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TRANSCRIPT OF PROCEEDINGS

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UNITED STATES DEPARTMENT OF LABOR

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MINE SAFETY AND HEALTH ADMINISTRATION

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In the Matter of:

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Lowering Miners' Exposure to Respirable Coal

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Mine Dust, Including Continuous Personal

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Dust Monitors

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PUBLIC HEARING

15

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30 CFR Parts 70, 71, 72, 75 and 90

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February 10, 2011

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Jenny Wiley State Resort Park

22

75 Theater Court

23

Prestonsburg, Kentucky

24

25

9:02 a.m.

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2 BEFORE PANEL MEMBERS:

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DR. WAGNER: Good morning. I'd like to welcome you to MSHA's public hearing concerning our proposed rule for Lowering Miners' Exposure To Respirable Coal Mine Dust. My name is Gregory Wagner. I'm the Deputy Assistant Secretary of Labor for Mine Safety and Health and I'm also a physician. Before we get started asking others to talk, I want to spend a few minutes giving you some ideas about really what has driven the Agency's thinking about the importance of trying to put in place a new rule to reduce the possibility of black lung.

I think that this picture's familiar to many of you in the room. It was a picture of -- from Fairmount, West Virginia, a fire and explosion at the Farmington Mine that killed 70 miners. This happened in 1968 and provided the stimulus, the impetus, to get the Federal Coal Mine Health and Safety Act of 1969 on the books. But it's important to realize that it wasn't only this tragedy and the desire of the country to prevent explosions, fires and other deaths from traumatic injuries in the mines, but another driver for the 1969 Act was the concern about lung disease in

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1 miners. There was a lot of activity, a lot of focus on
2 trying to end black lung, to prevent black lung.

3 As part of that Federal Coal Mine Health and
4 Safety Act of 1969, Congress basically made a promise.
5 It mandated that respirable coal mine dust exposures
6 should be reduced to a level which will prevent new
7 incidences of respiratory disease and the further
8 development of such disease in any person. Congress
9 promised to end black lung. It set a standard that was
10 intended to do that. In 1977 after the Scotia Mine
11 disaster that took place close to here, a new Act was
12 passed, the Federal Mine Safety and Health Act of '77
13 that among other things it intended to reduce some of
14 the hazards of mining.

15 It said that the Secretary shall set
16 standards which shall assure on the basis of the best
17 available evidence that no miner will suffer material
18 impairment of health or functional capacity even if
19 such miner has regular exposure to the hazards dealt
20 with by such a standard for the period of his working
21 life. So no miner should suffer. It doesn't say 10
22 percent, 5 percent shall suffer and the rest will go
23 without. No miner shall suffer, even if you're exposed
24 for the entire working life.

25 So fast-forward to the mid-'90s. The

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1 National Institute for Occupational Safety and Health
2 took a look at the world scientific literature about
3 lung diseases from coal miners. They summarized it and
4 they came up with recommendations. There were some
5 copies of this circulating, but this is the
6 recommendations from the National Institute for
7 Occupational Safety and Health, and those
8 recommendations were an effort to take stock of what
9 was going on with the miners and to make
10 recommendations for wiping out black lung.

11 It's called "Criteria for a Recommended
12 Standard for Occupational Exposure to Respirable Coal
13 Mine Dust." Those recommendations went to the
14 Department of Labor. The Department of Labor set up
15 its own blue ribbon panel that was made up of labor and
16 industry and independent academics who weren't involved
17 in the original report. And they made a report to the
18 Secretary of Labor. It was Secretary of Labor's
19 Advisory Committee On the Elimination of Pneumoconiosis
20 Amongst Coal Workers. Those recommendations from NIOSH
21 and from the Secretary of Labor's advisory
22 committee are those that have driven this rulemaking.

23 Let's talk a minute about what it is that
24 we're actually trying to prevent. On the left you see
25 a slice of a normal lung. In the middle, the black

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1 spots are accumulations of coal mine dust in the lungs
2 that have begun to create little spaces where you can't
3 get air through the lungs into the body. It begins to
4 interfere with breathing. People become short of
5 breath when walking on level ground or up an incline,
6 can't keep up with others their age.

7 On the far right-hand side -- let me get out
8 of the way -- is the most advanced form of black lung.
9 That's where the deposits of coal mine dust cause
10 scarring and shrinking in the lung tissues, destruction
11 of the lung tissue so that there isn't a way for the
12 normal oxygen to get through the lungs and into the
13 bloodstream. This frequently shortens individuals'
14 lives. It causes significant reduction in breathing
15 capacity.

16 The diseases we're concerned about are not
17 only what we call the fibrotic diseases, the coal
18 workers' pneumoconiosis, but those that interfere with
19 the flow of air. Emphysema and chronic bronchitis are
20 twice as common in people who are exposed to respirable
21 dust such as coal mine dust. And those in themselves,
22 whether or not they show up on X-rays, continue to
23 cause both disability and increased death rates.
24 Excuse me. Other concerns are also silicosis for
25 people who have been exposed to high levels of

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1 respirable crystal and silica. And tuberculosis is an
2 increased risk for those with increased silica.

3 This chart shows what's happened since the
4 Mine Act has been placed in the standards. Look, for
5 example, at the top line. That's for miners who have
6 worked 25 years or more. And you can see in 1970,
7 beginning after the new standard, a lot of old miners
8 retired. New miners came in. But the rates of disease
9 that were identified in a program that takes X-rays of
10 miners' lungs went down, down, down, and down until
11 about the year 2000. And then we saw a disturbing
12 trend of either leveling off or increasing rates, even
13 for miners who have been exposed only under the current
14 dust standard. So these aren't people who were, you
15 know, exposed before 1970. But you begin to see that
16 there's continuing disease in those miners, even young
17 miners.

18 This information was then gathered by the
19 National Institute for Occupational Safety and Health.
20 They went around and identified a certain number of
21 miners who had had X-rays over time where their lung
22 disease had progressed quickly. And some of these
23 miners were from Eastern Kentucky, others Southwestern
24 Virginia, West Virginia, Pennsylvania. The Appalachian
25 coal fields were where they get their study of rapid

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1 progression.

2 Let me show you what I mean. Here's two X-rays
3 of the same guy, one in '97 and one in the year 2000.
4 The one on the left, he was only 37 years with only 16
5 years of underground experience, and he already had
6 advanced chronic coal workers' pneumoconiosis. Three
7 years later with 19 years experience, his lungs had
8 begun to collapse together with destruction of the lung
9 tissue like I showed on the far right of those slices
10 of lungs. So at age 40 years old, 19 years
11 underground, he already had Stage B progressive massive
12 fibrosis. One more example, a 42-year old, 22 years of
13 underground experience as a roof bolter, shuttle car
14 operator, scoop operator, and he had started at age 20,
15 22 years experience, 42 years old, he had the most
16 advanced form of coal workers' pneumoconiosis.

17 We're always concerned about each of the
18 fatalities of people in mining, and we know that when
19 their roof collapses, when there are fires, explosions,
20 people getting crushed by equipment, it often makes it
21 into the newspaper. What doesn't make it to the
22 newspaper are the literally hundreds of people who are
23 dying with coal workers' pneumoconiosis. Over a decade
24 there were 10,000 miners or more who died from -- they
25 died with lung diseases that were a result of their

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1 dust exposures. They died from coal workers'
2 pneumoconiosis. They died with emphysema, with
3 bronchitis that were either caused or made worse by
4 their exposure to respirable coal mine dust.

5 And it's not only a personal problem. It's
6 not only a tragedy to have people's lives cut short,
7 for them to have 20 years, 30 years of disability as a
8 result of their lung disease, but it's also a severe
9 economic problem. Along with the '69 Coal Mine Health
10 and Safety Act, there was a black lung benefits program
11 that pays benefits only for people who are totally
12 disabled from all coal mine work as a result of their
13 lung disease from dust exposure. It's a very limited
14 program, but it's already paid out \$44 billion in
15 benefits.

16 So the scientific evidence underlying what it
17 is that we're going to be talking about today is that
18 pneumoconiosis appears to be rising in miners with
19 greater than 20 years of mining tenure among those who
20 are X-rayed in the NIOSH monitoring program and that
21 cases of severe disease are being seen in young miners,
22 even those occasionally 40 years old or less. The
23 prevalence of pneumoconiosis is more than Congress
24 envisioned in 1969 when they set the original standard
25 that we're still living with today.

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1 More miners are dying with CWP from mining --
2 than are dying from mining injuries due to accidents by
3 a factor of ten or 20 or even 30. Miners are at
4 greater risk for other chronic lung diseases that are
5 severely affecting them, such as chronic bronchitis and
6 emphysema. The bottom line is that black lung disease
7 is caused by excessive exposure to coal mine dust.
8 Nothing else causes black lung disease. And our goal
9 is to reduce miners' exposure to respirable coal mine
10 dust in order to prevent black lung. It's actually
11 quite simple. If dust causes disease, reduce it.
12 You'll have less disease.

13 So what are we proposing here? Well, there
14 are a number of problems that people have identified in
15 order to state what they think might be occurring
16 that's caused the continuation of black lung. People
17 know that miners often work longer than eight-hour
18 shifts, but our current sampling program is for eight
19 hours only. One miner, I think it was actually a
20 Kentucky miner, told me, you know, when I wear a dust
21 pump, it goes for eight hours. But my lungs go for the
22 entire shift. What we're proposing in this rule is to
23 require sampling for the entire shift. Miners are
24 exposed every working shift, but right now only a
25 limited number of shifts, five shifts are sampled. And

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1 the samples are averaged to determine whether or not
2 exposures are within the exposure limit. But the
3 proposal would determine exposure on each shift rather
4 than the limited number.

5 Currently the operators can legally take
6 samples at reduced production levels compared to
7 average. Even though Congress originally intended that
8 normal production be in place, the more production,
9 generally the more dust. This proposal would require
10 sampling at the average of the last 30 production
11 shifts. Another issue and -- is that miners are
12 getting disease at the current standard. Congress set
13 the standard in 1969. It's not doing what they
14 intended. This proposal would reduce the exposure
15 limit.

16 One last thing. Miners are currently not
17 provided a lot of information about either their
18 exposures or about the health consequences of their
19 exposures. This proposal would provide ongoing
20 information through the use of a continuing --
21 continuous personal dust sampler about the
22 environmental exposures and would also provide more
23 health information by having not only X-rays available
24 but also breathing tests.

25 This rulemaking is part of MSHA's

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1 comprehensive effort to end black lung which involves
2 education, outreach education with the mining community
3 and now proposed regulations to reduce miners' exposure
4 to respirable coal mine dust. I'm going to call the
5 panel up to the front, introduce them, and then we'll
6 get started with the public comment and so on.

7 Okay. I'm going to reintroduce myself. I am
8 Gregory Wagner, Deputy Assistant Secretary in the
9 Department of Labor for Mine Safety and Health. And
10 I'm going to be the moderator for this public hearing
11 on MSHA's proposal to lower miners' exposure to
12 respirable coal mine dust, including use of the
13 continuous personal dust monitor.

14 And on behalf of Joseph A. Main, the
15 Assistant Secretary of Labor for Mine Safety and
16 Health, I'd like to welcome all of you to today's
17 hearing, extend our appreciation for your participation
18 in this rulemaking, and note that you came over
19 sometimes difficult driving conditions. I think the
20 number of people in this room speaks to the importance
21 that we all feel for trying to do something to improve
22 the prevention of lung disease from respirable coal
23 mine dust.

24 I'd like to introduce the members of the
25 panel. To my left is Robert Thaxton and to his left

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1 George Niewiadomski, both from the component of MSHA
2 that deals with coal mine safety and health. To my far
3 right -- people shifting seats -- is Ronald Ford, next
4 to him, Susan Olinger, both from the Office of
5 Standards for MSHA. And to my immediate right is
6 Javier Romanach from the Office of the Solicitor of
7 the Mine Safety and Health Division, also in the
8 Department of Labor.

9 Let me just ask. Are you able to hear me? Is
10 that volume okay? Thank you very much. The proposed
11 rule for lowering miners' exposure to respirable coal
12 mine dust is an important part of the Agency's
13 comprehensive initiative that we've called End Black
14 Lung Act Now. The Secretary of Labor, Hilda Solis,
15 considers ending black lung disease as one of the
16 Department's highest regulatory priorities.

17 The proposed rule was published in the
18 Federal Register on October 19th, 2010. And in
19 response to requests from the public, on January 14th,
20 2011, MSHA extended the comment period that was
21 originally supposed to end at the end of February. It
22 was extended to May 2nd, 2011. All comments and
23 supported documentation must be received or postmarked
24 by May 2nd, 2011.

25 This is the sixth of seven hearings on the

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1 proposed rule. The first five public hearings were
2 held first December 7th in -- at the MSHA Academy in
3 West Virginia. Then the others were held January 11th,
4 January 13th, January 25th, and February 8th
5 respectively in Evansville, Indiana; Birmingham,
6 Alabama; Salt Lake City, Utah; and Washington,
7 Pennsylvania. Our last hearing will be held next week
8 on February 15th, 2011 at the MSHA headquarters
9 in Arlington, Virginia.

10 Since I suspect that many of you did not read
11 the Federal Register notice that we put out with the
12 rule, I'm going to provide an opening statement that
13 summarizes the kinds of questions that we included
14 there so that you'll know the areas where we're looking
15 for comment. As many of you know, the purpose of these
16 hearings is to allow MSHA to receive information from
17 the public that will help us evaluate the proposed
18 requirements and proposed -- and produce a final rule
19 that protects miners from health hazards that result
20 from exposure to respirable coal mine dust.

21 MSHA will use the data and the information
22 from these hearings to help us craft a rule that
23 responds to the needs and concerns of the mining public
24 so that its provisions can be implemented in the most
25 effective and appropriate manner. MSHA solicits

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1 comments from the mining community on all aspects of
2 the proposed rule. Commenters are requested to be
3 specific in their comments and submit detailed
4 rationale and supporting documentation for suggested
5 alternatives submitted.

6 At this point I'm going to reiterate some
7 requests for comments and information that were
8 included in the preamble to the proposed Rule in the
9 Federal Register publication.

10 Number 1: The proposed rule presents an
11 integrated comprehensive approach for lowering miners'
12 exposure to respirable coal mine dust. MSHA is
13 interested in alternatives to the proposal that would
14 be effective in reducing miners' respirable dust
15 exposure and invites comments on any alternatives.

16 Number 2: MSHA solicits comments on the
17 proposed respirable dust concentration standards. Please
18 provide alternatives to the proposed limits to be
19 considered in developing the final rule, including
20 specific suggested standards in your rationale.

21 Number 3: The proposed rule bases the
22 proposed respirable dust standards on an eight-hour work
23 shift and a 40-hour workweek. The 1995 NIOSH Criteria
24 Document recommends lowering the exposure to 1
25 milligram per meter cubed for each miner for up to a

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1 ten-hour work shift during a 40 hour workweek. MSHA
2 solicits comments on the NIOSH recommendation.

3 Number 4: MSHA included the proposed phase-
4 in periods for the proposed lower respirable dust
5 standards to provide sufficient time for mine operators
6 to implement or upgrade engineering or environmental
7 controls. MSHA solicits comments on alternative time
8 frames and factors that the Agency should consider.
9 Please include any information and detailed rationale.

10 Number 5: In the proposal, MSHA also plans
11 to phase in the use of the continuous personal dust
12 monitors to sample production areas of underground
13 mines and sample miners who have rights to work below
14 dusty environments as a result of beginning of coal
15 workers' pneumoconiosis, so-called Part 90 miners. MSHA
16 solicits comment on the proposed phasing in of CPDMs,
17 including time periods and any information with respect
18 to their availability. If shorter or longer time
19 frames are recommended, please provide your rationale.

20 Number 6: MSHA's received a number of
21 comments about the use of the CPDM, the continuous
22 personal dust monitor. For operators who have used
23 this device, MSHA's interested in receiving information
24 related to its use. For example, MSHA's interested in
25 information related to the durability of the unit,

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1 whether and how often the unit had to be repaired, the
2 type of repair, cost of repair, whether the repair was
3 covered under warranty, how long the unit was
4 unavailable, any other relevant information including
5 the training that was provided to those who were using
6 it, and any recommendations for changes in training.

7 Number 7: MSHA understands that some work
8 shifts are longer than 12 hours and that the dust
9 sampling device batteries generally run for
10 approximately 12 hours. MSHA solicits comments on
11 appropriate time frames to switch out sampling devices,
12 whether gravimetric samplers or CPDMs, to assure
13 continuous operation and uninterrupted protection for
14 miners for the entire shift.

15 Number 8: The proposed single sample
16 provision is based on improvements in sampling
17 technology, MSHA experience, updated data, and comments
18 and testimony from earlier notices and proposals that
19 address the accuracy of single sample measurements.
20 The Agency is particularly interested in comments on
21 new information added to the record since October 2003
22 concerning MSHA's quantitative risk assessment,
23 technological and economic feasibility, compliance
24 costs, and benefits.

25 Nine: MSHA is interested in commenters' views on

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1 what actions should be taken by MSHA and the mine
2 operator when a single shift respirable dust sample
3 meets or exceeds the Excessive Concentration Value,
4 known as ECV. In this situation, if operators use a
5 continuous personal dust monitor, what alternative
6 actions to those contained in the proposed rule would
7 you suggest that MSHA and the operator take? MSHA is
8 particularly interested in alternatives to those in the
9 proposal and how such alternatives would be protective
10 of miners.

11 Ten: The proposal includes a revised definition
12 of normal production shift, so the sampling is taken
13 during shifts that reasonably represent typical
14 production and normal mining conditions on the
15 mechanized mining unit. Please comment on whether the
16 average of the most recent 30 production shifts as
17 specified in the proposed definition would be
18 representative of dust levels to which miners are
19 typically exposed.

20 Eleven: The proposed sampling provisions address
21 interim use of supplementary controls when all feasible
22 engineering or environmental controls have been used by
23 the mine operator -- used by the mine operator, but the
24 mine operator's unable to maintain compliance with the dust
25 standard. With MSHA's approval, operators could use

1 supplementary controls, such as rotation of miners or
2 alteration of mining or production schedules in
3 conjunction with CPDMs to monitor miners' exposures.
4 MSHA solicits comments on this proposed approach and
5 any suggested alternatives, as well as the types of
6 supplementary controls that would be appropriate to
7 use on a short-term basis.

8 Twelve: The proposed rule addresses which
9 occupations must be sampled using CPDMs and which work
10 positions and areas could be sampled using either CPDMs
11 or gravimetric samplers. MSHA solicits comments on the
12 proposed sampling occupations and locations. For
13 example, please comment on whether there are other
14 positions or areas where it may be appropriate to
15 require the use of CPDMs. Also comment on whether the
16 proposed CPDM sampling of ODOs on the mechanized mining unit
17 is sufficient to address different mining techniques,
18 potential overexposures, and ineffective use of
19 approved dust controls.

20 Thirteen: The proposed rule addresses the
21 frequency of respirable dust sampling when using a
22 continuous personal dust monitor. MSHA solicits
23 comments on the proposed sampling frequency and any
24 suggested alternatives. For example, if sampling of
25 designated occupations were less frequent than

1 proposed, what alternative sampling frequency would be
2 appropriate? Please address the sampling strategy in
3 case of noncompliance with the respirable dust standard
4 and provide your rationale. Also, should CPDM sampling
5 of designated occupations be more or less frequent than
6 14 calendar days each month? That's other designated
7 occupations, ODOs, be more or less than 14 calendar days
8 each quarter? Please be specific in suggesting
9 alternatives and include supporting rationale.

10 Fourteen: The proposal would require that persons
11 certified in dust sampling or maintenance and
12 calibration retake the MSHA examination every three
13 years to maintain certification. Under this proposal,
14 these certified people would not have to retake the
15 proposed MSHA course of instruction. MSHA solicits
16 comments on this approach to certification. Please
17 include specific rationale for any suggested
18 alternatives.

19 Fifteen: In the proposal, MSHA would require that
20 the CPDM daily sample and error data file information
21 be submitted electronically to the Agency once a week.
22 MSHA solicits comments on suggested alternative time
23 frames, particularly in light of the CPDM's limited
24 memory capacity of about 20 shifts.

25 Sixteen: The proposal contains requirements for

1 posting information on sampling results and miners'
2 exposure on the mine bulletin board. MSHA solicits
3 comments on the lengths of time proposed for posting
4 data. If a standard format for reporting and posting
5 data were developed, what should it include?

6 Seventeen: The periodic medical surveillance
7 provisions in the proposed rule would require operators
8 to provide an initial examination to each miner who
9 begins working in a coal mine for the first time and
10 then at least one follow-up examination after the
11 initial examination. MSHA solicits comments on the
12 proposed time periods for -- specified for those
13 examinations.

14 Eighteen: The proposed respirator training
15 requirements are performance based and the time
16 required for respirator training would be in addition
17 to that required under Part 48. Under the proposal,
18 mine operators could, however, integrate respirator
19 training into their Part 48 training schedules. The
20 proposal would require that operators keep records for
21 training for two years. Please comment on the Agency's
22 proposed approach.

23 Nineteen: The proposed rule specifies procedures
24 and information to be included in CPDM plans to insure
25 miners are not exposed to respirable dust

1 concentrations that exceed proposed standards. For
2 example, the proposed plan would include preoperational
3 examination, testing and setup procedures to verify the
4 operational readiness of the CPDM before each shift.
5 It would also include procedures for scheduled
6 maintenance, downloading and transmission of sampling
7 information, and posting of reported results. Please
8 comment on the proposed plan provisions, including
9 supporting rationale with your recommendation.

10 Twenty: MSHA's received comments that some
11 aspects of the proposed rule may not be feasible for
12 particular mining applications. MSHA's interested in
13 receiving comments on specific mining methods that may
14 be impacted and alternative technologies and controls
15 that would protect miners.

16 Twenty-one: MSHA's received comments on proposed
17 Section 75.332(a)(1) concerning the use of "fishtail"
18 ventilation to provide intake air to multiple MMUs.
19 Commenters were concerned that under the proposed rule
20 the practice of using fishtail ventilation with
21 temporary ventilation controls would not be allowed.
22 MSHA solicits comments on any specific impact of the
23 proposed rule on current mining operations, any
24 suggested alternatives, and how the alternatives would
25 be protective of miners.

1 Twenty-two: The Agency has prepared a Preliminary
2 Regulatory Economic Analysis that contains supporting
3 cost and benefit data for the proposed rule. MSHA's
4 included a discussion of the costs and benefits in the
5 preamble. MSHA requests comments on all estimates of
6 costs and benefits presented in the preamble and the
7 Preliminary Regulatory Economic Analysis, including
8 compliance costs, net benefits, and approaches used and
9 assumptions made in the Preliminary Economic Analysis.

10 Twenty-three: MSHA's received comments that the
11 proposed rule should not require mine operators to
12 record corrective actions or excessive dust
13 concentrations as Section 75.363 hazardous conditions.
14 MSHA would like to clarify that the proposal would
15 require the operators to record both excessive dust
16 concentrations and corrective actions. However, under
17 the proposal, MSHA intends that these actions to be
18 recorded in a similar manner as conditions are recorded
19 under section 75.363. But MSHA would not consider them
20 to be hazardous conditions.

21 Twenty-four: A commenter at the first public
22 hearing suggested that the time frame for miners'
23 review of the CPDM Performance Plan be extended. I
24 want to clarify MSHA's position in the proposed
25 rule. In developing the proposed rule, MSHA relied on

1 the time frame and process in the existing requirements
2 for mine ventilation plans. In the proposal, MSHA did
3 not intend to change the existing time frame and
4 process and stated that the proposed rule is consistent
5 with ventilation plan requirements and would allow
6 miners' representatives the opportunity to meaningfully
7 participate in the process.

8 Now, as you address the proposed provisions
9 either in your testimony today or in your written
10 comments, please be as specific as possible. MSHA
11 cannot sufficiently evaluate general comments. Please
12 include specific suggested alternatives, your specific
13 rationale, the health benefits to miners that would
14 improve from your alternatives, and any technological
15 and economic feasibility considerations and data to
16 support your comments. The more specific your
17 information is, the better it will be for us to
18 evaluate and produce a final rule that will be
19 responsive to the needs and concerns of the mining
20 public.

21 Now, as many of you know, today's hearing,
22 public hearing, will be conducted in an informal
23 manner. Cross-examination and formal rules of evidence
24 will not apply. The panel may ask questions of the
25 speakers. Those of you who notified MSHA in advance of

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1 your intent to speak or have signed up today to speak
2 will make your presentations first. Then after all
3 scheduled speakers have finished, any others who wish
4 to speak may do so. If you wish to present written
5 statements or information today, please clearly
6 identify your material and give a copy to the court
7 reporter. Would you like to -- there you go. You may
8 also submit comments following this public hearing.
9 Comments must be received or postmarked by May 2nd,
10 2011. Comments may be submitted by any method
11 identified in the proposed rule.

12 Now, we'll make a transcript of this hearing
13 and MSHA will make available transcripts of all the
14 public hearings approximately two weeks after
15 completion of the hearing. You may view the
16 transcripts of the public hearing and comments on
17 MSHA's website at www.msha.gov.

18 We've asked that anybody in attendance please
19 sign the attendance list and those who want to speak
20 please sign the list indicating your interest in
21 speaking. Those lists I think were right outside the
22 door. Now, we're going to begin today's hearing. When
23 I call you up to the front, please begin by clearly
24 stating your name and organization, and spell your name
25 for the court reporter so that we have an accurate

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1 record. The first speaker will be Norman Stump, if
2 Norman is here. Just come up to the front. I have to
3 get my book. Is Norman here? We'll call Norman again
4 later and go on to the second speaker, who is Bill
5 Bissett.

6 MR. BISSETT: My name is Bill Bissett, B-i-l-
7 l, last name B-i-s-s-e-t-t. I'm the president of the
8 Kentucky Coal Association. We're headquartered in
9 Lexington. We represent the Eastern and Western
10 Kentucky coal fields. Our production is about a
11 hundred and fifteen million tons a year. We represent
12 18,000 men and women who mine that coal every year. I'm
13 here today also on behalf of the member companies and
14 the associate member companies. We have 28 member
15 companies and more than a hundred associate members who
16 depend on this industry for their existence.

17 I appreciate the opportunity to speak to you
18 today, and it's important that we do these kinds of
19 hearings. It's important that we have access to you
20 and have our voice heard. And, again we thank you for
21 doing this in Kentucky. We are the third largest coal
22 producer in the nation and appreciate you taking the
23 time and setting it up here at Jenny Wiley.

24 Please know that our industry shares your
25 concern about coal worker pneumoconiosis or CWP. It is

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1 a serious concern that we put a lot of time, energy,
2 and effort into every day, the investments in testing,
3 technology that our companies have done through best
4 management practices, state-of-the-art dust control and
5 mine ventilation plans, our serious commitment, not
6 just to our workers but to the reputation of our
7 industry. And while you share this admirable goal with
8 us, we believe the proposed rule contains many
9 technical and operational impracticalities employing a
10 convoluted and subjective enforcement scheme while
11 misapplying current dust control technology. And
12 that's a grave concern.

13 We feel that Congress also should be more
14 engaged in this process and some of the work they're
15 currently doing should be part of this focus, and it
16 should not come simply from an appointed agency. We
17 feel you are grossly underestimating the financial
18 concerns and the effect it will do, not only to the
19 mining industry but to many, many companies who depend
20 on the mining industry for their existence. We believe
21 that your process to come up with this rule has
22 violated the previous cooperative approach that MSHA
23 has had in working with our industry to eradicate CWP.
24 And that is also concerning, especially at a time we
25 find other agencies in the federal government acting in

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1 similar ways.

2 And perhaps the most concerning is how we have
3 come here today: that you will not share the study,
4 the data collected, the methodology and even the
5 conclusions that you have found to bring us to this
6 rule today with our industry. This has not been a
7 transparent process. It has not been an open process.
8 And that is very, very concerning.

9 We understand that you believe HIPAA, the
10 very law that protects us from having our health care
11 share information with others, prevents you from
12 sharing information. That is not fair, and that is not
13 the definition of HIPAA by my understanding or by our
14 lawyers. For academic research, for so many different
15 ways, you can -- you can blind this information where
16 we don't have people's identity. We simply have access
17 to data that led you to these conclusions. Without it,
18 the very existence of this rule is called in question
19 before you even get to this process.

20 And you suggest "hot spots" have been found
21 where younger coal miners in the ages of about 25 to 30
22 have been found in high rates of CWP. Our concern is,
23 if you have specific hot spots, specific geographic
24 locations where these concerns exist, why are you
25 suggesting an industry-wide rule if only in specific

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1 locations.

2 The personal dust monitors, which I would add
3 are an invention that came from a working relationship
4 between our industry and the union, there are many,
5 many concerns about the PDMs, including weight, the
6 fact that only one manufacturer currently produces
7 them, their very high failure rate, their propensity to
8 break down, and operator complaints both from the
9 companies and from coal miners themselves regarding the
10 PDMs and their use. You estimate that a less than \$40
11 million annual impact will be absorbed by the industry
12 with its implementation. Again, we feel that is a
13 grossly unfair financial estimate.

14 Based on the administrative burden, the
15 adjustment of production schedules, the -- modifying
16 the mining methods, and the altering existing and
17 effective mine ventilation systems, we estimate the
18 impact will be a billion if not billions of dollars on
19 the coal industry. An additional cost would be the
20 increase in dust sampling. Currently, industry wide you
21 look at about 25,000 dust samples a year. Based on
22 this rule, that number would grow from 25,000 to 750 or
23 a hundred or a million samples a year. One of our
24 member companies suggested their sampling alone will
25 change from 2,000 to 32,000 a year. Again, that's very

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1 much an increased cost when the initial starting point
2 is still in question.

3 We, the coal industry in Kentucky, are
4 committed to providing a safe and healthy atmosphere
5 for all of our workers, for all of the employees of our
6 coal companies, and we will work with you to do so. We
7 want to work with you. But this process you've chosen
8 with this rule does not demonstrate a working
9 relationship but more a secret process with hidden data
10 and methods. And that is very concerning.

11 We ask you to reconsider this rule and take
12 appropriate time and a transparent, open process to
13 find solutions. That is what needs to happen here. And
14 that's what you've done in the past, which has been
15 successful. We ask that you to do that in the future,
16 especially with this rule. Dr. Wagner.

17 DR. WAGNER: Thank you very much.

18 MR. BISSETT: Yes, sir.

19 DR. WAGNER: I'm going to turn to the panel
20 now. Yeah.

21 EXAMINATION

22 BY MR. FORD:

23 Q. Mr. Bissett, I've just got one question --

24 A. Yes, sir.

25 Q. -- basically. And that is, will you be

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1 providing -- concerning the underestimation of the
2 cost, will you be providing written testimony detailing
3 exactly what you believe the cost will be and in -- in
4 what areas of Kentucky mines that you think will be
5 affected?

6 A. We'll be happy to do that. We will be
7 providing written comments later. I know we have until
8 May deadline, I believe, to do so. You'll also be
9 hearing from other safety experts within our industry
10 today who will give you greater specificity on those
11 issues.

12 MR. FORD: Okay. Thank you.

13 MR. BISSETT: Of course.

14 EXAMINATION

15 BY MS. OLINGER:

16 Q. And I imagine some of your comments would
17 address the optimal sampling strategy and use of the
18 CPDM, including occupations to be sampled and
19 frequency?

20 DR. WAGNER: Turn the speaker on. turn the
21 mic on.

22 COURT REPORTER: Speak up.

23 DR. WAGNER: It needs to be turned on. It's
24 on the side. There you go.

25 COURT REPORTER: Thank you.

0034

1 MS. OLINGER: Sorry.

2 Q. Your comments will address sampling strategy,
3 including occupations to be sampled, the frequency and
4 what you consider the best-use, the scenario to use
5 CPDMs?

6 A. We can definitely do that within our written
7 comments. We -- those companies that I know of, some
8 of who will be speaking today, that have used the
9 personal dust monitors, and they have that experience
10 and will share their experience, and also put it in
11 writing.

12 MS. OLINGER: Thank you.

13 MR. BISSETT: Of course.

14 EXAMINATION

15 BY MR. ROMANACH:

16 Q. Mr. Bissett, would your -- your comments,
17 would they also address your concerns about the
18 personal dust monitor figure the -- you made? You
19 mentioned the weight, the high failure rate and
20 operator complaints.

21 A. What I'll do is we'll try and include
22 personal experiences that we've seen thus far in the
23 field and also implementation and also talk to the
24 manufacturer themselves. We've also heard some
25 concerns from the manufacturer themselves.

0035

1 EXAMINATION

2 BY DR. WAGNER:

3 Q. I have a few questions. First, you started
4 off expressing some concerns about the scientific basis
5 that was used to develop the rule. I'm -- I'm
6 wondering since we do reference the NIOSH Criteria
7 Document from the mid-'90s that reviewed probably in
8 excess of 500 scientific studies from the world
9 literature, in the peer review literature, and other
10 reports forming the basis -- all of them are listed in
11 the NIOSH Criteria Document -- can you identify those
12 studies and the science that you're concerned about
13 that's an inadequate basis for this?

14 A. Dr. Wagner, what I'm concerned is that the
15 criteria document was done through, for example,
16 use of buses in Wal-Mart parking lots seeking
17 volunteers, that you don't have a representative sample
18 of the population where you're trying to identify these
19 concerns. If you had more of a I think representative
20 sample of the population of the coal fields, of people
21 working within them, and not in a voluntary sort of
22 come forward way but more in a showcase process in an
23 identification that's random, I think you're going to
24 do a lot better identifying if this problems exists
25 than the uptake that you suggest in the hot spots.

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1 Q. Do you believe that those miners who were
2 identified, even if volunteers in the mobile
3 facilities, do you believe that those who demonstrated
4 coal workers' pneumoconiosis or other breathing
5 problems have problems?

6 A. Absolutely. If the X-rays were properly
7 diagnosed, then there is an issue going on there. How
8 one has damage to the lungs I know can sometimes be
9 part of the discussion. But I would add the question
10 is, where do you find these geographic locations and
11 how are you getting those volunteers to be come forward
12 in parking lots, et cetera, to be part of this process.

13 Q. So people with progressive massive fibrosis,
14 with coal workers' pneumoconiosis, who have been
15 identified, whether they're one in ten or one in a
16 hundred or one in a thousand are people with problems.

17 A. They are people with problems. But I would
18 say if you want to sample an entire population, you
19 need to randomly select that population in order to get
20 a representative sample rather than people just coming
21 forth and I have a problem.

22 Q. Uh-huh.

23 A. I think you'd want to know how is the entire
24 industry affected, how are miners affected before you -
25 - you suggest an industry-wide solution.

0037

1 Q. And are you familiar with any of the other
2 studies that preceded the hot spot investigation that
3 provide scientific basis for the rulemaking?

4 A. I specifically studied the hot spot study
5 that's in the suggested rule.

6 Q. So the other hundreds of studies other than
7 the few reports of hot spots are not part of your
8 consideration in your comments today?

9 A. Mine are the suggestions that the hot spots
10 are used as the impetus for this rule.

11 Q. To clarify, the hot spot investigations came
12 far after the 1995 NIOSH Criteria Document. It came
13 after the 1996 Report of Secretary of Labor's Advisory
14 Committee. The rule reflects the recommendations from
15 the NIOSH Criteria Document based on their scientific
16 finding, the recommendations of the Secretary's
17 Advisory Committee based upon their assessment of the
18 literature and practicality of what's going on in the
19 mining industry, and was not stimulated by the hot
20 spots. The hot spots provide a certain amount of
21 context and additional information concerning miners
22 who are getting disease under current circumstances,
23 but they do not provide the basis for the rule. So I
24 just wanted to make sure that you understood in your
25 comments going forward that if you wish to address the

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1 basis for the rule, I would look well beyond the hot
2 spot investigation.

3 A. Thank you.

4 Q. You indicated a commitment to end black lung,
5 and I was -- and have acknowledged that at least some
6 miners are having problems as a result of respirable
7 coal mine dust exposure. Do you have specific
8 recommendations for ways to move forward in order to
9 reduce risk to miners from respirable coal mine dust?

10 A. The other safety experts you'll hear from
11 today will give you specific suggestions on that front.
12 My goal today was to give you an industry wide response
13 to this rule suggestion.

14 DR. WAGNER: Very good. That being the case,
15 I will look forward to the other experts that you've
16 brought in. And again, we'll look forward to your
17 written comments that I expect will provide substantial
18 detail on your alternate recommendations and the
19 justification for new data upon which your
20 recommendations are based. But thank you very much for
21 being here.

22 MR. BISSETT: Thank you.

23 DR. WAGNER: The next speaker will be Wes
24 Addington.

25 MR. ADDINGTON: Good morning.

1 DR. WAGNER: Good morning. Do you want to
2 state your name and your organization.

3 MR. ADDINGTON: I will. My name is Wes
4 Addington. I'm an attorney with Appalachian Citizens
5 Law Center in Whitesburg, Kentucky. Our office
6 represents disabled miners and their widows in federal
7 black lung benefits claims. We also represent miners
8 in issues of mine safety.

9 I also would like to thank MSHA for coming to
10 Eastern Kentucky to hold this hearing. I know in the
11 past that different rulemaking hearings have not been
12 held in the coal fields, and I applaud you being here
13 in support of --

14 COURT REPORTER: Can you spell your name,
15 please.

16 MR. ADDINGTON: My last name is Addington, A-
17 d-d-i-n-g-t-o-n.

18 COURT REPORTER: Thank you.

19 MR. ADDINGTON: MSHA's proposed rule renews a
20 much needed focus on the elimination of black lung
21 disease. First I'd like to state that we will be
22 submitting specific written comments before the comment
23 period is over. Today I think I'd like to speak more
24 generally in support of this rule. The proposed rule
25 renews a much needed focus on the elimination of black

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1 lung disease. This is a very important issue, and it's
2 imperative that MSHA act as speedily as possible. The
3 '95 NIOSH Criteria Document recommended a reduction in
4 the allowable amount of respirable dust to 1 milligram
5 per cubic meter as called for in the proposed rule. In
6 the 16 years since NIOSH published this recommended
7 standard, NIOSH has documented an alarming increase in
8 the incidence of coal workers' pneumoconiosis among
9 working miners. Many miners who started working after
10 NIOSH published this Criteria Document -- Document in
11 1995 are no doubt now suffering from black lung. MSHA
12 needs to act now to prevent new miners from getting
13 black lung.

14 As I said earlier, I work with disabled
15 miners and widows seeking black lung benefits. Today
16 I'd like to tell you about a few miners who we have
17 represented. All of them worked in coal mining in
18 Eastern Kentucky. The first miner was 50 years old
19 when he stopped working in '99. He had worked in
20 underground coal mines since 1974. He was a continuous
21 mining machine operator and had worked for nearly 20
22 years when he was forced to stop work. In August 2004
23 he was referred to a surgeon for treatment of a lung
24 mass. The surgeon removed a nodule 3 centimeters by 1
25 1/2 centimeters from his lung and found an extensive

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1 anthracotic nodule in his right upper lung. The
2 surgeon reported the patient's lungs were basically
3 black with multiple small nodules throughout both lung
4 fields.

5 The second miner was 53 old when he was
6 forced to stop working in 2006 due to his breathing
7 problems. All of his work had been on strip mines
8 where he operated a drill and loaded and shot coal. He
9 said he often worked as much as 11 hours a day. The
10 doctor found pneumoconiosis with large nodules in his
11 lungs which were classified as Category B opacities on
12 his X-rays.

13 The third miner was 46 years old when he was
14 forced to stop working. He had started mining in 1978
15 and had worked 23 years as a coal miner and underground
16 miner, most recently as a continuous miner machine
17 operator. Doctors suspected that the large mass seen
18 on X-ray and CT scan were cancer. After surgery no
19 cancer was found, and it was determined that the mass
20 was pneumoconiosis. A pathologist reported that the
21 pneumoconiosis -- pneumoconiotic lesions on his lungs
22 were greater than one inch in size.

23 And in driving up here -- these -- these were
24 a few miners that my boss at ACLC handled their claims.
25 And as I'm driving up here, I was just sort of thinking

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1 about some of the miners that I've been representing.
2 I recently had a miner who I believe was still in his
3 60s who had a lung transplant who was awarded black
4 lung benefits a couple of years ago. I also have a
5 miner who worked less than 20 years in coal mining who
6 had complicated pneumoconiosis and was a nonsmoker. So
7 we're still seeing, you know, the serious effects of
8 this disease in our office through our -- our claims
9 work.

10 All of these miners worked for large coal
11 mining companies in Eastern Kentucky. They have
12 suffered permanent and irreversible lung damage due to
13 breathing coal mine dust. All -- all of these
14 performed the mining work after the passage of the 1969
15 Coal Mine Safety Act, which mandated that coal mine
16 dust be no more than 2 milligrams per cubic meter.

17 It is apparent that this standard is not
18 adequate to protect miners from permanent and severe
19 lung damage and that more must be done. These miners
20 have severe fibrotic lung disease due to coal mine
21 dust. Many other miners are afflicted with severe COPD
22 and emphysema as a result of exposure to coal mine
23 dust, which is the case of the miner that I mentioned
24 that I represented that recently had a lung transplant.

25 The '69 Coal Mine Act was intended to

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1 eliminate black lung by reducing the amount of dust
2 that miners breathe. The law stated that the
3 government should establish limits reducing the amount
4 of dust in the mines to a level of personal exposure
5 which will prevent new incidences of respiratory
6 disease and the further development of such disease.
7 The law stated that it intended to ensure that the
8 working conditions in coal mines were sufficiently free
9 of dust in the mine atmosphere to permit each miner the
10 opportunity to work during the period of his entire
11 adult working life without incurring any disability
12 from black lung disease or any other occupational
13 disease. We've certainly not succeeded in this effort.

14 I am encouraged that MSHA has a renewed
15 dedication to eliminate black lung. While preventing
16 unsafe and unhealthy work conditions are the primary --
17 primarily the responsibility of the employer, MSHA must
18 ensure that coal mines are safe and healthy work
19 places. All miners should be able to work in an
20 environment where they are not at risk for developing
21 an incurable lung disease. I urge MSHA to move ahead
22 speedily on this proposal to cut the dust limit in half
23 as recommended by NIOSH in 1995.

24 I urge MSHA to immediately require the mines
25 use the new personal dust monitors that fit on a

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1 miner's helmet and continuously monitor, read out, and
2 record dust exposures so that it is easy to determine
3 whether the miner worked in a place that's in
4 compliance with the respirable dust standard. I urge
5 MSHA to move ahead on its other proposals to control
6 exposure to excessive dust.

7 And I also urge MSHA to involve the miners in
8 the effort to end black lung disease. And as we've --
9 as a previous commenter spoke about -- and I also
10 identified Eastern Kentucky as a hot spot for coal
11 workers' pneumoconiosis, I guess I would characterize
12 it as a hotter spot. I don't know the -- the areas
13 that haven't been identified as so-called hot spots are
14 adequate in protecting their miners from the likelihood
15 of developing black lung disease. But I think that --
16 I think these are much more serious areas or hotter
17 spots.

18 I encourage MSHA to hold events in Eastern
19 Kentucky and talk with miners about the problem and ask
20 them for solutions. Some miners may fear losing their
21 jobs if they insist that the mine follow the law and
22 probably measure and control respirable dust. MSHA has
23 the power to protect miners from retaliation and
24 insisting that the mine obey safety and health
25 regulations. MSHA must make sure that miners know

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1 their rights.

2 And anecdotally from -- from my experience in
3 representing miners, a number -- a number of miners are
4 afraid to become Part 90 miners. They -- they clearly
5 understand there there's an implication there that the
6 company will take action against them in the future if
7 they decide to elect to become a Part 90 miner. You
8 know, that's not true in all cases, but a number of
9 miners have that fear.

10 You know, Mr. Bissett talked about -- or I
11 would say criticized the coal workers' surveillance
12 program for bringing a bus around -- it's more of a
13 really nice RV -- to do the testing in and going to
14 Wal-Mart parking lots. Now, I've -- I've seen the van
15 at schools monitoring miners that -- that chose to come
16 out. So they're not just at Wal-Mart parking lots.
17 But the bigger -- the bigger issue is, why aren't
18 employers encouraging or even requiring miners to
19 participate in this program?

20 I mean, wouldn't that be -- instead of a --
21 you know, getting -- you talk about an accurate sample.
22 Why not get a larger sample? I know, for example, if
23 my memory serves me correctly, in Southwest Virginia,
24 one employer was bringing their employees over to be
25 tested while the -- while NIOSH was in the area. Why

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1 can't more employers in Kentucky do that? It would
2 give us better data. That's for sure. Unfortunately,
3 the current data shows that we're not protecting miners
4 from getting disabling and then sometimes fatal lung
5 disease. And I think MSHA does have to act now. And I
6 applaud their efforts in proposing this rule.

7 I'd like to thank you for the opportunity to
8 speak here and thank you for what you do for miners and
9 their family. One last thing I would like to put into
10 the record. A miner has brought some pictures of a
11 surface mine operation. And I will hand these to the
12 panel and I'll also hand a copy to the court reporter
13 in which you can watch -- in which you can watch a
14 loader disappear in -- in the dark dust. Thank you.
15 I'm finished with my comments.

16 (COLLECTIVE EXHIBIT 1 MARKED FOR IDENTIFICATION)

17 DR. WAGNER: Thank you. While I'm looking at
18 the pictures, if I could ask if you're able to provide
19 these as electronic images, it would be easier for us
20 to be able to include them as part of your testimony.

21 MR. ADDINGTON: I would. Actually, I have
22 them and brought them in terms of 5-by-7 photos. But I
23 can scan those and make them digital.

24 DR. WAGNER: Great. Thank you very much. Any
25 further comments? Susan?

0047

1 EXAMINATION

2 BY MR. NIEWIADOMSKI:

3 Q. I have a few questions for you. The mines
4 that you're represent -- that you represent, my
5 question is, are you seeing more miners or less miners
6 than in the past seeking your -- seeking your
7 assistance?

8 A. Well, in terms of -- are you talking about in
9 terms of black lung benefit plans?

10 Q. That is correct; yes, sir.

11 A. Well, we're seeing an increase in those. And
12 part of that is proposed changes in the law.
13 Unfortunately, what we're not seeing is a reduction in
14 the -- the seriousness of their disease, the
15 progressiveness of their disease. You know, at some
16 point you would hope to stop seeing -- at this point we
17 should stop seeing complicated pneumoconiosis in these
18 miners. And that's not happening. Frankly, I've been
19 doing this six years now representing miners in those
20 claims. And lately I've been seeing more complicated
21 pneumoconiosis claims come across my desk,
22 unfortunately.

23 Q. Do you know if these individuals that you're
24 representing whether they get their X-rays, is that
25 part of the -- offered by the -- under the NIOSH

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1 surveillance program or do they file claims? And --
2 and I'm just -- I'm just curious, because I think you
3 pointed out something that's very important, something
4 that's historically we've had a problem with. And
5 that's why NIOSH implemented the enhanced -- with the
6 support of MSHA the enhanced X-ray surveillance
7 program. You know, by having this van which has the
8 latest data technology and X-ray -- X-rays to really
9 bring it to the coal fields, because the problem we've
10 had in Eastern Kentucky -- and it's no secret -- is
11 participation. Okay. We've had probably -- and that's
12 the only way we can get them to -- to participate,
13 because the numbers are very small. But the fact is
14 and it's no secret that the highest rate of respirable
15 coal dust rates are in Eastern Kentucky.

16 A. Uh-huh.

17 Q. They're very high. Okay. And some of the
18 data that's -- that's offered by and was provided by
19 the Department of Labor wants -- once, of course, the
20 claims have been approved, a very, very high rate of
21 progressive massive fibrosis, okay, are from Eastern
22 Kentucky. So -- so, in fact, it's a serious problem.
23 It's not an old man's disease. A lot of young people
24 are getting it. Okay. And, I mean, the previous --
25 the previous speaker had criticized the approach that

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1 NIOSH has taken. But we find that's more successful
2 trying to get that van to places where they feel it's
3 more secure and they can, in fact, get an X-ray done.
4 So I was curious whether or not these individuals --
5 how did they get their X-ray, whether or not they went
6 to a private physician or with the Department of Labor
7 and what.

8 A. It does vary. Generally I don't see many
9 surveillance X-rays, you know, historically. Most of
10 them -- you know, most of the miners have been retired
11 for a while. They file for federal black lung
12 benefits. And that starts the -- the X-ray process.
13 You know, some miners have had serious lung problems
14 over the years, so, you know, there will be some
15 hospital records of those X-rays. Frankly, I haven't
16 seen that many come to me that's been part of the NIOSH
17 surveillance program.

18 Now, I actually had a miner recently who has
19 participated in the program since the early '90s. And
20 that's the first miner that I've that, you know, sort
21 of religiously, you know, has taken advantage of the
22 program. He's been able to track -- I mean, you can
23 track his X-rays. You know, he's went from 0/0 to 0/1.
24 Now he's 1/0, and maybe the latest one is 1/1. So you
25 can see the progression of the disease as he's worked.

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1 But that's -- that's definitely the exception in my
2 experience.

3 Q. Can you offer any suggestions of how -- how
4 to increase participation in the X-ray surveillance
5 system?

6 A. Yeah. I mean, one problem in Kentucky --
7 there's a couple of problems I think that you run into
8 in Kentucky. You know, obviously -- and you're going
9 to see this anywhere -- some miners don't want to know
10 while they're working. But that -- that's an issue I
11 think that's nationwide. You know, another thing is
12 the issue of Workers' Comp in Kentucky. Miners fear
13 that once they have evidence of pneumoconiosis, it
14 starts with special limitations. And then so they
15 never go and get the X-ray. Part of it I think is fear
16 of retaliation.

17 You know, one good thing about being at the
18 Wal-Mart parking lot is, you know, you're visible.
19 People can come and, you know, go through the process.
20 The other -- you know, I guess the down side that, you
21 know, I've heard from some miners is that, you know,
22 people can see you there, so -- and I do think it's a
23 legitimate fear -- I wasn't just saying that -- that --
24 that miners have about electing to become a Part 90
25 miner is, you know, they've got a serious X-ray and

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1 evidence of coal workers' pneumoconiosis. I had a
2 miner who was in his early 40s that had X-ray evidence
3 of complicated pneumoconiosis, and he was afraid to
4 elect to become a Part 90 miner, you know.

5 MR. NIEWADOMSKI: Thank you very much.

6 MR. ADDINGTON: Sure.

7 EXAMINATION

8 BY DR. WAGNER:

9 Q. On the Part 90 miners, do you have any
10 recommendations to the Agency for how to assure that
11 people who are eligible to become Part 90 miners don't
12 feel those barriers to -- to electing to do it?

13 A. I -- I'll think about that and I'll include
14 that in my written comments.

15 Q. Thank you. You mentioned miners you were
16 dealing with who had to have a lung transplant as a
17 result of his severe emphysema that was --

18 A. Uh-huh.

19 Q. -- caused or contributed by the coal mine
20 dust exposure. Do you have any idea about what the
21 cost to him and his family and overall the insurance
22 costs that were involved in that transplant operation?

23 A. It's -- I've recently become aware that it's
24 a major issue to the family. I think it's -- it could
25 -- could be potentially bank -- it could bankrupt them,

1 I think. And as of now he's in benefit status.
2 However, the Department of Labor did not pre-approve
3 his lung transplant. So I think they're going to be
4 going through the process of also trying to, you know,
5 litigate those costs and hopefully have some of them
6 covered. As of right now they're not covered. So from
7 what he's telling me, their family is in a very tough
8 financial situation at the moment.

9 Q. About how old was this miner?

10 A. I'm pretty certain he's still in his 50s, but
11 I didn't look at his case file before I came. Sorry.

12 Q. Some commenters in the course of this hearing
13 on the issue of participation in the X-ray surveillance
14 program have said that it should be a requirement that
15 miners participate, not -- and not have participation
16 be optional. What's your feeling about that?

17 A. Well, it's a good question. You know, in
18 Kentucky with this statute of limitations issue on the
19 State Workers' Comp, that -- that can be problematic
20 for the miner, you know, maybe if there was a way in
21 which they did not personally become aware of it if
22 they did not want to. I think all miners should --
23 should participate in the program. I think all miners
24 should take an active, you know, role in realizing
25 their -- their current state, lung state, pulmonary

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1 state. And frankly, you know, I think, employers
2 should encourage and at least work with NIOSH to
3 arrange for miners that are willing to participate to
4 participate.

5 I just keep going back to the -- what I was
6 told last by employees of NIOSH, that there was a
7 Southwestern Virginia coal company that essentially
8 bussed their employees to be tested. I don't know why
9 employers couldn't do that. I mean, I think if you
10 care about their dust exposure over the history of
11 their working lifetime and about your employees,
12 especially, you know, loyal employees that have been
13 there 20 years, I think you owe it to them that if --
14 if they really can't stand any more dust exposure to
15 get them out of serious dust exposure. That's just my
16 personal opinion.

17 DR. WAGNER: Any other questions? I want to
18 thank you again for coming and speaking today. And
19 we'll look forward to your written remarks --

20 MR. ADDINGTON: Thank you.

21 DR. WAGNER: -- should they come in before
22 May 2nd.

23 MR. ADDINGTON: Thank you.

24 DR. WAGNER: Thank you very much. The next
25 will be Leonard Fleming. Is Leonard Fleming in the

0054

1 room and wanting to speak? I don't see Leonard here
2 right now. I'll go on to the next speaker, John
3 Blankenship. It looks like -- I think that Mr.
4 Blankenship indicated that he might not be available
5 right now.

6 UNIDENTIFIED SPEAKER: They went -- they went
7 out to get him.

8 DR. WAGNER: Oh, okay. So we'll -- I'm going
9 to call again for Norman Stump, who had previously
10 signed up. It seems that Mr. Stump isn't here and Mr.
11 Blankenship is on his way apparently. I think he
12 indicated that he would be in the building and
13 available.

14 UNIDENTIFIED SPEAKER: Go ahead to the next
15 one. He's going to call.

16 DR. WAGNER: We have no other speakers signed
17 up to speak, so I'm going to see whether there's anyone
18 who has not signed up who would like to be speaking, or
19 perhaps I don't have your name and you did sign out
20 there. The mic is open if anyone want to make
21 additional comments on any specifics or any
22 generalities.

23 Seeing no one wanting to speak but since Mr.
24 Bissett [sic] specifically did sign up and requested an
25 opportunity to speak and I know he's in the building,

0055

1 I'm going to take a break until 10:30. Right now it's
2 about 13 minutes after ten or something like that. So
3 we're going to take a break for 17 minutes. We'll
4 reassemble at 10:30.

5 (OFF THE RECORD)

6 DR. WAGNER: We're going to be reconvening
7 now. Good morning once again. As promised before, we
8 took the break. There were a couple -- there are
9 actually three people who signed up who have not yet
10 been able to speak. Norman Stump, has Mr. Stump
11 arrived? We will call him again. Mr. Leonard Fleming?

12 UNIDENTIFIED SPEAKER: And he's not coming.

13 DR. WAGNER: Okay.

14 UNIDENTIFIED SPEAKER: He will address his
15 comments online.

16 DR. WAGNER: Thank you. So Mr. Fleming won't
17 be speaking. The third person who has signed up and
18 not yet spoken is Mr. John Blankenship. I didn't know
19 if you were in here. Please speak and spell your name
20 as well as the organization you're from.

21 MR. BLANKENSHIP: Yes, sir. My name is John
22 D. Blankenship.

23 DR. WAGNER: I'm -- maybe -- I'm not sure the
24 mic is on. Oh, it is on. you just need to be closer.

25 MR. BLANKENSHIP: My name is John D.

0056

1 Blankenship, B-l-a-n-k-e-n-s-h-i-p. I work for Teco
2 Coal Corporation. And you don't need a phone contact
3 here. And I will be submitting some written comments
4 afterwards. I'd like to thank the panel for the
5 opportunity to speak today and I appreciate the
6 accommodations of accommodating my phone call.

7 COURT REPORTER: You're going to need to
8 speak up. I can't hear you and I'm over here.

9 DR. WAGNER: Hit the mic and make sure that
10 it's operating Just tap it and make sure.

11 COURT REPORTER: It's on. Okay. Thank you.

12 DR. WAGNER: Okay.

13 MR. BLANKENSHIP: I'm a fourth generation
14 coal miner. I've held many varied positions within the
15 underground mine environment, from general inside labor
16 to upper mine management over more than a 30-plus year
17 career. And again, I would like to thank the panel for
18 the opportunity to speak and make a few brief comments.
19 I, much like many of my friends in the industry, are
20 curious to actually have the opportunity to review some
21 of the data and the studies and the methodologies
22 I can speak to some of your cross-examination of Mr.
23 Bissett about the detailed analysis of those studies.
24 I have been party to some conversations with the Agency
25 in the past where we have questioned some of the

0057

1 demographics and some of the studies and some of the
2 environmental aspects that have been left out of the
3 equation. And we are especially concerned about the
4 hot spot studies and some of the information. I think
5 Mr. Bissett covered that, and I'll say no more to it.

6 I would like to speak to the use of the
7 single sample compliance methods. My experience has
8 taught me that the mine environment is truly a dynamic
9 environment in which we work. And that's experience at
10 the face, and the majority of my time actually has been
11 in production. And many advances have been made in
12 dust control over the past decades that I've worked in
13 the industry. I will applaud the -- the changes that
14 were brought out after '69 and after '77. And I can
15 attest by personal experience that those have been
16 great improvements.

17 The mechanical equipment, everything in the
18 section can play havoc with -- with the dust control
19 measures. Anyone that's actually been a face boss and
20 operated on a section or -- or been a crew member, you
21 know that it's a constant vigilance that you got to
22 have to keep the dust under control in the miner. These
23 variable conditions have been the reason that all the
24 samples today have been averaged and determined work-
25 related exposures to miner across the work week.

0058

1 Single samples I don't feel personally can adequately
2 give a true overall picture of a true work environment
3 in the mine. The current system as well as the
4 proposed system also has built-in flaws for single
5 sample use as well.

6 A single sample under the current system with
7 the -- with the pole would only sample the occupational
8 location for a shift, not actually the miner's exposure
9 if that miner was moved from that area or occupation
10 during a shift. As an explanation -- I don't know how
11 familiar you are with the actual implementation
12 underground -- but the device is placed at the
13 designated occupation, and it stays at that location
14 even if that miner is removed back to an area outby or
15 even into a dustier atmosphere. So it's not truly
16 sampling that miner's exposure. It's sampling the
17 occupation. And this is, as I said, not truly sampling
18 a coal miner but is sampling the location of the miner
19 operating and performing that occupation. In reality,
20 to sample a coal miner, the sampler should be worn
21 wherever the miner works during the shift doing
22 whatever work that coal miner is required or assigned
23 to do. Only then will you truly sample the miner.

24 In addition, MSHA should permit the use of
25 resp -- respiratory protective devices to be used for -

1 - to provide protection for the miners from respirable
2 coal dust. Those should be used as in other industry to
3 meet compliance. The use of personal protective
4 equipment to filter particulates and other harmful
5 products in the atmosphere should be permitted for
6 protection and compliance rather than only consider the
7 fresh air environment to test for compliance purposes,
8 as MSHA currently does, and as is mentioned in the
9 proposal.

10 One other comment, I would like to speak to
11 the quartz issue. The industry has struggled with the
12 ongoing quartz compliance problem, which has been
13 exacerbated by MSHA's use of the lower standard when
14 quartz is present. Industry I don't feel -- does not
15 demonstrate the need to protect themselves from silicosis
16 and the silica hazard. For this reason with MSHA's
17 methodology of lowering standards by a silica
18 calculation of quartz across the total sampling.

19 I would make a recommendation that MSHA use
20 the recommended safe level of 5 percent across a 2
21 milligram per cubic meter as is the standard and use that
22 as a compliant basis to maintain the 5 percent across a
23 2 milligram, regardless of what the actual exposure is
24 during a shift. Currently many operations are
25 subjected to lower standards simply by doing a better

0060

1 job. If we lower our current standard by methods of
2 mining or other dust control means and the same amount
3 of quartz is present due to the geology, we're -- we're
4 actually punished by actually having to meet a lower
5 standard across the board. I don't think that is
6 conducive to -- to what we're trying to do. If 5
7 percent quartz is safe at 2 milligram level, that same
8 amount of quartz should be a safe limit across a 1
9 milligram standard -- sample. Simply set a standard
10 for the way you accept the quartz in the atmosphere.
11 Five percent quartz in 2 milligram should be acceptable
12 to -- to both industry and to MSHA.

13 The new proposed regulation asks for the new
14 category of ODO, other designated occupations, which
15 would be additional occupations as selected by the
16 district manager to be sampled. I'd like to say,
17 first, that MSHA says within this very proposal -- and
18 I quote -- "MSHA considered options that would sample
19 more miners more frequently but rejected these due to
20 estimated projected benefits." Now, I can't propose to
21 answer what MSHA looked at or how they came to those
22 conclusions, but it seems to me that by requiring a new
23 category, ODO, they have basically contradicted
24 themselves within the -- against that statement.

25 And yet the Agency seeks to grant the

0061

1 district manager the ability to further identify more
2 miners to be sampled in addition to the DO, the
3 designated occupation, for sampling. The current use
4 of the DA, the designated area samples, do basically
5 the same thing as the Secretary has requested here. And
6 that's a question I leave open to you. Under the
7 current DA system, at least in our operations, almost
8 every roof bolter in our mines is being sampled on a
9 regular bimonthly cycle, just the same as the other
10 MMUs. What would the difference be with an additional
11 ODO designation? I do not think it is necessary --
12 necessary nor do I believe it will result in any
13 increased measure of protection for the miners, since
14 the DO is already an occupation that's most exposed to
15 respirable dust, according to the current sampling that
16 is used.

17 The use of calculations extend the eight-hour
18 shift exposure across ten shifts is going to result in
19 numbers that are not relevant to the exposure of the
20 miner. And I'm no mathematician, but common sense
21 would tell me that. Should the Secretary want to set a
22 limit for exposure, it should be done as a unit of
23 measure across the whole shift. This is an attempt to
24 mathematically impose higher standards when shifts are
25 longer than eight hours. Should the Secretary feel

0062

1 that 1 milligram per cubic meter is a safe exposure
2 level, then that level should be safe at all times a
3 miner's exposed, whether they work eight-, ten-, or 12-
4 hour shifts.

5 I will be submitting written comments later
6 concerning the WPAE and WAE standards as proposed
7 within this regulation after getting some expert advice
8 on these two standards. I'm not currently prepared to
9 provide comments or address any issues concerning those
10 two items.

11 I would like to close with the comment on
12 proposed cost to the industry. I believe within the
13 proposal it identifies a 40 to 44 million dollar cost
14 to industry. I looked at simply my company, and if my
15 company were to have to purchase within the next 12
16 months sufficient continuous personal dust monitor
17 devices to cover our operations at an estimated \$12,000
18 per unit, that cost would be over \$600,000, not even
19 close to any additional personnel or other resources to
20 be expended to include maintenance on the machines and,
21 of course, the additional personnel that I think would
22 be required to meet these standards.

23 This has convinced me that MSHA has
24 significantly underestimated the true cost to the
25 industry with this proposal. My company is not a very

0063

1 large company, and the financial burden would be great
2 should this proposal pass. The impact on the small
3 mines that work in our areas would be devastating. The
4 struggles this industry has had since 2006, with the advent of
5 the Miner Act of '06, have been immense due to the ever
6 changing regulatory landscape. In the past five years,
7 the industry has little time to adjust, reset, and even
8 get our arms around the changes before another major
9 change is in the works.

10 Perhaps it's time for industry and regulation
11 to have a short pause to work on the status of the
12 programs that result in the past year's changes,
13 determine what is working, what is not working, and
14 even possibly create an atmosphere of cooperation from
15 the Agency and the industry as well, an atmosphere
16 which would truly further miner safety rather than
17 create a further adversarial relationship, which never
18 results in maximum benefits to any miner. Thank you.

19 DR. WAGNER: Thank you very much.

20 MR. BLANKENSHIP: You're welcome.

21 DR. WAGNER: I'll return to the panel. All
22 right, Mr. Ford. Move the mic closer.

23 EXAMINATION

24 BY MR. FORD:

25 Q. Yeah. Mr. Blankenship, you noted the

0064

1 increased cost that the proposed rule would cost your
2 particular coal corporation, Teco. My question is, if
3 the proposed rule went into effect, would you go ahead
4 and incur those costs and continue mining?

5 A. You ask a question that -- that looking at --
6 in the simple light of this one proposal, I would say
7 that, yes, we could continue in operation. However,
8 when you look at this proposal in light of everything
9 that has been incurred in the past five years, the
10 issues we have currently with meeting other
11 requirements of other agencies as well as your agency,
12 those taken into cumulative, I think they're going to
13 have a very negative impact on the industry as far as
14 survival.

15 Q. But just under a -- I guess it would be a
16 reasonable assumption, I guess, to assume that a
17 manufacturer wouldn't produce a product unless the
18 revenues exceeded the cost of producing that product.
19 So I guess you're saying at least for today, for your
20 comments today, that you would still be able to go
21 ahead and have revenues that would be greater than your
22 cost.

23 A. What I said, sir, was that given as a single
24 issue, a \$600,000 commitment would not bankrupt my
25 company. But what I did say was that \$600,000 taken in

0065

1 the cumulative with all the other regulatory changes
2 and the regulatory changes that we see on the future,
3 those will be -- significantly impact our ability to do
4 business. And again, remember, that we survive not
5 mainly in the met market, but we survive in the steam
6 market. And the ability of the consumer to pay the
7 prices I think will be -- when you look at the business
8 model, it's going to severely impact the nation as
9 well.

10 Q. So then you're talking about not only
11 existing MSHA regulations but perhaps looking across of
12 future MSHA regulations that possibly could come out
13 and then also other regulations outside -- federal
14 state and federal regulations outside MSHA; is that
15 correct?

16 A. That's correct.

17 Q. Okay. On that -- on that basis, can you then
18 in your written comments when you try and detail these
19 costs try to detail them in that light to say that
20 these are the particular regulations that we feel that
21 are existing that would impact our comp -- our company
22 and -- and try to associate the costs with those
23 particular regulations. And it would be even helpful
24 to say also if these future regulations that are on --
25 that are out there are in effect, this is how we think

0066

1 we will be impacted on a cost basis.

2 A. I can attempt to do that, yes, sir.

3 MR. FORD: Okay. Thank you.

4 MR. BLANKENSHIP: You're welcome.

5 MR. FORD: I have no further questions.

6 EXAMINATION

7 BY MR. NIEWIADOMSKI:

8 Q. Mr. Blankenship -- Mr. Blankenship, thank you
9 very much for -- for -- for your comments. I have a
10 few questions to ask you. And this has to do with I
11 think your position that you've expressed about
12 sampling the designated occupation versus sampling
13 indiv -- the individual miner. Do you feel that --
14 that the current system which has been in place and the
15 proposals that have continued since 1969 is to -- is to
16 measure the environment in which the designated, which
17 is a high risk occupation, and the intent of that is to
18 -- is to eliminate sampling everybody but sampling the
19 high risk and so that that high risk is in compliance,
20 there's reasonable confidence that people in the same
21 area are all being protected. Do you believe that -- I
22 mean, what's your -- what is your position? I know
23 you've indicated -- I think you're advocating personal
24 sampling instead of monitoring the work environment; is
25 that correct?

0067

1 A. That's true. I think that if you truly
2 want to know what a miner's exposed to, you should
3 sample the miner.

4 Q. Now, let me ask this. Does that also mean
5 that you would advocate it if you want to know what
6 individual miners are being exposed to, that each and
7 every miner on that section be monitored?

8 A. Not necessarily, no, sir.

9 Q. Well -- well, then -- then how would you ensure
10 that everybody is being protected?

11 A. You also have within the current regulatory
12 scheme designated area sampler where you do it at
13 designated areas. And I see no reason why you couldn't
14 use a DA sampling to meet the very question that you
15 ask.

16 Q. Okay. You've also indicated that -- that the
17 Agency has failed to recognize for compliance purposes
18 the use of personal protection, correct?

19 A. Yes, sir, for compliance purposes.

20 Q. For compliance purposes. But you're also
21 aware that in order for -- the Agency's not opposed to
22 the use of respirators. Okay?

23 A. And -- and neither is industry, sir. I mean,
24 we use it every day.

25 Q. While we are not opposed to their use, we're

0068

1 opposed to their use for compliance purposes because
2 we're enforcing an environmental standard, not a
3 personal exposure standard. You are aware that that's
4 what we have been enforcing is an environmental
5 standard.

6 A. I think that's what my comments agree. I
7 said you were sampling as an environmental standard,
8 yes, sir.

9 Q. All right, sir. Now, you've indicated that
10 we should recognize the use of -- of personal
11 protection. You also recognize that in order to gain
12 the benefits of -- of a respirator, they have to be
13 properly used. People have to be clean shaven, because
14 -- because with any face like yourself, you can get
15 zero protection. Are you aware of that?

16 A. Yes, sir, I am. And I can assure you that
17 during my time on my rescue teams, I remain clean
18 shaven. I -- I only wear the beard to impress my
19 grandchildren.

20 DR. WAGNER: That is an impressive beard.

21 Q. The other comment you made about the
22 reliability or the accuracy of single shift sampling,
23 the proposed regulation recommends that we take action,
24 enforcement action, whenever you exceed a single sample
25 value that is the accepted value we've defined. Now,

0069

1 using a PDM, the intent of the PDM is to allow you to
2 take appropriate action during the shift to prevent
3 such an overexpose -- overexposure to occur. That's the
4 intent of the PDM is to -- is to ensure that no one is
5 overexposed at the end of the shift if properly used,
6 because it provides data in real time. So you have
7 ample opportunity to take appropriate action and
8 prevent people, miners from being overexposed. So the
9 question, the concern about citing a single sample
10 really goes away because we shouldn't have any -- we
11 should not have any overexposures on any single shifts.
12 Do you agree with that part or what's your position on
13 that?

14 A. I can't speak to that because I personally
15 have not used the CPDM at any of our operations. I
16 have spoken with many people and I understand there are
17 some problems with them. The point that I wanted to
18 make is during the mining cycle, especially mines in
19 the lower seams that we mine, we encounter certain
20 geological phenomenons a lot of times that we are
21 generating a great amount of rock material simply due
22 to intrusions of the roof. And those -- those occur
23 fairly regularly. That accounts for some of those
24 changes.

25 Now, regardless of the type of equipment that

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1 I use to monitor, I can't change that. And should I
2 have a CPDM on and I encounter a -- a geologic
3 formation that I have to cut with the continuous miner,
4 I have to go through that to advance the miner. And
5 that's going to generate at least a short-term increase
6 in particulate, not necessarily coal, but particulate
7 in the air. And that was what I was trying to address
8 with that.

9 Q. Well, do you have any -- what you're saying
10 is that you're going to get excursions during a shift.
11 Okay. You're basically saying you're going to get
12 levels above the standard during the shift.

13 A. That is possible.

14 Q. Are there -- do you have any recommendations
15 of what the Agency -- what kind of excursions we should
16 permit on individual shifts, how high should it go?

17 A. Well, I think my point that I try to make
18 here is that when you know that you have these things
19 which are possible to occur, we should do as many other
20 industries do. We provide personal protection
21 equipment for our people, and that will protect them
22 from the exposure and make sure that the environment
23 that they're actually breathing is protected. And
24 that's perfectly capable of being done I feel by a PPE,
25 as other industries currently do. I think the general

0071

1 industry standard for OSHA actually permits the use of
2 both PPE for particulate and for noise exposure to be
3 in compliance.

4 Q. I have one final question, and that concerns
5 the issue on quartz that you brought up. Are you
6 suggesting that -- that the Agency entertain a separate
7 standard for quartz and enforce that?

8 A. Well, actually I think that MSHA currently
9 has a standard for quartz, which is 5 percent of a 2
10 milligram respirable dust sample, correct? My point
11 that I make is that the density of the quartz is about
12 twice what -- or more what the coal particles are. So
13 if we take 5 percent quartz that caused a 2 milligram
14 respirable dust sample, let's -- let's just for the
15 sake of a hypothetical say that that one particulate of
16 silica is 5 percent of that 2 milligram sample, if we
17 maintain that single particulate of silica across a 1
18 milligram standard, Mr. Thaxton can give you off the
19 top of his head what the percentage that we are going
20 to be allowed to have or what our standard is going to
21 be set at, correct?

22 Q. Well -- well, let me just clarify. The
23 standard is 100 micrograms. Okay? I mean, it's a
24 gravimetric standard. That's what we enforce.

25 A. Yes.

1 Q. So much dust, you know, that's over an eight-
2 hour shift. We certainly -- if -- if you read the
3 rule, we -- we are responsive to what the concerns that
4 have been raised about the reducing standards. And the
5 proposal and the way it's written right now requires us
6 to use the standard only when you exceed a hundred
7 micrograms. So we're using that as the limit. And only
8 then do we take into account the percentage that is --
9 that will cause you to be -- if it's above a hundred
10 micrograms, that's when we use it. But factored in is
11 your baseline that we are enforcing right now and will
12 reduce standards only when you exceed over a hundred
13 micrograms.

14 MR. NIEWIADOMSKI: Okay. Well, I have no
15 further comments. Thank you.

16 EXAMINATION

17 BY MR. THAXTON:

18 Q. I have just a couple of questions for you.
19 And one, Mr. Niewiadomski started on quartz here and
20 left off it with it. I'll start with it first. As he
21 said, our proposed rule actually sets a limit of 100
22 micrograms at the level that we start making reduced
23 standards, the fact that currently we do it at any
24 level. However, the current rule actually still
25 maintains the 100 micrograms even, on a reduced

0073

1 standard. It assumes that you're going to have up to
2 100 micrograms of quartz present. So your 5 percent of
3 the 2 milligrams is 100 micrograms. So essentially I
4 just want to make sure we're talking the same thing.
5 You are proposing and suggesting that the Agency use
6 the 100 micrograms as under the proposed rule, that we
7 continue that 100 microgram level, but you would see it
8 being applied even with a reduced standard going to 1
9 milligram.

10 A. That's my fear. I think I understand what
11 you're asking me.

12 Q. Okay. You don't want us to reduce the silica
13 any further. You're saying use the hundred micrograms
14 that we have now, even if we reduce the standard to 1
15 milligram?

16 A. Yes.

17 Q. Under the proposal?

18 A. As I understand your question, yes, sir.

19 Q. Okay. The second thing, you had indicated
20 you didn't quite understand the ODOs asking for the --
21 being allowed the additional occupations to be sampled
22 versus what we do with DAs now. If you read the
23 proposal, you will see that essentially DAs on the
24 section do go away and they're replaced with ODOs. That
25 is a change in designation because designated areas

0074

1 were originally written for outby areas. We're
2 clearing that up and trying to make clean back to the
3 way it was originally.

4 The ODOs in itself are not just DAs. They go
5 a little further. It is for identifying those
6 locations that the Agency feels are potentially exposed
7 to greater concentrations due to the type of mining
8 that's going to be conducted. And -- but it is based
9 on the evidence of the type of mining and sampling that
10 would be collected. The overall aspect of adding these
11 additional occupations to be sampled compared to the
12 statement that you read, that is in -- that is in
13 contrast to sampling everybody on a section. So we did
14 decide that we would not sample everyone on the
15 section. We alternatively went to maintaining DOs --
16 the DOs and then selecting some ODOs.

17 A. I actually did understand that. What I did
18 not read in the proposal was the limit on the number of
19 occupations that the district manager had the liberty
20 to identify.

21 Q. The way the proposal is written, he can
22 designate everybody on a section, if that comes to
23 that.

24 A. That's the way I read the proposal.

25 Q. But the likelihood of that happening is very

0075

1 slim. The majority of them you'll notice the proposal
2 actually spells out specific ODOs. Those are the ones
3 that would be established automatically. Others would
4 be based upon sampling results that indicate people are
5 potentially overexposed. So there would only be
6 additional occupations selected if there was a need for
7 that.

8 A. But you are agreeing in my assessment that
9 there is no limit on the number of occupations that the
10 district manager can impose.

11 Q. That's correct.

12 EXAMINATION

13 BY DR. WAGNER:

14 Q. Mr. Blankenship, I just have a few to wrap up
15 as well. From your discussion I understand that you
16 have heard or have criticisms of the hot spot studies.
17 I just wonder if you had any concerns or criticism of
18 any of the other studies that were cited by NIOSH cited
19 in the -- in the Federal Register. I think there were
20 probably another 25, 27 studies that were cited in the
21 Federal Register notice that were not hot spot studies.

22 A. I have looked at several of the studies in
23 the past. And I'm not an epidemiologist nor am I a
24 medical doctor. But what I don't understand, even in
25 your presentation this morning, Doctor, was that you

0076

1 reference several respiratory diseases such as
2 emphysema, bronchitis, and others. Those diseases, as
3 my limited knowledge is, that they can be brought about
4 by other environmental situations such as exposure and
5 the like to mold, mildews, allergic reactions to
6 chemicals, volatile organic compounds. And, of course,
7 we've all talked about smoking and our past histories,
8 as in my past history. I've been involved with several
9 other industries other than coal mining, and all of
10 those can have an impact.

11 My point that I would make is that the
12 questions concerning the reasoning or the actual
13 causation behind the pulmonary disease, we need to look
14 at the global exposures and make a determination based
15 upon that. There may be a correlation between -- I
16 mean, some of those studies say marijuana smoking is 20
17 times harder on your lungs than -- than cigarette
18 smoking. So maybe there's a -- there's a relationship
19 between marijuana smoking and -- and coal or perhaps
20 cigarette smoking and coal that would make the
21 prevalence of black lung even more a possibility for --
22 for miners. That could lead to significant information
23 for us within the industry as you as a regulatory
24 committee encourage better habits to -- to prevent the
25 occurrence of black lung.

1 All of the studies that I've looked at, I see
2 no mention where those questions are asked of the
3 respondents as to what those other environmental
4 causative things were. And maybe in my ignorance I'm
5 not able to discern that from the studies. But I -- I
6 -- I think that's one of the reasons we would like to
7 take a look at some of the internals on this hot spot
8 study.

9 Q. There are any number of studies looking at
10 the issue of chronic bronchitis and emphysema in miners
11 that do go through a range of other occupations as well
12 as the other exposures, personal exposures, that are
13 discussed in some detail in both the NIOSH document and
14 subsequently. So I encourage you to take a look at
15 that, and if you continue to have concerns or questions,
16 please include it in your written comment.

17 A. And could I ask, Doctor, that in -- in the
18 future in the X-ray program, perhaps we could start
19 asking those questions of -- of people that come in and
20 consider those parameters when we're looking at future
21 studies.

22 Q. Thank you for that recommendation. Moving to
23 something else you mentioned, the dynamic nature of
24 coal mining, which I think we all agree, one issue that
25 the proposed rule addresses differently than the

0078

1 current practice is doing measurements during a normal
2 production shift. Do you have thoughts about what the
3 -- an appropriate definition of a normal production
4 shift would be for compliance with the coal mine dust
5 standard?

6 A. Well, I worked for many years with the 60
7 percent standard.

8 COURT REPORTER: With what standard? I'm
9 sorry.

10 MR. BLANKENSHIP: Pardon?

11 COURT REPORTER: I couldn't hear you. You
12 worked with -- for many years with what standard?

13 A. Oh, we -- we worked many years with the 60
14 percent standard that we currently operate in. And we
15 have to meet 60 percent production to count as a viable
16 shift. Given the circumstances that we mine in, you
17 know, we can vary greatly from day to day and week to
18 week. I would rather just look and then maybe you tell
19 us a sampling date, and we sample within that -- that
20 week or -- or whatever. The -- the going back and
21 calculating the -- these standard operating times, I --
22 we're not as an industry what people have -- have put
23 us out to be. We're just as concerned with our
24 people's health and safety as -- as you are.

25 And it's been my experience that -- that we

0079

1 don't cheat. So if -- if I go in with the intentions
2 this morning to run a dust sampling and I run 50
3 percent of the tons that I ran over the past 30 days,
4 that's not an intentional cheat. That's going to be
5 due to conditions, equipment breakdown, or something
6 that's beyond my control, because my intent and my
7 company's intent or the owner's intent are when we go
8 in in the morning to work, we're there to give a
9 hundred percent effort and produce the most we can
10 produce for that day. We're not there to short-circuit
11 or shortcut in any way, whether it be for a dust sample
12 or anything, the safety of the miners. And we all have
13 to have standard to work by. I -- I understand that.
14 And I don't see the need to -- to go from a 60 percent
15 to an 80 percent, because our production will fluctuate
16 more than 20 percent across a week.

17 Q. So let me just ask. What would happen to
18 your profitability if you were limited to 60 percent of
19 your average production day after day after day?

20 A. What I'm saying is that 60 percent of any
21 given day may be our average.

22 Q. And that's actually -- let me just -- average
23 would be average. Half the time you'd be above it.
24 Half the time you'd be below it. So it's a hundred
25 percent of average is average.

0080

1 A. But you're setting the floor rather than a
2 ceiling. And when we send a sample in, we know that
3 the floor to be a valid sample is 60 percent. If you
4 go back and look across your samples, I'm sure that
5 you're going to see that the majority of the samples
6 that you receive are not on 60 percent production.
7 They're going to be well above 60 percent, is the point
8 that I make.

9 Q. Well, would you be surprised to find out that
10 more samples are below average than are above average
11 production?

12 A. I can only speak to my company, and I don't
13 think you'll find that with my company, no.

14 Q. Okay. No, that's certainly fair enough. The
15 -- just make sure that I'm clear. You spoke to both
16 the importance of individual sampling to know what an
17 individual miner was exposed to as well as the
18 environment standpoint to be consistent with the Mine
19 Act and that you spoke to being able to do both?

20 A. I think you have a current mechanism to do
21 that.

22 Q. Okay.

23 A. My point is the DO, rather than require the
24 DO sample to stay at the miner wherever MSHA has
25 designated as the occupation, that if you want to do

0081

1 that, you sample that as currently under your system a
2 DA. And then if you have a miner that has that
3 occupation, then leave that sample with him and do the
4 DA at that occupation. Then we'll know what the
5 exposure to the individual is as well as designated
6 area sampler for that -- that occupation.

7 Q. Just so that -- I mean, I -- you said that
8 you -- for some CPDMs for your company, you indicated
9 that if -- if you have to spend \$600,000 at a \$12,000
10 per unit price, the numbers would be 50 units you'd be
11 buying for your companies. Could you share with us the
12 number -- your number of mining units and the number of
13 miners that you have working that you need those 50
14 units for.

15 A. I currently have about 1200 active miners.

16 Q. Uh-huh.

17 A. We have five facilities. We have 12 surface
18 mines and three large underground mines with as many as
19 four sections in each -- each mine.

20 Q. Thank you. Yeah, it would be helpful when
21 you do put together your written comment for you to
22 sort of run through the numbers of units that you would
23 expect to be using.

24 A. Yes, sir. That's my intent.

25 Q. I would be grateful. You spoke about the

0082

1 calculations depending upon shift length and suggested
2 that a single standard be assessed that would be
3 enforced no matter what the length of the shift, right?

4 A. That's correct.

5 Q. So if -- and right now the standard is set
6 based on an eight-hour shift assumption with the
7 epidemiology that was available in the 19 -- in the
8 1960s. You said some shifts may be up to 16 hours. So
9 would you -- the current standard is 2 milligrams per
10 cubic meter intended to protect somebody who's working
11 eight hours five days a week. If we wanted to protect,
12 not changing anything, say a miner but instead protect
13 everyone as if they were working 16-hour shifts, are
14 you suggesting going to a 1 milligram standard and if
15 it's an eight-hour shift, six-hour shift, 12-hour
16 shift, 14-hour shift, or 16-hour shift just enforce
17 that 1 milligram standard through the entire 24-hour
18 cycle.

19 A. Well, first let me correct your statement. I
20 made no mention of 16-hour shifts.

21 Q. Okay. Then I did mishear.

22 A. And -- and -- and my intent was not to assert
23 that I believe in a 1 milligram standard. What I meant
24 was whatever the standard, you set the standard, and it
25 should remain that standard for whatever time that you

0083

1 work underground. If you have an environmental
2 standard which sets a 1 milligram respirable dust in
3 any cubic meter of air that you're breathing, as long
4 as we maintain, that should be a safe level for
5 whatever hours we work. That was the point I was
6 trying to make.

7 Q. Okay. Then that actually is clarified. So
8 if -- if a miner currently working a 12-hour shift --
9 are there any miners working 12-hours shift in your
10 company?

11 A. Not my miners, no.

12 Q. Okay. What -- what's the normal shift?

13 A. I have some in the preparation plant which do
14 work 12 hours.

15 Q. Okay. All right. And nobody ever works
16 doubles in your company?

17 A. I'm sure they do.

18 Q. Okay. Okay. But your suggestion is focus on
19 whatever potential shift length there is and protect
20 miners through the course of that rather than engage in
21 calculations based upon shift length.

22 A. That is my comment, yes.

23 DR. WAGNER: Okay. All right. Again, I want
24 to thank. I think you provided very valuable
25 information. I have others who want to jump in here

0084

1 before we're done.

2 EXAMINATION

3 BY MR. NIEWIADOMSKI:

4 Q. I'd like to clarify something, a conversation
5 we had and Mr. Thaxton about the quartz. Okay? And
6 when you mention about, for example, at 1 milligram, as
7 he indicated that the limit has been a hundred
8 micrograms since 1970, okay, a hundred micrograms per
9 cubic meter. Although we never enforced it directly,
10 by reducing the standard, the intent was is if quartz
11 levels stayed the same, that's how we're going to -- we
12 would control the hundred micrograms by reducing the
13 standard. Okay? That was -- that's been the intent.
14 So if 1 milligram -- what -- what I said was in the
15 proposal is that before we would consider reducing that
16 standard below 1 -- and let's assume they're at 1
17 milligram, which is -- that's the proposed limit, you
18 would have to first exceed a hundred micrograms per
19 cubic meter, which is -- you know, the Act requires us
20 to take action to reduce the standard whenever you
21 exceed a hundred micrograms. And that's based on 5
22 percent on a 2 standard. Okay?

23 A. Correct.

24 Q. That's the limit, a hundred micrograms.

25 A. Correct.

0085

1 Q. When you have more than 5 percent, you're
2 exceeding a hundred micrograms, you need to lower it so
3 that you don't exceed. That's the way you control. We
4 would continue to do that. However, as he indicated,
5 that the test would be, you have to exceed a hundred
6 micrograms. All right? Just what you were talking
7 about. And then we would apply that percentage,
8 whatever that percentage would be, to apply to that 1
9 milligram standard. So we would not reduce it if --
10 the 1 milligram until it exceeds one -- a standard of a
11 hundred micrograms per cubic meter. The other question
12 that I have I wanted to ask you is this. I know you
13 just mentioned you had 12 surface mines or something
14 like that?

15 A. Yes.

16 Q. In your comments, you -- you mention nothing
17 about the -- the changes that are being proposed for
18 surface -- for surface coal mine. Are you aware of the
19 changes?

20 A. Yes, I am.

21 Q. What -- I know you have to -- do you have any
22 comments on the -- on what is being proposed, whether
23 you like it or don't like it?

24 A. I will address those in my written comments.

25 MR. NIEWIADOMSKI: You will. Thank you. I

0086

1 have no further questions.

2 EXAMINATION

3 BY MR. ROMANACH:

4 Q. Yes, sir. Mr. Blankenship, I just have a
5 couple of questions. Do you have any -- besides the
6 cost, any -- any comments as to the use of the CPDM for
7 sampling purposes?

8 A. I can't comment on the CPDM as a sampling unit
9 because I haven't used it. I am aware the Coal
10 Association is -- is looking at some of the issues and
11 problems, and I would hope to be able to have access to
12 those comments and perhaps place those in my written
13 comments.

14 DR. WAGNER: Does anyone have any further
15 questions? Just one on the quartz issue. You had in
16 your -- the course of your comments referred to the
17 current silica standard as being a safe limit. And
18 it's certainly MSHA's intent to have a safe limit.
19 That's our mandate. I want to make sure that you and
20 everybody else in the room know that in our regulatory
21 agenda that we've published, there is a look at silica
22 and the possibility of putting out a new silica
23 standard. And so I'm sure we'll be inviting comments
24 on that as well. But the -- from the 1970s on, the
25 current silica limit has been recognized as not being

0087

1 fully protective of miners and others. And that's one
2 of the things that we will be addressing in the future.

3 MR. BLANKENSHIP: That goes to my comments
4 about future regulations having an impact also, so...

5 DR. WAGNER: Absolutely. So again, I want to
6 thank you for being here, for the comments that you've
7 shared and questions that you've answered, and I'll
8 look forward to the information that you'll provide in
9 your written comments. Thank you very much.

10 MR. BLANKENSHIP: Thank you, panel, for the
11 opportunity.

12 DR. WAGNER: I'm going to once more ask
13 whether Mr. Norman Stump has arrived and once more ask
14 whether there's anyone else in the room now who on the
15 basis of sitting here this morning --

16 MS. DAVIDSON: Thank you.

17 DR. WAGNER: -- would like to make some
18 comments.

19 MS. DAVIDSON: Doctor, my name is Denise, D-
20 e-n-i-s-e, Davidson, D-a-v-i-d-s-o-n. I am generally
21 considered a defense attorney. I have represented coal
22 companies and other companies for about -- since 1984
23 in both the State Workers' Comp and the Federal Black
24 Lung Act. And I actually came today just to be an
25 observer, but after Mr. Addington, I felt compelled to

0088

1 at least make some comments.

2 I know that your proposed standards are
3 relying upon MSHA or NIOSH's study in 1995. That's 16
4 years ago. As far as we know, there are no current
5 studies. I would reiterate what Mr. Blankenship has
6 indicated. The industry is just as concerned about the
7 increase in the progressive massive fibrosis cases as
8 you are or the claimants are. It is an extremely
9 expensive cost for the companies. We really don't have
10 answer as to why in the last four years we're seeing an
11 increase in the progressive massive fibrosis cases.

12 But in the 27 years that I have represented
13 companies and practiced under the Federal Black Lung
14 Act, you haven't seen an increase since 1995. You
15 haven't seen an increase since 2000. You have seen an
16 increase in the last three to four years of progressive
17 massive fibrosis. Now, we can all speculate as to why
18 we've seen an increase. But I submit to you that the
19 studies that NIOSH has relied upon does not have that
20 answer. We would like to have that answer. You know,
21 it is a medical question.

22 I -- I happen to have represented a company
23 that had twin brothers that entered the mine the exact
24 same day, same mine, worked on the section side by
25 side, and at the end of 32 years at the face, one

0089

1 developed simple coal workers' pneumoconiosis. The
2 other did not. I -- what's the susceptibility of one
3 miner as opposed to another? I don't have that answer,
4 and I submit to you that you don't either and that the
5 NIOSH study hasn't provided you with that answer.

6 They -- studies that the NIOSH -- that you
7 talked about, the 20 some studies, they come from
8 Britain. They come from other countries with totally
9 different types of mine -- or coal dust that the
10 exposures are. You know, why don't we have a study in
11 the United States that's been done within the last ten
12 years? We have the resources, but we don't. We don't
13 have that study. We want that study. The industry
14 wants that study.

15 You know, I can give you examples of prior to
16 President Clinton on his last day of going out of
17 office in 2001 changing the amendment to the Federal
18 Black Lung Act. You had a 3 percent approval rating
19 with passage of that Act alone. That increased to 10
20 to 12 percent. You know, is it a political disease? I
21 don't know. But sitting here today, I do have to
22 concede this. I have to concede that we are seeing
23 more progressive massive fibrosis and complicated
24 pneumoconiosis cases, and -- but that has been in the
25 least three to four years.

0090

1 And yes, some are younger. Yes, some are
2 older. Some -- you know, I've probably had four cases
3 at this point in the last 27 years that have gone to
4 lung transplant, three of which have been in the last
5 three years, you know, at a cost of over \$3 million in
6 just the medical without the increase in the benefits.
7 You know, this is a concern for the industry. But I
8 don't know that you're answering that concern by what
9 you've proposed here. You know, I think that, you
10 know, if MSHA and NIOSH actually want to -- to find out
11 what's going on, we would have a study done in the
12 United States coal mines, you know, over the last five-
13 year period. We don't have that.

14 You know, I've had Part 90 miners. I
15 recently last year had a miner who elected Part 90 four
16 years ago. He continued to work for our company. He
17 was removed. There were -- there were no
18 repercussions. He was able to continue to work the
19 number of hours that he wanted to work. He continued
20 to work overtime. You know, he was 60 -- or 58 years
21 old. The reason he continued to work is because he
22 wanted to make the money financially. You know, he
23 felt like he had his financial house in order. Also
24 maybe because of the State Workers' Comp statute of
25 limitation, he decided an arbitrary day, and he quit.

0091

1 We at that time conceded both in his State Workers'
2 Comp case and his federal black lung case, you know.

3 To make the industry out to want to subject
4 their men to unsafe standards is just not fair, nor is
5 it a reality. You know, if you don't believe that they
6 care about their men, you have to know that the cost
7 alone is a tremendous burden. But I submit to you they
8 care about their men, because while the companies may
9 sit somewhere else, the supervisors and the management
10 sit in the same hometown as we do. You know, I'm from
11 Hazard. I was born and raised in coal country. You
12 know, I'm not anti coal miner. We obviously want to
13 provide a safe environment.

14 But again, I would just ask you to -- to look
15 at, you know, why is it we're seeing an increase in the
16 last three to four years. That '95 study is not going
17 to give you the answer. Those '95 recommendations are
18 not going to give you the answer. You know, I am -- 27
19 years up until three to four years ago, I may have seen
20 four complicated pneumoconiosis cases. In the last
21 three or four years I have seen 20. You know, why?
22 You know, we don't know. But I think it is a medical
23 decision.

24 And I think that, you know, both the
25 industry, NIOSH and MSHA should take a step back and

0092

1 say, okay, why are we relying upon the '95
2 recommendation. Why are we trying to, you know, 16
3 years later put in action what was recommended, you
4 know, based on a '95 study. Why -- why don't you step
5 back and conduct a study over the next four or five
6 years, you know. Again, it's just pure speculation.
7 You know, it may be that they're working longer number
8 of hours. Maybe it's because we're having to get into
9 the rock, the silica. I mean, again that's speculation
10 by doctors, because the doctors don't have the studies
11 that they can rely upon and pinpoint and say, this is
12 why we're seeing an increase.

13 You know, we are seeing an increase in simple
14 coal workers' pneumoconiosis federal black lung awards.
15 But I submit to you it's not because you're seeing a
16 greater number of simple coal workers' pneumoconiosis
17 cases. I think it is a political issue. I mean, when
18 you have miners who live in Eastern Kentucky who will
19 drive to Chicago to undergo an exam, their U.S.
20 Department of Labor exam, the doctor that they've
21 chosen, when they will drive eight and ten miles -- ten
22 hours each way to go -- undergo an exam, you know, I
23 just think you need to look behind your studies, you
24 know.

25 I don't know why more miners do not

0093

1 participate in the NIOSH opportunity. I know that my
2 employers most certainly do not discourage it. My
3 employers do not discourage Part 90. And, you know,
4 there are repercussions in which there are employers
5 who do. You know, this is not the day and the era
6 where you see small coal companies. If you look at
7 your coal companies now, these are large companies who
8 have the ability and who put in place good safety
9 training. But, you know, I think that at this point
10 your proposed regulations, you know, they may or they
11 may not reach the ultimate goal. But if you have been
12 this long in trying to set new standards, I think you
13 would want to get them right.

14 And to enact, you know, a proposal that was
15 drafted 16 years ago based on old data would not --
16 would not be right, would not get you where you want to
17 be. And so those would be my comments. I mean, I can
18 -- I can compile many cases on the opposite side that
19 Mr. Addington compile in his favor. You know, we've
20 practice against each other I guess for the last six
21 years. But I've been doing it for 27 years. You know,
22 I'm also fortunate enough to be on the Mine Safety
23 Review Commission in Kentucky, you know, for a -- for a
24 six- or seven-year period.

25 You know, I assure you that safety is -- is

0094

1 the industry's personal goal. It's not -- it's not the
2 production at all cost. It is safety. We -- most
3 certainly we want to produce. We want to be players.
4 But, you know, you're looking at, okay, what is the
5 normal workday. Eight hours. You're going to have
6 fewer miners who are going to work overtime, so you're
7 going to have an increased demand for miners. Where
8 are the miners, you know.

9 When I graduated from high school, you know,
10 a lot of people went into the mines, you know. I have
11 three children now in college, and they never
12 considered going into the mines straight out of high
13 school. You know, where are you going to get your
14 miners? There -- there are going to be huge costs. And
15 I just think that you just have to look behind the
16 numbers that you have and just say, is this really
17 going to be what we want. And what you want is a safe
18 environment for your workers. We want to stop
19 progressive massive fibrosis.

20 You know, my experience has been with surface
21 mining, the only time I see progressive massive
22 fibrosis cases is with a drill operator. You know,
23 I'll tell you that. I think those studies, if you look
24 behind the awards, if you look at their work history,
25 it would tell you that. You obviously see more

0095

1 progressive massive fibrosis cases in continuous miner
2 operators. And you see they are in shuttle cars or any
3 of the other jobs. But why? Is it because they're
4 drilling into rock, the quartz, the silica? At this
5 point it's -- it's speculation. And I guess, Dr.
6 Wagner, you're in a better position than any of us to
7 determine the medical aspect of it.

8 But, you know, I'm fortunate enough to meet
9 with attorneys from 12 to 15 states a year in August.
10 And we're all seeing an increase in progressive massive
11 fibrosis, not just the "hot spots." Again, so those
12 are just some of my comments again. You know, I didn't
13 bring anything today with the proposed rules. I wasn't
14 prepared to make any comments, nor was it my intent to
15 make any comments. But I did feel compelled to tell
16 you, you know, what my experience has been.

17 DR. WAGNER: I appreciate that. Thank you.
18 I'm going to turn to the panel, please.

19 EXAMINATION

20 BY MR. FORD:

21 Q. Ms. Davidson, you mentioned that, you know,
22 this rule or it has been mentioned today that this rule
23 would incur a considerable amount of costs for
24 operators. But in -- in your statements about how much
25 companies you say in your limited experience in cases

0096

1 you've dealt with have spent for black lung expenses,
2 medical expenses and so forth. Wouldn't it be -- it
3 would be reasonable, I guess, to say that some of those
4 costs should be -- could be offset by this savings that
5 those companies would normally incur for paying out
6 medical costs?

7 A. Well, let me say in 27 years I have literally
8 defended thousands of cases. And, you know, like in
9 Kentucky, for instance, we have what was called a
10 Retraining Incentive Benefits Act that we've -- that
11 was implemented in the early '90s where a miner could
12 actually get benefits and work at the same time, with
13 the thought being that if they wanted to be retrained
14 in some other area, they could draw benefits while they
15 were still working. And, you know, again it might have
16 been the lay of the land, but the truth of the matter
17 is it became the new boat or the new truck act.

18 They -- they did not use the benefits to be
19 retrained. They used the benefits because they could
20 get them and work at the same time. They settled their
21 cases and they bought new trucks and new boats. You
22 know, they weren't interested in being retrained. They
23 didn't use it for that. With simple coal workers'
24 pneumoconiosis -- and again, Dr. Wagner I'm certain is
25 in a better position to give comments regarding medical

0097

1 treatment -- but the general thought is there is no
2 medical treatment that is necessary to treat simple
3 coal workers' knew pneumoconiosis.

4 And in my experience with the thousands of
5 miners who have had or been determined judicially by
6 the administrative law judge to have simple
7 pneumoconiosis, they've been asymptomatic. Now, what
8 are we seeing now? We're seeing miners that were
9 awarded in 1987 who are now in 2010 or 2011 going into
10 the hospital with severe respiratory problems, and they
11 haven't been exposed to coal dust in 20 some years.
12 But they've continued to smoke or they gained weight or
13 some other causes for their disease. And we're having
14 to fight those claims.

15 But generally speaking, from a medical standpoint
16 and the expense of a medical treatment, unless a miner
17 has progressive massive fibrosis, we don't incur a lot
18 of expenses to treat the actual disease itself. Now,
19 when you get into progressive massive fibrosis, sure,
20 they can be astronomical: a lung transplant, \$3
21 million, you know, \$4 million. I've had three of those
22 I think in the last three years. And, you know, that's
23 besides the disability benefits that they receive. You
24 know, that doesn't include what we're paying out, you
25 know, for them.

0098

1 And I guess you're all aware of the Health
2 Care Act and the provision that was passed in the
3 Health Care Act regarding federal black lung. You
4 know, now there's automatic entitlement for widows. So,
5 you know, we're -- we're going to see a huge increase
6 that coal companies have to -- to endure.

7 Q. Right. You know, I just -- I mention the
8 medical benefits for a company that has to deal with
9 the black lung, but I think I -- and I know there's
10 much more than that. I'm also talking about the -- the
11 legal expense that the company puts out. As Dr. Wagner
12 showed in the beginning, we -- we have pretty good data
13 on looking at the picture as a whole, you know, \$44
14 billion in medical expenses. It's -- it's not so easy
15 to get data for specific companies that -- that would
16 volunteer this type data. So to the extent that -- I
17 guess I'm not asking a question. I'm just making a
18 comment.

19 A. Okay.

20 Q. If it's possible that you could give us some
21 written comments on your experiences with cases that
22 you've had in -- in the actual medical and even legal
23 expenses that the companies have to pay. And you don't
24 have to name the companies.

25 A. Sure.

0099

1 Q. You can just say Company A, Company B.

2 A. Sure.

3 Q. That would be very helpful to see, you know,
4 the -- the actual micropicture what a company -- the
5 expenses that they have to go through in just fighting
6 black lung. And I'm not -- I just said medical and
7 legal now, but also any other ones that I'm -- I'm
8 forgetting that you might be aware of.

9 A. Certainly. I think if you would look at the
10 medical, just -- just so I hope you'll try and break it
11 down -- when an individual is awarded federal black
12 lung benefits, then that is an administrative decision
13 to basically pay the medical. And I submit to you that
14 they pay literally everything that is submitted. Now,
15 on the State Workers' Comp side, because the miners are
16 actually -- because, you know, it's -- it's from a
17 medical standpoint in a federal claim. Once the guy's
18 been awarded medical benefits, he gets his medical, and
19 it comes in. And you really have no right to contest
20 it on whether or not it's causally related to his coal
21 workers' pneumoconiosis. In your state claims you do.

22 And if you look at the true cost of what the
23 medical costs are in a State claim, you know, it's --
24 it's not a fraction of what Dr. Wagner has put up. And
25 we have no way to dispute or no way to defend the

0100

1 medical that's being paid under Federal Black Lung Act
2 claims they have submitted. I mean, I could probably
3 answer my mail today and it -- open my mail -- and I'm
4 a solo practitioner, so I only represent a few
5 companies. But I could probably have three medical
6 bills that we have to get tests where an individual
7 goes in, for instance, and he's going to have a bypass,
8 a triple bypass, but because he has breathing problems,
9 those get submitted and paid or get submitted to be
10 paid under Workers' Comp.

11 Now, we have an obligation in Kentucky to
12 either pay them. We deny and contest it or pay it
13 within a 30-day period. And in order to deny it, we
14 have to get a medical review that says it's not
15 causally related. So a lot of those bills are getting
16 paid as a practical matter because they don't want to
17 pay a lawyer a hundred dollars an hour to contest the
18 medical. They don't want to pay a doctor when you're
19 seeing medical bills at 300 or 400 dollars.

20 So a lot of the medical bills that you -- you
21 have put up, you know, if there was a mechanism that
22 they -- that companies could accurately contest those
23 in a economically and judicial manner in federal black
24 lung cases, those numbers would be a lot lower and --
25 but I will address, you know, in written comments for

0101

1 you how much it costs to defend the cases, you know,
2 from a legal standpoint.

3 MR. FORD: Yeah Thank you very much. As you
4 can see, you're actually much more knowledgeable than I
5 am in knowing the particulars of this matter. And I
6 look forward to your comments about individual
7 companies, the expenses they incur in what we're
8 talking about. Thank you.

9 EXAMINATION

10 BY MS. OLINGER:

11 Q. You mention seeing some progressive CWP in
12 drill operators at surface miners.

13 A. Well, I guess probably the more accurate
14 statement I should say is over the 27 years, if I would
15 get into a case of a miner who was primarily a drill
16 operator, that would cause me more concern until I --
17 until the medical evidence has developed. I can't say
18 that we're seeing -- in our State Workers' Comp right
19 now, you can no longer receive retraining instead of
20 benefits and work at the same time. And Kentucky
21 Workers' Comp, I -- it's not nonexistent, but it's --
22 it's very close to nonexistent to see occupational coal
23 workers' pneumoconiosis right now since the enactment
24 of another rule, law.

25 But I'm not seeing an increase in the surface

0102

1 miner's awards. I -- I can't say that, not even as a
2 drill operator. I can say as far back as 27 years ago,
3 if I was going to see a 2/2 or a 2/3, that was still
4 simple under the ILO system. If I was going to see
5 that, I would probably see that in a drill operator as
6 opposed to, you know, someone who's operating a piece
7 of equipment in the pit. And why? Again, it's pure
8 speculation, but the rock. You know, they're drilling
9 through the rock, the silica. And that's the reality.

10 MS. OLINGER: Thank you.

11 EXAMINATION

12 BY MR. NIEWIADOMSKI:

13 Q. Ms. Davidson --

14 A. Yes.

15 Q. -- are you aware of the information that's
16 published by NIOSH on the results of their X-ray
17 findings?

18 A. Yes, sir. In general, yes.

19 Q. Okay. Were you surprised or how would you
20 react to the stats which is, you know, the number of
21 cases of simple -- of -- that have evidence of early
22 development of CWP? Are you surprised at those
23 statistics given compared to what the published average
24 dust concentrations are, for example, at Eastern
25 Kentucky mines?

0103

1 A. No, sir. And I will tell you why. And this
2 will seem cynical, I know, but I'm not trying to be. I
3 think it's -- it's a change in the political tide. I
4 mean, it's all about the readers. You know, these X-
5 rays, we -- you can't put them in a machine and make an
6 objective determination whether someone has coal
7 workers' pneumoconiosis or not. It's the individual
8 readers. I mean, we all come to the table with some
9 underlying premise, whether we want to admit it or not,
10 whether we're pro or against some type of area. I --
11 you know, I wish we had some objective way that we
12 could just read all of these X-rays in, and everybody
13 knows yes, this is simple. No, it is not. I think what
14 you're doing is -- you know it's the -- the readers.

15 Q. Knowing full well that NIOSH doesn't read
16 these X-rays, okay --

17 A. I mean --

18 Q. Do you understand?

19 A. -- you have doctors who are contracted.

20 Q. They have physicians who do that, correct?

21 A. That is correct. just like the U.S.

22 Department of Labor has a list.

23 Q. Right. So -- so you're -- you're still
24 questioning -- what you're doing, you -- you're
25 questioning the reliability of those statistics. Okay?

1 A. That's correct. You know, what I would like
2 for you to see if you were looking at it is, you know,
3 get a panel of physicians, both considered conservative
4 and liberal, have all of the panel -- Kentucky did
5 this, by the way. In Kentucky we have this. We have a
6 panel of physicians. And what they do is they -- you
7 know, they all make the same amount of money per read.
8 And what we do is they rotate. And at some -- they keep
9 numbers, statistical numbers. If this physician is
10 finding evidence of pneumoconiosis statistically
11 significant more than all the other physicians, at the
12 end of two years he's moved. Or if this physician is
13 not finding evidence or reading X-rays as simple
14 pneumoconiosis in a significant number, after two years
15 they're removed, so that what you really do want are
16 people who are objective and people who do not have a
17 hidden agenda or an underlying agenda who would read.

18 You know, I'm not saying that all readers
19 overread, but, you know, the claimants when we submit
20 ours, oh, that's the company doctor. When the
21 claimants submit theirs -- and now they get a U.S.
22 Department of Labor read, which, you know, there's a
23 limitation of evidence. And with your U.S. Department
24 of Labor reads, you know, I can give you an example. I
25 had a miner testify last week that he drove ten hours

0105

1 to Chicago to have his Department of Labor exam under a
2 particular doctor. You know, he passed up probably 50
3 doctors on his way. And those are the numbers you're
4 seeing.

5 Q. Okay. Well, still, in your professional
6 opinion, do you think that the NIOSH -- NIOSH stats,
7 okay, which we rely on, is overstating the prevalence
8 rate or understating the prevalence rate in Kentucky?

9 A. Of simple?

10 Q. Of CWP --

11 A. Of simple --

12 Q. -- simple or complicated, because they report
13 whatever they see. Okay?

14 A. Of simple, yes. I would have to say that,
15 you know, with my experiences, we are seeing a definite
16 increase in the number of progressive massive fibrosis.

17 Q. Does that concern you?

18 A. Yes, sir.

19 Q. Okay.

20 A. Absolutely. Absolutely. I wish we knew why
21 so we could prevent it.

22 MR. NIEWIADOMSKI: I have no further
23 questions. Thank you.

24 EXAMINATION

25 BY MR. THAXTON:

0106

1 Q. I have a few to ask you. First I would like
2 to hit on something that you just recently mentioned.
3 You indicated that in Kentucky Comp that you really
4 don't see much in the way of CWP cases, claims, I
5 guess, being paid.

6 A. Based on the law.

7 Q. But --

8 A. I mean, I want to be -- I want to --

9 Q. Based on the regulation.

10 A. -- be fair. You know, the regulations make
11 it very difficult for a claimant to get it under
12 Workers' Comp.

13 Q. Okay.

14 A. I want to make that clear.

15 Q. Is that the regulation that Mr. Addington
16 alluded to that is -- that miners have to report in a
17 disease or any finding or diagnosis to their employer
18 report, it would affect their compensation then?

19 A. Under -- under Kentucky Workers' Comp, if a
20 miner is diagnosed with coal workers' pneumoconiosis, a
21 miner must give notice to his employer, which simply
22 means a letter saying, I have been diagnosed with
23 simple coal workers' pneumoconiosis. He does not have
24 to file his claim within that time, but he does have to
25 give notice, like an injury, a hearing loss, anything

0107

1 else.

2 Q. He does have to provide notice to the
3 employer that he's had a diagnosis of any level of
4 disease.

5 A. He -- he does or --

6 Q. Receives it through the federal expose --
7 monitoring program that he's been given that he has any
8 level of disease, he has to notify his employer --

9 A. He --

10 Q. -- under Kentucky compensation law.

11 A. He does or he runs the risk of not -- of a
12 notice question, you know, as attorneys who have
13 claimants who have filed it four or five years down the
14 road that he did give notice. But he doesn't have to
15 file a claim.

16 Q. Right.

17 A. Okay. And I have given notice on behalf of a
18 claimant before, by the way, who continued to work with
19 complicated pneumoconiosis.

20 Q. Do you have an opinion as to whether that
21 sort of thing affects miners' desire to participate in
22 finding out whether they have the disease or not?

23 A. Probably not the insight that Mr. Addington
24 does. I suspect that -- that it does not. I'm not
25 really sure why they don't participate. But I -- but I

0108

1 don't think that's it. I can give you example after
2 example where mine companies call me, their HR people.
3 They send a miner to a doctor for a pre-employment
4 physical, and the doctor finds evidence of simple
5 pneumoconiosis. And they still hire them. They hire
6 him because he's a good miner operator. He's a good
7 equipment operator. You know, if you have to have the
8 men to fill the position, they still hire them, even
9 though I can sit here and tell them what their
10 potential risks are and what it's going to cost them,
11 you know, down the road.

12 Q. You indicated that you are here because you
13 represent the mine operators. Are the people that you
14 represent, are they mainly here in Eastern Kentucky or
15 all over the state, Western Kentucky as well or...

16 A. The only facilities that I represent are in
17 Appalachia, either in Virginia or Kentucky.

18 Q. Okay.

19 A. Yes.

20 Q. You do talk quite a lot about PMF being --
21 yes, you see an increase in that. But you're specific
22 about talking about PMF. And as Mr. Niewiadomski
23 mentioned, you do accept that NIOSH is looking at all
24 of the disease. So their prevalence rate of reporting
25 if somebody even has beginning stages it's reportable,

0109

1 as far as we're concerned as far as tracking the
2 disease. The interesting thing is that you don't
3 mention is that you don't acknowledge that even though
4 you're seeing that increase in PMF cases, those PMF
5 cases are happening to much younger miners than what
6 historically PMF cases back. Usually in the -- in the
7 past, PMF was a disease that you saw in older miners.
8 Now we're seeing those PMF cases being reported in much
9 younger miners.

10 A. That was not my intent. I -- I thought I did
11 say that I was seeing it in younger miners. I didn't
12 mean to mislead you. That -- that's exactly what I
13 thought I said.

14 DR. WAGNER: You did say that.

15 Q. You asked also though that -- you suggested
16 the Agency, because we're looking at the NIOSH report
17 from 1995, that we look at and do a study for the next
18 four or five years to determine what's going on and try
19 to answer why we're seeing an increase. Realizing that
20 NIOSH looked at the data in 1995 and came to the
21 conclusions at that time based on the data they had,
22 which, as you indicate, we don't see the PMF cases at
23 that point, they still come to the conclusion though
24 that the standard needed to be reduced in order to
25 protect miners because they were seeing cases of

0110

1 disease that was greater than what Congress intended in
2 the Act.

3 Now that we're seeing an update in those --
4 in that data from '95 forward, why would you think we
5 need to back off and do a four- or five-year study
6 before we move forward given the fact that the data
7 from '95 and back indicated that the regulations were
8 not protecting miners? The -- it looks like the only
9 thing -- anything you would see now would be that it's
10 indicating that it's getting worse and that we probably
11 should have acted sooner.

12 A. Hopefully to get to the answer, because I
13 think if you look at the NIOSH studies that are
14 attached and Dr. Wagner has referred to, you're --
15 you're not looking at U.S. studies and you're looking
16 at epidemiological studies as opposed to individual
17 studies on miners. If -- if you designated what you
18 believe to be true hot spots -- and, you know, I can't
19 speak to that because I'm not outside of Eastern
20 Kentucky or Appalachia Virginia -- but if -- you know,
21 do a study. You know, have these personal dust
22 monitors. Go over a period of time and see if this is
23 exactly -- you know, are they being exposed to silica
24 more so than they are the coal dust.

25 You know, is this what's prompting

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1 progressive massive fibrosis. Are there certain pieces
2 of equipment that an individual operates, are those
3 more prone to have progressive massive fibrosis? You
4 know, I have -- I have ideas based on what I have
5 observed. If that's the case, then do you limit how
6 long someone can operate that particular piece of
7 equipment in a shift, you know, as opposed to just a
8 general across-the-board dust standard that may not
9 really get what we want. And what we all want,
10 industry as well, is to stop progressive massive
11 fibrosis.

12 Q. Are you speaking -- when you say standard,
13 are you only referring to the 1 milligram standard or
14 are you referring to all the provisions of the proposed
15 rule?

16 A. And I have to be candid that I don't know all
17 the provisions. I mean, I've read through it. But to
18 have a true understanding I don't. I'm talking about
19 the 1 milligram. You know, if that would fix the
20 problem, you know, I would applaud you. You know, if
21 you have the medical evidence to absolutely sit here
22 today and say, if we pass this standard that that's
23 going to fix the progressive massive fibrosis, I would
24 be the first to stand up and give you a standing
25 ovation. But, you know, the doctors that I have worked

0112

1 with over the last 27 years, the studies we've seen,
2 you know, at this point no one has an answer. And we
3 don't have an answer because we do not have a U.S.
4 study with U.S. coal miners and, you know, what we're
5 seeing. We're relying upon other countries.

6 Q. I would suggest that maybe you take a look at
7 the Criteria Document. There are a list of references
8 in there. And there's more studies actually where we
9 have looked at U.S. coal miners. So I would suggest
10 that, you know, maybe you take a look at these.

11 A. I think I've reviewed all of those studies.
12 and again, epidemiology, what -- what are your
13 parameters.

14 DR. WAGNER: That's all.

15 EXAMINATION

16 BY MR. ROMANACH:

17 Q. Ms. Davidson, I just have a couple of
18 questions. Have you noticed any increase in the number
19 of filings for black lung benefits in the past five
20 years as opposed to the previous five years?

21 A. The past five years, no. The last -- since
22 the passage of the Health Care Act, they've been going
23 -- going -- an increase. I don't know if you're aware
24 of the provision that was in the Health Care Act. It's
25 a little unknown provision that no one really knew

0113

1 about until it was already passed that Senator Byrd put
2 in. But it affects federal black lung claims. And
3 there are certain presumptions and years. And so have
4 seen most certainly an increase in the last six months.
5 We -- we have dips. And in 2001 you saw a large
6 increase. In the last five years, I would say no, but
7 in the last two years, I would say yes. Yes.

8 Q. Have any of these cases already come up for
9 hearing?

10 A. Now, most of them, yes, sir. Yes, sir, they
11 have.

12 Q. And has there been an increase in the
13 percentage of these cases being awarded benefits?

14 A. Absolutely.

15 Q. Have you kept any -- any data on -- on -- on
16 these claims, the number of claims and the number of
17 claims that have been awarded?

18 A. Probably from 3 percent to 15 percent. It's
19 a significant increase.

20 MR. ROMANACH: I have no further questions.

21 Thank you.

22 EXAMINATION

23 BY DR. WAGNER:

24 Q. You had mentioned a few times that you were
25 concerned about a lack of studies since 1995. I'm

0114

1 confused. If you take a look in the Federal Register
2 notice, in the preamble, there are references to more than
3 40 studies that have been done since 1995 that were
4 taken into consideration in the proposals here. You
5 express concerns about studies being done elsewhere and
6 not in the United States. And there are a good many
7 studies, 50 or more, that -- since '95 that are
8 reported on U.S. coal miners. So I just encourage you
9 before you submit your written comments, take a look
10 through and make sure that your comments embrace what's
11 actually there or not, what you say you're --

12 The other -- I'm kind of confused about the
13 kind of study that you're recommending that be done
14 before the Agency move forward. You suggested --
15 you're -- that it not be epidemiological, that it be
16 focused on individual miners. And I -- I just -- the
17 studies that have been deemed sort of recently that
18 have come up for criticism in other settings, including
19 this one by the first speaker, have focused
20 substantially on individual miners who voluntarily come
21 and get their chest X-ray.

22 A. You're talking about the X-rays through the
23 NIOSH study.

24 Q. Yeah. So I -- I'm trying to figure out which
25 kind of study is it that you feel should be helpful.

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1 A. Well, obviously I think the more effective
2 study would be -- I -- I'm not really sure what the
3 cost would be to the companies. They have spoken more
4 about the personal dust monitors, the jobs that
5 individuals do. You know, my personal experience, as
6 I've said, if you're operators, the miners, miner
7 operators, those have been my experience where I've
8 seen all my progressive massive fibrosis cases. And
9 two, once as plaintiff's attorneys with a surface mine
10 on a drill operator. And I had one drill operator as a
11 defense attorney who actually is my age. And I don't
12 consider myself old, but 51, but I think at the time he
13 was in his 40s. So, you know, I didn't want to imply
14 that I've not been in any case.

15 But I think a lot of the men who -- whether
16 you consider it monitoring a particular area in the
17 mines or whether you consider it monitoring a
18 particular job, but, you know, my experience is that
19 you're not going to see the progressive massive
20 fibrosis in -- in the outby jobs. You're not going to
21 see them in a lot of shuttles, a lot of the bridge --
22 even the bridge operators, I don't -- don't see them,
23 you know, who run the belt line right there. And, you
24 know, I think they are very job related. You know, my
25 speculation, as well as other attorneys that I've

0116

1 spoken to and doctors, is the silica. But, you know,
2 it is speculation at this point, because no one's been
3 able to distinguish them.

4 Q. Thank you. You had mentioned a -- an annual
5 gathering of lawyers who were involved in this area
6 from 15 to 18 states where I gather that you have a
7 shared experience of recognizing recent increases in
8 PMF. What states are these lawyers coming from?

9 A. Tennessee, Indiana, Pennsylvania, West
10 Virginia, Virginia, Kentucky. I don't think we have
11 any Western -- I don't think we are out in the area of
12 Utah though. I don't think there are any attorneys
13 from Utah, from that area.

14 Q. Okay. So this is a kind of --

15 A. Illinois.

16 Q. -- something to draw -- are some from
17 Illinois? Okay.

18 A. Yes, sir. Yes, sir.

19 Q. Any others you can -- you didn't mention
20 Ohio. Is Ohio there?

21 A. No, sir. I don't -- I don't think that there
22 are any from Ohio.

23 Q. So -- but basically this is a -- this isn't a
24 Kentucky problem.

25 A. That's right.

0117

1 Q. This is a -- that's the point you were
2 making.

3 A. Yes, sir.

4 Q. This is a shared problem that's being
5 recognized by defense attorneys. And I assume it's a
6 group of defense attorneys?

7 A. It is, Your Honor.

8 Q. Yes. So recognized by defense attorneys in
9 numerous states around the country, and it's not kind
10 of local specific issue here.

11 A. No. We all acknowledge we're seeing more
12 progressive massive fibrosis, but -- but probably not
13 the numbers that you are talking about.

14 DR. WAGNER: Well, I really appreciate your
15 having been moved to speak, even not having to plan to
16 come speak. You've provided valuable information
17 today. We encourage you as well as anyone else who
18 wants to prepare written remarks to supplement what
19 you've been able to tell us today. So thank you very
20 much for your time.

21 MS. DAVIDSON: Thank you.

22 DR. WAGNER: I'm going to ask one last time
23 whether there are any others in the crowd who feel
24 similarly moved, maybe you didn't come with prepared
25 remarks, but you want to say something to get it into

0118

1 the record now. Well, I don't see anyone -- I'm being
2 asked to -- asked since he did sign up in advance,
3 Norman Stump. Perhaps he would follow some level of
4 prudence and didn't want to take the roads today.

5 So if no one else wishes to make a
6 presentation, I want again to say that the Mine Safety
7 and Health Administration appreciates your
8 participation in this public hearing. We want to thank
9 everybody who made presentations, and we also want to
10 thank everybody who became part of the process by
11 coming here observing and listening and becoming
12 informed, not only about the MSHA proposal, but about
13 some of the comments that people are making. All
14 comments that are put into the record will be taken
15 into consideration as the Agency moves forward to put
16 out a final rule.

17 I want to emphasize that anyone who wants to
18 submit written comments, they must be received or
19 postmarked May 2nd, 2011. MSHA will take your comments
20 and your concerns and considerations in developing the
21 Agency's final rule. Anyone else who wants to comment
22 next week, we will be having our hearing in Arlington,
23 Virginia, as I mentioned previously. And I'll again
24 say that that date is February 15th at the MSHA
25 headquarters. You can find that information on the

0119

1 MSHA website, along with the transcripts from the prior
2 hearings. And you'll have a transcript of this hearing
3 within a couple of weeks, we hope. And that's at
4 www.msha.gov. Since no one else wants to speak, this
5 public hearing is concluded. Thank you very much. Be
6 safe on the roads.

7 (WHEREUPON, the hearing concluded at 12:08 p.m.)

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5 COMMONWEALTH OF KENTUCKY)

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7 COUNTY OF MERCER)

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11 I, PATRICIA A. SECKLEY, a Court Reporter and Notary
12 Public in and for the Commonwealth of Kentucky, whose
13 commission as such will not expire until November 26,
14 2012, do hereby certify that the foregoing transcript
15 is a true, complete and accurate transcript of the
16 captioned proceedings, as taken verbatim by me at the
17 time, place and for the purpose stated herein.

18 I further certify that I am not related to nor employed
19 by any of the participants herein and that I have no
20 personal interest in the outcome of these proceedings.

21 WITNESS my hand on this the 15th day of February, 2011.

22

23

24 Patricia A. Seckley

25