

TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
PATTERN OF VIOLATIONS)

Pages: 1 through 57
Place: Birmingham, Alabama
Date: June 9, 2011

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IN THE MINE SAFETY AND HEALTH ADMINISTRATION

IN THE MATTER OF:)
)
PATTERN OF VIOLATIONS)

Birmingham, Alabama

Thursday
June 9, 2011

APPEARANCES

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

Speakers:

TRUMAN CHIDSEY, Director of Corporate Safety
Services, Vulcan Materials Company
RICK STEISKAL, National Aggregates USA, National
Stone, Sand & Gravel Association
MARK ESLINGER, General Safety Manager Five Star
Mining, Inc./Black Panther Mining, LLC
THOMAS WILSON, UMWA, International Health &
Safety Representative
JAMES BLANKENSHIP, UMWA, Local 2245 President,
Walter Energy Number 4 Mines of Brookwood, Alabama

P R O C E E D I N G S

(12:30 p.m.)

1
2
3 MODERATOR SILVEY: Good afternoon. My name is
4 Patricia Silvey, and I'm the Deputy Assistant Secretary
5 for Operations for the Mine Safety and Health
6 Administration.

7 I will be the moderator of this public hearing
8 on MSHA's proposed rule for Pattern of Violations.

9 On behalf of Assistant Secretary Joseph A.
10 Main, I would like to welcome all of you here today. I
11 would like to introduce members of the MSHA panel. To my
12 left, Jay Mattos, who is Chair of the Pattern Rulemaking
13 Committee; to my right, Cherie Hutchison, who is with
14 MSHA Standards Office; and to her right, Anthony Jones,
15 with the Department of Labor, Office of the Solicitor.

16 In response to requests from the public, MSHA
17 is holding public hearings on its Pattern of Violations
18 proposed rule. This is the third of four public hearings
19 on the proposal. The first hearing was in Denver,
20 Colorado on June 2nd; the second in Charleston, West
21 Virginia on June 7th; and the next hearing will be in
22 Arlington, Virginia on June 15th.

23 The Pattern of Violations proposal applies to
24 all mines, coal and metal and nonmetal, surface and
25 underground.

1 The purpose of this hearing is to receive
2 information from the public that would help MSHA evaluate
3 the requirements in the proposal and produce a final rule
4 that will improve safety and health conditions in mines.

5 As many of you know, the hearings will be
6 conducted in an informal manner. Formal Rules of
7 Evidence will not apply. The hearing panel may ask
8 questions of speakers, and speakers may ask questions of
9 the panel. Speakers and other attendees may present
10 information to the court reporter for inclusion in the
11 rulemaking record.

12 The post hearing comment period for this
13 proposed rule ends on June 30th. MSHA must receive your
14 comments by midnight, Eastern Daylight Savings Time, on
15 that date.

16 We ask that everyone in attendance sign on the
17 attendance sheet, and I think that everybody probably has
18 done that.

19 If you have a hard copy or a electronic version
20 of your presentation, please provide the court reporter
21 with a copy.

22 MSHA is proposing to revise the Agency's
23 existing regulation for Pattern of Violations. MSHA
24 determined that the existing Pattern of Violations
25 regulation does not adequately achieve the intent of the

1 Federal Mine Safety and Health Act of 1977, or the Mine
2 Act. Congress included the provision in the Mine Act so
3 that operators would manage safety and health conditions
4 at mines and find and fix the root causes of "Significant
5 and Substantial," or S&S, violations to protect the
6 safety and health of miners. Congress intended that MSHA
7 use the Pattern of Violations provision to address
8 operators who have demonstrated a disregard for the
9 safety and health of miners.

10 MSHA intended that the proposal would simplify
11 the existing Pattern of Violations criteria, improve
12 consistency in applying the pattern criteria, and more
13 adequately achieve the statutory intent. The proposal
14 would also encourage chronic violators to comply with the
15 Mine Act and MSHA's safety and health standards.

16 MSHA has requested comments from the mining
17 community on all aspects of the proposed rule and is
18 particularly interested in comments that are addressing
19 alternatives to key provisions in the proposal. The
20 Preamble discusses the provisions in the proposal and
21 includes a number of specific requests for comment and
22 information. MSHA asks that commenters be specific in
23 their comments and submit detailed rationale and
24 supporting documentation for suggested alternatives.

25 The proposed rule would include general

1 criteria and would provide that the specific criteria
2 used in the review to identify mines with a pattern of
3 S&S violations would be posted on MSHA's web site.

4 In the Preamble to the proposal, MSHA requested
5 suggestions on how the Agency should obtain comments from
6 mine operators and miners during the development of and
7 periodic revision to the specific POV criteria.

8 MSHA also requested comments on the best
9 methods for notifying mine operators and the mining
10 public of changes to these specific criteria. In the
11 public hearing notice, MSHA clarified its proposal and
12 stated that any change to the specific criteria would be
13 made available to the public for comment via posting on
14 the Agency's web site before MSHA uses it to review a
15 mine for a Pattern of Violations. MSHA would then review
16 and respond to comments, revise, if appropriate, the
17 specific criteria, and post the Agency's response and
18 enter revised specific criteria on the Agency's web site.

19 MSHA requests comments on this proposed
20 approach to obtaining public input into revisions to the
21 specific criteria -- to the specific Pattern of
22 Violations criteria. As -- MSHA also requested comments
23 on the burden that monitoring a mine's compliance record
24 against the proposed POV specific criteria using the
25 Agency's web site would place on mine operators.

1 As many of you know, MSHA has developed a web
2 tool to make it easier for mine operators to monitor
3 their compliance. In the interest of transparency, MSHA
4 developed this web tool whereby mine operators could just
5 put in -- or anybody, for that matter, any member of the
6 public could put in a mine ID number and then the
7 information would be populated on that mine to show a
8 mine how close it was coming to approaching the Pattern
9 of Violations specific criteria.

10 MSHA asks that commenters give us their
11 reaction to the web tool and include detailed rationale
12 and supporting documentation for any comments or
13 suggested alternatives.

14 Under the proposal, to be considered as a
15 mitigating circumstance, the proposal would provide that
16 an operator may submit a written safety and health
17 management program to the District Manager for approval.
18 MSHA would review the program to determine whether the
19 program's parameters would result in meaningful,
20 measurable, and significant reductions in S&S violations.

21 MSHA would like to clarify that the Agency did
22 not intend that the Safety and Health Management Program
23 referenced in this proposal be the same as that
24 referenced in the Agency's rulemaking on comprehensive
25 safety and health management program. I think that some

1 members of the public have gotten that confused, but
2 those are two different safety and health management
3 programs.

4 The safety and health management program under
5 this proposal would be one that would be applicable to
6 the significant and substantial violations that a mine
7 would be experiencing at that particular mine. And to be
8 considered a mitigating circumstance, that safety and
9 health management proposal would have to include
10 measurable benchmarks for abating the specific violation
11 that could lead to a Pattern of Violations, and it would
12 also address specific conditions at that mine.

13 MSHA requested detailed information and data on
14 the cost benefits and feasibility of implementing the
15 proposed provision. As you address the proposed
16 provision, either in your testimony today or in written
17 comments, please be as specific as possible as how these
18 changes would affect the safety and health of miners. If
19 you have specific alternatives, provide your rationale.

20 MSHA will make available a transcript of each
21 public hearing approximately two weeks after completion
22 of the hearing. You may review the transcripts on
23 www.regulation.gov and on MSHA's web site.

24 We will now begin the testimony. Please begin
25 clearly by stating your name and organization and

1 spelling your name for the court reporter so that we may
2 have an accurate record.

3 Our first speaker today is Truman Chidsey with
4 Vulcan Materials.

5 MR. CHIDSEY: Good morning.

6 MODERATOR SILVEY: Good morning.

7 MR. CHIDSEY: Let me apologize in advance.

8 I've been fighting a persistent cough; and, hopefully, I
9 can get through this without interruption.

10 My name is Truman Chidsey. It's T-R-U-M-A-N,
11 C-H-I-D-S-E-Y. And I'm the Director of Corporate Safety
12 Services for Vulcan Materials Company. I appreciate the
13 opportunity to provide comments concerning the proposed
14 rule on the Pattern of Violations.

15 Vulcan Materials, based here in Birmingham,
16 Alabama, is the nation's largest producer of construction
17 aggregates, a major producer of other construction
18 materials, including asphalt and ready-mix concrete, and
19 a leading producer of cement in Florida.

20 Vulcan currently operates 255 active MSHA-
21 regulated facilities across the country. Although Vulcan
22 fully supports the position that operators who repeatedly
23 violate mandatory safety and health standards should face
24 appropriate sanctions, MSHA's proposed rules contain
25 modifications to the existing regulations, which we find

1 objectionable.

2 MSHA has done a commendable job of creating a
3 POV single-source page on its web site, whereby an
4 operator can view the current potential POV criteria, as
5 well as view an evaluation of the mine's potential of
6 being considered for a potential POV. However, Vulcan
7 believes that the specific POV criteria to be used for
8 selecting operators for POV should be detailed in the
9 proposal itself. These criteria are not simply guidance,
10 but are intended to be binding criteria that will
11 determine whether mines are subject to substantially
12 increased enforcement.

13 It is essential that the criteria not be a
14 moving target, especially if the operators are expected
15 to monitor their own performance to avoid POV status.
16 Vulcan does not support the proposed rule in which the
17 current provision allowing for potential POV notification
18 of a facility has been deleted. This notification allows
19 an opportunity for remedial steps to be taken, as well as
20 an opportunity for the operator to meet with a District
21 Manager to review the basis for a potential POV
22 designation.

23 If there are inaccuracies, irreparable harm can
24 come to operators erroneously placed into a pattern when
25 their operation's citation history doesn't warrant it.

1 As MSHA notes, Congress intended for the POV program to
2 apply to mine operators with a record of repeated S&S
3 violations who have not responded to the Agency's other
4 enforcement efforts. Vulcan is concerned that the
5 proposed rule does not adequately reflect the legislative
6 intent that POV is intended for circumstances of repeated
7 violations by unresponsive operators, rather MSHA's
8 criteria based on multiple violations. Thus, under the
9 current proposal, a facility can be placed in potential
10 POV status as a result of a single inspection with
11 multiple citations or as a result of one or two
12 inspections with few citations followed by one with a
13 large number of citations. However, a facility is not
14 currently placed into full POV status unless it fails to
15 improve its performance over a period of time.

16 If there is to be no official potential POV
17 status under the proposed rule, the problem is that it
18 may be difficult, if not impossible, for a mine operator
19 to determine if a facility is threatened with POV status.
20 This is clearly not the Congressional intent of the POV,
21 and a revision of the rule should squarely address this
22 problem.

23 The most objectionable aspect of the proposed
24 rule is the elimination of existing requirements that
25 only citations and orders that have been become final are

1 to be used to identify mines with potential POV. Vulcan
2 understands MSHA's preference to base POV status on
3 citations and orders issued as opposed to final orders
4 because there can be a substantial delay in the final
5 determination of a citation or a challenge by an
6 operator. This delay hampers MSHA's ability to use POV
7 as a timely tool to address current problems.

8 However, it is essential to note that if
9 actions are to be based upon nonfinal orders, they may
10 not be punitive in nature without violating the
11 operator's due process rights. The 14th Amendment
12 prohibits the Federal Government from depriving citizens
13 of liberty or property without the due process of law.
14 This means that actions that are punitive cannot be taken
15 without appropriate access to review. But in seeking to
16 strengthen the justification to eliminate final orders,
17 MSHA cites statistical evidence that fewer than 1 percent
18 of citations are reversed based on 700,000 citations
19 issued from 2006 to 2010.

20 What MSHA does not provide, however, is the
21 percentage of contested citations that are vacated or
22 modified. The number of citations that are vacated or
23 modified as a percentage of the total number of
24 violations assessed has much less relevance to this
25 process than the number of those that are reversed or

1 modified as a percentage of the number contested. MSHA
2 further neglects to take into account the number of
3 citations that are threatened and/or issued only to be
4 informally vacated or otherwise dismissed at the MSHA
5 field office level, which is a regular occurrence
6 throughout MSHA regions.

7 While there is substantial evidence that MSHA
8 is not always correct in their interpretation of
9 regulations, MSHA wishes to change the regulations in
10 such a way that does, in fact, assume that all citations
11 are correctly issued. The potential for mine operators
12 to be placed on a Pattern of Violations based on
13 citations that may be vacated or modified at a later date
14 should cause any reasonably prudent person to conclude
15 that this change to an existing regulation is unjustified
16 and unreasonable.

17 In summary, while Vulcan Materials Company
18 fully supports all efforts to improve the safety and
19 health of miners in this country, we feel that MSHA
20 already has the necessary tools at its disposal to
21 identify operators with a Pattern of Violations and to
22 address a pattern with appropriate enforcement action.
23 The proposed rule will only increase the potential for a
24 mine to be placed on a Pattern of Violations without
25 sufficient justification for doing so, rather than

1 improving the safety and health of our miners.

2 Thank you for an opportunity to provide
3 comments on this proposed rule.

4 MODERATOR SILVEY: Thank you. I have a few --
5 one -- a few questions and then maybe a comment or two.

6 With respect to the use of the single source,
7 you mentioned in your comments, the single-source page.
8 Have you used the web tool?

9 MR. CHIDSEY: I have.

10 MODERATOR SILVEY: You have?

11 MR. CHIDSEY: I found it very useful, and I
12 think it's a good tool.

13 MODERATOR SILVEY: So -- and now with respect
14 to what we said in the Public Hearing Notice, as well as
15 what I stated in my opening statement -- and I stated
16 that MSHA had re -- refined it -- excuse me -- its
17 position and that, as you know now, we have specific
18 criteria in the form of a formula on the web site. And
19 that formula is then what becomes populated into one of
20 your mines if you -- if ya'll put in this identification
21 number.

22 But in the opening -- in the Public Hearing
23 Notice and the opening statement, we stated that before
24 we change that specific criteria and use that changed
25 criteria to review a mine for a Pattern of Violations,

1 that we would make it available to the public for
2 comment. We would then review the comments, give a
3 certain period of time for comments, and we would make it
4 available on our web site. We would then, as I said,
5 give a certain amount of time for comment. We would --
6 we would then review the comments, and we would next put
7 on the web site our response to the comments. And if we
8 made any revisions to the specific criteria, we would put
9 the revised criteria on the web site. What -- what is
10 your reaction to that process?

11 MR. CHIDSEY: As stated earlier, I feel that
12 that specific criteria should be put into the proposal
13 itself.

14 MODERATOR SILVEY: And somewhere in your
15 testimony, you also stated that the -- when talking about
16 the deletion of the potential Pattern of Violations, that
17 mine operators should have the opportunity to get with
18 the District Manager and review any inaccuracies in the
19 data or something like that.

20 One of the things that we were seeking to do in
21 the proposal is that -- and, hopefully, the web tool
22 would allow operators to know if they were approaching a
23 Pattern of Violations. And they could come into the
24 Agency with a -- a safety and health program as a
25 mitigating circumstance. They could develop a

1 comprehensive -- a safety and health program. And they
2 could come in to the District Manager with that safety
3 and health program aimed at whatever the conditions were
4 that would lead -- giving rise to the pattern. And the
5 District Manager would review that, and then they would -
6 - the operator would implement it, and hopefully -- in an
7 optimum situation, the conditions giving rise to the
8 pattern would be reduced through that, through that
9 safety and health program.

10 And, in fact, we are operating under that kind
11 of concept right now through corrective action plans.
12 The operators -- a number of operators have been
13 identified for a potential Pattern of Violations and have
14 subsequently submitted corrective action plans -- I guess
15 they're called "corrective action plans." And then
16 they've made tremendous improvements. I mean, Jay has
17 the specific numbers on that. But I think, generally
18 speaking, that process has worked.

19 MR. CHIDSEY: Maybe I misunderstood the
20 proposal. My understanding was that that potential POV
21 status and notification was going away.

22 MODERATOR SILVEY: The potential POV is going
23 away. But I am just suggesting to you that the proposal
24 does contain an opportunity for an operator to have a
25 remedial process. That's my only -- that's what I'm

1 saying.

2 Under the mitigating circumstance provision,
3 that does -- that does contain the concept of the
4 operator having an opportunity to remediate himself or
5 herself. That's what I was suggesting. And I think
6 under the -- it's the same concept under the existing
7 process, and I think it's working now.

8 The only other comment I have is that you -- in
9 your -- on page 2 of your comment, you say: "MSHA
10 further neglects to take into account the number of
11 citations that are threatened and are issued only to be
12 informally vacated."

13 Can you explain to me exactly what you mean by
14 "threatened and are issued only to be informally vacated
15 or otherwise dismissed?" I mean, give me an example.

16 MR. CHIDSEY: Well, there's just a number of
17 times when an inspector makes the verbal comment that
18 he's going to write that as a citation. We -- you know,
19 we get involved and contact the Field Office Supervisor
20 or the District Manager and explain the situation and --
21 and the inspector has communications with that -- with
22 those folks and does not end up writing a citation.

23 MODERATOR SILVEY: Okay.

24 Actually, the citation is never written in that
25 situation, right?

1 MR. CHIDSEY: That's correct. Sometimes they
2 are written and that same process occurs and it's vacated
3 without going through the formal process.

4 MODERATOR SILVEY: But I guess I was -- by
5 looking at this, I was sort of -- figured if you said
6 "threatened," that a citation was never issued in that
7 situation.

8 MR. CHIDSEY: Well, I think -- you know,
9 "threatened" is a -- is a proper term.

10 MODERATOR SILVEY: Well, it may be a proper
11 term. It may be factually what happened. I guess my --
12 the only point I'm making is that under that situation,
13 the citation would never be taken into consideration for
14 a pattern because the citation would never -- that's my
15 point.

16 MR. CHIDSEY: I understand your point.

17 MODERATOR SILVEY: Okay. Thank you. Okay.
18 Thank you.

19 MR. CHIDSEY: Thank you.

20 MODERATOR SILVEY: The next speaker is Rick
21 Steiskal. Yeah, I was going to say Hendrix. Excuse me.

22 But you have to spell your name for the -- with
23 the National Aggregates USA and the National Stone, Sand
24 and Gravel Association. Thank you.

25 MR. STEISKAL: Good afternoon, everybody. My

1 name is Rick Steiskal. It's R-I-C-K, last name is S-T-E-
2 I-S-K-A-L.

3 Welcome to the Southeast. I hope it's hot
4 enough for you folks.

5 MODERATOR SILVEY: It's the same in Washington.

6 MR. STEISKAL: All right. Well, it's what we
7 deal with this time of the year.

8 MODERATOR SILVEY: Right.

9 MR. STEISKAL: I'd like to take a moment to
10 discuss the current Pattern of Violations program. I
11 have to give you some of my background so that you better
12 understand where my comments are coming from.

13 I'm an EH&S manager for Aggregates USA in the
14 Georgia division. I oversee the activities of three
15 quarries and approximately 140 employees. So we're not a
16 very large producer when it comes to nationwide. But
17 Aggregates USA won the Sterling Award in 2011 as the
18 NSSGA member with the lowest total incidence rate for the
19 previous calendar year in the large producer category.
20 We're very proud of that fact, and we take safety as a
21 top priority.

22 One of our quarries takes approximately seven
23 to ten days to complete for an inspection, when the
24 others take approximately two, if only a single inspector
25 shows up. So that lets you understand how long we do

1 spend with an MSHA inspector at our quarries a couple of
2 times a year.

3 The current pattern criteria: (1) is 50 S&S
4 citations in a 12-month period; (2) 25 percent of issued
5 S&S citations are either high or reckless disregard;
6 (3) goes over elevated citations; and (4) its injury
7 severity rate is much greater than industry average.
8 Those criteria to me are unbelievable. One percent of
9 mines fell into the original POV criteria? Was it
10 designed to catch anyone? With those being used to catch
11 America's worst mining facilities, I can't comprehend
12 what they must have been like to work in.

13 First, I applaud the Agency for wanting to
14 amend this regulation, because, as I have stated, the
15 above criteria is absurd. However, I warn you with the
16 current proposal, I do not believe that this is the best
17 path forward.

18 I believe the greatest fault with the new
19 version of POV is the fact that operators have not been
20 provided with enough information about the criteria to
21 properly assess the new rule. As everyone involved
22 knows, the most important aspect of the POV program is
23 being able to understand whether a Pattern of Violation
24 even exists.

25 MSHA has asked operators to comment on a

1 program that is not fully developed or, if it is, then
2 all the criteria have not been made available to the
3 public. I must admit that it is impractical, if not
4 impossible, for us to comment on such a vague proposal.
5 MSHA must act responsibly and repropose this rule and
6 include the criteria it proposes to use in determining --
7 to use in determining if the Pattern of Violation exists.

8 Once this is done, the affected parties will be
9 able to give much better criticism and analysis of how
10 this proposed rule may affect us. First, MSHA must
11 remove the provision in the proposed rule where POV
12 status would be based on issued citations rather than
13 final orders. Does the Department of Labor or Assistant
14 Secretary really believe that the intent of the Mine Act
15 should outweigh the intent of the Constitution?

16 Since this proposal removes the protections
17 guaranteed by due process, there's no guarantee that a
18 mine operator would not be unjustifiably -- would not
19 unjustifiably suffer from punitive sanctions for Pattern
20 of Violations status. Citations must be able to
21 withstand the critical review in either a hearing or
22 alternative measures deemed suitable by the Secretary
23 before they can be used fully against the operator.

24 According to MSHA's web page, approximately 25
25 percent of all citations written from January 2008 to

1 December 2010 have been contested. I realize some of
2 these are probably frivolously contested. But
3 nonetheless, MSHA inspectors do make mistakes; computers
4 make mistakes; databases are fed bad data' and mistakes
5 have already been made in alerting an operator to
6 potential Pattern of Violations status. With these facts
7 at hand, how can MSHA propose to remove an operator's
8 only available safeguard in this area? If a mine is put
9 on POV status and it is not warranted, then the operator
10 may be irreparably damaged.

11 With many of today's mining companies being
12 public companies, potential damage increases
13 exponentially to those affected operators. If this
14 situation were to actually play out, MSHA being a
15 Government entity can slip out the back door while a
16 wronged company is trying to retain people, fix its
17 reputation and its stock price while it's being beat
18 about the head and neck by the press. MSHA needs to
19 explain how vacated citations and orders will affect
20 pattern of violation status. Operators have not -- MSHA
21 has not properly clarified in the proposal how it will
22 deal with the situation where issued citations and orders
23 that are part of the those that cause the POV status are
24 vacated while an operator is still under pattern of
25 violation status.

1 There must be a procedure implemented that will
2 cause a review of the outstanding citations and orders
3 that are vacated by the Agency in settlement or
4 litigation, and they may remove the operator if they no
5 longer meet POV criteria.

6 As the proposed rule is currently written, it
7 is unclear, confusing, and allows the Agency too much
8 discretion in determining POV status. The only thing
9 consistent with MSHA is their inconsistency. It is this
10 inconsistency that makes this proposal based on citations
11 issued versus final orders a very dangerous proposal for
12 all mine operators.

13 The proposed rule is seven items that would be
14 taken into account for determining the criteria for POV.
15 The problem is that we've been asked to provide comments
16 on the proposed rule without being privy to the fully
17 developed criteria. I understand they will be numerical
18 when they are developed. The proposed rule also states
19 an eighth factor called "mitigating circumstances." This
20 deals with safety and health management programs.

21 MSHA has not made clear how it intends two
22 rule-makings to perverse, so it is difficult to
23 understand how this piece of the puzzle will be used
24 against operators -- will be used by or against
25 operators. Sorry about that.

1 Under the same factor, MSHA also must define
2 "effective implementation." How would MSHA improve the
3 management program and how would this program affect
4 pattern of violation status?

5 Things that I need -- I believe must be
6 considered before POV can be changed: Inspectors. In my
7 very short time in the mining industry, I've run into
8 some gems. MSHA is hiring inspectors from all walks of
9 life, many with little to no practical mining experience.
10 I realize I am above-ground aggregates, so we probably do
11 not see the most qualified or educated inspectors. Those
12 are probably reserved for underground coal anyway. Many
13 of the inspectors that we see every six months have a
14 teaching degree, Coast Guard experience, or are an ex-
15 police officer. I understand that they are trained for
16 six weeks at the mine academy and also spent time in
17 training with another inspector before their AR card is
18 issued.

19 However, just a year ago, the Inspector General
20 found that 56 percent of journeymen inspectors had not
21 completed annual refresher training. I submit there is
22 too much at stake for operators to allow every sheet of
23 paper written by some of these inspectors to be treated
24 as if it were gospel. POV is based on issued S&S
25 citations. I've read that MSHA is working to change the

1 definition of S&S because it is too narrow. How can MSHA
2 expect operators to provide substantial comments on a
3 proposed rule when the criteria provided is not only
4 vague, but the very tool you plan to use to assign POV
5 status to operators may be amended in the future? Does
6 MSHA's reasoning for citations issued versus final --
7 final orders stem from the Agency's repeated complaints
8 about backlog in cases? Is this the justification for
9 violating the due process for every citizen? Having
10 one's day in court is the foundation of the 4th and 15th
11 Amendments and a cornerstone to our freedom and greatness
12 as a country.

13 I thank you for your time, your consideration,
14 and your continued to work -- and your continued work to
15 keep America's mines the safest in the world.

16 MODERATOR SILVEY: Thank you. I have a few
17 comments.

18 First of all, let me start from the last thing
19 first. And I -- and I -- and maybe I'm not doing a very
20 good job. But the safety and health management program
21 that's referenced in this proposal has nothing to do with
22 the safety and health management system rulemaking on
23 which we had public meetings last year. The two -- and
24 maybe we need to think about coming up with a different
25 term now. But the two are totally unrelated.

1 And some -- at one of the other hearings,
2 someone referred to it as a rulemaker and they referred
3 to it as a proposal. It hadn't even reached the proposed
4 rule stage, by the way, because all we did was have -- we
5 did what, in fact, the President is encouraging and what
6 the mining public says to us all the time, which is get
7 early public input into rulemaking before you first --
8 put the first pen to paper. And that's what we sought to
9 do with that safety and health management system
10 rulemaking. But that's a separate entity, as I said.
11 Don't relate it to this one. It's unrelated.

12 And, now, the more I -- I'm sitting here now
13 just thinking extemporaneously -- and you know what they
14 say, maybe that's not the best thing to do. I'm thinking
15 out loud. But we -- we may need to come up with a
16 different terminology for it.

17 Under the current pattern process, we use
18 "Corrective Action Plan." That's really all it's meant
19 to be. And it's a -- it would be a program developed by
20 the mine operator to address the specific items at that
21 mine that could lead to a Pattern of Violations, you
22 know, at a -- at an underground mine -- at an underground
23 coal mine; it might be ventilation issues or roof control
24 issues and nothing -- and nothing else. At a surface
25 aggregate mine, it might be haulage accidents or

1 something else. So that's what that program was meant to
2 be.

3 You know, an operator could use the web tool,
4 could see that he was approaching a Pattern of Violations
5 -- he or she was approaching a Pattern of Violations. It
6 might be within a range of 10 percent; and if I get 10
7 percent more violations in either particular category,
8 then I'm going to be over the threshold for Pattern of
9 Violations and -- and come up with a program as to how I
10 could reduce these. That was -- that is the intent of
11 that.

12 Now, I want to go back to your comment now on
13 the specific criteria because, obviously, we've heard a
14 lot of comment on that. The specific criteria that we
15 are using today, that criteria on the web site, everybody
16 is -- when people say we have no -- we don't know what it
17 is; it's on the web site. I probably cannot recite all
18 of it to you right now, but it's so many S&S violations -
19 - is it percentage or a number?

20 MR. MATTOS: It's a rate of the industry
21 average.

22 MR. STEISKAL: Yeah, the current is 50 in a 12-
23 month period.

24 MODERATOR SILVEY: Okay. So, anyway, that
25 criteria are on the web site.

1 As I advanced the proposal this morning, what I
2 did say to everybody is that before we -- if we were to
3 make any revisions to that criteria, which is up there
4 today, before we did that, we would make the -- the
5 revised specific criteria available to the public on our
6 web site, take comments from the public, and then if
7 we -- and put your -- put our response to your comments
8 on the web site. And if we were to revise that criteria,
9 we would post the revised criteria.

10 So, you know -- so in terms of listening to
11 people saying they don't know what it is, that's one
12 thing to say you don't know what it is. But it is up
13 there, the criteria. And it will be up on the web site,
14 so you will know what it is. Saying that now -- I will
15 say to you, saying that you want it into the proposal,
16 that's a different issue. And I understand that.

17 So I -- but I'm -- I'm just trying to make it
18 clear so that everybody understands where the proposal
19 is. And that's all -- I don't have any questions per se.
20 Those were comments.

21 MR. STEISKAL: So if I may --

22 MODERATOR SILVEY: Yes?

23 MR. STEISKAL: -- the criteria is currently
24 found under 104(3), I believe it is, where there's 4 and
25 then "or the hundred per 12 months or the" -- I don't

1 know what the other -- injury severity measured greater
2 than, those six things are remaining the same, those six
3 criteria under the -- I think it was written in 1990.

4 MODERATOR SILVEY: Well, just go on.

5 MR. MATTOS: Those criteria actually were used
6 -- that set that is currently out there was used for the
7 first time in 2010, last year, last screening.

8 MR. STEISKAL: Okay.

9 MR. MATTOS: We had a slightly different set of
10 criteria that we used between 2007 and 2009. And
11 probably need to clarify, too, the -- in the proposal --
12 what we did in the Preamble here, note that Congress
13 provided the Secretary with broad discretion in
14 establishing pattern criteria, recognizing that MSHA may
15 need to modify the criteria as experience dictates.

16 And our intent in coming up with this -- the
17 proposal to, in effect, notice and comment on the
18 criteria whenever we think it needs to be -- those
19 criteria need to be revised with our web establishing a
20 methodology by which we could revise these things as the
21 things changed. All kinds of things can change.

22 They need to be -- the criteria will need to be
23 tweaked every now and then. If we have to go pull the
24 notice and comment and rulemaking every time we need to
25 make a minor modification to those criteria, we could

1 have criteria that really are not working for us now, but
2 we're bound by regulation to use them every -- twice a
3 year, even though we know when we find out, if we find
4 out, a new modification. So that's just one point of
5 clarification.

6 One thing, too, I need to clarify -- and
7 this -- Mr. Chidsey, it came up in your testimony also.
8 We currently do use citations and orders issued that are
9 not final in the current screening criteria. We use a
10 combination of citations issued and those that are final.
11 Just a clarification.

12 I do have one question, and I made a note here
13 that we would need a procedure to address the citations
14 and orders that are issued, that are in contest, that you
15 contest.

16 MR. STEISKAL: Yes.

17 MR. MATTOS: Do you have any thoughts on what a
18 procedure like that might be to address that concern?

19 MR. STEISKAL: I think if a -- if it is
20 contested and it makes it past the District Manager, that
21 that citation should not be used against the operator
22 until ALJ has heard it. In the -- if the ALJ vacates, it
23 does not count towards the 50. If the District Manager
24 vacates it -- if it gets that far and he decides to pass
25 it on, then so be it.

1 MR. MATTOS: Thank you.

2 One issue we have right now is that there's a
3 25 percent contest rate.

4 MR. STEISKAL: Approximately. I found that on
5 your web page.

6 (Off the record.)

7 (On the record.)

8 MODERATOR SILVEY: He was talking about -- you
9 were talking about if citations and orders were
10 contested, right?

11 MR. STEISKAL: Yeah. If an ALJ holds it up, I
12 think you should be able to count that. But, you know, I
13 mean, that can be wishy-washy also. I haven't had to go
14 past that yet on anything that I've contested.

15 You know, Aggregates USA's record is out there.
16 You can look us up. We contested six in the last two
17 years and won six. So it's usually very subjective and
18 stuff that I don't feel -- well, they agreed that it's
19 not a hazard to miners.

20 MR. MATTOS: Thank you.

21 MR. STEISKAL: Yes, sir.

22 MR. JONES: I had a question. You mentioned
23 that the specific numerical criteria was unbelievable.
24 Could you explain what you meant by that?

25 MR. STEISKAL: We're a small quarrying

1 operation. I can't imagine one mine having -- and I
2 realize some of the coalmines, MSHA inspectors live and
3 sleep with those guys. 50 S&S citations, I'd be looking
4 for a job. My boss would be looking for a job. Our
5 quarry managers would be looking for a job. Our
6 experience is smaller quarries -- we have a couple that
7 make greater than three million tons a year. But 50 in -
8 - in one -- at one spot, you know -- that's not company -
9 - that's just shocking to me.

10 MODERATOR SILVEY: I understand. I'll just say
11 that obviously when MSHA has to develop anything, some
12 people have noted that, you know -- we have to do it and
13 particularly now when you look -- this morning's rule was
14 on underground coal mine. For this Pattern of
15 Violations, we've got to do our best.

16 And sometimes -- and that's what Mr. Mattos was
17 talking about when he went to the fact that sometimes the
18 criteria may need to be refined. For a Pattern of
19 Violations, it's -- you've got to develop something
20 that's going to be applicable to coal and metal/
21 nonmetal, surface and underground. And just like you
22 pointed out, small, big, you know, and all kinds of
23 conditions. And, and so I hear what you're saying.

24 MR. STEISKAL: You know, I disagree. You've
25 given Aggregates the opportunity to set up their own

1 training. Give Aggregates the opportunity -- break it
2 out. Give us the opportunity to have our own rules. You
3 have the different severity, severity measurements for
4 above-ground coal, underground coal, all those other
5 things. You can have different criteria for each of the
6 different areas.

7 MODERATOR SILVEY: Well, clearly you could.
8 And I don't want to -- you know, I'm not going to debate
9 that here.

10 MR. STEISKAL: Yeah.

11 MODERATOR SILVEY: You could have different
12 criteria. But under this provision, we've got to also
13 look at what we thought the Congressional intent was.
14 And for the Pattern of Violation stated, we think that
15 Congress intended for us to develop a uniform rule.

16 And so, yet, all I'm suggesting to you is that
17 -- I hear your point, but this is what happens when you
18 do -- you try -- that's all I'm saying.

19 MR. STEISKAL: Yeah, I understand. You've got
20 to spread the peanut butter all the way to the edge of
21 the bread.

22 MODERATOR SILVEY: Anyway, thank you very much.

23 MR. STEISKAL: You have a good day.

24 MODERATOR SILVEY: Does anybody else wish to
25 -- wish to make comment?

1 Okay, Mark. Come on, Mark.

2 MR. ESLINGER: You say that with disgust.

3 MODERATOR SILVEY: No, Mark. Please come on.

4 MR. ESLINGER: I'll try not to quote this time,
5 okay?

6 My name is Mark Eslinger. I'm the General
7 Safety Manager for Five Star Mining, Inc., and Black
8 Panther Mining, LLC. Mark -- M-A-R-K -- Eslinger -- E-S-
9 L-I-N-G-E-R -- stating that the specific pattern criteria
10 will be posted on MSHA's web site gives no indication of
11 what the criteria will be. The proposed section does
12 list the things that will be considered, but does not
13 give an indication of what the criteria will actually be.

14 Mine operators need to know what this criteria
15 will be that they will be judged against. And to say it
16 needs to be modified down the road or could be changed as
17 to rulemaking is open-ended and you're changing the rule
18 down the road. I think the mine operators deserve to
19 know exactly what the rule is, as far as Pattern of
20 Violations and know exactly and specifically what the
21 operator is being judged against.

22 I also believe that the citations and orders
23 used in determining whether a mine should be put on the
24 Pattern of Violations must be final. You talked about a
25 25 percent contest rate. When you're looking at POV, the

1 big things that are considered are like D orders, D
2 citations, S&S citations. Well, obviously those are the
3 things that you're going to contest because, one, they're
4 high dollar and, second, they enter into the POV. It's
5 not the mine operators' fault right now that it's running
6 so far behind, backlogged.

7 Just yesterday, I worked on a 2007 docket, 2008
8 docket, and two 2009 dockets. Those are all out outside
9 the 15 months that's used for, you know, judging your
10 history.

11 MSHA in coal, at least, is taking away the
12 conferencing. Conferencing is being denied. You send in
13 a conference request and it's denied. They've taken that
14 right away. Conferencing was a very good tool. It gave
15 a chance for the mine operator to sit down with somebody
16 in MSHA who was not the inspector and go through the
17 violation that was cited and discuss the parameters. And
18 there's a lot of things to it. You're looking at
19 negligence. You're looking at the number of people
20 affected. You're looking at whether it's reasonably
21 likely, unlikely, highly likely. And you're looking at
22 the injury, whether it's fatal, permanently disabling,
23 lost workdays, and that kind of thing. That's been taken
24 away from us. You can't do that anymore.

25 So any time you get a citation that's S&S or a

1 D, generally you're going to ask for a conference and be
2 denied. And you're going to get the assessment sheet and
3 you're going to check off on that sheet that, hey, we
4 want to contest those can go back in. So now you're
5 dealing with the lawyers, and the only ones in MSHA
6 giving settlement is the District Manager and the
7 Assistant District Manager. So it's bogging the system
8 down.

9 And if MSHA thinks that they're going to get
10 this thing caught up, I don't think this is going to
11 happen. Because right now, the inspectors coming out
12 that are being trained are assessing things at a much
13 higher level than they used to be. Moderate negligence
14 is like the default. Instead of being low, they default
15 moderate to high. They end up high negligence citations
16 now repeatedly.

17 When I was an inspector, high negligence was
18 reserved for situations where there was a need to say to
19 the operator, Look, this is a severe thing on the
20 negligence, and now it seems like you get high negligence
21 all the time. I wish we could talk about the number of
22 citations like this guy talked about there. If you've
23 got a large mine, 50 S&S shouldn't be, but it's not that
24 hard to get.

25 MODERATOR SILVEY: Right.

1 MR. ESLINGER: But the conferencing taken away,
2 it slows up this whole thing.

3 And another thing was a good teaching tool.
4 When an inspector came in, the conferencing officer would
5 say to that person, Hey, justify the number of people.
6 Why is it ten, or why is it five people? How is it high
7 negligence? Well, you have in your notes to support
8 that.

9 When we go before a judge, how are you going to
10 support that? And, generally, the level would come down
11 to a more applicable level, and sometimes the
12 conferencing would raise it. And now that's been taken
13 away from us. So, to say we're just going to -- whatever
14 is issued, we're going to use, I think, is really unfair
15 to the operator.

16 Now, when I was still in District 8 in MSHA, we
17 had this new inspector that got his AR card and he went
18 charging out and used 20-something pieces of paper in 2
19 days, most of which were Ds. And then the final result,
20 none of the Ds held up, and most of the violations didn't
21 hold up. There's some that held up.

22 But here, if you would take a young guy that
23 goes out and does that to a relatively new mine, I mean,
24 he's put that operator in a hurt if you cannot, you know,
25 wait until this thing sorts through the system.

1 So I think it's wrong that you're saying that
2 we're going to just use the one issued. I do like the
3 tool right now where you can go onto the web site. I've
4 used it. I don't think that it's appropriate. The
5 criteria that's being used, I mean, we have no input into
6 it. But at least you can go in there and determine where
7 you're at in a situation at this point in time.

8 And then I'd like to say something about the
9 determination of 104(e)(1) Pattern of Violations. If
10 you're a large coalmine, it's almost impossible to go
11 through a quarter without getting an S&S violation. It's
12 almost impossible. I've only seen it happen a couple of
13 times. And the only way you're going to get off is if
14 MSHA wants you to get off.

15 I mean, you're going to make an attempt and
16 they're going to push down the violations. Because right
17 now, there's some criteria out there that have been given
18 by headquarters and District Managers. When you're like
19 a 103(i)(5)(A) spot mine and you get a permissibility
20 violation, it's S&S. It takes the judgment out of the
21 hands of the inspector, but it makes an automatic S&S.
22 If you get a bare spot in a cable, it's S&S.

23 So, I mean, this issuing the higher paper has
24 been pushed up. You're getting more and more of these
25 automatic S&S's. It's really unfair to the operator, and

1 it goes to the criteria you're not going to be able to go
2 before the LJ, you know.

3 And one thing I'll say about contesting the
4 citations. When you get outside that history, we've got
5 to the point where we're just working on dollars. We
6 don't care what you mark. Because if it doesn't affect
7 the history, you know, other than somebody someday down
8 the road, somebody said: well, you had so many Ds and you
9 had so many this and that, you know. We're just looking
10 at the dollars.

11 Because we get that group out in Denver that
12 will say, well, we'll agree to lower the paper, but we're
13 not going to lower the money or we will only lower the
14 money a little bit. And we're saying, hey, we don't care
15 what you do with the paper because it's outside the
16 history. Let's look at the -- let's look at the
17 assessment. And the assessment in itself is unfair. If
18 you look at the assessment criteria, it goes up
19 exponentially. I mean, it starts out a couple of dollars
20 for every point and it goes up \$3,000 for every point and
21 -- or more. And it's very arbitrary what the inspector
22 can select.

23 He can select -- he can make it highly likely,
24 and it bounces up the points considerably. So, see,
25 you've got to get in there and contest it. You have to

1 be able to be afforded that opportunity to contest it.
2 And you shouldn't have to be hit with that Pattern of
3 Violations on those occasions that you haven't been able
4 to contest. That's the end of my comment.

5 MODERATOR SILVEY: I'd like to just say
6 something about you mentioned that we got rid of
7 conferencing.

8 Basically, I think that probably in some MSHA
9 districts, both coal and metal and nonmetal, they do do
10 some form of conferencing.

11 However, on a pilot basis, we did have -- and I
12 see now the gentlemen have left because they were then --
13 in the metal/nonmetal, we had a pilot that was in the
14 southeast district, which would have been -- which would
15 have effectively applied to Georgia, his mine. And two
16 coal districts, Districts 2 and 6. I think they were 2
17 and 6 where the pilots were. And we're doing an
18 evaluation of that right now to determine where we go
19 from those three pilots.

20 But what I found interesting -- now, you never
21 know people's motivation. But it seems to me from
22 looking at the -- from review of what I saw so far,
23 percentage wise, a lot of the operators didn't avail
24 themselves of the conference process during that period
25 of time. I think I must say that I think that the ones

1 who did said that they found it, you know, helpful,
2 useful. But I don't think a lot did. But we are
3 evaluating that on a whole, full-scale basis to determine
4 where to proceed.

5 MR. ESLINGER: You know, I don't understand
6 this. We had a conference thing in place for 25 years or
7 more.

8 MODERATOR SILVEY: Yeah, I understand.

9 MR. ESLINGER: Why do we got to run a pilot
10 program to look at it to determine if it worked?

11 MODERATOR SILVEY: I'm saying --

12 MR. ESLINGER: It worked. And now that right
13 of conferencing has been taken away.

14 MODERATOR SILVEY: Yeah.

15 MR. ESLINGER: And, unfortunately, right now,
16 I'm fighting citations in 2007 and 2008, back when that
17 was still in effect. And the safety technicians in that
18 were not trained to take notes because the safety
19 director could go and sit down with the conferencing
20 officer and they could bring up points back and forth.

21 Now, you've got to do it like you're an MSHA
22 inspector and you're going to court. So now it's forced
23 the safety person to become like an MSHA inspector, and
24 he has to write out a series of notes of what's happened.

25 I mean, you -- you put us into a position of

1 battling legally everything that's being done. And I
2 think it's detracting from the safety department. But I
3 really think in this POV, you have to go after the final
4 paper. And if you all can't get it done in a few months,
5 you know, that's MSHA's problem. That's not the
6 operator's problem.

7 You know, we're willing to sit down in the next
8 day or next week and conference these citations and --
9 and move on. And a lot of this contesting could be
10 overcome if you would give us a conference officer and
11 give us somebody reasonable with experience and go from
12 there.

13 MR. MATTOS: One point just to clarify, Mark,
14 on your commenting on violations that are in contest
15 being outside that 15-month window or history.

16 Actually, we use the final order day in the
17 15-month history, so it's anything that becomes final
18 within that 15 months regardless of when it was cited.
19 So it, it never gets outside the history window. Just
20 to --

21 MR. ESLINGER: Can you explain that? So if we
22 settle a D order, let's say, of 2007, okay. And let's
23 say it's -- we come to an agreement and the judge signs
24 off on it today.

25 Is that part of today's history then or what?

1 MR. MATTOS: It will be in the history for the
2 next 15 months, for civil penalty assessment purposes,
3 yes.

4 MR. ESLINGER: So in other words, you're saying
5 that really on the S&S and D papers, we need to get that
6 moved down if we think it should be and not worry about
7 the dollar situation?

8 MR. MATTOS: Well, the -- for civil penalty
9 purposes -- well, it doesn't make any difference if it's
10 a -- the history if it's an S&S or an order. It's any
11 citation that's issued. That becomes final. So the
12 paper itself isn't -- unless it's vacated, it's going to
13 show up in history for that period of time.

14 MR. ESLINGER: So, so, right now, for POV, if
15 you get a D order today, it's going to sit in history for
16 the 15 months, and then come 2 years down the road, if we
17 settle it, it still becomes a D; and then it goes back in
18 the history, and it goes back through it again?

19 MR. MATTOS: It becomes -- in looking at final
20 orders under the current violations for Pattern of
21 Violations, we're looking at anything that became final -
22 - currently we're looking at a 12-month window.

23 The 15 months is for civil penalty assessment
24 purposes. For Pattern of Violations, we're looking at a
25 12-month period now. But for final orders, it's anything

1 that became final within the 12-month review period
2 that -- whenever we did the POV, regardless of when it
3 was issued.

4 MR. ESLINGER: Okay. I know it's 15 months on
5 your repeated violations and all that kind of stuff.

6 MR. MATTOS: For civil --

7 MR. ESLINGER: And 12 is for field --

8 MR. MATTOS: Currently, it's 12. In the
9 previous iterations, it was two year, a two-year window.
10 The last review, we did a one-year window.

11 MR. ESLINGER: Okay.

12 MR. JONES: I just wanted to clarify the record
13 on a legal point.

14 You mentioned about termination of POV notice.
15 The Mine Act specifies in 104E that POV is terminated
16 when the mine goes through a complete inspection without
17 an S&S. And our regulations just restate the actual Mine
18 Act text on how a POV is terminated.

19 MR. ESLINGER: Yeah, but I just want to make a
20 point. In real -- you know, MSHA has been criticized for
21 not using this tool. The reason they didn't use this
22 tool was it was a death penalty for the mines.

23 And I can remember sitting in District
24 Manager's meetings where they talked about it saying this
25 is a death penalty. And that's one of the reasons that

1 they did not like to use POV and they resisted sitting
2 down and going through POV calculations.

3 MODERATOR SILVEY: I -- we -- I understand.

4 MR. ESLINGER: You understand? Well, I mean,
5 he brought it up.

6 MODERATOR SILVEY: I understand. I understand.
7 Okay. All right. Thank you very much.

8 Does anybody else --

9 Mr. Wilson, Tom?

10 MR. WILSON: Thomas Wilson -- W-I-L-S-O-N --
11 UMWA International Health and Safety representative. I
12 rise in support of the UMWA International's previously
13 submitted comments, and I'd like to talk about a couple
14 of the points in there.

15 The UMWA agrees with eliminating initial
16 screening criteria that MSHA has used to provide an
17 operator with an advance written warning about a
18 operation being vulnerable to imposition of Pattern of
19 Violations procedures.

20 Operators should have an ongoing awareness
21 about their own health and safety practices and
22 experience and shortcomings in these regards. They
23 should know when problems with their health and safety
24 program require more resources and/or attention.
25 Accordingly, there should be no need for the Government

1 to provide a specific advance warning about operation
2 substandard health and safety record and the heightened
3 enforcement attention that may follow.

4 We, thus, support eliminating what is now in
5 104.3, the provisions for determining when operations
6 meet a potential Pattern of Violation. By removing this,
7 this would also remove the whipping post that operators
8 implement when they formally receive the advance notice
9 on the miners.

10 I have very little experience around Pattern of
11 Violations, but every time an advanced letter has, has
12 been issued, all of a sudden, there's fear tactics that
13 go out to all the miners trying to pit the miners against
14 MSHA. And, again, I think operators should be on
15 continued notice to what may come if they don't provide
16 the health and safety.

17 Also, another critical change that would be
18 accomplished by this proposed rule concerns the removal
19 of the current limitations that MSHA only consider final
20 orders for purposes of POV. Under this proposal,
21 citations and orders will be considered for possible POV
22 enforcement during the review period after the citation
23 and orders are issued, but while any legal challenges
24 remain pending.

25 The problem with the current system that limits

1 a POV analysis to only final orders is that it can take
2 years to resolve a contested citation. And by the time
3 such as a citation becomes final, the Health and Safety
4 Commission at the mine may bear no relationship to what
5 they are when they -- when the hazard was identified and
6 the citation first issued. Meanwhile, miners may be
7 exposed to extraordinary unhealthy and unsafe mining
8 conditions by a chronic and persistent violator of MSHA
9 regulations. This exposure to unsafe conditions must be
10 eliminated, and I believe this proposal does this. Thank
11 you.

12 MODERATOR SILVEY: Thank you. Thank you.
13 Thank you so much. Okay.

14 Does anybody else wish to make comment or
15 testimony?

16 Mr. Blankenship.

17 MR. BLANKENSHIP: James Blankenship -- B-L-A-N-
18 K-E-N-S-H-I-P -- UMWA Local 2245 President, Walter Energy
19 Number 4 mines here in Brookwood, Alabama.

20 I rise in support of the International comments
21 that were sent to the office earlier, and I just want to
22 make a few points about what I've heard today.

23 About the potential Pattern of Violation
24 notice, all that does is let them know that they'll
25 change it for a little while. It doesn't change it

1 forever. They'll change their safety standards until
2 they get off of this, off the POV, and then it goes right
3 back to where it's at. Operators should know already
4 what their health and safety standards are. They
5 shouldn't need a letter from MSHA saying your potential
6 Pattern of Violations. They should know it already.

7 I know it as a worker what they are. They
8 should know it. I know for a fact that operators contest
9 citations that they know were written correctly just so
10 that it doesn't become final rule so it gets tied up in
11 the two- or three-year system and doesn't count against
12 them. I'm glad that's being taken away from them. I'm
13 glad you're closing that loophole. Some gentleman quoted
14 the Constitution. It's been a long time since I was in
15 school, but nowhere in our Constitution do I see that it
16 gave an operator the right to injure or kill employees.

17 So close the loophole, make it fair and protect
18 the workers in these operations. That's what MSHA's only
19 job is, is to protect the people who go underground,
20 whether they're salary, union, company, or whatever.

21 One other thing I want to bring up is having
22 criteria that is based on MSHA inspection hours helps
23 bring some fairness to the system. Union representative
24 mines generally have better health and safety records
25 based, for example, on the number of fatality accidents.

1 Yet, they're often issued a disproportionately large
2 number of citations because of the Constitutional
3 provisions served to encourage miners to show inspectors
4 any and all violations. This helps us to find and
5 correct problems before accidents occur.

6 Also, a disproportional high number of
7 inspection hours are devoted to the large unionized
8 operations. It is important that such operations do not
9 get unfairly targeted for POV procedure just because
10 union miners and unionized operations may receive a
11 relatively large number of citations and orders when they
12 tend to be more attentive to their health and safety
13 practices. That's true.

14 At Walter's Walter Energy Number 4, every day
15 we've got one, two, three, four inspectors, every day. I
16 know living in Alabama that there are not the nonunion
17 operations like that. Working in West Virginia, I worked
18 in a union mine. I know that we got inspected a lot more
19 than the nonunion mines across the road from us. I know
20 that for a fact. No doubt about it. We got more
21 citations because there was more hours put into it.

22 Another problem is how injuries are reported to
23 MSHA. And it relies upon -- the company comparing the
24 health and safety records of various mines is unreliable.
25 Injury reports depends on operators' reports, but have

1 long -- but we have long known that chronic
2 underreporting -- some employers maintain programs that
3 serve to reduce the reporting of injuries. Some simply
4 fail to report reportable accidents.

5 One recent and public example rose in
6 connection with the television show "Coal," which I
7 personally know a lot of those guys that work in the
8 coalmines. On Spike TV, its first episode, a miner was
9 injured and carried away by ambulance, obviously missing
10 some work. That subsequent employee in episodes
11 confirmed while the accident should have been a
12 reportable lost time accident, our review of the POV
13 monitoring for cobalt coal does not show any such
14 accidents were reported.

15 Underreporting is a frequent problem that
16 demonstrates the problem with relying on accident reports
17 to understand what an operation actually experiences and
18 measure for POV. We, we suggest that fatality rates
19 should generally be weighed more heavily than injury
20 reports.

21 And if you look, even your own report earlier
22 said nonunion mines, there's a lot more accidents, a lot
23 more fatalities. That should weigh a lot heavier than an
24 injury report.

25 In closing, I just want to say that I think

1 you're on the right track. There's no reason for any
2 operator to be afraid of this, none whatsoever. You
3 shouldn't be afraid of a State Trooper going down the
4 Interstate, going down 59 here when you leave here if you
5 abide by the law. If you're doing 70, he won't stop you.
6 If you're doing 90, he'll stop you. Same way in mining.
7 We all know what the law is. We know what we've got to
8 do. All we've got to do is do it. We shouldn't fear
9 these inspectors, and this should never be a problem.

10 So simply what operators want is you not to do
11 this, but you let them do what they want to do. Don't do
12 that. Hold their feet to the fire. Make them do what's
13 right. And I appreciate it. Thank you.

14 MODERATOR SILVEY: Thank you.

15 Let me make just one -- with respect to your
16 statement that you know -- you said you know for a fact
17 that nonunion mines get inspected less frequently than
18 union mines.

19 Do you have data on that, or is it more what
20 you --

21 MR. BLANKENSHIP: What I've talked and seen to
22 people -- talked to people. I've got friends that work
23 at nonunion mines, and I talk to them a lot.

24 MODERATOR SILVEY: But you don't have any --
25 you don't have any empirical data?

1 MR. BLANKENSHIP: Not any data, but I can --
2 you could probably find -- I could probably find it.

3 MODERATOR SILVEY: Well, if you do have
4 empirical data and can submit it to us, I would be
5 interested in that.

6 MR. BLANKENSHIP: All right. I'll do it.
7 Thank you.

8 MODERATOR SILVEY: Okay. Thank you.

9 MR. BLANKENSHIP: Appreciate it.

10 MODERATOR SILVEY: Okay.

11 Anybody else wishing to comment? If nobody
12 else wishes to make a presentation, then I again want to
13 say that the Mine Safety and Health Administration
14 appreciates your participation in this public hearing.

15 I want to thank everybody who made
16 presentations, and I want to thank those of you who
17 attended the hearing and may not have made a
18 presentation. As I stated in the hearing this morning,
19 that says to MSHA that you have an interest in this
20 rulemaking, and we appreciate that.

21 I want to again emphasize that all comments
22 must be received by June 30th, 2011. MSHA will take your
23 comments, concerns, and your specific alternatives into
24 consideration in developing a final rule.

25 And I encourage everybody to continue

1 participating in this and any other MSHA rulemaking.

2 The hearing is now concluded.

3 Thank you very much.

4 (Whereupon, at 1:23 p.m., the hearing in the
5 above-entitled matter was concluded.)

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REPORTER'S CERTIFICATE

CASE TITLE: Patterns of Violations
HEARING DATE: June 9, 2011
LOCATION: Birmingham, Alabama

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 9, 2011

ANTHONY & ASSOCIATES, INC.


LISA BAILEY
(Official Reporter)