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

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

Thank you very much. I appreciate it.

MR. NICHOLS: Thank you.

(Applause.

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

Max? Max Kennedy?

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

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

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

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

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

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

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

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

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

MR. NICHOLS: I don't know.

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

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

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

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

I'm confused.

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

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

MR. NICHOLS: We don't know.

MR. KENNEDY: Okay.

MR. NICHOLS: Let's talk about it.

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

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

MR. NICHOLS: I think that's right

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

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

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

MR. SCHELL: No.

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

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

MR. NICHOLS: Yes.

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

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

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

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

MR. KENNEDY: I'm still --

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

what NIOSH is recommending.

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

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

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

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

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

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

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

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

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

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

MR. KENNEDY: Okay.

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

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

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

MR. KENNEDY: Okay.

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

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

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

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

MR. KENNEDY: Right. Right.

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

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

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

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

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

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

MR. NICHOLS: Yes?

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

MR. NICHOLS: Right.

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

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

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

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

MR. NICHOLS: That's correct.

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

MR. NICHOLS: That's correct.

MR. KENNEDY: -- and be in compliance.

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

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

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

MR. KENNEDY: Okay.

MR. NICHOLS: All right.

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

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

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

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

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

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

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

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

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

Anybody got anything different?

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