TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
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Mine Safety and Health Administration)
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THE DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION

IN THE MATTER OF:)
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Mine Safety & Health Administration)
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Underground Coal Mine Ventilation)
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Holiday Inn
4101 U.S. 41 North
Evansville, Indiana

Thursday,
May 13, 2003

The hearing convened, pursuant to the notice, at 8:00 a.m.

BEFORE: MARVIN W. NICHOLS, JR.
Moderator

MEMBERS OF THE COMMITTEE:

JON KOGUT
FRANK HEARL
BOB THAXTON
LARRY REYNOLDS
GEORGE NIEWIADOMSKI

SPEAKERS:

JOE MAIN

P R O C E E D I N G S

(8:00 a.m.)

MR. NICHOLS: My name is Marvin Nichols. I'm the director of the Standards Office for MSHA and I'll be the moderator for today's public meeting. On behalf of Dave Lauriski, the Assistant Secretary for MSHA and Dr. John Howard, the Director of NIOSH, we want to welcome all of you here today.

Today's public hearing is being held to receive your comments on two related MSHA regulatory actions. First, we have reopened the record for comment on the joint MSHA and NIOSH single-sample proposed rule that was originally published on July 7, 2000.

Second, we have reproposed the plan verification rule. It was published in the Federal Register on March 6, 2003. Your comments today will be included in the record for both proposed rules. The two proposed rules were 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 pneumoconiosis by eliminating miners overexposure. They completely changed the federal program for controlling, detecting and sampling for respirable dust

in coal mines. The emphasis on the new program will be on verifying engineering controls so that miners are protected on every shift.

Let me introduce the panel that's up here with me. To my left is Bob Thaxton. Bob is the technical advisor in Coal Mine Safety and Health. He also chairs the dust committee. Next to Bob is Larry Reynolds. Larry is with the Solicitor's Office. At the end of the table is George Niewiadomski. George is a mine safety and health specialist with Coal Mine Safety and health. To my right is Frank Hearl. Frank is a senior advisor in the Office of the Director of NIOSH. As you know NIOSH and MSHA are joined on the single-sample rule. And at the end of the table is John Kogut. John is a mathematician with the Office of Program Policy and Evaluation.

We also have to other members of the committee in the audience. They work for my office at headquarters. That's Pam King. Pam is a reg specialist over at the right here. Ron Ford on the front row. We're a little crowded at the front table, so Ron is seated on the front row here. Ron is an economist in my office.

Let me mention how today's hearing will be conducted. The formal rules of evidence do not apply at

these hearings and the hearing is conducted in an informal manner. Those of you who have notified MSHA in advance will be allowed to make your presentations first. Following these presentations, others who request an opportunity to speak will be allowed to do so.

I would ask that all of the questions regarding these proposed 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 discussions concerning these rules on the record.

Following the completion of my opening statement, Bob Thaxton will give you an overview of the new 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 permanent record.

The hearing transcript, along with all the comments that MSHA has received to date on the proposed rule will be available for review. We intend to post a copy of the transcript on MSHA's web page at www.msha.gov. If you wish to obtain a copy of the hearing transcript before this, 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 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 the request from the mining community, the agency will extend the post period comment period for both plan verification proposal and the single-sample reopening from June 4th to July 3rd. The notice to extend plan verification from June 4th to July 3rd will be published in the Federal Register soon. A notice to extend single-sample for the same period will be published after consultation with NIOSH. As I mentioned earlier, that's a joint effort between us and NIOSH and we'll have to have consultation with them.

As you know, we've schedule three additional public hearing to address these two proposed rules. They will be in Lexington, Kentucky on May 15th, in Birmingham, Alabama on May 20th and in Grand Junction, Colorado on May 22nd. The hearings will begin at 8:00

a.m. 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 7, 2000, would allow MSHA to make compliance determinations on single-sample results. The agency would no longer use the averaging method to determine if miners were overexposed to respirable dust.

Averaging can mask individual overexposure by diluting a high sample with a lower sample 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 conditions more quickly. Single samples measurements have been used for many years by NIOSH and at metal and non-metal mines in this country.

MSHA and NIOSH are jointly reopening the rulemaking record for this proposed rule to provide an opportunity for you to comment on the new information in the record concerning MSHA's current enforcement policy, health affects, quantitative risk assessment, technological and economic feasibility and compliance cost, which has been added since July of 2000.

For example, we updated the preamble to include

the most recent information on the prevalence of Coal Workers Pneumoconiosis or CWP or Black Lung among coal miners examined under the Miners Choice Program during the period 2000 to 2002. These findings show that miners continue to be at risk of developing CWP under the current dust control program. The quantitative risk assessment is based on additional and more recent data. None of the new information changes the actual finding published in the Federal Register on July 7, 2000. The single-sample issue has been through a long public process, which is outlined in the preamble of the proposed rule.

The second regulatory action is the reproposed plan verification rule. This proposed rule supersedes the one published on July 7, 2000. MSHA held three public hearings on the previous proposed rule during August 2000. Many commenters urged the agency to withdraw the earlier proposed rule and go back to the drawing board.

Some commenters believes that MSHA had failed to adequately address their concerns and the reforms of the Federal Dust Program recommended by the Dust Advisory Committee, by NIOSH in its criteria documents and reforms urged by coal miners since the mid-1970s. After carefully reviewing all the facts, issues and concerns

expressed by commenters, MSHA is proposing a new rule in response to the comments made to the July 7, 2000 proposed rule.

Box Thaxton will give us a short overview of the new plan verification rule. You can follow Bob's presentation on the screen over there. We're going to also enter Bob's presentation on the web page for further reference. And we ask that you hold any questions that you may have for Bob until you come up to the table and we'll address any questions that you have at that time.

MR. THAXTON: First, can everybody hear me okay without the microphone in the back?

MR. NICHOLS: Can the court reporter hear?

COURT REPORTER: Yes, sir.

MR. NICHOLS: Then we'll going to insert the whole presentation into the record.

MR. THAXTON: What I'm going to try to do is go through a real short presentation as far as going through the rule and walking you through it. There are copies of this presentation that generally follow along with it that were available for you to pick up that you can go along with it. There's some slight changes from what you see in the handout.

What we're going to through is the proposed rule, both single-sample and plan verification and try to

relate how they work and what can be expected from it. First, why are we doing this? What's the reason behind some of this? Just for an instance, we put together some information concerning the instance of Black Lung from 1981 to the present 2002.

As you can see, there's really not been a major drop off in the instance of Black Lung or the presence of Black Lung among miners for the last 20 some years. And it's time for us to start taking a look at that and see if we can do something that will start driving this down to a more acceptable level. The acceptable level for us is nobody getting Black Lung. And you can see that we're going from 4.1 percent in 1981, and in the current data that's been referenced in news articles that has been put out by NIOSH recently is a combination of MSHA and NIOSH data.

MSHA, if you recall, conducted and offered free x-rays to miners for a period of about three years. That data, in conjunction with the data that NIOSH generated from the program that is offered by mine operators to underground miners, was all combined and produced the information for 2002 shown here, which shows 2.8 percent prevalence. That means that we're seeing 2.8 of the current miners, particularly, coal workers' pneumoconiosis to some degree.

That's not a production. At the same time, we're showing in the black box the percent of samples that have exceeded 2 milligrams and the average concentration of those samples. This is based on the operator's DO samples only. The DO samples are the designation occupation, which is the continuous miner operator, persons working closely on longwalls, shears, those type of people.

The two rules, we consider one package. They're married, both go out at the same time. They're designed to develop effective plans and provide with control dust and for monitoring of the effectiveness of those controls. Single-sample provides for a new finding that the average concentration can accurately be measured over a single shift. That's contrary to what we're doing currently. Ever since the 1972 finding that says the accuracy has to be based on multiple single average.

This rule, as a new standard, that says the Secretary may use single, full-shift measurement to determine the average concentration over that shift that the sample is collected. This is a change. This is where we come into single-shift sampling. That is that we take a sample of one shift. If that concentration exceeds the standard level we set for citation purposes, then you can be cited for that sample. Whereas, right

now, it's based on the average of five samples.

Plan verification provides for each underground coal mine operator must have a verified ventilation plan. The portion that we're talking about being verified are the dust control portion. It's contrary to what we have at this time. We have plans that are sampled to see if they actually work, but they're samples that are pretty low production level. They may have elevated controls where they exceed plan parameters. That's contrary to what this rule provides for.

The plan will be verified under actual mining conditions by mine operator samples. They actual mining conditions, as you'll see later on, is going to increase the production level that has to be maintained during the verification process and we control the amount of controls that are in place so that they more truly represent what they have in the plan.

MSHA assumes responsibility for compliance of taking samples in underground mines. Plan verifications only of that underground mine. Single-sample of that effects both the surface and the underground. So the single-sample rule will be applied throughout the coal industry. Plan verification will only be applicable to underground mines. But under that, MSHA will assume the responsibility. We will be going out and collecting

samples to determine compliance. We will be the ones going out taking samples to determine abatement of the citation.

Also, finally, MSHA samples will be used to set the reduced standards for the courts. As we currently have them, there's a combination of MSHA and operator samples that are utilized to set the process to determine what quartz content is in the mine area so we can set a standard that protects people. Under the proposed plan verification rules, only MSHA samples will be utilized for that purpose.

To verify the plan, what we're going to do is show you a little bit about -- a comparison of what you're seeing right now. What we're comparing is what is under the current rule and what we're proposing under the 2003 rules. Under the current rule, MSHA samples to approved plan. That sampling is based on the average of multiple samples. It's full shift, 8-hours or less, portal-to-portal samples and it's considered valid samples with at least 60 percent of the average production. That's the average over the last 30 shifts. That average is usually determined, though, by the either just talking with miners, checking with my operator as to what they normally produce. There's no hard and fast information that's required to be kept to

base that on. You're going to see there's a rule change related to that.

Under the 2003 proposal, operator samples would be utilized to verify the plan effectiveness. The operator has the controlled conditions so they can make sure that they get the production levels and keep the controls at a level that we've asked for in the plan verification process. It will require full-shift samples and that's production time, full-shift production time. We want the samples turned on when the miner gets to the section and they cannot be turned off until they leave the section. So that the actual time that a miner is up on a section that we're collection these samples.

At higher than average production -- we'll get into the production in just a minute, but it's higher than what we see this average. And there will be separate quartz and coal mine dust verification limits. We have respirable limits that are set up for 1, 2, 3, up to 5 samples. If an operator wants to verify a plan on one series of samples, and we say series times to shift the samples they have to collect. They have to meet a separate respirable dust limit and a separate quartz limit. Both were designed to obtain a 95 percent confidence that they are actually meeting the 2 milligrams and 100 micrograms limit on those two areas.

So what we have first, as an example, for one shift of samples the operator would have to meet a 1.71 milligram cubic meter respirable dust level and an 87 microgram quartz level in order to verify their plan is protecting people with 95 percent confidence at the 2 milligram and 100 microgram levels.

The proposed rule also allows the use of PAPRs or powered air-purifying respirators and administrative proposed on any mining units as a supplemental measure after exhausting feasible engineering controls. So this goes to that if an operation comes up, they're producing at the level they we say to, the controls have been put in place, there's nothing left to be done and they're still exceeding the standard and they can't supplement those engineering with additional, either administrative controls or the use of powered air-purifying respirators to protect miners until such time as something else becomes available.

The key here that I want emphasize is that after exhausting feasible engineering controls. No controls should be allowed to be taken off. All controls are worked on and utilized up to that point to show how low we can get will have to be maintained from that point forward. This plan also comes under review every six months by the agency. We continuously will be looking to

see that all feasible controls are being utilized. If additional controls become available or the mining system changes so that some other controls that we looked at in the past now becomes feasible, it would be expected to be put in place. If it's not, then the operator will lose the approval of his plan.

The information relating to the plan -- under the current rule, MSHA samples are conducted at 60 percent of the average production and there's no records of that production required to be maintained. Like I said, our talking with miners and talking with mine operators, trying to determine what's the normal production so we can then figure out what 60 percent of that is to determine whether our samples are valid or not.

Under the proposed rule, it will require that a sample from this plan be verified by the mine operator at the 10th highest production level over the last 30 shifts. And what the 10th highest production level is, we will get into in a minute and demonstrate what we're talking about. It does also require the recording of production and maintaining those records for a six month period so that the agency can come in and review those records to determine what the average production is for that section and make sure that the samples that are

being collected are truly representative of normal conditions.

This recording of production is raw material. We're looking for anything that's found -- coal, rock. It makes no difference, total production for that sample. Ten times production level, what does that mean? Where does that really come into play and how does it relate to what we're doing right now? What we've done is we've shown a series of 30 shifts of production off an actual longwall MMU. This is in Northern West Virginia. And what we did was plot those and you can see that the average total for this particular longwall is 6295 tons over the last 30 production shifts.

If we went with the MSHA samples right now, 60 percent of average would being it down to about 3700 tons, which is what we would look for in 60 percent of the samples that were found versus the average of 6295. We were asked to look at going to 90 percent of average. Well, 90 percent of average only gets us still to about 5600 tons. So we're still below what the average is for the 30 shifts.

What we've proposed in the rule is the 10th highest production. And what that means is that out of 30 shifts, two-thirds of the shifts are going to be below the 10th highest and one-third is going to be higher. So

what we're looking at is that we're reasonably saying is we're getting what we consider the highest production that represents the more normal operations for that section so that we can truly verify whether those controls are going to be adequate or not.

In this case, the 10th highest production would be about 7500 tons. Well, you can see that's more than average. It's quite a bit higher than the 60 percent that we're currently using. So we're looking for the operator to collect samples at a production level that truly represents what they're capable of producing.

The use of PAPRs or powered air-purifying respirators -- under the current rule, if an operation wants to use PAPRs, they're perfectly capable at this to do so. If they apply them in conformance with the regulation under our current rule, 72.700, which says how to set up a respiratory detection program. If they're utilized in that fashion and completely follow those guidelines, then we can consider that as a means of adequate protection for miners and it would result in possibly getting any excessive dust citations in that section would be classed as non-S&S. What that does is that reduces the penalty dramatically on overexposure citations.

Under the 2003 proposed rules, this is carried a

little further. It does permit use when all feasible engineering controls have been exhausted. Again to emphasize, we've worked with an operation. They have to provide all controls possible determined by the agency as being feasible for that operation. Once they have exhausted all these controls, then they come under this plan that they can use PAPRs, not until so. We only allow the use of loose-fitting powered respirators with MSHA's and NIOSH's approval. Currently, that's only one unit. That unit that has both approvals is the 3M Ratel Helmet.

You must provide the Respiratory Protection Program as part of the approved ventilation plan. This Respiratory Protection Plan is under our current rules. It just says that if you follow all these things, we will give you a non-S&S determination. Under this proposed rule, they have to write their Respiratory Protection Program and it's included as part of their plan for the mine so it becomes part of the regulation for that mine. So if there's a violation that something is not being followed in that Respiratory Protection Program, it is citable under the plan's provision.

You must maintain dust levels as low as possible with feasible engineering controls. Again, if we have an operation where they are able with all feasible controls

to get down to, say, 2.5, they would be required to maintain nothing greater than the 2.5 and allowed to use the PAPR Program then to provide extra production for miners until such time as additional controls become available. Remember, we're going to review this plan every six months. And if something changes in the mine, or another control measure becomes available, then that would be presented to the mine operator for inclusion at that particular time.

Protection factors assigned to this particular type of unit for this rule is between 2 to 4, depending on the built-in air velocity. And that protection factor is assigned for the unit use, not to a particular respirator. The action that we're taking is as velocity on the face increase, it decreases the ability of the PAPRs to produce the kind of environments that the unit would require. So as the velocity of air increases on the face, the protection factor goes down. The maximum protection factor is 4 and it depends on where you are as to where you fit in between that 2 and 4.

It is important to know that protection factor 4 as the maximum, is an indication only the air inside the PAPR itself would be one-fourth the concentration of the air outside. That's the way we're looking at the use of PAPRs and that's how we're applying the protection

factor. That protection factor is not assigned to the unit. So just because you buy a particular PAPR, you can't take it just anywhere and get a protection factor of 4. It depends on where it's used. The protection factor is assigned to the area used or the unit used for collecting.

The type of sampling you're going to see, under the current requirements, operator bi-monthly mine sampling is conducted in underground mines and that's what you see as every bi-monthly period. Citations are issued for failure to submit the required samples and citations are issued for exceeding the actual standard. The operators are also required to collect abatement samples to determine when compliance is achieved in response to a citation.

MSHA currently conducts quarterly sampling on MMUs, section DAs and part mining-miners. We also issue citations for exceeding the applicable standard based on those. However, it's still based on the average of multiple samples. Under the proposed 2003 rule, the operator will be required to collect the plan verification samples for additional approval and designated MMUs collected, collect one sample each quarter to confirm whether the controls continue to be effective.

Each operator will be required to submit a plan for approval and all MMUs that currently have plans will eventually have to go through this within the first year the rule is in place. They would go through verification sampling to prove that, that plan works.

Certain MMUs -- those that are found to exceed the criteria spelled out in the rule, which is if you exceed the actual standard on any sample that MSHA requests, that MMU would then be designated for quarterly sampling by the operator. And there the operator will collect samples each quarter to show that plan is still working the way it's intended. And all of those standards have to be selected at what we're calling the 10th highest production level and they would have to have their controls monitored where they could not exceed the plan parameters by more than 115 percent.

An example would be if somebody has 100,000 cfm of air in their plan for the longwall face. They could not exceed that quantity by more than 115 percent of it, which is 115,000 cfm while we're doing the doing this sample. So they cannot have 150 or more cfm than at that time. But they do have to meet the minimum. At the same time the 10th highest production level has to be maintained. So they have to be at that 10th highest production level or higher for those samples to count.

MSHA will be collecting samples to determine the compliance and abatement of citations, not the operator. All MSHA determinations will be made on single, full shift samples measurements. And citations could be issued for exceeding the applicable standards.

Now the level at which we issue citations and we get into is not the same as what we do right now. To make a compliance/non-compliance determination, under the current rule, we use the average of multiple samples to make compliance/non-compliance determination at all coal mines. This is based on the average of five samples on five different shifts. If the average concentration exceeds the applicable standard by 1/10th milligram or more, non-compliance is indicated. The key thing is, is that we're basing this on the average of five samples collected on five different shifts.

Under 2003 proposed rule, single-sample determinations at all coal mines, surface and underground. As we said, simple-sample determination apply to the coal mining industry as a whole. Non-compliance or citations will be issued at a 2.33 if you're on a 2 milligram standard. Now we are basing this on a single shift for samples. We've taken one sample on, say, DO is collected for that shift. To have 95 percent confidence that you're exceeding the 2 milligram

standard on sample, we cannot cite until we get to the 2.33 milligrams.

Now the difference between that and what we're currently doing is where we based the non-compliance at 2.1. The 2.1 is based upon the average of five samples collected on five shifts. That gets us to the same level of confidence that we're achieving at the 2 milligram standard. According to the one single sample, to obtain that confidence interval, we have to raise the level that we actually write the citation to. That's why we call this the citation level, not the compliance level.

Even if somebody does not exceed 2.33 milligram on the confidence interval, but they exceed the 2 milligram standard, we can see that there is a potential problem and we would further analyze whether the plan is adequate. We may ask for the operator to conduct additional sampling of their plan for verification that the plan works. It will not just simply walked away from, but there is no citation issue simply because they do not meet the 95 percent confidence level and we would not be able to substantiate it in court.

The citation levels for all standards for 2 milligrams and below are spelled out in the rule. So as you go down, if you're going to reduced standard because of quartz, you're not going to have get to the 2.33. It

drops as you go downward the standard.

The effect of averaging -- why are we doing this? What are we talking about? This is an example of a particular mine where operator sampling on five different samples goes to DO, five different shifts and what they actually submitted was the first sample was 3.2 milligrams, a second sample of 1.6, a third sample of 1.5, fourth one at 0.8 and fifth sample at 3.1. If you average all five of those, it comes up to 2.0. Under our current rules, this section is considered to be in compliance and there is nothing that can be done. There's no action take.

Under the new proposed rules, that if we have this situation where we take a sample in this first shift and we get a 3.2 on an initial sample, it exceeds the 2.33. That operation is noncompliance. At that time, action will be taken to reduce the exposures. That's the impetus of this particular set of rules, is to do away with these shifts of overexposure. That if we can protect people on each every shift, we think that we will prevent people from developing Black Lung.

Part of the plan verification program is that you need controls in place. Those controls that will actually result in compliance. Well, to go along with that, under the current rule, we have a requirement that

the examination of the controls at the beginning of each shift to make sure that those controls are actually in operation.

Well, currently we have controls in the plan that are the minimum parameters. Like I said, a lot of times you'll find that the air is anywhere from 150, 200 percent of what you see in the plan. You may find water pressure sprayers that won't be actually called for in the plan. You'll see production may be not be as high as full production is. While the same period the examination of the controls is important. It is important right now. It will be even more important under the plan verification provisions that are in the proposal so that we do maintain that provision under the current rules. We did not change that. So the rule will still be that requirement for one shift examination under the control parameters that are in the plan. The change is that the plan parameters are going to be representative of what tool needs to be in place to maintain compliance.

Miner participation in this program -- under the current rule, miners have the right to accompany, with pay, MSHA personnel during MSHA sampling. Also, the operator notifies the miners' representative of plan submissions and revisions and post them on a bulletin

board. The miners' rep may submit comments to MSHA during that review process so those comments can be considered.

Under the 2003 proposed rule there is a little bit more added in the miners' participation. Operator's sampling -- the operator has to notify miners of the date and time prior to verification of quarterly sampling that is being collected. So there will be some kind of notice put out so that the miners will know that the operator is going to be collecting samples on this particular MMU to verify the plan two days from now or three days from now or whatever so that you know that's going to be coming. The miners have to be provided the opportunity to observe that sampling, but there is no entitlement to pay.

Miners participation during MSHA stays the way it is. Miners have a right to accompany, with pay, MSHA personnel during the compliance and abatement sampling. So anything that MSHA is conducting you still have the opportunity to travel with us with pay provisions. The provisions for the submitting of the plan and having the right to submit comments during our review, that remains in effect as it does now.

Use of personal continuous dust monitors or PPDMs -- under the current rules, there is no consideration for those units. They were not anticipated

in 1981, not available, so they were not addressed in the current rule. Under the 2003 proposed rule, any unit that the Secretary of Labor approves with the conversion factor is acceptable. The conversion factor is that any unit that's approved has to be related to the current sampling system. We use MSA samplers right now. That's what most of you see is the MSA sampler, which are the filters. Whatever unit comes up as a personal continuous dust monitor has to be able to be equivalent that particular unit.

Under the proposed rule, designated miners must wear for the full shift portal-to-portal. These are personal continuous dust monitors to measure the exposure of an individual. If an operation elects to utilize these units, then they would be expected to put them on specific people and those people would have to wear them portal-to-portal full shift.

It permits the operator to use administrative proposal without first exhausting feasible controls. Again, we back to this a personal continuous monitoring. When you're monitoring individuals, the movement of individuals affects the concentration of dust that they're exposed to. As long as you're monitoring each individual, then you can utilize it to move them around to maintain the exposure. That's the draw to use

personal monitors.

There will be no citations for overexposure cited on personal continuous dust monitor readings. However, the operator would be required to record those readings at the end of each shift. And any reading that exceed the standard, they would have to take action to reduce that exposure and record that action. Failure to take corrective action to reduce that exposure would be a potential violation of these regulations.

What are some of the benefits that we see for the two rules as a package? First, we can get plain parameters that reflect actual mining conditions that have been verified at highest production levels, (2) no operators collecting samples used to determine compliance, (3) protection for miners when feasible engineering controls have been exhausted, (4) provisions for use of personal continuous dust monitors.

What are some of the benefits that you actually are deriving in relation to Black Lung? Well, we've taken a conservative approach and looked at the data that we currently have. Based on that data, we've drawn some conclusions about how many people we would see reduced as far as developing Black Lung disease. And the 2003 proposal would reduce the total of 42 cases less of CWC, broken down to designated occupations, non-designated

occupations and roof bolters.

Just to walk you through a little bit, some of the concerns as to how this particular program works in conjunction with what we have as a companion document on our website this time. MSHA did publish the inspection procedures that we anticipate utilizing if the rules were to go into effect as they're written. Those inspection procedures are not part of the rule. MSHA does not write any rules on how often we're going to sample and where we're going to samples. Those are issues that are covered in the inspection procedures manual.

So that you will know what those procedures and be able to make comments on the rule appropriately, we've included a draft of that document on our website. So what we've done is we've prepared three scenarios of the samplings so that you can see how those interrelate.

I'm going to the first scenario is that an operator collects his first verification sample. Like I said, they have to meet two levels, respirable dust and quartz. This operation comes in. He's sampling the mine operator and the roof bolters. We say that we're going to do single shift monitoring work, the operator does plan verification monitoring, it's one shift that is looked at, at a time. That doesn't mean that there's only one sample collected. There are specific operations

or specific occupations on each MMU that must monitored under plan verification.

Continuous miner section -- we'd have to at least monitor the continuous miner operator and the roof bolt operators. So on this particular one, we're taking a sample on the miner operator and the roof bolter to get the dust concentrations of 1.6 and 1.7, respectively, with 72 micrograms of quartz on the miner operator and 92 micrograms on the roof bolter.

You can see that, based on this, the very first shift of the samples, they have to be 1.71 milligrams on dust and nothing greater than 87 micrograms of quartz. So you can see the roof bolter sample exceeds the 87 micrograms of quartz. That automatically tells the operator that he has to collect a second shift sample. The operator collects that second shift for verification, submit them. We now have 1.63 on the miner operator with 71 micrograms of quartz, 1.69 milligrams and 91 micrograms on the roof bolter.

Now on two shifts of samplings for verification the levels become 1.85 for respirable dust and 93 micrograms for quartz. All samples have to be below those two limits. You can see all four respirable dust concentrations and all four quartz levels do, indeed, fall below those two limits. So we would consider the

operator has verified their plan and the controls that they have place being sampled as to the 10th highest production or higher does show that, that plan will work and will maintain compliance with a 95 percent confidence of the 2 milligram standard and 100 micrograms of quartz. So it does verify the plan.

MSHA comes in and collects its first bi-monthly set of samples. We sample miner operator, miner helper, shuttle car operator and two roof bolters. We come in with respirable dust on our samples for continuous miner is 1.62 with 78 micrograms of quartz, miner's helper is at 1.71.

And I apologize for the shuttle car operator dust samples and quartz on this particular slide. The 1.41 is the respirable dust on the shuttle car operator. The roof bolter is 2.38 with 138 microgram on roof bolter no. 1 and 2.42 and 148 micrograms on roof bolter no. 2. Based on this information of one shift of samples, we would issue one citation for the roof bolter occupation because they exceed the 2.33 citation level with somebody on a 2 milligram standard.

We issue one citation because the roof bolt operators are on one machine. Whatever they actually take to correct that overexposure is going to effect that one dust-generated source. The operator will be required

to take the corrective action to reduce those exposures and then they must notify MSHA within 24 hours of having those controls in place that they have them in place so that the agency then can make the decision a decision whether they're coming back in to collect an abatement sampling or whether they're putting the operator back into the verification sampling to upgrade the plan.

In this case, we've determined that we're going to take the abatement samples. MSHA collects them, not the operator. In addition, though, to this, because of these high quartz levels, we're showing miners being exposed to greater than 5 percent of quartz. An indication that maybe the standard is too high and should be adjusted downward. But MSHA's determination of the actual standards on the last three MSHA samples collected. It's the only way that we set a reduced standard. You would think that possibly because we're doing bi-monthly sampling that you would have to wait for three bi-monthly periods to pass before we get a sufficient number of mining samples to set that standard. But when we come in and find somebody that's being exposed to quartz levels greater than 5 percent and they're on a 2 milligram standard, we think that's important that we find out quickly whether that truly represents an exposure that high level of quartz that

needs to be addressed.

So as soon as these sample results come back, we don't wait for the additional bi-monthly period to collect a sample, instead, there is a requirement under our inspection procedures that MSHA would in and collect two additional samples within the next 15 days after being getting those results back to make two additional quartz determinations. Based on those two quartz determinations, plus the one we already have, we now have the three MSHA samples that are necessary so that we can go ahead and set a standard based on that quartz analysis so we can get the protections in place for reduced standards as fast as possible.

In addition to that, because these samples being greater than the actual standards, the operator of this particular MMU will be told that they're designated for quarterly sampling, meaning that they're going to have to collect a sample on this MMU each quarter at the verification levels. That is the 10th highest production level and maintain their dust control parameters at no more 115 percent of their plan. Each quarter present that sampling to the agency, just as they do now, to show that the plan parameters are still continuing to be effective in controlling dust.

The second scenario -- there's a variation on

this. We utilize the same samples at the beginning. So the operator still has the same operation. He's got the same samples on his verification samples. So we still have a verified plan. What we're changing here is the MSHA survey. We come in, all the MSHA samples are below 2 milligrams. All the quartz levels -- you can see the highest quartz level is 78 micrograms. They're all less than 5 percent.

MSHA comes in and looks at these samples. We say compliance is determined based on this series of samples. Nobody receives a citation. However, there's another decision to be made. In addition to MSHA inspection procedure, we want to put our resources where we think there is the most problem. So anybody that demonstrates truly well that they're in compliance on a single shift determination, the agency will skip bi-monthly periods for operations that show that they are able to maintain concentrations consistently low.

So on this particular operation, they meet the qualifications, initially, a single sample. We're still using the 1.71 milligram per cubic meter as the respirable dust level and 87 micrograms for quartz. And all the samples that were reflected on this particular sample as far as dust and quartz meets those two limits. So it looks like the services at this MMU meets the

qualifications. That we would be able to skip the next bi-monthly period for MSHA sampling because it looks like it's well maintained for meeting the 2 milligram standard.

However, to make that true determination, when MSHA comes in to collect samples, we collect samples for 8 hours, portal-to-portal. We're also not mandating the production level because our samples do represent portal-to-portal samples and there are going to be shifts when the operator does not exceed the verification production level. Like we said, one-third of the shifts are going to be above it. Two-thirds are going to be below it. So it's likely that when MSHA comes in to collect the sample, we have the chance that production is going to be less when we collect our samples than what the production level was to verify the plan.

Based on that, though, we want to make an engineering judgment as to whether those controls actually are keeping the dust levels low in that section. So what we do is we do a conversion and we look at the things that look that they really effect the results that we're getting are the production and the ventilation air quantity that's put in the section.

So what we do is we take the production during this particular survey. We've established it 750 times.

The production that the plan was certified 800 times. The ventilation air quality during the sampling was 10,000 cfm. The plan calls for 9800. So we're showing some slight changes here as to what the parameters call for and we're also showing a slight reduction in the production for what the plan was verified in.

We take those two quantities and come up with a ratio factor for those. And 1.06 is the ratio on the production and 1.02 is the ratio for the air issues. That's 750 times the production -- 800 being divided by the 750 and the 10,000 being divided by the 9800. We take those two factors, find those by multiplying the highest concentration and the highest quartz level that we obtained during our MSHA survey.

We apply it to the respirable dust and it comes out to 1.75 milligrams per cubic meter and the quartz goes to 84 microgram per cubic meter. What that tells us is, is that 1.75 milligrams exceeds the 1.71 level that we established for a single shift sample. Therefore, based on that, we think that we think that an MSHA judgment is, is that section is not being controlled at the 1.71 level. Therefore, we will come back and do bi-monthly sampling each bi-monthly period.

Now that's not a calculation that you as an individual go through. That's a calculation that the

agency would be applying to its inspection samples only. And it's only to determine whether we come back and do the next bi-monthly sample. The most an operation can skip is every other bi-monthly period. If they fail to follow that, though, then they will be sampled each bi-monthly period if not more often.

The last scenario is the use of PAPRs. This is just for the sake of our discussion. For the longwall section we're saying that the mine has a shearer clearer, has shield sprays and hand sprays. They have a maximum air velocity along the face of 500 feet per minute and their verification production level -- that is what they verify their plan at is 16,000 tons.

The sample results, we show the shearer operator at 1.9 on respirable dust, 130 micrograms of quartz and the 060, the furthest down wind, at 2.0 and 145 micrograms. Based on that, we're saying that this the result of all the verification samplings. So I simplify this down. We would actually be taking five or more samples before they get to this point. MSHA will make the determination based on all the information provided that all feasible engineering controls are in place, but the operator is still not able to verify the plan. They cannot show that they meeting the 2 milligram standard and the 100 microgram level for quartz with the controls

that are available to them. So they've put in everything that's available. At that point, the agency says you've exhausted all the feasible engineering controls and the operator says I want to use the PAPR program.

What the operator does then is they have to submit a full program to be included as part of the plan. It becomes part of the approved plan for that particular time for that section. So it becomes part of the things we look at that have to be complied with on each and every shift. It requires in this particular instance all miners working in and by the shearer must wear a PAPR in accordance with the approved plan. They put that in as part of its plan, then MSHA would come in. All miners working downwind of the shearer must have working PAPRs that meets the approved criteria and use. If not, it's a violation of the plan.

The air velocity across the longwall is stated to be 490 feet per minute. Now the reason that we require that the velocity be put in there is because the velocity, like I said at the beginning, when you allow the use of PAPRs, the protection factor is associated to velocity of air going across that longwall face. The 490 feet, the formula for determining the protection factor is the quantity of 2 times the quantity of air of 800 divided by the quantity that's actually on the section.

So in this case it would be 2 times the quantity of 800 divided by 490. That works out to a protection factor of 3.2. Remember, I said the protection factors have to be between -- the minimum is 2 with a maximum of 4.

In addition to having a protection factor, the plan has to maintain all engineering controls that were determined to be feasible by MSHA. So just because we're going to a PAPR protection program, doesn't say that MSHA is going to cut back number of sprays. That you can cut down on the velocity of air or the quantity of air being delivered, any of that. Whatever was worked on, up until the point where we make that determination of feasible controls being exhausted, all those controls must be maintained and in place on that section from that point forward.

The equivalent concentration on this particular section that we look at to see how this would work. The equivalent concentration of 2 milligram result up here inside the helmet with the 0.62 milligrams. We've taken the quantity of 2, dividing it by the protection factor of 3.2, so the concentration of the outside air is 2 milligram while the person wearing the helmet would be exposed to would be the equivalent of 0.62 milligrams. That completes the overview.

MR. NICHOLS: Okay, Bob, thanks. Frank Hearl

would now like to make a statement. And then, Frank is going to give us an update on the status of the development of the personal dust monitors that Bob talked about.

MR. HEARL: Thank you, Marvin. Good morning, the National Institution of Occupational and Health, NIOSH, joins MSHA at the table today to hear your comments on the proposed rules for single, full shift measurement of respirable coal mine dust. The proposed rule amends Title 30, Section 72.500 that the Secretary may use a single, full shift measurement to determine the average concentration on a shift. The Mine Act made this provision a joint action by NIOSH and MSHA which is why I'm here today.

I also want to provide you with an update on some research related to the personal continuous dust monitors that have been under development by NIOSH and a private firm, Rupert & Potoshik Company. The units, I have some photographs of them here. They operate on the basis of something called "the taper element oscillating microbalancer" or TEOM. What that really means is that there is an element inside that's vibrating. And the frequency that it's vibrating, the rate that it's vibrating depends on how much dust is added at the end of that taper element.

The more dust that lands it changes the vibration frequency and you can measure that and relate that to the amount of dust that's been sampled. What this means is you can make a measurement on a continuous basis of what the dust levels are, where the sampler is operating and those results are recorded automatically inside the instrument. It's got computer works inside that records that dust concentration and can give you a read out on what the dust are, what the dust levels will be at the end of the shift where they to continue at that rate on a cumulative basis.

The current studies have been completed in the laboratory and have shown that the instrument performs with acceptable accuracy when compared to the existing cyclone dust measurement that you currently use in the mines. The unit has been integrated into the cap lamp. I'll show pictures and have them available to you to take a look at during the break, but it's actually integrated with the cap lamp, and the sampling cap is off the cap lamp. Dust comes along in and gets measured by the device that's worn and integrated with the cap lamp battery so there's no extra piece of equipment that needs to be worn. Here's a couple more closeup shots of the belt worn unit. As I said, the pictures are here and you can examine them later.

So the current status on the research is that the we've completed the laboratory testings. And beginning this month, we're going to begin doing some field testing with the unit. We expect the field testing to be completed by August. What happens after that is a matter for -- depending on the results of the field testing. If they're successful, the unit could go on to commercialization. That would be done by the private sector. NIOSH is not in the business of commercializing units.

We are hopeful, because of the successful results in the lab, that the units will be perform well underground. But that's yet to be determined. And that's the current status of where we are with the personal continuous dust monitors.

MR. NICHOLS: Okay, thank, Frank. This is the third public hearing we've had. Last week, we were in Washington, Pennsylvania and Charleston, West Virginia. There seems to be some misunderstanding of what these rules are intended to accomplished. I would like to just tell you briefly what the rules are intended to accomplish, what they say and what they do not do.

As you've seen in our presentation, the rules eliminate the sample averaging where you can have two samples over 300 and call that compliance. They improve

dust control plans to more reflect the mining conditions. As Bob showed you, you can be producing as low as 60 percent under today's rule and we sample and call that compliance.

They protect miners when all engineering controls have been exhausted by allowing supplemental controls on a temporary basis. They allow for the incorporation of new technology as Frank just demonstrated the new personal dust monitors.

What these rules do not do is raise the 2 milligram standard. What they do not do is eliminate the primacy of engineering controls. That stays in place. Bob talked about the quartz content, how we analyze that and reduce the standard. Not only does it not raise the 2 milligram standard, 44 percent of all underground mines today are operating on a reduced standard. That means less than 2 milligrams. That's going to stay in place. In fact, it's going to be improved.

We currently established that lower limit by averaging MSHA samples and operator samples. These proposed rules eliminate that. MSHA will take all the quartz samples to establish these lower limits. So that's what they do and do not do. If that's not fully understood, then we need to receive your comments on how to further clarify these rules to make it clearer.

Here's how we're going to proceed. We're going to take a 15-minute break and when we come back, we'll start receiving comments. What we've done at the last two hearings is work straight through lunch because we have around 30 people signed up to give comments. Now I believe all but one person is UMWA, Joe. So if you guys don't want to work straight through lunch, let me know and we'll take a break. But if I don't hear from you, that's the way we'll operate. So let's take a 15-minute break and come back at 9:30.

(Whereupon, a short recess was taken.)

MR. NICHOLS: Our first presenter will be Joe Main with the United Mine Workers. When you guys come up, would you please spell your name for the court reporter?

MR. MAIN: My name is Joe Main, M-A-I-N. I represent coal miners and I'm the administrator of Health & Safety for the United Mine Workers of America. You know, I found myself in a spot at the beginning of all three of these hearings. The third one today of having to start with explaining the rule as we see it because there is a great difference here with the presentations that we have received from MSHA and both the information we've provided prior to the hearing from MSHA and our observation of this rule tells us it does.

I can guarantee you one thing. You guys can say what you what want to. That same dust sampler is on the miner today, an example, on that longwall that says 2 milligrams max stand at the same spot, taking the same kind of dust sample under this rule taking you up 8 milligram of dust. That didn't come from Joe Main. That came from MSHA in the first briefing that we had.

We've validated, through questions I think it was on the first hearing on Tuesday that in those situations for mine operators what would be on that upper limit of 8 milligram that the level can reach 9.33, which I think is a matter of record now from MSHA, where MSHA would actually cite a violation where that standard would be in place.

Now this is where they cut to the chase here as to what the differences is. MSHA claims that the 2 milligram standard is not reduced in this rule. And when you read the rule, that's what the normal person would think. That's what I thought when I first read it until I understood what the formulas was that you guys explained to, which is beyond the comprehension of the average person. You have to sit down and walk through a number of complicated formulas to even figure out what this rule does.

And not only what the standard is, 2 or 8, but

it's a number of formulas and definitions that are confusing and complex that will cause, in our opinion, total chaos in the coal fields if this rule ever goes into effect because it's just that complicated.

In simple terms, the Mine Act says now that in the mine environment of active workings you can't exceed 2 milligrams. It's straightforward. Congress put that in there in '69, so that within three years every operator has to do that. They have to get to that level. Through some of the craftiness of this rule, what the rule tries to say at some face value is that, yeah, that's the standard. But what the rule does in actuality is it changes that. It does allow the dust levels in the mine environment in active workings to go up 8 milligrams. It would be legal by the presentations that we've received from MSHA. And I think people need to understand that.

As we've pointed out, and tried to get through this debate in the first hearing, what MSHA tells us is to trust us. We're not going to do that. We're not going to let that get up to that level. Currently, we have bar under the law that says you can't let it get up there. That they have to maintain that 2 milligram level in the mine environment of active workings. And it also says you cannot use respirators for the purpose of

replacing any air controls to allow that dust level to rise. Legally, you can't do it.

Now that provision as well is effected by this rule. And by some crafty language here there's little loop holes that can get around that. Because the truth of the matter is today they can't do it. It is not legal to do it. Under this proposal, it will be legal to do it. You got to ask the question, if it's not legal today, if it is tomorrow, when are guys going to make it legal? How does that whole thing work?

And as I've pointed out, based on your explanation of those formulas, in those margins of errors and factors there's an opportunity for mine operators to submit plans to you guys claiming we've exhausting engineering controls that they get you to agree to it, to a policy decision. They can increase those dust levels. It could be 2.5. It could be 3. It could be 4. It could be 6. It could be 7. It could be 8. I mean, with elaboration here, those dust level -- MSHA, I think it's only fair that there's an honest presentation to the coal miners. They need to know that. They don't need to believe that there's going to be a 2 milligram standard showing up on that dust sampler as the max that can show up on that when they take those samples. That's just not true in this rule. And if what I said is wrong, correct

me.

MR. NICHOLS: Well, I think we seem to be making the leap right to these have happened. I mean, if we haven't made it clear in the rule, we need some help on it. That what's going to happen first before any consideration of supplemental controls is a thorough review and requirement that all engineering controls be maintained and be applied. We're only going to get to a discussion of PAPRs when that's done.

And preceding the consideration of supplemental controls is going to be the best thinking of this agency based on our experience, the most help we can get from tech support, from the miners, from NIOSH and there's going to be no consideration of supplemental until that process is completed, Joe. Now there seems to be no understanding of that.

MR. MAIN: No, but I think the difference is here, Marvin, what happening here is that the guarantee that the miners have you can't do that now. It's illegal for you to what you're proposing to do in this rule. Now that's a starting point. You're placing those legal barriers that Congress gave these miners in 1969 with a policy determination to be made by the agency. Trust me. We won't do that. That's what it gets down to. And the question people have to ask is, you know, in terms of how

they think this will apply. Can they really trust this agency to be stiff-backed when that operator says, gee, I've exhausted my controls here. There's nothing more I can do. An operator can decide not to put an air down because there's a whole lot of complications here in this rule that really bother us that you're setting the stage to have this within a short period of time as a box that MSHA puts itself in and puts the miners in big time.

We have, as we've said in previous hearings, case after case where operators have said, gee, we've exhausted our engineering controls. Only then for us to show them that they haven't. Had those not been union mines, I'd be scared to death to figure out what may have happened in this room because it was a hard cast in some of those situations to get a mine operator to do what other mine operators in this country was doing to protect their miners.

The bottom line is this, that under that rule, you can approve a plan to allow the mine operators to up to 8 milligrams. This rule will allow you to do that, yes or no? Just yes or no, Marvin. Does it allow you to raise it up to 8 milligrams?

MR. NICHOLS: It allows you to deal with what's over 2 milligrams after you've exhausted engineering controls, yes.

MR. MAIN: Does it allow you to raise this up to 8 milligrams. Whether you say you're going to do it or not, that's a side question, does this rule allow the dust level to be increased to 8 milligrams in the mine environment active workings. The answer is yes. You told us that in hearings and you've told us that privately. So, I'll answer it for you. Does it allow the dust level to go, in those circumstances, if those would be approved by MSHA at 8 milligrams, 9.33, before the operator would be cited for a violation? Does it allow that to happen? Box Thaxton said very unequivocally last Tuesday at the hearing, yes, okay.

And I think in all fairness to the coal miners they need to understand what this is and understand that we are replacing a barrier here with a trust me, the government.

MR. NICHOLS: But in all fairness to the coal miners, they have to understand that this agency is not abandoning the engineering controls.

MR. MAIN: What Marvin Nichols says today is not what the agency may well think about how they apply this rule three or four years from now. I just want to roll back to the 2000 hearing. You said something at the beginning of the hearing here that I think was pretty straightforward. In 2000, the proposed rules, those

things were soundly rejected by both labor and the industry. They told you go back to the drawing board and come out with proposals that really met the needs of fixing this problem.

And one of the things in this proposal was a plan to allow these PAPRs to be used on longwalls only and allow the dust level to go up to a factor which equated to a milligram. And miners across this country said we want no part of that. We do not want this law changed. We want those protections in the law of 2 milligrams and of barring respirators to stay in place.

But a proposal comes back, Marvin, and I'm just stating the case just like it is. We have a proposal now that says, gee, we're not just going to allow longwalls. We're going to allow all mining sections to possibly have this standard. And we're not going to do 4 milligrams. We're going to raise it up, based on the factors that was put in this rule, up to 8 milligrams. Now that's what you've told the miners, okay, in this rule.

First off, I'm here to tell you, (A) you didn't listen to what miners had to say, and maybe that's chose. I mean, we're pretty well are getting to understand that now. No matter how loud or how hard we try to make this case out, miners want no part of that. And I think

you're going hear that from here to the rest of the hearings. We've come out of two hearings in the East where I think you got a pretty clear message about that as well. You stay wedded in that proposal and it does violate the law. It gets around the 2 milligram standard. It allows over 2 milligrams. It is barred from exceeding that level in a mine environment in active workings to be exceeded. You know, to us, it's just dust, it's that simple and it's the wrong thing to do.

There's a number of things in that proposal that we believe that you didn't listen to whenever you went back to the drawing board. But going back to this 2 milligram or 8 milligram issues, I believe that maybe one of the witnesses in Charleston raised a point where MSHA promised, and I shouldn't say promised. Had told the miners, look, we never figuring on applying this respiratory standard to any more than the longwall fellows during the hearing from the agency. And now we come back with a proposal that, that's exactly what the agency said they wouldn't do, Marvin. I mean, those are things that we make our determinations here about can you trust this government. You know, I don't think that the folks that heard that in 2000 have a lot of confidence in you guys saying we're going to hold the line and not approve those dust levels up that far. I don't think you

have credibility there. I really don't.

MR. NICHOLS: But it comes back with a new concept, Joe, that in situations where miners that encounter unexpected conditions like mining through rock seams that there's a time there where they may not be protected by the engineering controls that are in place. It would allow for the use of supplemental controls while they're mining through those rocks.

MR. MAIN: So you're saying this doesn't apply to continuous working sections?

MR. NICHOLS: Not under normal conditions it wouldn't.

MR. MAIN: No, get my point here. Miners railed against that proposal last time, which only permitted MSHA to approve PAPRs on longwalls. The agency tried to lay out this case. Trust us fellows. We'll never do more than these longwalls. That's the only place that's really got this problem. Now correct me if I'm wrong, as I read this rule, they can get PAPRs on continuous mining sections. Am I incorrect about that.

MR. NICHOLS: Well, you're not incorrect about it. If they encounter the unusual mining conditions.

MR. MAIN: The provision that was limited to just strictly longwalls was taken out of this proposal compared to the 2000.

MR. NICHOLS: The new rules were expanded to include unusual mining conditions.

MR. MAIN: And it took the word "longwall" out of the section that dealt with MMU, which admits MMUs. Am I wrong about that, Bob? I asked this question trying to figure out what this thing did. I was informed that it applied to MMUs now, not longwalls.

MR. NICHOLS: Have I correctly stated what the rule does?

MR. THAXTON: Yes.

MR. MAIN: Have I correctly stated what the rule does, Bob?

MR. NICHOLS: What you're stating is what the 2000 proposal cited.

MR. MAIN: I'm saying what the 2003 rule says.

MR. NICHOLS: No, if your question is, have we expanded the 2000 rule from dealing only with longwalls to including other areas where you encounter unexpected mining conditions the answer is yes.

MR. MAIN: And the question I specifically asked, before you get to that one section, Marvin, and the section deals with the straight up MMUs and using PAPRs on MMUs. The 2003 rule was explicit only to longwalls, is that not correct?

MR. NICHOLS: You just said the 2003 rule. It's

not the 2003 rule. The 2000 rule was applicable only to longwalls.

MR. MAIN: Now as I read this proposed rule, and this thing is so confusing, if I've got it wrong, Bob, correct me here. As I read this rule, it just talks about MMUs now generically, not explicitly to longwalls, am I correct about that?

MR. THAXTON: That's correct. As Marvin stated, it's because --

MR. NICHOLS: But not without explanation.

MR. MAIN: Well, see here's the reality of the way this rule reads, okay. If what I'm saying is wrong, correct me fellows because the one thing I want to do is get the facts out to the coal miners. And I think that there has enough information out there that has not laid this picture out about what the mine operator about get into. They really have a right to know what this rule do. As we read this rule, a mine operator can apply for any PAPR program off of a continuous mining section the same as they can off of a longwall section in the past proposal. That's the way we read the rule.

MR. NICHOLS: Yes, that's what's missing in the discussion. They can after they've exhausted all engineering control.

MR. MAIN: The only thing I'm trying to say

here, Marvin, is that there was a commitment made, as I understand from miners during these hearings, that we would like to stay in this field of longwalls. And it was limited in 2000 only to longwalls and now that's changed. The way we read the rule it doesn't distinguish you have to do anything different from a longwall as far as a continuous mining section. It's generic the way that standard was wrote when it talks about MMUs.

I mean, if you guys want to clarify it. I mean, that's the way we read the rule is an MMU you apply for a PAPR program.

MR. NICHOLS: But only, Joe, for good reasons.

MR. MAIN: Forget the reason.

MR. NICHOLS: No, you can't forget the reasons.

MR. MAIN: No, I'm saying forget that for this argument. What I'm trying to do is, piece by piece, but this together because I think you've established on the front side that the law now prohibits you from doing that. That there's a provision in the rule here that allows you to approve a plan that operator submits a plan here to use PAPRs claiming that they have exhausted all feasible engineering controls and you guys could agree with that, okay. They could use PAPRs and increase the dust levels under this proposal.

MR. NICHOLS: On a temporary basis if they've

encountered unusual mining conditions.

MR. MAIN: Are you talking about the second proposal or are you talking about the proposal using PAPRs? There are two different standards in this rule that deal with PAPR approval. One of them is dealing with approval of PAPRs in special circumstances. That's completely different. Are you talking about one or the other?

MR. THAXTON: I'm talking about special circumstances.

MR. MAIN: I'm talking about the new rule. That's what I'm trying to say. I haven't gotten to the special circumstances yet. But just to walk through here, the clarification that I think is needed is this rule does, in fact, allow the dust level to increase if you guys approve them. If you guys agree with the operators that they've exhausted their engineering controls and they can use PAPRs.

Over the past hearings and over the hearings in 2000, there was a wealth of information put on the record for these very PAPRs, as you say, was approved, which is the airstream, and I think made by the 3-M Corporation, has found to be faulty in their use in coal mines for a variety of reasons.

Testimony of both miners and representatives of

the industry has laid that case out, I think, fairly clearly. And what we're about ready to do is take those PAPRs, use that as the means to allow the operators to jack up the dust. And when you approve it, that's the pull that they have.

And we know that historically that those things don't get the job done. And we've been struggling the work at 2 milligrams. Now we're getting ready to put these leaky, faulty respirators as an alternative means to improve for operators in these high dust environments. It's outrageous. That's what the simple result of all this is and that's what the miners want to know.

Another issue that's a bit controversial -- I just read an article from the head of MSHA. Who's the one that's going to sign off on these rules, which scares the heck out of me, doesn't seem understand the union's position on the MSHA take over of the respirable dust sampling program. And I'm just going to read this into the record because I presume it was a statement of Dave Lauriski. It's attributed to him.

"For years, the United Mine Workers afforded MSHA to exercise primacy in sampling dust inside the underground coal mines an agency official said Thursday. Now that MSHA is moving to do just that in one of the two proposed rule changes, the union has reverted itself.

Assistant Labor Secretary and MSHA Director David Lauriski said." That's not true and there's a big misunderstanding here about what's going on.

The fact of the matter is the union has supported a federal take over of the operator-controlled compliance dust sampling program. But what the union has told this agency time and time again, we want a take over that's effective. And we have called for expanding on the frequency and number of samples that have been taking place with both the operator and MSHA. It's pretty clear on the record of 2000.

And if anybody missed it, I'll be happy to go pull that out and provide it to the agency. But at that time there was a total of 36 shifts being sampled in the nation's coal mines that we said was far too infrequent. That any take over needed to accomplish those and have increased frequency.

The union supported the Federal Advisory Committee finding and I want to read that because it's part of the provision you guys have here the craft issue was from. It's Recommendation No. 16(C) of the Federal Advisory Committee, which was appointed by the Secretary of Labor to craft -- I served on that committee. We were given the responsibility to craft standards to reform this broken dust sampling program.

And here's what Recommendation No. 16(C) says, "The committee considers it a high priority that MSHA take full responsibility of all compliance sampling at a level which assures representative samples of respirable dust exposures under usual conditions of work. In this regard, MSHA should explore all means to secure adequate resources to achieve this end without adverse impact on the remainder of the agency's resources and responsibilities. Compliance sampling should be carried out at a number and frequency at least a level currently required of operators and MSHA." When we wrote that there were 36 samples being taken, okay.

We have stood solidly behind this for years. And I was a little mystified as to how the head of MSHA is not ready to write this rule, implying our position has changed. What we have said is we think the proposal that you launched in 2003 failed to meet that test. There are too infrequent of sampling taking place in the nation's mines. And that was not only our position, that was the position held by many others. And we saw in the 2003 proposal, and when we told the agency come back with more frequent sampling, we have a proposal before us, and let's tell the truth out there what it does. The requirements have been stripped from the regulations.

There are no mandatory requirements for

compliance sampling, other than the part-time miners in that rule. The section sampling is gone. The outlying sampling is gone. And it's replaced with a "trust me" policy of the agency where you claim that you plan to do specific compliance samples for outlay areas of the coal mines. That's goes to one shift sample a year by your plans.

And on sections, as little as three shift samples on a mining section in some mines in this country. That's outrageous. We never supported that. Nowhere will you find the union or miners supporting that kind of infrequent sampling. I think it's wrong for the agency, particularly, the guy who's signing off on these rules, to say that. And I would urge that you go back and clarify the record to the assistant secretary that his statement is dead wrong.

He also claims that we're not changing this law, this 2 milligram standard. That we're still going to have this 2 milligram standard. But what he isn't telling the public is, by these formulas and these gimmicks we're putting in the standard, we are actually going to let those mine operators increase that dust in those active workings of the mine environments up to 8 milligrams. That's what this rule does. Now I'll debate him if he wants to any day of the week, but this is what

the rule that you guys put out does. There are statements in here that's incorrect.

This rule reverses the standard implemented by Congress in 1969 that said operators within three years you're going to be down to 2 milligrams and that's where you'll stay. You're going to do it by environmental/engineering controls and you're not respirators to replace that. The rule is very clear. Those laws are changed to fit to allow the escape hatch to allow the dust levels go up and use respirators under this proposal to 8 milligrams. That's straightforward.

And I think this is what's wrong with the explanation to this rule. Let's tell it like it is. And I think when miners find out the truth, you're going to sample one location, one shift outlay in a year's time. I mean, that's outrageous. Does anybody believe that we can based the health of our miners in this country who tens of thousands have died from Black Lung on one lousy sample of a shift of a coal mine in a year. That's outrageous and we are outraged by that and by the tones of, gee, you can't understand where we're at. And three shifts a year being sampled for compliance on sections. That's outrageous. Six shifts a year is outrageous.

JERRY CROSS: Thank you. My name is Jerry Cross, C-R-O-S-S. I'm regional director for United Mine

Workers in the Midwest. I actually haven't worked in a coal mine in several years, but I have negotiated contracts, and I was mayor of a town for about 12 years. So I think of myself as fairly intelligent until Marvin stated how easy these rules and regulations were because I've read them, and I've listened to your explanation this morning, and I still don't have a clue what they say. You know, I've heard what you said up here. I heard what Mr. Maien has said. And to be quite truthful, I'm not sure what they are.

So surely the rules weren't written, in my opinion, for the everyday coal miner, or actually the representatives that are here today. To me, they was more written for you people from MSHA and the experts that are here. So, you know, I'm a little -- I don't understand. It was my understanding that through the Federal Advisory Committee and NIOSH about 2000 that Joe Maien talked about, it was your recommendation to actually lower the dust levels and increase the samples. And to me, what I can pick out of these rules is that it goes just opposite. It raises the dust standards and lowers the level.

And if I can ask some questions -- I'm concerned -- Dennis Boehm asked you a question -- and I think, actually, Bob, you answered the question -- in regards to

what is feasible in regards to when they raise the level and how that's going to be determined. How do you do that, though, if you're only going to be taking a sample once a year?

MR. THAXTON: I don't know where you mean taking a sample once a year.

MR. CROSS: Well, you're only doing sampling one time a year, correct?

MR. THAXTON: No, that's not correct. The plan verification process -- the operator has to collect multiple samples on a shift.

MR. CROSS: Right.

MR. THAXTON: And he'll keep sampling under plan verification until he can verify the plan. That could be four or five samples on the initial round by itself.

MR. CROSS: Right.

MR. THAXTON: Because if he's unable to meet 2 milligrams, he's going to have at least five samples to show that. If he fails to verify with all feasible controls, there is going to be several rounds of samples collected by the mine operators. So this is going to be two, maybe three rounds of verification that they'll attempt to go through and be able to show that they're not meeting the standard before we would actually say you've exhausted all feasible controls.

At the same token, if there is a request for the agency to say that you've exhausted all feasible engineering controls, the agency would have the option -- and probably will exercise that most strenuously -- that we could come in and also evaluate through our sampling what is going on and what the levels are in relation to the controls that are in place. So it's not going to be based on one sample to say that you've exhausted all feasible engineering controls and are therefore able to submit either a -- and it's not strictly a PAPR program or respirator program.

They have the option of either using PAPRs or administrative controls because we do recognize that there are mining operations where you can't use a PAPR protection program.

MR. REYNOLDS: Can I interject? I just wanted to say that -- this is Larry Reynolds -- in the document that you've got on page 1081-A -- and we've had this question several times -- there is a very long discussion of how this process would take place. And it begins with the request going to the administrator for coal mine safety and health. It has to be initiated at that level by the operator. And at that point, there would be a panel appointed to take a look at that operation to see if in fact all feasible engineering controls are

implemented before we would even go into consideration of the use of supplementary controls. And if you want to take a look at that, it's in the documents that are available from Pam. If you look in on page 1081-A, there is a long description of that.

And also, in answer to the earlier question from Mr. Boehm, there is also a description in there of what we mean by feasibility and how the agency would determine if all feasible engineering controls have been implemented. And that's on page 10804, and there is a description for that as well. I understand that for a lot of you the preamble material is very, very -- it's intimidating to look at. But there is a table of contents at the beginning, and we're required under the rulemaking process to explain everything that we're doing here. And if you look at the table of contents, it will lead you to the section that answers this question. And also, there is a section that goes into all of the details about use of continuous monitors as well that we discussed earlier.

MR. THAXTON: Thank you.

MR. CROSS: Just a couple of more questions and then a final comment. I think it has been stated before, too. We're just concerned why this is moving so fast right now, why it has to be -- it seems like it is being

shoved down our throats at this point in time. Is there a reason for that?

MR. THAXTON: We don't consider this being moved fast. Like Marvin says, this has been worked on since the early '90s. The proposal that came out in 2000 then has been followed. This is a re-proposal. It's not a rehash of the 2000 proposal. It's a re-proposal. It was on the great agenda for the agency for the last year and a half. Definitely, it was being worked on. This is something that has been written on for over a year now to prepare what is ready at this point.

So it's not something that's, you know, just written in a matter of a month or a week or something and then said throw it out there for people. These proposals were published March 6th of this year. So they have been out 60 days before we started the first public hearing. They've extended the comment period now to where it goes through July the 3rd, so you'll have 120 days now on this particular rule while it has been published for looking at it, commenting, and submitting those comments to the agency.

MR. CROSS: How do you -- Mr. Sweeten spoke earlier also, and he talked about the problems with the airstream helmets, about them fogging up and the people talking them off because -- you know, I've been told that

especially on repairmen that try to work on anything underneath the shields, it's almost impossible to use those. What does the agency plan on doing in that regard?

MR. THAXTON: If you recall on the presentation that I gave, we said that the use of respirators had to be spelled out as a respiratory protection program that was going to be included in the approved plan. So based on that, they have to spell out exactly how they're going to do that.

The respiratory protection program says how the units are to be maintained, who is responsible for maintaining them, a central person at the operation that's in charge of the program, that they have to be maintained as approved. So using filters that aren't permissible or not changing filters, not checking the units, switching the units between two different people without them being cleaned and disinfected between use, that all is covered is in the respiratory protection program and has to be followed because it becomes part of the approved plan for that mine at that point.

MR. REYNOLDS: This is Larry Reynolds. I was going to say I notice some of you are leafing through the documents. But if you look on page 10863, it gives you very specific examples of what an operator would be

expected to do and what they would be required to put in their ventilation plan if they were approved -- if they did receive approval to use PAPRs. And it's very detailed, and it addresses a lot of the concerns that Mr. Sweeten had about the maintenance, the proper use, the sanitary conditions -- all of those would be requirements before the operator could implement this plan.

That's also discussed on 10863 and 10864, if you want to take a look at what MSHA would expect from the operator if they were -- if they should get approval to use PAPRs.

MR. THAXTON: Just to follow up on sort of where you said that you thought that these rules were being shoved down your throats in a quick fashion. You know, that's why we're out here doing these hearings and why we extended the comment period. It's that we are interested in hearing from you. We want to know what the people that actually are going to be affected by the rules, what you think of them, and where we can make changes and where we can possibly make improvements.

We are here to listen to what the comments are. And that's why we ask questions in the way that we do in the rule when we talked about the use of the personal continuous dust monitors. Yes, we have written up how we think that they can be used because at the time these

rules were being written, there is no unit out there. There is no way for us to say this is what everybody has to require because we don't have those units available yet.

However, we do put in there several questions, and it's like a page of questions, that say, you know, how do you see it being used, how do you think it should be used? Should it be increased? Should it be used a different way? Because we do want to hear from you as to what you think of it in relation to each item on this particular rule.

MR. CROSS: We do agree that the continuous monitoring is the best way to go, and we hope to see that in the future. Just a couple of closing comments. I appreciate the opportunity to speak today. I don't know if any of you have had the opportunity to deal with someone that has Black Lung and has expired from that disease. It's a very terrible disease. They wind up basically drowning. In one of the jobs I've had with mine workers, I spent eight years dealing with those people. And it's terrible, and it is something that has to be corrected.

These people give their lives to generate the electricity in this country, and it's something that we have to work forward to and get done.

You know, in closing -- and I don't mean any disrespect in what I'm about to say, but the analogy I see here today -- you know, I hear what Mr. Nichols is saying, and I hear what we're saying. And it kind of reminds of the war in Iraq. Baghdad Bob, remember him? He was the guy, the minister, who was out there all the time saying that, you know, nothing is going on. We're going to win this war. At the end, he was even saying, you know, the American troops aren't even in Baghdad. And I don't know if you've seen anything or not. They've got a thing on the Internet where it shows an American troop dancing behind him.

I kind of feel that this is the same way. You're telling us all this stuff, but we just don't believe what you're telling us. We think there is something else behind it. And that's just our feelings.

So I appreciate the opportunity to give you my comments. Thank you.

MR. THAXTON: Thank you.

(Applause)

MR. THAXTON: Craig Smith.

MR. SMITH: My name is Craig Smith. That's C-R-A-I-G, S-M-I-T-H. And I'm with Local 1613, and I'm a safety committee person.

I read through the proposal. I did not study it

because I didn't understand it. It was confusing to me. But one thing I got out of it is it's not in my favor or miners' favor. And it needs to be written in simpler form with no loopholes, more or less in plain English.

Letting companies do their own dust sampling isn't in miners' interest. And the way to protect miners is keeping dust levels -- I think at 1.5 would be a lot better than 2.0, or going to 1.0, as we are with the Part 90 miners, what they're allowed.

On the panel, how many people has worked in a coal mine, this panel?

MR. THAXTON: Marvin Nichols worked in mining before he became part of the agency. The balance of the committee or the panel that you see up here -- and this panel isn't the committee that worked on the rule. This is the panel that's conducting the hearings. But of the -- I mean, several of us up here have over 25 years with the agency dealing with miners' health and safety.

MALE SPEAKER: We can't hear you. We can't hear you.

MR. THAXTON: There are several of us on the panel that -- Marvin, George Niewiadomski, and myself -- all three of us have over 25 years of working strictly with miners' health and safety within the agency.

MR. SMITH: Well, I've been in a coal mine for

29 years. And just as an example, if this room atmosphere was 2.0, how long do you think this tablecloth would stay white?

MR. THAXTON: You're asking?

MR. SMITH: Yes.

MR. THAXTON: It's impossible to say because of the type of air movement in here. If this was 2 milligrams, realizing respirable dust doesn't settle out -- it behaves as a gas. Generally speaking, respirable dust only falls about 2 centimeters --

MR. SMITH: Well, we're talking about --

MR. THAXTON: -- in still air, and the air in this room is not still. So you're dealing with an entirely different subject. Realistically, 2 milligrams, you would not expect to see much of anything settle down on the tablecloth in an eight-hour period. You wouldn't see that. When you see dust settling out on the tablecloth, you're probably dealing with something that's greater than respirable dust size.

MR. SMITH: All right.

MR. THAXTON: As an example, just so you have a better understanding of what we're talking about, if you pulled out one hair of your head and looked at the diameter of it from the end, that hair is 50 microns in diameter, as an average for a human. The dust that we're

dealing with is 10 microns or less in diameter. So you can see we're dealing with dust that's much smaller in diameter than the diameter of a human hair if you looked at it from the end.

Because of that, that dust does not settle out in moving air. In still air, it falls very slowly, like I said, approximately about 2 centimeters in a given period of time. So it isn't what you see as falling out and collecting on surfaces.

MR. SMITH: All right. Well, my experience working 29 years in the mine, I would say 2.0, this tablecloth would be black in eight hours. And if you let it go to 8.0, I think it will only take two hours for this tablecloth to be black. And we don't need to get that level at all.

I'd like to see you put these proposal on the back burner and get more input from miners and work with the miners and not against them because I feel you're working against them. Okay?

MR. THAXTON: Thank you.

(Applause)

MR. THAXTON: Gary Mahan. Greg Mahan.

MR. MAHAN: My name is Greg Mahan, M-A-H-A-N. I'm from Illinois. Thank you for having me here today.

We started with stats on the Black Lung. You

said they were going down from I guess years. Does that -- could you tell me, does that have the calculation of people who have applied, how many people who have applied for Black Lung Claims?

MR. THAXTON: That data is based upon X-ray analysis of miners in general. It represents approximately 20,000 miners X-rayed by MSHA over the last three years, in addition to approximately 6- or 7,000 miners X-rayed through the NIOSH program operated through the mine operators. So a total of about a little less than 30,000 probably miners.

MR. MAHAN: How many have been turned down?

MR. THAXTON: This has no bearing on Black Claim benefits.

MR. MAHAN: No. I just -- I know I don't have -- like I'm saying here is we're sitting here going to raise the dust standards, and we're saying that the Black Lung claims have gone down.

MR. THAXTON: No. We're not saying Black Lung claims have gone down. We said the prevalence of Black Lung disease has generally been on a decline. But it has not been much of a decline. It has gone from 4.2 percent in 1981 down to 2.8 percent under the 2002 data. That's not much of a decline. We're saying that that's insufficient. We need to get that down to zero. And so

we're saying that there has not been a sufficient decline in the prevalence of disease.

MR. MAHAN: And do you think that that's going to happen by raising it to the 8 milligrams?

MR. THAXTON: These particular rules we have said as a general -- that are packed together -- will, we believe, result in reduced exposures on each and every shift so that the prevalence of Black Lung will be reduced.

MR. MAHAN: All right. What do you consider an unusual condition when it pertains to mining quartz? You know, when you -- it stands to be -- levels could be increased because of unusual conditions?

MR. THAXTON: Unusual conditions because of cutting through rock and getting quartz? You're saying that if you're cutting through that material and it's for a short duration, the dust control parameters may be insufficient. So you can ask for additional control measures at that point that would be used for a short period of time. It's better to provide people protection for the short period of time that they'd be exposed to that than to ignore it, as we currently do.

The time frame that it would take to get new controls put in place, get those controls verified, and get the plan approved, you would not more than likely be

past that situation already and not get any changes in the plan then. So we're saying to address that situation we need to look at some additional controls that would be made available immediately.

MR. MAHAN: I'm not saying every day at my mine. But a lot of times -- I'm going to say three out of five days a week -- we cut through rock, falls or whatever. And it's an ongoing situation in my mine almost -- not daily, but quite often. And, I mean, if we say, well, 45 days, is there going to be a time limit on this? I mean --

MR. THAXTON: There actually are time limits built into the rule.

MR. KOGUT: Is your mine -- the section that you're talking about -- are you working under a reduced dust standard?

MR. MAHAN: I'd say we've been working on a reduced dust standard for quite some time.

MR. KOGUT: What dust standard are you working under?

MR. MAHAN: Well, we have a Boyd ventilation system now that Mr. Esslinger, who was down at Lexington last week -- he was the one that helped implement this Boyd system. And since 2000, I know myself I'm out-by, and we get to this and get tested once a year. And you

got -- I mean, whoever made this proposal will kill me the last few years. I've got more deaths now than there has ever been at that mine. And the ventilation system at that mine -- and they said those checkers is the last open cross-cut. They had to be tied secure or that was a violation. Not one has been ruled on that.

I think there was a couple citations wrote under where the air coming back from the face was going over power boxes. In my opinion, there has not been enough done since 2000, which favored the companies being given an open door on the dust sampling in the first place.

You go in my mine, and you go out, and you've got a lot of roads -- an hour after you wandered in. That's how dusty it is, so much air -- I mean, and we get tested once a year. That's a sin. I mean, you know, everybody here that worked in mine ought to bring a little spit card. Doctors give you the test samples because I believe everybody here is going to be sick today one guy would spit up in a day's time, at my mine.

I mean, we go through the quartz mines and cut over there to check with the miners. Technology, you know, is changing daily at these mines. But the technology for the protection of miners is decreasing every day. We've seen that when they brought the diesels in the mine. You know, like I said, since 2000. I mean,

it's a shame with all of the respirable dust. You know, NIOSH has agreed that what the standards are, they should be lower. And I believe that, you know, instead of going from eight, it will be zero, not raise it to eight. If it says that it can be raised to eight, I guarantee you the agencies will let them be allowed to go increase to eight on a continual basis. If it's in there, it's wrote in there 8 milligrams, I guarantee you it won't -- there will be more times they will be allowed to hit 8 milligrams than not.

I, as well as every member of the United Mine Workers across the land, are pleading with you to strike these proposals and do what a gentleman from my great state of Illinois intended this agency do and do only what is to protect the miners. John L. Lewis. That is why the organization was put on this earth. He fought for this agency to protect the miners.

Like I think Mr. Sweeten said, it's for all miners, union or non-union, all miner company people. And to sit here and let this be allowed is a slap in the face not only to the members before me who fought for these rights, but for my leader, John L. Lewis, years and years ago -- it's a shame that we have to sit here and waste the time of our local and the government for changes that should not be and cannot be and should not

be allowed. Congress is the one that can change this, not this committee.

I thank you for your time.

MR. THAXTON: Thank you.

(Applause)

MR. THAXTON: Joe Urban. Is Joe back in yet?

MR. URBAN: My name is Joe Urban, U-R-B-A-N. I'm with United Mine Workers of America. Hi, Marvin.

MR. NICHOLS: Hi, Joe. How are you doing?

MR. URBAN: I'm doing fine. Bob, how are you doing?

MR. THAXTON: Just fine.

MR. URBAN: Marvin, let's you and I talk about something. Dust averaging. Don't like it, do you?

MR. NICHOLS: Are we talking about the current system of averaging five samples?

MR. URBAN: Uh-huh?

MR. NICHOLS: Yeah. No, I don't like it.

MR. URBAN: Okay. I don't either. But I don't think you can replace averaging with less than a number of samples. Correct me if I'm wrong. Right now we have somewhere in the neighborhood of 30 samples taken per working unit because it takes five to get your average, correct? Single sample rule, which United Mine Workers support, we're saying we shouldn't need that many samples

for verification purpose, right, for compliance purpose?

But what we're also saying, Marvin, which I don't think is coming out clearly here -- we agree with you on the averaging issue, okay? What we don't agree with is that that number of samples taken should not decrease. That's what the miners have a problem with. Give me 45 samples per working unit, and I'll be satisfied, Marvin. But you know and I know the reality is you don't have the inspection force to do that, and that creates a problem.

Do operators want single sampling? No, they don't want it because it doesn't give them as current -- the five averaging sample does not give them the time to get into compliance over that averaging span time.

But let's not mislead the miners out here. We agree averaging is wrong. But we need to increase the number of samples that we take. If we had been taking 30, 34, or 36 samples a year at a mine at each working unit, then let's continue or add to that.

The airstream helmet issue I think has been beat to death. We don't want them, Marvin. We don't want them.

MR. NICHOLS: I think we've got that.

MR. URBAN: And I understand what you have said in reference to administrative and engineering controls.

But I think the act clearly articulates what should be in place first, and that is all engineering controls before you look at other avenues, i.e., respirators, personal protection, whatever.

MR. NICHOLS: That's not different from what we're saying.

MR. REYNOLDS: In the preamble, if you'll read on page 10798 and 10799, it specifically states that all engineering controls had to be place. All of them have to be exhausted before we would ever go into a situation where MSHA would allow the use of PAPRs or administrative controls. There is a detailed description of what we mean by that, and that will remain in place.

MR. URBAN: Mr. Reynolds, I respect you. I realize you're an attorney, okay, and I'm not here to debate or argue the issues with you.

MR. REYNOLDS: I'm just trying to say what is --

MR. URBAN: I understand. What you're explaining to me is preamble. It's not the law. It's not the rule. You show me where that explanation is placed in the rule itself, verbatim.

MR. REYNOLDS: Okay. Give me a minute. It's under conditions of use. Under 7211, is it?

MR. URBAN: What page, sir?

MR. REYNOLDS: On 10877. Okay. It's 210. If

you look on 72 of 210, if you've got the thing, 10877 -- if you read under A, 1, i, and 2. Must include all the feasible engineering controls, reduce the concentration of respirable dust in every occupational environment where PAPR is required as low as achievable, and maintain other occupational environments at or below the verification limits.

MR. URBAN: Okay. And who verifies whether or not that has been made?

MR. REYNOLDS: MSHA.

MR. URBAN: Can you explain one question for me, Mr. Reynolds? Why have we reverted to talking about the PAPRs? Why have we said in the working faces or working sections rather than in the mine atmosphere? Why are we talking that language out of the definition?

MR. REYNOLDS: We're not. I mean, we can't change what the Mine Act says. But we've set up this scheme for in limited situations when all feasible engineering controls have been exhausted there would be approval to use these to protect miners. But the existing Mine Act standard remains the same.

MR. URBAN: Keep in mind, gentlemen, I'm just a coal miner, okay? I'm not an attorney. I'm not a scholar. I'm not a mathematician. So when I look at 70.218(a), it says if a valid equivalent concentration

measurement -- what is that? How do I determine that as a coal miner? For any occupation sampled by MSHA meets or exceeds the citation threshold value, the CTV -- which I can find it. You gave it on the next page, the little table -- that corresponds to the applicable dust standard in effect. Now as a layman coal miner, how do I know what that is?

MR. REYNOLDS: The use of the term "applicable dust standard" is meant to cover those situations where you have an operation that has a reduced dust standard. That's why they use applicable. We've had this question before. When they say applicable dust standard, they're trying to include operations that are operating under a reduced dust standard, which I think George said was 44 percent of the MMUs that would be -- mines would be under a reduced standard.

So instead of saying under the dust standard, as in the dust act, we use the term "applicable dust standard" to include those people that had a reduced standard because of quartz. That's why -- I understand a lot of people were confused by that term in the other two hearings.

MR. URBAN: Okay, okay. And that was my only point, that the language is so complex and confusing to the average miner. It really is.

MR. REYNOLDS: Okay. The other thing about equivalent concentration, the reason that was there was to try and provide coverage for people working under extended work shifts and work weeks. There is a method of making sure that they remain under the 2 milligram standard under the Mine Act, too. That's what all that equivalent concentration stuff is about. And it is defined in -- there is a definition, and then there is a long description of the definition in the preamble and in the rule.

MR. THAXTON: And it's equivalent to what we do right now with the MMU equivalent concentration that you calculate now to some degree.

MR. URBAN: Bob, I understand what you're saying. But again, his lengthy explanation answers my question with the fact a regular coal miner can't understand that.

MR. REYNOLDS: I know. It is a proposed rule, and we're getting -- we're hearing loud and clear that it's complicated and difficult to understand. And we are having these whole series of public hearings and listening to everybody. And we're open to your comments. If you have suggestions on other language that might be easier to understand or other ways of describing what -- I understand my description is long. What we're trying

to do with these words is protect everybody working long shifts. We're trying to protect everybody who may be exposed to levels higher than the 2 milligram standard. And, you know, that's what we're here for, is to -- if there is some suggestions on what other terms we could use to describe equivalent concentration level -- I mean, one thing I've heard so far today is we need a table of acronyms so that you can look in there and see what a VPL is and what an equivalent concentration is.

MR. URBAN: Since you're the general counsel, Mr. Reynolds, and this committee has formulated this proposal, I'm going to ask you a legal question, and that is who has the power to change this proposal? Does this committee have that power or does the assistant secretary have to do it?

MR. THAXTON: Let me. Joe, these are agency rules, and we're here to take your comments. If you have comments on how to improve these rules, we're glad to take them. But they're agency rules.

MR. URBAN: You didn't answer my question. I have a suggestion once I get a response to my question.

MR. THAXTON: Give us your suggestion.

MR. URBAN: Give me my response.

MR. THAXTON: We're here to take your comments.

MR. URBAN: Okay. Basically, here is my

comment, Marvin. We have tried and tried and tried to clearly articulate to you that the miners out here working in the mines, these helmets will not work. You're relying on outdated testing that has been done on the airstream helmet, 1979. What we're suggesting is take this proposed rule -- and I realize there has been a lot of time -- a lot of intense work went into this. I realize that. But throw it in the damned trash can. It's not worth the paper it's written on. And go back to the drawing board. And, yes, Marvin, Mr. Joe Maien and the United Mine Workers of America will give you all kind of information that you need to help write it to where miners can understand it, plain and simple.

I realize the fact that, yes, we have been waiting and waiting on a continuous monitoring system. What has got me upset, Marvin, is we're this close. We're this close. With the help of NIOSH, we're this close to having a continuous monitoring sampling device. But my gut feeling is I don't think the agency wants to know because if they know the true exposure, then something will have to be done about it.

Now I'm just telling you in coal miner language, Marvin. That's the way I feel.

Bob, I did have one question on your chart that you put up on the cases of pneumoconiosis, the study that

-- or the statistics that you did in 1981, 4.2 down to 2.8. You had said that there was a cumulative of about 30,000 individuals that had been tested in that last testing period area. Is that correct?

MR. THAXTON: In the 2002 period, yes.

MR. URBAN: Okay. In 1981, how many people were tested?

MR. THAXTON: I don't have those numbers here.

MR. URBAN: So there is a possibility that there could have been a whole lot larger number of people, which we'd have to get the mathematician involved here on this one. But proportionately, there could have been --

MR. THAXTON: I can tell you with about a 90 percent confidence right now that there were less in each of those periods before 2002. 2002 actually represents probably the best number of people being tested to determine the prevalence of disease.

MR. URBAN: Whenever that testing was done back in 1981, do you have some kind of a breakdown of what criteria that testing was as far as union/non-union relationship?

MR. THAXTON: The information on the breakdown is in a NIOSH document. It's the work-relatedness of lung disease. It has all the charts. It goes back to 1971.

MR. URBAN: Okay. Do you know how many of the non-union segment were tested in your last testing round the last three years?

MR. THAXTON: The 2002?

MR. URBAN: Yeah.

MR. THAXTON: I do not have those numbers with me, but there were a significant number of non-union operations.

MR. URBAN: Okay. Correct me if I'm wrong, but when you done your presentation, you talked about sampling for a shift. Now I'm assuming that shift -- are we still on eight hours or are we going to 10 hours, are we going 12 hours? What is a shift?

MR. THAXTON: The shift as defined for verification purposes, it's a full production shift. That is, as I said, from the time you get to the MMU, the pumps are turned on; you turn the pumps off when you're leaving the MMU. That's on the operation verification sample. MSHA compliance and abatement sampling is eight hours portal to portal, as it is right now.

MR. URBAN: Okay. So you're still using the eight-hour formula for --

MR. THAXTON: For compliance purposes, yes, because it is an eight-hour standard.

MR. URBAN: It appears to me, Marvin -- and

don't misunderstand what I'm saying. We feel that there is an ample opportunity -- and even though you have said that in the proposed rule that if an operator so choose to take advantage of the technology of the continuous monitoring, do you really think that would happen? Seriously.

MR. THAXTON: We've asked you for a whole series of -- I think we asked a whole series of questions in this proposed rule on how this new technology ought to be used. And we're here to accept any ideas you've got.

MR. URBAN: Make it mandatory.

MR. THAXTON: That's your comment. We hear it.

MR. URBAN: Make it mandatory. No ifs, ands, buts about it, which I really feel it's going to prove itself to be a reliable technology. And if I'm right -- and I know, Marvin, we've been waiting a long time for something. But, you know, a light bulb does come on every now and then. So maybe it's time for our light bulb to come on. Make it mandatory in the rule. That way when it is finalized and it is commercialized, it's available and we can protect our people. That's all I have. Thank you.

MR. THAXTON: Thank you, Joe.

(Applause)

MR. THAXTON: John Stewart.

MR. J. STEWART: Yeah. My name is John Stewart, S-T-E-W-A-R-T. I'm a coal miner for 32 years, 29 of them being underground. I'm also the National Black Lung Association president. And on a daily basis, I talk to widows that's lost their husband due to Black Lung and members who are slowly dying of Black Lung.

I stated before Black Lung was discovered in 1831. A hundred and seventy-two years later, we still got members dying from it. In the last 43 (sic) years since the Mine Act came into effect in 1969, there still has been approximately 78,000 miners die of Black Lung. These members died of Black Lung working in coal mines that was 2.0 milligrams of respirable dust per cubic meter of air or less.

Now we're introducing -- MSHA is introducing these dust rules that will allow in some cases, with the right proposition, for the dust to be up to 8 milligrams. MSHA should be acting on the miners' behalf to clean up the unhealthy, unsafe conditions in the mines by lowering the dust and increasing the sampler. The one shift sampling is a good ideal to listen at. But the operators is going to make sure that one shift sample is the best possible sample there is. They can do that continuously, and have done it continuously.

I don't think these rules -- they are ignoring

the miners' needs to decrease the dust and increase the sampling. Right now, there is, as I said, 2.0 milligrams, and miners are dying every six hours of Black Lung, on average. That's 1,400 to 1,500 miners a year that dies of Black Lung.

We all expect MSHA would set the standards to assure that working conditions are free of respirable dust so miners wouldn't suffer a long, drawn-out death. We had a lady testify in the Charleston hearing that you all heard that went through that for eight years, Linda Chapman, a very good speaker and a very religious person. She knows well what our members go through. And by asking the coal companies to verify their own dust rule when, as people before me have said -- you know, there was 160 individuals or companies that have been convicted or pled guilty to criminal charges of dust frauds. It's not reasonable.

We need the dust monitors. We need that dust monitor on our miners where they can monitor theirselves 24/7, 365 days a year. That's what -- that's the whole program right there. That would eliminate the whole problem. If we got our members knowing what dust they're in, they're going to see to it that they get out of the dust. As it is right now, the company is going to see to it that they get around the samples, that they get around

the MSHA in one way or another.

The Mine Act of '69 not only says that mine dust must be 2.0 or less, it also says that no issues -- no standards can be issued that lessens the protections of the miner. This dust rule, as I see it and most coal miners sees it, does lessen our protection. Where there is a possibility that the dust is going to be up to 8 or even 9.33 milligrams, that is definitely lesser protection.

The Mine Act also says, as I stated, that you can't have a 2.0. That's even if one particular mine don't ever get in the situation where they get up to eight. We still in this new rules -- it still says 2.3. Instead of going to the average lower part in the safe and healthy part of the miner, you're going up to the benefit of the company, which is wrong.

Coal dust in the mines can be kept under 2.0. It can be. Like I said, I've spent 32 years down there. And if you use water and you use air enough, you can keep that in a reasonable atmosphere. It can be done. Even -- I read a report the other day. Some England mines -- most of England's mines is under government control. They don't have Black Lung. They don't have Black Lung problems. A lot of it may be since it is government controlled. They control it. They don't

leave it up to the companies.

Of course, MSHA knows the law of the coal mines. They know about the 2.0. But yet we're going to these -- possibility of going to these airstream helmets that no telling what it can get to. It's already kind of got out of hand with the longwalls. Now it's going to work itself into mining sections.

We had a longwall in 1974. Nobody, nobody could stay on that thing hardly for eight hours. Not only did we have a lot of problems, but we had a lot of dust problems. We again had a longwall in 1994. It was a considerable amount of difference. In the meantime, the laws changed and made everything better. But we still got the dust. We still got the problem. We still got the people dying of Black Lung. And we will have, under these new dust rules, a lot more than what we have now.

It should be mandated by MSHA that the samplers increase and the dust is decreased. It should be mandated that the miners are monitored 24/7, 375 days a year. I am sure none of you as individuals on this committee would want to see anybody die in the mines with Black Lung. But as a committee of this new dust rules that you're going to put into effect, that is exactly what is going to happen. We're going to have thousands of more people dying. It's going to increase because the

dust is going to increase. Our members is going to increase of dying.

That's not even considering the unsafe practice of the dust, additional dust, of explosions. And now, under these rules, they're talking about the Belair going to back to the phase two. The whole plan needs to be rewritten and withdrawn. I think you guys are educated, well more than I am. You guys can come up with a plan. I don't know what the reason is why this is so much in the company favor -- and that's what all miners believe it is. But I don't think that there is any way around of making it where it is going to be worse under what the rules is going to be applied.

Like I say, it is my opinion that they should be rewritten and sent back. Thank you.

MR. THAXTON: Thank you.

(Applause)

MR. THAXTON: Don Stewart.

MR. D. STEWART: My name is Don Stewart. I'm president of Local 1613 in Carville, Illinois. I represent 250 miners of the UMWA. And I'm here with a couple of questions I'm having a hard time understanding a few comments.

MR. THAXTON: Would you spell your name?

MR. D. STEWART: S-T-E-W-A-R-T. My first

question is, we're sitting here talking about eliminating Black Lung. And we're all agreeing that we've got a problem, Black Lung. So if we've got a problem with 2 milligrams since 1969 still causing Black Lung, why are we talking about a lower number? That's pretty simple stuff to me, but I think I'm missing something. Can somebody answer that?

MR. THAXTON: It is explained in the preamble to the rule that we are not assured that the sample results that indicate compliance with the 2 milligram standard are ones that we can substantiate. And because of that, until we actually get controls and information that we feel does show whether the 2 milligram standard was adequate or not, it's premature to push for a lowering of the standard until you actually have controls in place and address the fact that you want samples that represent what you're actually exposed to and getting control measure in place that will meet that standard.

MR. D. STEWART: Well, that sounds pretty good. But I would think if you went with a lower number, that would be a better way to study it myself. I mean, maybe I'm wrong and missing something here. But we all agree we've got a problem that we're not doing -- we're not making it better. It sounds to me like we're keeping it the same or maybe even a little worse.

MR. KOGUT: Under the current system, because of the way that the samples are averaged and because mine workers here have expressed that on sampling days conditions are different than on non-sampling days, we believe that under the current system a certain percentage of -- a fairly high percentage of days miners are overexposed. The object of the plan verification that we want to put into place and eliminating the averaging is to eliminate all those overexposures relative to the current standard.

So we believe that by eliminating those overexposures, that's what is going to reduce the Black Lung instances.

MR. D. STEWART: Okay. We've had a -- in our mine the last 2002 -- I think was the last time we did the X-rays. We had 12 new miners, Black Lung miners now. We've got 11 or 12. Three of them were out-by employees. You tell me how this plan is going to address out-by employees. I'm am out-by employee, and what we contend with every day -- there is dust in the beltlines. And when I was a rock duster, I requested a sample because I didn't get it often enough, and it was always way out of compliance. And that has been an issue with me for a long time. Why do we address out-by employees different than in-by? I mean, they get Black Lung, too,

maybe more so with the rock dust than the ones in the units.

MR. NIEWIADOMSKI: MSHA has been sampling out-by areas, designated areas and non-designated areas, on an annual basis for the past 20 years, okay? Operators have been sampling bimonthly. And, you know, we've been looking at that data consistently where there have been thousands and thousands of shifts sampled. And every time we've looked at those samples, we see very few instances, especially in our samples, where you have concentrations that come close to 1 milligrams. We have not identified out-by areas as being problems. That doesn't mean that we're not sampling. We are sampling them, and we are targeting other locations.

Now to respond to your question about out-by workers having CWP, well, we really don't know whether or not those out-by workers have worked their entire mining career in out-by areas. Most of the dust that we see, as well you know, is where coal is being mined. That's at the mechanized mining unit. Those are highest dust concentrations. But as you well know, the rule does require for the panel is almost all the way out now. So summer is coming on. So it will be about 80 degrees or plus on that face. And we've got soft bottom sometimes, and that mud will build up on the feet. You ought to try

to work in an environment like that with a football helmet on your head, basically.

We've got enough stuff on us now and we're going to add something else. And people have told me visibility is a problem, an issue, keeping them moist, the humidity and stuff, you know, from breathing. So just to say this is what we're going to do, I don't -- I mean, this needs to be looked at a lot more than it is being looked at, I think. I don't know if all of you have ever been around a mine or what. But I'd encourage you to go do something like that and see what it's really like because it's a lot different in our world than it is in the world you deal with. And I know you try to address things, but I think we can do a lot better.

And my only thing -- the last thing I want -- a comment I want to make is to me, we need more sampling than we do now because the mine is treated different when we got a guy there with dust pumps. It's treated a lot different. Your rolls of are water better. The sprays are all made sure they are working when you start. And maybe we should do that every day, but that's not the reality.

So I think we need more sampling. And let's not -- let's go below two, not above two. We know two don't work. I mean, your theory might be all right to you, but

to the average guy down there every day that goes home spitting dust out, they're not too crazy about it. And another thing, I think everybody that works in a coal mine and every safety committeeman that represents people ought to at least be able to read this and go explain to his employees what it means. And none of us can do that.

So I appreciate your time.

MR. THAXTON: Thank you.

(Applause)

MR. THAXTON: Tim Miller.

MR. T. MILLER: Good afternoon. My name is Tim Miller, M-I-L-L-E-R. I'm president of Local 5138 UMWA. I also serve on the state mining board in Kentucky. I'm here to represent all miners. I don't want to dissect and make any difference in miners. All miners are miners. I worked myself non-union for 18 years. A lot of you guys are hearing information today from guys that have basically worked in union settings. I worked in a non-union setting for 18 years at a longwall. Had two longwalls there, one underground mine at one time.

One thing that I want to make everybody clear is that on a MSHA day, when you have sampling and you have average sampling on the MSHA day -- it's what they called it in a non-union setting -- it's a perfect world. Everybody needs to understand. All the sprays worked.

All the dust was taken care of on those days.

So when I think about the people that are working in the non-union mines that basically are voiceless, and you're talking about single sample days and doing away with the other four days, then it just tells me that they're going to lose 80 percent, basically, of the time that they have a decent environment to work in.

When MSHA walks away, whether you impose airstream helmets, if you do that -- those airstream helmets are expensive. Non-union operators are not going to have those things subjected to damage every day. And they'll be there when your inspectors are there, when MSHA personnel is there. Those things will be on the power center when MSHA is not there.

There is no way other than continuous monitoring that you can correct this problem. This is an ongoing problem. It has been going on for as long as time. We all know that. As long as there has been a lump of coal to mine, there has been people dying from Black Lung.

It's obvious that with the continuous monitoring, it's a no -- you can't fool the system, guys. You just can't do it. If you're monitoring it constantly, then you get a constant read-out. We all know that when we drive down the highway, speeding down

the highway, you're constantly looking for that state trooper. It's the same way in an underground mine, okay? But if you have those radar detectors sitting on the side of the road that's shooting your speed, you don't know, and you see that helicopter and you don't really know what is going on, you drive the speed limit.

If you're constantly monitored, you'll do what is right. If you're not constantly monitored, you're not going to do what is right. And I'm not here today to say that everybody is bad. But I do know with experience individual people -- sometimes you have to protect them from them selves. And coal miners are no different than anyone. With these airstream helmets -- they look like a fireman's helmet -- you get in a situation where you're in low code and you have those things strapped on your back, you lose all flexibility in the neck. You basically have restricted vision, restricted breathing. The fog is unbelievable, the condensation on them, and you can't use those things.

I've tried to use those things before, and I've talked with a lot of people on our longwall that tried to use those in the past. And again, they all ended up on the power center stored away. Guys just could not use them.

We've had the black box before on our long wall,

had trouble with getting it mounted in the places that we wanted it mounted, things of that nature. Joe Maien come down and looked at that before. I've got personal -- I guess personal experience with some of the things that we talk about. Once you have exhausted all your administrative controls and all your feasible engineering controls that we talked about today -- noise conservation is something that MSHA has really been big on over the last few years. And we had a shear that was out of compliance on our longwall. And basically, what happened with that is once the company had exhausted all their avenues, then they requested a P code.

You know, MSHA has never -- at that time, you know, MSHA never handed a P code. And so we were tied up in legal red tape with this P code for months and months and months while guys were being exposed every day to the noise. And, you know, MSHA wasn't going to give a P code to this district that we work in here first, is what I was told. And so when we talk about exhausting all of our controls, you know, then that really gets into some gray area. And I hope that everybody remembers about the P codes and the noise conservation and all that and what that really actually does.

And I think we're all, whether we like it or not, are taxed with each individual miners' health and

safety. It's as simple as that. And I think that as far as the health of a miner, there is no doubt that Black Lung is still here. It's still prevalent. The safety of the miners -- the airstream helmets definitely impair a miner. There is no doubt. But when you put the constant monitoring system on a miner, then you force everyone to comply. It's black and white and as simple as that.

You don't have some calculus expert -- you'd have to be a calculus expert, I think, to be able to do some of these formulas. We're talking here today, and everyone here says, you know, your rules and your new proposals are going to subject miners to four times more dust than they're subjected to today.

Now I can't sit here and draw this up and do the proper math to show you that that's case. But no one here today can tell us that that's not the case. So if we have constant monitoring, it looks like a no-brainer.

Now I hope that we're still not tied up in an age where basically we're worried more about dollars and cents and corporate greed and the almighty dollar. I know that coal companies are powerful entities, and I understand that they also have a say, especially dealing with state rules and regulations in our state we deal with with the operator every day.

But again, it's obvious. Constant monitoring,

and your problem is over and solved, and there will be no more need for all these meetings that we're having today. I appreciate your time today.

MR. THAXTON: Can I ask you one question, please?

MR. T. MILLER: Sure.

MR. THAXTON: You've stated that use of the continuous dust monitor would take care of it. Everybody would be protected every day. Wearing the continuous dust monitor, though, you also indicated that it's because we have MSHA days because MSHA is there and it's like the police being there to look over. Why do you think wearing a monitor just by itself would substitute for MSHA presence? A monitor is just another piece of equipment that could be taken off and put over on the power center or left outside when MSHA is not there. What makes you believe that just having a continuous dust monitor available for each miner is going to force that it would actually be utilized in the manner in which it is designed?

MR. T. MILLER: Well, first of all, I think the continuous monitors -- the apparatus that we've been looking at pictured in here -- it's basically contained in your camp lamp. And it will be on your person with your camp lamp. And I don't think there is anyway to

separate that system. So if a coal company had a complete set of camp lamps opposite of those for their miners, I think that would be exposed. I think that it would be absolutely impossible for you not to be monitored every day.

When I talk about MSHA days, I want you guys to understand what I'm talking about. When you know that you're going to be sampled by MSHA or that the company is going to be doing their own sampling, things are different on those days, especially in a non-union operation. Totally different. All the bells and whistles are there. All the bells and whistles are there, and they're working that day.

But on those days that you're not dust sampling, those bells and whistles don't necessarily have to be in operation. And I'm talking about water in the hallways and all that. I've been subjected to that many times. Over the years of being a non-union miner, I've watched people take the dust pumps with the company when the company is supposedly are running the DAs, the designated areas, and maybe taking samples in the return. I've seen those things gathered up and taken to the intake. There is no doubt. And I've seen that happen before.

We've seen all kinds of things happen when an inspector comes in to run his dust and leaves his pumps

and goes back outside and waits until the end of the shift. There is all kinds of avenues for fraud there. And you give people a lot of leeway, and maybe in some instances even make criminals out of otherwise people that would be honest. But I think with the continuous monitoring system on the camp lamp, the apparatus that we looked at today, it's a no-brainer. It's absolutely -- you'll make everybody comply.

And I go back again to saying, you know, when you see the state trooper down the road, you know you're speeding, you definitely slow up. The damage is done, guys. Like this P code I talked about with the noise conservation and things like that. You continue to expose people through all the red tape. It can take eight months. It can take a year. And then they say, well, we've come up with some new engineering controls now, so we're going to try these. So we spray our shear with foam, put the foam on it. You know, it stays on there a week, and it's gone. And they say, well, that didn't work. It basically dies. Let our mine completely mine out and expire all their reserves, and we still have miners exposed to all that noise over that period of time.

But again, to answer your question -- and I don't mean to drag this on. But it's obvious. If you're

continually monitored, then MSHA knows what is going on every day, every minute, every hour. It's a no-brainer.

MR. THAXTON: Thank you.

MR. T. MILLER: Thank you.

(Applause)

MR. THAXTON: Lance Miller.

MR. L. MILLER: My name is Lance Miller of Local 1613, United Mine Workers. A lot of this stuff we've been going over and over. And earlier, you talked about the extenuating circumstances where they could use the PAPRs or whatever. And people have asked you what that is going to be. And I -- our mine, we're driving 12,000 feet. And probably the last 40 crosscuts, maybe 50 crosscuts, at 150-foot centers, the coal ceiling goes down to about 4-1/2 feet, and they're still cutting out about 3 feet at top. And we have compliance problems, or have had compliance problems.

Now is that going to be an extenuating circumstance or a planned event? I mean, what is -- you said when they hit rock or something like that, we could do it. And I'm kind of curious as to is it a short-term, long-term planned event or what?

MR. THAXTON: The supplemental controls is set up to be a short-term thing. The operator actually is required in the rules themselves that the supplemental

measures cannot be utilized for more than 30 days. If they do, then they have to incorporate new controls into the plan and reverify them.

The supplemental measures that we're talking about are designed to take care of things that last three, four days, something like that, because the time period that it would take to get controls put in place, verify those controls to get a plan actually approved, the situation that caused the need for the additional controls would be over with, and we wouldn't be able to verify it then as far as working.

When you're talking about what you're saying, that you're driving the last 30, 40 breaks through rock, that you're mining three foot of rock, the length of time that that would take would necessitate that the operator would have to actually put in controls and verify their plan, or they'd have to substantiate that they have exhausted all feasible controls before they would be allowed to use the supplemental controls.

MR. L. MILLER: A little bit ago, we were talking about our local. We've got I think a dozen new Black Lung cases. And most of these guys -- I know of only one or two that have worked at other mines. Some of them have less time than I do, probably 25 years. One guy is 45 years old that has it, and is pretty healthy.

And he, by the way, is the one that hadn't worked in-by very much. And what I have a problem with is we have 2.0, which means maybe 2.33, which could be 8.0. And if we're still having this many cases, a dozen at our mine, with 2.0, I'd hate to see it -- and I don't think we should see it -- go on higher and allow them at 2.3, the 8.0 because even with measures, as everybody has pointed out, there are going to be people affected by it that may or may not have the respirators or something like that. And I think it's just going to send it on higher.

And personally, I just feel that this is wrong to keep going higher and higher with these dust standards, and that if anything they should be taken lower. And I know there has been a lot of talk about the continuous monitoring. And at least if those were around, whether they were used every day -- but at least that you could send them out and there would be, I think, less chance of any fraud or deception or anything of that sort.

Thank you very much.

MR. THAXTON: Thank you.

(Applause)

MR. THAXTON: Let's take a break until 12:45, just about 20 minutes. Butch Oldham will be the next commenter.

(Whereupon, a short recess was taken.)

MR. THAXTON: Can you guys hear me? Can you hear me now? Okay. Our next commenter will be Butch Oldham.

MR. OLDHAM: My name is Edgar Oldham, O-L-D-H-A-M, Jr. First, we'd like to thank the panel for the opportunity to speak today. I appreciate that. But also, I come before this committee today in opposition of the proposed rules. As I watch what is going on within MSHA today, it bothers me with the direction they're going in. I recently attended the public hearing regarding the use of those rules that absolutely made no sense to me when it was clear that petitions that are presently in place at various mines provide much more protections than what it is being proposed.

Is MSHA on some kind of mission to prove their loyalty to coal companies? Because they're definitely proving to the miners across the country they're not on their side. Most people have the opinion that less is sometimes better. But that isn't the case when it comes to sampling for respirable dust that our nation's miners are being exposed to.

I know from first-hand experience how the dust sampling process works, how it has worked in the past and how it is working today, with the widespread cheating

that has taken place and the way miners have been cheated out of the precious years of their lives due to working in excessive dust. I know from firsthand experience because I myself am a coal miner -- I had to breath the dust. I've worked in the coal mines. I've been behind a miner when there wasn't a scrubber on it, when it was so black you couldn't even see the end of the boon, when you had to change your dust filter in your dust mask two and three times a day.

So I know what the exposure is. I don't have to guess. I've been there. As the old boy says, I've been there and I've done that, and I've paid for it because I don't breath like I used to either.

So what MSHA in my opinion is proposing is just another way for the coal companies to deprive miners out of a working environment that is as dust-free as technology can provide. The technology is only available only if the coal companies use it and only if the regulatory agencies require them to implement it. You know, it appears to me we've allowed technology for production to overrun the safety factors that we have here. We've put high voltage miners into the mines. We've put high voltage longwalls in the mines. We've done all this stuff to get production up. But we've let it slide on how to protect the miners when it comes to

dust because we all know that the more power you put on the miners and the faster you cut that coal, the more dust that's generated.

And, you know, I've seen the guys in the mines that have to work on these longwalls that has so much water on them that they have to wear rubber boots, lined suits, and everything else just to keep theirselves dry. And, you know, maybe you're controlling dust, maybe you're not. But those guys are paying a price for it, guys, believe me. And the technology, you know, should be worked on to help those guys. They hate to go to work. I've talked to them that's on the longwalls.

When you have to put boots on and tape yourself all up to keep from getting soaking wet and working every night, the job becomes miserable. It's not a job anymore. It's just something you have to do to provide for your family.

We thought and we expected that when we asked MSHA to take over the dust sampling program that we the miners we're going to receive a better dust sampling program, and one that would be a model for not only this country, but one that other countries would want to follow. But instead, what these proposed rules is written, miners will no doubt get less protections.

We thought in our discussions with MSHA,

industry, and others that we were working toward a continuous sampling program, only to find out we were going to get less sampling than we had before. I am sorry to report to you today that this isn't the type of program we were looking for. Coal companies don't need any help devising ways to beat the system. Just remember, they wrote the book on it. Besides, MSHA is supposed to protect the miners' best interest and not the coal companies.

We have all too often witnessed the manipulations that have taken place on what we cal sampling days versus non-sampling days. We have seen companies require that the curtains be hung up properly, that water sprays be checked after every cut, that cutting bits be checked and changed after every cut, that miners be removed from the return side of the section so they won't be exposed, and miners being switched out in order to reduce their exposure.

Then on non-sampling days, management didn't care where you were at or what you were doing. It really upsets me when a senior official states -- when MSHA states in the newspaper that the union doesn't understand that the union's criticisms are based on an old way of thinking, and that MSHA is looking at requiring better dust control plans. That statement alone should be a

slap in the face to every working miner across the country who is working underground or on the surface that are being exposed daily to the respirable dust.

What I would say to MSHA and this official is where in the world have you been in the last several years while miners were being exposed to this dust? Why haven't you required adequate dust control plans that work to protect miners instead of plans that just get by. Your agency is as much to blame for miners contracting Black Lung disease as anyone because you haven't required dust control plans that work, only ones that provide minimal coverage and, like I said, plans that just get even -- that just get by, even though your agency had the power to require more.

You made the statement that there are better plans out there. So whether this rule passes or not, we are expecting to see much better plans being improved from your agency. Why is MSHA so hellbent on ignoring what Congress required in the Mine Act, where miners wouldn't be exposed to anything greater than the 2 milligrams? Are we off on some mission of our own to just do whatever pleases the person in charge at MSHA, whether it is in violation of the Mine Act or not?

Miners were looking for and expected MSHA to come out with a rule that required full shift sampling.

Many miners that I have spoke to continue to ask why doesn't MSHA sample for our full shift because we are now required to work 10- and 12-hour shifts a day. It seems as though as soon as the dust pumps are turned off and collected after an eight-hour sample, it's taken -- that the eight-hour sample is taken -- it's no holds barred, and now let's run some coal.

Another issue that I would like to discuss is why should our tax dollars be spent on creating an advisory committee to look into better ways and technology to protect miners from respirable dust and Black Lung disease that MSHA isn't going to listen to anyway. This reminds me of a news program called, "The Fleecing of America." The advisory committee wasn't some one-sided committee that traveled across the country trying to sell their program. They were a group of well-educated and talented individuals trying to look at ways to help miners from contracting Black Lung disease.

The advisory committee was charged with making recommendations that would improve dust levels in the mines. Yet MSHA has virtually ignored their recommendations, the same way they are ignoring the coal miners across the country.

I apologize for not having anything positive to say about these proposed rules. And I'm sure by the end

of the public hearings, you and your agency will get the message that miners aren't going to sit idly by and let you destroy what little protections they presently have. They want and deserve better than what you have proposed. Now it's your job to go back to the drawing board and create rules that truly protect the miner and not the company.

Also, at the public hearings that were held several years ago, you saw miners that were there to testify that were non-union employees. These miners came directly from work, and their faces were black with coal dust. At that time, you asked -- at that time, they asked you to help them out with their dust problems at the mines they work at. And even today, you have failed them, and this rule will fail them, too.

One thing I'd like to also comment on is over the items in the dust rule becoming policy. And I'm sure that anybody that has been on the safety committee and anybody with MSHA that gets the program policy manual and sees how many changes of policy comes through there and how many you get in the mail understands why we're so afraid of this rule because policy don't work because whoever is in charge can change policy. And when things become policy and you get the program policy manual, and it is always an interpretation of the next guy in line,

it becomes a problem for us.

Also, you talked about the continuous dust monitors. We talked about why we would want the continuous dust monitors, why we would not want that instead of an MSHA sample. Well, to us, the problem is real simple, why we believe that if this continuous dust monitor does what it says and what it is designed to do, that we also understand it has got a downloadable feature on it. And just as you require records for the hoist, just like you require records for the preshift, these dust samples can be downloaded and become a record at the mine also that can be sent to MSHA or anyone in the country.

So people can look at what miners are being exposed to. Then they can get a confidence level of exactly what is going on in these mines on a continuous basis. It don't hurt to keep -- you know, do a preshift every day so they can keep a record of these dust samples every day. Then we will truly know what is going on.

Also, under the proposed rule, you know, the question has been asked many times can the operator go over the 2 milligram standard before being cited. And we all know that a minimum can be 2.33 before he can be cited under the proposed rule. NIOSH and the advisory committee have both recommended that the standards be

lowered, not more. But even at the 2.33, how many more miners are we getting exposed?

And like you said, maybe some people are being overexposed by doing the averaging of the samples. But we know we've got a 2 milligram today, and then let's get that under control before we try and raise it to a 2.33 or anything else. And we truly believe it should be lower than that anyway.

Under the old rule, isn't the purpose of conducting bimonthly samples to see if the dust plans is meeting what it is designed to do? So now we're going from a bimonthly sample to a quarterly sample. How can this be better than before? Like I said before, less is not better.

One point I'd like to make is what about these smaller non-union mines that are all across eastern Kentucky? They don't even pay for the violations that are issued to them let alone incorporate increased engineering controls. But they continue to operate, and MSHA allows them to do so. You all know that as well as I do, in the ability to pay. How many times have we heard that with violations? This is just a small coal operator. He can't afford this. Let's let him have a reduced violation here. But now here is Peabody or some other company that's a multinational corporation.

They've got the ability to pay. So what? Those miners there can pay their part. But these little guys can't.

You know, it's ridiculous. If you're in the coal mining business, everybody ought to be treated the same, whether you are a non-union miner working for $5 an hour or somebody at Peabody working for 15. You know, I don't understand, and never will understand, where that analogy comes from.

Also, the point you're missing is that miners are looking for a single shift sample without all of the other bells and whistles and formulas included. They're looking for less dust exposure, not more. Miners are contracting Black Lung today at the 2 milligram standard. And at the least, your proposal will allow the 2.33, like I said before, before the company will be even cited. This proposal would not reduce Black Lung. Give the working miner the benefit of the doubt, not the company.

And just for my benefit, how many of you on the panel has ever worked at an underground mine? I haven't met one of them.

MR. THAXTON: You said mine.

MR. OLDHAM: Coal mine then. Let me restate that.

MR. THAXTON: Were general miners, and I've

worked with the agency 32 years. And the leadership of MSHA probably has a combined total of 100 years mining experience. And we have all sorts of underground mining experience to draw on these rules. And I think I'm uniquely qualified to figure out what part an industrial hygienist plays in the overall scheme of rulemaking and dust control and what part miners play. So I think we've got that covered.

MR. OLDHAM: I appreciate it. But I hope you understand that miners understand what part of less dust they also want to breath, and not more. Thank you.

MR. THAXTON: Thank you.

(Applause)

MR. THAXTON: Dan Skinnie.

MR. SKINNIE: Good afternoon, gentlemen. Dan Skinnie, S-K-I-N-N-I-E. I'm presently the chairman of the safety committee at Local 2161, southern Illinois. I just have a few points and a question. On these dust monitors, instead of having a provision for them, they should be mandatory. We've been haggling over these for years. I mean, let's get it on the show. The technology is there. Put it in law because it ain't going to happen if you don't. You know that as well as I do.

We need more samples taken by MSHA and more inspectors to do it. The ones we got now, you know,

they're strapped. I mean, they haven't been hiring any. And I realize they ain't going to get to it if they don't hire some more inspectors.

We need to lower -- instead of having that 2.33 before you can cite it, we should put it at 1.67, or you can cite it at 2. I mean, if that's the reason you're doing it. Is that for the error? Is that how you got that figured on 2.33, figuring the error in it?

MR. THAXTON: Yes, it's been counted. Go ahead.

MR. KOGUT: Yes. It's to allow for measurement error. That's right.

MR. SKINNIE: Also, these rules should be plain, which an everyday miner can understand. You know, that's who it's for. It's not for some guy sitting in an office or whatever. It's for the miners. And one question I'd have -- I heard Dennis Boehm talking about the feasibility of these engineering controls and how it is determined. Is there economics figured into this, on feasibility? I mean, if something costs $100, is that too much? Or how do they -- does that have anything to do with the feasibility?

MR. THAXTON: Not with the controls we work with today, right? Anybody want to respond to that?

MR. REYNOLDS: Let me read you what it says in the preamble. It says -- it's based on the commission,

the Federal Mine Safety and Health Review Commission, a case. And what they look for is -- the commission itself -- that MSHA must assess whether the cost or the control is disproportionate to the expected benefits and whether the total cost is so great that it is irrational to require these to achieve those results. So cost would be an element.

MR. SKINNIE: So in other words, if something costs $1,000 and you can fix it permanently, and they thought it was too much, it wouldn't be fixed, whereas if it were $5, it would. I mean, is that what we're saying here basically?

MR. REYNOLDS: Well, they would also look at it in relationship to the reduction in dust. I mean, if it's something extremely expensive and it doesn't provide much of a reduction in dust, they probably wouldn't require it. But, you know, it is an element, in response to your question.

MR. SKINNIE: All right. Thank you. You know, we've heard several speakers here today, you know, and a lot of them have repeated their complaints and issues. And, you know, sometimes some people might feel that we're beating a dead horse. But, you know, something in this manner I really feel needs beating. Probably if you took a poll of people in this room, I don't know if you'd

find one that agrees with this rule in its entirety. And by no means am I a genius or anything. But, you know, some of it may be because we don't understand it. I mean, I don't understand a lot of it. That's me.

That's all I've got, if anybody has any questions.

MR. THAXTON: Okay, Dan. Thanks.

(Applause)

MR. THAXTON: Russ Stilwell.

MR. STILWELL: Good afternoon. My name is Russ Stilwell, S-T-I-L-W-E-L. I live in Booneville, Indiana. I worked in the mines for 12 years. I've been with the Mine Workers for the last 20. I also served in the Indiana General Assembly. And I only point that out because most things affecting mine, mine safety and all I'm involved in in that aspect. And many miners across the state of Indiana, because of that position, also question me from time to time about laws that -- sometimes they think they're state laws, but they're federal laws, and we get that all the time.

So I came down today particularly to get more information on what I could and then to try to make sense of what was proposed here. And I did a pretty good job when you all finished your presentation. And then when I heard Mr. Maien's presentation, I believe it is, I'm

like, well, I didn't do such a good job in the first part of the presentation. And then when I heard all the other presentations, I've come to the conclusions I've got a lot more questions than I have answers, if I may.

The first thing I'd like to ask -- and I think I know the answer. I just want to verify it. Under the dust control regulations that MSHA does currently across all the mines in the country, are there any states that do duplicative type work?

MR. THAXTON: I don't know of any state that actually --

MR. STILWELL: So most of this -- so most of the burden is placed on MSHA. I know that we have safety enforcement in other areas of mining safety, that many states do equal or sometimes superior. But clearly, many states do equal what MSHA does in the process. But in dust regulation, it is primarily the MSHA, is it not?

MR. THAXTON: That's correct.

MR. STILWELL: The second question I have -- and I was going over the -- and I was on the Internet, actually. Why would I be doing this on a Saturday evening. And I was curious. And when I found 105-proposed rules, my printer ran out of paper at page -- I think it's 17. But I marked up a couple -- and I really didn't go back. I was tired and I was ready to get home.

I went back and I marked out a couple of questions here, and I think it's under the preamble. Or I'm not sure if it's -- what you called that. But it says, consistent with the Mine Act, this proposed rule preserves the primacy of engineering controls. I'll give you a page, but I don't know if there is page numbers on that. Seventy-six is where it's at.

But my question is pretty simple. It's just the one sentence I'd like to have an answer on. To the extent they are technologically -- I think I understand what that means -- and economically feasible. Now technologically feasible I think I understand can it be put -- implemented with reasonable technology and current use. What I don't understand is what does it mean, economically feasible. I don't understand that. And let me preface that to say is economically feasible -- say I'm a coal company operator who has very limited resources, and it's not economically feasible for me to implement this versus a coal operator who has deep pockets that it is economically feasible. How does MSHA define economically feasible? I couldn't understand that one.

MR. THAXTON: I think Larry -- Larry gave you the legal answer of it.

MR. STILWELL: Well, I understand --

MR. THAXTON: Wait a minute now. We ask the questions here. Let us respond here. The goal can't be wholly out of line with the benefit. Now much of this has to be dealt with on a case by case basis. I don't know any control where you said that it's not economically feasible. Maybe the panel does, for dust control.

MR. REYNOLDS: The only kind of control that I would see as being possible to come under an economic determination at this time would be that we determine that there needed to be a change in the mine itself, such as sinking a new air shaft or reorienting the mine completely so that you would be able to get better, say, air flow, or you would have to change the water flow and the water pressure that's available. Something like that may come in and say, well, that's not feasible at this time. But it may be something that we build into the program so that maybe a year from we would expect the mine to have that in a place because they would be in a position to do that.

MR. STILWELL: Okay. It was an honest question, I mean, just looking for a candid answer from the question. I really meant that very sincerely. Oftentimes, even the things that I did in the state house, if I put economically feasible, I'm going to get

drilled because someone is going to say what do I mean, and I'm going to be complied to give them an answer. And I was looking for the same type of answer. And if I understand that correctly, some sort of a manifestation of a large expense, but more so than that. They're going to have to change the way the mine by itself may have to operate.

MR. REYNOLDS: That's true. I mean, even to the point of if we walk on a longwall and it's a long wall that, say, does not have the most up-to-date technology on remote moving of the shields -- to come in and say to somebody that that's a way of preventing people's exposure downwind, that's a $24 million expense to replace the longwall. It may not be able to be done on this panel that you're working on because you can't stop in the middle.

MR. STILWELL: Okay.

MR. REYNOLDS: It may be something that you say prepare for the next one or the next panel down. It's not -- like I said, most of these things, when we make those determinations, it's reviewed every six months. So what we say is not feasible today doesn't necessarily mean it's not feasible tomorrow or down the road.

MR. STILWELL: Okay.

MR. REYNOLDS: It's an ongoing process. So

economics do figure in. Like I said, it cannot be wholly out of proportion to the benefit that you're going to derive from it.

MR. STILWELL: Thank you. The second question that I had -- and I'm confused to the degree that when I watched the presentation earlier -- is it 2 milligrams that are the allowable from the '69 act? Or then I heard Mr. Oldham speak just a few minutes ago that that's really 2.33. And then I heard Joe Maien speak very, very early this morning that that really can be eight or more. And I guess my answer is I really am confused from that perspective. What is it?

MR. REYNOLDS: Two.

MR. THAXTON: The standard is 2 milligrams.

MR. STILWELL: Okay. Let me ask you this then. If the standard is 2 milligrams -- and as I'm reading this register -- and I didn't mark this until I got here today because I never really noticed it. But then it's on that same page down here. And I understand that it said it's 2 milligrams. But then the paragraph right below that says, using the engineering environmental control parameters, the proposed ventilation plan at levels not exceeding 115 percent of the quantities specified in the plan. So is that allowable standard 115 percent of the 2 milligrams?

MR. THAXTON: No. The 115 percent relates to the dust control measures, that is, the quantity of air, water --

MR. STILWELL: Okay. So that's not related to the 2 milligrams whatsoever.

MR. THAXTON: No, it is not.

MR. STILWELL: Okay. Thank you for that. Then I guess lastly -- because it would be repetitious, and I don't want to be repetitious from many of the other people who spoke over here. But getting down to the continuous dust monitors that many people have spoke about, is there a reason that -- I understand that they're allowable under this proposed rule, and I understand that most people -- and I've even seen heads nod up here just like these are really good things, and these would really give us an accurate measurement so we can really control the dust and make sure that our procedures are complied with in the mines that you're governed to provide safety for the miners.

Is there a reason that these aren't required under these proposed rules if they're as good as most people agree that they are.

MR. THAXTON: Well, they're in the prototype stage being tested right now. The rules would accommodate those if they are developed and become

commercially available.

MR. STILWELL: Then can I ask you this question from MSHA's perspective or NIOSH's perspective, if it will. When is it anticipated that those would become commercially available, and what would be -- and then the second part of that question, what would be the driving force to make them commercially available?

MR. HEARL: I can answer part of your question, I think. Currently, those units have been tested in a lab setting only. They've successfully been tested in a lab setting. And at this point, over the next two months, they're taking the units out to underground mines to test them out in the mining environment. So it's hopeful that they'll perform well under real mining conditions. But obviously there is no guarantee that they will. They might need to come back and do some additional work with it.

That testing is expected to be completed by August of this year. Commercialization would be a matter of market forces driving the personnel to manufacturer units.

MR. STILWELL: Okay. So would it be fair to say if these -- if the results, including what I call tinkering you might have to do to get those to the standards working in the real world of underground mines,

is as good as you anticipate they may be in the laboratory, that it would be feasible at some time by the end of this calendar year, all things equal, if they worked as well you anticipate, that they could be available for commercial operation?

MR. HEARL: I couldn't really speculate as to how long the industry that would be producing them, the company that would be producing them, would take to tool up to --

MR. STILWELL: I understand. The market conditions would have an effect on that as well.

MR. HEARL: What I can tell you, though, is if they are successful, we would be basically, you know, launching them out and saying private sector can do your thing after the testing would be complete. The earliest that would be would be August.

MR. STILWELL: I understand. And then they are -- if I understand this correctly -- another question, but I want to make sure that this proposed rule allows for the use of them. Is that correct?

MR. NICHOLS: That's correct. And we have a whole series of questions asking for comments on how they ought to be used.

MR. STILWELL: Then the comments then under this here, would it not be wise to -- well, this other

question precedes. Originally, this was a 60-day comment period.

MR. THAXTON: Ninety.

MR. STILWELL: No. It's always a 90-comment period. March to July is 90 days then, the 90-day comment period. Would it not be within the perusal of MSHA to, number one, extend the comment period or review a combination of what NIOSH is talking about for these monitors to perhaps come out and say that upon such and such effective dates that these are going to be mandatory in mines. And if you will, let me give you an example of another industry that said this just can't work, and that's the auto industry, which is doing a pretty good job over the last 10 years of producing cars in America.

I think they said we can't produce cars with air bags because it's not feasible. I think they said that we can't get 30 miles to the gallon out of any car. And the government set standards and a date and says you will, and they did. They did the same thing with air bags. And we're dealing with people's lives under those situations, and we're dealing with the oil crisis we had in this country.

I would like to ask MSHA if you would be agreeable -- would you look at imposing using these personal continuous dust monitors at a given date that

this is going to be the rule of the industry, and every miner is going to wear one so that you can monitor that on a 24/7 daily basis?

MR. REYNOLDS: Actually, Russ, Mr. Stilwell, we are asking for comments on that. I mean, that's a very good suggestion. And other things we'd like to hear in comments or we're specifically asking for in comments is exactly how would it be used in the mine, what miners would wear it, who would have the authority to stop mining or do things differently in the mine. Would it be the miner? Would it be the operator? Would it be the supervisor?

We're really looking for specific answers to those questions and suggestions on how to do that. And a delayed date -- I mean, that's a very -- you know, we're welcoming your comments.

MR. STILWELL: Well, my comment would be -- and I haven't run this -- I normally just speak from the cuff, as I am here as well. But if in fact MSHA scrapped these rules and said upon a specific date these are going to be complied with and set out some proposed rules, in consultation with representatives of miners and the industry -- number one, I think you'll find disagreement about a mandatory use of the personal dust monitor. But beyond that, if you come out with that, I think then you

would find resolution about how they are going to be used, how the data is going to be used, who does the monitoring, when they're going to be allowed in and out of the section determined on the dust quality. But I think that's something that MSHA should look at in a real clear, decisive way rather than looking at these same standards. And I think we all agree that Black Lung has not been eradicated in this country, in due respect that we all want to eliminate that disease.

I don't question anybody on this panel or anyone else that we want that eliminated. I don't question that whatsoever. But if we're doing that by the same standards that has been in place from '69, I'm not sure how we accomplish that unless we have the most accurate, up-to-date monitoring available to get compliance in the mines. Would that be a fair statement or am I missing something? I'm speaking pretty much as a southern Indiana boy that used to work in the coal mines 20 years ago. And I'm just trying to make sense of this, sir.

MR. THAXTON: We've laid out a number of things that we think would take us a long way to do that. Stop this averaging of samples. If you were here -- were you here for the earlier presentations?

MR. STILWELL: Yes, I was.

MR. THAXTON: Yeah, well, you said you were,

yeah. You know, where you average those five samples and --

MR. STILWELL: Sure.

MR. THAXTON: Eliminate that. Improve dust control plans -- the current minimum is -- if operators are producing, they get 60 percent, we sample them and get two or less, that's compliance. We think that's not right. An approved plan, get them up to where they reflect actual mining conditions. And we think that's a step in the right direction.

MR. STILWELL: Thank you. In closing, if I may, I guess my comments would be limited based on the answers of my questions, and I do appreciate those answers. The personal dust monitors, I think that's something that MSHA not only -- obviously, you've looked at it because you've mentioned it in the proposed rules. It's just like -- to me, it's no different than when we're having tens of thousands or hundreds of thousands of people killed on the highway system back in the '70s and '80s and '90s, and the auto industry said we can't stop it. And we eliminated it to a large degree because certain agencies in the federal government came out and said you will do this.

And I think the same thing can be said of MSHA. If you'll come out and say you're going to do this, and

then work with the industry and a representative of the workers to set the standards on how this new technology is going to be complied with in the mines, then we'd have I think a win, win, win -- MSHA, operators, and the representatives of miners, a trip win situation where we eradicate Black Lung, reduce the dust levels, and you'll have the most up-to-date compliance that we can have.

So with that, gentlemen, I appreciate the opportunity to be down here, and thank you for coming to Evansville.

MR. THAXTON: Thank you.

(Applause)

MR. THAXTON: Dave Cantu? Dave is not here? Mark him off. Steve Earl?

MALE SPEAKER: He's not here.

MR. THAXTON: David Acker?

MALE SPEAKER: Dave is not here.

MR. THAXTON: Sam Sukey?

MALE SPEAKER: He's gone.

MR. THAXTON: Greg Young?

MALE SPEAKER: Greg Young is away.

MR. THAXTON: I believe it's Frank Winstead.

MR. WINSTEAD: Here.

MR. THAXTON: Frank is still here.

MR. WINSTEAD: Frank Winstead, W-I-N-S-T-E-A-D,

25 years experience, United Mine Workers safety committee.

Are you comfortable?

MR. THAXTON: Go ahead, sir.

MR. WINSTEAD: Again, I guess I'll go over a few things that has probably done been over several times. I'm not agreeing with anything that's above 2 milligrams, you know, of course. You've got to understand that right away. I got a lot of time underground, a lot of time in different areas underground, continuous miner, out-by, shuttlecar, pinner. And I know from experience that you have good days and you have bad days with dust control. And I think that that would -- the continuous monitor device, the one that we seen and the like, would be very beneficial to know exactly what a miner is subjected to on a monthly basis.

I think that -- I don't believe right now that we're getting a good representative sample of what miners are subjected to. Do you? As a panel, do you think that the way that we're doing it now is a test that represents the true facts?

MR. NICHOLS: I think there is bigger problems. I think this averaging of these samples is a big problem. I think mining at a minimum --

MR. WINSTEAD: Say that again. I can't hear

you.

MR. NICHOLS: Well, I think there is bigger problems. I think --

MR. WINSTEAD: A bigger problem than dust?

MR. NICHOLS: No, than getting -- your question was are we getting representative samples.

MR. WINSTEAD: Representative samples, yea. Are we getting a true representative sample of the miners that are underground? Again, I've been underground for 25 years, you know, right at it, in all phases of mining, in-by and out-by. And I can tell you that our controls are effective to a certain extent. But they become ineffective if they're not properly maintained, for instance.

At that time then, if there is no dust pump in that area, we really don't know what that miner has been subjected to on an average for a week or a month.

MR. THAXTON: As far as whether we think there is representative samples, we've said that we don't think so because sampling right now is only required -- operator samples have to be collected at 50 percent of normal production that has been reported on the previous bimonthly period. MSHA samples only have to be collected at 60 percent of the average of 30 shifts.

We've got dust control parameters that are in

place, but they are the minimum parameters. And generally speaking, most times when we're sampling, those parameters are being exceeded, either a little bit or quite a bit. So to say that we're getting samples that are truly representative of what happens in each and every day, no. That's why we're saying that we need these rules, is because we need to address those situations like we had in the example today.

One shift, somebody is exposed to greater than 3 milligrams, three shifts less than 1 milligram or less than two indeed, and then another shift of somebody being exposed to greater than three, your average is still 2 milligrams. That kind of situation, while it may actually represent what was monitored on those days with the conditions that are applicable under the rules as far as what they have to meet, that's an indication that we have people exposed on shifts over the limit, and that's what we think is causing people to develop Black Lung, and that's what we need to get a handle on.

So to say we want representative samples, that's what we said, yes, we want to do.

MR. WINSTEAD: I respect that. That's what we're really all after. We're after to protect the miners underground. That's our key function. Your key function, I guess, would be to protect those miners and

find out what they are subjected to and try to correct it.

I think that we can -- just my opinion -- that we can overwrite rules. We can write them to where that there is so much groundwork that there is big loopholes in them, you know. You can make so many words that somebody can find a way around them. And I don't think that all operators are going to do that. I think that a lot of operators are truly concerned with their workers. I've work for several different companies.

But there are some out there that are not. And those that are not, will try to find a way around the rules and that's really the working. So my opinion is that don't stop the work. I appreciate all you've done -- kept me from getting killed probably a dozen times with your rules. But I believe that we should make the rules a good bit less complicated. Make them more concise. Spell it out in laymen's terms. I think Mr. Maien can help you with that, lay it down to where that it is pretty binding instead of making it so wordy that somebody will try to find a way around the words.

I feel like sometimes -- and this is -- I feel like before the dust sample comes about that we do a little extra preparing underground, water and roadways. And myself, I've changed water sprays out completely,

done duct work planing, things like that, curtains up. And all of a sudden, boom, you know, we'd have a dust sample. Maybe it's coincidental. I'm not pointing any fingers. It seems like it happens quite a bit.

Okay. Another problem I had with sampling is that it seems like a lot of people think that if the sample goes out that we just turn a knob and it's back in compliance. Usually, if the sample is out -- and this is just my experience -- if the sample is out, there is not a whole lot they can do to get it back in because they're already probably doing what they can. It's probably a piece of equipment. And one particular piece of equipment comes to mind. And I had a lot of trouble with it on the safety committee because the operators were complaining to me quite a bit about it just not working for them. You know, at best it didn't do real good.

I was going some place with that. But it seems like that whenever it came time to sample that mine -- and I asked for it to be sampled -- something happened on the run, you know. Baler went down, didn't run enough coal to get the sample, things like that. That mine was finally taken out. I guess they got scared of it.

But that's pretty much all I have.

MR. THAXTON: Okay. Frank. Thanks.

MR. WINSTEAD: Thank you.

(Applause)

MR. THAXTON: Paul Newton.

MR. NEWTON: Paul Newton, N-E-W-T-O-N. And I want to talk to you a little bit about the personal side of this. I worked in a deep mine for a few years. I quit the deep mine because of dust. I decided I didn't want to take the chance on Black Lung. I worked with men who were so affected with Black Lung that they couldn't work, and they were still on the job. We took -- we done their job for them. When I was a young man, I was down there. We was able to do their job and ours, too, and see these guys. We'd just walk them over and sit them down along the rib or set them on a coal bank or rock dust, and we would do their work because they couldn't work any longer.

And I watched these guys die. They had become great friends, some of them, and I saw these guys die with experience -- the trouble of having Black Lung. And I'm not here to think that you guys aren't trying to do something about Black Lung. But I think there are some things that you maybe don't understand. I realize you said you had somewhere of 100 years of experience. And, fellows, I don't want to insult you, but unless you breath the coal dust, you don't have the experience. You may have knowledge about the dust. You may have

knowledge about what -- the being experienced.

But unless that dust comes into your lungs, you're not experiencing coal mining. And whenever the dust comes into your environment, then it needs to be controlled. And if it comes into your environment -- if I can pump in 2.0 into your offices every day for 10 years, and I just keep pumping it in and tell you it's okay, you can breath this much, and you'll be able to live, you would find you another job because you'd come out black every day. And this would be something that would bother you. You would either find another job or you would find a way of getting this dust out of your environment.

This is what we're talking about, is getting the dust out of the environment. And I know that's what you're working on. But I feel like that -- and maybe it's a wrong feeling. But I sat back there feeling like maybe that you guys are just appeasing us, that you're just listening to what we have to say. You already have your mind made up, and you're not really listening to what the men are saying.

There are several ways I think these things can happen. But I think you need to listen to the miners that is working in the environment. I think you really need to hear them. You need to hear their

representatives. You need to talk to them. You need to ask what ways can we make this happen. Why aren't you liking our program or our assessment of what we need to do? What is wrong with it? And really want to know. And I know that's why you're here. You're trying to find that out.

But my question is will you change it if you find it. Or is it already in concrete now and you're only appeasing what we have to say? That's one question I have. I know that sounds personal to you guys, and I'm not trying to threaten anything. I'm just saying that I believe that you have to breath the dust before you will really understand what -- how it affects you. And I breath the dust. That's the reason I quit, because I had a young family and I didn't want to die a young man and not be able to support my family.

There are several ways -- there is one way that I think that this thing would happen, just in a view that I have. And it's not an educated view. I'm not trying to tell you I have all the answers. But one thing that we had on the miner when I was in the deep mine was a monitor to shut down the machine whenever we got into too much gas. We had the most modern mine in the country. We had gas, lights, and water, and we had plenty of -- we only had one light, but we had plenty of the other two.

And whenever that machine -- whenever that gas filled that entry or filled that -- where we had a face -- it shut the mine. It shut it down, and everybody knows that it does that. What I wonder is if what these -- well, these monitors that you're talking about, that personal monitor, is there any way to integrate these things into the machine that you're running. Sure, it's going to cost something. It is going to cost the mine to do this.

But we're talking about lives here, guys. We're talking about men and women who are going to die if we don't cut down the amount of that coal dust that they're breathing. And if we can integrate this in the machine, that machine dies. The machine quits. It shuts off when this monitor gets so high that it's not applicable for them guys to be in that area. And I can't see that we can do it any other way because when the mine shuts down, when the buggy shuts down, when the roof holder quits, they'll do something. The company will do something. They'll have to because they'll have to get that machine moving again to make money.

So they're going to do something. And I really believe that this is the answer, to have something that we can monitor our environment on an every day basis to make this thing. And that's just my humble opinion.

There is something else. I thought maybe it might impose too much on you fellows. But I feel like that I'd like to pray for you. Maybe you don't believe in God. Maybe all of you do. But I'd like to pray for you. I really would. I pray for you, ask God to help you guys form a plan that would truly help men and women in our coal mines. If that's acceptable, I'll do that. Does anybody reject that?

MR. NICHOLS: Pray for us tonight.

MR. NEWTON: Pray for you tonight?

MR. NICHOLS: Yeah.

MR. NEWTON: Okay. I'll do that.

MR. NICHOLS: Okay. As far as receiving your comments -- I mean, we've so far probably heard in excess of 100 miners testify. The way this works is that MSHA considers every comment that we receive. And as we move to the final rule stage, those comments are either accepted or rejected. But if they're rejected, there is a full explanation of why the agency did not think that it had merit.

MR. NEWTON: Okay. That's fair enough. So you'll send out to --

MR. NICHOLS: It will be in the preamble to the final rule, just like this preamble explains what the agency is trying to do here. It will cover -- you know,

if you've got 25 comments on a particular issue, those will be grouped. But there will be a response written to that comment. That's how the agency reviewed it, considered it.

MR. NEWTON: Will you then make ruling to change your rules here or is this already in place?

MR. NICHOLS: No. These are proposed rules.

MR. NEWTON: Okay.

MR. NICHOLS: And this is part of the process. We come out with proposed rules. We have a public hearing. For this rule, we're having six public hearings. And then we receive a lot of written comments. If you remember earlier, I said the record does not close until July 3rd.

MR. NEWTON: Okay.

MR. NICHOLS: We'll take everything we've gained from the public hearings, the written comment, and the committee will review all of this. And then the leadership will make decisions, and then we'll address all of those comments in the preamble to the rule.

MR. NEWTON: Okay. Well, I don't think for a moment that you guys are trying to go with one side or the other. I don't believe in sides anyway. I think we should work together to make this dust thing go away. And that's what we're here for. Thank you.

MR. NICHOLS: Thank you.

(Applause)

MR. THAXTON: Tim Baker.

MR. BAKER: My name is Tim Baker. It's B-A-K-E-R. I work for the United Mine Workers of America, the department of occupational health and safety.

Normally, I am pleased to be given the opportunity to express my opinions and the opinions of my union on rules that are being proposed by the agency. Unfortunately, that is not the case with the proposed dust rules. As each of you know, this is the third hearing on these rules, and I have attended and spoke at each of them.

At the conclusion of the second hearing, I requested the panel carry a message back to Arlington, Virginia, that through those two hearings approximately 75 individuals testified. There was a rally at the capital. And no one that I was aware of had publicly voiced support for this rule, and had requested that this rule be withdrawn.

My question at this point, has anyone from this panel taken that message back to Arlington?

MR. NICHOLS: I have.

MR. BAKER: And the response -- was there a

response?

MR. NICHOLS: I've taken the message back.

MR. BAKER: Okay. So there was basically no response, which I guess is kind of typical of the position that we are in and why we are in fact in a third hearing and heading for a fourth, and I would assume a fifth and a sixth.

I would like to start my comments here in Evansville with our concern with the agency's approach to this rule and how that action conflicts with the act. I know we have discussed that previously in a piecemeal fashion. Different speakers have approached it from different angles. What I would like to do at this point is basically go through those provisions in the act that we feel that this proposed rule is in conflict with.

First of all, in one of the three --

MR. NICHOLS: Let me interrupt you. Is this going to be different than what Joe entered into the record at the end of the last hearing?

MR. BAKER: Some of it will be, yes. Most of it will be.

MR. NICHOLS: Okay.

MR. BAKER: In 103(f) of the act, there is a provision that guarantees miners specific rights. It states the subject of regulations issued by the

secretary. A representative of the operator and a representative authorized by miners shall be given the opportunity to accompany the secretary or his authorized representative during a physical inspection of any coal or other mine, pursuant to the provisions of this subsection A.

So for the purposes described in the act, miners are permitted to accompany an inspector, and we have the right to walk around is basically what we look at. Further, the representative of the miner, who is an employee of the operator, shall suffer no loss of pay during the period of his participation in the inspection under this subsection.

The union believes the agency, in proposing this rule, is attempting to circumvent the act. You're doing it initially by reducing the number of inspections to as few as three per year in active and in use and one out-by. The reduction in sampling will in fact severely restrict the information miners have regarding dust levels in their mine. Obviously, your samples will be easier to manipulate by mine operators, and a scheme -- and given this scheme, miners may never know what dust concentrations they're forced to work in.

Maybe for the purposes of the rule, that's what we're looking for. Less cops on the beat will result in

fewer tickets. There is no doubt about that. However, it does not by any stretch of the imagination mean there is less crime.

But let me go one step further. With 103(f) of the act, we are looking at a walkaround that goes to a whole different place. Under the proposed rule, the agency -- and the agency determines that all engineering controls have been exhausted and PAPRs are required. And I'll mention this briefly because I think we did discuss it before. If dust levels go to 2.1 milligrams, to 8 milligrams, however we look at that, PAPRs are required.

There is a possibility that the miner's representative will not be permitted in that area to complete that walkaround. And that is a violation of the act. That is clearly a violation of the act. If PAPRs are required, and the individual who is doing the walkaround is not trained on those PAPRs or has not been given that opportunity, they will not be allowed to go in-by. So we view that clearly as a violation of the Mine Act.

Section 104(a) -- and I don't think we've touched on this. It outlines when citations and orders will be issued to operators for violating the act or a specific regulation. In general, 104(a) states that an operator -- if an operator is found to be in violation of

the act or any mandatory health and safety standard, they shall be promptly issued a citation. It also states that -- and I'll quote here -- that the citation shall fix a reasonable time for abatement of the citation, okay?

The proposed rule changes that. The proposed rule does not necessarily require abatement of a dust violation. In fact, the operator can make a change in the mining process, submit it to the district manager, and the citation may go away. The district manager could require the operator to reverify the plan and submit that to the agency. So it is possible that this citation could be done away with without the normal abatement process that we understand today.

Clearly, this is not an option that the agency has. You're violating the act by not recognizing the abatement of the citation as outlined in 104. This is not within the scope of your authority, and you do not possess that right. Citations issued must be abated.

Now you are responsible to see that those citations are abated. By looking at what the operator does or doesn't do, whether it's engineering control, PAPRs, or whatever, that is not what we consider abatement. When you have a dust violation, you do a dust sampling. So that is clearly a violation.

202(d) we have discussed I think at length. And

basically, what we're looking at is effective three years after the date of the enactment of the act, each operator shall continuously maintain an average concentration of respirable dust in the mine atmosphere during each shift in which a miner in the act of working in such mine is exposed at or below 2 milligrams.

Again, that is a violation of the act to exceed that to any extent. And I would say that when Congress wrote the language, there was nothing ambiguous about it. We believe that Congress was well informed when the language was written. They understood the conditions affecting miners. And they methodically thought out a remedy. They set the standard, and there is not a reg on MSHA's part to change that.

Coupled with 202(b), too, I think we must also look at (b)(6), 202(b)(6), and while there is language from two to six in that subsection that is important, believe it or not, for brevity I will skip to six. And basically, that states that no permit for renewal thereof for noncompliance shall entitle any operator to an extension of time beyond 18 months from the date of enactment of this act to comply with 3.0 milligrams. So that's 18 months into the act, okay? And they're saying you can't have it higher ever again. And 72 months from the date of the enactment, to comply with 2.0 milligrams.

And the reason that we believe this is important is that because it reveals the thought process and it reveals an understanding that Congress had when they arrived at this, okay? And I believe that speaks volumes for the language in the act. There is a process they went through. They looked at these things. They discussed these things. And they incrementally reduced the amount of respirable dust allowed in the mine -- they didn't come out one day and say you can only have 2.0 now.

So they realized what they were dealing with. They went through the process and arrived finally at 2.0. And that's important when we deal with the legislative history and how the act was -- how the act really came about.

The other section that I would like to mention, and I think we have, is section 202(g) that states the secretary shall cause frequent spot inspections as he deems appropriate of active workings of coal mines for the purpose of obtaining compliance with the provisions of the act.

Now I've got to submit to you that the proposed scheme here, whether it's three inspection shifts per year or whether it's six inspection shifts per year of MMUs and one in the out-by areas meets that requirement.

I don't believe that there is an individual outside this hearing room that would consider that as frequent. I just don't see that. Reducing compliance sampling to these levels we believe is a violation of the act. And we believe that the agency does not have the authority to reduce so severely the number of inspections that will be conducted.

I think that we have looked at 202(h) in great detail. So I will dispense with reading that, except to say that I must reiterate as machines get bigger, as more coal is produced, as more dust is produced, we are going to need to also enhance engineering controls that are out there. This proposal does not do that. This proposal will not encourage in any way, shape, or form, the invention of any new environmental controls, and in fact encourages just the opposite.

Finally -- and I think we've touched on this briefly -- is the pertinent points of section 303(b), where it states within three months after the operative date of this title, the secretary shall prescribe the minimum velocity and quantity of air reaching each working face of each coal mine in order to render harmless and carry away methane and other explosive gases, and to reduce the level of respirable dust to the lowest obtainable level.

In effect, the proposed rule reverses that. This section, we believe, takes a proactive approach to respirable dust in the coal mines. This section of the law does not even limit itself to the 2.0. It says the lowest attainable, if that happens to be 1.9 or 1.5. It says basically we must continue to strive to reach that level. We must continue to strive for better and better.

So we believe that the rule is in conflict with the act. In all of the areas I have just cited, the union believes that the agency does not have the authority to make a change. We believe this rule to be illegal, and we believe this rule should be pulled.

Just briefly, I'd like to get into a couple of other things. And I will try not to be long. But somebody mentioned the regulatory agenda earlier. And I would really be remiss if I didn't at least make some comment on that because the agency has over the course of the last year or two years gone through that regulatory agenda and removed some very important things that miners were looking at as far as rules go. I mean, there is an air quality standard. There is a dust flammability standard. There is a continuous dust monitoring standard. And all those were removed from the table.

I see those as impacting miners in this rule in

a lot of ways. I saw those rules as possibly being very protective of miners, but they're no longer on the table. On the other hand, you've moved the high voltage rule. You've moved the Belair rule. And now you're moving these rules. None of these rules, in my opinion, address the needs or the concerns of the miners. And with that, I have -- and the brothers and sisters of my union -- have opposed those rules at each turn.

There is an interesting irony here. Because the agency argued during the high voltage rule -- and then whenever we talked about the Belair rule -- that you need with something with uniformity, some consistency so that every mine isn't doing a different thing so that you don't have to deal with PDOs because every mine being different, it complicates matters. It complicates matters. You know, it's an administrative nightmare.

But here, what you're proposing is not different standards for each mine. You're proposing different standards for each MMU is what you're doing. And it isn't -- in this respect, it isn't consistent with what you argued with the other two rules. Now you either want consistency across the board that says here is the rule, you all live by it, or you have the consistency to say everybody submit a different plan on how you feel today. But you can't have it both ways. And that is in essence

what we're looking at with this rule. The Belair rule, the high voltage rule, you say let's be consistent.

This way, you're saying everybody give us a different plan for every section that you have in the mine. And if mine to mine it's extremely difficult to administer, then it's going to be even more difficult to administer any of those plans MMU to MMU unless the only possible rationale is here because the teeth of the rule, the teeth to sampling and the teeth to checking on where this rule will be or who is going to be there to police it, is in a policy. Unless that policy goes away and we do no sampling, then I think you've solved the problem. Then I think you'll have consistency. No sampling means you don't have to enforce any of it. And if it's in a policy, that's always a possibility. And unfortunately, that is a possibility we'd rather not look at, but must look at, must look at from the history of what we're dealing with.

Just a couple of other notes that I've taken. I find it ironic. Sometimes I hear people say, well, are you really listening to us, and are you really going to pay any attention. And we get the same response. Well, it's going to be in the record and, you know, it's all going to be documented. And somehow this was all in the record from 2000. Somehow hundreds and hundreds of

miners came to you and said take over all the sampling. MSHA has got to do it, you know, because let's be honest. I mean, I've had conversations here this morning with coal operators, and they said, listen, no matter how high I sample, you're not going to trust me. I told them, you're right. I will trust you. I don't care what you find.

But you need to take it all over. You got them doing the verification, okay? That's a problem. We said increase sampling. You didn't go there. I mean, there is no way that we can look at this as increased sampling. So when I hear people say sure, we're listening to you, and that's why we're trying to form this rule -- and, Larry, I appreciate, you know, your sentiment. But you didn't listen in 2000. And I know that we have talked before about if PAPRs ever come into the mine, the mine committee has -- or the safety committee has the right to go to the district manager and talk to him about it.

Fellows, if you didn't listen to us before and you didn't listen to us in 2000 and you continue to ignore us now, what is the sense of us going to the district manager and saying, please don't do this to us? Because you didn't listen to us before. It's a real problem. It's a real problem.

Credibility is something that I believe the

agency is truly lacking at this time from the miners. They just don't believe that -- if it isn't written in black and white -- maybe there was a time when they said, listen, they're going to take care of us, you know, and we can get through that. But it's not there anymore, guys. And if it's not written in stone, if it's not in regulation, please don't expect us to because we went from six inspections to four. So we need to look at those things very carefully.

The other thing is miners have said that this rule is complicated, and it is. They said it's extremely hard to understand, and it is. Some have even suggested that you try to write the rules a little simpler so we can all understand it. But I submit to you that there is absolutely no way you could write this rule in the simplest fashion and have it not be fatally flawed the way it is right now. It's just cannot happen.

The cure for the rule in our opinion is simple. Monitor people all day long every day. And, you know, how do we know that the dust -- the continuous monitoring won't be tampered with? Well, you know, you try to make them as tamper-proof as possible. I mean, that's what you do. You put them on everybody, and if the light doesn't move, the battery doesn't move, it's indicated by the equipment. It says this thing was hanging from a

post for eight hours. You have that capability.

If you plug the end of the PDM, it's let you know that somebody restricted the air flow. You make them as failsafe as you possibly can. That's the answer here, guys. That really and truly is the answer. And we keep beating on it and beating on it, and maybe we need to continue to beat on it. But we need to get there. We don't need to be here with this rule. This rule is not going to get it.

Just a few more questions. And I think that -- well, one question, and then I'll close. There was a question asked -- and I thought it was a very good question -- about feasibility of engineering controls. And it wasn't exactly answered because you said, well, here is what the review commission said. I guess the question in my mind is if -- is there different standards for different coal operators based on feasibility and the ability to pay? And the reason I ask that, if Peabody Coal is over here, can you say to them, Peabody, you have the money. You have got to put this device on your machine, and it's going to cost $100,000. But Billy Bob over here running coal, you need the same thing, but you don't have that kind of money.

Is that what we're looking at? Or if Peabody got to do it -- Billy Bob can't afford $100,000 now. We

know that. What do we do with Billy Bob? I mean, where does that go? Is that what we're talking about when we talk economic feasibility, mine to mine to mine?

MR. NICHOLS: I think Bob laid out a fairly detailed explanation as to what considerations you go through. Do you want to add anything to that or do you want to just stand by what --

MR. REYNOLDS: Tim, I was just going to say we'd look at the MMU and we'd look at the mining operation. We wouldn't be looking at the pockets of the operator. That wouldn't be the issue.

MR. BAKER: Okay. So then I can be at least reasonably assured that if it cost Peabody $100,000, too bad, Bill, you're going to get the 100,000, too. That's what you're telling me.

MR. THAXTON: It's not mine size specific. An operator with five to ten people working for them is no different than somebody having 300 people working for them.

MR. BAKER: Okay. And I'll be honest with you. That's what -- and maybe it was just me. But that's not the way it came across in the back of the room as I was listening to the response.

In conclusion, all I'd like to say is at the opening Marvin -- and I thought you did a fine job of

trying to say what this rule does do and what this rule doesn't do. However, I would submit that this rule does in f submit that this rule does in fact reduce sampling in the mine. It does and will increase dust levels. It virtually eliminates, virtually eliminates miner participation, retards engineering controls. It does not protect miners to the degree they deserve. It does not deserve the support of any working miners. This rule, for all the obvious reasons, must be withdrawn.

If you have any questions, that's great. I'm guessing that since I'm last --

MR. NICHOLS: Thanks for your time.

MR. THAXTON: Tim was the last person we had signed up to speak.

(Applause)

MR. THAXTON: Okay. Thanks for your attendance, your participation. And that concludes today's public hearing.

(Whereupon, at 1:55 p.m., the hearing in the above-entitled matter was adjourned.)

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REPORTER'S CERTIFICATE

DOCKET NO.: n/a
CASE TITLE: Underground Coal Mine
HEARING DATE: May 13, 2003
LOCATION: Evansville, Indiana

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the
Mine Safety and Health Administration.

Date: May 13, 2003

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