

TRANSCRIPT OF PROCEEDINGS

In the Matter of:)
)
PUBLIC HEARING ON PROPOSED)
RULE CHANGES)

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U.S. DEPARTMENT OF LABOR
MINE SAFETY AND HEALTH ADMINISTRATION

In the Matter of:)
)
PUBLIC HEARING ON PROPOSED)
RULE CHANGES)

Thursday,
October 19, 2006

Allegheny/Ohio Room
Pittsburgh Airport Marriott
777 Aten Road
Coraopolis, Pennsylvania

The meeting in the above-entitled matter was
convened, pursuant to Notice, at 9:00 a.m.

BEFORE: PATRICIA W. SILVEY
Moderator

PARTICIPANTS:

Agency Panelists:

PATRICIA W. SILVEY, Director,
Office of Standards, Regulations,
and Variables, MSHA

JAY MATTOS, Acting Director,
Assessments

PETER MONTALI
Office of Metal and Nonmetal
Mine Safety and Health

KEITH WATSON
Office of Assessments

ROBERT STONE
Economic Analysis Division

WILLIAM CROCCO
Office of Coal Mine Safety and Health

PARTICIPANTS (continued):

Agency Panelists:

JACK POWASNIK
Office of the Solicitor

Speakers:

RON VAN HORN
WES ADDINGTON
STANLEY GEARY
HANK MOORE
RON BOWERSOX
TIM BAKER
DENNIS O'DELL

P R O C E E D I N G S

(9:00 a.m.)

1
2
3 MS. SILVEY: Good morning. My name is
4 Patricia W. Silvey. I am the director of the Mine
5 Safety and Health Administration's Office of
6 Standards, Regulations, and Variances. I will be the
7 moderator of this public hearing today on MSHA's
8 proposed rule concerning civil penalties.

9 The members of the panel are: to my right,
10 Keith Watson, who is the deputy director of the Office
11 of Assessments and a member of the Rule-making
12 Committee; Jay Mattos, who is the acting director of
13 the Office of Assessments now; and the chair of the
14 Rule-making Committee could not be with us today
15 because of a previous commitment. To the right of
16 Keith, Pete Montali, who is with MSHA's Office of
17 Metal and Nonmetal Mine Safety and Health and also a
18 member of the committee; to my left, Jack Powasnik,
19 who is a lawyer with the Labor Department's
20 Solicitor's Office, and he is the attorney on the
21 committee; to his left, Robert Stone, who is MSHA's
22 chief economist and who works in my office; and to his
23 left, William Crocco, who is with MSHA's Coal Mine
24 Safety and Health Office and who is also a member of
25 the Rule-making Committee. And not to miss her, in

1 the back of the room, Linda Weitershausen, who is also
2 in the Office of Assessments, and Linda is also a
3 member of the Rule-making Committee.

4 This is the last of six hearings on this
5 proposed rule. As some of you who followed this rule-
6 making know, the first hearing was in Arlington,
7 Virginia; the second in Birmingham, Alabama; the third
8 in Salt Lake City; the fourth in St. Louis; and
9 Tuesday of this week, we were in Charleston, West
10 Virginia; and today is our final hearing.

11 The comment period for this rule closes on
12 October 23. Because of provisions in the Miner Act,
13 the Mine Improvement and New Emergency Response Act of
14 2006, MSHA must issue regulations related to the
15 penalty provisions by December 2006.

16 This hearing will be conducted in an
17 informal manner. Formal rules of evidence, as those
18 of you who have participated in MSHA hearings know, do
19 not apply. Members of the panel may question
20 witnesses, and witnesses may ask questions of the
21 panel.

22 Scheduled speakers will make their
23 presentations first, and then others will be allowed
24 to speak.

25 Before I discuss the provisions of the rule,

1 I want to give a very brief overview of the civil
2 penalty process, beginning with a clarification of
3 four terms that are used throughout the rule-making.

4 The first term is "citation." The inspector
5 issues a citation for a violation of any MSHA
6 standard, rule, order, safeguard, or regulation, and
7 the inspector sets a time to abate the condition.

8 The second is an "order." The inspector
9 issues an order under several circumstances: When a
10 violation is not abated within the time set by the
11 inspector, when the inspector finds a violation caused
12 by an unwarrantable failure to comply, or when the
13 inspector determines that an imminent danger exists.
14 Any order requires withdrawal of affected miners until
15 the violation is abated. The order does not
16 necessarily mean that the entire will be shut down.
17 It applies to the area affected by the violation.

18 Third, "significant and substantial," or as
19 we say, "S&S." An S&S violation is one that is
20 reasonably likely to result in a reasonably serious
21 injury or illness. The inspector makes the S&S
22 determination at the time of the issuance of the
23 citation.

24 Finally, "unwarrantable failure," and this
25 has been defined by case law to be "aggravated conduct

1 constituting more than ordinary negligence...."

2 Under the Mine Act, MSHA proposes penalties,
3 and the Federal Mine Safety and Health Review
4 Commission, or "the Commission" assesses penalties. A
5 proposed penalty that is not paid or contested within
6 30 days of receipt becomes a final order of the
7 Commission and is not subject to any review by any
8 court or agency. Penalties that are contested before
9 the Commission are reviewed de novo.

10 We will use the term "assessment" to refer
11 to those proposed assessments that MSHA issues, as
12 well as assessments of the Commission.

13 The Mine Act requires MSHA and the
14 Commission to consider six criteria in assessing
15 penalties, and those are: the appropriateness of the
16 penalty to the size of the business; the operator's
17 history; whether the operator was negligent; the
18 gravity of the violation; the operator's good faith in
19 abating the violation; and the effect of the penalty
20 on the operator's ability to continue in business.

21 The first five criteria are applied in
22 computing the penalty, and the last criterion is
23 applied after the penalty is proposed upon request by
24 the mine operator, and what the mine operator has to
25 do in that instance is to submit supporting material

1 if the operator believes that the penalty will
2 negatively affect the ability to continue in business.

3 MSHA would review such information and may adjust the
4 penalty.

5 MSHA published the proposal in the Federal
6 Register on September 8. We placed a copy on MSHA's
7 Web site, and sent a copy to the Small Business
8 Administration Office of Advocacy.

9 The proposal basically does two things. It
10 revises MSHA's civil penalty program to increase
11 penalty amounts and to improve the effectiveness of
12 MSHA's civil penalty process. These changes are
13 intended to induce greater mine operator compliance
14 with the Mine Act and MSHA's safety and health
15 standards, and to thereby improve safety and health
16 for miners.

17 Secondly, the proposal implements three
18 provisions of the Miner Act.

19 The proposal does not change the way
20 inspectors issue citations. Under the proposal, the
21 inspectors will continue to make factual
22 determinations with respect to safety and health
23 violations and will issue citations and orders just as
24 they do now.

25 Note that while both the Mine Act and the

1 Miner Act contain provisions for criminal fines, this
2 rule only concerns civil penalties, as the name
3 implies. Under the existing rule, MSHA has three
4 types of assessments: single, regular, and special.
5 I will now address the proposed changes with respect
6 to each type.

7 I'm going to begin with the existing civil
8 penalty assessment. Throughout these public hearings,
9 we have heard a lot about the civil penalty provision.
10 Under the existing rule, there is a \$60 single
11 penalty for non-S&S violations that are timely abated
12 and where the operator does not have an excessive
13 history of violations.

14 The agency proposes to delete the single
15 penalty provision, and here I want to make a real, if
16 I can, try to clarify for the record that by proposing
17 to delete the single penalty provision, the agency
18 will replace the single penalty provision with --
19 those single penalty, non-S&S violations that are now
20 single penalties, processed through the single
21 penalty, will now be processed through the regular
22 assessment provision.

23 So, in other words, what I'm saying is they
24 will continue to be cited, as I said. Inspectors will
25 continue to cite them, but instead of being processed

1 as a single penalty, they will now be processed, all
2 violations will be processed, through the regular
3 formula, except for special assessments, and I'll get
4 to that.

5 At this point, as further clarification, I
6 would like to draw your attention to page 53055 of the
7 proposed rule, under the "Background" portion. MSHA
8 stated, under the general background, "(a) General,"
9 in the second paragraph, the first sentence: "MSHA
10 proposes a civil penalty assessment for each
11 violation," and I want to reiterate that. "MSHA
12 proposes a civil penalty assessment for each
13 violation." So non-S&S violations will continue to be
14 cited, and we will have to propose a penalty. They
15 will not be thrown out, so to speak.

16 The second thing I want to draw your
17 attention to there in this proposal is, on page 53066,
18 and this is under the Section 4, "Executive Order
19 12866." It's under the "regulatory analysis" portion
20 of the proposal. But on 53066, in the second column,
21 number two, we state that "in the analysis --" it is
22 in reference to the analysis, but we say "-- all 2005
23 regular and single penalty assessments would be issued
24 as regular assessments under the proposal."

25 So I just want to stress that the single

1 penalty assessments under this proposal would be
2 issued as regular assessments. I think I've said
3 enough there.

4 The agency believes that, by taking this
5 action and eliminating the single penalty and
6 processing those non-S&S violations through the
7 formula system, this will cause mine operators to
8 focus their attention on preventing all hazardous
9 conditions.

10 The second type of assessment is regular
11 assessments. Regular assessments are derived by
12 assigning points for the statutory criteria and then
13 converting total points to a dollar amount. Regular
14 assessments are computer generated through MSHA's
15 management information system.

16 The proposal would make a number of changes
17 to the process for determining penalty amounts. The
18 point tables would be revised so that penalties
19 increase proportionately to increases in size,
20 history, and negligence, and the gravity or
21 seriousness of the violation.

22 Regular assessment changes are as follows:

23 Size. The size criterion includes the
24 operator size and controller size. For coal mines,
25 the operator size is measured by tonnage of coal

1 produced during the previous calendar year. For metal
2 and nonmetal mines, the operator size is measured by
3 hours worked at the mine during the previous calendar
4 year, and size for independent contractors is
5 determined by total hours worked at all mines during
6 the previous calendar year.

7 Under the proposal, the maximum number of
8 points would increase from 10 to 20 for operator size.

9 The proposal would continue to assign no points for
10 the smallest operators, and those are coal mines with
11 10,000 tons of coal up to 15,000 tons, metal/nonmetal
12 mines with 10,000 or less hours worked, and
13 independent contractors who have worked up to 10,000
14 hours at all mines.

15 Please note that the preamble to the
16 proposed rule states that, according to 2005 data,
17 nearly half of the existing coal mines had annual
18 tonnage of up to 15,000 tons. That actually is not an
19 accurate figure because it includes 463 surface
20 facilities that do not produce coal, and if we were to
21 exclude those facilities, we get a more accurate
22 number of one-fourth of producing coal mines that had
23 annual tonnage of up to 15,000 tons.

24 The proposal makes no changes to size points
25 for controlling entities. MSHA, however, solicited

1 comments on whether greater weight should be placed on
2 the size of the controlling entity, and I invite you
3 to address this issue.

4 History of Violations. The proposal
5 includes several changes to the history criteria. It
6 would shorten the time period for determining history,
7 change independent contractor history from an
8 annualized number to the total number, add a new
9 component for repeat violations of the same standard,
10 and increase the maximum number of history points.

11 Under the existing rule and the proposal,
12 only violations for which the penalty has been paid
13 are finally adjudicated or included in determining an
14 operator's history.

15 Under the proposal, the time period for
16 determining history would be shortened from 24 months
17 to 15 months. MSHA believes that the shorter time
18 period would more accurately reflect an operator's
19 current state of compliance. Both the existing rule
20 and the proposal base history for production operators
21 on violations per inspection day.

22 Under the existing regulation, history for
23 independent contractors is based on the average number
24 of violations over the past two years. The proposed
25 rule would change this and use the total number of

1 violations during the previous 15 months. Since
2 history would no longer be based on 24 months, there
3 is no need to annualize the number of violations.

4 In the proposal, MSHA solicited comments on
5 this approach to determining violation history for
6 independent contractors, and that is whether an
7 annualized average should continue to be used or
8 whether the total number should be used. I invite you
9 to address this issue today or in your written
10 comments. Violation history; the total number of
11 penalty points would be increased from 20 to 25.

12 The proposal adds a new component to the
13 history criteria for repeat violations of the same
14 standard. Penalty points would be added for more than
15 five repeat violations of the same standard during the
16 preceding 15 months. Under the proposal, repeat
17 violations would be determined according to the manner
18 in which the standard is cited. As an example, a
19 violation of Section 56.14101(a)(1) would not be
20 considered in determining the number of previous
21 violations of Section 56.14101(a)(2).

22 MSHA solicits comments on this approach to
23 determining repeat violations. Penalty points are
24 assigned for the total number of repeated violations
25 during the 15-month period. MSHA also solicited

1 comments on two additional aspects of repeat
2 violations: whether penalty points should be based on
3 the total of repeat violations or on the number of
4 repeat violations per inspection day, and whether
5 repeat violations should include all violations or
6 only S&S violations.

7 The agency invites you to address these
8 issues.

9 Negligence. The proposed rule would retain
10 the existing five levels of negligence and would
11 double the maximum number of penalty points that could
12 be assigned for negligence from 25 to 50, with the
13 increase placed entirely in the three highest levels.

14 Under the proposal, penalties would increase
15 proportionately for operators who exhibit increasingly
16 high levels of negligence.

17 Gravity. The proposed rule would retain the
18 three components of gravity -- likelihood, severity,
19 and the number of persons potentially affected -- but
20 would increase the maximum number of penalty points
21 from 30 to 88.

22 Good Faith and Abating the Violation. The
23 existing rule adds 10 penalty points if the operator
24 does not abate within the time set by the inspector
25 and reduces the total penalty by 30 percent if the

1 violation is timely abated.

2 The proposal would decrease the reduction
3 for timely abatement to 10 percent. Under the
4 proposal, no penalty points would be added for
5 violations that are not timely abated.

6 Penalty Point Conversion Table. The dollar
7 amounts on the existing conversion table range from
8 \$72 to the statutory maximum of \$60,000. The minimum
9 regular assessment is \$60. The proposal provides a
10 maximum of 208 penalty points. The revised conversion
11 table begins with \$112.

12 Under the proposal, with a 10-percent
13 reduction for timely abatement, the lowest penalty
14 would be \$100. The dollar amount of the penalty
15 increases steadily as the number of penalty points
16 increases. Beginning at 133 points, each additional
17 penalty point corresponds to an increase of
18 approximately \$3,070. The maximum penalty of \$60,000
19 is reached at 140 points. Although all penalties are
20 increased, violations with the highest number of
21 penalty points, which would generally be those that
22 involve high negligence and gravity or greater
23 violation history, will increase at a greater rate.

24 Special assessments are processed where the
25 violation is of such a nature that an appropriate

1 penalty cannot be determined using the regular
2 formula. The existing rule lists certain categories
3 of violations, such as fatalities and unwarrantable
4 failure, that must be reviewed to determine if a
5 special assessment is appropriate.

6 The proposed rule would remove this list,
7 but by so doing, MSHA would retain its discretion to
8 determine which types of violations would be reviewed
9 for special assessment without being limited to a
10 specific list. We've gotten a lot of comments on
11 special assessment also.

12 MSHA anticipates that the proposed regular
13 assessment provision will provide an appropriate
14 penalty for most types of violations because the
15 penalty amounts under the regular formula do increase.

16 This change will permit MSHA to focus its enforcement
17 resources on more field enforcement activities rather
18 than on administrative review activities.

19 The proposal would shorten the time allowed
20 to request a health and safety conference with the
21 district manager. We've also gotten a lot of comment
22 on this aspect of the proposal. Under the existing
23 rule, parties are allowed 10 days to make this
24 request. The proposal would shorten the time to five
25 days.

1 The proposed rule also includes a
2 requirement that requests for health and safety
3 conferences be in writing. MSHA is considering adding
4 a requirement that the conference requests include a
5 brief statement of the reason why each citation should
6 be conferenced. MSHA believes that this change would
7 assure that parties requesting a conference focus on
8 the issue to be conferenced, and it will also help
9 expedite the conference process by providing the
10 appropriate district manager with necessary
11 information prior to conducting the conference. MSHA
12 solicits comments on this change.

13 Finally, as mentioned earlier, the proposal
14 implements the civil penalty provisions of the Miner
15 Act, and although these provisions are included in the
16 proposal, they were effective on June 16, 2006. The
17 agency has issued a procedural instruction letter to
18 MSHA personnel containing information on procedures
19 for processing violations consistent with the Miner
20 Act. I will discuss each provision separately.

21 Unwarrantable Failure. In accordance with
22 the Miner Act, unwarrantable failure citations and
23 orders will be given penalties of at least \$2,000 and
24 \$4,000, respectively, and the proposed rule includes
25 these provisions.

1 Penalties for "Flagrant" Violations. The
2 Miner Act established a new penalty of not more than
3 \$220,000 for "flagrant" violations, and flagrant
4 violations are defined in the Miner Act as those
5 involving "a reckless or repeated failure to make
6 reasonable efforts to eliminate a known violation of a
7 mandatory health or safety standard that substantially
8 and proximately caused, or reasonably could have been
9 expected to cause, death or serious bodily injury."
10 As stated earlier, these violations would be processed
11 as special assessments.

12 Failure To Notify. The Miner Act
13 establishes a penalty of not less than \$5,000 and not
14 more than \$60,000 for failure to timely notify MSHA of
15 a death or an injury or entrapment with a reasonable
16 potential to cause death. These violations would be
17 processed as special assessments.

18 Please sign the attendance sheet in the back
19 of the room, if you have not done so. MSHA will post
20 transcripts of all of the public hearings on our Web
21 site. Each transcript will be posted there
22 approximately one week after completion of the
23 hearing, and most of the transcripts, I hope, should
24 be on the Web site right now. The transcript will
25 include the full text of my opening statement and the

1 specific issues for which the agency seeks additional
2 comment.

3 We will now begin, and please begin your
4 presentation by clearly stating your name and
5 organization for the reporter.

6 At this point, our first witness will be Ron
7 Van Horn with American Energy Corporation.

8 (Pause.)

9 MR. VAN HORN: Good morning. My name is Ron
10 Van Horn. I'm the safety director of American Energy
11 Corporation, a Murray company. I would like to thank
12 MSHA and this panel for the opportunity to provide
13 comments on the proposed civil penalty rule, a rule
14 which will have widespread effect on the industry and
15 not in the manner that MSHA seeks.

16 American Energy Corporation is an
17 underground coal mining operation located near
18 Bellesville, Ohio. We operate four continuous mining
19 sections, and we employ approximately 411 people.

20 We take safety of our employees as our
21 absolute, top commitment. It is our moral and ethical
22 responsibility to protect the health and safety of our
23 employees.

24 The proposed rule will be very harmful to
25 the safety efforts of responsible operators. Civil

1 penalties are not an incentive for safety, nor do they
2 have any positive effect on our or any other
3 responsible operator's safety efforts. We strongly
4 urge mail to modify the proposed rule and return to
5 the prior penalty system, to the extent possible.

6 Some of the provisions of the proposed rule
7 are statutorily based and cannot be affected by rule-
8 making procedures. Our comments will be more aimed at
9 the changes in which MSHA has some discretion or
10 otherwise statutory but subject to interpretation.
11 The changes as a whole are a misguided attempt to
12 increase safety by punitive actions against the
13 operators. The result would be greatly increased
14 civil penalties and an effort tripling them.

15 Our specific comments are as follows:

16 100.3(b), "Penalty to the Size of the
17 Operator's Business." MSHA has proposed to increase
18 the penalty points on size from an old maximum of 10
19 to 20 for mines over two million tons of production.
20 MSHA contends that making the monetary penalty
21 proportional will, therefore, increase compliance.

22 The view is seriously flawed and
23 discriminatory. Large operations are inherently
24 safer. This proposed change has the reverse effect of
25 punishing size, which is generally a safety enhancer.

1 The series of mine disasters that led to the Miner
2 Act were at small mines. This is typical of the
3 proposed rule and shows a disconnect between the
4 reality of mining operations and MSHA bureaucracy.

5 100.3(d), "Negligence." The old, five-tier
6 system determining points to be assigned for
7 negligence was effective and has been retained by MSHA
8 but with points for the upper three tiers increased
9 and doubled at the level of reckless disregard. Our
10 view is that the increase should not apply to moderate
11 negligence, as it would be subject to wide variations
12 of interpretations.

13 100.3(e), "Gravity." MSHA has increased the
14 potential from a maximum of 30 penalty points under
15 the previous rule to 88 penalty points under the
16 proposed rule. Historically, the gravity portion of
17 the citation is the most frequently contested item by
18 our company in health and safety conferences conducted
19 with the agency. This is primarily due to the
20 inspectors' determination of gravity being speculative
21 in nature and subject to individual interpretation.
22 The excessive increase in penalty points is
23 unwarranted in potentially subjected areas.

24 100.3(f), "Demonstrated Good Faith of
25 Operator in Abating Violations." In this misguided

1 section, MSHA actually decreases the beneficial effect
2 of timely abatements of violations by operators.
3 Previously, an operator could receive a reduction of
4 30 percent for timely abatement. Now it's only 10
5 percent: a disincentive rather than an incentive to
6 timely compliance.

7 100.3(g), "Penalty Conversion Table." This
8 now assesses \$412 for a penalty. It is inappropriate
9 to set such a floor for non-S&S penalties and mere
10 paperwork violations. This is the purpose for which a
11 single penalty assessment was designed, but this has
12 also been eliminated in Section 100.4 of the proposed
13 rule. The deletion of a single penalty; the floor of
14 \$112 will have the effect of merely increasing
15 bureaucracy and inefficiency and will not have any
16 real effect on safety compliance.

17 The concentration of MSHA and the operators
18 should be on the elimination of potential S&S
19 citations. The elimination of the single penalty
20 causes the initiative to be blurred. Lumping all
21 citations, both S&S and non-S&S, into one category
22 actually diminishes the emphasis on S&S. This is a
23 further example of the lack of a practical approach of
24 MSHA to the real issues.

25 100.4, "Unwarrantable Failure." Much of the

1 proposed rule in this area is designed to implement
2 the statutory requirement of the Miner Act. As such,
3 there is little discretion possible. It is difficult
4 to gauge the effect of one proposed change, the
5 elimination of a list of specific categories that can
6 be a basis of special assessment. Our view is that
7 this has not been a problem before, so why change it?

8 Any change would probably lead to an increase in
9 special assessments, which, if flagrant, can be
10 assessed at \$220,000. This is an unacceptable
11 combination that provides MSHA too much discretion.

12 100.6, "Procedure for Review of Citations
13 and Orders." The time period for requesting a safety
14 and health conference has been reduced from 10 to five
15 days, and there is no reason for the change. The rule
16 goes on to incorporate certain statutory disclosures.

17 MSHA predicts that, for each 10-percent increase in
18 penalty for citations, there will be a three-percent
19 decrease in the probability of occurrence. This
20 appears bogus, as compliance at responsible operations
21 are not driven by penalty costs but by other
22 motivations. This is a cynical attitude by MSHA and
23 indicates that punitive mind-set rather than safety
24 mindedness.

25 Further, in the disclosure portion, MSHA

1 states that the proposed rule is economically feasible
2 for the mining industry because the anticipated
3 expected increase in penalties will be \$15.9 million,
4 equal to .07 percent of the coal sector revenue of
5 \$22.1 billion in 2004. This, again, shows a
6 disconnect between the economic challenge faced,
7 especially by the underground coal operators and their
8 understanding of the MSHA.

9 Thank you for your time, and I will answer
10 any questions.

11 MS. SILVEY: Thank you. Some of my panel
12 members might have questions, but before any questions
13 that I might have, I have a few comments to make
14 because we've heard a lot of comments along the line
15 of your comments, Mr. Van Horn.

16 I guess, first of all, I would say that our
17 overriding purpose in issuing the proposal was to
18 provide greater inducement, and I think I said
19 something like that in my opening statement, for
20 improved operator compliance and thereby improve the
21 safety and health of miners. As I say that, I'm going
22 to do this again, and it probably appears somewhere
23 else in the transcripts, maybe at three or four of the
24 other public hearings.

25 I'm going to read the purpose of civil

1 penalties under the Mine Act, as we included in the
2 proposal, page 53055, and I'm going to quote: The
3 intended purpose of civil penalties, and I stress
4 "civil penalties," under the Mine Act is to "convince
5 operators to comply with the act's requirement," and
6 that is a direct quote from the Senate report that was
7 a part of the 1977 Mine Act. That was the
8 congressional intent in the Mine Act, that civil
9 penalties serve that purpose.

10 We issued this proposal, hopefully, to try
11 to improve that purpose. When you stated that, to
12 reduce the 30-percent good faith -- you all heard that
13 one of the criteria is the good faith of the operators
14 in timely abating the violation, and you said that, to
15 reduce that from 30 percent to 10 percent is a
16 disincentive to timely compliance.

17 I guess I would ask, though, and we've heard
18 that, too, that even if we were to go forward and
19 reduce it from the 30 percent to 10 percent,
20 operators, as you started out saying in the beginning,
21 it's your moral and ethical duty for safety to comply
22 and to have a safe and healthful workplace.

23 In a way, this is kind of a rhetorical
24 question, and it's not at all meant to put you on the
25 spot, but, hypothetically, no matter what we did in

1 the final rule, if the inspector came and issued a
2 citation for a violation at your mine, would you abate
3 the violation? This is sort of a leading question,
4 but would you timely abate? What would you do? I
5 should have said, "What would you do?" instead of
6 "Would you?"

7 MR. VAN HORN: We go beyond the abatement
8 time that the inspector gives us, and we immediately
9 start making corrections to abate that right now.
10 But, technically, you have that abatement time period
11 to get that violation abated.

12 MS. SILVEY: That's correct, but you're
13 telling me that generally you immediately abate.

14 MR. VAN HORN: We immediately abate so that
15 we can get the 30-percent reduction. Even though you
16 don't abate it, you know what's going to happen.
17 You're going to get the B order.

18 MS. SILVEY: Okay, okay. On the single
19 penalty, we've heard a lot of comments on the single
20 penalty, too, and you said that the single penalty is
21 focused on paperwork violations, and our purpose
22 should be to eliminate S&S violations, but I will say,
23 and I want to stress to everybody, in proposing to
24 delete the single penalty, our purpose was to assure a
25 focus on all violations, to eliminate all violations,

1 S&S and non-S&S. And, at this point, some of my
2 colleagues up here have jokingly called it, and,
3 unfortunately, I don't have a better thing other than
4 this.

5 But I think that, graphically, and you all
6 are not going to be able to see this either,
7 graphically, I think it is a need to do this here, and
8 you can't see this, but you can imagine this line
9 that's drawn on the horizontal axis on this sheet, a
10 line drawn along there, and then this vertical line
11 intersects on the left-hand side, about a third of the
12 horizontal line, and where the vertical line
13 intersects it, everybody in this room might agree with
14 me that everything on this side of this vertical line
15 is a non-S&S violation because we know that, and when
16 the inspector issues a citation, there is some
17 judgment call.

18 So we might agree that everything at this
19 third on this side is non-S&S. Then I drew a vertical
20 line down to the right third of this horizontal line.

21 We all might agree that everything to the right of
22 here is S&S, but somewhere in the middle here there
23 are still a lot of violations, and these can be,
24 depending on the exact situation, act of mind, and
25 even some of our inspectors might make different calls

1 on them, but they may or may not be S&S violations, or
2 they may or may not be non-S&S. But, clearly, some of
3 them fall in the category that if they were left
4 uncorrected, they would get to this right third, where
5 all of us would then agree.

6 So part of our purpose was, and I know this
7 is really, you know, an unartful kind of drawing --
8 hopefully, I've explained it, but part of our purpose
9 is that the operators would focus on reducing and
10 correcting, all being proactive and correcting, all
11 violative conditions before they occur. So, you know,
12 as best we can, that's how I would like to leave that.

13 That's one of the reasons we proposed getting rid of
14 the single penalty.

15 With respect to special assessments, I said
16 earlier, we heard a lot of discussion on that, that
17 that would give MSHA too much discretion. One of the
18 things we projected was that because we were
19 increasing the amounts in the regular formula on the
20 table, that most of the violations would receive an
21 appropriate penalty under the regular formula. And,
22 in point of fact, the special assessments would drop
23 because there is a lot of time and attention that MSHA
24 gives to reviewing the special assessments, and we
25 felt that that time and attention of our assessments

1 people, of our enforcement people, metal, nonmetal,
2 and coal, could be better spent out in the field doing
3 inspections.

4 Robert, we had a specific number of special
5 assessments that we projected from the existing. Can
6 you give that number, please?

7 MR. STONE: We estimated the number of
8 special assessments would decline from over 3,000 in
9 2005, and we estimated that of all of those of that
10 amount, fewer than 500 -- I think, 391 -- would remain
11 as special assessments. The remainder would be
12 treated as regular assessments.

13 MS. SILVEY: But in so doing, we projected
14 that their formula system would generate an
15 appropriate penalty.

16 MR. STONE: Yes. For those penalties that
17 were specials in 2005, using the regular assessment
18 formula for those special assessments, those penalties
19 would increase by 84 percent, treated as regular
20 penalties.

21 MS. SILVEY: Basically, I didn't have any
22 questions of you, Mr. Van Horn. I just wanted to try
23 to make a few comments.

24 Does any panel member have any questions?

25 MR. CROCCO: Yes. I'll ask one question,

1 Ron. You mentioned, on the size of the operator, that
2 the proposal discriminates against the biggest
3 operators. Did you have a recommendation as to how
4 that should be handled, or is that just a general
5 comment?

6 MR. VAN HORN: The small mines should be
7 judged the same as a large mine, If they violate the
8 law, they should have the same penalties as a large
9 mine, and that's what's not really fair, whether it
10 puts them out of business or not. If they are
11 violating a law, they are violating a law.

12 MS. SILVEY: Okay. Thank you, Mr. Van Horn.

13 MR. VAN HORN: Thank you.

14 MS. SILVEY: Next, we have Wes Addington
15 with the Appalachian Citizens Law Center, Inc.

16 MR. ADDINGTON: Thanks for your time. My
17 name is Wes Addington, and I'm with the Appalachian
18 Citizens Law Center in Prestonsburg, Kentucky.

19 We're a nonprofit law office that works on
20 the issues related to coal mining. Personally, I
21 represent coal miners that are in 105(c)
22 discrimination cases in which they have been fired or
23 discriminated against for making safety complaints. I
24 also represent miners and widows in claims for black
25 lung benefits.

1 I guess my first comment would be about the
2 hearing process itself. I think there should have
3 been a seventh hearing in this case. I think it
4 should have been located in eastern Kentucky. If
5 you're a Harlan County miner, if you're a Harlan
6 County mine operator, Charleston or Birmingham are not
7 really convenient if you want to make your comments
8 known publicly.

9 Kentucky has seen 15 fatalities this year.
10 That's the most in over a decade. That's another
11 reason I think that east Kentucky deserved a hearing
12 in this matter.

13 As to the proposed rule, looking at
14 100.3(b), the size of the operator's business, I think
15 we would stress that the penalty points should be
16 doubled also for the size of the controlling entity.
17 I'm not sure I understand the distinction made with
18 the proposed rule just doubling up the size of the
19 mine and then not changing the size of the controlling
20 entity. It seems like that would be, in some ways,
21 unfair to larger operations that necessarily don't
22 have a larger controlling entity.

23 Looking at the 100.3(c), the history of
24 violations, I think the reduction from 24 months to 15
25 months and then taking in the history is problematic.

1 You know, if you look at the litigation on some of
2 these citation contests, it's going to take a month,
3 two months, sometimes three months to get the proposed
4 assessment out there, 30 days to contest that, and
5 then, with litigation, you're going to get outside
6 that 15-month period, and I think you're going to have
7 some of these citations resolved within that 15-to-24-
8 month window.

9 So I think some of the more serious
10 citations aren't going to be taken into account
11 because there are not going to be final adjudications.

12 So, therefore, that really impacts this new, repeat-
13 violation aspect of 100.3(c).

14 Looking at 100.3(e), the gravity, one thing
15 that I noticed that I think I had a problem with was
16 the fact that the permanently disabling category,
17 under "severity" dealing with gravity, hasn't
18 increased at the same rate as the lost work days and
19 fatality category. I'm not sure why that is. I know,
20 in Kentucky, in the last few years, we've had a major
21 problem with a number of serious accidents in which
22 miners have been maimed, paralyzed, permanently
23 disabled. So I think that category should also be
24 increased, at least at the rate of the lost work days
25 or the new fatality proposed penalty points.

1 Looking at 100.3(f), the law center doesn't
2 have a problem with a decrease in the amount of the
3 reduction, from 30 to 10 percent. I think it's
4 appropriate since operators are already required by
5 law to abate the violations. However, we did have a
6 problem with the deletion of the 10 additional penalty
7 points for failure to abate. If, you know, the
8 penalty assessment system rewards operators who abate
9 violation, then it's only logical that the same system
10 would punish those operators who don't. I'm not sure
11 why that should be removed.

12 Looking at special assessments, 100.5, I'm a
13 little confused as to what's being done here, and, I
14 guess, what the Department of Labor's stance now is on
15 these former eight categories that are currently in
16 the rule. We believe that the eight categories should
17 not be deleted from the law. In fact, you could also
18 include language, sort of as the preamble indicates,
19 to indicate that these eight categories aren't
20 exclusive and that MSHA could have the power to also
21 have a special assessment in the categories outside of
22 these eight categories.

23 I guess the problem I have with the language
24 is you're deleting language. I think the preamble is
25 a little disingenuous as to why you're deleting some

1 of the language currently in the rule. If I could
2 read from the preamble, it says that the reason that
3 you're deleting the -- I think it's the second
4 sentence, the sentence referring to the types of
5 violations. It says the sentence is unnecessary
6 because the first sentence specifies that it is within
7 MSHA's discretion to waive the regular assessment.

8 Well, the first part of the sentence is sort
9 of redundant in that manner, but you're also deleting
10 the part of the sentence that says, "Some types of
11 violations may be of such a nature of seriousness that
12 it's not possible to determine an appropriate penalty
13 under these provisions." And by looking at the
14 numbers, what you're citing, that special assessments
15 are going to go down by 85 percent, it almost seems
16 like, to me, that you're looking at these eight
17 categories, which are very serious, and now saying,
18 well, I think they can be lumped in with the regular
19 assessments. And by deleting that language, you are
20 taking away some of the seriousness that was formerly
21 in the rule.

22 I heard some stats a minute ago on the
23 special assessment that you expect the special
24 assessment penalties now, on average, to go up by 84
25 percent. Is that correct? Could someone tell me what

1 the regular assessments are expected to go up by, on
2 average?

3 MR. STONE: Yes. Not taking into account
4 the reduction in the number of penalties induced by
5 this rule, they would go up by about 176 percent.

6 MR. ADDINGTON: I guess that's my point
7 again. Again, the special assessments proportionally,
8 these eight categories, it seems like, to me, in some
9 ways, proportionally, they are not being taken into
10 account as are other violations. So I'm not sure why
11 they are being lumped back in with the regular
12 assessments now.

13 I guess my point is, it seems like some of
14 the emphasis from these eight categories, including
15 fatalities, injuries, violation of closure orders, not
16 permitting inspections, 105(c) of violations,
17 violations of imminent danger, is pretty serious
18 stuff, and it seems like, to me, by removing some of
19 the language within 100.5, you're no longer
20 highlighting the gravity of these categories anymore.

21 In some ways, you're bringing them closer in line
22 with some of the other violations in the regular
23 assessment system currently.

24 I guess, finally, my final comment as to the
25 proposed rules doesn't deal so much with the

1 assessment but the collection of these penalties. I
2 think that's an area that has to be improved;
3 otherwise, you can change the way that you assess
4 penalties, you can increase those penalties to induce
5 compliance, but if you're not collecting, that sort of
6 all falls by the wayside. I know, in eastern
7 Kentucky, we have a number of operators, some of whom
8 historically have failed to pay any fines because they
9 knew they could keep operating that way, and nothing
10 really ever happened to them.

11 I'm hoping that the way in which MSHA and
12 the Treasury collect these fines improves greatly.
13 Thank you.

14 MS. SILVEY: Thank you. On your last
15 comment, we are working closer with Treasury and have
16 done -- I think we've made a lot of progress in
17 getting in excess of a 180-day-old debt to Treasury
18 and then, obviously, you know, where Treasury goes in
19 collecting that. But I think the backlogs -- we've
20 been working frantically to reduce the backlogs, and,
21 in point of fact, I think we are succeeding.

22 Do you want to add anything?

23 MR. WATSON: If I can say, in the last year,
24 we've gone from having probably \$10 million in debt
25 that's over 180 days' old at the agency to having

1 probably \$12 million that's over 180 days over at
2 Treasury, so we shifted all of that to Treasury in the
3 last year, so it's a big elimination of backlogs.

4 MR. ADDINGTON: I applaud that. What I was
5 saying, it was not only unfair, in my personal
6 opinion, to the miners that have to work in those
7 mines in which operators aren't paying their
8 penalties, it's unfair to your inspectors, who have to
9 go in those mines, and then it's unfair to other coal
10 operators who, like clockwork, follow the system in
11 good faith, and either they pay their citation, or
12 they contest it. Some operators out there, especially
13 in eastern Kentucky, were just ignoring the system.
14 It was almost like it didn't matter that nothing was
15 being done, so I'm hoping that changes. Thank you.

16 MS. SILVEY: Thank you.

17 MR. STONE: I wanted to respond to your
18 comments about the special specials movement. Part of
19 the rationale for converting some of the specials to
20 regulars is because it is our belief and expectation
21 that, by revising the points system, the penalty
22 points incurred for various degrees of negligence and
23 other factors, that the actual regular schedule will
24 properly deal with the circumstances of the penalty
25 and that only in fewer cases the special assessment

1 will be needed.

2 You did note that the percentage increase is
3 small for the specials treated as regulars than what's
4 happening to the regulars, but there a couple of
5 reasons for that. One reason is because the old scale
6 didn't in any way fully capture some of the special
7 attributes. We believe that they are better captured
8 in our system here so that we would expect the
9 percentage to go up less.

10 The second reason that they would be less is
11 because, for some of the specials, at least, we're
12 dealing with very high penalties to begin with. So if
13 a penalty in 2005 for special were, let's say,
14 \$30,000, we were limited to \$60,000 here for a regular
15 assessment. So it couldn't go up more than 100
16 percent, couldn't go up 176 percent.

17 So, in other words, there is a ceiling here
18 which sort of limits the percentage increase, to some
19 extent, so the number we would expect to be smaller.

20 MS. SILVEY: Okay. Thank you.

21 Next, we have Stanley Geary, Pennsylvania
22 Coal Association.

23 MR. GEARY: Good morning. My name is
24 Stanley Geary. I'm the director of regulatory affairs
25 of the Pennsylvania Coal Association, and our office

1 is in Harrisburg, Pennsylvania. PCA appreciates the
2 opportunity to present testimony on the proposed
3 amendments to MSHA's civil penalty regulations. With
4 me is Hank Moore of Jackson Kelly, LLP's, Pittsburgh
5 office. Hank is PCA's legal counsel in mine safety
6 matters.

7 PCA is a trade association representing both
8 underground and surface bituminous coal mine
9 operators. The vast majority of the bituminous coal
10 produced by Pennsylvania underground mines is produced
11 by members of PCA.

12 Rather than simply implementing the new
13 requirements of the Miner Act with respect to civil
14 penalties, the proposed rule dramatically reshapes the
15 whole penalty structure, as well as modifying the
16 procedures, making the system imbalanced. While some
17 increase in civil penalties may be warranted, the
18 dramatic reconfiguration of the system is not. The
19 new scheme will greatly increase the amount of
20 operators' penalties without any demonstrated
21 concomitant increase in safety and without an
22 appropriate cost-benefit analysis of the impact of the
23 proposed amendments.

24 PCA suggests that the proposed rule should
25 be revised in the following respects.

1 The three-tier penalty system that includes
2 single penalties for non-S&S violations should be
3 retained.

4 The proposed addition of the new "repeat"
5 category for history of violations should not be
6 adopted.

7 The existing "good faith" reduction of 30
8 percent, rather than 10 percent, for prompt abatement
9 should be retained.

10 The proposed significant increases in
11 penalties, without a showing that such increases will
12 promote actual safety, should be reduced.

13 The regulatory criteria for special
14 assessments should be retained rather than eliminated.

15 The time for requesting a conference should
16 be kept at 10 days, and the conferencing system should
17 be improved.

18 I will address each of these
19 recommendations.

20 The single-penalty assessments should be
21 retained. The existing, three-tiered assessment
22 system -- single, formula, and special -- takes into
23 account the fact that many enforcement actions concern
24 technical violations, record-keeping violations, or
25 violations with very low potential for injury.

1 In the May 21, 1982, edition of the Federal
2 Register, MSHA outlined the need for the three-tiered
3 system, including a relatively small penalty for non-
4 S&S violations, and I'll quote from that, from the
5 Federal Register: "MSHA believes that the single
6 penalty provision will help achieve improved health
7 and safety for miners by eliminating the need to spend
8 disproportionate amounts of time reviewing and
9 processing violations whose impact on safety and
10 health is minimal. The primary focus of both MSHA and
11 the mining community must be on the prevention and
12 correction of conditions which pose a serious risk to
13 the safety and health of miners."

14 This statement is still applicable today.

15 The removal of the single-penalty assessment
16 will greatly increase penalties for non-S&S citations
17 that present no real degree of hazard.

18 For example, one of PCA's members was just
19 cited for an alleged violation of 30 C.F.R. § 75.400
20 (accumulation of combustible materials) for the drill
21 tailings from horizontal degas holes contained within
22 a sump and which were soupy in consistency. The
23 operator had not previously been cited with respect to
24 such tailings, and the citations represented a change
25 in the field office's interpretation of what

1 constitutes a "hazardous" accumulation of coal. This
2 would be assessed under the current scheme at \$60.
3 Under the proposed rules, the penalty would be between
4 \$154 and \$764, depending on the "repeat" history
5 points.

6 There is an additional basis for keeping the
7 single-penalty assessment in the penalty scheme. A
8 \$60 penalty makes it far less likely for an operator
9 to contest such citations. Significant increases in
10 penalties for violations that have minimal impact on
11 safety and health will lead to more contests,
12 resulting in increased costs and burdens on the
13 operator, on MSHA, on the Department of Labor
14 solicitor's office, and on the Review Commission;
15 costs not considered by MSHA in its cost-benefit
16 analysis of the proposed rule.

17 Decrease in the Good-faith Reduction. MSHA
18 has proposed changing the amount of reduction in the
19 penalty when the operator abates the citation within
20 the time period set by the inspector from 30 percent
21 to 10 percent. The rationale for this proposed change
22 appears to be the assertion that the operator has to
23 abate the condition anyway, and there is no reason to
24 reward it for doing what it is supposed to do.

25 In 1982, MSHA had a different opinion on

1 this subject, again quoting from the Federal Register:

2 "Since the civil penalty system, by its very nature,
3 addresses existing hazards, timely abatement is most
4 critical to miner safety and health. The good-faith
5 criterion is the principal mechanism within the civil
6 penalty formula for recognizing abatement, and MSHA
7 believes that this revision encourages the early
8 correction of hazardous conditions."

9 In many cases, operators begin correcting
10 violations as soon as inspector indicates that a
11 citation will be issued but before it is actually
12 written. A reduction from 30 percent to 10 percent
13 for the good-faith credit removes substantially all of
14 the incentive for early correction of violations.

15 History of Violations. MSHA has proposed
16 making two significant changes in the use of an
17 operator's violation history: first, reduction in the
18 time period for history of violations from 24 months
19 to 15 months; and, second, creation of a second
20 separate category of violation history for "repeat
21 violations."

22 PCA believes that the reduction in the time
23 period does more accurately capture what might be
24 going on at a mine, and PCA supports that proposed
25 change. However, PCA objects to creation of the

1 additional category, the "repeat" violation, to be
2 used in addition to the operator's history of previous
3 violations established in Section 105(b)(1)(B) of the
4 Mine Act. The addition of the repeat violation
5 category to the already existing violation history
6 category appears to count history twice for an
7 operator. Also, there are more significant problems
8 with this proposal.

9 In each category of mining, but especially
10 in underground coal mining, MSHA issues citations and
11 orders for a disproportionate number of violations of
12 one or two standards. In coal mining, over 12 percent
13 of all violations are of 30 C.F.R. § 75.400
14 (accumulation of combustible materials). The large
15 number of violations of this standard is due in part
16 to the fact that the standard does not set out any
17 criteria for what constitutes a hazardous accumulation
18 of coal and the fact that citations have been issued
19 for a number of different types of conditions in
20 various areas of mines.

21 For example, citations have been issued for
22 depths of coal ranging from zero to eight inches under
23 a conveyor belt; for coal that is so wet that it has
24 to be scooped up in buckets; for material with an
25 incombustible content approaching 70 percent; for

1 paper bags and candy wrappers; and for "spider webs"
2 of coal dust. Those conditions addressed conditions
3 at the face, in roadways even where the bottom
4 consists of coal, along conveyor belts, and in return
5 airways.

6 The use of a repeat violation criterion for
7 such a vague standard, which can cover a myriad of
8 situations, arbitrarily lumps together different areas
9 of the mine and different violation scenarios. Thus,
10 penalties could be escalated on a repeat violation
11 criterion even if the violation in question is
12 dissimilar to other violations of the same standard by
13 the operator.

14 Also, the fact that the repeat violation
15 category is not limited to S&S violations is
16 problematic. The thrust of this change, as well as
17 other changes, such as elimination of the single
18 penalty, appears to have virtually eliminated the
19 significance of an S&S finding, contrary to the intent
20 of the Mine Act.

21 Finally, the proposed repeat violation
22 criterion fails to consider that large mines will
23 receive more violations. Many mines have even rather
24 modest size now have 300 or more inspector days each
25 year. It is a given that the more inspector days a

1 mine has, the more violations it will receive. As
2 noted earlier, violations such as those involving
3 accumulation of combustible materials are subjective
4 and involve issues in unrelated areas of mines.

5 Operators of large mines could receive more
6 total citations of this type of standard than smaller
7 operators because of the size of the operation and the
8 number of inspection shifts received in a 15-month
9 period. As a suggested alternative, using a rate-per-
10 inspection shift would at least provide some fairness
11 in assessing repeat violations.

12 Special Assessment Criteria. The proposed
13 rule virtually eliminates the criteria to be applied
14 in determining what particular violations are
15 considered appropriate for special assessment. We
16 hope that MSHA's assertion that this is being done
17 because fewer penalties will be reviewed for special
18 assessment is correct.

19 We believe that the majority of violations
20 should be assessed by the formula, and those
21 violations potentially subject to special assessment
22 should be limited to a very small category, which
23 would include "flagrant" violations, as defined by the
24 Miner Act. "Discretionary" use of special assessments
25 should be eliminated. Such exercise of discretion

1 only leads to arbitrary enforcement, as seen with
2 respect to independent contractors, which was the
3 situation in the Twentymile Coal Company case.

4 Also, MSHA should include in the regulations
5 the matrix of criteria that it is now using to
6 calculate special assessments. The perception has
7 always been that MSHA's special assessments are the
8 result of arbitrary calculations. We believe that it
9 would be far better if mine operators understood how
10 MSHA arrives at the amount of special assessments. As
11 PCA understands, there is a point system for special
12 assessments. That point system should be included in
13 the regulations.

14 Operator Size. The proposed rule will,
15 according to MSHA, impose larger increases in
16 penalties on larger operators. There is no
17 justification for this disparate treatment. The
18 penalty scheme already takes into account mine size.
19 There is no basis for disproportionately increasing
20 the penalties on larger operators, especially given
21 MSHA's position over the years that it is small mines
22 that sustain a disproportionate share of injuries.
23 Larger operators, using MSHA's definition, typically
24 have proven, effective, safety programs to reduce
25 injuries. Despite this, the proposed rule penalizes

1 them because of their size.

2 Controlling Entity. MSHA has asked for
3 comments concerning the weight that should be assigned
4 in the penalty scheme to the size of a controlling
5 entity. No weight should be assigned to the size of
6 the controlling entity. The Mine Act is very
7 specific: It is the size of the operator, not some
8 other entity up the corporate chain that is considered
9 in calculating the size of the penalty. The existing
10 system itself is inappropriate and contrary to law
11 because of the use of the size of the controlling
12 entity as a factor in calculating the penalty. No new
13 system should include that factor in any fashion.

14 Conferences. The proposed rule will shorten
15 the period for an operator or miners' representative
16 to request a conference. The purported basis is that
17 it will result in penalties being assessed closer in
18 time to issuance of a citation. That rationale is
19 without foundation. The delay in the process occurs
20 not in the request for a conference but after the
21 request. In many districts, conferences are not held
22 for as many as five or six months after a request for
23 a conference. That delay is not caused by the
24 conference request.

25 Further, there are substantial delays in the

1 assessment of penalties, sometimes over a year for
2 special assessments. The reduction of the time period
3 for requesting a conference serves no purpose other
4 than to potentially cut off some operators and miners'
5 representatives from having a conference.

6 A requirement that would expedite penalty
7 assessment would be to require conferences to be held
8 within 30 days of the issuance of the citation or
9 order so that, if the operator is not satisfied, it
10 can file and immediate contest.

11 Also, the current conferencing process lacks
12 credibility. Therefore, the rule should address the
13 inadequacies of the conferencing process, including
14 scheduling of conferences in a timely fashion and
15 providing that conferences be fair, balanced, and
16 independent of the district structure.

17 PCA believes it is time to remove the
18 conferencing officers from under the jurisdiction of
19 the district managers and their subordinate managers
20 and give them authority to make changes to citations,
21 orders, and proposed assessments that are appropriate
22 under the facts. That could significantly reduce the
23 number of contests, thereby allowing all parties to
24 concentrate their efforts on preventing and correcting
25 hazardous conditions.

1 Again, PCA appreciates this opportunity to
2 comment on the proposed rules. We also intend to
3 submit written comments by the deadline. Thank you.

4 MS. SILVEY: Thank you.

5 I have a few comments. First of all, with
6 respect to the single penalty, really, I don't think I
7 need to make any more comments. I want to, for the
8 record, sort of reiterate the explanation I gave
9 earlier at this public hearing because you mentioned
10 that the single penalty addressed technical violations
11 with low potential to cause harm, and, in point of
12 fact, those are the ones that are the non-S&S
13 violations.

14 But the only thing I would say, and I will
15 say again, is that sometimes, because of the judgment
16 involved, the non-S&S violation may appropriately fit
17 as a non-S&S violation, depending on the circumstance,
18 depending on the inspector, but, and I will reiterate
19 this, if that condition is left uncorrected, that non-
20 S&S violation can, in another situation, five minutes
21 later, depending on the condition, can lead to an S&S
22 situation, and it was with that in mind.

23 So I think that the non-S&S violations,
24 clearly, the non-S&S violations are those that are not
25 significant and substantial. The S&S violations are

1 the others. But there is a gradation of violations
2 that, depending on the circumstance, might fit in
3 either category, either one category or the other, and
4 they agency was intending to put an emphasis
5 particularly on those violations and to get all of
6 those violations eliminated from the mine and
7 workplace, so I want to stress that.

8 I would like to ask you if, with respect to
9 your comment on decreasing the good-faith reduction,
10 would that proposed change -- I'm sort of going to ask
11 you maybe in a little bit way than I asked the other
12 gentleman -- would that proposed change, the change of
13 the 30 percent to the 10 percent, cause any change to
14 the way the operators in your organization, your trade
15 association, address violations at their mines, do you
16 think?

17 MR. GEARY: I'll let Hank answer that
18 because he spends more time out at the mines that I
19 did.

20 MS. SILVEY: And before I finish that, there
21 was another. It's a second part of that, because, at
22 some point in your comment, you said that change would
23 remove the incentive for the early correction of
24 violations.

25 MR. GEARY: Reduce it, substantially reduce

1 it.

2 MS. SILVEY: Okay. I thought you said
3 "remove." Why would it reduce the incentive for the
4 earlier? Why do you say that? Why do you say that?

5 MR. GEARY: You asked me why I say that, so
6 I'll answer that question, but I'll let Hank answer
7 the first question that you asked.

8 My understanding is, if an inspector says,
9 "I'm going to write a citation," the operator
10 immediately starts to correct this before it's even
11 written, and part of the reason they do that is they
12 just want to get things done. Let's say you have a
13 paperwork violation, and you have 24 hours to fix it,
14 and you were going to get a 30-percent reduction, but
15 now you're only going to get a 10-percent reduction.
16 What's the rush in fixing that? That's not a
17 violation that affects health and safety; it's a
18 paperwork reduction.

19 MS. SILVEY: My question I'm asking you
20 deals with all of the violations. I'm just asking
21 you, why would that change the approach in the way you
22 --

23 MR. GEARY: Well, apparently, in 1982, MSHA
24 felt that, by increasing the amount up to 30 percent,
25 it would be an inducement, but now your position is

1 it's no longer and inducement.

2 MS. SILVEY: No. Our position is not that
3 it's an inducement. We proposed a 10-percent
4 reduction in good faith, so that's some reduction in
5 good faith, and I guess all I'm asking for you is,
6 does that change? Would that change the way you
7 approach the correction of violations --

8 MR. GEARY: That's the question I deferred
9 to Hank. I'll let Hank answer that one.

10 MS. SILVEY: All right. I'll listen to
11 Hank, then.

12 MR. MOORE: Let me answer that, as I don't
13 think it would necessarily decrease the amount of time
14 it takes an operator to abate a citation, but
15 recognize what we have here. We have a strict
16 liability act. There is a violation whether or not
17 the operator knows of it. So when the inspector walks
18 up on him, the operator may never have known it, and,
19 at that point, the inspectors says, "I've got a
20 problem with this," and the operator then takes steps
21 to correct it. That should be rewarded, in our view,
22 and recognize also that the inspector walks up to him
23 and says, "I'm going to cite this," and then, in coal,
24 what they do is they go outside at the end of the day
25 and write it up.

1 Well, a lot of times -- in fact, a majority
2 of the times -- that's corrected before it's put on
3 paper, which is what the act requires. The abatement
4 time, actually, as I understand most of the abatement
5 times, looking at them over the years, really go from
6 when they verbally told you about it.

7 There should be a reward for abating it
8 quickly, and I think the 30-percent reduction is a far
9 more appropriate reward than a 10-percent reduction,
10 that historically you want operators, when the
11 inspector says, "I've got a problem with this," to
12 start taking action. There is nothing wrong with
13 providing them with an incentive to do that, and I
14 think the 30 percent does; the 10 percent, I don't
15 think, really does.

16 MS. SILVEY: Okay. At some point, Mr.
17 Geary, you gave several incidents of non-S&S
18 violations when you were citing in your testimony on
19 75.400. You gave paper bags, candy wrappers, spider
20 webs. If I could recall your attention to that part
21 of your testimony, would you repeat that exactly, what
22 you said there?

23 MR. GEARY: Yes. I didn't say that it's
24 non-S&S. I would just saying that those are examples
25 of different kinds of conditions that have been cited

1 under that standard because that standard doesn't have
2 subparts, as I understand it. So there are --

3 MS. SILVEY: Go on, yes.

4 MR. GEARY: So those are just examples of
5 conditions that have been cited under that standard.
6 I didn't say they were cited as S&S or non-S&S.

7 MS. SILVEY: Okay. Give them to me again.

8 MR. GEARY: Okay. I'll give you a copy, if
9 you want to follow along. It's on page 4.

10 MS. SILVEY: Yes. Thank you.

11 MR. GEARY: It's the second paragraph on
12 page 4, and the examples are about halfway down in the
13 paragraph. If you want, I'll read them again for
14 everyone's benefit.

15 "Citations have been issued for depths of
16 coal from zero to eight inches under a conveyor belt;
17 for coal that is so wet that it has to be scooped up
18 in buckets; for material with an incombustible content
19 approaching 70 percent; for paper bags and candy
20 wrappers; and for 'spider webs' of coal dust." Those
21 are the examples.

22 MS. SILVEY: And I know we've heard this
23 throughout these public hearings. People pick out, a
24 lot of times, some of their most graphic citations. I
25 guess I would do the same thing.

1 Have you all received a lot of citations for
2 paper bags and candy wrappers?

3 MR. GEARY: I'll defer again to Hank.

4 MR. MOORE: I have seen it --

5 MR. GEARY: Hank has spent his lifetime.

6 MS. SILVEY: I know that.

7 MR. MOORE: I have seen at almost every mine
8 I've represented over the years paper bags,
9 particularly rock dust bags, being cited as
10 combustible materials. I've also seen very recently
11 at a mine --

12 MS. SILVEY: I was really looking for the
13 candy wrapper one.

14 MR. MOORE: I saw recently at a mine -- it's
15 not in this district -- where they had actually
16 gathered up things, such as paper bags and candy
17 wrappers and the like -- and were staging them to take
18 outside, and they were cited for combustible
19 materials.

20 MS. SILVEY: Okay. I understand that, but
21 do you have a lot of citations like that?

22 MR. MOORE: I couldn't put a number on them.
23 I've seen enough of them over the years to know that
24 it is not uncommon.

25 MS. SILVEY: I'm going to ask you the same

1 thing that I've asked other people throughout these
2 hearings, seriously. Some of your paper bag and candy
3 wrapper citations, I would like you to send to us.

4 MR. MOORE: Okay.

5 MS. SILVEY: That's all. That's all that I
6 have. Does anybody else have any comments?

7 MR. CROCCO: Let me ask you a question about
8 the size of operator. You said you objected to the
9 proposed change -- operator. Were you intending to
10 say that the current system is adequate, in your view,
11 or did you have something else in mind?

12 MR. GEARY: I'm going to let Hank answer
13 that one, too.

14 MR. MOORE: I think the current system is
15 adequate. It addresses size of operators in a way
16 that's consistent with the Mine Act.

17 MR. MONTALI: Yes. I have one question.
18 You did say you disagree with the 10 days-to-five days
19 for requesting a conference and that there are some
20 areas that citations would normally take between five
21 and six months to be conferenced. I would like you,
22 if you have it available, to send out to this group so
23 we can review that because I'm not aware of it taking
24 that long, unless there are some special circumstances
25 involved. So If you have a listing of what offices

1 you were dealing with in that timeframe, we would like
2 to have some comments --

3 MR. MOORE: We did conduct a survey that
4 included districts either than District 2, and the
5 outside range was where we were looking at five to six
6 months, but we can provide some of the names of those
7 districts and what portions of the districts we're
8 talking about.

9 MR. STONE: I just wanted to make one
10 observation, basically to amplify, I support what Pat
11 Silvey said about single penalties and the fact that
12 what currently are single penalties really encompass a
13 wide range of different types of penalties. Some of
14 them really are pure non-S&S. Some have the potential
15 for being S&S. Some are paperwork. Some may be
16 wrappers or other factors that would seem to be
17 relatively non hazardous perhaps; some are not.

18 But I wanted to emphasize that by going to
19 regular penalties, it allows us to make those
20 distinctions. By our calculations, approximately 65
21 percent of what were single penalties, we estimate,
22 would still receive the minimum penalty. It would go
23 from \$60 to \$100, and then there are various
24 gradations, but the point is that, at least the
25 majority, about two-thirds of the penalties, would, in

1 fact, be treated equivalently except for a \$40
2 increase, as the single penalty is now. So, again, it
3 allows us the flexibility to more accurately reflect
4 the circumstances of the violation.

5 MR. GEARY: And this is no disrespect, but
6 these percentages that you're throwing out are really
7 just estimates, projections. You don't know if that's
8 going to be the case three years from now. That's
9 part of the reason why we have the concerns that we
10 have.

11 MR. STONE: Those numbers were based on
12 looking at the penalties in 2005 and giving them what
13 they would receive as a regular penalty. Admittedly,
14 circumstances could change, and the composition of
15 penalties could change, but at least to the extent
16 that we looked at set of penalties in 2005, and we
17 calculated them as regular penalties, that's what we
18 would find. So that's, we think, fairly accurate.

19 MR. GEARY: Okay. Thank you. Anything
20 else?

21 MS. SILVEY: No.

22 MR. GEARY: Thank you.

23 MS. SILVEY: Thank you very much.

24 Okay. Next on our list, we have Ron
25 Bowersox, UMWA, United Mine Workers.

1 MR. BOWERSOX: Good morning. My name is Ron
2 Bowersox of the United Mine Workers.

3 First, I would like to address to the panel,
4 the location of hearings should be considered in the
5 future in order to receive maximum participation.
6 Washington, PA, would be a more central location hub
7 for the miners represented here today. The distance
8 of travel, the time you're coming into Pittsburgh, has
9 got to be a considering factor. Some of the miners
10 here today worked the afternoon shift last evening,
11 and they get up, like, four or five in the morning to
12 get here to this hearing.

13 I would like to speak on penalty points,
14 small mines versus large mines, MSHA's points based on
15 mine size. Small mines have less inspection shifts
16 than larger mines do per quarter. That's a large
17 advantage. For example, Emerald Mine, to complete
18 this last quarter, they had as high as five inspectors
19 on one shift to complete that mine size. Small mines
20 didn't complete within a couple of weeks, sometimes
21 less.

22 I agree with MSHA that often fines are too
23 low at the larger mines, which results in it's cheaper
24 to pay the fine than interfere with the production.
25 Why wouldn't that theory not work the same in a small

1 mine?

2 I also believe a violation is a violation.
3 I've requested -- a couple of times, and never once
4 did my wages have a bearing on what the cost of the
5 fine would be, do I can't see any difference for the
6 coal miner.

7 A miner working a small mine should have the
8 same equal enforcement to protect them. The agency
9 solicits comments on whether greater weight should be
10 placed on the size of the controlling entity. Paper
11 trails are hard to follow. I would like to know how
12 you're going to do this sometimes.

13 I agree with Mr. Van Horn. This dual
14 enforcement must be stopped, and all operators must be
15 required to abide by all regulations or suffer the
16 same initial penalty.

17 MSHA should not be in the business of
18 determining if penalties assessed result in the loss
19 of a business.

20 One last item that I would like to see if
21 the panel would address: How are you going to address
22 safeguards at the mines, as far as assessments? Are
23 they the same, or is there any change in this
24 proposal?

25 MS. SILVEY: No change in this proposal with

1 respect to addressing safeguards. Safeguards would be
2 addressed as they are now, yes. No change under this
3 proposal.

4 MR. BOWERSOX: Okay.

5 MS. SILVEY: The safeguard would be written
6 as it is now. The inspector would come back.

7 MR. BOWERSOX: That's all I have.

8 MS. SILVEY: Does anybody have anything?

9 (No response.)

10 MS. SILVEY: Thank you, sir.

11 At this point, is there anybody else in the
12 audience who wishes to speak? Anybody else in the
13 audience who wishes to speak?

14 MR. BAKER: It looks like me.

15 MS. SILVEY: I was going to say, you know
16 what they say, three times.

17 MR. BAKER: I wasn't going to let that
18 happen.

19 MS. SILVEY: You weren't going to let it get
20 to the third time.

21 MR. BAKER: I wasn't going to let that
22 happen.

23 My name is Tim Baker. I'm with the United
24 Mine Workers. I'll try to limit my comments today to
25 some of the issues that I've heard, since I've already

1 testified once, and I'll kind of do, as best I can,
2 and just do some highlights, but there are a lot of
3 areas that we agree with the commenters that have been
4 here before me, and we would assert that a reduction
5 in the number of days to ask for a conference from
6 five to 10 is burdensome.

7 With the current scheme of shifts that
8 people work at the mine, and especially at our
9 operations, and we'll have Mine Committee men or
10 Safety Committee men on several different shifts. The
11 citations that are issued need to be discussed with
12 those folks, and sometimes it's difficult to get
13 together. So we would certainly advocate that the 10
14 days is retained. We've got to be honest about this.
15 Reducing that timeframe from 10 days to five is not
16 going to expedite this process at all. It's just not
17 going to do it. So we would advocate and agree with
18 the previous comments.

19 In some ways, as I listen to what goes on, I
20 find some of the comments disingenuous because I
21 continue to hear that citing someone and citing them
22 with a higher penalty will not induce them to act as a
23 good citizen. I guess, to put it in perspective from
24 where we come from, most of the employers out there
25 have programs for safety at their mine where they will

1 -- I'm using their words -- take action that is
2 punitive against an employee who does something
3 unsafe, or they perceive to be unsafe.

4 So it's pretty disingenuous to come before
5 any panel and say, "Boy, if you fine us, and it's
6 punitive, it doesn't incur just to be good citizens
7 and do everything right," but turn around and go back
8 to the mine and say to Bill, the roof boulder
9 operator, "That was an unsafe act, you know. I'm
10 going to take some punitive action against you."

11 So it's one way or the other. We believe
12 that the fine scheme that is created here may not be
13 perfect, and we have our objections and have
14 registered some of those, but that is the only course
15 to at least have some of these operators come into
16 compliance, and we would like to point that out.

17 The other thing I would like to point out is
18 there continues to be discussion about the
19 subjectivity of the inspector. Will it be S&S? Won't
20 it be S&S? What's the gravity going to be? It's all
21 subjective, and it's so difficult to get your arms
22 around, and they agency really has us where they want
23 us because they can do these things, but, on the other
24 hand, as we go through the process, they also say,
25 don't be real prescriptive whenever you do a rule so

1 that you don't tie us into anything real tight.

2 You either get the subjectivity, or you get
3 the long document that tells you exactly what you can
4 do every step of the way. So we've got to look at
5 this very carefully and say, really, basically, which
6 way do you want it? Do you want us to use a little
7 subjectivity? Sometimes you may feel it works against
8 you; sometimes it may work for you, or do you want us
9 to tell you every step of the way, and if you step
10 just outside the line, you're going to get nailed?

11 So you've got to be careful -- I guess it is
12 kind of be careful what you ask for. So we've got to
13 look at those things. I would say the example that
14 was used, 75.400, which is obviously the big item that
15 is written, generally speaking, they are not S&Ss, as
16 I see them. Most of them are not S&S, but the
17 citation or the violation still exists. It's got to
18 be corrected. There has got to be an inducement to
19 correct that, and to say these are kind of minuscule
20 and paperwork kind of thing, they are not. The last
21 time I heard, rock dust bags do burn. I don't care if
22 there was rock dust in it at one time or not; it still
23 does burn, so it is a combustible material.

24 All of those things need to be taken into
25 consideration when we look at these things. Some of

1 these citations are not just paperwork. I would say,
2 even the non-S&S, the vast majority are not just
3 paperwork issues, so we've got to look at those.

4 We would agree that there is a deep
5 disparity between small and large mines. That should
6 never be the case. We're in the business of mining
7 coal. You know the rules, and if you don't know the
8 rules and don't understand them, first of all, you
9 shouldn't be in the business.

10 Secondly, if you're in the business, know
11 the rules, and you break the rules, everybody should
12 be treated equally. We've stated this before, but I
13 don't think we can state it often enough, is the
14 baseline fine should always be the same. If there are
15 extenuating circumstances, such as gravity, and we
16 would agree with the repeat violations, should be a
17 factor, then you can go up from there and increase
18 those fines. But that should not apply less to a
19 small operator than it does to a large operator. If
20 the conditions at one mine that has 400 employees are
21 exactly the same as one that has five employees, the
22 end result should be the same fine.

23 I mean, fairness across the board, and I
24 know most people in here won't feel bad for me, but
25 yesterday I was in Pittsburgh, and they towed my car.

1 When I went to get the car out of the impoundment,
2 they didn't say, "By the way, about how much money do
3 you make? How big are you? Can you afford the money
4 to pay the fine?" They just said, "Here's the bill.
5 Pay the bill."

6 The same scenario should work. You violate;
7 the fine is the fine because there are certain
8 responsibilities, I think, that we look for everybody
9 to have. Mine operators are supposed to comply.
10 Miners are supposed to work safely, and MSHA has a set
11 of responsibilities that you all know well, and that's
12 the enforcement of the Mine Act.

13 You issue citations, you assess them, and
14 you collect penalties, and since we're to that point
15 right now, we do need to address -- you do need to go
16 back and have some teeth that collects these
17 penalties. Simply saying, "We sent a large chunk of
18 them to Treasury," doesn't do it because they will sit
19 at Treasury uncollected, and that doesn't induce
20 compliance.

21 There has got to be some mechanism to get
22 those sent back and shut that operation down. They
23 shouldn't be mining coal if they don't pay their
24 bills.

25 I talked about equal inspection time at

1 mines. I think that was raised here before, but we
2 should have some comparable inspection time. If it
3 takes three days to do a section in a large mine with
4 X amount of equipment, it should take those same three
5 days in a small mine. It should all be the same.

6 I didn't talk too much the last time about
7 special assessments, but I think we need to do that.
8 We are concerned that, when you drop the eight
9 categories, obviously there will be a wholesale run to
10 eliminate special assessments, and maybe that's not
11 all bad, to look at that in a broader context. But I
12 think we need more information on what's going to
13 trigger a special assessment because right now we're
14 just saying, well, we'll look at it and decide, but
15 that's pretty broad discretion.

16 I think we need, at least, some parameters,
17 need to be clear on at least some of the issues that
18 will certainly be out there for special assessment.
19 We're not comfortable with fewer of them being special
20 assessed, but it's hard to make too many statements on
21 it because the details aren't there. The data isn't
22 there. I think we need more of that data.

23 I've also spoken, and will just say again
24 that this is the Mine Act. This is not just a coal
25 mine act. I think you need to reassess what you're

1 doing, whether it's sand and gravel or anything in
2 metal, nonmetal. Equal treatment across the board is
3 something that needs to be considered here. They are,
4 after all, miners and deserve the same protections.

5 We will get the final information to you,
6 but, you know, the concern with small mines, sometimes
7 reporting is a problem, and I think we all recognize
8 that. The reporting can be simply a paper chase. Do
9 you report all of your accidents, or don't you? I
10 would like to believe that they are all reported, but
11 we all know better.

12 So what we do is when we do an analysis, and
13 we will get that to you in our final comments, the one
14 thing that you're going to report every time because
15 you have no choice is a fatality. I think, as you
16 look at those numbers, you will see that small mines
17 are the largest problem in this equation. Congress
18 gave you the ability to look at small mines specially.

19 We believe you're doing it in reverse. You
20 have enough data to show that small mines are a
21 problem. They need more enforcement. They don't need
22 less. They don't need benefits that ought not be
23 there. You have the ability to change the statutory
24 language, as you have proved in the past, to eliminate
25 this, whether or not they stay in business. That's

1 not MSHA's problem. If they can't pay, they should go
2 out of business.

3 The reduction, I've talked about before. We
4 don't believe there should be a 10-percent reduction
5 for good faith. You know the rules. You broke the
6 rules. You pay the penalty.

7 You can't say that you get a benefit, and I
8 shouldn't use it like that -- you shouldn't get
9 something special off your bill just because you
10 abated it in an allotted amount of time, and if that
11 is an incentive, is that is truly considered, at this
12 point, an incentive on the part of some companies to
13 abate within a short period of time, we would suggest
14 you just shorten the abatement period. Instead of
15 giving them five days to abate, give them two. That
16 will get it abated faster. There should be no
17 incentive, and there should be no discount for taking
18 care of that.

19 I don't think I have anything else. I think
20 we've pretty much covered most of the topics. We will
21 have written comments and certainly more data to fill
22 in the blanks where we've made some statements where
23 we believe or we see, but we would also ask the same
24 from you. We're still looking at those, and through
25 this rule, there are many beliefs and assumptions on

1 the part of MSHA. It's hard to get your hands around
2 beliefs and assumptions because mine might not
3 necessarily be the same as what I'm looking at on the
4 paper I'm reading.

5 If there are any questions or comments, I
6 would be happy to take those questions and see what I
7 can do with them.

8 MS. SILVEY: I'm going to make a comment
9 now. Tim said we've got beliefs and assumptions, and
10 we do have beliefs and assumptions, particularly in
11 our analysis, and as I've said at other public
12 hearings -- I haven't said it thus far today -- when
13 you all read the analysis, and not necessarily saying
14 that it's the most exciting reading in the world, but
15 when you do read it, if you disagree with our
16 assumptions, then let us know, and the most optimal
17 comment would be the one where you disagree with our
18 assumptions, and you provide specific data in terms of
19 why you disagree or alternatives to what our
20 assumptions were. That would be very useful in
21 helping us develop this final rule.

22 Had Tim not raised this, I might not have
23 said, but he was saying he is still getting through.
24 When you look at the regulatory analysis, one of the
25 things we did is we, as Robert stated earlier, we took

1 our 2005 -- that was our body of violations -- that's
2 what we had to start dealing with -- we took all of
3 the violations cited in 2005, and then we developed a
4 baseline, a baseline of civil penalties, 24-point-some
5 million dollars, if I recall, and a baseline of
6 violations.

7 Then what we did is we took the proposed
8 rule, and we applied, under the new table and the new
9 dollar amounts under the proposal, we applied those to
10 those violations, and then we got, if I'm not
11 mistaken, roughly, \$68 million, all of this done in
12 the aggregate now.

13 Then what we did is we said that, when these
14 new penalties go into effect, most operators will
15 expend some amount of money, and I think our
16 projection was \$8.9 million, to improve compliance.
17 We didn't add that to the cost of the rule because
18 that was to improve compliance related to existing
19 standards, so we had already costed those out.

20 And we said, when they will spend that \$8.9
21 million, ultimately, it will be the passage of some
22 time, and I was quoted in one of the papers as saying
23 six months. Your guess is as good as mine. It could
24 be six months or within a year, but within some
25 passage of time, then the violations would go down,

1 and we then estimated that roughly, because of this
2 improved compliance, that would be about 20 percent --
3 I think it was 20 percent -- fewer violations.

4 So, therefore, ultimately, then, the
5 penalties would go from \$68 million to \$45 million.
6 Now, those are assumptions, but we did explain those,
7 and we broke down the penalty amounts by coal mines,
8 by sizes of coal mines, by metal/nonmetal mines, and
9 by sizes of metal/nonmetal mines.

10 But if there are those of you who, when you
11 read that, you disagree with those assumptions, then
12 let us know. Let us know alternatives that you might
13 have. We would really appreciate that.

14 I didn't have any questions of you, Tim.
15 You triggered my thinking about making that comment.

16 MR. BAKER: But just one comment on that.
17 You know, as the rule clearly does, I think we've all
18 looked at the previous rule and said, well, you know,
19 larger fines get fined larger amounts than smaller
20 mines, and that was part of that process. But as you
21 created this particular document, you've increased
22 that substantially beyond what it ever was before.

23 Listen, I would never mean to sit here and
24 say, you don't fine the large operator. I mean, if
25 they get banged, they get banged. That's not my

1 problem. They have got to pay their bills just like
2 everybody else. But it has gotten to the point where
3 this particular document that almost seems to be
4 taking the fairness out of the system at all, and I'm
5 saying that inspection times should be equal, but I'm
6 also saying, if the fine for a large operator is
7 \$60,000 for this particular violation, and that
8 condition exists at a smaller mine, that ought to be
9 \$60,000.

10 If they can afford to pay it, fine. If they
11 can't afford to pay it, what you're actually doing is
12 you're saying, "Well, we're going to fine you less.
13 You're allowed to have a lesser degree of safety than
14 the other guy," and that's what it amounts to, in our
15 estimation. The bill is the bill.

16 MS. SILVEY: We understand. We clearly have
17 heard that comment, but I do want to say to everybody
18 so you do know, we're not necessarily trying to signal
19 how what's going to happen in the final rule because
20 it doesn't mean that a small operator wouldn't get a
21 penalty, as Tim; it just means that, in computing the
22 penalty, different points would be given for certain
23 of the criteria, and for the size criteria, the very
24 smallest operators, under this proposal, which is no
25 different than the existing rule, would get no points

1 for size. But we did that, trying to be consistent
2 with the Mine Act, which is what I read at the
3 beginning, talking about the six statutory criteria.

4 We've heard a lot of comments on that, so I
5 just want everybody to know that --

6 MR. BAKER: But now you've got me going
7 again because you changed the statutory criteria
8 previously in previous rules. So you can't hide
9 behind, we have a criteria that's statutory because
10 the statutory criteria of the Mine Act is no
11 ventilating face areas with belt air. So you can
12 change it if you want.

13 MS. SILVEY: I didn't finish with you, Tim.
14 I have one last question. When they towed your car
15 in Pittsburgh, where were you parked?

16 MR. BAKER: I was parked in Arby's parking
17 lot.

18 MS. SILVEY: Now you're telling me a lie,
19 that you were parked in Arby's parking lot.

20 MR. BAKER: Okay. Just to make it real
21 brief, I thought if I went in and bought a coffee, I
22 could walk my kid back to his dorm, but the two truck
23 was late.

24 MS. SILVEY: I won't say any more because
25 I'm making some assumptions now --

1 MR. BAKER: I paid my citation.

2 MS. SILVEY: -- that I'd better not make.
3 Okay. Thank you.

4 MR. MOORE: I just have one quick comment
5 regarding the reduction for good faith -- made a
6 comment such as there should be no percentage given
7 for good faith doing that, and the comment was,
8 instead of five days, reduce it down to two days. You
9 know, whenever citations are determined by the
10 inspector, they review the situation, see exactly what
11 that situation is, and determine the appropriate
12 amount of time for that company to correct that
13 violation.

14 Now, it may be a situation where it could
15 take five days, or it could be a situation which
16 generally takes five minutes. The inspector actually
17 has to determine that, what is the proper amount of
18 time needed for that company to abate that citation
19 and take care of that violation?

20 So if the determination is that it needs two
21 days because they have to order a part, and they do
22 order it, that's the quickest that they can do that,
23 to correct that. Then, on the other hand, if you
24 don't have enough air in the last cross-cut, they are
25 not giving them a week to do that; they are going to

1 do that immediately. So I think the inspector
2 actually tries to take the appropriate action with the
3 circumstances involved to do that.

4 MR. BAKER: And I would agree, and I would
5 say, in most instances, they do that, but I did hear
6 the comment that we try abate it quickly so we can get
7 our 30 percent. Well, if the idea is you're going to
8 get your 30 percent, and you do it quick, apparently
9 in these instances where you can do it quick, you
10 shouldn't get a rebate. Just do it quick. We'll give
11 you less time to do it. That way, we'll know it's
12 done quick.

13 But I do understand what you're saying, and
14 there are those instances where, you know, you may
15 need 15 days to do something, and I understand that.
16 But to make a comment that we do that quickly so we
17 can get our 30 percent is kind of, in my opinion --

18 MR. MOORE: If it can be done in five
19 minutes --

20 MR. BAKER: It should be done in five
21 minutes. You know, I've got to be honest with you.
22 Most inspectors that I have dealt with look at those
23 things pretty objectively and give the allotted time
24 needed for some things and say, "No, you've got to fix
25 it now." But that's what the comment was kind of

1 directed at. Anything else? Thank you.

2 MS. SILVEY: Thank you. Anybody else?

3 MR. O'DELL: My name is Dennis O'Dell,
4 administrator of occupational health and safety for
5 the United Mine Workers. I didn't plan on speaking
6 today, but based on some of the conversation that took
7 place, I would like to add some comments, if I may.

8 As of January of this year, it's been a
9 very, very trying time for the coal industry. It's
10 been a bad year for us. Many things have happened.
11 Some people say bad luck. Some say conditions have
12 just caught up with us. But whatever, it's been a bad
13 year for us, and as a result of that, Congress has
14 given us an opportunity to fix some things so that the
15 industry will be better for operators and miners
16 throughout the country.

17 There is a lot of confusion based on this
18 rule, and I think you heard it first in Alabama. I
19 looked at it, Tim looked at it, our field reps looked
20 at it, our rank-and-file miners looked at it, and when
21 we sat down, and we talked about how this rule was
22 written, there was still a lot of confusion on this
23 single assessment, and you've heard that through
24 testimony.

25 I would say that if the operators were

1 honest, and I think they have been -- there is some
2 confusion on their end as well as what this is saying
3 -- that's something that maybe, through our fault, we
4 should have requested when the rule first came out, to
5 have a sit-down, if at all possible, with all
6 interested parties to get through this.

7 I know there is still some time left before
8 the closing date on this. I would like to see the
9 opportunity, and I don't even know if it's possible or
10 not, with the rules of ethics and everything else, but
11 I would like to see the opportunity for all interested
12 parties to be able to sit down in an open-room
13 discussion and have some good, healthy debate as to
14 what this really does mean so that we can answer, give
15 a good, solid answer, to what our positions are on how
16 this whole structure is laid out.

17 I think that has to happen because, even as
18 of today, as people walk out of here, they are going
19 to be confused. I'm not sure that by eliminating the
20 single assessment, the \$60 fine, that it's going to do
21 the right thing, even though I'm hearing that fines
22 will increase the numbers.

23 It's going to generate more revenue, more
24 money for you, the agency, but I'm trying to think
25 back about what the percentage of the \$60 fines are,

1 as far as the fines structure goes now. How much of
2 that is actually written in the whole realm of things
3 today versus the S&S, the more serious citations?
4 What percentage of that is actually -- I would say
5 that's the majority of the fines that are written
6 today. Is that going to go away?

7 Here is the important part of my whole
8 comment is that we have an opportunity to make some
9 good changes for the very people that need the changes
10 to be made. Number one, that's the inspector that's
11 on the ground writing these citations. He needs to
12 understand the rules and the guidelines, and he needs
13 to have the tools to be able to write the citation so
14 that the citation sticks, and the next step, the
15 conference officers. They need to be able to
16 understand how this is going to work as well. They
17 need to be able to have the tools to understand how
18 this whole process -- I honestly believe there are
19 still -- Patricia, I heard what you said early on, at
20 the beginning of this.

21 I talked to my folks from Alabama after the
22 first hearing, but even after the discussion that took
23 place then, there is still some confusion on how this
24 whole thing is supposed to work. Collection is still
25 a huge problem, collection of these fines.

1 There's a lot of fines, and I know you said
2 earlier that that's being addressed, but there's a lot
3 of fines that go uncollected, and that's something
4 that needs to be fixed, and I don't know if it can be
5 fixed in this setting or not, but I'm going to make
6 the comment anyway just for the record that that's
7 something else that needs to be addressed.

8 I want to thank you guys for all of the hard
9 work you've done in putting this together. We don't
10 want to see anybody put out of business because those
11 operators are the very people that we work for. So we
12 don't want to see anybody put out of business, but
13 what Tim, and I heard other people say, is you have to
14 level, and I just want to reinforce, you have to level
15 that playing field.

16 Based on what I've read and the testimony
17 I've heard, it's still a very uneven playing field for
18 the large operators versus the small operators, and I
19 think that's a huge thing that has to be fixed in this
20 whole process because it certainly seems that those
21 small operators -- it's going to be based on the
22 criteria.

23 Excuse me for my ignorance on this, but the
24 criteria that's set up, and how the new structure is
25 written, those \$100 fines, if they are taken to be

1 assessed, and they get a 30-point reduction for timely
2 abatement, and I can't remember now what the other,
3 without looking at it in front of me, where are those
4 fines actually -- what are they going to be? Are they
5 going to be less than what that \$60 fine would have
6 been to begin with? I'm sure that's an easy answer.

7 MR. WATSON: The \$100 is after the good-
8 faith reduction.

9 MR. O'DELL: After the good-faith reduction.
10 Okay. So Tim probably understands that better than I
11 do because Tim has been -- we've had some discussion
12 on this -- Tim has been involved, as far as putting
13 our comments together on this. I just want to address
14 this panel and say that I appreciate the work that
15 you've done, but please take the comments that you've
16 heard. Patricia, the fact that you've had to
17 reiterate at each hearing --

18 MS. SILVEY: I don't disagree with you, and
19 I'm going to do it one final time because I don't want
20 anybody to leave here confused.

21 MR. O'DELL: But there will be. That's the
22 problem. There is going to be still confusion out
23 there as to where this whole thing is supposed to go.
24 So with that, I'll shut up, and I thank you for your
25 time.

1 MS. SILVEY: Thank you.

2 I'm going to talk about the single penalty
3 again. On the single penalty, I really would like
4 nobody to leave here not fully understanding what the
5 agency did with respect to the single penalty. We
6 said in the proposal we would delete the single
7 penalty, and in that part of the proposal, on that
8 page, I took it last night and looked at it again,
9 where we said we would delete the existing single-
10 penalty assessment provision, page 53056, and it's a
11 semicolon.

12 What we could have done, equally could have
13 done, was to say, after that semicolon, taken the
14 sentences from 53066 -- I'm reading from 53056 --
15 taken the sentence from 53066: "Regular and single-
16 penalty assessments would be issued as regular
17 assessments under the proposed rule," which means that
18 all non-S&S violations, which were issued as single
19 penalties today, under the proposal, would be issued
20 as -- what did I read? I'm going to go back and read
21 my exact sentence: "-- would be issued as regular
22 assessments under the proposed rule."

23 Dennis, you asked the question, Is that
24 going away? The single penalties are not going away.
25 The inspectors will be issuing them, as they do

1 today, using the citation form, making the same
2 determinations with respect to the conditions at the
3 mine, with respect to gravity, negligence, likely,
4 highly unlikely, and it's just that those citations
5 would be processed under the formula system because,
6 under the proposal, we now would have a two-tier
7 system as opposed to a three-tier system. We would
8 have the regular assessment and the special
9 assessment.

10 So it is important to me, and I think I
11 speak for our panel, the Labor Department's panel,
12 that as we close these hearings today, that the
13 public, particularly the mining public, understands
14 that the non-S&S violations under this proposed rule,
15 the one that is the subject of this hearing, and non-
16 S&S violations would be processed as regular
17 assessments under the proposal.

18 One thing I did want to comment on, Mr.
19 O'Dell, and that is the collections. We've heard a
20 lot of comment on the collections, and I, you know,
21 spoke to it, but with respect to treating collections
22 in this proposal, the collection issue is outside the
23 scope of the rule-making, but it is a part of MSHA's
24 business, and I felt like we should talk to it, and it
25 is a part of what the assessments office does.

1 MR. O'DELL: Is there anything in this rule
2 that would give the inspector the ability -- I think
3 you said it earlier -- it gives them the power to
4 actually shut a section down? Is that written --

5 MS. SILVEY: For nonpayment of penalties?

6 MR. O'DELL: Yes.

7 MS. SILVEY: No.

8 MR. O'DELL: Just on the violation, the
9 severity of the violation.

10 MS. SILVEY: Yes. Right. On the severity
11 of the violation.

12 (Discussion held off the record.)

13 MS. SILVEY: Is there anybody else who
14 wishes to speak?

15 (No response.)

16 MS. SILVEY: There being nobody else, it
17 appears as though nobody else wishes to speak, then,
18 at this point, I'm going to say, on behalf of the
19 Labor Department and the Mine Safety and Health
20 Administration, give our appreciation to everybody who
21 appeared at this hearing today. Those of you who
22 provided testimony and comment, those of you who
23 appeared here and did not comment but at least showed
24 to us that you have an interest in these proceedings,
25 we want you to know that we appreciate that.

1 We have gotten a lot of comment. This may
2 not have been a long hearing, but this hearing is
3 indicative of the types of comments and testimony
4 we've taken over the process of the six hearings, and
5 the comments have run the gamut. I mean, we've heard
6 support for certain provisions of the proposal. We've
7 heard opposition to certain provisions.

8 As I stated earlier, for those of you who
9 will provide us comments before the record closes, we
10 would be very appreciative if that, in your comments,
11 you would provide specifics that support whatever your
12 position is, specifics in support of your positions
13 and your comments. If you have alternatives to the
14 proposal, we would appreciate very much you supplying
15 us with specific alternatives.

16 In any event, as I said earlier, we have to
17 do this final rule by December 2 of '06. Obviously,
18 that doesn't leave us much time, but as we go forward,
19 we will be very mindful of your comment and testimony,
20 and as we develop the final rule.

21 So, with that in mind, at this point, I'm
22 going to conclude the hearing, and we will stay here,
23 however, for the next -- probably we will stay here
24 until at least 1 o'clock -- so I'm saying that to all
25 of you -- in case anybody knows anybody or even thinks

1 that they want to go back on the record and make a
2 comment, we'll be around. But at this point, there
3 being nobody else who wishes to speak, and, again,
4 finally, me expressing appreciation to all of you, I
5 will conclude these proceedings.

6 (Whereupon, at 11:00 a.m., the hearing in
7 the above-entitled matter was concluded.)

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REPORTER'S CERTIFICATE

DOCKET NO.: n/a
CASE TITLE: Proposed Rule Changes
HEARING DATE: October 19, 2006
LOCATION: Coraopolis, Pennsylvania

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 United States Department of Labor.

Date: October 19, 2006

— Joel Rosenthal

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