

TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
PATTERN OF VIOLATIONS)

Pages: 1 through 61

Place: Charleston, West Virginia

Date: June 7, 2011

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IN THE MINE SAFETY AND HEALTH ADMINISTRATION

IN THE MATTER OF:)
)
PATTERN OF VIOLATIONS)

Charleston, West Virginia

Tuesday
June 7, 2011

APPEARANCES

MSHA Panel: PATRICIA W. SILVEY, JAY MATTOS,
CHERIE HUTCHISON, ANTHONY JONES

Speakers:

CHRIS HAMILTON, West Virginia Coal Association
JOHN GALLICK, Alpha Natural Resources
BRIAN LACY, United Mine Workers of America
KENNY MURRAY, Alliance Coal

P R O C E E D I N G S

(11:31 a.m.)

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2
3 MODERATOR SILVEY: Again, good morning. My
4 name is Patricia W. Silvey, and I'm Deputy Assistant
5 Secretary of Operations for the Mine Safety and Health
6 Administration. I will be the moderator of this public
7 hearing on MSHA's proposed rule for pattern violations.
8 On behalf of Assistant Secretary Joseph A. Main, I would
9 like to welcome all of you here today.

10 At this point, I would like to introduce the
11 members of the MSHA panel. The Chair of the Pattern
12 Rulemaking Committee to my left is Jay Mattos; to my
13 right, Cherie Hutchison, who is with the Office of
14 Standards; and to her right, Anthony Jones, who is with
15 the Department of Labor Office of the Solicitor.

16 In response to requests from the public, MSHA
17 is holding public hearings on the pattern of violations
18 proposed rule. This is the second of four public
19 hearings. As all of you know, the hearings are being
20 held in tandem with the proposed rule on Examinations of
21 Work Areas.

22 The first hearing was held in Denver on June
23 2nd; the third hearing will be in Birmingham, Alabama, on
24 June 9th; and the final hearing in Arlington, Virginia,
25 at the headquarters' office on June 15th.

1 The Pattern of Violations proposal applies to
2 all mines, coal and metal/nonmetal, surface and
3 underground.

4 The purpose of the hearing is to receive
5 information from the public that will help MSHA evaluate
6 the requirements in the proposal and produce a final rule
7 that will improve health and safety conditions at mines.

8 As most of you know, the hearings will be
9 conducted in an informal manner. Formal Rules of
10 Evidence will not apply. The hearing panel may ask
11 questions of the speakers and the speakers, as I said at
12 the prior hearing, may ask questions of the hearing
13 panel.

14 Speakers and other attendees may present
15 information to the court reporter for inclusion in the
16 rulemaking record. MSHA will accept written comments and
17 other appropriate information from any interested party
18 including those not presenting oral statements.

19 I assume that by now everybody has signed the
20 attendance sheets. If you have a hard copy or electronic
21 version of your presentation, please provide the court
22 reporter with a copy.

23 The post-hearing comment period for the
24 proposed rule ends on June 30th. MSHA must receive your
25 comments by midnight, Eastern Daylight Savings Time, on

1 that date.

2 MSHA is proposing to revise the Agency's
3 existing regulations for pattern of violations. MSHA
4 determined that the existing pattern of violations
5 regulation does not adequately achieve the intent of the
6 Federal Mine Safety and Health Act of 1977, or the Mine
7 Act. Congress included the Pattern of Violations
8 provision in the Mine Act so that operators would manage
9 safety and health conditions at mines and find and fix
10 the root causes of Significant and Substantial, or S&S,
11 violations to protect the safety and health of miners.
12 Congress intended that MSHA use the Pattern of Violations
13 provision to address operators who have demonstrated a
14 disregard for the safety and health of miners.

15 MSHA intended that the proposal would simplify
16 the existing Pattern of Violations criteria and improve
17 consistency in applying the Pattern of Violations
18 criteria and more adequately achieve the statutory
19 intent. The proposal would also encourage chronic
20 violators to comply with the Mine Act and MSHA's safety
21 and health standards.

22 MSHA requested comments from the mining
23 community on all aspects of the proposed rule. It's
24 particularly interested in comments that address
25 alternatives to key provisions in the proposal. The

1 preamble discusses the provisions in the proposal and
2 includes a number of specific requests for comment.

3 The proposed rule would include general
4 criteria and would provide that the specific criteria
5 used in the review to identify mines with a pattern of
6 S&S violations would be posted on MSHA's website.

7 In the preamble to the proposal, MSHA requested
8 suggestions on how the Agency should obtain comments from
9 mine operators and mines during the development of, and
10 the periodic revision to, the specific POV criteria.

11 MSHA also requested comments on the best
12 methods for notifying mine operators and the mining
13 public of changes to these criteria. In the Public
14 Hearing Notice, MSHA clarified its plans and stated that
15 it would provide any change to the specific criteria to
16 the public for comment via posting on the Agency's
17 website before MSHA uses it to review a mine for a
18 Pattern of Violations.

19 MSHA plans to review and respond to the
20 comments, revise as appropriate the specific criteria,
21 and post our response and any revised specific criteria
22 on the Agency's website.

23 And so to explain that, right now, you all know
24 that the specific criteria for patterns are posted on the
25 Agency's website. And what we said in the Public Hearing

1 Notice was that before we make any changes to the
2 specific criteria, we would make that available to the
3 public on our website. We would allow the public to
4 comment. We would respond to the public's comments; and
5 then if we had to revise that specific criteria based on
6 comments made by the public, we would post the revised
7 criteria, as well as our response to the public comments
8 on our website.

9 So we ask for your comments on this proposed
10 approach to obtaining public input into revisions to the
11 specific criteria. MSHA also requested comments on the
12 burden that monitoring a mine's compliance record against
13 the proposed POV specific criteria using the Agency's
14 website would place on mine operators.

15 As most of you probably know, we developed a
16 web tool to make it easier -- I know some of you know
17 because I know some of you came into Arlington and we
18 presented the web tool to you, but we developed -- in the
19 interest of transparency, we developed a web tool to make
20 it easier for mine operators to monitor their compliance.
21 We asked that commenters give us their reactions to the
22 web tool and if they would, include any detailed
23 rationale and supporting documentation for any comments
24 or suggested alternatives.

25 Under the proposed rule, to be considered a

1 mitigating circumstance, the proposed rule would provide
2 that an operator submit a written safety and health
3 management program to the District Manager for approval.
4 In other words, if an operator used the web tool or some
5 other format and found that they were approaching the
6 parameters in the specific criteria, they could come in
7 to MSHA and submit a safety and health management program
8 as a mitigating circumstance to the District Manager.

9 MSHA would review the program to determine
10 whether the program's parameters would result in
11 meaningful, measurable, and significant reductions in S&S
12 violations. MSHA would like to clarify -- because we've
13 gotten some comments on this and we got some comments at
14 the public hearing in Denver that the Agency did not
15 intend that safety and health management programs that
16 are referred to in this proposed rule be the same as
17 those referenced in the Agency's rulemaking on
18 comprehensive safety and health management programs.

19 Those are two different -- two different items
20 and that other rulemaking, MSHA had not -- the safety and
21 health management system rulemaking, MSHA had not gotten
22 to the proposed rule stage on that rulemaking. MSHA
23 would consider a safety and health management program as
24 a mitigating circumstance in the Pattern of Violations
25 proposal when it includes measurable benchmarks for

1 abating specific violations that could lead to a Pattern
2 of Violations at a specific mine and addresses hazardous
3 conditions at that mine.

4 MSHA requested detailed information and data on
5 costs, benefits, and feasibility of implementing these
6 proposed provisions. MSHA requested specific comments on
7 its estimates on numbers of mines affected, which are
8 likely to vary from year to year.

9 As you address the proposed provisions, either
10 in your testimony today or your written comments, be as
11 specific as possible about how the changes would affect
12 the health and safety of miners, and also be as specific
13 as possible in any suggested alternatives, including your
14 rationale. MSHA will make available transcripts of all
15 the public hearings approximately two weeks after the
16 hearing. You may view the transcript on our website at
17 www.MSHA.gov or www.regulations.gov.

18 And we will now begin our testimony. Please
19 begin by clearly stating your name and organization and
20 spelling your name, so that the court reporter will have
21 an accurate record.

22 Our first speaker is Mr. Bissett with the
23 Kentucky Coal Association. Is he here?

24 We would now then move to Mr. Hamilton, Chris,
25 West Virginia Coal Association.

1 MR. HAMILTON: For the record, my name is Chris
2 Hamilton.

3 And allow me to simply reference my
4 introduction earlier here today to incorporate as a
5 preface for my specific comments on this ruling if that's
6 all right.

7 MODERATOR SILVEY: Can we go off the record?

8 (Off the record.)

9 (On the record.)

10 MR. HAMILTON: As it relates to the West
11 Virginia Coal Association, who we represent and some of
12 the concerns we have as we continue to lose production
13 here in Central App.

14 And let me say, we at the outset recognize the
15 importance of the Agency's Pattern of Violations power to
16 effectively carry out what I think we would all envision
17 as the intent of the Mines Act, and that's to have the
18 ability to sanction some additional sanctions against
19 those operators that we feel are recalcitrant or
20 otherwise simply just not complying, not complying with
21 the law.

22 However, we do believe strongly that the POV
23 system should be (1) simplified; (2) transparent; (3)
24 fundamentally fair; and (4) uniformly applied before
25 changes to the current process are made; therefore, we

1 oppose MSHA's proposed changes to the existing POV
2 procedure for the following specific reasons.

3 First, MSHA's proposed rule in our view clearly
4 violates mine operators' due process rights and
5 principles of fundamental fairness. The current POV
6 procedure requires that only citations and orders that
7 have become final will be used to identify mines with
8 potential POV issues. MSHA's proposal would change this
9 approach and allow POV determinations to be made solely
10 off of violations that have been issued as opposed to
11 those that are final adjudication.

12 While we fundamentally agree in the purpose of
13 the POV power, we believe the extension of the rule would
14 leave an operator presumed guilty rather than innocent
15 until proven guilty and is, accordingly, unfair. MSHA
16 believes that this change is absolutely necessary to cure
17 a large backlog of cases pending before the Federal Mine
18 Safety and Health Review Commission. This, coupled with
19 MSHA's belief that only a small fraction of Significant
20 and Substantial violations are ever modified or vacated,
21 is the main reason for MSHA's evisceration of due
22 process.

23 Most troubling is the fact that MSHA itself has
24 contributed to the backlog of cases more than any other
25 single factor because of the substantial increase in

1 questionable citations issued by inspectors.

2 This proposed rule is nothing more than an
3 irresponsible attempt by MSHA to clean up some of its own
4 inconsistencies while leaving operators no chance at
5 being heard. Given this lack of justification, the
6 current POV rule should not be altered. MSHA should not
7 have the authority to end run such a constitutional right
8 of due process, no matter how busy they are or for any
9 other reason.

10 The Fifth Amendment's guarantee of due process,
11 at the heart of due process is an individual's right to
12 his or her property. The Fifth Amendment of the U.S.
13 Constitution holds that no person shall be deprived of
14 life, liberty, property, or due process of law. It
15 should not be punitive POV sanctions for violations
16 issued instead of final adjudications on contested
17 citations or orders and it is an absolute denial of this
18 right.

19 To constitute a due process violation, a party
20 must be deprived of a protected interest; and, if so, the
21 Court must determine what process is due. Surely, the
22 shutting down of a mine operation and the economic
23 detriment that would attach would qualify for due process
24 and envisioned by the Fifth Amendment.

25 Congress was well aware of such dangers when

1 they passed the Mine Act and created a way for mine
2 operators to be heard. All of this protection was
3 designed to prevent erroneous deprivation and though
4 slow, the current system prevents this deprivation. In
5 fact, MSHA stated during the formal rulemaking process
6 for the current POV rule that in order to avoid
7 inequities regarding which mines are placed on a pattern,
8 the Agency must make ample provision for due process when
9 applying the broad framework.

10 MSHA will consider only final citations and
11 orders when identifying mines with a potential of
12 violations. MSHA has completely changed its position
13 apparently in favor of inequities in the POV process.

14 Secondly, the POV rule must ensure that mine
15 operators receive adequate notice and a fair opportunity
16 to be heard. With the current proposal, it appears that
17 MSHA would also have the current practice of full and
18 fair notice to operators. Fundamental fairness requires
19 that operators be made aware of circumstances giving rise
20 to the issuance of a POV, thereby, giving the operator a
21 reasonable opportunity to address any condition that
22 might alleviate the situation altogether.

23 Even Secretary Main once commented on the
24 necessity of fair and adequate notice. He once stated in
25 a letter to MSHA regarding the proposed version of the

1 current POV rule that: "All mines, which are under
2 review for potential Pattern of Violations shall be given
3 notice to that effect by the Agency. This notice is
4 designed to give operators the opportunity to take
5 concrete actions and improve the citation history at the
6 mine and to implement a remedial plan. MSHA should
7 evaluate these and similar company efforts to correct the
8 Pattern of Violations when the Pattern Notice Conference
9 is held."

10 It is well established that courts and
11 prosecutors are not allowed to suspend the rights of its
12 litigants just because they may be overworked. Likewise,
13 MSHA should not be allowed to do so. There has been
14 absolutely nothing to warrant the proposed changes to
15 this rule. It is nothing more than an attempt by MSHA to
16 enact administrative conveniences at the expense of mine
17 operator rights.

18 At a minimum, MSHA should provide a pre-
19 dispositional hearing to operators. MSHA and the
20 commission should adopt a formal system that would
21 consolidate and expedite violations being contested in a
22 way that affords operators reasonable opportunity to
23 contest erroneous penalties.

24 Third, the potential for unchecked malfeasance
25 on the part of MSHA inspectors allowing MSHA inspectors

1 to write S&S violations that can be added to a POV
2 without a hearing is simply unfair in numerous other ways
3 as well. For example, it may not have been considered by
4 many, but under this proposed rule if an MSHA inspector
5 truly wishes to place a mine operator on a POV, they can
6 accomplish this in just a matter of months. Assuming
7 that there was just one inspector with a personal
8 vendetta against the mine, they could single-handedly
9 bankrupt a mine operator under the proposed rule as MSHA
10 has largely abandoned the conference system. This
11 proposed system leaves no avenue to challenge those
12 citations and orders.

13 There being no safeguards with this type of
14 activity and to allow this loophole to exist is the
15 height of irresponsibility. In fact, the only kind of a
16 safeguard available for this scenario is not much of a
17 safeguard at all. MSHA may argue that a check on an
18 inspector with a personal vendetta against the mine is
19 the gravity of the harm requirement for writing an S&S
20 violation, which must be at the least reasonable
21 likelihood; however, should an inspector improperly place
22 the gravity of the harm as reasonably likely, there would
23 be no recourse for the operator before being placed on
24 the POV under the proposed rule because an operator would
25 not have been afforded a hearing on the improper gravity

1 mark before the violation is added to the POV.

2 The above concern is exasperated due to the
3 current adversarial relationship that exists today
4 amongst industry and MSHA inspectors and the inexperience
5 level of a number of MSHA new hires today.

6 And we heard from a representative from the
7 State of Illinois earlier, and I've heard the same from
8 representatives of our State Department of Mines here in
9 West Virginia, that many of the new hires joining the
10 ranks of the inspectors at MSHA do not meet the
11 qualifications to be hired as a state inspector. And we
12 understand that many of the new hires at the Agency have
13 not even met the qualification and competence
14 requirements set forth in MSHA policy.

15 And, thirdly, it's been well documented that
16 there's a lack of training that a number of new hires
17 have received in preparation for their new
18 responsibilities and important work.

19 Another issue that I would simply raise is that
20 one of the screening criteria for POV determinations
21 involves a calculation using the inspector's on-shift
22 hours; therefore, shouldn't MSHA be using the on-shift
23 hours of all authorized representatives that frequent or
24 visit a mine site, including supervisors, assistant
25 District Managers, technical specialists, and even

1 District Managers since they carry authorized
2 representative cards.

3 Section 104 of the Mine Act requires all
4 authorized representatives to issue citations and orders
5 when they believe a violation exists. So, again, we
6 would simply point out that we believe that all the time
7 for all authorized representatives ought to be used --
8 ought to be part of the calculation for POV purposes.

9 In conclusion, we would agree that the POV can
10 be a useful tool to ensure compliance with the Mine Act,
11 however, the proposed rule on the table now is simply too
12 far-reaching to be approved. It is our position that
13 this is being posed as an administrative convenience for
14 dealing with a self-imposed problem and aims to destroy
15 basic civil liberties.

16 For the reasons stated here already, we would
17 respectfully oppose the implementation of this rule.

18 Now, in lieu of doing nothing, we would ask
19 MSHA to exercise its authority to establish an advisory
20 group of mine safety experts to determine -- to look at
21 this whole issue and others that surround it to determine
22 whether fundamental changes to the program are necessary,
23 and if so, how to make this a genuine workable tool for
24 the Agency and for the industry alike.

25 And I would remind the panel that last year,

1 there were a number of changes that were advanced before
2 Congress to make this program more workable, including a
3 rehab -- what was characterized as a rehab period for
4 operators who undergo a variety of safety initiatives to
5 improve their overall mine safety performance.

6 And there was also a means to more accurately
7 assess a mine's safety performance record known as the
8 Safety Performance Index that was also known as the
9 Grayson model, so that a mine's safety index and
10 performance in totality was factored into any program
11 that had with it the most severe enforcement sanctions.
12 It was a model developed by a professor, Dr. Larry
13 Grayson at Penn State University. It was introduced
14 during several congressional hearings held on several
15 pieces of legislation moving from Congress a year ago,
16 and I think it was attested to by law that it would be a
17 more accurate instrument or barometer of measuring mine
18 safety performance.

19 So we would simply alternatively suggest that
20 you develop those safety enforcement principles and
21 enforcement and administrative tools through a
22 participatory process with all stakeholders within the
23 industry.

24 So that concludes my testimony. I'm available
25 to answer any questions that the panel would have.

1 MODERATOR SILVEY: Thank you, Chris.

2 First of all, short of an advisory, you
3 recommended that the Agency withdraw the proposal and you
4 said that you would recommend that we form an advisory
5 committee.

6 I'm going to ask you the same sort of question
7 that I asked in the prior hearing. Short of an advisory
8 group, would you have an alternative proposal that you
9 would make to the Agency for Pattern of Violations?

10 MR. HAMILTON: Yes. I would adhere to the
11 current final adjudicated violations as the basis -- or
12 citations as the basis for POV determinations and would
13 provide for a more detailed delineation of procedural
14 steps for operators to have an opportunity to discuss and
15 conference that record, as well as have an opportunity to
16 improve the specific conditions cited by MSHA when making
17 a POV determination.

18 MODERATOR SILVEY: Can you put those in writing
19 and send them into us?

20 MR. HAMILTON: Yes, I will do, yes.

21 And is the final comment the same as for the
22 preceding hearing?

23 MODERATOR SILVEY: Yes, yes.

24 On your reference to the proposed legislation
25 last year, and I think probably some of you in the room

1 are familiar with that and you mentioned that safety
2 performance index.

3 Let me ask you something. That model that was
4 in that proposed legislation, have you taken that model
5 and actually applied it to any real mines in the members
6 of the West Virginia Coal Association and, therefore,
7 data, have you taken that mine, and then taken one of the
8 mines in your group and applied that model to see how the
9 mines, how they come out?

10 MR. HAMILTON: Yes.

11 MODERATOR SILVEY: You have done that?

12 MR. HAMILTON: Yes.

13 MODERATOR SILVEY: And what happened?

14 MR. HAMILTON: Based on the experience level
15 and competence of those that were involved in that
16 process, there was a general conclusion that it was a
17 more useful tool in accurately measuring a mine safety
18 performance, what mine health and safety professionals
19 would reasonably conclude as a more accurate instrument
20 or barometer for measuring mine health and safety.

21 Now, I don't have the data for the results to
22 give you, mathematically, but the general conclusion,
23 almost without exception, was that it was a far better
24 method of measuring mine safety in totality, real mine
25 safety versus, again, the mere issuance of a category of

1 MSHA citations.

2 MODERATOR SILVEY: And I don't need to go to
3 the effort to recite to you the preamble. I did some of
4 it in my opening statement, and I know you don't want to
5 hear it again, but a couple of things --

6 MR. HAMILTON: I will incorporate that in my
7 written comments.

8 MODERATOR SILVEY: What?

9 MR. HAMILTON: That was my humor.

10 MODERATOR SILVEY: Okay.

11 MR. HAMILTON: And I apologize for that.

12 MODERATOR SILVEY: That's all right. No.

13 The -- a couple things, though, are worth
14 noting. And the first being, you know -- and you all
15 probably know -- some of you know that we've got comments
16 on the issue that we propose to eliminate the final order
17 and we gave our rationale for doing that in the preamble.

18 You know, one of the things, though -- because
19 now you mention the proposed mine safety legislation, one
20 of the things that when Congress drafts the legislation
21 and that, you know, whether it passes or not, a lot of
22 times you will find what Congress said about that
23 legislation in the legislative intent and there's a
24 number of things in the legislative history to the 1977
25 Mine Act that goes to Congress's intent, and we

1 referenced that in the preamble to the proposed rule,
2 particularly when it comes to the concept of final
3 orders.

4 And as many of you -- some of you know that
5 that provision was put in. Congress at the time thought
6 that they did not have the tool to appropriately deal
7 with what happened at the Scotia mine and the fact that
8 ventilation violations, violations, not final orders were
9 left to occur over and over and over again and that at
10 the time, MESA didn't seem to have the tool to deal with
11 these violations.

12 So I say that only as a point of reference.
13 The second thing is you mentioned in your testimony that
14 of all these questionable citations issued by the MSHA
15 inspectors -- and I will say that one of the things that
16 MSHA strives to do, it might not look like it to you all,
17 is to improve the consistency of enforcement, although
18 all of us here probably would admit to this and
19 particularly people who have been inspectors either
20 inspectors or for that matter examiners would note that
21 and you said some of that meant that whenever you have
22 the human element and have a particular standard, that
23 may be nine times out of ten, nine inspectors might see
24 it the same way; but that one time, there might be a
25 difference of interpretation in how an inspector might

1 see it, and that is why we try to minimize any
2 inconsistency, that might tend to be some inconsistency.

3 But on that note, just for everybody to know
4 that, we have -- we do issue a fair number of violations
5 and we've got statistics on that and the majority of the
6 violations are paid without contest. Then a even smaller
7 percentage are -- sometimes they are modified, but the
8 percentage is quite small of the citations that are
9 modified, let's say from -- because that would be
10 significant in this case, no pun intended, but they are
11 modified from S&S, Significant and Substantial, to non-
12 S&S. There's a pattern of S&S violations, but then an
13 even smaller percentage are vacated.

14 And when I say "smaller," I think less than 2
15 percent are vacated. So overall when you look at it -- I
16 mean, we get all these comments to us about all of these
17 changes are going to be made. And when you look at it,
18 the data will show that the vast majority are really
19 upheld if they are contested, upheld on appeal, but even
20 the greater majority are not contested at all.

21 Having said all that, if you would -- when you
22 were mentioning that legislation, that legislation had a
23 rehab period -- and I can't remember that proposed
24 legislation in detail -- but one of the things MSHA has
25 tried to do in this proposed rule is to -- and I

1 mentioned that in my opening statement, but it's the
2 concept you talk about of rehab, that if a mine thought
3 the mine were approaching a Pattern of Violations, they
4 could come in with the safety and health management
5 program and that safety and health management program
6 would be aimed at the type of S&S violation that the
7 operator was approaching that looked like might be giving
8 rise to the pattern, and that's where MSHA -- and MSHA
9 has some experience under sort of that concept right now,
10 mines are coming in with -- I guess do we call them
11 safety and health plan --

12 MR. MATTOS: Corrective action.

13 MODERATOR SILVEY: Yeah. Mines are coming in
14 with corrective action plans; and on the majority of the
15 corrective action plans, they've achieved just what you
16 talked -- the concept of rehab. I mean, they've
17 significantly improved their S&S violations and the other
18 indices in the formula that we use to consider a mine for
19 pattern, which is really what we look to. I mean, that's
20 really the purpose of the whole Pattern of Violations
21 provision is so that the mine is made safe, and I think
22 we are seeing some improvements in that concept.

23 MR. HAMILTON: A couple comments. I'm not sure
24 it's really appropriate here today to compare the early
25 '70s and Scotia and some of the findings of that to what

1 we're dealing with today.

2 MODERATOR SILVEY: Well, I mean, I was just
3 going back to -- I mean, I was just going back to point
4 to something of a Pattern of Violations provision.

5 MR. HAMILTON: I know.

6 MODERATOR SILVEY: Do you have anything?

7 MR. MATTOS: I have just a couple points of
8 clarification.

9 First, I don't want to get too far in the
10 weeds, but we're talking about the time we used to
11 measure the violations per inspection hour, and I have a
12 feeling that our friend Kenny back there in the audience
13 had a little something to do with getting that in your
14 testimony, but that's something that -- I appreciate
15 that.

16 MR. HAMILTON: I tell you over the years,
17 there's been a lot of -- it seems like POV is a place to
18 maybe flush that out a little bit, but that's raised, all
19 mines have, you know, an inspector ratio of sorts, issues
20 of violation, you know, whatever, but that has
21 historically come up periodically.

22 MR. MATTOS: But just to clarify, we do use the
23 supervisor's time and anyone who is an authorized
24 representative, we use their time. We just don't use all
25 of their time. I just wanted to clarify that.

1 MR. HAMILTON: Is there a formula of some sort
2 that guides them?

3 MR. MATTOS: It's the way they code their time.
4 If they're there for inspection activity, that time is
5 then included and it's there, some of it --

6 MR. HAMILTON: Some or all may be part of it.

7 MR. MATTOS: It's not, but that's something we
8 need to address. I appreciate that.

9 The other thing that I wanted to clarify is we
10 have commenters talking about -- and the final order is a
11 big issue that we should only consider final orders. We
12 currently look at citations and orders issued that are
13 not fined also; we do that today in the Pattern of
14 Violation screenings.

15 It's the current role of the hazard division in
16 one part of the division that we have them look at only
17 final orders; but in other parts, we look at citations
18 and orders issued regardless of whether they are final or
19 not. I just wanted to clarify that for the record.

20 But in the beginning of your statement, Chris,
21 you said that the system needs to be simplified. Were
22 you talking about the procedures that need to be
23 simplified, the formula needs to be simplified? I mean,
24 you referenced the performance.

25 MR. HAMILTON: You know, and that might be and

1 I'll expand on that more in the written comments. But
2 from what I understand from some of the individuals who
3 have inputted over the years -- and maybe it's that
4 institutional knowledge that's being carried forward
5 today where, you know, several years ago and I think we
6 may have made some effort to clarify that just a couple
7 years ago -- it was very difficult to understand and
8 follow procedures and protocol to try to understand how a
9 mine would ultimately become eligible and how they would
10 be notified and whether they would have an opportunity to
11 improve, and then what would follow would be a real
12 pattern.

13 So there was just a lot of confusion in trying
14 to, you know, really figure out what a mine had to do to
15 get on path. You know, the big picture was clear, but
16 when you got down into the detail of actually attempting
17 to administer the program, that's where some of the
18 confusion, I believe, came.

19 MR. MATTOS: Okay. Because you also referenced
20 the need for transparency. We have the web-monitoring
21 tool out there now. Do you think that's enough
22 transparency, that web monitoring tool, or do you think
23 there's something else needed?

24 MODERATOR SILVEY: Have you used it?

25 MR. HAMILTON: Have I used it? No, no.

1 Unfortunately, I don't have a mine.

2 MODERATOR SILVEY: No. I meant -- I understand
3 that. I meant had you in terms of --

4 MR. HAMILTON: No. I'm not sure anyone is up
5 to the same level of knowledge and competency on what
6 does exist and how all the tools are integrated today.
7 So that could be a little bit of an issue. I mean, just
8 being efficient and more transparent as opposed to the
9 traditional, you know. We think we've just about got is
10 just principles that we embrace, the more transparent;
11 the more people can look and find out where they stand in
12 relationship with the others and the likelihood of
13 additional enforcement actions, I just think they're
14 better off.

15 MODERATOR SILVEY: Well, we know a lot of
16 people have, in fact, used that web tool because we can
17 tell -- obviously, we can look and see how many hits we
18 get on it.

19 And how many do you think?

20 MR. MATTOS: We were getting about 800 a week
21 when we first put it out. I haven't looked recently.

22 MODERATOR SILVEY: So we do know that people
23 are, in fact, using it. And I think while people have
24 made some specific comments to us, in large part, people
25 have said they have found it useful. That's why I asked

1 have you used it because it was in the interest of
2 transparency that we develop -- I say "we," Jay and
3 people develop a web tool -- and so, therefore, I was
4 just wondering.

5 MR. HAMILTON: You know, there's just a lot of
6 concern -- I think first of all, there's just a real
7 solid appreciation for what's envisioned and what's
8 intended through the Pattern of Violations program. I
9 mean, it is a tool that I think concerns everybody,
10 particularly regulating community more so.

11 So, you know, there's just -- it's the one
12 program that everybody is just overly concerned over how
13 it may be utilized and ensure that the transparency and
14 due processes is absolutely provided because there's just
15 a lot of concern over misuse, you know, the vendetta-type
16 inspector.

17 I mean, these are concerns that everyone has,
18 the good operators and the operators that are very
19 conscious about their safety efforts, as well as the
20 people that may not have that, you know, concern. But
21 everyone wants to make sure we get this thing right and
22 that's the suggestion of, you know, taking a more
23 holistic approach on how you go about assessing basic
24 mine safety performance as opposed to just the one
25 category of violations that will always and forever be

1 somewhat subjective.

2 MR. JONES: Has your Association done an
3 analysis of how many of your members could be potentially
4 affected by this Pattern of Violations provision?

5 MR. HAMILTON: No.

6 MODERATOR SILVEY: Okay. Thank you very much.

7 MR. HAMILTON: Thank you.

8 MODERATOR SILVEY: Does anybody else wish to
9 make comments, provide testimony? Somebody in the back
10 of the room?

11 MR. LACY: Good afternoon.

12 MODERATOR SILVEY: Good afternoon.

13 MR. LACY: Brian Lacy with United Mine Workers
14 of America -- B-R-I-A-N, L-A-C-Y.

15 The UMWA generally supports the proposed rule.
16 Things that MSHA has proposed, which we support, include
17 elimination of initial screening criteria that MSHA has
18 used to provide an operator with advanced written warning
19 about an operation being vulnerable to a Pattern of
20 Violations.

21 The operator should have an ongoing awareness
22 of the conditions in their mine and whatever shortcomings
23 exist without MSHA having to notify them that they are
24 entering a Pattern of Violations.

25 Further, MSHA started a new webpage so mine

1 operators can track their own history and whether they
2 meet the criteria for Pattern of Violations.

3 We also agree that simplifying the POV
4 procedures and making them more transparent would support
5 the posting on the web of a mine's record, which
6 indicates whether it meets the POV criteria. With MSHA
7 monthly updating this information, the mine operator will
8 be able to keep up to date on their POV assessment.

9 A critical change to proposed language concerns
10 the removal of the current limitation that MSHA only
11 consider final orders for the purposes of POV. The
12 problem with the current system that limits a POV
13 analysis to only the final orders is that it can take
14 years to resolve a contested citation. By the time the
15 citations become final, conditions at the mine may bear
16 no resemblance to what they were when the citation was
17 originally issued.

18 Further, only considering final orders
19 encourages a mine operator to challenge everything MSHA
20 issues to avoid being placed on a Pattern of Violations.
21 Recent Congressional hearings on the backlog of cases
22 pending before the Federal Mine Safety and Health
23 Administration attests to the problem, only considering
24 final orders has created. The UMWA believes that both
25 legislative history of the Mine Act and litigation will

1 support MSHA on this position.

2 We agree that the health and safety record of
3 each operation shall be reviewed at least every six
4 months to ensure that MSHA is keeping abreast of any
5 deterioration in health and safety conditions. We
6 believe a quarterly review would be better, but agree
7 that a six-month review would be adequate considering the
8 other responsibility that MSHA has.

9 The UMWA agrees that when the mine has a
10 Pattern of Violations, a copy of the notice must be
11 posted on the mine bulletin board in order to make sure
12 that everyone at the mine is informed that their
13 workplace exhibits substandard health and safety
14 conditions.

15 Problems we see with the proposal include this
16 proposal anticipates having MSHA periodically revise the
17 POV criteria through informal administrative action. The
18 UMWA opposes that. Instead, we believe the Agency should
19 collect and consider the comments submitted to this
20 proposed rule to set criteria for purposes of the POV.
21 The criteria should be fixed at least until an
22 opportunity for public input on any changes that may be
23 warranted in the criteria. A subsequent notice and
24 comment period should occur to allow public input should
25 the POV criteria be changed.

1 The UMWA holds reservations about using injury
2 rates as weighted criteria for consideration in a Pattern
3 of Violations. Injury reporting depends on operator's
4 reports and the industry has long known about
5 underreporting of accidents and ,consequently, it would
6 not be a reliable statistic for consideration. Covering
7 up accidents and underreporting seems to be commonplace
8 with some of the industry. We recommend that fatality
9 rates be rated more heavily than injury rates.

10 The UMWA has reservations about a mine being
11 removed from a POV for mitigating circumstances. Many
12 questions remain open regarding this issue, such as how
13 the presence of a mitigating factor is used to remove an
14 operation from POV status, if so, for how long; and does
15 MSHA contemplate using any sort of probationary status?
16 If an operation indicates it will pursue certain
17 mitigating practices, and doesn't, then will it be placed
18 back on the POV? The union would at least ask the Agency
19 for clarification on what constitutes mitigating
20 circumstances and examples of such.

21 This concludes my testimony. I'm here on
22 behalf of the UMWA to enter our position into the record.
23 I would ask the panel if they have any questions to
24 reserve those for our Department of Occupational Health
25 and Safety staff who will testify at the June 15, 2011

1 hearing in Arlington, Virginia. Thank you.

2 MODERATOR SILVEY: Thank you very much.

3 Just for the record, I do have a few comments
4 to yours. But I've got to remember now, I do have to
5 remember that I'll ask those of the UMWA in Arlington.

6 You said they will be testifying?

7 MR. LACY: Yes.

8 MODERATOR SILVEY: So now I've got to remember
9 that I've got to do that.

10 I will say, though, to everybody because he
11 brought up a good point -- and I want everybody here to
12 know as to the issue -- I mentioned that in my opening
13 testimony -- of mitigating circumstances.

14 He said they oppose the mine being removed from
15 a POV due to a mitigating circumstance and that he asked
16 for some clarification there.

17 Well, the concept is that once the mine meets
18 the POV specific criteria, it's too late then to come in
19 as a mitigating circumstance. The concept of mitigating
20 circumstance is that the mine operator saw that he or she
21 is approaching a Pattern of Violations.

22 So prior to meeting all the formal stuff for a
23 POV, then that mine operator would come into MSHA with
24 the safety and health management program to address the
25 conditions that the mine was seeing. I don't know if

1 they have roof control problems or ventilation problems.
2 This program would address those types of S&S violations
3 that give rise to the pattern.

4 So as I just said, so it's not removing a mine
5 from POV consideration. We intend that to come into play
6 before a mine would be considered for a pattern, so I did
7 want to clarify that for everybody. I have a couple more
8 comments, but we will do with those in Arlington.

9 MR. LACY: Thank you.

10 MODERATOR SILVEY: Thank you.

11 MR. GALLICK: John Gallick, G-A-L-L-I-C-K,
12 Alpha Natural Resources. The proposal does not contain
13 specific criteria, but rather seeks comment on how the
14 Agency should contain comments during the development of,
15 and periodic revision to, the POV screening criteria is
16 impossible to comment on criteria that have not been
17 shared in the proposal.

18 We believe the Agency should establish a
19 comment period by notice and comment rulemaking. Section
20 104(e)(4) specifically requires that, "Secretary shall
21 make such rules as he deems necessary to establish
22 criteria for determining when a Pattern of Violations
23 exists."

24 The Office of the Inspector General also
25 specifically recommended that MSHA seek stakeholder input

1 on the POV screening criteria in its report dated
2 September 29, 2010, on page 3 and page 24. MSHA has not
3 effectively done that in the proposed rule in our
4 opinion.

5 Section 104.2 of the proposed standard lists
6 only generic categories of the information that will be
7 reviewed, but does not quantify or explain how such data
8 will be applied to issue a pattern notice. The proposed
9 rule also apparently anticipates that the criteria will
10 be fluid and subject to change without any established
11 method for notice and comment rulemaking on the core of
12 the rule, which are the criteria.

13 This approach totally fails to provide
14 operators with notice of the criteria and apparently is
15 intended to provide MSHA with the ability to change, or
16 worse, ignore the criteria in some situations. It fails
17 to inform stakeholders on what is expected to avoid a
18 pattern notice and offers no comment on the specific
19 criteria before the rule would then become in effect.

20 The absence of the specific, critical criteria
21 from the proposal is of particular concern since the
22 proposed rule eliminates any potential for discussion of
23 the application of the criteria to a mine before the
24 pattern notice is issued to a mine operator. It appears
25 that the rule anticipates an automated process for the

1 issuance of the pattern notice based on a mine operator's
2 monitoring of the criteria on the MSHA website. I am
3 comfortable as an employee of a large operator that we
4 can devote the resources to provide in-house monitoring
5 provided that the criteria are known and clear. I am not
6 comfortable with accepting this approach.

7 It is useful to be able to check the status of
8 each operation on the MSHA website, but the failure to
9 promulgate the actual criteria that an operator needs to
10 measure is a continuing problem. It is difficult to
11 reconcile this with the supposed consideration of
12 mitigating criteria provided for in the proposed rule
13 prior to the issuance of the notice. This would subject
14 an operator to the immediate withdrawal orders without
15 any opportunity for discussion of any means to avoid the
16 sanction or curtail its use prior to its application.

17 MSHA should reissue its proposal to include the
18 criteria that will be used in the POV process in one
19 rulemaking and to maintain a period for discussing
20 mitigating circumstances prior to an automatic issuance
21 of a pattern notice. This would be the most efficient
22 and transparent process to employ and would not adversely
23 affect the safety and health of miners. Rather, it would
24 allow for a period to correct any deficiencies before
25 subjecting a mine to this onerous sanction. For example,

1 the current criterion relies on the number of inspection
2 hours, and we believe those hours actually need to be
3 better defined. I believe Chris spoke to that already.
4 Discrepancies have been noted in the current round of POV
5 letters on hours.

6 In similar fashion, S&S rates need to be
7 defined because in the latest round of POV letters, one
8 mine in an improvement plan had to go from a rate of 3.0
9 S&S per 100 hours to 4.88. Yeah, they had to go up.
10 That obviously was an error, but it highlights the need
11 for promulgated criteria. Promulgation of the criteria
12 itself would provide the transparency and simplicity that
13 is consistent with the Agency's and industries' goals.

14 Current 30 C.F.R. 104.3(b) states that only
15 citations, which have become final, shall be used to
16 identify mines with potential Pattern of Violations. The
17 proposed standard change is the approach that has been
18 followed since 1991 to base the pattern notice review on
19 violations issued to make future POV determinations.

20 The use of violations issued to trigger a POV
21 sanction, absent a meaningful opportunity for prior
22 independent review or a hearing is of particular concern,
23 given the deletion in the proposed rule for any prior
24 ruling of an issuance of a pattern notice and the failure
25 to set out the prescribed process to avoid issuance of a

1 pattern notice by establishing a timeframe in which to
2 discuss mitigating factors referenced in the rules.

3 As no described criteria are articulated in the
4 proposal, it is vague and it fails to provide notice to
5 stakeholders how to avoid this notice sanction.

6 Couple this vagary with the absence of any
7 meaningful warning of the notice's impending issuance
8 renders it basically impossible to avoid. Combining
9 these disturbing shortcomings with a pattern notice based
10 on enforcement action issued rather than final orders
11 denies stakeholders of due process and makes the
12 imposition of the pattern notice prone to error resulting
13 in enforcement actions that may well be turned out to be
14 invalid down the road.

15 The standard must provide an avenue for
16 expedited hearings on contested citations that are used
17 by the Agency to list an operation as a Pattern of
18 Violations. Ideally, this expedited hearing would also
19 be coupled with the restart of meaningful management
20 conferences for all operations. It is imperative that
21 operators know that prior to being subjected to the most
22 onerous enforcement tool in the MSHA tool box, they have
23 a right to make their arguments concerning citations that
24 the operator believes has been poorly evaluated.

25 I have carefully tracked the contests of my

1 company's contested citations, and I see the gravity
2 routinely overwritten. I see resolutions where as many
3 as 50 percent of the S&S designations we receive are
4 deleted in litigation or settlement. That does not make
5 one feel comfortable that relying on citations issued is
6 acceptable. We agree with NMA's concerns expressed in
7 their comments on the unreliability of the application of
8 the criteria.

9 According to information released by MSHA's
10 Office of Assessments on January 31, 2011, almost 19
11 percent of the violations issued as Significant and
12 Substantial, which were litigated in fiscal years 2009
13 and 2010 were vacated or modified to non-Significant and
14 Substantial as a result of the litigation process.

15 Similarly, when Section 104(d) violations,
16 which alleged an unwarrantable failure to comply were
17 litigated in the same period, almost 33 percent of those
18 violations were either vacated or modified to Section
19 104(a) violations. Clearly, relying on violations issued
20 to impose the punitive sanction of Section 814(e) of the
21 Mine Act could well result in erroneous application of
22 the pattern enforcement.

23 Further, we believe that any criterion that
24 takes into consideration Section 107(a) orders is
25 inappropriate. First, imminent dangers may not be linked

1 to occurrence of violations. They often result from
2 natural events that cannot be controlled.

3 In addition, the elimination of a process where
4 an operator is given a chance to improve is contrary to
5 any concept of fairness. It renders the POV solely one
6 of punishment, with no opportunity for redemption. No
7 operator who gets the POV will get off in my view, absent
8 closing the mine. That is not what the Agency or the
9 industry or labor should strive for.

10 That was my written comments. I have some
11 extemporaneous comments based on your questions. I want
12 to talk briefly about the mitigation process.

13 My concern there, and I heard what you had to
14 say, Pat, and my concern is this. Until I have clearly
15 adjudicated any violations that are part of getting me to
16 the POV, I shouldn't have to present the mitigation
17 process because mitigation processes by definition -- and
18 I looked at them; you call them the health and safety
19 management. But the ones that I've seen have required
20 the operator to do multiple extra examinations of
21 electrical cables via his chief maintenance foreman, for
22 example. That is in one of the documents I have seen.

23 Those things are burdensome to the operator if
24 he is not, in fact, a pattern potential mine. The only
25 way he'll know that is if his litigation is completed,

1 and if he fails, then his plan needs to go forward. And
2 if he's successful, then, obviously, he should not be
3 subjected to an extra burden of requirements the plans
4 will put on him.

5 We've all talked about this issue, the one-year
6 violation versus final orders. I mean, that's been back
7 and forth and I'm sure every hearing you're going to go
8 to, you're going to debate that. I look at it this way.
9 I'm sort of in the balancing of it. I like the idea of
10 using present day citations, that's what the mine looks
11 like in the last year, you know, versus final orders.
12 I'm dealing in final orders for 2007, 2008, 2009.

13 We may be doing much better now or much worse;
14 we may be shut down. We have mines shut down and we
15 still get a stack of orders, but the ultimate unfairness
16 of using last year's violation records without having a
17 litigation process in place is that it is essentially --
18 we are now essentially writing POV on the actions of a
19 few inspectors.

20 I'll give you an example. A mine had a
21 potential POV letter; they had the 90 days to improve.
22 They were given the opportunity to not necessarily
23 litigate, but to meet with the District Manager on the
24 violations that they believed were improperly written.
25 They were successful to the percentage they dropped off

1 the letter completely. Had that interim step not been
2 done by the District Manager, and it's not in any rule,
3 had that next step of saying I'll meet with you and we'll
4 talk about the paper that you think was improperly
5 issued, had that not been available to that operator,
6 that operation would have probably gone to the next step,
7 which is POV.

8 It's very important that any operator -- if you
9 want to use the latest and newest violations over the
10 last year, which is the way I think the present system is
11 in place, then you have to provide means of adjudication,
12 whether it be management conferences as step one, which I
13 think is the first logical step one, and step two,
14 litigating in front of a judge, get expedited hearings.

15 MSHA has asked that solicitors file for
16 expedited hearings on cases in which they wanted to push
17 POV and was able to get them. Basically, we're unable to
18 get -- we're almost unable to get expedited hearings in
19 today's world. But I believe if you put it into a rule,
20 there would be no -- it would be part of the standard.
21 You're not on POV until you have your hearing on the
22 cases that you contested.

23 Percent of change, you know, the statistics are
24 all over the place. But basically when you litigate --
25 we don't contest all violations. So when you contest

1 them, you like to believe that at least we believe we're
2 right on the majority that we're contesting or else we
3 wouldn't have contested them. You know, let's take that
4 as a given. I know you can argue that point. The data
5 says one out of five S&S violations that are contested
6 and finally reach some settlement are reduced to at least
7 a 104(a) violation and non-S&S. Unwarrantable is 33
8 percent. That's a significant change.

9 Now, when you look at the total violations,
10 obviously, the percentage goes down because we don't
11 contest them. You know, for the 100,000 violations
12 written in the country, 30,000 contested or whatever. So
13 you know -- but when you're running that closely to a
14 pattern in a one-year window in a mine where you can
15 ratchet down the criteria to whatever number we have in
16 the rule, basically whatever number the administrator or
17 the assistant secretary or whoever does that, you know,
18 can ratchet down to whatever number, you want to make
19 sure that at least that operator has the ability to have
20 his day in court. It's only fair. It's only fair.

21 As far as the website tool, I think it's a
22 pretty good tool, Jay. I don't have any real problems
23 with it. We do use it. And I know that you've had, you
24 know, like any other thing, there's, you know, things
25 that will get better on it, but it does offer a tool to

1 look at numbers. And, clearly, that's our goal to deal
2 with the issues before it would get to a POV level. But
3 you know if the violations are being written improperly,
4 we would like to have an opportunity to have a hearing
5 before we ever get there; before we ever get the letter;
6 before we have to go to litigation; before we have to
7 submit a health and safety plan; before we have to do any
8 of the additional above-the-law standards. We want to be
9 able to say we feel that this was a fair adjudication and
10 that takes somebody -- that takes somebody to provide a
11 hearing. That's my extra comments.

12 MODERATOR SILVEY: Okay.

13 I want to just ask you one thing and that is --
14 and for everybody -- obviously, you know that from the
15 proposed rule, we advanced our position somewhat in the
16 Public Hearing Notice with respect to a specific
17 criteria, and that's the only thing I'm talking about.
18 And then the proposed rule, we had that statement, just
19 like you said in there that we were soliciting comment on
20 how we should obtain feedback from, and periodic revision
21 to, a specific criteria.

22 In the Public Hearing Notice, we said, you
23 know, today, if we were to stop things in time today,
24 we've got specific criteria on the website or I can refer
25 to it as the former. Well, what we said in the Public

1 Hearing Notice is that we would -- before we review a
2 mine for a Pattern of Violation and before we make any
3 change to that specific criteria that we used to date,
4 before we make any change to it to review a mine, we
5 would post that criteria, the specific criteria, we would
6 take stakeholder input into it. Then we would respond to
7 stakeholder input.

8 We might use some stakeholder input and revise
9 the specific criteria, but then we would post on the
10 website our response to the stakeholders, as well as any
11 revised specific criteria, we would post that on the
12 website before we would ever use it in the review of a
13 mine for a POV.

14 What's your response to that? How do you see
15 that?

16 MR. GALLICK: Well, I think it gets to the
17 point of posting and letting me know in advance what the
18 criteria are going to be, obviously.

19 MODERATOR SILVEY: And allowing you the
20 opportunity to respond to comments.

21 MR. GALLICK: Right. My view is that my
22 comments and response on most public notices aren't --
23 I'll just say the percentage of our comments on changes
24 and my comments on changes are rarely accepted, so my
25 view is I would rather see it in a more formal

1 rulemaking. I think it leaves the Agency with too much
2 latitude to establish a rule based on -- you know, you
3 can go as paranoid as saying do you find a mine you think
4 ought to be on pattern and make sure the criteria -- pick
5 that up or do you go saying different Agency leaders will
6 have different views of what is important.

7 You know, in previous conversations, we talked
8 about the legislation action on the Hill and, clearly,
9 when you were spending time talking to different
10 legislative people, obviously, some people were very
11 strongly driven towards citations, S&S, and various
12 things. Others were driven more towards acts of
13 prevention, which are accident rates, which are severity
14 rates, that type of thing.

15 I would say that, again, when it's not in a
16 rulemaking, a person who is determining what the criteria
17 are going to be for the next cycles or next whatever,
18 that weight would be if I were sitting in that seat, I
19 would be weighing accident prevention stronger than
20 citable stuff. Take another person, they're going to go
21 in the other direction. You know, so that bothers me.
22 I can throw all the inputs in you want, but if you're
23 predisposed to believe that citations is the driving
24 force, you know, and I've heard people say -- I've heard
25 a lot of reasons why you could argue any of those points.

1 But if I'm predisposed to believe whatever I believe and
2 I am predisposed to believe what I believe, therefore I
3 would then say, no, I think I will stick with what I
4 believe. Whereas if it's a rulemaking, it is what it is.

5 MR. MATTOS: Just one comment on that as part
6 of this rule. We really have to pay attention to the
7 Mine Act, as a pattern of S&S violations, so we really
8 have to keep that the core of what we're doing under the
9 current Mine Act. That's just a comment.

10 But, John, you mentioned the example of the one
11 mine where S&S during the last go-round where it actually
12 could have gone up, and it would not have been a Pattern
13 of Violation. And if I recall, that operation had some
14 unwarrantable failure citations or as it became final,
15 that's how they got on the list. And --

16 MR. GALLICK: Fortunately, it was not mine.

17 MR. MATTOS: No, it was not yours.

18 But the reason I bring that up is this is the
19 second go-round with the formula of criteria that we are
20 using for patterns of violations. And in each, there
21 arguably have been pluses and minuses, a couple of
22 minuses each time.

23 The example that mine shows, okay, the current
24 criteria probably needed some kind of loophole plugged in
25 that criteria. So if we get another set of criteria and

1 we come out with them; we put them in a rule; we go and
2 we have another one of these operations where we need to
3 tweak this thing, we'll all be sitting here again, but
4 we'll be required to use that criteria.

5 So how would we get around that? That's my
6 question. It's a long-winded question.

7 MR. GALLICK: It's a legitimate question. I'm
8 not sure how you get around it. But it seems to me that
9 there's no question rulemaking is slow, but because it is
10 a slow process, it gives people opportunity to think
11 about it and work on it.

12 And I look back -- when you asked the question,
13 Pat, the only similar action -- and I can remember, would
14 not be proposed in the proposed rule was when we were all
15 given the opportunity for your policy on tracking and
16 communications, and we all had only a short period of
17 time to write a bunch of comments. And I can remember
18 putting pages and pages of comments on what I would
19 change. I also remembered none of them were accepted,
20 but it was clear to me that the assistant secretary or
21 whomever had his -- just like I would've had -- had his
22 goal in mind of what he thought was needed and that's
23 what we got.

24 There wasn't an ability to sit down in a
25 roundtable discussion even and maybe when you make your

1 stakeholder thing, it can't be as antiseptic as written
2 comments back and forth, maybe you need to say some type
3 of roundtable. I don't know what the answer would be
4 either, but some way of getting that give-and-take.
5 That's why I don't think that makes sense.

6 I would've liked to have thought that if we had
7 that type of thing on tracking communications, we would
8 have worked the section issues out more logically, but it
9 was like we wrote comments and we got on some date,
10 here's the final proposal. That's my concern about what
11 you said. You've got to have that back and forth give-
12 and-take.

13 MODERATOR SILVEY: I hear you and I appreciate
14 that and that, obviously, communication and tracking is
15 not --

16 MR. GALLICK: No, no. I use that as an example
17 of the only one I remembered us doing that.

18 MODERATOR SILVEY: That's illustrative. I will
19 add since we're talking about it, the only problem with
20 that, not in defense of MSHA is that we were up against a
21 Congressional mandate with a timetable. I mean, we all
22 know that. Sometimes when you don't have the most
23 optimum circumstance, then you would sort of push to do
24 things that under other circumstances, you might engage
25 in another process. I appreciate what you're saying.

1 MR. GALLICK: Right. All I'm saying is I think
2 you have to have that give-and-take, number one. Number
3 two, recognize that, unfortunately, this could be the
4 same kind of pressure if we unfortunately have something
5 go wrong in the industry and the political pressure,
6 Congressional pressures, has all that happening.

7 MODERATOR SILVEY: Okay. Thank you.

8 MR. GALLICK: Thank you.

9 MODERATOR SILVEY: Anybody else? Yes?

10 MR. MURRAY: Kenny Murray from Alliance Coal.

11 Just to -- not to beat a dead horse, but for
12 kind of a point of clarification on Mr. Hamilton's
13 remarks on supervisory time --

14 MODERATOR SILVEY: Are you his --

15 MR. MURRAY: I'm his follower.

16 MODERATOR SILVEY: I'm just -- go on.

17 MR. MURRAY: We've been talking about this for
18 a long time. And as you well know, the expectations of
19 the MSHA top staff have indicated that the supervisors
20 should spend more time. As a matter of fact, they're
21 mandated to spend time, more time, frequently underground
22 and onsite. And we felt that whether they're there for
23 field reviews or conducting inspections, that Section 104
24 doesn't distinguish between administrative time, that
25 they have a clear obligation under 104 to issue a

1 citation if they're observed by -- I'm not talking -- any
2 card carrying representative has that obligation under
3 the Mine Act, therefore, his time should be counted.

4 You know, if he's there as a mentor, it
5 actually increases the amount of citations that get
6 written. I mean, maybe it's subconsciously or human
7 nature, but we think that it has an impact on total
8 inspector hours, and we think that's consistent with
9 104(a) of the Mine Act.

10 Thanks for the clarification, Mr. Mattos. The
11 other thing, the web tool that you talked about, it's
12 excellent.

13 MODERATOR SILVEY: You got one good review.

14 MR. MURRAY: As a matter of fact, internally,
15 we have our IT folks monthly, it comes out about the 15th
16 or 16th, it updates them for the previous month. They're
17 charged with graphically illustrating for each operation
18 and sending that to the responsible party. So we do use
19 it and we thank you for hearing our expressions.

20 MODERATOR SILVEY: And you use it as a
21 proactive tool?

22 MR. MURRAY: That's correct.

23 MODERATOR SILVEY: To be preventive.

24 MR. MURRAY: Yeah. We don't wait for the end
25 of the year or the end of the quarter. On the 16th, we're

1 vigilant on what happened the previous month, so thanks
2 for that.

3 MR. MATTOS: And that 25 percent reduction in
4 assessments for that remark will be --

5 MR. MURRAY: But we appreciate that and we
6 recognize your efforts on that.

7 MR. MATTOS: Thanks.

8 MODERATOR SILVEY: Okay. Thank you.

9 Anybody else? Anybody else?

10 (No response.)

11 MODERATOR SILVEY: Well, if nobody else wishes
12 to present testimony, then I will bring this hearing to a
13 close.

14 Before I do, I want to again say that we at the
15 Mine Safety and Health Administration appreciate your
16 participation in this public hearing.

17 Again, I want to thank everybody who made
18 presentations, but I also want to thank the people who
19 attended the hearing and did not make a presentation. We
20 appreciate that because that shows us you're interested
21 in the rulemaking.

22 All comments, as we stated earlier, are due by
23 June 30th, 2011. MSHA will take your -- I ask again that
24 if at all possible, please be specific in any
25 alternatives that you might recommend to the Pattern of

1 Violations proposed rule. MSHA will take your comments
2 and your concerns into consideration and develop a final
3 ruling.

4 We encourage you to participate and continue
5 participation in this rulemaking and the examinations of
6 work areas rulemaking, and in any future MSHA rulemaking.

7 At this point, this public hearing is
8 concluded. Thank you very much.

9 (Whereupon, at 12:58 p.m., the hearing in
10 the above-entitled matter was concluded.)

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REPORTER'S CERTIFICATE

CASE TITLE: Patterns of Violations
HEARING DATE: June 7, 2011
LOCATION: Charleston, West Virginia

I hereby certify that the proceedings and evidence are contained fully and accurately on the audio and notes reported by me at the hearing in the above case before the Department of Labor, Mine Safety & Health Administration.

Date: June 7, 2011

ANTHONY & ASSOCIATES, INC.


DENYS SNODGRASS
(Official Reporter)