

TRANSCRIPT OF PROCEEDINGS

Public Hearing on Proposed Rule)
Criteria and Procedures for Proposed)
Assessment of Civil Penalties)

Pages: 1 through 115
Place: Birmingham, Alabama
Date: September 28, 2006

AB51-HEAR-2D

HERITAGE REPORTING CORPORATION

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

UNITED STATES OF AMERICA
 DEPARTMENT OF LABOR
 MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)

Public Hearing on Proposed Rule)
 Criteria and Procedures for Proposed)
 Assessment of Civil Penalties)

Thursday
 September 28, 2006

Birmingham Ballroom I
 Sheraton Birmingham Hotel
 2101 Richard Arrington, Jr.
 Boulevard, North
 Birmingham, Alabama

The above-entitled matter convened for public hearing, pursuant to notice, at 8:00 a.m., PATRICIA W. SILVEY, Acting Director, Office of Standards, Regulations and Variances, MSHA, presiding.

PANEL MEMBERS:

JAY MATTOS, Acting Director of Assessments

PETER MONTALI, Office of Metal and Nonmetal
 Mine Safety and Health

WILLIAM CROCCO, Office of Coal Mine Safety
 and Health

KEITH WATSON, Office of Assessments

JACK POWASNIK, Office of the Solicitor

ROBERT STONE, Economic Analysis Division

I N D E X

<u>TESTIMONY OF</u>	<u>PAGE</u>
Wesley Pierson	17
Larry Turner	19
Jeremy Eaton	25
Ricky Dunn	28
Joe Weldon	30
Herbert Cordell	36
Lester Barnes	37
Rodney McGough	38
James Blankenship	41
Thomas Wilson	71
Guy Hensley	94
James Blankenship	109
Guy Hensley	109

P R O C E E D I N G S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MS. SILVEY: Good morning.

VOICES: Good morning.

MS. SILVEY: My name is Patricia W. Silvey; I'm the Acting Director of the Office of Standards, Regulations and Variances for the U. S. Department of Labor's Mine Safety and Health Administration. And before we get started with this hearing this morning, I would like it if you would all join with me in a moment of silence in memory.

We as a country have just remembered September 11, 2001, and remembered not only the many Americans and other people were killed on that day, but, also, the many workers who responded. And some 12 days later, we were tragically touched by another accident in the mining industry, at the Jim Walters Mine in Alabama.

And so if you would, join with me in a moment of silence in memory of the miners who were killed that day, the ones who died immediately and the ones who died doing some of the same things that happened on September 11, and that is: Going in, responding and trying to rescue their fellow workers. So I'd appreciate it if you would do that, please.

(Pause.)

MS. SILVEY: Thank you.

1 I will be the moderator of this public hearing
2 today on MSHA's proposed rule concerning civil penalties.

3 The members of the panel are: To my right, Jay
4 Mattos, who is the Acting Director of the Office of
5 Assessments and who is the chair of the Civil Penalty
6 Committee; Pete Montali, who is from MSHA's Metal and
7 Nonmetal Mine Safety and Health office and also on the
8 committee; and, to his right, Keith Watson, who is from
9 MSHA's Office of Assessments; to my left, Jack Powasnik,
10 who is with the Department of Labor's Office of the
11 Solicitor and is the attorney on the committee; and, to
12 his left, Robert Stone.

13 Robert Stone is the Chief Economist for MSHA,
14 and he is in my office. And to his left is William
15 Crocco. And he is from MSHA's Coal Mine Safety and Health
16 Office, and he is representing coal on the committee. And
17 not least -- I don't want to forget her -- in the
18 audience, we have Gerry Gunn. And Gerry Gunn is the
19 regulatory specialist on the committee, and she's in my
20 office.

21 This is the second of six hearings on this
22 proposed rule. The first hearing was held, as many of you
23 probably know, on September 26 in Arlington. The third
24 hearing will be held October 4 in Salt Lake City; the
25 fourth, October 6 in St. Louis; the fifth, October 17 in

1 Charleston, West Virginia, and, the sixth, October 19 in
2 Pittsburgh.

3 The comment period for the proposal closes on
4 October 23. In accordance with the MINER Act, MSHA must
5 issue regulations related to the penalty provisions of the
6 MINER Act by December 2006. So that time frame -- it is
7 sort of a short time frame for MSHA to do that portion of
8 the rulemaking. We will accept documents today if you
9 would like to submit any for the record.

10 This hearing will be conducted in an informal
11 manner. Formal rules of evidence will not apply. Members
12 of the panel may question witnesses; witnesses may ask
13 questions of the panel. Scheduled speakers will make
14 their presentations first. After that, others will be
15 allowed to speak.

16 The transcript for this hearing will be posted
17 on the MSHA website within a week.

18 Before I discuss provisions of the rule, I will
19 give you a short overview of the civil penalty process,
20 beginning with the clarification of four terms that are
21 used throughout the rulemaking. The first term is
22 "citation." The inspector, as many of you know, issues a
23 citation for a violation of any MSHA standard, rule,
24 order, safeguard or regulation. The inspector sets the
25 time to abate the condition.

1 The second is an "order." The inspector issues
2 an order under a number of different circumstances: When
3 the violation is not abated within the time set by the
4 inspector, or any extensions of time; when the inspector
5 finds a violation caused by an unwarrantable failure of
6 the mine operator, and; when an inspector determines that
7 an imminent danger exists. In that case, an order
8 requires withdrawal of the affected miners until the
9 violation is abated. The order may not necessarily
10 require that the entire mine be shut down; only that area
11 affected by the violation.

12 "Significant and substantial." An S&S
13 violation, as many of you know, is one that is reasonably
14 likely to result in reasonably serious injury or illness.
15 The inspector makes the S&S determination at the time of
16 the issuance of the citation.

17 And, finally, "unwarrantable failure." This
18 has been defined by case law to be aggravated conduct,
19 constituting more than ordinary negligence.

20 Under the MINER Act, MSHA proposes penalties
21 and the review commission assesses penalties. A proposed
22 penalty that is not paid or contested within 30 days of
23 receipt becomes a final order of the Commission by
24 operation of law and is not subject to review by any court
25 or agency. Penalties that are contested before the

1 Commission are reviewed de novo. We will use the term
2 "assessment" to refer to MSHA's proposed assessments, as
3 well as assessments that are final orders of the
4 Commission.

5 The Mine Act requires MSHA and the Commission
6 to consider six criteria in assessing civil penalties, and
7 they are: The appropriateness of the penalty to the size
8 of the business; the operator's history of previous
9 violations; whether the operator was negligent; the
10 gravity of the violation; the operator's good faith in
11 abating the violation, and; the effect of the penalty on
12 the operator's ability to continue in business.

13 The first five criteria are applied to compute
14 the penalty amount. The final criterion is applied after
15 the penalty is proposed, upon request by the mine
16 operator. The operator must send in supporting documents
17 which show that the penalty would negatively affect the
18 company's ability to continue in business. MSHA will
19 review this information and may adjust the penalty.

20 MSHA published the proposed rule in the Federal
21 Register on September 8. A copy was placed on MSHA's
22 website and sent to the Small Business Administration's
23 Office of Advocacy..

24 The proposed rule basically does two things.
25 First, it revises MSHA's civil penalty program to increase

1 penalty amounts and to improve the effectiveness of the
2 civil penalty process. These changes are intended to
3 induce greater mine operator compliance with the Mine Act
4 and MSHA's safety and health standards and regulations,
5 thereby improving safety and health for miners.

6 Second, the proposal implements three
7 provisions of the Mine Improvement and New Emergency
8 Response Act of 2006, which I earlier referred to as the
9 MINER Act. The proposal does not change -- and I
10 emphasize, does not change -- the way inspectors issue
11 citations. Under the proposal, inspectors would make
12 factual determinations with respect to safety and health
13 violations and will issue citations and orders as they do
14 now.

15 Also, please note that while both the Mine Act
16 and the MINER Act contain provisions for criminal fines,
17 as the name implies, this proposal deals with civil
18 penalties. Under the existing rule, MSHA has three types
19 of assessments: Single, regular and special. I will now
20 address proposed changes to each type.

21 The existing rule provides for a \$60 single
22 penalty for non-S&S violations, timely abated, and where
23 the operator does not have an excessive history of
24 violations. The Agency proposed to delete the single
25 penalty provision and believes that eliminating this

1 provision will cause mine operators to focus their
2 attention on preventing all hazardous conditions.

3 Regular assessments, the second type of
4 assessment, are derived by assigning points for the
5 statutory criteria and then converting the total points to
6 a dollar amount. The penalty point tables are published
7 in Part 100.3 of the rule.

8 Regular assessments are computer-generated
9 through MSHA's Management Information System. The
10 proposed rule would make a number of changes to the
11 process the table used for determining penalties. The
12 point tables would be revised so that the penalties
13 increase proportionately to increases in operator size,
14 history and negligence, and the gravity or seriousness of
15 the violation.

16 The regular assessments changes are:

17 Size. The size criterion includes the operator
18 size and controller size. For coal mines, operator size
19 is measured by tonnage of coal produced by the mine during
20 the previous calendar year. For metal and nonmetal mines,
21 operator size is measured by hours worked at the mine
22 during the previous calendar year. Size for independent
23 contractors is measured by the total hours worked at all
24 mines during the previous calendar year.

25 Under the proposal, the maximum number of

1 points for operator size would increase from ten to 20.
2 The proposal would continue to assign no points for the
3 smallest operators, and that is: Coal mines that produce
4 up to 15,000 tons of coal, metal and nonmetal mines with
5 10,000 or fewer hours worked, and independent contractors
6 who have worked up to 10,000 hours at all mines.

7 Please note, also, that the preamble to the
8 proposed rule states that according to 2005 data, nearly
9 half of the existing coal mines had actual tonnage of up
10 to 15,000 tons. This figure, however, included 463
11 surface facilities that do not produce coal. So,
12 excluding those non-producing facilities from the total
13 amount of coal mines provides more accurate data.

14 And with this revision then, approximately one-
15 fourth of producing coal mines have annual tonnage up to
16 15,000 tons, versus one-half. Not one-half.

17 The proposal makes no changes to size points
18 for controlling entities. In the proposal, MSHA solicited
19 comments on whether in considering the size of the
20 operator greater weight should be placed on the size of
21 the controlling entity. And I invite you to address this
22 issue at this public hearing today or in your written
23 comments.

24 History of violations. The proposal includes
25 several changes to the history criterion: Shortening the

1 time period for determining violation history; changing
2 independent contractor history from an annualized number
3 to the total number of violations; adding a new component
4 to history for repeat violations of the same standard,
5 and; increasing the maximum number of history points.

6 Under both the existing rule and the proposal,
7 only violations for which the penalty has been paid or
8 finally adjudicated are included in determining an
9 operator's history. Under the proposal, also, the time
10 period for determining history would be shortened from 24
11 months to 15 months. MSHA believes that this shorter time
12 period would more accurately reflect an operator's current
13 status of safety.

14 Both the existing rule and the proposed rule
15 base history for production operators on violations per
16 inspection day. Under the existing regulation, history
17 for independent contractors is based on the average number
18 of violations over the past two calendar years; the
19 proposed rule would change this and use the total number
20 of violations during the previous 15 months.

21 And since history would no longer be based on
22 24 months, MSHA does not believe there is any need to
23 annualize the number of violations for independent
24 contractors. And also, MSHA believes that this change
25 would have a de minimis effect on the average assessment

1 issued to independent contractors.

2 In the proposal, MSHA solicited comments on
3 this approach to determining violation history for
4 independent contractors, and that is: Whether an
5 annualized average should continue to be used or whether
6 MSHA should do it using the total number of violations
7 during the previous 15 months.

8 Again, I invite you to address this issue in
9 your comments. The maximum number of penalty points for
10 this component of violation history would be increased
11 from 20 to 25.

12 Significantly, the proposal adds a new component
13 to the history criteria; that component would be repeat
14 violations of the same standard. Under the proposal,
15 penalty points are added for more than five repeat
16 violations of the same standard during the preceding 15
17 months.

18 In the proposal, repeat violations are
19 determined according to the manner in which the violation
20 is cited. And let me give you an example.

21 A violation of Metal/Nonmetal Standards Section
22 56.14101(a)(1) would not be considered in determining the
23 number of previous violations of 56.14101(a)(2). MSHA
24 solicits comments on this approach to determining repeat
25 violations. Penalty points are assigned for the total

1 number of repeat violations during the previous 15-month
2 period.

3 In the proposal, MSHA solicited comments on two
4 additional aspects of repeat violations: Whether penalty
5 points should be based on the total number of repeat
6 violations, as in the proposal, or on the number of repeat
7 violations per inspection day, and; whether repeat
8 violations should include all violations, as in the
9 proposal, or only S&S violations.

10 We invite you to address these aspects of
11 repeat violations. This component of violation history
12 would add up to 20 penalty points.

13 The next criterion is negligence. The proposed
14 rule would retain the existing five levels of negligence
15 and would double the maximum number of penalty points that
16 could be assigned for negligence, from 25 to 50, with the
17 increase placed entirely in the three highest levels.
18 Under the proposal, penalties would increase
19 proportionally for operators who exhibit increasingly high
20 levels of negligence.

21 The next criterion is gravity. The proposed
22 rule would retain the three components of gravity --
23 likelihood, severity and the number of persons potentially
24 affected -- but would increase the maximum number of
25 penalty points that could be assigned for each component.

1 The maximum total gravity points would increase from 30
2 to 88.

3 Good faith in abating the violation. The
4 existing rule adds ten penalty points if the operator does
5 not abate the violation within the time specified by the
6 inspector and reduces the total penalty amount by 30
7 percent if the violation is timely abated. The proposal
8 would decrease the reduction for timely abatement to 10
9 percent. Under the proposed rule, no penalty points would
10 be added for violations that are not timely abated.

11 Penalty point conversion table. The dollar
12 amounts on the existing conversion table range from \$72 to
13 the statutory maximum of \$60,000. The statutory maximum
14 corresponds to 100 penalty points. The minimum regular
15 assessment is \$60. The proposed rule provides a maximum
16 of 208 penalty points.

17 The revised conversion table begins with \$112.

18 The dollar amount of the penalty increases steadily as
19 the number of penalty points increases. Beginning at 133
20 points, each additional penalty point corresponds to an
21 increase of approximately \$3,070; the maximum penalty of
22 \$60,000 is reached at 140 points.

23 Special assessments are processed where the
24 violation is of such a nature that an appropriate penalty
25 cannot be determined using the regular formula. The

1 existing rule lists certain categories of violations, such
2 as fatalities, serious injuries, and unwarrantable
3 failure, that must be reviewed to determine if a special
4 assessment is appropriate.

5 However, under the proposal, MSHA would retain
6 its discretion to determine which types of violations
7 would be reviewed for special assessment without being
8 limited to a specific list. This change will permit MSHA
9 to focus its enforcement resources on more field
10 enforcement activities rather than on administrative
11 review activities.

12 The proposed rule would shorten the time
13 allowed to request a health and safety conference with the
14 district manager. Existing 100.6 allows ten days; the
15 proposal would shorten the time to five days. MSHA
16 believes this reduction would result in a more effective
17 civil penalty system, because penalties would be assessed
18 closer in time to the issuance of the citation.

19 Finally, as I mentioned earlier, the proposal
20 implements the civil penalty provisions of the MINER Act.

21 Although these provisions are included in this proposal,
22 they were effective on June 16. In addition, the Agency
23 has issued a procedure instruction letter to MSHA
24 personnel containing information for processing violations
25 consistent with the MINER Act. I will briefly discuss the

1 provisions in the MINER Act.

2 Unwarrantable failure citations and orders.

3 The Act establishes minimum penalties of \$2,000 and \$4,000
4 for unwarrantable failure citations and orders,
5 respectively. The proposal includes these two provisions.

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

16 Failure to notify. The MINER Act establishes a
17 penalty of not less than \$5,000 and not more than \$60,000
18 for failure to timely notify MSHA in the case of death or
19 an injury or an entrapment with the reasonable potential
20 to cause death. As stated earlier, these violations are
21 processed as special assessments.

22 For those of you who haven't done so, we would
23 like it if you would please sign the attendance list in
24 the back of the room before you leave. As I stated
25 earlier, we will post transcripts of all the public

1 hearings on our website. Each transcript will be there
2 approximately one week after the hearing. It will include
3 the full text of the opening statement and the specific
4 issues for which we seek additional comment.

5 We will now begin. And please begin by clearly
6 stating your name and organization for the reporter.

7 Our first speaker today will be Wesley --
8 Help me, Wesley.

9 MR. PIERSON: Wesley Pierson.

10 MS. SILVEY: Pierson?

11 MR. PIERSON: Pierson.

12 MS. SILVEY: I couldn't see the P.

13 MR. PIERSON: I'm sorry.

14 MS. SILVEY: That's okay.

15 Wesley Pierson, UMA Local 2245.

16 MR. PIERSON: Yes, ma'am.

17 MS. SILVEY: Excuse me just one minute.

18 (Pause.)

19 MS. SILVEY: Okay. I'm sorry.

20 MR. PIERSON: Okay. My name is Wesley Pierson,
21 and I'm a 47-year-old coal miner with 29 years of
22 experience. I work at Jim Walter Number 4 Mine, and I'm a
23 mine committeeman at Local 2245, UMA.

24 In reading the MSHA proposed rules, I found it
25 impossible for me to make meaningful comments. This is

1 because of the vagueness throughout the proposed rules.
2 The proposed rules are full of examples. I will give you
3 one such example.

4 On page 53063, MSHA states that the limitation
5 is based on the evaluation of the agent's data and a
6 review of the experience gained. MSHA provided none of
7 the data, and MSHA did not explain how experience yields
8 these conclusion.

9 In reading the proposed rules, I found
10 throughout, "MSHA believes," or, "We believe." But then
11 MSHA offered no factual records for the changes. I cannot
12 accept this proposed rule simply because, "MSHA believes."

13 In 1985, MSHA released a press statement saying
14 that they were creating MSHA District 11 to curb mine
15 accidents in Alabama. I want to remind everybody that the
16 creation of MSHA District 11 did not work out like MSHA
17 believed it would. There has not been a single year under
18 MSHA District 11 that Alabama has not had a fatality.

19 In 2001, Alabama had the worst mine disaster in
20 the United States since 1984. Alabama's last mine
21 fatality was my co-worker and friend, Gary Jones. History
22 has proved to me that MSHA is not correct when they,
23 "Believe."

24 With the above stated, I also want to state for
25 the record that I am against MSHA eliminating all single

1 penalty assessments and MSHA's factoring in a number of
2 inspection days for repeat violators. Thank you.

3 MS. SILVEY: Thank you, Mr. Pierson.

4 Our next person is Larry Turner, also of UMA
5 2245.

6 MR. TURNER: Good morning.

7 VOICES: Good morning.

8 MS. SILVEY: Good morning.

9 MR. TURNER: As was stated, my name is Larry
10 Turner. I work at the Jim Walter Resources Number 4
11 mines, Brookwood, Alabama. I'm 50 years old, with
12 approximately 20 years of experience in the coal mines.
13 I'm a member of the safety committee at our mines. Thank
14 you for this opportunity to speak on the proposed rule
15 changes, first on page 53063 at Number 4 on that page,
16 determination of penalty, single penalty assessment, 100.4
17 of the MINER Act, a document that was written in 1977 for
18 the safety and health of all coal miners.

19 This document was written with the blood of
20 coal miners past. To delete the single penalty assessment
21 provision in 104.4 of the Act -- the MINER Act would give
22 a way for coal operators to circumvent most if not all so-
23 called non-S&S violations.

24 Congress may be convinced by this cleverly
25 disguised document that by deleting the single penalty

1 provision, it will cause mine operators to focus their
2 attention on preventing all hazardous conditions before
3 they occur or promptly correct those violations that do
4 occur, but those of us that work and toil in the coal
5 fields know that this is just not true.

6 At this time, I would like to ask you panel
7 members why and how this change, in your words, or delete,
8 in your words, will help and not hinder the health and
9 safety of all coal miners in one of North America's
10 deepest mines, which I work.

11 MS. SILVEY: Okay. You are asking us --

12 MR. TURNER: My question is: How will deleting
13 this 100.4 help me and my people at my mines?

14 MS. SILVEY: Okay. We -- I want to clarify for
15 the entire audience that we proposed -- the Agency
16 proposed to delete the civil penalty but not delete any
17 penalty -- but that there would continue to be a penalty
18 for non-S&S violations. It's just that the penalties for
19 non-S&S violations would be treated through the regular
20 assessment process. And it actually would be a higher
21 penalty.

22 And so that is why the Agency thought that by
23 making this change, the focus would be -- it would create
24 a greater inducement for our operators to focus more on
25 all the violation and give the same attention to S&S and

1 non-S&S alike. So we are deleting the single penalties to
2 where they are treated as a separate category now and
3 given a \$60 penalty.

4 The -- all violations, S&S and non-S&S, would
5 be processed through the regular formula system. All the
6 criteria apply to them -- all the five criteria that I
7 read in my opening statement. And that is what led us to
8 conclude that, but we are here today to take your
9 testimony if you believe differently than that.

10 MR. TURNER: That is, Madam, about as clear as
11 the tax provisions that we're locally now under, which
12 is -- it takes a Philadelphia lawyer and a crew to figure
13 out this table of contents. But I'll take your answer,
14 and I will move on to the second thing I --

15 MS. SILVEY: No. I do want people to
16 understand what we had in mind when we did that, you know.
17 Right -- okay.

18 MR. POWASNIK: Were you under the impression
19 that by eliminating the single penalty, we were
20 eliminating a penalty completely?

21 MR. TURNER: No.

22 MR. POWASNIK: Oh. Okay. But -- and you did
23 understand that by eliminating the \$60 penalty, a penalty
24 for a non-S&S violation would go through the regular
25 assessment?

1 MS. SILVEY: The assessment.

2 MR. POWASNIK: And what we are proposing now is
3 \$112 as the lowest penalties or -- it would be \$112 and up
4 higher from that.

5 MR. TURNER: Okay. So let me add one more --

6 MS. SILVEY: You know, I guess the thing I want
7 to underscore -- because I know how it can be with
8 regulations. And agencies put out so many regulations.
9 So I do want -- and I clearly understand.

10 I do want to underscore that we said, Delete
11 the single penalty. And I'm -- so I'm saying it again.
12 But those violations will get a penalty.

13 And as Jack said about that, they will get --
14 under this proposal, they will end up getting a higher
15 penalty. So, you know, we want to leave you -- and it's
16 because of that that they would be processed for a higher
17 penalty. It's because of that that we thought that would
18 lead to a better safety.

19 MR. TURNER: The next comment I would like to
20 make is -- on the proposed rule is on page 53058, "c.
21 History of previous violations," 100.3(c): "The
22 operator's violation history on the number of violations
23 received in a preceding 24-month period for which a civil
24 penalty has been paid or finally adjudicated."

25 To change this law from 24 months to 15 months

1 would be a disgrace to all who work and toil in the
2 nation's coal fields. All of our nation's co-operators
3 currently have on retainer at least one two-bit attorney
4 that is capable of making sure their more meaningful
5 violations are not paid or, in your words, finally
6 adjudicated within a 15-month period.

7 In my opinion, this change would not provide an
8 incentive for improving safety and health, but provide the
9 coal operators of America, large or small, a way of
10 escape.

11 Third, MSHA also solicits comments on whether,
12 in determining penalty points for repeat violations of the
13 same standard, the Agency should factor in the number of
14 inspection days during which the repeat violations were
15 cited.

16 In my opinion, the amount of inspections should
17 not determine the gravity or the penalty of the violation.

18 The amount of the inspections in any given quarter or,
19 currently, 24-month period must not determine how a
20 violation would be viewed. A violation is a violation no
21 matter how many inspections have been made.

22 I would like to take this opportunity to thank
23 you for allowing me to speak on these topics. I only
24 hope that this hearing is much more fruitful than the
25 meeting on September 15, 2005, with District Manager

1 Richard Gates, concerning the removal at our mines of
2 head-gate shields. While this meeting was being
3 conducted, the approval for the plan was being faxed to
4 our mines.

5 MSHA was created to protect the health and
6 safety of American coal miners; however, this Agency is
7 now being run by ex-coal operators or their attorneys.
8 This new group of MSHA leaders are only interested in the
9 gifts they can give to the coal operators, not my health
10 and safety. This proposed rules change is nothing short
11 of a cleverly disguised gift for coal operators.

12 I have one more thing that I would like to
13 read. It's in a document that is titled "A Brief History
14 of the UMA."

15 "The United Mine Workers' history is full of
16 legendary and often tragic names. The Molly Maguires, the
17 Lattimer Massacre and the Ludlow Massacre, Matewan and the
18 Battle of Blair Mountain, Paint Creek, Cabin Creek and
19 Buffalo Creek and Bloody Harlan are some of many legendary
20 stories that have been handed down in the oral history of
21 mining families.

22 "Despite the threat of physical harm and
23 economic ruin, miners have consistently struggled against
24 great odds to achieve their goals: The 8-hour work day in
25 1898, collective bargaining rights in 1933, health and

1 retirement benefits in 1946, and health and safety
2 protections in 1969."

3 I thank you for your time. And I only hope and
4 pray that this hearing is not something just short of
5 getting out and seeing people, but taking to mind what we
6 as miners go through on a day-to-day basis. Thank you.

7 MS. SILVEY: Well, thank you, Mr. Turner.

8 (Applause.)

9 MS. SILVEY: Thank you, sir.

10 Next we will have Jeremy Eaton, UMA Local 2245.

11 MR. EATON: My name is Jeremy Eaton I'm the
12 vice president of Local 2245. I work at Jim Walter
13 Resources Number 4 mine, Bloodwood, Alabama. I'm 29 years
14 old, with nine-and-a-half years mining experience.

15 On page 53063, MSHA is proposing to delete the
16 single penalty assessment provision. In 2005, Number 4
17 mine had around 330 citations. Of the 330 citations, 205
18 were single penalty.

19 The Agency comments on 53063 on determination
20 of single penalty assessment that by deleting the single
21 penalty provision, it will cause mine operators to focus
22 their attention on preventing all hazardous conditions. I
23 am here today to tell you that the statement, "Eventually,
24 we believe," is not strong enough in meaning, nor does it
25 have any supporting facts.

1 On page 53058, MSHA is proposing to reduce the
2 24-month review period to a 15-month review period. In
3 this, you are letting coal companies have a chance to get
4 off the hook.

5 I know that in our mines, we had a fatality
6 five months ago. And the citation just went to the first
7 step of conference last week. The worst lawyer in the
8 state of Alabama could drag the process out longer than 15
9 months. And the only citations that can be repeat
10 violations had to be paid for or fully adjudicated. So if
11 a company can drag its feet longer than 15 months, you
12 can't use the citations against them.

13 Then you go on to say that the provision would
14 not affect smaller mines. I personally find this very
15 disturbing in the fact that I started my career in a small
16 mine. For the three years I spent in a small mine, the
17 dangers were more than in the big mines.

18 When a cop doesn't give you a speeding ticket,
19 he doesn't ask you if you're lower or middle or upper
20 class so he can adjust your fine; it's level across the
21 board. So should MSHA.

22 I feel that all violations must be considered
23 in determining repeat violations and that the Agency
24 should not factor in the number of inspection days during
25 which the repeat violations were cited. I also feel that

1 should our operator choose to contract out our work, the
2 contractor would see less points and penalties than if our
3 people kept doing the job, which would lead to companies
4 contracting out work to save on penalties, thus putting us
5 in harm's way.

6 Before I leave here today, I have to say one
7 more time: Throughout this provision, MSHA states, "We
8 believe," time and time again, with no facts to support
9 the provision. If the provision is as strong as you say,
10 why would you not say, "It will change"? Thank you for
11 your time.

12 MS. SILVEY: Thank you, sir.

13 MR. MATTOS: Excuse me, sir. I -- just chat
14 with me. I have just a question or two. Going back to
15 the single penalty, you said you had 205 at the mine last
16 year?

17 MS. SILVEY: 330.

18 MR. MATTOS: And if I understand you correctly,
19 you're saying that you would rather that those 205
20 remain -- under the proposed rule, continue to get that
21 single penalty, as opposed to a higher penalty?

22 MR. EATON: I would prefer that MSHA use the
23 tools they have now. They -- I don't even feel that MSHA
24 uses the tools that's under the way we have it now.
25 That's the reason why I said that. I don't even think

1 that the way the MSHA inspectors do their citations now is
2 up to par to the authority that they have.

3 FEMALE VOICE: Excuse me. When the panel asks
4 questions, could you be a louder? We can't hear back
5 here.

6 MR. MATTOS: Oh. Okay.

7 MR. EATON: Is that it? Thank you, ma'am.

8 MR. MATTOS: Yes. Thank you.

9 MS. SILVEY: Thank you.

10 Our next witness will be Ricky Dunn, UMA Local
11 2245.

12 MR. DUNN: Good morning.

13 MS. SILVEY: Good morning.

14 MR. DUNN: My name is Ricky Dunn. I work the
15 Number 4 Mine in Bloodwood, Alabama, Local 2245. I have
16 30 years in the coal mines, and I'm presently on the
17 safety committee.

18 I'm here today to talk about the new provisions
19 by MSHA. I would like to start by commenting on page
20 53063, paragraph 5, unwarrantable failure. In this
21 provision, MSHA wants to take out language from the 1977
22 MINER Act. The 1977 MINER Act was put in place for the
23 protection of coal miners so your agency could hold
24 companies accountable.

25 So I ask you. After the years of blood and

1 sweat of the writing of the '77 MINER act, are you not
2 taking the teeth out of this part of the Act?

3 Also, nowhere in the provision have you shown
4 any support facts that will stand behind the -- what I
5 call a death warrant you are proposing. We have for many
6 years fought companies for our health and safety, but
7 today, it seems, the way I read this, we're also fighting
8 you.

9 On page 53060, MSHA shows the old point system
10 and the new point system. MSHA is not using the tools
11 they presently have available to them, for example, for
12 the number of people affected on citations. Time and time
13 again, they only use one person affected when in fact, in
14 many cases, there's many more people affected or that
15 should be affected. If you cannot properly use the tools
16 you have today, I ask how will you use the tools you have
17 in this provision?

18 I disagree with contracting out work. This
19 proposed rule places less penalties on contractors than on
20 the coal operators. I disagree with this in that this
21 results in a financial incentive for a coal operator to
22 contract out work. I believe this will result in more
23 accidents and injuries.

24 I disagree with just using S&S citations for
25 repeat violations. All citations should be used. And I

1 thank you for your time.

2 MS. SILVEY: Thank you very much. I would just
3 like to say one thing, sir, to you as a clarification.
4 And that is -- and I'm glad to have your testimony on the
5 repeat violation issue, because the proposal does include
6 all citations. And we asked the question of whether it
7 should be S&S only. So thank you for your comments.

8 We next have Joe Weidon --

9 MR. WELDON: Weldon.

10 MS. SILVEY: -- of UMA.

11 MR. WELDON: Good morning.

12 MS. SILVEY: Good morning.

13 MR. WELDON: I find it a privilege to address
14 you this morning. My name is Joe Weldon, and I'm a member
15 of the United Mine Workers of America Local 1948. I'm on
16 the safety committee. I've been in coal mines 27 years;
17 I'm 46 years old. That's pretty much all I've known.
18 I've lost a father underground in the coal mines from a
19 roof fall, and I've lost an uncle. So I know something
20 about the struggles and going through hard times.

21 And I was involved in mine rescue. I was at
22 Jim Walter Number 5 during the recovery of those 13
23 bodies -- the 12 guys that died there. So I know
24 something about struggle.

25 And so I'm familiar with that and the struggles

1 of miners in the industry, what they go through. And even
2 though I'm a younger guy, I've been there and I've seen a
3 lot of things that was pretty rough sometimes.

4 And what I wanted to address was the 100.6
5 where it would reduce the time from ten days to five days
6 to submit additional information. And I don't think that
7 that warrants enough time for us to get together for
8 conferences and stuff, because not only as part of being a
9 full-time coal miner, a husband, on the safety committee,
10 executive board committee and trying to get those things
11 together, sometimes that time frame all runs together.

12 Dealing with issues at the mine site and even
13 away from -- you know, while you're at home, you still get
14 calls, and you still get things that you try to work out.

15 And this time frame, I think, don't allow us enough time.

16 And I'd like to see more time. I know we need to work
17 things out speedily, but when we're talking about men's
18 and women's lives and what's involved -- and you have to
19 look those people in the face every day and know that
20 you've done a good job and you wanted to serve the men
21 well -- we feel like this time frame should not be
22 reduced. And if anything, add to it.

23 And I'll submit the chair to someone else. And
24 I thank you for your time. If there's any questions --

25 MR. CROCCO: Could I ask a question?

1 MR. WELDON: Yes, sir.

2 MR. CROCCO: How much time do you think would
3 be adequate if ten days is not enough?

4 MS. SILVEY: He said five days is not enough.

5 MR. WELDON: If ten days is not enough, I'd say
6 15.

7 MR. CROCCO: All right. Well --

8 MR. WELDON: I think that that would -- but we
9 definitely don't want the reduction.

10 MS. SILVEY: You don't want the reduction.
11 Right.

12 MR. WELDON: Anything from anybody else?

13 (Pause.)

14 MR. WELDON: I thank you for your time.

15 MR. MATTOS: I have a question.

16 MR. WELDON: Okay.

17 MR. MATTOS: This is on the ten- and five-day
18 thing. Thanks for the comments. If -- would it -- what
19 about if we split that so -- the intent was to speed up
20 the assessment process.

21 MR. WELDON: Exactly.

22 MR. MATTOS: And we're looking for ways to do
23 that, but we don't want to --

24 MS. SILVEY: Harm --

25 MR. MATTOS: -- around here.

1 MS. SILVEY: Yes.

2 MR. MATTOS: What about if requesting -- if the
3 conference had to be requested within five days, but the
4 amount of time you're allowed to submit additional
5 information up to when you have a conference, for example?
6 I mean I'm -- just a question.

7 MR. WELDON: No. I think that we'd like to
8 stick with that.

9 MR. MATTOS: Okay. Thank you.

10 MR. WELDON: Thank you very much.

11 MS. SILVEY: Thank you, sir.

12 Randall Green next, UMA.

13 MR. GREEN: My name is Randall Green, and I
14 currently serve as the president of Local 1948 at the
15 Shoal Creek mines, Drummond Company. And I'd like to make
16 a statement. I'm also a member of the safety committee.

17 Of course, I support an increase in the
18 penalties that we're proposing today. And also, I'd like
19 to comment. In our mines, we've had a lot of accidents.
20 Last year, we had a charged fatality. Also, it seems like
21 the operators made the decision it's cheaper to pay the
22 fines than to try to correct.

23 Also, it's important that labor and management
24 work closer together. And I don't know -- the incentive
25 should be that we should be able to make things safe and

1 try to lessen our violations. But in trying to deal in
2 the last few months and meeting with the management, it
3 seems like we're wide apart between our safety committee
4 and trying to do the things we need to do.

5 Also, we want to try to get the people in the
6 mines aware of what's going on. The safety committee
7 continuously tries to meet with management in trying to
8 reduce the number of citations we have at the mine,
9 because it's important, and -- but we're failing to do
10 this.

11 And we're also aware that management has
12 retained a large group of attorneys there to fight these
13 fines and increases. We see that they're reduced in most
14 cases before they even go to court. We've got a lot of
15 serious decisions at our mines. And February 24, we had
16 an explosion in our mines, and thankfully we didn't have
17 any fatalities.

18 These fatalities -- we could have had a greater
19 number than we had seen at the Jim Walter mine. And since
20 then, the safety committee at our mines has made every
21 effort to try to work with management to reduce these
22 things. In fact, up to that time, we had a full-time
23 safety committee that management supported. But the first
24 thing they done -- they done away with a full-time safety
25 committee because we wanted to make an effort to reduce

1 the fines or the violations at our mines and to have safer
2 mines.

3 So at some point, we've got to have an
4 incentive for people to work closer together to reduce
5 these things. These are things that we should do. We
6 should be able to correct the situation at our mines, and
7 we should be able to sit down with management and try to
8 look at these situations and correct them and -- so that
9 we don't have this loss of life and have the things that
10 we've happened in our mines.

11 And I appreciate it. And if there's any
12 questions, I'll be glad to answer them.

13 MS. SILVEY: No, sir, I don't have any
14 questions. But I would like to use your comments as -- to
15 pick up on your comments and say something, and that is:
16 I agree with you. And I think we as an agency agree with
17 you that one of the -- and, you know, hopefully, we strive
18 to do this every day.

19 And you mentioned management and labor working
20 together to reduce violations and to correct hazardous
21 conditions and improve safety, and I would like to add in
22 MSHA working with labor and industry to do that. And as I
23 said at the first hearing that we had, you know, our
24 ultimate goal, quite honestly, is that there be no
25 violative conditions. And if there were no violative

1 conditions, then, hopefully, there would be no or very few
2 injuries and illnesses, and no fatalities.

3 So -- and I -- you know, despite the -- we have
4 the Mine act and all of that. But I think one of the core
5 tenets of the Mine Act, just as you said, is that all
6 parties work together to reduce hazards in the mine and
7 work place. So I -- we agree with you there.

8 MR. GREEN: Well, thank you, ma'am.

9 MS. SILVEY: Thank you.

10 Our next person will be Herbert Cordell.

11 MR. CORDELL: Good morning.

12 MS. SILVEY: Good morning.

13 MR. CORDELL: My name's Herbert Cordell; I'm a
14 member of the Local Union 2133, where I serve as vice
15 president of the local and chairman of the safety
16 committee. I have 38 years mining experience. And I
17 would like to object, also, to the proposed change to
18 100.6(b), which reduces the number of days to submit
19 additional information or request a conference.

20 Like this gentleman said, we're full-time coal
21 miners, husbands, fathers and grandfathers. And along
22 with that, we deal with safety issues on a daily basis at
23 the mines. We review plan change submittals that the
24 company makes. And I just don't think that we have time
25 to fit this in in the reduction of days there.

1 And that's about all I have. Thank you, ma'am.

2 MS. SILVEY: Thank you.

3 MS. SILVEY: Is there anybody else? These are
4 the names of the speakers that I have on the speakers'
5 sign-in list. Is there anybody else in the audience who
6 wishes to speak?

7 (Pause.)

8 MR. BARNES: I apologize for my dress; I worked
9 last night in the coal mine and then came down here for
10 this hearing. My name's Lester Barnes. I've got 26-1/2
11 years in the coal mine. I am currently the chairman of
12 our safety committee in our mines. In the Bloodwood
13 Number 5 mine, we lost the 13 men in that devastating coal
14 mine explosion.

15 I'd like to ask the Commission. What is the
16 exchange rate on the price of a ton of coal versus the
17 life or a limb or a disease contracted by violations of
18 operators allowed to continue to take place in our coal
19 mines? What is the exchange rate for that?

20 Long after the MSHA inspector leaves our coal
21 mines, we have two other shifts that come on board and
22 work in this environment ten hours a day six days a week.

23 The size of the operation should have no bearing on the
24 amount of penalties that are assessed because of the
25 citations that are issued because of the violations of the

1 standard.

2 The size has nothing to do with how many people
3 are going to be injured because of those violations that
4 take place. And I would like for you to consider -- as
5 you go over these comments to realize that the number of
6 hours that a MSHA inspector spends underground versus the
7 number of hours of the men and women who work in the coal
8 mines -- there's no comparison to it.

9 We live underground. We see our co-workers
10 more than we see our own families. We face the dangers of
11 the industry a lot more than the inspectors who come in
12 and inspect our coal mines and more than the people who
13 make the assessments and make the changes in MSHA policies
14 regarding those citations and violations that occur.

15 So I want to ask you to consider -- as you go
16 over these things, remember that those men and women who
17 are underground just about live there 24 hours a day seven
18 days a week. Thank you.

19 MS. SILVEY: Thank you.

20 (Pause.)

21 MS. SILVEY: Good morning.

22 MR. MCGOUGH: My name's Rodney McGough. I work
23 B&M North River mine, Local 1926. And I object to
24 100.6(b). We need more time because -- you know, you all
25 are wanting to reduce it to five days. And ten days is

1 not enough a lot of the time and -- because, you know, we
2 have other jobs to do. I work in the mines, plus I'm vice
3 president of our local, on the organizing, and, you know,
4 hold other jobs. And we need more time to look over these
5 things.

6 And, two, on like your contractors -- you know,
7 the fines is reduced on them -- than it is the coal
8 operator. Well, if you all keep doing that, that's going
9 to put my people out of work. Already you can see the
10 mines is full of contractors now where I work -- and
11 taking my people's jobs. You need to raise the fines on
12 them.

13 And it's just not right. If you all raise the
14 fines on the company and not the contractors, my people's
15 going to be on the street. And that ain't going to get
16 it. The contractors need to be fined more. That's about
17 all I've got for right now.

18 MR. MATTOS: Can you all hear me now?

19 VOICES: Yes.

20 MR. MATTOS: Okay. Thank you. I have just one
21 question, or maybe it's more of a comment on the
22 independent contractors. I want to make it clear to those
23 here that the penalty structure for independent
24 contractors -- the citations and orders issued to
25 contractors -- is exactly the same as it is for the

1 operators with the exception of the size of the business
2 and then some of the history pieces. And that's strictly
3 a function of the information we have on independent
4 contractors.

5 MR. McGOUGH: Yeah.

6 MR. MATTOS: But the penalty structure -- and I
7 think you understand. Now, we -- it was not our intent
8 and it isn't our intent to minimize the penalties for
9 contractors at all.

10 MR. McGOUGH: See, this -- it was just like
11 this awhile back. The inspector wrote a citation on a
12 contractor on our property. This contractor hazard-
13 trained his person, his employee. The inspector wrote a
14 citation on him because this contractor is not part of the
15 management. That citation got thrown out. Some of you-
16 all's people, you know, higher up than where you all is
17 said he had the right to hazard-train his employee on our
18 company's property -- and him not being employed with this
19 company.

20 You know, we're living down there. You know,
21 that's not right. One of our company employees should
22 have hazard-trained this person, but, you know, some of
23 you all said he was legal by doing that. But in the book,
24 the way I read it, he don't have that right to do it. But
25 the citation got thrown out. He didn't have to pay a

1 dime.

2 MR. MATTOS: Okay. Thank you.

3 MR. McGOUGH: See, when you get stuff going
4 like that right there, that's going to put my people on
5 the street. Thank you.

6 MS. SILVEY: Okay. Excuse me. Before you
7 leave and later -- if you could do that to me -- that
8 particular citation you were talking about -- could you --
9 is there some way you could get us that number or send it
10 to us or something?

11 MR. McGOUGH: I can get you a copy of it.

12 MS. SILVEY: You can get a copy?

13 MR. McGOUGH: Yes, ma'am.

14 MS. SILVEY: Okay. We'll get it from you?
15 Okay. I would --

16 MR. McGOUGH: I appreciate it.

17 MS. SILVEY: -- look into that. Okay. Thank
18 you.

19 (Pause.)

20 MS. SILVEY: Good morning.

21 MR. BLANKENSHIP: Give me one second.

22 MR. MATTOS: Take your time.

23 MR. BLANKENSHIP: My name is James A.

24 Blankenship; I'm president of the United Mine Workers
25 Local 2245, District 20, here in Alabama. I'm employed at

1 Jim Walter Resources Number 4 mines as an underground
2 electrician.

3 I've got almost 32 years in the mines. I
4 worked in small mines and started out my life in West
5 Virginia, and then I worked with Jim Walters. I'm a
6 third-generation UMA coal miner, and I've got a son that
7 works at Pin Oak. That makes him a fourth-generation
8 miner.

9 So I've got a lot at stake here. I've got a
10 few more years, and then I'm going to retire. I've got a
11 son that's going to be there, hopefully, another 30 years
12 or so before he retires. So this means a lot to me. I
13 feel that, you know, if we allow this to go through, I'll
14 probably sign his death warrant along with you all for
15 lack of enforcement. I don't see it in these regs today.

16 I want to comment -- before I really get into
17 the meat of what I want to do, I want to comment on your
18 opening statements a little bit. Through your opening
19 statements, several times, you said, MSHA believes. You
20 even added it a few times where the written document
21 doesn't say it -- that MSHA believes -- but you added,
22 "MSHA believes," with no proof to show why you believe
23 that.

24 I went through this document extensively the
25 last three days. I don't -- can't find and don't see what

1 MSHA believes is going to happen. And I'm going to get
2 into that later on, but I wanted to bring that up before I
3 moved on -- about how even in your opening statements
4 several times, it's, "Believes," not facts, not that it's
5 going to happen, but, We think it might happen.

6 We can't put miners' lives on a, "I think it
7 might happen," or, "I believe it might happen," because --
8 I'm going to tell you what'll happen. We'll have
9 fatalities.

10 I'm here today to talk to you about several
11 points of the proposed rule which I feel greatly lessen
12 the health and safety of the miners that MSHA is supposed
13 to protect. The proposed rules are full of statements
14 like, again, "We believe," or, "MSHA believes." There's
15 no evidence to back these statements up.

16 I can tell you what I know, and that is: On
17 September 23, 2001, 13 miners lost their lives at the Jim
18 Walter Number 5 mines because of the lack of enforcement
19 by MSHA. And the proposed rules does nothing to make the
20 mines safer. To tell you how strong I feel about the
21 statement I just made, I'm dressed in black today to
22 respond in respect for the miners who will lose their
23 lives in this nation's coal mines because of these
24 proposed rules if they're approved.

25 Under the existing rules, MSHA reviews eight

1 categories of violations for special assessments. They
2 are as follows.

3 Section 100.5 lists the following items which
4 the Agency must consider for a special assessment, and the
5 key word is, "Must," consider. Special assessment is
6 appropriate in violations involving fatalities and serious
7 injuries, unwarrantable failures, operations in the face
8 of a closure order, failure to permit an authorized
9 representative of MSHA to inspect, violations for which
10 individuals are personally liable under 110(c), imminent
11 danger of 105(c) discrimination, and extraordinarily high
12 degree of negligence, gravity or other unique aggravating
13 circumstances.

14 These eight categories are the ones the Agency
15 must review, but there are no restrictions that say the
16 Agency cannot review other categories for special
17 assessments. Under the new proposed rule, it would be
18 left up to the district manager on what he would consider
19 for special assessments.

20 We're talking about political pawns at the
21 Department of Labor and MSHA that is ran by Bush-appointed
22 coal operators, coal mine owners and CEOs, and the
23 district manager that rubber-stamps any and all company
24 plans submitted to them no matter how detrimental it is to
25 the health and safety of the miners.

1 And Mr. Turner spoke earlier on some stuff that
2 happened at our mines. For the safety of the miners,
3 existing rules should not be eliminated.

4 On page 53063, it reads -- this is the middle
5 column: "Although an effective penalty can generally be
6 derived by using the regular assessment formula and the
7 single assessment provisions, some types of violations may
8 be of such a nature or seriousness that it is not possible
9 to determine an appropriate penalty under these
10 provisions." That sentence is going to be eliminated, by
11 the way.

12 And if you'll turn to page 53072, under 100.3,
13 it tells you how a regular assessment's going to be done.

14 It lists six criteria for how it's going to be done, and
15 they are: The appropriateness of the penalty to the size
16 of the business of the operator charged; the operator's
17 history of previous violations; whether the operator was
18 negligent; the gravity of the violation; the demonstrated
19 good faith of the operator charged in attempting to
20 achieve rapid compliance after notification of the
21 violation, and; the effect of the penalty on the
22 operator's ability to continue in business.

23 "A regular assessment is determined by first
24 assigning the appropriate number of penalty points to the
25 violation by using the appropriate criteria and tables set

1 forth in the section above." And if you'll turn to the
2 next page, to -- yes, it's 74 -- 53074 -- we're going to
3 talk about special assessments.

4 And this says -- this is 100.5: "MSHA may" --
5 again, MSHA may; it doesn't have to, but may, if we change
6 the rules -- "elect to waive the regular assessment under
7 100.3 if it determines that conditions warrant a special
8 assessment."

9 "(b) When MSHA determines" -- or if they
10 determine -- "that a special assessment is appropriate,
11 the proposed penalty will be based on the six criteria set
12 forth in 100.3," what I read three pages ago. So you've
13 got a regular assessment using six criteria. You get a
14 number, one of you-all's numbers, in the final. Okay? If
15 it's going to be a special assessment and you can use the
16 same six criteria, how are you going to get a different
17 number? It's going to be the same number whether it's
18 regular or special.

19 So there's no such thing as a special
20 assessment under this proposal. There's words, but
21 there's no assessment that I can see. And, you know, if
22 I'm wrong, somebody tell me.

23 If you'll turn to page 53060 -- this is 100.3.
24 Under the new proposed rules, the three measures of
25 gravity will be retained, and the maximum number of points

1 assigned for likelihood of occurrence of an event will
2 increase from ten to 50. The max number of points
3 assigned for severity of injury or illness would increase
4 from ten to 20, and the max number of points assigned for
5 the number of persons potentially affected would increase
6 from ten to 18.

7 This would be great if the citations written by
8 MSHA would reflect exactly what the situation was when the
9 citation was written. I'll give you a few examples of
10 what I'm talking about.

11 These citations I'm going to read to you in a
12 minute were written by, in my opinion, one of the best
13 MSHA inspectors not only in District 11, but in all of
14 MSHA. And still the citations don't affect what the
15 actual situation was when the citation was written.

16 We had a citation written at Jim Walter Number
17 4 mines. An inspection cover was not installed on a four-
18 inch round junction box in the shower room of the ladies'
19 bath house. The junction box had the light fixtures
20 removed, leaving a 1-1/2-inch hole in the metal plate,
21 exposing -- energized 110-volt wires and nuts easily can
22 be seen through the hole in the metal plate. And this is
23 a direct passage for water to contact the wires. The area
24 wire installed are not sealed tightly to prevent the
25 entrance of moisture in a water and electrical hazard

1 location.

2 A bath house? We have several ladies work at
3 our mines.

4 S&S? Yes. Persons affected by moderate
5 negligence -- I mean if there was more than one lady in
6 that bath house, if you use the criteria to get severity
7 and increase penalties, that's part of it. And if we
8 don't show that, then there's not going to be an increase
9 in penalties. There is not going to be an increase in
10 monies. They're not going to be fined more. They're
11 going to be fined less, using your criteria.

12 If you wrote 50 women or 30 or however many was
13 in that bath house, it might be a different story. But
14 that's not what's happening today. That's not
15 going to be what happens tomorrow.

16 Combustible material in the form of dry, black
17 float coal dust was allowed to accumulate on the metal
18 frame work on the operating first West belt line. The
19 location existed from 8 Section discharge and in by the
20 Number 8 intake overcast. Approximate distance was 228
21 feet. Ventilation travels in by to the working Number 6
22 section from this area.

23 Persons affected: Four. That's the people he
24 observed working on that belt line. But his citation
25 says, "Intake to Number 6 section," where there was at

1 least ten more people affected by it if there was a
2 problem on that belt line. Not 14, as -- I mean not four,
3 as this citation says, but 14 -- at least 14. When you
4 add in a belt crew or a track crew or extra electricians
5 or whatever, you're talking about more people.

6 Moderate negligence? A fire boss or somebody
7 walked that belt. That's not moderate. They walked that
8 belt prior to him being down there on the previous shift.

9 Again, using your own citations, there's no increase in
10 the fines. And this gentleman -- I have more respect for
11 him than any inspector I know, because he does a good job.

12 But that's the way they write them.

13 Battery-operated scoop observed operating in
14 Number 6 Section with combustible material in the form of
15 oil, grease and soap. Accumulations were allowed to exist
16 in the main electrical control panel and around the
17 conduit with the engine compartment, measuring 2-1/2
18 inches in depth. The accumulation of coal and coal fines
19 were allowed to exist under the drive-shaft in the
20 operator's compartment, measuring 2 inches to 2-1/2 inches
21 in depth.

22 That's on the section. Affected people: Two.
23 Moderate negligence.

24 There was ten people on the section, not two.
25 There might have been two standing by that machine when he

1 walked up, but there's ten on that section. And if that
2 scoops out by the face area and something happens to it,
3 the air is going to take the smoke, the fire or whatever
4 straight to those individuals.

5 Combustible material in the form of engine oil
6 accumulation on the hot motor valve covers; hot hydraulic
7 hoses, motor and valve covers covered with hydraulic oil.

8 Again, three people on the section. There's more than
9 three on the section. It takes at least ten -- nine or
10 ten to run coal. Negligence low.

11 These citations would not increase fines. I'm
12 telling you I've tried to figure it up. I'm not a rocket
13 scientist. I don't see it. I actually called your
14 office. I actually talked to the gentleman on the end
15 here the day before yesterday to try to see if I
16 couldn't -- somebody couldn't walk me through one to
17 make -- so I could know how it worked. I didn't get that.

18 Combustible material in the form of saturated
19 coal and coal fines, up to three inches, with hydraulic
20 oil. Dry, black float coal dust around the pot motor,
21 hydraulic cables and the energized electric areas in a
22 Stamler feeder on Section Number 4, two people affected.
23 Moderate negligence. S&S, but moderate negligence. Two
24 people on the feeder.

25 Re-intake without belt lines. If there's a

1 fouled up feeder, it's going to the face. It's not going
2 outby. It's going to affect everybody in that section.

3 Combustible material in the form of black float
4 coal dust was allowed to accumulate in the North A power
5 center. The float coal dust measured 1/16th-inch and was
6 located in the power center cover bottom ledges, 110-volt
7 electrical outlets, 7200-volt energized power cables. The
8 power center was located 25 feet from the North A belt
9 line. Intake air up the belt. Number affected: One
10 person. Moderate.

11 Diesel man-trip located in the 1 West kickback
12 had combustible material in the form of hydraulic oil,
13 grease on and under the motor and speed reducer and pump
14 air. These areas were hot and warm when inspected. The
15 combustible accumulation on these hot engine parts
16 measured 1/3-inch thick. Miners working on or traveling
17 in by this man-trip would be exposed to smoke and fumes
18 from toxic chemicals produced from combustion.

19 This man-trip was available for use, was not
20 tagged out and obviously recently operated, as was
21 evidenced by the engine compartment area having hot
22 conditions. He said in the citation, People traveling in
23 by and working in by this man-bus. One person affected.
24 Moderate negligence.

25 Number 8 Section feeder accumulation: Oil,

1 grease, coal fines. Four inches deep. Affected person:
2 One. Moderate. The same thing: It goes belt-line, inby
3 air, to the section. It's not one person; it's ten
4 people.

5 The alternate escape for Number A6 was not
6 being maintained to assure safe passage for anyone,
7 including disabled persons. The alternate escapeway,
8 located 30 feet up by the outby corner of crosscut Number
9 55, spread 23-13-9, was observed to have black, murky mud
10 nine inches in depth and the mud saturated with oil and
11 grease from the rib edge to the belt structure for a
12 distance of 30 feet, 69 feet wide.

13 Uneven, slick, unstable footing conditions
14 resulted from failure to maintain a safe walkway through
15 this area. Persons that will have need to travel this
16 area will slip and fall, resulting in strain,
17 dislocations, bone breakage occurring. Examiners and
18 persons performing cleaning work frequently travel this
19 area.

20 He said, "Disabled persons", "alternate
21 escapeway." One person affected. Moderate. If
22 somebody's injured, it's going to take at least four to
23 carry them out on a stretcher. At least, it should have
24 been five, not one. But if it's a section evacuating,
25 again, we're talking ten or more, not one person.

1 Fletcher roof bolter, Number A6. Combustible
2 material: Float coal dust, grease, oil. The same thing:
3 Only one person, non-S&S, moderate.

4 There's not a dime -- this reg ain't worth ten cents.
5 There's no fine for that non-S&S, because there's nothing
6 there. One person. Using your point system, it doesn't
7 get any points. It doesn't get any. It doesn't get a
8 nickel.

9 The operating Jeffrey RAM car, Number A6 --
10 and, again, combustible material. Headlight guts open,
11 exposing wires, electrical wires. It's a fire hazard with
12 float coal dust. Number affected: Three people. Non-
13 S&S. Moderate.

14 There was probably a couple of electricians and
15 a RAM Corporation guy there looking at it or working on it
16 as he walked by. But the people inby are affected just as
17 much as they are if something happens to that RAM car.

18 Combustible allowed to accumulate in the form
19 of oil and hydraulic on hot hydraulic hose exflow cables
20 on the roof bolter on the Number 4 section. Again, two
21 people.

22 You know, if the roof bolter's in the face,
23 that's two. And the miner's in one. That's at least the
24 two -- well, we've got three bolters -- three people in
25 our bolters, plus the miner, miner helper and the RAM car.

1 That's at least -- the least number should have been
2 six -- the least he could have got. You put the foreman
3 up there doing an examination, and that's seven. No way
4 that it's two people.

5 There was no weekly exam -- electrical
6 commission ability examination on the 575-volt water pump
7 location on the return air course. It goes on to talk
8 about that there was no gas or anything found, but if
9 there had been a problem, you know, there was no
10 examination that could have found it. One person
11 affected. Moderate, non-S&S.

12 Somebody like the fire boss had -- somebody
13 made a weekly examination. Somebody had to check those
14 pumps. So it's not moderate negligence. It's more than
15 one person affected in the area, because we have pumpers
16 and fire boss pumpers that walk those areas a lot.

17 The mine track was not being maintained free of
18 compacted material in the following locations: C/O
19 switch, west side of the service cage, four-way at the
20 bottom, northwest four-way switch, elevated above the
21 track, kicking up mine dust into the atmosphere. He
22 wrote, One person affected. Substantial, but not
23 moderate.

24 We're talking at the bottom, where everybody's
25 inby if something happens. So there's more than one

1 person at Jim Walter Number 4 during a shift. I'm telling
2 you we're talking a hundred or better, and not one person.

3 Personnel man-door provided at Number 10
4 located at M-12 long wall butt end was left propped open.
5 Zero people affected. Non-S&S. Moderate.

6 If there's a fire on that belt line, the
7 smoke's coming up the belt and through the door and up the
8 intake. Now, as your main escapeway is smoked out, the
9 secondary escapeway's smoked out. Fire, fumes and
10 whatever comes off that belt line. Both of them has got
11 smoke in them because that man-door was left open. And
12 nobody affected, non-S&S and moderate? This citation
13 under these proposals was a wasting in writing.

14 Personnel Door, Number 2 entry, 1 West:
15 Isolate intake was not closed when in use. Man-door left
16 open again. He wrote "six people," because there were six
17 people working in that inside that man-door on that belt
18 line. But in up that belt on that section was another ten
19 people. That -- if there's a fire, it's going up the belt
20 and up the intake.

21 Another man-door left open. No isolation
22 between the intake and secondary escapeway and primary
23 escapeway. The same thing: One person, moderate, and
24 non-S&S.

25 Personnel man-door left open. Non-S&S.

1 Persons affected: One. Moderate.

2 It's the same as -- there's hundreds of them.
3 I only brought you about 30, so, you know -- but it's
4 ridiculous.

5 Combustible material in the form of black float
6 coal dust was allowed to accumulate on the roof ridge and
7 mine floor areas and return air course in the first West
8 Left Turn. Persons affected: One. Non-S&S. Moderate.

9 That's ridiculous. Again, combustible
10 material, black float coal dust, electrical-energized 7200
11 transformer located Number 2 crosscut in the long wall
12 belt. One person, S&S, moderate.

13 If there's a fire in that transformer, it's
14 going into that long wall, because the air is going right
15 up that belt line.

16 Combustible material: Black float coal dust
17 allowed to accumulate on 7200-volt, 4160-volt, 110-volt
18 electrical cables running the coal level production shaft
19 column, continuing down to the feeder level, around the
20 top of the production shaft. Coal level, the coal fines
21 and dry flow coal dust coated the roof ribs, measuring 1/2
22 inches in depth, on electrical cables and railings. The
23 walkway between the rib and the shaft had coal fines
24 accumulating seven inches in depth. Person affected:
25 One. Moderate S&S.

1 That's at the bottom, now, too. Don't -- our
2 production shaft is at the bottom, where everybody gets
3 off and leaves. So everybody's inby this thing if
4 something happens there. If there's an explosion,
5 everybody's inby. There's more than one person affected.

6 Diesel low-track, combustible material in the
7 form of hydraulic fluids have been allowed to accumulate
8 around the diesel fuel-injector and head engine area. The
9 return fuel lines leading from the fuel-injector were
10 saturated with diesel fuel.

11 A film of diesel fuel coated these motor parts,
12 which were so hot to the touch that the low-track operator
13 used this area to heat up a can of soup to the point
14 needing thick gloves to touch it. That's the can of soup
15 now we're talking about. That's how hot it got in there,
16 with diesel fumes and fuel all over.

17 This low-track was operating a primary intake
18 escapeway. If this condition is allowed to exist, it is
19 reasonably likely that a miner working or traveling inby
20 will be exposed to fire, smoke and fumes, resulting from a
21 fire occurring from the combustible accumulations being in
22 contact with hot engine parts. Moderate, S&S, one person.

23 Intake escapeway. There's more than one person
24 inby that low-track.

25 Accumulation of hydraulic oil allowed to

1 accumulate on low-track on Crosscut 3 and 1 West track.
2 That's out by several sections at our mines. Person
3 affected: One. Non-S&S, moderate.

4 If something happens to that low-track, the
5 intake air is going straight to 3 section and the long
6 wall.

7 Weekly examination of the fire-suppression
8 system on the North A belt drive was not conducted for the
9 dates 12/22, 1/03. When inspected, the fire-suppression
10 system functioned properly. Failure to perform the
11 required examination on fire-fighting equipment exposes
12 persons to serious hazards from combustible sources
13 occurring. Ventilation travels in by this area, and four
14 persons were observed working in the belt line. Non-S&S.

15 The four people that he saw working. And
16 moderate. But the key words is, Ventilation travels inby
17 this area, through everywhere.

18 This last one is an order that was written.
19 The approved mine emergency evacuation plan was not
20 followed on 8/7/2006. The carbon monoxide monitoring
21 system went into alarm due to elevated carbon monoxide
22 readings at 12:43 a.m. on the morning of 8/7/2006.

23 Page 4, Section C, Article Two of the approved
24 plan requires miners in the affected area to be withdrawn
25 outby affected sensors. Supervisor Lewis [phonetic]

1 failed to follow the approved plan in that affected miners
2 in Number 8 section were not withdrawn.

3 Supervisor Lewis was engaged in aggressive
4 conduct, constituting more than an ordinary negligence,
5 thus abnormal failure to comply with the mandatory health
6 and safety standard. S&S, high, but ten people. Ten.

7 There's four -- five sections -- four sections
8 on the long wall inby that sensor that went off. Not ten
9 people. That was one section. The other three sections
10 on the long wall aren't affected, but they were -- on this
11 citation or this order, they wasn't affected, but they
12 were affected.

13 One other thing, talking about affected. In
14 the Tuscaloosa news September 27, 2006: Two miners from
15 the Sago commit suicide. Now, tell me that that mine
16 disaster didn't affect these two gentlemen. They weren't
17 in it, but they worked at that mine.

18 I have brothers and sisters that got
19 transferred from Five mines to Four during layoff. They
20 weren't in that explosion at Five, but it affects them
21 every single day. They talk about it. It's on their
22 minds. So to say, "One person affected," or, "Two people
23 affected," doesn't do it justice.

24 So although you're no in the explosion, it
25 still affects you. And if you want to read this article,

1 I'll be glad to give it to you.

2 The proposed rule states the number of
3 categories in the persons potentially affected table will
4 increase from seven to 11. I looked through this. I
5 can't find that table in here. I mean I might have
6 overlooked it, and if it's here, well, somebody point it
7 out to me. So I don't know if it increases or what it
8 does, because I couldn't find it.

9 If you'll turn to page 53059 -- it says all
10 violations should be considered in determining repeat
11 violations -- not just S&S. That's how I feel.

12 What I just showed you proved that, also, all
13 standards should be considered. I mean it's the way the
14 inspectors are writing the citations. I think it's the
15 way they've been told to write them. That's my personal
16 opinion. It doesn't -- there's no points that can be
17 accumulated, because of the low numbers they're putting on
18 them, the low negligence they're putting on them.

19 And as far as the history, I want to use the
20 example you all used in the plan. If you'll turn to -- in
21 the -- if you've got one -- 30 CFR, it's 75.202(a) and
22 202(b).

23 If I read this correctly, for a history to be
24 formed, the inspector has to write it under 75.202(a),
25 (a), (a), (a), (a), (a). If he writes (a) today and a (b)

1 tomorrow and another (a) and another (b), he has got to
2 write about ten citations before that mine has got a
3 history, but we've still got ten unsupported-roof
4 problems, if you read this.

5 It says, "The roof, face and ribs of areas
6 where persons work or travel should be supported or
7 otherwise controlled to protect persons from hazards
8 related to falls of the roof, face or ribs and coal and
9 rock." That's (a).

10 (b): "No persons shall work or travel under
11 unsupported roof unless in accordance with this subpart."

12 We're talking unsupported roof, (a) and (b),
13 but that's two different citations if he writes them,
14 202(a) and 202(b). So you've got to write about ten
15 citations to get a history. And in 15 months, like my
16 brother said, the worst lawyer -- shoot, I handle
17 arbitrations. I can drag it out 15 months, and I'm not
18 even a lawyer.

19 There's no history. There's nothing. You've
20 done away with it. Excuse my language. I'm sorry.

21 It takes -- also, the Agency should factor in
22 the number of inspection -- should not factor in the
23 number of inspection days in which repeat violations were
24 cited. They should not do that, because we're talking --
25 small mines don't get cited or inspected nearly as much as

1 large mines. And I worked in small mines about four-and-
2 a-half years. I know. That's just another way to lessen
3 the repeat violations history and let operators that
4 violate the law off easy.

5 If you'll turn to page 53061, the old rule, a
6 10-point penalty is assigned when the operator fails to
7 abate the violation within the time set by the inspector.

8 The new rule deletes the 10-point penalty but still
9 leaves a reduction in the amount of a regular assessment
10 when the operator abates the violation within the time set
11 by the inspector.

12 It's hard for me to understand how the new rule
13 would cause an operator to abate a violation on time when
14 there's no penalty if you don't. I mean he gets 10
15 percent. And 10 percent -- that's \$120. So if he has got
16 something else to do or if he puts -- according to this
17 plan, if he puts one person on there, he's trying to abate
18 it. I just don't see it being effective.

19 I know you're going to tell me that the Mine
20 Act provides two other sanctions for failure to correct
21 violations. We have those same sanctions now, and they're
22 not being used, so what would make me believe it would be
23 any different under the new proposed rules?

24 If you turn to -- well, we're on page 53061.
25 The new rule changes Table III-10 from zero to nine to

1 zero to ten with point increases as far as persons
2 affected -- potentially affected. I think there should be
3 two steps, not zero through ten as on here -- or more.
4 There should be two steps: Zero persons affected, or one
5 or more persons affected. And one or more persons
6 affected would be the max penalty of -- you all have got
7 18 points, not ten. Not ten steps.

8 You know, one life is bad. If we lose one
9 life, it's bad. We shouldn't put it and say, Well, if we
10 lose ten, that's worse. I just lost a brother at Jim
11 Walter 4 this year. That was bad. He was a good friend,
12 a good man. One life's bad. So if one person's affected,
13 it should be the same penalty as if it was 50 affected.

14 So then we take out this part here. That makes
15 this one person affected mean something then. So make it
16 two steps. Don't drag it out for a week.

17 In closing, I cannot accept MSHA's underlying
18 assumptions that the operators complying with the law --
19 or the money MSHA says the operators will be fined and the
20 monies collected. I don't see it in here. And like I
21 said, I called the assessment office to try to get
22 somebody to walk me through a citation, and it didn't
23 happen.

24 For the health and safety of the coal miners of
25 this nation, I ask you please don't approve these rules as

1 they're written. Go back to the drawing board if you have
2 to and change them, and we'll come back and do this again.
3 There's bugs in it. I see ways of less enforcement, less
4 compliance and more things like what happened at Jim
5 Walter 5.

6 In 2001, September 23, it was a disaster. It
7 didn't make big national headlines, because of 9/11. The
8 miners in Alabama and the widows in Alabama cried for
9 stiffer MSHA compliance to make them do their jobs, make
10 the mine operators do their jobs. Nothing happened for
11 five years. January of this year, at Sago mines in West
12 Virginia, it happened.

13 There was no other big news at that time. It
14 made national headlines. People cried out for mine
15 safety. The governor of West Virginia and the congress
16 said, Okay, we're going to do something. In big
17 headlines: "Increase penalties," which was good. People
18 started to say, Oh, that's great.

19 But then we come down with this proposal, in my
20 opinion, by coal operators and mine owners, which says,
21 There ain't no penalties here. This is not stiffer. It's
22 less, and it gives them loopholes to get out of it. Don't
23 do that.

24 We're here in Alabama. We're not the headlines
25 today. George Bush is the headlines, two doors down.

1 There's not going to be an outcry because these are passed
2 today or next week or next month. So don't do it. It's
3 out of the headlines now, but it's still in our hearts. I
4 think you're putting miners at risk. So please don't do
5 it. Thank you.

6 MS. SILVEY: Thank you.

7 (Applause.)

8 MS. SILVEY: I have a couple of comments, and
9 some of my colleagues and panel members might, also.

10 MR. BLANKENSHIP: Okay.

11 MS. SILVEY: First of all -- and this is just
12 as a way of me reiterating or restressing the fact that a
13 number of times, you stated, Mr. Blankenship, in the
14 proposal, as well as in my opening statement, that we used
15 the statement that, "MSHA believes", "The Agency
16 believes," in support of some of the actions that were
17 contained in the proposal.

18 MR. BLANKENSHIP: Okay.

19 MS. SILVEY: And we did. One of the things
20 that we all know, I think, is that the purpose of civil
21 penalties -- civil penalties, now, and you get to a
22 different purpose when you get to criminal penalties.

23 But the purpose of civil penalties is not to
24 drive mine operators out of business, but to -- and
25 somewhere -- you know, there's probably a balance

1 somewhere: Not to drive operators out of business, but to
2 serve as an accepted deterrent to unsafe and unhealthy
3 workplace conditions or, in another way, to induce mine
4 operators to create safety and healthy conditions in their
5 work places and, thereby, to improve compliance with MSHA
6 laws and regulations, some of which we heard you recite
7 from some of the violations.

8 When we used in the proposal, "We believe," and
9 when I included that in my opening statement, we looked at
10 MSHA's violation data from the year 2005. And I think
11 throughout the proposal in various parts, we refer to
12 that. So when we said, "We believe," the belief was based
13 on an analysis of that data, as well as on the MSHA's
14 experience.

15 We have representatives on the panel, some of
16 which before you you can see, representing coal mine
17 safety and health --

18 MR. BLANKENSHIP: Right.

19 MS. SILVEY: -- metal and non-metal mine
20 safety and health. And you just see two of the people,
21 but not the full experts that we use when we were coming
22 up with this proposal.

23 So in the proposal, in using the 2005 data,
24 what you will find in the analysis is -- you will find
25 aggregate data. We didn't segregate the data down to,

1 let's say, Jim Walter mine or Vulcan Materials or Drummond
2 Co., but we looked at all -- took all the violation data,
3 got sums of all of this violation data and included it in
4 the proposal.

5 And what we did is -- we showed the baseline
6 number of civil penalties under the existing rule. We
7 took that number of the total civil penalty violations for
8 2005 and applied as if -- we took it and just did an
9 estimate, applied the penalties under this proposal to
10 that data. And we got -- and we took the baseline average
11 of civil penalties, the number and the average.

12 And so in so doing, then we got the total
13 assessments under the proposal. And that total went from
14 24 million to 68 million. And then we got the average
15 under the existing rule and the average under the
16 proposal. And the average went -- depending on -- the
17 table is on page 53067 in the proposed rule. So we used
18 that.

19 And then in Table IV-6, we developed a
20 percentage increase in the penalties. And the percentage
21 increase went from -- for coal operators -- I'll stay on
22 coal operators. The percentage increase went for coal
23 operations of one to five, which have one to five
24 employees, at 48 percent, to a 333 percent for operations
25 with 501-plus, with various percentages along the way.

1 And for metal and non-metal operations, there
2 were similar increases in the assessments. And the dollar
3 amount of assessment went from -- worked into that same
4 from a dollar amount of 165 to \$1,668 per -- that's per
5 violation.

6 So I just wanted to say for the purposes of
7 everybody in here you -- we had to do some type of
8 analysis, and you had to use some basis for what you did.

9 Even though I -- as I say that, you know, one of the
10 reasons you have notice and comment in rulemaking is that
11 you can get comment from people who are affected by the
12 rule, like we're doing today.

13 But in terms of the basis for our rule, I would
14 draw your attention -- and I'm not just talking to you,
15 Mr. Blankenship, but to everybody here.

16 MR. BLANKENSHIP: What's fine.

17 MS. SILVEY: I would draw your attention to the
18 various analyses that are done and included in the
19 proposal. I might ask you to comment on some of the
20 analyses; there might be ways that we can improve them as
21 we move to the final rules.

22 MR. BLANKENSHIP: Okay.

23 MS. SILVEY: The second comment I'd like to
24 make is on your -- the citations that you pointed out to
25 us --

1 MR. BLANKENSHIP: That's fine.

2 MS. SILVEY: -- and the number of persons
3 potentially affected, particularly that aspect of the
4 citation.

5 I would like to say to everybody here, also,
6 that MSHA continues to emphasize areas where we can
7 improve enforcement. And I know you all know that the
8 inspectors go through a lot of training and they have, you
9 know, refresher training. And that's an aspect, an area,
10 where we can improve certain things with respect to what
11 the inspectors have to do when they issue the citations,
12 one of the -- both for consistency and for accuracy, that
13 they do it right.

14 And one of the areas that we are emphasizing in
15 this inspector training is persons: How do you mark for
16 persons potentially affected by the violation and to make
17 sure that we get it right and they do it right? And not
18 to be critical of our inspectors, either, as I say that,
19 but there's always room for improvement.

20 MR. BLANKENSHIP: Well, like I said earlier, I
21 have a lot of respect for this gentleman.

22 MS. SILVEY: You did. You said that. I
23 appreciate that.

24 MR. BLANKENSHIP: I wasn't bringing him down
25 whatsoever.

1 MS. SILVEY: And me, either. I'm not meaning
2 to be critical, but there -- you know, there's room for
3 improvement, yes.

4 MR. BLANKENSHIP: Sure.

5 MS. SILVEY: Does anybody else --

6 MR. MATTOS: Well, yes. I'd like to follow up
7 with -- on the comment on not being able to walk through a
8 citation under the proposed rule. I'd like to offer,
9 after we adjourn today, to do exactly that.

10 MR. BLANKENSHIP: Okay. Great. I appreciate
11 that.

12 MR. MATTOS: You certainly have some examples
13 with you that we can use.

14 MR. BLANKENSHIP: Yes. We can do that. I
15 appreciate it.

16 MR. MATTOS: Okay.

17 MR. BLANKENSHIP: I'm going to give these to
18 you, because I think --

19 MS. SILVEY: Yes. We'll put that in the
20 record. Thank you.

21 MR. CROCCO: Hey, James?

22 MR. BLANKENSHIP: Yes, sir.

23 MR. CROCCO: Before you go, I'd just like to
24 say that Pat's right. I mean we are looking at a number
25 of things about how we review gravity and number of

1 people, you know, in inspectors training and things like
2 that. And under the proposal, you know, the assessments
3 will have a lot more based on that assessment. So we will
4 be doing a better job along those lines.

5 But I was going to ask you. Do you raise those
6 objections at conference or close-out conference or
7 anything like that?

8 MR. BLANKENSHIP: We -- sometimes. I mean,
9 basically, we're arguing, "Yes, it was," or, "No, it
10 wasn't." I mean, you know, the violation. But I probably
11 will now --

12 MR. CROCCO: Oh. Okay.

13 MR. BLANKENSHIP: -- now that you've brought
14 that up. I hadn't thought about it. But I probably will
15 now.

16 MR. CROCCO: Okay. Thanks.

17 MR. BLANKENSHIP: I appreciate it. Thank you.

18 MS. SILVEY: Thank you.

19 MR. WILSON: Good morning.

20 MS. SILVEY: Good morning.

21 MR. WILSON: My name is Thomas Wilson; I work
22 for the United Mine Workers of America, international
23 representative. I rise in favor of increasing civil
24 penalties, but, with all due respect, I rise against the
25 proposed rule as written. Before I start commenting on

1 specifics, I first want to explain the foundation for my
2 beliefs.

3 The proposed rule and assumptions are based on
4 the violations written. I strongly believe that the
5 violations written represent less than 5 percent of the
6 total violations and hazards that exist in every work
7 place on a daily basis. I also strongly believe that many
8 of Alabama's work places are flirting with death and
9 disaster every day of every week.

10 With every phone call -- there's nothing but
11 fear that the next phone call will be that call that a
12 disaster has occurred. I want to give you but just a few
13 examples of what has occurred in Alabama in the last
14 month.

15 The UMWA representative had to request that at
16 a contractor job site drug testing be performed in that a
17 contractor's supervisor was distributing cocaine to all
18 the workers on his shift at that job site. As a result of
19 that request, eight contractors lost their jobs.

20 Also within the last month, at another
21 contractor site, it was alleged and uncontested that three
22 miners were smoking in a shaft which had cut into one of
23 Alabama's deep mines.

24 We have other operations which, regardless of
25 the day of the week or the shift, we cannot go to the

1 operations without finding numerous hazardous conditions.

2 And unfortunately, although I have no fault with any
3 individual MSHA inspector -- unfortunately, some of these
4 areas where we're finding hazardous conditions that would
5 cause death or serious injury, the inspectors have just
6 inspected the same areas and are not citing the same
7 number of hazards that we're citing.

8 With that said, being that this proposed rule
9 is based on violations written, I believe that it is
10 fundamentally flawed from the onset. It states throughout
11 the rule that, MSHA believes. I'll simply state that I
12 believe differently than what MSHA believes.

13 I have studied this proposal very hard numerous
14 times. The results that MSHA claims that this proposal or
15 that they believe this proposal will achieve I have not
16 been able to convince myself, my heard and mind, that in
17 any way this proposal will achieve what MSHA sets out to
18 or states their goal is to achieve.

19 There is one thing in the proposal that I do
20 believe. It's on 53068. It says -- I'm just going to
21 read a few words of it: "Estimate the new reduced number
22 of violations." Now, I do believe that the following, the
23 passage -- if this proposal goes forward, we will see a
24 new reduced number of violations. I don't believe it's
25 because of anything that this proposal does. I, like many

1 commenters before me, believe that it's because of the
2 direction of the top officials of MSHA , the direction
3 that they want the agency to go.

4 MSHA's proposal has little to commend it and
5 constitutes a significant disappointment. Moreover,
6 MSHA's so-called explanations have virtually no objective
7 support. The agency repeatedly says, "We believe," but
8 then offers no factual record or any analytical support
9 for these, for the changes. This puts the stakeholders in
10 the difficult position of criticizing what appears to be
11 very random result-oriented choices.

12 A troubling proposal is the elimination of the
13 list of categories for special assessment. While MSHA
14 claims to be removing the limitation quotes on the types
15 of violations for which special assessments are made, in
16 fact, there is no current limitation. While there is a
17 list of eight types of violations that must be considered
18 for special assessments under the existing regulation, the
19 fact is: No restriction on violations for which a special
20 assessment may be considered or applied.

21 Most significant, though, is that each of the
22 eight types now routinely referred for consideration of a
23 special assessment is very serious. We do not want to see
24 any of them treated as routine, as the MSHA proposal seems
25 to do.

1 While MSHA claims to be burdened by the amount
2 of administrative time each special assessment now
3 consumes, it reports that only 2.7 percent of all
4 violations were specially assessed, without offering any
5 information about how many violations were referred for
6 special assessment but which did not receive a special
7 assessment.

8 At page 53065, it discusses how it expects the
9 special assessments would operate under the proposal. At
10 page 53066, MSHA indicates special assessments would
11 properly apply only for agents, those involving fatalities
12 and failure of timely notifying MSHA, and flagrant
13 violations, thereby suggesting the other items currently
14 referred for special assessments generally would no longer
15 be referred.

16 I believe that the current list that is listed
17 in 100.5 -- I believe it's -- (c) should remain as the
18 minimum guideline for special assessments. District
19 managers should not have the ultimate say in what is
20 specially assessed; there should be that minimum guideline
21 of eight categories. If he chooses to go above that
22 eight, he currently has the right to, and he would
23 continue to have the right to.

24 For regular assessments, 100.3, MSHA claims to
25 be revising the penalties so they will increase

1 proportionately to increases in operator size, history,
2 and negligence, and the gravity or seriousness of the
3 violation.

4 At page 53056, I can agree that history is an
5 appropriate factor for increasing a penalty, though not in
6 the way MSHA proposes to change how history is figured, as
7 is the relative negligence and gravity of the violation.

8 But I suggest -- as you heard earlier, miners
9 testified that had previously worked small mines. They
10 testified that in small mines hazards and violations were
11 worse than at the big mines.

12 I started the presentation talking about
13 contractors, and I heard one of the panel members speak
14 earlier that the scales was proportionately increased for
15 each category. I submit to you that all the penalties are
16 too low and that each -- if current regulations have you
17 where you have to proportionately increase those
18 categories, then proportionately increase them higher.

19 These low penalties will not achieve the
20 compliance that MSHA is seeking. I believe MSHA has
21 factored in the violations written, the cost of -- it's my
22 belief -- and I stated it earlier -- that the violations
23 written represent less than 5 percent of the violations
24 and hazards that are there, miners face every day. The
25 incentive to correct that other 95 percent needs to be

1 much greater than what this proposal does.

2 Even though MSHA is required to consider small
3 operators, contractors, you've got to recognize that some
4 of these locations where we're having the greatest threat
5 on miners' lives -- I gave you but two examples of
6 contractors in Alabama that happened in the last month.

7 Those type of activities in mines should not be
8 condoned, and just because they're a contractor, they
9 should not be rewarded for those type of activities.

10 As for history of violation, MSHA proposes
11 reducing the relevant time period from 24 months to 15
12 months. Under existing language, only those violations
13 for which a civil penalty has been paid or finally
14 adjudicated are considered, whereas the newly proposed
15 language includes the words "or have become final orders
16 of the Commission."

17 While MSHA claims no change in the intent is
18 intended, it does not explain why it wants to add this
19 language, and it may serve to confuse. If an operator
20 appeals a particular violation from the FMSHRC to the
21 courts, will MSHA consider it finally adjudicated?

22 Perhaps the new language is intended to clarify
23 that, but unless that is stated in the preamble, confusion
24 rather than clarify may result.

25 MSHA does not give any objective data about the

1 implications for the reduced changed time span, but it
2 seems suspicious. It does not explain it, and the change
3 certainly seems arbitrary.

4 There's several objections to the repeat
5 violation, and I think each one is a strike against
6 safety: reducing the time period from 24 months to 15
7 months. We've heard many commenters on this. Considering
8 only violations that are paid or finally adjudicated.

9 MSHA seeks comments on whether only S&S should
10 be considered for repeat violation. It's my opinion that
11 all violations should be considered for S&S violations and
12 that the 24-month period should remain.

13 This was written in a manner that gave me the
14 impression that MSHA is trying to do away with the
15 important tool of repeat violations.

16 And it was also pointed out by a former speaker
17 that repeat violation -- MSHA has also narrowed it in
18 another area: It has to be of that specific same subpart.

19 Every proposal that MSHA has made on repeat
20 violation actually, again, gives me the impression MSHA is
21 trying to throw away that tool and make it that much more
22 difficult to use that tool.

23 MSHA should look at the overall regulation as
24 it now does, without considering which particular subparts
25 were violated. MSHA should not look only at violations

1 that are cited in exactly the same way. This will not do
2 an adequate job of identifying chronic problems, which is
3 the purpose behind levying higher fines for repeat
4 violations.

5 Under 100.3(c)(1) I believe MSHA would exempt
6 from the additional points any operator that has had ten
7 or fewer violations of any sort in the prior 15 months.
8 This seems arbitrary and would only apply to small
9 operations, which have fewer MSHA inspections.

10 In the next section 100.3(c)(2), MSHA also
11 would not impose any additional penalty points on any
12 operators that has had five or fewer of the exact same
13 standard within the last 15 months, again,
14 disproportionately helping the small operations.

15 I agree with MSHA's proposal to retain the five
16 tiers of negligence under 100.3(d) and its plan to attach
17 more points for the three highest levels of negligence at
18 page 53059.

19 As for the impact of gravity under 100.3(e),
20 three items are considered: likelihood of occurrence,
21 severity of injury or illness if the event were to occur,
22 and the number of persons potentially affected. MSHA
23 proposes increases the points for the greater severity,
24 which seems appropriate, but MSHA is not increasing those
25 points enough.

1 Like MSHA's plan to eliminate the special
2 assessment criteria, MSHA's proposal to delete the
3 assignment of additional penalties whenever an operator
4 fails to timely abate is a bad idea and not logically
5 supported by the rationale MSHA offers.

6 At page 53061, the agency claims that the
7 additional penalties are not necessary because it has two
8 other sanctions available to apply: withdrawal orders and
9 assessments of daily penalty under 110(b). However, MSHA
10 offers no suggestion nor any promise that it will apply
11 either of these sanctions in every case. Without that
12 promise, why remove one enforcement tool it now has.

13 At this point I'd like to ask for clarification
14 on -- for unwarrantable failures, 100.4, at page 53063.
15 MSHA references to minimum fines that must be imposed
16 through the MINER Act but does not state that the point
17 and penalty system otherwise in place would apply to
18 these, does it?

19 MS. SILVEY: Jay will address that more
20 specifically, but as of today -- and that's what I tried
21 to say in the opening statement -- we are -- the MINER Act
22 provisions for civil penalty are really in place today,
23 and so every cite to every unwarrantable citation and
24 order is receiving the \$2000 for an unwarrantable citation
25 and the \$4000, at least -- I said receiving; I should say

1 at a minimum it's receiving the \$2000 for an unwarrantable
2 citation and \$4000 for an unwarrantable order, in
3 accordance with the MINER Act.

4 And that is happening today, and it will
5 continue to happen under the -- when the rule goes final.

6 You want to add anything?

7 MR. MATTOS: Does that answer your question?

8 MR. WILSON: Yes. I cannot accept MSHA's
9 underlying assumptions about how operators will likely
10 respond to the proposed changes, so, too, I cannot accept
11 the conclusions shown in the charts about the dollars that
12 will be assessed and/or collected.

13 At page 53059, the agency solicited comments on
14 whether or not inspection days should be factored in. I
15 am against the number of inspection days being factored
16 in.

17 I don't know if I've missed this or not, but
18 I'm also -- all violations should be considered for
19 repeat -- this is page 53059 -- not just S&S.

20 As those that have spoken before me, page
21 53060, (e), on gravity -- I'll make two points on that
22 section. One is I don't believe MSHA has proposed a great
23 enough increase and, two, there's many cases where MSHA is
24 currently not figuring this correctly as we sit before you
25 today.

1 I said I'd make two points. Also like the
2 previous commenter, I, too, have been unable to find the
3 scales that this section refers to. The second column,
4 where it refers to maximum number of points assigned for
5 the number of persons potentially affected would increase
6 from ten to eighteen; in addition, the number of
7 categories in the persons-potentially-affected table would
8 increase from seven to eleven.

9 I also want to take a moment to comment on some
10 earlier comments that were submitted into the record.
11 First, Greer Industries, Inc., dated September 19, 2006,
12 second page: It states, "MSHA's education and training
13 personnel should be providing 30 CFR Part 48 and Part 46
14 training to mining companies and not simply making it a
15 law that states what has to be achieved to meet
16 compliance. Good education on training is hard to come
17 by, and MSHA should be providing the training."

18 I want to strongly object. Each operator
19 should care enough about their miners to develop good
20 training programs and should not look to MSHA to provide
21 all that training.

22 This letter goes on to state, "MSHA should also
23 be concentrating its effort on problem mines. Mines that
24 have high accident and injury rates, increased violation
25 rates, and fatalities should be targeted by MSHA for

1 increased enforcement and penalties.

2 "Mines with good safety records, low accident
3 and injury rates, and no fatalities should be given a
4 grace period from inspections for a period of time and
5 also have their penalty assessments decreased as a way to
6 positively reinforce a job well done and thereby increase
7 operator compliance and increase safety and health to well
8 maintained, safe, and productive mines."

9 Again, I rise in opposition to those earlier
10 comments.

11 Also, an earlier comment from Michael Joseph
12 that's posted on the website to 30 CFR Part 100.3(a)(1):
13 And he states, "More training and proper procedures in
14 performing a task that a miner performs, proper preshift
15 examination, on-shift examinations, and weekly examination
16 is the key in eliminating accidents and should be MSHA's
17 main goal."

18 He states that after saying increasing the
19 penalty for a violation is not going to improve safety at
20 the mines.

21 The things he lists as being key are things
22 they should be doing now. We currently have coal fields
23 that's full of tragedies, and we need to take stronger
24 steps.

25 I'll close: I rise in favor of the increase in

1 civil penalties. With all due respect, I rise against the
2 proposed rule as written in that it does not raise the
3 penalties high enough.

4 Thank you.

5 MS. SILVEY: Thank you, Mr. Wilson.

6 I have a couple -- no questions, but I have a
7 couple of comments. Somewhere in your testimony you
8 talked about reduced violations, and I'd like to just talk
9 about that table that we showed on page 53069 of the
10 proposal, talking about reduced violations, but just to
11 explain the process that the agency went through.

12 And in doing that -- and our economist is
13 here -- but in doing that, you know, you make a lot of
14 assumptions; I mean, we know about that when you look at
15 the economic assumptions that they say underlie all kind
16 of figures that are put before us for our daily lives. A
17 lot of times the economic assumptions we say we might not
18 agree with.

19 But to come to any type of figures -- I might
20 say I don't agree with some of them, but to come to any
21 type of figures, you have to build in some assumptions,
22 and that's another reason. You know, we draw your
23 attention to that, and that's probably one of the reasons
24 I want to talk about it. And so you can comment on the
25 assumptions, even.

1 So on page 53069 -- and the reason we used
2 reduced violations, we show two sets of tables here:
3 Table 4-9, and the heading was Impact of the Proposed Rule
4 with Unchanged Compliance and With Increased Compliance
5 Response to Higher Penalty Assessments.

6 And this is what the thought process that we
7 went through, that under the existing rule we show the
8 number of penalties, the old penalties. Then we show the
9 new proposed rule with the same compliance; the penalties
10 would go from 24.8 million to 68.5 million, and I'm
11 rounding.

12 Then we show that we -- and basically we got a
13 mathematical difference, which was an increase of \$43
14 million. But then we said that when these -- and, you
15 know, you can -- we shouldn't argue about that; we don't
16 know exactly when this will happen. But sometime after
17 the new penalties go into effect, hopefully sometime after
18 December '06, because that's when, under the law, we have
19 to do part of this proposal, the parts related to the
20 MINER Act -- sometime after December '06 we said that mine
21 operators would expend additional monies to improve
22 compliance, because with these new penalties in place, new
23 higher penalties, that would be an incentive; they would
24 want to expend funds and improve compliance.

25 We estimated, based on some economic

1 assumptions, that mine operators would expend
2 approximately \$9 million to improve compliance, but we
3 didn't add that to the cost of the rule, because we said
4 they should be doing that anyway.

5 And then we said that because of that improved
6 compliance and the higher penalties, that the penalties
7 would go down. But those are assumptions; we are assuming
8 that because of the improved compliance and the higher
9 penalties that -- now, that's probably some year or two
10 out, you know, out years; we said that -- and that's why
11 we used the term "reduced violations": nothing that MSHA
12 would be doing, nothing that the inspectors would be doing
13 to reduce any citations of violations, but actions on the
14 parts of the mine operators, that they would be doing
15 these to better comply and because of the higher
16 penalties.

17 So I wanted to explain that part so everybody
18 would understand that's the thought process that we
19 went -- the agency went through. You could agree with
20 that; you could take issue with that in your comments, but
21 that was our thought process.

22 MR. WILSON: Yes, ma'am. I understood that,
23 and I was taking issue with it.

24 MS. SILVEY: Okay. And then the other thing
25 that I want to comment -- you made a comment, Tom, about

1 the history, that the violations that are paid are not
2 finally adjudicated in terms of being taken into
3 consideration for history. And would you explain --

4 MR. MATTOS: Yes. There really -- actually I
5 have a question for you on that, as well, or related to
6 that.

7 The reason we changed the language in the rule
8 to say "a final order," the old language, I believe, said
9 that it had to be paid or otherwise finally adjudicated.
10 Well, actually, it doesn't have to be paid. If it's
11 not -- once -- after 30 days if it was not contested, even
12 it's not paid, it's a final order, so that is --

13 MS. SILVEY: It's no change.

14 MR. MATTOS: -- included in the history, so
15 there really is no change. It was a clarification of the
16 language, but no change.

17 MS. SILVEY: No change.

18 MR. MATTOS: Which is a segue into my question,
19 that we've covered a lot of comments over the time frame,
20 reducing it to 15 months. The current rule, on history,
21 we go back 24 months, but that 24 months is six months in
22 the past, so we're going back 2-1/2 years to start the
23 history calculation for the penalty.

24 What our intent was -- the committee had a lot
25 of conversation on this: We really think it's more

1 important to look at the most recent history in an
2 operation -- what are the current conditions in the
3 operation -- not looking at what was occurring 2-1/2 years
4 ago.

5 We did have a lot of concern about -- we have
6 to consider only final orders of the Commission. We had
7 some concerns over the contest rate, and we looked at
8 those numbers, and you had a question about that, how we
9 came up with the 15 months.

10 And in general, all -- well, the vast majority
11 of citations and orders are final within three months. So
12 that's why we went back 15 months, so that we'd get a full
13 year in, and we'd be looking at the most current history.

14 And my question to you on that is, if the
15 contest rate was not an issue; if the contested citations
16 and orders could be considered -- which they can't,
17 because it's due process issued -- would that 15-month
18 time frame work for you? Would you agree with that, or do
19 you have other concerns over that 15-month time frame,
20 beyond being able -- what -- some of the quotes here have
21 been dragging out the citations so that they're not
22 considered.

23 Is that your only concern, or are there others
24 with that 15-month time frame?

25 MR. WILSON: The main concern is that we think

1 there's several different steps in the proposed rule that
2 narrows that window for what MSHA would consider repeat
3 violations.

4 And collectively, if you add all those steps
5 together, you've got such a narrow window that we think
6 you're eliminating an important tool that currently
7 exists.

8 MR. MATTOS: Okay. On the repeat -- the
9 violation history, the only change that we have there is
10 shortening up the time frame. I think maybe there's some
11 confusion over the repeat violations of the same standard.
12 Is that an issue?

13 MR. WILSON: Well, another narrowing of the
14 window would be the same -- the exact same standard.

15 MR. MATTOS: Okay. Just to clarify that one,
16 the repeat violation of the same standard is an entirely
17 new category, so we're adding points that didn't exist
18 before for the repeat violations of the same standard.

19 And we do appreciate the comments. That's one
20 of the reasons we asked for comments on that, because it
21 is a new provision, and we did want comments on how that
22 provision is written and how we proposed it, and
23 appreciate that.

24 But we're not -- on the violation history we're
25 not narrowing down anything, I think, beyond the time

1 frame, and changing that.

2 One other question I had was, on the special
3 assessments -- we've received a lot of comments on special
4 assessments, and at the first hearing we had some comments
5 that -- or concerns that the number of special assessments
6 would increase under this proposal, and here we're hearing
7 today about concerns that they would decrease.

8 The question -- you had a question of the 2.7
9 percent of citations that were specially assessed last
10 year, what percentage of those recommended by the district
11 managers for special assessment received a special
12 assessment, and that's 100 percent; that's all of them.
13 That's the process: If they recommend it for a special
14 assessment, it gets specially assessed.

15 The committee's deliberations in changing or
16 removing the list of categories that we will automatically
17 consider for special assessment, not automatically give a
18 special assessment, but consider for special assessment --
19 really no change from what we're currently doing; we
20 just -- right now the district managers can consider any
21 citation or order, recommend any citation or order for
22 special assessment, and that does not change on the
23 proposed rule; just to clarify that.

24 We took the lists out of those categories that
25 we will automatically review for special assessment, and,

1 frankly, it was something that was -- we considered -- the
2 committee considered unnecessary in the rule, because it
3 was really doing rulemaking on MSHA, saying, This is what
4 MSHA is going to do automatically every time, and I guess
5 we need to do a better job of clarifying that in the
6 language, because we received comments both ways on that
7 one.

8 MR. WILSON: By removing that list, there's
9 still no assurance that MSHA will continue to consider
10 those eight categories. You say that's what they're doing
11 now and that's what you plan to do in the future, but
12 there is no assurance that that's what they will do.

13 MR. MATTOS: And I appreciate that comment for
14 the record. Thank you.

15 MS. SILVEY: Anybody else have anything?

16 MR. CROCCO: Yes. I have a question for Tom.
17 You made some comments about small coal operators. Was it
18 your opinion that small operators get too big of a break
19 in the way of assessments, or were you -- you heard some
20 of the earlier commenters say that, you know, the
21 assessments should be the same regardless of operator
22 size. Do you have an opinion on that?

23 MR. WILSON: Yes. I believe small operators
24 receive -- not only in assessments, but if you look
25 through waivers and every other category of -- for small

1 operators, I do believe they receive too big a break, and
2 they don't have the incentive to provide the safe working
3 conditions that's sometimes found at other operations.

4 And the only way to get their attention is to
5 raise the whole scale, and I suggest you raise the whole
6 scale. Did that answer your question?

7 MR. CROCCO: Yes, sir. Thanks.

8 MR. WILSON: Okay.

9 MR. STONE: Let me just try to clarify one
10 thing about the special penalties that will become regular
11 penalties. It is not the case that the specials -- and
12 2005 is an example -- would receive a lower penalty
13 treated as a regular. On average, for those special
14 penalties that we estimated would become regulars, the
15 average penalty as a regular went up 86 percent relative
16 to what they had been as a special.

17 And the logic for moving them from a special to
18 a regular is because we do believe that through this new
19 penalty structure that in most cases the regular penalty
20 structure will accurately or reasonably reflect the
21 seriousness of the citation and the circumstances of it.

22 And, again, going from a special to a regular
23 will yield larger penalties relative to what they had been
24 in 2005.

25 MS. SILVEY: And I'll add on to what Robert

1 said, Tom, and that is that one of the things we found
2 out -- like Jay said, we don't want to put regulations on
3 MSHA, but one of the things we did find out and we do know
4 is that, with respect to special assessments, an
5 inordinate amount of enforcement time is spent on the
6 special assessments.

7 So one of the things we thought we could do --
8 if you had an appropriate penalty, as Robert said, that we
9 felt that an appropriate penalty could be achieved through
10 the formula system, computer-generated penalty, since we
11 had increased all the factors, then the time that our
12 enforcement people would be spending reviewing and
13 analyzing the specials and commenting and providing
14 documentation -- that time could be allocated to field
15 enforcement work, so that was the driving force in there.

16 It was really sort of enforcement driven, and that's what
17 we -- another assumption that we used. So I wanted to add
18 that.

19 Anybody else?

20 (No response.)

21 MS. SILVEY: So, Tom, I would like to say that
22 we have received constructive and innovative comments.
23 Jay mentioned that earlier -- and meaningful comments, and
24 we do appreciate that, and we will use those as we go
25 forward from the hearing today -- now we've got four

1 remaining -- to the other four hearings. And I do want
2 you to know that.

3 MR. WILSON: Okay.

4 MS. SILVEY: Thank you.

5 Is there anybody else who wishes to testify?

6 (No response.)

7 MS. SILVEY: Any other persons or
8 organizations?

9 MR. HENSLEY: Good morning. My name is Guy
10 Hensley. I'm an attorney with Jim Walter Resources.

11 What concerned me about the proposed rules, as
12 I read them, is I picked a couple of citations that we
13 received in 2005, under the old current point system, and
14 ran them through the new point system, and the numbers
15 went up a lot higher than the proposed rule would have
16 indicated.

17 A non-S&S citation that I picked, at just
18 somewhat random, went from \$60, under the single-penalty
19 assessment provision, to \$807. A regular assessment for a
20 regular S&S -- reasonably likely, lost work days, one
21 person, moderate negligence -- went from \$324 to nearly
22 \$4000 under the new point system.

23 This was concerning to me, so I've been running
24 numbers ever since, with the aid of a number of people who
25 have abilities beyond mine at computers and number-

1 crunching.

2 I don't understand everything about the
3 formulas that were used or the reasons for them, and I
4 don't totally understand the goal. It appears that we're
5 trying to reduce citations and reduce the mines safer as a
6 result of that; I understand that.

7 It also appears that the goal appears to be
8 something around 20 percent reduction over time, according
9 to the paperwork that I've seen from the agency. Is that
10 pretty close to what you're trying to do?

11 MS. SILVEY: That, per se -- and I hope I --
12 clearly that's the overall goal, that violations would be
13 reduced and the mines would be safer; that the higher
14 penalties would serve as a greater inducement to mine
15 operator compliance with MSHA's standards and regulations.

16 I gave as an example of what we include in our
17 reg analysis some assumptions, and when we use those
18 assumptions, we projected that the violations would come
19 down by whatever number we included in there.

20 As a matter of fact, we show two numbers: We
21 show violations under the proposed rule with the same
22 compliance, and then we show violations -- reduced
23 violations with improved compliance, and that's an
24 assumption. I want to say that it was not necessarily a
25 per se goal that we had in mind, but it was an assumption

1 that it was something that grew out of the assumptions we
2 used when we went through that process -- the analysis
3 process.

4 And, Robert, you correct me if I'm wrong here,
5 but with respect to your comment about you took a few
6 citations -- and, Jay, you -- Robert and/or Jay -- and put
7 them through -- I'm not a data person, either. I mean,
8 I'm the last person who learned something about the
9 computer.

10 But you said you took a few and you put them
11 through the new proposal. The numbers that you see in all
12 of the analyses in the proposals are aggregate numbers,
13 and as aggregate numbers and average numbers, that
14 means -- obviously I don't have to -- you know, you --
15 that means that any particular citation might come out
16 under that or might come out -- some may come out well
17 above that, depending on, you know, the circumstances of
18 the facts surrounding that particular citation.

19 But when we took all of these violations that
20 were issued in 2005 and then ran aggregate analyses on
21 them, those are the numbers that you see reflected in the
22 agency's various analyses in the proposal.

23 Is that accurate?

24 MR. STONE: That's -- I can give you an example
25 in a couple of cases. Again, we did not start with a goal

1 of 20 percent reduction. That fell out of our analysis.
2 Certainly MSHA's goal is not to have any citations or
3 injuries and fatalities, and as constrained by the Mine
4 Act and the MINER Act, we're trying to proceed as best as
5 possible to achieve that.

6 And what we did was, in trying to figure out
7 what the compliance response would be of industry, we did
8 some economic modeling, and we assumed a particular type
9 of elasticity response of mine operators and contractors
10 to increased penalties.

11 And we've used as a particular elasticity
12 response in this -- we assumed that .3 -- minus .3. We've
13 used that in the past, and we justified it in the
14 regulatory analysis -- in the economic analysis that we
15 supported this rule with -- proposed rule with.

16 And that minus .3 could be subject to change
17 that will lead to some changes in that percentage
18 reduction. In theory if there were no response by
19 industry, there would be no reduction. But we believe
20 that industry will respond, and we assume the minus .3.

21 Pat already indicated that there is a
22 distribution of effects; basically a distribution of what
23 the penalties would be, and you're reflecting what you
24 observed with your individual firm, in particular several
25 citations.

1 You mentioned, for example, a single penalty.
2 I'll give you what the distribution is, roughly. You had
3 one going from 60 to 870 [sic], which is -- 60 to \$870.
4 And that is in the range of possibility, but it's not
5 likely for the overall number of single penalties.

6 For all single penalties, 65 percent of them
7 would go from \$60 to \$100; about 20 percent would go to an
8 average of \$155. Eight percent would go to about \$335.
9 Five percent would go to \$770, and then above that, about
10 1.8 percent would go from above \$770 to up to \$4800;
11 that's about 1.5 percent fewer -- 1.5 percent in the
12 example you used.

13 I assume it's an accurate calculation. It's
14 certainly posited, but it's not representative of all the
15 penalties that we saw, and that would be true for any of
16 the regular other penalties that you calculated.

17 MR. HENSLEY: Well, as it turned out, the
18 non-S&S citation that I had picked was a 75.400 citation,
19 and so it would be the most cited standard.

20 MS. SILVEY: Yes.

21 MR. HENSLEY: By far.

22 MS. SILVEY: Yes.

23 MR. HENSLEY: And at our mines, as many other
24 mines of any size, it would be nearly impossible not to
25 get the 20 bonus points for every 75.400, regardless of

1 non-S&S or S&S designation.

2 So it would happen a lot, because that is the
3 most-cited standard. Clearly there aren't that many
4 standards that would receive the kind of attention that a
5 75.400 would, and appropriately so.

6 That was just the starting point for the
7 analysis, because I went back for two of our three mines
8 for 2005 and aggregated the penalties and figured out what
9 those increases would be. And as you might expect, it
10 wasn't as extreme as the examples that I gave, but I think
11 the examples are symptomatic of a problem that I wanted to
12 suggest that might be in existence, because our numbers
13 ended up being way beyond the pale when I ran them for the
14 whole mine for 2005, going up from -- you know, going up
15 about 400 to 500 percent across the board.

16 And, you know, you take the elasticity number,
17 which I -- from what I understand is an arbitrary number,
18 with no quantitative analysis behind it.

19 MR. STONE: We did not quantifiably justify it,
20 but we qualitatively discussed why we have used this
21 number in the past and why we're using it now. But we do
22 not have statistical studies to justify using the minus .3
23 for elasticity.

24 MR. HENSLEY: I didn't understand how the
25 qualitative analysis led you specifically to the .3.

1 MR. STONE: We discussed several factors that
2 would lead an operator to respond or not to respond to a
3 larger extent, and so some of the reasons would be that
4 there are other factors and other points that the operator
5 will consider, for example. It's not just a penalty that
6 an operator would be concerned with: the risk of an
7 accident which would damage his property, so that would be
8 another reason why he would want to invest in safety;
9 concerned, obviously, about the health and welfare of the
10 miners who work with the operator.

11 And the operator would also be concerned about
12 if the mine had a reputation for being unsafe, the miner
13 would be concerned about attracting miners to work there,
14 about how much you'd have to pay them to attract them. So
15 there are other factors other than the fine itself. Also
16 there was the risk of closure. So there are a variety of
17 factors that go into play, not just the penalty itself,
18 that will influence the operator.

19 MR. HENSLEY: That's a fair point, and that
20 applies to -- especially to non-S&S -- more serious items.

21 I don't totally understand how that applies to -- for
22 example, we received in the past non-S&S citations for
23 cobwebs in the women's bathhouse, a condition we don't
24 want to have in existence, but if the fine goes from \$60
25 to under this formula it would be about \$160, I don't see

1 how that seems as rational. I don't understand how the
2 non-S&S -- frankly, I don't understand the policy of doing
3 away with single-penalty assessments versus just elevating
4 the penalty, period.

5 If we're going to increase penalties with the
6 goal of decreasing accidents by decreasing citations, then
7 why do we have to go to all of this analysis and just
8 increase it and see? We've got some quantitative analysis
9 that we could do; we've had two 10-percent increases in
10 the last decade that we could look and see what happened
11 to citations then.

12 If they went down 3 percent, as your elasticity
13 number would suggest, each time, then maybe we've got
14 something. If they went up, then maybe there are other
15 factors.

16 MS. SILVEY: In Tuesday's hearing -- and the
17 transcript will be on the website -- we got testimony
18 comment that we should not delete the single penalty;
19 maybe we should increase it. And now we're -- there was
20 differing testimony on how much we should increase it,
21 various gradations, to increase it from -- some, based on
22 size, maybe \$125 for medium mines; 275 for large mines;
23 that was one of the set of testimonies Tuesday.

24 But, quite frankly, if you can listen to
25 yourself, you and the United Mine Workers are saying the

1 same thing: Don't delete the single penalty. Really you
2 are. I mean, quite honestly, if I wanted to close the
3 record today and go forward to drafting the final rule,
4 you know, I might have the single penalty -- I might
5 recommend to keep the single penalty: The entire mining
6 industry was in agreement on keeping the single penalty.

7 (Applause.)

8 MS. SILVEY: Okay. Go ahead. That was a
9 little humor, everybody. You all know I'm from Alabama.

10 MR. STONE: I'll just go back to your comment,
11 if I could just make one point -- one small comment. That
12 is, you mentioned why not look at the record of when we've
13 had the two increases in penalties. These were to account
14 for basically inflation. And the problem is that the real
15 cost of penalties, taking into account, taking out the
16 inflationary effects over time, is that the real penalties
17 have not changed, so we would not really expect a serious
18 change as we keep making inflationary adjustments; the
19 real penalties have been relatively constant, taking into
20 account just the inflationary increases.

21 MR. HENSLEY: I understand that, but the theory
22 was -- and the elasticity number is driven by the fact
23 that the theory is a 10-percent increase in civil
24 penalties leads to a 3-percent decrease in the number of
25 violations.

1 We've had two 10-percent increases, and I
2 wonder what those numbers would be. I haven't seen them
3 myself, but that would be kind of a quantitative analysis
4 that I would be interested in, and I may try to run it if
5 I have time. It's taking me a lot of time just to run
6 these numbers here, and we haven't even -- the numbers
7 that I gave you with the 400 to 500 percent increases that
8 we would see, given the same level of activities we had in
9 2005 -- I didn't include special assessments in that; I
10 only had time to run the regular assessments and do the
11 conversions with the formula.

12 Continuing through the preliminary regulatory
13 economic analysis paperwork, I took our numbers and ran
14 them, at the end of all of these, through the formulas --
15 the primary formula that's in a footnote, to find out that
16 what we should expect to see is -- based on the penalties
17 that we would see, would be a 40-percent decrease in
18 violations, and I think everybody would applaud that, but
19 I don't know if it's actually going to happen. I just
20 wanted to tell you what I found.

21 Another thing that I found in doing the
22 analysis for three of our mines over the 2003-2005 period
23 is that the citations would fluctuate more than the 8
24 percent per year or 16 percent over two years that MSHA
25 talked about across the industry, and that suggested to me

1 a possibility that the number of citations is pretty
2 volatile from year to year, and you might not be able to
3 determine a whole lot about what the problem might be in
4 the industry by looking at 8 percent from year to year or
5 16 percent over two years, just as a possibility.

6 Sometimes I had a mine go up 20 percent in
7 citations one year and go down 20 percent the next year.
8 But overall our compliance record has improved in the time
9 frame that MSHA noted in the proposed rule.

10 Because this panel -- which I appreciate your
11 coming here, by the way; I meant to say that at the
12 beginning -- and your time -- solicited comments on a
13 couple of things, I will mention briefly that we do think
14 that if repeat violations of a particular standard are
15 going to be counted in a penalty points calculation, it
16 should at least be scaled to the violations per inspection
17 day, because that's the way history is considered
18 generally under Mine Act 110(I) factors.

19 And we think it's consistent and apples to
20 apples to count also violations per inspection day under
21 the same standard if you're going to count them twice,
22 which, by the way, we don't agree with.

23 There was a suggestion of a solicitation of
24 comments over whether non-S&S citations should count or
25 should not count for penalty points or additional

1 enhancement purposes, and having already said that we
2 don't agree with that proposition totally, if you're going
3 to do penalty points, we would encourage the non-S&S
4 citations not be included in that calculation.

5 It wouldn't matter for some of the most cited
6 standards in a 15-month window anyway, because for
7 75.400s, for example, you're going to hit 20 points no
8 matter which way you look at it if you include non-S&Ss or
9 S&Ss.

10 Also it is not clear -- and I wanted to ask
11 this question. It's not clear in the proposed rule
12 whether non-S&S citations would be eligible for the
13 penalty points. Would they?

14 MS. SILVEY: It's not clear?

15 MR. HENSLEY: To me it's not clearly stated in
16 the proposed rule whether non-S&S citations would receive
17 the penalty points as well.

18 MS. SILVEY: For repeat violations?

19 MR. HENSLEY: Correct.

20 MS. SILVEY: Yes. Under the proposal all
21 violations are included. And as you correctly said, the
22 agency solicited comments on whether they should be
23 limited to S&S only.

24 MR. HENSLEY: Another point that I wanted to
25 make about non-S&S recalculation under the point system is

1 that if increased penalties are supposed to increase
2 operator focus on resolving issues related to those
3 citations, and non-S&S citations are not related to a
4 current hazard, doesn't it stand to reason we would end up
5 spending a lot of time -- if we're having to increase
6 spending time on resolving non-S&S citations, that we
7 would end up spending that time on resolving those with
8 increased penalties, as opposed to resolving hazardous
9 conditions?

10 That was poorly worded, and I apologize for
11 that. I just wanted to --

12 MS. SILVEY: If I understand it, the brunt of
13 what you said is that don't we think that more time should
14 be spent on resolving issues related to hazardous
15 conditions?

16 MR. HENSLEY: Yes. And one of the premises of
17 the proposed rule is that increasing penalties will cause
18 operators to spend more time resolving --

19 MS. SILVEY: All --

20 MR. HENSLEY: -- what was cited.

21 MS. SILVEY: Right.

22 MR. HENSLEY: And we're all about complying
23 with the law; it just seems that if we're going to, you
24 know, increase a \$60 citation to \$807 in this one example
25 or maybe \$200 in most examples, it would require us to

1 spend a lot of resources on things that are admittedly not
2 hazardous by definition.

3 MS. SILVEY: Not significant and substantial.

4 MR. HENSLEY: Well --

5 MS. SILVEY: Not reasonably serious injury or
6 illness.

7 MR. HENSLEY: Right. And that's why I said
8 earlier not currently hazardous. I realize that things
9 can become hazardous even though they might not be
10 hazardous at the time they're cited; that's why I said not
11 currently hazardous.

12 MS. SILVEY: Okay.

13 MR. HENSLEY: I mean, there are some things,
14 like the cobwebs example, that would probably not be
15 hazardous, depending on the kind of spiders that would be
16 involved.

17 MS. SILVEY: I hope you don't have a lot of
18 cobwebs citations.

19 MR. HENSLEY: There was also perhaps a
20 misunderstanding in our interpretation of the good faith,
21 I guess we call it the credit, over time. I understand
22 that our obligation is to comply with the law, and I don't
23 really understand the reduction from 30 percent to 10
24 percent, because -- maybe my definition is wrong; the
25 good-faith credit was not only complying with abatement

1 with a violation within -- you know, by the deadline set
2 by the inspector, but earlier than that; that's what I
3 viewed as an incentive.

4 And I don't know if maybe I'm misunderstanding
5 what the purpose of that good-faith credit was. Is
6 that --

7 MS. SILVEY: If I -- I mean, I've got in my
8 mind that right here, but if I remember the wording of the
9 Mine Act, it says within the time set by the inspector,
10 you know, or obviously an extension.

11 So conceptually, yes, good faith -- any good
12 faith sort in any instance means doing it -- you know,
13 some consideration for doing something better, doing it
14 sooner, doing it -- you know, all kinds of positives
15 associated with doing.

16 But the good-faith criterion under the statute
17 is applicable when the operator corrects the condition --
18 abates the condition in the time set by the inspector.
19 And we just, under the proposal, thought that, you know,
20 in restructuring the penalty point table and, you know,
21 the regular assessment process, that we should reduce that
22 from 30 percent to 10 percent, recognizing that, albeit
23 that it was something that the operator must do, anyway,
24 the law does require that MSHA take into consideration
25 that aspect of the criteria.

1 MR. HENSLEY: Well, we enjoyed the 30 percent
2 while it lasted.

3 That was about all the questions that I had and
4 the comments that I had. Thank you again for coming down.

5 MS. SILVEY: Thank you for your testimony.

6 Is there anybody else who wishes to speak?

7 (No response.)

8 MS. SILVEY: I would appreciate if the persons
9 who spoke --

10 MR. BLANKENSHIP: Can I --

11 MS. SILVEY: Sure.

12 MR. BLANKENSHIP: This is James Blankenship,
13 president of Local 2245. I want something clarified.
14 These proposed rules are supposed to give operators
15 incentives to do better, to not have violations. Is that
16 correct?

17 MS. SILVEY: That's correct.

18 MR. BLANKENSHIP: And if I heard him wrong,
19 that's what I want corrected; didn't want a lawyer to sit
20 here and accept it at 20 percent on 75.400s. They say,
21 We're going to get it no matter what. Why? We shouldn't.
22 Rock dusk cleaning program -- I mean, he's telling me --
23 if I'm wrong, you all speak up, or he can speak up.

24 He's telling me that, do it; it's not going to
25 work anyway; going into it thinking it's not going to

1 work.

2 MS. SILVEY: Well, I thought that the 75.400 --
3 okay, and I mean, I -- obviously I don't have to tell you
4 this; I'm not a coal miner. But I've worked in the
5 industry a long time.

6 It was my -- he's here; he can speak for
7 himself. It was my understanding that what he was talking
8 about, generally -- generally, in an underground coal
9 mine -- and maybe he was saying that you could -- you
10 know, you work there, so you can tell -- the workers, when
11 I say that, could be as attentive as they want to be to
12 accumulations of, you know -- right?

13 MR. BLANKENSHIP: Correct.

14 MS. SILVEY: But that most likely in an
15 underground coal mine there will likely be the situation
16 where you're going to go in and find something. I
17 thought -- that's kind of how I took what he said.

18 He can make it clear, but he can do it himself.
19 I think -- that's the only way I thought -- that,
20 generally speaking, in an underground coal mine, you most
21 likely will find some situation where you will find some
22 accumulation of coal dust.

23 MR. BLANKENSHIP: But it shouldn't be what it
24 is today. I mean, if --

25 MS. SILVEY: Maybe.

1 MR. BLANKENSHIP: If these proposed rules are
2 going to say, you know, we're going to fine you a lot more
3 if you don't clean this up, if you don't do this, then me,
4 as a worker, and then, as a supervisor, should say, Okay,
5 we're going to do this; we're not going to have 400
6 75.400s like we did last year; we're going to narrow it
7 down to 200.

8 MS. SILVEY: Yes.

9 MR. BLANKENSHIP: And that 200 might get us
10 below that 20. And that's the reason I wanted to get this
11 clear before I left. If Jim Walters writing off the 20
12 point already before we even go into this? If we are,
13 this has failed.

14 MR. HENSLEY: I was using 2005's numbers. I'm
15 not sure I -- I couldn't really hear what you were asking.
16 I was just using 2005's numbers.

17 MR. BLANKENSHIP: What you said was, you know,
18 the 75.400s were going to get the 20 bonus points, no
19 matter what we do. I don't agree with that. I mean, if
20 this is supposed to lower citations and lower violations
21 of the law, then that 20 points shouldn't be there.

22 If 75.400's a problem, then that's something
23 that needs to be address with Jim Walters or whoever. We
24 shouldn't go into this thinking, well, we're going to get
25 those 20 points, so it's going to cost us \$800 for a

1 75.400.

2 To me, this process failed -- doing this
3 proposal fails if that's what we're looking at here. And
4 I just wanted to clear -- make sure I heard -- I wanted to
5 hear what he said was right.

6 75.400 can be taken care of; we can rock dust;
7 we can clean up. We can put a cleaning program into place
8 and not have those. We're going to get some, yes; we're
9 going to get some citations no matter what you do, but to
10 say I'm going to get -- I got 400 in 2003 and '4, I'm
11 going to get 400 in 2006 is the wrong attitude to have.

12 I just want to make everything clear.

13 MR. HENSLEY: Well, just speaking as the
14 company's attorney and in my role as that, I was using
15 2005's numbers, which indicated that the mines that I
16 worked at would hit their 20-point maximum at about three
17 months of the 15-month window.

18 And looking at it that way, I didn't see -- the
19 levels of reduction that will be required would certainly
20 be in the out years, as you said earlier. And I'm not on
21 the side of the -- there are a lot more people than me in
22 our safety departments, a lot of them former union safety
23 committeemen that we've brought on to try to increase our
24 focus on compliance that spend every day trying to figure
25 out how to do prevention, like what Mr. Blankenship was

1 talking about; he works with them every day.

2 And I applaud those efforts. I'm simply
3 looking at what data that I had to look at, and when I saw
4 that we were hitting our limit in three months, it was
5 kind of depressing.

6 MR. BLANKENSHIP: That's the reason I want to
7 make it clear what we're saying.

8 MS. SILVEY: I understand.

9 MR. BLANKENSHIP: Maybe you got the wrong guys.
10 I appreciate it.

11 MS. SILVEY: Thank you.

12 Anybody else?

13 (No response.)

14 MS. SILVEY: At this point, then, what I was
15 going to do is, for persons who testify and didn't sign up
16 on the attendance list, if you did not sign up on the
17 attendance list, if you wouldn't mind, just make sure that
18 you sign up -- I don't mean the attendance list; I mean
19 the speakers list. Make sure you sign the speakers list,
20 just to have -- because the speakers list, we do put it in
21 the record, so if you would make sure you sign, I'd
22 appreciate that.

23 And if nobody else wishes to speak, then, again
24 I want to thank everybody -- first of all, I want to thank
25 those who came and spoke, and then I want to thank those

1 who were in attendance, who showed that they have an
2 interest in this rulemaking.

3 I want to say, on behalf of all the panel
4 members here, that we appreciate your constructive, your
5 innovative, and your meaningful comment, and as we proceed
6 through the rulemaking process, we've clearly got some
7 comments today that we're going to have to take another
8 look at what we proposed.

9 And as I said, that's the real meaning of
10 notice-and-comment rulemaking. So as we proceed for the
11 remainder of the hearings and after we close the record,
12 we will start quickly drafting the final rule and
13 hopefully we'll have something out in December, and we
14 will use some of what you gave us today.

15 So right now what I'm going to do is I'm going
16 to close the hearing, but we are going to be around --
17 I'll probably come back here at one o'clock, to make
18 sure -- if any shows up and anybody wishes to speak, then
19 what I'll do is reopen the record, but if nobody comes
20 back, then I will not reopen the record and we will close
21 it right now. Thank you very much.

22 (Whereupon, at 12:20 p.m., the hearing was
23 concluded.)

24 //

25 //

REPORTER'S CERTIFICATE

IN RE: Public Hearing on Proposed Rule Criteria
and Procedures for Proposed Assessment
of Civil Penalties

DATE: September 28, 2006

LOCATION: Birmingham, Alabama

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 U.S. Department of Labor Mine Safety and Health Administration.

Date: 10/3/2006

Brenda Thompson
Official Reporter
Heritage Reporting Corporation
1220 L Street, N.W.
Washington, D.C. 20005