wanting to guarantee compliance 365 days a year and I'm asking you, where in this proposal does it guarantee that? Or even stipulates to it.

MR. THAXTON: You have to realize that the plan parameters, if they are complied with, then we're saying that you have --

MR. OWEN: If they are complied with.

MR. THAXTON: Yes. And I mean all of this is conditional on people actually putting in the controls that are necessary and adhering to them. That's why we have the on shift exam that you determine that the controls are in place at the beginning of each production shift and then you have reason to believe, because you have the parameters in place that have been verified to show that they do control the dust, that you can see just because you can see those parameters in place, that you can think that you're going to be in compliance for that shift.

If an operator chooses not to put those things in place and run in contrary to what's been verified, that's true, that can happen if we're not there.

By the same token, if he's taking a sample on every day, if that sampler is not run in the right place or if he takes the reading and just doesn't record it or make any notation of it, it doesn't do anything. It's all of it. Whether you're taking samples or whether you're just -- where you're working with the dust control parameters, you're relying on the mine operator and the miners to insure that the controls that have been found to be effective, truly are in place.

If you sample every single day, taking a sample every single day, unless you are sure that those control

parameters are in use every day, is not going to change anything. Taking a sample every single day and showing that you're overexposed still shows you're overexposed.

But taking samples either every day, once a week, once a year, as long as those samples show that your controls that you have in place truly do control dust, gives you reason to believe, and us reason to believe, that you're being protected so that you will not develop disease.

The answer for us is that we need the controls that actually work. We need to sample often enough to determine for sure that those controls continue to provide protection.

MR. OWEN: You need to sample every day to guarantee that they're followed.

MR. THAXTON: That's --

MR. OWEN: PDM is the method to do it, to do this.

MR. THAXTON: We're hearing your comments in relation to that, and you are free to make that comment to us in relation to that point.

MR. OWEN: Another question I have is, if they are cited, what type of citation is it? What kind of penalty is involved? And how do you go about abating it?

MR. THAXTON: The citation that would be issued

in relation to an overexposure, is that what you're asking?

MR. OWEN: Correct.

MR. THAXTON: It would be a citation under 104(a) for overexposure. They would exceed the limit. The penalty associated with that depends on the mine itself and where it falls under the Part 100 regulations, as they do right now. It would be assessed the same way.

As far as the abatement, the abatement has two different avenues that can be addressed. If the problem that caused the overexposure is something minor and the operator corrects that, the Agency will come in and collect the abatement samples. We will collect samples the same as we did to put them in noncompliance. We will come in and collect the samples to show that there is compliance.

If the required corrective actions though are a major change and it results in that the plan needs to be changed, then the Agency will probably push the operator to say, you have to revise your plan and you have to resample under plan verification to prove that those parameters work.

If they do that, then we can abate the violation.

MR. NIEWIADOMSKI: It would be an S&S violation.

Any overexposure would be an S&S citation unless an operator is using approved respiratory protection in accordance with current regulations. Just like we do right now. Every excessive dust citation would be designated S&S.

MR. KOGUT: One clarification on what Bob said about the abatement. The first option that you brought up, you said that the abatement would be dealt with in the same way as the compliance determination. Actually it's a little bit more stringent because before an operator is cited under the proposal, the measurement value would have to exceed the CTV value as listed in the table of 70-2 on 10879.

But in order to abate that citation, all these samples would have to be below the applicable standard. So, for example, if the applicable standard is 2.0, then the abatement sample would have to come out less than 2.0.

MR. OWEN: Now, we're all here today, really, to let you people know that this -- there is no guarantees in this proposal. This proposal is useless. It is absolutely useless to a coal miner.

There is no guarantees in here. You say you want to -- you know, we're coming in, you'll do this and you'll do that. We're not getting this done now. We're

not going to get it done later.

When you lessen the amount of sampling that you do that is required to be done, there is no way you're going to afford the same protection towards that miner as what the current rules do.

When you change these, when you lessen them, they're going to get lessened. If all they have to do is comply one day, one day and they're clear. And it's -- it's ridiculous.

Again, you know, in previous hearings I've asked the panel questions and I didn't receive an answer. And I'd like to ask it again. Approximately five years ago the Agency expended a tremendous amount of time, energy and tax dollars on investigating dust sample fraud. What in the last five years has changed, other than politics, to make you feel that these people that you so vehemently tried to prosecute five years ago are now all of a sudden so trustworthy that they can formulate and verify their own dust plan?

Now there's a lot of lives, coal miners' lives, and there's a lot of billions of dollars riding on your answer to this question. I take it with all your --

MR. THAXTON: I was waiting until you finished your question.

MR. OWEN: I'm finished. I'd like to have an

answer. What has changed other than politics in the last five years that all of a sudden these people that we spent all this money on to prosecute, now all of a sudden are the good guys? They are just unquestionably trustworthy.

MR. THAXTON: I think you've seen and heard people testifying there were over 162 cases of mines, companies, individuals that were tried and found guilty of dust fraud. We have prosecuted the ones that we felt we needed to prosecute and had the evidence to do so.

Just because we found some people that were doing that doesn't mean that we have painted the entire industry as not being able to collect samples and have samples that are truly representative.

If you also look at the inspection procedures that came out with this particular rule, in addition to the fact that we -- yes, we have the operator collecting the verification samples. It states in there that MSHA will go in and monitor while the operator is collecting those samples. That is that our inspection people will watch while those samples are being collected at time. Knowing that it's not going to be done on a routine basis, it's one where we will come in unannounced, we will find out what they're doing and see if they are doing it the way it should be done.

We are going to be doing those kinds of spot checks. At the same token, we will be comparing what we get on our samples versus what the operator has turned in with their verification samples.

The regulations plainly state that the plan that the operator submits, designs, they are supposed to design a plan, design and controls, and they submit it to the Agency for approval. Our duty under the regulations is to review that plan and approve it. We take that responsibility.

But it is not our responsibility to design the plan for the mine. That is the operator's.

MR. OWEN: Your rhetoric is good. But the bottom line is, you're still dealing with the same companies, the same businesses and they've still got the same policies, they've still got the same morales that you were dealing with before. If they were doing it in the past, all you're doing is making it easier for them to do it in the future.

If you're truly interested, and I mean this, if you're truly interested in controlling the amount of dust and eliminating black lung, all you have to do is give us what we want. Not only what we want, what we need and what we deserve. Require the PDMs.

MR. NICHOLS: I think we understand your

position. Thank you.

MR. OWEN: Thank you.

MR. NICHOLS: Edgar Oldham.

MR. OLDHAM: My name is Edgar Oldham, O-L-D-H-A-M, Jr. I'm with the United Mine Workers of America, Health and Safety rep, and also on the Kentucky Mining Board for the State of Kentucky.

I've got a few things to kind of just talk about. One of them is on page 10854. I'm having a little hard time figuring out this economics and stuff that we're talking about here.

But on that page the economic feasibility that was done. Now it appears to me that it's going to be a big cost savings to the coal industry if this rule is passed. And I'm just using some of the figures that's quoted here. $3.8 million, reduced citations and elimination of operator abatement sampling. $2.2 million, elimination of operator bimonthly sampling. Point three million dollars, reduction in MSHA ordered mine closures. Point three million dollars, reduced payout by operators for black lung cases. $3.0 million, reduced penalty costs associated with the reduction in operator citations arising from the proposed plan verification rule. Would therefore provide a total yearly cost savings, including net reduced penalty costs,

of $5.1 million to the underground coal mining industry. I guess I'm reading that right.

But then I get confused when I go to the compliance cost section of it and read just one part of it. In the middle of it, there would be offsetting yearly savings of $6.6 million. So I'm kind of confused on, is it saving the coal industry $5.1 million or is it saving 6.6 or is it saving them both?

If somebody could answer that.

MR. FORD: In the preliminary regulatory economic analysis, we have that there are savings of $6.6 million to the mine operators. Those savings are what you read off. The reduction in citations due to elimination of -- reduced citations and elimination of abatement sampling, that's the 3.8. Elimination of operator bimonthly sampling is the 2.2.

MR. OLDHAM: Okay.

MR. FORD: The elimination of delayed production time due to mine closure, that's the 0.3 million. And the reduced black lung payouts by mine operators, that's the 0.3 million. And those savings adds up to 6.6 million.

Now, on the other end, there's costs to the mine operators to implement the plan verification proposal.

MR. OLDHAM: Right.

MR. FORD: And those costs add up to 4.5 million.

MR. OLDHAM: Right.

MR. FORD: You subtract the savings, 6.6 savings, from the 4.5 million cost, you get a net savings of 2.1.

MR. OLDHAM: Right, but --

MR. FORD: Now, if you then add to that $2.1 million in net savings, the savings in penalty costs to the operators of 3.0, that comes up to a total net savings, including penalty costs, of 5.1 million to the mine operators.

MR. OLDHAM: So, you know, that kind of, to me, answers the question that was asked in Evansville Tuesday, why wouldn't the coal industry want this proposed reg.

MR. THAXTON: Before you jump -- that's only the cost associated with plan verification. Finish filling him in on the cost because of single sample. These two rules go together.

MR. FORD: Yes, that's -- Bob's correct, that's the cost of plan verification. Concerning the single sample rule, the single sample rule in itself will cost the mine operators $3.1 million. And in addition to that, there will be additional penalty costs because

we're saying there will be additional citations with the single sampling rule, and those additional penalty costs would be $1.7. So if you add the 3.1 million and 1.7 million, then the total cost of the single sample rule alone, by itself, including penalty costs to mine operators, will be 4.8 million.

MR. OLDHAM: So you believe that they are going to violate the 2.33 standard because they can't get a penalty assessed until they reach that level?

MR. THAXTON: There will be citations issued. This actually projects how many citations we think will be issued based on the implementation of these proposed rules. But the overall net effect of all the costs is that you have a cost of 5.1 -- you have a savings of 5.1, you've got a cost of 4.8. So there's actually only a net change of .3 of a million dollars, or $300,000 is all that there is as far as a cost savings from what the current requirements are.

MR. OLDHAM: Right, so -- and that's my point. We're talking about we're under a 2.0 standard now and at 2.1 they're issued citations that they have to pay a penalty on. So you all are looking at that it is going to be other citations issued for 2.33 because they're going to violate the law still.

MR. THAXTON: That's because we're going to

single sample and we will be -- we could issue more violations because it's based on that one sample instead of the average.

MR. OLDHAM: I realize the single sample.

MR. NIEWIADOMSKI: Let me clarify. It's single sample by itself. If you had no plan verification, if you started today instead of averaging samples, you would cite on single samples, we would be issuing more citations. After plan verification, we expect a number of -- you have more compliance because you have better plans. So we expect the number of citations to drop significantly.

MR. OLDHAM: I understand, you know, where you're coming from, what you're trying to say and all that, but, what we're saying is, we're still getting coal miners killed today under the 2.0 mg standard. Whether it's a single sample that gets them killed or multiple samples, miners are still being exposed. And I know where you're coming from.

MR. THAXTON: A lot of people have brought up that we're killing 1,000 miners a year with black lung. Realizing though that most of those people had their exposures 25, 30, 40 years ago. And that's why we had the original chart that showed when the rules -- when the Act went into effect in 1970, we had an 11% prevalence

rate of black lung. It has dropped to 2.8% now. And that 2.8% is based on x-ray analysis of miners that are currently working.

So there has been a reduction in the prevalence of black lung with the 2.0 mg standard and what's been put in place to this point. What we're saying is that even at 2.8 though it's still too high. And what we want to do is effect a change to that.

Yes, we're still seeing the residual effect of peoples' being exposed in the past. And that's where that 1,000 people. Black lung doesn't occur over night. So anything we do now will effect people in the future but it could be 15 years down the road before you actually see the kind of reduction or going down to zero.

MR. OLDHAM: I started in the mines in 1975. So I'm one of those 25, 28 year miners. And if we do something -- if we stay at the 2.0 mg today, we're going to be looking 25 more years down the road saying we're still at 2.8%. You know, unless we reduce the standard and reduce the exposure of people, I don't see where it's going to help a bit, what we're trying to accomplish here.

MR. NIEWIADOMSKI: We believe that eliminating exposures on individual shifts will significantly reduce the number of CWP cases. And let me give you an example.

We're talking about past exposures. In 1971, 44%, 44%, almost half the samples or half the shifts of the operator sample were over 2.0 mg, okay?

Right now, in 2002 that dropped to 8%. So 8% of all the shifts of the operators samples are above the standards. So we've made -- everybody will agree, and that's -- you see the data that significant progress has been made.

However, we're getting to the point now where we're continuously having a 9% of the shifts over. And that's what we're trying to eliminate. By eliminating that, we're going to eliminate -- drop those CWP cases below 2%.

MR. OLDHAM: And that leads to my next question. Because I'm curious, of all the dust samples that's collected at the present time under the 2.0 standard, when the 2.0 mg standard is violated, has there been any calculations done as to what percentage of the violations that are issued are between the 2.1 -- or would fall in that category of 2.1 to 2.3?

Or if the standard was lowered, you know, what ones would fall between even 1.7 to 2.0?

MR. NIEWIADOMSKI: It's not quite that simple because if only one of the five samples or two or three, we can't issue a citation if some of them are above --

fall in that gray area between 2.1 and 2.33. We can only issue a citation if all -- if the average of the five --

MR. OLDHAM: I'm saying under the present conditions.

MR. NIEWIADOMSKI: Under the present system, what I can say is that it virtually never happens. It's an extremely rare event that you have -- that you would be citable on the average being 2.1 or above. Where there wouldn't be at least one of those samples would be greater than 2.33.

In other words, it almost never happens that all five of those samples fall in that gray area.

MR. OLDHAM: But when you calculate your average, the penalties that MSHA issues for -- after the average is done and the number comes up, those that fall under 2 point -- from 2.1 to the 2.33, has there been any calculation done --

MR. NIEWIADOMSKI: No.

MR. OLDHAM: -- of how many violations --

MR. NIEWIADOMSKI: That's what I'm saying. If the average is greater than or equal to 2.1, then it's almost always the case that at least one of those measurements would be greater than 2.33. So that if you're -- in the present -- under the present regulation, you would be able to cite on the average. We would

almost always -- and by the almost always, I mean really almost always, it's an extremely rare event that there wouldn't be at least one of those samples greater than 2.33, so that you would be able to cite on one of those single samples.

MR. OLDHAM: Okay.

MR. NIEWIADOMSKI: Does that answer your question?

MR. OLDHAM: I guess not really. I mean not -- I'm sure of what he's saying. Because he's saying if you take five samples and all of them is 2.0 but one of them and it's 2.5 and you average them up, and I don't know what that comes to, but -- and that's 2.1 --

MR. NICHOLS: I think what --

MR. OLDHAM: On the average of those five samples that's taken, that one falls under 2.1. How many violations are issued under today's standard for that 2.1, in that category, from 2.1 to 2.3, how many violations do you issue under those -- that scheme right there?

MR. NICHOLS: Do you understand the question?

MR. NIEWIADOMSKI: I understand the question. I don't guess we -- we don't have that --

MR. OLDHAM: You all haven't calculated that.

MR. NIEWIADOMSKI: We don't have that number

right here.

MR. THAXTON: It doesn't really -- I mean we don't have the numbers to answer your question.

MR. OLDHAM: Because what I'm trying to figure out is how much of a cost savings is that to the companies? Because when you go to the 2.3, when they have to abide by a 2.0.

Is that a big reduction for the coal industry on the violations that they're issued?

MR. NIEWIADOMSKI: No. That's the question I thought you were asking and what I was trying to answer is, no, there wouldn't be any savings. We would get more instances under the present samples that we're seeing. There's far more instances where at least one of the citations -- one of the measurements is greater than 2.33. But the average is less than 2.0. So the typical situation you'd be seeing is like the one that Bob had in his example up on the board where you have one or two of the measurements are greater than 2.33, but the average is less than 2.0.

So under the current regulation, we are not able to cite on it. But under the proposed regulation, we would be.

MR. OLDHAM: All right. On the issue of dust control plans and, you know, Marvin, you were quoted in

the newspaper stating that if this rule was passed you would require better dust control plans than you presently have now. And my question is, what is stopping MSHA or what's stopping the Agency from requiring dust control plans that provide protections to miners at or below the 2.0 mg standard today?

MR. NICHOLS: I'll let Bob answer but I think it's the current law.

MR. THAXTON: The current regulations basically are set up to where you take five samples and average them. And those samples only have to be collected at 60% of average production, and the plans are only required to have minimum controls. So that's why -- right now the regulations only allow us to go to that point.

Whereas, under the proposed rules, they would have to put in controls that when sampled at the 10th highest production level, actually maintain compliance. And then those controls would have to be maintained at all times.

That's going to be -- those samples are going to be collected, like I said, at the BPO or the 10th highest. So you're far above the 60% production level. They're going to have to have the controls in place when they're sampling. It cannot be exceeded by more than 115%. So they're going to actually have to put controls

in there that represent a need in order to maintain compliance.

Right now they can have the minimum controls in their plan and we come in to evaluate later, they can have three hundred percent of what the quantity of air is and it's perfectly legal because the plan parameters right now are only minimum requirements. And as long as don't exceed those, they're okay.

MR. OLDHAM: You know, that's one of my pet peeves because when they do the plan submittal and they do that at the mine and they do all these extra things at the mine, but they don't get submitted into the plans and MSHA don't require it. And I've brought it to their attention numerous times. Safety committee has come to me and said, look, we had to do this, this and this extra to get this plan to come in, but it wasn't submitted. And it's like pulling teeth to get somebody from MSHA to say, well, you're going to require this because these are the things that you done to get this plan to come into compliance. And that is a big problem out in the industry, and with the committee people.

You all asked for comments on the continuous dust monitors, what our feelings are. To me, that part is plain and simple -- require our companies to use them. Just like we did with the noise rules. You didn't just

jump up and say, okay, next week when this passes, everybody is going to come into compliance with this noise. You did it in phases.

So, if it takes doing this in phases, then let's do it. If it takes looking at who the top three most people you feel like is exposed to the dust, then start with those people.

You know, there has got to be a starting point somewhere, but if you only test that the company is using them, then you know and I know it will never get done and we'll be several more years down the road here trying to get this phased in.

So, if you are going to do a rule, then let's at least start somewhere and if it has to be phased in over one, two, three years or whatever it takes, but at least start. Once they come into production, like I say, we don't know what the production is, but we know what some of the cost savings is for the company, so they can afford to buy two or three. Or they can afford to buy eight or 10 and at least start looking at where the most dustiest places in the mine are, but at least start somewhere.

The more we use these things -- it's just like anything else -- like auto industry. Nobody wanted seat belts, nobody wanted air bags, nobody wanted the bumpers

that they got on the cars these days. You know, we the consumers had to pay for that. It's no different. After it was phased in and everybody started using them, the cost associated with them started coming down and they got to where they was affordable.

The coal industry is no different. They don't mind passing costs on to the consumer to mine the coal. And the power companies sure don't. They are buying coal today cheaper than they have ever bought it, but I have not seen my electric bill go down, so the costs associated with phasing this stuff in can be overcome.

As far as full-shift sampling, you talked about that. You asked for comments on what a full shift should be. In my opinion, it should be considered the entire shift. A miner is required to be on the ground, that is portal to portal. This is a timeframe that you get the true exposure of the miner.

Roadways are just as dusty and there is just as much coal and float dust in some of these roadways in some of these mines that miners are being exposed to. And we are not talking about a miner walking through a door, getting out of his car and walking into a building. We are talking about people having to ride in these rides now sometimes an hour to get to the working section on rubber-tired vehicles that generate a lot of dust,

that exhaust, that are hitting on the mine floor, that is blowing this dust up and putting it in the air. So, miners are being exposed as they are going down the roadways and it doesn't make a bit of sense to put a dust pump on somebody and say don't you turn it on until you get to the section. He is still being exposed.

So, portal to portal and like the old saying, bank to bank. Then you got the true exposure of what a guy is really getting and what he is being exposed to.

One that Tom Sweeten hit on a while ago, under the special circumstances and that's on page 10-877, 70.212. He stated where the district manager can approve the use of the PAPRs the first days and it over-exposure continues, how long can the district manager extend the use of the PAPRs. Now, I know you said 30 days is it, but when you read the section of the law, it says then after 30 days you have to go back and reverify the plan and stuff. Is that right, what I am reading?

MR. THAXTON: You have to revise the plan --

MR. OLDHAM: And reverify it or verify that the plan is adequate.

MR. THAXTON: Right.

MR. OLDHAM: All right, under plan verification, that says up to 45 days. Am I not right?

MR. THAXTON: They have up to 45 days to do the

verification, yes.

MR. OLDHAM: Okay, so are we talking about now extending that 30 days 45 more days while he verifies the plan? It don't say in the law -- plan verification says up to 45 days to verify plan.

MR. NIEWIADOMSKI: The intent was that once the 30 days has expired, the operator has to submit a totally new plan. He has got to put in his new VPO. He is going to have to put in all the controls that he is going to be using and so he is going to have to -- we are going to have to determine how long can he reduce those concentrations using engineering controls. The use of the PAPRs --

MR. OLDHAM: No, this is because of overexposure and special circumstances is what we are talking about in this section.

MR. NIEWIADOMSKI: Yes.

MR. OLDHAM: So, if we are in a situation and a mine is operating -- say, cutting overcast or something, and they don't have it done and we are at the end of our 30 days, time is up. What do we do?

MR. THAXTON: They have to put controls in place that will protect PAPRs and that do no rely on the PAPRs at that point.

MR. OLDHAM: But what if they say we are going

to resubmit a plan that does this, but we still need to make sure that miners are not overexposed, we still need the PAPRs. Do we start the 30 days over again after that plan is resubmitted and the new controls are in place or do we do the 45 days waiting for them to verify the plan? I don't know.

MR. THAXTON: The operator has 45 days to verify the plan, but they cannot use PAPRs as a means of control at that point. They have to increase the control measures that are being put in that situation. You have to realize, it's not that we are not saying that aren't controls that are available, that could work to help reduce the situation where you are in special circumstances. It's that because of special circumstances, usually lasts for such a short period of time that you can't have time to get the controls in place and go through verification until you are already out of it.

Well, what this allows is for that special circumstance, for that short period of time, the additional controls. If that special circumstance is going to last that long, then that operator has to put controls in place that will result in compliance and he will have to exhaust all feasible engineering controls. That means going through verification sampling to show

that he is not able to verify. He will have to convince the Agency through our evaluation that there are no other controls available.

So, this could go on for a while, but the 30-day limit for use of the supplemental controls, once he has passed that 30 days, that is the end of it. He has to put in controls then at that point. If it's found later that he has exhausted all feasible engineering controls, then he can ask to use supplemental controls and it's not necessarily PAPRs. It can be administrative controls.

MR. OLDHAM: I just can see --

MR. REYNOLDS: As I said, we have asked for comments on this and I think it's clear that maybe we need to clarify that, because it's not crystal clear.

THE WITNESS: It's not, I mean, because at least you can go to the plan verification and then when you go to the plan verification, it says you got 45 days to verify the plan. You know as well as I do that if we have a mining operation and they say don't believe this job is going to take over 30 days, but things happen. Equipment breaks down, roof conditions get bad, water gets bad -- whatever -- and it goes over 30 days and then here we are in a situation. Does the district manager approve and let them go on and use the PAPRs because they are saying we are cutting rock, people are probably going

to be exposed, we don't want them overexposed, so what do we do? We don't know. Thirty days is up, so do you give the district manager extra time or do you say, well, let's see what the plan does? Submit us a plan, make sure it's adequate, make sure you add some stuff to it that you think it going to take care of it and then let's verify what the plan is going to be? So, then you get into the 45 days.

I think to me, to be honest, I think that situation will happen in the industry. We hope it don't, but I believe you are going to run into those.

MR. THAXTON: But if you have comments that the 30-day time limit for the use of supplemental controls is too long, I mean, we would be interested in hearing that. If you think that the 45 days to verify a plan is too long, that also is something. If you think that a combination of these two, if they are in that situation, that part of their time of using the supplementals control should be knocked off being able to verify something, those are the kinds of things that we would like to hear from you about.

MR. OLDHAM: I truly believe that within 45 days, if I was running the company, if I couldn't verify that something is going to work in less than 45 days, then I believe I need to get another manager, because I

think I could do it. With the sampling that we have and the machines they got, I think it can be done.

MR. NIEWIADOMSKI: You mean to verify the plan within that time?

MR. OLDHAM: Sure. I mean, if you can't verify a plan even in my opinion in two weeks that something is going to work, I think you have got a problem.

Also, we talked a lot about these PAPRs. Has anyone within MSHA -- and I know you said you all have checked to see how they are being utilized some and that now you are aware of men being required to swap out at shift change with their counterparts. Some of the diseases that I mentioned here has already been mentioned, but one.

You talk about hepatitis, herpes, even the common cold, but we got new viruses, guys, that is coming into this world -- SARS. Nobody knows what it does. One of your friends may have it and not even know it. You put that mask on. What's just happened to you, that you are required to swap out at the face with him? Would you like to put a mask on with a guy that you don't know even know has SARS?

We don't even know what the disease does now. And whatever else other virus is going to come out in this world. We don't know. Here we are swapping masks

out with people and breathing after them. I would want to do it. I wouldn't want to put somebody else's dust mask on. And that is virtually what you are doing, is taking a dust mask and taking it off your buddy and putting it on your face. Would you want to swap out a dust mask that a guy chews tobacco and stuff in spits in and stuff and then you have to go right behind him and swap out with him?

If you are going to make people use these things, get one for everybody. That way that man can maintain his own. He don't have to worry about what's coming behind him.

MR. REYNOLDS: In this proposal, there is a model and there are -- as an example of what would be required for the respirator trading protection program and it would require them to have individual PAPRs.

MR. OLDHAM: Not the way I read it. It requires them to clean them and maintain them.

MR. THAXTON: Yes, and they do have to be cleaned and sanitized in between individual uses. If it's used for two hours and they are going to be swapped out, it has to go through cleaning and disinfection before the next person wears them.

If it's not, then it would be a violation of their plan.

MR. OLDHAM: But I am not a doctor and I don't know except what we have heard on the news about SARS and stuff, but I don't know if we got anything that will sanitize it today.

MR. THAXTON: SARS is linked so far -- as a -- communicated just like the common cold.

MR. OLDHAM: Yeah.

MR. THAXTON: Things that are used to sanitize respiratory protection would be effective in anything like that. Generally, it's effective in anything that we have come across that we would be concerned about.

Now, whether it's effective in the future, that would have to be addressed and in the plan, it actually calls for them to be sanitized and disinfected in a manner that would be safe for other people to use. It has to go for HIV. It has to go for SARS. It has to go for the common cold. It has to go for HIV -- I said that already -- so, hepatitis. It's to cover anything and generally speaking, most units are sanitized with either an iodine or chlorine based type of disinfectant, for the most part. That's the most common things that are out there.

MR. OLDHAM: All right.

MR. THAXTON: But that is -- every bottle of pop that you drink is sanitized generally with an iodine

based material. I mean, things that we commonly used in today's society in this country. That is something that is covered in the program and would have to be addressed by the individual operator.

MR. OLDHAM: Let me ask you this, Bob. If we go out and search out a person that has SARS and put a PAPRs on them, and let you sanitize it, will you put it on?

MR. THAXTON: If I sanitize it?

MR. OLDHAM: Yes.

MR. THAXTON: Yes.

MR. OLDHAM: You would?

MR. THAXTON: Yes.

MR. OLDHAM: And be comfortable with it.

MR. THAXTON: Yes.

MR. OLDHAM: I'm glad you would, because I sure won't and I would not put one on that somebody else has already had on. That is going to be a problem. That is going to be a big problem in the industry and I am surprised people are even doing it.

You know, the other point I would like to make is did any of you read The Courier Journal series that was reported in April '98 entitled "Dust, Deception and Death"?

MR. NICHOLS: Yes, I think we have all read that.

MR. OLDHAM: I think most people have. But since that article was printed, I don't know of anything that has actually been done except prosecution to eliminate black lung in this country. The Courier Journal interviewed 255 working and retired miners and not one of them had anything positive to say about the dust sampling program in this country. These people were coal miners before me that were forced to work in these types of conditions in order to provide for their families.

Those same conditions hold true today as they were reported in 1998. And the best we can get out of MSHA is proposed rule that raises the standard at which a company is fined for non-compliance from 2.0 to 2.33. I don't see how you can justify this.

Why won't you listen to miners that are telling you they want lower dust standards, not higher, they want better projections, not worse? Why don't you just -- I guess I question also why you didn't hold these hearings in Eastern Kentucky coal fields where they were at the last time. Was you afraid that you would see more coal miners showing up with faces that were black with coal dust that showed up the last time? Instead you held a hearing that was at best three hours away from any miner to drive that just had to work a 10 or 12-hour day.

Another thing I would like to throw out. Marvin, you said there is 100 years of knowledge within MSHA that is fixing and working on these rules. Well, at a minimum, -- I'm not a big mathematician, but there was about 130 people there, so you look at how many years -- on the average every miner there had 20 years, so that's 2,600 years. So, you have got somebody with 100 years trying to tell people with 2,600 years of knowledge what is best for them.

Thank you.

MR. NICHOLS: Tony O'Neal.

MR. O'NEAL: Tony O'Neal, O-N-E-A-L. United Mine Workers Local 5138, but I would like the record to show that I am here speaking on behalf of all coal miners in general.

I have been a miner for 24 years. First of all, I would like to thank you for the opportunity to be here and talk to you. Everybody looks a little bit tense. I wish you all would relax, because this is a whole lot different from mining coal and I am not used to this setting. So, bear with me.

MR. NICHOLS: You will do fine.

MR. O'NEAL: First of all, I would like to start by asking to me a pretty simple question. I have always thought that MSHA's number one priority was health and

safety of coal miners.

MR. NICHOLS: And it remains that.

MR. O'NEAL: Thank you. Because I know back home that I have got several of your field inspectors' names at home. They gave me their personal numbers through the years and told me if I needed them for anything at the mines or something come up, to call them any time of the day. I want everybody on this panel to understand that I appreciate the job that those guys do and you, too.

In certain points, you guys are the only people that we have got looking out for us -- and your field inspectors, people like you. You are all we have got.

I know everybody on this panel has got to be uniquely qualified to set on it, but I am a coal miner. That's what I do. I don't speak, as you will know throughout, on a regular basis or anything.

Most of the time, I can understand rules. I have fire bossed and done different jobs, about every job in the mines over 24 years. But when they set me down and went over these rules, these new rules, I haven't had a chance to study them long and it would take me a while to understand them, because I don't understand them. To me, I like to keep things simple. I am not saying I am simple minded by any means, but I like to keep things

simple.

All we have done it looks like to me is complicated things -- vastly complicated things. When you start reducing sampling and as this one says that or if this happens, and you can possible increase the amount of dust by eight milligrams through certain avenues, all that does to me is say, hey, we are going the wrong way instead of the right way.

We have hundreds of miners across the United States a year -- and I don't mean to be redundant -- that die from black lung every year. To me, we need to be looking at that. I can't imagine going through what Ms. Chapman who spoke earlier has gone through. That's has got to be terrible. I do have a little bit that I will address later on that subject in my family.

But the next thing that I want to talk to you a little bit about, is I have got a little bit of an experience with the air stream helmets. I worked for a company that probably everybody should know. It's the same company when I first started there, it was Pyro Mining Company. Then it went to Constain Coal Company and now it's Lode Star Energy. Actually, they have change ownerships -- it's same place.

But getting back to the Airstream helmets, I think it was right at or it might have been after the '89

explosion -- maybe they were just coming out. It was probably mid-90s or something. I don't know, but I am sure it's the same thing. They got one probably from a manufacturer and they let me try it on one day. I do remember the experience.

It was like what I would call a full-face motorcycle helmet and I know it had the fan and filters. You had to drop the shield and then there was something here -- I don't even remember what it was -- that comes down also. But that fan didn't then -- of course, the technology could have changed by now, but that fan then either I didn't drop the shield or pull this down, but it almost cuts your air off until you get it right. Then it did anyway. I don't how it is now.

And when you are gasping for air, it puts you in a little bit of a shock. That's the only thing I remember much about it. But I have got a real good friend whose name is Robert Grundle. He is from Clay, Kentucky. You just have to know Robert. He worked most of the time on the long wall and he did every and anything he could to keep himself protected against dust. I mean, even lately, you can go over on the long wall face and he will look Darth Vader coming down. He's got a big air mask -- air filter mask with goggles and everything.

But anyway, he volunteered to wear that helmet for a week. He had problems with it. I don't recall everything. I know he had trouble getting in and out of shields to work on things. Also, the shield becoming dirty and just the weight of it. He said he couldn't deal with it. I know if he couldn't deal with it, it will probably unless the technology has really come a long way, it will probably still be a problem.

I want to talk to you a little bit now about my experiences, what I want to say, living in dust. Maybe that is to an extreme, but I want to tell you a little bit about my experiences with it from the mines. I know in my younger days working where I was working, that I would get to the section and I have witnessed the face boss say -- I was an extra man, but I have witnessed him say, buddy, you go to the left side of the run and start over there picking those dust pumps up, I'll meet you back at the timberline at the in-take, you know. And you did what you was told then. You did what you was told. They would put them in the in-take.

And then they had a guy off the header, the bell head, and he would run a phone out to the supply road. They told him to do it. This was non-union operation then. He would set there and if anybody come by, he would call up the unit and they would pass those pumps

out again or they would either call from outside when an inspector was coming in. I have witnessed that happen.

I have also witnessed things a lot worse than that. In 1989, we had a methane explosion. When you have a methane explosion, you have got dust. And in 1989, 10 of our fellow workers was killed in that explosion. One of them was my next door neighbor. His name is James Tinsley -- it was James Tinsley.

That day of the explosion, my wife was at work. She heard about it and I had been working third shift. She didn't know exactly what happened. She sent somebody to see if it was at home and I was at home. But that afternoon, I can remember going over to James' wife's house and talking with her and her eight or nine-year old daughter, setting there hugging them. That is the second hardest thing I have ever done in my life. The first thing was my mother passing away, but that is one of the hardest things that can ever happen to anybody.

Closer to home, my father-in-law suffers from black lung. He's 78 years old. He worked in a non-union operation all of his mining career and in the State of Kentucky, he has yet to even get benefits. His doctor and other doctors have said that it's black lung, but with the way the laws are right now, he has yet to even get his benefits from that.

It weighs on your heart when you see somebody that is close to you, your own family, that struggles to get out of the car from the driveway about 20 or 30 feet away and get in the house. It weighs heavy on your heart.

I have always thought that MSHA is the watchdog for coal miners across the country. I have always felt that way. But it almost seems like now that the dog has contracted a disease -- it's got something that made it go mad -- rabies or something. I apologize for that, but it don't seem like that we are thinking right. The dog has gone mad or something.

And I hope that you will consider not passing these regs and changing them. I hope what you will do is look at the dust pumps, the new dust pumps that they have got, the continuous dust pumps and look at the cost of those and try to come up with someway that we can use those where there can't be any falsifications of records and we will take this to a different level, to help coal miners instead of seeing more bad health.

The last thing I would like to say leaving -- and I appreciate your time in listening to me and bearing with me, but I am sure there are some of you guys that have a feeling on how this is going to go -- pro or negative. I would like to know myself, because what I

would do then, I would go out and what few dollars I have to spare, I would buy stock in these new Airstream helmets and then I would try to scrape up a few more dollars and I would go and find me a large casket company somewhere and I would buy stock in it, because we are going to continue to kill people with black lung, lose people with black lung and that number is going to rise instead of going down unless we do something about it.

Then if I could make money on that stock, I might be like one of these coal operators that are worrying about the bottom line and the dollar and I wouldn't have to worry about going in one of these coal mines and breathing that dust.

Thank you.

MR. NICHOLS: Thank you. Tim Miller.

MR. MILLER: My name is Tim Miller, M-I-L-L-E-R. I am president of local 5138 United Mine Workers of America and I also serve on the Kentucky State Mining Board, appointed by the governor to look out for the safety of the Kentucky coal miner, something that I hope we share.

I hope you guys understand what we are tasked with. We are tasked with the position to look out for the safety of the coal miner.

One thing that I would like to do is I would

like to have a raise of hands in our crowd here of all the non-union coal miners that are present today. I don't have to look over my should. There is no hands. If this room was still full of all the people we had here this morning, there still would be no hands, because, guys, you have to understand, that is the silent majority that we all represent now.

Probably 80 or 90 percent of the coal that is mined today is mined by that silent majority. That silent majority doesn't have a labor contract. You see, the non-union coal miner is voiceless. Their only protection is MSHA, which is you. You guys make the choices for them. You impose new dust rules and they go along with them just like everybody.

You have public hearings to get the message out about your proposed changes and, of course, the UMWA is always going to be here, but where is that silent majority? We all know that no coal operator will allow any hourly employee to attend these hearings. No non-union miner would challenge their employer for fear of retaliation.

I am not up here blowing smoke or trying to grab press. I worked 18 years for Pyro Mining Company, while it was non-union. If you would call talking with an MSHA inspector about any kind of dust fraud or anything, you

would quickly be joined by company personnel and you would quickly be retaliated against -- swiftly.

You see, if it wasn't for my right and my UMWA contract providing me to speak here before you today, I couldn't participate in today's hearings. I would be part of that silent majority.

You look out at your numbers present today and you think maybe the opposition is not bad. You can't be fooled by this. If these non-union miners had the ability to be here and participate today, there would be hundreds of people in this room. This room would be full. But that fear of retaliation, that is going to always override.

If they only knew that your present plan calls for a 75 percent increase in respirable coal dust in underground mines, that your present proposal also calls for one sample instead of four or five. You see, most miners look forward to MSHA day. I talked to you guys about that in Evansville. See, they feel that MSHA day would be a day that's less dusty, be safer, be a better environment to work in, things would be done right, safety will be first and production will be second.

So, it's obvious to this union, who does have a very trained eye on what this new proposal really does. MSHA day means more production days, less safety days.

But what if we made ever day an MSHA day with continuous dust monitoring on every coal miner? Would the company tell coal miners to hit the ground running when the miners reach their section? Or would they first say check your water sprays, check your dust parameters, make sure all your ventilation is in place. See, that gives us the perfect environment for the coal miner, when all the bells and whistles are operating.

If every day is an MSHA day, I guarantee you those bells and whistles would be operating. They would be sufficient.

See, guys, we are all today talking about different ways to monitor a situation. The way we do it now, with the dust pumps, we do it certain times and certain times, we don't. We talk about the continuous monitoring. The bottom line here is we are all tasked with the same job -- to try to clean the environment up, clean the mess up.

I mean, it's obvious that the job hasn't been done. Bob, you have attested to that over the last two times I have been here -- Tuesday and then today -- that there hasn't been a big enough increase. The black lung has not decreased over the past -- I think you used over the past 20 years, only a small percentage.

As MSHA -- and this is a question I have -- are

you really ready to tell every coal operator, union and non-union, to clean up their act? That is the bottom line, guys. It's your job to ask the operators are you really ready to clean up your act or is this just a dog and pony show? You guys going to parade around the country and end up, I think, down through Alabama, go through the south and go through the west and when you get done with your dog and pony show, are you really dedicated to the coal miner's safety or are you just doing your boring job by listening to a bunch of union coal miners bitch -- because you don't have any non-union coal miners here. They are not going to be here.

We all know the technology is ripe to clean up this dirty mess. You don't have to have any more headlines in The Courier Journal. You don't to have any more dust and deception. You have the option to do the right thing, to improve the coal miner's health and safety once and for all. We all know that the silent majority, the non-union miner would love the idea of a clean environment to work in. But would operators agree? Is this committee really tasked with improving coal miners' safety or is it your job to go on tour with your dog and pony show? Talk to a few reporters, head back to MSHA, tell your boss not a long of opposition out there, not really, just a few UMWA people out there

bitching along the way.

Remember, we don't represent just union coal miners. We represent all coal miners. We understand our job is to protect every coal miner from coast to coast. We would always protect with safety first. Unlike your new proposal, we don't have restrictions like feasible or exhausting all engineering options. We are safety first, second and third. I would like to think the panel has the same interest.

I would like for you guys to listen with open ears. I worked underground for 24 years. I understand from firsthand experience -- not hearsay. I'm not a bureaucrat sitting in front of you. I work underground every day. I'm still employed underground.

Like Tony O'Neal said before me, I have had the same opportunity to be told to remove dust pumps, put them in the in-take, all that stuff that went on at Pyro. It goes on at every non-union operation and it still goes on today. The only people that will participate in that is the people that have the ability to set in these hearing and get educated and understand what their rights are, because, see, guys, most non-union miners don't understand what their rights are. They do know that that retaliation doesn't only go to that employer, but it goes out into the coal fields and basically black balls them

from getting a job anywhere if they are a watchdog.

I myself am in the same position. I am president of my local union. I have been a huge proponent for this union. I help organize Load Star Mine, Constain, Pyro, whatever way you want to paint it. There is no operator out there that would ever hire me again, because they know what I am. I am a watchdog and I am going to be looking over those guys to make sure they do things right. And it's not above me to call MSHA and tell them when they are doing something wrong. So, guys, I am in a bottle now and I know I am, and I am proud that I am there.

So, I hope this committee will be very careful with your proposal. Don't impose dust options on -- these dust options that you have for these greedy operators. Here in Kentucky, we have changed our -- I guess, our machine to prosecuting criminals. We prosecute operators every day, criminal operators. You see, here in Kentucky, we have cleaned up our mess. We have in place now actually a well-oiled machine. We have a commission now that criminals go in front of and they are tried and convicted and they are removed from the mine.

I understand, Bob, you have talked about all the people that you have tried over the last -- I think you

went over about 160 cases. That's great. But if we have this continuing dust monitoring 24-7, 365, you are going to make a bunch of criminals honest, because they can't cheat anymore.

Now, there were some questions asked to me in Evansville about what would take -- I think you asked me, Marvin -- or Bob did -- what would keep the operators from having the employee take that dust pump and hang it in the in-take. First of all, those things -- Frank knows better than me, those things have motion sensors in them, things of that nature. That is going to show up. Also, it's attached to your cap lamp. That cap lamp, you can't survive in a dark environment without that cap lamp, if you don't have your cap lamp.

So, your light, the motion, it's going to all show up, so there it's absolutely virtually impossible not to have that thing on your body. It's going to be with you in the environment that you are basically exposed to for an entire shift. So, basically it's a no-brainer. I have said this before.

For the life of me, I -- like I said, here in the State of Kentucky, we deal with a lot of political hogwash and I know that you guys do on a higher level, but you have to do the right thing for the coal miner. You have people that are suffering. You have people that

are absolutely voiceless. They don't have the options that we have. They can't be here in front of you today.

I hate to be redundant, but those people are suffering and whatever comes down the pike and whatever your final judgment is and whatever your final judgment is and whatever you guys decide to impose with your proposals, at the end of the day, there is going to be a lot of coal miners that suffer or there could be a lot of coal miners that prosper.

We can clean this coal mine up. We can clean all the coal mines up. We can make some of the jobs that are just undesirable better jobs. The future is basically limitless if you do away with black lung. Black lung is something that carries on. You can work 24 years like Tony O'Neal before me said and look at say, I've got all my fingers and I have got all my limbs and I have made it a long time in coal mining and maybe I can retire and go on in life, but then you remember, the exposure that you had that lingers on with you.

Myself, I know I am a victim of black lung. I have been at the face for over 20 years. But there is no doctor that is going to diagnose me in this state with black lung, because of the greedy operators. We understand that. They got their way with the black lung here in this state. It's a sad day when a guy walks away

and knows that his health has been impaired by all of his years of exposure and he looks towards MSHA for help and he wants to be able to read something that maybe will help generations behind him and he sees the thing going in the opposite direction.

I know you guys are browbeat. I know you are tired of hearing all of us say things that you don't agree with, but if we make this something that is absolutely foolproof, then there is not going to be any argument. You have all the calculus involved in this and all the algebra and all the things that I have trouble understanding like everyone else and all the factors that factor in.

I told you before, I deal with all those engineering -- feasible engineering things of that nature with the hearing conservation program. I know at the end of that day when we got done, it was probably eight or 10 months that we rode along with all kinds of citations that were written and they had done all their engineering alterations that were feasibly possible and then had tried another one and then they applied for the P code. I don't know where this all goes and how this ties in, but at the end of the day, I was told that MSHA in District 10 -- they didn't want to be the one to give the first P code, but this thing just kept stringing out and

stringing out and now the operation has deplete all its reserves. We are done producing coal and I guess there was never anything done other than miners continuing to be exposed during all the redtape.

I hope that this doesn't become something comparable again. I want you guys to understand that you have an opportunity to fix something and fix it right and it almost looks like with the -- it's right here on the horizon -- this continuing dust monitoring system for the individual, it looks like it's right here on the horizon. It's just right here. We got the pictures of the machine. There is a lot of people that have a lot of hands on experience with the machine here today.

I think, Frank, you said earlier that that machine is almost available for mass production. Is that right?

MR. HEARL: Actually, it's isn't ready for mass production. Where it is right now, is we have got the prototype units and this week they are starting to take them out to the field to try them out for the first time to use in an underground coal mine. So, it really has to come to the point where it's successful in an actual underground test. You know that things don't work as well in a mine as they do in a mine, but it was successful in the lab, so there is some degree of

optimism that it will be successful in the field test. But it still has to complete that and after that, it would be turned over to the private sector for commercialization.

MR. MILLER: How long do you think the field test -- what kind of window are you look at there for the field test?

MR. HEARL: We are expecting the field test to be completed by August of this year.

MR. MILLER: August of this year?

MR. HEARL: August of 2003.

MR. MILLER: I guess where I am going here is there is a small portion of people that maybe think that there is a rush to change here, to try to beat this technology. Maybe there is something a lot better right here in our grasp if we were just a little patient and exercised a little patience, that we might have the answer to our problems.

It would really be a shame if we impose some new regulations here and think we have to look at those regulations for another decade before we make a decision on whether or not we have cleaned up the coal mines and we will be up here in 2013 and we all -- some of will have maybe a little gray hair, but we will all be up here looking at other bars and graphs and charts and showing

that we haven't done the job again for another decade and there will be more miners that have died in that time.

Or we can do something that gives us absolutely instant information. I don't understand -- Marvin, maybe you can help me with why this is not even an option.

MR. NICHOLS: Well, it is an option and maybe we can -- we have written the proposed regs to where it can be incorporated. Now, the last hearing I conducted in 2000, we were told that this PDM was just around the corner. That's two and a half years ago. In fact, the industry coined the term bridge to the 21st century and I want to talk to them about that when they get up to the table.

But we support the PDM, but we think there are other things that are other things that are important, too, like getting these plans out to where they reflect normal mining conditions, eliminating this averaging.

So, we are not at odds over developing this PDM. I'll tell you what, to say that these dust rules have been moved along hurriedly is like saying these tectonic plates move fast. I mean, we have been working -- this panel has been working on fixing the dust control programs since 1991. And they worked on the set of regs that was developed from about 1998, 2000 that got caught in MSHA administrations.

So, there is no rush and there is plenty of open opportunity. Our goal is to finalize these rules by the end of the year. We will have some idea by August. Let these coal miners wear these things and beat them around a little bit and let's see if the prototype can hold up.

MR. MILLER: See, Marvin, what I am concerned with is those options that the operators have. If you put plenty of options at the operator's disposal, we all know with the open opportunity that they have in these new proposals, that they are going to take the cheapest route. There is no doubt. And they are going to take the easy route. It's just a sad day when we are giving all this credibility to the operator and if it wasn't for this MSHA organization, and it wasn't for the UMWA, I think that it would be a tough day in the coal fields all across this land.

I know that I seen coal miners actually celebrate MSHA day. When they know that they are going to run dust -- because see, they don't only know that they are going to have a good fresh day that day, good clean air to breathe and good wet roads and just a good safe day, but you know, when they run that company dust and they treat it like an MSHA day, these non-union operations, if they come in on that dust in some way, they usually buy them chicken. You know what I mean,

Marvin? You ever heard that story? These operators, they will run dust and if those employees hide those pumps under their coats or maybe take them and put them in the in-take for half a shift, well, they buy them presents. They give them trinkets and tell them, boy, you done good, we are going to stay open another day now.

If that dust hadn't come in, they were about to -- MSHA was about to shut us down.

So, you got to remember that, guys. That still goes on and that goes on every day. I want everybody to understand that. When a coal operator goes out to hire employees, he don't hire 43 year-old experienced miners like myself that's been through all these dog and pony shows. He tries to hire these 19 or 20 year-old kids. He can put them up on that long wall and tell them, hey, our dust is out, we got a citation on this dust and we got to get our dust in and if you don't put that damn pump under your dust coats, you might not have a job here next week, because MSHA is going to shut us down.

Guys, don't live in a fantasy world and think that stuff don't happen today, because it's still happening today. At times, we have had to threaten our own members in this organization and tell them if we catch them doing that, we are going to report them. But it's a sad day to know that you can absolutely put that

fear in people of losing their job. Mining jobs are tough to find right now. Good mining jobs, good paying mining jobs. Guys go a long way to protect them.

See, when you take that guy and he sticks that dust sampler under his rain coat, plastic rain coat, I don't think you are going to get that accurate reading. And I don't think that you can put enough MSHA inspectors on section to stay with every individual man. You can't do it.

So, even your single sample that you take in a day, that single sample, it could be the most bogus thing that you have ever seen.

MR. NICHOLS: If I was inclined to do what you said you had done --

MR. MILLER: I didn't say I was doing it.

MR. NICHOLS: Well, I mean, the example you gave, I think I would find a way to plug that continuous sampler, too.

MR. MILLER: I think if you plugged that continuous sampler, it's going to probably let you know. It's got the bells and whistles built into it.

MR. NICHOLS: I am just telling you that two and a half years ago this committee heard that the continuous dust monitor was just around the corner. That's what we are hearing right now. But there is some important

things with the current dust program that need to be fixed and we included those, too.

We tried to write the reg and factor in and we have asked you all to comment on how it will be used. I think we understand your comments on how it ought to be used.

MR. MILLER: Marvin, one thing that I want to make sure that I do get across to this whole committee is that the people that cheat on dust, a lot of people cheat on dust and don't even have an idea what they are doing. They don't understand. They don't understand the ramifications if they are caught cheating on the dust. You guys understand that there is a few people that have been in the industry a long time that do understand it, but these young guys, they are hiring kids from Eastern Kentucky and putting them in the coal mines up there. Those kids in Western Kentucky, they are doing the same thing and they are doing it across this nation. They don't have a clue.

MR. NICHOLS: Well, if you tell who they are, we will come in an explain it to them.

MR. MILLER: I think what you need to do is explain it to the entire industry in a different manner. If you continue to do what you have always done, you will get what you always got. You guys are wrapping this

package a little different, putting it right back out there the same way. So, if you continue to do what you have always got, you will get what you have always got.

I appreciate your time. I just want you guys to understand this is an opportunity for MSHA to shorten the rope of the operators, keep them from hanging themselves. You can shorten the rope, clean up the coal mines and you guys have got the opportunity to do it. Appreciate your time.

MR. NICHOLS: Thank you. Bill Musgrave. He's gone? Gregg Mahan.

MR. MAHAN: My name is Gregg Mahan. I'm from Illinois, District 12 with the UMWA local 1969. I won't take much of your time. I know you are as happy to be here as I am.

I would like to start off with a gentleman who commented earlier today that we are here -- the technology we have today we have had since 1976 when I started in the mines, the technology we have has never benefitted the miner. Never has. We are talking about things today, technology, the new prescription Viagra -- this is the company's Viagra right here. You stated that production -- I say this is the only reason that we are here is production, so the coal operations can increase production.

I'm sure if this is passed, they are going to go for 50. And we are going to increase production, put miners at risk, their health and well-being.

You know, I had an inspector, when he was a mine manager, he couldn't stand MSHA. He said they are going to shut us down. When he became an MSHA inspector, they were the greatest people in on earth -- lot of good inspectors. Great.

I asked him about a citation one time and he says you know, if you keep asking us to write citations, it's going to shut this mine down. That isn't the point. You don't want to shut the mine down. You want to protect the miners.

The way I see it, this gentleman also stated that the atmosphere in these mines for the last few years have been increasingly changed for the benefit -- better. Come to central Illinois, my mine. I will show different. I will show you where inspectors have wrote -- - state inspectors have wrote recommendations for dust. We have the technology now, a piece of machinery that the company bought that does an excellent job. But will they use it? They don't use it.

I have dusted the seals since 1998 one time. I'm a rock duster. My job is to rock dust. I see this dust every day. You can go to my district manager, our

district manager in Illinois, ask him how many -- I would give on dust. I wrote more dust -- as a problem in my mine. I won't put up with it and nobody should put up with it. We have a problem with it on a daily basis. Outbye, a daily basis. In-by, it's not quite as bad, but it is bad and here we go talking about outbye sampling.

I got a minimum of 270 cross-cuts outbye. Right now, the dust, the air on our belt lines is so great that you can start dusting right now and you can't even tell the dust is in the air. The only time you can see it is on the ground. That's where you see it.

It should be dusted every day. Float dust is in excess every day. Depending on who the inspector is and what the district manager will allow, we may have one or two inspectors year or year and a half ago get on about dust.

Like I said the other day about this new Boyd ventilation system, there has not been one inspector write up a violation for air going out the travel -- on this Boyd ventilation because they don't want to make waves. Right now, I see it that they are just catering to the companies. Mr. Kazinksi -- I'm sorry, that's the uni-bomber -- Mr. Lauriski, who was once a coal operator himself and now is the head of MSHA. The gentleman underneath him, we all know him, the former safety

director Wheelburg mine. I'm sure him and the other coal operators would love to see this -- more increased production and less protection for the miners.

Why is there no non-union coal miners here today? If there was, he would not raise his hand, because for sure he would not have signed in, because if he had been here today, he would be fired tomorrow.

We are here to see that there is protection for all miners in this country.

I would like to ask on this outbye sampling, say you are at 10,000 feet and two or three weeks after they start this unit up and inspector comes out and takes a sample. For one year, that's all he has to do. Say everything is okay, so for another year, he don't have to take that outbye sampling for another year, a whole year. I believe that is disregard for the safety and health of everybody who goes in that mine under those conditions.

We need a continuous monitoring system. I would like to ask what do you sample for just at the unit? Why not portal to portal? When you sample, you just do it on production. Not as it is -- a dust pump is turned on for eight hours, which is not done in my mine. It goes in on an eight-hour shift. It goes in and comes out.

On that other one where it says your contingency, it stays on portal to portal. Why is it one

and not the other?

MR. NICHOLS: I take it you are talking about the two different types of samples.

MR. MAHAN: I am talking the samples that you take on machine -- if you take it where I am going to wear that thing that goes on my belt --

MR. NICHOLS: The continuous dust monitor? It's portal to portal.

MR. MAHAN: Right.

MR. NICHOLS: It's an individual sample.

MR. MAHAN: There you go, but who are you testing here on this dust sample?

MR. NICHOLS: We do not sample individuals. We sample occupations. That's why when our pumps go in, if the guy switches jobs, the pumps gets swapped. We are interested in occupations and what those occupations are exposed it. We are there to determine compliance.

MR. MAHAN: I know what you say there, because you put it like a unit.

MR. NICHOLS: I'm sorry?

MR. MAHAN: You dust sample like a unit. It could be a roofbolter or a machine. The bolt machine or the roofbolter, right?

MR. NICHOLS: We sample the roofbolter operator.

MR. MAHAN: Okay.

MR. NICHOLS: Not the machine.

MR. MAHAN: All right. What is the difference between one of the continuous monitors -- you should be continually monitoring it on a dust sampling basis whether it be on a machine -- he goes inside that thing, he still should be on a dust sampling basis.

MR. NICHOLS: I am not understanding what you are asking.

MR. MAHAN: You test -- you say you test the individual in the unit.

MR. NICHOLS: We test the occupations. We do not sample individuals. The only individuals that are sampled are --

MR. MAHAN: Miner operator --

MR. NICHOLS: We sample miner operator, roofbolt operator on the left side, roofbolter operator ont right side. It shows operator one and operator. If they swap out, then the pumps stay with the occupation that we started on. If there are two or three people that swap out as a continuous miner operator, the pump gets swapped out so that the one pump stays on the continuous miner operator. That's what done --

MR. MAHAN: The guy that goes in there and wears that box that fits on the side of his belt, it stays with him most of the time. On the in-take, I have seen a box

hanging from the in-take grid.

What I would like to see is that we take this back and I would like to ask the board here today if it was today that you had to go back and tell whoever it is, would you accept this the way it is? Yes or no? These proposals that were given to me and my members?

MR. NICHOLS: What is the question?

MR. MAHAN: I am asking would you today, if it was today that you had to go back and report and make a decision, yes we should allow these proposals to go into effect, yes or no. Today. I mean, today if you had to do that --

MR. NICHOLS: Well, we think they are responsible rules. We are out here collecting comments. This is part of the rule-making process. That decision won't be made until sometime later this year.

MR. MAHAN: And say if that was made later in the year, you said that there are the continuous monitoring systems out there. Say, there was a page here that says they may use these. Why couldn't that be must? It says they may implement these devices. Why couldn't it be must? You put a word in like may, you may as well not put it in there as far as the company is concerned, because they are not going to do it.

Why do we change -- we change -- this panel or

whoever makes the decision, I wish they would tell the EPA board to lift the standards on the sulphur dioxide. Heck, we wouldn't have to worry about --. We could do it then. We could clean the streams up -- the levels of pollution in our streams. We put catalytic converters on our cars to reduce the carbon monoxide. We do all kinds of things here, but when it comes to underground mining, we are going the opposite way -- disregarding the miner's health and safety. We have a time-bomb here as far as explosions. I just think like Mr. Roberts said in Charleston, if this is passed, then I say God have mercy on everybody's soul who implements this and like Mr. Roberts said, I hope the lights go out in this country. I thank you for your time.

MR. NICHOLS: Thank you. Steve Earle.

MR. EARLE: Mr. Nichols, the panel members, my name is Steve Earle, E-A-R-L-E. I am a political action director, lobbyist for the United Mine Workers in Kentucky. I am here today speaking on behalf of coal miners in this state, union and non-union alike.

You have heard in recent days why the UMWA is opposed to the proposed rules and changes that you are trying to implement. In my 31 years of experience as a coal miner, and talking to countless miners across this state, I honestly feel that MSHA's new rules, represent a

very dangerous step backwards in the ongoing fight to eliminate black lung disease in America.

We have lost 1,287 coal miners in Kentucky alone since 1987 to black lung disease. Those figures are not mine. They are NIOSH's. We all know that coal dust in underground mines is the primary cause of black lung disease, which has killed more than 55,000 miners from 1968 through 1990 and still kills about 1,500 miners annually.

I want you all to think how many miners, how many wives of miners don't have a husband, how many children don't have a father, how many grandchildren don't have a grandfather. I want you to think about all the pain, the suffering, the agony these coal field families have endured since our miners began mining this nation's coal. I personally lost two grandfathers to black lung disease, and several friends.

There are changes contained in the MSHA proposals that the UMWA fears will create an even more unhealthy and dangerous workplace for miners. Many are too complex to attempt to explain and too complex to decipher. We always said that monitoring and sampling should be taken over by MSHA, but not three times a year as opposed to 44 times.

It is troubling in only a few short weeks after

NIOSH release a new study revealing that coal miners are still contracting black lung disease at the current 2. mgs. cubic meter dust levels and here we are fighting to prevent the federal agency charged with protecting miners' health and safety from raising the level to eight milligrams cubic meter levels.

The current proposed MSHA rules would turn the clock back to pre-1969 levels when the historical Mine Act was passed.

I would like to regress for a moment and go back to 1998 when this state's most respected newspaper, The Courier Journal, wrote a five-part series entitled "Dust, Deception and Death, Why Black Lung Hasn't Been Wiped Out". I would like to read to you some excerpts from that series beginning with a letter from Benny L. Ivory, Executive Director of the Louisville Courier Journal.

For years, a quite but deadly tragedy has been played out in the nation's underground coal mines. Coal mines operators have known about it. The federal government has known about it and coal miners themselves have known about it. The tragedy is that in 1998, black lung disease still kills hundreds of miners nationwide. Doctors have known for a century that coal dust causes black lung, which can be prevented through underground dust control measures, but 30 years after Congress placed

strict limits on airborne dust and ordered mine operators to take periodic tests inside their mines, about 1,500 miners die of black lung every year.

The Courier Journal set out to find out why. The answers were shocking. In a year-long investigation that involved interviews with 255 working and retired miners and computer analysis of more than seven million government records, The Courier Journal found that among other things, miners continue to breath dangerous levels of coal dust because cheating on dust tests is rampant. Most coal mines send the government air samples with so little dust that experts say they must be fraudulent.

Many mine operators, non-union mine operators in particular, don't comply because strict adherence to safety regulations is time-consuming, costly and cuts into profits.

The federal agency responsible for protecting miners ignored overwhelming evidence of cheating. Nearly every miner interviewed said that cheating on dust tests is common and many miners help operators falsify tests to protect their jobs and almost no coal miner has qualified for black lung benefits under Kentucky's new Worker's Compensation law.

Since publication of the series, Kentucky's Attorney General has asked the US Attorney General to

investigate why mine safety officials have ignored evidence of cheating and state law makers have called for a special session to adopt new legislation on Worker's Compensation.

I want to read some headlines to you. This is a five-part series. Cheating on Coal Dust Tests Widespread at the Nation's Mines. Surface Mine Drillers Face High Risk.

You have heard this morning, this afternoon about there isn't any non-union miners here today testifying and I think that is a shame. But I want to read to you what one of them had to say to the Louisville Courier Journal. His name was Freddy Brock of Whitesburg, Kentucky. He worked underground for 12 years until 1991 and he has got black lung, by the way. He says, believe me, I have seen them turn the dust pumps off and put sandwich bags over the sniffers and I have seen the boss just make the men put them in their shirts so it wouldn't get to the dust. If the company operated by the rules, taking care of the men and hanging the curtains and ventilating dusty places, then a fellow wouldn't get near the dust that he did, but the only time that got done is when the inspector was coming. And then that kind of slow production down and before an inspector even gets outside, the boss says get them curtains down,

get them out of the way. It would get so dusty our teeth would be black. We would have to stop and rinse our mouths out with water to get the dust out.

Another headline, US Mine Agency Ignored Fraud. Black Lung, Cheating Worse at Small Non-union Mines. Depressed Profit Margins Spawn Fraud.

The dust was so thick at Yellow Creek Mine in Sassafras, Kentucky that Larry Hatten said he couldn't see his hands on the controls of his mining machine. And it goes on and on and on.

Do you recognize this guy right here? That's Mike South, former president of the National Black Lung Association, who lobbied with me in Frankfort for some time before he succumbed to black lung disease. He died a few months ago.

In closing, gentlemen, I would like to say that there has been many ideas that have been proposed for cleaning up coal mines and wiping out black lung disease. They have came from experts on mining, the government, industry, and everyone in between.

You know, the Bible says in Proverbs, chapter 31, speak up for those who cannot speak for themselves. The United Mine Workers has tried to do that since its inception in 1890. There are thousands of coal miners in our nation's mines who need our help. They need your

help. Miners who are threatened every day on the job by unscrupulous, greedy and dishonest coal operators and, gentlemen, we know they are out there, they are out there everywhere from Kentucky to Alabama to West Virginia to Pennsylvania. You gentlemen sitting on this panel, and the men and women who have worked for your agency must do everything in your power to see that this nation's miners' health and safety is protected at all cost.

I ask you on behalf of those who cannot speak for themselves that the proposed rules need to be withdrawn and rewritten. If we have the technology to put men on the moon, then we can find a solution to this problem.

You all were charged with the responsibility of protecting the men and women that work in this industry. You got a lot on your shoulders and I hope and pray that you all do the right thing, because there is a lot of people out there that are counting on it, that you will do the right thing.

I thank you for your time and I thank you for giving me an opportunity to address this panel.

MR. NICHOLS: Thank you. Dan Spinnie.

MR. SPINNIE: Afternoon.

MR. NICHOLS: Afternoon.

MR. SPINNIE: Dan Spinnie, S-P-I-N-N-I-E. I'm

chairman of the safety committee for local 2161 at Coalville, Illinois. I just have a few brief comments. I have been a coal miner for 28 years and the way these rules are written out that I myself along with other miners that we have heard from in the past week are opposed to them as they are written. And for good reason, which you have heard in the past and you are probably going to hear again in the future.

Several parts of this rule is designed not only to -- will it be unable to protect the miner, but we believe that some of it is illegal, such as allowing dust concentrations above 2. milligrams, which the Act specifically states.

I heard and old saying one time and I think it holds true in this case. It says sometimes you can't see the whole picture if you are in the frame. Now, for sure MSHA is in the frame and for sure, they are not seeing the whole picture.

For instance, we should require longer samples for the shifts. I heard you tell about the operators, that when MSHA samples, they should the whole shift, as soon as you leave the portal, go inside, until you get back out of the portal. That's what the people is in the dust and that's when it should be sampled.

There has been a lot of talk about the

continuous dust monitors and they will soon be available and one of you gentlemen a while ago mentioned that we have been talking about this since 1991 and that being the case, they say they are going to be pretty well ready if all tests check out all right in August. Why get in any hurry now? I mean, let's go for the continuous dust monitors.

I also believe and not only for union mines, but for non-union mines that more samples need to be taken by MSHA. At the very least, this protects that guy one more day while MSHA is on the property. I am going to give you an example in regard to what Bill Mains' point was about sample days and non-sample days -- kind of what happens in the real world. My memory isn't too good, but this just happened Monday at my mine, so I can probably remember it. I was traveling with an MSHA inspector to do a dust sampling on the right side MMU of the number two super section. Upon arriving on the section, the company said we couldn't sample the right side because the miner was down, the water spray was broke off, had to be repaired.

Well, after doing a little talking with the miner operators, this water spray block had been broke off for five days. And needless to say, this miner didn't sit there for five days.

That's what we get into in the difference of sample days and non-sample days. I mean, what is the difference -- well, I know what the difference is for the company. They didn't want to get the big ticket. Well, they should get the big ticket. It all goes back to the point of allowing union mines and non-union mines when MSHA is there, the game is different and has been and I testified to this whenever the hearings was back in West Virginia the last go around. And it ain't changed. I mean, this was last Monday.

This is just one example of what goes on in the real world, I guess you could say, between non-sampling days and I would urge MSHA as far as these rules go to just trash this and bring us one back that looks at the whole picture and protects the miners. They are the ones that need protecting from the big silent killer called black lung. We have to. It's your obligation.

Thank you.

MR. NICHOLS: Thank you. Next is John Stewart.

MR. STEWART: My name is John Stewart. S-T-E-W-A-R-T. I've been a coal miner for over 32 years. I am the National Black Lung Association president. I deal with widows that's lost their husbands due to black lung disease, and our nation's coal miners who are slowly and painfully dying from black lung disease. These miners

worked in mines for the last 40 years where the maximum allowance of coal dust was 2.0 milligrams of respirable dust per cubic meter of air. That is the law by the 1969 Coal Act.

Now, MSHA is attempting to violate the law, we feel, and allow coal companies to raise the dust limit four times higher than what the law allows now. There will be no reduction in black lung of our members in that case.

MSHA should be getting the coal dust in the mines lower than 2.0 milligrams, not increase it four times higher. MSHA should ignore the needs of the miners. Instead, they should set standards they are sure that working conditions are less than 2.0 milligrams.

There have been over 77,000 coal miners die of black lung disease with the law being 2.0 milligrams of respirable dust. These new dust rules that you are trying to introduce will kill tens of thousands more coal miners. There is a miner die of black lung every six hours. That's about 1,500 a year. Under these new rules with four times higher, a miner could die every hour and a half with black lung disease.

We feel this committee and these rules are favoring the company by increasing the dust and decreasing the sampling. It is not only against the law,

we feel it is immoral because this will inflict our miners with more disease and agony and death.

MSHA has not listened to the coal miners or the advisory committees or NIOSH's recommendations. A study by NIOSH that came out in April 18th showed out of 30,000 miners, 862 of them had black lung. This is already unacceptable, what the law is now at 2.0 milligrams of dust.

The new dust rules are several pages long. They are confusing, complex and misleading when the solution is very simple -- mandate continuous dust monitors on our coal miners 24-7. Gather the information and reduce the dusty areas.

I know no one on this committee has any coal mining experience, but I wish you could look in the eyes of the coal miners who can't catch their breath because of black lung disease. You have looked in the eyes today of a widow that lost her husband over a period of years to black lung, Linda Chapman. There is tens of thousands more widows that is in her same position. Or maybe even some of you could work in a coal mine for a few weeks in the conditions that we see every day.

I went with the federal inspectors hundreds of times over the 32 years. I have even seen them kind of get to coughing and gasping for breath after talking to

the miner at the machine, not having a respirator on.

This nation's great first responders of firemen, police and rescue workers who responded to the 9-11 disaster and recovered bodies and body parts, after three months, they had lung disorders. Our miners spend 20, 30, 40 years in dust, which is probably higher than what they had. The cost of the medical care to treat tens of thousands of black lung victims runs in millions of dollars. The coal company spends millions of dollars trying to beat our miners out of benefits. Pay millions of dollars to the lawyers and doctors. The coal companies also pay several tens of thousands of dollars to their employees for taking dust samples, taking care of dust problems.

If we took a small percentage of all this money and spent it on these PDMs, we would just about have the problem eliminated there.

As National Black Lung Association president, I am asking this committee, do not kill thousands more coal miners over and above what is dying now. Do not increase the coal dust in the mines. Do not decrease the sampling of the dust and do not break the law of the 1969 Mine Act.

If you do, the burden of these miner's lives and their family incomes and well-being will be on your

shoulders and I can't believe that anyone up here would want the blood of these miners on your hands.

Thank you.

MR. NICHOLS: Thank you. Joe Urban?

MR. URBAN: My name is Joe Urban, U-R-B-A-N. I'm with United Mine Workers. I have three or four prepared pages I want to read into the record, Marvin, and then just a couple extra side issues to comment on.

On January 13, 2000 the UMWA filed a lawsuit on behalf of the nation's miners to compel MSHA to issue rules overhauling the respiratory dust sampling program. That legal action called for four major requirements long demanded by miners. Those included MSHA to assume full responsibility for all compliance sampling, while increasing, not reducing the compliance sampling to require continuous dust monitoring for respirable dust, to protect miners each day and every day, 24-7, to insure that the dust sampling contemplates miner's full shift exposure by sampling the full shift and to insure miners had the full right to participate in their dust sampling program with representatives of the miners paid during that process as outlined in section 103 of the Mine Act.

Given the fraud and manipulation of the dust sampling program over the years, these reforms were essential to effectively overhaul the respirable dust

program. They are necessary to protect miners from lung diseases that have claimed the lives of tens of thousands. Those reforms would stop operators from exposing miners to unhealthy levels of coal mine dust and force them to put necessary controls in place and remove miners from unhealthy levels of dust.

Unfortunately, there are mine operators who do not want the dust levels to be identified and do not want to have to install dust control measures to control the dust.

The reform sought by miners was supported by federal advisory committee and NIOSH findings and recommendations and must be put in place if the dust sampling program is to be fixed to protect miners. The proposed rules were found to eliminate a number of projections and standards contained in the federal Mine Safety and Health Act in Title 30 CFR regulations.

They outright ignore and are contrary to years of work to effectively reform the respirable dust program, the Mine Act, the 1996 Security of Labor Advisory Committee report on recommendations to elimination of pneumoconiosis among coal mine workers, the 1995 NIOSH criteria for recommended standard occupational exposure to respirable coal mine dust, the extensive record of public hearings which included

numerous miners from across the country on the 2000 proposed respirable dust rules and the clear needs of miners.

Numerous proposed rules would violate section 101(a)(9) of the Mine Act by reducing protection afforded miners under the act. We feel that MSHA blatantly ignored the well-documented record on reform needed as they crafted the new rule.

The rule must be withdrawn and rewritten. More specific reasons for that are as follows: there is clear reason to reform the dust sampling program and get it right. Miners' exposure to unhealthy respirable coal mine dust has led to the deaths of tens of thousands of miners and cost billions of dollars for those stricken by black lung disease.

Miners continue to die from exposure to the unhealthy coal mine dust. The NIOSH study just released in April of 2003 reveals that working miners are continuing to get the black lung disease. A special chest x-rays program ran between October of 1999 to September 2002 found that of the 31,179 working miners, the prevalence of pneumoconiosis was found in 862 cases. The study did not include high participation of miners in some states such as Kentucky where the numbers of miners afflicted with this disease is suspected to be

among the highest.

During the 1990s, over 160 companies and or individuals were criminally prosecuted for fraudulent dust sampling practices aimed at hiding the unhealthy respirable dust levels they were exposing miners to. A program must be put into place that gives miners control over the dust conditions that destroy their health and lives.

Unfortunately, like failed reforms in the past, the new proposed ruled can't seem to break from the tradition of operator and agency interests. What is most appalling is the fact that the government would not even listen to the miners who are the victims of these wrong-headed policies. They choose to ignore the fact that thousands have already died.

When MSHA issued the proposed rule on March 6th, they chose not only to ignore the demands and needs of the miners. They also ignored the solution to the troubled dust sampling program handed to them on a silver platter.

That solution is the development of a continuous dust monitor that can provide instant read-out of the dust levels in the mines, the PDM-1.

For the past several years with the support of taxpayer dollars, the UMWA, industry and NIOSH together

with extensive work has been undertaken to develop a personal dust sampler. That device in the hands of the nation's coal miners could do more to protect them than any single regulatory action envisioned. Miners knew that when they demanded it be built in the mid 1970s.

In 1980, the federal government, MSHA, promised miners they would work to develop a device that would continuously monitor the mine atmosphere to protect them from the unhealthy dust. Through years of research and development and the support of labor, industry and NIOSH, that device is now within reach.

Final testing is expected to be completed in the late summer. The parties have pressed for the continuous dust monitors to be the centerpiece of the respirable dust reforms, not the side issue contained in the MSHA proposals. The proposed rule does not mandate their use. It simply allows operators to decide if they want to use them. The proposed rule is actually designed to discourage that. The personal continuous dust sampling devices, unlike current dust samplers, are worker-friendly and built into a miner's cap light battery. They will provide continuous and instantaneous data to miners on respirable dust levels throughout the entire shift with projections on dust levels for the remainder of the shift. The sampling

results for the entire shift are instantly available at shift's end and the data can be electronically transmitted directly to MSHA.

They have been built to be as tamper resistant as possible.

Any reforms of the respirable dust program must include the use of continuous dust monitors as the center of the requirements, not a limited operator option. These personal continuous dust sampling devices need to be required at each coal mine, each shift, each day for all miners that could be exposed to unhealthy dust.

It would solve a number of problems plaguing the respirable dust program including continuous sampling of the mine dust to permit immediate action to protect miners from harmful dust, sampling for the full shift instead of the current partial shift sampling to insure miners are not over-exposed, instant results of dust levels as opposed to days or weeks later. This would allow constant plan verification and immediate changes to improve dust control plan efficiency. This will place a wealth of data in the hands of miners, MSHA and the mine operators affording them the ability to constantly evaluate compliance with the mine's dust standards, most importantly, a method to constantly protect miners from exposure to unhealthy dust.

MSHA's failure to design the respirable dust rules around this device defies logic. The current proposed dust rules, which are nothing short of disaster must be withdrawn and replaced with a continuous monitoring model that works.

We were highly disturbed to find that in crafting the new proposed dust rules, MSHA turned a deaf ear to the extensive record. The agency supposedly used this wealth of information to develop the new proposal. The well-documented concerns raised by miners and miner's representatives across the country during the public hearings on the proposed respirable dust rule in 2000 and the 1996 federal advisory committee appointed by the Secretary of Labor to develop recommendations recommended action on elimination of pneumoconiosis among coal workers were outright ignored by MSHA.

The miners and other concerned parties expressed the need for the dust rules to include an effective take-over of the mine operator controlled compliance dust sampling program by MSHA increasing the number of shifts on which compliance dust sampling is conducted at coal mines to make sure that unhealthy dust levels are maintained requiring dust samplers be run the full shift instead of having the sampling shut down well before the shift ended, which was allowing mine operators to expose

miners to more of the unhealthy dust than permitted by law, providing full participation by miners and their representatives during dust sampling to curb mine operators cheating, citing mine operators when they exceed the legal exposure levels as opposed to dust levels being in excess of the standard before citing, having MSHA conduct verification of dust control plans to make sure the plans would control the unhealthy dust, requiring a lowering of the 2. mgs. per cubic meter of air respirable dust levels in coal mines as sought by the Mine Act and government findings, increasing the sampling of the coal mine dust levels in areas outbye the coal face to protect miners from exposure to respirable dust and requiring continuous monitoring of dust levels in coal mines to make sure dust levels are maintained at safe levels each shift as called for by the Mine Act.

The agency in our view not only failed to heed these needed calls for improvements but the new proposal reverses and extensively weakens current projections. They would substantially undercut the dust standards proposed in 2000. The new proposed rule eliminates mine operator regulatory compliance sampling with no take over of the sampling program by MSHA.

This leaves no regulatory dust compliance sampling program in place. Instead of increasing the

number of shifts on which compliance sampling would take place, the new proposal substantially reduces compliance sampling by as much as 90 percent at some mines.

Based on MSHA's own projections, the 34 shifts currently sampled on the mining section could drop to as few as three and those are not even guaranteed in the dust rules. Instead of reducing the dust concentrations in mines, the new proposals would allow substantial increases of unhealthy respirable dust concentrations in coal mines by as much as four times the current dust levels from 2. mgs. to eight based on MSHA's own projections.

Instead of MSHA verifying the mine operator dust control plans to assure they are credible, the new proposal lets the mine operator verify their own plan. In plain terms, the fox is guarding the hen house.

The new proposal ignores the need for full-shift compliance sampling by having dust samplers shut down while miners are still working and subject to the dust. This could be for hours during the remainder of the shift. The dust rules contain no mandatory requirement for continuous dust sampling and do not increase compliance dust sampling in areas away from coal faces leaving most of the mine to be sampled only one shift a year.

It does not require citing the mine operator when specific mandatory exposure levels are exceeded. The dust rules allow mine operators to place environmental dust controls which are mandated by the Mine Act with a type of respirator not properly designed for that application. Permitting this would violate the Mine Act.

The dust rules reduce dust sampling to a point where there is little for the miners to participate in.

Marvin, correct me if I am wrong, but I think in Evansville you had asked a question well, what do we do if we have got continuous dust monitor and we have an over-exposure and we are producing coal, what do we do? Well, my response to that, Marvin, would be the same as what do we do when we have over one percent of methane or over one and a half percent of methane. You set down, you shut down, you make the necessary corrections, then you go back into production.

We talked some about the fact that MSHA is supposedly supporting the technology that NIOSH is doing. I differ with that, Marvin, because if MSHA truly was supporting the technology, then I feel MSHA would mandate the use of this technology in the rule. And I will say that because, Marvin, we live in a capitalistic society and no company is going go out there and ask their

stockholders to invest thousands of dollars to put this piece of equipment in the manufacturing mode without having some means of getting their money back and if it's not required for the operators to buy them, they are not going to buy them.

Secondly, the personal dust monitor should be dealt with in the same way that the SECSRs were. How did we get them? It was mandated by MSHA. That's how we got them.

I do have one question for Larry. I was curious. Larry said that he had wore one of the helmets in his office. What did you do with that helmet in your office, Larry?

MR. REYNOLDS: I sat at my desk and worked and I found it very helpful because clients went away because they were afraid of me.

MR. URBAN: So, outside of the mental work that you did, you didn't actually do anything physically with it other than sit at a desk or walk around the office.

MR. REYNOLDS: I just sat at my desk in my fancy air conditioned office and tried to work.

MR. URBAN: Gentlemen, I know you have got a big responsibility. I know you want to please the people that you work for and I know that you have spent countless hours in putting this together. But

unfortunately, and I know Larry has stated it time and time again, that plan verification is in the rule and thereby the operators have to go by it. Well, I am required to drive a certain speed on the highway, too, Larry, but that doesn't mean that I always do it. MSHA can't be there every day, every shift, 24-7. Of course they could be and that would put a lot of coal miners that's out of work -- give them jobs, but the reality of it, we have got the technology that is there that can do that for us with continuous dust monitor.

I know you owe an allegiance to the people you work for. You want to set the best example that you can in the work that you do for that agency and for the individual you work for. But I am going to give you Joe Urban's final version of what I think this proposed rule is -- and all due respect, this rule is only a gift for Energy West and that's all it is.

Thank you.

MR. NICHOLS: Thank you, Joe. Frank Winstead.

MR. WINSTEAD: I will keep mine real brief. I am not for raising the 2. mg. dust rules to something higher. I feel like if you don't write a citation until the dust level gets to 2.33, you are raising the level.

The only reason that we should change a law is if it makes it better for the health and safety of the

people concerned. From where I see, this lowers the level of protection for the miners. The Act says that our goal is to protect industry's most valued asset, the miner. If we lower the level of protection, I believe that we are losing sight of what we are supposed to be doing.

I think sampling every day, at least in those high dust areas is the only answer. This is the only way that we can measure the true amount of dust the miners get. Everyone knows in the mines we have good days and bad days as far as dust goes and I think that the pump on the miners every day would guarantee a whole lot less of those bad days.

It may be coincidental, but it seems like on dust days -- I know you have heard already, but it seems like that the scrubbers get cleaned out, the water sprays are all clean and kept clean, plenty of new wing curtain on a run, all roads are watered down. I think that the cap light pumps would make a more consistent control for those companies that want to take advantage of days like that, getting things cleaned up.

I myself would not like to use an Airstream helmet that somebody else has been using. I wouldn't even want to use one that I used every day unless I cleaned it thoroughly and I am not sure that you can do

that. Those things are full of crevices and cracks and places for bacteria and such as that to get in and evade being washed out by solvents and what solvents can we use to kill a virus, for instance. I mean, I know they have some, but is the toxicity level so high that it might affect my skin to have it on? That is the problem I have with those. I think it's going to be a trade off -- one problem for another.

I know there are solvents out there that we use on the floors. Those solvents are extremely toxic. I wouldn't want to put something on my skin that is going remain as a residue in that helmet that I would be using on the floor in order to kill off bacteria or viruses.

Also, it's a wet dust environment and the dust with the moisture tends to stick to the shield and you are going to be up and down and getting dust in and out of it from trying to keep it clean, breathing the atmosphere. If it's at eight milligrams, you are really going to suck some dust down pretty quick.

I don't think that this all should be so complicated. The more wordy you make it, the more chance that someone will find a way to abuse it.

You need to make the language simpler and more concise. A dust rule should be simple worded and demand compliance.

12.42 percent of the violations written in 2002 were for accumulations of combustible material. Coal dust is highly combustible material. Allowing an amount of dust in the atmosphere to exceed 2. mgs. would surely allow more dust to accumulate making a fire and explosion hazard.

MSHA wrote 2,409 violations in 2002 on companies not following their ventilation plan. What I am trying to say is that there are some companies out there that would take advantage of license.

In conclusion, I think that you should start over with something simpler worded, to the point, and that demands compliance. I think that you should let Joe Main help you with it and look closely at what the advisory board has said in the past and come up with some way to get a good representative sample so that we can deal with the real problem.

Thank you.

MR. NICHOLS: Thank you, Frank. Thanks for your patience.

MR. WINSTEAD: No problem. I am a patient man.

MR. NICHOLS: Mike Dillingham.

MR. DILLINGHAM: My name is Michael Dillingham, D-I-L-L-I-N-G-H-A-M. I'm with United Mine Workers, district 12, subdistrict 23, local union 6492, health and

safety committee.

As you know, we have sat here today and listened to about everybody. I have. I think there is one other speaker besides myself. Kind of heard views from a whole lot of different people. A lot of the concerns seem to be the same.

I didn't prepare a big long thing to talk about today. I am kind of more or less a person to look a guy in the eye and tell him how I feel from what I know. I started coal mining when I was 18 years old. I will be 48 this year. When I was 38 years old, they told me I had the first stages of black lung.

I have worked 15 years underground, seven years on the surface and done mine construction for seven years. I have been around pretty well all of it.

I sat and listened today about different things and we still have dust problems in the mines. MSHA was at the mine yesterday and ran dust. It seems like on the days we have inspectors come, they don't know they are coming -- they are not supposed to know, but when they get out of their car, they know they are out of the health group. They know when they get their dust machines out what they are going to do.

First thing they do is get on the phone and tell them wet the unit down, make everything is all right,

they will be on the unit in probably 30 minutes, have third shift wet it down. That's one of them days that Tim referred, I guess, as MSHA days.

We work on trying to keep our air up, trying to keep everything the way it should be. It don't always work. You have days, but most of time, we try to keep it to where it will be that we don't have to breathe that dust.

I was in the mines on an inspection a couple weeks ago, very dusty situation. I asked a miner operator, man, you got enough air? Got plenty. Checked the air coming in -- supposed to have 65 coming down the wing. The mine I work at, we got a mixed breed of people. We have got people from all over little mines that has been laid off, bigger mines, different companies, everybody -- you know, there's no jobs. Everybody is just hanging on to what they got. They have us down working four days a week. Everybody is scared to death they ain't going to have a job.

Then I set and look and listen and I think about all the lives that have been lost over the years due to roof falls, explosions, just different things -- black lung. Then I sit and think about that and I thought why was the Act created? Why did they come up with the Act? They came up with it because of how people were

mistreated. There was no standards to help the miner. Farmington, I think after that a lot of stuff started happening. And this is what? Almost 30 years later, something like that -- 35. Times has changed. Just like I think this gentleman said a while ago when he was talking about production. When you go from 400 ton a shift to 5,000 ton a shift -- big difference, you know. There has got to be something there to compensate for that.

I sit and listen to what comes about today and I don't know where they derived the 2. mg. standard from in '69 when they put it in. I don't where they came from. But I know that was more of a benchmark and a set point to get a start from, but who is to say it needed to be eight? Who said it didn't need to be .5? This day in time, there is a lot more dust. I would like to see us come up with a thing like this fellow was talking here to Frank, about they are going to be testing the end of August or sometime in August. It might be a reality, you know. I don't think the answer, from looking and listening -- I've tried to read over these regs. I can get some out of it and some I can't. That's why I guess I am kind of one of the fortunate ones this afternoon to listen to everyone else and kind of absorb what they had to say.

I believe that that monitor type system would be the best thing for coal mines. I think personal monitors would show exactly what is going on with it and with the technology and -- it's got to work, you know.

Then I sit and look at the type of dust programs we have got now. People are still getting black lung and it's under from what we are doing now. Then I look at the new standards and -- or proposed standards and see how if they can accelerate the rate of dust you are going to be able to breath, how is that going to help curtail black lung?

I look at myself as being still pretty young, and I would like to keep -- I guess, what few years I have got left -- healthy. But I am a coal miner. Have been since 18 years old. I ain't got but a few more years to work. Somebody told me the other day looks like you will retire before long. I said, yeah, about 20 more years and I will probably get it.

Anyway, I would like to see us work more on that. I would like to see us work more on trying to get some standards to where we have a lower than 2.0 -- or maintain that and do the sampling in accordance with the way we are until maybe we can look at something better. I mean, I will go what a guy said a while ago -- you all worked hard on this and spent a lot of time and effort

and things put into it, but I'm here to represent not only the miners I work with, but the miners I don't, miners in general. It's like Tim Miller said. There is miners that is not going to be here because they won't come here. They can't come here. They can't even speak up. If they are told to go down there and fall into it, they have to go, because they don't know any different. They don't know what miner's rights are.

I deal with it every day. I've have got them from all walks, all different mines. They don't know what it is.

And if some does fall into place to where it would be on a shift sample, whether it be eight, 10, 11, 12 hour shifts to get a true sample -- and I know part of you people work for MSHA. And that is something that -- we depend on you guys -- from Arlington all the way down to Madisonville. We depend on you guys, because the law is what backs us. I traveled yesterday with a guy doing a triple A on the surface. Wrote five violations.

I look hand in hand and then I listen when we first started out this morning and I don't think anybody is here to get down on nobody. I look back in '95 under this Balinger bill when it came out. The coal operators, non-union people wasn't pushing to keep MSHA. It was the United Mine Workers. They was the one pushing.

I remember setting up there at the academy and you were there and I think I have seen some of you fellows. I know I have you two a bunch of times, because I have been to the academy a lot over the years. I have been a miners rep 15 years. And somewhere, we need to work hand in hand on this deal. It don't need to be where it's forced down.

I know the administration we got now, things has changed -- the way money is, the way budgets are. We hear that out at the mines, too. They don't make no money. They ain't never made none. I have worked at about 12 of them. They have never made any money. don't know how they keep going, but they do.

What I would like to say in closing here today, I would like to see everybody work earnestly for the same common goal and that's to cut respirable dust, monitor it in a safe way, in a manner that is going to be for the health and safety of the miners themselves -- not for somebody that don't want to lose a dollar, that want to gain two off me.

I think it should be the right thing to do, because I always felt that if you do right, you be right. I look at it that way and that is from the inside of me. I look at everything I do that way. If you do right, you will be right.

So, I am asking this committee today and I appreciate you all giving me the opportunity to speak and say what I have to say. Critique this thing and try to get it more in line, make it better for the miners, make it more feasible, try to get the dust levels down, try to just make it safe for the miners to go in where they can got home every day.

Thank you.

MR. NICHOLS: Thank you. Tim Baker.

TIM BAKER: Before we get started, Joe had talked earlier about dust fraud and I just want to enter into the record two documents. One is the Triangle case. The other is a print-out of the -- it's a case summary of the criminal prosecutions. I will just give those to you, Marvin.

MR. NICHOLS: Yes.

MR. BAKER: One thing I would like to say for the record initially is -- and I guess I do mean just the way it sounds. I believe it's a little bit disingenuous -- and I have heard this at every meeting -- it's a little bit disingenuous for anybody on the panel to sit up there and say in 2000 we got to hear about this PDM that was going to be out there right around the corner -- it was a bridge to the 21st century -- whenever I sit here knowing that your agency pulled funding that

particular instrument. Say what you like and believe what you like, but to sit here and tell miners we have been waiting forever for this thing, when in fact you impeded the progress of that particular device.

We may be sitting here in a different place and a different time with a PDM done if that hadn't been done, so I want to make sure that clearly gets on the record.

Now, what I would like to do and I will try to be brief, but sometimes you got to be careful what you ask you. You have mentioned at every hearing that certain documents were used to create this rule -- the task group document, the DAKS (phonetic) document and the NIOSH criteria document. As I read these documents, I find it hard to reconcile this rule with what these documents state. I know some of this will be repetitive as I go through it, but when a panel or a group or a committee finds it important enough to mention in their own documents four or five or six times, we need to do this, then I think that at least for the record, we need to bring those things out.

What I would like to do is I would like to go through some of these documents and read what their recommendations were whenever they were completed, completed their findings. The reason I think need to do

that is because where the rule is and what these recommendations are seem to be very much in conflict with one another.

What I would like to do first is go over the report of the coal mine respirable dust task group, the task group, which I believe was really an MSHA group. I believe Lynn Martin -- I believe it was Lynn Martin called for a group to be put together and it was put together under William Tattersal, so this is a 1991 study. I am just going to read and cite the pages and read some of the information and we can go from there. I will try to be brief, but like I say, if they felt it was important enough to put in many times, then I think that it bears listening to.

On page two they discuss respirable dust monitoring and they said continuous monitoring of the mine environment and parameters used to control dust offers the best solution for improving dust enforcement programs. Therefore, the task group recommends an accelerated research program to develop a fixed site monitor capable of providing continuous information on dust levels to the miner, mine operator and to MSHA if necessary. A research program should also be accelerated to develop a personal sampling device capable of providing both short term personal exposure measurements

as well as full-shift measurements.

The parallel program to develop instrumentation for continuously monitoring the parameters used to control respirable should also be undertaken. And that is the recommendation there for respirable dust monitoring.

MSHA enforcement. MSHA is not conducting the prescribed number of respirable dust inspections -- and this is in 1991, guys -- nor is MSHA adequately monitoring the operator abatement of dust violations. So, clearly, they see a problem there. And what we are recommending in this rule is less sampling at this point.

Their perception of the role of the miner, miners or their representatives should be encouraged to report to MSHA any irregularities in sampling, the sampling process and to participate in reviewing and providing input into the dust control plans proposed by the operator. And again, our concern is this plan severely limits that participation.

On page nine, part way down the second paragraph, the 1969 Coal Act established the first comprehensive dust standards for coal mines in the United States. These standards were based on studies conducted in Great Britain and were intended to protect the health of miners by imposing strict limits on the amount of

respirable coal mine dust allowed in the air that miners breathe.

Mine operators were also required to take accurate dust samples at periodic intervals to measure the amount of respirable dust in the mine atmosphere where miners work and travel, so we are talking portal to portal. We are not talking MMU.

The Coal Act was amended by the Federal Mine Safety and Health Act of 1977, but the respirable dust provisions remained essentially unchanged. So, they were discussing at that point portal to portal monitoring.

On page 11, during the development of the 1980 regulatory revisions, the operator sampling requirements, comments were received that indicated a lack of confidence in MSHA relying on operator samples to make compliance determinations. In response to those concerns, MSHA published a proposed regulation in 1980 that would provide miners representatives the right to observe each phase of the operator dust sampling process. The proposal was intended to promote better cooperation between mine operators and miners in order to improve the effectiveness of the program. That rule is here and that rule was published in the Federal Register on -- it was in 1980.

That rule subsequently died and there was no

action taken on it. But the rule was introduced to increase participate, including verification samples, operator samples. Obviously something that was again left out of the current proposed rule.

Further down on page 12, both the Coal Act and the Mine Act authorized the Bureau of Mines to conduct research to develop new improved means and methods or reducing concentrations of respirable dust in the coal mine. I guess the point here is, the thrust was to continue to look at ways to reduce the amount of respirable dust in mine atmosphere and that is not what this rule does.

On page 20, agency data indicate that there have been significant reductions in respirable dust levels since 1969. At that time, the average dust concentration in underground coal mines was reported to be approximately 6.5 milligrams per cubic meter. At the present time, results from MSHA's spot inspections, which were conducted at the request of the task group, indicate that average dust levels for the occupations sampled were below 2.0 mgs. per cubic meter. I think what this is is there is the potential -- and we have established that there is the potential to reach beyond eight mgs. Now, we are talking in 1969. The task group of MSHA personnel said in the worst case, it was 6.5.

Now, I can only surmise from that that larger equipment, less emphasis on environmental controls means that we are going to be able to push that. They can get it to 6.5 back then when the technology was smaller and slower. We can certainly get it to 8.

This is on page 22. In addition to other aspects of the monitoring system -- submission of unrepresented samples -- the committee recommended or stated that limited the sampling duration to 480 minutes does not measure the actual dust levels to which each miner on extended shifts are exposed. Experience indicates that some miners regularly work longer shifts than eight hours in duration and I would tell you that those shifts are now 10 and 12 hours and in 1991 they were saying sample for the full shift beyond eight. This rule does not do that.

On page 26, the clear intent of the Mine Act is that environmental controls should be the primary means of limiting miner's exposure. Environmental controls are methods that control the level of dust in the environment by either reducing dust generation or by suppressing, diluting or capturing the dust. Personal protective equipment or administrative controls should not be used in lieu of environmental controls. Environmental controls or work practices, which restrict the amount of

time that miners spend in high dust can result in lower personal exposures, however, these types of controls do not achieve the intent of the Act, which was to maintain dust levels in the miners' normal work environment at or below specified limits. In general, industrial hygiene practice, the concept of environmental controls is recognized as the best approach for controlling exposure.

So, they are clearly saying that you need to, when you can, engineer this dust problem.

On page 31, at the bottom of the page, given the importance of effective dust control, some form of continuous monitoring of dust control parameters should be highly desirable. The technology currently exists for monitoring of such parameters as water pressure and flow rate, but has yet to be integrated into a system that can be implemented in underground mines. I would submit that we have gone beyond that. We can integrate that into one package and are very close to doing that.

MR. NICHOLS: Tim, are you just going to read that into the record?

MR. BAKER: Well, Marvin, every time I come in, you said how you used these documents. What I am trying to find out is where in these documents you got the stuff for your rule.

MR. NICHOLS: We are thoroughly familiar with

the document and we can submit for the record and it will have the same effect as reading it into the record.

MR. BAKER: I'm not sure. I'm not sure about that, because these statements were made in 2000. Some of this data was read in 2000. Clearly, person after person, study after study said lower the respirable dust. I don't see it. I see an increase.

Clearly in this document, they say that MSHA needs to take over all sampling at at least the current level being done by the operator and agency. I don't see it in the proposed rule.

My concern is this, that as I submit the document -- well, it may get the same effect as me reading it, but I think that we have all been told here is where we got our information. Well, the task group said and we listened to it. It's not in here. I don't see it in the rule.

You said that the DAK said we need to do this --

MR. NICHOLS: Well, I don't think that we have tried to portray and we adopted everything in that report.

MR. BAKER: I don't see much -- maybe if you can tell me something you did it on, maybe that would be easier. I mean, I swear to God, I have read these things

twice and I am still struggling to find out where it's at.

MR. THAXTON: Go to page 107(8)(a) in the preamble, you will have a discussion on what was done with the task group report followed by 10790, the advisory committee report. You have both of those that spell out what we looked at and what we -- how we respond to those documents.

MR. BAKER: Well, I would suggest that --

MR. THAXTON: The criteria document also starts on page 107(8)(a) at the bottom.

MR. BAKER: Before I get to Alabama, I will make myself thoroughly familiar with the preamble, although you and I both know that no inspector is going to cite anything that is in the preamble, which is something else I want to talk about.

But my concern is explaining it away in the preamble does not answer the question as to if everybody that has done a study -- if three different groups have done a study that says you must reduce the amount of respirable dust to 1. mg., and all three of these studies say that, where did the agency get to 8. mgs.? Where -- how did we end up there?

I never heard a single person at the hearings in 2000 -- I never read a single document where anybody

recommended any increase for any reason. I even have the documents here that say don't even make an increase for air measurement of any equipment. Two is two. That's it. You hit 2.1, you lose. You get the citation. Tough luck. I haven't seen anywhere where anybody has called for an increase, yet your rule does.

MR. NICHOLS: Well, the issue here is whether you go through and read that into the record or you read the preamble where we discuss how we handled that report.

MR. BAKER: I will tell you what, Marvin. I think that there are some important issues within these documents that need to be read into the record. And where all three are saying the same thing, maybe that gets redundant and maybe that is what we need to do. Maybe what I really should do is have everybody read into the record and maybe it will sink it somewhat, because it hasn't to this point.

MR. NICHOLS: I get to decide who reads what into the record.

MR. BAKER: Then you can shut me off.

MR. NICHOLS: I don't want to unfair to you, but I want to be reasonable here.

MR. BAKER: You know what? That's what we would like. We would like a little bit of reasonableness.

MR. NICHOLS: I have never not allowed a miner

to give all the comments they want to give, but --

MR. BAKER: What I am suggesting is the rule is absolutely unreasonable.

MR. NICHOLS: That is beside the point of what we are talking about here.

MR. BAKER: No, that is the point.

MR. NICHOLS: Well, that is another point. I am going to let you set and read that whole thing into the record or direct you to the preamble where --

MR. BAKER: Then tell me no. Tell me I can't read it into the record.

MR. NICHOLS: How much do you want to read into the record?

MR. BAKER: As much as I got here.

MR. NICHOLS: Well, how much is it?

MR. BAKER: There are three documents.

MR. NICHOLS: Well, you are on page 20. How many pages are you going to read?

MR. BAKER: I'm not reading every page, just the ones I highlighted. I am guessing -- I don't know between the three documents. I didn't count them up.

MR. NICHOLS: How long would it take?

MR. BAKER: I have no idea.

MR. NICHOLS: You ought to have some idea before you come up here.

MR. BAKER: Why would I need to have some idea? Look, Marvin, if you don't want me to read it, just tell me you don't want me to read. I will go to the other questions I have and then I will just tell my people that Marvin wouldn't let me read it.

MR. REYNOLDS: Marvin, why don't you set a time limit?

MR. NICHOLS: Read as much as you can within the next 30 minutes.

MR. BAKER: Okay. On page 41, the task group recognized the new technology and concluded that new technology for the continuous monitoring of mine environment used to control dust offers the potential to improve the integrity of the enforcement program and further improve miner protection from excessive levels of respirable dust. The current rule does not advocate the use of that technology.

On page 47, the primacy of controls, the most effective dust control strategy to minimize the potential for miner exposure to respirable dust is the application and use of environmental control methods. Control of the working environment gives reasonable assurance that all miners in the area will be adequately protected. This is consistent with the Act and may serve to encourage the development of new dust control technology, which is

contrary to what the proposed rule does.

While administrative controls may be attractive to mine operators because they may be easier and less costly to apply and maintain in the short term than environmental controls, they have the potential to be less reliable.

Something that we believe to be very important is the miner's role in the dust program and on page 50, they concluded that one important means of improving the dust sampling program is to encourage increased involvement of miners in the process. The miners should be familiar with the hazards of over-exposure to respirable dust, appropriate sampling procedures and engineering controls required by the dust control program. Accordingly, the task group recommends MSHA should stress the importance of the miner's role in recognizing and reporting to MSHA any irregularities in the sampling process or any other unhealthful work practices.

MSHA should encourage miners and their representatives to participate in reviewing and providing input into the dust control program and this proposed rule certainly does not do that.

Again, on page 50, they discuss accelerating the research into the state of the art technology for fixed

cite mine dust monitors. They also discuss a monitor that is capable of cutting power to the mining equipment whenever applicable dust standards are demonstrated to be exceeded. A research program to develop a device for measuring full-shift personal respirable dust exposures for use as a method to control dust.

One thing, and I will switch gears here briefly since I am on a time limit, but I will try to cover as much other ground as I can. I have found and would like to enter into the record at least a partial -- what we would consider a partial solution for some of the problems we need in the current proposed rule and that is in effect part of the rule that was proposed on April 8th of 1980 and that was miner participation. Just briefly, it states that of course one of the most important provisions of the '69 Act was the requirement for each operator to continuously maintain 2.0 average concentration in the mine atmosphere.

But what we found encouraging by this proposal was that it would have actually given miners the right to participate in any sampling that was done, whether that was by the operator or whether it was MSHA. And if we are looking for solutions and we are looking for way to correct the dust problem, we would suggest that this might at least be part of the model for doing that.

Before I get back into those documents, so I don't lose my time with some of the things that I guess I need to respond to -- there was some discussion earlier about when we do verification samples and single samples three times or six times a year as the case may be, I think there was a debate going on about how given the fact that we now have these new parameters, new verification levels, that the lesser sampling would be adequate and you don't need as many samples. I would make the argument and I think that some have at least skirted the issue today that, in fact, the problem because you have a new system of verifying or because you now required stricter parameters, the problem doesn't go away based on the fact that you have now set these things down and they have got to meet that. Because whenever you are not there and the line canvas doesn't go up and you are not there and the water sprays aren't cleaned and you are not there for monitoring those things, I don't care what plan you verify. It's not going to be effective. It's not going to be useful. And they are not going to use it.

The only solution, the only possible solution we see is the continuous dust monitor and then you can't get out of having the parameters up. You got to maintain your parameters day after day after day. Otherwise, you

are going to be caught.

But to suggest that just by saying, gee, now you got to verify and you got to include this in your plan and here is how it's supposed to look and once you verify it, we are going to come in and do that either three or six times a years, you know as well as I that they are not going to maintain those parameters while you are not there.

As was said before by a gentleman who was straightforward with you, Tim Miller, 18 years as a non-union miner, he not only didn't have the opportunity to use those parameters, he wasn't allowed to question why he wasn't. He was just told mine the coal and that's it. So, those aren't going to change.

One other thing I want to talk about is I get the clear impression there is going to be a whole debate over the economic feasibility of a PDM-1 and we have come to the realization that these things are going to cost somewhere between $7,000 and $10,000 a piece. I will put the industry on the spot, at least some of the ones that we have worked with BCOA, in particular some of the people I have talked to recently, they knew the cost going in. They clearly knew the cost going in. The last I have talked to some of those representatives, they are not concerned about that cost. They knew what it was

going to be.

From a feasibility standpoint, if the burden is placed across the board on all mine operators, nobody gets a competitive advantage whether you are Peabody or Bledsoe or whoever it may be. If everybody is required to get them, then I guess the price of a ton of coal goes up a few bucks and everybody gets the monitors.

So, I caution against any economic feasibility being brought in to the picture. I think if it's required, they will come up with the money.

I am real concerned, too, on the discussion that was had about sanitary conditions that these PAPRs are going to be. You know, if you really want to waylay or if you really want to rest my fears on that -- I'm sure it doesn't really matter to you, but if you want to rest miner's fears on that, put in the rule. Tell me exactly what they are going to do with that, exactly how they are going to clean them. Because if you don't tell them exactly, it's not going to occur. It's not going to happen, guys.

I mean, we have all be in this business long enough to know that. And I know you know. But sometimes I think, God, they don't really think that is going to happen unless they are going to make it happen, do they? You all know that. It needs to be in the rule.

We did talk a little bit about the cost savings and the money savings or the expenses based on there is going to be expense for single sample, because of the way citations are going to be listed and where the savings are going to be. I'll tell you what. I would submit to you that if an operator gets a citation, one citation under the new plan, shame on them for getting two. I will be honest with you. If they get cited for being out of compliance, whether that is 2.33 or 9.32, shame on them for getting a second one, because there are enough loopholes in this sucker that if they can't figure out a way to get their exposure level, their milligrams raised at that particular mine or if they can't figure a way to get around those in the parameters after one citation, then they need someone else that can do it for them. There is just too many loopholes for them to be able to avoid.

So, when we talk about the 1.7 million dollars we are estimating for penalties on that, I wouldn't hold my breath. I will wait and see on that one. I want to revisit because I am a little confused one thing. There was a long discussion on the overcasting. I don't want to beat this horse to death, but it confused me because if I am cutting an overcast and I got approval for 30 days for a PAPRs, special circumstances, after the

30 days, wouldn't I just a renewal if I am not done? And if not, why not? If nothing has changed. There is no new engineering controls out there. That is where I am confused. What happens to that piece of equipment or what happens to that process after the 30 days? Do you just shut it down and say you can't do that no more?

MR. THAXTON: Go to the regulations under 70.212(d). It tells you exactly.

MR. BAKER: After 30 days, what happens?

MR. THAXTON: If PAPR use is to exceed 30 consecutive calendar days or if any equivalent concentration measurements indicate that the miners are getting over-exposed, the operator must revise and verify the adequacy of the plan parameters under the prevailing operating conditions.

MR. BAKER: Okay, I guess the question when you talk about over-exposed, is that over-exposed based on the new -- what is the best way to phrase this? Is that over-exposed based on something that may be higher than 2.0? For instance, he has PAPRs now and he is allowed to go to 3.5 and if he doesn't exceed 3.5, he can continue? I mean, what does that mean?

MR. THAXTON: Two things here. One, he cannot exceed the equivalent concentration with the PAPRs. Number two, he can't exceed 30 days. After 30 days, he

has to address the concentrations through engineering controls first. He has not shown by putting supplemental controls in that he has exhausted feasible engineering controls. That is an entirely different subject.

MR. BAKER: Wait a minute. You really confused me. Don't I have to show that I have exhausted all engineering controls before I get the first 30 days? Or do I not?

MR. THAXTON: No, you do not.

MR. BAKER: I just have to say I want these guys to wear like football helmets for the next 30 days?

MR. THAXTON: It is for special circumstances. That is a separate issue. Special circumstances for short duration, an operator can build into their plan the use of a PAPR to address something like cutting an overcast, running into a road, because by the time you run into it, you establish what the controls need to be, get those controls implemented and try to verify, he would be finished with it. MR. BAKER: So, then in essence, what I am looking at is, I can put this individual in an Airstream helmet and for 29 days expose him to God knows what, because I don't have to check it. I mean, I may be exposing him to so much quartz -- for 29 days I can do that is what you are telling me. But I don't have to monitor. I don't have to tell you what I

am exposing him to. I don't even have to sample it.

MR. THAXTON: The operator will not sample it. MSHA will come in and probably sample.

MR. BAKER: Don't give me probably, Bob. Please.

MR. THAXTON: Well, I can't -- if it's only for a day, we may not get there. If the guy is doing something, going through a road that is going to last 25 or 29 days, then, yes, there is a good chance that MSHA will be there and monitor during that time to make sure that the equivalent concentration that is measured, both quartz and respirable dust, that the miners stay protected.

MR. BAKER: Forgive me if I am not overjoyed by the idea that there is a possibility you may be there. Because if the calvary don't come, we are in trouble.

In essence, I could have 29 days of exposure to I-don't-know-what-limits of quartz, of respirable dust, of whatever and never even have to make a determination as to what's in that atmosphere.

MR. THAXTON: What do you today?

MR. BAKER: Hey, it's a new rule. I thought we were trying to make things better, buddy.

MR. THAXTON: We are. We are trying to put controls in place, that is supplemental controls that

will provide protection to the miners as an interim measure until such time as we determine whether more controls need to be put in place because this is a long term thing.

If it's a short term thing, right now, we have people cutting through roads or cutting an overcast that only last two or three days, those two or three days, people are being exposed, but right now, it's okay, because there is no proper air sampling done during that time. There is probably MSHA sample at that time. Even if there was, the average of five samples has to be collected to show over-exposure. The chances of it lasting five days for us to sample it or the operator, either one, is slim on most of these circumstances that have been thought up.

MR. BAKER: Well --

MR. THAXTON: So, in that case, people are currently being exposed and there is no protection provided to them whatsoever. What we are saying is let's recognize that, have the operator build in that we are going to provide some degree of protection that will work for that short period of time. The rest of time, the control measures that are in place have been shown to be effective.

MR. BAKER: And if we are recognizing the

problem that you are stating that we are not doing anything today, if we are recognizing that problem, why don't we first say to them, there is a problem here, let's look at engineering control before we even get into the PAPRs?

It's confusing. I worked in the mine long enough. I worked underground for 15 years. I worked in a section -- low coal and began to have one high entry to run your belts and your tracking. You cut rock every other day.

MR. THAXTON: Because that is a constant occurrence on that section, they would not qualify under this.

MR. BAKER: No, they could get --

MR. THAXTON: They would build their plan in such a way to address that situation at all times.

MR. BAKER: You get them permanent, is what you are telling me. Every time he cuts rock he can get them.

MR. THAXTON: No, he would have to address it by exhausting feasible engineering controls.

MR. BAKER: And once again, we go back to -- the operator is going to initially he has exhausted them and then you are going to make a judgment on whether or not that is true.

MR. THAXTON: The determination of exhausting

feasible engineering controls is going to be the agency's. The operator may submit that he thinks he has exhausted feasible engineering controls. The agency will be the one to come into evaluate it and provide the information to a panel of people that will address the situation and provide information to the administrator for coal, who will make that decision. I think we have covered that in our hearing today.

MR. BAKER: I'm not sure we have in that manner, because we are dealing with differing situations here. Initially, I am under the impression that even on a temporary, you are going to exhaust engineering controls, and now I am learning that that is not the case. We are not even going to look to those things. Maybe I should have read it closer or maybe it should have been clearer and maybe we should look at that from both ends.

But I was under the impression that in order to get PAPRs on anybody, you had to exhaust all engineering controls, but now I am being told that is not the case.

MR. THAXTON: If you actually read section 70.212(a) --

MR. NICHOLS: You need to back to the advisory report, the criteria document, and read that stuff before we get to Birmingham.

MR. BAKER: If you are insinuating I am not

informed, I take offense, because I have read these documents and it doesn't match anything you have in that document.

MR. NICHOLS: Well --

MR. BAKER: It clearly does not. By saying we have looked it doesn't explained that you have actually assessed and reviewed --

MR. NICHOLS: You read it one more time and if we need to go back to that other document, we will do that.

MR. BAKER: Then I would caution against referring back to anything that is contained in the preamble when these guys start asking questions about how you are going to enforce things, because I have never seen a citation issued on the preamble of a rule. I haven't. And I don't know an inspector out there that is able to cite one.

So, if we are going to talk about what can be cited when these guys have questions, and I have noticed that again today -- you say well, it's on page 108.68 and I am looking and thinking, it ain't in the rule. Fellows, if it ain't in the rule, it's not going to cited. Let's be honest to these guys out here, too. Let's make sure that we tell them.

I am guessing that my half hour is up, so I am

not even going to push the issue.

MR. NICHOLS: The half hour was related to reading that -- if you got other issues, you can raise them. That was for that document you were going to read into the record.

MR. BAKER: I am going to try again, too. But let's just be fair with it. Those things -- and Larry, I know you just go back to that preamble time and time again, and I want to caution you against that. I mean, those things are not enforceable. No inspector is going to go to the preamble and say, oh, there it is.

MR. REYNOLDS: Trust me. Believe me, we do a lot of counsel and every time we do a citation, if there is any question, we go back to see what the preamble says.

MR. BAKER: You do that trust me thing and that scares me.

MR. REYNOLDS: And it's available at this point on the website. You can go over all the old rules. I think they are there for the client's assistance, not for the agency or anybody else.

MR. BAKER: I will tell you. I beg to differ with you. I have seen instances where the inspector will say hey, that is not in the regulation, it's simply not in the regulations, I am not writing it. I have

witnessed those. You can go back to the preamble and chances are, he never read the preamble either -- just like a lot of miners don't. You can get up and say it.

MR. REYNOLDS: This is Melinda Pon of the health division.

MS. PON: I was going to say that in the inspection procedures that MSHA provides to reflect the preamble in the rule itself. And when the citations are issued, like Larry said, every citation is checked against the preamble.

You may be correct, Tim, that some inspectors will tell you that it's in the regs, so they don't cite it, but in our inspections procedures chapter one, they do go through and we do an analysis of what it says in the preamble, the intent and the spirit of law. It's reflected in chapter one.

MR. BAKER: And when can that inspection procedure be changed?

MR. REYNOLDS: It's able to be changed at any point.

MR. BAKER: Any time. Any time at all?

MR. REYNOLDS: They still have to be in line with the preamble of the rule, because that is what the agency --

MR. BAKER: No, no, no.

Let's be honest.

MR. REYNOLDS: The rules that you had the experience with probably did not have the extensive preambles that we have now. I mean, I know because I can look at the old rules.

MR. BAKER: Wait a second. Because you are talking about three things here now and you are telling me that the inspector's policy handbook as to how they are going to do the inspections --

MR. REYNOLDS: That is agency enforcement policy.

MR. BAKER: Now, if this rule becomes law tomorrow and three days later the policy is rewritten and says we are only going to do inspections once a year on each MMU, is that not what is going to happen? Or if you say, listen, we have done this for two years now, we are going to change policy and we don't have to do any sampling, that's in the policy? There is nothing in the rule that guarantees me any inspections. There nothing in the preamble that guarantees me any inspections.

MR. REYNOLDS: In the first place, there is a statute which gives you four inspections a year.

MR. BAKER: You are proposing three.

MR. NICHOLS: If the question is can policy be changed, the answer is yes.

MR. BAKER: Listen, I have people up here telling me that it's basically -- you are looking at it as it's etched in stone. This isn't etched anywhere. This isn't etched anywhere. You can change your policy tomorrow and I get no inspections.

MR. NICHOLS: The policy is different from the preamble.

MR. BAKER: You just said the policy was written from the preamble. Is it all integrated? And if it's all integrated, why isn't it integrated in the rule that tells me I get X amount of inspections? That is what I am asking for. I get no comfort level from a preamble or a policy. Because you can change them or ignore them -- as has been done in the past.

MR. NICHOLS: What else you got? We are going nowhere with this.

MR. BAKER: Yeah. Well, we are going to end up somewhere. Just not sure where.

I will reserve the rest of my comments and I will determine -- and it may be that you will just have to shut me off after half an hour next time -- how best to present it. But I think that there is sufficient evidence in the record for what many different groups had requested should be done and I think clearly this rule does the opposite in most of those instances.

MR. NICHOLS: If you take a look at those pages and if you aren't satisfied, we will go back to that document in Birmingham or --

MR. BAKER: Marvin, don't you think it's already a foregone conclusion? Just by reading that preamble, it's not going to satisfy my -- it's not going to satisfy my concern that what is in these documents isn't in that rule.

MR. NICHOLS: Well, that document is in the record, right?

MR. BAKER: I would think that all of them would be.

MR. NIEWIADOMSKI: I think that Tim made it clear that his recommendation is that MSHA sampling procedures, anything that is discussed in chapter one needs to be codified. Is that what you are saying, Tim?

MR. BAKER: Where are you going to do that at?

MR. NIEWIADOMSKI: You are proposing that it be codified --

MR. REYNOLDS: We understand what you said. your comment is that you would like to see this frequency of sampling in the CFR.

MR. BAKER: Based on the recommendations of the committee, which is all compliance sampling, all sampling at least at the levels which is currently being done by

the operators and MSHA, which is what the recommendations were. That's what the recommendations are.

More sampling would appear to be the way to go, but these recommendations say at least as often as is currently happening by the operator and by the agency.

Now, that didn't solve the problem with the entire rule. I mean, I don't want to give anybody that impression.

At this point, I really have nothing else. And, Marvin, I will read that again, but it's not going to change the fact that what I see in the rule doesn't reflect what I read in these records.

MR. NICHOLS: No, no, that's not the issue. The issue is whether you need -- we need to go through this document and read it page for page into the record, something that is already in the record.

MR. BAKER: But you see where my concern -- and I will leave it at this. I guarantee after this, I will shut my mouth. My concern stems from this. Hundreds of miners have testified. Reports have been issued. In almost all instances, even including people from industry, have said you need to take over sampling, you need to do it frequently, you need this and you need that and in at least in some resemblance to what is in these documents. And it's not in the rule.

MR. NICHOLS: I will do this. I probably agree that whatever you want in the record gets in the record, even if it's no more than me, you and the court reporter.

MR. BAKER: Hey, however it works out. May be long evenings. I have spent many of them.

I thank you very much.

MR. NICHOLS: Thank you. That is the end of our public hearing.

(Whereupon, the hearing was concluded at 3:44 p.m.)

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REPORTER'S CERTIFICATE

DOCKET NO.: N/A
CASE TITLE: IN RE: Single Sample & Plan Verification
HEARING DATE: May 15, 2003
LOCATION: Lexington, Kentucky

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

Date: May 15, 2003

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