

TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
EXAMINATIONS OF WORK AREAS IN)
UNDERGROUND COAL MINES FOR)
VIOLATIONS OF MANDATORY HEALTH)
OR SAFETY STANDARDS)

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IN THE MINE SAFETY AND HEALTH ADMINISTRATION

IN THE MATTER OF:)
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 EXAMINATIONS OF WORK AREAS IN)
 UNDERGROUND COAL MINES FOR)
 VIOLATIONS OF MANDATORY HEALTH)
 OR SAFETY STANDARDS)

Charleston, West Virginia

Tuesday
June 7, 2011

APPEARANCES

MSHA Panel: PATRICIA W. SILVEY, GREGORY FETTY,
KEVIN BURNS, ALFRED D. DuCHARME

Speakers:

CHRIS HAMILTON, West Virginia Coal Association
 JERRY KERNS, United Mine Workers of America
 JOHN GALLICK, Alpha Natural Resources
 DONALD McBRIDE, Illinois Department of Natural
 Resources, Office of Mines and Minerals
 RANDALL HARRIS, West Virginia Office of Miners'
 Health Safety and Training

P R O C E E D I N G S

(8:30 a.m.)

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

7 I will be the moderator for this public hearing
8 on MSHA's Proposed Rule on Examinations of Work Areas in
9 Underground Coalmines for Violations of Mandatory Health
10 or Safety Standards.

11 On behalf of Assistant Secretary Joseph A.
12 Main, I would like to welcome all of you here today. I
13 would like to introduce the members of the MSHA panel.
14 To my left, Greg Fetty, who is with Coal Mine Safety and
15 Health; and to his left, Al DuCharme, who is with the
16 Department of Labor, Office of the Solicitor. To my
17 right, Kevin Burns, who is with the Office of Educational
18 Policy and Development.

19 There are a few people in the audience who
20 worked on this rule, also, and that is Larry Davey and
21 Erik Peterson, also with the Standards Office.

22 In response to requests from the public, MSHA
23 is holding public hearings on the Proposal of
24 Examinations of Work Areas in Underground Coalmines for
25 Violations of Mandatory Health or Safety Standards. This

1 is the second of four public hearings on this proposed
2 rule.

3 The first hearing was held in Denver, Colorado,
4 last Thursday. We will hold the other hearings this
5 Thursday, June 9th, in Birmingham, Alabama, on Thursday
6 and back at MSHA's headquarters in Arlington, Virginia,
7 on June 15th.

8 In the back of the room, we have copies of the
9 Federal Register that contains the proposal. As many of
10 you know, the purpose of this hearing is to receive
11 information from the public that will help MSHA evaluate
12 the proposal and produce a final rule that will improve
13 health and safety conditions at mines.

14 Also as many of you know, the hearings will be
15 conducted in an informal manner. Formal rules of
16 evidence will not apply. The hearing panel may ask
17 questions of the speaker and, quite frankly, the speakers
18 may ask questions of the hearing panel.

19 Speakers and other attendees may present
20 information to the court reporter for inclusion in the
21 rulemaking record. MSHA will accept written comments and
22 other appropriate information for the record from any
23 interested party, including those not presenting oral
24 statements.

25 I assume that by now everyone has signed the

1 attendance sheet in the back of the room. If you have a
2 hard copy or electronic version of your presentation,
3 please provide the court reporter with a copy. MSHA will
4 have a verbatim transcript of this proceeding taken and
5 we will post the transcript on the Agency's website.

6 The post-comment period for this proposed rule
7 ends on June 30th. MSHA must receive your comments by
8 midnight, Eastern Daylight Savings Time, on that date.

9 MSHA is proposing to revise its existing
10 standards for pre-shift, on-shift, supplemental, and
11 weekly examinations for underground coalmines. The
12 proposed rule would require mine operators to identify
13 and fix Violations of Mandatory Health or Safety
14 Standards.

15 Requirements for these examinations are
16 mandated in the Mine Act and are a critical component of
17 an effective safety and health program for underground
18 mines. The proposal would also require that on a
19 quarterly basis, mine operators review with mine
20 examiners the citations and orders issued in areas where
21 pre-shift, supplemental, on-shift, and weekly
22 examinations are required.

23 In addition, the proposed rule is an important
24 component of the Department of Labor's Plan Prevent and
25 Protect strategy for workers.

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

6 At this point, I would like to reiterate some
7 requests for comments and information that were included
8 in the preamble to the proposed rule.

9 One, the proposed rule presents a more
10 proactive approach in creating a culture of safety at the
11 mine. It would enhance miners' safety because violations
12 of health and safety standards would be identified and
13 corrected, removing many of the conditions that could
14 lead to danger in underground coalmines.

15 The Agency is interested in any alternatives to
16 the proposal that could be effective in assuring that
17 operators examine for Violations of Mandatory Health or
18 Safety Standards, record and correct violations, and
19 review violations with examiners. And I will say that we
20 have gotten several suggested alternatives; and then at
21 our public hearing in Denver, we did hear the public's
22 version of what some people thought would be effective
23 alternatives to the proposal. But as I said earlier, we
24 do -- solicit alternatives and encourage you to submit
25 them; but if you would, please, to be the most use to us,

1 if you would be real specific in your alternatives.

2 The second item listed in the preamble, mine
3 examinations are critical to ensuring that all of the
4 requirements in the mine ventilation plan, including the
5 dust control plan, are in place and working. Examiners
6 check section and out-by ventilation controls and the
7 respirable dust control parameters that are key factors
8 in reducing miners' exposure to respirable coalmine dust.
9 This, we believe, could lower miners' exposure to
10 respirable coalmine dust, thereby lowering the incidence
11 of black lung.

12 The Agency has prepared a preliminary
13 regulatory economic analysis that contains supporting
14 cost and benefit data for the proposed rule. MSHA has
15 included a discussion of the costs and benefits in the
16 preamble. MSHA requests comments on all estimates of
17 costs and benefits presented in the preamble and the
18 preliminary regulatory economic analysis; including
19 compliance, costs, net benefits, and approaches used in
20 assumptions made in the preliminary economic analysis.

21 MSHA's cost estimates do not include the costs
22 of any corrective actions that would be necessary to come
23 into compliance with the underlying regulatory
24 requirements. These costs were included in the Agency's
25 estimates associated with existing regulations and are

1 not new compliance costs resulting from the proposed
2 rule.

3 Under the proposed rule, rather than wait for
4 violations to be either identified by an MSHA inspector,
5 or rise to the level of a hazardous condition and be
6 identified by a mine examiner, the proposed rule would
7 require mine operators to identify Violations of
8 Mandatory Health or Safety Standards during the mine
9 examination. This would prevent some accidents because
10 mine operators would be required to take corrective
11 actions earlier before a hazardous condition develops.

12 As you address the proposed revision either in
13 your testimony today or in your written comments, please
14 be as specific as possible. As I said earlier, we cannot
15 sufficiently evaluate general comments and include your
16 alternatives and your rationale, benefits to miners, any
17 economic feasibility considerations and data to support
18 your comments.

19 The more specific -- and I know, you know, I've
20 said this a number of times, but this is real critical to
21 the public when the public is submitting comments. The
22 more specific your information is, the better it will be
23 for MSHA to evaluate and produce a final rule that would
24 be responsive to the needs and concerns of the mining
25 public.

1 We will make the transcripts available
2 approximately two weeks at the completion of the hearing,
3 and you may view the transcripts at MSHA's website,
4 www.MSHA.gov.

5 We will now hear testimony. And if you would,
6 please, begin by stating your name and organization; and
7 if you would spell your name for the court reporter, so
8 that we would have an accurate record.

9 Our first speaker today is Bill Bissett with
10 Kentucky Coal Association. No, not here? Okay.

11 Then our next speaker is Chris Hamilton, West
12 Virginia Coal Association.

13 MR. HAMILTON: Good morning. My name is Chris
14 Hamilton with the West Virginia Coal Association --
15 C-H-R-I-S, H-A-M-I-L-T-O-N.

16 We appreciate the opportunity to participate in
17 today's hearing. Our Association is a trade association
18 comprised primarily of coal-producing companies who
19 collectively account for 90 percent of the state's coal
20 production.

21 Our membership also includes mine maintenance
22 and specialty contractors, mine reclamation and equipment
23 manufacturing companies, and general service companies.

24 The State of West Virginia is the nation's
25 leading underground coal-producing state. We average

1 about 150/155,000,000 tons of annual coal production,
2 about 100,000,000 tons of that amount comes from
3 underground mining operations, which accounts for about
4 200 underground mining operations, employing about 16,000
5 underground miners. Arguably, the State of West Virginia
6 and our member companies are more impacted by this
7 proposal than any other state.

8 West Virginia is also part of a group of
9 eastern coal states that produce coal east of the
10 Mississippi River who account for approximately 40
11 percent of the nation's production of coal, but nearly 80
12 percent of the nation's coal workforce. This region of
13 the country has seen its share of national production
14 fall from a high of about 625,000,000 tons of coal about
15 20 years ago, 1990, to an estimated 330,000,000 tons, or
16 a mere 50 percent drop this year, 2011.

17 The central states of this region are
18 principally comprised of West Virginia, Kentucky,
19 Virginia, Pennsylvania, and Ohio. These are the same
20 states that we believe have clearly been under attack by
21 this Federal Obama Administration, as well as those
22 Federal Agencies with responsibility for mining that
23 collectively seemed destined to see production from this
24 region severely restricted and all mining, permitting and
25 operating costs elevated. We would hope that this rule,

1 as proposed, is not part of that strategy as some submit
2 that it clearly is.

3 As an initial statement, concerning the topic
4 of today's hearing, our Association opposes the adoption
5 of the proposed rule in its entirety. Under MSHA's
6 proposed rule, mine examiner's will be required to
7 identify any and all Violations of Mandatory Health or
8 Safety Standards during the course of their examination
9 duties.

10 This would be in addition to identifying more
11 immediate hazards that they are currently required to
12 identify than the existing regulations. Moreover, the
13 proposed rule requires mine operators to record and
14 collect any violations discovered on examinations, note
15 all actions taken to correct such violations and review
16 with mining examiners; i.e., mine foremen, assistant mine
17 foremen, and other foremen on a quarterly basis. All
18 citations and orders issued in areas where pre-shift,
19 supplemental, on-shift, and weekly exams are required.

20 Respectfully, we believe that the requirements
21 proposed are totally inappropriate and should be
22 withdrawn by the Agency.

23 While our Association's support for safety in
24 our state and nation's underground coalmines cannot be
25 overstated, we do not agree that instituting a rule

1 requiring mine examiners to be de facto MSHA inspectors
2 is the right way to achieve that goal.

3 We believe that MSHA's rationale with regards
4 to extending requirements in 75.360, 62, and 75.364 to
5 include identification of mandatory health and safety
6 violations is flawed for the following reasons. Plainly
7 and simply put, mine examiners are not trained MSHA
8 inspectors. It should be obvious, but mine examiners are
9 not trained MSHA inspectors. Applying broad sweeping
10 regulatory standards is better left to well-trained
11 inspectors.

12 Mine examiners are trained by the State, not
13 MSHA. Examiners have practical, real-world training
14 aimed at identifying immediate hazards. MSHA inspectors
15 have a particularized understanding of regulations. To
16 require mine examiners to identify all violations would
17 effectively render the job of MSHA inspector obsolete
18 while placing an impossible burden on examiners, State-
19 trained and certified examiners.

20 Secondly, MSHA held the opposite review in a
21 proposal by the Agency about 15 years ago. In 1996, a
22 proposed rule was made to require miners to report all
23 non-compliance with mandatory safety and health
24 standards. This proposal, like the proposals of today,
25 was met with considerable objections from various

1 segments of the mining industry and was never adopted as
2 the final rule.

3 Comments consistently indicated confusion and
4 misinterpretation of the proposal's scope, offering a
5 wide range of interpretations. After reviewing these and
6 other comments, MSHA correctly concluded that the
7 existing standard was appropriate and best served the
8 objective of giving the examiners clear guidance for
9 making effective examinations.

10 Accordingly, the 1996 proposals for
11 examinations to include noncompliance with Mandatory
12 Safety and Health Standards was not adopted as a final
13 rule. MSHA's position on this rule then was opposed to
14 MSHA's position on this rule now. MSHA stated back in
15 '96, that most hazards are violations of mandatory
16 standards, requiring the examiner to look for all
17 violations regardless of whether they involve the same
18 hazard could distract the examiner of the more important
19 aspects of the examination.

20 This was MSHA's position then and there was a
21 limitation in the rule then concerning the scope of the
22 examination for noncompliance. This limitation expected
23 examiners to identify noncompliance only in situations
24 that could result in a hazardous condition.

25 With the current proposed rule, however, there

1 is no such limitation. MSHA's requirement that any and
2 all violations be reported and corrected, and that any
3 actions taken are reported; thus, the current proposal is
4 even broader than the 1996 proposal. Yet, MSHA has
5 completely shifted its position.

6 Thirdly, identification of the top ten
7 violations is subjective. MSHA has stated that it is not
8 their intention to significantly change the general scope
9 of examinations already in place. MSHA argues that
10 examiners would not be required to perform additional
11 tasks, take additional measurements, or open and examine
12 equipment or boxes. Instead, examiners could easily
13 identify violations from the list of the top ten most
14 cited standards by MSHA inspectors while simultaneously
15 checking for hazards that pose an immediate threat.

16 This is not realistic. First, it should be
17 noted that there is no expectation that MSHA inspectors
18 will construe this rule in that fashion. Secondly, the
19 task of choosing from a list of ten violations is not as
20 simple as MSHA makes it appear. For example, one of the
21 top ten standards cited by MSHA is 75.400, the dust
22 accumulation standard, which can include any amount of
23 dust accumulation, is truly a catchall standard. To
24 require the strict black letter identification of any
25 amount of accumulation during an examination could

1 arbitrarily place any mining operation at risk through
2 inconsistent or selective enforcement.

3 Indeed in the real world, this standard does
4 not apply to just any reasonable accumulation found by
5 MSHA inspectors. To issue a violation requires a
6 subjective and a particular line of knowledge of what
7 constitutes a danger under the current Federal standards.
8 To require a mine examiner to be vigilant for that type
9 of minutia, while he or she should be concerned about
10 more immediate and objective hazards, would be to drop
11 the ball completely.

12 Other comments to this proposal have stated
13 that under current standards, requiring an examiner to
14 identify only hazardous conditions is too subjective to
15 prevent danger; however, there is no basis for this
16 logic. Hazardous conditions should be and are almost
17 often immediately identifiable to a mine examiner. They
18 are after all far more intimately familiar with a
19 particular mine than anyone else. Subjective thinking
20 can only occur if a rule requires mine examiners to apply
21 broad sweeping regulatory standards when as stated from
22 the beginning, they should be applied by trained
23 inspectors.

24 Hazardous conditions and Violations of
25 Mandatory Health or Safety Standards, correcting and

1 recording proposed, 75.363, we also oppose the proposed
2 revision to this section, which would extend the
3 correcting, posting, and recording of hazardous
4 conditions requirements to include the correction,
5 posting, and recording of violations to the health and
6 safety standards. This requirement would be completely
7 unnecessary and would only give MSHA the means to write
8 additional citations based on what is and is not in the
9 mine's record books.

10 This type of behavior is nothing new. Some
11 mine operators have already experienced this type of
12 behavior by MSHA inspectors routinely. If this proposed
13 rule is adopted, it will become a common occurrence, we
14 believe. If inspectors can simply come to a mine, look
15 in the record book and write citations without entering a
16 mine, then we have to question what is MSHA's real
17 motivation here?

18 Theoretically, MSHA inspectors could sit in
19 Arlington, Virginia, and write citations for any mine
20 based solely on records they have received
21 electronically. This practice should not be permitted.
22 The upshot and perhaps unintended, maybe intended,
23 consequences of this section places MSHA in an oversight
24 capacity with direct line authority over mining
25 examiners.

1 As far as correcting violations, nobody can say
2 that prompt abatement is not a huge concern among mine
3 operators. More than enough incentive exists for
4 operators to abate a violation. MSHA analysis of
5 injuries arising out of unreported violations, we
6 believe, is flawed. MSHA maintains that the majority of
7 injuries between the years of 2008 and 2010, as contained
8 in MSHA's reports, could have been avoided if mine
9 examiners would have identified violations as opposed to
10 just hazards. However, a review of MSHA's reports
11 suggests entirely different contributing factors.

12 In some cases where injuries have occurred, the
13 mining examiner failed to mention any hazard at all. In
14 other cases, a hazard was identified, but it was not
15 properly addressed. Still other cases involve instances
16 where the mine examiners simply failed to adequately
17 perform the examination for hazards. Other cases show
18 that injuries occurred with no connection at all to the
19 examination. But most striking is MSHA's refusal to
20 account for failures that may have resulted in injuries.

21 In conclusion, we strongly oppose the adoption
22 of this rule and urge you to withdraw the proposal
23 immediately for the reasons stated above.

24 That concludes my prepared testimony for this
25 morning's hearing.

1 As we have in the past, as we move closer to
2 the final post-hearing comment period, we will supplement
3 this testimony with some additional comment and remarks.

4 MODERATOR SILVEY: Thank you.

5 Let me make some comments first, and then I
6 have some questions for you, Mr. Hamilton.

7 First of all -- and some of the questions I
8 have for Mr. Hamilton, as you all listen to me, I'm going
9 to ask other people the same thing, so I'm giving you
10 notice now.

11 I would first like to say that you recited to
12 me MSHA's thinking at the time of the 1996 proposal, as
13 everybody heard, and I would just like to say because
14 somebody did that at the Denver hearing, too.

15 As many of you recall, I was the head of the
16 Standards Office then, so I just -- you know, and I do --
17 my memory is serving me pretty good, so for all of you, I
18 do remember what MSHA said in the 1996 proposed rule.

19 But since you brought it up, I was going to ask
20 anyway, if you go back further than the 1996 rule, the
21 pre-1992 rule, for those of you who were working in the
22 mining industry, pre-1992 and particularly, those working
23 in underground coal, that rule had that the examiners
24 should examine for hazards and for violations of
25 mandatory safe and health standards.

1 And I would like to ask you, Mr. Hamilton --
2 now granted, that provision was not for every one of
3 those exams; i.e., the pre-shift, the supplemental, and
4 the weekly. I think it was for the weekly.

5 So I would like to ask you, Mr. Hamilton, do
6 you recall how it worked at that time; how things worked
7 pre-1992 when examiners were, in fact, examining for
8 Violations of Mandatory Health or Safety Standards?

9 MR. HAMILTON: Are you suggesting that that was
10 in the rule, the '92 rule?

11 MODERATOR SILVEY: It was in the rule that
12 predated the rule that we operating under now.

13 MR. HAMILTON: And then was removed in '96?

14 MODERATOR SILVEY: Yes. It actually was
15 removed in 1992. And then we re-proposed it and didn't
16 carry the proposal forward.

17 MR. HAMILTON: No, I have no working experience
18 of how that --

19 MODERATOR SILVEY: Actually, it was in the Mine
20 Act.

21 For those of you who really remember, it was
22 really in the Mine Act.

23 MR. HAMILTON: I would like the opportunity to
24 maybe go back to the Agency's rule record for '92 and --

25 MODERATOR SILVEY: Yeah, but I'm asking -- and

1 I'm going to ask it for those of you who recall pre-1992
2 is a provision in the Mine Act and it was that examiners
3 examine for Violations of Mandatory Health or Safety
4 Standards. Because I'm hearing this testimony from
5 people and I'm trying to figure out, you know, if it was
6 such a burden, how did it work then because I don't
7 remember hearing a lot about it being so problematic.

8 So for people that can remember -- and I know
9 that's asking for pre-1992, that's asking people to
10 remember 20 years ago, basically -- but if people can
11 remember, I would like to hear something from people who
12 do have recollections of what happened then.

13 MR. HAMILTON: The procedure for today, how
14 long are you going to maintain the hearing as an open
15 hearing? I might even be able to consult with some
16 people who are present, perhaps some individuals who
17 aren't present and readdress the issue here later this
18 morning.

19 MR. HAMILTON: Okay. Maybe later this morning
20 if the hearing is going to remain open.

21 MODERATOR SILVEY: The next thing. You said
22 you opposed the adoption of the proposed rule in its
23 entirety.

24 And I mentioned this in my opening statement.
25 If you oppose the adoption of the rule in its entirety,

1 do you have an alternative to the proposed rule?

2 MR. HAMILTON: Not at this point.

3 MODERATOR SILVEY: Okay.

4 I ask, again, if you have an alternative that
5 you would submit the alternative to us.

6 MR. HAMILTON: We will collectively discuss the
7 proceedings today, the comments, the other comments that
8 are made at the hearings and, again, be prepared, perhaps
9 prepared to advance alternative language, if that's what
10 you're asking --

11 MODERATOR SILVEY: Yes, that is.

12 MR. HAMILTON: But, again, we do think that
13 just from a fundamental basis, we believe that the rule
14 is flawed.

15 MODERATOR SILVEY: I heard that.

16 MR. HAMILTON: Well, we ask that MSHA -- also,
17 as you would like for us to provide perhaps some
18 alternative approaches, we would ask that MSHA perhaps
19 remain flexible based on the testimony that's rendered,
20 to perhaps consider withdrawing the rule if that makes
21 sense.

22 MODERATOR SILVEY: No. I'm asking people to
23 submit alternatives. MSHA is always open, but I am
24 asking people to do --

25 Okay. The next thing I have to say, the

1 provision, the proposed provision, that would require the
2 operator to review with mine examiners on a quarterly
3 basis all citations and orders that were issued as a
4 result of -- in areas where pre-shift, on-shift,
5 supplemental, and weekly are required, do you -- I mean,
6 what's your thinking about that proposed provision, the
7 provision that requires operators to review with mine
8 examiners on a quarterly basis?

9 MR. HAMILTON: Well, you know, I think the
10 record shows that training, currently, your current level
11 of training and training requirements in the mining
12 industry is perhaps more comprehensive and more intensive
13 than most other industries, if not all other industries.

14 We think as a matter of routine, identification
15 of hazardous conditions, and to the extent we're able to
16 articulate what represents a typical violation or a
17 routine violation of a particular standard, we think that
18 is done as a matter of routine at the current time. It's
19 done through individual safety contacts; it's done
20 through training; it's done through retraining; it's done
21 periodically through a number of training and personal
22 contact procedures that are underway at the mining
23 operation; to formalize it and to place the obligation on
24 the mine examiner tends to just question the
25 appropriateness of that or the necessity, quite frankly.

1 MODERATOR SILVEY: Of -- see, you lost me
2 there. The appropriateness of having the operator review
3 with mine examiners on a quarterly basis, you question
4 that?

5 MR. HAMILTON: Yes, yes. I think that that's
6 done as a matter of routine. Hazardous conditions --

7 MODERATOR SILVEY: Then, as a follow along to
8 that, I would like to ask you and I would like everybody
9 to think about this. When do examiners, in your mind,
10 identify and correct mandatory safety and health
11 standards?

12 MR. HAMILTON: There is a fine line that exists
13 between a mere violation of law and something that
14 constitutes an accident-producing situation or a danger.

15 MODERATOR SILVEY: I understand that.

16 MR. HAMILTON: Well, I'm not sure the Agency
17 fully does.

18 MODERATOR SILVEY: Well, I do. And I guess all
19 I'm asking you is let's take this category of things.
20 Let's for the sake of -- let's say we agree. We'll say
21 this group of things represents hazardous conditions, and
22 then all of the other things -- if I'm talking about the
23 length of this table and maybe from here to the end are
24 hazardous conditions. From here on, these are violations
25 of health and safety standards

1 MR. HAMILTON: In whose opinion? Are they
2 violations of --

3 MODERATOR SILVEY: I understand.

4 MR. HAMILTON: That gets right to the crux.

5 MODERATOR SILVEY: For the sake of
6 understanding where we're going here, let's say we could
7 agree; we all agree that these are hazardous conditions
8 from here on and these are Violations of Mandatory Health
9 or Safety Standards. I just want to ask you one simple
10 thing. When would examiners at your mines, those mines
11 that are members of the West Virginia Coal Association,
12 when would examiners correct, identify and correct, the
13 mandatory health and safety standards that are not the
14 hazardous conditions? I mean, how do you go about doing
15 that in your mind?

16 MR. HAMILTON: I think they are trained with an
17 eye towards identifying -- in fact, I know they are
18 trained with an eye -- with the confidence of identifying
19 dangerous conditions regardless of whether it's a
20 violation of State or Federal law.

21 They are looking, or have their sole attention
22 and are looking for unsafe conditions, so they're able to
23 determine that area. You know, understand the critical
24 nature of that individual's role. You know, he's out
25 there and there's trust and confidence that he's

1 declaring that particular section or that area of the
2 mine to be safe and clear of danger.

3 MODERATOR SILVEY: No, I understand that.

4 MR. HAMILTON: He's not looking for
5 administrative or other type of technical errors or
6 violations that a Federal inspector may have the eye and
7 may, quite frankly, have a priority to identify every
8 single administrative and technical deviation from his
9 Federal guidelines.

10 MODERATOR SILVEY: You said that in your
11 testimony, mine examiners are not trained inspectors --
12 and I hope everybody is following my line of -- well,
13 this conversation.

14 Are you suggesting that only the MSHA
15 inspectors should be identifying violations of mandatory
16 -- is that what I'm hearing? Because I would think the
17 optimum condition would be if the MSHA inspector came to
18 the mine and there were no Violations of Mandatory Health
19 or Safety Standards.

20 MR. HAMILTON: And I think that's typically
21 what the inspector finds when inspecting underground
22 mining operations. There are a number of underground
23 mining operations where he finds no violations within the
24 working areas within the face regions where our mine
25 inspectors may visit and check.

1 He may find that there's not enough toilet
2 tissue in the bathhouse or maybe no soap in the
3 bathhouse; but in those areas that are frequented by your
4 mine examiners, in a lot of instances, perhaps the
5 majority of instances, there are no violations noted.

6 MODERATOR SILVEY: So, in fact, the operator
7 has had somebody who has identified these five mandatory
8 health and safety standards and corrected them.

9 MR. HAMILTON: If I may, the remainder of my --
10 I'd also like to say in response to your question, we
11 have an extraordinarily comprehensive body of law that
12 governs the day-to-day mining operations and every single
13 standard requirement when violated does not constitute a
14 danger to the people working in that area.

15 Our underground mine foremen and mine examiners
16 are trained to look for hazards, real life, real
17 condition hazards that could jeopardize or place miners
18 of the operations in and of itself in an accident
19 situation. That's what they're trained for. That's what
20 they're currently charged with. That is how the program
21 that's been operative for years between the State and
22 Federal --

23 MODERATOR SILVEY: Okay. The next thing --

24 MR. HAMILTON: Let me finish the one point,
25 though. Your inspector, he is trained with an eye

1 towards that entire voluminous comprehensive book and I
2 believe he is obligated to note any deviation or
3 departure or any violation regardless of the consequences
4 or particular facts that he finds surrounding that
5 violation.

6 MODERATOR SILVEY: The next thing --

7 MR. HAMILTON: I don't think we want to burden
8 the mine examiners in their critical role with
9 administering that entire book of violations.

10 MODERATOR SILVEY: I understand. I clearly
11 understand what you're saying. For everybody here, we've
12 heard this also. I understand that.

13 What I'm trying to get to is at some point in
14 time, albeit not during the pre-shift and we've heard
15 that, maybe it shouldn't be during the pre-shift or not
16 during the on-shift or not during the supplemental or the
17 weekly, but at some point in time, the operator does have
18 somebody who identifies and corrects Violations of
19 Mandatory Health or Safety Standards. That's the only
20 thing I'm asking. So when is that done? That's what I
21 was trying to practically ask. Everything does not rise
22 to the level of a hazardous condition, but it might then
23 be a Violation of the Mandatory Safety and Health
24 Standard.

25 So all I'm suggesting is that at some point

1 during the day, or maybe during the off-shift, during the
2 maintenance shift, I guess people are finding and fixing
3 those things. I'm sure those things are not always
4 relegated to the inspector to find them. I wouldn't
5 think you would want them to be relegated to the
6 inspector finding them. That's all I'm suggesting.

7 The only last point, you said the inspector
8 would come and write citations without entering the mine,
9 and I couldn't quite understand how that --

10 Could give me an example of what you were
11 talking about?

12 MR. HAMILTON: Our reading of the proposed rule
13 tends to place additional responsibility on the examiner
14 and perhaps removes some of that same responsibility from
15 the local inspector where perhaps all he has to do, he or
16 she, is come to the mine and look at the reports and
17 compilations, if any, of violations of the Federal law
18 and simply cite the operator based on what is recorded in
19 that book, and it may actually serve discourage or
20 disincenent the local inspector from making visits with the
21 same knack for detail as perhaps he does today.

22 It also tends to place him in an oversight
23 capacity where he comes, looks at the record, and then he
24 can make the argument that he sees an oversight with a
25 direct line authority over those in charge of the mine.

1 The other point I want to make is that we would
2 ask that MSHA respect State law in this instance and all
3 the time and preparations gone into the design and
4 development of the State mine examiner certification.
5 It's not Federal training; it's not particular lines of
6 training to be able to administer Federal law.

7 I would also point out that there's additional
8 requirements on mine examiners as it relates to on-shift
9 inspections here within the State of West Virginia that
10 I'm not sure MSHA is aware of.

11 Aside from pre-shift, on-shift, mine examiners
12 are also required to examine working places and working
13 faces every two hours, which is an unprecedented --

14 MODERATOR SILVEY: Yes. No, I know. I am
15 aware of that. I think we're all aware of that.

16 MR. HAMILTON: The additional demands being
17 placed on him may make that near impossible to make it to
18 all the places he's currently required to make.

19 MODERATOR SILVEY: Yeah. We're aware of that.

20 MR. FETTY: Just one question, Chris. You made
21 a comment or suggestion that we would take into
22 consideration the State of West Virginia requirements.
23 And as I understand it, and I'm sure you know it better
24 than me because I'm more familiar with Federal law, but
25 I'm pretty sure that the State of West Virginia requires

1 mine examiners to report the violations of their code.
2 It doesn't necessarily have to rise to the level of a
3 hazard.

4 So for the purpose of consistency, do you not
5 feel that it would be a positive thing to incorporate
6 violations? I know when I inspected, one of the things I
7 often heard was we don't know what to put in our books
8 because you guys want something and the State wants
9 something else.

10 How do you feel that, you know, these rules
11 could possibly correlate with one another?

12 MR. HAMILTON: I'll be perfectly honest with
13 you. I'm not aware of that provision in State law that
14 requires, you know, identification of an accident with
15 respect to violations of law. I thought that it also
16 required hazardous conditions to be noted. If I may, I
17 will research that and put that in the final comments.

18 MR. FETTY: Thank you, sir.

19 MODERATOR SILVEY: I would, as I said,
20 encourage you to submit specific alternatives to us
21 before the record closes.

22 For people who might be interested -- and I was
23 talking about the pre-1992 rule. It is embodied, the
24 provisions, are embodied in Section 303 of the Mine Act
25 under the section on ventilation, and so it's 303-D-1,

1 303-E, and 303-F.

2 So if you have some leisure time and care to
3 review it -- and this is the Mine Act -- and so if you
4 care to look at that, then you can see what I was talking
5 about. And for those of you then who do remember working
6 in the underground coalmines during that period and have
7 some recollection of how things went, as I said earlier,
8 I know it's asking you to go back 20 years, so if you can
9 or if you would do that. And maybe if you did that, that
10 could so inform any comments that you might want to
11 submit to us prior to the record closing. Okay. Thank
12 you very much.

13 MR. HAMILTON: Thank you.

14 MODERATOR SILVEY: Our next speaker is Jerry
15 Kerns with the UMWA.

16 MR. KERNS: My name is Jerry Kerns --
17 J-E-R-R-Y, K-E-R-N-S. I'm with the United Mine Workers
18 of America. And I would like to thank you all for this
19 opportunity this morning. At this point, I'll start with
20 my statement.

21 The UMWA supports MSHA's proposal to revise the
22 existing standards to require that the Violations of
23 Mandatory Health or Safety Standards are identified and
24 recorded by mine examiners. This is what Congress
25 intended when passing the 1977 Mine Safety and Health

1 Act. The Agency is correct in restoring language to the
2 standards to require mine examiners to identify and
3 record Violations of Mandatory Safety and Health Act.

4 The current rule simply requires the examiner
5 to look for hazards, which is subject to the mine
6 examiner's opinion as to what constitutes a hazard.
7 Reinserting language to require identifying and recording
8 violations can only improve upon the examination
9 requirements and overall mine health and safety.

10 A mine examiner's task becomes simplified and
11 more straightforward when they are required to identify
12 and record all Violations of Mandatory Health or Safety
13 Standards. This removes the judgment call mine examiners
14 must now make to determine whether a Violation of a
15 Mandatory Safety and Health Standard is a hazard. The
16 proposal should result in a more thorough mine
17 examination in which all violations are identified,
18 recorded, and corrected.

19 The operator will continue to prioritize and
20 correct conditions reported based on the seriousness of
21 the hazard they present; however, as MSHA points out,
22 there have been numerous fatal accidents wherein the mine
23 examiner did not record Violations of Mandatory Health or
24 Safety Standards, which contributed to the accident. The
25 examiner may have overlooked the condition because he/she

1 did not believe it to be a hazard. So restoring this
2 language to the rule will be beneficial.

3 Although we support the rule, there are a few
4 things we believe will enhance its effectiveness. I will
5 summarize that as follows. Number 1: Requiring uniform
6 reasonable time for abatement. The language of the rule
7 should specify that the operators must abate health and
8 safety violations within a reasonable time as the Mine
9 Act requires for violations that MSHA cites. We
10 recognize that mine operators must be granted reasonable
11 time to abate conditions, but the proposed rule itself
12 fails to specify any time limits for correcting
13 conditions.

14 The UMWA supports the two-day rule currently
15 used by MSHA. As part of this requirement, a record must
16 be kept of each step taken to correct the condition. If
17 additional time is justified, it could be granted;
18 however, the operator must make a serious effort to
19 correct conditions by devoting sufficient materials and
20 manpower to fix the unsafe condition.

21 Number 2: Miners' representative role. The
22 rule should incorporate the valuable role of the
23 designated miners' representative in identifying hazards
24 in the mine. At least one miner's representative must be
25 included in the quarterly review process. Miners'

1 representatives are more familiar with the conditions of
2 the mine through regularly traveling with MSHA on
3 inspections and often dealing with health and safety
4 issues through their union and could contribute much to
5 the quarterly review process.

6 All miners' representatives must have a
7 protected right to access the written record of the mine
8 examiners in case they have a concern about a particular
9 condition in the mine.

10 Number 3: Mine examiner training. Since the
11 new proposal will require mine examiners to identify and
12 record Violations of Mandatory Health or Safety
13 Standards, they will need to be adequately trained to
14 perform this task.

15 The mine examiner should have the same training
16 as an MSHA inspector because they will be basically doing
17 the job of an MSHA inspector. Because they will be
18 expected to identify and record violations, the mine
19 examiners must be kept abreast of any regulatory change,
20 change in MSHA enforcement policies, or legal decisions
21 affecting enforcement.

22 For this reason, the operator must submit a
23 detailed plan to MSHA for approval, outlining the
24 training to be provided to the mine examiners. The
25 training must be conducted at a minimum on an annual

1 basis with refresher training when needed to update the
2 mine examiners on changes to the regulations.

3 Number 4: Mine examiner's authority. The UMWA
4 believes that the mine examiner must have no superiors
5 when performing their duties to examine the mine. The
6 proposal must have a provision added making it a
7 violation if any operator tries to direct or influence
8 the mine examiner while they are carrying out their
9 duties to examine the mine.

10 Much attention has been focused on a recent
11 mine disaster and how the mine foremen and examiners have
12 been discouraged from reporting hazardous conditions and
13 Violations of Mandatory Health or Safety Standards. The
14 mine examiner must have no superior while performing
15 their duties, nor should they be influenced or
16 discouraged from reporting conditions found.

17 Hourly employees who are certified should have
18 the right to refuse to be required to use their
19 certification to perform mine examinations if they so
20 choose. Many UMWA miners who have a mine foreman
21 certification are often forced to make mine examinations
22 or serve as a section foreman whether they want to or
23 not. Those who hold such certification should have the
24 choice as to whether they want to use their
25 certification.

1 In closing, I would like to thank you for the
2 opportunity to testify today. I'm here to enter the
3 statement into the record on behalf of the United Mine
4 Workers of America.

5 If this panel has any questions, I would ask
6 that you reserve those for our Department of Occupational
7 Safety and Health staff who will be testifying at the
8 hearing on June 15th, 2011, in Arlington Virginia.

9 Thank you.

10 MODERATOR SILVEY: Thank you. Okay. Thank
11 you.

12 Don McBride from the State of Illinois -- I'm
13 sorry. I'm sorry. Please excuse me.

14 Earlier, I almost said I'm older now, and I
15 truly am. My eyes messed up.

16 MR. McBRIDE: Somebody else?

17 MODERATOR SILVEY: Yes. And I don't want to go
18 out of order because I don't want them getting mad at me.

19 The next speaker is John Gallick with Alpha.

20 MR. GALLICK: Good morning. My name is John
21 Gallick -- G-A-L-L-I-C-K. I appreciate the opportunity
22 to provide some additional information on this proposed
23 rule on workplace examinations.

24 I am Vice President of Safety of Alpha Natural
25 Resources. Alpha's affiliates, as you know, operate a

1 number of underground coalmines ranging in size from our
2 large underground longwall operations to relatively small
3 mines that depend on continuous miners to produce coal.
4 We operate underground mines in Pennsylvania, West
5 Virginia, Kentucky, and Virginia.

6 In my position, I oversee the safety process of
7 the company; including accident prevention, regulatory
8 mine safety issues, compliance issues, interpreting,
9 applying, and advising on compliance with the regulatory
10 standards and on mine rescue capability. I am also
11 involved in the litigation process for contests of
12 citations and orders.

13 I started working in the coal industry in 1972,
14 and I do remember the pre-91. I'll discuss it at the
15 end. I started out as a general laborer and began work
16 in the safety department of then Bethlehem mines in 1976.
17 I have worked in various safety capacities since then
18 from the mine inspector level to my current position. I
19 am certified by the State of Pennsylvania to perform mine
20 examinations. I have a Master's degree in safety from
21 Indiana University of Pennsylvania. I also have an
22 understanding of how rules are developed and applied once
23 they are promulgated. I was involved as one of the
24 industry representatives in negotiating the new
25 Pennsylvania mine safety law that was adopted in

1 Pennsylvania in 2008.

2 Make no mistake; the proposed rule would make a
3 fundamental change in how examinations are done and the
4 expectations concerning such examinations. We believe
5 that their rule will place unrealistic expectations and
6 burdens upon the people who perform examinations and, as
7 proposed, are entirely unrealistic. Further, it will
8 divert examiners from the principal task of examining for
9 serious conditions.

10 Examiners are not trained as inspectors. They
11 are trained to recognize hazards from a practical real
12 world viewpoint. These hazards are generally conditions
13 that can be observed and the examiner's duty is to
14 determine whether that observed condition such as coal
15 float dust, roof conditions, etc. rise to the level of a
16 hazard. They are experienced miners who study for and
17 take a comprehensive test. They do not take 13 or 26
18 weeks or whatever amount of training that inspectors are
19 now receiving so they will recognize all the potential
20 violations in Part 75 of the code.

21 Most examiners are certified by a State Agency
22 rather than MSHA, and those states often have differing
23 requirements. None require the examination of the mine
24 for violative conditions as opposed to hazards. None
25 require a mastery of 30 C.F.R. Part 75, a mastery that

1 even the most trained people in industry and Agency do
2 not always achieve.

3 This is not the first time that the proposed
4 rule has sought to include identifying and recording
5 noncompliance with mandatory safety and health standards
6 during examinations. In 1996, a similar proposal was
7 made pursuant to 30 C.F.R. Section 75.364 to include
8 noncompliance with mandatory safety and health standards.
9 61 Fed. Reg. 9764, 9806 (March 11, 1996). I'm going to
10 skip those cites from this point on.

11 This proposal, however, drew considerable
12 objection and was not adopted in the final rule. At that
13 time, MSHA stated most hazards or violations are
14 mandatory standards. Requiring the examiner to look for
15 all violations, regardless of whether they involve a
16 distinct hazard, could distract the examiner from the
17 more important aspects of the examination. MSHA
18 concluded then that the existing standard was appropriate
19 and best served the objective of giving examiners clear
20 guidance for making effective examinations.

21 It's interesting to note that the 1996 proposal
22 would have limited the scope of the examinations for
23 noncompliance of situations that could result in a
24 hazardous condition. Such a limitation is not present in
25 the current proposed rule. In fact, MSHA makes clear

1 that a violation that does not pose a hazard to miners
2 would have to be recorded and corrected, and the
3 corrective actions taken be recorded as well.

4 Like the formal proposal, the current proposed
5 rule detracts from the purpose of conducting
6 examinations. It requires certified examiners to act in
7 a similar manner to MSHA inspectors, despite the lack of
8 inspector training and time constraints for examinations
9 not placed on inspectors not making certified
10 examinations.

11 In the preamble, MSHA asserts that the top ten
12 standards cited by MSHA "are the types of violations that
13 well trained and qualified examiners can observe while
14 conducting effective examinations." But an examination
15 of those standards for underground coal indicates that
16 few, if any, of these standards are clear-cut as to their
17 interpretation and application. In fact, a number of the
18 most frequently cited standards are clearly outside the
19 types of examinations listed in this proposed standard.

20 Section 75.400, the most frequently cited
21 standard, is a catchall. It has been our experience that
22 the standard that is cited most frequently for inadequate
23 examination is Section 75.400. There is a wide range of
24 conditions to fall within the standard: accumulations
25 along beltlines, section spillage, up to a quarter-inch

1 of oil on machinery, coal on a continuous miner, trash
2 that has been assembled for removal from the mine, float
3 coal dust, wooden pallets used to transport material into
4 the mine, candy wrappers, etc. One inspector once
5 offered the theory at one of our mines that the paper
6 bags full of rock dust sitting on a pallet was a
7 violation of 30 C.F.R. Section 75.400 because paper
8 burns.

9 Our company mine affiliate was cited once for
10 an accumulation of combustible materials. The
11 combustible materials were trash in a large bag stored at
12 the trackside for removal from the mine. The standard of
13 conduct is an accumulation that would be perceived by a
14 reasonable person as a hazard; yet, here an experienced
15 inspector was not able to make that sort of distinction,
16 yet, you are inserting examiners into that sort of
17 regulatory confusion. It is asking a great deal of an
18 examiner to apply such a standard.

19 Similarly, the roof control and ventilation
20 plans are very broad. Sections 75.202(a), 75.1725(a),
21 75.503, and 75.512 are broad general standards that
22 involve an exercise in judgment that will not contain
23 specific clear-cut standards. A simple review of the
24 requirements of 75.503 and 75.512 establish that these
25 requirements would not be a part of any of the

1 examinations listed in the proposed standard; yet, an
2 operator would have to train examiners on them or risk
3 being penalized for not providing adequate training and
4 examination requirements for certified persons.

5 The preamble also refers to 75.403, the rock
6 dusting standard, and this is not even in the top ten of
7 the violations cited. Usually a violation requires
8 actual sampling and is not something that is readily
9 determined visually. Again, this standard is not
10 something in examiner should be expected to report as a
11 clear-cut hazard, or in the case of the proposal, a
12 clear-cut violation.

13 In most cases, examiners do report in general
14 the need for someone to determine if additional rock
15 dusting is needed, but they do not attempt in most cases
16 to determine visually whether the area in question rises
17 to a citation.

18 One of the other standards in the top ten is a
19 violation of Section 75.1403. These are safeguards,
20 which are inspector-written and are strictly interpreted.
21 Many safeguards fall well out of the observable
22 examination arena as many safeguards involve equipment
23 pre-ops, etc., that have little or nothing to do with
24 certified examinations. Safeguards are rules that
25 provide significant fodder for legal analysis and

1 dispute; yet, as the proposed rule is written, you expect
2 the mine examiner to parse the safeguards as they examine
3 the mine.

4 According to the Notice of Proposed Rulemaking,
5 it is not MSHA's intent to significantly change the
6 general scope of the examinations under the existing
7 standards. The proposed rule would not require examiners
8 to perform additional tests, take additional
9 measurements, or open and examine equipment or boxes. If
10 that is your intent, put it in the language of the rule.
11 If it is not there, all of us in the industry know that
12 this is an empty assertion.

13 With all due respect, you cannot reassure any
14 of us who have experience with the actual MSHA
15 inspections that the application of the rule will not be
16 broader than those ten standards, or that it will not be
17 interpreted to require additional tests or additional
18 looking into boxes for the inspection of equipment.

19 Inspectors, for example, cite roof bolts that
20 are too widely spaced by a matter of inches. It is not
21 difficult for one to believe that inspectors will site
22 operators for inadequate exams because they did not meet
23 bolt spacing. The rule does not specify such limitations
24 and we have no reasonable expectations that it will be
25 interpreted by inspectors in that fashion.

1 As proposed, the rule would require examiners
2 to look for all violative conditions, even those that do
3 not present a hazard, but are violations of the mandatory
4 standards. Part 75 is a comprehensive set of rules and
5 we fully recognize that the potential exists that every
6 citation written or substantive rule will be evaluated
7 for, and in many cases will be accompanied by a citation
8 for failure to perform inadequate examination.

9 The intent of this proposal may be well
10 intentioned. The more information examiners supply to
11 management, the more proactive actions management can
12 take to correct issues before they become hazards. This
13 intent, however, is not embedded in the actual words of
14 the proposed standard. Rather than providing a proactive
15 examination environment, the requirement to identify
16 violations will end up permitting inspectors to write
17 many additional citations based on what is in the record
18 books.

19 It is clear that there will be inspectors to
20 issue citations based simply on what is in the books. We
21 think such an approach to enforcement is antithetical to
22 the purpose of the examination, identifying hazards, and
23 timely correcting them, so that miners are not injured.

24 Make no mistake, we think this rule should be
25 pulled back; but if it moves forward, there is another

1 issue of the proposed standard that needs discussing. As
2 I have stated, this list needs to be culled down to the
3 specific standards that the Agency truly believes the
4 examiner should be examining for, in my opinion,
5 observable conditions that may, if left uncorrected,
6 become a hazard.

7 As noted earlier in my comments, the preamble's
8 general statement about the top ten cited standards or
9 rules to live by don't know the scope of the MSHA
10 inspector's expectations for examiners. Every examiner
11 will need training in all of Part 75; yet, an operator
12 will also be faced with trying to explain what an
13 examiner can practically be expected to accomplish. The
14 Agency places both the operator and the inspector in an
15 impossible position. Further, any citation for an
16 inadequate exam issued, regardless of the logic, will
17 become a required addition to all future examinations.

18 An inspector citing as an example, a fire
19 extinguisher missing a tag and not reported in the exam
20 book as an example, will require the operator of that
21 mine and maybe that company to retrain all examiners that
22 this is now the new reality. It won't matter what is
23 finally worked out in the legal system. Abatement times
24 on an examination citation will not allow for anything
25 but a quick training meeting with certified people and

1 whatever was cited under the inadequate exam being added
2 to the examination requirements. I'd like to think that
3 most inspectors will not cite as an inadequate exam
4 relatively minor citations. It is incumbent upon the
5 Agency to write standards where hope is not part of the
6 equation.

7 If this standard is to go forward, the Agency
8 must establish some specificity and logical examination
9 standards that are directed as to what an examiner is
10 assigned to observe. We cannot ask an examiner to be
11 potentially responsible for any and all requirements of
12 Part 75. Failing to do so will result in confusion and
13 frustration.

14 Now, I'd like to spend a few minutes discussing
15 the economic analysis. The economic analysis of this
16 proposed rule does not take into account that a
17 significant number of additional persons will be required
18 to perform these exams.

19 On page 81171 of the proposed rule, it is
20 estimated that a pre-shift examiner would take 30 extra
21 minutes to perform his duty in a 3-hour window; a
22 supplemental examiner, 15 minutes to perform examination;
23 and a weekly examiner, 45 extra minutes to look for
24 violations during each examination. We believe that a
25 significant number of examiners will need to be hired.

1 We do not believe this will be easy or even feasible.
2 Remember, there's only three hours for pre-shift exam.

3 We believe the analysis underestimates the
4 rule. We are not sure why any person would assume the
5 role of the examiner with the potential for second-
6 guessing and Monday morning quarterbacking that this rule
7 creates. It is difficult enough to find good examiners
8 now. It may become impossible under the new rule,
9 proposed rule.

10 In addition, we have reviewed the accident and
11 injury reports that were posted on the single source
12 page. We have a fundamental disagreement with MSHA's
13 conclusion that the majority of injuries with have been
14 prevented by examinations that identify violations rather
15 than hazards. In fact, a review of these reports
16 indicates a number of things, none of which support the
17 promulgation of a rule.

18 They demonstrate a failure in some instances to
19 recognize hazards such as the failure to recognize a
20 hazard from horseback in the case of Sunrise Coal. Some
21 involve citations where a hazard was identified, but not
22 properly addressed such as the case of Rosebud Mining.
23 Some involve the failure to conduct an adequate
24 examination for hazards such as the case of Aracoma Coal.
25 Some involve accidents in and around mining equipment

1 that do not involve situations where examinations were at
2 issue, such as the case of South Central Coal where a
3 miner went inby roof support.

4 The cited accident reports and the fatalily
5 information included in the preamble of this rule is
6 flawed, as well in that the rule indents for the reader
7 to believe that if the top ten standards would have been
8 found by examiners in the accident reports listed, the
9 injury would not have occurred.

10 It is important to not only note, but to
11 emphasize, that this statement is contradictory to the
12 root cause analysis prepared by MSHA in these accident
13 reports. For instance, in June 18th, 2008 report, one of
14 the root causes was the examiner not recognizing a
15 hazardous condition or ignoring it. I have not seen how
16 looking for a violation would have eliminated any such an
17 event as he missed the hazardous condition itself.

18 On page 81167, the District Manager can require
19 that examinations in other areas of the mine for
20 Violations of Mandatory Health or Safety Standards. This
21 will give the operator no recourse or remedy if there is
22 a disagreement with the District Manager's decision to
23 add anything to be looked at or examined as he chooses.
24 Mines can be held hostage to this threat of enforcement
25 or in some cases, additional burdens placed on them by

1 the District Manager for examinations.

2 We would urge the Agency to reconsider this
3 proposed rule and to act as it did in 1996 in not
4 promulgating a new rule, especially one that fails to be
5 sufficiently specific as to recreate the potential for
6 undermining the existing system of examinations directed
7 at hazards.

8 The industry along with MSHA's prodding since
9 1996 has concentrated on improving pre-shift examinations
10 and I believe they have improved; however, this new
11 requirement will leave many persons with questions as to
12 what and when should we look at this or how in-depth must
13 the scope of our examinations go?

14 I believe this proposed standard should be
15 withdrawn. Make no mistake about that; however, if the
16 Agency intends to continue with the standard, then a
17 number of significant changes must be included. The
18 proposed standard must be much more specific as to what
19 specifically an examiner is legally bound to examine. It
20 cannot be so general as to imply to all Part 75 as
21 included. If the Agency insists on going forward with
22 this standard, I urge the Agency to develop specific
23 observable conditions of which a report is necessary.

24 Finally, I request the Agency if it determines
25 that it intends to promulgate standards that change

1 examining standards, provide sufficient time for training
2 and recrafting of reporting books, etc.; our affiliates
3 alone have thousands of certified people who all need
4 trained. We would provide each of them the training that
5 they need. The Agency needs to provide the time to
6 conduct that training.

7 There are serious consequences for certified
8 people and operators when inadequate examinations are
9 cited. The industry has stepped up its training efforts
10 to minimize these problems. Throughout my career, one of
11 the requests of certified examiners is to help them with
12 more specific information on making judgments in gray
13 areas. We owe them that same help here. Either withdraw
14 the proposed standards in its entirety or rewrite it so
15 that the certified examiner and the operator can have
16 clear expectations of what a citable standards can
17 logically be expected for an examiner to look for and
18 record in making a three-hour examination.

19 Thank you; any questions?

20 MODERATOR SILVEY: Okay. Thank you.

21 Before I make some comments and then ask you
22 some questions, did you say you remembered how things
23 were pre-1992, if you can?

24 MR. GALLICK: I'm sorry. I'm old enough, I do.

25 MODERATOR SILVEY: Yeah, me too. I mean, not

1 that I remember what happened in the underground
2 coalmines, but I know what you mean, I'm old enough too,
3 so if you would try and explain it.

4 MR. GALLICK: I think there's two or three
5 different points that need to be made.

6 One, is in that timeframe, and we're talking in
7 my case in the late '70s and '80s, there was not a lot of
8 110-type offenses filed for inadequate examinations.
9 There were not a lot of double-dipping violations where
10 you cite the condition, and then you cite the pre-shift
11 for inadequate examination. There was not a lot of
12 second-guessing on violations. There were plenty on
13 hazards and dangers, but not a lot on violations.

14 So the examination book that had minimal
15 violations in it didn't end up becoming the battleground.
16 The battleground was the physical facts of the MSHA
17 inspection. I think that's the big change. The change
18 is not so much in the practical words themselves, but the
19 practical effect that now exists in the world we live in.

20 In today's world, there is a huge amount of
21 violations that end up being inadequate examinations even
22 when the hazardous conditions are the only thing to be
23 reported. So you get a double order. There are a number
24 of 110 investigations that go on constantly over
25 inadequate examinations. That whole environment will

1 impact every one of these examiners.

2 So in the past what I remember the pre-1992
3 timeframe, we train not nearly what we would have to
4 train now on Part 75, but the examiners recorded what I
5 call observable violations, things that they physically
6 could see. They didn't report as many as there were, but
7 the consequences were minimal to them as individuals and
8 to the company as a whole. I don't think that will be
9 the case this time around. I think that's why we're all
10 concerned about this rule.

11 MODERATOR SILVEY: Okay. Thank you for that.

12 So in other words, you're saying that the
13 atmosphere has changed?

14 MR. GALLICK: That's right.

15 And to follow up on that, I just want to
16 reiterate what I said in my -- I think the rule ought to
17 be withdrawn. I'll stay with that, but I'm going to
18 comment further on that. Any rule that you put in place,
19 we owe the examiners to make it very clear what parts of
20 Part 75, if any, they have to look for. You cannot ask
21 them, as it is now the general statement violations.

22 MODERATOR SILVEY: Okay. I'm going to follow
23 up with some of the same line of questioning that I was
24 asking Chris, really.

25 A couple of things, first of all, because we

1 had examiners testifying in Denver, so for everybody
2 who -- people in this room who may be examiners or who
3 may at one time have been examiners, we do -- I want to
4 say -- and I'm sure my colleagues share my opinion --
5 that we know that that is a job that you take seriously
6 and from the Agency's standpoint, we appreciate that
7 because that's a solemn job.

8 As I said when I was in Denver, for somebody to
9 go in, you know, within three hours before the oncoming
10 shift and basically go through the mine and after you go
11 through and do your examination to then basically certify
12 that the mine is safe for the miners to come on, the next
13 shift to come on, that is a responsibility that people
14 take seriously. And as I said, we appreciate that.

15 Back to you, John, though, if you would -- and
16 I'm hearing what everybody's saying. But as your
17 counter, you said that we should develop a rule where
18 specific changes must be made. If you have any
19 recommendations for what should be encompassed in those
20 specific changes, we would appreciate it if you would
21 submit those, and I'm talking about down to a specific
22 language. As I said in my opening statement, if you
23 would do that, that would be helpful to the Agency.

24 I'm going go back, though, and make just the
25 one or two other comments.

1 On the issue of the District Manager being able
2 to require other areas, the existing rule requires that
3 only in one section, but I just want people to know
4 because, I mean, I'm hearing all these comments that MSHA
5 has come out now somehow with unbridled -- giving
6 unbridled discretion to the District Manager. And in the
7 existing rule, it's under the pre-shift Section 75.360,
8 but one of the provisions that we propose to change was
9 indeed the pre-shift.

10 Obviously, you all know it was the pre-shift,
11 on-shift, supplemental, and weekly. But under the pre-
12 shift provision, it says that the District Manager may
13 require -- it's actually the same language as under the
14 pre-shift. It would just be expanded.

15 MR. GALLICK: Maybe I didn't make myself clear
16 enough and I apologize. But what I'm saying is if you're
17 going to review this rule, we need a place to arbitrate
18 the decisions.

19 MODERATOR SILVEY: Okay. Well, then -- I'm
20 glad we're engaging in this.

21 MR. GALLICK: We need to be able to say, I
22 don't agree with you. I have a place to go to discuss
23 this be beyond your authority.

24 MODERATOR SILVEY: Okay. Because it is an
25 existing provision, are you having -- are you

1 experiencing problems with this provision now? And I'm
2 going to put you on the spot because that's kind of a
3 loaded question because the District Manager will look at
4 this.

5 MR. GALLICK: I didn't up until about 30
6 minutes ago.

7 MODERATOR SILVEY: I said, I didn't mean to put
8 you on the spot.

9 MR. GALLICK: No. It's been very rare when I
10 see an additional pre-shift added in my career. I just
11 state like anything else, if we're going to rewrite a
12 rule, we need to add methodology to get -- I use the
13 phrase "arbitration," but someplace to go mediate a
14 dispute.

15 MODERATOR SILVEY: The other comment I had --
16 and I'm hearing this from -- and I know that some of the
17 comments are duplicative. I don't mean word for word,
18 but some people are saying the same thing, but I'm --
19 hearing examiners are not trained inspectors.

20 So not intending to spend the same amount of
21 time that I spent with Chris, but some amount of time
22 with you, John, I don't want to ask for me -- you're not
23 suggesting to me -- I don't think you are suggesting to
24 me that Violations of Mandatory Health or Safety
25 Standards at your mines be left for the inspector to

1 point out, are you?

2 MR. GALLICK: No, no.

3 MODERATOR SILVEY: I didn't think so.

4 MR. GALLICK: Let's walk through this as a
5 practical matter.

6 MODERATOR SILVEY: So you heard my other line
7 of questioning?

8 MR. GALLICK: Right.

9 MODERATOR SILVEY: So I know at some point in
10 time, you know, examiners or non-examiners, they could be
11 the person doing -- it could be the roof bolt person, you
12 know, whatever, the pumper. I'm just making it -- will
13 go and correct certain other Violations of Mandatory
14 Health or Safety Standards. Maybe not during the time of
15 the examination, but at some other time. Because as I
16 said earlier, the optimum thing would be for the
17 inspector to come and there be no violations.

18 But, anyway, you said walk through it, so I
19 kind of just wanted to get that out sort of.

20 MR. GALLICK: Okay. Walking through it, Pat,
21 ideally, your goal is to have a system in place; and your
22 system includes your compliance with regulations, your
23 safety systems, your various processes, which should
24 minimize the amount of citations or violations that are
25 in your mind, so when you make a power move and you have

1 an inspection checklist, that you look to the power box
2 and it's in place, therefore, you have a minimal amount.

3 MODERATOR SILVEY: Right.

4 MR. GALLICK: What I'm saying is this. Let's
5 use that as an example. I move a power box, that is not
6 a pre-shift examiner's role, that's other people's roles
7 to inspect that. But as the rule is written, I would
8 have to potentially train him on the nuances there
9 because it's all Part 75. I'm saying we need to cull
10 down Part 75 and say the only observable items on his
11 normal examination should be reportable.

12 The other thing is I think almost every
13 operation, most operations, I'll just let it go at that,
14 have other systems besides the plan. They have, as you
15 said, various ways of getting information out. When
16 people find violations, they either correct them or they
17 report them.

18 What you ask examiners to do typically for you
19 is to record in the book hazardous conditions, and those
20 hazardous conditions need to be handled in the manner of
21 the Act or the regulation.

22 You then have other information that you want
23 to know from your examiners. They don't necessarily have
24 to judge whether it's a violation. They have to make
25 only -- once they're past the fact that it's not a

1 hazard -- let's start with that. Right now, they're
2 required to tell you they have to have certain standards.
3 Once they're past that, then you have various reporting
4 of what I used to call observable conditions. There's a
5 hole in the stop gap; the door doesn't close in a wall;
6 you know, things that are not necessarily, are not
7 hazardous, clearly not hazardous, but you'd like to know
8 as a mine foreman, they gave you that list somewhere,
9 sometimes in a book, actually in a certified book,
10 sometimes it's in another nonofficial manner, but that's
11 information you ask them to give you they are not having
12 to make.

13 The clear distinction between that and this
14 proposed regulation is the fact that they miss things for
15 you is part of your developmental life, you know, the guy
16 doesn't recognize things and you may train better, maybe
17 you don't, but, you know, that's part of it. Whenever he
18 gives you, he's not judging whether, A, it's a violation
19 or, B, it's just a condition to tell you about.

20 So I tell you that there is some spillage along
21 the beltline, 35 to 38. I'm not judging you. I know
22 it's not a hazard, so I'm not judging you. I'm letting
23 you know to inform you as the mine foreman and you and
24 the mine foreman can make the decision when you set your
25 belt cleaners up, say, stop over there and take a look at

1 it. The guy may stop up there and say why am I stopping,
2 it's only three shovelfuls, or he may say, wow, this is
3 pretty bad. Either way, it's a system. This rule
4 attempts to change that informal system to a formal
5 system and now puts the pressure on the examiner for all
6 the negative consequences of missing violations.

7 The second problem I have with that rule --
8 that's why I said earlier, I think we should just be
9 having him look for observable things and maybe that's
10 the right answer just say observable conditions and
11 there's no secondary citation; there's nothing. You're
12 judged on hazards and you're not judged, but we want you
13 to tell us what else you see in the mine.

14 Okay. I'll have to think about that, how that
15 would work language-wise. The second thing is as an
16 examiner, one of the things examiners -- especially when
17 I was at the mine site -- unfortunately, I don't do that
18 much anymore -- but when I was at the mine site trying to
19 train examiners, they always ask, give me black-and-white
20 descriptions. What do you want me to report? When
21 should I shut this down? When should I do this? And we
22 would sit there and talk and work and ask any of the MSHA
23 guys that have been part of those conversations, you
24 know, people would like to have a handle on their job.
25 You know, you said you've had examiners who testified in

1 Denver. They want to have a handle on their job. When I
2 tell them, look, guys, you've got to report any Part 75.
3 Now, I'm going to give you a one-day training class on
4 Part 75, which we all know is not really all that
5 detailed and I'm going to say don't worry about the
6 electric stuff, you're not expected to know that. Well,
7 it doesn't say that in the book, John. It says all Part
8 75.

9 Now, that's not a great way of establishing a
10 rule. As I said in my comment, we can't have hope in a
11 rule. We have to have language. So maybe the answer to
12 say record conditions without comment, things that you
13 want the mine foreman to go look at. I don't know. I
14 have to think about that.

15 MODERATOR SILVEY: Okay. This is advancing;
16 good discussion, and I appreciate that.

17 One of the things so that everybody -- one of
18 MSHA's goals was to include Violations of Mandatory
19 Health or Safety Standards was to assure that -- and I
20 said that in the opening statement that you identify and
21 correct conditions before a hazardous condition develops.

22 Now -- and this is kind of some of what I said
23 in Denver, too. There may be a Violation of a Mandatory
24 Safety and Health Standard. We both sort of agree to
25 that. That in and of itself may not present a hazard and

1 I gave an example. Okay. And then you may take another
2 Violation of a Mandatory Safety and Health Standard --
3 I'm talking about underground coal -- and you add that to
4 it and it still, the two of them may not present a
5 hazard, working out, then you got it. I'm only thinking
6 of how far a Violation of a Mandatory Safety and Health
7 Standard -- I'm talking about underground coal -- and you
8 add that to it and it still, the two of them may not
9 present a hazard. Then you've got a third. I would go
10 that far, Violation of a Mandatory -- all three of them
11 are violations. That might not present a hazard, but you
12 get four or at some point, and I don't know what the
13 magic number is and I'm not even identifying what the
14 standards are right now. They could be related.

15 Let's say you're talking about a group of
16 ventilation violations, but at some point even though
17 singularly, they might not be -- it might not be a
18 hazard, at some point they together, taken together, they
19 might. So that was one of the things we were trying to
20 get at, to make sure these Violations of Mandatory Health
21 or Safety Standards were identified and fixed, and that's
22 one of the things.

23 And then the second one was to get -- identify
24 either one of the four I just talked about without
25 mentioning what they are, making sure that they didn't,

1 in and of themselves, singularly develop into a
2 progressively worse condition.

3 So those are the kind of things -- but
4 recognizing, you know, like everybody has said to us that
5 the time for a pre-shift is a defined amount of time.
6 You all know when a supplemental is needed and you know
7 how the on-shift is done, as well as the weekly. So, you
8 know -- so I say that. And then if you, John, can think
9 you've progressed further in terms of how we're going now
10 and you want to submit any specific alternative, then we
11 will appreciate that.

12 MR. GALLICK: Okay.

13 MODERATOR SILVEY: Anything?

14 MR. FETTY: No. You actually went right down
15 the example that I was going to use. I was a little more
16 specific and maybe I will elaborate a little, but I was
17 going to say, maybe just for the sake of conversation,
18 let's say you have a person, like the air -- you know,
19 you've got things pressurized like they should be and the
20 air is filled with what it should be doing.

21 At the same time, you got a squeaking wheel.
22 It doesn't pose any hazard. It's not at the point where
23 it's hot. It doesn't pose any immediate hazard and it's
24 not going to take the belt out of service for that
25 roller. Near that squeaking roller, you have the

1 accumulation that you identified between 35 and 38
2 blocks. The accumulation is not rubbing in the belt and
3 it's not turning in the roller. I don't think we have a
4 coal operator in this room that would want to let any of
5 those three conditions, you know, go for any length of
6 time before they corrected one, if not all three.

7 But, you know, there are instances where the
8 inspector will come behind the examiner and find those
9 three conditions and wonder, you know, what's going on.
10 And like Pat was saying, you know, if you have those
11 three coming together, it's not a good situation.

12 MR. GALLICK: No question. I would say, Greg,
13 that, yeah, in the ideal world, the examiner would close
14 the door because that's fairly simple to do and would
15 inform the mine foreman -- mark the roller and inform the
16 mine foreman in some manner, official or unofficial.

17 However the system at the mine is -- there was
18 a door open at the 36 crosscut or there's spillage, some
19 coal spillage, from 35 to 38, and I marked a roller that
20 maybe somebody needs to take a look at, it's running, but
21 it sounds to me like it needs to be looked at, that's the
22 ideal world.

23 The difference between what you and I just
24 described here, and I think we're both comfortable with,
25 and this rule is that would now become a legal document.

1 I'm saying that unless it's a hazard, it should not be a
2 legal document relative to the examiner and the mine
3 foreman's actions. Now, I expect the mine foreman to fix
4 those things like you and I just talked about.

5 Now, from a priority standpoint, he may say:
6 Okay, you've got the door shut; okay, I'm going to have
7 so and so check the accumulation, but I've got three
8 other ones to do first. You know, and that's the
9 difference where I see my paranoia. And I believe
10 they're really out to get you. It's not paranoia that we
11 will end up in situations where examiners get questioned
12 on that; he misses that roller or whatever; and someone
13 says we see it now in hazards. You know, you should've
14 seen this. Well, it wasn't that bad when I went through
15 or whatever may be. Now, you get into that back-and-
16 forth discussion between what is an inadequate exam,
17 what's an inadequate exam. We don't need -- it's tough
18 enough on hazards. We don't need it spinning around on
19 various parts of Part 75. My view is all those
20 additional recordings of non-hazards should be in some
21 non-citable groupings.

22 You know, to get back to your question of
23 Chris, you know, when you record this in the book, the
24 guy may or may not -- it may not be about MSHA. I mean,
25 he's not going to be the judge of -- I mean, you're not

1 going to walk by that and say it's a violation. The
2 inspector might say it's not a violation. You might get
3 somebody to look at that, but I'm not citing it today.
4 You know, those are all judgment calls. But, ideally,
5 your examiner would at least tell you about those things.
6 I just don't think you need to be told in a formal book
7 where he is dealing with all of Part 75 and that he feels
8 threatened; and I don't mean it that way, but feels under
9 the gun that his decisions could be second-guessed by me,
10 you and others, and that's what I'm trying to avoid.
11 Your example is a good example of how you would like to
12 accomplish things.

13 MR. FETTY: I guess I do have one other follow-
14 up question.

15 MR. GALLICK: Sure.

16 MR. FETTY: You know, based on your experience,
17 is there anything you could possibly suggest or come up
18 with at a later time to remove some of the subjectiveness
19 of what constitutes a hazard and what doesn't? I mean,
20 that's one of the problems.

21 And I'll give you an example. You know, when I
22 inspected, I would find let's say float coal dust, you
23 know, for the length of the beltline, say 400 or 500
24 feet, just as an arbitrary number. And, of course, I'm
25 going to give you a 400 for the condition in and of

1 itself, and I'm going to cite a 75.360, whatever, you
2 know, for the failure to report that. And in my closing
3 discussion with the mine operator such as yourself, the
4 response that I would receive was the mine didn't
5 consider it a hazard and we did not have an immediate
6 ignition source and that's the kind of stuff that were
7 trying to prevent.

8 MR. GALLICK: That's tough, float dust, any of
9 those are tough as to what -- you know, like I said, if
10 we're debating hazards, think about this. I think you
11 and I could sit down, and we could add a couple other
12 people. We could add miner's reps in the room here and
13 we're only talking hazards, a relatively small number of
14 the actions that you see during your course of time in
15 the mine.

16 Now, we're talking about expanding this
17 exponentially to an entire Part 75. Can you imagine how
18 those debates are going to go? You know, that's the only
19 reason I'm saying you need to stay away from that whole
20 book. There has to be a better alternative. By the way,
21 I have never solved how to tell somebody what a hazard
22 is.

23 MODERATOR SILVEY: One thing, John. You
24 mentioned that in the economic analysis, you mentioned
25 that the proposal would require a significant number of

1 examiners, and I was going to ask you if you have
2 specific amounts, either numbers to just provide them
3 before the record closes.

4 MR. GALLICK: I probably won't be able to. But
5 I just assumed that if mine examiners, if you only have
6 three hours to examine, you're not going to change that;
7 you're not going to make it four hours.

8 MODERATOR SILVEY: Yeah, but --

9 MR. GALLICK: If you take an additional 30
10 minutes, the runs have to be shorter.

11 MODERATOR SILVEY: I know. But if you disagree
12 with the economic analysis, can you tell me that it's --
13 and I get these comments all the time, they say it's not
14 realistic. It's a lot more. Well, I don't know what a
15 lot more means.

16 Are you telling me it's going to be, you know,
17 \$100,000 more, or is it going to be \$5 million more?
18 That's all I'm saying.

19 MR. GALLICK: Fair enough.

20 MODERATOR SILVEY: If you look at the record, I
21 can't take your comments and tell -- and talk about
22 objectives and turn it into an objective comment that I
23 can use.

24 MR. GALLICK: Fair enough.

25 MODERATOR SILVEY: Kevin, did you have

1 anything?

2 MR. BURNS: I just had a question on the
3 examinations that your people do.

4 I mean, based on your training, are they
5 trained to maybe change the way they do their
6 examination? Because my experience has been, you know,
7 the direction that you're walking in a mine, if you're
8 walking this way, the condition doesn't look that bad.
9 But when you're walking this way, you know, that
10 direction changes, you know, your whole perception of
11 that condition. I'm sure you've seen that?

12 MR. GALLICK: Yes, I have.

13 MR. BURNS: Is there anything in how you train
14 your people so that you don't -- because I know when I
15 cut the grass, I do it the same way all the time. Is
16 there anything that you do to force your examiners to
17 change how they approach everything so that they can pick
18 up on that sort of situation?

19 MR. GALLICK: No.

20 MR. BURNS: Because quite frankly, I think
21 often our inspectors do things just the opposite way your
22 guys do. You work from the face back; they work from the
23 mouth up. And, you know, you're looking at the same
24 condition, but from a different perspective, quite
25 frankly.

1 MR. GALLICK: The short answer is no. If we're
2 doing anything, it's informal at the mines that I'm not
3 aware of. We don't have anything official.

4 But I'll answer, you're right; they do look
5 different from different angles, no question. When
6 you're walking a beltline in or out, the ribs in
7 particular will have a different opening, you know,
8 different gaps and what not.

9 MODERATOR SILVEY: Okay. Thank you very much.

10 MR. GALLICK: Thank you.

11 MODERATOR SILVEY: Okay. Thank you very much.

12 MR. GALLICK: Oh, thank you.

13 MODERATOR SILVEY: Now, our next speaker is Mr.
14 McBride.

15 MR. McBRIDE: Good morning.

16 MODERATOR SILVEY: Good morning.

17 MR. McBRIDE: I appreciate the opportunity to
18 represent the State of Illinois, and, my Director, Joe
19 Angleton, we're very interested in what's happening here
20 today.

21 MODERATOR SILVEY: Would you just give her your
22 name?

23 MR. McBRIDE: My name is Donald -- D-O-N-A-L-D
24 -- McBride -- M-C-B-R-I-D-E.

25 The Illinois Department of Natural Resources

1 Office of Mines and Minerals is charged with the
2 responsibility of protecting the health and safety of all
3 coalminers in the State of Illinois. This is
4 accomplished by the strict enforcement of the Coal Mining
5 Act (225 ILCS 705) and the Safety and Health Regulations
6 (62 Illinois Administrative Code 220).

7 Our inspection force is comprised of certified
8 State mine inspectors, which requires mine examiners'
9 credentials, mine managers' certificates, and a total of
10 at least ten years of underground coal mining experience.
11 They are assigned a district and are directed to inspect
12 each mine within their district at least one inspection
13 cycle per month.

14 As part of the inspection cycle, Illinois State
15 mine inspectors work with miners and management to ensure
16 that the mines are all examined in their entirety each
17 shift, even on non-coal producing days. Illinois law
18 mandates that examinations include every active working
19 place in the mine, and that examiners test for
20 accumulations of methane and other harmful or noxious
21 gases. Examiners are to measure the air in each air
22 split to ensure that the air is traveling in its proper
23 course and volume. Examiners are to examine all seals on
24 the pre-shift every shift, all doors affecting
25 ventilation, and are to inspect the roof and ribs at all

1 faces and other working areas, as well as travel ways
2 where miners are required to work or pass to work.

3 Illinois mine examiners are also required to
4 examine approaches to abandoned workings to ensure that
5 they are still being properly ventilated. Illinois law
6 also requires that the entire escape way system be
7 examined daily. During the actual work shaft, Illinois
8 requires that a supervisor who is certified as a mine
9 examiner do at least one workplace examination or more
10 often if necessary for the continued safety of the miners
11 and an additional examination by an Illinois certified
12 mine examiner before any electric equipment is taken into
13 working face areas.

14 Illinois examiners are charged with the duty to
15 mark out or danger out any conditions that they determine
16 are hazardous or dangerous, such as loose or hazardous
17 roof, accumulations of methane or other gases, or any
18 other dangerous condition. The results of the
19 examination must be entered into a book and kept for that
20 purpose.

21 Each mine examiner must complete the
22 examination cycle for pre-shift for the entire mine
23 within the prescribed time limit of four hours in
24 Illinois for the mine to be considered adequately
25 examined. If any area is omitted from the examination or

1 the examiners have not completed the examination in the
2 prescribed time limit, then that examination is declared
3 inadequate and the entire mine must be re-examined again
4 before work can be performed anywhere in the mine other
5 than that of the examination.

6 Additionally, Illinois does not allow for
7 callout examinations, meaning that each examiner must
8 exit the mine to fill out the books. Transferring
9 information by phone to another person is not permitted.
10 We believe that this ensures that inaccurate information
11 about the examination is not passed on to the next shift.

12 Any miner wishing to become an Illinois
13 certified mine examiner or supervisor must provide
14 evidence that he/she is at least 21 years old, of good
15 repute and temperate habits, a citizen of the United
16 States, has had at least four years of experience in
17 underground coalmines, and possesses a first-class
18 miner's certificate issued by the Illinois Miners'
19 Examining Board.

20 Even graduates holding mining engineering
21 degrees must have at least two years of actual
22 underground mining experience before they are eligible to
23 challenge the Illinois mine examiners' test. This is in
24 sharp contrast with the Mine Safety and Health
25 Administration's standard that accepts MSHA inspectors

1 without any practical mining experience. In fact, many
2 MSHA inspectors do not qualify from a practical work
3 experience standpoint to be certified as an examiner in
4 Illinois.

5 Any miner that meets the criteria referenced
6 above is eligible to challenge the mine examiner
7 certification test administered by the Illinois State
8 Mining Board. This Board is responsible for overseeing
9 all aspects of mining in Illinois and requires separate
10 certifications for all inspectors, examiners, mine
11 managers, mine superintendents, hoisting engineers, shot
12 firers, and a variety of surface mine certifications.

13 Miners who successfully complete the
14 certification process can function only with the Illinois
15 State Mining Board's consent.

16 Not only are Illinois miners required to obtain
17 certificates to perform specific job duties, but they
18 must also maintain these certifications by acceptable job
19 performance under the watchful eye of the State mine
20 inspectors. Any charges of malfeasance by any certified
21 person requires action by the State Mining Board and can
22 lead to disciplinary action, including suspension or a
23 complete revocation of certificates.

24 When studying our system objectively, it is
25 obvious that the State of Illinois takes the process of

1 coal mining very seriously and guards the health and
2 safety of the miners very closely. We feel that adequate
3 examinations are a vital part of the overall mine safety
4 effort. We cannot, however, agree to the proposal that
5 is the topic of this hearing. Primarily, the concept
6 that mine examiners examine for violations as part of
7 their pre-shift or on-shift examinations, we find
8 particularly objectionable. There are several reasons
9 for our objections, and we will attempt to address them
10 and explain our rationale.

11 Point Number 1. Illinois certified examiners
12 are certified according to Illinois mining law and
13 establish mining practices under the authority of the
14 Illinois State Mining Board.

15 The Federal mining regulations as found in
16 Title 30 of the Code of Federal Regulations, 30 C.F.R.,
17 are not taught in the classes that prepare miners for
18 Illinois certification. Title 30 C.F.R. is an important
19 piece of legislation, which was designed to promote
20 safety. In reading the statute, it is evident that the
21 regulations were to be enforced by the Federal
22 Government.

23 Under the proposed rule, however, the State
24 certified mine examiners would be required to enforce the
25 finer details of Title 30 C.F.R. without having obtained

1 any training. The IDNR feels that this oversteps the
2 intent of the law and would be very unfair to the
3 examiners and the mine operators, as well as to the State
4 Mine Regulatory Agencies. The only individuals qualified
5 to dive into the fine details of Title 30 C.F.R. are the
6 people that have been hired by the Federal Government for
7 that purpose, which are Federal inspectors.

8 Federal inspectors have the advantage of
9 attending the Mine Academy in Beckley, West Virginia,
10 where they are educated in the details of Title 30 C.F.R.
11 and the MSHA philosophy of mine inspections.

12 The training received at the academy and that,
13 which is obtained on the job, equips Federal mine
14 inspectors with the tools necessary to conduct
15 inspections and write violations that they feel warrant a
16 citation. Even new MSHA inspectors also travel and train
17 with seasoned inspectors for sometimes up to a year
18 before they are authorized to write their own violations.

19 The State of Illinois also puts State mine
20 inspectors through a rigorous training cycle before they
21 are allowed to function as a standalone inspector, even
22 though each of them has a minimum of ten years of
23 underground experience. The title of inspector, whether
24 State or Federal, requires a stepped-up level of training
25 that even dedicated, very experienced miners do not get

1 during the daily routine of working in a mine.

2 IDNR's philosophy is that this experience
3 teaches miners how to recognize obvious hazards, as well
4 as some that are not so obvious; but only advanced
5 classes can teach the proper math skills and the use of
6 technical instruments to be able to calculate ventilation
7 quantities and recognize potential mine gas problems, but
8 nothing short of being an MSHA inspector trained as an
9 MSHA inspector can truly make an MSHA inspector. Putting
10 even the most experienced miners under the gun of seeing
11 mine conditions through the eyes of a highly trained MSHA
12 inspector is very unfair.

13 Point Number 2. An Illinois examiner or group
14 of examiners must start and complete an examination of
15 the entire mine within four hours. Examiners arriving on
16 the surface late after their examination will cause the
17 entire examination to be declared invalid and the entire
18 mine to be re-examined.

19 In Illinois, an examiner or group of examiners
20 must start and complete an examination of the entire mine
21 within four hours. For the larger Illinois mines, it
22 means that each examiner may have an examination route of
23 several miles long that must be started and completed
24 within that four-hour window.

25 Illinois State mine inspectors adjust the

1 length of the routes with mine management and the
2 examiners to make sure that the routes are adequate as
3 far as the distances that must be covered in relation to
4 the time constraints. When the State mine examiner feels
5 the route is too long for the examiner to do an adequate
6 examination, additional examiners will be required.

7 Here is our second problem with the proposed
8 rule change. Even on an average route, an examiner may
9 ride or walk a combination of three miles or more to
10 observe the hazards he has been trained to look for and
11 to take the measurements he is required to take.
12 However, all of this has to be completed in the time
13 constraints of our four-hour window. An MSHA inspector
14 has neither the distance requirements nor the time
15 constraints to contend with. An MSHA inspector can take
16 an entire shift to inspect a 50 crosscut travel way,
17 measuring bolt spaces, checking bolt torque or header
18 board tightness, measuring diagonals at intersections or
19 a number of other things that he feels necessary to
20 satisfy Title 30 C.F.R.

21 This travel way may only make up 10 percent of
22 the mine examiner's route, so how can we expect the mine
23 manager or the MSHA inspector to agree on everything when
24 one has four hours to examine three miles and the other
25 has an entire shift to cover 50 crosscuts with a fine

1 tooth comb? Again, this is unfair and unreasonable.

2 Point Number 3. In the background information
3 section of the justification document for this proposal,
4 MSHA states: "Underground coalmines are dynamic work
5 environments where working conditions change rapidly and
6 without warning."

7 If this rule change is adopted, this poses
8 another problem from our perspective. Very rarely does a
9 mine examiner examine his route at the same time as the
10 MSHA inspector does his inspection. Many times, the time
11 difference will be several hours between the times when
12 the two people are in the same area. When the examiner
13 was in the area, he observed no hazards and continued his
14 route. If an MSHA inspector goes into the same area
15 three to four hours to six hours later and sees what he
16 feels is a violation according to the proposed rule
17 changes, an additional violation will be written against
18 the examiner or examination for not seeing the same thing
19 that the MSHA inspector saw. This philosophy goes
20 against the very statement highlighted above in MSHA's
21 own words, those words that underground coalmines are
22 dynamic work environments where working conditions change
23 rapidly and without warning.

24 We pose the question how can two people be
25 expected to see the same thing in an area of a coalmine

1 when they are looking several hours apart from each
2 other? We agree that mine conditions do rapidly change,
3 but we do not agree that a mine examiner should be held
4 accountable for what an inspector sees during another
5 time of day or even a completely different day.

6 Point 4. We share in recognizing the
7 importance of thorough mine examinations and we require a
8 very strong commitment from all miners that we certify.
9 But because of increased pressure by MSHA, we are now
10 seeing some very experienced and well-qualified people
11 decline to become certified as mine examiners.

12 Recently, the Illinois State Mining Board
13 received the credentials from three miners that no longer
14 wish to maintain their mine examiner certifications.
15 These miners appeared before the Illinois State Mining
16 Board and requested that the Board revoke their mine
17 examiner certificates. The Board reluctantly complied
18 with the individuals' requests to voluntarily revoke
19 their certifications.

20 The reason for the surrender of the credentials
21 was that the miners were fearful of action against them
22 if they failed to see all of the things that the MSHA
23 inspectors saw along their examination routes. We want
24 the examiners to be thorough. It is unreasonable to
25 require an examiner to see identical conditions with the

1 same priorities as an MSHA inspector. Many of the
2 violations written are judgment calls.

3 In Illinois, we have yet to see a definition of
4 what constitutes many violations we see written. At what
5 point does a very small discoloration on top of rock dust
6 become an accumulation of combustible materials?

7 If a mine examiner witnesses a 3-inch high pile
8 of coal fines under a bottom roller of a belt line with a
9 roller still 2 feet above the fines, he may decide that
10 that is not a hazard and, thus, does not record it or put
11 it in the books. The next day, however, he finds out
12 that this examination was declared incomplete or
13 inadequate because an MSHA inspector conducted an
14 inspection and wrote the condition as a violation that in
15 the MSHA inspector's opinion, the examiner should have
16 seen. Our argument is that both people did see the small
17 pile of coal fines.

18 Now, under this proposal, one person's opinion
19 of a condition is mandated to be the opinion of everyone
20 and that is just not humanly possible. We reiterate,
21 concerning obvious hazards, there will rarely be
22 disagreements; however, on the finer details of Title 30
23 C.F.R., an examiner cannot possibly satisfy the MSHA
24 standard and should not be held accountable for having a
25 different opinion on the point of law.

1 In Illinois, we have witnessed MSHA violations
2 of toilet paper being written as combustible materials in
3 the mine. That is not a violation that we teach miners
4 to recognize, and we do not consider that a hazard when
5 they take their certification test, nor do we intend to
6 start teaching many of the other things that our
7 examiners have been cited for not putting in the books.

8 If MSHA feels that these differences in
9 opinions are really citations and is comfortable in
10 defending these violations, then that is MSHA's
11 prerogative to do so. The State certified mine examiner
12 should be left out of that equation. This proposal puts
13 the mine examiner in an unwinnable situation and does
14 little to nothing toward improving the safety of the
15 mine.

16 If an examiner is willfully or knowingly
17 neglecting to properly examine his assigned route, the
18 State of Illinois will see to it that he pays the price
19 for that negligence. We will help MSHA purge our
20 industry of unmotivated and ineffective examiners, but do
21 not punish the vast majority of good conscientious
22 examiners in this country because they have a different
23 opinion or less time to look or less training to satisfy
24 an MSHA inspector.

25 Point Number 5. There are several other points

1 to discuss, but we will conclude with this one. The
2 State of Illinois has witnessed MSHA citations against
3 examiners and examinations being deemed inadequate for
4 several years now.

5 Our question is if MSHA has the authority to
6 issue citations to the examiners and examinations now,
7 then why is there is a need for this new rulemaking?
8 Have the MSHA inspectors in Illinois been overstepping
9 their legal authority to cite the examinations?

10 We, as a State Agency, have seen some MSHA
11 inspectors' actions that have go beyond what we feel is
12 the original intent of Title 30 C.F.R. If the proposed
13 rule changes pertaining to mine examinations are adopted,
14 we are concerned that more highly qualified mine
15 examiners will forfeit their certifications for fear of
16 prosecution should their examination fail to meet MSHA
17 standard. This reaction by a certified examiner will
18 cause the examiner's position to be filled by less
19 experienced miners who will examine motivated by fear
20 rather than a good-faith search for hazards. Thank you.

21 MODERATOR SILVEY: Thank you.

22 I'm going to say this for the benefit of
23 everybody. I am hearing all this testimony on the fact
24 that the Violations of Mandatory Health or Safety
25 Standards should be left to the MSHA inspector and I

1 think you heard me earlier say that any responsible mine
2 operator would want to find violations.

3 I think any responsible mine operator in this
4 room would agree with me would want to find Violations on
5 Mandatory Safety and Health Standards before an MSHA
6 inspector did. But as a point of clarification, because
7 I'm having some difficulty following this line that the
8 standards in the code in Part 75 here -- and I'm going to
9 point it out to be illustrative, that the safety and
10 health standards in here are for the MSHA inspector to
11 find.

12 And as a point of clarification, I'm going to
13 go back to the Mine Act, again, and the Mine Act says --
14 and I know you know it as well as I know it that
15 operators of such mines with the assistance of the miners
16 have -- and this is a declaration from Congress -- have
17 the primary responsibility to prevent the existence of
18 such conditions and practices in such mine, but the
19 specific one I want to read here for a point of
20 clarification is: "It is the purpose of this Act, (1) to
21 establish mandatory health and safety standards and to
22 direct the Secretary of HHS and the Secretary of Labor to
23 develop and promulgate and improve the mandatory health
24 and safety standards to protect the health and safety of
25 the nation's coal and other mines; and (2) -- and this is

1 the underscored on here -- "to require that each operator
2 of a coal or other mine and every miner of such mine
3 comply with such standards"

4 And I guess the only thing I want to say is
5 that the state mandatory health and safety standards
6 provide a benchmark for compliance. Now, granted, the
7 inspectors go in and determine if the operators comply,
8 but the benchmark for compliance is for the mine operator
9 to comply with the standards.

10 And I guess you asked me why am I saying that?
11 I'm saying that because when we add hazardous conditions
12 or whatever the standard said, hazards, and Violations of
13 Mandatory Health or Safety Standards, it seems that
14 everybody is coming back to me saying -- almost everybody
15 -- let me say that -- because I shouldn't say everybody
16 because we did get one comment this morning who supported
17 the proposed rule -- but it seems like everybody is
18 coming back and saying that the inspection is for the
19 inspector to identify Violations of Mandatory Health or
20 Safety Standards. And everybody, we all know that the
21 role of the inspector is to go in and inspect the mine
22 for Violations of the Mandatory Safety and Health
23 Standards, but it's the responsibility of the mine
24 operator to comply with the Mandatory Safety and Health
25 Standards.

1 So I'm just making that as a statement. But as
2 a point of clarification so that we, you know, all are
3 sort of on the same -- start out from the same place sort
4 of. And, quite honestly, I don't have any more comments.
5 I mean. I don't have any questions of you, except for
6 that comment, that I wanted that comment.

7 Thank you very much.

8 MR. McBRIDE: Thank you.

9 MODERATOR SILVEY: The next, Mr. Harris, state
10 of West Virginia, Randall Harris.

11 MR. HARRIS: Welcome to Charleston.

12 MODERATOR SILVEY: Thank you. We like being
13 here.

14 MR. HARRIS: My name is Randall --
15 R-A-N-D-A-L-L -- last name -- H-A-R-R-I-S. I'm
16 representing the West Virginia Office of Miners' Health
17 Safety & Training.

18 Again, thank you all for coming. We appreciate
19 the opportunity, again, to make our position known.

20 The sovereign State of West Virginia takes the
21 process of coal mining very seriously and guards the
22 health and safety of its miners very closely. We feel
23 that adequate examinations are a vital part of the
24 overall mine safety effort. We cannot, however, agree to
25 the proposal that is the topic of the hearing today.

1 Primarily, the concept that mine examiners
2 examine for violations as part of their pre-shift or on-
3 shift examination, we find particularly objectionable.
4 This position was voiced to the Agency and its management
5 as part of the meeting in Arlington with the member
6 states of the Interstate Mining Compact Commission last
7 month.

8 During that meeting, no state in attendance
9 spoke in favor of the approach.

10 West Virginia concurs with the position of
11 other mine safety regulatory organizations and their
12 objections to the rule as proposed.

13 We will be providing detailed comments, and
14 alternatives will be submitted prior to the end of the
15 comment period in more detail. We just wanted to make
16 sure that you understand that we concur with the other
17 states and our position to the rule as proposed.

18 While I'm here, I also wanted to follow-up on a
19 couple of other comments that were made earlier. West
20 Virginia code does not require mine examiners, we call
21 fire bosses, to look for more than hazards and dangers.
22 I'm not sure what Greg was referring to. I'd like to
23 know what quote. I just called our counsel to make sure
24 I was right in stating that, but we don't know of any
25 such provision.

1 The other thing is as far as the pre-'92 thing,
2 Pat, I wasn't in the mines pre-'92. However, I quickly
3 went through numbers and pre-'92, we were averaging well
4 over 100 fatalities a year. Post-'92, we have been
5 averaging around 50. So something happened in '92. I
6 don't know what it was, but to say that the removal of
7 that resulted in more absence or fatalities isn't
8 supported by the numbers.

9 MODERATOR SILVEY: I think -- and I said this
10 in Denver -- not in response to the comment you just
11 made, but what I said is I think that over the years,
12 progressively over the years -- and you can look back at
13 the statistics and I think they reflect that -- I do
14 think that there has been significant improvement in mine
15 safety and health in both coal mining and the non-coal
16 industry. And I think the industry, the labor, miners
17 and all take some, you know, share, share some credit in
18 that.

19 So I think, you know, there has been some
20 improvement in mine safety and health and not some
21 general improvement, and I think the numbers may reflect
22 that. But I would say -- I only have one thing to say
23 and that is that we look forward to your -- you said you
24 were going to provide detailed alternatives. We look
25 forward to receiving any detailed alternatives from the

1 State of West Virginia or from any other states. I don't
2 know if you're going to send them in as a part of your
3 compact that you're in, but however you send them in, we
4 do look forward to getting in detail.

5 MR. HARRIS: The State of West Virginia will
6 have detailed comments, but the Interstate Mining Compact
7 Commission is also consolidating comments from all
8 states, so you'll get multiple sets of comments.

9 MODERATOR SILVEY: Okay. Thank you.

10 MR. HARRIS: And, Greg, if you can find that
11 point that you were referring to, I would like to figure
12 out where that is.

13 MR. FETTY: Yeah. And I said I wasn't sure
14 when I made my statement, so if you would clarify that,
15 then I was obviously wrong.

16 MR. HARRIS: Thank you very much.

17 MODERATOR SILVEY: All right. Well, thank you
18 very much.

19 Our next speaker will be Frank Forte. And
20 maybe I'm wrong on the name. Foster. Thank you.

21 MR. FOSTER: I mistakenly signed the speaker
22 list.

23 MODERATOR SILVEY: Okay. So you don't --

24 MR. FOSTER: Subtract my name off.

25 MODERATOR SILVEY: Okay. I will do that, done.

1 Is there anybody else who wishes to speak?

2 Yes, Chris?

3 MR. HAMILTON: If I may to engage the panel
4 just for clarification on a couple of points.

5 I'm glad Randy researched that. I was a little
6 confused with your question. I'll follow-up that as
7 well.

8 Two issues I would like to broach and perhaps
9 engage --

10 MR. DuCHARME: I'm sorry. Excuse me. I'm not
11 hearing you well enough, and I didn't get your name.

12 MR. HAMILTON: Chris Hamilton, West Virginia
13 Coal Association, the first presenter here this morning.

14 I'd like to raise as a follow-up to some
15 discussion that's been held here, two issues in hopes of
16 soliciting a response or some feedback from the panel.

17 We raised a concern -- I raised a concern in my
18 testimony of inspectors merely citing violations for
19 things that they observed in the report, a report that
20 may eventually, given some new technological
21 advancements, may be done electronically. But given the
22 way it's currently done, is it MSHA's intent for
23 inspectors to write or cite violations for every citation
24 that is entered into the book under the proposed rule by
25 the examiner?

1 MODERATOR SILVEY: Yeah. I don't follow what
2 you're saying, so can you provide me a concrete example?

3 MR. HAMILTON: Well, Section 104(a), if you
4 continued in your reading from the Act --

5 MODERATOR SILVEY: Okay. So you're not -- I
6 get it. You're not saying for every line of every
7 citation written into the book by the examiner because
8 the examiner wouldn't write a citation, you're saying for
9 every violation that's in the book --

10 MR. HAMILTON: I'm using the two terms
11 interchangeably for purposes of an examiner's
12 responsibility. He's charged under the proposed rule
13 with entering violations, so he is, in fact, making a
14 citation.

15 MODERATOR SILVEY: Huh?

16 MR. HAMILTON: So he is, in fact, making a
17 citation.

18 MODERATOR SILVEY: Mr. Hamilton, he is, in
19 fact, making a citation. But I like to use the terms
20 exactly as they are; he's entering violations. Okay.

21 Go on. I follow you.

22 MR. HAMILTON: Okay. He is entering
23 violations, period.

24 MODERATOR SILVEY: Okay. Right.

25 MR. HAMILTON: Under Section 104(a) of the Act,

1 it says that upon inspection or investigation, the
2 secretary or his authorized rep believes that an operator
3 of a coalmine or other mine has violated the Act, he is
4 to issue a citation.

5 So this rule is in place. It's a final rule.
6 A year from now, I come to a mine as an MSHA inspector.
7 I pick up the book and see where a mine examiner found a
8 violation and recorded that in the book for that purpose;
9 is it MSHA's intent for that inspector to cite that
10 violation at that point in time?

11 MODERATOR SILVEY: Based on that entry into the
12 book?

13 MR. HAMILTON: Yes.

14 MODERATOR SILVEY: The short answer is, no.

15 MR. HAMILTON: Based on his belief that a
16 violation occurred because he believes that in good
17 faith --

18 MODERATOR SILVEY: Okay. The answer to that
19 is, no.

20 MR. HAMILTON: Unequivocally not; that will not
21 happen?

22 MODERATOR SILVEY: It is not -- you asked me
23 that. I said it is not MSHA's intent to issue a
24 citation.

25 MR. HAMILTON: How do you reconcile that

1 statement in conclusion with the clear language in the
2 Act if he believes a violation has occurred, he's to cite
3 it?

4 MODERATOR SILVEY: Well, the --

5 MR. HAMILTON: Does that mean he doesn't
6 believe the examiner's record in the book?

7 MODERATOR SILVEY: No. The MSHA inspector
8 does -- and I don't want to -- the MSHA inspector does a
9 physical inspection of the mine.

10 In my humble opinion, the only time the MSHA
11 inspector would do that is -- now, I don't even think
12 this would happen. But let's say the examiner found this
13 condition on March the 1st -- I'm making up this date --
14 this 2011, and the MSHA inspector came to the mine July
15 2nd, 2011, and that same condition existed. Then, you
16 know, the MSHA inspector would cite that. I wouldn't
17 think that the operator would let that same condition
18 exist for that long, but then the MSHA inspector, I could
19 see the MSHA inspector citing it then.

20 MR. FETTY: Yeah. And I don't mean to -- to
21 follow up on Pat's comments and we kind of have that
22 right now.

23 You know, to use an example of the hazard
24 that's entered into a book. If a hazard is entered into
25 a book, you know, to the best of my knowledge and I hope

1 this isn't going on, MSHA inspectors are on the blind
2 issuing a violation for all the hazards that are entered
3 into the book. You know, like Pat said, if we follow up
4 and see that an inspector is continuing to carry it and
5 not correct it, you know, that's obviously a different
6 story.

7 MR. HAMILTON: I accept that and it sounds
8 perfectly reasonable; however, we're changing the whole
9 complexity of this examination.

10 MR. FETTY: There's language in the rule that
11 says, you know, we feel, you know, that the operator has
12 to be given reasonable time to correct violations.

13 MODERATOR SILVEY: Okay. And you said you had
14 a second point.

15 MR. HAMILTON: Yes. Thank you.

16 And the second point is -- and this comes from
17 listening to the representative from Illinois, talking
18 about the responsibilities of mine examiners.

19 Let's look at a scenario where a mine examiner
20 for whatever reason does not during the course of his
21 examination find a violation, but yet a violation is
22 found subsequent to that reported exam by an authorized
23 representative of labor, an MSHA inspector; what happens
24 at that point? How are those two actions reconciled?

25 Let's say it's in close proximity. Let's say I

1 arrive at a mine as an MSHA inspector today and conduct
2 an examination and the report shows no violations, but I
3 find what I believe are violations. What sanctions or
4 actions are then levied against the mine examiner or
5 operator? And who mediates that obvious difference in
6 opinion on what existed at the time the two examinations
7 occurred? And who represents the examiner, is it the
8 State that issues his certification is it the mine
9 operator? And how do they collectively go about
10 mediating or resolving to reconcile the differences?

11 MODERATOR SILVEY: I think it would be much the
12 same as it is now. And, clearly, if it were a hazardous
13 condition, that you say -- everybody is talking about --
14 and I understand your point about examiners. Trust me,
15 we heard from examiners in Denver, so I take that very
16 seriously, but MSHA cites the mine operator. You say
17 what kind of sanctions against the examiner; No, MSHA
18 does not cite mine examiners. Nothing changed; this rule
19 does not change things.

20 So if the inspector came -- let's say taking
21 your scenario and it was in close proximity, and the
22 inspector found hazardous conditions that the inspector
23 feels should have been identified in the pre-shift, then
24 I think the inspector would issue a citation for
25 inadequate examination.

1 Now, I'm going to go on further. I'm not going
2 to stop there. Let's say that the inspector found no
3 hazardous conditions, not something that was hazardous,
4 but a Violation of a Mandatory Safety and Health
5 Standard, then I think it depends on what the Violation
6 of the Mandatory Safety and Health Standard was.

7 MR. HAMILTON: What would be --

8 MODERATOR SILVEY: You didn't hear what I said
9 because I got that in some comments.

10 I think the inspector -- if the inspector
11 passed a fire extinguisher and a tag was missing on the
12 fire extinguisher, I don't think the inspector would cite
13 the operator for that.

14 MR. FETTY: The examiner.

15 MODERATOR SILVEY: Well, he's citing the
16 operator for an inadequate examination. You don't cite
17 the examiner, in fact, you would never cite the examiner,
18 but you would cite the operator for an inadequate
19 examination.

20 I know what you all are saying that the
21 examiner is the one who does the examination. I follow
22 that point, but the examiner -- the citation is to the
23 operator.

24 MR. HAMILTON: It's really compound, it becomes
25 compound when you attempt to reconcile State law with

1 Federal law.

2 We have a sanction here in West Virginia called
3 an IPA, Individual Personal Assessment, for a certified
4 person failing to conform or failing to comply with the
5 statutory Mine Safety and Health Standard.

6 And in the case here of MSHA citing an operator
7 because of the failure of a mine examiner, a State
8 certified mine examiner from completing a mandatory
9 inspection, then there's potential State sanctions
10 against that individual, issuance of --

11 MODERATOR SILVEY: What is that IPA again?

12 MR. HAMILTON: Individual Personal Assessment,
13 IPA, and those are issued here in the State of West
14 Virginia. They're issued against hourly individuals,
15 salaried individuals and, more importantly, certified
16 examiners. And I'm -- you know, so it triggers a line of
17 enforcement actions, enforcement sanctions, that I'm not
18 sure have been thought through and certain consequences
19 for mine examiners, including the ultimate
20 decertification.

21 MODERATOR SILVEY: How often have you issued
22 that IPA where you used that provision of the statute,
23 West Virginia?

24 MR. HAMILTON: I don't have those numbers,
25 several hundred a year.

1 MODERATOR SILVEY: Several hundred a year.

2 MR. HAMILTON: I believe. I think the number,
3 you know, fluctuates.

4 MODERATOR SILVEY: If you get a specific
5 number, if you could send it --

6 And how many people have to decertify, let's
7 say, in a typical year?

8 MR. HAMILTON: I can't give you that
9 information. There are several, of decertifications.

10 MODERATOR SILVEY: Okay. Okay.

11 MR. HAMILTON: But short of a decertification,
12 it's still a blemish. It's a blemish against an
13 individual for failing to comply with the statutory Mine
14 Safety and Health Act.

15 And, you know, who ultimately represents the
16 examiner in that situation? Is it the company? Is it
17 the State? Does it put the State against MSHA? Is there
18 a fair and impartial independent review or process that
19 the examiners would have? Or is it simply, you know,
20 MSHA versus the State, which it would be our experience
21 is MSHA is typically correct?

22 MODERATOR SILVEY: Well, when you say -- who
23 mediates it, how --

24 MR. HAMILTON: We have a fundamental
25 disagreement; we have --

1 MODERATOR SILVEY: How does it happen now?

2 MR. HAMILTON: Well, there's supposed to be a
3 conference process, which doesn't exist, quite frankly,
4 but there is supposed to be an independent and impartial
5 conference.

6 MODERATOR SILVEY: Under West Virginia law?

7 MR. HAMILTON: No, under MSHA law in the State
8 of West Virginia, the opportunity to conference
9 violations.

10 MODERATOR SILVEY: Okay. I guess I thought you
11 were talking about this IPA, when that happens.

12 MR. HAMILTON: No. I am on down here. You're
13 asking how does it happen. No, under this scenario, you
14 would have a situation where MSHA cites a company for the
15 failure of an individual from performing inadequate
16 inspection. And so taking it from there, how is it
17 resolved? Would it be that the company appeals?

18 MODERATOR SILVEY: It would be the same way as
19 things are done right now under MSHA law in terms of a
20 citation.

21 MR. HAMILTON: Well, I think it becomes more
22 convoluted than that because you're involving individuals
23 that are certified by the State and are subject to
24 penalties by the State if they failed to carry out
25 certain mandatory responsibilities.

1 Again, it just requires -- I thought maybe you
2 had thought through that and it just requires some
3 additional research.

4 MODERATOR SILVEY: Well, it's the same -- but,
5 you know, right now, certified people have
6 responsibilities to do certain things. So under this
7 proposed rule, that process has not changed. We've
8 proposed no change to that process.

9 MR. HAMILTON: Well, here's how it changes.
10 You have strict liability under Federal law. You have a
11 situation where if an inspector finds that there is a
12 violation that exists, he doesn't have to determine
13 culpability. It's cited as a violation.

14 Under State law, you have a situation where the
15 individuals can be cited, as well as an operator,
16 particularly certified persons; i.e., mine examiners.

17 MODERATOR SILVEY: When did West Virginia pass
18 that law? How long has that been in place in West
19 Virginia?

20 MR. HAMILTON: It's been in place many years.

21 MODERATOR SILVEY: Okay.

22 MR. HAMILTON: Many years, at least 30, 35
23 years.

24 MODERATOR SILVEY: Okay. All right.

25 MR. HAMILTON: So it just adds to the potential

1 concern of this section.

2 MODERATOR SILVEY: Okay. Thank you.

3 MR. HAMILTON: Thank you.

4 MR. HARRIS: Ma'am, can I follow up?

5 MODERATOR SILVEY: Yes.

6 MR. HARRIS: Randall Harris, again.

7 I just wanted to follow up on the previous
8 conversation. There are a couple of issues. One is the
9 decertification process that the states have in place
10 that MSHA doesn't. Multiple states have processes, not
11 only for certification, but for decertification and
12 recertification.

13 What we're setting up as a scenario even if an
14 individual assessment, an individual personal assessment,
15 isn't made. When we get to recertification, it's going
16 to be either legally or politically impossible to ignore
17 the fact that an examiner on recertification has had
18 multiple instances where MSHA has cited his examination
19 as being less than adequate.

20 So no matter what we do here, you have to
21 recognize that certification, decertification,
22 recertification is the responsibility of the sovereign
23 states. They cannot be totally -- although they're
24 disconnected, they cannot be totally separated from the
25 actions that are being proposed here because in this

1 case, this particular rule is going to point back to an
2 individual as having not done their job. And maybe right
3 now, there's not a hard link between the MSHA situation
4 and the various state situation, but I know for sure that
5 Kentucky, West Virginia, and Illinois all have individual
6 recertification/decertification processes. We're not
7 going to be able to separate those over time.

8 So what you're doing now is you're setting up a
9 scenario where over the course of the ensuing period,
10 there's going to be a coupling between those situations
11 where a MSHA inspector has second-guessed a mine examiner
12 and that mine examiner has been found at fault in doing
13 his job. We cannot ignore that in doing a
14 recertification process. It's not a hard link now, but
15 there will be eventually because, politically, you can't
16 separate the two.

17 MR. BURNS: How would you even -- I mean,
18 normally when it's cited, it doesn't mention the
19 examiner's name. It just says "inadequate examination".

20 MR. HARRIS: At the examination on Section 2 on
21 date certain, we'll know who the examiners are. I mean,
22 this is part of an ongoing debate that Pat and I have had
23 for years, and we probably will until we both retire, is
24 that the different responsibilities of the sovereign
25 states that are out doing mine regulation and the Federal

1 Government that's out doing mine regulation and the lack
2 of meshing the two at multiple levels and they're --
3 often what happens at the State level affects what is
4 done at the Federal level and the Federal level affects
5 what's done at the State and we can't do these things
6 without coordination.

7 MODERATOR SILVEY: Okay. Thank you.

8 MR. HARRIS: Thank you.

9 MODERATOR SILVEY: Does anybody else wish to
10 make a statement, a follow up, a rebuttal?

11 Okay. Come on.

12 MR. MURRAY: My name is Kenny Murray -- last
13 name M-U-R-R-A-Y.

14 MODERATOR SILVEY: It's good to see you.

15 MR. MURRAY: It's good to see you guys.

16 Just one clarification on the point that Chris
17 Hamilton brought up that's related to 104(a) of the Mine
18 Act.

19 Greg mentioned the fact that the way we do
20 business today, if there's something in the book, then
21 the inspector doesn't go to that area --

22 MR. FETTY: I never said that.

23 MR. MURRAY: It's what I thought you said.

24 MR. FETTY: I said we wouldn't automatically
25 cite it.

1 MR. MURRAY: Oh, not automatically. But just
2 to clarify the record, that doesn't preclude the
3 inspector from going to that area that's listed in the
4 book and issuing a violation for the condition that was
5 in the book.

6 MR. FETTY: I absolutely agree.

7 MR. MURRAY: It may say the adequacy of an
8 examination, but the fact that the inspector comes and
9 looks to see what's in the book, that doesn't stop him
10 from going to that area. Matter of fact, it may point
11 him into that direction.

12 I think Chris's point was if we require
13 examiners to list violations, that doesn't stop an
14 inspector from going to that same area to validate or to
15 eliminate the fact that there was a violation in that
16 area, and once he gets there, 104(a) requires him to
17 issue a violation -- or to issue a citation. Let me get
18 these terms correct.

19 So he doesn't -- I don't see how we're going to
20 be able to reconcile this particular proposed rule with
21 what's already 104(a). That's my point.

22 MR. FETTY: I guess my only follow-up to that
23 would be that I don't know that we would have time to
24 continually look at your books and try to chase down
25 things that you guys put in the books, just so we can

1 cite you. I mean, that's not the intent of this Agency.

2 MR. MURRAY: It's part of your protocol to look
3 at the examination book for the areas that you're going
4 to go inspect.

5 MODERATOR SILVEY: Okay. Thank you.

6 Does anybody else have any comments? Well, if
7 nobody has any further comments, what I'm going to do is
8 I'm going to tentatively bring this public hearing to a
9 close.

10 I, again, would like to say that the Mine
11 Safety and Health Administration appreciates your
12 participation in this public hearing.

13 At this time, I want to say that we appreciate
14 those of you who took the time and came and made public
15 statements, but we also want to thank those of you who
16 are in the audience who attended the hearing, but may not
17 have made a presentation because what that suggests to us
18 is that you have an interest in the rulemaking, and we
19 appreciate that.

20 Again, I want to say that for anybody who
21 wishes to make a specific alternative proposal to MSHA,
22 if you would do so before the record closes on June the
23 30th. We appreciate specific alternatives because we can
24 react to those and go forward to develop the final rule
25 in a more meaningful way, the more specific the

1 alternative is.

2 As I said, comments are due by June the 30th and
3 we would take your comments into consideration as we
4 develop the final rule. We encourage you to continue to
5 participate in this rulemaking and in other MSHA
6 rulemaking. Thank you very much. The hearing is
7 concluded.

8 (Whereupon, at 11:00 a.m., the hearing in
9 the above-entitled matter was concluded.)

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REPORTER'S CERTIFICATE

CASE TITLE: Examinations of Work Areas
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)

ANTHONY & ASSOCIATES, INC.
770.590.7570

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