U.S. DEPARTMENT OF LABOR
Washington, DC

PROPOSED RULE UPDATING OSHA STANDARDS BASED ON NATIONAL CONSENSUS STANDARDS - PERSONAL PROTECTIVE EQUIPMENT

Frances Perkins Building
Auditorium
3rd and C Streets, N.W.
Washington, DC 20210

Tuesday,
December 4, 2007

The committee was convened, pursuant to notice, at 9:00 a.m., THOMAS M. BURKE, Administrative Law Judge, presiding.

APPEARANCES:

MR. THOMAS M. BURKE
Administrative Law Judge

OSHA DIRECTORATE OF STANDARDS AND GUIDANCE

MS. DOROTHY DOUGHERTY

MR. WILLIAM PERRY

MR. DON PITTENGER

MR. TED TWARDOWSKI

OSHA DIRECTORATE OF EVALUATIONS AND ANALYSIS

MR. ROBERT BURT

MR. ROBERT BLICKSILVER

OFFICE OF THE SOLICITOR

MR. RONALD GOTTLIEB

MR. BRADFORD HAMMOCK

MS. SARAH SHORTALL

OSHA OFFICE OF COMMUNICATIONS

MS. VENETA CHATMON

ALSO PRESENT:

MR. KEVIN CUMMINS
Director
Public Policy & International Trade

VICTORIA BOR, Esq.
Sherman, Dunn, Cohen, Leifer & Yellig
Counsel to the Building and Construction Trades

CHRISTINA TRAHAN, CIH
BCTD

SCOTT SCHNEIDER, CIH
Director
Occupational Safety & Health for Laborers' Health Fund of North America

C O N T E N T S

E X H I B I T S

Number	Marked	Received
OSHA-2007-0044-0058	17	17
OSHA-2007-0044-0059	99	99
OSHA-2007-0044-0060	176	176

P R O C E E D I N G S

WELCOME

JUDGE BURKE: Good morning, folks. If you'd like to take your seats, we'll get started.

This is the Occupational Safety and Health Administration's Proposed Rule Updating the Agency's Personal Protective Equipment Standard on eye, face, foot, and head protection. The proposed rule was published May 17th, 2007 in the *Federal Register* at Volume 72, page 27,771.

I'm Judge Thomas Burke, the administrative law judge assigned to preside over today's hearing.

The purpose of the hearing is to receive oral and written testimony of interested parties, as well as receiving other information pertinent to the proposed rule. At the conclusion of the hearing, OSHA will review the record of the proceedings and determine what the content and the final rule will be

My role as presiding judge is limited to conducting the hearing to ensure a complete and accurate record and that all interested parties receive a fair hearing and have an opportunity to submit their information.

The OSHA rules governing this hearing in the pre-hearing guidelines issued on October 30, 2007 are

available at the entrance to the auditorium. There's also a revised list of witnesses that will be presenting testimony also at the same location.

Last month, OSHA had sent the pre-hearing guidelines and the hearing schedule to those persons and organizations who filed a Notice of Intent to Appear at the hearing.

Just a few words about the nature of the hearing. Despite the informal nature of the hearing, the hearing will be governed by OSHA's rules governing hearings and pre-hearing guidelines to ensure that everyone has a fair opportunity to speak and express their points of view, although unduly repetitious testimony will not be allowed, and the presentation of witnesses generally will be limited in time.

The written comments and testimony that you've already submitted, or will be submitted during this proceeding, will be made part of the rulemaking record. Thus, in your oral testimony the participants who are presenting testimony should concentrate on presenting the highlights of the written testimony or clarifying any points that they wish to have clarified. Participants, in fact, may identify and sponsor their written testimony and simply make themselves available for questioning from other participants.

After each participant who presents testimony is finished with their testimony, they will be asked to take questions from all those who have submitted a Notice of Intent to Appear. After participants have asked questions of the witness, then OSHA's panel will then have an opportunity to ask questions.

After a witness finishes giving testimony, I will ask the participants in the audience who have questions of the witness to raise their hand and I will call on them to ask their questions of the particular witness.

And one additional point before I turn it over to attorney S. Shortall. I ask that ask that those of you who have cell phones, turn your cell phones off. If you're going to use your cell phones, we would request that you go ahead out in the hall and use them there.

Ms. Shortall?

MS. SHORTALL: Thank you, Your Honor.

Good morning. I also would like to welcome you to this informal hearing. It's a pleasure to see so many familiar faces out there. With me today from the Solicitor's Office are Brad Hammock and Ron Gottlieb.

I'd like to take just a moment to explain the

role of the Solicitor's Office in this rulemaking hearing. Our responsibility is to help facilitate the development of a clear, complete, and accurate record. We will do this through asking questions, eliciting information on other issues, and helping to resolve any procedural matters that might arise.

Your Honor, at this time I would like to offer to you the master index of the complete record of this rulemaking for inclusion in this hearing record. This is not a copy of all the exhibits and all the documents that have been submitted. Rather, it's a list of all the documents that are in the docket of this rulemaking, which is OSHA 2007-0044.

All the documents in the record that have been submitted are available for copying and inspection in the OSHA Docket Office, Room N-2625 in this building, and they're also available online at www.regulations.gov, which is the new Federal Government e-rulemaking portal.

JUDGE BURKE: Thank you, Ms. Shortall. The master index is accepted into the record.

MS. SHORTALL: Thank you, Your Honor.

Now we'd like to introduce members of OSHA who are participating in today's hearing. On my far left is Dorothy Dougherty, Director of the Directorate of

Standards and Guidance. With her are Bill Perry, the Deputy Director of Standards and Guidance, and Don Pittenger, Director of the Office of Safety Systems in Standards and Guidance. Behind them is Ted Twardowski, also from the Office of Safety Systems, and project officer for this rulemaking.

On my far right is Bob Burt, Director of OSHA's Office of Regulatory Analysis, and behind him is Bob Blicksilver from the Office of Regulatory Analysis, and the project economist for this rulemaking.

And now, Your Honor, Ms. Dougherty will present OSHA's opening statement.

JUDGE BURKE: Ms. Dougherty?

PRESENTATION

By Dorothy Dougherty

MS. DOUGHERTY: Okay. Good morning, Judge Burke, ladies and gentlemen. I'm Dorothy Dougherty, Director of Directorate of Standards and Guidance of the Occupational Safety and Health Administration, OSHA.

On behalf of OSHA, I welcome you to this informal public hearing on the proposal to update references to national consensus standards in OSHA's personal protective equipment, PPE, standards for general industry, as well as shipyard employment, marine terminals, and longshoring, collectively referred to as maritime standards.

Your participation here is greatly appreciated. The testimony received today, along with all the written comments, will provide important information to the Agency in developing the final rule. This rulemaking is a part of OSHA's initiative to update its standards that reference outdated consensus standards.

The purpose of today's hearing is to discuss OSHA's proposed rule published on May 17, 2007 to update the PPE standards for eye, face and head, and foot protection. The proposal removes references to

outdated consensus standards and inserts performance-based requirements into the regulatory text, and includes references to updated consensus standards that comply with the standard in the non-mandatory appendix.

OSHA believes the proposal will increase worker protection, make compliance easier for employers, and provide a more expeditious approach for updating reference standards in the future.

However, before we get into the details of the PPE proposal, I would first like to take a few minutes to talk about OSHA's overall initiative to update all of its standards that either reference national consensus standards or are based on national consensus standards.

OSHA's use of national consensus standards began in 1971, when the Agency first came into existence. Under Section 6A of the Occupational Safety and Health Act of 1970, Congress gave OSHA the authority, during the first two years following passage of the OSH Act, to adopt both national consensus standards and establish Federal standards and OSHA standards without filing Notice and Comment rulemaking procedures.

Congress provided that authority so OSHA would be able to begin protecting the Nation's employees

immediately. OSHA exercised that authority and adopted numerous consensus standards as OSHA standards. The vast majority of those OSHA standards have not been updated since they were adopted.

Today, more than 500 provisions in OSHA standards reference consensus standards and hundreds more are based on consensus standards. Many of the references are decades old. To update each of those OSHA standards one at a time following the normal Notice and Comment rulemaking processing would be an extremely lengthy process.

That is the reason OSHA announced in the *Federal Register* on November 24, 2004 a new initiative to update OSHA standards referencing consensus standards. To accomplish that initiative in the most expeditious manner possible, OSHA said that it would use a variety of regulatory approaches, including Notice and Comment rulemaking, direct final rulemaking, and technical amendments.

The PPE proposal we are discussing today is the second part of OSHA's update initiative. The proposal revises 18 references to consensus standards in existing PPE standards for eye, face, head, and foot protection in general industry and maritime. Those consensus standards, which are American National

Standards Institute, or ANSI, standards dating as far back as 1967, are all out of date.

The referenced consensus standards have all been superseded by newer versions, or replaced. For instance, the ANSI's Z41 PPE standard for protective footwear has been completely replaced by an American Society for Testing Material, ASTM, standard on protective footwear.

OSHA believes that as consensus standards have been updated over the years, manufacturers have followed the design requirements of the newer consensus standards, even though the OSHA standards still reference the older versions.

OSHA estimates the average life of the types of PPE the proposal addresses is between two and four years. Consensus standards development organizations can, and generally do, update their standards much more quickly than OSHA is able to update its standards.

For example, standards development organizations operating under ANSI procedures require that every five years consensus standard be reaffirmed, revised, or withdrawn. As a result, when employers buy new PPE they often find that the PPE on the shelves has been manufactured to consensus standards that have been updated, sometimes updated several times, since the

version referenced in the OSHA standard.

The new PPE, as well as the newer consensus standards, reflect advances in technologies and materials that have occurred during the time since OSHA incorporated the earlier consensus standard. As a result, the new PPE is at least as protective as PPE manufactured to the decades-old versions referenced in the OSHA PPE standards. Indeed, it is often difficult for employers to find PPE manufactured in accordance with the consensus standards referenced in OSHA's rules, or even find copies of those consensus standards.

Some of the old consensus standards are no longer in print or available to the public through the issuing standards development organization. In the past, OSHA has updated its PPE standards by revising them to incorporate more recent versions of the relevant consensus standard.

However, this approach only temporarily alleviates the problem of referencing outdated consensus standards, because as soon as the standards development organization updates their consensus standard, the same problem arises again.

OSHA believes that the proposed rule will provide a more permanent solution. OSHA proposes to

revise the general industry and maritime PPE standards for eye, face, head, and foot protection to remove references to consensus standards from the regulatory text and instead require that PPE be constructed in accordance with good design standards.

The proposal includes specific guidance about what constitutes good design standards. In addition, the proposal includes examples of national consensus standards in a non-mandatory appendix that OSHA has determined meet the criteria of good design standards.

Although the proposal does not require that PPE be constructed in accordance with the listed standards, it requires that PPE must provide protection equivalent to, or greater than, PPE constructed in accordance with one of the listed national consensus standards.

As mentioned, OSHA believes the proposal will provide several benefits: it will increase worker protection; make compliance easier for employers, and provide a more expeditious approach for updating references in the future. The list of consensus standards provide a baseline of worker protection that is at least as effective as OSHA's existing standards, but that also reflect changes in PPE technology and materials.

Future consensus standards will have to meet or exceed the proposal's criteria and baseline before a PPE that is built in accordance with newer standards will be considered complying with the OSHA's rule. The proposal will also allow employers to readily take advantage of future safety advances and improvements in consensus standards and PPE, with more scrutiny than under the existing standards. This makes compliance easier for employers.

The proposal presumes that updated versions of consensus standards, including those listed in the appendix, will continue to meet the good designs standards requirement instead of requiring employers to obtain and analyze older consensus standards to determine whether they provide employees with at least equivalent protection as PPE designed in accordance with the referenced version of the standard.

Finally, the proposal specifies that OSHA will update or add to the listed consensus standards by engaging in direct final rulemaking. The direct final rulemaking process will allow OSHA to update the list of consensus standards more quickly. At the same time, the direct final rulemaking process ensures that the baseline will not be lowered because additions or changes to the listed consensus standards cannot become

effective through direct final rulemaking if the Agency receives significant adverse comments.

If OSHA receives such comment, the Agency will withdraw the direct final rule and proceed with regular Notice and Comment rulemaking, which ensures that the public has full opportunity to comment on any proposal, to add or to change the listed consensus standards. OSHA believes this approach also increases transparency and public accountability.

OSHA is interested in hearing more from participants about the proposal, including their suggestions and ideas on improving OSHA's proposal, or other approaches that OSHA should consider to ensure that employees are provided with adequate PPE protection.

The Agency recognized that the proposed approach is different from what OSHA has done in the past. However, OSHA believes that the problem of updating such a large number of outdated consensus standards requires a solution that will streamline the process and expedite the recognition and acceptance of up-to-date, state-of-the-art consensus standards. We are here today to get your input on how to accomplish this.

In closing, OSHA will carefully consider the

information and suggestions provided by commentors and participants as the Agency develops a final PPE rule. OSHA looks forward to hearing today's testimony and working toward a solution that assures worker safety and health and facilitates a way to keep references up to date. Thank you once again for your participation.

At this time we will answer any questions the participants might have.

JUDGE BURKE: Thank you, Ms. Dougherty.

MS. SHORTALL: Your Honor, at this time I'd like to mark OSHA's opening statement as Exhibit number OSHA-2007-0044-0058, and request that it be entered into the record of this hearing.

JUDGE BURKE: It's so entered.

MS. SHORTALL: Thank you.

(Whereupon, the document referred to as Exhibit OSHA-2007-0044-0058 was marked for identification and entered into the record.)

JUDGE BURKE: At this time do we have any questions from anyone in the audience that filed a Notice of Intent to Appear, of the OSHA panel and the proposed standard? Yes, ma'am. Why don't you approach the podium to my right.

Before you start, could you introduce yourself

or state your name and your organization that you represent?

MS. TRAHAN: Yes. Thank you. My name is Chris Trahan and I'm here with the Building and Construction Trades Department panel. I have a few questions.

The first question that I wanted to ask, is the reason why the construction industry was excluded from this rulemaking.

MR. PERRY: Good morning. As you know, OSHA has, as our preamble points out, a couple of hundred consensus standards referenced. Many of these are equipment design standards such as the one we're dealing with today dealing with PPE. This rulemaking today, that we're discussing today, is really part of a very large effort by OSHA to update many, many of these standards.

Consequently, we consider this to be kind of a phased approach. For that reason, a decision was made to, at this point, propose this PPE consensus standard for general industry and the three maritime sectors. Obviously we read your comment and we understand that it perhaps makes sense to include construction in such a rulemaking, and we'd seriously consider that and we'd be interested in discussing that as part of your

testimony today.

MS. TRAHAN: Do you have any projected timeline of including the construction industry in this rulemaking?

MR. PERRY: Not at this time, no.

MS. TRAHAN: There is no timeline.

Do you view the construction standards as presenting substantially different issues than the general industry standards as far as PPE specifications go?

MR. PERRY: Well, that wasn't a consideration at the time we proposed this rule, but we'd certainly be interested in discussing whether, you know, the extent to which there are similarities or differences in PPE use or practices in the construction industry.

MS. TRAHAN: But you don't have an opinion as far as the difference as an Agency, or --

MR. PERRY: No, not at this time.

MS. TRAHAN: Now, I'm going to shift gears a little bit. I'm thinking about in the future, as OSHA goes on to enforce the standard, if it's adopted as proposed. How much leeway do you think employers may have to determine what is equally effective as the items listed in the appendix? The proposed rule seems to state that you don't have to follow what's in the

non-mandatory appendix when choosing PPE, but it has to be as effective. How will employers determine that, in your view?

MR. PERRY: I think our preamble discusses some criteria dealing with -- if one is using PPE that is designed to a standard that's not listed in the appendix, we're looking to see that the standard to which the PPE is designed addresses safety concerns with respect to usage of that PPE in the way it's designed, and that it reflects a test method that's generally regarded by the safety profession as offering a sufficient level of protection, or level of protection that's at least equivalent to the ANSI and ASTM standards that are listed in the appendix.

We did ask questions, particularly about that criterion in the proposal, and would be very interested in hearing people's opinions as to whether that's the right criteria, whether we should be thinking about something else.

MR. HAMMOCK: And Bill, if I might just add one point on that. The existing general industry PPE design standard requirements, as you know, lists a specific ANSI standard or consensus standards that people have to comply with, but it also allows employers now to use any other type of equipment built

to its standard that provides equivalent protection. So, I think in that sense the existing standard provides a great deal of leeway to employers now.

In many ways, what we've done here is we've tried to better define that process that an employer can enter into to make a determination if they want to use a type of PPE that isn't the one listed. I mean, we've laid out the criteria and then we put in a non-mandatory appendix.

So I don't know to what extent there's more or less leeway, getting back to your question, in the existing rule. But I do believe we've tried to put in some criteria to guide employers in that. Again, as Bill said, whether we've done that effectively or not, we would certainly welcome your all's comments on that.

MS. TRAHAN: Along those lines, Bill, you indicated that -- it seems to be that you indicated that if an employer chooses to use a PPE that doesn't conform with the consensus standards referenced in the non-mandatory appendix, that they would have to show that the test method was equivalent.

So I'm inferring that the compliance officer, if they encounter PPE that's not on the non-mandatory appendix list, will have to request from the employer the data to support that the PPE is equally effective

or equally as protective. Is that -- I'm trying to ask, how do employers comply, and secondly, how do compliance officers evaluate if employers are in compliance?

MR. PERRY: I don't think we see that the enforcement of this rule as proposed now would be much different than the way we enforce the existing rule, because right now where we encounter situations where employers might be using PPE that doesn't comply with the required or the referenced consensus standard, our field officers make judgments as to whether the standard to which that PPE is designed is at least as effective. So, we've been doing it all along in terms of enforcing the existing rule.

I think the advantage that we were hoping to gain with the proposed rule is that we would have this built-in presumption that, as newer standards are developed, newer consensus standards are developed, there's a presumption that they are at least as effective as the ones listed in the non-mandatory appendix. Right now, OSHA has to look at those new standards and make a determination that they are at least as effective.

MS. TRAHAN: Well, I think that leads me into what might be my last two questions.

MR. PERRY: Okay.

MS. TRAHAN: Is there a specific criteria that OSHA has in mind when evaluating future consensus standards to determine if they are equally effective or equally protective?

MR. PITTENGER: In essence, a couple of things. One, the proposal talks about -- characterizes a good design standard which speaks toward the process under which such standards are developed. Beyond that, from a technical perspective, in essence, these standards are based on a set of performance tests, so that the test results can be compared one against the other.

A European standard may use different units for force, but one can make an assessment on that basis, and that is our current thinking on how we will assess whether or not an alternative standard to what we have listed may be appropriate and provide protection that is at least as good as those that we have listed.

MS. SHORTALL: Might I add one other word about the presumption that newer consensus standards of the ones listed in the appendix will be presumed also to constitute good design standards? As you well know, the existing standards reference consensus standards

back to 1967, and yet it's going to be very difficult to find PPE that meets that as opposed to the new consensus standard.

So, all along, as the ANSI, and now ASTM, standards have been updated, OSHA's engineers, both in our national and regional offices, have been evaluating to see whether the newer standards are as protective, and in each case they found that it is at least as protective, if not more protective.

Based on this experience that we've had over the years, we feel that this presumption also regarding the newer versions of the consensus standard listing in the appendix would be equally as protective is well warranted.

So for those particular ones, we are going to -- you're suggesting that there is a presumption that they, too, will be in compliance, which will give employers some ready reliability that they can count on as they move forward in purchasing additional PPE for their employees in the future.

MS. TRAHAN: Okay. I think the last question I had, which I was hoping you could clarify, is there a reason that you couldn't use the direct final rule to update content of an OSHA standard that's within the body of the regulation versus a non-mandatory appendix?

MR. PERRY: Well, in fact, we have done that in past consensus standard update rulemakings. I think what we were trying to do here was, number one, to provide employers with more flexibility than would be the case if we were referencing consensus standards directly in the regulatory text, and number two, to ease the burden on OSHA to have to update every time new standards come out, which is the box that we're in right now.

So we felt what we were trying to achieve by putting these standards in this appendix, along with this presumption that newer standards would be considered to be at least as effective or would constitute good design standards, was also to help OSHA make sure that its standards could be kept up to date more readily.

MR. HAMMOCK: And I think, just to add one other thing, too, to that--I believe we said this in the proposed rule--the direct final rulemaking process in this instance, what we feel like we'll be able to do is really limit the issues that are involved. And by that, I mean what we would be asserting in a direct final rule process is that the particular thing we want to add to the non-mandatory appendix provides equivalent or better protection.

So we're trying to focus the issue of the direct final rule to that as opposed to changing a broader requirement in some way, which may or may not, depending on how the reg texts were formulated, have to result in greater analyses or longer review by folks. This is a focused direct final rule.

What we'd basically be saying is, this particular thing that we're adding is as safe as what's currently there. By that I think we can do it much quicker, we can reduce the amount of analyses we might have to do, and it will be less controversial.

MS. TRAHAN: Okay. Thank you very much.

JUDGE BURKE: Thank you. Thank you, Ms. Trahan.

Is there anyone else that has filed a Notice of Intent to Appear that wishes to ask questions? Mr. Kojola?

MR. KOJOLA: Good morning. My name is Bill Kojola and I'm with the AFL-CIO. It's a pleasure to be here this morning at this rulemaking. I wanted to ask the panel some questions about direct final rulemaking.

So isn't it true that direct final rulemaking is a process that is supposed to proceed fairly rapidly?

MR. PERRY: Yes, it's supposed to.

MR. KOJOLA: Okay.

MR. PERRY: Yes.

MR. KOJOLA: And doesn't the Agency have some history of updating by direct final rulemaking standards that have referenced consensus standards in the body of the rulemaking text?

MR. PERRY: Yes.

MR. KOJOLA: And typically, as I see it from looking at the regulatory history, these direct final rulemakings take on the average of several months of activity on the part of the Agency, at least from the first notice in the *Federal Register* until it becomes a direct final rule. Is that correct? I mean, we're talking about a process here that takes months rather than years, typically.

MR. PERRY: Provided that the Agency doesn't receive an adverse comment, or substantive comment that then --

MR. KOJOLA: Correct. And the direct final rulemaking is really meant to look at non-controversial issues. Isn't that correct?

MR. PERRY: That's the intent.

MR. KOJOLA: And has the Agency had a history of having controversy around the ANSI standards with regard to PPE?

MS. SHORTALL: In the first effort that OSHA did in 2004 to update or to delete outdated references and various safety standards, they weren't PPE ones. Surprisingly, we did receive adverse comment and did have to proceed to Notice and Comment rulemaking, which I think took the Agency a little bit by surprise because we really thought it was non-controversial. So as Brad said, the smaller the bite we can take for direct final rulemaking, the more likely it is that we will be able to proceed through without adverse comment.

MR. KOJOLA: But even in the case of a direct final rulemaking proposal, the Agency typically publishes sort of a separate, but parallel rule so that if you get a significant adverse comment, that comment then essentially slides into the Notice and Comment rulemaking and you move forward, so you don't lose any time.

MR. HAMMOCK: Well, yes. I mean, obviously, if you don't receive a significant adverse comment that's faster.

MR. KOJOLA: Correct.

MR. HAMMOCK: But we do the practice, with one exception, which was when we dealt with the role of a protective structure's direct final rule from a year

ago, and that was a limited circumstance, but with one exception being that we do issue a proposed rule at the same time as we issue the direct final, yes.

MR. KOJOLA: Okay. Now, I think, Sarah, you mentioned just previously that the experience of the Agency has been, as the revisions to the consensus PPE standards have unfolded and OSHA has examined them, you've found them to be at least, if not more, effective than the previous older version. Is that generally the Agency's experience with looking at the revision?

MS. SHORTALL: Yes.

MR. KOJOLA: So typically you're not having situations where the revisions provide less protection, they're providing at least equivalent or higher levels of protection.

MR. PERRY: In the case of personal protective equipment, yes.

MR. KOJOLA: Yes. Correct. We're talking about PPE. Yes, that's correct.

MR. PERRY: Yes.

MR. KOJOLA: So you've had a history of revising rules where you reference consensus standards in the body of the rule itself by direct final rulemaking. It's been fairly quick. Has the Agency

ever used a direct final rulemaking procedure for a non-mandatory appendix?

MR. HAMMOCK: For a non-mandatory appendix? No, not that I am aware of.

MS. SHORTALL: But we have done technical amendments.

MR. KOJOLA: Technical amendments, but not using the direct final rulemaking procedure. So would the direct final rulemaking process be any different between one option of inserting those as consensus standards in the body of the rule versus inserting the consensus standards in a non-mandatory appendix? Would it be any different? Would there be any differences here?

MR. HAMMOCK: Well, I think there's a couple things to keep in mind with that. As I indicated a moment ago, we believe that by setting this up this way we limit the actual issue that would be looked at for the direct final rule, for limiting it to only whether those particular consensus standards provide equivalent protection. That is, in a sense, the only issue that we would be putting forth for public comment on.

MR. KOJOLA: And that would be the case whether the direct final rule was referenced in the standard itself versus a non-mandatory appendix. There

really is no difference.

MR. HAMMOCK: But there could be a difference. I know that in your comment, for example, you have suggested that OSHA consider this process. One of the things that I think we'll be asking you is to flesh that out a little bit, exactly how that would work, because if you were to set up the reg text as you are -- one way to set up the reg text along the liens that you're talking about would be to say, okay, employers must purchase PPE that meets ANSI 2005, with no other exceptions.

You could set it up that way with no grandfathering, for example. You wouldn't have to, but you could. Well, now if you go in and you try to update that, depending on how you were to update it, you could result in significant costs to employers and you'd have to go and do that analysis.

I'm not saying you would necessarily have to do that, but depending upon the way you set up the reg text and depending on the way you were to place obligations on employers, in fact, you might have a broader analysis than what you would have under this particular proposal. The second thing I would point out, is part of the reason for doing this --

MR. KOJOLA: Is that what you would expect,

though? I mean, dealing with the ANSI standards around PPE, that you would expect that?

MR. HAMMOCK: Would I expect --

MR. KOJOLA: I'm not sure I would.

MR. HAMMOCK: Expect what, exactly?

MR. KOJOLA: That you would have to do a much broader analysis, other than to assess whether or not the revised consensus standard provided at least equivalent or better protection for workers.

MR. HAMMOCK: Well, again, it depends on how the reg texts were set up.

MR. KOJOLA: Okay.

MR. HAMMOCK: It depends on how they're divided. But I think the other thing--and Bill was mentioning this, and he can pick up on this as well--there's at least two things that we're trying to accomplish here. One, is we're trying to get rid of outdated versions and to ease the process of complying with newer versions.

But it's also to set up a broad performance standard that will provide more flexibility for employers to use equipment that meets a standard that is at least as equivalent as those listed in the non-mandatory appendix. I mean, right now we have a standard that requires people to meet ANSI, which is

specifically referenced in the reg text. We believe that we created a more flexible approach here. So, there's more than just that one reason. There's a number of things we're trying to accomplish with this approach. I don't know. That's just picking up on what Bill was saying.

MR. KOJOLA: I'm not certain that most employers are going to be interested in examining the contents of your good design standard and then doing their own independent evaluation of some key PPE that doesn't conform to the list of consensus standards that you have, whether they're in the rule itself or in the non-mandatory appendix. I mean, I think that will take some considerable effort. I think it's easier for the majority of employers to say, look, I'm going to buy the ANSI safety shoes, et cetera.

MR. PERRY: Which we acknowledge. Yes, I think we agree that most employers are going to go that route.

MR. KOJOLA: So I'm not so sure that there's a hue and cry from the employer community to have more flexibility, in other words.

My last question here has to do with timing. You know, we talked about the direct final rulemaking being accomplished in a matter of months, but that the

consensus standards are updated approximately every five years. So we have a situation where, as you update through direct final rulemaking, there will be some period of time before the Agency needs to sort of revisit the issue as the consensus standards are revised.

So we're not having a situation where it seems like there's a huge burden to the Agency to do that, particularly if it does it through a sort of regular, routine, direct final rulemaking process. Any response to that sort of comment?

MR. HAMMOCK: Well, I think that we've sort of looked at this and looked at that alternative, and looked at different approaches going forward. I think we thought that this approach suited us and suited our needs and the needs of the regulated public the best. I mean, certainly we'll consider that. We are sort of, in many ways--and I know Dorothy and Bill can speak to this too--we're dealing with, you know, 200-plus references, many of which are outdated.

Those of you who remember the very first action, we deleted a reference to a 1944 drinking fountain standard. So, we're sort of trying to figure out a way, with the resources that we have. And again, this is one part. This is PPE. But there are,

unfortunately or fortunately, 170 other references that we have to deal with here and we're trying to figure out a way to deal with all of these things in the most effective way.

MR. KOJOLA: I think I'd point out one other thing, is we're not dealing with a single consensus standard here. We've got different standards for eyewear, footwear, and they aren't all on the same cycle. We can't predict the future. We don't know when these things are going to get updated next.

So, again, we were hoping to give OSHA some flexibility as well in terms of allocating our resources at any given point in time and not feel that we have to do an update of a rule at a given point in time because the way we constructed the rule to begin with is creating some problem out there for people. So that's why we're looking for an approach that we hope we can extend really to many other standards that reference equipment design specifications, such as this one.

MR. KOJOLA: I appreciate the Agency's efforts to tackle this issue. Thank you very much.

MR. PERRY: Thank you.

JUDGE BURKE: Thank you, Mr. Kojola.

Anyone else who has filed a Notice of Intent

to Appeal that wishes to ask questions? Yes, sir?

LT. BADAR: Lt. Commander Tisif Badar. I represent the Marine Corps' Chemical/Biological Incident Response Force.

Is there an opportunity here --

JUDGE BURKE: Excuse me, sir. Could you spell your last name for the record?

LT. BADAR: Badar, B-A-D-A-R.

MS. SHORTALL: Who are you with?

LT. BADAR: I'm with the Marine Corps' Chemical/Biological Incident Response Force, CBIRF.

MS. SHORTALL: Your Honor, to my knowledge they did not file a Notice of Intention to appear and question witnesses today.

LT. BADAR: That is correct. We're wondering if we could ask a question here.

JUDGE BURKE: Those who are going to ask questions are limited to those who filed a Notice of Intent to Appear.

LT. BADAR: Okay. Very well. Thank you.

MS. SHORTALL: But Your Honor, I do acknowledge that if they would like to file comments during the post-hearing comment period, they should feel free to do so.

LT. BADAR: Thank you.

JUDGE BURKE: Very good.

Anyone else?

(No response)

JUDGE BURKE: Okay. That completes the questioning of the OSHA panel.

The next witness will be Mr. Daniel Shipp, of the International Safety Equipment Association. But before Mr. Shipp presents his testimony we're going to take a short 15-minute recess.

(Whereupon, at 9:42 a.m. the hearing was recessed and resumed back on the record at 9:57 a.m.)

JUDGE BURKE: If we could get back on the record now.

Mr. Shipp? Mr. Shipp, before you start, if you could identify yourself for the record, as well as your organization.

MR. SHIPP: Okay. Thank you. My name is Daniel K. Shipp. I'm president of the International Safety Equipment Association, also known as ISEA.

JUDGE BURKE: Thank you. You may proceed.

PRESENTATION

By Daniel K. Shipp

International Safety Equipment Association

MR. SHIPP: Thank you. Judge Burke, members of the panel, ladies and gentlemen, thank you very much for convening this hearing to discuss this important issue. I would like to summarize my testimony which has been submitted, and assume that that will go into the record as part of the proceedings.

JUDGE BURKE: It has been.

MR. SHIPP: ISEA is the trade association for companies that manufacture and sell personal protective equipment, including head protection and eye and face protection, the devices covered by the PPE standard that's the subject of this hearing this morning.

ISEA is a standards developing organization. We're responsible for the ANSI standards for eye and face protection, ANSI ISEA Z87.1 and for ANSI ISEA Z89.1. ISEA and its members are also active in standards development in other organizations in the U.S. and Canada. We participate as well in standards activities in Europe, Asia, and internationally.

We'd like to thank OSHA for convening this hearing to discuss the May 17th proposal. ISEA asked for this hearing, believing that an open discussion of

the proposal would help the Agency to arrive at a solution that streamlines its standards process without adding new compliance burdens and potentially lowering worker protection.

ISEA is sympathetic to OSHA's difficulty in matching its regulatory requirements to the latest version of national consensus product standards. I think Ms. Dougherty's opening statement was a good, thorough explanation of the problem.

We agree with that statement that the May 17th proposal will alleviate this problem. We respectfully disagree with the contention that it will ease compliance or that it will improve worker protection. We think there's a better way, and we'd like to explore that this morning.

ISEA and OSHA are not far apart. In fact, I reviewed some of the records back in 1999 where we had submitted a statement to MACOSH. One of the issues that we had in that statement regards standard development and improvement of the process was that it would be a good idea to use the non-mandatory appendix. I guess maybe you should be careful of what you ask for.

I'd like to summarize our written comments this morning and then respond to questions.

First of all, the good design standard concept, we believe, eliminates baseline performance requirements for protective equipment and as a result could potentially compromise worker safety. Employers would have to ensure that PPE is constructed in accordance with a good design standard.

This means a standard that: 1) specifies safety requirements; 2) is recognized in the U.S. as providing some undefined adequate level of safety; and 3) was developed by a standards development organization in an open and inclusive process. There is no definition of how a standard would be recognized in the United States, or even what OSHA considers an adequate level of safety.

So OSHA would provide guidance by listing in a non-mandatory appendix those standards that meet the good design criteria and would be presumed to be acceptable. The employer may use a product that does not conform to one of the listed standards, but it must be made to a good design standard and be just as protective as a product made in conformance with the standard that's listed in the appendix.

The problem is, to be listed in the appendix OSHA will evaluate standards to see if they meet the good design criteria, not whether they are as

protective or offer equivalent protection to other standards that are either listed there or have been used in the past in the regulatory text. So the PPE performance requirements under this proposal become a moving target, and we believe that there's a threat to workers, that workers will be less protected as a result.

Our second point. All national consensus standards do not offer the same levels of performance or protections. ISEA members understand the importance of PPE product standards in protecting workers. Standards, after all, make it possible for producers, sellers, specifiers, regulators, and users to speak the same language, to understand that when they get a hard hat that meets a standard, it will provide a certain level of impact attenuation, penetration resistance, flammability, dielectric strength.

They know that instead of specifying each of these requirements separately, they only need to look for the label, in this case, ANSI Z89.1. They can purchase helmets in different colors, sizes and designs, knowing that they will offer the same baseline of protection.

But all standards are not equal. National consensus standards for personal protective equipment

exists all over the world. In our written comments, we included a chart showing the different performance measures for safety glasses in the U.S., Europe, Canada, Australia, and Japan.

We have identified over 180 national head protection standards in 18 countries in addition to the U.S., plus European and ISO standards. Many of them would satisfy the good design criteria, assuming that an importer could get them recognized in the U.S. and therefore achieve the criteria that they have to be recognized in the U.S. as providing an adequate level of safety, but they are far from equivalent to the ANSI or ASTM standards that have been recognized by OSHA and are used in the American workplace.

Three. OSHA's proposal does not require that the standards be equivalent. OSHA's proposal, as has been stated, requires that PPE be as protective as equipment of the same type that conforms to one of the standards listed in the non-mandatory appendix, but no where else does OSHA specify that the standards have to be equivalent.

It intends to update the mandatory appendix to include any future national consensus standard it determines meets the requirements of the proposed rule--in other words, it must be a good design standard. It

has to specify safety, it has to be recognized in the U.S., it has to be developed in an open process--but not a standard that offers equivalent protection.

We don't believe that OSHA intends to adopt standards that would lower the level of protection, but under the proposed rule it could happen. The proposal does not simplify compliance for employers. Most employers are not in a position to evaluate whether a standard meets the good design standard definition or whether a PPE bearing the mark of a standard provides the same protection as ANSI-compliant equipment.

OSHA should not disrupt the longstanding effective approach in which U.S. manufacturers and standards developers produce consensus standards that are trusted by employers and workers and accepted by the government agency that is responsible for protecting the workforce.

As part of our comments, ISEA has proposed what we believe is a simplified and effective alternative regulatory approach and I'd like to explore that at this time.

We believe that our approach retains the important minimum performance requirements for PPE while providing important flexibility for both OSHA and the regulated community. It preserves the core of

OSHA's proposal, listing applicable consensus standards in a non-mandatory appendix that can be updated through direct final rulemaking, although I will have to agree with Mr. Kojola's comment this morning that there doesn't seem to be that much difference between updating a reference to a standard in the regulatory text through direct final or the non-mandatory appendix.

Under this approach proposed by ISEA, OSHA would retain references to national consensus standards for eye and face protective devices and protective helmets--because those are the products for which we are responsible--incorporated by reference in applicable sections of 29 CFR Parts 1910, 1915, 1917, 1918, updated to reflect the current revision of that standard.

We recommend regulatory language specifying that PPE would have to be in compliance with the standard incorporated by reference or another national consensus standard that provides equivalent protection. A non-mandatory appendix could list national consensus standards that OSHA has found to be equivalent, and therefore acceptable.

To keep its regulations up to date, the Agency could evaluate the adequacy of additional consensus

standards for PPE and list those standards in the non-mandatory appendix when it's determined that they offer equivalent protection to the standard adopted by reference.

ISEA believes that OSHA is better able than employers to evaluate national consensus standards where they exist and provide employers guidance on what is acceptable. ISEA believes that this approach would maintain the level of performance of PPE that meets the consensus standard in the current regulation so that worker protection is not compromised.

It gives employers the flexibility to select PPE that best meets their needs based on hazard assessment. It frees employers from having to do an analysis of whether a PPE standard meets the good design criteria, transferring to the OSHA staff the responsibility to evaluate alternative consensus standards for safety equipment. It gives OSHA the flexibility to update the reference to consensus standards when they are revised or when a new standard is issued using technical amendments or the direct final rule method.

Under this procedure, OSHA can work hand-in-hand with standards development organizations as they update consensus standards. ISEA recommends that the

Agency adopt a procedure whereby standards developers provide official notification when they begin the revision process for a consensus standard included in the regulation or appendix, and it specifies milestones during the process. That way OSHA can evaluate the standard as it's being revised and align its updates to references in the appendix.

Finally, ISEA urges OSHA to continue to seek a permanent solution by which it can keep its regulations current with the consensus standards to which these regulations refer. We encourage OSHA to look at what has been done in other agencies faced with similar problems, notably FDA recognition of voluntary standards under the Food & Drug Modernization Act of 1997, administrative simplification provisions of the HIPPA Act of 1996, and also some provisions in one of the reauthorization bills for the Consumer Product Safety Commission that's now working its way through Congress.

ISEA would be glad to work with OSHA in this regard and we believe that other standards development organizations would as well. If the language of the OSH Act continues to be a deterrent, we would pledge our support in getting enactment of necessary legislative changes.

Thank you. I'll be glad to respond to any questions. I would ask, for the questioning period, that ISEA's technical director, Janice Comer Bradley, be able to join me here because she knows more about the process even than I do.

JUDGE BURKE: Yes. Ms. Comer Bradley, if you want to come on up to the panel.

MS. BRADLEY: Good morning.

JUDGE BURKE: Good morning.

Any questions from those who have filed a Notice of Intent to Appear for Mr. Shipp? Mr. Kojola?

MR. KOJOLA: Thank you. Bill Kojola, AFL-CIO.

Dan, you testified that a good design, a performance standard, would not necessarily provide, or might not provide baseline equivalent protection for workers. Is that correct? Is that the right summary?

MR. SHIPP: That's right. Yes.

MR. KOJOLA: Okay. And is your sense and your experience that when employers purchase PPE and they want to comply with whatever OSHA regulations regarding that PPE, that they are comfortable with the fact that OSHA has identified certain consensus standard PPE and that if they purchase that they will be in compliance with the law?

MR. SHIPP: Yes. That's the whole purpose of

standards.

MR. KOJOLA: Okay. Now, do you think that employers, the average employer in this country who's purchasing PPE for its workers, would understand the good design provisions in the proposed rule?

MR. SHIPP: I think the employer is looking for a mark of compliance with a standard.

MR. KOJOLA: Okay.

MR. SHIPP: To have a simple method of knowing whether the product that the employer is providing the workers is in compliance. I don't see much evidence that employers right now are evaluating equipment for the equivalence to the ANSI standard to be in compliance with the existing rule. I think to expect an employer to evaluate whether a product meets some good design standard is several more steps than most employers are interested in taking when they're providing PPE to workers.

I also believe that the good design standard concept offers the opportunity for an employer to buy something or to provide workers with something that may not provide the same protection as products that are made to the ANSI or the ASTM standard, and make a good point that it meets a good design criteria as established by OSHA. In the absence of third-party

certification or testing, who's to say that it doesn't, and provide equipment to workers that is less protective?

MR. KOJOLA: So is it your belief that employers would generally prefer to have a list of consensus standards that apply to PPE that would meet OSHA approval for use by their workers in their workforce?

MR. SHIPP: I think so. Anything that simplifies compliance.

MR. KOJOLA: Okay.

MR. SHIPP: And that certainly would simplify compliance.

MR. KOJOLA: Now, do you have any experience with OSHA compliance officers having a good in-the-field assessment of PPE that's not manufactured to an ANSI or ASTM standard, is it that they will have the ability to quickly determine whether or not a non-ANSI or non-ASTM PPE would meet the good design standards?

MR. SHIPP: Janice Bradley has been in that position and has been a safety officer and a safety director, and I'll let her take care of those.

JUDGE BURKE: Before you answer, Ms. Bradley, could you identify yourself for the record?

MS. BRADLEY: Janice Comer Bradley, Technical

Director, ISEA.

I think the recommendation that ISEA made, to include the most current version of the ANSI standard or ASTM standard in the body of the text of the regulation, is really what the majority, overwhelming, compliance officers, as well as employers, will look for.

The fact that there is an ability for some small portion of employers that will look to other standards, it would be available. But by and large--as you know, your membership represents a large number of users--they'll look for the ANSI standard that we're recommending be put in the body of the document and the regulatory text.

MR. KOJOLA: Thank you very much. I appreciate it.

JUDGE BURKE: Thank you, Mr. Kojola.

Yes, ma'am?

MS. BOR: Good morning. I'm Victoria Bor. Last name is B-O-R. I'm counsel to the Building Trades Department.

Mr. Shipp, at the beginning of your testimony you said that ISEA is responsible for ANSI's head protection standard and I didn't hear what the --

MR. SHIPP: Eye and face protection.

MS. BOR: Eye and face protection. Okay. And those standards are ANSI -- the head protection standards.

MR. SHIPP: Are you looking for the nomenclature?

MS. BOR: Yes.

MR. SHIPP: The eye and face protection standard is ANSI ISEA Z87.1, and the head protection is ANSI ISEA Z89.1.

MS. BOR: Okay. The eye and face protection standard. Is that industry-specific?

MS. BRADLEY: No, it's not.

MS. BOR: And what kinds of equipment does it cover?

MS. BRADLEY: It covers spectacles, goggles, face shields, and welding helmets and coverings for respirators.

MS. BOR: If an employer in general industry needs various eye and face protection equipment, they would look to equipment that is compliant with the ANSI standard that you noted, right?

MR. SHIPP: Yes.

MS. BOR: What about an employer in the construction industry? Would that employer be looking for equipment that is complaint with a different

standard or with the same ANSI standard?

MR. SHIPP: No, that would be the same ANSI standard. That's a very broad standard, unlike -- there are eye and face protection standards in other countries, for example, that may be a standard for a very narrow part of that, only for goggles, or only for face shields, or only for spectacles. But Z87 covers all general-purpose eye and face protection.

MS. BOR: Let me ask you basically the same questions with respect to head protection. What are we talking about with head protection?

MR. SHIPP: Hard hats.

MS. BOR: Hard hats. Okay. So an employer in general industry who is looking for a hard hat that would be appropriate for its employees would be looking for something that's compliant with the Z89.1?

MR. SHIPP: Exactly. Yes.

MS. BOR: Okay. What about in construction?

MR. SHIPP: The same thing. The differences, I think, in one hard hat to another are whether or not it is designed to provide lateral protection versus protection only from the crown, the dielectric strength of the helmet, and all of these things are covered in the ANSI standard.

MS. BOR: So if I'm an employer in the

construction industry and I am looking for a hard hat that's compliant with the most current ANSI standard, am I looking for the same hard hat that an employer in general industry would be looking for if that employer was looking for a hard hat that was compliant with the most current appropriate ANSI standard?

MR. SHIPP: Yes. There's no difference.

MS. BOR: No difference. Okay. Thank you very much.

JUDGE BURKE: Thank you, Ms. Bor.

Anyone else?

(No response)

JUDGE BURKE: We'll ask now for questions from the OSHA panel.

MS. SHORTALL: Thank you, Your Honor. First of all, we'd like to thank Mr. Shipp and Ms. Bradley for coming here to testify. We do have some questions and we're going to start with Mr. Pittenger.

MR. PITTENGER: Thank you very much.

OSHA's current standard, as well as your alternate to the Agency's proposal here, would give employers the option of using personal protective equipment that meets an ANSI standard that is referenced or PPE that provides equivalent protection, in other words, I think meets an alternative consensus

standard as long as, in your words, performance specifications in those standards are "at least as protective".

MR. SHIPP: Yes.

MR. PITTENGER: Do you see a substantive difference between allowing employers to deviate from a standard in that manner that is referenced in an appendix instead of allowing them to deviate from a standard that is actually in the regulatory text?

MR. SHIPP: We are recommending that by including the reference to the standard in the regulatory text, that sets the baseline. Any other standard -- any product that is used in the workplace, whether it meets that standard or another standard, would have to offer equivalent protection. We would ask that the Agency evaluate standards and list them in the non-mandatory appendix or a mandatory appendix, or somewhere, as standards that offer the same protection.

The difference between what we are proposing, I believe, and what OSHA has proposed is that the inclusion of standards, additional standards in the non-mandatory appendix after evaluation by OSHA, would have to provide the same level of protection as that standard that's there in the regulatory text. Under the proposal as it is now, there is nothing to ensure

that that happens.

MR. PITTENGER: Okay. So the recommendation then, one way to effect the recommendation would be to take one of those that are listed, for instance, in the current proposal, pull that into the regulatory text, and then identify the others located elsewhere, perhaps in an appendix, as providing protection that is at least as good as that baseline.

MR. SHIPP: Yes. I wouldn't even say taking one of them. I'd say, take the most recent version of the standard, put it in the regulatory text. You could use the non-mandatory appendix to include older versions of the standard, but I wouldn't go back more than one generation.

If you look at the reality of what's available on the work site, I don't think you could buy products that meet the version -- I'm certain that you can't buy products that meet the versions of the ANSI standards that are currently in the OSHA regulation.

MR. PITTENGER: Is it generally true that the oldest of those standards is not equivalent in protection to the newest?

MR. SHIPP: By the oldest.

MS. BRADLEY: We have to revise and take action on our standards every five years for a reason,

and that's because they represent the latest in materials and technology advances that offer the best protection for workers.

So without doing an in-depth analysis of everything, I would like to think that the efforts of standards developers and manufacturers are to produce the best standard that represents the best protection for workers in the most latest version of the document, hence our recommendation that the most recent version of the ANSI standard be put in the regulatory text.

MR. PITTENGER: Okay. I think I might have heard in that that what the Agency generally sees is that the most recent standard tends to provide better protection than the older standards. In other words, there is an evolution over time.

MR. SHIPP: There is an evolution in a number of ways. If you look at the specific requirements of the standard in different areas, I don't know that the -- for example, that the impact or penetration requirements of the hard hat standard have changed significantly.

What has changed over time is designations, terminology, the addition to the ANSI standard of the Type 2 helmet which offered lateral protection. It becomes more an enhancement of features, more an

enhancement of terminology than a significant increase in protection.

The products that we're talking about are pretty basic. I mean, the idea is that you put something over your eyes and face that will protect it against flying objects, or that you put on something that will protect your head against something falling on it or being hit from the side. We could certainly do an evaluation of the changes in the standards over the last three generations, but I don't think that that would show --

MS. BRADLEY: I hate to use the words "greater" or "more" because the emphasis is really on, if you look at some -- I mean, both the Z89 and the Z87 standards have a long history. I mean, they've been in existence for quite a while. But instead of more or greater protection, it recognizes new hazards, hazards that might not have existed in previous versions of the standard.

They are product performance standards, so they allow manufacturers to provide protection using different kinds of materials, perhaps lighter weight materials that workers find more comfortable. So it's not just a matter of more, but it's different ways to accomplish the end protection.

MR. PITTENGER: Okay. Thank you.

MS. SHORTALL: Mr. Twardowski will go next.

MR. TWARDOWSKI: Just a couple of quick questions on current practices.

Do you agree with OSHA's estimate that the normal PPE out there has a life span of about two to four years?

MS. BRADLEY: It really depends on the use environment. I mean, for many cases it's much less.

MR. TWARDOWSKI: Do you feel that some of these consensus standards are becoming more performance-oriented, as we've tried to do?

MR. SHIPP: That is something that we always try to do in standards. For example, where you might have had a standard a generation or two ago that had dimensional requirements for the thickness of a lens or something like that, the improvement of material allows the standard to be written in a language that provides impact resistance rather than size. That's a performance specification and that's one of the things that we look for in all of our standards.

MR. TWARDOWSKI: Just one more question. What is your estimate of the extent that we have PPE out there that doesn't meet the ANSI or ASTM national consensus standards? Ballpark figure.

MR. SHIPP: I think that's impossible to calculate.

MS. BRADLEY: It really is. I mean, it's a growing problem.

MR. TWARDOWSKI: We've had a lot of problems with things from China.

MR. SHIPP: There's a problem in -- first of all, it's very easy to inscribe "Z87" on temple of a pair of safety glasses and put it on the market. One of the things that we try to educate users, is to know your manufacturer, know who you're buying from, know if it's a reputable company that is making the product to the standard and doing the testing, because in the absence of a requirement for third-party certification, it's difficult sometimes unless you really know who you're getting the product from, to ensure that the product meets the standards. We have evidence that there are manufacturers in other parts of the world who believe that "Z87" is a decorative mark.

MR. TWARDOWSKI: Right. I've heard that from several people.

MR. PITTENGER: Is that the type of information that you could submit for the record?

MR. SHIPP: I don't know that we -- I mean, e don't have documentary evidence. We don't have test

results, for example, that we've done. We can talk to our companies and see if they have any information like that, but we don't have anything right now. I think the way to do that would be to get a big sample of products and run tests, and see how many of them comply with the standard. We haven't done that.

We have no regulatory authority over the use of the Z87 mark. We have no policing authority. We are not a certification organization. There is none. I'm sorry. There is a certification organization, but just putting the "Z87" or "Z89" on a product without the requirement for third-party certification, there's no additional assurance.

MR. PITTENGER: Who, in your opinion, has the authority to do that type of policing?

MR. SHIPP: That becomes a legal question because, in the absence of a trademark violation where someone is putting a company's label or is putting out a product that counterfeits a company's trademarked design, for example, I suppose that if you wanted to make an import case, if you wanted to try to stop product at the border from coming in that is mismarked with a standard, that a trade case could be made there. We have not done that. We haven't taken that kind of action. Part of that, as I said, is we don't know the

extent to which it's a problem.

MR. PITTENGER: Is the concept of third-party certification -- has it been taken up by either of the two ANSI committees?

MR. SHIPP: Before Janice answers the question about the ANSI committees, the concept of third-party certification was taken up and rejected by OSHA in the 1994 issuance of the PPE rule. At that time, OSHA cited the existence of the Safety Equipment Institute programs and the voluntary compliance with third-party certification as one of the reasons not to require mandatory product approval.

Since then, I think some of the manufacturers here might be better able to answer the question about the market demand for product that is third-party certified. Janice can answer the question about the standards and the committees' deliberations.

MS. BRADLEY: The committees have -- both a Z89 and Z87 committees have discussed third-party certification and have not reached consensus on the issue.

MR. PITTENGER: At some time there may be some language in one of those standards?

MS. BRADLEY: There certainly could be in subsequent revisions.

MS. SHORTALL: Mr. Gottlieb will go next.

MR. GOTTLIEB: What can you tell us about the status of the proposed revisions or reaffirmation of the 2003 versions of the ANSI standards?

MS. BRADLEY: We expect both to be revised in 2008.

MR. GOTTLIEB: The early part of the year, later part of the year?

MS. BRADLEY: Later part of the year.

MR. GOTTLIEB: What do you consider to be the essential attributes of a "good design" standard? How would you define the term if you were writing the definition of a good design standard?

MR. SHIPP: The definition of a good design standard in this proposal comes from, as I understand it, the definition of test standard under the NRTL procedures at OSHA, which is a standard that is designed to be used by a testing agency which is supervising the process and evaluating the standard. There is a definition for consensus standard that is accepted in the U.S. not only by consensus organizations such as ANSI and ASTM, but also internationally.

There's a definition of "consensus standard" that is accepted by the World Trade Organization, for

example, that is generally used and it has to do with the process, the openness of the standards process, the applicability of the standard, the relevance of the standard.

But if the other part of the NTRL rules following the definition of "test standard" is that ANSI and ASTM standards are assumed to meet that criteria, I don't know whether our definition of what is a good design standard adds anything to this proceeding because we don't believe that good designs -- that the idea of a good design is assumed, and the acceptance -- and I think if you take a look at OSHA's definition of "national consensus standard", that satisfies the requirements of the good design standard because it gets to the process by which a standard was developed and approved.

MS. BRADLEY: I think the current OSHA criteria for a good design standard makes some broad assumptions that there's conformity assessment, and that's not the case.

MR. GOTTLIEB: Okay. But I'm offering you an opportunity to write the definition of "good design". Your comments talked about, they have to have performance specifications and they have to have testing provisions. I'm just --

MS. BRADLEY: Our point is, if you consider safety, for example, in a good design standard, you consider safety, you can say or demonstrate that you consider safety, but your idea of safety could be at a much lower level, for example, than the hazards that American workers face.

MR. SHIPP: We believe that you could make a case that any one of hundreds of standards in use around the world would meet the criteria for a good design standard in the May 17th proposal, but not offer the same protection as a product that is made to the ANSI or ASTM standard that has been used in the OSHA standards in the past, and that is commonly used in the American workforce. Our definition of good design -- I don't think there's anything you could do to improve the definition of "good design" standard to make this proposal work.

MR. GOTTLIEB: I want to piggyback on what you said about the NRTLs, the Nationally Recognized Testing Laboratories, and the criteria applied by them in other contexts, but is not appropriate to use in here in this context because employees don't know how to apply them. But don't manufacturers, in effect, have to apply them before they submit something to a NRTL to get certification?

MR. SHIPP: Those definitions determine -- and those are the requirements for the test standard that the test house is going to use, and OSHA, when it's approving the application of a NRTL to be a recognized test lab, are going to look at the standards that that test lab uses to meet the requirements of approval in some OSHA standard.

OSHA doesn't have to approve every revision to that test standard. It gives the test lab some authority to change the standard, to update the standard, and notify the Agency that that's happening. I believe that's the way the process works.

Manufacturers are looking for a standard to manufacture the product. The standard includes performance requirements, classifications, test procedures. That's what's in there. So, for example, in the head standard, performance requirements specify the amount of impact attenuation, penetration resistance. Classifications specify how you show the dielectric strength. There are test procedures in that standard to guide a manufacturer in how to make a hat that conforms to those requirements.

The question of whether or not that's a good design standard or is a national consensus standard or meets some requirements for consensus really rest with

the approval organization, in this case ANSI. When we draft a standard, when we supervise the process by which that standard is reviewed and approved by a broad consensus body of users, government agencies, safety and health experts, and others, then we submit that to ANSI and they take at it and say, yes, it conforms to our procedures and our definition of what is a consensus standard, or good design standard, if you will.

MR. GOTTLIEB: You submitted a chart for eyewear.

MR. SHIPP: Right.

MR. GOTTLIEB: Would you be able to submit a chart for helmets and the other PPE that are covered by the proposal?

MS. BRADLEY: We could.

MR. SHIPP: Oh, sure.

MS. BRADLEY: Was it helpful?

MR. GOTTLIEB: I'm not much of a technical person.

MS. BRADLEY: I'm going to assume it was if you're asking for another one.

MR. GOTTLIEB: It's more helpful to others than to me. But I think it would be helpful to have it for the other types of equipment.

Regarding urging that OSHA adopt the approach of other agencies under other statutes, would you, in your comments, be able to explain what your understanding is of what these other agencies do under these bills for recognizing national consensus standards and how you think OSHA can apply those approaches to this?

MR. SHIPP: Yes. We can submit that. I'll say, this would probably require changes in the OSH Act. We will take a look at that as well.

MR. GOTTLIEB: All right. Thank you very much.

MS. SHORTALL: Your Honor, I have a few questions, too.

A quick question for both of you. That is, Ms. Bradley said that the vast majority of employers just pretend to follow the ANSI standards when they purchase their equipment right now.

MS. BRADLEY: That's my belief, yes.

MS. SHORTALL: If the proposed rule were adopted as it is, do you think that the vast majority of employers would still choose to follow the ANSI standards that are listed in the appendix? In other words, follow the easiest route to compliance?

MS. BRADLEY: I would hope so, but I don't

know for sure. I mean, when you start putting the ANSI standard as one among many that are viewed by OSHA as equivalent, I think that brings in a whole different challenge for those specifiers and purchasers of PPE.

MS. SHORTALL: Do you think then that employers, if there were other standards out there, would begin the process of independently evaluating which standard is the best, or would they --

MS. BRADLEY: I don't think they would do an evaluation.

MR. SHIPP: I don't think so.

MS. BRADLEY: They just pick one.

MR. SHIPP: I think they would look at the ads that say "Just as good as ANSI". These ads may be run by companies that have little or no understanding of the performance requirements of the product but are getting something from a manufacturer offshore and don't know whether it's been tested or not.

MS. BRADLEY: And the products have not been tested or evaluated to that standard, or any standard.

MR. SHIPP: Yes.

MS. SHORTALL: All right.

I'm going to read you something from your written comments and just ask you to explain it. It's not from your testimony.

MR. SHIPP: Sure.

MS. SHORTALL: "OSHA offers language in 1910.132(b)(2) in support of a statement, yet that paragraph, applicable to eye and face protection, states that only the device, and not the standard to which the device was manufactured, must be equivalent to another device of the same type made in one of the standards listed in the proposed non-mandatory appendix."

Could you just explain what you meant by that a little bit more?

MR. SHIPP: Yes. The proposal, as we read it--and we've read it many times--requires that an employer provide PPE that is as protective as a standard that is listed in the mandatory appendix. First of all, it has to be a good design standard, and that those standards in the non-mandatory appendix are assumed to be good design standards.

I believe, the way that we read it, is that the requirement is that -- say, for example, eye and face protection. An eye and face protector has to be as protective as an eye and face protector meeting one of the standards listed in the non-mandatory appendix. That's my understanding of the way the proposal is written.

There's nothing in the proposal that says that the next standard to be added to the non-mandatory appendix, meeting the definition of good design standard, has to offer the equivalent protection of the standards that are there now. So the standards in the non-mandatory appendix become a moving target.

MS. SHORTALL: Is there anything that you could offer to us in terms of improvement we could make to assure that it was our intent that anything that would be added to a non-mandatory appendix would have to be providing protection that is equivalent to, or more effective than, the listed standards in the appendix?

MR. SHIPP: Right.

MS. SHORTALL: Is there any other language you might offer to assure that the second, third, and fourth that we add to it would also meet the protection of the first one?

MR. SHIPP: We believe that the language, the proposed regulatory text that we submitted with our comments in June, would make that happen. What we're proposing is that the reference to a standard be maintained in the regulatory text, and that any standard that is listed in the non-mandatory appendix would be evaluated by OSHA to offer at least the

protection, the same level of protection, as the standard that is in the text of the regulation.

MS. SHORTALL: All right.

I'm going to go back to one other issue that you were talking about, and that is, today employers are--the vast majority--complying with purchasing head, eye, face, foot protection that meets the reference standards, even though they'd be allowed to choose something that they demonstrate provides equal protection. Why aren't employers doing that today?

MR. SHIPP: Aren't they doing what?

MS. SHORTALL: Aren't choosing alternative standards.

MS. BRADLEY: Not exercising their ability to choose?

MS. SHORTALL: Right.

MR. SHIPP: It's the reality of the marketplace. What's out there for sale in the U.S. is product that is made to or marked to the ANSI standard, or in some cases CSA standard. That's what is being sold in the U.S. That's what's available to employers now because there's a requirement in the OSHA standard that that's the baseline. That's what you've got to have.

MS. SHORTALL: All right.

You've just said that you don't think employers are going to bother testing alternative standards.

MR. SHIPP: I don't think that they do now.

MS. SHORTALL: No, they don't. But if we adopted the proposed rule, you don't think they would bother testing new standards. Do you think that employers, if they're not going to test new standards, would simply grab something off the shelf, hoping to be in compliance, or do you think their normal action would be, I know that the ANSI product definitely meets the standard so I will just continue to choose that?

MS. BRADLEY: I don't know. It's impossible to predict that because I think if the good design standard is maintained in the OSHA proposal, I think you'll get several standards. I think you'll get petitioned to recognize several standards as good design standards, even though the product might not provide equivalent protection to the ANSI standard.

MS. SHORTALL: All right.

In the tables that Mr. Gottlieb asked that you could prepare, would you be able to indicate which element in that particular table provides the strictest interpretation or the most protective? For example, as I'm looking at Attachment A, it does look, on a couple

of elements of the standard, that one of the other standards might, in fact, be more protective on that element than the ANSI standard is, or stricter on the element.

MR. SHIPP: And that's very true.

MS. SHORTALL: Would you be able to highlight that all the way through?

MR. SHIPP: Sure.

MS. SHORTALL: And is that true? Am I reading it correctly?

MR. SHIPP: Yes.

MS. SHORTALL: Okay.

MR. SHIPP: The purpose of that chart was to show that these standards are not necessarily equivalent. Yes, there are some features of standards for eye and face protectors in other parts of the world that may be more protective in some categories, but you've got to look at the standard as what it covers and the range of product that it covers.

MS. SHORTALL: All right.

Finally, could you, Ms. Bradley, tell me, what would you say is the length of the use life of head protection?

MS. BRADLEY: The service life of head protection is really determined by what's included in

the standard as inspection criteria that we require of the user. Literally, if it undergoes an impact you should change it out, but there are instructions for inspecting both the shell and the suspension for any signs of wear and it lays out specific criteria to look for. If it's only two days old and it has those signs of defect, it should be changed out of service.

MS. SHORTALL: Well, then on average, what would you say the useful life of head protection is?

MS. BRADLEY: I really couldn't say.

MR. SHIPP: That's a question you might ask the manufacturers who will be appearing this afternoon as well.

MS. SHORTALL: And then for Ms. Bradley, I have one more question to ask you. That is, to make sure that we have the transcript correct, would you mind spelling your whole name?

MS. BRADLEY: J-A-N-I-C-E C-O-M-E-R B-R-A-D-L-E-Y.

MS. SHORTALL: Thank you so much.

MS. BRADLEY: Sure.

MS. SHORTALL: And thank you for appearing today.

JUDGE BURKE: That completes the questioning from the OSHA panel?

MS. SHORTALL: Yes, Your Honor.

JUDGE BURKE: Thank you.

Thank you, Mr. Shipp. Thank you, Ms. Bradley.

MR. SHIPP: Thank you.

MS. BRADLEY: Thank you.

JUDGE BURKE: The next witness will be Mr. William A. Ells.

(No response)

JUDGE BURKE: Is Mr. Ells present this morning?

(No response)

JUDGE BURKE: Or anyone representing the American Society of Testing and Materials? Yes, sir?

MR. CUMMINS: Good morning. My name is Kevin Cummins. I'm with ASTM International. I'm not sure about his whereabouts. Perhaps you could take him out of order.

JUDGE BURKE: We can do that. All right. Let's do that, then.

Ms. Adele Abrams? Good morning, Ms. Abrams. Ms. Abrams, could you identify yourself and your organization?

MS. ABRAMS: Yes. My name is Adele Abrams. I'm an attorney and safety professional who is representing the American Society of Safety Engineers,

and I am their Federal representative.

JUDGE BURKE: You may proceed.

MS. ABRAMS: Thank you.

PRESENTATION

By Adele Abrams

American Society of Safety Engineers

MS. ABRAMS: I believe you already have a copy of our statement for the record, and we would ask that it be included in the formal proceedings here.

JUDGE BURKE: Do we have a copy of the statement?

MS. SHORTALL: Yes. It's already part of the record. Thank you.

MS. ABRAMS: Okay. Thank you.

I will try to summarize this. I am appearing today on behalf of ASSE's more than 32,000 members who are safety, health, and environmental professionals. We appreciate the opportunity to share our views with the panel and the audience today concerning this important rulemaking.

ASSE has long spoken out for the need for OSHA to commit to an ongoing process of updating its standards to reflect the considerable advances in occupational safety and health reflected in the voluntary consensus standards process.

It is imperative that OSHA keep pace with the occupational safety and health community's advancements in safety and health and maintain its leadership

position in the Nation's effort to protect workers, as well as workplaces.

Assistant Secretary of OSHA Ed Foulke has spoken eloquently about OSHA's ability to help employers retain competitiveness, and we believe that making sure that OSHA standards are consistent with the voluntary consensus process is a step in helping companies to do so. So, we do commend OSHA for its thoughtful approach to this important subject here.

We recognize that, given OSHAs resources and the difficulties engaged in rulemaking and the length of time that rulemaking can take, that incorporating specific versions of consensus standards directly into standards is not realistic.

ASSE itself sends OSHA information on developments in its ASSE ANSI consensus standards, fully realizing that they cannot be included without having an entire standard go through the rulemaking process, and that is not likely given the realities of the Agency's resources and the process itself. So, ASSE believes that a new way is needed.

The rulemaking at issue here, taking the proposed performance-oriented approach based on setting a general requirement, in this case that PPE be constructed in accordance with good design standards,

coupled with the non-mandatory appendix listing those national consensus standards that OSHA determines support the goal of the standard, has the potential as a workable approach.

But before ASSE can support this approach fully as contained in the notice, we do have some concerns that would need to be addressed in the subsequent rulemaking.

The first one is that ASSE is concerned that the overall approach does not guarantee that the voluntary consensus standards included in your non-mandatory appendix in the future will be quality standards widely accepted by industry and the safety and health community.

Without such a guarantee, the approach taken here could result in OSHA's recognition of standards offered by standard development organizations, or SDOs, that are not respected or widely recognized. This could have an unintended consequence of diminishing occupational safety and health standards. Simply stating that OSHA will include standards it determines are "good design standards" is not an adequate protection.

ASSE also urges inclusion of the criteria for standards development organizations contained in OMB's

Circular A-119, which is titled "Federal Participation in the Development and Use of Voluntary Consensus Standards in Conformity Assessment Activities", published February 10, 1998.

That circular carries out the requirements of Section 12D of the National Technology Transfer and Advancement Act of 1995, Public Law 104-113. That law required Federal agencies to use voluntary consensus standards where appropriate, and the criteria it sets forth for standards development organizations include openness, balance of interest, due process, and an appeals process.

Organizations like ANSI and ASTM International clearly do meet these criteria and any standards that are included in a non-mandatory appendix must be created by an SDO that develops standards through the same type of rigorous, transparent, and widely accepted process.

OSHA's involvement in helping set such qualifications would have an added benefit of helping ensure that the voluntary consensus standard system continues to be a credible means of advancing occupational safety and health.

ASSE also has concerns about copyright issues that are not addressed in this proposal. As you know,

copyright protection ensures that standards development organizations will have the resources necessary to develop consensus standards, and without it the consensus process that guarantees all stakeholders a voice in the development of standards would not be possible.

Given the past litigation that has surrounded consensus standard development and ASSE's own experience with the expectations we have seen arise even out of reference standards, we urge OSHA to state expressly that a voluntary standard's inclusion in a non-mandatory appendix does not create a right to the contents of that standard.

As to the PPE standard itself, ASSE wants to bring to OSHA's attention that the preamble states: "Comparison between the 1989 and 2003 versions of the ANSI standards for protective eye and face equipment shows that ANSI has strengthened the impact resistance requirements of the standard."

While it is true that the ANSI Z87.1 standard was significantly strengthened, the non-mandatory appendix lists the 1989 version and the reaffirmed versions as approved standards. These are no longer current standards and should not be listed as such.

While this correction needs to be made, ASSE's

concern also points to difficulty that the proposal presents in attempting to be so specific and including standards in a non-mandatory appendix. ASSE believes that a better approach would be to simply list the appropriate standards and state that the most current version would apply.

Since the appendix is non-mandatory, this avoids some of the legal implications of having a binding, but fluctuating, requirement for enforcement purposes that could otherwise raise legal concerns under the Administrative Procedures Act.

Also, the recently approved ANSI ASSE Z359 Fall Arrest code needs to be listed in the non-mandatory appendix. ASSE points out that there is growing acceptance within the occupational safety and health community that fall arrest and protection equipment should be considered PPE no less important than that that protects eyes, foot, breathing equipment, in protecting workers.

Inclusion in the non-mandatory appendix would indicate OSHA's leadership on this issue and would help to protect workers. We have, in our comments, included information on the ANSI Z359 series and we hope that OSHA will take a look at that as it moves forward in this rulemaking.

So, in conclusion, ASSE does support this approach to ensuring that OSHA standards keep pace with the voluntary consensus process and we hope that the changes and improvements we have outlined here will allow us to be supportive of the final rule. As always, we stand ready to assist OSHA in this effort and we appreciate the opportunity to share our thoughts today.

JUDGE BURKE: Thank you, Ms. Abrams.

Any questions of Ms. Abrams from the audience?

(No response)

JUDGE BURKE: Any questions from the OSHA panel?

MS. SHORTALL: Yes, Your Honor. We'll start with Mr. Pittenger again.

MR. PITTENGER: Thank you.

One of the points you made is that your reading of our proposed rule is that there's really no guarantee that the consensus standards included in the appendix are quality standards, widely accepted, and so forth.

What would you look for as that guarantee?

MS. ABRAMS: Well, I think the ISEA witnesses have already spoken to this. One option, obviously, is setting up some type of third-party certification

process, or at least ensuring that there would be adequate testing.

I would note that the definition of the good design standards in the preamble to this rule almost makes a circular argument. They talk about, "An inherent part of any good design standard is a testing protocol that will provide a specified level of protection, and that the PPE would be constructed in accordance with good design standards, including the requirement that PPE be tested in accordance with a testing protocol that is designed to ensure that the PPE provides the level of protection the good design standard is intended to achieve."

It does not set any baseline or anything to benchmark that against. Clearly, what we have already recommended, that any standards that would be included in there would have that vetting through a transparent process that is open to all stakeholders, where there is an appeal process consistent with the criteria included in the OMB A-119 circular, that at least gives something that ensures these are standards worthy of recognition by OSHA and not just something that has been cobbled together by an unrecognized group.

MR. PITTENGER: You seem to be wanting to take the circular's definition of consensus standards-making

body.

MS. ABRAMS: Right. The SDOs.

MR. PITTENGER: And substituting that, perhaps, for the good design standard definition.

MS. ABRAMS: That certainly is something to be considered here. Because "good design standard" is a very vague concept. It's in the eye of the beholder. I daresay that any manufacturer thinks that what they manufacturer is a good design standard, but whether it is a good design standard relevant to the safety needs--and has been pointed out already will ensure at least equivalent protection to those standards that are already listed in this proposed non-mandatory appendix or which have previously been incorporated by reference by OSHA--that's a different story.

MR. PITTENGER: Okay. Thank you.

MS. SHORTALL: Mr. Twardowski will go next.

MR. TWARDOWSKI: Just a quick question. ANSI is our representative at the ISO. Do you feel that the ISO standards produced are equivalent, and offer equivalent protection?

MS. ABRAMS: I can't speak to every ISO standard because I'm not familiar with those. I'm most --

MR. TWARDOWSKI: Well, the ones dealing with

PPE. The ones dealing with PPE.

MS. ABRAMS: I am most familiar with the ANSI and the ASTM standards, frankly. So while ASSE certainly has members that utilize ISO standards, generally, I don't feel that at this point I could speak to the equivalency of ISO PPE standards vis-a-vis the ANSI. If you would like, this may be something we could address in post-hearing comments.

MR. TWARDOWSKI: I would appreciate that, yes. Thank you.

MS. ABRAMS: Okay.

MS. SHORTALL: Mr. Gottlieb will go next.

MR. GOTTLIEB: Aside from adding the OMB criteria, do you have any other suggestions for how you would define a good design standard in a way that would assure that it provides an adequate level of protection?

MS. ABRAMS: I would want to give some thought to alternative regulatory language on this. I recognize that in Paragraph B2 of each of the amended standards, you do talk about it having to be, I believe, to meet the requirement for good design standard, the protective eye and face device, for example, must provide protection equivalent to, or greater than a protective eye and face device of the

same standard that is constructed in accordance with one of the listed national consensus standards.

For right now, that would work. The issue, as was pointed out by ISEA, is what happens if you start having other non-U.S., or non-ASTN for international, or ANSI standards included in there? Then that undermines the efficacy of that language in keeping the baseline minimum protections from a safety perspective. But there may be some alternative language that could be used to further qualify and quantify what constitutes a good design standard, and we will give some thought to that.

MR. GOTTLIEB: Thank you very much.

MS. SHORTALL: I have a few questions, too, Your Honor. But, first, I'd like to thank Ms. Abrams for coming to testify today. We certainly appreciate it, and the thoughtful comments you provided for the record.

I want to ask you a couple of questions about how safety engineers today select PPE for the employees of the companies where they work. Do they tend to evaluate and look for other standards or do they look to OSHA's standard and then I'm going to take the ANSI or the ASTM one and that's good enough?

MS. ABRAMS: Well, from my own experience--and

I do safety consulting as a professional member of ASSE, as well as being a Federal representative--I daresay I do not recommend either the OSHA or the MSHA standards--I do mining work as well--because they are incorporating outdated versions.

The gold standard, from my perspective--and I think for many safety practitioners--would be the most current version because, as already noted, it is going to reflect the better technology, the better materials, lighter weight, more user friendly in terms of employees who might have to wear it for long periods of time. There are new chemical risks, for example, now than were envisioned 20 years ago, and so, you know, you have to keep updating your consensus standards and the efficacy of the protective equipment for different uses.

There are basic things, if you are just trying to keep splinters from hitting your glasses, that's a different type of goggle than might be needed in a heavily corrosive chemical environment, for example. There are different types of hard hats, as already mentioned. So it is not a one-size-fits-all.

You can't just have one hard hat and have it meet a multiplicity of uses. You're going to have to look at, are you going to have exposure to electrical

hazards, are you involved in just guarding against things being dropped, hit from the side versus dropped from a height, what are the uses? And I'm also involved, I should add, in the Department of Labor's Committee for Women and PPE.

There are physiological differences between women and men, and those have to be addressed, and there's different PPE out there that is suited size-wise and based on the anthropomorphic models--shoe design, for example--that is going to be appropriate for women to use versus men. So these are all considerations that go into selection of PPE, but you certainly start with the most current version of an ANSI or an ASTM international standard, not one that is 20 years old.

MS. SHORTALL: The proposed rule does include the most current standards in it, so if the proposed rule were finalized, what do you think safety engineers would do? Would they just select PPE that meets that most current standard or they go about evaluating other standards to make a selection?

MS. ABRAMS: I think the OSHA standard, for compliance purposes, is always your starting point. You want to make sure, at a minimum, you are not going to put your company or a client into a position of

being cited. As new items come on the market, I think safety practitioners do try to stay abreast of new technological developments, but again, those are always benchmarked against the current ANSI and ASTM standards.

MS. SHORTALL: We asked the representatives from ISEA about useful life of PPE and they weren't certain of it, so that's the preface I have. Is it your intent in telling OSHA to remove the older versions of the standards from the appendix that if an employer has PPE that is still in good working order but it meets one of the older standards, that they would have to throw that out and purchase new PPE?

MS. ABRAMS: I don't think that is our intent. I think we would be amenable to grandfathering in existing stocks, and certainly if there's ANSI- and ASTM-approved equipment that is still out there for sale on the market, that suppliers would be able to sell that equipment.

It does not mean that those do not provide safety, it's just that there's a better mousetrap out there, so to speak. And, again, the hard hats, the glasses may have better fog resistance, they may be lighter to wear. It's more comfort level as well as, at times, addressing newly-recognized hazards. In

those situations, if an older version of PPE is not going to be appropriate and protective enough of workers, then, yes, you might want to upgrade that. But that would be a case-by-case analysis. In general, the equipment that is still out there on the market should be able to be used for the rest of its useful life.

MS. SHORTALL: And has either ASSE or members within your organization looked at PPE consensus standards of organizations other than ANSI/ASTM and found them to provide protection that is equivalent to the ANSI and ASTM PPE standards?

MS. ABRAMS: Again, I think this is something that would be best addressed in our post-hearing comments. We do have an international practice specialty and it may be that they can provide us with some input on that because they would be more familiar with the non-U.S.-based consensus organizations.

MS. SHORTALL: I appreciate that so much.

Any other questions from OSHA?

(No response)

MS. SHORTALL: Once again, thank you so much for your testimony.

MS. ABRAMS: Okay. Thank you.

JUDGE BURKE: Thank you. Thank you, Ms.

Abrams.

Has Mr. Ells appeared? Yes, sir?

MR. CUMMINS: This is Kevin Cummins from the AST International. I regret that Mr. Ells will not be able to appear today. I would ask that his statement be available in the record.

JUDGE BURKE: I believe it's already been made a part of the record, has it not?

MS. SHORTALL: The comments and the Notice of Intention to Appear that he submitted are in the record. We did not receive any additional written testimony that he would present today.

MR. CUMMINS: I will follow up with you on that, and also leave my information if there are any follow-up questions from the panel for ASTM.

MS. SHORTALL: Since he did file a Notice of Intention to Appear, if he would like to include anything during the post-hearing comment period that would be appropriate as well.

MR. CUMMINS: Thank you.

JUDGE BURKE: Thank you.

Mr. Kojola, I note that you're scheduled to speak at 1:00, but I understand you're willing to move up your testimony to now.

MR. KOJOLA: Right.

JUDGE BURKE: All right. Please.

PRESENTATION

By Bill Kojola

AFL-CIO

MR. KOJOLA: Thank you very much. My name is Bill Kojola and I am the industrial hygienist at the AFL-CIO.

I'm pleased to be here today to testify on OSHA's proposed rule regarding the updating of its PPE standards based on national consensus standards.

In general, the AFL-CIO strongly favors OSHA's specification standards over performance standards when it applies to items of safety equipment, including PPE. OSHA's specification standard offers a number of distinct advantages over that of performance requirements, including:

A) Employers clearly understand what PPE they must purchase for their employees

B) The PPE selected for use by workers is assured of meeting a uniform minimum level of safety performance and protection

C) It assists equipment manufacturers in knowing what specifications it must meet when producing PPE so that the items comply with OSHA requirements

D) It simplifies OSHA compliance efforts so that compliance officers understand what consensus standards PPE must meet and what workers must wear

It is readily apparent that the referenced ANSI consensus standards in OSHA's PPE rules are out of date. It is also apparent that the Agency is in need of finding a mechanism to ensure that its PPE standards are regularly updated so that they reference the most current consensus standards.

Finding an updating mechanism is particularly important, given that the Agency asserts that each successive addition to the consensus standards has improved the design features of the PPE. We would agree that developing such an approach is an important undertaking in this rulemaking.

The AFL-CIO supports retaining the practice of placing the list of acceptable ANSI and ASTM consensus PPE standards by reference within the body of the standard itself and not in a non-mandatory appendix, as the Agency proposes. By referencing the standards within the rule, OSHA makes it clear and unambiguous for workers and employers what the Agency looks at for PPE.

To speed up the process of updating its PPE

standards with the latest consensus standards development organization versions, we believe the Agency should do so by using its procedures for issuing direct final rules. The AFL-CIO strongly supports this approach as a means to shorten the time frame under which updating can occur than would be possible under full rulemaking.

The Agency has recently and successfully used direct rulemaking approach to modify and update national consensus standards referenced in several of its standards, including fire protection and shipyards and roller protection structures, for example.

Direct rule updates like these examples can be accomplished in a matter of months instead of the years it can take to finalize standards under full rulemaking procedures. We believe this mechanism will work well for updating its rules with the latest PPE consensus standards.

For the record, we are submitting with this written testimony copies of the *Federal Register* notices associated with OSHA's use of direct final rulemaking procedures for updating references to national consensus standards involved in standards for roll-over protective structures and fire protection in shipyards.

From these documents, it is quite evident that this process is efficient and that the final rules were adopted within months of issuing a direct final rule. We think it makes sense for OSHA to apply this successful mechanism to this rulemaking.

Instead, OSHA proposes to apply its direct rulemaking strategy to a non-mandatory appendix list of acceptable ANSI/ASTM consensus standards for PPE. We believe the Agency ought to adopt this approach for such national consensus standards by referencing them directly in the rule itself, as it has done in the past.

By doing so, OSHA can significantly speed up the process of adopting the most recent consensus standards versions and do so clearly within the rules themselves, which are mandatory. Affected employers and employees will then know precisely what ANSI/ASTM standards will place them in compliance with OSHA requirements and ensure that workers are provided with the appropriate PPE.

The purpose of direct rulemaking procedures is to quickly promulgate new rules that are expected to be non-controversial. It appears to us that ANSI consensus standards on PPE are not controversial, so using a direct rulemaking approach makes sense.

However, in the event that a party submits a significant adverse comment to a proposed direct final rule, regular rulemaking can then proceed, which preserves the Notice and Comment requirements necessary under the OSH Act.

The AFL-CIO believes that utilizing the direct final rulemaking approach updating PPE national consensus standards referenced within the rule itself is a clear, efficient, and effective means to accomplish OSHA's primary objective in this rulemaking, and we strongly urge the Agency to consider our views and adopt our approach.

Thank you. I'd like to have my written testimony and the *Federal Register* notices I just mentioned added into the record.

JUDGE BURKE: Thank you, Mr. Kojola.

MS. SHORTALL: Your Honor, I'd like to mark Mr. Kojola's hearing testimony as OSHA Exhibit OSHA-2007-0044-0059.

Mr. Kojola, as to your *Federal Register* notices, we can enter them in as an exhibit, but there is no need. OSHA can take consideration of those. What is your preference?

MR. KOJOLA: So long as you take consideration of them within the context of the record when you

undergo your deliberations for issuing the final rule, it's fine with me either way.

MS. SHORTALL: And we have your testimony in the transcript referring to them.

MR. KOJOLA: Correct. Sure, that's fine.

JUDGE BURKE: Very good. Then the testimony of Bill Kojola, AFL-CIO, will be admitted into the record as the last four digits, 0059.

(Whereupon, the document referred to as Exhibit OSHA-2007-0044-0059 was marked for identification and entered into the record.)

MS. SHORTALL: Thank you, Your Honor.

JUDGE BURKE: Okay.

Any questions from the audience of Mr. Kojola?

(No response)

JUDGE BURKE: Questions from the OSHA panel?

MS. SHORTALL: Yes, Your Honor. We'd like, once again, to start with Mr. Pittenger.

Before he starts, I'd like to thank Mr. Kojola, on behalf of the AFL-CIO, for coming here to testify today. Thank you.

MR. PITTENGER: Under our existing rule for PPE standards, our rules, are you aware of any problems of personal protective equipment that purports to meet

national standards, is marked, but doesn't actually meet those standards?

MR. KOJOLA: I'm not personally aware, no, of any circumstances where they're purporting to meet the standards where they, in fact, don't. No.

MR. PITTENGER: Your experience in following the standards, not necessarily these but primarily this set of design-oriented testimony on personal protective equipment standards, is, generally, a new standard at least as protective or more protective than the older versions of those standards? Would you agree that the possibility that newer versions of reference consensus standards would be less protective is probably rather remote?

MR. KOJOLA: I would say it would be relatively remote. Certainly the history of dealing with PPE, it appears to be even less unlikely than remote. It seems to be the history that the equipment, over time, is at least as equivalent, if not more effective, in terms of offering worker protection.

MR. PITTENGER: Okay. Do you consider this mechanism, which we're at this point calling a non-mandatory appendix, I think in essence a list of compliance alternatives, do you see that as a useful construct for one of our rules?

MR. KOJOLA: I actually think it adds a little confusion. I mean, as opposed to referencing the ANSI consensus standards directly in the rule, it's very clear what employers are to comply with. It's very clear what employees are to be provided by their employer.

Now you have a non-mandatory appendix which also has an imprimatur that, well, it's non-mandatory, we don't really have to follow it, so therefore what do we go to? So if we turn to the rule, the rule doesn't say anything.

The rule just refers you back to the good design requirements and the non-mandatory appendix. I think it adds confusion in an area where you don't need additional confusion. We need clarity. I think the clarity has been provided in the previous versions where the ANSI standards were referenced directly in the rule.

MR. PITTENGER: And so, in essence, your comments related to that appendix deal with the fact that it is not communicating clearly what the requirements are.

MR. KOJOLA: I mean, I think, by and large, most employers, when they purchase their equipment, are going to look for the ANSI or ASTM certifications on

that equipment and, assuming that they have any intention of complying with the OSHA regs, that's what they'll purchase. But if they start looking at what you proposed, I actually think it adds confusion rather than clarity.

So, I think that's -- you know, whenever we can avoid complexity and make it simple and make it understandable for compliance purposes, you know, assuming what is in the rule itself is protective, then I think we ought to move in that direction and favor that approach.

MR. PITTENGER: Thank you.

MS. SHORTALL: Mr. Twardowski?

MR. TWARDOWSKI: Yes. Based on your answer to Don's question, it appears that the AFL-CIO doesn't have any problem with us grandfathering in some of the older -- for people who still have that equipment or the equipment is available that suppliers have.

MR. KOJOLA: I mean, you know, I hadn't really thought about the issue of grandfathering before coming here today, and I know that issue has come up. It's something that I think we would consider. I'd like to think about that and maybe submit some --

MR. TWARDOWSKI: Sure. Post-hearing comments would be just fine.

MR. KOJOLA: Some post-hearing comments on that particular issue.

MR. TWARDOWSKI: Does the AFL-CIO have any position on the ISO standards or other standards? Have you had any experience where they're less protective than the ANSI standards?

MR. KOJOLA: I've had no experience to really make that judgment.

MR. TWARDOWSKI: Thank you.

MS. SHORTALL: Mr. Gottlieb?

MR. GOTTLIEB: Excuse me if my first question is too lawyerly.

MR. KOJOLA: Too what?

MR. GOTTLIEB: Too lawyerly, too much like a lawyer.

MR. KOJOLA: Oh. Okay.

MR. GOTTLIEB: You said you weren't personally aware of equipment not meeting ANSI standards, even though it had been stamped "ANSI".

MR. KOJOLA: Right.

MR. GOTTLIEB: That includes you not hearing about it in your position as a Union president?

MR. KOJOLA: Yes. Correct. In my own field experience, when I spent a considerable amount of time in the field, most of the employers that I was dealing

with were purchasing PPE that was in compliance with the OSHA requirements.

MR. GOTTLIEB: But you haven't heard about it. Nobody's reported problems to you, right?

MR. KOJOLA: No. No, we've gotten no reports that this is a problem. It may very well be, but we've not received reports of that.

MR. GOTTLIEB: And if we made clearer in the text than I guess we did in the proposal that you have to provide protection that's equivalent PPE that's built according to standards that are listed in the non-mandatory appendix, would that reduce the confusion that you foresee under the proposal?

MR. KOJOLA: I think ISEA makes a good point about the issue of equivalence. I think if you want to build in a minimum level of protection for PPE provided to workers, then you have to have some framework to have things equivalent, at least some baseline criteria, as opposed to meeting some general performance design criteria where you may, in fact, have potential differences in worker protection measures.

MR. GOTTLIEB: Thank you.

MS. SHORTALL: I have a few questions, too. I'm going to actually read something from a comment

we're going to receive a little bit later this afternoon and ask if this has been your experience.

We're going to have testimony this afternoon from 3M that questions some of the representativeness of standards development organizations. This is 3M: "On occasions, we have witnessed unbalanced representation of the membership, particularly the lack of end users, in the writing and canvassing process."

Has that been your experience, I guess, employees being one of the end users?

MR. KOJOLA: Well, speaking as someone who has worked for many years in trade union organizations doing worker safety and health, we get pulled in a thousand different directions and we are constantly being asked to participate in a whole range of activities, including the consensus standards bodies.

But we can't be everywhere at one. We can't clone ourselves--yet--so we find ourselves in situations where we have to say it's not possible to participate because it doesn't rise to some threshold level of importance within our own organization and we just don't have the time.

So to the extent that you can look at some of the consensus bodies and see they're not representative, they don't have a sufficient number of

end users, I'm sure that's the case where workers or worker representatives are not present, not because they're not necessarily interested in the issue, but because it didn't rise to some level of importance within the organization.

Now, having participated in consensus standards efforts, not with PPE but in other situations, I think it's important to have the wide range of all the affected parties, including the end users, in these kinds of activities. So, I think that's an important piece.

MS. SHORTALL: All right.

I'm also going to quote from 3M again: "3M believes that a majority of employers and manufacturers will simply purchase and design products, respectively, to the standards listed in the proposed appendix."

MR. KOJOLA: It's been my experience that employers -- yes. My own experience is that employers will purchase the equipment that complies with the ANSI standard that's listed in the OSHA rule. Yes.

MS. SHORTALL: And I'm not trying to suggest that you necessarily support the proposed rule as written, but let's say the proposed rule were adopted as written. Do you think that would continue to be the case, that the majority of employers and manufacturers

would simply follow the design standard listed in the appendix?

MR. KOJOLA: Well, I'm not so sure that employers will sort of abandon their practice, but I think it allows for, over time, sort of an encroachment on that process because, as I mentioned earlier, I think the way the standard is constructive, it provides a little bit of confusion, it could provide some slippage. Folks could decide, well, we're not going to purchase the ANSI equipment. We'll purchase equipment that purports to be complying with some other national consensus standard, and we'll hope to hell that it complies with the good design standards that OSHA intends.

So I think over time you could see some erosion here, and I think we don't want to find ourselves in a situation where there's the potential for erosion. We want to find ourselves in a situation where pretty much everybody knows what they have to do in terms of purchasing equipment and workers can have some level of confidence that the equipment that is being purchased meets the requirements and provides a minimum level of worker protection.

MS. SHORTALL: Okay. Thank you very much.

MR. PITTENGER: I have another question.

MS. SHORTALL: Sure.

MR. PITTENGER: Speaking of other standards, are you aware of other organizations, either in the U.S. or elsewhere, that develop and publish PPE standards?

MR. KOJOLA: Not that I'm aware of. So I have no sense that there's sort of a mushrooming of other consensus organizations that are wanting to develop PPE standards, consensus standards in this country. So, there doesn't seem to be a hue and cry to expand this whole process. I'm not seeing it.

MR. PITTENGER: Do you have any suggestions on how the Agency should approach looking at additional standards, should somebody suggest that, sort of in our process in judging whether or not equivalent protection is provided?

MR. KOJOLA: I haven't thought carefully about that, but I think that is an issue that I would like to spend some time contemplating and maybe provide some of my thoughts on that in post-hearing comments. I do think it's an issue that needs to be considered.

MR. PITTENGER: Thank you.

JUDGE BURKE: Thank you, Mr. Kojola.

Is Mr. Colton present? Mr. Colton, you're scheduled to present your testimony as the second

witness at 1:00. Would you prefer to present it at 1:00 or do you want to start now?

MR. COLTON: (Off mic)

JUDGE BURKE: All right. I'll tell you what. Let's break for lunch and we'll resume at 1:00.

(Whereupon, at 11:30 a.m. the hearing was recessed.)

AFTERNOON SESSION

[1:02 p.m.]

JUDGE BURKE: Okay. Let's go back on the record.

Good afternoon, everyone.

Mr. Colton, are you ready to proceed?

MR. COLTON: Yes.

JUDGE BURKE: Okay. Thank you for appearing, Mr. Colton.

Could you identify yourself and then state your organization that you're appearing on behalf of?

PRESENTATION

By Craig E. Colton

3M Company

MR. COLTON: Yes. Thank you, Your Honor. I'm Craig E. Colton. I'm a Certified Industrial Hygienist, employed as a Senior Technical Service Specialist with the 3M Occupational Health & Environmental Safety Division.

The 3M Company, or 3M, is pleased to participate in these public hearings and thanks the Occupational Safety and Health Administration for the opportunity to present testimony today.

3M, through its Occupational Health & Environmental Safety Division, is a major manufacturer and supplier of respirator protective devices and other personal protective equipment, including those being discussed here, throughout the world.

3M has invented, developed, manufactured, and sold approved respirators since 1972. Our technical staff has participated in the development of several ANSI and ASTM standards on personal protective equipment. In sum, we have substantial experience in all phases of the applications of personal protective equipment.

Also, as a global manufacturing company, we

have a global industrial hygiene and safety program that uses a lot of personal protective equipment and involves many safety and health professionals.

3M appreciates this opportunity to present the following testimony on some of the issues raised by OSHA in its Request for Comments on the Proposed Rule Updating Standards Based on National Consensus Standards - Personal Protective Equipment.

3M supports OSHA's efforts for proposing a performance-oriented approach to updating the standards for personal protective equipment, or PPE, and recognizes the difficulties of trying to keep these standards updated to a specific ANSI or ASTM standard.

3M, however, has concerns regarding specific items in the proposal. As we read the proposal, OSHA has proposed that PPE be constructed in accordance with good design standards, that is, complies with the good design standard, and according to OSHA a good design standard is an equipment standard that meets the following criteria: the standard specifies the safety requirements for the particular equipment; the standards recognized in the United States as providing specifications that result in an adequate level of safety, and the standard was developed by a standards development organization under a method providing for

input and consideration of views of industry groups, experts, users, governmental authorities, and others having broad experience and expertise on the issues related to design and construction of the particular equipment.

Then a non-mandatory appendix would contain examples of national consensus standards that OSHA has determined meets the above criteria. However, PPE are not required to be constructed in accordance with one of the listed standards.

Regarding these requirements, we offer the following comments. On the first item, that the standards specify the safety requirements for the particular equipment, it is from our experience participating in the consensus standards development process that we believe individuals who are involved in standard development have a unique competency and skill in designing performance criteria and test methods that have some relationship and correlation to workplace hazards.

From talking with our safety and health personnel and interaction with our customers, most employers do not have this expertise and knowledge to properly evaluate the performance criteria outlined in design standards and will likewise find it extremely

difficult to evaluate future design standards.

In addition, one corporate 3M industrial hygienist indicated that they also do not have the time to evaluate specific PPE standards and rely on agencies like OSHA to determine the standard's appropriateness.

With 3M's experience in this area of providing PPE to employers, we believe that a majority of the employers will not be capable of determining whether their PPE meets a good design standard. Users, including certified safety professionals and certified industrial hygienists, look for PPE that meets a specified standard. They've not been trained to compare and contrast PPE design standards. Simply put, they rely on the conformance mark placed on the PPE, for example, ANSI Z87.1.

To resolve this issue, OSHA's appendices to the PPE standard should be mandatory and as specific as possible in listing acceptable design standards. Without OSHA review and a mandatory appendix, this determination will be delegated to the employer and, as discussed above, this is not an acceptable alternative.

Regarding the second item, that the standard is recognized in the United States as providing specifications that result in an adequate level of safety, the term "adequate level of safety" is overly

subjective. 3M has experience in the consensus standards process and we found that experts in the field of PPE often struggle with drawing correlations between the lab testing and the workplace hazards to which PPE will be subjected. Since employers are not trained in this area, we believe that they will not be able to understand and apply this criterion.

For this reason, we believe that OSHA must be the final arbiter as to which design standards provide an acceptable level of protection for each type of PPE. As indicated in the proposal, OSHA has committed to reviewing future national consensus standards as they are promulgated. OSHA must do this with any standard it is considering adding to its appendices. In order to keep this important task to a reasonable size, we'd recommend that only ANSI and ASTM standards be considered for listing at this time. While other international standards might be adequately protective, there are simply too many for OSHA and employers to review.

We support OSHA's use of direct final rules to add acceptable standards to the appendices in a timely manner. In addition, we believe the appendices should be mandatory to clearly identify to manufacturers, employers, and OSHA compliance officers which designs

are acceptable. OSHA should be the authority as to which standards provide an acceptable level of protection for the workers in the U.S.

On the third item, that the standard was developed by a standards development organization under a method providing for input and consideration of views of industry experts, users, and governmental authorities and others, 3M agrees that ANSI and ASTM standards requirements for PPE serve as guidelines, indicating that PPE has been constructed in accordance with good design standards.

3M has participated in the process of developing national consensus standards in the past, and in particular has participated on ANSI committees. While 3M sees value in the process, it recognizes that it seeks input from industry employee representatives, government agencies, safety experts, and others, and decisions from such a process are not subject to the same level of scientific and technical scrutiny as must be applied to OSHA's rulemaking process. On occasions, we have witnessed unbalanced representation of the membership, particularly the lack of end users, in the writing and canvassing process. Therefore, OSHA needs to have oversight in the process.

In summary, we believe that OSHA must be the

final arbiter of which design standards provide an acceptable level of performance for each type of PPE. OSHA has already committed to reviewing the future national consensus standards as they are promulgated, and OSHA should review the composition of each standard committee and review the public's opportunity for input to ensure that the intentions of the Administrative Procedures Act are met. OSHA must do this with any standards it is considering adding to its appendices. In order to keep this important task to a reasonable size, we recommend that only the ANSI and ASTM standards be considered for listing.

Finally, we encourage OSHA to use the direct final rule process for the update of a mandatory appendix listing the acceptable PPE standards that meet the requirements in the proposal. We believe this potentially one-stage rulemaking process saves regulatory resources over the more traditional rulemaking process.

Thank you.

JUDGE BURKE: Thank you, Mr. Colton.

Has Mr. Colton's statement been made part of the record?

MS. SHORTALL: I don't believe so. But did you read it verbatim into the record?

MR. COLTON: Yes, I did.

MS. SHORTALL: Then there's no need to enter it.

JUDGE BURKE: Very good.

Any questions of Mr. Colton from the audience?

MR. CUMMINS: Thank you. Again, my name is Kevin Cummins. I'm Director for Public Policy of ASTM International.

If I may preface my question, thank you for your testimony today and thank you for your support of ASTM's standards.

ASTM is the largest standards development organization in the United States, and our standards conform to the WTO principles laid out in the Technical Barriers of Trade Agreement so that they conform to international standards, so they don't constitute technical barriers to trade.

I'd just like to ask the question, Mr. Colton, if you're aware that the ASTM committee composition is made available upon request, and that there are ASTM rules in our processes and ANSI-accredited standards development organization for a balance among producers and end users in the committee, and that we strive to encourage end user participation, and that there are voting balance requirements as well to ensure the

consensus process, and that all negative comments about a standard are considered invalid and must be considered and deemed either persuasive or non-persuasive. As a result of this process, we believe our standards are the best, technically relevant, and the most superior scientific quality available in these areas.

MR. COLTON: Yes. I'm aware of the efforts that are made and the requirements that they strive to achieve when they go to put a standard together. In fact, that's why we support ANSI and ASTM standards. However, that's not always possible. And not taking that as a slight against the standards development, there are people in some areas that they just aren't able to either have resources--whether it's financially, time, people--to participate in them.

So, that's why our comment about finding some that don't get the balance there. I agree that you can find out what the make-up of the committee was, and that was the statement to OSHA, that there is a way for them to go and find that out.

The other point I'm trying to make, is that also with regards to the standards, fewer people watch, or are aware of when ANSI standards or ASTM standards are out and made available for commenting to them,

because there are methods there for the public to comment, and they're more aware of at least things in the *Federal Register*.

We could argue how well they follow the *Federal Register*, but I believe more people follow *Federal Register* notices than they do announcements from the group that sets the standard, therefore allowing more input. Again, I think that's an area that OSHA could oversee when it comes to adding.

MR. CUMMINS: And just as a follow-on, as an industry user and a company that participates in standards development, is it correct that you're already aware that the standards process is available online as well and through Web site tools for participation in standards development activities and meetings in a virtual and online environment?

MR. COLTON: Well, that's true for some standards. I don't know that that's true for all of the standards that are out there.

MR. CUMMINS: You're aware that it's true in the case of ASTM, which is the only organization I --

MR. COLTON: Yes. Yes.

MR. CUMMINS: Okay. Thank you very much.

If I may ask again, in the case of users, I'd like to ask if you're aware that ASTM, in some

instances, has paid for consumer representatives to come and travel, to do the best we can to ensure participation. I don't know if you're aware of this.

MR. COLTON: I wasn't prior to lunch.

(Laughter)

MR. COLTON: Okay. But I can tell you that I'm familiar with some of the ones that ISEA, for example, has sponsored and I know that they've made--or I guess I should say we, since I've been on some of those--or tried to make great effort to track other people to participate in those standards. That gets to be difficult at times.

MR. CUMMINS: Well, thank you very much for your responses to my questions.

Again, thank you to Judge Burke and the OSHA panel.

Again, I'd like to make myself available for any help if there's questions, over lunch or coffee, for anyone in the room. So, thank you very much. I appreciate it.

JUDGE BURKE: Thank you, Mr. Cummins.

Anyone else have any questions of Mr. Colton?

(No response)

JUDGE BURKE: OSHA panel?

MS. SHORTALL: Yes. We're going to start with

Mr. Pittenger.

MR. PITTENGER: Thank you very much for your input.

You stated or recommended--suggested, at least--that the Agency ought to have some role, and I think the word you used was "oversight" of the ANSI process. We just heard from you again on the one aspect related to membership. Could you elaborate on how you envision that that might work, how that might get implemented?

MR. COLTON: Well, when it comes to standard make-up, I mean, those rosters are available as we heard earlier, not only for ASTM, but for ANSI standards. So that's one way OSHA could check to see what balance or what input went into that standards. I think there's also a way to see what comments came when the organizations put it out for public comment, see how much input is received by them. I think that wouldn't be a difficult piece of information to get.

So one of the things with the typical procedure for publishing it in the *Federal Register* to get comment, is to solicit comment from a wide variety of people who'd be interested in it. One thing with the announcement in the *Federal Register*, is you can send in your written comments. It takes two things to

comply or to receive input from it, I think. One, is easy methods for getting the comments in that don't necessarily involve traveling, which certainly sending them, in dropping them in the mail is one way, or electronically does that.

The other thing, is knowing about it and having some method where it's announced to the public. While the standards groups do that, I don't know that it's as broad as the *Federal Register* notices. I mean, we're all pretty familiar with the *Federal Register*, I think.

MR. PITTENGER: So as far as implementation related to making folks aware of what's going on in the committees, the *Federal Register*. With regard to the information gathered as to the membership, are you suggesting that the Agency should take some action related to situations where there is an opinion developed within the Agency that there's an imbalance on a particular committee?

MR. COLTON: I don't know if I was suggesting that they take action on imbalance, at least in talking with the standards development organization. But from the standpoint of at least trying to solicit wider comment by publishing in the *Federal Register* -- which I think the direct -- for example, we mentioned the

direct final rule. That's one way that it goes out. At least it's been distributed, perhaps, I think, more widely than it would be in the previous method just by the SDO, and then you have a chance for greater feedback to it. You still may not get the feedback that you want. Then you can proceed, as I understand the direct final rulemaking.

MR. PITTENGER: Another question. Your comments, 3M's comments related to the question posed in the proposal on, are there other publicly available design standards that are not included in the proposed appendices that would provide an adequate level of protection and, therefore, should be included in the appendices, within 3M comments was that OSHA should consider reviewing international consensus standards from such organizations as the International Standards Organization, or ISO. You statement today recommended that the Agency limit this particular proposal to ANSI and ASTM.

MR. COLTON: At least as a start, I believe what I mentioned. We think that the way the proposal is written, that right now with the definitions for good design standard and the national consensus standard, that OSHA could find out that there will be many standards that come to surface as good design

standards. I think there was testimony earlier that, again, I don't see employers looking and getting copies of those standards, but they'll look at the literature or the labeling information that comes with that product of whether it needs it.

So, I think the proposal allows for lots of standards to be used, and to ask OSHA, I think, to review all of those--I don't know. You might make some time in direct final rule maybe, but spend more evaluating those--that somewhere you've got to start. ASTM and ANSI standards are fairly recognized, and that's an understatement, I think, here in the U.S., and that would be a good starting point.

But you find more with things like the ISO standards gaining more significance. I can't predict what's going to happen there, but that might be one down the road.

MR. PITTENGER: As a manufacturer, you're designing and manufacturing/fabricating personal protective equipment that meets standards outside the ASTM/ANSI-approved standards, I'm guessing?

MR. COLTON: Most certainly.

MR. PITTENGER: Do you have some designs that actually meet an ANSI or ASTM standard as well as some other standards where you market elsewhere in the

world?

MR. COLTON: I don't know about eye and face. I'd have to go and check on that. But there are some other types of PPE that meet standards in more than one country. So they'll meet ones here in the U.S., as well as ones in Europe or in other parts of the world.

MR. PITTENGER: Does this require you to, I assume, conduct more than the tests that are included in any one standard? Is that the primary difference and technical challenge in assuring that you're meeting both standards? Is it rooted more in the test processes or not?

MR. COLTON: Oh, for the basis for our comment, do you mean?

MR. PITTENGER: Actually, I was asking about your experience in, say, respirators where you have a single design that is meeting -- you're showing, you can demonstrate, that you meet the standards. I'm presuming that that may require additional tests beyond what you may have been doing a decade or so back.

MR. COLTON: Well, okay. I think with time, right, there are more tests probably being done, or at least those tests have evolved to be different than they were years ago. We also have, like, some of the tests that we do here for products in the U.S. maybe

are different than tests in other parts of the world, so we end up testing the product against the, what do I want to say, the specificities of that particular test method as well to ensure that it meets those standards.

MR. PITTENGER: Are you familiar with situations where protective equipment that is purported to meet a particular standard, in fact, does not?

MR. COLTON: I'm not personally aware of having found product that purports and doesn't meet it. I've heard anecdotal stories.

MR. PITTENGER: Okay. Thank you.

MS. SHORTALL: Mr. Gottlieb?

MR. GOTTLIEB: When 3M builds equipment according to non-ANSI and ASTM standards, do they make an independent determination that the PPE is going to provide an adequate level of safety?

MR. COLTON: I don't know if we know that the adequate level of safety is. That was one of the comments. What we do --

MR. GOTTLIEB: Well, in your mind.

MR. COLTON: -- is make sure that it performs to the standard. I mean, the problem that I alluded to in our comments was that, you know, you make a test and the test gets performed and you show that the product performs or meets that requirement, but what it means

to the workplace, I don't know if we have exact correlations with those.

We've maybe done better with respirators where we're able to test the performance to see how well -- you know, we know that they meet a laboratory test, and then we can test them in the workplace, you know. We're not trying to propose that we start testing hard hats out there in the workplace on people.

I mean, I can tell you that hard hats protected my head in a center plant, for example, and that I didn't receive an injury from falling items. So I think what manufacturers do, is they look for a stringent test that we at least will provide some good performance here that we think will help at least reduce the risk of that hazard, you know, if a worker uses that equipment in the workplace.

MR. GOTTLIEB: And do you ever determine whether you're decreasing your risk more than is required by an ANSI standard or an ASTM standard? If you increase the risk below that, the risk would be if you just built to an ASTM or ANSI standard.

MR. COLTON: Well, I think probably, at least the way we look at these standards, is that they're minimum performance requirements. Certainly if we've done a good job of identifying those tests for some

parameter that's going to relate to protection by exceeding that, we may increase that degree or level of safety.

MR. GOTTLIEB: So you think you have done that with respect to some PPE? You've increased safety beyond what would be achieved by complying and building it according to the ANSI specifications?

MR. COLTON: Well, I think I can say we made a good-performing device. With that, as it relates to safety, if doing so you increase safety, how much or if it's a significant difference, I don't know if I can say.

MR. GOTTLIEB: Okay. Thank you very much.

MS. SHORTALL: I have a few questions as well.

You mentioned in your comments that you thought the criteria that we included in the proposal about the design standard providing an adequate level of safety was too vague.

MR. COLTON: Right. Safety is a hard concept to identify, at least in this context. Then reading a standard, and our comment was sort of made with the employer in mind, that then to look at a standard, and you see one that has an impact test and you compare that to another standard that has an impact test, we find that many times the requirements might be slightly

different, and to know, well, how that impacts safety, is going to be difficult, if next to impossible.

MS. SHORTALL: Would it take care of the vagueness issue if, for example, OSHA, in a final rule, said that the standard is recognized in the United States as providing a level of protection that is equivalent to, or greater than, the standards listed in the appendix?

MR. COLTON: Well, I think two words, "equivalent" and "greater", are open to a lot of interpretation.

MS. SHORTALL: Same thing.

Do you find that other standards other than ANSI and ASTM that your company has dealt with provide protection that's equivalent to the ASTM/ANSI standards?

MR. COLTON: Can you repeat that?

MS. SHORTALL: In other words, if you designed an eye and facepiece or head protection that met one of the other standards, an ISO standard, Canada, CSA standard, do you think those provide a level of protection that is at least equal to, or more protective than, the ANSI and ASTM standards?

MR. COLTON: I don't know that I can assess that, the level of protection. I think they may have,

in some cases, similar performance requirements, but in some cases they may be slightly different. That may not make them or indicate that they don't protect.

I mean, if you go and look at -- I think sort of the premise that OSHA had in their appendix where they had old standards listed, saying that those were ones that were providing an adequate degree of safety, and we've had the standards and then you had subsequent additions to the standard listed, you know, I believe that the newer standards make for a better performance, you know, or a higher level of performance than the older ones.

But we certainly have done it with -- at least my feeling is that we've done it with the intent to make them more protective, but maybe they were -- who's to say last year's standard wasn't protective or protective enough? I think those are the same differences you might get into with regards to standards in different localities.

MS. SHORTALL: All right.

When you mentioned in your comments about some standards development organization possibly having lack of representation among end users, who all were you including or who did you mean by "end users"?

MR. COLTON: Well, end users are people who

would purchase the equipment and actually be using it. It could be the employer who is purchasing it for their program or their representative, or it could be people who actually have to wear the device and have used it in the field. Those sometimes can be different people.

MS. SHORTALL: Okay.

You also mentioned--in fact, I mentioned it when I was questioning another witness--that at least 3M believes that a majority of employers and manufacturers -- let's start with just employers. A majority of employers simply choose to provide the PPE that meets the ANSI or ASTM standards, and that's a current practice. You suggest that you think the reality is that, in the future, that's exactly the same thing that they will continue to do.

MR. COLTON: Yes. Based on the way things are now, yes.

MS. SHORTALL: So regardless of whether the standard is listed in the regulatory text or in an appendix, they will still look for the easiest route of compliance and just choose PPE that meets the ASTM or ANSI standard?

MR. COLTON: I believe that's what they'd like to do. Having had people who have read the context of the standard, to evaluate the standard and its

appropriateness for their conditions, I think it's pretty much non-existent. They've got to get the standard, so they look for the thing they -- when they look at the OSHA standard and they see whether it's in, I think, an appendix or in the regulatory text where it's been identified that it meets, that's what they would prefer to go with.

MS. SHORTALL: So 3M, as I guess both a producer and end user of PPE, if the proposed rule were finalized exactly as it is, how would 3M comply? Would 3M just continue to choose the PPE that's listed in the non-mandatory appendix or would you go through an evaluation process of lots of other standards?

MR. COLTON: Well, I can tell you, in discussing with them on what they'd like to do for purchasing it, is they'd like to just look somewhere for a statement of a device that meets it, and then select that device. I don't know if it were to happen where they could use other standards, if they would actually start to evaluate standards and products that comply to different standards for their selection.

MS. SHORTALL: And is it true that whether a PPE provides an adequate level of safety depends on the situation and the conditions under which it will be used?

MR. COLTON: Yes, that's part of it. Yes.

MS. SHORTALL: All right.

So that a PPE might be providing an adequate level of safety for one particular workplace, but may not be what's needed in another type of workplace because of the type of hazards or conditions that are present?

MR. COLTON: I think that's generally true. That's why there's different classes of types of protectors, so selection becomes a part of the issue. But there's limitations as to how--what do I want to say?--robust you can make the devices, you know. So there are limitations to all the PPE we make.

MS. SHORTALL: Another thing. In the proposal we said one of the reasons we were suggesting that the framework that we did was to provide employers with more flexibility. We surmised that the vast majority of employers would simply choose PPE that matches the standard listed in the appendix, but that some manufacturers may--and particularly those who are international in nature--want the flexibility of being able to look at PPE more broadly that not only has to meet a standard in this country, but the fact that we have a workforce in another one and would also meet a standard in another country.

Is this something that would be of concern or help to 3M as an international company?

MR. COLTON: Well, based on the comments when we were asking them for their input, they want to keep the process as simple as possible, while still provide a reasonable-performing device to their workers. I hesitate to use the word "protection" since I talked about the subjective nature of that, but they'd like to do that.

They want to provide some level of protection to their worker, you know, and they want to meet the OSHA standard, and doing it the simplest way would be to be able to look at a device, know that it complied with one that's acceptable to OSHA, and with OSHA having looked at determining that that was one that was a standard that provided this level of protection that they're interested in, they could select that device and then use it.

Maybe somewhere down the road they would start to look at all the standards and select devices that way, but in our interviews with them, our discussions with them, that's not what they're interested in doing right away. Having what my own background is in safety and health, people are looking to keep it simple.

MS. SHORTALL: All right.

On behalf of the Solicitor's --

MR. GOTTLIEB: Could I ask another question?

MS. SHORTALL: Oh. Go ahead.

MR. GOTTLIEB: You say 3M basically wants certainty that what they're producing complies with the OSHA standard

MR. COLTON: No. Those comments were to the people selecting the users, is how I took her question.

MR. GOTTLIEB: The users.

MS. SHORTALL: The users.

MR. COLTON: Now, we want our products to comply with the standards that are the ones we think are good design standards, so we're going to have them tested against standards here in the U.S. that would be recommended or supported by OSHA as ones complying with the standard.

MR. GOTTLIEB: But when the text of the standard refers to an older standard, 3M manufactures to the older standard or to the newest standard?

MR. COLTON: Past history is, we've always moved to the newer standard.

MR. GOTTLIEB: Could you presume that OSHA would accept that just because you think it's safer?

MR. COLTON: Well, I guess. Yes. That's partially our assessment of the standard, whether we

think it's at least as protective, if you will, as the one existing prior to it.

MR. GOTTLIEB: But you do make a determination that it's at least as protective as the one that's actually referenced in this.

MR. COLTON: Right. But we have talked about, there is the possibility that we could see one that might not be as protective. I mean, I think that past history indicates that that is, I think --

MR. GOTTLIEB: Unlikely.

MR. COLTON: Unlikely. Right. But who knows? The world is always changing.

MR. GOTTLIEB: Okay. Thank you very much.

MS. SHORTALL: Well, on behalf of the Solicitor's Office and OSHA, we thank you for your testimony today.

Am I correct, you came down here from Minnesota?

MR. COLTON: That is correct. Ya, sure.

MS. SHORTALL: I apologize that we couldn't give you more hospitable weather than gale-force winds yesterday. But if you high-tail it out of town today, you will avoid the 1-to-2 inches we're supposed to get tomorrow. I thank you again for appearing.

MR. COLTON: Thanks. Yes. We got five inches

Saturday.

JUDGE BURKE: This is like the tropics, then.

(Laughter)

MR. COLTON: Yes.

JUDGE BURKE: Thank you, Mr. Colton.

The next witness will be Mr. James Byrnes, from Mine Safety.

Good afternoon, Mr. Byrnes.

PRESENTATION

By James K. Byrnes

Mine Safety Appliances Company

MR. BYRNES: My name is Jim Byrnes and I'm representing MSA. MSA is the largest full-line manufacturer of personal safety equipment for head, eye, and face, respiratory, fall protection. MSA is very active on numerous standards committees, including ANSI, NFPA, CSA, ISO, ASTM, ISEA in the U.S. and globally.

I have comments that were sent in and I'd like those put on the record. They're very similar to what other people have already stated and I would not want to take up your time by reiterating the same things.

I am part of ANSI committees in the U.S. for eye, face and head protection. I am also the chairman of the ISO TC-94-SC1 committee, so if there are any questions that I could answer, I'd be more than happy to do that.

JUDGE BURKE: I take it Mr. Byrnes' comments have already been made part of the record, is that right?

MS. SHORTALL: Yes, they have, Your Honor.

JUDGE BURKE: Okay. Very good.

Do we have any questions from the audience of

Mr. Byrnes? Yes, ma'am.

MS. GRIEST: Hello. My name is Linda Griest. I'm a safety and health manager. I've worked in industry for quite a while. I wanted to come to the committee and maybe learn some things more about the PPE.

MS. SHORTALL: Your Honor, I'm not sure if Ms. Griest filed a Notice of Intention to Appear.

JUDGE BURKE: The rules of the proceeding are that, in order to ask questions of the witness, one has to have filed a Notice of Intent to Appear.

MS. GRIEST: I apologize then. Excuse me.

JUDGE BURKE: Okay. Very good.

OSHA panel? Any questions from the OSHA panel?

MS. SHORTALL: Yes. We'll start with Mr. Pittenger.

MR. PITTENGER: Mr. Byrnes, related to this grouping of consensus standards that are in the proposal, some being older and some that are also listed, do you believe that these older versions of consensus standards that are applicable to these types of PPE we're discussing today offer an appropriate level of safety? Can some of the older standards be considered a baseline?

MR. BYRNES: I think if we're talking about the current PPE we're discussing today, in some of the cases they were at the time safety -- they were a safe standard. Some of them have changed. Most of them have changed significantly, but they would be safe at the time, but they're safer today. I don't want to say that they were unsafe before, because they were safe before, the products that were manufactured to those. It's just that we've moved forward, in most cases, with testing and higher levels of protection.

MR. PITTENGER: As a manufacturer, but probably more importantly as an employer, would you be concerned that your folks, your workers, were using, say, the 2003 ANSI standard for, let's say, eyewear, safety glasses, once the 2008 standard came out?

MR. BYRNES: Yes. I think if you look one standard back, if you're looking at a previous revision or it's just being revised, having that product in the plant, I don't see any problem with that at all. I know you were talking about grandfathering or looking at something like that.

I think that in most cases, most customers that use products that we're considering right now that we're talking about in the PPE, when a new standard comes out they don't throw away their current product.

They use that product until it's worn out and inventories are reduced, and then the new product is circulated in. So there's nothing unsafe about the product that's there, to answer your question. But most everyone will then update, because most manufacturers will only be manufacturing to the new standard within a certain period of time after it's issued.

MR. PITTENGER: Okay. So then given the fact that in the case of ANSI there is basically a five-year process, so that at one point you may have a standard that is 10 years old, or if a standard is being reaffirmed, that next older standard to a current standard could actually be, I think, aged more than, say, 10 years, maybe 15 years. That seems to be an appropriate situation.

MR. BYRNES: It depends on the standard. If, technologically, there isn't any advancement, you don't want to make a change just to make a change. In most of the standards that we're talking about, you're seeing change. But if you went 10 years and there hadn't been a revision and that standard was good, I would still consider that product good. I think you're going to find that most committees are going to take a look at that. If there's an opportunity even for

changing a small portion of a standard, then that would be made.

MR. PITTENGER: Okay. I think that's all I have at the moment.

MR. TWARDOWSKI: Mr. Byrnes, how long does it take from the time a new standard comes in till manufacturers and suppliers can get the new product out to the user?

MR. BYRNES: I can tell you, it's going to vary. I can talk about us, but I can talk about most of the main manufacturers. When you're looking at that, it really depends on what the product is and how fast you want to turn on that. Most manufacturers know that the new standard is coming about.

Most manufacturers are ready to produce when the standard comes out, or very close to that depending on what the standard is and what the testing is, what testing has to be required for it. So you're looking at -- usually manufacturers are starting a year ahead of time before the standard comes out to start preparing for that.

Just as you see Z87 is going to be changing for 2008, most people are now looking to make those changes even though they're not final. The same with Z89. People have started working on that.

MR. TWARDOWSKI: That puts the Agency at a little bit of a disadvantage if manufacturers have a bit of a jump. We can't do anything until the consensus groups put the standards out, and then we can evaluate them.

MR. BYRNES: Right. And in that case it really isn't a problem. If the standard came out, some people -- you're going to sell off your inventory -- people are selling off their inventories.

MR. TWARDOWSKI: Right.

MR. BYRNES: Distributors have inventory, you know, so you've got the layer, upon layer, upon layer. It could take a year for old inventory to be completely cleared out. Again, just as the question was raised on products that are out there that you're currently using, they're not unsafe. They're still safe products.

MR. TWARDOWSKI: MSA appears to sit on several standard committees, CSA, ISO, et cetera. How do you feel their standards compare with the ANSI standards? Are they as protective? You don't have to give me an answer right now, if you could do something in the post-hearing comments.

MS. SHORTALL: Get the answer now. Get the answer now.

MR. TWARDOWSKI: Okay.

MR. BYRNES: I want to be very careful in what I say.

MR. TWARDOWSKI: I understand.

MR. BYRNES: I can tell you my opinion. I have served on committees. I was on the Trilateral Commission. I'm the chairman of the ISO committee. So, I can tell you what happens. A lot of standards people will say that their standard is the best.

I want to be careful in what I say, but I can tell you with ISO for sure, in head protection only, not looking at eye and face because eye and face, I think, is fairly close, but in head protection it definitely has lower levels of protection for electrical impact and penetration, it's just the way that was written.

But the current ISO standard doesn't exist anymore. They're going to start working on it again. But in most cases, it's the differentiation of the test procedure and what level you're getting from it. So it's very difficult to say who's better and who isn't. You really have to look at an analysis. You're asking for the comparison for head protection and we can provide that. The ISEA's Z89 committee group has that chart available with the major 20 standards. As you

know, there are many.

MR. TWARDOWSKI: Right.

MR. BYRNES: So we take the major 20 in the world.

MR. TWARDOWSKI: Hundreds.

MR. BYRNES: And we can supply that chart showing all the different levels of protection and the different ways that people do it. But it's the test itself.

MR. TWARDOWSKI: That would give us a little bit better idea.

MR. BYRNES: Yes. Yes. But you have to remember, it's the test.

MR. TWARDOWSKI: Right.

MR. BYRNES: Something can have the same level, but if the test is different it's a lot easier to pass that test than this test, even though it's the same level. So, it's a mixed bag.

MR. TWARDOWSKI: Thank you.

MS. SHORTALL: Ron, do you have any questions?

MR. GOTTLIEB: Do you think manufacturers generally can compare one standard to another to determine whether --

MR. BYRNES: Yes. Usually you have the expertise in certain categories and you'll be able to

easily tell what the differentiation is between products, what the levels of protection are.

MS. SHORTALL: I appreciate your offer to provide us with the top 20, or the big 20 on the head protection.

I have another request. That would be, when you do that table, could you mark to each performance element which standard--or maybe there might be one--has the strictest performance level?

MR. BYRNES: We can try. Again, you can have something that may show a higher level of impact or a higher level of penetration, but the way the test is done and the device that's used actually is easier to pass than something that has a lower level of impact or penetration. We can try to do that for you. It would be our own personal that we'd be putting out. I want to be very careful when we would do something like that it's our interpretation.

MS. SHORTALL: Sure. Feel free to annotate it, that it's simply your interpretation of it, but that way we can see. It seems that there may not be one standard always across the entire world that every single performance element is the strictest of all. It may vary. Is that the case?

MR. BYRNES: My expertise is basically in

head, eye, face and hearing, so I want to be very careful in how I comment on other standards. But in those categories, it would be very close.

MS. SHORTALL: Currently, the employers you deal with, or as far as your own knowledge goes for the organization, would you say that the vast majority of employers, although they could choose another standard, just tend to provide PPE that meets the standard listed in OSHA's standard?

MR. BYRNES: I think that what you find is a mixed bag. I listened to your questions and everybody else's answers, and mine might be a little different.

MS. SHORTALL: Let me pin you down.

MR. BYRNES: That's fine. I honestly believe that when you look at this, it's broken down into categories. Some companies will automatically ask. They'll come to us or they'll come to the person that they're purchasing from and say, what do I need to meet, how can I comply with OSHA requirements? And they'll say "ANSI".

MS. SHORTALL: When you say "companies" are you talking about manufacturing companies at this point or end users?

MR. BYRNES: No, end users.

MS. SHORTALL: Okay. Thank you.

MR. BYRNES: An end user. They'll go to a distributor or they'll come to the manufacturer and say, I'm going to do X. What do I need to be in compliance to do X? We will say, to do X according to the PPE standard in OSHA, this is what the requirement is, this is what you should be using: you should be using an ASTM product that meets this, you should be using an ANSI product that meets this. They're very direct. That's in a lot of cases. Larger companies do a hazard assessment. I know you're supposed to, but not everybody does that.

Larger companies do their hazard assessment and then they usually will ask the same thing. They'll say, here's our hazard. Can you make a recommendation on a product? Because when you're talking about things--let's just say head protection--you don't just build a helmet that does everything for everybody. You have different environmental conditions.

They all meet the same standard. They all meet the same level of protection, but they work for different environmental conditions. So that we can make that recommendation, but we have a baseline to work from, and it's ANSI. It's that standard. That's what people are looking for. They're looking for that baseline.

MS. SHORTALL: And in the appendix to the proposed standard, as OSHA explains, the ANSI or ASTM is at least a baseline. Your organization and manufacturers say, well, if you want to make it easy on yourself, just get that one.

MR. BYRNES: Then I'd have to ask you a question, first. How will OSHA enforce non-mandatory appendix standards?

MS. SHORTALL: Well, I can only look at the one that's in there right now.

MR. BYRNES: Okay.

MS. SHORTALL: And that one has an irrebuttable or conclusive presumption as complying with the standard, whatever is listed in the appendix.

MR. BYRNES: So your interpretation of a non-- when you move it from the current portion to the non-mandatory portion, and if I'm a user and I say it isn't mandatory anymore, it's in the appendix, it's a non-mandatory standard, will they still have to comply according to OSHA as if it was in the main thrust of the body?

MS. SHORTALL: They won't be required to comply with that particular one, but if they comply with that they will be in compliance. So if they comply with that listed ASTM or ANSI standard, they

will be in compliance.

So given that, what will your organization and manufacturers most likely tell employers?

MR. BYRNES: It depends on what you put in, how many standards you have in there. I think if you take today and all you did was move what you have in there now to ANSI over, or ASTM and you move that over, our problem, again, as everybody else has stated, is the "equivalent" or "equal to". Today that's fine where it is, because most people always will go for the standard. Very few people look for the equal to or mandatory. They're looking at specific, really fine applications.

MS. SHORTALL: All right.

MR. BYRNES: I think when you get it in there, the longer term, you can't look at this as just what's going to happen tomorrow if you made it final. It's what's going to happen for the years down the road.

MS. SHORTALL: All right.

MR. BYRNES: And if you start adding standards, that's where the problem is going to be. How do we tell someone what to use? Because now you've got three or four standards which have completely different application. I mean, they're going to have different standard levels, different dielectric levels,

different impact levels. You can't. You can't direct somebody to that. It's going to confuse the customer. It's going to make it very difficult for us to give them the recommendation and for someone that's distributing the product or selling the product.

MS. SHORTALL: All right.

I have another question about your comments that you submitted. MSA proposed two following options to consider. I don't know if it's either in terms of an alternative or whatever. Could I get you to explain that first option in a little bit greater detail for me, please?

MR. BYRNES: Yes.

MS. SHORTALL: Okay.

MR. BYRNES: I wish you hadn't asked that.

MS. SHORTALL: Oh, well.

MR. BYRNES: I guess the real thrust of this is that we'd either like it to stay as it is and come up with a cleaner way for OSHA to be able to change and update the standard by either only referencing the standard without a date or updating the date.

MS. SHORTALL: I see.

MR. BYRNES: That's the basic thrust of what we're trying to do in one.

In two, we're saying we'd like the same thing.

If you'd like to move it to the appendix because it makes it easier for OSHA, that's great, but it's the same thing. We'd like to have one standard as a baseline. You can put "equivalent" and "equal to" in there and that's fine. As long as there's only the one standard, I think everything would stay the way it is. We're looking at those two recommendations.

MS. SHORTALL: And can you clarify for me, which ISO committee are you chair for?

MR. BYRNES: TC-94-SC1, which is head protection.

MS. SHORTALL: Head protection. And that one, you said, right now is lower than, but it doesn't exist.

MR. BYRNES: Yes. Unfortunately, we worked on it about three years ago and then it dropped. But the original standard was from 1973, the original ISO for industrial head protection, because that portion -- we have a lot of other helmets in there.

For industrial helmets, it would be similar to Z89. It was written in 1973 and never updated. They are just going to start working on that standard. It's going to be in March of next year again. So, the standard was dropped about 10 years ago.

MS. SHORTALL: I see.

MR. BYRNES: They pulled it out because there hadn't been any work done on it.

MS. SHORTALL: And what is the time frame for completing standards projects for ISO as compared to ANSI? Do they have a similar, every five years or you're out the door?

MR. BYRNES: No. Yes. I can tell you, for the industrial head protection, looking at it has been, it can be years and years. It just depends.

MS. SHORTALL: A working life?

MR. BYRNES: I've been on standards I was on for 20 years.

MS. SHORTALL: Oh. All right.

MR. BYRNES: Unfortunately.

MS. SHORTALL: Does anyone else have any other questions?

(No response)

MS. SHORTALL: On behalf of OSHA and SO, we really appreciate you coming today to testify at the hearing. We'll appreciating hearing your follow-ups in your post-hearing comments. Thanks a lot.

MR. BYRNES: Thank you very much.

JUDGE BURKE: Thank you. Thank you, Mr. Byrnes.

The next witness will be Ms. Joann Kline from

Jackson Safety.

Good afternoon, Ms. Kline.

PRESENTATION

By Joann M. Kline

Jackson Safety

MS. KLINE: Good afternoon. My name is Joann Kline. I represent Jackson Safety. Our company is headquartered in St. Louis. I, myself, am out of our Grand Rapids, Michigan plant.

I had some comments that I had submitted in July with the initial comment period and they tend to echo a lot of what's been said here. So as I debated what keeps coming out as the main thrust of what I thought those comments were, I think it comes down to the issue of confusion and simplicity.

We've had some testimony here and attempted questions from users that I would call sophisticated and connected, maybe the military, 3M I would certainly characterize as a sophisticated user. As I thought about our customer base and my individual history as an employee before I got into this industry, I thought there's so many companies that are small body shops -- I worked for a spring shop of 65 people.

I'll be honest, they don't particularly know or understand whether the revision in the OSHA regulation is up to date or not. I'm not sure they understand what a revision is, and they may not know

what a standard is. But what they do know, is that there are certain things that they look for that says, this meets OSHA requirements and this is what, for lack of a better way to put it, the government says is good. Those are marks such as Z87, Z89, and the various other things that go along with these standards.

I think as we contemplate a good design standard, the concern that's been raised is, well, you could have many other kinds of standards, different countries, maybe private entities that develop a standard and you start the proliferation of acceptable standards, different marks.

With some of these small businesses that maybe don't have the ability to come here and testify and maybe aren't sophisticated users, the first time they see a brochure that cuts 25 percent of the cost and someone says this meets OSHA's requirements, that's very compelling to them, and that simplicity of, I understand it, my employee understands it, would be largely lost.

I think, from the manufacturer's standpoint, as Mr. Byrnes testified, to say that we have the ability to assist some of these smaller customers and what do you need, even that seems to end up, what type of device, is a visor, is it a goggle. The ANSI safety

level is built into the conversation, so to speak.

So as the different standards that may meet the criteria of good design standard but provide a different level of protection from what people have traditionally used and understand works in their shop, or their body shop, or their spring-making shop, or whatever it is, I would say that my biggest concern is the loss of the notoriety of the ANSI marks, so to speak, that are so well understood.

Right now, even an individual employee can go buy his Harley-Davidson safety glasses for however much he wants to spend on it and take it, and everyone knows as long as it says Z87 I can wear them on the floor, and he'll never take them off, believe me. They will buy those kinds of things and never take them off. But all they know is that if it says Z87, if it says Z89, this is good and I can wear this.

The government says it's good, for lack of a better way to put it. I doubt any of them could articulate how it comes to be good or that there's a standard behind it, or testing, or anything, just that they know it's good. I guess I would like to end there, because out of all the things that I had written, the one that's really emerged to me today and in thinking about it, is the loss of simplicity,

there's so many more marks and so many more -- if safety turns into a sales claim, there's a lot of things that could go wrong there: well, my mark meets OSHA's new requirements. I know you're not familiar with it, but it meets OSHA's new requirements. Then it turns into a marketing thing.

With that, I think I'm done.

JUDGE BURKE: Very good.

Any questions from the audience for Ms. Kline?

(No response)

JUDGE BURKE: OSHA panel, any questions?

MS. SHORTALL: Thank you. We'll start with Mr. Pittenger.

MR. PITTENGER: Thank you, Ms. Kline. As a manufacturer, how do you ensure that PPE that you manufacture complies with the national consensus standards? Also, how might that process change if this particular proposal became a final rule?

MS. KLINE: What we do currently, is we have a lab that can test every requirement. In Belmont, Michigan, we can test every requirement of the two standards we're talking about today, the Z87 and the Z89. We assure certainly on design when we go to launch a product. It gets extensive testing. Then once it's in production, it's also tested routinely to

make sure it's meeting those standards.

If this rule went into effect, it would depend on what my company decided to market and manufacture. That may, in turn, be determined by some kind of competition that emerges as somebody else starts putting in different product with different marks and made to different standards.

Certainly the cost of trying to outfit a lab to do all that testing or even monitor what's going on with some of these different standards and trying to test to those would be formidable, so in terms of assuring it, it would have to start with what we would decide to even make. I think the competitive realities would start driving that. I don't know if that's a good answer. That's the best one I can give, because I don't know what exactly we would market.

MR. PITTENGER: Okay. Thank you.

You mentioned sophisticated users, perhaps the military, somebody like NASA, for instance, that may come to you and ask about some specialized purpose. Does that cause you as a manufacturer to perhaps enter into a design phase for some new piece of equipment, or perhaps would you test a current piece of equipment to assess whether or not specific needs of a potential customer can be met with something in your mind

currently?

MS. KLINE: We would probably try to see if it could be met within the product line. We have gotten that in the past, maybe not recently, but desires for auto-darkening welding filters, which are the filters that darken automatically when a user strikes a weld. Can they be darker? We're always trying to drive them faster. That's a competitive item at this point.

If it were something that was not in our product line, we might try to go and design something like that. I don't think that has happened in the realm of pure expansion of safety characteristics since I've been at Jackson, and that's six years, which is not very long in this industry. Six years experience is not that much experience here.

MR. PITTENGER: Are you aware of any customers that have come to you, asking if your equipment meets some standard other than the ANSI standards?

MS. KLINE: No. Not unless it's within one of our international operations. We will say, can we take this American product and cross-market it somewhere else? But within the U.S., no.

MR. PITTENGER: Do you manufacturer equipment in order to meet standards elsewhere?

MS. KLINE: Yes.

MR. PITTENGER: Do you find that some equipment that is, let's say, designed to meet an ANSI standard will also meet an ISO standard or Canadian standard, Australian standard?

MS. KLINE: For the most part, if we make something for the United States market, it's a fairly easy transition to go to Europe or go to Canada, which is my main secondary areas of what I'm familiar with. Beyond that, my knowledge drops like a rock in terms of what those standards may be.

But it's fairly straightforward. If we make it for the U.S. market, there are one or two tweaks I can think of in the other standards that we might have to look at design-wise, but it pretty much is going to meet some of those other standards.

MR. PITTENGER: Okay. Thank you very much.

MR. TWARDOWSKI: I have no questions, Your Honor.

MR. GOTTLIEB: Just a couple.

Do you manufacture PPE according to the 2003 versions of the ANSI standards?

MS. KLINE: Yes.

MR. GOTTLIEB: And did you do that based on the independent determination that the equipment was as safe as PPE built according to the earlier version?

MS. KLINE: I'm going to speak lightly to this, because at that time I was even newer yet with the company and the industry. My take on it is, we upgraded and went to those new revisions of the standard because that's the way the world was going. That's what the competition was doing. That's what the new ANSI standard was.

If you want to claim compliance, you want to claim compliance to the latest version. I don't recall any specific conversations as to why exactly we would want to make that upgrade, except the fact that I don't think it was even on anyone's mental map anywhere that it would be an option not to.

MR. GOTTLIEB: And you would be capable of making that determination, regardless of whether you actually --

MS. KLINE: Yes.

MR. GOTTLIEB: -- went through that process.

MS. KLINE: Yes. We would certainly be capable of making the determination.

MR. GOTTLIEB: You said it's pretty easy, once you have something built according to ANSI, to make sure that it's in compliance with an ISO standard.

MS. KLINE: I don't know anything about ISO standards.

MR. GOTTLIEB: The European standards?

MS. KLINE: European and Canadian. There are a few things that we know to look for that may be different in those standards.

MR. GOTTLIEB: What about the reverse process? How easy or difficult it is to take something that was built according to a Canadian or European standard and make sure that it's in compliance with the ANSI standard?

MS. KLINE: I have limited experience in that, because most of what we make is for ANSI. But for some of the things that we try to cross bring in, particularly from Europe, we find that there's some work to do at the drawing board before we can pass them for ANSI standards in my lab. There is more work to be done, at least in some of the welding helmet areas, to market them here.

MR. GOTTLIEB: So it could be done. Has it been done? Are there occasions that you recall where it's actually been done?

MS. KLINE: I'm sorry?

MR. GOTTLIEB: It actually has been done?

MS. KLINE: Where we tested something that was a European product and said, hey, do we want to bring this over, we have an opportunity to partner up and

bring it over. There would be some things that we'd say, you need to go back to the drawing board on on a few particular items. It's not money. As you can see from the chart that I think you have on the Z87, there are individual things that this one might be better than that one, that one might be better than the other one.

MR. GOTTLIEB: Thank you very much.

MS. SHORTALL: You mentioned your fear that under the proposed standard manufacturers would just put a label on saying "this complies, this is okay with the government". What's stopping manufacturers from doing that today?

MS. KLINE: In the sense of Z-87?

MS. SHORTALL: Yes. What's stopping anyone from doing that today?

MS. KLINE: I don't think I meant necessarily that they would falsely apply a label, as meaning more that they would have manufactured something to something that met the good design standard criteria and say, it's okay with OSHA because of that. Not so much a false label, but a label of something different, saying, well, now this will pass your OSHA inspections and it has my new "JMK" mark on it because "JMK" is a good design standard.

MS. SHORTALL: All right. So you're just saying manufacturers will become their own standards-setting organization?

MS. KLINE: No. But if someone did have something that was made to a good design standard, however obscure and however possibly unknown, they could market to that and say this meets the good design standard criteria, therefore it's compliant and it meets OSHA's requirements.

But nobody would necessarily know what that meant and it would come down to, like I said, a sales thing that says this is OSHA compliant because it has mark X on it, and mark X may go to something that's a good design standard, but the source of that standard, what exactly it means, how it compares, would be unknown.

MS. SHORTALL: The vast majority of employers who seek PPE from your company, they're just asking for something that meets the standards in the current -- I mean, the ANSI standards or ASTM standards in OSHA's current regulations? They're not out there testing it?

MS. KLINE: Testing our product to --

MS. SHORTALL: No. Testing different standards or anything.

MS. KLINE: No.

MS. SHORTALL: Give me the thing that complies and I'm just going to go use it.

MS. KLINE: Yes. Absolutely.

MS. SHORTALL: Okay.

In the proposed standard, and I'll use eye and face since that was one of the ones that you mentioned, the proposal states that "protective eye and face devices that are constructed in accordance with any of the listed national consensus standards will be deemed to meet the good design requirement of Paragraph B1.

If the proposal became the final rule and an employer wanted to come and ask you for a quick answer, give me something that today complies with the OSHA standard, would you be telling me that that's what you wanted, I'm going to give you the PPE that meets what's in the OSHA's appendix?

MS. KLINE: I'm sorry. I'm not quite sure I understand the question.

MS. SHORTALL: Okay. In our proposed rule we say, if your PPE is designed in accordance with one of the standards listed in our appendix, it's deemed to be in compliance with this rule. An employer comes in and asks you, just give me something that complies with the OSHA standard, would you be likely to advise them to take the PPE that's designed in accordance with the

ANSI and the ASTM standards, since they are listed in the appendix?

MS. KLINE: Yes. If the rule were to pass immediately thereafter, absolutely, because that's what everyone would have. I think I'm in agreement with Mr. Byrnes, to say, what happens if, 15 years down the road, it's not ANSI and ASTM, which is now a very quick answer: it's 12 standards, it's 18 standards, it's I don't know how many.

In that case, I'm not quite sure what we would do. I am sure we would try to recommend something that was appropriate and, frankly, in our product line that we sell. So if we're not selling to standards 3 through 17, we might say, this will meet OSHA, this will meet their requirements.

MS. SHORTALL: And did I hear you correctly before when you were saying that currently some of the PPE, when you compare it to some other standards other than ANSI and ASTM, sometimes it's stricter and sometimes it's not as strict, it sort of goes up and down across the board?

MS. KLINE: For the most part, they're close. The ANSI standards overall seem to be a little stricter. There are some places where, as you can see on your chart, one of the other -- there may be a

slightly different rate or velocity of impact, something of that nature.

MS. SHORTALL: In your written comments, you say that the ability of PPE manufacturers to be watchdogs over PPE product line and characteristics would be lost under the proposed rule. Could you explain what you mean by that and why you think that will happen?

MS. KLINE: There are times, for a variety of reasons, that we may test a competitor's product: our sales guys see something in the field, a customer asks a question about it, my personal individual curiosity if I literally see something at a store that I want to buy. We test our competitor's product. We know that they occasionally test ours for a variety of reasons. We do that because we're all manufacturing to largely the same standard. I have the equipment to do that.

If there were a lot of different standards that required different kinds of equipment and different kinds of tests, our ability to say -- if someone said, well, they say this meets OSHA's requirements because it meets standard X, does it meet standard X? I might have to say I don't know and I can't tell because I can't afford to equip my lab with whatever testing standard X requires, especially if

there are many standards that have a lot of different equipment kinds of requirements.

MS. SHORTALL: Then I have a couple of other questions about useful life of PPE. Could you tell me, first of all, does Jackson Safety distribute or manufacture eye, face, head, and foot protection, all four of those we're discussing?

MS. KLINE: Not foot protection.

MS. SHORTALL: Okay.

But for the three that we you do, could you tell us what the average useful life of eye, face, and head protection are?

MS. KLINE: I don't know. And when other people have said it's about the user environment, if someone has a hard hat that they're wearing in a warehouse that has a hard hat requirement for whatever reason, it's an indoor environment, he punches out, he puts it on the top shelf of his locker, the useful life of that device is going to be way different than the guy that's working in a quarry, he's out in the sun all day, he's drilling things and getting little pebbles on his hat all day, and then he puts it on the dashboard of his truck.

So, we really do try to avoid those kind of questions because the environments are so extreme, that

certainly when we get them from different customers it's hard to say, well, how are you going to treat it? Some people sit on their hard hats to use it for a lunch chair. There's just so many different environments, I just can't answer that.

MS. SHORTALL: All right.

We've had some comment that maybe ANSI or other standards development organizations may miss the mark in terms of some of their representativeness. Have you found that to be an issue at all?

MS. KLINE: No.

MS. SHORTALL: Okay.

Any other questions? Bill?

MR. PERRY: Good afternoon. This will be quick, I think.

Are you aware whether there are vendors of personal protective equipment in the United States that are marketing equipment that conforms to an international standard? Like, is Canadian equipment coming into this country?

MS. KLINE: Marked only to a Canadian standard or a Canadian standard in addition to an ANSI standard?

MR. PERRY: Only to a Canadian standard.

MS. KLINE: No, I'm not aware of any.

MR. PERRY: No.

And so you haven't experience that there's really any demand or any particular advantage to, say, an employer shopping for PPE that conforms to some international standard?

MS. KLINE: I can't think of any, and I'm not aware of anyone bringing it up or having asked it or proceeded with us.

MR. PERRY: Okay. Thank you very much.

MS. SHORTALL: Any other questions?

(No response)

MS. SHORTALL: Ms. Kline, on behalf of OSHA and the Solicitor's Office, we certainly appreciate your trip here to provide testimony in the hearing today. Thank you very much.

JUDGE BURKE: Thank you, Ms. Kline.

Let's take a 15-minute recess now. It's about 20 after, 25 after 2:00. We'll reconvene then at 20 till 3:00. When we reconvene, we'll take testimony from the Building and Construction Trades panel.

(Whereupon, at 2:24 p.m. the hearing was recessed and resumed back on the record at 2:42 p.m.)

JUDGE BURKE: Let's go back on the record.

Good afternoon, folks. This is the Building and Construction Trades Department panel. Proceed as you wish. If somebody wants to start and introduce the

others, or how do you want to proceed?

MS. TRAHAN: Well, we'll just introduce ourselves.

JUDGE BURKE: Sounds good.

PRESENTATION

By Christina Trahan, Scott Schneider, and Victoria Bor
Building & Construction Trades Department, AFL-CIO

MS. BOR: I'm Victoria Bor. I'm with the law firm of Sherman, Dunn, Cohen, Leifer & Yellig, and I'm am counsel to the Building Trades Department.

MS. TRAHAN: I'm Chris Trahan, a Certified Industrial Hygienist here for the Building and Construction Trades Department, AFL-CIO.

MR. SCHNEIDER: And I'm Scott Schneider, and I'm the Director of Occupational Safety and Health with the Laborers Health & Safety Fund of North America.

MS. TRAHAN: I'm going to say a few words and Scott's going to say a few words, and we're going to go ahead and answer any questions you might have.

First of all, thank you for having this hearing and thank you for doing this rulemaking. The Building Trades Department. I'm presenting this testimony on behalf of our 12 affiliated unions and the millions of workers those unions represent. The issue of personal protective equipment obviously is very important to constructive workers and we urge OSHA to update the construction standards during this rulemaking by either expanding the scope of this rulemaking or very quickly initiating a process for

updating the construction regulations.

The main positions we have is that the ANSI standards and the ASTM standards that are under discussion here should be included within the regulatory text of the rulemaking update. We believe that employers and employees need clear and specific guidance on the requirements that are in the OSHA standards and most performance-oriented language, or at least in this case it doesn't serve to clarify the requirements that these construction employers need to meet.

We think the use of the direct final rule is appropriate to update such standards when they go out of date, but again it should be in the body of the regulation instead of in a non-mandatory appendix.

The Hearing Conservation Amendment, Confined Spaces, Lock-Out/Tag-Out, Lead, these are just -- I'm throwing out here as examples of areas where OSHA has let construction workers down and waited years--and in some cases never--to extend worker protection to construction workers that workers in other industries have been allotted.

Construction workers need your protection. Please don't let this opportunity go by to improve your regulations while excluding the industry from your

actions.

MR. SCHNEIDER: Okay. I submitted copies of a written statement to Ms. Shortall, and I guess that will be entered in the record in full, so I'm not going to read that.

MS. SHORTALL: Your Honor, I would ask that Mr. Schneider's hearing testimony be marked and entered into the record as Exhibit OSHA-2007-0044-0060.

JUDGE BURKE: So admitted.

(Whereupon, the document referred to as Exhibit OSHA-2007-0044-006 was marked for identification and admitted into the record.)

MR. SCHNEIDER: Okay. I'm not going to read my testimony. I think a lot of it would repeat what everybody else has said today.

I think if you have listened to all the testimony today, there's been a remarkable consistency. Everybody--I mean, everybody--unanimously has agreed that the standards need to be updated. It seems like everybody agrees that it ought to be updated in the regulatory text, that employers need clarity. They need to know exactly -- they want to know what to comply with and they want to be told in clear language.

I think OSHA's attempt to give employers

flexibility in complying with the rules -- it's attempting to do that, even though employers don't want flexibility. They want the clarity that a specific rule in the regulatory text would give them.

I guess my biggest concern is that this hearing, really, is 30 years too late. It should have happened 30 years ago when the ANSI standards that were first adopted in 1970 went out of date. I'm glad that it's finally happening, but I think it probably should have been done a long time ago.

I'm sorry that OSHA seems so reluctant to actually take a position, a stand, and say, okay, we are going to adopt this standard and then see what happens. I think what you've seen from this hearing is, there's not going to be a hue and cry against adopting and putting in the regulatory text the most recent ANSI standards or ASTM standards. You could do it very easily as a direct final rule. This hearing probably would have not been necessary if that approach had been taken initially.

So I think that is sort of summarizing what I've heard today and what I hope that you'll take away from this hearing, is that moving forward with a direct final rule to adopt the most recent ANSI and ASTM standards is probably the best route to go and would be

a very expeditious way of updating all the rules.

I'd be happy to answer any questions.

MS. BOR: I just wanted to make one point, which follows up on Ms. Kline's testimony. That is that I think a lot of the questions from the OSHA panel today have focused on the extent to which changing the language of the standard or providing a greater range of options would change employers' behavior in purchasing and utilizing PPE. I think the real issue--and again, this was following on what Ms. Kline said--is that the real question is, will it change what manufacturers do? Because when it comes to personal protective equipment, employers are basically consumers.

They're not creating the PPE, they're not deciding -- the average employer is not making technical judgments about the quality of the PPE. They're purchasing hard hats, or goggles, or face shields that are available to them and they're making judgments about how they're marked, you know, whether they have an ANSI mark on them or an ASTM mark on them.

So the question really is, are you providing guidance or are you providing options to the manufacturers that are going to undercut the certainty that employers have when they purchase PPE? I've been

sitting here and thinking, we're all consumers. You go into the drugstore and you see on the shelf a bottle of Tylenol and a bottle of CVS pain relief, and it says "as effective as Tylenol" and it's half the price.

You don't test it to see. You as the consumer don't test it to see whether in fact it's as effective as Tylenol, or if this hard hat is as effective as the ANSI-stamped hard hat. If it's stamped that way and it says "approved by OSHA" or "compliant with the OSHA standard", I think that's probably what -- and it's half the price, I think people will use -- the consumer, the employer/consumer is likely to make the judgment that they can rely on that mark and go forward.

I think that's really where our concern lies, in providing -- with the intent of providing employer flexibility, where we maybe end up is employers relying on marketing, which may or may not be reliable, and that the flexibility is not, in fact, a sure kind of safety that we're looking for.

JUDGE BURKE: Thank you.

Any questions of the panel?

(No response)

JUDGE BURKE: No questions from the audience.

The OSHA panel. Do you have any questions?

MS. SHORTALL: Thank you, Your Honor.

MR. PITTENGER: Reading your testimony, the one that was entered into the record, you indicate that OSHA should regularly propose an update to these standards. I was wondering if you could provide some input related to the frequency that you would look at having that done.

MR. SCHNEIDER: I was going to say every 30 days, but --

(Laughter)

MR. SCHNEIDER: I don't know. But I think since ANSI standards are updated every five years, I mean, perhaps every five years, regularly update them. I don't know, but I think that would make sense on a five-year cycle.

MR. PITTENGER: Okay.

One other thing that is listed here near the end is a suggestion that the Agency may also want to consider proposing adoption of international standards, as is being done. There's some work being done on that, hazard communication. I was wondering what advantages that you see in the Agency doing that.

MR. SCHNEIDER: Yes. I think my intent was that if manufacturers are manufacturing globally and marketing globally, and there is a global consensus on

an international standard for equipment testing, then it would make sense. It would be easier for the manufacturers to comply with one global standard.

If that's not the case, then that may not be an advantage. So I think what is incumbent upon the Agency, the Agency's responsibility is basically to look at the standards that exist out there and make a determination as to what the Agency thinks will provide the best protection for American workers.

If the Agency decides that an ISO standard or whatever is the best protection, then that's what they should propose. Then if there are objections to it, then people can object and you can have a public hearing and decide whether or not to use that or the ANSI standard. I don't think there's a global consensus right now. I think that was just something for OSHA to consider.

I think in general, the ANSI standards, the ASTM standards are the ones that are accepted here in the U.S. and the ones that ought to be followed in general. But if a global consensus did occur on a particular standard for testing a certain type of protective equipment, then OSHA should consider it. If OSHA felt that it was a better standard, then I would expect OSHA to propose it, at least.

MR. PITTENGER: Okay.

Can one of you comment on how it is that your members generally assure that the personal protective equipment that they're providing do give them adequate protection from the worksite hazards?

MS. TRAHAN: Well, if they have been trained, they look to see if their safety glasses are stamped with Z87.1. If they have been trained, they look at if their hard hats say 89.1. That's how they check.

MR. PITTENGER: Okay.

I guess my final question is, are you aware of any information, members or otherwise, related to specific instances where personal protective equipment in use has been purported to meet a required standard, a requirement of our current standard, yet does not meet that?

MR. SCHNEIDER: I don't know how we would know that or how the employees would know that.

MR. PITTENGER: Perhaps through actual accidents.

MR. SCHNEIDER: Right. But just because a piece of equipment fails, it doesn't necessarily mean it doesn't meet an ANSI standard. I mean, it still is possible for it to fail if the impact was significantly greater than what it was tested at, perhaps. So, I

don't know. I don't think they have any way of knowing that.

MR. PITTENGER: Thank you.

MR. GOTTLIEB: Are you aware of members being provided PPE that meets non-ANSI or ASTM standards, that meets Canadian or international ISO standards?

MR. SCHNEIDER: Well, I know we have Canadian members, so I'd have to ask them.

MR. GOTTLIEB: But within the U.S.

MR. SCHNEIDER: I don't know of any.

MS. TRAHAN: No.

MR. GOTTLIEB: That's all I have. Thank you.

MS. SHORTALL: I wanted to ask you a question about a comment that we have in written comments from a Mr. Ben Simmons who was supposed to be testifying later this afternoon that says "Mass marketers already import large quantities of products that bear markings on the item or its packaging and feloniously claim compliance to a recognized American standard."

Have your members reported obtaining or being offered PPE that has a felonious claim that it meets an ANSI standard?

MR. SCHNEIDER: How would we know? How would they know? I mean, if it says that it meets it, they have no way of knowing that it doesn't. I mean, how

would they know?

MS. SHORTALL: I just asked.

MR. SCHNEIDER: Okay.

MS. SHORTALL: Did they know? Have you had any members report that?

MS. TRAHAN: No.

MS. SHORTALL: At the same time, does that also say that maybe you can't rely on these stampings and markings because no one is going to test it? You don't know if it's a good one or a felonious claim that's been stamped on it.

MS. TRAHAN: What's the question?

MS. SHORTALL: The question is, you say your members look for the mark on the PPE. Now you're saying you don't know if the mark is good or not.

MR. SCHNEIDER: Well, we don't really know how common that is or if it's common at all. I mean, I don't really know what substantiation he has for that claim. But I think this is one of the reasons some people have suggested that maybe there needs to be some sort of third-party certification, et cetera. At some point that may be the way to go if this is a significant problem. I don't know if it is or not, I really don't.

MS. TRAHAN: I think that the question should

be, what recourse should the standard-setting body have on manufacturing that erroneously claims that it meets their standard versus how a worker could determine whether or not that mark was appropriate.

Personally, I have a lot of faith in the standards-setting bodies that are being discussed in this rulemaking, but I don't have faith in manufacturers that would provide the erroneous claim. I think that's beyond our ability to really comment on.

I mean, there should be some mechanism for someone to go after somebody who's making the false claim, and that could be OSHA. If you have a requirement that says you have to have safe equipment manufactured to a certain specification, there has to be some mechanism to enforce that. That relates to, how would OSHA enforce the standard that didn't specify what an employer specifically had to do? That kind of ties into the question asked this morning.

MS. BOR: And I think, again, maybe part of your question is, if there's already a problem or a perceived problem with companies falsely claiming that they are ANSI compliant, why do we think it would be any greater if you were to give employers or manufacturers greater leeway in what standards they meet? And I think part of it is the concern about

being detected.

Again, Ms. Kline made the point about, to the extent that current manufacturers can police themselves and police others because they all test for the same things, that's one way of assuring that at least the market polices itself to a certain extent, or if OSHA is in a position to know what the standard is that they're testing against.

But our concern is, once you get into more subjective "equally as effective" or to the same standards where it's not a single technical test that will tell you whether one product is as effective as another product, it makes it easier for people to make claims and more difficult for either the Agency or the market to police itself. I think that's -- to go back to your question.

MS. SHORTALL: Scott, or Mr. Schneider, I would like to ask you a few questions about your experience with working with construction workers, about the useful life of head protection.

Is there any average useful life of head protection?

MR. SCHNEIDER: I really don't know. I think, you know, some people can keep a hard hat for maybe several years, and others may replace them on a regular

basis. But I think they like to keep their hard hats. They decorate them and they become personal, and they like to keep it. But I think more than a couple of years is probably beyond their life, average life.

MS. SHORTALL: Is that the same for eye and face protection?

MR. SCHNEIDER: I don't know. I think eye and face protection probably gets replaced a little bit more often.

MS. SHORTALL: And what about foot protection?

MR. SCHNEIDER: Wow. I have no idea.

MS. SHORTALL: I want to thank the Building Trades and Construction Department for coming here to testify today. We really appreciate your comments and look forward to your post-hearing comments as well. Thank you very much.

MS. TRAHAN: Thank you.

JUDGE BURKE: Thank you, Mr. Schneider, Ms. Trahan, and Ms. Bor. Thank you very much.

Mr. Philip Johnson from Sperian Protection.

PRESENTATION

By Philip M. Johnson

Sperian Protection

MR. JOHNSON: Good afternoon. My name is Philip Johnson. I'm with Sperian Protection, headquartered in Rhode Island. We make a wide range of personal protective equipment for sale worldwide.

I think I'm going to echo probably the sentiments of the people that have gone before me, in that I don't think I have anything substantive to add beyond the comments that have already been made here today. It's our feeling, and we're in complete agreement with the ISEA proposal, to keep at least a baseline reference to the ANSI or ASTM standards in the body of the regulations, and to the degree that a non-mandatory appendix can be added, that it can be done as a supplement to that.

I did have a couple of other additional comments, however. Picking up on what the folks in front of me just said, I think the reason we ought to keep Z87, or Z89, or other ASTM standards in the body is because the users, for sure, aren't doing any testing. Employers, safety directors, industrial hygienists, purchasing agents, they won't be doing any testing. So, it's up to the manufacturers to do the

testing for the products themselves. If we open it up to standards beyond ANSI and ASTM, I think there's no real mechanism to police that because there is no third-party certification required.

The final comment I have -- actually, a couple more. I think one of the things that's been overlooked today, is we have a tendency, and certainly I'd include myself in that group because we're the manufacturer and in order to test new designs and to test the production that we make daily in our factories, we are always looking to the standard to provide test methods and acceptance and rejection criteria. So it has a tendency to be focused on the product and the product performance and test methods.

But one of the things that's key to us -- in fact, we train our customer service personnel to remind employers when they call in asking for recommendations on eyewear or hard hats, have they done their hazard assessment. The hazard assessment is required and written into the body of Z87.

We believe that's a great thing to have because it forces the employer, who oftentimes perhaps are undermanned or under resourced to the point where I don't have time to do this, I know I need to provide PPE, but I'm going to call the manufacturer and ask

them what they recommend.

It's very difficult for us, sitting, perhaps, hundreds of miles away to make a proper recommendation or suggestion, so this at least gets them off on the right foot by conducting the hazard assessment. Again, I think that's a key piece to Z87 today. It's incorporated by reference now in the regs. I'm not sure that if we add good design standards in the future to the non-mandatory list, whether that requirement which is for the whole setting of personal protective equipment and its use would be invoked that way.

My final comment is, I know that there's been some questions today about ISO standards. I am on the U.S. tag for the ISO eyewear standards in development. It's been under development for, going on five years now. It's quite a long and arduous process. But that is now, as I said, in process. We hope it will finish up before I retire, I guess.

But in any event, that's a standards development organization that has a tendency to take a group of people worldwide, people who are experts in eye protection across the world, and put them into one blended standard. I hope that when that comes out it will stand the test and have some chance of being accepted worldwide as an adequate standard for

protective eyewear.

That concludes my comments.

JUDGE BURKE: Very good. Thank you, Mr. Johnson.

Any questions for Mr. Johnson?

(No response)

JUDGE BURKE: Any questions from the OSHA panel?

MS. SHORTALL: Yes.

MR. PITTENGER: Other than the location in our proposal of the reference standards, what is your opinion on that particular group of standards that spans a few years?

MR. JOHNSON: I think, as Mr. Byrnes stated, some of the standards work--and I can speak more from experience on eye and face--that they do update from time to time to take into account technological advancements. But at the same time, a lot of these standards, this process has the tendency to be evolutionary as opposed to revolutionary.

So I think if we were to take the current version and one generation before, we would be in good shape in terms of spanning standards that provide safety and protection for the wearer, and at the same time take advantage of new advanced as they occur.

MR. PITTENGER: Okay. Also, your input, if you would, on the frequency at which you would like to see the Agency update these particular standards.

MR. JOHNSON: Well, I think it would be great, but I understand the resource limitations you have. But I think in the standards-setting process, we are working to revise standards on a five-year cycle. I would think that would be what I would recommend as well.

MR. PITTENGER: Okay. Thank you.

MR. TWARDOWSKI: One short question. Are you aware of any manufacturers out there that are producing PPE, any one of these three types of PPE, to the older standards?

MR. JOHNSON: Difficult to say. I would suspect the answer is no. The last version of the eyewear standard, for instance, came out in 2003. I think if there's not a performance pressure to change, then certainly if I'm looking at updating my product line versus what my competitors are going to do, I don't want to put myself in a position where I'm behind. So, I'm probably working toward getting that done sooner rather than later.

MR. TWARDOWSKI: Thank you.

MR. GOTTLIEB: I'm just going to follow up on

that line of questioning. So Sperian is producing according to the 2003 version of the ANSI standard?

MR. JOHNSON: Yes.

MR. GOTTLIEB: And did they make an independent determination that this was at least as protective as the prior version of the ANSI standard?

MR. JOHNSON: Well, again, I guess I have the advantage of sitting on some of the committees where this work is anticipated and I can see this in the process. I think, given that, we can take a look at how evolutionary the process is and take a look at if there's any particular performance areas that are changing--I hesitate to use the word "radically"--but something that would be significant and we can pretest to see if our existing product line meets that or if the performance or a marketing requirement to change that, we would do it.

MR. GOTTLIEB: But you could evaluate the expected safety performance of the --

MR. JOHNSON: Right. Whatever the standard requires, we could evaluate in-house.

MR. GOTTLIEB: And do you produce PPE in accordance with other consensus standards besides ANSI standards?

MR. JOHNSON: Yes.

MR. GOTTLIEB: Which ones would they be, generally?

MR. JOHNSON: Well, we manufacture products that are sold in different parts of the world. So if goes to Canada, we would make it so that it would meet the Canadian requirements. If it goes to Europe, ditto for the EN requirements, and same for Australia and New Zealand.

MR. GOTTLIEB: And how do you compare the PPE built according to these other consensus standards as far as safety?

MR. JOHNSON: We do the requisite testing and then see if it meets the requirements. Pretty straightforward.

MR. GOTTLIEB: But do you think that PPE built in accordance with Canadian or European standards are as safe as the ones built in accordance with the ANSI standards?

MR. JOHNSON: Well, actually I anticipated that question. I'm not sure how to answer it. I think my --

MR. GOTTLIEB: As best you can.

MR. JOHNSON: My way of backing out of that, I guess, is to refer back to the chart that you've been supplied. I think you'll find certain performance

attributes are held more strictly or more loosely in different parts, so it's never an easy comparison.

MR. GOTTLIEB: What would consider the essential attributes of a good design standard? How would you define the term if you wanted to provide more guidance than what is provided?

MR. JOHNSON: I'm not sure I can answer that. I think that's why we're all here. It seems it's pretty difficult to be able to put your arms around that. Is it strictly testing? Is it the fact that the people do a hazard assessment in their factory? Is it that the product is out there and is actually held to some tighter standard, like third-party certification where you could prove it and have documentation?

I think that's what this is all about, is it seems to be a little too gray, a little too ambiguous to be able to lock in exactly what a good design standard is.

MR. GOTTLIEB: You said a good design standard was a standard that provided protection that was equivalent to the standards that we're going to list, or are proposing to list in the non-mandatory appendix. Would that be a workable definition?

MR. JOHNSON: I'm not sure. I think it still leaves it open a little bit when you compare it to the

exact requirements on the established standard, like an ANSI or an ASTM document.

MR. GOTTLIEB: Wouldn't just saying list it in the appendix be the exact same?

MR. JOHNSON: Yes.

MR. GOTTLIEB: And excuse me if I missed this. But the eye protection that you said you're working on, is that an ANSI standard?

MR. JOHNSON: It's an ISO standard.

MR. GOTTLIEB: ISO.

MR. JOHNSON: ISO.

MR. GOTTLIEB: And do you think that will be as protective as the ANSI standard?

MR. JOHNSON: Well, I'd like to think it's going to be equivalent. But again, if you take a look at the standards that exist today from different regions like Europe, Australia, Japan, United States, these are the very people that are contributing, and to the degree that they feel passionate about certain test attributes or test methods in their standards, they're saying, well, this is what we believe needs to be in the ISO standard. So ultimately you could take the chart that you have there and add an ISO column, and then go down and match it up attribute by attribute and see if it passes muster.

MR. GOTTLIEB: When do you think that will be complete?

MR. JOHNSON: When we started the process I was thinking 2010, but I'm not quite sure.

MR. GOTTLIEB: Okay.

MR. JOHNSON: It's done on a part-time basis for all of us volunteers, so it's difficult to complete.

MR. GOTTLIEB: Thank you very much.

MS. SHORTALL: Do you want to ask another one? Okay.

MR. PITTENGER: I was wondering if on occasion you have tested, or do you test, personal protective equipment, that is, the product of other manufacturers?

MR. JOHNSON: Yes.

MR. PITTENGER: Has that test -- in any instance do you have information where, let's say, if it were built under an ANSI standard or a Canadian standard, that that particular equipment did not meet the standards that it was labeled to meet?

MR. JOHNSON: Well, I think I need to be careful there. I think you find every once in a while, in the course of doing testing on a repetitive basis, that every once in a while you find something that is perhaps a little outside of the standard. But what I

can say is, in terms of the United States manufacturers that I'm familiar with and talk with and meet at these standards meetings, it's never those. It's usually something that's come from an out-of-state source.

MR. PITTENGER: In other words, your sample sizes are quite small.

MR. JOHNSON: Well, millions and millions of pieces of eyewear get sold, so the sample size is reasonably small, yes.

MR. PITTENGER: Any way to determine whether or not a defect is due to the design or due to the variability in the manufacturing process?

MR. JOHNSON: Well, I guess if you're prepared to check enough samples and you were to find the same attribute or the same feature or mechanism on the product failing, then it might lead you to think it's the design. But if it's just a one-time occurrence, it may be a fluke.

MR. PITTENGER: What advantages would you, as a manufacturer, see in the third-party certification process?

MR. JOHNSON: Well, I think it gets to the point where you're not able to check everybody's production every day, but certainly I think most every other region in the world has invoked third-party

certification. In fact, when you go to a standards meeting on an ISO level, that is one of the things that's very hard for them to believe because they are very, very structured in the way they do things, and third-party certification is automatic because, after all, how do you have some degree of policing in the environment if you haven't forced the people to submit samples and have them tested and have them end up on an approved products list?

MR. PITTENGER: When you market your products elsewhere then, do you make use of third-party certification processes that may exist where you're marketing?

MR. JOHNSON: Yes.

MR. PITTENGER: Thank you.

MS. SHORTALL: Just following up on Mr. Pittenger, do you voluntary do third-party certification for your products distributed in the United States?

MR. JOHNSON: In some cases, yes.

MS. SHORTALL: And why, and what cases?

MR. JOHNSON: It depends. Sometimes if we sell into a market, or a particular end user may require additional documentation, we would do that.

MS. SHORTALL: I see.

Since you referred to the ISEA appendix that listed the eye and face protection comparison across several standards, in your opinion of those various standards, which one had the strictest performance requirements?

MR. JOHNSON: I'm going from memory now, but it seems to me it was the Z87 standard.

MS. SHORTALL: It was what?

MR. JOHNSON: It was the ANSI standard, I believe.

MS. SHORTALL: Okay.

Could I ask, in your post-hearing comments, to look that over again and if there is any correction to be made from your comment, or that opinion, to include it in your post-hearing comment?

MR. JOHNSON: Sure.

MS. SHORTALL: And for the eye and face protection that you manufacture, what is the average useful life of the equipment?

MR. JOHNSON: Well, I'm probably going to invoke the same answer most everybody else has used. I've seen it run the gamut from people who would send back a product that they've had and taken care of lovingly for some amount of time and said, my lens is a little scratched now, can you send me a replacement,

and you find it's three or four years old, and in other cases we're led to believe that most equipment is provided free of charge to the employee, so in those cases they don't take care of it, and I've seen eyewear that gets changed out every two to four weeks.

MS. SHORTALL: All right.

Going back to third-party certification, are you seeing an increasing request from purchasers for you to have third-party certification of the PPE that you manufacture?

MR. JOHNSON: Tough to say. I would think the answer is yes, but I'm not sure of the slope of the increase there.

MS. SHORTALL: And why are you seeing them asking for this?

MR. JOHNSON: Well, I think some of it has to do with product liability. That's one area where we're all involved all the way down through the supply chain. That's why they like to call and ask for our specific recommendation for their specific tasks. And it's difficult, again, for us so many hundred miles away, to be able to give them an exact recommendation for the PPE that they need because we haven't seen everything that they do in detail.

MS. SHORTALL: Have you seen any flooding of

the market in the U.S. of PPE imports that claim to meet he ANSI standards but in fact do not?

MR. JOHNSON: I don't think we've seen it a lot. I think some of it's anecdotal.

MS. SHORTALL: All right.

Any other questions?

MR. PITTENGER: Just one related to third-party certification. In those places where there's a requirement for such certainly, is that requirement generally within the consensus standard under which the equipment is constructed?

MR. JOHNSON: Yes.

MR. PITTENGER: Thank you.

MS. SHORTALL: Mr. Johnson, I want to thank you for sitting so patiently and listening to everyone's testimony, and knowing how to answer our questions from being our last witness.

MR. JOHNSON: Well, I got to cheat like that a little bit, I guess. Thank you.

MS. SHORTALL: Thank you so much for coming to testify.

JUDGE BURKE: Thank you, Mr. Johnson.

Mr. Johnson is the last of the scheduled witnesses. Is there anyone else in the audience that has filed a Notice of Intent to Appear that wishes to

testify?

(No response)

JUDGE BURKE: Ms. Shortall, I believe that's the last of the witnesses.

MS. SHORTALL: Thank you.

As mentioned in the Notice of Proposed Rulemaking, and in Your Honor's pre-hearing order, it is OSHA's custom to generally allow some time for post-hearing comment. The time is generally divided into two parts. The first portion of the post-hearing comment period is for the submission of additional information of data that is relevant to this rulemaking, and the second part is for the submission of final written comments, arguments, summations, and briefs.

Your Honor, I would like to suggest that we allow 30 days, until January 3, 2008 for the first part of the post-hearing comment period for interested parties to submit that information and data, and then I suggest that we allow an additional 32 days, until February 4, 2008, since the 30th day falls on a Saturday, for the second post-hearing comment period, and for interested parties to submit their final summations and briefs.

JUDGE BURKE: Very good. Then the request is

granted. Pursuant to the provisions of 29 CFR Part 1911 and as provided in the Notice of Proposed Rulemaking and my pre-hearing order, the record will remain open until January 3, 2008 for the submission of additional information and data. The record then will close for the submission of such information and data, but will remain open until February 4, 2008 for the submission of final comments, briefs, argument, or summations.

MS. SHORTALL: Thank you, Your Honor.

And may I add, for the record, that I will reduce this motion to writing and it will be available as a post-hearing order?

JUDGE BURKE: All right. Very good, then. The post-hearing order will be issued stating the same, providing for the same post-hearing schedule.

The public hearing then on the Proposed Standard Updating OSHA's PPE Standards on National Consensus Standards is concluded. Let the record show that all persons and organizations who filed a Notice of Intent to Appear have been extended the opportunity to do so.

Let the record also show that in every instance following the presentation of oral comments and testimony, that an opportunity was extended for

questioning of those witnesses, first by those participants who filed a Notice of Intent to Appear, and then by the members of the OSHA panel.

On behalf of the Department of Labor, I wish to publicly thank all those of you who gave your time, thought, and hard work and expended your own funds to attention the hearing and participate in the promulgation of this standard.

On behalf of the Department, I want to express its appreciation to the OSHA panel for its hard work in preparing this and putting this standard together.

Finally, I wish to thank Vaneta Chatmon, who was the Hearing Management Officer for this proceeding, and thank her for her hard work.

For all the participants, thank you. The hearing is adjourned.

(Whereupon, at 3:24 p.m. the hearing was adjourned.)

C E R T I F I C A T E

This is to certify that the foregoing proceedings of a hearing on the Proposed Rule Updating OSHA Standards Based on National Consensus Standards - Personal Protective Equipment, U.S. Department of Labor,proceedings of a hearing before the United States Department of Commerce, held on Tuesday, December 4, 2007, were transcribed as herein appears, and this is the original transcript thereof.

LISA DENNIS

Certified Verbatim Reporter