UNITED STATES DEPARTMENT OF LABOR
MINE SAFETY AND HEALTH ADMINISTRATION

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

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

Wednesday,
August 16, 2000

The public hearing convened, pursuant to the notice at 8:32 a.m.

BEFORE:

MARVIN NICHOLS
Administrator, Coal Mine Safety and Health

RON SCHELL,
Chief, Coal Health Division

LARRY REYNOLDS,
Office of the Solicitor

LARRY GRAYSON,
NIOSH, Associate Director Mining Research

PAUL HEWETT,
NIOSH, Industrial Hygienist

APPEARANCES: (continued)

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

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

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

JON KOGUT,
Mathematical Statistician, Office of Program Policy Evaluation

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

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

RODNEY BROWN,
MSHA, Office of Information and Public Affairs

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

C O N T E N T S

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P R O C E E D I N G S

MR. NICHOLS: Good morning. My name is Marvin Nichols and I am MSHA Administrator for Coal Mine Safety and Health, and I will be the moderator for today's public hearings. On behalf of Davit McAteer, Assistant Secretary for MSHA, and Dr. Linda Rosenstock, the Director of NIOSH, we want to welcome all of you here.

This morning we will begin with the public hearings on two proposals which were published on July the 7th in the Federal Register, the Joint Single Sample proposal and the Plan Verification proposal. Your comments will be included in the record on both proposals.

Let me introduce our panel. To my left we have Ron Schell who is the Chief of the Health Division for Coal Mine Safety and Health, and to my right Larry Reynolds from the Office of the Solicitor.

On the panel behind me we have Larry Grayson, Dr. Larry Grayson, Associate Director Mining Research with NIOSH; Carol Jones, the Director of MSHA's Office of Standards, Regulations and Variances; George Niewiadomski, Mine Safety and Health Specialist, Coal Mine Safety and Health; Thomas Tomb, Chief, Dust Division, Pittsburgh Safety and Health Technology Center; Jon Kogut, Mathematical

Statistician, Office of Program Policy Evaluation; Rebecca Roper, Senior Health Scientist and Ron Ford, Economist, both from the Office of Standards, Regulations and Variances.

Because the single sample rule is a joint MSHA/NIOSH proposal Paul Hewett, Industrial Hygienist, is here from NIOSH. And Rodney Brown from MSHA's Office of Information and Public Affairs is also present at the hearing. Rodney's standing back at the door there. Rodney will be available with press kits for the media and will be available to answer any press inquiries.

And we have Pam King from MSHA's Office of Standards, Regulations and Variances. Pam greeted you when you came in. If you've not yet signed in, please see Pam and do so. Or if you wish to speak, sign on the speakers' list.

Let me first mention about how the hearing will be conducted. The formal rules of evidence do not apply at these hearings and they are conducted in an informal manner. those of you who have notified MSHA in advance will be allowed to make your presentations first. Following these presentations others who request an opportunity to speak will be allowed to do so. I would ask that all questions regarding these rules be made on the public record and that

you refrain from asking the panel members questions when we are not in session.

A verbatim transcript of this hearing is being taken and it will be made part of the official record. Please submit any overheads, slides, tapes and copies of your presentations to me so that these items may be made a part of the record. The hearing transcript, along with all of the comments that MSHA has received to date on the proposed rule will be available for review. If you wish a personal copy of the hearing transcript, you should make your own arrangements with the court reporter that's sitting to my right.

We will also accept additional written comments and other appropriate data on the proposed rule from any interested parties, including those who have not presented oral statements today. These written comments may be submitted to me during the course of this hearing or sent to the address listed in the hearing notices. All written comments and data submitted to MSHA will be included in the official record. If you wish to present any written statements or information for the record today, please identify them. When you give them to me, I will identify them by title as being submitted for the record.

And, once again, Pam is sitting at the table by the door and has an attendance sheet which you may want to sign to register your presence.

To allow for the submission of post-hearing comments and data, the record will remain open until September 8, 2000.

As you may know, we held hearings last week in Morgantown, West Virginia, and Prestonsburg, Kentucky.

Before we begin this hearing let me give some background on the proposals we are addressing here this morning. First, the full shift sample joint proposal.

In this proposal the Secretary of Labor and Secretary of Health and Human Services announce their proposed finding in accordance with the Federal Mine Safety and Health Act of 1977 that the average concentration of respirable dust to which each miner in the active workings of a coal mine is exposed can be accurately measured over a single shift.

In this proposal, the Secretaries are proposing to rescind a 1972 finding on the accuracy of such single-shift sampling. The joint proposal also addressed the final decision and order in National Mining Association v. Secretary of Labor issued by the United States Court of

Appeals for the 11th Circuit on September 4, 1998. That case vacated a 1998 joint finding and MSHA's proposed policy concerning the use of single, full-shift respirable dust measurements to determine noncompliance with the applicable respirable dust standard was exceeded.

As most of you know, the single sample issue has been through a long public process which is outlined in the preamble to the proposal.

The process ended with a September 4, 1998 ruling by the United States Court of Appeals for the 11th Circuit. The Court vacated the 1998 Joint Finding, concluding that "the record contains no finding of economic feasibility," and that MSHA "failed to comply with Section 811(a)(6) of the Mine Act." Therefore, in response to the Court's ruling, the Secretaries are proposing to add a new mandatory health standard to 30 CRF Part 72. The 1972 joint notice of finding would be rescinded and a new finding would be made that a single, full-shift measurement will accurately represent atmospheric conditions to which a miner is exposed during such shift. this finding is the basis for the new proposed mandatory health standard.

MSHA believes that singe sample measurements are more protective of miners' health than the current practice

of averaging multiple samples. The process of averaging dilutes a high measurement made at one location with lower measurements made elsewhere. MSHA recognizes that single full shift samples have been used for many years by OSHA and at metal and non-metal mines in this country.

The coal mining community had the opportunity to experience the use of single full shift measurement for a two year period in 1992 and 1993 and from May 1998 until September 1998 when the Court of appeals vacated the agencies' finding. We are interested in your comments concerning the application of full shift samples at your mines during that time period.

Additionally, because the proposed rule would be implemented as a mandatory health standard, all elements of Section 101(a)(6)(A) of the Mine Act have been addressed in this proposal. These include the portions of the proposal which address health effects, develop a quantitative risk assessment, and the significance of risk.

We are seeking your comments on this proposal as well as on the plan verification proposal. The plan verification proposal is based in significant part on recommendations contained in the 1996 report of the Secretary of Labor's Advisory Committee on the Elimination

of Pneumoconiosis. that report was based on the studies and discussions of representatives from labor, industry, and neutral experts. they believe that if their recommended changes were made, Black Lung disease could be eliminated and confidence would be restored to the federal program to control coal mine respirable dust levels.

The plan verification proposal adopts three recommendations, three key recommendations of the Advisory Committee:

1) MSHA should take full responsibility for all respirable dust sampling for compliance purposes;

2) MSHA should verify ventilation plans at typical production levels; and

3) MSHA should require operators to record production levels and dust control parameters to monitor the dust levels.

Under the plan verification proposal all the existing requirements in our regulations at 30 CRF Parts 70 and 90 for underground coal mine operators to conduct respirable dust sampling would be revoked. MSHA would assume responsibility for all sampling to determine if miners are overexposed to respirable coal mine dust. This includes bimonthly sampling, abatement sampling, sampling to

establish a reduce standard in mines where quartz is present, and Part 90 sampling for miners who have evidence of the development of pneumoconiosis.

Since MSHA would conduct all sampling, the miners' representative would have the right to observe sampling with no loss of pay.

Before approving ventilation plans, MSHA would conduct verification sampling under typical production levels, with only the controls listed in the plan in effect, and for the full shift. This would assure that miners are not overexposed to respirable dust.

The results of these verification samples must be below the "critical values" listed in Section 70.209 of the proposal before MSHA would approve a plan.

The proposal defines "full shift" differently for purposes of plan verification and abatement sampling and for bimonthly compliance determination. The proposal would revise the existing definition of "concentration" so that it is an 8-hour equivalent measure, even if the work shift is longer than 8 hours.

In addition, under the proposal only MSHA samples would be used to establish a reduced standard in underground coal mines where quartz is present. this would change the

existing procedure which allows operators to submit samples which are averaged with MSHA samples.

Finally, MSHA would allow longwall mine operators to use, on a limited basis, either powered air-purifying respirators or administrative controls when all feasible engineering controls cannot maintain respirable dust levels at or below the applicable standards. Coal mine operators must first request that the Administrator for Coal Mine Safety and Health determined that all feasible engineering controls are in place. If so, MSHA would grant the operator interim ventilation plan approval. However, the operator must implement any new feasible engineering controls which may become available.

Now, in response to the hearings last week in Morgantown and Prestonsburg we want to spend a few minutes outlining in some greater detail the major provisions of these two rules. And Ron Schell will do that.

MR. SCHELL: Good morning. Just give us a second to get set up here, would you please.

(Pause.)

MR. NICHOLS: Do we need to move?

MR. SCHELL: No.

(Slide.)

MR. SCHELL: Can everybody see that?

As Marvin said, I'd like to take just a few minutes to sort of outline for you what this proposal is. It is an extensive proposal so I'm going to give you the "Reader's Digest" version. and the technique that I use when I go through here is basically I'm going to show what we do now and then compare that with what this proposed rule is. And I'm not going to read everything that's on these charts, guys, because most of you know what we do now. I just put it up there so that you can sort of visually compare the two.

(Slide.)

There are really four parts to this rule, part dealing with effective plans, part dealing with compliance with plans, part dealing with monitoring plan effectiveness, and that's sampling, and a part dealing with abatement.

And I want to talk a little bit about effective plans and compliance with plans. And I don't mean to pooh-pooh sampling or abatement -- they're key -- but what we've done with this rule is to really try to focus on the fact that coal mines aren't like normal industrial operations. In normal industrial operations an industrial hygienist goes in and samples to determine if there's a problem. If they

find a problem then they move to control that environment.

Well, in coal mining you don't have to do that. We know any time you mine coal or transport coal you're going to be generating respirable dust and possibly silica. So you've already got a hazard. So we have to move to is to control that hazard any time we're mining or transporting coal.

The average mine in this country operates 400 shifts. I say average because a lot of them operate more than that 400 shifts. What we're really trying to do is to control exposures of miners on every shift, not just the shifts that are being sampled. So the key to this proposal is we want to have an effective dust control plan in place every shift that you're producing coal. And we want to make certain that that dust control plan is maintained and operating before you begin production on every shift.

So that's the key to what these proposals are; we want to protect miners every shift that they're working.

How do we plan to do that with effective plans? One of the things, if you take -- again I want to focus the current program is on the left, the proposed program is on the right. One of the things that we have done in this rule is we're designing plans that will protect miners the entire

shift. If you're working 12 hours, we want that plan to be effective for 12 hours. If you're working 8 hours, we want that plan to be effective for 8 hours.

The second thing we're doing, and that's the key, is we want that plan to work at high production.

George, put that other view up there.

(Slide.)

During the last two hearings there was a lot of confusion between what, at what level we were going to approve plans in terms of production. So we put this chart together. And I'm going to ask Jon Kogut to just take a minute and explain this.

Jon?

MR. KOGUT: Okay. As Ron said, there was considerable confusion expressed at the two hearings last week about the various production levels that we referred to in the plan verification proposal. So this chart is based on the last 30 production shifts that were actually recorded in a longwall MMU from our District 3 a few years ago.

The little dots that are plotted along the left scale represent the actual productions recorded for those 30 shifts. Each dot represents one production shift. So, they're a little faint on the overhead, but as you can see,

the three highest production shifts were up above 9,000 there, and the lowest one was just a little -- there were two that were more or less in a tie above, just above 2,000.

There's an important distinction between, you should keep in mind between the percentile and a percentage of the average. The sixth highest production which is plotted there is just under 8,500 tons. And that happens to be the 80th percentile. Where that 80th percentile comes from is that it's the sixth highest out of 30. Six divided -- six out of 30, that's 20 percent. So that means that 20 percent of those production shifts are at that level or above, and 80 percent of them are less than that level of just over 7,500 tons -- I'm sorry, just under 8,500 tons. So that's called the 80th percentile. That's the sixth highest production

The 10th highest is at around 7,500 tons. And two-thirds of the production levels are less than that value. That 10th highest is in the proposal what has been, what we've proposed as being the level at which verification sampling is going to take place. So what that means is that for a -- when we go in to verify the plan under the proposal, the production levels that counts towards verification sampling have to be at that level or above.

And if they're not at that level or above, that 10th highest level, then they won't count towards verification sampling.

Also, when a -- after a plan is approved under the proposal the operator is required to keep records of production levels. And when an inspector goes in and checks those, subsequently checks those production records, if it looks as though more than a third of the production levels, productions that are being mined on shifts are higher than that verification production level, then that would be grounds for requiring reverification of the plan.

In other words, if the MMU is mining at levels more than third of the time on more than a third of the shifts that are greater than the verification level then MSHA could require that the plan be reverified. And the reason that that's set at one-third is because under the proposal we're setting the verification production limit level to be that 10th highest value which corresponds to the 67th percentile.

Now, just for purpose of comparison I'm showing the average on their to be 6,295 tons. That's the average for those last 30 production shifts at that longwall operation.

And another figure that was brought up at the

hearings last week was a recommendation of the Advisory Committee that compliance sampling be conducted at 90 percent of average production. So, as you can see, the 90 percent of average is, of course, less than the average and it's considerably less than the 10th highest value.

And another number that's up there is the 60 percent of average production which is what under both the current program and under the proposal those are the -- that's the production level that's required for MSHA compliance samplings.

MR. SCHELL: George, put that other slide back up.

(Slide.)

Again, the point we wanted to make there is we're going to verify for the full production shift 10 hours, we verify for 10 hours. We're going to verify at higher than average production. And like Jon said, that we're going to keep records of that production so we can see if production is creeping up and you need to reverify.

Next thing is MSHA's going to do that verification sampling. And when we verify that plan, only those controls listed in the plan can be in effect. Okay? High production, only those controls in effect, with a slight margin there because we know you can't get 100 percent each

time. When we verify that plan we're going to be verifying more than one occupation.

Up there you see we'll be looking at both the roof bolter and the DO on a continuous miner section. And what's important is when we verify that plan we're going verify based on two criteria, two separate criteria:

1) They have to be in compliance with the 2 milligram respirable coal mine dust standard;

And then we're going to look to make sure they're in compliance with the 100 microgram silica standard.

So both silica and respirable coal mine dust have to be controlled.

We estimate it's going to take one to ten shifts to verify a plan. In some cases it may take more because you have to reach certain limits before we'll approve that plan.

Lastly, we have proposed that if engineering controls have been exhausted and the Administrator reaches that determination, under limited circumstances downwind of the shear operator on longwalls only, operators would be allowed on an interim basis to use administrative controls or PAPRs on miners who work downwind of the DO.

The point I want to leave you with, we are

applying stringent criteria to the plan approval process to make certain that when we approve that plan we know that plan is going to work. And, again, our goal, compliance on all shifts.

George, the next slide.

(Slide.)

How are we going to achieve compliance with plans? One of the major things that the Assistant Secretary has done in the past few years is to pass a requirement in the ventilation proposal that says that operators have to conduct an on-shift examination of the dust control parameters prior to production on every shift to make certain that those controls are in place and working. That requirement stays in place. The difference though, we've got better plans. So we ought to be doing an on-shift before every production shift on better plans.

Secondly, we're going to be increasing our monitoring of that on-shift requirement. In addition to checking it when we do routine inspections we'll be checking it when we do our bimonthly sampling and we'll be checking it when we do abatement sampling. And as Jon mentioned before, we now will require that production records on every, on every MMU be maintained so that we can look to see

what the production has been on that MMU over the past six months.

What are we going to do in terms of monitoring plan effectiveness? George, why don't you jump ahead to that next slide?

(Slide.)

And one of the major things we're going to do that's in this proposal is we're going to single sample determinations. And this is a chart to show you what we're trying to get away from. This is a real mine. These are samples taken in April of 2000. And you'll see that five samples taken, these are operator compliance samples, two of those samples clearly are beyond the 2 milligram standard. One of them's almost double it, the other is at 2.4.

We take no action based on those samples. And why? Look at the section average: 1.8. Two out of five samples show overexposures. We take no action. Why? Averaging masks high exposures with low exposures. We need to get away from that.

(Slide.)

We are proposing that when we do our sampling bimonthly that we do it as we currently do for an 8 hour period of time. We believe that since we're there, since

we'll know what the plan parameters are, since we know where the miners are, 8 hours ought to give us a good idea whether or not that plan continues to be effective. And a key to this sampling is to allow us to make a judgment as to whether or not conditions have changed so that that plan is no longer protective of the miners on every shift.

We are soliciting comments as to whether or not this compliance sampling should be full shift sampling rather than 8 hour sampling.

When MSHA samples on a bimonthly sample, well, when MSHA samples bimonthly we're going to be doing what we do now, that's we go out and we don't sample just one occupation, we're going to sample at least five occupations on the MMU each time. That gives us an overall view of what's happening on that section and doesn't allow you to move people from dusty areas to less dusty areas when you're only sampling one person.

Like Jon said, production has to be at least 60 percent to be a valid sample. We will every bimonthly period sample the DA and any DAs on or near the MMU. We will sample every Part 90 miner. We are proposing in these regulations that we only sample the non-MMUs, the outby DAs, at least once a year. And the reason for that, if you look

at the exposure levels that we see in both operator samples and MSHA samples we find very few overexposures outby. I think last year we only issued eight citations nationally for overexposures on outby DAs.

One of the key things to our doing the sampling is since we're there we can record what the plan parameters were in place, what the production was on that day, where the people were on that day. And over a period of time that gives you an enormous amount of data on what's happening at that mine and what works and what doesn't work at that mine. So just being, in addition to doing the sampling, collecting that data over a period, you know, six times a year, year after year gives you an enormous base of data on what's really happening at that mine.

MR. NIEWIADOMSKI: I think it's important to recognize with regards to bimonthly sampling that that represents only minimum amount of sampling. Because our criteria calls for if any sample exceeds the applicable standards but is below the two sides value we're going to go back and sample an additional shift.

MR. SCHELL: That's a good point, George. And one other point I would make is since you've got an approved plan, since that plan has to be on-shifted prior to every

production shift if an operator goes out on that plan and we're there, so we would have known if that plan was being complied with, it's likely that we'll put that plan back into plan verification to make sure that that plan works. That will generate another series of one to ten samples to reverify that plan.

(Slide.)

Abatement. We think this is a significant improvement. In the past, operators took abatement samples. We didn't know what changes they had made to come into compliance, what their production was. MSHA is proposing to do all abatement sampling. MSHA will do the abatement sampling. We will be doing it based on single samples so even if one occupation goes out on the MMU we'll sample all five. All five have to come back into compliance.

A difference, when we sample for abatement we want to do full shift sampling. Again, we will be able to record what the parameters were in place, what the production was in place. And repeating what I just said earlier, any time we have to do abatement sampling the first thought we're going to have is there's something wrong with this plan and it needs to be modified. That doesn't mean there couldn't have been a situation where a miner got themselves in the

wrong, positioned themselves in the wrong place. But, again, we're going to be looking to see why that plan didn't control that environment on the day that they went out of compliance .

Marvin, I think that's it.

MR. NICHOLS: Okay. Thanks, Ron.

It's been pointed out that I not only misspoke once but twice in my opening statement. I referred to this proposal as "full shift sample proposal." Of course I meant it's a single full shift sample proposal, the single shift sampling is what we're talking about.

Okay, at this time we'll consider any evidence or discussion on any aspect of the two proposals. And as I said earlier, we'll begin with those that have requested to present information in advance. And following all the presentations for folks we have signed up, anyone else that wants to come forward and make a presentation will be allowed to do so.

We have the hearing scheduled for all day today and we have this room up until midday tomorrow. So we should have plenty of time for anybody that wants to make a presentation.

So at this time we'll start with Joe Main with the

United Mine Workers of America.

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

MR. MAIN: Good morning again. My name is Joe Main and I am the Administrator of Health and Safety for the United Mine Workers of America. And as the panel knows, I also served on the Secretary of Labor's Advisory Committee which was instructed to develop proposed rules for the government to act on to reform the coal mine dust program.

And as I have said in previous testimony before this panel, this rule falls far short of what's needed to protect the nation's miners. It falls far short of that that miners have expected and demanded over the years. It fails to address the law suit continued or filed by the miner workers on January 13, 2000. And it seriously fails to follow the recommendations of the Federal Advisory Committee which I served on.

And each of those areas I want to express the extreme disappointment of the United Mine Workers for the proposal that's before us.

And I came to one conclusion after trying to rack my brain to figure out how we could make this rule work. And the only conclusion I came to is that we need to elect

Ron Schell President of the United States. We need to give him the single duty of carrying out the proposal that MSHA has prepared, and we've got to go to God and ask for him to be placed in a state of immortality. Now, short of that I have not figured out any way for this rule to actually be carried out in a way that would be effective across the board to miners.

And, as we pointed out, we do support the agency's concept of a single full shift sampling. After reading the rule it fails to accomplish that and it fails to accomplish the wants and needs of miners, the findings of the Advisory Committee, as I've pointed out. And it falls far short of really making sure that the miners are really protected in the workplace in this country.

We also support the concept of plan verification. But in its current structure in the rule there is several difficulties with that rule that we think should not be finalized in that form and enacted as a final regulation because we think it would fail to adequately protect the miners of this country.

And as we pointed out, we're very concerned about the work empowerment aspect of this rule. We believe that actually there is deteriorations in current worker

empowerment protections and rights that miners have. And we believe the process was really designed for the government and to be implemented and used by the government.

And by the style of the proposal and both the policy concepts of taking standards out of the current rule and placing those into policy, by using the policy approach in the preamble to implement the agency's proposal, and by designing the rules in such a way that are very discretionary we believe that it has weakened the knees of miners' protections or rights under the current -- that miners have under the current rules. And would fail to have a standard in place that miners could clearly understand.

I've talked to many miners since this proposal hit the decks and one thing that I have found is that the miners out there are totally confused about what this rule is and does. And as I pointed out, I think the announcements that were provided to the public on the implementation of this rule did not fairly characterize a lot of the changes that took place. And I think it served to create some of the confusion that we're continually trying to clear up in the coal fields.

I know many miners that I've talked to thought that when that announcement came out there is full shift

sampling for miners during compliance sampling. That is just not in the rule. We understand that full shift sampling would only apply on abatement samples in terms of compliance purposes.

Miners thought there was a takeover of the operator program, which we've all sought for years, only to find really the agency is going to continue to do what they are currently doing now and eliminating the mine operator sampling program. And there's a few changes around that, but generally speaking that's what the proposal amounts to. That's not what miners wanted, that's not what the mine workers wanted, that's not what the Advisory Committee sought to do and so on.

So, and I could go into more detail which I'm going to bypass that for right now. We'll doing a lot more for the record. And other folks will be testifying here later.

Miners in Prestonsburg and Morgantown I think sent a clear message to this panel as I pointed out in the closing remarks in Prestonsburg, and that was to send the proposal back, go back to the drawing board and issue a new proposal. And that's particularly true with respect to Parts 70, 75 and 90. And I just went back through and just

in my mind all the miners that testified who came from West Virginia, Pennsylvania, Alabama, Kentucky, Illinois, Virginia, and there was just this clear message from the miners that that's what they wanted done.

And they pointed out I think a lot of the flaws in the proposed rules that would really affect them at the mine site. And I think that there is an obligation on the part of this panel to listen to the public since it is only part the public really plays in this rulemaking process. And if the government fails to heed that I think that they have neutered really the citizens' rights to influence government actions in this country. And being those that are directly affected by this and representing miners who will directly affected I think that would be just entirely the wrong course of action to take.

In addition to the Advisory Committee, the lawsuit, the historical record that miners have laid out asking for different reforms that just did not take place in this rule there is another issue that has not been discussed before this panel. And I would like to spend a little bit of time this morning on that.

There's some confusion out there that I picked up in Prestonsburg. And I think it's when I get through this

people will understand what it is. There is the view that this whole rule is a NIOSH/MSHA rule. And as I have read the record and I've listened to the announcements, as I clearly understand it the only part of this rule that MSHA or that NIOSH has played a part in is the single full shift sample proposal under part 70.500.

Is that correct in terms of --

MR. NICHOLS: That's generally correct, I think.

MR. MAIN: And my question would be given the fact that MSHA or that NIOSH issued a criteria document in 1995, submitted it to MSHA in accordance with the Mine Act which required MSHA to take official actions, and that is to either issue rules based on that criteria document or publish a notice, if they decided not to do so, why they decided not to do so. And as I've plowed through this rule and the preamble I don't see that clearly identified, particularly in the areas that the agency has engaged in rulemaking on. And we're going to do that throughout this process.

But I think it's a fair question to ask, why was NIOSH not a party to the development of the rules under Part 70, 75 and 90?

MR. REYNOLDS: Joe, I just wanted to clarify that

the reason the rule is structured the way it is and the reason we have two proposals is the only thing that NIOSH participated in was the issue of whether we could accurately measure over a single shift the level of respirable dust. NIOSH does not have rulemaking authority and for that reason they were not involved in developing the rules under Parts 70, 75 and Part 90. They were strictly involved in the issues of measurement under the single full shift measure proposal, the joint proposal with NIOSH and MSHA.

So the other, the plan verification rule is completely the Mine Safety and Health Administration. That's why the rules are structured the way they are, why we have the separate rules.

MR. MAIN: But having said what you did and having a knowledge of the criteria document and the rulemaking process I find it strange that NIOSH has specific recommendations made with regard to single full shift sampling that is pertinent to the rule that was published on Part 70.500, and they are participants. And the agency likewise had pertinent information and involvement in parts of Part 70. That, I'm confused as to why NIOSH was a party to the Part 72 rulemaking process and was not a party to the Part 70, Part 90 and the Part 75.

And if I could go one step further and just explain. The NIOSH criteria document recommended that there be full shift sampling as I read it. And I have a copy which I would like to introduce into the record because I don't think it's fully in the record yet on the Part 70, Part 90, Part 75 rulemaking process. There is some excerpts or references to this in a couple areas but the whole document has not been, as I have read the preamble, really a broad piece of that.

But the single sample rule in one instance is recognized under Part 70.500. And its implementation is recognized in Part -- or the Part 72.500 rather is the single sample rule. And the implementation of, I want you to check on that, is represented in the Part 70 which would define what a full shift is, you know, how miners would be sampled, the actual exposure level that would be applied.

So, you see I'm a little bit confused why they were over here on this part of it but it wasn't a part of the second part. But there's other issues as well but that's just an easy one to settle.

MR. REYNOLDS: Well, once again, the reason they were strictly involved in the issue of whether we could accurately measure and it was MSHA that would have exercised

the authority to create the mandatory standard under Part 72 to implement that.

MR. MAIN: I understand your answer but I don't understand you answer. And if that makes any sense I still can't understand why they weren't a party to the other process.

If you look at the NIOSH criteria document there is some clear-cut recommendations that went to MSHA in September of 1995 that is directly reflected by this rule. And I'm going to go through a few of those and just point those out. And with that I think that NIOSH ought to have been a party. And before this record closes I'm going to make an official request that NIOSH does respond to this rulemaking. And I question after reading this rule the conflicts between both the Advisory -- the 1995 criteria document and what MSHA proposed is, I sat back and watched this panel for, you know, two hearings now and I have not seen any weigh-in really on the debate on those issues that had been clearly articulated by miners and by those who were testifying.

The lowering of dust standards versus the raising of dust standards is one clear on.

MR. REYNOLDS: I just wanted to clarify once more

that NIOSH didn't have anything to do with the changes, the proposals for Part 70, 75 and 90. And the criteria document would have been in the form of recommendations. That's the role of NIOSH. So they would not have been involved in the rulemaking, you know, those particular rulemakings, they were strictly involved in the single full shift measure proposal.

MR. MAIN: I understand your answer but, again, I don't understand your answer because I think there's a conflict both ways. Okay.

And to that end I'd just like to walk through this proposal because I think miners do deserve to hear from NIOSH about their position on this or government agencies that have done a tremendous amount of research and work, consistent with the Advisory Committee, they launched in to try to develop reforms. And as a starting point I'd just like to start talking about the 2 milligram standard.

Now, MSHA had proposed the 2 milligram is probably the best standard on coal mine longwalls to be done with the 4 milligram. And I know there's some difference about how you define what I'm saying. But in my book two is two, four is four, and there's going to be a four that is clearly stated in the proposed rule.

NIOSH, however, recommended to cut the current exposure level in half to 1 milligram. And I just seriously question does NIOSH support the criteria document and their findings or do they support the position of the proposed rule issued by MSHA? Because any way that you slice it there is a clear difference there. If one agency is proposing cutting the rule in half to 1 milligram and there's a reform proposal to raise it to 4 milligrams that's a clear conflict. And I think it's a clear question to ask if NIOSH supports the criteria document or if they support the MSHA rule?

MR. GRAYSON: NIOSH policy is contained in the criteria document.

MR. MAIN: I'm sorry?

MR. GRAYSON: NIOSH policies are contained in the criteria document.

MR. MAIN: Which means?

MR. GRAYSON: They are recommendations to the agency on what we feel are our proper measures.

MR. MAIN: And in support of that position let me ask the question this way, NIOSH clearly recommended that the exposure level be reduced to 1 milligram in this criteria document. Does NIOSH still stand by that position?

MR. GRAYSON: Yes.

MR. MAIN: Yes?

MR. GRAYSON: Yes.

MR. MAIN: Okay.

MR. REYNOLDS: One thing I wanted to interject is that actually reducing the exposure level was outside the scope of this rulemaking. And as I'd mentioned earlier, there is another rulemaking action that was under development at Mine Safety and Health. Earlier, you know, farther down the rulemaking process is an advance notice for proposed rulemaking. So that was outside the scope of this rulemaking as to whether or not to reduce the exposure level to 1.

MR. MAIN: I understand two things: one, that the government in 1980 issued proposed rules or filing rules with the promise to miners that they would do more. And we're still back here in 2000 trying to get them to do more stuff. So the promises from the government are not well received by the miners. And I --

MR. NICHOLS: I think we've answered your question. Larry says they support what's in the criteria document. We have it out for advance notice of proposed rulemaking.

MR. MAIN: But I think the difference here then, Marvin, is this, that what you did in this proposed rule was actually affected that very issue by raising the dust standard. Okay. Had you not raised the dust standard then I think it would be a different issue. But --

MR. NICHOLS: We haven't raised the dust standard.

MR. MAIN: Okay, we can debate that. But there is a 4 milligram standard that is permitted.

MR. NICHOLS: Joe, you know that's the gap between the rule and the protection factor for the personal protective equipment.

MR. NICHOLS: And I know miners who are currently wearing airstream helmets will have based on the application of that rule an increase in the dust levels if that goes forward, if you want to look at it that way.

MR. NICHOLS: For a very small section of an overall mine where all engineering controls have been exhausted.

MR. MAIN: Nonetheless, those miners that are currently working at that, from our opinion, would have an increase.

MR. SCHELL: Joe, I just need to just technically clarify. What we're saying is that if you're working

downwind of the shear operator with a PAPR on you won't be exposed to 4 milligrams of dust. We're saying that we're putting a protection factor of two on that. And if you have that respirator on you will not be breathing 4 milligrams of dust or we wouldn't be recommending it.

Now, if you have data to show that that protection factor isn't proper we need to get that. But to say that miners are going to be exposed to 4 milligrams of dust isn't correct. If they're wearing that PAPR we have reason to believe that they won't be exposed, they won't be exposed to 2 milligrams.

Just like the administrative controls, we'll allow them to use administrative controls downwind but we're not going to allow them to be exposed to more than 2. So maybe I'm being technical but you need to understand we are not saying we're going to allow anybody to be exposed to breathe 4 milligrams of dust. We believe that that instrument will make certain that they don't breathe 4 milligrams of dust, that they won't breathe any more than 2.

MR. MAIN: Three responses I have. Number one is that miners who are currently wearing Racal helmets on those areas will have their dust increased if permitted to go to the airstream helmets and increase the dust levels to 4

milligram. I think that's just a fact of life, the dust generation levels would go up.

The second point I will make is with regard to the evidence about the use of airstream helmets, I think there's been considerable evidence put on the record already with regard to the faultiness of those only approved -- the only approved devices I know in this country today, if there are more then I'd like to hear about those, whereas the filter system has neutered the ability of those airstreams to provide a quality respiratory protection to miners is creating all kind of difficulties.

I would also let you know that I've been in many mines and for those that think that these things are being worn as approved respiratory protection devices as outlined by NIOSH is just not true. I've been to a lot of mines where that seal shield is taken off of there. And there's a simple reason for that is in that enclosed headpiece a lot of miners just find it totally uncomfortable to breathe and the condensation builds up creates problems. And they're not being worn in many mines by many miners as an approved device. And I think that creates some problems.

And I think the testimony that's been presented too shows a lot of difficulties in work environments that's

already been put on the record.

MR. SCHELL: Well, where we might disagree a little bit is with your first premise that dust levels are going to go up. What we're saying is they're already there. What we're saying is that they're mining at a rate and they're generating a level of dust. And we've gone in and we've checked and we can't find a way to control that dust anymore, it's there already.

And what our concern was that we not walk away and pretend that everybody is protected, that if in fact they're already generating that level of dust they've exhausted everything, we need to do something to protect those miners. And that's where we're saying in those circumstances we're going to control, we're going to make certain that those engineering controls stay in place and we're going to control to 2 milligrams to the DO.

But we're not going to let the dust go up that's already there, Joe. What we're going to try to do is protect that miner who's already in that dust because we can't do it through engineering controls.

MR. NICHOLS: You're not suggesting that those folks that have engineered out the problem can forget about engineering controls and go to airstream helmets, are you?

MR. MAIN: Given my knowledge of this system and how it's worked and how many times operators have come before us in this agency saying, "I've exhausted all the controls, give me airstream helmets," I know what we can expect, Marvin. That just, you know, is going to happen. It has happened. And I know that the agencies have been weak-kneed at different times in life and approved mine systems and mining conditions that we believe are not in the best interests of miners. And that's the problem we have.

We also know that under the current scheme miners do have a control over what happens to engage engineering controls. If they're out of compliance MSHA cites them, miners have the ability through the legal process that's going to be removed now up to 4 milligram under this proposal, to challenge the agency's enforcement of that if they fail to properly enforce it and bring about the engineering controls. And I'm a firm believer, and I believe that has worked in the past and it needs to continue to work in the future.

I think the problem everybody is missing here is we lack quality respiratory protections for all miners in this country, not just longwall miners. And I've raised this on many occasions. I have offered to work and am

jointly working with the BCOA through a partnership to try to develop better working respiratory protection for all miners.

I have looked at the record regarding the operators ability to use respiratory protection to lessen enforcement actions. And if the enforcement numbers I've got from MSHA are any indication of what's happening out there mine operators across the board are not taking advantage of that by providing quality respiratory protection when they are out of compliance to get them on an SS citation. I think the latest numbers I got is still in like the 95, 96 percent range of SS citations.

So what I'm saying, Marvin, is I think the law has worked. It needs to continue to work. Miners do not need to have that right stripped away from them where they can now challenge. We need to hold to the traditional 2 milligram standard that miners fought hard to get to in this country. We need to use rational approaches under citation to fix these problems. And I think it has been executed in many mines in this country, Trail Mountain, Jim Walters and other location. And not strip this right away from miners and not move away from this hard fought standard that miners, many miners died to gain.

MR. NICHOLS: Okay, you wouldn't be opposed to some plan like, I forget which Jim Walters mine it was at, the -- it's an administrative control referred to as the Haney plan where are you saying you'd support a plan like that?

MR. MAIN: I'm saying that in the context of the Mine Act that whenever an operator is out of compliance that during that out of compliance period that they take measures to protect those miners. I firmly believe that. And at times during that phase while they're installing the engineering controls and fixing that, respiratory protection by law is obligated on the part of mine operators to be provided to miners.

Miners need to be reduced from that exposure in those circumstances but with the clear mindset that that operator has to continue to develop and implement engineering controls to fix that problem and it's being done while it's under citation. With a legal responsibility of that operator to comply with this law that replaced the Mine Act in 1969, that is I think the most precious thing that miners have.

And that's one of the problems I have with this whole proposal is what MSHA did with this is not only opened

that floodgate -- and I understand what MSHA's saying, but I understand, you know, once out the door, you now, more horses get out of the barn. But also understand the removal of the miners from this whole process.

And when my guys ask me what can we do when they do that? I said, stand and scream. Because that's the only right that you have. As opposed to now you can go in and tell that federal inspector this operator isn't moving fast enough to fix this problem, we don't agree with that abatement time, we don't agree with this modification. You put the paper on then which is the order if they don't get this thing fixed now.

And what happens, and I think that has set the environment for both the mine operator and the mine operators to work together along with MSHA to get the problem solved to move forward. It puts -- it builds the kind of box that's necessary to get to an end solution of getting quality controls in, Marvin. And in the bottom of my heart I believe that. And I think whenever you remove that you're removing that control that miners have.

And, you know, I support the developments of worker-friendly respiratory protection that really works for miners. In the study that we're doing jointly I think

we're, you know, a ways a way from doing that, you know, figuring that out. But it's time, what we did was send this back to the miners, let them figure out what kind of respiratory protection they need based on giving them a model, what would you change about that, what would you fix? But the whole concept here is not to replace engineering controls with that, it's to buffer the current law.

MR. NICHOLS: Do you think miners understand this so-called compliance with the 060? The example we put up here clearly shows that two miners were overexposed but that once we got through this average scheme there was no noncompliance. Do the miners understand that?

MR. MAIN: I think a lot of miners understand that. And I think and also it's clear as a bell from miners' perspective, as far as I know from the Mine Workers' perspective we think that's something that definitely needs to be changed. We need to go to the single sample application. And we need to have a standard that is applied that quickly and legitimately requires the dust to be placed under control.

If I could go through more of the issues. The MSHA proposal would raise the exposure level for compliance sampling to 2.33 and 1.26. NIOSH recommended that MSHA make

no upward adjustment of the REL for measurement and certainties.

Further, NIOSH recommended that the 1 milligram, we call a REL which is recommended exposure level, would actually be equivalent to .09 when measured according to NIOSH. And that's contained in the abstract of the criteria document.

Now, as I read the MSHA proposal and Part 70 and I read the NIOSH criteria document again I see a clear conflict with the direction of the agency's, the MSHA proposal, and the clear recommendation posted to MSHA by the criteria document. And I understand what you're saying that there will be more rulemaking. You're going to address this. You're addressing this now. I mean that's one of the fundamental problems. And I have no hopes that we'll ever see another reform of the dust program once this gets out because we've waited 25 years to get here. And I would not advise miners across this country to put any weight on there being another reform in their lifetime given what we've gone through to even get this far.

Having said that, there's a clear conflict here between the proposal of NIOSH and the MSHA proposal. And again I'm going to ask NIOSH do you support the

recommendation that you made that there be no upward adjustments in this proposal and that really the direction that MSHA needs to go is to lower the dust standard with a much lower exposure level?

MR. GRAYSON: Yeah, I know this doesn't work and I will try to speak loudly but it does go to the record.

But at this point I really should say that, yes, those are the policies of NIOSH that are contained in there. They're still the policies of NIOSH.

You know, however, NIOSH does support efforts by MSHA and anyone else that will reduce miners' exposures to dust and silica dust and also eliminate or at least reduce significantly the incidents of the diseases that we're here discussing. And, you know, we can realize that steps, strong steps are necessary. And oftentimes they do need to be incremental in nature. And but once again, our policy is contained in the criteria document. That was all those policies that you're about to cover are recommended such that we have the greatest possible impact on reducing disease and reducing exposures.

MR. SCHELL: Joe, could I comment on two things? And maybe again here it's semantics. At Prestonsburg I think Tom Wilson asked a question about how many

overexposures we discovered using single sample at 2.33 versus using average. And I believe what we said is that by using single sample at 2.33 we uncovered something like 2.5 times as many overexposures and resulted in us taking steps to reduce that dust level.

So there is a significant improvement in miner protection of going to single sample versus our averaging now in citing at 2.1. And that was the gain that we were trying to make.

Now, granted, we believe that for legal reasons that the Secretary has the burden of proof to show that there is a violation. That's why we put the upper limit, the two site value. We don't accept 2.33 as being in compliance. And that's the point George was making. If you're between 2.1 and 2.33 that's an area that's going to be targeted by MSHA for further sampling. So we do that to meet a legal burden, not because we believe 2.33 is where we should be.

And the last thing I would refer you to is at page 42,069 of the preamble to address you point. It says, and I will quote it, "Although it is beyond the scope of this rulemaking, in its 1995 criteria document NIOSH recommended a time weighted average exposure to respirable coal mine

dust of 1.0 milligrams per meter cubed up to 10 hours per day for the 40 hour work week. The Secretary of Labor and the Secretary of Health and Human Services believe that miners' health can be further protected from the debilitating effects of occupational respiratory disease by limiting their exposures to the applicable standard."

So I think both NIOSH and the Secretary believe that reducing the standard is the way to go. If you remember, the Advisory Committee's recommendation was that in addition to reducing the standard they did ask the Secretary to also do what they could to ensure compliance with the current standard. And that was really the focus of this rulemaking.

MR. NICHOLS: I think any -- you know if I'm wrong about this the panel can correct me -- but I think any instrument we use, whether it be dust or noise, has a correction factor. I mean certainly we use that with the noise rule also.

MR. MAIN: It's obvious that the correction factor works to support the interest of the mine operator and not the miner.

MR. NICHOLS: No, Joe. It's purely based on the accuracy of the instrument.

MR. MAIN: Yeah. If it goes plus or minus then what I'm saying is you go to the high side of the equation as opposed to the low side.

MR. NICHOLS: Well, if it was 1 it would be higher than 1. I mean it's a corrective factor for the instrument.

MR. MAIN: But I'm just saying that in this rule the agency did set a standard by which compliance is going to be measured by. And that standard was -- is going to be effected as a new standard across the board in this rule. And as the agency addressed that standard I think they had an obligation to follow the recommendations of the advisory committee. And I'm not here to tell anybody, any miner to rely on any hopes of the agency coming back to readjust the exposure level because in my mind I just don't think, you know, that's going to happen. And it is part of this rulemaking, in our opinion, and I know there may be some differences there.

The MSHA proposal also dramatically reduced the frequency of compliance sampling. Only six shifts on a section and one shift outby of coal mines would be compliance sampled. And those are not guaranteed, as we pointed out, given the fact that they're a policy and not a regulation. And there's a clear question of funding

attached to that.

MR. SCHELL: Joe, I would just add if you look at plan verification we have gone to the other side. If you'll notice that on plan verification that to verify at one sample you have to come in at 1.7 whatever it is, which does the same thing, gives greater than 95 percent probability that in fact you're below the levels. So we've tried, on a compliance side we've had to put the adjustment factor in. But on the plan verification we've tried to go the other way and required it to be, if you wanted, you know, required the plan to be verified below the 2 milligrams.

MR. MAIN: And we understand that. And that's for the initial plan verification. The follow-up for determining miners' continued exposure is rested, however, in the compliance sampling which gives us great concern in that there is very infrequent sampling of miners once the plan is verified.

Now, NIOSH called for sampling to be periodic and occur frequently enough that significant and deleterious changes not be permitted to persist. NIOSH noted although a single full shift sample could accurately measure the average airborne concentration during a shift, a single exposure measurement has little predictive value for

demonstrating that a work environment is and is likely to remain acceptable.

And so I think they noticed, you know, the need to do in that statement more constant measuring because you just can't rely on that to be the, you know, the totally predictable factor.

And NIOSH used an example, one or more closely spaced samples being taken instead of the current bimonthly sampling where the environment is particularly dynamic. The NIOSH recommendation did not call for reduced sampling frequency. I mean I could find that nowhere in the criteria document. And, you know, again, you know, does NIOSH support the reduced compliance sampling which is not even guaranteed by a rule, guaranteed by law, funding's not guaranteed, in this proposal because I think there is a clear conflict between what I read in the criteria document and what I see in the MSHA proposal.

MR. SCHELL: Joe, I'm sorry, were you saying the criteria document recommended 36 shifts of sampling?

MR. MAIN: I didn't say it recommended 36 shifts. I said it -- if you read the thrust of it, it recommended more infrequent sampling. And I don't think -- there is nowhere in here that I see that it recommended a reduction

to six shifts a year. And I think that's contrary to everything that I read in this document, Ron.

MR. SCHELL: Could it have meant an increase to six shifts a year by MSHA?

MR. MAIN: I'm sorry?

MR. SCHELL: Could that document be read to mean an increase to six shifts a year by MSHA?

MR. MAIN: Well, I think the, if you read the document, it wasn't talking specifically about MSHA or about the operators. As a matter of fact, probably more so about the operators' scheme than the MSHA scheme. But it was talking about the need to have the frequency of sampling. And that's a real major problem I think that everybody understand that we have with this rule. And we believe that the NIOSH criteria document supports convention of and will have more frequent sampling as opposed to less frequent sampling.

MR. NICHOLS: That's a good point though, I mean to talk about where MSHA has come in the last year we've moved from one sampling shift a year to bimonthly. That's a significant increase.

MR. MAIN: In the last year?

MR. NICHOLS: Last --

MR. TOMB: April.

MR. NICHOLS: How long?

MR. TOMB: April.

MR. NICHOLS: Since April.

MR. MAIN: Well, correct me if I'm wrong. I think the record reflects during the workings of the Advisor Committee you guys were doing about four underground samples a year; is that correct?

MR. SCHELL: Yeah, but then we implemented that in a phased-in fashion, Joe, as we got resources from the Congress. We started with a pilot program in a couple districts and then we expanded that pilot. Then as we got more resources from Congress we went to the six. So it was over some phase period.

But you're right, the Advisory Committee we were talking about doing it fours and twos. We never proposed to do six and twos to the Advisory Committee.

MR. MAIN: Never proposed to do six and twos.

MR. SCHELL: Six underground. That's bimonthly sampling.

MR. MAIN: Well, I think there are some statements that was read into the record which reflects the transcript that I think that MSHA was at one time talking about the 12

a year. And we're submitting that as part of the documentation.

But I disagree that we went from one to six. I think we went in the context of 1995 from four to six as I understand the chain of events. And I think it was a clear recommendation from the Advisory Committee to beef up what you were doing then. And then when you got in a position to take over the program to do that. And from what we've seen is you went to the beefing up process here and when it came time to take over the program that fell fairly short. And some of the recommendations from the Advisory Committee that would have implemented that I don't think have been met.

And I think that's part of our problem here that, you know, you beefed it up but when it got to the point of taking over the operating sampling which would have gave us more frequent sampling, and maybe just the inability of the agency to do that, you know, may be what we're faced with.

We do have a FOIA request in, Marvin, that we're still waiting on. And it does address itself to the amount of inspectors, the number of mines, the number of MMUs that have existed from 1995 to 2000. And it's very important that we get that document because we'd like to set down and take a look at, get a good perspective of what we think the

capabilities of the government may be. And we have the ability to do some outside influencing as well with the budgets of the country. And we still haven't received that yet. And we do need it as part of our decision making on this whole rule.

MR. NICHOLS: Okay.

MR. GRAYSON: May I add one thing, please? You're right in one instance that frequent monitoring of exposures was what was recommended without being specific. But later on if you look at periodic exposure monitoring part of that document you'll see that it was suggested that as necessary to show that exposures are controlled --

MR. MAIN: Yes.

MR. GRAYSON: -- is the language.

MR. MAIN: And one shift outby in coal mines and six shifts sampled out of maybe 900 a year, that's the thrust of the proposal, which is not even guaranteed by law, is that that's balanced again, Larry. Because that's what the proposal does.

There's other provisions in the criteria document that I'm not going to go into a lot of detail today. We're going to be covering that in the written record, you know, on the silica levels that's addressed. NIOSH had

recommended a reduction of about half, I think, the current time weighted average. And they also as you look at the structure, the full shift sampling, and what's contained in the lawsuit calls for miners' exposure over the entire work period.

That's not addressed in the proposal. That was recommended by the Federal Advisory Committee, by NIOSH in the criteria document. And, actually, I think it was a 10 hour, 40 hour week was maintaining a 1 milligram standard over a 40 hour week, 8 hour day which is sort of like the encompassing standard that was proposed by NIOSH. And as we see it in many areas the MSHA proposal goes in the opposite way.

MR. SCHELL: Joe, I don't, I just don't understand that. Could you clarify that. Because I thought what we were trying to do was we clearly tried to expand to looking at full shifts. Now, we didn't look at weeks beyond 40. But in what sense did we go the opposite way?

MR. MAIN: In terms of the raising of the standards versus the lowering of the standards and having a measurement at the end of the day. If you look at the NIOSH components I think it was -- and it was like the Advisory Committee component on the recommendations, it was clear

that there was a drive to lower dust standards in coal mines. There was a drive to measure the miner's exposure during a full shift and, as well, to measure that miner's exposure over the work week. And I forget exactly what the recommendation is in the Federal Advisory Committee but there was a recommendation I think to clearly accomplish that.

And I think when you look at the structure of the proposed rule, and particularly when you get to the avenue of the backup verification of the plans, you find that on a compliance sample you have a 480 minute sample, not a full shift, regardless of the shift length.

You don't have any measurements that really reflect, I don't think, the full work week which is contained in the lawsuit that we have addressed, the full measure of exposure, and not contained in the advisory committee or the NIOSH criteria document.

You have the stand that there's going to be 2.33 or 1.26 which in my opinion, and I just, you know, 1.22 as some miners pointed out, and I agree with that logic, does not go in the same direction of the recommendation of the NIOSH criteria document. Really having a .09 I think with all the variables applied is laid out in the abstract.

So I think there is a lot of differences there. I think it does, this whole thing does go in different directions. I think miners were very disappointed when they didn't see a standard, Ron, that said we sample you, you're working 12 hours, we're going to sample you for that full shift and get a full measurement to determine your compliance in dust levels.

MR. SCHELL: Okay. And we've asked for comments on that.

One thing I'd like to clarify on the record, and the whole basis for this rule, is what we, our goal with this rule was to eliminate excursions above the standard. What we found with poor plans and what we found with operators doing abating and what we found with multiple, averaging multiple samples is that you frequently had excursions, like you said on that chart, at 2.4, 3.8. So that the whole thrust was to put a ceiling so that miners would not be exposed above the 2 milligram standard, and if you want to characterize, 2.33. But it was to get rid of these 2.4's, 2.5's, 3's and 4's, that they would no longer be permitted.

And the underlying concept in the rule is by eliminating those excursions, those frequent excursions,

miners are going to be more protected and disease is going to come down. So that the whole thrust of these rules is to lower exposures of miners by eliminating these excursions above the standards.

MR. NICHOLS: Yeah. Do you think these two miners that are overexposed up here might be disappointed in the fact that the three other samples let them average down theirs?

MR. MAIN: Marvin, we agree with this whole averaging thing.

MR. NICHOLS: Well, you keep saying the disappointment of miners. If I was those two miners overexposed I'd be greatly disappointed in the current.

MR. MAIN: And I think that we've been on record saying let's do that. So let's do it. Okay?

MR. SCHELL: But am I making my point, Joe? We are driving exposure levels down through these proposed rules by eliminating those excursions. That's what we were attacking in these rules and that's what the preamble says that we're attacking.

MR. MAIN: But you can't just pull out one piece -- and I think that's the center of the problem here -- and look at that piece of the rule fixing the, reforming the

system. And my fear is that that's a lot of what we've wound up with.

You know, I can tell you, Ron, I've talked to a lot of miners who do not believe that sampling them one shift or six shifts a year for 480 minutes for a compliance sample as the backup on 60 percent production, as I understand the policy that would be applied, at 2.33 is the kind of system that they expect to have in place to protect them.

Now, in terms of the averaging, you know, Marvin we've said it, we agree with you on that, let's do it and get it done. But I think on all these other issues there is some real fundamental problems here that just don't address the needs of the miners that I think you're failing to understand.

I do understand what you said. And I think miners appreciate having that single sample take the averaging out. But I don't think, and there's testimony has been put on the record, these outby miners, I've had a lot of side discussions with miners about that, you know, their concern is they were, Ron, whenever they spoke with you in January, or 1998 when you were discussing the record, that there was infrequent dust sampling then in the outby areas. And they

were concerned that miners that work in a lot of these areas that wasn't even going to get sampled. And that problem needed to be fixed. We need to change this whole DA thing which we haven't had a chance to get into to any degree other than I think miners putting it pretty eloquently, you know, that that DA outby is not working even under the current system. And we don't fix it by going to 1.

MR. SCHELL: Well, my response is we did look at the outby DAs. And, remember, we are sampling, by definition we are sampling dust generating points with the DA. And that concept was so objected to by the operators that they sued us on the DA concept on the theory that we were sampling an area where people didn't even exist. And even the Court of Appeals said that even though it's a more stringent way of sampling that that was a reasonable way for the Secretary to do it.

So we didn't, when we drafted these rules we didn't try to forget the outby guys. We went out and we took a look at what operator dust exposures were, what our dust exposures were. And I mean we don't need to re-look at it, Joe, but what we found is that we're doing a pretty good job of controlling outby DAs sampling the areas where the dust is being generated.

MR. MAIN: The point that miners have made, Ron, is you're not sampling where they're at. And that's one of the things I clearly hear from the testimony. And we'll provide more evidence if that's necessary. But I think that the miners have pretty well eloquently stated that for the record that you're not getting then while they're out in the dust. And that's the fundamental problem with the outby rule.

I'm going to close off of here and give other folks the opportunity to testify. But I think that, you know, it's important to make note that the criteria document was noted for government action in accordance with the law. As we view the law we think that the agency is going to follow the recommendations of the NIOSH criteria document in developing standards of which they specific addressed and make changes in. And we think that's part of the overall record here.

And I will submit this for the record as part of our testimony.

And, also, as promised at the last hearing I think anybody that sits on this panel should have read this. It's an official document. Hopefully, I've got enough copies around. If you're short, please let me know.

And that document I think as I noted at the last hearing was drafted by an investigator reporter that received a commendation by the President of the United States for just as, as I understand, a sound investigative report. And I challenge this panel to figure out this one magic answer of six shifts a year with a plan that's verified at those mines represented in that story that failed to implement that plan that was verified when MSHA is not there and miners who are afraid to speak up because of losing their jobs have no other protection in this void. And I challenge this panel, if you don't fix that problem you're not going to fix Black Lung in this country. Just take it to the bank.

And if you don't figure out some way to continuously monitor that dust in the absence of federal inspectors you're not going to fix that problem. And if you don't figure out a way to do it to the best of your ability so that's not tampered with you're not going to fix that problem. And the benefits needed there clearly is, one, is continuous dust monitors in coal mines.

And I challenge you to search in your hearts and your mind what you're doing here. And you answer the question I've run through my mind, How is this proposal

going to fix that problem? It doesn't.

And I thank you very much.

MR. REYNOLDS: Joe, I just wanted to ask you, I asked you in Prestonsburg as well, that I understand that your position is that you do support the single full shift sample joint proposal with NIOSH and that most of your comments are addressed to the MSHA proposal for plan verification and compliance sampling for dust?

MR. MAIN: The problem --

MR. REYNOLDS: Most of your comments are addressing those?

MR. MAIN: Well, the problem areas of the single shift sample rule is not etched really in 70.500. The problem with that rule is found in 70.100, 90.100, if I've got my numbers straight.

And there is some technical issues that we have with the proposal which I promised that we would address when we get back. And Jim Weeks is going to go over those today.

MR. REYNOLDS: It's not really the accurate measurement, it's as it might be applied in Part 70 and 75?

MR. MAIN: As it's applied as the exposure levels are defined, as full shift are defined, all those are in

Part 70, so on. Because all the single sample rule does is explain the policy of the -- and I keep saying "policy" -- it's a policy that would now be the rule, that the agencies can use the single sample method for the purposes of sampling. And other than few areas that Jim Weeks will be addressing a little bit later on I think it's that simple mine with the problems, like I say, over in the other parts of the regulations.

In closing, on behalf of the miners, I'm probably going to come back at the end and do a little bit more clean-up, but in behalf of the miners we urge that MSHA go back, come out with a real reform package that addresses all the points that miners need and do what's right for the miners.

Thank you very much.

MR. NICHOLS: Well, wait a minute, Joe. I think there's some practical pitfalls to that last recommendation that you ought to understand and think about. It's my understanding that you generally support single full shift sampling and plan verification.

MR. MAIN: Concepts of those.

MR. NICHOLS: The concept of those. And that this rule contains some improvement.

I think there's some hurdles to overcome if this rule goes back to the drawing board. One is that somebody would re-propose it. I'm not saying that would or would not happen but it's going to take -- it would take weeks or months to do that. So it may or may not happen.

Let's say it did, then there's a resource consideration. I think to adopt operator sampling sample for sample, and I don't want to be held to these numbers exactly, but a good ballpark figure would be that Coal Mine Safety and Health would need an additional 200 inspectors and probably with salary and equipment probably $20 million.

Now, the agency may or may not be able to obtain those funds. I can tell it took the Assistant Secretary three years to get 90 additional positions to go to bimonthly sampling. So to take this back and risk losing the improvements, I mean that's, I think those are practical hurdles that the agency would have to overcome.

MR. MAIN: I've looked at this thing long and hard since the proposal come out in the last, what, 32 days. And I tried to think as deep as I could to where we're at. And I keep going back to the recommendations of the Advisory Committee which I think was pretty straightforward.

What it sought to do is to have the agency and the

operators beef up their sampling and dust control actions. And at the point when MSHA was prepared to do that to take over the operator program. And look at the funding mechanism which that's the question I've got is like what kind of research and work did the government really do to figure out a way to fund this thing beyond the taxpayers because that was a clear recommendation of the committee? We're going to be taking another look at that. But to get themself in the position to take this whole thing over.

There is a concept that is embodied I think in the Federal Advisory Committee report that called for an MSHA takeover with a quality sampling program, with a mine operator still responsible for doing plan verification sampling, with increased involvement in several different areas of the miners to get them in a position that they've strived to get for years and totally deserve, and to have continuous dust monitoring as part of this whole scheme.

And a problem that we find is we ordered the car. We've got the damn thing. It hasn't got the engine in it yet or the transmission in it yet. It's got the engine in it but the diagnostic light that tells you, you know, the oil is low is sort of not there yet. You know, just we don't have a whole car yet. And putting this thing on the

road as you've laid out that car is not going to run well in our opinion.

And we need to go back and take the time and get it done right. And, Marvin, you know, being the realist that I am I know two things: if there is an interest on the part of this government to fix this problem you will come back with a proposal. If the interest of the government is to let the thing lay there then, you know, I think it's going to take a public outcry to force that to happen.

But once you do something, if you look historically I think, and being fair to all these miners, you know, let's do not promise one more thing that can't be delivered on. I am not going to do that in my mind. I'm not going to promise them that something will happen if they go to another hearing. I've learned my lesson on that. But I think we need to be fair here. And I think the government needs to step up to the plate, set back down, do a reform package that works, that takes care of all these issues and get them out there.

And I think that's the same thing that I'm hearing, you know, from the industry as well is that this, this thing is so murky with what we have that it's hard for people to understand. It has a lot of shortcomings in it.

And we need to just get this thing done and get it beyond us or get beyond it.

MR. NICHOLS: Okay, thanks, Jim. And we'll hear from the industry next.

But let's take a 10-minute break and then Bruce Watzman will be on next.

(Brief recess.)

MR. NICHOLS: Okay, let's get started back. The next presenter will be Bruce Watzman with the National Mining Association.

Bruce, go ahead.

STATEMENT OF BRUCE WATZMAN, VICE PRESIDENT, SAFETY AND HEALTH, NATIONAL MINING ASSOCIATION

MR. WATZMAN: Thank you, Marvin, and members of the panel. As Marvin said, I am Bruce Watzman, Vice President for Safety and Health with the National Mining Association.

As most if not all of you area aware, NMA and its predecessor organizations, the National Coal Association and the American Mining Congress, have a long history participating in MSHA regulatory proceedings. We have and continue to work with both of the agencies represented to further the dramatic improvements that have been attained in

miner safety and health. While more needs to be done, we must recognize the role that miners, your agency and mine operators played in achieving the striking reductions in fatalities and accidents and injuries that have occured.

At the same time we must recognize the dramatic changes that have occurred and continue to occur in the coal industry. Consolidation and closures have become increasingly commonplace as MSHA's own statistics point to the monumental reduction in both the number of operating mines and miners.

As we began our review of the pending proposals we employed two tests:

First, would the proposed revisions restore confidence in the dust sampling program? and

Second, would the proposed revisions after all was said and done improve miners' health?

Regrettably, we have concluded that the proposal fail both of these tests. Approximately two weeks ago we wrote to the Assistant Secretary requesting a 120-day extension of the period to submit comments on these proposals. The Assistant Secretary, pointing to the industry's presumed familiarity with the proposals and the pending writ of mandamus filed by the UMWA, granted a 14-day

extension.

This extension, while appreciated is nonetheless woefully inadequate. It must be remembered that the agency has had this matter under consideration for several years yet the regulated community is afforded merely 60 days to comment on the hundreds if not thousands of pages contained in the rulemaking record.

Throughout the three public hearings the agency have conducted miner after miner has pointed to the inadequate time provided to read and fully comprehend what many consider to be the most significant proceeding to impact the underground coal industry since passage of the Act, yet the agency granted only a 14-day extension. Throughout the public hearings that the agencies have conducted miner after miner has pointed to the difficulty understanding the proposal given the new, plain English format. Yet the agency has done little to address those concerns.

The industry has long sought performance rather than prescriptive regulations, yet the proposals are in their current form neither. They are too subjective and too open-ended to numerous and ever-changing interpretations. We take little comfort knowing that MSHA will develop and

issue policy guidance documents to supplement a final rule.

As you are aware, we have historically opposed the agency's attempts to regulate through policy. We will continue to do so should this be finalized in its current form. Revisions to health inspection manuals cannot take the place of regulation. Representations in the preamble cannot substitute for regulatory language.

As numerous court decisions arising under the Mine Act and other federal statutes have found, an agency is not bound by policy statements. And those who rely on such statements do so at their own peril.

The D.C. Circuit Court's decision in the Cathedral Bluffs case is a perfect example of that principle. In this case the company cited to an MSHA policy statement as support for their position. The Court held that policy does not have the same force and effect as the law or regulations and ruled against Cathedral Bluffs. The subject, open-ended nature of the proposals leads us to conclude that it will do little to restore confidence in the dust sampling program and may well exacerbate an already difficult situation.

And I would say that the colloquy that took place earlier between members of the panel and Joe Main did little to soothe my concerns.?

I would be remiss, however, if I did not recognize that many of the changes contained in the proposal have long been sought by the industry. We support MSHA assuming responsibility for compliance and abatement sampling. Similarly, we support MSHA's recognition at long last that supplied air helmets can and must play a role in protecting a miner's health. We do not believe their application should be restricted in the manner proposed and will provide additional comments on this point prior to the close of the comment period.

These provisions notwithstanding, we share the miners' belief that the proposal should be withdrawn.

We're at a critical time in the continuum of respirable dust sampling. Our cooperative efforts have us on the verge of introducing new technology that will enable miners to know on a real time basis their individual dust exposure. No longer will we have to rely on subjective sampling technology or argue about laboratory variability, precision or accuracy. No longer will we have to await days to get the results of sampling. Rather, miners will be empowered with the knowledge required to prevent exposure to dust above permissible levels.

Rather than committing resources to apply bandaids

to an antiquated dust sampling system, our collective resources should be committed to advancing engineering controls. Our collective resources at that point will be committed to advancing engineering controls to reduce dust generation and exposure.

Quite simply, the respirable dust standards as we know them today, either in their current form or as MSHA seeks to revise them, will become obsolete. We must not, we cannot allow ourself to brand because of an arbitrarily determined regularly schedule the introduction of this technology. Finalization of the current proposals whose benefits are minimal at best must not thwart the development and introduction of this new technology.

In 1996 President Clinton campaigned on a platform of a bridge to the 21st Century. Personal continuous readout dust monitors are our bridge to the 21st Century. Our collective interests would be better served by MSHA committing the resources they are using to finalize these regulations to the development, the introduction of personal dust monitors into the mining environment.

Thank you.

MR. NICHOLS: Thank you. It's long been the position of the industry that MSHA take over the dust

sampling program. I know you haven't had time to fully digest all these rules but what would an MSHA takeover look like from an industry point of view?

MR. WATZMAN: Marvin, we support, as I said, the MSHA assumption of all compliance and abatement sampling. But when we looked at this proposal we couldn't look at in terms of cherry picking this over here and this over here, we looked at the proposal as a whole. We looked at it in terms of our historic position in opposition to the use of single shift samples for compliance purposes today given the current state of the technology we use for dust sampling.

On more than one occasion the National Mining Association and the Bituminous Coal Operators Association has written to the Assistant Secretary. We outlined through those letters what we believed would be the elements of a new dust sampling program. We believe taken as a whole it would improve the situation that exists today. The current proposal doesn't embrace all of that.

We tied the use of single shift sampling to the availability, commercial availability of a commercial readout continuous dust monitor. So while we support, as I said earlier, MSHA assuming compliance dust sampling, we're not going to allow ourselves to be put in the position of

looking at any individual element of this in a vacuum. We have to look at in terms of the whole proposal that's before us.

MR. SCHELL: Bruce, is the industry's position that we're in a posture where we can move forward with requiring continuous monitoring rulemaking at this point?

MR. WATZMAN: No, it's not, Ron. As you know, the technology is not there today. We believe we're very close. We believe that we've overcome some of the roadblocks that have been put before us.

As you know, the industry, both the industry and the miners when we started talking about a personal continuous dust monitor recommended one particular prototype. The agency, MSHA, chose to go a different direction. Even though the stakeholders recommended the development of one prototype. NIOSH has picked up the ball on the other prototype. And that set us back some time.

But from what we understand we're closer than we've ever been and we think everyone's interest would be better served by awaiting the test results of the prototypes. If they work as we all hope and believe they will work then we're all going to be better off, the miners are going to be better off down the road. We're not going

to be dealing with gravimetric sampling. We're not going to be fighting with Tom over laboratory weighing systems and over precision and reliability, we're going to empower miners to know the dust they're exposed to at that particular moment so that remedial actions can be taken to lower those dust levels, not a week later, not five days later, not three days later, but when the overexposures occur.

MR. HEWETT: May I ask a question regarding those overexposures?

MR. WATZMAN: Sure.

MR. HEWETT: I'm with NIOSH so I have somewhat of an interest in the continuous dust monitors. A dust monitor during a shift could give you two pieces of information:

1) at that particular moment the concentration is above whatever standard there is;

2) that given cumulative exposure up to that point the end of shift exposure is likely to be above the standard.

What does industry -- what would industry want the section foreman to do if the concentration at that moment's above the standard and what would the industry want the section foreman to do if the end of shift projection is

above the standard?

MR. WATZMAN: I think you're a little ahead of where the discussions are. However, having said that I think there are a multitude of options that might be available to the section foreman. He could at that time review the engineering controls that are in place to see if all the water sprays are operating as one would hope. He can check the ventilation. He can make the determination to employe administrative control to remove that individual so that their end of shift exposure is not above the allowable level.

But the fact is is that that's a determination and those are actions that can be taken at that point rather than having this compliance determination be made at some later point when the overexposure has either continued unaddressed or whether there is not an overexposure. I mean that has been one of the biggest problems we have had with the dust sampling, as you all know, the lag time between when the samples are taken and the ability to take remedial action. That serves no one's interest. Mostly, most importantly it doesn't serve the miner's interest. A continuous readout tool, a continuous personal dust monitor will if it works as we hope provide us the ability to take

those actions at that time.

MR. HEWETT: If at that time, say halfway through the shift, that particular miner's exposure has according to the direct reading instruments reached and exceeded the current dust standard what should the section foreman do with that miner or over the section in general?

MR. WATZMAN: I think I just answered that. I mean my response was he can review the engineering controls that are currently employed making sure that they're all operating at optimum levels.

MR. HEWETT: This question is different. I understand you're repeating your earlier answer. The question is --

MR. WATZMAN: That's because I think you're repeating your earlier question and I thought I responded to it.

MR. HEWETT: Thank you.

MR. NICHOLS: We've had a lot of testimony in the two previous hearings about this policy versus the rule mostly, I think, as it relates to the sampling requirements from MSHA. If that were tightened up and further explained or consideration that it be put in the rule, would that move you any closer to favoring these rules?

MR. WATZMAN: I don't know, Marvin, because I think it would require a fundamental re-writing of the rules. One of the responses that was given to a miner's question, I think it was at the Morgantown hearing, was we're rewriting the -- we're currently rewriting chapter 1 of the health inspection manual and we'll address that in that rewrite.

That's not the way regulations are written in our mind. We can't -- those are rewritten, they're written by this current administration, they'll be written by another administration, they'll be rewritten by, reviewed by another assistant secretary down the road. You know, I guess one of the discomforts we have, and I understand the move and we're supportive of the move to write regulations in plain English, but I guess one of the questions that was asked in the preamble was What are your views on the new format we've taken? And it is in writing these regulations a question and answer format as opposed to what was fairly black and white historically. And I think it is such a dramatic movement of the pendulum away from what we're accustomed to that it has raised as many questions as it has answered.

I will tell you that I sat in a meeting of industry representatives who deal with dust control plans,

who deal with ventilation, and there were numerous interpretations given to various sections here by people who have dealt with this for years and years as to what that really meant in terms of agency enforcement policy. It's extremely difficult, given that, to respond in a concrete manner.

MR. SCHELL: Can I?

MR. NICHOLS: Go ahead.

MR. SCHELL: Bruce, one of the -- I think we'd all like to be where you are and have a continuous monitoring. But one of the things that's motivating us, and we talked about it here, is we do continue to have miners that are overexposed above the 2 milligram level. And we put up the chart that shows what happens with averaging. Single sample was meant to address that. Plan verification, I know on discussions that we've had earlier on the rule we all agreed that even if you have continuous monitoring you're going to need to continue to have plans where our proposal was attempt to develop quality plans. But the thrust being, and the Advisory Committee addressed this too, we have got to find some way to eliminate these excursions above the standard that overexposed people.

And to say go back and start again, another way of

saying that is to continue to have miners overexposed until we get that. I'd be interested in specifically what the industry's views are on the plan verification approach that we've taken. I think I know what it is on single sample, but if you want to comment on that I'd appreciate hearing that.

MR. WATZMAN: Ron, we're going to submit detailed comments by the close of the rulemaking. I will tell you that I'm in the process, we're in the process right now of drafting them.

What we are going to attempt to do, having said that we believe that this should be withdrawn, we feel we have an obligation to respond in detail to the proposal which we will do. So we will submit to the best we can, and I have to preface it by saying given the manner in which it's written we're going to do the best we can to try to provide you with revised regulatory language even though we're struggling with the regulatory language as it's written. But we're going to do that.

And I'm really just not prepared to go through it section by section at this point. I mean I've said that we support MSHA assuming all sampling. We are pleased that the agency has recognized for the first time the use of air

helmets where we have exhausted engineering controls. We think what you have proposed is far too restrictive. We think there are applications where the same criteria used for longwall permission may very well apply to other situations as well, probably not as broad in nature, probably not as frequent, but we think it's wrong to exclude the use of so valuable a tool through these regulations because, you know, we probably won't have the opportunity to revisit this again.

You know, there are times on continuous miner sections where we may very well need this tool. And we think it is wrong for the regulation as it's written to preclude that application at all.

You know, in many ways this is kind of tantamount to what the agency has finalized and is about to implement in terms of noise controls. You know, you didn't limit the application of personal protection in terms of noise controls. There is the pea coat theory, the pea coat concept and practice where once an operator has exhausted to the agency's satisfaction the availability of engineering controls then there must be a means to protect the miner. Because that's the overall objective that we're all striving to get to.

If we can get there through engineering controls, far the better. We all support that. But where we can't, the objective at the end of the day has to be protecting the miner's health. Why the agency chose in dust to limit so dramatically the application of a protective, the use of a protective device so dramatically in terms of dust but didn't do so in noise is something that quite honestly we're trying to understand. We think it's the wrong approach.

So these are some of the issues that we'll get into in more detail in our written comments.

MR. NICHOLS: Well, I think the experience with dust control is that in all areas except one, and that's working downwind of the shear operator, that controls have been demonstrated that will work and engineer away the problem. With noise that's not the case. But we don't have that history of compliance with the noise rule like we do the dust rule.

The key is not so much that a control does not exist to control dust in all other areas of the mine, is that the controls are not maintained.

MR. WATZMAN: Marvin, as a general statement I'd say you're probably correct. But I don't think you can generalize across all mines and all mining systems and all

mining applications. Every mine is different. I mean we have to accept that. At times mines have to do things that are different than the traditional practices in mines.

To say that we're not going to protect miners because we've excluded the use of a protective device in those situations to us is just ill advised. You know, maybe your statement is right generally, but we think that you shouldn't exclude it, make a rubber stamp exclusion and say we're only going to provide the use, allow the use in this very limited application.

I would argue with you that you've restricted it to such a degree that you're probably not going to see the use of supplied air helmets given how dramatically you've restricted it. And if that's what the agency's objective is, was through this, well, then I think that we may well say that you've accomplished what you've set out to achieve. But we just think it's the wrong approach to take.

MR. NICHOLS: Tell me again why you're opposed to single shift?

MR. WATZMAN: We don't think that the agency -- and I will prepare myself for the salvo from Paul Hewett and Jon Kogut and others.

MR. NICHOLS: We'll protect you.

MR. WATZMAN: Please protect me.

We don't think that the agency, and I must say one of the things you've done that has made this easier for me personally is taking all of the comments from the single sample, the previous single sample proceeding and made them a part of this rulemaking. It makes my task a lot easier. We still don't believe that the agency has adequately accounted for all the sources of variability that exist both in the mining environment and the analytic practice, process. And, therefore, that a single shift sample as currently comprised under the scenario that the agency has laid out is flawed.

And we will provide additional comments on that. I know that you have added some new studies into the record since the last proceeding. We're looking at those currently and developing some comments. And we'll provide more on that. And I'd just like to leave it at that on that subject for now.

MR. NICHOLS: Okay. And we had these two periods where we used single shift in coal. One was maybe '92-'93 and then up until the Court of Appeals. Do you have any knowledge of any great burden that put on the coal industry during those two periods?

MR. WATZMAN: No. I have no information about that period.

MR. NICHOLS: Okay. Does the industry agree with this averaging scheme that will allow a couple miners to be over, three to be under, and at the end of the day all five are under?

MR. WATZMAN: Marvin, we don't want to see any miner overexposed. Our objective has been and will always be to maintain dust levels below the applicable standard. However, I think we have to recognize that there's somewhat of a difference in view between the agency and the industry in this regard. Dust is a chronic exposure. The standard was predicated on the belief that a miner exposed eight hours a day, five days a week for a normal 45-year working career would not develop coal worker's pneumoconiosis.

As far as I know, and correct me please if I'm wrong, there is no agency or independent body yet who has -- and I would say domestic because I'm not that familiar with international, but as far as I know and the last I checked there is no body that has recommended a short-term exposure limit for exposure to coal dust. Am I -- Go ahead, Ron, what was that?

MR. SCHELL: Yeah, I think the Congress did. I

mean the law --

MR. WATZMAN: The law is eight hours, 2 milligrams.

MR. SCHELL: No, the law is that no miner should be exposed to more than 2 milligrams on any shift. That's the law.

We constantly get into this debate about the long-term exposure versus the short-term exposure. But I'm telling you the law says on any shift, it doesn't say over a period of time.

MR. WATZMAN: I will leave it to your lawyers and our lawyers to argue over what the law says and what the Congress intended. I'm not going to get into that debate. I don't think it's -- I don't think it furthers anything.

All I'm saying is is that we view this differently than the agency does. I was trying to respond to Marvin's question and present the difference in how we view this as opposed to the agency. Do we want to see any miner overexposed? Absolutely not. Do we want to have the availability to use every single tool to prevent that occurring, from occurring? Absolutely, we do. That's why we support and are glad that with -- that to the limited degree you had you've recognized the use of supplied air

helmets.

Do we want to get to the point where miners know on a real time basis what the exposures are? Absolutely. The industry has committed to work with the agency, with NIOSH. As soon as the prototypes are available for taking underground, much like we provided mines to work on the continuous machine-mounted monitor, we will make the mines available to test the personal readout continuous dust monitor. And we're just looking forward to that day.

MR. NICHOLS: What would be your best guess as to how long it would take to develop that technology?

MR. WATZMAN: I think there are people who are far better equipped than I am to respond.

MR. NICHOLS: Just a guess?

MR. WATZMAN: I don't know, Marvin. And I'm not going to venture a guess that someone's going to say, boy, have you underestimated it or are you out to lunch? I mean maybe Dr. Grayson has a better sense of that sine NIOSH is one of the agencies working toward the development of that.

MR. NICHOLS: But we're not talking months, we're probably talking years?

MR. WATZMAN: I don't --

MR. GRAYSON: I would say quite likely it won't be

months because in any research project there are bugs that have to be removed and iterative steps. And, you know, we want to move it along as quickly as possible.

MR. WATZMAN: As do we.

MR. GRAYSON: But we have to see indeed that it does work.

One question of clarification if I may, Bruce. I'm wondering if you are including in your definition of sources of error spatial variability of the dust cloud or not?

MR. WATZMAN: Yes.

MR. GRAYSON: You are?

MR. WATZMAN: Yeah. And I know we disagree. And I will accept that we have a disagreement on that.

MR. HEWETT: Maybe I can comment on that a little bit further for the benefit of the audience although I know that we disagree. Won't be much of a resolution of that. But in this debate between lawyers, your lawyers, the government lawyers regarding specific interpretations of the '69 and later the '77 Coal Mine Safety and Health Act I do hope ours prevail.

Not as a lawyer, I read it and look at the plain language in it and it clearly indicates that there is a

phased-in period incurred in reductions of exposures with the goal of reaching a single shift measurement and a 2 milligram standard. I want to point out that at the time of the '69 Act the only standards of exposure limits in the U.S. were those recommended by the American Congress of Industrial Hygienists, the TLVs. Those then and not were single shift limits. Regardless of whether the eight -- or if it was defined as an 8-hour limit that could be for chronic disease eight, it could be something that manifests its effect over an 8-hour period.

For those that have short-term limits you probably want something that has an instant, almost instantaneous effect.

Coal dust standard implemented by, promulgated or recommended by the TLV committee was a single shift limit. the OSHA limits have always been single shift limits. There is nothing wrong with a single shift limit producing control and exposure to something that's nominally a chronic disease agent. And that has been the case since the inception of the TLVs, since the '50s, '60s, up to today. And so there is nothing inconsistent with what MSHA is trying to do with the coal dust standard as required by Congress in '69.

So I just want to point that out that single shift

limits have been used for along time. The agency draft recommends no long-term standards. OSHA recommends no long-term standards. NIOSH I think for radon gas that's the only long-term standard we have. But all the others are single shift limits. Even if you have a chronic disease agent you have to control on a day to day basis. That's why you have an 8-hour limit. The Europeans use it, the British use it, every industrialized nation in the world with the exception of a few on a few substances, like vinyl fluoride in Europe, use single shift limits.

So there's only a few people out in left field on this issue. And I'll leave it up to you to figure out who they are.

MR. NICHOLS: Well, plus a good chunk of your constituents are subject to it. The metal and non-metal folks have used single shift since I started with them in 1971. And we were using single shift in 1971, so a good number of operators you represent live with this in the metal and non-metal industry.

MR. WATZMAN: Regrettably, we haven't prevailed in court to overturn that for the metal/non-metal sector yet.

MR. SCHELL: Bruce, and you may want to answer these just in terms of understanding where you're coming

from on continuous monitoring. The way I interpreted your view is that you would see continuous monitors as something that would be used daily or on each shift. And would you see it being used for compliance purposes? Have you talked about that?

MR. WATZMAN: We haven't talked about that, Ron. And I think you're probably getting a little ahead of the game in terms of elements of a protocol as to how these would be used in the mines. I mean we haven't gotten that far along. You know, we didn't in terms of the continuous machine mounted, although we were further along in that one. We're clearly not that far along in terms of it on this as to whether, you know, what miners, what applications, what frequency. I mean we just haven't had those discussions.

And, you know, I'm sure we will have those discussions with you and representatives of the miners as this proceeds.

MR. SCHELL: And if I come back and ask a question again, you've answered it and that may be it, I was just looking for a feel of this panel. Plan verification is a key. And there were some key elements of it, plan verified at high level of production, plan verified using only the parameters listed in the plan, plan verification over the

entire shift. Can you give us a sense of where the industry is coming out on this at this point, Bruce?

MR. WATZMAN: No, I can't, other than as I said previously, we'll provide some detailed written comments on those elements. You know, where we think that it is appropriate that the provisions be revised we'll provide suggested language.

MR. NICHOLS: We've got a list of questions we want to ask about the airstream helmets and other protective devices. Who is the best one to ask these two of the industry, you or?

MR. WATZMAN: I'm missing what you're getting at, Marvin?

MR. NICHOLS: Well, generally we've had a lot of testimony that they're too heavy, they don't work, they fog up. Miners use rags and whatever for filters. And are you aware of any major problems with the airstream helmets currently in use?

MR. WATZMAN: I know that there was a problem, as we've had discussions with NIOSH regarding the new filters that are used in them, the hepa filter as opposed to the filter that was used previously. I know that has -- there are some problems that have resulted from these filters.

But I also know that there are efforts underway to try to come up with a resolution of that.

Prior to NIOSH changing their requirements in terms of the consistency of the filter element I am unaware of the concerns that you've talked about.

MR. NICHOLS: Okay. Okay, Bruce, thanks.

The next presenter will be Randy Tatton with Energy West Mining Company.

STATEMENT OF RANDY TATTON, ENERGY WEST MINING COMPANY

MR. TATTON: Good morning, Mr. Chairman, other members of the panel. We appreciate the opportunity that we've been given today to provide testimony on the provisions of this proposed regulation. Like you said, I'm Randy Tatton. I'm Manager of Health and Safety at Energy West Mining Company. And I submit this testimony on behalf of Energy West Mining Company that operates two large underground coal mines in southeastern Utah. And this business employs about 500 miners and we produce approximately 8 million tons of coal annually.

It's our objective to provide each employee with a safe and healthful workplace and to achieve excellence in our business activities through continued improvement. First and foremost I'd like to acknowledge that Energy West

Mining Company is in full support of the position that Bruce Watzman has articulated on behalf of the National Mining Association and its members. We especially stress that more time is necessary for interested parties to make proper comment on this very critical proposal and also agree that the current proposal should be withdrawn.

I'd like to make some additional comments and views about powered air-purifying respirators, or PAPRs, that must be considered in a new proposal.

As the agency is aware, Energy West Mining Company submitted a petition for rulemaking to amend 30 CFR Part 70, Mandatory Health Standards for Underground Coal Mines, to allow the use of airstream helmets or other NIOSH-approved PAPRs as a supplemental means of compliance with respirable dust standards. The petition was submitted to the agency on September 10, 1997. But MSHA to date has not issued a formal determination on the merits of this petition. Instead, the agency has contended that the use of PAPRs would be addressed as part of this present regulatory effort.

Energy West Mining Company acknowledges that MSHA has incorporated provisions for PAPRs into this proposal and applauds the agency for finally recognizing that this

technology does play a significant role in improving the health of our miners. Our assessment of this proportion revealed that the agency has not included many of the provisions of our petition for rulemaking but has only cherry picked certain proponents of that. The proposal in its current form would only serve to discourage mine operators from providing PAPRs for their employees because it is so limited in its applicability.

Both Part 70.212 as we presently understand it only allows for the use of PAPRs to supplement engineering controls for miners who work downwind of the designated occupation 044, the longwall operator. We believe very strongly that this concept needs to be changed because it discourages mine operators from seeking approval to use this valuable and proven tool to protect the health of miners.

Section 70.211 of the preamble states that while it may be difficult to make the environment safe for some miners working on the longwall face under certain mining conditions, MSHA believes that an acceptable work environment can be provided for the longwall operator designated occupation 044 and other miners on a continuing basis. Generally this statement is accurate, but it is an absolute fact that in some mining conditions it is just as

or more difficult to make the work environment safe for the tailgate shear operator as it is for miners who are required to work downwind of that designated occupation.

In many cases mining conditions require the tailgate shear operator to be in by the shear which is the primary dust generation source. We emphasize very strongly that regulations must not, as presently written, limit or exclude the enhanced health benefits that PAPRs can provide for miners working at that designated occupation 044 or others.

It's been our experience at Energy West Mining Company that PAPRs are accepted and used by continuous miner operators, shuttle car operators, roof bolters, haulage equipment operators, masons and even fire bosses. This regulation should not limit the use of PAPRs to only specific longwall applications but should be encouraged for the use in all underground mining applications.

Energy West Mining Company plans to submit additional written comments and information prior to the closing of the post-hearing comment period. This concludes our testimony. And we appreciate the opportunity we've been afforded to testify today.

MR. NIEWIADOMSKI: Randy, can I ask a question?

MR. TATTON: Yes, sir.

MR. NIEWIADOMSKI: What's been your compliance record since you moved to the 060 designated occupation?

MR. TATTON: I'm probably not the best person to answer that question. I am somewhat distanced from that now and I have not looked at those samples and records and couldn't respond accurately to that question now, George.

MR. NIEWIADOMSKI: I mean when you submitted that proposal the concern was you were, your field was 044 at that time?

MR. TATTON: Yes, it was.

MR. NIEWIADOMSKI: And you were concerned about moving to 060 because you felt, I believe, that you may not be able to control that environment using existing engineering controls; is that correct?

MR. TATTON: Yes.

MR. NIEWIADOMSKI: All right. It appears from some of the data that I've seen that you've been somewhat successful in controlling that environment?

MR. TATTON: I think that would be an accurate statement. We have. Although I think you'd also find that as we have in the past we have had situations or bouts where we've had problems with compliance.

MR. SCHELL: Randy, we've heard a lot of testimony from the miners over the past two public hearings about their real concern that once the agency allows the use of the PAPRs that any incentive for operators to find new engineering controls will be eliminated and that, in effect, the development of engineering controls will cease and that the use of these instruments will be expanded to other areas.

Now, I think we all come to the point that engineering controls have to be primary and we have to continue to work on engineering controls and that PAPRS are, in our view at least, a poor substitute for engineering controls. But how do you respond to the question of where is the incentive for mine operators to develop engineering controls if we've allowed the use of PAPRs?

MR. TATTON: Well, I think if you talk about our proposed petition for rulemaking or we talk about this current proposal you'll see that in both cases each one of those documents endorse or even insist on all engineering controls before there is any consideration given for PAPRs to be used for compliance.

We at Energy West have for many years now worked very hard to include all of the state-of-the-art and the

most recent engineering controls into our mining processes. And certainly I wouldn't see us doing anything any different if there are new engineering controls available. And we'd be more than willing to try those and use them if they work.

MR. NICHOLS: Can you give us some more examples as to where you have problems that you can't engineer away?

MR. TATTON: Oh, one particular example that would come to my mind -- and I will direct this more to a situation where we talk about controlling the dust exposure for that designated occupation 044 -- and that would be a situation where we're losing top and we're losing rock from the top. That would require that that person sometimes would have to be in by the location of that shear to do what he has to to try to correct that problem, catch the top and so on. And in those situations it becomes very, very difficult to comply.

MR. NICHOLS: Well, I think the rule recognizes that situation, doesn't it?

MR. TATTON: No, it doesn't recognize the use of PAPRs at any time for designated occupation 044.

MR. NICHOLS: Okay. Thanks.

MR. SCHELL: Randy, just one other -- Go ahead, Paul.

MR. HEWETT: I can recall doing some work for NIOSH in both the local conventional mine, local longwall, and not liking the experience all that much. And I was considering based upon the testimony last week what it would have been like to have been in those mines wearing an airstream helmet, adding an additional weight to both my head and my body. Your particular mine is a western mine I take it and very high top?

MR. TATTON: Yes, it is a western mine. It is not really high top. Our average coal height would be between 7 and 8 feet.

MR. HEWETT: So everybody has an opportunity to stand upright in these mines?

MR. TATTON: In most of the cases, yes. There are times when heights would limit standing up to some degree. But that would be -- that wouldn't happen very often.

MR. HEWETT: Wouldn't happen very often.

What would be your opinion or your professional opinion regarding height limited situations and the use of PAPRs and other type similar respirators?

MR. TATTON: Certainly as heights decrease and spaces become more confined it becomes more difficult to wear that, that apparatus. I've been a longwall foreman.

I've worn the helmet myself for a lot of years during my career, and have found that you can do that.

That question may be better for some of the people that are coming behind me that have used the device.

MR. HEWETT: Thank you.

MR. GRAYSON: Got a question, Randy. With respect to the use of PAPRs in your mine in what condition are they being used?

Can you hear me?

MR. TATTON: Yes, I can.

MR. GRAYSON: In what position are they being used, in an as-approved condition or in a modified condition, even if it's the miners who may modify it at times?

MR. TATTON: I would have to answer honestly and say they are being used in a modified condition. Miners some, you know, have typically removed the shroud, or I don't know the term for it. Of course, when you say are they properly used, I think NIOSH to that would mean do they keep the face piece down at all times? No, they don't. They raise the face piece to communicate and so on.

MR. GRAYSON: Okay. Have they had the problem with fogging up?

MR. TATTON: We've had that problem recently, Larry, since we've been required to use the new version of the filter. There has been what seems to be reduced flow in the unit and that has also resulted in more fogging. And we've worked real hard to try to -- with 3-M to try to resolve that.

MR. NIEWIADOMSKI: Randy, I have a couple follow-up questions that I didn't have a chance to ask the first time that deals with production. You, what is your view about approving under the proposal verifying the plan under the VPL, which is the verification production limits? Do you feel that if in fact that was implemented would you be able to control the 060 with engineering controls?

MR. TATTON: You know, I think at this time I'd defer those comments that I have on that to our written comments. We're still looking at that issue and really not prepared to talk about that one at this point.

MR. NIEWIADOMSKI: My last question deals with production during bimonthly as compared to non-sampling periods. Is it the same or is it less than during non-sampling periods?

MR. TATTON: I would think it's the same. You know, that we --

MR. NIEWIADOMSKI: The same. It's the same?

MR. TATTON: Yeah. Thank you.

MR. NICHOLS: Thank you, Randy.

Let's take a 10-minute break. The next person up will be Jim Stevenson with the UMWA. So we'll start with Jim at 11:10.

(Brief recess.)

MR. NICHOLS: Okay, let's have a seat here and get started back. Okay, let's get started back.

Let me say one more time for the record, I continually catch myself saying when we're talking about single full shift sampling, I continually catch myself just saying full shift sampling. I think it goes back to my metal and non-metal days when you said full shift it meant single full shift sampling. So the record will be clear that I'm talking about the proposal in front of us it's single full shift sampling.

Okay, Jim Stevenson.

STATEMENT OF JIM STEVENSON, INTERNATIONAL UNDERGROUND SAFETY REPRESENTATIVE, UNITED MINE WORKERS OF AMERICA

MR. STEVENSON: My name is Jim Stevenson. I'm the International Underground Safety Rep for the United Mine Workers. I've been in that position for the last eight

years. Have a total of 31 years of mining experience, 24 years at Sunnyside underground, 14 of them spent on the longwall, 11 years as a shear operator.

I'm going to just do a summary of what we think of this new rule, 30 CFR Part 72, determination of concentrations of respirable coal mine dust. The proposed rule is only one paragraph found on page 42122 of the Federal Register notes. The rule states that MSHA may, doesn't say will or shall, it says may use a single full shift measurement to sample to sample miners for exposures to coal mine dust. The preamble explaining the rule implemented in the proceeding, 54 pages of fine print. The rule applies to all surface and underground mines.

The second proposed rule under 30 CFR Parts, 70, 75 and 90, Verification of Underground Coal Mine Operators' Dust Control Plans and Compliance Sampling for Respirable Dust, proposed rules on pages 42177 through 42185, was 55 pages of fine print in the preamble.

The MSHA proposed rules would in fact eliminate the mine operator dust sampling program and all dust operator -- all operator dust sampling responsibilities, eliminate the procedures for dust samplings with miners in areas of the mine including the specific frequency and

procedures for sampling that's to be done, increase dust exposure compliance levels miners may be exposed to, substantially reduce dust sampling frequency, allow operators to use respiratory protection in lieu of engineering controls, establish plan verification requirements of coal mine dust controls, allow MSHA to use single shift sampling method with limited number of miners exposure sampled for the full shift, revise the core sampling procedures, establish procedures allowing administrative controls to be used as an alternative to engineering controls for compliance, increase the miner operated posting of dust information, increase mine ventilation plan information and revise Part 90, miner requirements.

The preamble also discussed miners' participation in the sampling, continuous dust monitoring and self-sampling responsibilities and sampling procedures. These matters, however, are not contained in the proposed rules which are continued to be -- which we are continuing to re-analyze these proposals.

Further, MSHA implementation policies which affect many policies is still being examine.

Following my review of the MSHA proposals by UMW

health and safety specialists, including UMW health and safety legal departments and mine and health and safety committees across the country we have been able to determine that the proposed rule are fatally flawed and not in the best interest of the nation's miners and in need of major changes. While the proposed rules do provide some improvements for miners there are overshadowed by changes that would be adverse to miners, some undercutting the Mine Act and health and safety standard protections.

In light of years of hard work we have all done to reform the respirable dust program we're extremely disappointed in several areas of the MSHA proposal. Our first recommendation is go back to the drawing board and come back with a proposal that everybody can live with based on the recommendations of the Dust Advisory Committee.

Here's why: many of the changes in the MSHA proposals are difficult to understand. The preamble, proposed rule and existing rule all need to be read carefully to fully understand them. Side by comparisons of the rule and the proposed rule are difficult since MSHA proposes significant structural changes. MSHA reduced some important protections and substituted those legally enforceable protections with agency policy. Some such

changes are reflected only in the preamble but not in the rule itself and some are curtailed altogether.

Some enforcement in the proposed actions would be discretionary. MSHA publicity about the proposed rule has contributed to misunderstandings. I'll give you a perfect example. The bullet sheet that I received from Davitt McAteer on what these new proposed rules were going to do, how they were going to affect miners. How they were going to protect miners, I think Joe said it perfectly, you know, we've got a body of a car here with no motor, no transmission, no seats, no tires, no nothing. What that bullet sheet said and confused a lot of miners, I think every miner in the country that read them, was that the agency finally after 15, 20 years was finally going to do something with this. And the Register and what come out in the Register doesn't show that.

The proposed rules also ignored findings and recommendations of the Federal Mining Committee. The Secretary of Labor established that committee to guide MSHA in developing proposed rules to reform the dust sampling program. Several MSHA proposals contradict its recommendations, undercutting protection for miners.

Miners in the UMWA participated in that committee.

UMWA supported the Advisory Committee recommendations which were aimed at fixing flawed respirable coal mine dust program and eradicating Black Lung and silicosis diseases. We wonder how MSHA veered so far off the path in adding protections miners have long sought and how its rules could be so contrary to the findings of the Advisory Committee.

The following is what I see as a summary of some of the significant issues. The proposal makes one point clear, compliance dust sampling is not important. While MSHA proposals would add single shift sampling and plan verification requirements they eliminate the compliance sampling standards in Part 70 of 30 CFR, including all the standards that miners could point to and know what requirements were.

Other protections were undercut as well. They are, they eliminate the entire compliance sampling requirements of Parts 70 and 90 with no replacement rules for compliance sampling, dramatically reduce by approximately 83 percent the frequency of shift samples for respirable dust. Mining sections -- and I think we've talked about this -- we go down to six shifts a year. And one test on the outby. And those aren't even guaranteed by the rule or by funding.

It dramatically increases dust exposure levels above those contained in the Mine Act and current standard. The proposals would allow mine operators to double from 2 milligrams to 4 milligrams on longwall faces. The proposed rule states that exposure levels will be 2 milligrams and 1 milligram for Part 90 miners on outby intake samples which the current rules MSHA vows to allow them to reach 2.33 and 1.26. These specific levels are not cited in the proposed rule or the preamble, they are referenced by preamble by a formula.

It permits, it also permits mine operators to replace engineering controls with respiratory protection and/or administrative controls on longwalls which are prohibited by the Mine Act. Enforcement of the MSHA proposal is too fuzzy and miners may not know what to expect. The MSHA policy addressing the sampling process and intended enforcement of the plan verification under the standards appears to reduce the policy and discretionary decisions by MSHA or inspectors. This is not good for miners or mine operators for that matter.

With administration that would be soft on enforcement, having so much discretion on plan verifications, sampling requirements, the actual sampling

levels, miner participation activities, approval of increased coal mine dust levels and other provisions could leave miners in a big hole.

Key points about what is and were not in the rules. Despite reports of the MSHA takeover of operator compliance sampling, they don't. There is nothing in the proposed rule on compliance sampling requirements. Those are eliminated. MSHA announced in the preamble that they will be doing all compliance sampling generally at the frequency they are now. Since it is not in the rule and funding is not being guaranteed, MSHA's current sampling is not legally guaranteed and could be reduced.

I think you made that point on budget constraints, Marvin.

Despite references of increased miners' representation, participations are not in the proposed rule. The preamble discusses those. For compliance sampling there are no more miners' rights than there have been since 1977. MSHA plans to recognize by policy miners' representative rights to participate in announced MSHA test visits to verify dust plans.

The industry has already challenged this. And you think they're going to let our guys go along and do these

verification samples? I don't think there's one coal operator in here who will stand up right now and say, yeah, we will let them participate and we'll pay them. Forget about it. It ain't going to happen.

The rule does call for single shift -- single full shift sampling. That's been supported by miners in the United Mine Workers. The proposal, however, is altered by MSHA policy and other proposed rules reducing the benefit for miners. Full shift samples will only be taken during abatement sampling. Routine compliance sampling, which will be the vast majority of the sampling, will not be full shift, it will be the 8 hours or 480 minute samples, with some flexibility when they will be taken during the shift. The compliance levels will be increased as noted above.

Although there have been discussions about continuous monitors monitoring the dust, there are no rules requiring continuous monitors. MSHA announced in the preamble that operators could test them if they want to. Give me a break.

I've got a dust study sample that was done back in 1984 and '85 by the Bureau of Mines that tested three difference continuous mining devices. Though they were perfected then they were getting close. As I understand now

the technology is there. All the have to do is harden the cases that this black box is in so it can't be tampered with. That's one way to level the playing field up with continuous monitors between union versus non-union mines is continuous dust monitors. We believe that that technology is there now.

The proposed rule contains a dust control plan verification that is very complex. Although plan verification is needed and we support that, as designed it is too complicated, may be ripe for operator abuse, and enforcement is far too discretionary. There are parts that clearly need changes. There's no backup plan for verification sampling once a plan has been approved.

The procedures allowing increased dust concentrations to be doubled and replace engineered controls with respiratory protection needs to be eliminated. More specific deadline on approvals of dust control plans is needed, to name a few. The proposal contains changes in the manner that cores are sampled. The full effect of those changes, we're still analyzing those. We'll have some additional comment.

The rule establishes procedures for administrative control for mine operators of longwalls to rotate miners'

activities to reduce exposures and comply with the dust standards. Under the scheme MSHA would not have operators under the citation to implement engineering controls which would remove legal rights miner have to force engineered controls. MSHA policy on this is so discretionary that it lacks enforcement teeth and clarity. This section is still being evaluated.

The rule contains no standards that require mine operators to take corrective action when the dust standard is exceeded. And if the sample is in compliance -- and the sample, the compliance sample changes must be incorporated in the ventilation plan. If it is a non-compliant sample the operator plan could be revoked. These proposals appear to tighten the rules requiring action to fix quality dust control plans. These provisions are still being reviewed.

The proposed rule establishes the requirements for posting information on mine bulletin board, including sampling results, the dust control parameters, the engineering and environmental controls and other factors. We support that. The rule contains improvement in the mine ventilation plan. It requires mine operators to record the amount of materials, coal and other materials produced on each shift. It also requires mine operators to specify in

detail the dust control measures that will be in place.

The rules contain several provisions changing standards in Part 90 regarding miners diagnosed with pneumoconiosis. These are still being reviewed also.

While MSHA asserts that proposals adopt recommendations by the Federal Advisory Committee, many MSHA proposals are contrary to what the committee recommended. The MSHA proposed rules conflict with several findings and recommendations of the Federal Advisory Committee appointed by the Mine Act by Secretary of Labor for the specific purpose of recommended rules reforming the respirable dust program.

The Advisory Committee called for lowering dust exposure levels. The MSHA proposals increase them.

The Committee called for increased compliance sampling. The MSHA proposal substantially decreased those.

The committee called for an effective MSHA takeover of mine operator compliance dust sampling program. The MSHA proposal instead eliminated the operator compliance sampling program.

The Committee called for a major expansion of miners' and their representatives' participation in the respirable dust program paid by the operator. The MSHA

proposals contain no rules for increased and in some cases can curtail it.

The Committee called for use of continuous dust monitors. The proposals contain no rules requiring that.

The Committee called for miners to be sampled for the full shift. The proposal excluded that from most dust complying sampling.

The Committee called for environmental controls to continue to be the method to control mine dust and not to be replaced by respiratory devices. The MSHA proposals allow respiratory devices to replace environmental controls while increasing dust levels.

There are other areas that the MSHA rule is contrary to the Advisory Committee recommendations. The Committee recommendations will be addressed throughout this summary.

Two areas the MSHA proposals follow the Committee recommendations at least in part is establishing single shift sampling measure and improvements in operators' respirable dust plan verification process. Those two areas by no means justify the action of protections miners have or ignoring other reforms the advisory committee recommended.

Let's see, a little bit of background on the

Advisory Committee that was appointed by the Secretary of Labor. The Advisory Committee was comprised of two representatives from each, miners and mine management and neutral -- and a neutral. And five representatives had no interest in the mining interest. Two UMWA health and safety officials served on the committee. Those representatives as well as several miners and Black Lung victims across this country testified before the Advisory Committee panel, laid out reforms needed to overhaul the failed respirable dust program.

In September 1995, NIOSH issued a criteria document calling for reforms in the coal mining dust program. The document was forwarded to MSHA to the Advisory Committee for consideration as they developed recommendations to overhaul the coal mine dust sampling program. The Federal Advisory Committee sent its official report dictating actions needed to reform the coal mine dust program to the Secretary on November 4, 1996. Under Section 101(a)(2) of the Mine Act, following submission of recommendations of the Advisory Committee, MSHA was obligated to publish a proposed rule or reason for not doing so.

Following years of delay, the MWA filed a lawsuit

on January 13, 2000 to force MSHA to issue regulations. Those are on key reforms, miners and the UMWA itself for years, and were recommended by the Advisory Committee over three years earlier.

You know, there's no MSHA takeover of the operators' controlled respirable dust compliance sampling program, it's just flat out eliminated. I think a lot of this has been talked about before so I'll just -- I don't want to take up a lot of time here. What I want to do is talk a little bit about the airstream helmets.

I believe that, as Mr. Tatton said from Energy West, that operators have been looking to get airstreams in the coal mines for years. Energy West probably led the way in that fight. As Mr. Tatton says, there's a lot of problems with the respiratory devices. They don't work. Miners modify them so they can talk. They lift the helmet, the mask up so they can speak, so they can see. They fog up.

If this proposal goes through as it's written it in effect will end any further engineering controls or any attempt to even make them better. Once mine operators get the right to use respiratory devices for administrative controls you're going to see an end to your engineering

controls. And mark my words, if this goes through you're going to have to increase your staff back in Arlington probably by 100 people just to start improving plans when mine operators are crying that they've used all the engineering controls available and the only thing they have left is airstream helmets. That's going to happen.

And you'll see that, if this goes through tomorrow you'll have 150 applications on your desk Monday. There's no doubt in my mind.

MR. NIEWIADOMSKI: Can I ask you a question?

MR. NICHOLS: Sure. Let me ask first.

You said on a number of occasions there that airstream helmets replace engineering controls.

MR. STEVENSON: Right.

MR. NICHOLS: That's not what the rule says. The rule says that if all engineering controls have been exhausted that consideration can be given for the use of airstream helmets for people working downwind of the shear operator. That, "consideration" has limited it to just that area.

Now, do you -- are personal protective devices used at your mine?

MR. STEVENSON: No.

MR. NICHOLS: Okay. They are used at other mines out here on a voluntary basis. And from time to time we've been asked to consider those as an engineering control. We have never done that. And we'll continue not to do that in all areas of a mine except where we believe engineering controls have been exhausted. And this is a stiff test based on our experience with controlling dust for the people working farthest downwind.

MR. STEVENSON: Let me ask you a question. What happens if the miners don't agree with that, that all engineering controls haven't been exhausted? What avenue do they have. Because if there's no rule and they say they're gone and we've got no -- and they're not under citation, where does that leave us?

MR. NICHOLS: Your consideration will be factored in with the decision.

MR. STEVENSON: We don't want it factored in, Marvin. We want it in black and white where if they're not using engineering controls to their full extent or even adding new ones, water infusion, slowing drum rotation. Has the agency ever forced an operator to use water infusion in the face? I don't think so.

Have they ever told them they have to slow down

drum rotation? I don't think so. Might have suggested it.

So the way they cut the longwall, figure 8 or cut one way the other. These might have all been suggested. But have they ever told an operator you try this before you use airstream helmets? I don't think so.

And it won't happen because it's going to be discretion either on the inspector that's onsite.

MR. NICHOLS: No, it won't. I mean that will be part of the process. The way we've structured this is that the only person that can give interim approval for the use of this personal protective equipment in this one area of the mine, that decision will be made by the Administrator for Coal Mine Safety and Health with input from our own technical people, our inspectors, the miners, anybody that has an opinion on this.

MR. STEVENSON: But when does it stop? There's no abatement period.

MR. NICHOLS: Do what?

MR. STEVENSON: When does it stop?

MR. NICHOLS: When a new -- When if we make a decision that all engineering controls have been exhausted and allow the use of an airstream helmet that stops when a new control is available to engineer away the problem.

MR. STEVENSON: You know, we just went through a dust survey at Trail Mountain by Energy West and a couple of our guys participated. And they'll know a lot more about that than me. But at the protocol meeting Energy West`s position was they had used all the engineering controls that they could do, they have done everything the knew. Bottom line was they wanted to use airstream helmets.

When MSHA come in there with tech support and stuff, in their main intakes they have from 5/10ths to 1.1 before the air was even going into the section. I mean so they were half out of compliance between the air even turned the corner.

And the statements that Mr. Tatton made, and I'm sure this is going to be the position of the entire industry, they don't only want to use airstream helmets on the longwalls, they want you to put them all when you get int your car in the morning to go to work until you get home that night.

MR. NICHOLS: Well, this rule doesn't even address any consideration for that.

MR. STEVENSON: Well, but that's where it's going, Marvin. This is the foot in the door. A foot in the door to eliminate engineering controls and environmental controls

and replace them with respiratory devices and administrative controls, running guys in and out of there for 10 minutes. You can get up for this long and get out of there so you don't get overexposed. I mean it's a foot in the door. And it's going to be a domino effect. Yeah, I can even see coal out there who's sabotaging their own engineering controls so they can use airstream helmets. I mean it makes life easy for them.

The law already says that if they're out of compliance they have to have respiratory equipment available for miners that works and its approved. I think we just heard a guy said that they don't have them or they allow miners to modify it. The technology is not there.

I think the technology is a lot closer on continuous monitoring than it is on an airstream helmet that the mine can wear where he can communicate with his fellow workers, where he can see, where it's not -- where it doesn't weight 10 pounds where he can move around. I mean if we're talking about a technology we're just as close with continuous monitors as we are with airstreams.

The first airstream they come up with was a motorcycle helmet with a shield on it. You had to tape your light on it. From that it evolved into this mammoth deal.

And like I say, I think there's only one that's approved now. But they don't remain in approved condition once the guys start wearing them because they can't wear them, they can't see.

MR. NICHOLS: George, you had a?

MR. NIEWIADOMSKI: I think you asked the question. You, what I was curious of if in fact Racals were being used or PAPRs were being used at your mine. You said they were not. I was curious at public mines that they're being used why aren't miners using those devices?

MR. STEVENSON: You know, I think when I say they're not being used at my mine, my mine's not in operation anymore. We used airstreams when the first ones come out back in the late '70s/early '80s. I think miners wear them now for protection. And if they're used right, they do have some protection. But they can't be -- they can't take the place of engineering controls.

MR. NICHOLS: Well, there's not a single mine operator today getting any credit for the use of airstream helmets as it relates to engineering controls.

MR. STEVENSON: But it's going to be, Marvin. Because if you've got a 2 milligram standard on a longwall now and it can be boosted up to 4 and guys can stand there

and mine coal with an airstream helmet that's an engineering control. Because there's -- if they're not under citation there's no way to abate, I mean they can mine forever.

MR. NICHOLS: Well, first of all, they're not going to get it if there's an engineering control that can be applied to the longwall. Are you saying that, are you saying that there's no place -- are you saying that all overexposures for people working downwind of the shear operator can be handled by engineering controls?

MR. STEVENSON: I'm not saying that. What I'm saying is -- and there's been times in our minds where we've used airstream helmets when they've got out of compliance. What I'm saying is the way this rule is written that in effect your going to end engineering controls and you're going to end environmental controls because the coal operators are going to -- all they've got to do is make a phonecall, you go in there and verify they're out of compliance and, bingo, they've got airstream helmets and administrative controls.

That's what we're -- we're not against airstreams and having protections for the miners as long as they're approved and they work and they're maintained in an operating condition. That's not going to happen. I mean

what's -- the next thing I see coming down the road is if we ever get any regulations on diesel emissions, which, God, I hope we do, what are we going to do then when they say that they can't control the emissions at the exhaust, what, are you going to put a gas mask over the top of the airstream and that's going to be okay?

MR. NICHOLS: Well, that's a separate rule. I don't think you can read this rule and make the statements as broad as you're making them there because we --

MR. STEVENSON: Oh, I can because I mean I've seen --

MR. NICHOLS: -- we've carefully structured this rule to where the only place you get consideration is those places where we think there could be a problem with engineering out the overexposure. What we're trying to get away from, what we're trying to do is recognize maybe some reality here and not get in a situation with these miners working downwind where they go through this sampling scheme that we've talked about here today where you've got two miners overexposed, three underexposed and then you average out and nobody's overexposed. As to where we keep making this argument about engineering controls but we keep sampling it until we find people in compliance so we can

satisfy ourselves that there's no problem.

I don't think that in reality I don't think that's the case. I think that in some cases where we're calling compliance we still have miners overexposed to 2 milligrams.

MR. STEVENSON: And I may agree with that. What I'm saying is if you're going to let them use airstream helmets put them under citation and give us recourse to make sure the engineering controls are there. If it's got to be for a short period of time, so be it. But once this, once they get the right to use airstreams and once they get the right to use administrative controls, forget about it, you're not going to have any engineering controls because they're not going to take care of them.

MR. NICHOLS: So you're saying issue a citation and extend it until -- issue a citation, allow the airstream helmet, but extend the citation until the period of time a new control becomes available? Is that what you're saying?

MR. STEVENSON: No, fix the controls they had that they were in compliance before they needed to come to you for the airstream.

MR. NICHOLS: No, that's where we're miscommunicating here. They're not going to use the airstream helmet if they've had controls in place to control

the dust. That's a non-starter. I mean, people are not going to be able to stay I want to use this and not engineering controls. I think we're clear on that in the rule.

MR. STEVENSON: And, see, I don't because all it says is, what is it, 70, wherever it starts, 70.2 up to 70.216 is it lays out what they have to do. You know, you've got verify your plan, da-da-da-da-da. They do all this stuff and still at the end they say they can't stay in compliance. And you agree with that. Once the airstreams, you start using airstreams and administrative controls there's no abatement period. I mean they could stay out of compliance for two years in one longwall section. Is that right or wrong? And there's nothing to say that -- there's nothing to say the agency can go in there and say, Try water. We want you to try water infusion and all those other dust controls that have been available for years.

MR. SCHELL: But, Jim, we'd never allow, under this proposal we'd never allow them to even go to the airstream helmets until they had tried that if we think that's a feasible thing to try.

MR. STEVENSON: But you can't make them do it. I mean there were recommendations made in Trail Mountain

survey that and they just said, forget about it, we ain't doing it. We've got all the controls in place that we have. We're experts at this. We've been doing it for years.

And I'm not singling out Energy West. Every coal operator is like that.

We know it all, we've tried it all, and we need airstream helmets.

MR. SCHELL: Well, if they disagree with us they're not going to get approval to use.

MR. STEVENSON: It doesn't say that in the rule.

MR. NICHOLS: Are they in compliance with the 2 milligram standard.

MR. STEVENSON: Is who in compliance?

MR. NICHOLS: Trail Mountain.

MR. STEVENSON: At times they are, yeah.

I mean let me ask you another question. You take an operation like 20 Mile. They mine a million tons a month. One month I think that's what it was approximately. Twelve, 14 thousand tons a shift. Are those longwalls in compliance? No way.

So they're the first ones that are going to say, well, just give us airstreams and we'll just keep mining like we've done.

MR. NICHOLS: Are you making that assumption based on an opinion or have you seen facts?

MR. STEVENSON: I'm making that assumption of talking to 190-some coal miners that worked at 20 mile mine because they called us because of safety concerns over there. I talked to these guys.

One guy was tickled pink, even though he couldn't see his hand in front of his face on the longwall, he was tickled pink because the operator always changed his filter and shined his airstream helmet, he thought he was protected.

And what happens to the dust? You know, it's not only the dust that gets in your longs, what happens to the exposure factor? That goes up greatly with increased dust. What do you do with that? You increase the velocities on the face to get rid of the dust? The adequacy of the airstream helmet goes down. I mean that's a known fact, any time you increase the velocities it, you know, I mean that's, that's the way it is. The lower velocities the better it works. As long as you're looking right in the face of the air. If you turn your head one way or the other, this and that, they're not as effective, Marvin.

MR. NICHOLS: I know. The rule recognizes that.

I mean we cut the protection factor from 25 down to 2. The manufacturer would say this device will protect up to 50 milligrams. We say, no, we'll consider it for up to 4 milligrams.

MR. STEVENSON: Yeah.

MR. NICHOLS: Do we have the -- do we have data on Trail Mountain, sampling data here with us?

MR. NIEWIADOMSKI: I don't have it right here but I can get it.

MR. STEVENSON: You know, I just think it's, you know, once you open the door to airstream helmets and administrative controls and to control dust I mean you can forget about it because you're going to see an epidemic again in Black Lung. I mean it's -- here you're condemning miners to an ugly death.

I watched my dad die from Black Lung. It's not a pretty site.

MR. SCHELL: Jim, what we were trying to do in this rule, and you touched on it, and just bear with me for a minute.

MR. STEVENSON: Sure.

MR. SCHELL: Let's take a longwall where they've done everything they can. Remember, we're going to require

them to be at 2 milligrams at the 044 under this rule. So that shear operator has to be in compliance. But rather than arguing with me about whether they've done all engineering controls just bear with me a minute.

Let's say they have done all engineering controls. What our concern is, like Marvin said, we kid ourselves and we sample till they come in compliance and then we walk away. And what happens is just what you said, is when we walk away you've got miners still going downwind and being overexposed. And that's what was bothering us that we were living this big lie that we were protecting these miners downwind.

Now, we absolutely agree with you and one of our concerns was just what you've stated, how do we make certain that all engineering controls are implemented and that we continue to develop engineering controls, because we want to be right where you are. Every feasible engineering control ought to be put on that longwall. But if we've done every feasible engineering control, they're still producing dust, we're not raising the standards. Those miners are already being overexposed.

So that we were trying to find some way to say let's stop pretending everybody is protected and let's go

down and protect them. And the two solutions we came up with were administrative controls and Racals. Because if you're in a Racal you shouldn't be in 4 milligrams of dust. Okay.

MR. STEVENSON: Okay.

MR. SCHELL: If that is being used your exposure should be less.

But we, we're struggling with the same thing you are, we don't want them substituted for engineering controls. And that's the point we're trying to make. And that's why we said only Marvin Nichols or the administrator will be allowed to do this. But we've got to recognize if you exhaust everything you just can't pretend everything is okay. How are you going to protect the guys that you know might be exposed?

MR. STEVENSON: And isn't that already in the law that if they're out of compliance they have to have them respiratory devices available? And they don't.

MR. NICHOLS: Yeah, it's in the law. But how do we -- what we usually do after we've included all engineering controls then we go to this creative sampling scheme that Ron walked you through this morning where if you keep sampling long enough and you keep averaging long enough

you'll find people in compliance. We don't want that.

MR. STEVENSON: And neither do we.

MR. SCHELL: And to some degree, Jim, you're right, it is in the law. What we wanted to do was put some parameters on how it would be used in the law. We didn't want every district manager to be able to say, Okay, go ahead and put respirators on. We didn't want people to be able to say you can put it on the entire longwall. So you're right, the law does recognize that if you can't -- if you're out of compliance you need to use respirators. And that's what we're proposing.

But what we're trying to do is to put some limits on where you can do that. Because, quite frankly, in our own mind, and I'd disagree with Randy Tatton a little bit, we don't understand why you can't control the 044.

MR. STEVENSON: And, you know, and using the airstreams to protect guys for a short period of time, we've supported that at times. But my main point is, and I guess we're going to have to agree to disagree on this, is once an operator gets the right to use Racals, airstreams, administrative controls, in lieu of engineering controls and keep researching and developing it to improve them, that's not going to happen.

MR. NIEWIADOMSKI: Let me clarify something, Ron.

Once we've made a decision the one thing that you need to recognize, I'm sure everyone does, is that that decision is going to be made when in fact we're going to be sampling under what we consider more representative production conditions that currently happens. Now, they're out of compliance right now based on samples that everybody agrees are non-representative. Can you imagine, okay, now we're going to say, all right, you better design a plan to reflect to be able to control dust under more typical production conditions. We're saying we're going to get to the situation where this longwall that's capable, normally produces 15,000 tons per shift and where we're sampling we're lucky to get ten, we want to be able to have the plan designed under 15,000.

So what we're saying is if they're having a difficult time controlling at 10,000, I can imagine what's going to happen at 15,000. And so the decision that's going to be made is, well, what do we do? Well, there's one option. We cut back on production. That's an alternative; right?

MR. STEVENSON: Uh-huh.

MR. NIEWIADOMSKI: But that's not a realistic one.

Okay. And so we're saying we're going to do that. All right? We're going to look at that. We're going to get it to a point where, gee, you know, we don't want to. For the past 20 years, and of course Energy West will attest to that, they've come to MSHA and say, MSHA, you're failing to ignore this new technology. And we're saying -- this mini-environmental control. And we've always said, that's a respirator, okay. The respirator will not be used as a substitute, okay. To supplement, yes. Okay. We haven't got to that decision. And only when they've exhausted all feasible engineering controls.

Let's assume we get to that situation. And one thing that you also need to know is that every aspect of the plan verification process, all documentations are to be posted on the bulletin board so you need to -- so the miner has an idea here's an operator comes in and says, I've used all engineering controls. You guys may disagree. And you guys will come to MSHA and say, we don't agree with that.

Well, let's assume this body of experts makes that determination, says this longwall in order for it to continue to produce 15 or 20 thousand tons per shift, you know, they've got to control through environmental controls at the 044, and we're going to use respirators. Every six

months as part of the six month review we're going to be looking at the performance. We're going to be looking at are there any new technologies? Are they implementing it? And, in fact, if we find that they're failing to comply with those provisions we will revoke their permission to use respiratory protection.

So we've got that billed that it's not like once we approve it that's it. So we have some checks and balances in there. So, you know, don't think we're doing it. We're concerned. We've made very clear that we advocate primacy of engineering controls. We are controlling the environment. We know if we control the environment it doesn't matter where you go, here or there, you're going to be protected. That's the intent of the law and that's what we want to achieve.

MR. STEVENSON: And I think that's what we all want to achieve. But I'll say again, once they get their foot in the door this is going to be the norm for the industry. Where the miners' reps have no say. I mean it's just ridiculous. I mean there's no -- it's going to be a flood.

And then one more thing I'll say and then I'll get off is something you said, Marvin, about budget constraints.

And if this plan goes back chances are we're not going to get anything done, I'll tell you what, I think that is a slap in the face because we've been trying to deal with this for 8 or 10 years and now you're telling us that if we don't accept this plan --

MR. NICHOLS: No.

MR. STEVENSON: -- that there ain't going to be a plan?

MR. NICHOLS: No.

MR. STEVENSON: That's blackmail.

MR. NICHOLS: No. I'm telling you there's a reality out there. I'm not telling you --

MR. STEVENSON: And we've been saying there's a reality out there for years, Marvin. Let's take care of the problem. And everybody has just ignored it.

I mean, what did it cost to put that Federal Dust Advisory Committee together? I mean there were expert people on there come up with some excellent recommendations. And they were completely ignored.

Where was the money put into the dust monitors? I mean 20 years ago the dust monitors were starting to come around. We've seen no pressure from MSHA to use them. We don't see any pressure from MSHA to use them now. If the

operators want to. Give me a break. They ain't going to do it. I mean that's just a simple fact.

I mean ask the guys that work in the mines. A lot of coal operators in here, the only ones you see any coal miners are from represented mines. You ain't going to see any coal miners from 20 Mile or West Elk or anyplace else coming in here and telling you exactly what's going on in their mind. And you won't. As a matter of fact, a fellow at Willow Creek complained about what was going on there and they fired him. He called us. We got him his job back under 105(c) discrimination.

I mean so it's not a level playing field out there. One way to level that up as far as dust is continuous monitoring. But it's my opinion, and I strongly believe that once the floodgates are open on airstreams as administrative controls you're going to see engineering controls go out the window. And I don't see MSHA having any say in forcing an operator to do anything more than he's already doing. Once they say their experts and their engineers and all these consultants that come in say this is as much as we can do, even if you have better ideas you can't force them to do it.

MR. NICHOLS: Well, I disagree with you there. I

totally disagree.

MR. STEVENSON: And they're not under citation, how can you force them to do anything?

MR. NICHOLS: Well, they've got to have a plan to operate these. We have control over these plans.

Now, I'm not trying to tell you what to do. I wouldn't even start to do that. What I am telling you about resources and this rule is that MSHA has the resources to do what we stated here. It's taken about -- it's taken three years to get 90 additional people to go to bimonthly sampling. I'm telling you from my own experience to go back and rewrite this rule from scratch that you're not talking about a few days, you're talking about some good amount of time. You'll have to decide whether somebody might say "That's a good idea, we'll do it." or somebody might say, "No, thank you."

Let's say somebody says, "That's a good idea," and then you get everything you want in these rules, all I'm pointing is that by just a rough calculation for coal to -- Coal Mine Safety and Health to enforce these rules, to substitute MSHA sampling sample for sample with operator sampling, you're looking at needing another 200, a ballpark figure of another 200 Coal Mine Safety and Health inspectors

plus probably $20 million for salaries and related equipment.

Congress may say that's a great idea and they may or may not. But I'm not trying -- I didn't say that to try to influence where you come out on these rules. I'm just saying it's not as easy to say, okay, MSHA's going to take over operator sampling and have the resources and the law to do it with.

MR. STEVENSON: Well, what I think I would say to that rather than --

MR. NICHOLS: But you said it was a slap in your face.

MR. STEVENSON: Oh, and it was.

MR. NICHOLS: What I'm trying to do is give you a picture of what the real world looks like.

MR. STEVENSON: I know what the real world looks like.

MR. NICHOLS: Well.

MR. STEVENSON: And I know what the real world is going to look like if this thing goes through. You're going to have tens of thousands of more new cases of Black Lung. It's as simple as that.

MR. NICHOLS: We've got -- You're just, Jim,

you're not, you're not doing a fair characterization of the rule. First of all, there's about 55 longwalls. You're talking about hundreds of plans. There's 55 longwalls in this country. There's about 850 to 900 mechanized mining units which we've said that this consideration for airstream helmets that's not even on the table. For all miners on these 55 longwalls that's not on the table. The only thing that's on the table is a section of this longwall where we're not convinced that miners are still not being overexposed to the 2 milligram standard after we've exhausted all engineering controls.

Now, this is the only rule that MSHA has that would require -- I believe I'm correct on this -- the Administrator's approval. To open the door for airstream helmets if we'd wanted to do that we would have left the approval at the field level. We'd a let district managers, inspectors, the field people make these determinations. We didn't want to do that.

Is there another rule that requires the Administrator's approval? No.

MR. STEVENSON: Isn't the inspector onsite or the district manager going to have most of the input in what he tells you at MSHA?

MR. NICHOLS: He'll have input just like your -- just like miners and health and safety committees and tech support, anybody else that has an opinion will all be factored into the decision making. I'm not going to approve the use of engineering -- or airstream or personal protective equipment if there's some scream up there by any party that, no, there's an engineering control that will take care of this problem. That will be factored into the decision as long as I'm the Administrator, and whoever else is the Administrator.

MR. STEVENSON: Well, I just don't see it happening like that. Like I say, I think that they'll be beating your door down to get airstream helmets and administrative controls and engineering controls are going to stop, there won't be any new ones developed.

MR. NIEWIADOMSKI: They've been trying to do that. And I'm not trying to get under. They've been trying to do that for over 20 years and we've resisted it. And that's different --

MR. STEVENSON: Until now.

MR. NIEWIADOMSKI: And that's for different administrations, okay. To different administrations we've resisted it. And we will continue to resist it until it's

demonstrated to our satisfaction by way of the inspector, technical personnel, even on mine, onsite visits that in fact, yes, there is nothing else to do except for what I said is, you know, cut back on production or something else.

MR. STEVENSON: Well, you know, when you talk about different administrations you know I think you're shortly the way it sounds, and I hope not, but we're going to be going back to the Reagan-Bush area. And --

MR. NICHOLS: But if it relates to this point, wait a minute.

MR. STEVENSON: -- forget about it. I mean everybody knows what happened during them 12 years.

MR. NICHOLS: As it relates to this point I have worked for MSHA since 1971, I've been in the headquarters group since 1983. We've been through a number of changes in administrations. But never has the agency varied on the fact that personal protective equipment or airstream helmets are engineering controls. That's never changed. We're not changing here. What we're doing is recognizing a situation that may exist that miners are still overexposed to dust after we go through this creative sampling here and get to the point.

The other thing you mentioned is that MSHA does

not taking sampling serious. We take sampling serious but we think something even more important than sampling is good plans that work, that MSHA understands, that the mine operator understands, that the miner understands, that the health and safety committee understands that can be checked on a daily basis before the start of the shift for all the parameters to be in place. We think that's how you get compliance on a day to day basis, compliance for every I think Ron mentioned 450 shifts. Not that we've got plans that where it would be legally okay to sample at 50 percent of production and more controls in place on the day we sample.

I mean is sampling six times a year for something you trust better than many more times a shift for something you can't trust? Does that make any sense?

MR. STEVENSON: Well, you know, I don't think I said it I didn't think MSHA didn't take it serious, I said it curtailed the samples.

MR. NICHOLS: Well, I believe that's what you said. I believe you said we didn't take it seriously.

MR. STEVENSON: And eliminating all those operator samples I think definitely hurts because, you know, six samples a year and then one outby. And we're going to have

some guys talking about this outby stuff. But like I said, it's my opinion and I think it's a fact that once this happens it's over for coal miners.

MR. NICHOLS: You think keeping operator sampling is important given the fact that the case has been made especially over the ten years that many samples are collected illegally, those that don't sample illegally take advantage of absolute best conditions for the sample? You think --

MR. STEVENSON: Well, what the Advisory Committee recommended is that you take over operator sampling, not do it the same way they did it. I mean, what would be the sense of that?

MR. NICHOLS: But are you talking MSHA taking over sample for sample?

MR. STEVENSON: Absolutely. Not curtailing down to six.

MR. KOGUT: You left, I think you left an impression that the for purposes of abatement sampling only that under the proposal the sampling would go beyond an 8 hour shift if there's more than 8 hours work. And I think you left the impression that under the proposal that samples greater than 8 hours would take place only on abatement

sampling.

MR. STEVENSON: That's the way I understand it.

MR. KOGUT: Under the proposal that would also be true for verification sampling.

MR. NICHOLS: Thanks, Jim.

MR. STEVENSON: Thank you.

MR. NICHOLS: Okay, the next presenter will be Camron Montgomery, UMWA.

Time got away from me. How about if we break for lunch until 1:00 o'clock and Camron will be on first after lunch.

(Whereupon, at 12:05 p.m., the hearing was recessed, to reconvene this same day at 1:00 p.m.)

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A F T E R N O O N S E S S I O N

(1:05 P.M.)

MR. NICHOLS: Okay, let's get started back. Is Camron Montgomery here?

MR. MONTGOMERY: Yes.

MR. NICHOLS: Okay, let's see if that time-out affected your stuff.

Yeah, go ahead.

MR. REYNOLDS: I just wanted to mention before we got started that when we originally published the notices about the hearing we had planned to have two different hearings on the two different proposals. And because of the fact that that hasn't worked we're conducting the hearing that's running the whole day on both proposals.

So I just wanted to mention if there is anybody here in the audience that thought there was going to be another hearing starting at 1:00 p.m., the hearing has been running all morning. And I don't believe there's anybody here that wasn't here this morning but if there is you need to go back and sign up to speak with Pam King if you want to get on the speakers list.

Thank you.

MR. NICHOLS: Let me say one other thing. We

received some comments that we're not, we're not up here hearing the presenters' comments, that we're locked in on this reg. Let me assure that's not the case. This is the third hearing we've had. We've had in excess of 100 miners testify. We've given everybody that wants to a chance to present testimony. We've had a lot of good comments during these three hearings that deserve a lot of consideration. But we feel compelled if we hear something that's not a fair characterization of what we're trying to do in the rule or that's something that needs further explanation or further education we feel compelled to do that.

So go ahead.

STATEMENT OF CAMRON MONTGOMERY, UNITED MINE WORKERS OF AMERICA

MR. MONTGOMERY: Well, I'll be honest and upfront. You guys probably aren't going to enjoy what I'm going to tell you, my opinion, what I've got on this new proposed reg. And I've kind of talked to people cross-sectionally through here. And the mining industry doesn't understand it as a whole right now.

Being fair to you guys, it's brand new and everyone hasn't read it and been able to dissect it and figure it out yet.

But my name's Camron Montgomery. I've worked in three of Utah's underground coal mines for the past 22 years. I'm currently employed for Energy West Mining. I worked at Trail Mountain Coal Mine. I'm classified as U4D longwall propman. I'm the current vice president, safety committee chairman for UMWA Local 2176 at Trail Mountain Mine. And I've been a miner's rep as defined under Section 103 of the Act for about the last 12 years. And I'd like to thank this panel for the opportunity of commenting at this public hearing.

So just from a little historical data talking to the people out here in safety and engineering from the mines around the west I've got a kind of consensus that most of the experienced mine health and safety people in the room do not entirely, completely understand or agree with this new entire -- or with the entire new proposed rule. Because I'm feeling a little bit inferior myself because I do not completely understand all of this myself. So I'm keeping my comments to the parts that I think I understand.

So we've established that the proposed rule is complicated and not altogether understood by the mining community, the same people that have to understand, establish, enforce it and teach it to the miners at all of

the respective operations.

Coal miners' exposure to unhealthy levels of coal dust leads to the disabling and life-shortening disease pneumoconiosis, Black Lung. This disease has crippled and killed tens of thousands of miners of this nation's coal miners over the years. According to studies done by NIOSH between 1987 to 1996 alone at least 18,245 deaths among this nation's coal miners occurred from Black Lung disease. That means that roughly about one of this nation's coal miners dies ever six hours from Black Lung disease.

And if you're one of this nation's coal miners that files for federal Black Lung compensation, don't hold your breath, what little breath you have left, because 93 percent of all Black Lung cases are denied and rejected.

In may of this year I had the rare opportunity of attending a healthcare rally at the nation's capital sponsored by the United Mine Workers of America. There were approximately 12,000 active and retired coal miners present. I was one of 17 people from the west that got to attend. We're fighting for a good cause I felt like, it was retiree, basically old coal miners' health benefits. The event seemed to be a success. The weather was beautiful. It was about 80 degrees at about 75 percent humidity. The grass

was green and all the different trees and flowers were in bloom all on the front steps of the Capitol. Quite a sight for a guy from southeaster Utah.

The only thing that stood out and seemed out of place was the steady, constant stream of ambulances that arrived and departed hauling off older retired coal miners that had succumbed to the heat and humidity as the day grew longer and hotter. I've not heard nor seen that many ambulances in Price, Utah, in the two years that I've lived in my house. My house is about three blocks away from the local hospital. The local hospital's the only hospital for miles around. And I remember myself sitting there looking at this underneath a beautiful magnolia tree, which we don't have in Utah, thinking to myself, wondering how many of these older retired miners occupying these ambulances had problems that day because of Black Lung disease.

On January 31, 1995 the Secretary of Labor established and advisory committee to advise on the topic of eliminating pneumoconiosis in coal mine workers. The committee was chartered to make recommendation for improving the program to control respirable dust in underground and surface coal mines in this country. It was paid for by the hard working American taxpayers in this country.

In 1996 the Advisory Committee handed down its recommendation. And it appears that MSHA through this new proposed rule cheated the hard working American taxpayer because MSHA didn't listen to a lot or most of the recommendations by the Advisory Committee. And I'll get into a little detail later.

In 1969 and amended in '77 the Federal Mine Health and Safety Act was made public law. At the top of the first page under "findings and purpose" the very first line stated, "Congress declares that the first priority concern of all in the coal or other mining industry must be the health and safety of its most precious resource, the miner." So, in my opinion anything that diminishes the safety of the miners is in direct violation or contradiction of the Act.

The new proposed rule diminishes the safety of the miners and, therefore, in my opinion is in violation of the Act. The first line in the Act, Section 202(a) through (h) of the Act detailed the dust standard and respiratory equipment. The new proposed rule rapes, plunders and buries Section 202 of the Act.

The details. MSHA's proposals ignore longstanding demands by miners and the UMWA on reforms needed to fix the troubled dust sampling program. The proposed rule ignored

findings and recommendations by the '96 Advisory Committee. The Advisory Committee called for lowering dust levels. MSHA's proposal increases them.

The Advisory Committee called for increased compliance sampling. The MSHA proposal substantially decreases them.

The Advisory Committee called for an effective takeover of the mine operator compliance dust sampling program. The MSHA proposal eliminates the operator compliance sampling altogether. Now, this might make a few mine operators and safety engineers happy, but I don't think it's in the best interest of my health and safety.

The Advisory Committee called for expansion of miners' and their representatives' involvement in the respirable dust program paid for by the operator, Section 103(f) of the Act. The MSHA proposal contains no rules for increased miner participation.

The Advisory Committee asked for use of continuous dust monitors. The MSHA proposal contains no rules requiring them.

Whatever happened to the black box? Rumor has it the program run out of money. And I'm just guessing nobody cares enough to fund that program.

The Advisory Committee called for miners to be sampled full shift. The MSHA proposal excludes that from most of the compliance sampling.

The Advisory Committee called for environmental controls, water and air, to continue to be the method to control coal mine dust to not be replaced by respiratory devices, Section 202(h) of the Act. We call them administrative controls at Trail Mountain Mine. The MSHA proposals allows respiratory devices, administrative controls, to replace environmental controls while increasing dust levels, a direct contradiction of the first page, first sentence of the Act.

The new proposed rule eliminates entire compliance sampling requirements in Parts 70 and 90 without any replacement rules for compliance sampling.

The proposed rule dramatically reduces the frequency of shift sampling for compliance. I think Jim Stevenson mentioned right around 83 percent reduction.

The proposed rule increases the dust exposure levels above those prescribed in the Act.

The proposed rule would allow and encourage mine operators to double the 2MGM3 standard on longwall faces to potential 4MGM3.

The proposed rule allows the Part 90 miner in outby intake samples to achieve elevated levels, levels higher than the current standard.

The proposed rule would permit mine operators to replace engineering controls with administrative controls, respiratory protection on longwalls, which is prohibited by the Act, Section 202(h).

The proposed rule is very vague on enforcement and it appears to take the teeth out of enforcement.

The proposed rule has no rule to require any kind of dust monitoring.

The proposed rule takes away the legal rights of miner representatives. The old rule gave miner reps a legal mechanism to resolve and solve dust problems.

The propose rule reduced much of what is law or rule to MSHA policy. In 1984 a Utah coal mine had an impeded, blocked bleeder entry off of the longwall tailgate. The law said the bleeder entry had to remain open and passable. MSHA policy allowed this longwall to operate and run coal. Later a mine fire somehow started and all the miners in the affected area got robbed of one of their alternative escapeways, the tailgate bleeder entry on the longwall.

The new proposed rule is overly complicated and vague and is not user friendly. It will be misunderstood by the people that use it and enforce it. And in my opinion if this nation's going to power its cities, industry using clean, cost-efficient productive coal fired steam generated powerhouses then it needed to fess up to the responsibility of taking care of its coal miners, the miners that extract the coal from its natural deposit, the coal that fires the generator, the generator that produces the power, the power that's available to every American that can flip the light switch and plug in a cord. This nation needs to know and understand that behind every light switch is a coal miner and every coal miner deserves a healthy place to work.

In conclusion, it appears that MSHA has exercised some disregard for the health and safety of this nation's coal miners by promulgating this new proposal. MSHA didn't have to reinvent the wheel with this new proposed rule, they just needed to polish it, balance it, tweak it a little to improve it. Instead it's turned out into a case of the bad outweighing the good. Therefore, I highly recommend that MSHA scrap, vacate and rescind this new proposal and go back to the drawing board, start over, stay within the realm and confines of the Federal Mine Safety and Health Act, follow

the Federal Advisory Committee's recommendation and don't ever come here diminishing the safety of this nation's coal miners.

And I had a couple things I wrote down through the course of this today I wanted to say. Directly to you, Marvin, you stated earlier that it would cost approximately, what, $20 million for about 100 or was it 200?

MR. NICHOLS: A couple hundred.

MR. MONTGOMERY: A couple hundred. And that's just an approximation in your opinion to start this rule over.

MR. NICHOLS: No. To -- If we adopted MSHA sampling one for one with the operating sampling.

MR. MONTGOMERY: Oh, okay.

MR. NICHOLS: If we replaced operating sampling with MSHA sampling one for one.

MR. MONTGOMERY: Well, you mentioned the word "reality." Well, here's a little reality: how many miners have to die of Black Lung disease to justify you, MSHA, to spend the money that it takes and needs to fix up this proposed rule? I haven't heard one coal mine operator or anyone say that they've agreed overall with much of what you've had to say. Otherwise the overall proposal although

it might have a good element here and there, the overall proposal is a wash.

And I wanted to mention to Paul Hewett, he asked a question on continuous dust monitoring. We've just went through a long, drawnout dust protocol survey at Trail Mountain Coal Mine. I'm a longwall propman. I'm a miner's rep. I helped through that whole six-month process. MSHA, the company, the union invested a lot of time and labor into it. And I thought to myself we were trying all these new engineering controls, and some of them worked and some of them didn't, and we were verifying them by samples. So we'd try an engineering control, sample it, trying to figure out if it actually helped or hurt us.

I think continuous dust monitoring would give us a real time readout of what exactly our engineering controls were doing right now, whether they're working or not.

Another advantage might be you asked a question it would be great, or I put it down you asked about the individual miner's exposure, and wouldn't it be great if on an individual miner's exposure you exercised some administrative controls if you knew by continuous sampling that the guy had exceeded the 2 mg standard over the course of his shift. He'd have the readout right there in front of

him telling him, you know, remove yourself to a less dusty environment for the rest of the shift. I mean that's an advantage to everyone in the industry.

And as far as your protection factor on the PAPRs, I got a kick out of this. NIOSH used a couple of weasel words, you know, to tie this up in litigation and lawyers for a long time, they used the word "estimated approximation" of the protection factor. Don't you guys come to me with estimates and approximations on my health. And I'll come with some real facts.

I'm a working stiff and in pairs we learn stuff. A guy come up and asked me what's our roof control plan say on excessive width with the pan? The company policy is you pole at 3 foot rib, the rib sloughs 2 foot you're still within your 5 foot width. It doesn't need any kind of additional roof support, conventional timber or a spot pole. I can take a tape measure and I can measure it and I can tell the guy it's okay.

With this rule I can't tell anything to anyone but what I think about it.

Any questions?

MR. NICHOLS: Well, your statement about continuous monitoring, that's where we all want to be. I

don't know if NIOSH wants to make any further comment on where we are with the technology.

MR. GRAYSON: As a matter of fact we will. I'm completely in with that particular set of projects.

Right now there were three different versions. One was the machine monitor which I think a lot of you have talked to as the black box.

Another is a personal dust monitor, continuous type, that would be worn by a miner. It's in two pieces for particular reasons that MSHA needs to prove the concept if you will.

And then there is another PDM of one single unit with only an inlet that would be used on say a lapel or a hat or wherever that works out best. And that one is sort of waiting in the wings.

Let me give you more details now. The PDM-2 which is currently being developed by the contractor, and this is a direct mass reading instrument. So, I mean that's good. I mean that's where we needed to be. It gets better calibration because of size, particle distributions, it gets rid of water droplets, things of this nature that were a problem before. So from the field work that had been done originally on the machine-mounted continuous monitor we have

seen two things. Number one, we saw that the variability of the instrument in reading dust measurements was not the same as the current sampling unit. So that's a good ray of hope.

Now, the bad downside of that, when it was mounted on equipment in one case where it was the conveyor setup it lasted I think it was about 20-some-odd days. When it was on anything that was more stringent with respect to vibration then it lasted less. In one case when water hit one of them it went out fairly quickly, like one shift. So there was obviously some ruggedness that was needed on that particular side of it.

What we felt as an agency was that -- and we actually did reach agreement with MSHA on this too -- was that it was going to be, the variability was controlled and it is direct reading so it was accurate, okay, we're getting the accuracy out of it that we needed as well, but it did definitely need the next step for an equipment manufacturer and this contractor to get together. And we needed something to sort of force that to happen to where they could get the bugs out on the regularization side of it, you know, take care of the vibration problem.

So, you know, that's where that one is sitting at this point in time. And we felt that that was the proper

way to go on that particular model.

We have since focused on the PDM-2 for the last year-and-a-half roughly. The PDM-2 version is due to be delivered around September. There's a little bit of slippage on the contractor's part. And we do try to hold them to the fire on this but they have problems as they try to develop this. So we're looking at maybe feasibly around November when they actually deliver it, it will be in our hands, and we can go out in the mines and test the PDM-2 which is the two-piece, it's a pretty good size unit here and another belt unit.

The field testing should tell us whether this is indeed going to be accurate and variabilities under control and also if it is rugged enough to withstand the rigors that the miners will put it to in the mine environment. If we get good positive answers to that NIOSH has now committed the next $300,000 that the contractor estimates that it will take to do the PDM-1. So it's not the full, big amounts like $2 million that was originally started off on the PDM-1 but some lesser amount to get the PDM-1. So that's good. That's really good news.

And if indeed the PDM-2 proves out then there is every hope that the PDM-1 will prove out as well. And

that's the version that the miners and the operators and everybody wants. That's the one that won't interfere with your work.

MR. MONTGOMERY: I have seen when it's all hooked to a cap, it's got a separate vacuum --

MR. GRAYSON: Yes.

MR. MONTGOMERY: -- tube coming up around your cap.

MR. GRAYSON: Yeah.

MR. MONTGOMERY: And vibration technology has come a long way due to these new noise standards. I looked really hard into vibration dampening gears, motors and stuff like that to reduce overall noise output.

MR. GRAYSON: And we are, we are considering at this point in time, just to throw this in too, if indeed the technology proves out on the personal dust monitor side then in a recent commitment we are also looking at the possibility of resurrecting the machine-mounted as soon as the technology can prove itself.

MR. MONTGOMERY: And I've just got a couple of items with PAPRs, power air-purifying respirators. Shoot, I wore one for about 12 years and I didn't know what a PAPR was. I thought it was a regular airstream. But I wore one

because I had a choice because Section 202(h) of the Act says that the mine operator will supply that stuff. I wore one by choice for 12 years.

It hasn't been till the last 6, 8, 9 months since we went through our dust protocol survey and it got listed as an administrative control in our plan that I've had to wear one. Everyone on the dang longwall that I work with wears one and it's always been by choice, for a couple of reasons, not just the respirator ability of it. We, you know, we have these localized seismic events, they could be microbursts to 2.1 on the Richter Scale bounces. If you get shotgun blasts by coal they're really good protection as far as your face, head, ears for that kind of stuff.

The ear protection is excellent on them. That might help us, you know, meet with some of the noise things. But one of the inherent problems with them is you forced the new hepa filter on us. The hepa filter is a better filter, no doubt in my mind. It reduces and filters smaller micron size particles but this things a first generation, 12, 13 year old piece of equipment. You've modified one end of it without modifying the whole thing.

The motor, I kept urging industry to increase the CFM output of the motor to compensate for the reduction of

airflow and velocity due to the hepa filter. The other big concern with additional weight, vibration and stuff because it's heavy anyway.

I noticed with the new hepa filters going through this dust protocol survey and using so many engineering controls, and we went through about 20 or 30 different kinds of spray configurations. You've got a lot of water, a lot of GPM per minute going down our wall. You get in all that moisture content and the relative humidity is so high coming in through the back of your fan that I believe the humidity actually helps kind of plug up the filter with dust in there, thusly reducing the amount of air flow. You get working real hard, the sweat, you fog up and visibility gets bad.

It hasn't been till about a month-and-a-half maybe two months ago that they finally come out with a little bit less restrictive of a pre-filter for the motor that's allowing a little more CFM to go through the motor. And it's helped out a little bit. But if you wear one, you get huffing and puffing working hard in one and it's pretty tough conditions at times.

And like I say, I've always wore one because it's been my choice to wear one.

MR. HEWETT: Another direct reading instrument that NIOSH has developed actually is Bureau of Mines individuals that are now part of NIOSH developed this is a simpler instrument, I don't know if you've seen it or not, but it is currently being developed by a manufacturer for sale that gives you a fairly accurate readout of respirable dust exposure. A very small, compact unit.

MR. MONTGOMERY: Right.

MR. HEWETT: It's not the type of device that you heard it being developed before, the machine-mounted unit. But that's available or will soon be. But for years other devices, direct reading instruments that could be used for assessing the efficacy of specific engineering controls or changes to your engineering controls they've been available for a long time.

There's respirable aerosol monitors, portable handheld devices that can give you that instant feedback as to whether or not this works or that works. Won't give you a compliance quality measurement but will tell you whether or not you've improved something on the longwall or elsewhere. So these devices have been around. And industrial hygienists working for companies are aware of these devices. So they're available now for your company to

buy for use in assessing efficacy of specific changes. You don't need NIOSH for that, that's been on the market for 20 years. So I just wanted to mention that.

MR. MONTGOMERY: All I'm saying is by the time you do a complete full shift sample of one engineering control with the dust pump the time and labor is so intense that by the time you go through 20, 30 different engineering controls -- and we had a RAD, rapid access readout monitor for dust. I don't think it does real good with aerosol mist in the humidity. Kind of seems to fool them off.

MR. HEWETT: You're right. I mean it has its problems.

MR. MONTGOMERY: And unless we actually used the pumps and tried to verify whether this worked, that worked. And I'll tell you what, it was labor intensive, time consuming. And I don't think MSHA enjoyed it. I don't think the UMWA employees enjoyed it. And I know my management probably didn't enjoy going through it.

MR. HEWETT: Well, the respirable aerosol monitors that we used are very small, compact devices, I'm not sure if it's exactly the same thing you're talking about. But regarding my query of the industry person earlier about how they would use continuous monitor data, I was curious about

that because I think there are differences of opinion of how these measurements will be utilized by miners and industry. So I was trying to get something from industry, get an idea of how they expected them to be used. Because every -- you're both for it. So right off the bat I have to wonder, well on what basis, because it could be very different reasons. And so I was just trying to get some clarification on that.

MR. MONTGOMERY: And that's the only reason I wrote down that question, Paul, was because of the question you asked one of the operators previously about the dust monitors.

MR. HEWETT: Thank you.

MR. NICHOLS: Okay.

MR. GRAYSON: Let me just have one more time because I'm concerned about the hepa filter, using this Racal or whichever one you're using for --

MR. MONTGOMERY: It's the only one approved. We've tried the Marcals. We did a study on them. We've got three guys that would just love you guys to approve it and give it to them. Mechanics just liked the thing. But it was a temporary approval. It doesn't have full-time approval for use underground. And so we got yanked of ours.

MR. GRAYSON: Yes, I just wanted to mention two things about that. We are trying to work on coming up with a fix to the current problem, meaning clogging up and the low air flow that has resulted. I'm not sure exactly how we can get it done but we are earnestly looking for a way to try and solve that problem with everybody.

MR. MONTGOMERY: Well, all I'm saying is that there's first generation technology out there. We're still using it. I mean I look the past 12, 15 years of computer technology, it's gone right through the roof. Where the heck is our regular airstream technology? We're using a dinosaur. You would think that with all the advances in new materials available from stuff you could build one lighter, better, all that stuff, but nobody's demanded it and nobody's funded it.

MR. GRAYSON: All right. And one final question or clarification. You were sort of indicating that the filter to the motor was changed and it helped a little bit. And you're saying now it takes maybe a certain activity level of the miner before you finally reach the point where it's actually fogging up? Is that an accurate statement or could you sort of explain to me how it helped?

MR. MONTGOMERY: The pre-filter, all pre-filters

are a white filter. It looks like cloth. They were very restricted. And all they do is basically get the big chunks out of the way for the fan motor so they don't eat the motor up going through it because they move through them at high speed. They've gone to a thing that looks like a piece of polyurethene foam now that's got very open pores in it like a sponge. And I think it tends to get the bigger stuff and maybe some of the smaller stuff goes through and the hepa filter gets it later.

But I have when we get in the high moisture areas, shield tip sprays, pan sprays, shear going by, high velocity air currents, moving the water from one location from the face to the walkway, you've got your head turned and you get a good blast it seems to, as well as the dust in the filter plugs up and the moisture seems to restrict them and help plug them up just a little quicker too.

MR. NICHOLS: Okay, thanks.

The next presenter will be Tom Klausing, UMWA.

STATEMENT OF TOM KLAUSING, UNITED MINE WORKERS OF AMERICA, LOCAL 2161

MR. TOM KLAUSING: Good afternoon.

MR. NICHOLS: Good afternoon.

MR. TOM KLAUSING: Thank you for the opportunity

to be able to speak to you. I'd like to read a letter that I sent to the Secretary of Labor that was also brought up at our local union meeting which will be explained in this letter that I will be reading, and to a motion and sent to the Secretary to Labor.

My name is Thomas Klausing, President of United Mine Workers Number 2161. I work at Old Ben Coal, Signal Mine Number 11, Coulterville, Illinois. Our mine employs approximately 200 men and women and is an underground mine.

On August 13 we had a local union meeting. We discussed the public hearing in Prestonsburg, Kentucky. A motion was made and unanimously passed to send the Secretary of Labor a letter telling how we feel about MSHA's proposed rules. In the motion it was also decided and unanimously passed to read this letter at the public hearing in Salt Lake City, Utah, August 16 and 17.

For the life of me I cannot understand why MSHA did not follow the Advisory's Committee recommendations. The Secretary of Labor established that committee to guide MSHA in developing proposed rules to reform the dust sampling program. The United Mine Workers, Local 2161 supports the Advisory Committee's recommendations. The representatives as well as several miners and Black Lung

victims across the country testified before the Federal Advisory Panel, laid out reform needs to overhaul the failed respirable dust program.

In September of 1995 NIOSH called out for reform in the coal mine dust program. The Federal Advisory Committee sent its official report to the Secretary of Labor on November 14, 1996, that would reform the coal mine dust program. There is no mention of takeover of the mine operator respirable dust compliance sampling required under Part 70 of the regs. That plan policy of MSHA provides no legal guarantee for miners that MSHA will continue to sample in specific locations in mines. There is no guarantee of funding for MSHA -- for the MSHA policy dust sampling.

The United Mine Workers and the Advisory Committee did not ask for an elimination of the operators' compliance sampling program. Instead of MSHA increasing compliance dust sampling in coal mines to protect miners, the proposed rule reduces the amount of sampling only to six per year. MSHA and the mine operators currently sampling mine sections about 36 samples a shift a year. Designated work areas, outby, the working section would only get one sample per year and are not guaranteed.

Under the current Rule in Parts 70 and 90 miners

can read the requirements for sampling. Those are gone. There would be no standards that the miner could rely on. United Mine Workers Local 2161 demands compliance. Sampling needs to be increased, not decreased, and put into law, not policy.

Despite the call to reduce exposure levels of respirable coal dust MSHA would increase respirable dust levels. Under MSHA's proposed rule, Part 70.213 allows mine operators to double dust concentrations up to 4 milligrams on longwall faces where approved by MSHA. It would also limit current legal rights the miners have under the law. With the proposed rule MSHA cannot double -- can double the 2 milligram standard and miners would have no legal recourse.

The Federal Advisory Committee issued a recommendation 15E that MSHA make no upward adjustment in the personal exposure level. Mine participation to help -- Miners' participation to help oversee the respirable dust sampling program lacks credibility. The Advisory Committee recommended 16, 6, 16A, 16 and 19A, B and C called for an increase in miners' participation in every phase of the respirable dust sampling verification and training program without loss of pay.

UMWA Local 2161 is demanding that MSHA go back to the tables and bring something that is in law that can be enforced and that we all can understand.

Despite the report -- That's the letter I sent to the Secretary of Labor. Now this is some other stuff I would to bring before you.

Despite the report of MSHA taking over the operators' compliance sampling, they don't. There is nothing in the proposed rule on the compliance sampling requirement. Those were eliminated. MSHA announced in the preamble that they would be doing all compliance sampling generally as the frequency they are now. Since it is not a rule and funding has not been guaranteed MSHA currently samples -- sampling is not legal, guaranteed and could be reduced.

Despite reference of increase in miners' participation there are none in the proposed rule. MSHA plans to recognize by policy miners' representation right to participate on an announced MSHA test visit to verify dust plans. The rule does not call for single full shift sampling that has been supported by the miners and the United Mine Workers. The proposal, however, is altered by MSHA's policy and other proposed rules reducing the benefits

for miners. Full shift sampling will only be taken only during abatement sampling.

Although there are discussions about continuous monitoring of dust there are no rules requiring continuous monitors. MSHA announced in the preamble the operators could test them if they want. The proposed rule contains a dust sample dust control plan verification that is complex. There are parts that are clearly need to be changed. The procedures allows increased dust concentration to a double and replaced engineering control and respiratory protection needs to be eliminated.

The Advisory Committee called for lower dust levels. MSHA's proposal increased it.

The Committee called for an increase in compliance sampling. MSHA's proposal substantially decreases it.

The Committee called for an effective MSHA takeover of mine operators' compliance dust sampling program. MSHA's proposal instead eliminates the operators' compliance sampling program.

The Committee called for a major expansion of miners' representation participation in the dust program paid by the operator. MSHA's proposal contains no rule for an increase of miners' participation and in some incidents

curtails it.

The Committee calls for the use of continuous dust monitoring. MSHA's proposed rules contains none.

The Committee calls for the miners to be sampled for a full shift. The MSHA proposal includes that most compliance sampling.

The Committee called for an environmental control to continue to be the method to control dust, coal mine dust and not to be replaced by respirable dust devices. The MSHA proposal allows respirable dust or respirable devices to replace environmental controls while increased.

I've just got a few questions now. On a full shift sampling Local 2161 is demanding that the company take a full shift. At our mine we work 10 hours. We change out at the face. We expect MSHA to be there taking the sample the same times whenever we leave out of there.

I got a question. When MSHA comes out after the company evaluates their plan verification and MSHA comes out and does their sampling, for instance, if it goes by production, the amount, are you going to take the highest amount of production that is made that day on day shift, second or third? Can anybody tell me how that's going to be done? Or is that going to be combined altogether? Or

exactly how is that going to work?

MR. SCHELL: Tom, I'm sorry, I'm not sure I understand your question yet.

MR. TOM KLAUSING: Well, let me kind of go through this here scenario that's going through my head. I work on a 3-shift mine. Work day, seconds and thirds. They produce coal on all three shifts. Most of the tonnage, high tonnage is done on seconds and thirds. That where most of the records are broke because due to other reasons, you've got MSHA out there and it slows them down or whatever, you know, according to them. And that's where the highest production is done.

Now, when they do their sampling it's all going to be on day shift. There's no doubt in my mind because neither company nor MSHA comes out either on seconds or thirds. Once in a while, you know, according to the law they have to, once during that quarter or regular.

I'm asking when they make that plan up, when they get their production report where are they going to be doing that sampling at or how are they going to be doing it? How are you going to total that up?

MR. SCHELL: This is for plan verification, Tom?

MR. TOM KLAUSING: Yeah.

MR. SCHELL: What we will do is we will take the last 30 days of production, irrespective of the shifts. The last 30 production shifts, I'm sorry. So we take the last 30 production shifts.

MR. TOM KLAUSING: Hold on a minute. Now that would be a total of all three shifts?

MR. SCHELL: No. We're going to look at, we're going to collect data on the last 30 production shifts. So we'll have 30 measurements. That will be 30 production shifts. Okay? So I'm going to array the last 30 production shifts from the highest to the lowest.

MR. TOM KLAUSING: Okay, I understand that. But I'm losing it here. I'm a little slow now. But what I'm saying is that on each shift, one, two and three, are you taking that high -- the total number on all three shifts of that day or are you taking one shift at a time?

MR. KOGUT: It would be individual shifts. But as you said, the high production in your mind is all during one of the three shifts that you take during a 24-hour period, then the top ten production shifts out of the last 30 are probably all going to come from that shift where you do the high production run; right?

MR. TOM KLAUSING: We'll say high particularly is

seconds. We'll say second shift is high, particularly the highest one.

MR. KOGUT: So then the ten highest out of that last 30, the ten highest are going to all come from that second shift; right?

MR. TOM KLAUSING: Yes.

MR. KOGUT: Right. So then the tenth highest production then would be from the second shift if all ten of them are from the second shift. And it would be at that production level that verification has to take place.

So I think the answer to your question is that it would be from the production at which plant would have to be verified would come from that second shift.

MR. TOM KLAUSING: Second shift. Okay.

MR. KOGUT: I want to also while I've got the mike --

MR. TOM KLAUSING: Yes.

MR. KOGUT: -- in my control just correct one thing you said earlier which is that under the proposal that we would be requiring sampling under an extended shift, in your case it would be a 10-hour shift, only during abatement sampling. And, as I mentioned earlier, that's not correct. Under the proposal we would require sampling to the full

extended shift under -- for verification sampling in addition to abatement sampling. So all the verification sampling would also be done for the full ten hours.

MR. TOM KLAUSING: The only way that could be done is through the ventilation plan. Not through the plan verification itself.

MR. SCHELL: No. When we verify we'll sample for ten hours. We'll sample three times. We'll sample to verify the plan at full shift. We're going to do the compliance sampling, the bimonthly sampling; that we're proposing eight hours. And the third is abatement sampling. That would be full shift.

MR. TOM KLAUSING: Okay, could somebody tell me where that is in the preamble?

MR. NIEWIADOMSKI: The definition section in the proposal, you know, which defines full shift concentration basically defines that for what full shift is. And it says that for verification it's going to be full shift including travel time. So it's in the rule also.

MR. KOGUT: It's in the definition section of the rule.

MR. TOM KLAUSING: Could you tell me where that is so I don't have to thumb through it again like --

MR. REYNOLDS: 42179.

MR. TOM KLAUSING: I don't have it memorized.

MR. REYNOLDS: 42179.

MR. TOM KLAUSING: 42179. I will look that up. Thank you.

But that still didn't get back to my -- I think you answered part of it. But on the other part of it when the inspector comes out and does the verification will he be on second shift to do that sampling or will he be on day shift to do the sampling?

MR. NIEWIADOMSKI: No, it doesn't matter what shift he's on that the operator is going to have to produce at or above the VPL. So it doesn't matter whether it's the first shift or if we go back second, he has to produce at the higher level or else the plan will not be verified.

So even though the production tenth highest comes mostly from the second shift, if we happen to verify on the first shift he's got to set the conditions to produce what he normally does during, you know, the high, during the second shift.

MR. TOM KLAUSING: So in other words you wouldn't ever be doing any sampling?

MR. NIEWIADOMSKI: No.

MR. TOM KLAUSING: Because, well, if second shift is the only one that's doing the high then if you're on day shift and day shift never meets that high then you're never doing any sampling.

MR. NIEWIADOMSKI: No, no. What we're basically saying we're telling to the operator, this is what it is, Mr. Operator, since we're going to be verifying this plan you have an opportunity to set those conditions that are going to be in place and to produce at or above the VPL. It doesn't matter whether or not that high production came always from the second shift, he's going to have to produce that on the first shift or else he's not going to get an approved plan.

If you're saying he's never going to be able to produce it on the first shift but he does it on the second shift what would prevent him from producing it also on the first shift?

MR. TOM KLAUSING: Well, to go back to you and answer, I'm going to have to add a little bit more than that. What is it that MSHA does -- or would come out on seconds and get the plan approved?

MR. NIEWIADOMSKI: Well, I mean MSHA will in fact they'll be verifying plans on off shifts also. It's not

limited to just the first shift. We'll be doing off shifts also. But the thing is this, the operator's on notice that for us to verify for him to have an approved plan we have to verify at or above the high production level.

MR. TOM KLAUSING: I can understand all that. But what I'm saying here, what I'm getting around here is that we'll say seconds and thirds, we agreed a while ago that hypothetically seconds is the one that's producing all the coal. And MSHA is only coming out on days. The only way they're going to get the plan approved MSHA would have to come out, the inspector would have to come out on seconds for a plan verification to get the plan approved. And then after once it's approved then they have to meet that criteria.

Now, are you saying whenever that inspector comes back the next time to do his sampling if he does not meet that requirement on days are you going to go back and evade that plan verification?

MR. TOM KLAUSING: What we're saying is if we have to go out and sample and the operator's been informed that MSHA will be going out there to verify the plan and he has to meet certain requirements that are in here, that means he's got to set the parameters, he's got to produce at or

above the VPL, if we go out there on the first shift and he fails to meet the VPL we're going to go back and sample the second shift. If he fails to meet the VPL we're going to be back there the third shift.

So in order for us to actually verify the plan we've got to, I mean the plan has to be verified at or above. If we fail, if the operator fails to produce that, that's going to cause MSHA to go out and sample additional shifts until we get the VPL, at or above the VPL.

But we could go out on the second shift and do that if it's necessary, Tom.

MR. TOM KLAUSING: Yeah.

MR. SCHELL: Does that clear that up, tom?

MR. TOM KLAUSING: I mean I can understand that as far as you can go anywhere you want. But what I'm getting through is that, or what I'm trying to get through, and I'm hoping that I am, is that the rule doesn't cover a lot of that stuff, you know. It doesn't protect. It could be the inspector, you now, the same as the companies, you know, that did the fraud, you know. The inspector could make an agreement with management and say, well, we'll do this. I'm not saying he is. But there is that possibility there, you know. That's what I'm saying that through the sampling, the

verification part of it that's the way it is.

And I don't know how other mines are. The ones that I do know about most of your production, your high production is either on seconds and third. But you're going to come on all three shifts.

MR. NICHOLS: It would make a difference if you're only looking at three shifts but we're looking at the 30 shifts.

MR. TOM KLAUSING: Yeah, but in 30 shifts don't necessarily mean they have to be all day shift. It could be part of one, part of two, part of three or all of two; right?

MR. NICHOLS: Yeah. But as Jon mentioned, it's going to be the tenth highest, the ten highest. Ten highest.

MR. TOM KLAUSING: If the company only samples on seconds then you won't know any other shift.

MR. NICHOLS: We're going to be sampling.

MR. TOM KLAUSING: No, the company does the sampling for the verification plan; right?

MR. SCHELL: No, no. We do it.

MR. TOM KLAUSING: I meant once you, once the company establishes a plan they've got to meet whatever

number they put up there right, first? So somebody's going to do sampling first; right?

MR. SCHELL: No, we're going to come out there.

MR. TOM KLAUSING: You're going to do that and put the magic number up there?

MR. SCHELL: No, they're going to tell -- they're going to have the magic number because they have to record production on every shift. All we have to do is come out and look at their production records. We'll know what their production was on every shift and we'll count down ten. Say that's your VPL.

MR. TOM KLAUSING: So in other words, once 30 days gets past then they're going to go ahead and put the -- or call MSHA and say we want somebody out here to instrument our plant verification?

MR. SCHELL: No. We'll actually call and schedule it.

MR. TOM KLAUSING: You will?

MR. SCHELL: Right.

MR. TOM KLAUSING: And say that you need to be getting your stuffed ducks in a row for we need a production report for 30 days?

MR. SCHELL: And remember, what we want is every

time we go out to sample we want to look at those production records going back six months so we can see if that production has gone up.

MR. TOM KLAUSING: Okay, while we're on that -- and thank you for your time on that.

MR. REYNOLDS: I want to interrupt. On full shift I just misspoke. And I wanted to tell you the definition is on 42177. I said 179.

MR. TOM KLAUSING: 42177?

MR. REYNOLDS: Right. I'm sorry.

And, also, there's a fuller explanation in the section by section in the middle column on 42141 where it goes into it and explains.

MR. TOM KLAUSING: 421 what?

MR. REYNOLDS: 42141.

MR. TOM KLAUSING: 41.

MR. TOMB: Mr. Klausing, I'd like to ask a question also.

MR. TOM KLAUSING: Yes.

MR. TOMB: Did I understand you to say that currently the company samples full shift?

MR. TOM KLAUSING: No.

MR. TOMB: Oh, okay. I thought I heard you say

that.

MR. TOM KLAUSING: No, they don't sample full shift for what I'm talking about full shift.

MR. TOMB: Ten hours.

MR. TOM KLAUSING: Yeah. No.

MR. TOMB: Okay. I just wanted to clear it up.

MR. TOM KLAUSING: Roughly around six hours because of your travel time, you know.

MR. TOMB: Okay.

MR. TOM KLAUSING: The other thing we was talking about as far as, and if I remember right, what you just brought up as far as -- let me go back here. I've got so much going through my head.

I don't remember what it was now. Oh, on the production reports, will the committee have a right to, our miners have a right to get a copy of that production report that they're going to issue to MSHA for this plan verification?

MR. NIEWIADOMSKI: Since it has to be made available to MSHA it will be, the district manager will also make that available to the miners' rep.

MR. TOM KLAUSING: Okay.

MR. NIEWIADOMSKI: And everything is going to be

posted. Because one of the things that we're basically saying is we want to make sure that if in fact the reports we're getting from the operator we want input from the miners to tell us, well, I don't think that's really accurate, okay.

MR. TOM KLAUSING: All right.

MR. NIEWIADOMSKI: But that's why we're going to be posting all of that information, okay. It's going to make sure that whatever information we're using to determine that the VPL that the operator has in his accurate.

MR. TOM KLAUSING: I agree. Will we have to go through the district manager or their inspector to get that? We can't force management to give us a copy of that?

MR. NIEWIADOMSKI: Well, the information that the operator when he submits, when he revises his plan and identifies the VPL he's going to also have to provide data with that. And that will be made available to the miners, to the miners' rep. That should be posted.

We're saying any information we get that has to do with plan verification, anything, any correspondence, okay, on plan changes, on VPLs, on what data, we're saying that that information has to be posted on the mine bulletin board so that everybody has an idea what's going on.

MR. REYNOLDS: What it says in the actual text is "the operator must record the amount of material produced by each MMU during each production shift, retain the records for six months, and make the records available to authorized representatives of the Secretary and the miners' representative."

MR. TOM KLAUSING: Okay. Well, I think that's all. Appreciate your time.

MR. NICHOLS: Okay, thanks.

The next presenter will be Daryl Dewberry, UMWA. Are you Curtis?

MR. CAGLE: Dwight Cagle.

MR. NICHOLS: Okay.

STATEMENT OF DWIGHT CAGLE, UNITED MINE WORKERS OF AMERICA, LOCAL 2397

MR. CAGLE: My name is Dwight Cagle, Local 2397 of the UMWA, Health and Safety Committee. I work at Jim Walter Number 7 Mines in Fruitdale, Alabama. I have 26 years experience at three different Jim Walter mines from the old conventional way to longwall. Appreciate this opportunity to address the panel.

At this time I would like to talk a little bit about the outby areas. At Jim Walter Number 7 mine we have

10 to 12 mile conveyor belts that our miners must clean, examine daily, seven days a week. Been exposed to a lot of dust. Just last month in July we received three D1 orders pertaining to dust in one form or another. One was float coal dust, extremely large quantities on 7200 volt power center and the circuits, some of the inner parts. And 500 foot of the prop entry which is our escape.

Number one longwall was another. Number one belt entry. Another drive box which powers the -- runs the four motors that pulls the belt. It was full of float coal dust.

This longwall has only been in operation about one month. And in our fire boss book, examiners book, this was listed as clear six shifts prior to this. What I'm trying to get across to you is that our Alabama miners are exposed to dust. And someone said that we only got probably eight citations on our outby people. These other mines are like ours, on the day they get checked they'll send them to a less dusty area on the sampling days.

That's one of the reasons we need more sampling, not less, and lower the standards, not raise them on our outby people. These outby people also work 9.5 hours. We need a full shift sampling, not 6.5, on the proposed dust rules. The proposed dust rules you'll never control Black

Lung or respirable dust.

You also need to stay with the engineered controls to reduce respirable dust, not administrative controls. We do not want airstream helmets. We tried this in '90, '91 down there and it didn't work out.

Due to layoff, attrition, retirement, miners dying we don't have enough people to trade out on the face for least exposure. We also in our mine we work 600 shifts, not 400.

On the full shift sampling of miners you said that that's what you all was going to do, but it's not proposed. It's only in the routine compliance sampling, not in routine, only in abatement sampling. And the other miner that was speaking before me, we have trouble getting then out there on the off shifts doing the sampling. I think I spoke to you one time up in Beckley about that.

We also support the personal protection monitors, continuous monitors.

Due to all this accumulation of dust we have a lot of air, we got a lot of water pressure. They was going to shut our -- he said he could not run unless airstream helmets. But with the committee and the company working together on it we proved him wrong on that with water sprays

and more air, putting sprays on the shields. But if you ever just let them go in those airstream helmets then just forget about all that. Water sprays, we mounted sprays on our shields to cut down on that. And the continuous monitor would work. It would let us know when it's out of the plan.

We hope to convince the panel to go back and use the Advisory Committee recommendations.

Any questions?

MR. NICHOLS: Thanks.

Is Dewberry back yet? Is Tain Curtis?

Does the court reporter need for these folks to spell their name?

COURT REPORTER: No. I have a sign-in sheet.

MR. NICHOLS: Okay, good.

STATEMENT OF TAIN CURTIS, UNITED MINE WORKERS OF AMERICA, LOCAL 1769

MR. CURTIS: I appreciate the opportunity to voice our remarks and opinions. My name is Tain Curtis. I'm the Safety Committee Chairman at UMWA Local 1769. I represent approximately 203 miners. I have 19 years of experience, 13 of which have been in the face on a longwall and a continuous miner.

I work for Energy Mining in Emery County, Utah.

And the people I work for and our local have a working relationship. But I believe that we need better laws to guarantee our help as miners. If our working relationship fails, MSHA has to guarantee that our health is not put into risk.

We as coal miners don't read or interpret the law, we just want the bottom line, which is better dust rules, lower exposure. To accomplish that first we need, we feel we need full shift sampling. Many mines now work longer shifts, therefore more time is spent in the face. This is the biggest item that has been requested by the miners I represent. The old 8 hour or 480 minute sample is or should be something of the past. Let's update this law now.

At our mine on a 4/10 schedule a miner spends approximately 117 hours more a year in the face. This does not include any overtime work. So please let's update this to our current mining practices. Miners see and understand this full shift sampling. They know when and where a dust pump is or if the full shift is being sampled. They know their exposure of a full shift sample and of that particular shift.

Number two, we need to lower the dust exposure of miners, so under no circumstances should the 2 milligram

standard be higher than the current standard even with the use of airstream helmets or administrative controls. Our people now use airstreams to lower exposure of the 2 milligram limit on a personal basis, not the 4 milligram limit that is proposed. We need a better plan and better technologies to accomplish these plans.

Number three, several years ago I heard of a black box on the tailgate of a longwall. I thought this was great to have something that would tell us whenever we came out of compliance, then we could fix the problem before exposure to miners was out of hand. I don't see anything that would encourage the development of something like this. We need to use our technology to our advantage. We have proven how technology has increased coal production over the years.

Earlier Mr. Bruce Watzman, I believe, mentioned the personal protection of an instrument for personal dust readings with a realtime readout. Something like this would be idea for the coal miners that work in these areas.

You mentioned how that would affect us, what we could do with that. Well, we as miners because of the Act have miners' rights. If we go out of compliance and we can see the realtime data in front of us it would give us an opportunity to exercise our miners' rights and request to

work in a lower dust area. That would be a great advantage to several miners that I know.

Number four, at our mine we have a program called LMPCP, labor management positive change process, it doesn't always work but sometimes we hope that it does, where we, the miners, take problems and come up with solutions. I don't see any participation of miners in this plan or in this plan verification or, if problems persist, any input from the miners.

Number five, our mine is located in the mountains overlooking Huntington, Utah. We have three intake portals that stretch for miles going up the mountain range, 9 3/4 miles of beltline and as many miles or more of roadways, and you're only requiring one dust sampling to be taken for this amount of the mine where these people work? These miners need to be able to carry a dust pump with them so that the areas that they travel and the exposure levels that they have encountered in their regular work schedule are recorded and their exposure is told to them.

In closing, I appreciate the opportunity of making my remarks. And I enjoy my family and want to be able to spend a long productive life with them. I also understand a little bit about economics and still want to have a job

tomorrow. So there needs to be common sense. Everybody needs to take part in this. I would like to see a final rule that addresses my concerns and does so in a simple and concise manner that most coal miners can understand.

Thank you.

MR. NICHOLS: Thank you. Daryl, how much time will you need?

MR. DEWBERRY: About 15 minutes.

MR. NICHOLS: Jim Weeks follow you and he's asked for up to 45 minutes. How about if we take a 10-minute break. Let's come back at 2:30. And Daryl, you will be up next.

(Brief recess.)

MR. NICHOLS: Let's get started back. I had been told that Daryl Dewberry and Dwight Cagle, Dwight told me they were going to switch places and I forgot that. So Jim Weeks will be up next and then Daryl Dewberry will follow him.

So, Jim.

STATEMENT OF JIM WEEKS, CERTIFIED INDUSTRIAL HYGIENIST, CONSULTANT TO UNITED MINE WORKERS OF AMERICA

MR. WEEKS: When we were in Morgantown and in Prestonsburg you all were all on the same level with us and

now I have to look up to you. Just because you're up there higher don't let it go to your head.

MR. NICHOLS: We hoped that would make the meeting a little less rougher but it don't seem to be working.

MR. WEEKS: Oh, no. No.

I'm Dr. Jim Weeks. I'm here as a consultant to the United Mine Workers. I was a member of the Dust Advisory Committee. I'm currently an associate professor at the George Washington University School of Public Health. And I'm a certified industrial hygienist.

First I would like to go over some history. And in my case it's somewhat personal.

I first became acquainted with the coal industry in 1972. And amongst the miners that I met in West Virginia the most, the hottest topic that people were talking about was the dust monitoring program. At that time they said it was ineffective, inaccurate, a farce, etc., etc. Very critical of the whole program.

The views were presented more explicitly during hearings in 1977 and '78 during rulemaking at that time. And when I went to work for the International in 1982, and ever since, miners' views on the operator dust sampling program were essentially the same. They were the same

during meetings of the Dust Advisory Committee and they were the same when presented to this panel in Morgantown and in Prestonsburg and here.

And miners speaking then, that is in Morgantown and Prestonsburg and here are the sons and daughters of miners that spoke some 30 years ago on these issues. This is two generations of miners that have had to contend with mine operator cheating and agency indifference. This is far too long. And some of your proposals are responsive to these problems that miners have raised but many are not.

Now, I'd like to comment on a number of issues, not in any particular order. And then I'll get into a more organized presentation soon.

First of all, one of the problems with this rulemaking is that the public relations about the rule differ from the actual rule itself. A couple of examples:

First is the meaning of a full shift. Now, if you ask any miner here, any person on the street what's a full shift it means the shift from beginning to end. If it's 10 hours, it's 10 hours. If it's 12, it's 12, etc. And the rule is advertised as being responsive to full shift exposure. But when we look at it, first of all it's not clear what exactly is meant by full shift and in what

circumstance.

And, in fact, I have a question for you all, and that is there are at least three different kinds of samples that you propose taking, one for compliance, one for abatement and one for plan verification. And I think full shift has a different meaning in each setting. So I would like to find out where in the rule it defines full shift for those three different kinds of samples? And I don't know why they're different.

MR. NICHOLS: Where was it?

MR. REYNOLDS: It's on page -- It's 70.2(j).

MR. WEEKS: What page is that?

MR. REYNOLDS: I'll read it for you. It's on 42177 in the third column at the bottom. It's 70.2(j).

MR. WEEKS: Right.

MR. REYNOLDS: It says, "full shift means an entire work shift including travel time but excluding, for purposes of bimonthly sampling only, any time in excess of 480 minutes."

MR. WEEKS: I don't understand why it's defined that way. It doesn't seem to serve any useful purpose and it is, frankly, confusing. And it seems, you now, I think that full shift should be defined in the sort of common

sense, everyday way in which people use it, and that is a full shift from beginning to end of the shift. I don't see what's gained by defining it in this somewhat elliptical way even at that.

Okay, let me -- If someone comes up with a response to that later I'll be glad to hear it.

A second place where public relations --

MR. SCHELL: Jim, I'll respond to that now.

MR. WEEKS: Okay.

MR. SCHELL: It's what I said this morning is for purposes of plan verification and abatement we're talking the full shift. We did in this proposal for purposes of compliance sampling say that we felt that since we were there, since we knew what the -- and since compliance sampling is done by an inspector we're there, we know what plan parameters are in place, we know what the production is, we know where the miners were, that it was our judgment that since the primary reason for compliance sampling is to assess whether the plan continues to be appropriate we thought we could do that on 8 hours.

But again I'll come back we asked for specific comments from the public on whether compliance sampling also should be full shift.

MR. WEEKS: Yes, I think it should. And let me take it one step further. The, I think the exposure limit should be adjusted for the full shift so that it is proportionately adjusted.

For example, if it's a 10 hour shift the exposure limit should be at .8 of 2 which is 1.6 milligrams. Let me explain why. What you get from that is that at the end of that shift a miner working 10- hours at a 1.6 standard will absorb exactly the same amount of dust as a miner working 8 hours at a 2.0 milligram standard. So what we're looking for is essentially equivalent level of risk for different shifts.

MR. KOGUT: Let me respond to that and direct your attention to the definition of "concentration" at page 42177 because we are in fact making that, proposing to make that kind of adjustment.

MR. SCHELL: Everything is adjusted to an 8-hour equivalent, Jim. I think we're doing just what you said.

MR. KOGUT: There's further explanation of that adjustment in section by section analysis for that definition. And we also solicited comments specifically about the method that we're proposing to make that adjustment.

MR. WEEKS: Well, then I assume that you then agree with the basic concept that there should be adjustment for shift length, essentially, or adjusting it to an 8-hour shift equivalent. And then I would go back, I think then for compliance purposes and any other purposes if you're going to take a full shift sample it should be a full shift sample for every time you take that kind of measurement.

Now, part of the reason for this is that if you, say in compliance sampling if you select a particular 480 minute interval for sampling the mine operator can cheat on your very simply, and they would just hold off on production until you've left them and they'll go ahead.

Now, I confess to being, frankly, very cynical on this issue. But then we've had 30 years' worth of operator cheating and we don't see any abatement of that. And I don't think you should construct a rule that's going to tolerate opportunities for operators to cheat.

Okay, now let me go on to another issue where the public relations somewhat differ from the actual rule. And, Ron, I confess to nitpicking on this, but it makes the point. The data that you presented coming from a real mine with five measurements averaged out to less than 2 and yet two of the measurements were over, were 2.4 and 3 something,

anyway, they were clearly in excess, I think it's a welcome change that the agency will be able to detect and take some action against excursions such as those. And I think that is the, one of the strengths of the single sample proposal is that you do that.

However, what that, what the data that you presented doesn't show is what happens to samples between 2 and 2.33 milligrams? And there weren't any on your data. And I know in the interim sample, the interim single sample EP, exposure program, for samples that came in at that level you state that you'd go back and take another sample, a compliance type sample. I couldn't find any reference to that in the proposed rule. So if you're going to do that I think it should be in the proposed rule. I think you should do more than that but I don't -- I think you need to clarify what happens to samples between 2 and 2.3.

But that is something that you're going to do, that you'd consider doing? It's not in the rule; am I correct about that?

MR. SCHELL: That is correct, Jim.

MR. WEEKS: Now, let me go back again to an issue that was raised earlier about why NIOSH was not involved in the plan verification proposal. NIOSH has responsibility

for certifying respirators, it has responsibility for making recommendations about exposure limits, it has responsibility about sampling protocols, and a variety of other functions all of which are at the heart of the plan verification procedure. So it seems to me logical that NIOSH should have been involved in that part of the proposal because they have jurisdiction expertise and regulatory functions for those particular aspects of that rule.

Okay, I'll let that question just dangle out there.

MR. REYNOLDS: Are you referring to the -- I mean there is one proposal which is a joint proposal but because of the fact that the plan verification program was established in an administrative process for MSHA to exercise its regulatory authority I didn't think it was appropriate for NIOSH to do it as a joint proposal. Now, you might wish to hear what NIOSH thinks.

MR. WEEKS: Well, NIOSH has specific regulatory authority over samplers. It has specific regulatory authority over approving respirators. And it has expertise in all of the other areas and has recommendations in the criteria document that pertain directly to issues of sampling and upward adjustment of the exposure limit and so

on. And it seemed to me NIOSH should have been included in that process.

MR. REYNOLDS: I mean in terms of consultation they were, in terms of all those factors. But they're not a part of the regulation.

MR. WEEKS: Right. No, I understand that. Well, we understand where we disagree and where the question lies. And if any of the NIOSH people have any comments to make on this I'd welcome it.

MR. NIEWIADOMSKI: I think we did make the comment earlier, Jim. The criteria document that was published does indeed contain all of NIOSH's policy on this particular issue discussed here. That clearly was sent to MSHA. And there are basically a number of complicated issues I think that have been involved. And MSHA has considered our document and the Advisory Committee's comments. I think in their regulatory authority, which we don't have, again specifically by statute, that they tried to address the best that they felt that they could those particular issues. But I can't speak any more to MSHA's role. But our, you know, our part is published.

MR. WEEKS: Right. Well, the Mine Act requires that when recommendations come from NIOSH that MSHA has the

responsibility of either adopting it or explaining why they're not. And there are several of the recommendations in the criteria document in which I haven't heard an explanation from MSHA why you did not adopt issues pertaining to sampling, exposure limits and the like.

So, I'll continue.

MR. REYNOLDS: I think the answer for the most part is that they were outside of the scope of the rulemaking particularly.

MR. WEEKS: I just, I just don't buy that.

MR. NICHOLS: Well, I think we understand your comment.

MR. WEEKS: Okay. Now, let me clear up a couple of misconceptions about the use of respirators. First of all there's the conception that mine operators are in some sense prohibited from using respirators. This is just absolutely not true. In fact, under the Act, under the appropriate section, which I don't remember offhand, mine operators are in fact required to provide respirators if exposure exceeds the exposure limit. And they can on their own require miners to wear respirators under any circumstances anyway.

What operators are prohibited from doing is using

respirators as a substitute for engineering controls. We support that. And we think that that approach is appropriate.

A second misconception is that the union is opposed to respirators. We are not opposed to respirators. There are circumstances when an exposure goes above the exposure limit in which it's entirely appropriate and in fact necessary for miners to get the protection that respirators provide. It should be temporary while the miner operator finds the engineering controls or whatever is necessary to bring exposure down to within the exposure limit.

So it's just not the case that we're opposed to the use of respirators. We're opposed to using them in any sense that would make them permanent or as a "substitute" for engineering controls. Now, I realize that that's heavily loaded rhetoric, the substitute for engineering controls. And to some extent the disagreement that we have over that has to do with what in fact is going on regardless of what it's called.

And what we are looking for is a high quality program of respiratory protection in which miners, in which there is a respiratory protection program similar to the one

that OSHA has that includes training, fit testing if it's appropriate, education, maintenance of the respirator, calibration, etc., a high quality program that actually uses respirators in fact the way they're supposed to be used. And I don't know that there is anywhere in the MSHA regulations where that kind of respiratory protection program is called for and in fact required. But that's what we want. And we think it's appropriate to use them in those limited circumstances that I described.

Now, the real, an underlying difficulty with this rule, and it has to do with getting to the respirators, is that there are a number of hurdles to get over on the road to getting to respiratory, adequate respiratory protection. The first of them and the most difficult is the determination of when the mine operator has exhausted engineering controls. Now, that is a, that's a determination that has -- that rests upon fairly, frankly vague requirements. They're in the -- they're here somewhere. But they have to do with whether or not the engineering control is totally disproportionate to the benefits, whether or not it works, whether it reduces exposure and so on.

These are requirements that were laid down by the

Federal Mine Safety and Health Review Commission. They were written by lawyers, they were not written by miners. And I think that's part of the problem, if you'll forgive me. And they are quite vague. What's missing from the criteria for making that decision is anything specific about, for example, identifying dust sources, identifying specific controls that are used throughout the industry, controls such as slow, deep cutting, such as homotropoventilation, such as the use of water infusion and controlling dust from shields, controlling dust that comes from the intake airway and so on. There is no list of engineering controls that are used throughout the industry that are common and which you could go down and say, I'm not saying you should say every operator has to try every one of these but there needs to be something specific that we can, we the miners and others can hang our hats on and say, yes, you've done a systematic job in evaluating engineering controls.

In my experience on this issue I first went to a mine out west in which this very issue was up for discussion. The mine operator presented at first glance a fairly impressive list of all of the engineering controls that they had attempted, those that I just mentioned and others. And they went and they also talked about the ways

in which they had evaluated the effectiveness of a powered air-purifying respirator. They did that in a fairly straightforward and competent way by putting samplers inside and outside the face shield and measured exposure under both circumstances.

Incidentally, the protection factor that they got from their data was 4, it wasn't anything close to 24 as you mentioned earlier.

MR. NICHOLS: And we're using 2.

MR. WEEKS: What's that?

MR. NICHOLS: And we're using a protection factor of 2.

MR. WEEKS: I understand that, yes. Right.

But when I looked closer at what that mine operator had done they had never identified sources. They had never systematically evaluated the effectiveness of any of their controls. And, in short, it was a very sort of superficial and haphazard assessment of those engineering controls. And they put that off on us saying we tried all these things, what we want to do is use air-purifying respirators.

I was totally unconvinced. And yet I can imagine a presentation by a mine operator coming to you or coming to

the District Director saying we've tried all these things, we're requesting a permit to use powered air-purifying respirators in by the shear. Then you'd be in the position of trying to evaluate that.

So one of the problems with that whole process is that the criteria are vague. They are quite vague. And there is no place in which more specific criteria are laid out.

A second problem with them is that it does not appear at anyplace are miners encouraged or permitted to participate in that decision. And I think this is a very critical decision that has a direct material effect upon miners. And yet when the mine operator makes his application there's no requirement that it be given to the miners or the miners' rep. There's no requirement even that the district director would give it to the miners or the miners' rep.

And I can conceive of a situation in which a mine operator wanted to go to -- wanted to claim that he had exhausted engineering controls, he said nothing about it to the miners, and the first thing the miners would know about it would be if respirators came down and said, here, you have to use this if you're in by the shear. I think if you

want to make a number of miners pretty angry that you would allow that to happen. But I think it's really, it's absolutely essential that on this issue miners participate actively in making that decision about whether or not engineering controls have been tried or exhausted or so on.

I see you looking in the book.

MR. REYNOLDS: Under 75.370 which is the existing part of the CFR it says that the mine operator shall notify the representative of miners at least five days prior to the submission of the mine ventilation plan and any revision to a mine ventilation plan and anything associated with the request to get interim ventilation plan approval to use PAPRs or administration controls would be included in that provision.

MR. WEEKS: Okay. I was actually hoping I would ferret something like that out.

MR. REYNOLDS: One other thing I meant to point out too. In the, in 70.212, the proposal, it does specifically say as part of the ventilation plan the operator would have to, if they did want to use PAPRs and if MSHA did approve the use of PAPRs in a limited situation they would have to incorporate it in the plan, a respiratory protection program for the use of PAPRs following the

procedures specified in 72.710, which is an existing part of the CFR.

MR. NIEWIADOMSKI: Jim, on this 70.220 which I mentioned earlier, what information must I, the operator, post on my bulletin board? We make it very clear, all written notifications from the district manager regarding any aspect of the plan verification process must be posted. So any request by the operator to make a determination, this correspondence between the district manager and the operator, that has to be posted on the mine bulletin board.

MR. WEEKS: What's posted on the board is the note from the district director; right?

MR. NIEWIADOMSKI: The district manager.

MR. WEEKS: Or district manager.

MR. NIEWIADOMSKI: Anything to do with the plan verification process --

MR. WEEKS: Right.

MR. NIEWIADOMSKI: -- which is if the operator's requesting MSHA to make a determination, there's correspondence as far as acknowledging receipt of that, all of that has to be, is going to be posted on the mine bulletin board. So mine operators will be aware of every step, you know, they'll know exactly what is transpiring.

It's not that all of a sudden they find out on the mine bulletin board is that here's a revised plan that requires the use of respirators.

MR. WEEKS: Yeah, but they might find it out maybe five days before which is a rather short period for -- I mean, I can -- and trying to evaluate this in five days, I mean that's just not going to happen. Five days is too short.

Okay, there are provisions in there, and I think it would help the rule enormously if those could be spelled out clearly that miner participation is, in making this decision is encouraged, it's essential, that mine operators have to give this plan to the miners' representative at the same time it's given to the district manager.

Okay. Now, there are some things in the proposed rule that we in fact support. For example, we support ending the operators' dust monitoring program. This program has been riddled with corruption for a long time. It's been the laughingstock of the industry. It was the fox guarding the henhouse, etc. We say farewell to the fox and good riddance. We have had it with this program.

What that program did, however, which yours doesn't is it sampled 30 shifts in the course of the year.

Your proposal samples only six. And that's the problem.

The biggest difference actually between the existing plan and the proposed plan is that the existing plan for compliance sampling is done by my operators and the proposed plan is to be done by MSHA.

Okay, secondly, we also support MSHA taking responsibility for sampling. This is not a takeover of the operators' program. I think MSHA is the only reasonable choice for doing this sampling for compliance and other purposes. Delegating this task to mine operators was a mistake.

Third, we support MSHA having the authority to determine compliance based on the results of a single sample. That's critical. I will say much more about that in a few minutes. And we support eliminating the use of the optional operator sample for determining the percent quartz in airborne dust.

Now, let me go on and talk about the single sample proposal. I apologize in advance, this is going to be a little tedious, but so is your proposal.

Briefly, the single sample policy, that is exercising the authority to issue a citation based upon a single sample best meets the requirements of the Mine Act.

The Act requires each operator to maintain each miner's exposure to respirable dust on each shift at or below 2.0 milligrams per cubic meter. That sentence is the heart of it, and there are many implications.

As you know, the wording of this section of the Mine Act is a real pain in the neck. And at the risk of inflicting that on you I want to go over it just one more time and emphasize a few things.

Section 202(b)(2) of the Mine Act reads as follows: "Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air."

"Each" occurs in that sentence three times. That is one sentence also, which is a -- whoever wrote that is, I don't know, it's trouble. I come from a family of teachers and we couldn't, you know, say "good morning" without having our grammar corrected. And if any of my teacher relatives saw this sentence they would have a fit.

Okay. Now, the word "each" it implies taking one at a time, I looked this up in several dictionaries, I looked it up in the thesaurus, it always means the same

things, it means "one at a time." That means one operator at a time has to perform as this rule requires. It means that one -- that the exposure of each miner has to be maintained and the exposure on each shift has to be maintained.

I think the terminology of the single shift sample actually could be made more specific by referring to a single miner sample which would create the more clumsy term single shift single miner sample. But that would be the natural derivation of this sentence.

MR. NICHOLS: I just heard something that got more confusing than this rule.

MR. WEEKS: That's where you've led us. I'm not proposing that as an alternative term. I just wanted to make the point that we're talking about each miner, each shift, each operator.

I'm going to go on to the issue of the average concentration. Additional statutory requirements are specified in 202(f). It's a longer sentence, in fact, and it reads as follows:

"For purposes of this title the term 'average concentration' means a determination which accurately represents the atmospheric conditions with regard to

respirable dust to which each miner in the act of working is exposed." And there's a parenthesis one which I will skip, go on to parenthesis two which is "as measured after 18 months over a single shift only unless the Secretary of Labor and the Secretary of Health and Human Services and in accordance with provisions of Section 101 of the Act determines that such single shift measurement will not after applying valid statistical techniques to such measurements accurately represent such atmospheric conditions during such shift." I won't repeat that.

Now, at first the trouble that comes up with this paragraph has to do with the meaning of the term "average." This is, what they propose here is not the ordinary meaning of average. When one thinks of an average we think several measurements, you add them together, divide by the number of measurements. But the definition in this rule, in the statute is a determination which accurately represents the atmospheric conditions with regard to respirable dust. And the critical test here is whether a measurement accurately represents conditions. There's no reference at all to a number of measurements outside of possibly doing it over several shifts.

Assuming, apparently, that a single sample might

not accurately represent conditions during such shift Congress I think suggested that an alternative to taking the single miner single sample sample -- single miner single shift sample was to take samples over a number of shifts. Now, the only way that the average exposure based on measurements over several shifts would accurately represent conditions on each shift is if there was no variation other than sampling error from shift to shift. Congress might have assumed that there was no variation and that variability of -- the only variability resulted from sampling and analytical error.

This assumption of no variation between shifts is obviously false and is pointed out in the preamble that there is substantial variation between shifts. So that to take -- to try and estimate exposure on one shift by sampling several would be like trying to measure Tom's height by measuring Dick and Harry's height also and taking an average. I mean it's that ridiculous. I think that taking several samples over several shifts and taking the average and pretending that that applies to a single shift is just not -- makes, logically makes no sense.

This and the implication of my statement is that the operator sampling program in addition to its other

problems does not meet the requirements of the Act because it's based on an average of several shifts. And I think that's the case. It did not meet the requirements of the Act because it assumed that shift to shift variation was non-existent which is not the case.

And to repeat what I said before, the act requires controlling exposure on each shift not on the average of several shifts. The current MSHA practice is to sample exposure of several miners on one shift. There have been some efforts to satisfy each shift requirement by taking the average exposure of several miners on that one shift. But the same problem exists: there is substantial variation between miners so you can't take an average of each miner by measuring the exposure of all of those on one shift and taking an average. It's the same kind of problem, it's complementary.

Now, let's see. So I go back to the question what did Congress mean when it referred to an average? Well, if you look at the places where that word occurs each time it's used, it's used in relation to respirable dust it applies to dust exposure on each shift in Section 2(b) or such shift, that is each shift. It is the average exposure over a single shift with which Congress was concerned.

The only conclusion that I come to is that the only meaningful average that they were talking about was a time weighted average which all of the industrial hygienists are very familiar with. But exposure varies not only from shift to shift, miner to miner but it also varies in the course of a shift over a day. And the conventional practice of industrial hygienists is to average that sample, that exposure out in the course of a day in doing what would be called a time weighted average. I think that's what Congress meant. I think it's the only logical conclusion to reach.

Now, this, I went through this exercise to provide what I considered to be some support to the agency's claim to issue citations based upon a single sample over a single shift on a single miner. Because I think that that is the only sampling protocol that meets the requirements of the Act, if you look at the way the Act is worded, because several other options are essentially ruled out. And I didn't see an argument like this in your preamble. I haven't seen it in any of your other things but I think it's an important sort of analysis.

Now, let me go on to the accuracy problem. Samples are also required to accurately represent conditions

on the shift. NIOSH has established criteria for accepting methods of measurement. We think that those criteria are fine, that the existing measurement techniques meet those criteria. We think it's appropriate. And I don't imply any criticism of the NIOSH accuracy criteria as applied to sampling equipment.

So I want to go on to a different approach to this question of accuracy. And there is I think a more generic meaning for "accuracy" and that is it has an absence of bias. Bias is known to exist in the operator sampling program. The large number of criminal citations for submitting fraudulent samples is ample testimony. In fact, if it were not for that bias in the operator sampling program I don't think we would be here with this rule today because that program did not meet the requirements of the Act and either each miner, each shift, etc., or in terms of accuracy. And that's been demonstrated in many ways. I think MSHA samples are biased also but in a different way.

Now, several investigators, myself included, have noted that -- but I didn't have it published so I probably shouldn't say that -- but have noted that when MSHA takes samples over several days the value of the sample on the first day is on average higher than the value on subsequent

days. There is this unique source of bias in MSHA samples when multiple samples are taken.

The most plausible explanation for this is that when the miner operator knows that when an MSHA inspector is coming to his mine the operator makes certain that dust is adequately controlled. But on the first day, the only day when an inspection is or would be called unannounced, the operator has less time to control dust. On later days in which the operator reasonably expects the inspector to come back he knows, he can take steps to anticipate the inspection and get control of the dust. I think that's what happens.

The logical implication is that dust concentration measured on the first day is less biased, that is to say it's more accurate. It's a more accurate representation of conditions than dust measured on later days. It should be obvious that a first day sample is exactly the same as a single sample. And for this reason I would argue that the single sample is a less biased sample.

Now, there's some other implications from this finding of bias in the MSHA sampling program. First of all, whenever MSHA does follow-up sampling such as, for example, for abatement purposes it shouldn't happen the next day

because you get into that same problem. The first day sample is one value, later day samples are lower. If you go to continuous -- your abatement sampling exactly the same the day after you find a violation you're going to find compliance. I'm just making that as a, you know, it's a bald prediction, but you're going to find it more often than not.

Therefore, I think follow-up samples should be unannounced and taken at random. And I would suggest, for example, you know, you take 15 or 20 shifts and at random pick three of those where you're going to go back. You don't tell anybody about it and you go sample on those days. They should be unannounced inspections in order to achieve the same lack of bias as what you get on the first.

I think this phenomena, this bias amongst MSHA samples, also illustrates that mine operators know how to control exposure to dust and that these controls are feasible. Consequently, I think complaints about the lack of feasibility should be taken with some degree of skepticism. I think this colors our views about operators having exhausted engineering controls.

Again, some history is important here. When the Mine Act was first passed in 1969 it was the Coal Mine

Health and Safety Act, for those of you who are not in the coal mining industry. Mine operators said we can't do it. We cannot meet a 2 milligram standard. And they went to the Supreme Court. They went everywhere they could to say we can't do it. Yet within six months after that Act went into effect dust exposure declined from around 7 milligrams to as I recall maybe around 3 milligrams. That is a drastic drop. And it certainly belies any complaints that they couldn't do it. And within a year after that they were on a regular basis down below 2. And at this point in time continuous mining sections are regularly below 1 milligram per cubic meter.

So that the complaint 30 years ago that they can't do it simply was not borne out in fact. And I think that when operators make that sort of claim we certainly treat it with a certain degree of skepticism.

Now, what happened in 1969 is that the agency did not accept reality, it did not accommodate itself to current practices in the industry. What the agency did at that time was changed it, they changed conditions, and dust exposure came down, fatalities became less frequent, and thousands of miners' lives were saved because the agency did not accept reality but in fact changed it and improved conditions in

the nation's mines. So I don't think there should be any "accommodation" to reality now as there was then, as there, you know.

Okay, a third implication of this bias is that MSHA has no provisions and no consideration to guard against operator cheating. Of the many methods of cheating that miners have spoken about in the past many of them do not require operator control of the sampling process. For example, during sampling operators could shut down certain jobs, require maintenance that would prevent dust sources from generating dust, could do any number of things. They could even go and turn off pumps or plug them up in some fashion. If the MSHA inspector is not there they could do that and just stop the whole sampling process, and other ways that MSHA could have of preventing that.

But I don't see anywhere in this rule that MSHA anticipates doing things that would prevent operator cheating. For example, there is no requirement that the MSHA inspector stay on the section the whole time that sampling is done and observe what's going on. You know, that may be your intention but it's not in the rule. And we want something like that, we want some guarantees that operators will not be able to cheat on this kind of sampling

either.

So, in brief, on the issue of supporting the single sample rule we think the statute supports it, we think MSHA should not be naive about its own samples and responding to the information that you have about biases in your own sample, but should take some active steps to continuously get accurate samples.

Now, on that regard, on that issue there's actually one sentence. The proposal on single samples is one sentence. It's only 27 words long. I hate to suggest taking any words away from it but I do have this one suggestion. It reads as follows:

"The Secretary may use a single, full shift measurement of respirable coal mine dust to determine average concentration on a shift..." So far so good. "...if that measurement accurately represents atmospheric conditions to which a miner is exposed during such shift." That proviso if it meets, if -- let's see, "if (it) accurately represents," etc., is trouble. What that can mean is it could open you up to challenge on every single citation that you try to issue saying it's not accurate, because that criteria is right there in the rule.

And I you should eliminate everything from the

"if" to the end because that issue of whether it accurately represents atmospheric conditions, etc., should be settled in something like, should be settled in this rulemaking and not during every sample and not for every citation that might be issued in one sample. So it would cut a 27-word rule down to maybe less than half that. But that's what I suggest.

Now, let me go on to what you referred to as the compliance threshold value, the so-called 2.33 limit. You argue in the preamble to the proposed plan verification rule that in order to determine with a high degree of confidence, meaning 95 percent confidence I assume, that measured exposure was above the 2.0 milligram standard. It had to be above the upper 95 percent confidence limit. And you've estimated this at .33, meaning that you would not issue a citation unless exposure were measured above 2.33 milligrams per cubic meter, as I understand that correctly. Yeah, okay.

I think that this approach is plainly contrary to the wording of the Act. And it's also contrary to standard public health practice. And I think it exposes miners unnecessarily to excessive dust. For example, a miner could be exposed to 2.3 milligrams a cubic meter for dust for his

entire working life and never, and the operator would never have any enforcement action taken against him. It's entirely possible under this rule. It's very unlikely but it's possible. And I think this tolerates an excessive level of exposure. So that's one problem with it.

But I think the more important problem is that I think it's contrary to the claim language of the Act. The Act requires that exposure be "at or below 2.0 milligrams per cubic meter." So rather than ensuring that exposure is above the exposure limit before issuing a citation for noncompliance the Act requires that operators maintain exposure below the limit. What the Act says is "at or below 2.0 milligrams." So that if you went two standard deviations below 2 then you would have a 95 percent confidence that exposure would be below the exposure limits, which is what the Act requires, the plain language of the Act.

Now, I realize this is a significant change, this would require significant change in thinking that persisted over 30 years but I think that's what's required. And I think that's what the Act requires also.

The distribution of sampling analytical errors, what this is based upon, can go actually in either

direction. If the question is whether the measurement is above the limit use the upper tail. But if it is weather the measurement is below the limit as the Act requires use the lower tail. In short, this dog has two tails and MSHA has the wrong one.

Now, there's some other more common sense reasons not to use this compliance threshold value, some of which I've mentioned. And an additional one is that both NIOSH and the Dust Advisory Committee recommended that the exposure limit be reduced. And last April MSHA itself proposed reducing the exposure limit. Given these recommendations if there is uncertainty concerning measurements of exposure the benefit of that doubt should go to the miners and not to the mine operators because it's mine -- and the miners, what miners have at risk here is their health. This is a chronic, irreversible, disabling disease. That's what's at stake for the miners. What's at stake for mine operators is additional expense. Now, these are not comparable levels of risk. And when those kinds of risk are laid out, played one against the other protecting miners' health should take precedence over mine operators' expense. In brief, the benefit of doubt should go to miners.

Now, let's see. Now, there's some things that MSHA could do that would improve the performance of the sampling unit. And I must confess I don't -- you must be doing this now but and if so, fine. But I've looked at operator samples over -- I've looked at several hundred thousand operator samples. For every single one of them when I looked at the data down for how long the sampler ran it said 480 minutes. That's just not true. One does not take 100,000 samples and every one of them come up with 480 minutes. And in the data sets that I looked at the sampling rate was assumed to be 2 liters per minute. There was not any indication that any other sampling rate was considered.

And what I suggest is that you take the exact time that the sample was run. If it's 486 minutes, it's 486 minutes. If it's 470, it's 470. But put in the exact number. The same thing for the flow rate.

The standard practice, at least the practice that I teach my students, is that the standard protocol is you measure flow rate, you calibrate it before you sample and you get it as close as you can to what you're trying to sample for and you calibrate it after you sample. And the active flow rate you take is the midpoint in between.

Now, this will not amount to a huge difference,

but it will improve the precision of sampling practices. I did some sort of off-the-cuff calculations and, for example, if the actual flow rate was 2.1 milligrams or 2.1 liters per minute and the actual sampling was 490 minutes and it was mistakenly put in as 2 liters per minute and 480 minutes what would have been a 2.15 milligram per cubic meter concentration would be reported as 2.0. Now, when we're dealing in, you know, very close levels here, 2.33 and so on going out to two significant digits, these kinds of errors can be a problem. And they're easily fixed. And that is to use the actual flow rate, the actual time, it will improve precision.

Now, moving on to some other topics. And, actually, I want to go back briefly to this what to do about the samples between 2 and 2.3 milligrams per cubic meter. When I looked at MSHA data, the limited amount of data that I had to prepare for these hearings I looked at, well, how many, of all the samples that are above 2 milligrams how many are between 2 and 2.3? It turns out to be not a small proportion. The data set that I had says 40 percent or so of all the samples between 2 -- of all the samples above 2 milligrams about 40 percent were between 2 and 2.3. That's a large chunk of territory to rule off the table as far as

not issuing citations.

Now, you requested comment on whether based on operators' regular samples the three parameters used in the risk assessment -- and those parameters were percent of mechanized mining units with a pattern of recurrent overexposure, second, the percent of production shifts for which the DO was overexposed, and the mean excess above the applicable standard -- whether these were appropriate parameters to measure doing your risk assessment? No, they weren't.

First of all, they're operator samples and they're totally suspect. They could be accurate, so on and so forth. As far as the Mine Workers are concerned, as far as the miners are concerned operator data is not credible. And we don't think you should use it for something like risk assessment or practically for any other purposes. So that's one, one problem with using that data.

A second is that, is that the meaning and relevance of these parameters is relatively obscure in any event, at least I couldn't figure it out. I didn't know where these parameters came from in the risk assessment. And there have been several people, Noah Seixas, Attfield and others, have done a more thorough analysis of exposure

data. And if you for conducting risk assessment we urge that you refer to the people that have been doing it for some time. And I think have been doing it well.

Now, let me go on to the issue of quartz dust which I don't think anyone has spoken about yet. In the identification of the hazard for coal miners under plan verification I didn't see any reference to quartz dust as a health hazard in plan verification in the section which says this is the toxic material that we're looking at. There might have been one sentence that said, yes, there's silica. But I didn't see anything else in that regard.

And I think in the single sample proposal there was a mention of it and there was a more sustained discussion of the health effects of quartz. It missed a few things. It didn't dwell sufficiently on the issue of the lung cancer risk for quartz and it didn't mention at all the occurrence of a variety of autoimmune disorders that are also associated with quartz. I mean we are learning more and more about the health hazards of quartz these days. And I think it's very important, especially within the mining industry which are the people who probably have the biggest exposure to quartz dust, and I think we need to keep up to date on this stuff.

Now, there are some features of the quartz policy that are constructive developments but on the whole it does not provide adequate protection. And I think it's contrary to recommendations of the Advisory Committee and the criteria document. The one thing I mentioned that I think is a step in the right direction is dispensing with the optional operator sample for determining percent quartz. But both the Advisory Committee and NIOSH in the criteria document recommended establishing a policy for quartz that is separate and independent of the policy for respirable dust.

It seems here that you continue the practice of determining percent quartz and then calculating a reduced standard for purposes of enforcement and taking samples and comparing to that reduced standard. This is an obsolete, a clumsy and unnecessary procedure. I think the exposure limit as you point out, the effective exposure limit by this process is 100 micrograms per cubic meter, and I think it should be enforced on that basis at 100 micrograms by taking samples, analyzing them for quartz dust, and issuing citations or not as appropriate on a 100 microgram exposure limit.

I should mention also that you also know that

NIOSH and the Advisory Committee also recommended reducing the exposure limit from 100 micrograms to a lower level.

Now, another problem with the quartz policy is that you base the determination of the percent quartz on three consecutive samples before you take any enforcement action. And this could expose miners to three documented incidences of overexposure to respirable quartz dust and no action would be taken by the agency other than calculating a percent quartz. There would be no citation of any sort based upon even though you had documented cases in which there was overexposure.

The sampling and analytical methodology exists for analyzing quartz dust. And I don't see any reason to calculate a reduced limit. And I think if you find in excess of 100 micrograms there should be a citation issued on the spot. I don't think that it's appropriate to give the mine operator sort of a free exposure limit. Miner operators know that there is quartz. Mine operators know that there is quartz in the rock surrounding many coal mines.

If it's sandstone, if it's granite there is going to be quartz going to be there. Some other types of rock have smaller percentages of quartz. But they know that.

And knowing that they know that anybody that drills into the roof is going to be exposed to quartz unless the sampling -- unless the controls are in place. If there's a sandstone middleman in the seam, if the miner cuts into the roof or cuts into the floor and it's a quartz-bearing rock they're going to be exposed to quartz as well.

And on surface mines drillers and others are also going to be exposed to quartz. And that is known simply by knowing what rock is there. The mine operators know the rocks. If they know anything, they ought to know one rock from another and where the silica is and where it isn't.

Therefore, if you find an exposure over the exposure limit I think you should take action and bring that under control and not tolerate it as this three sample calculation of the percent quartz does.

Okay. Let me just conclude with a few comments on the need for miner participation which I mentioned at the beginning. I think the lack of miner participation or at least the rather haphazard way that it's sprinkled through the rule is a real problem.

And let me mention something else, it's something that I think Bruce Watzman referred to, but the way, your new way of doing rules is, you know, What do I have to do?

Sort of a question and answer format. And it's always presented as if the person reading the rules were the mine operator. Rest assured, mine operators are not the only people that read the rules, the rules apply to miners as well. I don't see anyplace in there where it says, What am I entitled to? What are my rights under these rules? which would apply to miners? I mean miners have certain rights and other things but I don't see any language in the question and answer format that addresses it in that way.

I think rather than try and do that I think you should go back to the old way of doing things. So I don't, this question and answer format I think is more trouble than it is worth. That's really my personal view on that matter.

Anyway, back to the issue of miner participation. Well, I believe I've actually covered all that which I have written here in front of me.

All right, let me end my comment at that point and if you have any questions or whatever I'd be glad to try and respond to them.

MR. SCHELL: Jim, just more a comment than a question. One of the concerns that we had on proposing a separate silica standard was a hope that we would eventually go to continuous monitoring. And as you know right now the

technology they're working on does allow you to make a determination on respirable coal mine dust, may or may not allow you to make it on silica, depending on how that develops. So our concern was if you had two separate standards and we went to continuous monitoring we'd only be enforcing the coal dust standard. The reduced standard would still give us some ability to enforce both of them.

Now, that may or may not have been the right way to go but that was the thought that went through our mind.

MR. WEEKS: Yeah. Well, my concern is that the technology is there now to enforce a 100 microgram limit. And I don't see why we can't just adopt that now and enforce it.

One comment I wanted to make about the continuous --

MR. NIEWIADOMSKI: Jim, can I add to what Ron said?

MR. WEEKS: Sure.

MR. NIEWIADOMSKI: Our approach, okay, our approach to addressing that particular issue is certainly contained in the plan verification where we are requiring the operator to anticipate that he's going to be encountering quartz and to design his plan to meet 100

micrograms and 2 milligrams. Okay? So, and it's at high production. So we have, as far as we're concerned, if in fact that plan is designed to control that then as far as we're concerned we're addressing what the Advisory Committee had recommended.

More importantly, the Advisory Committee did not recommend lowering of the quartz standard, it recommended, because I'm looking here, lowering of silica exposure of miners. And this is what we're doing. Recommendation number three.

MR. WEEKS: I think including the quartz exposure in plan verification is appropriate and I think is a good feature. And I think that that's, you know, to the extent that the plan verification process is going to help to control dust, and my gut reaction is that I think it will but, frankly, I rely upon many of our members' opinion of that because there has to be worked out at a mine level. But I think it's a strong feature of the plan verification process.

My point was that when it comes to enforcement, enforcement depends upon taking three samples in which there could be manifest evidence of overexposure and the only thing you do with those three samples is calculate the

percent quartz and go to this obsolete method of calculating the reduced standard and making enforcement decisions based upon that. I think it's inefficient, I think it's unnecessary and it doesn't provide adequate protection.

MR. SCHELL: I did have one other thing to say about the continuous monitor. Yeah, I know, along with others here, I know what the state of the technology is on that. And it's promising but it's not there yet. There is nothing to prevent this agency from writing a rule that would force the technology.

And the one thing that's going to move it along is by creating a demand for this technology. And if you require it in some fashion in the rule, taking account of all the vagaries involved in it, that would move things along, it would provide some additional pressure, feet to the fire, fire to the feet so to speak on developing and improving technology for continuous mining. But there's no mention of it in the rule at all. And I think that's a mistake.

MR. WEEKS: Now, there's another issue that I just thought about there. Sorry to be so haphazard myself in this. But wouldn't it go to the issue of whether engineering controls have been exhausted and whether the

mine operator would be issued a permit that would allow him to use air purifying, the powered air-purifying respirators, I think the procedure that I would suggest is, that I think is better is the procedure that's laid out in the act. It's a very straightforward procedure: if there is overexposure miners should get respiratory protection. And the citation would persist, the pressure on the operator would persist to use engineering controls and to reduce exposure.

Under what you propose, permitting respirators in-by, permitting this 4 milligram excursion in the same place, it takes the pressure off the operator and essentially endorses what the operator cannot do right now rather than put the pressure on and saying you need to control dust.

I mean if I were to draw an analogy with gas, admittedly it's an acute problem, dust is chronic, but if gas goes to 5 percent the mine closes, everyone comes out, saying you do not mine coal at 5 percent gas. And it's unequivocable. And it should be.

And I think some of the requirements of mining coal in this country is that you reduce exposure to 2 milligrams. That's the way it's done in this country. That's the kind of protection we want to give to our miners. And I think we need to create incentives and pressure to get

it there. And I think allowing air purifying respirators and these excursions to 4 milligrams doesn't do that. It takes the pressure off. It says, okay, I give up, you don't have to try any more engineering controls, you can do it this other way. I think it's the wrong way to go.

MR. NIEWIADOMSKI: Jim, what is your views or opinion about the proposed plan approval process, is it more or less effective than the existing process?

MR. WEEKS: I don't feel qualified to speak to that. So I would just be using up time if I did.

MR. KOGUT: I just wanted to address the concern you expressed about the citation threshold values and possibility that your concern was that a miner could be exposed on a continuous basis to a level like 2.32 and for a whole lifetime. And I think it's our intention in formulating this whole proposal, including the verification part, was to eliminate that kind of excursion, that kind of situation. So it's certainly not our intention to allow that kind of thing to persist.

And I think that, this is I think the reason that I think that that can't happen under the proposal is that we don't, even though we believe that there is a burden of proof in sustaining an individual citation which is why we

go through the citation threshold values into the approach, if we take a measurement at 2.32 or even 2.1 the fact that we don't feel that we can issue a citation or sustain a citation at a high confidence, at a sufficient high level of confidence in order that that citation be upheld in court, that does not suggest that we consider that MMU to be in compliance with the standard. We would not consider that as being in any way evidence that that MMU is in compliance with the standard.

The first thing that such a situation could trigger is when you would go back and resample, if a second sample at that MMU again is above the standard but below the level at which we would have enough confidence to sustain the citation, to issue a citation, then that would in most cases I think trigger the plan verification process.

When we go in to reverify that the plan is effective that shifts the burden of proof from us in issuing a citation over to the operator in demonstrating that the plan is effective. So the burden of proof then is then on the operator to demonstrate at a high level of confidence that concentrations are going to be maintained below that 2 milligram standard.

And so when you look at it in the context of the

plan verification process I don't think that this kind of a situation where someone was exposed for a long period of time above the standard but below the citation threshold value, that's not the situation that I think could occur.

MR. WEEKS: Well, let me respond to that in a variety of ways. First of all, as I mentioned, resampling following exposure measured between 2 and 2.3 is not in the rule. And, you know, I think it should be there but there is no guarantee that that would happen the way the rule is proposed right now. So my projection was based upon that assumption that you wouldn't, there's no resampling because it's not there, there's no discussion of it.

Second, I noticed in the plan, as I mentioned earlier, I think the citation threshold value is at the wrong end of the distribution under any event because the Act says exposure must be kept at or below. It doesn't say it should not go above. It says at or below. And so I think we should be at the lower confidence interval and not be fooling around with the upper one. Because when we get in the upper one it's an issue, essentially as I understand, it's an issue of due process. And I think in this case when there is so much compelling evidence that excess exposure is going to increase the risk of disease in this case and the

disease that's it chronic, it's irreversible, it's disabling and so on, in that situation I think that notion of due process has to take a back seat to the need to protect miners' health.

That I think is another of the problems. So that's why it should be at the lower confidence interval.

Now, I notice that that is essentially what's done in the exposure values for plan verification. I think that's appropriate. I was, frankly, glad to see that those lower values were there for plan verification if I understand them correctly. And I think they should also be in this issue over determined compliance at the lower end, at the lower confidence interval and not at the upper one.

I don't believe that I've silenced the lawyers. I don't understand this. This is --

MR. REYNOLDS: We've been down this path before. But I just wanted to mention that that's pretty much 95 percent confidence level of exceeding an exposure level like that is a fairly standard practice in other situations where you have a hazard either under the OSHA program and also under --

MR. WEEKS: Yeah.

MR. REYNOLDS: -- the programs administered by

EPA. So it's not anything that's unique or unusual to MSHA. And also it would be unique and unusual for us to take that position and difficult for us to sustain in an enforcement action. So that's why we're in a position where we believe that this is the most effective way to write this.

MR. REYNOLDS: I understand it's standard operating policy to do that. I also think it's the wrong policy both in general because these two risks, the risk of mine operator expense or miners' health, are not comparable. If those were comparable levels of risk, comparable risks in any sense we could make reasonable tradeoffs, but they're not.

And, secondly, --

MR. REYNOLDS: But in an individual enforcement action that's not what we're dealing with. The Secretary is dealing with an issue where she's taking an enforcement action against an individual mine operator and that's the context of the decision we have to make. It's not whether or not we're furthering, you know, miner health over a cumulative period of time. I mean the issue is whether or not we could sustain an individual enforcement action against an individual mine operator for a particular sample.

MR. WEEKS: There is no other purpose for taking

that individual action against a mine operator than protecting miners' health. That's the purpose of doing that. And I think --

MR. REYNOLDS: It also would be the purpose for us to go back and to continue sampling in situations where we were on the margin.

MR. WEEKS: Well, right.

MR. REYNOLDS: The issue though is whether or not we can sustain an enforcement action if that's what we choose to, you know, if that's what we do in that situation.

MR. WEEKS: Yeah.

MR. REYNOLDS: But it's not like we're going to ignore situations where the exposure level is on the margin there, you know, between 1.9 and 2.31. There would be action taken by the agency and the agency would not tolerate, you know, a continued exposure at that level. But the issue is can the agency, can the Secretary of Labor sustain an enforcement action against an individual mine operator on that sample? And that's why we're doing it that way.

MR. WEEKS: right. I understand that the purpose of that, of doing it that way is to be able to defend enforcement actions in court because someone's going to

challenge it saying you can't with 95 percent certainty and so on and so forth. I think the reply to that is that's not what the Act requires. The Act requires that we keep exposure at or below the limit.

I really think that this kind of translation of statistical reasoning into public policy needs to be challenged because it's permitting excess exposure to miners, to whoever, is at stake in this.

There are too many lawyers involved in this. There's two on the front table here. And, I don't know, are there lawyers in the back table too?

MR. HEWETT: Jim, I feel like I need to come to defense of lawyers.

MR. WEEKS: You traitor, you.

MR. HEWETT: At some risk of wasting time. So, Marvin, you might want to cut me off.

MR. NICHOLS: I was ready to do that.

(Laughter.)

MR. HEWETT: You talked about the '69 Act and the what to you is confusing wording. And I have to agree that, yes, some of the words can be and phrases can be misinterpreted as they have been. But I could point out that although I wasn't involved, I was in high school at

that time, as I think most of the people in this room, the people that wrote that Act, and I'm sure there was more than one lawyer involved, actually put together something that was very intelligent -- perhaps for the first time, I don't know -- but for a government regulation or an act. But they had this phased in approach.

And, as you mentioned, the average exposure for Bureau of Mine studies for continuous operators, for shuttlecar operators, continuous miner operators, shuttlecar operators, and so on, was quite high, 6, 7 milligrams on average for continuous miner operators. Something similar for the other occupations. So they knew that overnight it was not going to be possible to go from 6 milligrams on average or 7 on average to 2 for each single shift. So they adopted this phased-in approach, three year phased in approach.

And because -- And, you know, and I think but for the benefit of others in the room, for the first 18 months the standard was going to be 3 milligrams as averaged over a number of work shifts to be specified by the regulatory agency. They fixed on ten work shifts. So 18 months it was 3 milligrams on average. At the end of 18 months it was going to be 3 milligrams for each single shift. And at the

end of the second of the 18 months, three years, it was going to be 2 milligrams for each single shift. So 3 on average, 3 per single shift, 2 per single shift. And that was expected to gradually bring industry into compliance with the goals of a 2 milligram standard.

And it was a very intelligent approach. Unfortunately, we got locked into the shifts on average approach.

And just for everybody's information, at that time personal dust sampling where we used our personal dust sampling pump was brand new. The MSA Model G pumps were the new kid on the block, just recently developed. There was actually some concern about reliability. It was reflected in the Act regarding the reliability of the measurement system. There were even articles published by the U.S.S. Steel or U.S. Steel, who owned many, many coal mines at that time, still do, arguing that the system, the gravimetric method system is inaccurate and we should continue with particle counting, God forbid. That didn't happen. But there was this concern.

So I can see how that requirement for estimating method accuracy crept into the Act. Now, at that time the method that MSHA was using, at that time called MSA and they

were in the Department of the Interior, probably may have met accuracy criterion, but it certainly wasn't tested to see if it was meeting it on a single shift. The analysis was erroneous, and we're trying to correct that, as you know. But the system today definitely meets the NIOSH accuracy criterion which is the only accuracy criterion used in the United States with regulatory agencies and NIOSH.

And, you know, we felt it was an erroneous decision back then in '72, decided that measurement system was inaccurate. And we're trying to correct this.

I just wanted to point out for the benefit of everybody here that there was some intelligent reasoning that went into those, that Act. And we're trying to get to where Congress wanted us to be, the single shift limit measured on every shift where the standard applies to each shift.

Now, regarding the 2 milligram standard, I want everybody to understand that the United States at that time had no good epidemiology or exposure response information or health effect information on coal worker's pneumoconiosis. And that standard actually derived from studies in Britain. The Bureau of Mines sent people over to Great Britain to talk to them about their coal dust studies which were then

just only partially completed, and actually asked them to write a report based upon their interim results.

So our standard is based upon an incomplete British study. So it was incomplete, it was just a best estimate of what a good single shift limit should be. Of course, NIOSH has since published a criteria document suggestion that it should be even lower. And because it was so tenuous at that time it was improper to interpret it as a long-term coverage and Congress quite properly intended it to be a single shift limit. And that's where we're trying to move to.

Sorry I took up so much time.

MR. NICHOLS: Okay, thanks.

Thanks, Jim. Thanks, Jim.

Hey, Daryl, come on up.

MR. WEEKS: Are you the hook? Okay, thank you.

MR. NICHOLS: Well, if you've got one you've just got to make, go ahead.

MR. WEEKS: Oh, come on, now you opened the door.

Well, just one thing. My purpose in referring to that early history was different. When the Act was passed it was to point out that mine operators had complained strongly that they, no way that they could meet the 2

milligram standard. And yet within six months or a year it was down to half, regardless of the phase-in period. You're right about the phasing in, that's a, it was an appropriate way to proceed.

And based upon that, you know, that's our experience, the union's experience in saying when someone says "we can't do it" we have a lot of historical evidence that says complaints of that sort are just not credible.

MR. NICHOLS: Okay, thanks.

Daryl.

STATEMENT OF DARYL DEWBERRY, UNITED MINE WORKERS OF AMERICA

MR. DEWBERRY: Thank you for giving me the opportunity to speak before you today. My name is Daryl Dewberry. That's D-A-R-Y-L H. Dewberry, D-E-W-B-E-R-R-Y. I'm the International Executive Board Member for District 20, United Mine Workers of America.

Let me say I've sit and heard in Prestonsburg the testimony from miners, from operators here and there from all over this great country. I don't believe I've heard anybody that was in favor of adopting your regulations or your rules as you proposed them.

I've heard the United Mine Workers as well as operators commend you on single sampling. I've heard the

operators commend you on the airstream helmets. But as far as the rules in general, I didn't make it to Morgantown, I don't know what happened but I'm sure the transcripts will bear out any support that you may have had, but I tell you it falls far from the mark of I guess making the operators and the people who are affected, adversely or pro by your rules don't like it. No matter how you sugar coat it it ain't going to fly. And I think the operators will take issue with it. I know that the United Mine Workers will if it is implemented in its present form.

We ask you to go back to the drawing board, to hear the pleas of the recommendations of the Advisory Committee that was charged with cleaning this thing up, take their recommendations, address each and every one of them, there's not but 20 of them as I recall. Give something -- and let me say that was a diversified committee that was put together, advisory committee, with operators, with union, and the interests of all people were addressed in those issues.

I would like to commend you on the single shift sampling. We've been long overdue for that. However, I think we missed the mark on the full shift sampling. Full shift is in my view is exactly what it should be, and that's

not -- it should be on a normal workday. A normal workday for the majority of the people that I represent are 10 hours. They come and get their pumps, take them off of them, and they stay in that environment an additional two hours. We have what we call a hotseat swap-out; they swap-out on the face. They're relieved on the face. Some of those people don't even eat lunch in the dinner hole. So they are subjected to that environment for the full 10 hours, not just 480 minutes.

And I'd ask you, I referred to the July 7 news release and got excited because I thought there was some technology, some method that would curtail or banish Black Lung or coal-related respiratory diseases. That's what everybody that read the news media, and that's not just in my area. I thought, well, maybe it might be a misquote. But let me say that the stigma that was put out was that MSHA had come up with a way as a result of a lawsuit from the United Mine Workers to eradicate Black Lung disease.

I would like for this panel to tell me how your rules as you put them before us today would eliminate Black Lung because I got some people that I represent that want to hear it. I can't find a way that this will do anything but further detect, and let me say it will give the operators a

much larger opportunity to not be exposed to sampling even though they've had it in control.

We've got some good operators out there that have attempted to comply with the regs as they are now. I'm for doing away with the averaging because if you're in over 2 milligrams of respirable dust you're in over 2 milligrams of respirable dust. Longwalls at the Jim Walter mines every one of them on any given day would exceed 100,000 cfm on occasion, depends on the methane concentrations that you've got. You have a string line curtain down 1,000 foot longwall face line to dissipate the methane, which also puts you in a tunnel so to speak of the dust coming off the shields.

Now we've, as a result of the 060 sampling as I referred to, we've come up with some technology that's in a collaborator effort of the union and management and put -- we had people wash these shields down and put sprays on these shields which tremendously reduced the dust. And that's when Jim Walters decided that they could possibly live with 060 sampling.

But under your present rules of raising the threshold from 2 milligrams to 2.33 on any given day, and I agree with Dr. Weeks that if I'm in 2.3 -- and I've looked

through your rules and gone through them from can to cank and I read, I've represented United Mine Workers in litigation as far as intervention in the MSHA case before ALJs, handled over 400 arbitration cases, the language is so ambiguous if I took that to enforce it before an arbitrator, and will say not the rule itself but in your policies you and I both know that you and an operator is not going to in any way shape, form or fashion allow you to enforce or cite a policy. I was chairman of the safety committee. I've traveled with federal inspectors who said, Daryl, I can't write it. That's our policy. But there's no law to support me on it.

Fellows, we don't need wish lists. We need something hard and tangible that you can put your hands on that you can enforce. And I know that your inspectors want that too. You're not doing anything but giving them a bona fide gun with blanks in it and say, Boys, go out there and enforce the law. And these operators say, That is not a rule, that's your policy, and we don't agree with your policy. And you and I both know that it's not enforceable.

As far as the Part 90 miners are concerned they've already been exposed, they've already contracted the disease. 1.26 is not that much but it's a lot to him. The

residual effect of that respirable dust in his lungs, in something that is already damaged for the rest of his life, taken years -- and I guess we've become complacent. When you go to a union meeting and see the pensioners there and two-thirds of them walk around with an oxygen bottle behind them, gentlemen and ladies of this panel, I wish that you could see it. We have gotten to an acceptance level: that's what you get when you work in a coal mine.

That was not the intent of Congress in 1977, nearly a quarter of a century ago. And here we are, and I cannot understand, I've read that Act. I said, the heck with the rules, let me go see what Congress promised me. It's no different than the Civil Rights Act, it's enforceable. And I've got legislators that are good friends. I deal with a lot of lobbying for United Mine Workers and I intend to approach some congressmen about it and such as that. But the intent is clear and ambiguous -- unambiguous, I'm sorry, especially on 202 on the airstream helmets. It says that you will not. It doesn't say unless you do this or do that.

And I refer you, and I did in Prestonsburg, refer you to page 36, 202(h), I'm sorry. It says that "respiratory equipment approved by the Secretary and the

Secretary of Health, Education and Welfare shall make available to all persons whenever exposed to concentrations of respirable dust in excess of the levels to be maintained under this Act. Use of respirators shall not," it's not ambiguous, it says "shall not be substituted for environmental control measures in the active workings."

I don't know how you can write any rule that would be in conflict with what's promised in a piece of legislation unless that piece of legislation is either ambiguous or it's been amended. And to my knowledge that piece has not been amended.

I didn't, I guess, wait for the answer of how, and maybe it was just misprints in the news media, but in this panel's opinion do you think that your proposals will eradicate or do away with Black Lung disease as we know it?

MR. NICHOLS: We think if you've got, if you've got good verified plans at a high production level and there's compliance with those on a daily basis it will go a long way to do it.

MR. DEWBERRY: But it won't eradicate it as has been I guess stigmafied or throughout the news media? Are we in agreement there? I mean it's been portrayed to eradicate, do completely away with Black Lung disease as we

know it. And I've got several news articles that have been quoted by Davitt McAteer and others that that's what it would do.

MR. SCHELL: Daryl, I think what we're saying and what our concern is, the average mine operates 400 shifts. Your mines probably operate more.

MR. DEWBERRY: Correct.

MR. SCHELL: Sampling 36 shifts, if 30 of those are operator sampling, we're not sure that gets us there. Our concern, and maybe we need to rethink it, but our theory was we've got to find a way to make sure that on 400 shifts or whatever number of shifts people work that there's compliance, not just on their sampling. And that was the thrust that we took in this rulemaking is to start out and saying, okay, no more games on the plans.

I've had a lot of discussions with your membership about we go out and sample and the dust control parameters are way above what's in the plan, production is way below. And you ask how can we say that that plan protects us? So we tried to address that, saying we're not going to accept a plan unless only the parameters that are listed in that plan are in place. And we're not going to accept it at a low level of production, we're going to make that plan be

verified at a high level of production. And we're going to verify it.

And then if we enforce this requirement that those plan provisions are in place every day we thought that that was a major step toward protecting miners on every shift.

MR. DEWBERRY: Well, and I can appreciate that. Let me say that's another issue that I do address. I appreciate the fact of MSHA taking over the complete sampling. And as I stated in Prestonsburg, I have several good, close friends that are in MSHA. I have a great deal of respect for them. I've got on a lot of people that says, Hey, they ain't worth a dime, or something like that.

I said, Let me tell you something, it's just like the old car out there, if that's the only vehicle you've got you don't go out there and shoot it and start working -- walking. That's all we've got to work with.

And on any given day I'd rather work in a mine in this great country than any other country as far as coal mines are concerned. And I appreciate the laws promulgated by Congress, the '77 Act and the '69 Act. However, I think you know that the technology -- and if it wasn't there, we've come a long way, gentlemen and ladies of the panel. Never thought that we'd be able to mine in the depths that

we mine in Jim Walter mines as far as methane deliberations. It's an everyday acceptance level as far as degassing, such as that. And you can't tell me, I've seen the computered longwalls with the electroflex shields that advance themselves. We've come from running a longwall with 25 to 30 people down to some 11, 10 to 11 to 12 people now, mostly mechanics, probably three mechanics on a shift of something like that. And it's just unbelievable the technology that we've come up with.

The longwalls are computer operated. They can detect CO. And as you all know, we've had several fires as far as hotspots at Jim Walter 5 mine. Every Thanksgiving I look for a call from Jim Walter 5 to have to go sit down down there. And they were able to monitor. And if they can monitor the amperage on a fan that's probably three miles away, the heat of that fan, the CO that's coming out of that fan, the methane deliberation that's coming out of that fan all on a computer, my granny, they can come up with the technology that does what Congress intended.

And as I stated earlier, we've had over 11,000 identifiable deaths as far as this disease is concerned. I found out today a good friend of ours, Dwight Cagle who is Safety Committeeman at the location I come from, a fellow

just died of congestive heart failure but he had Black Lung also. Guaranteed that Black Lung didn't help him.

And as far as the -- you know, one of the questions that's come up is Should MSHA require a higher level of confidence? I've had confidence in MSHA for quite a while as far as abating a citation on dust. Let me say that the confidence level obviously has been there. A nd I would disagree with the burden of proof.

Let me say that if we have something that's tangible that demonstrates a violation, at that point it establishes a prima facie case. If you've established a prima facie case that is accepted by the industry and courts overall as a rule, the burden of proof would shift to the operator to prove that your sample was in error. If that level at 2 milligrams was met, unless they could prove that there were mitigating circumstances to alter the sample itself, then I think that it would be more than enforceable. That burden shifts when you meet that prima facie case with the prima facie evidence, as you know.

2.33, as far as giving you a level of confidence, I bet the operators would say you'd be real confident with 3 percent. Where does it stop? And the Act, again going to the literal language of the '77 Act and the guarantees in

there, it doesn't state in there that unless you're not confident with being able to produce evidence that 2 milligrams is not there, then you can raise it to 2.33. It's unambiguous. It's clear in the Act that you're going to hold that standard, that environment to 2 milligrams in the working places.

And one, and I agree with Dr. Weeks 100 percent, I think that if you lowered the standard to 1.8 in working places and .8 on the Part 90 miner then if you issued a citation then you would be in complement with the Act. The criteria would be enforceable in line with the Act. And we'd be better served for it.

One of the things I guess that --

MR. NICHOLS: Daryl.

MR. DEWBERRY: Yes, sir?

MR. NICHOLS: What we're talking about here is whether we issue or not issue a citation --

MR. DEWBERRY: Yes, sir.

MR. NICHOLS: -- between 2.0 and 2.33. The issue is not whether a miner is going to continue to be exposed to that because we're going to follow up. If we get a concentration between 2 and 2.33 we're not going to walk off and leave that and call it compliance, we're going to follow

up on it.

The issue I think is whether a citation -- whether we can legally issue a citation in that range. But for the health of the miner we're going to follow up on that.

MR. DEWBERRY: Yes, sir, I understand that. I understand that's your threshold for purposes of litigation enforcement to give you a higher level of confidence that we'll take this one on because it's at 2.33 even though the standard says we're at 2 milligrams, my gosh, we can enforce this. And the Act does not say that you will cite at 2 milligrams. I mean it says that that's what you'll hold it to. And I know that that's your intent.

However, in going back and trying to recall exactly where it would be in there, I think that would be more or less your policy to do that. I think if I were an operator and wanted to challenge you and you showed a disparity, a disparate treatment between me and my company and another, that I would take issue with it. And if you had already varied or deviated so far from -- not so far but far from what the Act had required, I think that it would probably give me a pretty good argument.

MR. REYNOLDS: I just wanted to try one more time. What the Act -- I mean we can cite when the operator gets

above 2.0. And if we have a sample that comes in at 2.31 what that means, and John might want to correct me, is that we have there's less than a 50 percent chance that that operator is above 2.0 with 95 percent confidence, because we're dealing with, you know, measurements which might -- there, you know, are factors that we had to take into play.

If we go to 2.32 or above that then there's a greater than 50 percent chance with 95 percent accuracy that that -- or 95 percent confidence that the operator has in fact exceeded 2.0. So we're still enforcing 2.0 as the Secretary is required to do in the Mine Act. But it's a matter of, you know, what our burden is and showing that there is a greater than 50 percent chance or preponderance of evidence that we've exceeded 2.0 or that the operator has in fact exceeded 2.0.

And, again, as Marv said once before, this does not mean that MSHA would not continue taking enforcement action and continuing to sample. There in the actual reg text it says that we may yank the approval of their ventilation plan if there's a problem there. And we may reinitiate verification sampling and put them through this whole process and make them take a look at the ventilation plan and their controls.

So it's not that we're not going to do anything in the levels between 2.1 and 2.32.

MR. DEWBERRY: I understand. I understand exactly what you're saying. It gives you a higher level of evidence and support in your argument for litigation purposes.

MR. REYNOLDS: And also I'm saying that that question is not something that MSHA can do as an administrative agency. I mean this is something we're dealing with in the administrative process in the courts.

MR. DEWBERRY: I understand.

MR. REYNOLDS: Okay. But I mean we can't control that through the rulemaking here.

MR. DEWBERRY: However, I think it would have probably I guess set well, and I guess maybe my ignorance as far as what has happened in the past, I knew that we averaged but haven't we held the confidence level somewhere around 2 milligrams on an average of five samples? Or have we used the 2.33 standard?

MR. REYNOLDS: Well, actually we've been way above that. If you recall what we went over at the beginning of the hearing --

MR. DEWBERRY: Yeah, I know that some of them --

MR. REYNOLDS: -- there could be situations where

you had somebody at 3.8 and 2.4 and you would still come into compliance.

MR. DEWBERRY: That's right.

MR. REYNOLDS: That would still show compliance.

MR. DEWBERRY: If over the average of those five shifts it would be 1.8 or 1.9 I believe it was.

MR. REYNOLDS: So you've got somebody sitting there with a 3.8 and a 2.4 and that operator is in compliance.

MR. DEWBERRY: Okay. But let me I guess rephrase the question. It was obvious that your confidence level at that point was at 2 milligrams, or did you use the 2.33 standard by averaging? I mean if the average of all five samples come up with a 2 milligrams did you issue a citation there?

MR. REYNOLDS: I didn't think we could get any more loosey-goosey with the numbers than that. I mean we were like out into the stratosphere of confidence if we've got somebody -- if you're willing to say in an average that that person is maintaining the respirable dust level on each shift or each coal miner at below 2.

MR. DEWBERRY: Yeah.

MR. SCHELL: Jon can explain it, but there is when

you're average multiple samples you come down lower.

Jon, why don't you explain why?

MR. KOGUT: I think that this is not an easy thing to explain. And there is sa fuller explanation of it in --

MR. DEWBERRY: Well, I probably wouldn't understand it if you did.

MR. KOGUT: Well, there's a fuller explanation of it in the preamble to the single sample notice that we put out in 1998, not the joint one that we issued with NIOSH but the one that MSHA put out by itself implementing the enforcement policy based on single samples. Now, that's the one that was overturned by a court decision, which is one of the reasons why we're going through this process.

But basically our position is that by averaging those samples that actually decreased the accuracy of our samples in the same way that Dr. Weeks was talking about because of biases that are introduced by averaging samples.

MR. DEWBERRY: Yeah.

MR. KOGUT: The principle of issuing a citation when the average of those five samples was at least 2.1, and that's when they did it because we were just using one digit to the right of the decimal place. So when the average was 2.1 or above then our citation was issued. that was kind of

established as a longstanding practice, and it wasn't based on any formal determination of what the confidence level is.

One way of interpreting it though is that since we were requiring 2.1 or above that we do have some level of confidence that the standard was actually exceeded in at least one of those locations or shifts where a sample was collected, at least one of them. So there is an interpretation you can place on that 2.1 that says, yes, we had a sufficiently high level of confidence. And the average comes out to be that 2.1 that we have a high level of confidence that at least one of those five exceeded the standard.

As I say, this is not a simple thing to explain.

MR. DEWBERRY: Yeah.

MR. KOGUT: And it's discussed in a lot more detail in that 1998 preamble.

MR. REYNOLDS: I just wanted to say the 1998 preamble is still, we can still look at that 1998 preamble because the reason we're going through this process now on single sample is not because there was any substantive problem with any of that, the information that we published in 1998, it's just that the court said we had to go through another procedure, which is what we're doing now, to do this

as a mandatory standard under the Act rather than as a notice. So that all the information that was published in 1998 about the enforcement policy would still be relevant to these issues.

MR. DEWBERRY: I guess that leads me to a question. And maybe it's for the counsel. Was that one, I mean 2.1 level of confidence ever challenged in court as far as an operator?

MR. NIEWIADOMSKI: Yes. Yes, it was challenged. Can you talk about the case, Tom?

MR. KOGUT: Let me just address the first part of your question while Tom is figuring that out. Remember that the, you know, that 2.1 confidence level that you get when you're talking about 2.1 that comes from an average of five samples. So, you know, that's different from when you're talking about a single sample. And if there were no bias -- and our position, as I said before, and I agree with Dr. Weeks on this point, is that by averaging samples you actually decrease the accuracy of the whole process.

MR. DEWBERRY: I agree.

MR. KOGUT: Because you're introducing potential biases. But if there were no biases then by averaging samples, say we were able to take simultaneous samples

somehow, taking it exactly the same location and you average them together, or you were able to do that somehow, then you could get away with a smaller margin of error than if you were dealing with one sample.

Now, I'm speaking hypothetically because we don't -- there's really no practical way of doing that. But if you were somehow able to do that and take those simultaneous samples all taken in exactly the same location then you be able to get away with a smaller margin of error. But you can't do that.

Another thing is that in order to get a high level of confidence there's more than -- there are other ways you can get a high level of confidence besides just getting that 2.33. For example, I said before that if on one of our repeat samples, say we go in there and we get a sample of 2.1, okay, and that triggers somebody coming back and taking another sample. And say that second sample comes in at 2.2, now that might trigger the verification process so we'd go in and reverify the whole plan.

Now, let's say that the verification plan for some reason was, the operator was able to actually comply with that verification plan and when we did that verification sampling the plan did in fact get reverified. And then we'd

go through -- go to compliance sampling again and the same thing happens all over again, you get a sample of 2.1 on the compliance sample.

Now you've got three compliance samples that were all greater than 2 but less than the citation threshold value for an individual sample. But keep in mind that that citation threshold value, that 2.33, that applies to an individual sample, not three samples and certainly not four samples. If you've got four samples that are all at 2.05, less than 2.1, if you've got four samples that are greater than 2.0 that in itself gives us as high level of confidence that something is, you know, that they're out of compliance.

So, you know, even if triggering the reverification process didn't work for some reason -- I don't see any reason why it wouldn't work -- I think this kind of situation would be caught in the reverification process. But for the sake of argument even if it didn't work then we would be able to get a high level of confidence that the mine was not complying just based on repeated samples that are above the 2.0 limit but below the citation threshold value.

Just as, you know, in the opposite of that or the other side of that is that during the verification process

we're doing the same sort of thing. If all of the samples for the different occupations come in below the critical value for one shift which is down around 1.7 something then that could reverify the plan on one shift. But if some of those samples come in, say, at 1.8 or 1.9 then the plan will not get verified on one shift and we go to another shift of sampling. And if we get repeated shifts where they're all, all the measurements are below the 2.0 limit then it's possible to verify the plan based on those multiple samples even though they're above the 1.72 critical value as long as all of them are below the 2.0 milligram standard.

So in other words there's more than one way to verify a plan. And by the same token there can be more than one way to achieve a high level of confidence that the mine is not continuously or the MMU is not continuously in compliance.

MR. DEWBERRY: I guess in response to your answer I guess it raises another question on the reverification process of each location. And I'm referring to the longwalls in general with the Jim Walter operations which the seam and height vary at any given time. Sometimes you're able to get under what we call the middle man. Sometimes you have to take the top which makes a difference,

a deviation between sometimes 5 foot of height. I've seen it get down as low as 46 inches with those longwalls and you have to start taking top then, which produces more quartz. You're cutting a lot of rock then.

And if you only sample six times per year is there going to be any criteria or is there anything that gives you enforcement power or the authority if the height and seam and great deviations change that you can come in and sample more often than the six times? Or would that be at the discretion of the CMI at that location?

MR. SCHELL: That's a good question, Daryl. And what we've tried to say is sampling six times a year, bimonthly sampling as a minimum. There are other things that should trigger additional sampling. So there is nothing to prevent us from coming in.

One of the things that we put out is guidance to our districts is in fact when you start cutting rock that's an area where we should be in sampling. So to be specific to your question, the six times we said was minimum. If there's a reason to go back more often, we need to do that.

MR. DEWBERRY: I understand that. And I guess it leads me to another question. And I've heard today and learned today as a result that we have been able to put on

90 additional miners -- I mean CMIs to inspect the mines and to enforce I guess these new promulgated rules. Is that based on the six shifts per operation or would it need additional funding to go back as needed because, you know, the -- and I guess what you'd have to do is get a plan at each location, one for taking the middle man, one for letting it fall in.

You know, you've got so many mitigating circumstances at some of these operations. In the Show Creek operation, for instance, that height is unbelievable. And the pitching seams, I don't know how they do it. I've never cut in that type of coal before, but it's up and down. It's unbelievable. It's something like you've never seen. And I would encourage all of you to go down there and look at it.

But I can foresee so many problems and variances when you approve a plan like that. And I'll get on into some other issues in a minute. But once it's approved and you're only going to sample six times, from that day forward, you know, the conditions, the mining conditions change daily there. And I think that that should be -- and I don't recall in reading the promulgated rules where you have the -- I think most of what I've read is policy and not

enforceable as far as the rulemaking. And that's one thing that I would encourage the panel to do, if you're going to write something, be able to put some bullets in it to enforce it.

I mean these operators and some -- you know, not just the operators but some things if you can't enforce it why put it in there?

That I guess raises --

MR. NICHOLS: Daryl.

MR. DEWBERRY: Yes?

MR. NICHOLS: How much more time to you think you're going to need?

MR. DEWBERRY: I'm about to wrap up right now, Mr. Chairman.

MR. NICHOLS: Okay. We need to decide on whether we're going to work late or go tomorrow, so.

MR. DEWBERRY: Well, I would have been through a long time ago but I --

MR. NICHOLS: You can have all the time you want. I just need to --

MR. DEWBERRY: I understand.

MR. NICHOLS: -- figure it out here.

MR. DEWBERRY: I guess in getting back to it, and

I've deviated somewhat from my notes, I'll just read it right quick and we'll get on.

I say comply with the '77 Act. I've already referred to that. You're charged with promulgating the rules that comply and complement the '77 Act, not rewrite it, not legislate it. The Act is clear and unambiguous. What you're charged with and what I've heard today is that we financially cannot afford to enforce the Act as it is right now.

MR. NICHOLS: Wait a minute. No, that's --

MR. DEWBERRY: Maybe I misunderstood.

MR. NICHOLS: No, that's not.

MR. DEWBERRY: You've got money allocated for?

MR. NICHOLS: We've got money allocated, these 90 additional positions were to allow MSHA to do bimonthly sampling.

MR. DEWBERRY: Okay.

MR. NICHOLS: And some additional amount of sampling. I mean we have some additional resources with mines closing and things like that.

What I said was that if MSHA took over the operating sampling program sample for sample, that just a rough figure would mean that we would need an additional 200

people, and probably about $20 million.

MR. DEWBERRY: Yes, sir. That's what I understood you to say. And, in conclusion, you know, I recommend that we, whatever it takes. I don't think the Act, and I've read from front to back, says this Act is restricted to a minimum amount of legislated or approved financial. You're charged with doing that. Whatever, you know, we need to do to see that it's done, I think that we'll certainly help you. We've come to the aid of MSHA on numerous occasions to make sure that you have the resources to fill the intent -- fulfill the intent of the Act. But these promulgated rules don't do it.

And what I -- maybe I misunderstood, but if we took the recommendations of the Advisory Committee then in all 20 recommendations that it would cost an additional $20 million and take 200 people to enforce it. Or correct me if I'm wrong there.

MR. NICHOLS: I don't know about all the recommendations but I was speaking specifically to taking over operator sampling sample for sample.

MR. DEWBERRY: Okay. Again, we need full shift sampling not 480 minutes.

We applaud the single shift sampling, not

averaging.

We need continuous monitoring in line with what NIOSH, even if we have to appropriate money to get there. I think that it would curtail Black Lung disease as we know it today. We know what the environment is.

So many times I've gone to a Black Lung hearing with somebody that I know wasn't sampled, maybe hadn't ever been sampled, worked outby drilling the roof or something like that and to hang cables or pipe on, and come back and they've got Black Lung. That's what happened to Scott Chappell. He wasn't working in the face. I don't think he ever had a sample, dust sample in his 15 years of employment. And that's unbelievable.

But when he went to the Black Lung hearing, my gosh, they said you didn't get it here. Must be from smoking. The boy never smoked. 33 years old. And he finally ultimately got it. But I've been to so many where if there is not paper to show this fellow wasn't working in that type of environment, and the Congress and MSHA guarantees that you're not going to get -- and I've heard this argument from operators so many times, that he wasn't exposed. Look, there's not a citation on it. Well, these people they usually cut them open, usually, to find out when

they've got it after they've deceased.

Again, policy is not enforceable. ALJ won't hear you. You know that.

As far as the airstream helmets, again you all saw how heavy they are, how hard they are to wear. When they first came out in the early '80s our people liked them at Jim Walters till they got down, and you think it's heavy with your neck straight and standing up, that's fine. But when you have to get down on the longwall shield and walk like that for 10 hours on a 1,000 foot face, I'm telling you it causes back injuries, neck problems and everything else. The thing is too cumbersome. And God help these boys that chew tobacco and spit. I mean it is a terrible sight. All the time I know that we've had people go in had to shave their beards to go in under apparatus. And maybe that would be the answer. But those people don't wear them now, they'd rather work in the dust because it's too cumbersome to get down. You've got to take it off to look under a longwall or whatever.

Gentlemen, I would, and ladies, I would ask you all to take the Advisory Committee recommendations, go back to the table. And if you need the assistance of the United Mine Workers to get more money appropriated I think we just

made an endorsement here lately but we'll certainly go to that well. But I think you're charged with complying with this Act that we've been promised. And that's what we expect you to do.

MR. REYNOLDS: Daryl, I just, I thought I understood you to say at the beginning that Dwight Cagle had passed away since last Thursday?

MR. DEWBERRY: No, sir. A friend of mine and Dwight Cagle's. He let me know that the fellow, when we were in Prestonsburg, Kentucky, died of congestive heart failure.

MR. REYNOLDS: Okay. I thought I understood you to --

MR. DEWBERRY: And, no, he testified today.

MR. REYNOLDS: Dwight was here. He was in Prestonsburg last Thursday.

MR. DEWBERRY: Yeah. He was a friend of ours. And he just passed away. However, he had Black Lung and as many others do there.

And let me say one other thing, too. I wish that the panel would address these hard rock miners. I have a sympathy for them. I worked in a hard rock mine sinking the shafts at Jim Walter Resources Number 5 and Number 7 with a

jumbo drill. Can't hear real good today from working in that environment, even with earmuffs on. It's like being around a full-time machine gun. But the dust is unbelievable too. And not one time in three-and-a-half years that I worked for that underground development sinking those shafts was I ever sampled.

And I was a continuous miner operator. And I was trying to recall, I haven't been sampled but twice, and I was a continuous miner operator for about seven years at Jim Walter Number 7 Mine and don't recall but being sampled probably one time.

So, thank you.

MR. NICHOLS: Thank you, Daryl.

Okay, we need to decide what we want to do here. We have 12 more presenters. The next 10 are UMWA presenters. And we have two other folks that are not.

It's 4:40. The choices would be go to 5:00 o'clock, take a break, come back and go longer. We have the room for as long as we want it. Or we could break at 5:00 and resume in the morning at 8:30.

Is there anyone that would have a problem coming back at 8:30 in the morning? Is Scott Boylen here? Would you have a problem in the morning?

MR. BOYLEN: That's fine.

MR. NICHOLS: Okay. John told me how to pronounce his last name but I'll probably pronounce it wrong. Yes, are you okay for the morning?

MR. DE BUYS: I'm okay.

MR. NICHOLS: Okay, let's go to 5:00 o'clock and we'll break then and resume at 8:30 in the morning.

Go for another hour? Okay, let's, yeah, how about let's take a --

MR. WILSON: I'm afraid if we don't continue some tonight because of the length of some of the testimony we're going to be getting into some flight problems.

MR. NICHOLS: We'll go as long as you want to.

Let's take a 10 minute break right now, come back, and we'll go at least till 6:00. And then we'll decide if we want to go longer then.

(Brief recess.)

MR. NICHOLS: Okay, let's get started back. Is Dan Spinnie in here?

MR. SPINNIE: Yes.

MR. NICHOLS: Come on up, Dan.

STATEMENT OF DAN SPINNIE, UNITED MINE WORKERS OF AMERICA, LOCAL 2161

MR. SPINNIE: My name is Dan Spinnie. I'm from Local 2161, Coulterville, Illinois, where I've been a safety committeeman for my local since 1980.

Last week I was at the hearing at Prestonsburg, Kentucky, and we heard from miners from the east, southeast, midwest. We heard complaints on the rules as follows:

Many MSHA proposals are contrary to both the Coal Mine Respirable Dust Task Group of 1991, the Advisory Committee on the elimination of Black Lung.

We heard complaints on the number of samples taken.

We heard complaints about nothing in the law only in the preamble about miners' representation and participation and none in the proposed rules.

We heard of single full shift sampling.

The Task Group of 1991 believes that the existing operator sampling program can provide adequate assurance that miners will not be exposed to unhealthful respirable coal mine dust until continuous monitoring is feasible if appropriate improvements are made in the program. The Task Group of 1991 recommended and spelled out that current regulations limit the duration of sampling for the entire shift or 8 hours, whichever is less. As a result, miners

who work on non-traditional shifts of more than 8 hours are not being adequately monitored under the existing regulations.

The Advisory Committee of 1996 also concurs with this.

We heard from miners who said there was no provisions for continuous dust monitoring for dust.

We heard from miners that there was a very complex rule that was hard to understand.

We hard proposals to use administration controls versus engineering controls.

We heard about the number of samples going to be taken outby and for Part 90 miners reduced.

We heard about the way production was counted on shifts.

The Task Group of 1991 reflects that of the following: MSHA should redefine normal production shifts to reflect actual production during normal work cycles. The agency should also develop a means to verify actual production levels of individual mining units. Again, the Advisory Committee of 1996 concurred.

All these complaints and objections to these proposed rules and some were for good reasons. Number one,

the preamble on page 42124 states certain aspects of the current respirable dust program limit MSHA's ability to assure the adequacy of the dust control parameters under typical mining conditions according to two expert panels which reviewed the federal program designed to prevent Black Lung among coal miners. Both the coal Mine respirable Dust Task Group established in '91 by the Assistant Secretary of Labor for Mine Safety and Health, and the Advisory Committee in 1995. The Task Group found that MSHA's current program did not promote the development and implementation of quality plans. The Task Group determined that the use of minimum production levels for evaluating the effectiveness of dust control parameters can result in marginal or inadequate plans.

The Task Group concluded that current regulations limiting the duration of sampling to 8 hours do not provide for adequate assessments of respirable dust exposure during non-traditional shifts of more than 8 hours.

And you know at most mines now there is not such thing as 8 hour shifts. Most change at the face or so-called hotseating. And also the rule needs to have provision for operations that run through the weekend because you all know as well as I do, and everyone in this

room for that fact, that Saturdays and Sundays is open season for some operations.

After reviewing these rules and the preamble I find a lot of them too discretionary with too many "ifs" and "mays." For example, example number one, page 42149, paragraph 2 of the preamble. "If you are cited under 75.371 for failure to comply with your approved plan, the District Manager may," "may conduct an investigation." Again, too discretionary. It needs to be put in the rule.

Example number two, page 42149, paragraph 3. "Finally, the District Manager may," and there's that word "may," "revoke your interim plan and withdraw permission to use the administrative controls for compliance purposes if you have a record of noncompliance with your interim ventilation plan, or if MSHA samples indicate that miners are not adequately protected."

Which leads me to a question. The word "record," where do they get this record from? Because we have no record established.

MR. REYNOLDS: I think what you're asking is what does MSHA do if we don't have a record of their production levels?

MR. SPINNIE: Yes.

MR. REYNOLDS: We don't have production records?

MR. SPINNIE: Yes.

MR. REYNOLDS: In the text of the reg it says -- let me find it -- what we do if they don't have 30, records of 30 production shifts, we go and we use the lowest level.

MR. NIEWIADOMSKI: There's a regulation at 70.208, "What if 30 shifts of production data are not available to establish the verification production level?" That's in the laws.

And it says if we don't have 30 shifts the VPL will be the minimum production level achieved on a shift that was sampled to verify the plan's effectiveness. So it's in there. And you're going to be held to it. Now, if production happens to increase, okay, then we will reverify that plan.

MR. SPINNIE: I think, I think we ain't on the same avenue on this.

MR. NIEWIADOMSKI: Are you referring to the record of noncompliance?

MR. SPINNIE: I'm referring to page 42149, paragraph 3 of the preamble where it says, "Finally, the District Manager may revoke your interim plan and withdraw permission to use administrative controls for compliance

purposes if you have a record of noncompliance with your interim ventilation plan."

MR. SCHELL: And your question was? I'm sorry.

MR. SPINNIE: Where does this record come from?

MR. SCHELL: That would come from our sampling. In other words if we go out and find out that they're not complying with their plan, you know, they'd be cited for that. But if they keep doing it they're not going to be allowed to continue to use that administrative control.

MR. NIEWIADOMSKI: And that information is what, this is basically what we determined the penalties is in the computer system. All the information is captured there. We would review to see exactly, you know, how many overexposures they've had, how many plan violations, all that would be considered. That's the record we're referring to actually.

MR. SPINNIE: Okay. Example number three, page 42149, paragraph 7, "Based on the dust parameters that were in use for the results of the compliance samples, dust concentrations measured by MSHA samples, and the information submitted by the operator regarding the types of corrective action that were taken, MSHA may elect to sample the cited entity to determine the effectiveness of your abatement

actions." One again the "may" word.

To me and a lot of other folks that I discussed this with, folks at our local union last Sunday, at our local union meeting, we feel that it's too discretionary and we need it in the rules. And we need a clear and obvious rule.

Example Number four, page 42150, paragraph 2. "If the District Manager determines that your production exceeds the VPL on more than 33 percent of the production shifts over a six-month period, then this may trigger the plan verification process using a higher" level. And, again, "may." Find this too discretionary with all these "mays" in here.

MR. REYNOLDS: Dan, I just wanted to speak about what it says. We're reading things from the preamble. But let me read you what it says in the actual text of the regulation.

It says, "What must I, the operator, do if I am cited for exceeding the applicable dust standard?" That's the section we're talking about in the preamble.

"If you are cited for exceeding the dust standard you must promptly review your dust control procedures to determine the cause of the excessive dust concentrations and

take corrective action to lower the concentration of respirable dust to comply with the applicable standard and notify the District Manager within 24 hours after implementing the corrective action. MSHA will then sample to determine the effectiveness of your abatement actions or require reverification of your ventilation plan under proposed Section 70.203. If MSHA samples demonstrate compliance you must incorporate these corrective actions in your mine ventilation plan. MSHA may reverify your ventilation plan after determining that your dust control parameters originally approved may be ineffective in controlling the concentration of respirable dust in a working environment of the MMU under current mining conditions. If they show noncompliance, the District Manager may revoke approval of your mine ventilation plan."

MR. SPINNIE: Does this mean must for the operator or may for MSHA?

MR. REYNOLDS: The "musts" are for the operator. But there are situations where, I mean there may be situations where it's not -- I mean once they've done all these things there may be no need to revoke the ventilation plan. But MSHA will always have the authority to do that. It's just a warning.

MR. SPINNIE: Warning. Okay. Nevertheless, you know a lot of times you refer back to the preamble as policy and the word "may" in there scares me to death. Because over the years I've seen contractor language, I've seen laws that had "may" in it, and somewhere down the line "may" comes back to haunt you

And, you know, I got thinking about that word "may." And there under Part 70.2 of definitions I don't find the word "may." And so, you know, I looked it up in the dictionary. And, of course, the first thing it says it's the fifth month of the year, which that don't really apply here.

But secondly it said "or is permitted." That kind of fits.

Thirdly, "will possibly." Now that, that kind of fits.

I guess in closing I'd like to say that we need a rule that fills the needs of the miner. And you must understand that everything a coal miner has ever got in his life he had to fight for it. You know, we didn't wake up one morning and have two weeks' vacation pay. We didn't wake up one morning and somebody tell us that we was going to have a safe environment to work in. We had to fight for

it.

And that, that's why we need something that fills the need of the working miner, not one that fills the need of corporate chiefs or Wall Street experts or politicians or anyone else that doesn't have to work in these environments. And mainly a rule that is discretionary free. And "discretionary" according to the dictionary means "freedom of choice and actions." Now that's pretty broad because when you get personalities involved inspecting these mines, if it ain't in black and white too many things can happen. It can help you and it can hurt you. And all I'm -- we need a rule that spells it out.

That's all I have. Thank you for your time.

MR. NICHOLS: Thank you.

Brad Allen?

STATEMENT OF BRAD ALLEN, UNITED MINE WORKERS OF AMERICA, LOCAL 1984

MR. ALLEN: Hello.

MR. NICHOLS: Hello.

MR. ALLEN: My name is Brad Allen. I am UMWA Safety Committee Chairman for Local 1984, designated miners' representative. I work at the Deserado Mine, 12 miles northeast of Ranger, Colorado. I have 12 years mining

experience and have worked in many aspects of the underground mining operations. I have worked primarily in continuance mining section but have also worked in outby areas, longwall faces, and am currently a belt examiner and fire boss.

I'd like to give a little background today on myself so you will understand one of the many reasons I am here today. Both of my grandfathers worked in the mining industry. One worked underground and one worked on surface at loadouts and driving truck. Both were diagnosed with Black Lung.

When I was a lad I would walk into the field to help my maternal grandpa change water. We would have to stop 8 to 10 times during the trip, and it was as small field, so grandpa could breathe. He later developed heart problems and also had to be on oxygen before it all got the best of him.

My paternal grandpa was not as bad as long as he did his inhalers. In his later years he would have to stop to catch his breath just to walk from the car to the house.

And I am here today, as many of my fellow miners are, to ask that MSHA take a closer look at the proposed rule and follow the Advisory Committee's recommendations

more closely and not lose sight of the finding and purpose portion of the Act. The rule, as proposed, is gutting the Federal Mine Safety and Health Act of 1977. MSHA has seen fit to actually increase the dust level that miners will be exposed to which the Advisory Committee called for lowering the dust level, allow mine operators to use PAPRs, to expose miners to increased dust levels beyond 2 mg, and reduce the frequency and number of samples and decrease compliance sampling.

The Act has a goal of being technologically inducing, and the technology is available and feasible for machine-mounted and personal continuous dust monitors. Of course, unless this is written as a rule that is requiring use of such technology in today's mines, operators will not "voluntarily comply." Let's drag the mining community into the next century and require the use of continuous dust monitors.

The Advisory Committee called for an effective MSHA takeover of the mine operator compliance dust sampling program. And MSHA's answer was to just eliminate the mine operator compliance dust sampling program which effectively give us, the miners, a significant reduction in the number of samples taken.

The Advisory Committee called for a full shift sample. The 480 minute rule still applied in almost every aspect of MSHA sampling procedures in the proposal. My shift is 600 minutes and sometimes five, six or seven days a week. Under the proposal I will allowed to breathe more dust than that lucky guy who only has to work 480 minutes per day and also inhale that level of dust for the extra shifts I'm required to put in.

MSHA needs to keep this full shift definition and concentration simple and the same level for every miner, and that is measure the actual dust that a miner sucks into his lungs in the shift and keep the concentration the same regardless of the shift length. No tricky formulas that the average Joe may not want to try and understand. And keep the current 2 mg standard or reduce it as the Advisory Committee recommended.

The Advisory Committee called for environmental controls to use, to continue to be the method of controlling dust. Control it at its source, not by using protective equipment that may or not be worn properly and is still subject to scrutiny and to my knowledge has not actually been laboratory tested under longwall-like conditions.

Another possibility is the use of unidirectional

cutting and slow the shear down and maintain it at a speed that will allow the operator to comply with the standard.

The Advisory Committee opposed changing the Act provisions regarding the substitution of use of respirators for environmental controls. And MSHA's proposal to allow reduced citation for having a "quality respiratory protection program" in place should be removed. Plan revocation, inspector presence and penalty assessments are what have historically gotten operators' attention. We need to hold their feet to the fire, period.

The Advisory Committee called for increased miners' representative participation and this was sidestepped in the rule and instead issued as policy. This needs to be a hard, fast, black and white rule. The proposed rule was also clouded with policy which is not set in stone like a black and white rule. MSHA should not leave any gray areas for operators to dabble in. Make it a regulation.

The verification of ventilation plans is a good idea. But as stated in the background information in the Register that "evidence suggests that it is highly probably that some miners are overexposed to respirable dust on shifts that are not sampled by either the operator of MSHA."

So plan verification will be under optimal conditions, not typical. To get approval and without frequent sampling in MSHA presence miners may still be subject to higher dust levels.

For example, at our mine roadways seem to get extra watering when dust samples are conducted. I recommend increasing frequency of sampling in MSHA dust parameter checks.

The verified production level is also a step in the right direction. This should increase the validity of actual values for the dust samples that are taken.

In closing, I want to express gratitude to MSHA for recognizing the need for the change in the dust control measurement and verification and want to say that under the proposed rule we may be forced to ask our senators and congressmen to accelerate the federal Black Lung program funding and make it easier to obtain. I suggest that MSHA go back to the drawing board and create new rules that are more consistent with the Advisory Committee recommendations. Please allow my fellow miners and my lungs to be in good shape when we are old.

Thank you. I have a copy for you.

MR. NICHOLS: Okay, bring it up.

Brad Peayn.

MR. PEAY: That's Peay by the way.

MR. NICHOLS: What is it?

MR. PEAY: It's Peay.

MR. NICHOLS: Oh, okay. That's spelled "pay right here" I guess.

MR. PEAY: P-E-A-Y is the way it's supposed to be spelled.

MR. NICHOLS: Go ahead.

STATEMENT OF BRAD PEAY, UNITED MINE WORKERS OF AMERICA

MR. PEAY: Thank you. My name is Brad Peay and I work at the Trail Mountain Mine that seems to be one of the topic mines here today, owned and operated by Energy West Mining. I've been a coal miner for 19 years. Approximately 14 years of it's been longwall experience.

I served on a mine rescue team during the Wilburg mine disaster in 1984 through '85. I currently serve on an Energy West Blue Team and I'm UMWA mine committeeman and union mine committeeman. I was heavily involved with the 060 dust protocol that most everybody's aware of that was in effect. I and as well as Cam Montgomery played a big part in that, making sure things were run right, proper on the UMWA level, making sure that the men were cooperative.

I sat through some of the hearings when John Cuzar and Bob Paxton come out to get things going. I watched the argument of "we've tried everything we can possibly do. We need the airstreams." I am thankful for John Cuzar for standing up and telling them no.

As UMWA workers, we knew that there was an opportunity there to make the company responsible. We went to the drawing board with the company and ended up being able to come into compliance.

On the airstreams, which I've been asked to talk about, a lot about why I'm up here, when I first went on the longwall about 12 years ago it took me a good two months before I decided I'd wear them. And I am thankful to the company that it's a policy that when we are on that face we wear them airstreams.

When NIOSH changed the filters in them airstreams we were one of the first ones to complain about them. Due to the changing circumstances and conditions that we have at the mine we are in extreme dust conditions. Some of the dust samples were way off the record during the protocol. Conditions changed from day to day through the top. The dust floating off the tops of the shields, you can't see the shear operator downwind from you from 10 shields away.

When we finally got used to the 060 testing and we came into compliance MSHA left and things started to go back the way it was. I am here to tell you that there are some things that I've witnessed, some things that I've seen that I would like to see MSHA hold the operators responsible for the things that go on.

They have threatened our shear operators by holding the tram speed down during sampling. I have watched our shear operators walk away as your MSHA inspectors have placed them pumps on them, walk down the pan line, cover them over with their jackets. Now, if this is going on in our union mine, what's going on in the non-union mines?

I have stood toe to toe, face to face with a couple of people ready to duke it out on the longwall over this. I don't think our coal miners are educated enough on how dangerous slope dust is. The operators have intimidated, "We're going to lose our contracts. We need the coal coming out." I've watched them pay overtime to get good samples. Please make them responsible. It's our lungs. We're the ones down there doing the work. It's easy to be out on the surface and call in on a mine phone and say How are we doing? We need more coal. We don't care about the dust it seems to be.

There are times when we are due to MSHA coming in that things start coming back into working order. The dust sprays are starting to work. But it's not until MSHA's due for their samples.

I've watched inspectors ignore things. MSHA inspectors need to be more responsible about what's going on.

MR. NICHOLS: Could you say that again. Inspectors ignore things?

MR. PEAY: Inspectors, I've seen inspectors ignore things. Turn around and walk off on these samplings.

MR. NICHOLS: Like what? Like what would they be?

MR. PEAY: They've seen these dust samples where they've been placed under jackets.

I am thankful John Cuzar didn't let them have them air sampler -- airstreams.

Conditions change from day to day in our mine. In our mine also during the sampling periods it's amazing how the outby traffic has stopped but on a regular day to day basis it continues. We've had people in belt drives that have never been sampled.

You know, and another thing that's on this tonnage, these 8 hour days versus these 10 hour days, they

come in and sample for 8 hours, start them pumps before we go in the mine. They pull these pumps off these guys, turn them off outside. And we've still got two hours, over two hours of mining left. After them pumps leave it's start, let's gag it. Things change as soon as the pumps are gone.

I believe that through administra -- or engineering controls the dust problem can be taken care of. It's been proven. I've seen it. I've witnessed it.

Is there any possible way MSHA could come up with ways to educate the coal mines -- the coal miners on how important the dust is?

What good are the laws if we don't enforce them now? If they're policies, how are you going to enforce policies to make the coal operators responsible? It's been addressed here today.

I have the possibility -- I have one son that works in the coal mine. I have a possibility of more sons working the coal mine. Please help us save them. Thank you.

MR. NICHOLS: Thank you.

MR. SCHELL: Brad, I will tell you the, I will pass on your comments about educating the miners. We put a lot of effort into developing hazard awareness materials for

miners on silicosis and Black Lung. And if that's not getting to you we'll make sure that does.

MR. PEAY: I'm aware of that at our mine. But I'm worried about the non-union miners. These coal operators who are thriving on pulling in the 19, 20 year old men, young men. The young man that was killed at Willow Creek here two weeks ago, two little children. Does he have any idea how, what the dust did to him? It's the non-union mines. Now that they're getting ready to close Trail Mountain down am I going to be able to go to a non-union mine and be able to enforce what I know as a worker?

MR. NICHOLS: Okay, thanks.

Bobby LaBleuw. How close was that?

STATEMENT OF BOB LaBLEUW, UNITED MINE WORKERS OF AMERICA, LOCAL 1984

MR. LaBLEUW: Hi. I'm Bob LaBleuw. And I'm from Local 1984 out of Deserado Mine, Ranger, Colorado. I've been a belt repairman with them for 11 years underground. And I had a bunch here I was going to read off but everything seems to have been covered pretty good today.

For the sake of this time I'd just like to state for the record that our local stands behind the rest of our union brothers who's testified today, we stand behind

whatever they've said today. And that's the dust standards need to be lowered, no raised. Single full shift samples should be that, full shift, whether it's 8, 10 or 12.

I'd like to see you put a high priority on getting the continuous dust monitors. I don't know how you do high priorities in MSHA or whatever, NIOSH. And one other concern is looking out at more samples on the outby areas, more DAs. I think that's a big problem.

And I just want to urge the panel to take the recommendations of the Advisory Committee and go back and re-do this a little bit, fine tune it.

And that's all I have.

MR. NICHOLS: Okay, thanks.

Larry Pasqule.

STATEMENT OF LARRY PASQULE, UNITED MINE WORKERS OF AMERICA, DISTRICT 20, ALABAMA

MR. PASQULE: Good afternoon. My name is Larry Pasqule. I'm UMWA District 20 in Alabama. I am also a District 20 board member.

And I was at the Prestonsburg, Kentucky hearing last week. I made some comments and asked questions to this panel. And after listening to what was said by both the people who gave testimony and the panel I went back to my

district in Alabama and attended some local union meetings this past Saturday and Sunday and gave the membership an update on what was said by coal miners and the panel.

The members in Alabama asked me to come here today and make a few statements on their behalf. We went over the Advisory Committee, went over some of the discussions and some of the proposed language or some of the proposed rule. They wanted me to express to you, the panel, that they were in favor of the Advisory Committee's recommendations, especially Number 6 which gives a walkaround right, Number 8, more research, especially Number 14 dealing with the construction workers, especially in shaft and slope, Number 19B and C on the dust sampling aspect for the coal miners to basically do the dust sampling and to be part of the dust sampling.

Coal miners in UMWA District 20 after myself listening to the talk earlier by the gentleman from District 12, UMWA District 12, President of Local 2161's letter that he had sent to MSHA, that basically echoes what's being said in the meetings that I attended with my membership this past weekend. And I support that gentleman's letter that he mailed off to MSHA.

And the question was asked, I know I asked it last

meeting to the audience when we were up in Prestonsburg, if coal miners wanted to play a big part in the sampling? A lot of them told me yes. Again, a lot of them told me yes this past weekend at a lot of the union meetings. And I attended three to be exact.

And, you know, I'm not a negative type person. Always try to look at some type of a positive. And but I would like to, and I spoke about this last week in Kentucky, but I would just like to remind the panel, if we would all just work together for the health and welfare for the coal miners a lot can be accomplished. Let's look at the technology that's available out there by both MSHA and NIOSH. And statements have been made by both agencies the technology is there, the monitoring systems are there to monitor dust levels. What we have to do, ladies and gentlemen of the panel, is make it a regulation, a government regulation. The technology is there for the machine-mounted type stuff to monitor the dust levels for respirable dust.

Again, I believe you remember the testimony given by one of the construction workers that was there. And I want this again on the record. Remember Mike Nelson's testimony last week, the construction worker who worked in

the shaft and slope. Those people have nothing to really protect them. I urge you to go back, look and adopt at least Advisory Committee recommendation Number 14 for those construction workers. Those boys need something. They're working in a 14-foot round hole with those drills.

I know Daryl Dewberry spoke on it a little bit. He'd done that type of work. I inspect those shafts all the time. I don't know how those guys do it. I really don't.

We have some good inspectors in district, your District 11 that help us out in safeguards for those people. But we need law. Safeguards aren't going to get it.

We're in the process right now of putting some safeguards together to sink a shaft at Jim Walters Number 7 mine. It's going to be pretty close to 2,300 feet, that shaft. Right now we've completed one at number, Jim Walters Number 4. It was 1,800 and some odd feet. Or at Jim Walters Number 5 right now they're probably about 280, 300 feet from completion of the Number 5 shaft. We have a lot of that shaft and slope type work in Alabama and we need some laws for my people, especially in shaft and slope.

We need the rules to protect the coal miner from coal mine dust, a rule requiring the use of modern technology that's waiting to be used to save coal miners'

lives and protect them from black lung.

A lot of this has been told to me by the people this past weekend. I'm sure this weekend when I attend some meetings they're going to ask me what went on in Utah. And I will tell them.

This panel needs to listen to what has been said at all the hearings and follow the Advisory Committee's recommendations. Again, I'm going to say for the record, as I said last week, remember Congress' intent in passing the Coal Mine Health and Safety Act is clearly spelled out in the Act's first sentence: to protect the health and safety of the mine industry's most precious resource, the miner. Please, gentlemen and ladies, remember that. And thank you for your time and allowing me to speak. Thank you.

MR. NICHOLS: Thank you.

Randy Klausing.

MR. RANDY KLAUSING: Good afternoon.

MR. NICHOLS: Good afternoon.

MR. RANDY KLAUSING: Are you guys tired yet?

MR. NICHOLS: No.

MR. RANDY KLAUSING: Come on. You are too.

MR. NICHOLS: Say what?

MR. RANDY KLAUSING: You're tired.

MR. NICHOLS: Oh, no. I'm like a --

MR. RANDY KLAUSING: I can see it in your eyes.

MR. NICHOLS: I'm like a John Deere tractor, man, I just keep pounding.

MR. RANDY KLAUSING: Is that right?

MR. NICHOLS: Yes.

STATEMENT OF RANDY KLAUSING, UNITED MINE WORKERS OF AMERICA

MR. RANDY KLAUSING: My name is Randy Klausing. I work at Old Ben Coal Company, Coulterville, Illinois. I've been a miner for 25 years, UMWA miner for 25 years. I just, a lot of questions.

I was at the hearing last week in Kentucky. I went over this stuff again still having a hard time soaking this stuff in. I've got some questions on your MSHA's bimonthly sample, five or more miners if available. What does that mean, "if available"?

MR. SCHELL: On some sections just that there just aren't five miners available. The best example I can give is in anthracite.

MR. RANDY KLAUSING: Okay.

MR. SCHELL: Where there may not be five people on the section. Most of the sections we, you know, would have that. But if they're -- if the crew is less than that we

would sample as many as we could, Randy.

MR. RANDY KLAUSING: Okay. On another question I got, the abatement, if the abatement, if management fails once MSHA comes in to abate a citation what happens to the plan?

MR. SCHELL: As I mentioned this morning, if -- since that plan was verified since if that plan, those control parameters were supposed to be on-shifted prior to production, if that plan fails the first thing we're going to look at is what's wrong with that plan? And that could force us to tell the operator you need to go back and reverify your plan.

Since we're doing the sampling if we believe something else happened, for example, they ran into a really unique condition or maybe a miner was putting themselves in a position that they shouldn't have, in other words if we don't believe that the plan is bad we'd go back and just sample to check that.

For the most part what we're looking at is when you go out of compliance we're wondering what's wrong with that plan.

MR. RANDY KLAUSING: Okay. On, we talked earlier with you and I understood it more after you guys explained

it with your percentage on your new plan, like you know second shift was the example, if it was the highest that's what we're going to go with. You know, that's great, you know, because usually I'm a day shift examiner. I'm chairman of safety. I'm with the inspectors all the time. We've never that I could remember been sampled on seconds or thirds. And that's where the production is, which is good. I applaud you guys for doing this because that puts everybody in the park.

If once you have that stat where we've got the amount that we need for this plan to be approved, once the inspector comes in and inspects or puts his pumps on, which is going to be day shift nine chances out of ten, which really don't make any difference because you have the plan, it's got to be there, if he don't exceed that, if he's below that level there, what happens? Do we look at the plan gain?

MR. SCHELL: If he doesn't exceed that? You mean if the plan comes in in compliance?

MR. RANDY KLAUSING: Yes. And he's got, for instance, you have X amount of tons that he has to be in with this plan that he has approved and he does not get that with his sample, what happens?

MR. SCHELL: What we'd be doing, Randy, is trying to figure out what was happening.

MR. RANDY KLAUSING: Okay.

MR. SCHELL: For example, let's say that a plan had been approved at 1,000 tons, we come in and sample and they reach 500 tons. And the dust level is 1.9. We need to figure out what happened there because that plan's been verified at 1,000 tons. If you're at 500 tons you shouldn't be at 1.9. So we'll be making a judgment.

Remember, since we're going the sampling we're going to know what plan parameters were in place. We'll know what's in the plan. We'll be able to compare those. We'll know what production level the plan was verified at, what the actual production level was. We'll be able to tell where the miners are.

So what we'd be doing is looking and saying, okay, what would we expect the dust levels to be based on what we saw? And if we find these discrepancies then we need to go back and figure out what's happening.

MR. RANDY KLAUSING: So will we sample again?

MR. SCHELL: We could or we could notify the operator they have to do plan verification again.

MR. RANDY KLAUSING: And such as if it's -- what -

- See, that's what I don't understand.

MR. KOGUT: Before you go on could you clarify one thing in your question? Are you talking about the production level not coming in above the verification --

MR. RANDY KLAUSING: Right.

MR. KOGUT: -- VPL? Or are you talking about doing verification sampling or doing compliance sampling?

MR. RANDY KLAUSING: Both, regardless. Both of them.

MR. KOGUT: Okay, well it's two different situations.

MR. RANDY KLAUSING: Okay. Explain.

MR. KOGUT: If, well, I'll handle the interpretation part and then you can talk about the compliance verification. If it doesn't come in at or above the VPL during verification sampling then that will not count as a verification sample.

MR. RANDY KLAUSING: So we just keep continue sampling until we --

MR. KOGUT: That's right. You keep. Then the inspector would have to come back on another shift again.

MR. RANDY KLAUSING: How long will this consist of, weeks? Months?

MR. KOGUT: Well, for the most part it shouldn't take --

MR. RANDY KLAUSING: Is there a time period? That's what I'm asking. Is there a time period? If he cannot exceed what his plan is saying he's wanting to do MSHA keeps coming back until he does exceed that? Is that the way I understand it?

MR. SCHELL: Or until we disapprove the plan.

MR. RANDY KLAUSING: Or until you disapprove the plan. And then they have to come in and submit another plan?

MR. SCHELL: Yeah.

MR. RANDY KLAUSING: What's that consist of? Because you're taking his average of the 30 shifts production.

MR. SCHELL: Well, then they're going to have to make changes and come into compliance. If they can't verify their plan, okay, and normally we're talking a continuous miner section, they don't have a choice, they have to have an approved plan or they don't mine. So if they can't verify their plan at their VPL they're going to have to do something, either introduce more controls or cut their production or whatever.

MR. RANDY KLAUSING: Well, that's what I'm trying to find out. If they can't meet that so they lower it? Is that how they're going to?

MR. SCHELL: Or do more controls. In our view we think that the control technology exists.

MR. RANDY KLAUSING: Okay, let's say we're not going to do the controls, we're just going to, we're going to tell you, MSHA, that we won't load that much coal?

MR. SCHELL: They could do that.

MR. RANDY KLAUSING: And that would be approved?

MR. SCHELL: If they verified their plan.

MR. RANDY KLAUSING: That's when you guys test, they'll come in and say, okay, we've got an inspector, he's going to do his dust. We're not going to load the coal like we do before. They could do that?

MR. SCHELL: Uh-huh. But what they do, Randy, but what they do is every shift they produce they have to keep records.

MR. RANDY KLAUSING: True.

MR. SCHELL: So if they're playing a game on us we're going to find out very quickly.

MR. RANDY KLAUSING: Well, yeah, they are. Because if they can't control their dust and you just said

if they come back and say, well, we won't load, we'll drop our production.

MR. SCHELL: Well, we'd have to be comfortable that their plan's okay. I mean if they just simply say we're not going to put any controls in place and drop our production our answer is no. Here are some things that you can do. You need to increase your water. You need to increase your air. So we don't give tentative approval to that plan if we think they're gaming us. We don't give tentative approval to that plan for verification unless we've got some reason to believe it's going to work.

MR. RANDY KLAUSING: So each time as it goes on, as it goes on days, months, months, months, months, you guys are still going to monitor their production sheets?

MR. SCHELL: Yes. That's why we want that production, every production shift on every MMU kept for six months.

MR. RANDY KLAUSING: So once, and you guys are going to come in and inspect these areas just like you do your diesel books and electrical books and stuff like that?

MR. SCHELL: Yeah, part of the dust, part of our sampling will be to look to see what their production has been.

John made the point we're verifying that at the 10th highest production.

MR. RANDY KLAUSING: Yeah, which is great. Which is great.

MR. SCHELL: Yeah. Which means we expect periodically to see production above the VPL. But if you start getting to the point where 50 or 60 percent of your production is above the VPL and they're coming in at 1.9, there's something wrong. You need to go back and verify your plan.

MR. RANDY KLAUSING: Nobody is going to get a plan verified at 1,000 tons and product at 1,500. I mean --

MR. SCHELL: Well, yes.

MR. RANDY KLAUSING: -- that ain't gonna.

MR. SCHELL: True.

MR. RANDY KLAUSING: Okay, now we got with this, and this, I still, I still don't understand this and people at my mine don't understand it. You guys on abatement time, it's a full shift that the inspector is going to be there with his pumps, on abatement? That's the only time? Beside the approval of the plan?

MR. SCHELL: That's right.

MR. RANDY KLAUSING: But then I heard this travel

time.

MR. NIEWIADOMSKI: The full shift means full shift that includes travel time. That's portal to portal. Verification for abatement, reason for abatement that is full shift. We want to make sure that the controls that the operator implements do in fact maintain concentrations at or below the standard for the entire shift. So we're assessing the accuracy of the controls.

MR. RANDY KLAUSING: So once he's in there if they're working 10 hours, 9 hours, that inspector is going to be there until that shift is done?

MR. NIEWIADOMSKI: The full shift.

MR. RANDY KLAUSING: The full shift. Guaranteed.

MR. NIEWIADOMSKI: -- 11 and 12 hours.

MR. RANDY KLAUSING: Okay. All right. Let's see what else I have here.

I know, Marvin, you talked about and, of course, Ron has too, the consistency of a plan. You know, I've heard you talk about that, you've got to have a plan. Granted, you have to have a plan. On ours, which we got miners, continuous miners, we got our dust control parameters that we have to do before we load. If we're hotseating, you know, you got that area that if you're

hotseating you've got an hour after or if you're coldseating you do it then. It's good if it's enforced. There's the key. A plan is good -- and you said it -- a plan is good if it's enforced.

MR. NICHOLS: Yeah, if we can't get that done everything is hopeless.

MR. RANDY KLAUSING: There you go.

But then we're going to turn around and we're going to sample six times a year. I know you're heard this.

MR. NICHOLS: Okay.

MR. RANDY KLAUSING: And you're getting sick of it and.

MR. NICHOLS: No, I'm not sick of it.

MR. RANDY KLAUSING: Oh, you're not?

MR. NICHOLS: No. Let's say we sample 40 times that leaves how many shifts?

MR. SCHELL: Three hundred and sixty.

MR. NICHOLS: Three hundred and sixty. So what are you going to do on the other 360?

MR. RANDY KLAUSING: Well, that's true. But a plan is as good as has been enforced. There's the key, enforce the plan.

MR. NICHOLS: Well.

MR. NIEWIADOMSKI: If we in fact verify a plan that's supposed to be effective under high production conditions but what you're saying is that that plan is not going to be complied with?

MR. RANDY KLAUSING: I wish I could say that. It would make it easier. But, no, I can't say that because things happen. You got an inspector comes in and he says -- if he's in there monitoring his pumps on a day shift and something happens where he don't get that production where he's supposed to within that range, it's up to the inspector to say, well, they had a -- the haulage roads were bad. But they weren't bad on seconds and thirds but they were bad on days.

See, you've got stuff that --

MR. NIEWIADOMSKI: Let me correct something on compliance sampling given the production, okay. The verification standards say there is my production level and we want to test the plan. For compliance sampling minimum production for the samples being done on 60 percent of average, okay. So if you in fact do not get 60 we would consider, we would in fact go back and sample again. All right. So it's not being -- and they're not going to have difficulty achieving or shouldn't have difficulty achieving

60 percent for us to collect a valid sample.

And the thing is it's very important the inspector makes those checks he's going to, and it's kind of important, he makes those checks he's going to document it. And that information is going to be then sent to the operating shifts and posted on the bulletin board. If in fact the miners feel that those parameters or at least what's being measured during sampling, that's not what's being maintained during non-sampling periods that's going to be brought to the attention of the inspector.

MR. RANDY KLAUSING: Well, your records on your production would show you that too.

MR. NIEWIADOMSKI: Right.

MR. RANDY KLAUSING: It would because --

MR. KOGUT: I think George is talking about all the dust controls --

MR. NIEWIADOMSKI: Yes.

MR. KOGUT: -- that are supposed to be in place though.

MR. RANDY KLAUSING: Well, that would show too. Because if there's an inspector on days and he's, and there's -- and he's checking his parameters and then you're saying that you're going to keep an eye on their production

sheets and you see a trend that seconds and thirds is higher, you know that they're not doing, they're not following their plan on seconds and thirds.

MR. NIEWIADOMSKI: No, no, that doesn't mean it. That says production is high, it doesn't mean that they're not complying with the plan because he's supposed to be doing it on shift; right?

MR. RANDY KLAUSING: True. But they can't do it on days because the inspector is in there with his pumps and they're making sure that they do their parameters. But you see it on their production that seconds and thirds, not much, but they're higher than what days is. Granted, maybe he is still in that range. But there's still a difference in production on seconds and thirds.

MR. NIEWIADOMSKI: Well, if we saw that, as Jon indicated, that exceeds 30 percent, 33 percent of the time that they're consistently high we would in fact go back and then reverify the plan under the high production. So that's, we have it in there. And, basically, we're not expecting every shift. We're not saying that there aren't going to be some shifts that are going to be high. We're going to limit how many shifts are going to be higher than the VPL. Is they're exceeding that certain limit we're

going to go back and reverify.

MR. RANDY KLAUSING: What is the limit?

MR. NIEWIADOMSKI: Well, we're saying 33 percent on the shifts.

MR. RANDY KLAUSING: 33 percent.

MR. NIEWIADOMSKI: If they exceed that, you know, we're back to verification sampling.

MR. SCHELL: Randy, a lot of the model this is based after isn't any different than what we do with roof control or ventilation. You've got a ventilation plan that's supposed to control the methane.

MR. RANDY KLAUSING: True.

MR. SCHELL: A roof control plan to control the roof. That, that plan has to be approved. The operator does their examinations to make sure they're complying with it. MSHA comes in periodically and checks to see the operator is doing what they're supposed to do.

That concept has really been a remarkable success of the Mine Act, this whole idea of designing plans that are tailored to the mine. And what we're really doing is taking a concept that has worked, I think we'd all agree well, in roof control and ventilation and moving it to the health area. Good plans, on shift, and period follow-up by MSHA.

MR. RANDY KLAUSING: Well, there's the key, the follow-up on MSHA. Just, you know, like I'm saying, I deal with MSHA majority, 90 percent of the time on day shift. And like I said, you have your plans, your electrical books, your diesel books. You know, your inspector goes through these on the quarters. You know, we checked it. We flipped through the pages. We flipped through the pages. We flipped through the pages. It's, I guess it's just a routine. Routine. Routine. Because we never follow up. We never follow up. The exhaust. I mean I'm getting off the stuff but it actually falls into what your 30 shifts because he's going to be inspecting that.

But, and I'm not a real educated person but I can see, and I've brought it to their eyes that this piece of equipment is always right there, same, identical, nothing varies. Come on, something's got to vary, the exhaust or something. You know, something's got to vary because it's never going to be identical the whole time.

And you're taking with the production of management's reports that they're in that ballpark numbers. You're consistent of numbers is what you're saying. Hell, I could put numbers on there. That don't mean I'm doing it. How are you guys going to find out? How are we going to

find out? Because I don't go down there and measure their tonnage. Now how are you guys going to find out? You're going to take the word of management; is that not correct?

MR. SCHELL: Well, to some degree. But if you track it on a map you've got a pretty good idea what they're mining on a section.

MR. RANDY KLAUSING: No. How?

MR. SCHELL: Well, we've done it in the past. We've gone in and marked the map and come back. And you can calculate how much coal has been removed over a period of time.

MR. RANDY KLAUSING: I'm not doubting you but I've never seen that. All I'm saying is you're taking what management puts in a book, whatever, if their tonnage is this that's what they're putting. Is that not correct?

MR. SCHELL: Well, yeah. We're going to look at it. If we catch them falsifying that book we're going to do something about it.

MR. RANDY KLAUSING: Well,

MR. SCHELL: But you can, you can --

MR. RANDY KLAUSING: The only way that you're going to find out is I guess going down there and measure I guess the ton, how much coal they actually cut.

MR. SCHELL: Well, we've got you guys to give us a good idea.

MR. RANDY KLAUSING: I don't know.

MR. SCHELL: But don't you know on any given shift what kind of coal you produced on that shift?

MR. RANDY KLAUSING: I know buggywise.

MR. SCHELL: That's all we need to know.

MR. NICHOLS: That's good enough.

MR. SCHELL: That's good enough.

MR. RANDY KLAUSING: That's good enough?

MR. NICHOLS: That's good enough.

MR. SCHELL: We can figure it out from there.

MR. RANDY KLAUSING: Oh, well, okay. So we got them now.

MR. NICHOLS: We got them now.

MR. RANDY KLAUSING: Burn their ass.

(Laughter.)

MR. NICHOLS: Thank you.

MR. KOGUT: I'd like to clarify. I'd like to clarify one thing about the 33 percent that you were talking about that would trigger, you know, trigger a possible reverification. One of the things that we specifically solicited comments on was setting the VPL at the 10th

highest. We solicited comments on whether that should be raised to a more stringent criterion.

Now, that 33 percent is tied specifically to the 10th highest. So part, in your comments if you recommended raising that to something higher, a higher production level than the 10th highest then that 33 percent would be tied to that. Do you understand what I'm saying?

MR. RANDY KLAUSING: So what you're saying is if I recommend that you raise that you'll do it?

MR. KOGUT: No, I didn't say that.

MR. RANDY KLAUSING: Oh, well, that's the way I take it. I'm sorry. But that's the way I took it. Hell, I'll do it.

MR. KOGUT: Okay, no, I didn't mean say that.

MR. RANDY KLAUSING: Oh, that's the way I took it.

MR. KOGUT: I'm just saying that the 33 percent is tied to the 10th highest. If it was something other than the 10th highest then it would be something other than 33 percent.

MR. RANDY KLAUSING: Okay.

MR. GRAYSON: Randy, question.

MR. RANDY KLAUSING: Shoot.

MR. GRAYSON: In your experience are the dust

controls maintained as well on second shift as first shift?

MR. RANDY KLAUSING: No. No.

MR. GRAYSON: Even if the production level was 900 tons on day shift and that's the tenth, one tenth highest would you still think that the controls would be different?

MR. RANDY KLAUSING: If, now what now, if it's 900?

MR. GRAYSON: In other words the day shifts were coming in at 900 tons and that's basically what you're saying is the higher shifts are second and third.

MR. RANDY KLAUSING: Right.

MR. GRAYSON: And on day shift with controls in place would those controls be the same for the second and third shift?

MR. RANDY KLAUSING: If?

MR. GRAYSON: If you're mining the same tonnage?

MR. RANDY KLAUSING: If we're mining -- then it would have to be.

MR. GRAYSON: You think so?

MR. RANDY KLAUSING: I don't --

MR. GRAYSON: I was just wondering.

MR. RANDY KLAUSING: I don't know. I would think so but that, you know, that's just me.

MR. NICHOLS: Okay, thank, Randy.

It's 6:00 o'clock and we have four more presenters. Tom, how much time do you think you'll need?

MR. WILSON: At least an hour.

MR. NICHOLS: Joe, how much?

MR. MAIN: About 30, 45 minutes.

MR. NICHOLS: Scott, how much will you need?

MR. BOYLEN: Five, ten minutes.

MR. NICHOLS: Five, ten minutes.

John, how much will you need?

MR. DE BUYS: Five to ten.

MR. NICHOLS: You guys would be willing to let them go tonight, wouldn't you, to get that out of the way and we'll come back with you and Joe in the morning?

Scott, come on up.

STATEMENT OF SCOTT BOYLEN, UNITED MINE WORKERS OF AMERICA

MR. BOYLEN: My name is Scott Boylen. I'm the safety director for Canyon Fuel Skyline Mine located near Helper, Utah. And I'm here today to represent the employees of the mine.

A couple comments I guess before I get started. I'm very thankful I came today. Some of the comments I heard, I am fortunate, I've grown up around the coal

industry and the comments that you hear today are essentially repetitive of what I've grown up around. So it doesn't -- I don't know how I want to say this, but the one thing that makes you feel good, I guess, with the organization that you're working with today that we feel that some of the testimony is true because I've had the opportunity to work at other operations. But the one thing that we are proud of is I think we take it in a little different perspective and a little different view of what the significance of dust is and we try to address that every day.

So to get started. What we did at the operation we took and put a comment period around. More or less pulled comments from anyone that wanted to comment. And this is a summation of what we've got. And I have the luxury of presenting it today, so.

Anyway, we looked through it and one of the first statements in the registers talks. It says the federal mine inspector sampling results during the 1968-1969 years showed the average dust concentration of a miner operator in an environment was an average of 7.7 milligrams. Current sampling for the fiscal year 1998 indicates that the average dust level for a continuous miner operator has been reduced

by 86 percent to 1.1 milligrams.

I think the consensus when we read this was it just tells you somebody is doing something right. I mean it shows a traumatic or dramatic improvement. And I think, yes, the system has its faults but in the same respect to give Mr. Nichols credit I think, you know, if the parameters that are proven are applied, are upkept day to day I think that is proven in the outcome of the results that you get.

So, with that said if you go further into the report and it says mine operators have reported 224 cases of Black Lung during 1998. It goes further to say 138 cases occurred underground while 86 cases occurred from surface miners. To us this raises some several questions, valid questions in this proposal.

We feel that the history of these individuals would offer some possible reasons for these cases. A couple questions we come up with was, one, how many of these reported cases are by persons who became employed in the coal industry after the passage of the 1977 Act? We feel that's very critical for the simple fact I think many of the miners, I think that's one thing about a coal mine industry it's generation by generation. The majority or the people today are at least second generation miners. And you look,

we've all had, we've all had the dealings with either a family member or someone close that you have known that did legitimately have Black Lung. It's a terrible disease.

But I think there is some significance in the fact were these prior to the Act of '77? And the point being there is it ties in also with the reduction from the 7.7 milligrams to the 1.1. And that just goes to show the continual strides that we continue to make.

Next, you know, if you want to categorize issues, if you take the mining type this person was exposed to. Was his entire career in the face? You know, typically, you know, you take a miner's history very few people spend the entire life of their working career in one occupation. The majority of the people I think the preference would be to go to an outby position. So how much consideration has been taken in that?

Ventilation type. You know, you can look at, I don't know the significance, possibly the fan type whether blowing or exhausting if that has any bearing. But definitely a line brattice or a tubing situation in a miner section, how much consideration has that been given to the type of exposures the persons were around?

The type of section haulage, electric, battery,

diesel, you know, is that a contributor?

Mine location. As one in the west many of the issues that we hear about, no disrespect, but are heavily influenced from what is going on in the east. So that would be one question we would ask is are these persons that were reported what region did they come from, east, west, southwest? Where were they from?

The rank of the coal that the persons worked in, how much consideration has been given to this?

And, one, it's kind of a personal question, I think sometimes people tend to take offense to it also, but was the person a smoker? If so, to what degree? Did he smoke his entire life? You know, how much did he smoke? I think those are some valid questions that can, you know, determine an outcome whether the person, how he obtained the black lung so to speak.

I'll move on a little bit, talk about ventilation plan, the verified ventilation plan that would be required. We feel that right now that, you know, our plan is reviewed every six months. And we look at this and basically it's to assure that it is suitable to current mining condition. The present format we feel is adequate means of ensuring compliance in additional views in this area would be

redundant and would not be cost effective for either party. So the mechanism is in place. Every six months you're going to conduct a review. So we feel that would be, you know, if it's not broke, don't fix it.

Let me back up a little bit on my paper here. It says the single shift sample was determined to be an inaccurate means of sampling by the secretaries in 1972. The finding concluded that a single full shift measurement of respirable dust would not, after applying valid statistical techniques, conditions to which the miner is continuously exposed. Nothing has changed in respect to a single sample being the sole means of measure and, consequently, a fair representation would never be obtainable by means from a single source.

MSHA recognized this shortfall soon after the passage of the Act in 1969 and began development of a fair representation of quantity of respirable dust that the miner in question is exposed to, which basically is what we're at today. The issue that a 1972 finding would be reassessed as new technology was developed and new data become available has been focused on an evaluation portion. I think we all agree that, yes, the continuous monitoring pumps is definitely where we need to be. But I think today we are

not there. So our stance would be absolutely. If we could do something like that we concur with the National Mining Association, we agree with their comments, when we get to that point technologically we feel that is the way to go. But today we are not there.

Another considera -- Excuse me.

We also, we give MSHA credit in that there has been great improvement in respect to how the final sample is handled and measured. You know, really you guys have come a long way in how the sample was, the final sample is handled. I think a lot of times -- not a lot of times, but the question with many operators is we continue to scrutinize how the data is collected.

MSHA admits that there is concern in the area of weighing uncertainty. Side by side comparisons have proven that the repeatability and validity of a sample is of great concern. Skyline made the same comments in '98 on this same issue. At the time, I was not there at that time, but the went through great measures to run side by side comparisons. And the results were that they could not find a true repeatability even by one side to another side of the person's body. So that raises various questions in our minds is the accuracy of the pumps. So, you know. So.

Until there has been a significant improvement in this portion of the sampling process a fair and repeatable means of collection is not attainable. This issue is the premise of the entire discussion. I think that's really what we're looking at is I think everybody, all parties involved want to get to a point to where you can have the closest accuracy of the sample and hang you hat on it, you now, every day. And I think no one would argue that.

The question in our mind from a single operator, are we there? And we don't think we are. Because we continue to struggle with side by side comparisons. So.

Part of the other study we read into, and I think there's some value in it as far as where the 2 milligram standard have come, but many of the studies use in the comparison and documentation were from other countries. You're talking European standards, you're talking Australian standards. For the record and for what it's worth, that is a 3 milligram standard. The point is that there's been tremendous change. I guess what I would say there, the point in time when the comparative studies were done, many on -- especially the English study that was quoted, was done prior to '77. So our stance on that would be also you tie that into the comparison from the '69 on the CM to the

percent day on the CM and you see the dramatic changes. So I think there's been some help but the comparison is probably not a valid comparison into what, you're not comparing apples to apples to today's standards.

So, consequently, we say a comparison as such does not reflect a true to form comparison with present day consideration given to respirable dust.

We'll make the statement as well by all means it's not perfect, the airstream helmet. It does it have its faults. But I think the thing it proves you there is where there's a will there's a way. And I think the technology that we have you look at the technology, especially in the area of longwalls, and the last ten years with the mechanization, with the electronics that's come forth, the water curtains, the programmable shields, I think the thing that we're looking at is and we're encroaching upon this. And I do truly believe that we'll get there. It's just this, what we're trying to get to today is maybe a little bit premature.

So I think in closing, from the Skyline operation we agree in the intent but we feel that the technology that we're trying to apply does not have the adequacy to attain the results. And we feel that this needs to be either

rethought or the emphasis needs to be placed on technological improvements in either the sampling process and also from the manufacturers' standpoint to further continue to try to find means to either engineer out the problems or look at administratively how can we position people to minimize the exposure. And I think that is the key is I think a lot of times we get hung up on the fact, and this is definitely not the topic of the discussion today, but the 060.

And you look at the 060 and I think it has its value in the sense that it makes you adhere to a more stringent policy, no doubt, that's black and white. But the question you ask yourself, are you measuring if I am on that face are you measuring my personal health, what I'm being exposed to or are you taking that particular occupation? And I think we all know the answer to that.

So, anyway, I'll close at that. And I thank you for this opportunity. And I would say we just need to continue looking forward and with the understanding that one day we'll get there. Thank you.

MR. NICHOLS: Okay, thanks, Scott.

Any questions?

MR. NIEWIADOMSKI: Yes. Can I ask you a question.

I don't mean to put you on the spot, but did I hear you say that the current plan process which would allow -- which would cause MSHA to or approve a plan based on a minimum of 60 percent of the average production will protect miners on each and every shift?

MR. BOYLEN: I am quoting from Skyline's operation. And I, you know, all this is public information. You know, the dust samples I mean all you've got to do is type in on the internet and you can tell what every dust sample that's come back. I mean we were looking here earlier, the comments come up on the significance of the 480 minutes. And that was an earlier conversation today.

And a couple of the guys, they've since left, but one of the comments was, you know, they were driving home a point that how come all the samples are right at 480 minutes? Well, if you look, and I would look and see, it's public, it's on the internet, that's really not the case. I mean you go in and look and, yes, there's some. And this particular individual was making a comment that of the samples taken, no disrespect, but the majority of MSHA samples were exactly 480 minutes. We leafed through a couple pages and the numbers that we were looking at varied from, you know, 475, 478, 482. So I think --

MR. NIEWIADOMSKI: Well, I'm aware of the samples. What I'm asking you is you indicated that you believe that it's an overkill that the current plan verification proposal there is no need for going forward with that because the current system works. Didn't you say that? That the current plan --

MR. BOYLEN: What I'm saying is, what I am saying is with the technological -- with the technology that we are applying today it is proven that it works.

MR. NIEWIADOMSKI: On what production conditions? I mean we're approving plans based on 60 percent of the average.

MR. BOYLEN: Yes, sir.

MR. NIEWIADOMSKI: Now, during non-sampling periods I'm sure you're producing more than 60 percent of the average. Now, that plan, what we're saying is that plan in the absence of continuous monitoring, we've always said going back to the Task Group, that we believe that the long-term solution is continuous monitoring. In the absence of continuous monitoring, which we all would like to have, we're going to be relying on well designed plans, okay, that are checked on each shift. We believe that if in fact that plan is designed and verified under high production

conditions we have reasonable assurance it will protect people on each and every shift.

Now, the production requirements being proposed in the approval plan is significantly higher than what's currently in place. So I was curious when you had said earlier that you felt that the current plan approval process is adequate.

MR. BOYLEN: I feel it is adequate in respect to the sampling mechanism that you have in place is my comment.

MR. NIEWIADOMSKI: Thank you.

MR. KOGUT: I want to also address one thing you said about the data that Skyline submitted in 1998 as part of our earlier rulemaking because I think you suggested that that data indicated that there was problems or questions about the weighing variability. That Skyline data is addressed in Appendix D of the current proposal --

MR. BOYLEN: Yes.

MR. KOGUT: -- on pages 42117 and 42118. It starts in the last column of 42117. We did an analysis on that data. And according to our analysis anyway the weighing variability that's indicated by that data is consistent with the weighing variability that we assumed for that period of time. And it's also less than the weighing

variability that is incorporated in the formula that generates those citation threshold values.

MR. BOYLEN: Okay.

MR. NICHOLS: Okay, thanks.

John.

STATEMENT OF JOHN F. DE BUYS, JR., BURR & FORMAN LLP, BIRMINGHAM, ALABAMA

MR. DE BUYS: Everybody tired and ready to go home? You know, I feel like the lawyer who is making a closing argument on Friday afternoon at 5:00 o'clock. And I have done that before.

My name is John De Buys and I am a lawyer. I represent a single operator who is -- I'm from Birmingham, Alabama, but he is not in the state of Alabama at this time. I've represented coal mining folks but only in the areas of zoning and business transactions and leases and contracts and all and I am not familiar with the regulatory process or these particular rules until I was asked last Wednesday if I would come and learn something about this and come to this meeting.

So the approach that you will hear is from someone who is relatively or real naive in this area but who has pulled this off the internet before I got here and have

tried to understand it and just know enough to be dangerous. So my comments, and by the way they actually may not, there are not going to be as many comments as it is going to be questions, but they certainly don't represent the views of my client because my client asked me to learn about it and I haven't learned enough to talk to him about it to come back to give you comments.

Nevertheless, I will, with that background so you know where I'm coming from, I will start and ask a couple questions if I might. I heard just in the last talk about side by side monitoring. Is that an okay thing to do? And will it be an okay thing to do for either I guess a miner's representative or the operator to side by side monitor with the inspectors and go through when those things are done? I don't know whether that's good, bad, acceptable or not. Is that an okay thing to do?

MR. NIEWIADOMSKI: Well, it's okay if an operator wants to take a sample alongside of an MSHA sample as long as it doesn't interfere with the MSHA sample. If the miner decides he doesn't want to sample it he's going to let MSHA sample. Okay. But the operator's not, he's not forbidden from doing any sampling on his own.

MR. DE BUYS: Well, that's not going to make

anybody mad for him to do that if he so chooses to do that I don't guess.

MR. NIEWIADOMSKI: No.

MR. DE BUYS: Okay.

MR. HEWETT: It's worth pointing out though that you have two measurements. And because the sampling and analytical variability with any measurement system you will get most often two different answers.

MR. DE BUYS: Sure.

MR. HEWETT: Now, the gentleman earlier mentioned the Skyline data. Skyline submitted 381 pairs of data. One measurement was sent to MSHA or the MSHA lab. The other measurement was sent to their own lab, okay. In 95 percent of the cases, 95 percent of the pairs the numbers were different but they agreed. That is, both of them were under the limit or both of them were over the limit 95 percent of the time. 5 percent of the time one was over, the other was under. And then we could split that difference between one was in favor of the mine, the operator, one favored MSHA so to speak.

So, in really 2.5 percent of the time was there any, would there be any real question. So you're going to get two different numbers but more pointedly exposures were

out of compliance or exposures were in compliance.

MR. DE BUYS: Sure. And I realize any time you take a sample of something you're going to have some variation but if they're close I'm sure that's all somebody would be looking for, at least I would think.

Okay, under the new proposal as opposed to the way it exists now I in reading this I tried to find out exactly what are the responsibilities of the mine operator. And I'm finding that other than obviously the proposing the plan is they've got to record the material that's been mined on a continuous basis and keep the record for six months. And I'm sure that's self-explanatory.

Then they have a duty of inspecting each of the controls prior to every shift being initiated on a daily basis therefore.

And then I've heard a couple of instances, and I'll go back and read it, about posting information, they have a duty to post information on the board. And there are certain things that I can go pick out as far as trying to go through it again and figure that out.

Is there anything else as far as requirements since they are not -- since they don't have any more monitoring requirements?

MR. SCHELL: Yeah, if you look in the plan verification part of the rule there is a question in there about What is the responsibility of the operator during plan verification? And there are two or three responsibilities listed there, including is, you know, submitting the plan and being prepared to have the plan verified.

MR. DE BUYS: Right. That's why my preamble was other than, you know, the creation of the original plan there was there anything on an ongoing basis that you needed to do. And I had read that and I was just trying to see if there was anything else that I missed or you all obviously, whoever had to proofread this thing is very familiar with all of it. Okay.

All right. As far as a DA, which I understand is as designated area, and the DO, which is a designated occupation, it seems to me is the proposal leaves some flexibility as to where these were being set up, located or ascertained. Is that basically a fair statement? The DO as I understand you said if you've got five or more, and if there are less than 5 people there you can -- up to five or as many as you can. But as far as the DA is there flexibility there or is that a judgment call or is that something that's defined?

MR. NIEWIADOMSKI: There is no change in the immediate requirements as far as those criteria guidelines that were developed back in 1982 when those regulations were promulgated that guide the operator in identifying designated areas. And then the District Manager will review to see whether or not that complies with its guidance.

For example, I think that talked about every flow transfer point there should be a DA established. Okay. So that has not changed at all, okay, the guidelines. The other thing is this, what hasn't changed is that MSHA when we go out and sample, in addition mind you right now we're proposing, which we currently do, sample every designated area outby annually. Part of that is that's an established entity, okay. But also we sample other locations that the inspector anticipates or thinks that may be high generating sources. And they also may become designated areas, okay.

MR. DE BUYS: So they can be added, too?

MR. NIEWIADOMSKI: Yes, sir. That's right. Which is certainly consistent with our existing procedures.

Now, the DO, the DO is defined in, it's defined in the current regs, it's defined in the proposal. The only change that we're recommending is that during plan verification when we determine that the operator has

exhausted all feasible engineering controls on longwalls we would shift the DO from the 060 to the 044, to the machine operator.

MR. DE BUYS: Okay. I noted that on page 42139, without necessarily turning to it -- well, let me do it anyway. In talking about the VPL the proposed rule would require mine operators, and it has three things it says. On the third, provide additional information and mine ventilation plans. Is that something that a miner or mine operator would know what that is or is that --

MR. NIEWIADOMSKI: Yes. It's defined under, when you look under Part 75 there is additional information that he has to provide to the District Manager which he currently doesn't. One of them is the length of the shift. Okay. Also he has to identify exactly how the mining cycle, how he intends to protect roof bolters and outbys and things like that. So there are some specific additional information beyond what is currently being required.

MR. DE BUYS: But there are criterial categories or areas that are already set that you know that you're going to have to supply that information?

MR. REYNOLDS: It's on 42102 in the second and third column if you want to put it in your notes.

MR. DE BUYS: 42102. All right, let me put that down and I'll go look at it. Thank you.

Does the court measurement other than MSHA is going to perform the test, you're going to the tenth, as opposed to the percentage your going to a one-tenth of 1 percent, is there any other change as far as the method of testing or the way that you analyze compared to what's been done for those two? For the record, there's a nod over there.

MR. REYNOLDS: No. No, the changes make it very clear that MSHA does the sampling for that.

MR. DE BUYS: Okay.

MR. NIEWIADOMSKI: But I think we need to clarify that currently they're doing, determining whether or not an operator is in or out based on that criteria. Okay. And based on our samples too. Under this proposal we would do that based on a single sample.

MR. DE BUYS: Right. right.

Okay, next question is, in reading this, and I guess this is the lawyer in me, is what about including a section on special exceptions, and I've heard this today, where people say, well, in a site, in a site specific type area can you, for example, or should you be allowed to

control dust exposure by administrative procedure? And I know that there'd be a lot of opposition there. But that's just one example. By respiratory equipment's another. And we talked about that. And or a situation where in the future when you develop a technology that you can have a prototypical plan set up where you can use this, these control readouts and various compliance procedures. If there was a section that did allow for special exceptions, then within what you all are proposing to do there as soon as the technology comes about then it would be consistent with your proposed rule to set up in this special section some kind of a special plan that would be approved by MSHA where these new ideas could be utilized without kind of going out on a limb.

Now, there may be something built into the proposal that allows you that leeway. But it didn't seem to me to be such a special area of some kind of an exception or special circumstances.

MR. NIEWIADOMSKI: You're talking about having some sort of a section in there that would allow us to automatically adopt new technology without going through a rulemaking?

MR. DE BUYS: Well, that would allow you to

consider it. In other words, you're supposed to operate under a certain procedure right now, okay. And suppose you wanted to take one operator, you wanted to make this a prototypical type thing. And suppose it would be for, you know, it may be for administrative procedures under certain circumstances. It may be under respiratory type attention or it may be under new monitoring devices with new technology with like one person answered, well, with the new technology you all asked the question how would you set certain parameters? And he said, I hadn't gotten to that yet. But if somebody does come up with that should there be an area where you could come and say, hey, look, I've got this plan, would you all consider this as a special exceptional circumstance?

And then you all would look and say this mine operator has always been in compliance, it's been this, he's got a special circumstance, we'll work with him or not. Should that be in there?

MR. SCHELL: It's not in there now. If you're asking us to consider it, you know, your comments are made on the record.

MR. DE BUYS: Okay. Please consider that. Just again from a lawyer's standpoint you've got a static

document that doesn't mold too well in some areas.

I guess along that same line and before I heard some of the comments that may object to it is I would think that an operator would object to having the lack of ability if you're on a continuous mining type operation as opposed to longwall to come under a circumstance where the respiratory equipment could be applied. And, also, nobody mentions the administrative controls, and I understand probably why they don't now. But that's, again, it seems like you could put that into the process if you were, you know, trying to protect somebody's exposure to excessive dust.

Okay. Next, with regard to the 480 minutes that will be used on compliance sampling, does that probably would you predict that that would probably be used during the worst case scenario? In other words when the inspector came in, it's a 10 hour shift and you've got 30 minute travel time you'd figure that he'd probably go first, you know, look at the worst case scenario. Would that be, I don't think it's said, but would that be kind of logical?

MR. SCHELL: Yeah. Our desire would be to do the sampling where we would envision that most dust would be generated.

MR. DE BUYS: Well, I just wanted to be able to advise that one. Probably something to look forward to.

And this is real ignorance on my part. How do you handle the situation on a continuous miner if there is both a deck and a remote and sometimes the operator is sitting on a deck and sometimes he's using a remote, I mean he's got a piece of equipment on? Is there anything that addresses that?

MR. NIEWIADOMSKI: Well, you mean as far as work sampling?

MR. DE BUYS: Yes, sir.

MR. NIEWIADOMSKI: The sampler stays with the occupation. So if you're in a remote location and the District Manager says that that's the DO it stays with the occupation. Okay? It doesn't stay on the deck when he moves off that deck because then you're not sampling the environment the miner works in.

In other cases it could be another DO that the District Manager determines is exposed to the highest dust levels.

MR. NICHOLS: But the sampler would stay with the employee; right?

MR. NIEWIADOMSKI: Yeah, in that particular case.

Yes.

MR. NICHOLS: Yeah.

MR. NIEWIADOMSKI: We're talking about an occupation, it stays with that person.

MR. DE BUYS: Right.

MR. NICHOLS: Yeah.

MR. DE BUYS: So that could vary. I mean whether or not he decides to ride up on the deck or ride back further that's going to vary according to the operator?

MR. NIEWIADOMSKI: Yeah. Currently it's within 36 inches in-by that person, okay, whoever's operating that.

MR. DE BUYS: Okay.

MR. NIEWIADOMSKI: Now, what's kind of important if they switch out people the sampler doesn't go with the person they started out with, okay. The sampler would switch out to the miner that replaced the miner of the section.

MR. DE BUYS: Okay. All right, with regard to your initial plan and verification of that plan, as I understand it if you got a substantial change in production you're going to have to submit for a new plan and reverification. Is there any flexibility built in to where if you know that a mine is currently, say, mining 20,000

tons a month and you know they're going up to 50,000 tons a month is there any way to set up a situation where that could be accounted for without, or suppose you know that you've got various production levels that go up and down continually, could you set up different parameters so that that would cover those unusual conditions?

MR. SCHELL: Well, the proposal is to verify it at the 10th highest production of the last 30 production shifts.

MR. DE BUYS: And suppose that is actually over a period of time after you collect the data is something that moves? For example, an operator is mining 20 and goes up to, wants to go up to 30, and that gets him into the next level, and yet he may want -- I guess if he drops down he's certainly going to be in compliance later on, wouldn't he?

MR. SCHELL: Uh-huh.

MR. DE BUYS: Okay. So maybe, perhaps that will take care of itself. I'm just wondering about the cost which I understand you all are figuring is the initial cost of setting up those plans is.

MR. NIEWIADOMSKI: Well, if an operator is going to increase production significantly I'm sure we'll probably, and he'll want the plan to be verified under

higher production levels once he submits that modification. Okay. And we determine that the controls probably will be effective we will again verify that plan. He can initiate it or we will initiate it based on the new data.

MR. DE BUYS: I was thinking about that and also where someone said there were so many different mining conditions where the longwall went from 4 feet up to 10 or 12 feet in various conditions. Is there a way to have any flexibility in that mining plan that would say, well, if you're in these conditions, then that, but if in these conditions, then the other? Probably not the way it's written I don't think.

MR. SCHELL: No, the plan can be tailored to the mine.

MR. DE BUYS: So you could have that?

MR. SCHELL: So if you ran into a middle man at a certain part of your mining you could have a provision that clicked in when you ran into that problem.

MR. DE BUYS: So it is flexible enough in the plan --

MR. SCHELL: Yes.

MR. DE BUYS: -- so you could put certain? Good. Okay.

All right. I think that I will conclude with that. I do want to while I was sitting back there, since everybody wants to go home, I wrote this down.

If a single miner mines on a single shift and a sample was secured for the full single shift the sample so secured should from said full single miner's single shift -- let's see, I can't read my writing -- satisfy the requirements of the single full shift sample under the proposed rule. But supporters of several single full shift samples cite situations -- cite sinister conduct -- I'm sorry -- therefore, said supporters of said single full shift samples send someone sounding sorely against singly sampling single full shift sampling.

MR. NICHOLS: I was not going to ask you who your client was until you came out with that.

(Laughter.)

MR. DE BUYS: Well, I don't mind. It's Sunrise Coal.

MR. NICHOLS: Okay.

MR. DE BUYS: It's just started up. You know, it's right now trying to right other wrongs.

MR. NICHOLS: Okay.

MR. DE BUYS: So thank you for your time.

MR. NICHOLS: Thank you, John.

Tom, you will be up first in the morning. What time do you want to start?

MR. WILSON: 8:30.

MR. NICHOLS: 8:30. Okay, see you at 8:30 in the morning.

(Whereupon, at 6:44 p.m., the hearing was recessed, to reconvene at 8:30 a.m., Thursday, August 17, 2000.)

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REPORTER'S CERTIFICATE

DOCKET NO.: N/A
CASE TITLE: 30 CFR Part 72
HEARING DATE: August 16, 2000
LOCATION: Salt Lake City, UT

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Department of Labor, Mine Safety and Health Administration.

Date: August 21, 2000

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