

UNITED STATES DEPARTMENT OF LABOR  
MINE SAFETY AND HEALTH ADMINISTRATION

In the Matter of: )  
 )  
 30 CRF PART 72 )  
 )  
 DETERMINATION OF CONCENTRATION OF )  
 RESPIRABLE COAL MINE DUST; )  
 PROPOSED RULE )  
 )  
 30 CFR PARTS 70, 75 AND 90 )  
 )  
 VERIFICATION OF UNDERGROUND COAL MINE )  
 OPERATORS' DUST CONTROL PLANS AND )  
 COMPLIANCE SAMPLING FOR RESPIRABLE )  
 DUST; PROPOSED RULE )

Alpine East Ballroom  
 Hilton Salt Lake City Center  
 255 South West Temple  
 Salt Lake City, Utah

Thursday,  
 August 17, 2000

The public hearing reconvened, pursuant to  
 notice at 8:30 a.m.

BEFORE:

MARVIN NICHOLS  
 Administrator, Coal Mine Safety and Health

RON SCHELL,  
 Chief, Coal Health Division

LARRY REYNOLDS,  
 Office of the Solicitor

LARRY GRAYSON,  
 NIOSH, Associate Director Mining Research

Heritage Reporting Corporation  
 (202) 628-4888

PAUL HEWETT,  
NIOSH, Industrial Hygienist

APPEARANCES: (continued)

CAROL JONES,  
MSHA, Director, Office of Standards, Regulations and Variances

GEORGE NIEWIADOMSKI,  
Mine Safety and Health Specialist, Coal Mine Safety and Health

THOMAS TOMB,  
Chief, Dust Division, Pittsburgh Safety and Health Technology  
Center

JON KOGUT,  
Mathematical Statistician, Office of Program Policy Evaluation

REBECCA ROPER,  
Senior Health Scientist, Office of Standards, Regulations and  
Variances

RON FORD,  
Economist, Office of Standards, Regulations and Variances

RODNEY BROWN,  
MSHA, Office of Information and Public Affairs

PAM KING,  
MSHA, Office of Standards, Regulations and Variances

C O N T E N T S

<u>STATEMENTS:</u>	<u>PAGE:</u>
TOM WILSON, UNITED MINE WORKERS OF AMERICA	343
JOE MAIN, UNITED MINE WORKERS OF AMERICA, ADMINISTRATOR OF HEALTH AND SAFETY	383
JOHN F. DE BUYS, JR., BURR & FORMAN LLP, BIRMINGHAM, ALABAMA	427

P R O C E E D I N G S

MR. NICHOLS: Ready to go, Tom?

STATEMENT OF TOM WILSON, UNITED MINE WORKERS OF AMERICA

MR. WILSON: Good morning.

MR. NICHOLS: Good morning.

MR. WILSON: Before I get into the prepared part of my presentation there is a few loose ends I'd like to deal with, the first one being on the topic of public hearings.

I sat back at Prestonsburg and here and there was times when panel members gave needed explanation to the proposed rules. And for those needed explanations, we thank you. And I can only describe this as a perception, but there's other times Tom Wilson, who's been at many public hearings throughout my career, got the perception that the panel's comments and the panel's actions went far beyond explanations. It went to the point of being defense, being argumentative and I guess one could say intimidating, especially to rank and file coal miners who give up their time to come to a public hearing to try to change things for their brothers and sisters back at the mine.

I'm a simple man. There's no mystery to me. One thing I've always tried to do and will continue to do, I will have no hidden agenda. I'm always going to tell somebody upfront where I'm coming from and where I'm going. The panel on at least a couple of occasions said they was listening and only time will tell if this panel actually listened to the testimony put forth before you at the public hearings. I hope that time that tells that is sooner rather than later. I, for one, will be anxiously awaiting any indication that this agency has listened.

We will soon be in receipt of the transcript of these public hearings. And those transcripts, of course, will be utilized to make the final comments before the close of the record. The one place Tom Wilson's at and one place Tom Wilson's going, I'm going to be personally on my own time reviewing and highlighting that transcript for those areas in my mind that was argumentative, defensive and intimidating. Because one goal I've got sitting here this morning is to go wherever I have to go to try to make future public hearings more open and warm for us intimidated miners that feel the need to come before you and testify.

I know this with all my heart, if it's intimidating, if we face argumentativeness, defensiveness and intimidation and we feel it I feel no comfort at all that the non-union sector would be comfortable coming before you and opening up their hearts and their minds and trying to change things.

I remember several comments where panel members after testimony was given was told you should be going to your District Manager. I've been there. That doesn't work.

I've heard other comments from panel members when they would act interested and the perception was given, Well, tell Arlington. We care. I've been there. That doesn't work.

I even went one step further than what was suggested by any panel member and I went to the Office of Inspector General. I've been there. I know personally that does not work.

There's panel members sitting before me that flew into my state for the sole purpose of putting together a surprise dust inspection at one of the local coal mines. There was only limited people in that meeting. MSHA knows who those people were, I don't. By the end of the evening I was on the phone with the District Manager -- No, by the end of the evening I had received a phonecall from a rank and file coal miner who on the mine phone heard the announcement of the surprise inspection that was going to take place that evening on the owl shift, midnight shift.

I immediately hung up the phone and called the District Manager who told me, Tom, you're wrong, that's not where it's at. Only to have him call me back a few minutes later to confirm he was wrong, that was where it was at.

As many of the panel members know, the transcript of that rank and file coal miner was given to you. And to this day that rank and file coal miner has not heard from you, I have not heard from you, and the Office of Inspector General did nothing with it.

I sat here yesterday and wondered why there seemed to be this huge void between us in the audience and those of you empowered to make -- have the power to make changes. There seemed to be this huge void that we've never been able to penetrate. And I kept wondering all day yesterday how do we fill that void with understanding? How do we in the least little bit penetrate it? And how do we bring that understanding closer together? And I don't have that answer.

Sitting behind me is some of the best friends I have in this world. Also sitting behind me is family. And there is nothing more important to me than my friends and family. The UMWA is my family. And I'm paid to do whatever I can to represent that family.

This morning in my room -- Let me back up.

I'm very thankful for every breath I've got, every breath I take and every day the good Lord lets me spend one more day on this Earth. I felt a little guilty in my room this morning because of the ease that I get to take each breath, wondering if Tom Wilson has fought hard enough or long enough that my friends and family may not have to suffer in taking their next breath. And I can't judge whether I fought hard enough in the past, whether I brought issues forward soon enough, but I know it's my obligation and, more importantly, it's what I want to do with the rest of my life is try

to represent that membership so they don't have to suffer taking their next breath.

The issue before us is a life and death issue. People's lives depend on it. There's great suffering that we can end by rolling up our sleeves, filling that void that exists and solving this problem. And I ask you today put perceptions behind you, whether it be a perception of Tom Wilson, Joe Main, United Mine Workers of America, perceptions that a struggling coal industry can't handle more regulations or strong regulations, put perceptions behind you and let's do what I hope we all feel we need to do, and that's stop the suffering.

At Prestonsburg, Kentucky public hearing on August 11, I read into the record testimony of Ron Schell --

MR. NICHOLS: Tom, let me respond to a little bit of that.

This panel will not apologize for these rules. We think there's a lot of improvement for miners' health in these rules.

I don't think you will go back and look at an MSHA hearing that's allowed for more comments and participation than this hearing. It was suggested when we started these hearings that we put time limit on speakers. We haven't done that. We've set through testimony of probably -- you probably have the number, of 125 or 30 miners. Much of it could be characterized as being redundant. But I want to let everybody have their say.

These comments about you need to be talking to your District Manager, I think you'll look at the transcript and see that the issues surrounding that had to do more with the current rule than -- it had to do more with our inspection policy. If there are people out there not being sampled under today's rules they need to talk to their managers and do that.

We have also set through some comments that I think could be characterized as inflammatory. One of your Shove Creek miners at Prestonsburg used the word "diabolical" to describe the industry. I didn't know what that meant. But I went back and looked it up and it means "very wicked or cruel, devilish." And then he asked us if we were diabolical. I let that slide for two reasons, one, I didn't understand what the hell he was talking about, primarily, but I don't think I'd have responded to it if I did.

So, I don't know how you characterize the panel being combative when we stand up and try to explain this rule. And I think we've tried to explain it in the greatest detail that we know how over probably five or six days of hearings. And have let some things slide where we could have gotten personally offended by it, that being one case, that Shove Creek miner.

MR. SCHELL: Tom, I think the only comment I'd make is I

won't think there's a dispute between the mine workers and this agency on what the goal is. We're talking maybe different approaches to solve that, that goal. And I think, like Marvin said yesterday, we've heard a lot of good comments. A lot of the comments that we made to the miners were to try to stress the points that we were making. But I can tell you I've known these people, we have the utmost respect for the miners in this country or we wouldn't be in this agency.

There clearly was never an attempt on my part or I know on Marvin's part or anybody to intimidate the miners who come here. We've got too much respect for them. If we created that impression that clearly was not our intent. Our intent was to propose to the industry something that we thought would improve the lot for miners. The purpose of these hearings was to allow us to talk to the industry about why we were proposing it, to talk to the miners about why we were proposing it and give miners an opportunity to talk back to us. But I want to assure you, we might have some dispute over how to approach the problem, but our dispute isn't over what the goal is.

MR. NICHOLS: I do believe in these rules. It's not often I ask to come out and do public hearings. I asked for this one because I believe there are major benefits and improvements in these rules. We've been through this business of averaging these samples, which to me is just a farce. And some of these plans that we approve are just, they're no good. We approve them based on this business of 50 percent production, shit like that. I am not a proponent -- well, I believe, I think there's great improvements and that's why I'm out here trying to promote them.

Now, if you, I've worked with you guys since 1991. I have never known you to be intimidated. I've not known many UMWA miners to be intimidated. And we've had some lively discussions. But it's -- and we've always -- we've not always agreed. We've been able to agree to disagree.

Now, if you're confusing my enthusiasm for these rules as being combative then that's, that's not a message I want to send, because I'm not. If I wanted to do that I'd cut these people off. You know, a lot of the miners have testified basically to the same, to the same stuff.

So, go ahead.

MR. WILSON: Just a few responses. I believe I opened up by expressing that the explanations were appreciated. And, Marvin, I did leave out that was something I had recognized, not imposing time limits is something that's appreciated by the speakers. And I think it's also beneficial for the public record.

You mentioned that I possibly am confusing your enthusiasm as combativeness. I'll give you that one. That

possibility does exist. But if that is the confusion that I've got I ask you not to be too enthused, too closed minded until you hear the record. I think that's important.

You raised the issue of Shove Creek, a Shove Creek miner. I'm anxious to get to know that Shove Creek miner more. I met him for the first time in Prestonsburg. And that is one of the points where Tom Wilson wished, didn't know how you had perceived it had I went to his defense and took the miner. I held back. Because I thought you had an unfair advantage and that discussion centered around many things that had happened in MSHA District 11 which he did not have full knowledge of. And we can both review that transcript and see what it actually did say.

We heard testimony in Prestonsburg, Glen Loggins, talk about how he had testified to MSHA in Charleston, West Virginia. I didn't remember that testimony until he mentioned it at the mike in Prestonsburg. Notifying MSHA of a company supervisor taking all their dust samples when the dust pumps were under a raincoat, and he was standing immediately downwind of water sprays.

Glen pointed out to you in Prestonsburg that he no longer has that problem in his mine, that MSHA has sent, hired that man as a federal inspector. One of the individuals that we have got to entrust, if this rule goes forward, future dust sampling to.

We heard testimony yesterday from a miner who I believe in his words described it stood toe to toe with other miners to try to get the dust pumps out from under their coats. That's real world stuff we're hearing about.

MR. NICHOLS: Tom, we've got a pretty good history of criminal prosecutions for dust fraud sampling. You know, it ain't always easy to prove. But if there's situations like that these special investigators ought to know that. And we'll pursue it. I mean we don't need new rules to do that. The current the current policy of Coal Mine Safety and Health will handled dust fraud. And MSHA don't prosecute the cases, we investigate them, but it will go to the U.S. Attorneys. We can build a case. And I think we've demonstrated that in the '90s.

MR. WILSON: As I was fixing to say, I heard the testimony yesterday. I'm sure you heard the testimony yesterday. He went on to describe how federal inspectors ignored, I believe was the word, those goings on.

And, Marvin, because I do want to get into the prepared presentation, on your willingness to pursue it I can only respond you can show us better than you can tell us. And I will leave that at that.

Back to the void I mentioned. I don't think we'll ever fill that void unless we start somewhere. Now, I guess as far as my knowledge goes you're under no obligation to do this but it



doesn't hurt to ask. To better educate the MSHA workforce as to what miners have to say and where we're at in this country, and it's just a request, but I'd like to make two requests this morning.

Number one, I would like for MSHA to provide all their personnel with a copy of the 1996 Dust Advisory Committee report. If they read it, fine. If they don't read it, so be it. But I would at least like to have it out there for them to read.

Number two, so they better understand the thoughts and feelings of the industry, and I'm speaking operators and miners alike, I would ask, like to ask the agency to provide each one of its personnel with the transcript of these three public hearings. I believe that would go a long way if for nothing else maybe providing a little understanding between the parties that must work together as to where each other's coming from.

And with that, I will get into the prepared presentation.

At the Prestonsburg, Kentucky public hearing on August 11 I read into the record the testimony of Ron Schell at three different Advisory Committee meetings concerning the frequency of sampling under an MSHA takeover. And I want to summarize these rather than going back that transcript.

The first transcript I read from was May 30, 1996, Charleston, West Virginia. And to summarize, at that point MSHA was discussing each underground twice a year and to troubled mines four or five times a year. Each above ground, once a year.

The second transcript I read from was June 20, 1996, Salt Lake City, Utah. MSHA's discussion at that public hearing or at that Advisory Committee meeting was underground mines four times a year, with targeting, surface mines twice a year.

The third was from the final Advisory Committee meeting July 25, 1996, which was held in Lexington, Kentucky. At that point discussions were being held sampling each MMU at a minimum about 12 times a year plus targeting at bad mines. Surface mines or for surface facilities four times a year.

I pointed out in Prestonsburg and I'll point out this morning at least my review of those transcripts that each one of those discussions by MSHA before the Advisory Committee helped shape the Advisory Committee's discussions and their work product. During the Lexington, Kentucky presentation Mr. Schell made the following statement:

"We would really also like input from you on what you think that level would be."

He was talking to the Advisory Committee at that point.

I'd like to pick up there this morning and, first, pages 1109 and 1110 out of the Lexington transcript. The first I will deal with is Joe Main providing the UMWA's version of what that

level would be.

"We had concluded that to have some kind of replacement system that would be credible we would be looking at twice a month sampling at mines using the single sampling method and using the 5 sample compliance methodology that we already agreed to. When you think about what that means that's 24 days a year on the norm."

The next page I go to is page 116 of that transcript. This is the operator's version. Mr. Joe Lamonica, which was an Advisory Committee member representing the operators.

"Mr. Lamonica: I don't want to overlook the fact that we addressed the statement of representative characterization, that what we're saying is that sampling at a level which assures compliance sampling is carried out at the level currently achieved by operator and MSHA sampling. That was a cap that I had tried -- I had talked about when we adjourned that there presently, if you take all compliance sampling that's done today and we'd look at that as being the cap.

"Dr. Wagman: So you're using the same, if we use the same numbers that I think Joe Main has been using the number is 32.

"Mr. Lamonica: Okay, yes. Then we wind up with more sampling because then the operator is taking control sampling for plan verification purposes which is in addition to all compliance sampling.

"Dr. Weeks: It's 32-plus, the DA samples that are --

"Dr. Wagman: Sorry. Yes.

"Mr. Lamonica: Plus abatement sampling."

I now go to page 1122. This is again the operator's representative Mr. Lamonica on funding.

"Mr. Lamonica: Let me explain. The point is that MSHA says that they can do with X amount of compliance sampling. But X does not equal Z. So all we're saying is that we will fund the incremental difference which is Y. So X plus Y equals Z."

Page 1167. Third is Dr. Demint on MSHA takeover and frequency of sampling.

"Dr. Demint: I think compliance sampling should be carried out at a number of frequency not less than currently achieved by operator and MSHA sampling."

Pages 1168, 1169 and 1170. And this is the neutrals of the Advisory Committee on the takeover and frequency of samples. It begins on the bottom of page 1168.

"Dr. Wagman: The neutrals have a substitute language for that to propose.

"Dr. Chris: Can you read the whole thing?

"Dr. Wagman: Compliance sampling should be carried out at a number and frequency at least at the level currently required of operators and MSHA. This is language upon which we are prepared

to vote.

"Mr. Main: I'm sorry, Dave, could you explain it again?"

"Dr. Wagman: Let me read how the, how the first paragraph would read. The first paragraph is, general statement: the Committee considers it a high priority that MSHA take full responsibility for all compliance sampling at a level which ensures representative samples of respirable dust exposure under usual conditions of work. Compliance sampling should be carried out at a number and frequency at least at the level currently required of operators and MSHA. The miners' representatives would be afforded the opportunity to participate in these inspection activities as provided in Section 103(f) of the Mine Act. In this regard, MSHA should explore all possible means to secure adequate resources to achieve this end without adverse impact on the remainder of the agency's resources and responsibilities.

"Dr. Wagman: I'd like to call for a vote on that paragraph. All those in favor of that paragraph signify by raising their hand.

"(Vote.)

"Dr. Wagman: All those opposed?"

"(No response.)

"Dr. Wagman: It's unanimous."

I now turn to pages 1171 and 1172. This again goes back to the operators on funding. There is as vote.

"Dr. Wagman: All those opposed?"

"(Vote.)

"Dr. Wagman: Abstentions?"

"The vote is six to three with votes against by Lamonica, Gibbs and Romani.

"Dr. Gibbs: Could we suggest a slightly different working on that paragraph?"

"Dr. Wagman: You can give it a quick shot, yes.

"Dr. Gibbs: That was written with the understanding that MSHA might not be able to come up with the funding to do all of the compliance sampling that we now laid out in the first two paragraphs. We're now looking at a situation where it's for sure there's going to be adequate funding. It's a matter of transition. We would certainly agree to obtain the operator sampling during transition.

"Dr. Wagman: The paragraph we just voted on, what John Gibbs is suggesting is language which would say that in the interim of achieving the goal above, something to that effect.

"Dr. Chris: And that interim might be forever.

"Dr. Gibbs: Yes. Once MSHA gets it they can never change it back."

Page 1174. Intent on MSHA takeover and operator sampling

continuing.

"Dr. Wagman: Operator compliance sampling in the interim should continue with substantial improvement to increase credibility to program based on the committee's recommendation.

"Dr. Chris: Then the complete intent is that MSHA will do as much as possible and there will only be a reduced level of operator, albeit improved, operator sampling in the interim?

"Dr. Wagman: No. The balance remains the same."

Pages 1175 and 1176. The vote on maintaining operator sampling until MSHA could achieve full takeover.

"Dr. Wagman: I think what this says is basically operator compliance sampling goes on in the interim. And I don't want to confuse that.

"Dr. Romani: Until MSHA takes over the program completely.

"Dr. Wagman: I'd like to call for a vote on that sentence. All those in favor of this paragraph please signify by raising their hand.

"(Vote.)

"Opposed?

"(No response.)

"Dr. Wagman: It's unanimous."

Although excerpts, I believe those excerpts are very important for consideration to understand how the Advisory Committee came to their 20 recommendations.

There's much more in the transcripts. In fact, it picks up approximately where I left off and talks in depth about the role of the miners and miners' participation and their intent there. If there's any question of any panel member of what we have said here, I urge you to go back to the transcript and review it.

At this time we ask MSHA not to revoke existing operator respirable dust sampling procedures under Part 70 and Part 90 until MSHA can achieve carrying out compliance sampling at a number and frequency at least at the level currently required of operators and MSHA. Plus, until such time MSHA secures adequate resources and guaranteed funding to carry it out. To do otherwise would put the miners of this country in a situation with all -- irregardless of the greatest intent of the possibility of a far reduced sampling dust program than what anybody even on this panel could envision.

It would put everybody's health depending on a year by year gamble as to whether the funding would be there or not. I, for one, don't gamble. I, for one, currently don't have it in my mind or in my heart to go on the Hill and ask for funding for an agency that I personally am disappointed in for a variety of reasons.

I, therefore, ask again that MSHA not revoke existing operator respirable dust sampling procedures under Part 70 and Part 90 until MSHA can achieve carrying out compliance sampling at a number and frequency at least at the level currently required for operators and MSHA, plus securing that and guaranteeing it, securing the resources and guaranteeing the funding.

The preamble and proposed rule introduces the term "feasible environmental or engineering control measures." the UMWA objects to the use of the word "feasible" in relation to environmental or engineering control measures. The word "feasible" is not found in the Mine Act anywhere. And we believe that it is being introduced by an MSHA agency that still after 23 years chooses not to enforce the Mine Act.

As far as the definition of "feasible" it has been defined through case law. In the proposed rule at 42.137, third column, MSHA provides legal guidelines when the control reduces exposure; (b) when the control is economically achievable, and this varies depending on the operator; and (c) whether the control is technologically achievable. Each of this is further explained on that page of the Federal Register.

I want to refer to the program policy letter that MSHA recently issued in connection with the noise rule. The pages about feasibility for purposes of that rule may be helpful to us here to understand the void that apparently exists.

Feasibility of engineering and administrative controls:  
1) Will MSHA continue to apply its metal and non-metal noise decision as decided by the Federal Mine Safety and Health Review Commission as a basis for how it will determine feasibility of engineering controls? Answer: Yes. The noise decision will continue to be applicable to feasibility of controls.

2) In enforcement how does MSHA apply the noise case factors? Consistent with the Commission's decision in enforcing the noise standard MSHA will continue to consider three factors in determining whether engineering controls are feasible at particular mines. These factors are A) -- and I put emphasis on this -- the nature and extent of the exposure; B) the demonstrated effectiveness of available technology; and C) -- again heavy emphasis -- whether the committed resources are wholly out of proportion to the expected results.

A) The nature and extent of the exposure. In considering the nature and extent of exposure as a factor in determining whether controls are feasible MSHA will consider the following component: source. Source or sources of noise; level (dose); and duration of exposure.

For example, the exposure of miners such as percussive drillers or bulldozer operators to high levels of noise on a

continuous or daily basis would require the application of feasible controls.

MSHA proposals on PAPRs and administrative controls, at least in my opinion, will affect this determination in the future. We, therefore, object to those sections of the proposed rule.

B) The demonstrated effectiveness of available technology. MSHA intends to continue its longstanding policy currently in effect for metal and non-metal mine operators of determining what constitutes an effective control, i.e., where a control or a combination of controls could achieve at least a 3 decibel reduction in noise exposure. Emphasis on this next sentence: This represents 50 percent reduction in sound energy. Where a single engineering control does not provide at least a 3 decibel reduction in miners' noise exposure you must consider the expected level of reduction from a combination of technology achievable controls. We have many years of experience in achieving significant reduction in sound levels on most pieces of equipment in metal and non-metal mines. Working together with metal and non-metal operators and equipment manufacturers MSHA has made great strides in significantly reducing noise exposure through the use of available noise controls.

If the word "feasible" is used in these proposed rules in connection with engineering controls I'm scared to death what that proceedings is going to have to be for it to be feasible in the future.

C) Whether the committed resources are wholly out of proportion to the expected results. In considering this factor MSHA will determine whether the cost of abatement is out of proportion to the expected reduction in noise exposure. If a control is extremely costly for the operators but the expected reduction in noise exposure is minimal, MSHA may determine that it is not economically feasible for you to install the controls.

For example, MSHA will not require rod and ball mills to be enclosed at costs that could reach hundreds of thousands of dollars. However, MSHA may require that control rooms and other practical controls be implemented to reduce noise exposure.

I think that the words of that policy and the direction of MSHA is obvious. Miner after miner have come to the mike and testified to letting the horse out of the corral by introducing airstream helmets and administrative controls. And I think it's fair to say, just thinking back real quickly, operator after operator at their time at the mike since you introduced this into the proposed rule we're already hearing the noise of extending that into other areas.

As we stated earlier, the UMWA objects to the use of the word "feasible" in this proposed rule.

MSHA's proposal specifically goes against the Mine Act and the intent of Congress in 1977. I want to specifically discuss three of those areas:

- 1) Allowable dust levels proposed in the rule;
- 2) Allowing non-compliance in the year 2000; and
- 3) The dust standard in effect in the year 2000 and proposed in this rule.

Now turning to the 1977 Health and Safety Act, Section 201. And for the panel's benefit I recognize 201, 202 is speaking about interim standards. But I think it's important that we drop back and take a look at those interim standards and what the intent was.

From Section 201, "Shall be interim mandatory health and safety standard" -- excuse me, "interim mandatory health standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory health standards promulgated by the Secretary."

Section 202(a). Excuse me. Section 202(b), "Except as otherwise provided in this subsection, (1) effective on the operative date of this title each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 3 milligrams of respirable dust per cubic meter of air.

"(2) Effective three years after the date of enactment of this act each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active working of such mine is exposed at or below 2 milligrams of respirable dust per cubic meter of air.

"(3) Any operator who determines that he will be unable using available technology to comply with the provisions of paragraph 1 of this subsection or the provisions of paragraph 2 of this subsection, as appropriate, may file with the panel no later than 60 days prior to the effective date of the applicable respirable dust standard established by such paragraph an application for a permit for noncompliance. If in the case of an application for a permit for noncompliance with the 3 milligram standard established by paragraph 1 of this subsection the application satisfies the requirement of subsection (c) of this section, the panel shall issue a permit for noncompliance to the operator.

"If in the case of an application for a permit for noncompliance with the 2 milligram standard established by paragraph 2 of this subsection the application satisfies the requirements of subsection (c) of this section and the panel

determines that the applicant will be unable to comply with such standard the panel shall issue to the operator a permit for noncompliance.

"(4) In any case in which an operator who has been issued a permit, including a renewal permit, for noncompliance under this section determined not more than 90 days prior to the expiration of such permit that he still is unable to comply with the standard established by paragraph 1 of this subsection or the standard established by paragraph 2 of this subsection, as appropriate, he may file with the panel an application for renewal of the permit. Upon receipt of such application the panel, if it determines after all interested persons have been notified and given an opportunity for a public hearing under Section 5 of this act that the application is in compliance with the provisions of subsection (c) of this section and that the applicant will be unable to comply with such standard, may renew the permit.

"(5) Any such permit or renewal thereof so issued shall be in effect for a period not to exceed one year and shall entitle the permittee during such period to maintain continuously the average concentration of respirable dust in the mine atmosphere during each shift in the working places of such mine to which the permit applies at a level specified by the panel which shall be at the lowest level which the applicant shows the condition, technology applicable to such mine and other available and effective control techniques and methods will permit. But in no event shall such level exceed 4.5 milligrams per dust of cubic meter of air during the period when the 3 milligram standard is in effect or 3 milligrams of dust per cubic meter of air during the period when the 2 milligram standard is in effect.

"No permit or renewal thereof for noncompliance shall entitle any operator to an extension of time beyond 18 months from the date of enactment of this act to comply with the 3 milligram standard established by paragraph 1 of this subsection or beyond 72 months from the date of enactment of this act to comply with the 2 milligram standard established by paragraph 2 of this subsection.

"(C) Any applicant for an initial or renewal permit made pursuant to this section shall contain (1) a representation by the applicant and the engineer conducting the survey referred to in paragraph 2 of this subsection that the applicant is unable to comply with the standards applicable under Sections (B)(1) or (B)(2) of this section at specified working places because the technology for reducing the concentration of respirable dust at such places is not available or because of the lack of other effective control techniques or methods or because any combination of such reasons."

Now, the portion I just read refers back to my first two



comments where I said MSHA specifically goes against the Mine Act and the intent of the 1977 Congress. And that's the areas where allowable dust level proposed in the rule. And I'm going to give you an example for clarification.

Downwind of the longwall shear. I see a lot of similarities between what MSHA attempted to do in these proposed rules and what Congress did back in 1977. But Congress specifically said that when the 2 milligram standard was in effect at no time should the panel grant permission above 3 milligrams. Your proposed rule on the downwind portion from the shear if I read it correctly could be, I've heard it interpreted both ways at these public hearings, 3.9 or 4 milligrams. I believe that you have specifically gone against the Act and Congress' intent.

Secondly, Congress was wise enough to put a maximum time frame that you could file with the panel for noncompliance. And I believe for the 2 milligram standard it was 72 months. I believe we're far outside of that time frame. And I believe that's the second area that your proposed rule is in direct conflict with the Mine Act and the intent of 1977 Congress.

Now to discuss the third area, and that is the dust standards in effect in the year 2000 and proposed in the rule. And I'm referring to (d), 202(d). "Beginning six months after the operative date of this title and from time to time thereafter, the Secretary of Health, Education and Welfare shall establish in accordance with the provisions of Section 101 of this Act," and I will put emphasis on the next portion, "a schedule reducing the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active working is exposed below the levels in this section to a level of personal exposure which will prevent new incidences of respiratory disease and further development of such disease in any person. Such schedule shall specify the minimum time necessary to achieve such level, taking into consideration present and future advancements in technology to reach these levels."

In my opinion MSHA hasn't carried out this mandate of Congress. And MSHA's proposed rule doesn't comply with this mandate.

After we got to the 2 milligram standard we went stagnant. And that's where we're at today. And I don't know, "beginning six months after the operative date of this title and from time to time thereafter, the Secretary of Health, Education and Welfare shall establish in accordance with the provisions of Section 101 of this act a schedule reducing the average concentration of respirable dust in mine atmosphere." I haven't seen that schedule. I don't believe there has been such a schedule.

The interim health standards were to apply only until superseded in whole or in part by improved standards promulgated through notice and comment rulemaking. 101(d) further requires each standard promulgated through rulemaking to not reduce existing protection. So based on simple logic, each new rule must constitute an improvement over or at least no regression from the one it's replacing and, thus, nothing proposed now could meet the Act if it were substandard to the interim rule that Congress established. We believe the proposed rules do exactly that.

Specifically in those areas that I mentioned we do not view that as improvement and we view them as being substandard.

MSHA continues to defend and ask for support for proposals, specifically 70.212 through 70.218. These proposed rules allow MSHA to permit use of PAPRs and administrative controls. The same MSHA that has failed to take action to specifically address Section 202(d) and the same MSHA that has failed to require the use of engineering controls that have and do exist today. This is not the MSHA that we can endorse having sole discretion at deciding that miners use PAPRs or work under administrative controls.

On page 42136 of the Federal Register dated July 7, 2000, MSHA solicits comments concerning the availability of feasible engineering or environmental controls to lower dust levels. I would like to specifically discuss some of those that MSHA has refused to utilize over the years: the use of water injection into longwall panels, water injection or water infusion, shear drum speed, the shear speed itself, the width of the longwall face.

In my short memory I remember back when the UMWA in the loudest voice we could do it in tried to get the agency's attention that we was creating a monster that was going to cause dust to go out of control. I remember a court date. Never felt so all alone in all my life because flying into Birmingham, Alabama in opposition to our argument that the width of longwall faces should be a consideration in the petition for modification process which we had no other avenue to raise the concern was MSHA expert testimony, the Office of Solicitor, all battling us, telling us when the industry goes to wider faces, UMWA, you're wrong, we're going to hold their feet to the fire to control respirable dust.

I ask you today to live up on those words, hold their feet to the fire. I do not see these proposed rules of allowing airstream helmets and 4, 3.9 downwind of the shear as holding their feet to the fire. Instead, I see the two offices that argued against us trying to now today give justification for the need, and the very thing that we seen and argued the direction we was going. I believe MSHA was wrong then and I believe MSHA is wrong today. I believe engineering controls are available today but for whatever

reason, and I don't ever have to understand those reasons, the powers to be at MSHA has refused to require them.

Also, on page 42143 of the Federal Register MSHA solicited comments on its question and answer format for this regulation's text. I would like to echo the industry's comments yesterday concerning this. I, too, believe that the question and answer format adds to the confusion with the propose rules. I believe new proposals should be styled the same as the remainder of the Code of Federal Regulations.

I will take it one step further, the question and answer format could possibly serve a useful purpose as an additional index to the rules. But the rule itself should be written in the same manner as the rest of the rules found in CFR.

As stated earlier, the UMWA recognized certain areas of improvements contained in the proposed rules. However, when considered as a whole they clearly do not go far enough. Possibly the proposals represent all that MSHA can currently do with their resources. And if that's the case, that's okay. As discussed earlier, the Advisory Committee recognized, discussed and made recommendations based on MSHA's limitations. The proposal or the proposed rule disregards those Advisory Committee recommendations.

The Advisory Committee concluded that restoration of miner and mine operator confidence in the respirable coal mine dust sampling program should be one of MSHA's highest priorities. After listening to miners and operators alike at the public hearings it is obvious that MSHA's proposal does not accomplish any restoration of miner and mine operator confidence in the respirable coal mine dust sampling program.

Two testifiers yesterday named Tom Klausing and Jim Weeks specifically asked the panel where in the rule could it be found that plan verification was full shift? Both times the question was raised the panel referred to 70.2(j) in definitions. To present from getting the same response by asking the same question again I will approach it differently.

For the record, the UMWA objects to 70.209 not specifically stating that verification samples will be conducted using full shift sampling. Fairly to specifically state that in the rule itself subjects 70.209 to legal challenge. Therefore, under any new proposal we would request that it be spelled out in the body of the rule itself. Full shift sampling, I believe that's -- The last testifier yesterday asked the panel, and this goes back to our confidence level, and again I may be confused or may have misunderstood the exchange, but the last testifier yesterday gave an example of a continuous miner that on days, on certain days is operated by remote and on other days is operated from the deck. And he asked the panel, and we can all refer to the transcript to

see exactly what that exchange was, what I believe I heard was he asked the panel if it was up to the operator to decide when he is going to operate from the deck and when he was going to operate remote? And the answer was "yes."

And I instantly had a question, on sampling days I as an operator can use remote but on non-sampling days I can require the workforce to operate from the deck. And I had to wonder if I understood that conversation correctly and if that's what these rules say is there manipulation built into the rule? Can I manipulate MSHA's sample in that manner? Food for thought.

I also have another point that I don't expect an answer to but I want to raise it. I cannot help but wonder explanation after explanation we've heard full shift sampling is going to be utilized for verification and full shift sampling is going to be utilized for abatement. Jon, is that correct? He nodded in the affirmative.

And this may or may not play the part in it but the question comes to my mind, is the reason full shift sampling not being considered for compliance an overtime issue versus a health issue?

With that I conclude my presentation.

MR. NIEWIADOMSKI: Tom, going back to that full shift, apparently, you know, we tried to explain that there was plenty of reference in the rule that verification is full shift. I want to take you to first paragraph 70.202. "What is a verified...plan?" "This demonstration..." -- I'm reading the last sentence.

MR. WILSON: Give me just a second, George, so I can turn to it. 70.202.

MR. NIEWIADOMSKI: Okay. This is on page 42179.

MR. WILSON: And you're reading from 202?

MR. NIEWIADOMSKI: Yes.

MR. WILSON: Okay.

MR. NIEWIADOMSKI: 70.202, and I refer you to the last sentence in that paragraph. And, of course, the formula of how we define certain things is consistent with how we've been doing it for the last 30 years. So when you see the last sentence it says, "This demonstration..." -- it talks about what is a verified plan, but the last sentence it says, "This demonstration is based on MSHA verification samples."

And if you look at on page 42178 which is a set of definitions, and let me refer you to the last definition which is (y) or (z)(bb), "Verification sample means a valid sample taken on a full shift during which the amount of material produced is at or above the VPL..." And that clearly says that it is a full shift.

And then referring to what "full shift" is it clearly says for verification it includes, going back then "full shift" is

defined as for means "an entire work shift including travel time but excluding," which you just brought up, "for purposes of bimonthly sampling only, any time in excess of 480 minutes."

So there, clearly, there should be no confusion about, you know, the length of shift during which verification sampling will be conducted.

MR. KOGUT: I might add to that that one of the things that we specifically solicited comments about was whether the definition of "full shift" should be modified to that it would cover extended work shifts for compliance purposes also, so we said that we were considering that. And we were soliciting comments about it.

MR. WILSON: Jon, there is one other point, if you would, please. And I didn't fully understand your comment yesterday. And I believe so that I can go forward and properly comment on the rule. I believe it was Randy Klausing that was at the table yesterday and there was an exchange conversation between you and Randy Klausing concerning where MSHA had solicited comments on a higher level of confidence for abatement sampling. And I believe you made reference to that if MSHA went to a higher level of confidence the 33 percent would not apply.

MR. KOGUT: Yeah. No, that wasn't --

MR. WILSON: And I'm confused as to how all that ties in.

MR. KOGUT: Okay.

MR. WILSON: And would appreciate as detailed of an explanation of that as you could possibly provide us.

MR. KOGUT: Okay. I don't think that we were talking about abatement sampling at that point, I think that we were talking about verification sampling. I believe that's the case. Because that's where the VPL issue comes up.

One of the things that we, another item that we specifically solicited comments about was whether the -- we proposed that VPL that was based on the 10th highest production level in the last 30 shifts. One of the things that we asked for comments about is whether that was an appropriate VPL or whether it should be something higher than the 10th highest, the higher level of production.

The way that this topic came up yesterday was that we were talking about when an inspector goes in and looks at the production records for the last six months we were talking about the circumstances under which the inspector might require plan reverification. And one of the ways, one of the things that might trigger a plan reverification is if the inspector looks at those six months worth of records and sees that more than 33 percent of the shift productions have been in excess of the VPL that's been established in the plan.

And the point that I was trying to make, and I think I, I apologize if I generated any confusion with this, the point that I was trying to make is that that number, that 33 percent is tied to the method that we're proposing for determining the VPL which is the 10th highest. If the VPL was based on something other than the 10th highest then that 33 percent would change to correspond to whatever the basis for the VPL is.

As you may recall on my chart, you know, that we showed during -- in the overhead, and there's copies of this out on the table that some of you may have picked up, the way this was explained was that it pointed out the 10th highest production level corresponds to the 67th percentile. That means that 67 percent of the production values are expected to be less than that 10th highest production.

So, by the same token, 67 percent are less than that value, then 33 percent are greater than or equal to that value. So if you chose, if you base the VPL on something different, for example the 6th highest -- this is just meant as an example -- that corresponds to the 80th percentile, meaning that you'd expect 20 percent to be at that level or higher.

So when we in this review that this inspector does of the six months' worth of production records if the VPL is based on the 10th highest then he's going to be checking to make sure that no more than 33 percent of the actual production levels are greater than the VPL. But if it's based on something other than the 10th highest, for example, if it were based on the 6th highest, then the inspector would be checking to make sure that no more than 20 percent of the production values are greater than the VPL.

And if more than 20 percent were greater than that would trigger a reverification, just as under the proposal when we base the VPL on the 10th highest he's checking, he or she is checking that no more than 33 percent of the production levels would be greater than the VPL.

Does that clarify?

MR. REYNOLDS: Well, I just wanted to interject too. I think Jon is trying to say that the agency was specifically seeking comments that maybe some people might think that we should go to somewhat something higher than that might, or something lower, but something higher than that might be a higher production level like maybe the 6th highest rather than the 10th highest some people have suggested. But the agency was specifically seeking comments from the public during the rulemaking process to see if maybe there might be another number that would make that percentage higher or lower depending on.

MR. KOGUT: See, the taking that level of the VPL there's a tradeoff involved there because we need to balance two things.

One is the, we want to protect miners on all shifts to the maximum extent possible. We want to protect miners on shifts regardless of what the protection -- production is.

On the other hand, as a practical consideration, the higher we set that production level that's used for the VPL, the longer it's going to take to verify a plan, the more shifts that, you know, you can't hit that high, highest production level on every shift, you know, it's not that easy to do. So the higher you set that the more difficult it will be to verify the plan at or above that production level, the longer it's going to take, the more shifts it might potentially take to verify the plan.

Now, remember that that VPL, you know, represents a minimum. So when an inspector goes in the operator is on notice that the inspector is going to come in. If he wants to get the plan verified as quickly as possible and get this whole process over with the operator will try to achieve the highest level of production that he can to make sure that the plan is actually going to get verified.

So some of those production levels are going to be higher than the VPL, you know, they're not going to be exactly at the VPL, they might be higher. But we won't accept it as a valid verification sample if it's less than the VPL.

MR. WILSON: Thank you for the explanation.

MR. NICHOLS: We need to take at least a 5-minute break. Joe, you'll be up. You're our last presenter.

(Brief recess.)

MR. NICHOLS: Joe, are you ready?

STATEMENT OF JOE MAIN, UNITED MINE WORKERS OF AMERICA,  
ADMINISTRATOR OF HEALTH AND SAFETY

MR. MAIN: Yeah, I think I am.

My name is Joe Main. I represent coal miners and I'm damn proud of it. That's my job. Done that since I've been 18 years old. And I grew up with coal miners, lived around coal miners, came from a coal mining families. And one of the things that I learned when I first started working in the mines was this damn dust will kill you.

And I grew up with that. And I grew up with friends of mine that have Black Lung. I've met many friends that have Black Lung now. And I don't know what circuits all of the panel runs but I tell you what, it does put impressions on your mind when you're constantly with miners, when you're constantly with miners who are afflicted with Black Lung disease and you're so frustrated that you can't get the system to change to wipe out a disease that can be eliminated in this country.

And I think on behalf of the miners that spoke here in Morgantown, the miners that spoke here at Prestonsburg, and the

miners that spoke here at this public hearing Salt Lake City you have to understand that. You folks don't deal with that every day. I would say there probably isn't a week goes by that I get a call -- that I don't get a call from a miner or a widow out there who is struggling to get Black Lung disability benefits. And that's another job that I've inherited as in my role working with the union is coordinating the Black Lung programs. So I get to see both sides, the folks that are terribly disabled and the miners who don't want to be.

And I'm telling you, I have never been so frustrated in my life to spend 25 years of my life trying to come to terms with fixing a problem that for some reason we just can't seem to come to grips with. And what's so frustrating is, as this lawyer came in here yesterday representing a client, I've represented my clients for well over 25 years now and they've placed a big burden on my shoulders and that is to try to figure out a way to fix this. And I can tell you this, I've taken that responsibility as serious today as I did the first day that that was put on my shoulders. And it is real frustrating.

And, Marvin, I don't know what "diabolical" response was of the miner but I can tell you this, that I've seen miners so angry at times over a failure for this system to work on their behalf, to fix their problems, that that term probably was lightly used. And as you go into the culture of the coal mining industry and you just go in a section, go in a dinner hole, go in a bath house it's not the same culture that sets here. And that bothers me because I think there is a disconnect in terms of the culture of people that we have that are making decisions and a culture who actually are affected by those.

And I sat here through the course of all these hearings and I swear there is such a disconnect here that I'm going to tell my folks in the message I'm sending out of here that based on everything that I've seen I think I have failed you guys again. And I just don't know how to fix this problem.

I have been to meeting after meeting after conference after public hearing after meeting after conference throughout my life. Miners came forth, raised these issues, expectations to the government to fix them and when we walk away -- and don't take this wrong but I think this is the situation we've rolled into -- the government knows best. I think there is such a loud message sent to this panel over the last, what day is this, the sixth day of hearings, fifth day of hearings, whatever it is, to do something different than you've done that if the government does not heed that message they're ignoring the public and the whole regulatory process. Firmly believe that from the bottom of my heart.

I don't know how many miners -- and we're going to go



back through the list when we pull out the transcripts and find out how many miners called for this thing to go back and be rewritten and follow the recommendations of the Advisory Committee, to go back and rewritten in a way that takes the policies out and puts this in a format of plain English, plain rule miner operators can understand, miners can understand and read it.

Now, this is a rule that Al Gore would have a fit over. And there's a lot of different reasons for that but I'm going to tell you the first reason. We had two of our witnesses yesterday ask for clarification on the record, Where do I find that full shift sampling is required for verification plan sampling? And you guys had me fooled too because I said, it's in there guys, it's plain, it's in there.

And after I think Tom Klausing was the last to ask that question, came back to me and asked me again. And I said, Well, I'll show you. So I started flipping through there. And you know what? I couldn't find it. And, you know what? Where it talks about sampling for plan verification and setting these standards of exposure levels it's not there.

And then when I heard the explanation this morning, because we sent Tom back like, Tom, we got to get this clarified. And you know what I found out? This is one of those rules where you go to the full shift rule, then you go to -- and I missed one of them, George -- you go to this one rule and then you go to -- I'll pull them out of the record. We'll respond to that whenever we do our final comments. But it's so complicated when why didn't we just say in the plan verification sampling provisions this is required to be a full shift sample with a reduced standard, and here's what it means? And it doesn't say that there.

And I think that's one of the real problems with this rule. And I just used that as the starting point because if this is for miners you expect miners to be able to figure all that out? And I sat here for how many days and listened. I mean, I'm really trying to understand this rule and I tell you what, I was confused. And I'm still confused after I got the last answer. But I can tell you there's a whole lot of miners out there that's going to be more confused than that. And I'm afraid, Marvin, there will be inspectors confused.

MR. NICHOLS: Joe, we wouldn't try to argue that the rule is not complex. And, you know, just to respond to what we've heard here, you haven't made a comment or a recommendation that we don't have. I mean I could almost set here and list them. And this panel has got your comments. I mean, I could assure you there's not one we've missed.

MR. MAIN: I'm not saying that you didn't write them down, I figure it's going to be in the record. I'm just talking

about where, what you hear. And I'm going to give you a couple examples of that as I go through.

Another clarification I think we need to make in the rules, too, regardless of what form they come out in when they do get in some kind of final stage is 70.214 which talks about the dust level and it talks about twice the average or twice the appropriate dust level, I think is somewhat close to the language. But the way that's drafted it gets some inference that you can actually even double the 4 milligram standard in section 70.214. And I know that's, you know, from the way I read it I know that's not what you intend to do but the way that standard is drafted I think it gives the inference that you could actually raise that 4 milligram to 8 milligram. And things like that I mean we need to go back, and we're going to be doing that through our final comments to clean it up. But points like that I would like to make.

Going back to trying to put the final comments on the record, and I think you're going to hear some different things here this morning that, hopefully, will help guide this process. But the first statement I got to make is that the message from the general public on this rule has been so compelling and has been so loud it's deafening about what needs to be done here and that the rule falls far short of what's needed to protect the nation's miners and that there's so many problems with this rule that you can't, we believe, fix it by just merely going back and making a few changes.

That it did not meet the recommendations of the Advisory Committee nor the NIOSH criteria document nor the lawsuit that was filed by the United Mine Workers. It's contrary to the Act in various areas. And it's just a very problemed rule. And the way it's drafted just adds to that complexity.

The rule in its structure is drafted in a way that I think has been clearly stated by a lot of miners and mine operators that it's too discretionary, too much policy. And I think you have to appreciate the fact that miners just are not going to buy a "trust me" rule. And basically that's what we get down to when we get outside of the framework of a clear, concise standard. And there's a lot of reasons for that. And I'm just going to talk about the reasons why miners would be skeptical of that just out here in the Utah area, in the west.

I remember when a plan was approved to allow at return entry on a two entry mining section to be blocked off by a roof fall. And that miners went to MSHA to try to get that fixed and they had already predetermined that the operator could do that. And shortly thereafter there was a fire and there was 27 miners trapped by that fire and which I personally was involved with the

efforts to recover those miners and eventually the recovery of the bodies from the mine, which took almost a year.

And those miners lost faith in their government to act on their behalf. And I think people could understand that, that why didn't the government protect us better by not letting that operator do that?

I remember a case at the Eagle Number 5 mine in Colorado where a coal miner was killed in a mine that had no roof bolting plan, that had no roof bolter. They were using a single roof post 4 foot off the rib and using three radius posts in the intersections. That was the roof control plan. The roof collapses, killed a miner.

And I was totally surprised to find that we still had mines like that in the United States, particularly union mines. And we went in to get it straightened out and sent a firm message to the company, You're buying a roof bolter or this mine isn't working.

And we had arrangements made to get that deal finalized when we found out that the plan that the company had already submitted to the MSHA district office allowed them to continue that same plan and I think add one radius post to the intersection and drill for HUD coal was approved. Yes, Eagle Number 5 mine.

And not only till a second miner was killed about a year later did that plan ever get changed. But miners were stuck with that.

And I mean this is the reality of what miners see about policies of the government. There's a lot of good policies, Marvin, that you guys do. And we appreciate those. And when we have a rule, you know, the good inspectors are out there and a good part of this agency that's making the right kind of decisions, you know, that system's going to work okay. What we've got to guard against is the bad decisions of mine operators and the bad decisions of the government or when politics get involved because of elections. And I think we can all write some history books on how policies change.

So you got to understand that this trusting approach for miners just don't work, they don't buy it, they don't want it, and they shouldn't. And I'd recommend based on everything I know to rail against any kind of regulation or any kind of regulatory activity that removes that clear rule from that posture to a unclear rule or a policy.

The rule failed to keep the promise of Congress. In one of the sections that we've been talking around but haven't really hit yet is 202(b). And I'm going to read 202(b) to you because I think that the panel is guided by this in their decision making:

"Among other things, it is the purpose of this title to

provide to the greatest extent possible that the working conditions in each underground mine are sufficiently free of respirable dust concentrations in a mine atmosphere to permit each miner," that's all those folks setting out there, "in each underground coal mine are sufficiently free of respirable dust concentrations in a mine atmosphere to permit each of those, each miner the opportunity to work in the underground during the period of his entire adult working life without incurring any disability from pneumoconiosis or any other occupational related disease during or at the end of such period."

That's your mandate by the Mine Act to draft rules to do that. And we believe that the rules that have been drafted, the proposals do not meet that objective of the Mine Act.

Section 101(a) of the Mine Act directs the agency on how to proceed with rulemaking. And what it says is "no mandatory health or safety standard promulgated under this title shall reduce the protection afforded miners by an existing mandatory health or safety standard." We believe there's various areas of this rule that the agency has made proposals that violate not only the principle of that but the clear language of that provision of the Mine Act.

Now, just for starters, I think whenever you have a standard that sets clear cut sampling processes that define when and how and by what means sampling will be done then you wipe those standards out and you rely on a policy to implement those that is contrary to protections that miners have that they could -- that they have under the standards, those are gone.

And when you look at the airstream issue and you look at the clear mandate of the Mine Act and the standards that implement that and you have a provision that now subverts that in our opinion and, you know, you know exactly where we're at there with regard to our belief that we're actually replacing engineering controls, that that's contrary to both the Mine Act and it violates Section 101(a) of the Mine Act.

When you raise the dust levels to 4 milligrams, and I think as Tom Wilson just walked through that process, there was a point in time to issue these special permits, that was at the inception of the Mine Act in 1969. That's gone. And I think the Act was clear that when you get to this point that's it. And there is also a focus by Congress to even reduce that dust standard lower. And I think that's what guides the agency in their decision making process.

To not do those things violates the Act, violates the principle of the Act and is unfair to the miners who are trying to achieve this goal of working their adult life without risking contracting pneumoconiosis.

As I pointed out, the rule in many areas failed to follow the Federal Advisory Committee. And not only myself, that's been a statement I think you've heard many, many times. And I would like to read from a recommendation that guided the agency in the takeover of the dust sampling program. And the thrust of a lot of that can be found in Recommendation Number 16(b) and (b), and I will read that.

"The Committee believes that any MSHA resource constraints should be overcome by mine operator support for MSHA compliance sampling. The Committee recommended that to the degree that MSHA's resources cannot alone serve the objective identified, resource constraints should be overcome by mine operator funding for such incremental compliance sampling. One means for obtaining this support could be a reasonable and fair operator fee based on hours worked or other equivalent means designed to cover the costs of compliance sampling. Any operator fee should include an accountability system to ensure the uniform applicability of the program throughout the industry. The fee should only be utilized for specific purposes of required sampling.

"The Committee considers it a high priority that MSHA will take full responsibility for all compliance sampling at a level which assures representative samples of respirable dust exposures under usual conditions of work. In this regard MSHA should explore all possible means to secure adequate resources to achieve this end without adverse impact on the remainder of the agency's resources and responsibilities. Compliance sampling should be carried out at a number and frequency at least to the levels currently required of operators and MSHA. And the miners' representatives should be afforded the opportunity to participate in these inspection activities as provided in Section 103(f) of the Mine Act."

Now that's Recommendations 16(b), 16(a) of which I was a party to in the development of. And we're going to be producing more information for the record but we've already gave it to you. But there is a considerable amount of discussion by the Committee about that very concern.

And as Tom pointed out in his earlier testimony, there was a concern that MSHA not just run in there and take this over without taking or making sure that they had those bases covered and to do it in increments. And what we found is we've only got to phase one, which is the agency beefing up its role and we never got to phase two with regard to taking care of this funding problem and this guarantee that we would have frequent enough inspections, sampling inspections at coal mines.

Now, I'm not mathematician, but I got my calculator out and figured out a couple things. One is that we produce about a

billion tons of coal in this country a year. \$20 million, Marvin, equates to 2 cents. That's Joe Main's 2 cents worth right there. 2 cents a ton on coal will come up with \$20 million.

Now, if you want more, and we suggest that we do go for more, then 4 cents would get you about \$40 million to make sure that we don't rely on taxpayers to have to foot this bill, that we don't have to worry about going to Congress every year and solving this problem with funding. That there be a mechanism in there that that fund really guarantee the dust sampling that mine operators did do in the past, and that that funding scheme be set up to adequately have enough frequencies of inspections in coal mine or dust compliance sampling in coal mines to protect the nation's miners to meet that one paragraph I referred to earlier in 2 or 2(b).

Is such a fund outrageously beyond the thinking? No, it isn't. We have at least three funds that I'm aware of, and there's probably more, established right now where there's contributions that go in to cover costs. One is the reclamation fund. One is the Coal Act fund, the healthcare fund. And a third is the Federal Black Lung Disability Program.

You know, an amazing thing about as I thought through this and tried to figure out some solutions here which was what the Federal Advisory Committee had expected MSHA to do, because that was a recommendation of the Committee, I started to ponder on this. It's cost through the Federal Disability Fund about \$36 billion since 1970. It cost about a billion dollars a year out of that fund to cover those who have become sick from the Black Lung disease.

Now, we're talking about in this case \$20 million or, say, \$40 million to create a fund to prevent that very disease of which we're compensating them at high rates at the other end. And it's sort if you was a public investor you would sure not invest in that kind of a stock. What you would invest in is the stock up front which is the preventative measure approach. And for the life of me, given the fact there is established trust to carry out specific functions of great importance to care for the nation's miners and one that we have found year after year to be so seriously flawed, and there is the opportunity to do that, and there is the recommendation of the government to proceed from the Federal Advisory Committee they appointed and received that recommendation from, for the life of me I can't figure out why we are not pursuing that, that approach.

And, you know, I went through the preamble, and if I miss something when I finish up if somebody wants to point out where there is a discussion about any kind of actions that the agency has undertaken to do that following, you know, consistent with this

recommendation I would like to see that because I would like to get better educated myself. But I'm making a recommendation at this point that you follow the recommendation of the Advisory Committee. I think you need to be looking at what the Committee already realized back in 1996 that they pre-advised the agency of, and go looking at establishing a fund of which operators would make contributions to to fund any additional resources. And to the extent that if we run into financial problems on Capitol Hill, can't get the funding, there is a mechanism that that trust fund jacks up the dollars or contributions to cover any shortfalls.

And I think that was clearly within the confines of that recommendation.

The other thing that I would like to point out is that I took a look at the data I did get. And, by the way, I'm still short data that I need which deals with the number of inspectors that MSHA has, enforcement personnel. And I do need that fairly quickly. If we don't get it we're going to have to ask for an extension to this whole process because it's really important to this, the crux of this whole issue.

But I took a look at the data and what I found is that when I was setting on the Advisory Committee in 1996 there was 1,722 MMUs being sampled by the operators in the United States. And you know what it was last year? 1,298, according to the data that I received from MSHA. And that's the number of MMUs, total number of MMUs that were sampled by the operator in both those years.

Now, what that represents is about 25 percent reduction in the number of MMUs from 1995 through 1999. And as Tom Wilson has pointed out twice in the record, we set before the Advisory Committee and listened to what MSHA could do or what they said that they may be able to do which was one inspection a month, and we had 25 percent more MMUs at that time. I've pondered on, gee, we ought to be able to do more now with fewer MMUs.

And I also took a look at the number of mines that was in existence in 1995. According to this data there was, the number of producing mines that were sampled by the operator was 1,539 mines in 1995. In 1999 that figure dropped to 1,289. That's a 16 percent reduction of total mines that exist if the agency's figures are correct that I've been provided with.

Now, what that tells me is we have a lot fewer mines than what we had in 1996 as we set there and debated this whole issue. And I've raised this question with MSHA, and my president has raised this question with me is where is all these resources going from those mines that are shutting down?

And that's the reason we need to get that data, Marvin, for us to be able to competently, you know, remark to the record,

b ut.

MR. NIEWIADOMSKI: Joe, can I just interrupt you for a minute.

You were talking about enforcement personnel. But I'm looking at the same data that you have and the last item there has total number of MSHA "enforcement personnel" by year. That's the question that you've asked; right? So there is a number there of total enforcement personnel.

MR. MAIN: That is an oversight. I see, it's a footnote. Okay. Okay. I'll double check to make sure my FOIA's completely complied with. I know whenever you told me it's coming over you said that was not with the data, George.

MR. NIEWIADOMSKI: At that time it wasn't.

MR. MAIN: Okay. Which is the same data you sent me right after you told me it wasn't there.

MR. NIEWIADOMSKI: Yeah, well, what happened was, what happened was when I was concentrating on respirable dust since it was delayed in sending it to you, remember you had called and said two hours later, Where is it? during that time.

MR. MAIN: If you've got it, put it in there. Okay, I understand. I was going on the assumption of the information you provided it wasn't in there. And I didn't, didn't understand the change and it was there. Appreciate that you did that. But have been better if I'd known about it. Okay.

We'll take a look at those numbers, too, to try to figure out the total resource issues later since we haven't had a chance to do that.

But, nonetheless, there is a sizeable reduction in the number of MMUs in this country and a sizeable reduction of the number of mines. And to us that would be the second approach that we would take to try to figure out that calculation in terms of what this government should do to take over the sampling program. But I firmly believe as a person who helped draft, who was in the debate over and in the final resolution of 16 of the Federal Advisory Committee that that recommendation be followed. And that's an official position of the Mine Workers at this time.

We need, as Tom pointed out, we need to fix this problem before we eliminate it. And I think it's totally unfair to miners just to wipe out a sampling scheme, although in many mines we would say that it's plagued with problems. I would venture to say that over the last few years because of some actions of MSHA that that has improved. And we appreciate those improvements. We also know one thing, a lot of those improvements were tied into policy. And it's tied into this rollercoaster of attention on respirable dust.

I have watched this whole respirable dust issue just go like this up and down. When the nation is focused on it, when the



attention is there there is attention given. Whenever the focus gets somewhere else and the heat goes off we've had an unfortunate situation where the dust problems have increased in coal mines in this country. And I think you can just follow that curve with regard to when the government was focused and was not over the years. So those are not reliable to fix the problems of these miners. They need something black and white, concrete that gets the job done.

And I believe that this problem cannot be fixed with the current rulemaking because the agency did not go far enough to address clear cut proposals that would implement the Federal Advisory Committee or implement the kind of a program that the miners in this country need, and therefore we've got to go back to the well and fix it.

Marvin asked yesterday I think one of the miners, may have been Tom Klausing or Randy I believe it was, in regard to the sampling or what do we do between those sampling, compliance sampling periods in coal mines? And there was an exchange about how the plan verification system would work, realizing that the afternoon shifts I think was the deal that had the higher production levels. And as I was walking through that it got to the point, well, okay, we verify based on whatever shift we pick based on the tonnage. But what happens after that when we go to do compliance sampling?

And there was a discussion I believe, Marvin, about the bimonthlies would cover that period. And you asked the question, Well, what will we go in between those?

And I think there's some simpleminded answers to that question that has been raised by miners by years, that was explicitly outlined in the Federal Advisory Committee to help deal with that. And one of which is in addition to an effective MSHA takeover which I think has to happen effectively, and I've said that on record, we don't want an MSHA sampling program, we want an MSHA quality takeover program. And that's two different animals. But we got to fix that.

And the operator has to have some responsibility to do plan verification to make sure their plan is functioning right. And we've addressed that and that was addressed as well by the Advisory Committee.

We need to require, Marvin, continuous dust monitoring in coal mines. And I think that's the one missing link here that we have failed to fix that will help I think this whole process in having quality continuous dust monitoring that A) gives miners the kind of information to empower them that they need, and to allow MSHA to have some other reliabilities of knowing what's going on in some of these mines while MSHA's not there.

We all know MSHA can't be in every one of these coal mines every day. That's an impossibility. We all know that there is some operators, if you look at the evidence, that has manipulated the system and that you give them the perfect plan verification system which we need to get these real good plan verification systems in place, but the minute you walk out of there down comes the line curtain, heck with the water sprays, heck with all these controls. And that's been verified I think by various evidence that's been placed on the record over the years. And you've got to do something to fix that. And I keep harping on that but I'm telling you, I think that is the most serious problem in the coal mining industry to fix that miners are most vulnerable, that that provision of the Act where they should be guaranteed the ability to go through life without getting the Black Lung disease that we're missing the most here.

And as I keep saying, I've like racked my brain as like how do we fix that? And I think one way is to build the most tamper proof continuous monitor you can build that records data, that gives miners at least to the extent that they have some freedom to use that the ability to use that data to act for themselves. And in those cases where they don't have, to give the government some information to act on. And bolt those suckers down to a piece of mining equipment that can't go out and hang in a dinner hole.

Now, again, I challenge this committee, if you have a better solution to fix that problem, you know, we're open to it. But, you know, in all of my years of trying to figure this out other than parking a federal inspector there at some of these operations, which we can't do, we've got to come up with a better solution if we're really going to help those miners.

And I do speak on behalf of miners that we don't represent all the time because I have lots of coal miners out there and a lot of them I think are being abused in some of these mines to the point that it's just awful that we as a society would let that happen.

You need to empower miners too. And I think that's one area that there is a real disconnect here between this panel and the audience and those that have put information on the record in the past. There is a wish for miners to have a greater role in the whole dust sampling, dust control program. And although, yes, we appreciate the fact that we have a provision in the ventilation plan scheme to submit comments, we know what that does. We know we have some district managers, Marvin, that are very perceptive so that, you now, to what miners have to say. And we have enforcement. Tom knows that for whatever reason, you know, it just didn't work out that way.

And so that provision is good to notify, good to give miners the opportunity to comment, but it is not a legal authority standard. And it is not one that guarantees specific rights. And what miners want is something hard and tangible that they have some right to not only participate but some right to have some power over influencing the conditions that they're going to be in in their coal mine.

And this whole discussion we've had over the raising of the 2 milligram standard, 4 milligram standard, I set back here because I just watched for any response saying, yeah, you guys are right, you do have a legal tool there that would be changed by this rule. The tool right now is if MSHA comes in and does cite at 2 milligrams, whether that's an average or just happens to be everybody's at 2 at the time, whatever that case may be, but at least under that provision of law you have a right to after MSHA cites to challenge both MSHA and that operator to fix the darn thing. And you have the ability to have a legal right if they don't do that to go into court to force that to happen. You can challenge abatement times or you can challenge the modifications of standards.

And it is our clear belief that the way this rule is drafted the real decision making takes place between Energy West, between Randy Tatton and I guess Marvin Nichols right now, I mean in terms of, you know, the two bodies that make that decision. And you stand back and say shouldn't the miners have some legal right here to say, Hold the fort, we can't let this happen? This is our life that you're trying to figure out here.

The mine operator who's setting up there in the office somewhere does not end up breathing that dust. And the MSHA official who is setting up in their office not breathing that dust is making the decision for Camron Montgomery, right back there, in that room of what he's going to have to live with. And we think that is totally unfair. And we think that what's happened here is that the agency has not really realized the importance of the miner's role to stop that from happening.

Now, I can guarantee you one thing, we've got some of the smartest safety committees in the world that work at these coal mines. And to the point that both the government and the employers would work with them and have them as a participant in the process, the miners at that coal mine's going to be better served, not worse served. But when we cut them out of the picture, we take away their legal rights, it undercuts their ability to represent their own miners and decide what kind of conditions they're in. And we think that's dead wrong.

And we think any redrafting of the rule as you go through that piece by piece, what role should the miner really have here?

And let's make sure that miner has some kind of a voice powerful enough to stop something that's going to be bad for them and to have some power to influence the right kind of decision making to take place. And I'm not prepared to go through all of that today but I'm just telling you I think that's all missed through this whole rule and regulatory scheme.

I don't think the agency really got the point on what true miner participation is and what it needs to be. I don't think they got the true meaning of what the Advisory Committee intended to do. You know, training these folks. And I think some of the miners talked about the training shortfalls of miners. Yeah, we put the information out. Yeah, we use our journal. Yeah, we get out there and we beat on our committees about all this stuff.

And like the chest X-ray program. We went out there and told our guys, as a matter of fact, we drug them to the old chest X-ray centers, you know, just trying to educate the mining population about the importance of staying healthy, about not breathing bad dust and about having medical surveillance and those things. But I'll tell you, there's a whole lot of miners out there that don't get that diet. And there's a whole lot of miners that I don't know at this stage how they're even getting information.

But I think the Advisory Committee wanted like the miners' reps to be there when -- let's do training, let's train these miners, let's have the miners' reps there, let's have him certified, paid for the operator so they know what the sampling program and system is. Let's have them there telling the miners, you know, from that perspective what they really need to do. Because, let's face it, folks, if you read that Coal or the "Courier Journal" story there's a lot of mine operators that don't want miners to know that because of the activities that they were engaged in. And there's still those miners around today.

So there's a whole raft of miners' rep issues that, you know, we think are just missing the mark in this whole proposal.

Continuous monitors. I've heard many miners talk about the need of continuous monitors in coal mines. And what drives me is what I hear from coal miners all the time. And the miners have said, Hey, Joe, get us something that we -- we're tired of getting these samples back posted on the bulletin board. You know, we were up there mining and cutting up bottom and top, you know, on the continuous miner, you know, two weeks ago. And we're out of there, sampled. But we want to know what kind of dust we're in today.

Miners are held hostage in the current system to what MSHA does or to what the operator does to figure out what their dust levels are. And we think that's dead wrong. We think that what position that miner's take in 1976 in Cincinnati, Ohio, that has been battle cry since that point in time is get us a dust

monitor we can put in those mines so we, the miner, can see what this dust level is and we can take some action here and we can force something to happen. And let's do it in a way that it documents what the dust levels are so we can use that for other purposes.

I believe that we are at a point that the agency can issue a rule. I think if the agency does not issue a rule this whole concept of continuous dust monitors is doomed. I think that the resistance by some sectors of the industry to do that is very obvious. And a proposed or a statement in a proposal saying if an operator wants to set up a test site so some miner may be lucky enough, and I don't know if that's going to be Cam Montgomery or it's going to be David McAteer at the Jim Walters Number 4 mine or who it's going to be but, you know, that's not way to regulate a protection that's desperately needed by miners. We need that in the rule. Let's get it done. Let them fight over it. If they want to argue that in court till heck freezes over, let them argue it. But I think the time has arrived for this government to step up to the plate, get bold and do it.

MR. NIEWIADOMSKI: Joe, can you clarify something? Are you advocating fixed site monitoring or personal --

MR. MAIN: Both.

MR. NIEWIADOMSKI: -- continuous monitoring?

MR. MAIN: Both.

And I think there's a reason for those, George. I think the fixed site monitors provide an ability of miners and mine operators to know if you locate those where the dust generating locations are at what the dust levels are and they can take some clear reactions to fix that problem. And I think that has a clear beneficial application to it.

I think on the other hand personal monitors that are worker friendly, and hopefully everybody got the message, particularly after seeing the miner in Prestonsburg, about what's worker friendly and worker unfriendly means. And that is the reason that the mine workers made the claim in those two meetings in February and March along with the BCOA and along with the NMA to build a worker friendly dust monitor, something that works for the miners, not for the government but the miners.

And I think the problem I have with that whole decision making process is that I think at the end of the day there's something that satisfied the government interest greater than the miners' interest. And maybe R&P lied to us, but I remember being told we can make one or the other. And maybe NIOSH lied to us whenever they said we've got to choose one of these, let's take a pick. And when we did choose there was a clear message that went out of that room by the mine workers, by the coal industry, by

NIOSH. The silence of MSHA was somewhat recognized later on. And I didn't know what that meant at the time. But we all left that meeting with the clear understanding we was building a PDM-1 type device that was worker friendly. Only to find out later on that there was a change.

But, you know the sad thing about it is that I think, and the record will reflect this, that both us and the industry had to find out and we had to go like, Hey, guys, what's going on here? Tell us what's happening? And, you know, we wrote letters to try to get this whole thing cleared up.

Bottom line is miners need both of those, George. And I think if you put these miners working on belt entries, I mean all those stories that you heard about these outby areas, what a great way for us to have miners monitored in ways we never had before, to really find out what those outby folks are into. That would be a great supplement to the dust sampling program where the miners themselves can push a button and see what kind of dust they're in and we can have some record of that to know so we can make public policy decisions on what exposures are much better than what we have today. I think it would make a public policy if you listen to monitors on bad data in those designated areas. And we've got to fix that problem.

Respiratory protection. MSHA and NIOSH were both aware of the faulty airstreams before this rule came out. I was in meetings with the BCOA where we discussed this, where we discussed it with NIOSH and MSHA officials, where we discussed the different, what different options do we have to fix this problem? And I'm going to have to go back and I'll recheck the dates when those meetings occurred, but there is official meetings of the MWABCA committee meeting where that occurred.

And I was surprised to find in the rule that this one troubled airstream helmet that's the only one I know certified is the model which the government had intended on being used to replace, in our opinion, the engineering controls in coal mines.

Now, what was so sad is I think we're the ones who brought that up in Morgantown, the faults and the problems with those filters. I'll go back and recheck the record to make sure I'm clear on that. But I think my memory serves me correct that we were the ones who did that. And with the government knowing that there's this problem reaching this rule, you know, after the, you know, problem is brought to their attention I think raises a real concern in our minds.

Miners do not want to -- or miners do not wear airstreams in the approved states. And I made a point at one of the points in my testimony about different mines, because I got talk to these guys because I really want to know what they want, what worked for

them. And in many of these cases you don't see that skirt on the airstreams. And the reason for that is when you put that skirt in it locks that face up. Even with the older filters a lot of the miners, you know, had that skirt taken off there. It's difficult for them to breathe. The, you know, the condensation gets heavy. A guy is in there working hard, sweating, I mean all that, just put a -- put something around your head and try that. I mean it's very human nature that you're going to have that kind of a problem.

Now, if you're just standing there located in a very cool environment with low humidity the problem probably is much less. But they're not using these in many cases as an approved device. And I think you need to understand that. And I think you need to understand there's a difficulty for them to use those in an approved measure. That's the reason we've been working with the BCOA on this partnership on these Martindales which I basically drafted the protocol which was agreed to by the BCOA of what we wanted to try to do there. And the approach in the agreement that we had was not to use those as a replacement for engineering controls but use those as a clear in accordance with the Mine Act when an operator is doing it out of compliance so we can get some quality respiratory protection for miners. And we've got to get there not just for the longwall miners but for miners as a whole in this country.

And I think, again, this whole rule misses the point. We're concerned about all miners. We're concerned about getting a quality worker-friendly respiratory protection for miners that will work to protect them from the dust. And I think that at the end of the day when we arrive there it's not going to be a NIOSH-approved respirator for a lot of different reasons but it's going to be the closest thing we can do to protect miners. And I think there's enough synergies to get us there. But I think this whole debate over this rule is going to polarize that. I'm very afraid of that right now.

The proposed rule that allows engineering or allows administrative and respiratory protections to be used in lieu of engineering controls need to be pulled from that rule. That is our official position. And I think that's recognized now.

As a matter of fact, Ron, I hate to use you as a beating board here. And I don't intend to do that. But since you're the one within these conversations I guess, you know, you're wrong. At least wrong here.

As you guys are trying to develop this rule, I mentioned at the last hearing about the miners who raised the issue about wanting something done on the outbys. And, unfortunately, what we got done was not what we expected to see and I'm sure what those miners expected to see. They wanted more. We got less, down to

one. But there's also a considerable amount of discussion on the record from miners about the use of airstream helmets replacing, however you -- substituting in your words, replacing in our words, engineering controls with these.

MR. NIEWIADOMSKI: Joe, let me correct you. Neither of those. It's to supplement, okay. I need to, and I need to --

MR. MAIN: George, for the record, I understand. I'm just trying to -- I'm recognizing, you know, you guys and us have a different position. I'm just trying to get my comments on the record. We see it completely different than that. We know what's going to happen here. We went through the earplug thing. And I just don't want to -- I don't want to get in a debate over it. You have your position, we have ours. And I just want to --

MR. NIEWIADOMSKI: I'm only trying to clarify what's in the document. We don't use the word in lieu, okay? We use supplement.

MR. MAIN: If it looks like a duck, walks like a duck, quacks like a duck, George, we call it a duck. Okay.

In any event there was in the rule or in the discussions I counted I think 23 comments on the substituting -- whatever word you want to use, George -- of the engineering controls with the airstream helmets. And there is not one supportive comment that I found in those 23. As a matter of fact, "Schell looked out," this is a closing, Ron, you again, "Schell looked out across the room and said, 'So I take it you have no interest in Racals?'" Which I think really brings up the comments.

Now, that was with a bunch of safety committees from all over the country. And I'm not sure who all was there at that time. And I'll go back and I can pull that out and figure out where those miners were from. But they sent a compelling message to the agency. This ain't a Joe Main. This ain't a mine worker. This ain't a Tom Wilson. This came from a bunch of coal miners like, no, don't do that.

They do have a rule that's before them now that does that. And, again, I will say we need to listen to miners. We need to figure out a real solution to this problem for all miners as far as respiratory protection and withdraw this rule.

One other point I'd like to raise on the airstream helmets too. As we got into this discussion a few years back and I found out, and I raised this earlier, but it didn't have these figure then. When we got into this discussion about replacing airstream helmets or the engineering control/airstream helmet issue, I found out that MSHA unbeknownst to me was allowing operators who had quality respiratory programs to get a non-S&S citation where they were cited for the dust standard. And didn't like that but, you know, that was the policy of the agency that was



instituted somewhere along the line that I clearly missed. But I got educated on it real quick.

So I go back and I have discussions with the industry and have discussions with MSHA about this whole thing. And I said, whoa, wait a minute. If the industry can get a break and reduce the enforcement action by having a quality respiratory program in place they ought to be having much reduced S&S violations.

That was about three years ago. And I think the percent of S&S violations was about 95 percent. And when I looked at the latest round of violations for the last year 98 percent of those violations were S&S. In 1998, 98 percent were S&S. And in 1997, the same. So I question the sincerity of the miner operator to really implement quality respiratory programs and I question the motive here. You know, what is it we're trying to do, just get out of an engineering control or really protect miners? And, again, I think the record supports the fact that mine operators need to get with it first and get quality respiratory programs before we even start launching that, which we do not currently have. We do not currently have quality airstream or air purifying systems that would even accomplish that today.

As far as full shift sampling, if anybody set in this room over the last five days when miners spoke about what kind of sampling they wanted and didn't understand they wanted full shift sampling all the time I think, you know, the panel has missed the mark there. I got that message as clear as anything else that was said. And any rule that comes down we believe if you're going to sample miners to comply with 70 -- or 202, 202(b) I believe it is, or 201(b) to prevent them from having pneumoconiosis through their adult working life in the coal mines I think you have to listen to that. Because you've got to measure their exposure during their normal working. You don't do it part of it, you do it through all of it. And you make reasoned judgments about what it is that needs to be done to make sure that those dust levels stay low.

Full shift sampling has to be part of the reformed rule that comes out.

Miners want plan verification it's clear. And I think we've had a lot of the discussions about that. We'll be commenting more on the record. We do support a plan verification process. Have since the 1991 task force recommended this, or 1992 task force recommended this as an action. We thought it was wise then. We think it's wise now. The question is how you do that, and you go through and fix some of the problems and you lop off the last part of that that replaces protections that miners have in the Act. And we'll be doing more comments on that.

MR. NIEWIADOMSKI: Joe, can I ask you for clarification? Are you recommending verification, plan verification by operators

or by MSHA? I know earlier on you mentioned by the operators.

MR. MAIN: Yeah. I think my position has been quite clear that the test for verification purposes has to be done, that final pass test, by MSHA. That's been our position I think for quite some time. And I think it's reflected pretty clearly in the document I referred to where Ron visited the mine workers with regard to that.

But we also believe that there has to be an obligation on that operator to continue to go in there. What I fear about this and what I think the fear was of the Advisory Committee, don't just let the operator say we have no responsibility here anymore.

And I was real interested when the guy asked yesterday about what real operator responsibility is in this rule? And I'm thinking, oh, my goodness, you know, two or three things, that's it.

I think we have to be darn careful about pulling out a responsibility of the operator not to have to go in and double check their own system. And that's the reason we support the continued follow-up plan verifications by the operator in the program.

Miners want dust levels to decrease, not increase. And we can quibble over what we think happened here. But, you know, we have a mindset. You haven't changed us. We see we haven't changed yours. And that creates a dilemma here.

We saw the Advisory Committee recommendations, rather that I served on, and the NIOSH criteria document and we think there's clear conflicts with what the agency has done and what's contained in those documents. There may be differences of opinion but that's the way we see it. And we think any reform needs to encompass those protections for miners. Miners want more frequent sampling, not less. I spent a lot of time on that. But it's just a fact of life that that's been raised here many, many times.

As I said, the rule is fatally flawed. The agency needs to go back to the well with regard to the Parts 70, 75, 90 provisions, repropose those in ways that really take care of the reform that's needed to have miners working their adult life in coal mines without the risk of being disabled from pneumoconiosis. And that's each miner. And needs to do it in a way that encompasses the Federal Advisory Committee findings, needs to do it in a way that follows the NIOSH recommendations, needs to do it in a way that follows the real needs of coal miners, that really and truly responds to the lawsuit filed by the Mine Workers on January 13, 2000. And needs to do it in a way that does not strip protections out of this Act or undercut provisions of this Act. Needs to be done in a way that doesn't strip away protections miners have under the rule or weaken those provisions under the

rule.

We're very firm about that. And we've racked our brain to say is there some way we could bandaid this thing. But when you look at the pieces you can't just pull out one or two and say, this is good, let's let the rest of the stuff lie because of the, I think the overall harm it does in terms of trying to fix this program, to the extent that you've got to go back and make these measured surgical changes. The bandaids don't work. The body needs surgery. And that's our recommendation.

Thank you.

MR. NICHOLS: Thank you, Joe.

I want to say something to not fully explain the role that these good civil servants play in this process that I have up here with me. I've watched many of them work on this same problem you've talked about since, up close and personal since 1991. I remember when I first came over to coal Ron Schell and Jerry Speiser were chasing dust fraud. And then following that a whole series of programs were put in place to try to get more real life dust sampling and compliance with the health regs.

But this committee and the agency is not the only player in rulemaking. The Department plays a role. OMB plays a role. So, and you know that, that there's more players than just the agency in the rulemaking process.

MR. MAIN: And I realize that, Marvin. But I realize the, how shall I say this, the formation of the plan starts with MSHA. Okay. And that plan goes to those places for evaluation and review. And as I've looked across this rule to see what MSHA really did to fix some of these problems, it was like this MSHA takeover, if there is information that you have about studies or actions you've taken to figure out a funding mechanism for this consistent with the recommendation. And I've, hey, I've supported that recommendation 16(a), 16(b), 16(c) to the hilt. I believed it when we sent it off. We had hoped that the agency would follow that recommendation. But I have not seen anything, any evidence to show that. Okay?

So if you show me there's evidence that, you know, you pursued this that will be helpful for us and we can maybe figure out a better way. But I think it's absent.

When I look at the continuous dust monitor issue that is so frustrating. And I think, I think some very honest people are as frustrated in the government as I am about that whole issue. And we got up to this finish line and for some reason decisions were made that I think put us several months behind both on the personal dust monitor. Marvin, I was there at that meeting. I'm telling you, I walked out, Joe Lamonica walked out of that meeting. We thought we had us a deal from the government to build a PDM-1

and move on. That didn't happen.

With regard to the continuous dust monitor I walked out of the meeting in February believing in my heart, Marvin, that the government was going out to put this contract together. We identified what we were going to do, how we were going to fix that. And that's what we were told was going to happen. Walked out of that meeting believing the government was going to do this, happier than, you now, we're getting there, you know. Only to find out that that contract was abandoned, for whatever reason. And we stopped that.

I heard complaints, We don't like using R&P. Well, maybe I don't either. But, you know, when you're in for diamond and for dollar. But we go back to R&P to build the PDM-2. I mean, okay, you know. You know, it's like the problem of it is we're stuck, unfortunately, sometimes with people who have the keys to the safe that we may not like but, you know, we've got to deal with.

But I think those are issues that you can't blame on OMB and you can't blame on the Secretary of Labor.

MR. NICHOLS: I'm not blaming any --

MR. MAIN: Okay.

MR. NICHOLS: Let's be clear here. I'm not blaming anything on the Department or OMB.

MR. MAIN: But I mean we can't blame them.

MR. NICHOLS: I'm just saying that there's other players in the rulemaking process beyond this committee.

MR. MAIN: I appreciate that. Understand it. I just met with OMB two weeks ago on the Black Lung disability rules. We've had meetings with the Labor Department on these rules. And one of the problems we're faced with as we set here is realizing this is a serious problem and there is all these other players, we'd better get off our dead butts and start doing something about dealing with the whole system here. You know what I'm saying?

MR. NICHOLS: I don't want these miners to think, though, that they've made a compelling case to this committee and what they want might not come out the other end.

MR. MAIN: I think we have an impression about what we should expect from this committee by setting here and watching the committee work that we have to react on. And, unfortunately, when I shut up here I guess the public comment period ends so we've got to all go make our judgments based on what we believe, you on yours, us on us.

But I tell you one thing I will not do, and I will not be guilty of the same sin twice. We walked away in 1980 based on promises that we're still talking about in 2000. I will not recommend to our folks that we walk away from here with the same hopes and aspirations that something will be done. Okay. I think





REPORTER'S CERTIFICATE

CASE TITLE: 30 CFR PART 72; PROPOSED RULE  
30 CFR PARTS 70, 75 AND 90; PROPOSED RULE  
HEARING DATE: August 17, 2000  
LOCATION: Salt Lake City, Utah

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 hearing before the United States Department of Labor, Mine Safety and Health Administration.

Date: August 21, 2000

Raymond M. Vetter  
Official Reporter on behalf of  
Heritage Reporting Corporation  
1220 L Street, N.W., Suite 600  
Washington, D.C. 20005