

# TRANSCRIPT OF PROCEEDINGS

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

Pages: 1 through 42  
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IN THE MINE SAFETY AND HEALTH ADMINISTRATION

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

Hazard, Kentucky

Tuesday  
July 12, 2011

APPEARANCES:

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

Speakers:

LEONARD FLEMING, Vice President of UMWA Local  
 Union 5741  
 CHARLES SCOTT HOWARD, Coalminer  
 SAM PETSONK, Law student, Washington & Lee  
 University, Lexington, Virginia  
 WES ADDINGTON, Appalachian Citizens Law Center  
 BILL BISSETT, President, Kentucky Coal Association

P R O C E E D I N G S

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(8:30 a.m.)

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MODERATOR SILVEY: Good morning. My name is Patricia W. Silvey, and I'm the Deputy Assistant Secretary for Operations for the Mine Safety and Health Administration. I will be the moderator of this public hearing on MSHA's Proposed Rule on Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards.

On behalf of Assistant Secretary of Labor for Mine Safety and Health, Joseph A. Main, I'd like to welcome all of you here today.

I would like to introduce the members of the MSHA panel. To my left, Gregory Fetty, who is with Coal Mine Safety and Health; to my right, Kevin Burns, who is with MSHA's Office of Educational Policy Development.

And I'd like to also introduce Larry Davey, who is in the audience, and he has been instrumental in helping MSHA draft the rules.

In response to requests from the public, MSHA is holding public hearings on its Proposed Rule on Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards. This is the fifth public hearing, and, as many of you know, the earlier hearings were held in Denver, Colorado;

1 Charleston, West Virginia; Birmingham, Alabama; and our  
2 headquarters in Arlington, Virginia.

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

7           As most of you know, these hearings are  
8 conducted in an informal manner. Formal Rules of  
9 Evidence do not apply. The hearing panel may ask  
10 questions of the speakers. The speakers may ask  
11 questions of the panel. Speakers and other attendees may  
12 present information to the court reporter for inclusion  
13 in the rulemaking record.

14           MSHA will accept written comments and other  
15 appropriate information for the record from any  
16 interested party, including those not presenting oral  
17 statements. We ask that everyone in the room sign the  
18 attendance sheet.

19           MSHA is proposing to revise its existing  
20 standards for pre-shift, on-shift, supplemental, and  
21 weekly examinations for underground coal mines. The  
22 Proposed Rule would require mine operators to identify  
23 and fix violations of mandatory health or safety  
24 standards. Requirements for these examinations are  
25 mandated in the Mine Act and are a critical component of

1 an effective safety and health program for underground  
2 coalmines.

3           The proposal would also require that on a  
4 quarterly basis, mine operators review with mine  
5 examiners the citations and orders issued in areas where  
6 pre-shift, supplemental, on-shift, and weekly  
7 examinations are required. In addition, the Proposed  
8 Rule is an important part of the Department of Labor's  
9 "Plan, Prevent and Protect" strategy.

10           MSHA requested comments from the mining  
11 community on all aspects of the Proposed Rule, and is  
12 particularly interested in comments that address  
13 alternatives to key provisions in the proposal.

14           Commenters were requested, and have been  
15 requested, to be specific in their comments and submit  
16 detailed rationale and supporting documentation for any  
17 suggested alternative. MSHA has received several  
18 comments suggesting alternatives to the proposal, which  
19 we appreciate, and we are interested in alternatives.

20           At this point, I would like to reiterate some  
21 requests for comments and information that were included  
22 in the Preamble to the Proposed Rule.

23           The Proposed Rule presents a more proactive  
24 approach in creating a culture of safety at the mine. It  
25 would enhance mine safety, because violations of health

1 or safety standards would be identified and corrected,  
2 removing many of the conditions that could lead to danger  
3 in underground coalmines. The Agency is interested in  
4 alternatives to the proposal that would be effective in  
5 assuring that operators examine for violations of  
6 mandatory health or safety standards, record and correct  
7 violations, and review violations with examiners.

8           The Agency has prepared a Preliminary  
9 Regulatory Economic Analysis that contains supporting  
10 costs and benefit data for the Proposed Rule. The Agency  
11 requests comments on the estimates of costs and benefits  
12 presented in the Preamble and in the Preliminary  
13 Regulatory Economic Analysis.

14           MSHA's cost estimates do not include the  
15 costs of any corrective actions that would be necessary  
16 to come into compliance with the underlying regulatory  
17 requirements. These costs were included in the Agency's  
18 estimates associated with the existing regulations and  
19 are not new compliance costs resulting from the Proposed  
20 Rule.

21           Rather than waiting for violations to be  
22 either identified by an MSHA inspector, or rise to the  
23 level of a hazardous condition and be identified by a  
24 mine examiner, the Proposed Rule would require mine  
25 operators to identify violations of mandatory health or

1 safety standards during mine examinations. This would  
2 prevent some accidents, because mine operators would be  
3 required to take corrective action earlier than under the  
4 existing standard, that is, before a hazardous condition  
5 develops.

6 As you address the proposed provisions,  
7 either in your testimony today or in your written  
8 comments, please be as specific as possible. As I've  
9 said many times, MSHA cannot sufficiently evaluate  
10 general comments. The more specific your information is,  
11 the better it will be for MSHA to evaluate and produce a  
12 final rule that will be responsive to the needs and  
13 concerns of the mining public.

14 You may submit comments following in the  
15 public hearing. Comments are due to MSHA by August 1<sup>st</sup>,  
16 2011. MSHA will make available a verbatim transcript of  
17 this public hearing approximately two weeks after the  
18 completion of the hearing. You may view the transcript  
19 of all public hearings and comments on MSHA's website at  
20 [www.msha.gov](http://www.msha.gov) and on [www.regulations.gov](http://www.regulations.gov).

21 We will now begin today's testimony. If you  
22 have a copy of your presentation, please provide it to  
23 the court reporter; and if you will please begin by  
24 clearly stating your name and organization and spelling  
25 your name, so that we can make sure that the court

1 reporter has an accurate record.

2 Our first speaker today is Bill Bissett, who  
3 is President of the Kentucky Coal Association.

4 Is Mr. Bissett here?

5 Our next speaker to be signed up is David  
6 Moss who is Vice President of Kentucky Coal.

7 Mr. Bissett -- neither Mr. Bissett nor Mr.  
8 Moss are here, then I go to the next speaker signed up.

9 The next speaker is Leonard Fleming, who did  
10 not sign up.

11 MR. FLEMING: My name is Leonard Fleming.  
12 I'm Vice President of Local Union -- UMWA Local Union  
13 5741. The address of my Local Union is Jenkins,  
14 Kentucky.

15 Again, I'll read -- I have a prepared  
16 statement here that I will give the court reporter that  
17 I'm reading off of, if I didn't already give it to him.

18 Again, my name is Leonard Fleming. I live in  
19 Whitesburg, Kentucky. I work as a coal miner and -- I  
20 worked as a coal miner at Beth Energy in the coalmines in  
21 Letcher County, Kentucky from 1964 to 1978. I operated a  
22 roof bolter and a continuous miner, and I was a  
23 repairman. I also worked on a coal tippie.

24 After I left Beth Energy, I become a safety  
25 representative for the UMWA and inspected mines and

1 investigated mine accidents and explosions.

2 In 1992, I become the Deputy Commissioner of  
3 the Kentucky Department of Mines and Minerals and held  
4 that position until 1995. I am retired. I am presently  
5 Vice President of the United Mine Workers of America,  
6 Local Union 5741.

7 I support UMWA's, the MSHA's Proposed Rule  
8 requiring mine examiners -- I'm having a little trouble  
9 reading it; the light's a little dim in here -- to  
10 identify violations of the Mine Safety and Health laws  
11 during this examination. This proposal will enable  
12 miners to promptly correct the violations and prevent the  
13 development of health and safety hazards.

14 Under current rules, examiners are only  
15 required to identify conditions that have already  
16 developed into hazards. However, this standard is ill  
17 defined and often unenforceable. This Proposed Rule will  
18 help to ensure that violations are found and corrected,  
19 which will make mines a safer place to work. The  
20 Proposed Rule requires identification, correcting and  
21 recording violations. The examiner must be required to  
22 post any written notice of violations.

23 Requiring that violations be posted helps to  
24 adequately convey to all concerned the existence of the  
25 violation. I also suggest that the examiner verbally

1 tell all the miners working in the mines about the  
2 existence of the violations.

3           Violations can quickly develop into hazards.  
4 Informing the miners of the violations would aid and  
5 protect the miners from possible injury. It would also  
6 involve miners more in the process of watching for unsafe  
7 and unhealthy conditions and make the miners more  
8 actively involved to ensure their work place is a safe  
9 work place.

10           The rule should require the violations to be  
11 abated within a reasonable time, hopefully, no more than  
12 24 hours. The rule requires mine operators review with  
13 mine examiners on a quarterly basis all citations and  
14 orders issued in areas where examinations are required.  
15 I suggest that the miners' representative at the mine be  
16 participants in those meetings.

17           I am encouraged that MSHA is using this  
18 Proposed Rule to focus on the compliance with ventilation  
19 plans as a measure to prevent black lung disease.

20           And I thank you all for the opportunity to be  
21 here today.

22           MODERATOR SILVEY: Thank you.

23           Our next speaker is Wes Addington, ACLC,  
24 Appalachian Law Center.

25           I'm sorry. I skipped somebody. So, please,

1 excuse me.

2 Our next speaker is Charles Scott Howard. I  
3 didn't mean to skip you.

4 MR. HOWARD: Howdy, everybody.

5 MODERATOR SILVEY: Good morning.

6 MR. HOWARD: My name is Charles Scott Howard.  
7 Do I need to spell that? I'm from Roxanna, Kentucky.  
8 I'm a coal miner.

9 And the first thing I think we need to help  
10 protect these rules that they're wanting to put into  
11 force is we need a good whistle-blower law, because that  
12 will protect the people that go by these laws, like when  
13 you make a pre-shift examination, that would also back up  
14 the rules for this examination.

15 And I think it was four years ago today that  
16 I testified on another public hearing you all had in  
17 Lexington. And since that day, I've tried to figure out  
18 any kind of reason or rules or laws that would make it  
19 safer to even make potato salad, but I haven't found any  
20 yet; but I'll tell you what, if anybody needs my address,  
21 talk to me after this, because I've got a recipe for the  
22 world's greatest potato salad, and it won't kill you  
23 neither.

24 But this rule on the pre-shifts and  
25 examinations is a good rule. I'm proud that Joe Main is

1 leading MSHA now, and it looks like he's leading a fight  
2 for the safety of anybody that enters the mines. But I  
3 also agree with the union rep here that the miners' reps  
4 should have the rights to be at these reviews and these  
5 meetings over this -- these pre-shifts. Also, any miner  
6 that's really concerned about how the pre-shift and exam  
7 is being done in where he or she works, should be able to  
8 be in these meetings for the reviews, not just the  
9 companies and the people doing the pre-shifts.

10           And I think if they're going to expect people  
11 to write the violations -- and, see, a lot of this stuff  
12 is common sense, that actually know the law, they're  
13 going to have to educate the miners about what the laws  
14 are, because a lot of times the only education you get is  
15 later that comes from what's done.

16           And I haven't got a lot to say about this,  
17 because I don't see a lot of problems with it. And, like  
18 I said, I'm glad that Joe Main is trying to upgrade  
19 safety for the miners. That's about all I've got to say  
20 about this rule on the pre-shifts. Thank you.

21           MODERATOR SILVEY: Okay. Thank you, Mr.  
22 Howard.

23           One thing I'd like, we appreciate your  
24 comments very much. I would like to say for the record,  
25 and, clearly, we appreciate your comments on the pre-

1 shift Proposed Rule.

2 In terms of your comment on the whistle-  
3 blower law, the Agency appreciates that comment. For the  
4 record, I'd just like to say that that comment is beyond  
5 the scope of this rulemaking.

6 Thank you for your other comments.

7 MR. HOWARD: Well, I know it's over the --  
8 but I'm just saying that would help and force them to  
9 take that ...

10 MODERATOR SILVEY: No, I understand what  
11 you're saying. Thank you.

12 MR. HOWARD: Thank you.

13 MODERATOR SILVEY: Now, Wes Addington, ACLC,  
14 and I know that's Appalachian Law Center and I'm  
15 confused. I'm missing the "C" part.

16 MR. ADDINGTON: Citizens.

17 MODERATOR SILVEY: Citizens.

18 MR. ADDINGTON: My name is Wes Addington.  
19 I'm an attorney in the Appalachian Citizens Law Center.  
20 We're a non-profit law office that represents working  
21 miners on issues of miner safety and health, and also  
22 represent disabled miners and their widows in federal  
23 black lung benefits claims.

24 I'd like to begin by saying that ACLC does  
25 support the rule on Examinations of Work Areas in

1 Underground Coal Mines and Violations of Mandatory Health  
2 or Safety Standards. I think, and as MSHA has noted in  
3 the Proposed Rulemaking, the Act, actually the Coal Act,  
4 I think, envisioned this sort of review by mine  
5 examiners, although it's never really been put in place  
6 until now.

7 I'd like to follow up a little bit on some of  
8 the things that Scott raised. I do think there should be  
9 a miners' rep provision within this rule. I don't think  
10 the quarterly meetings should only be between mine  
11 management and the actual mine examiners. I think  
12 miners' reps -- I mean, if MSHA believes that they're  
13 important in the process of keeping miners informed about  
14 matters that affect their own safety and health, then I  
15 think they should be involved in these quarterly meetings  
16 also and share in the access to the recordkeeping of the  
17 violations that the companies will be required to keep.

18 I think it would be also a good idea to  
19 require communication of these violations to working  
20 miners in the mines in a timely fashion. That way,  
21 miners can be aware of the types of violations that are,  
22 you know, currently occurring in their mines. You know,  
23 whether that be that they're posted in some way, whether  
24 they're orally communicated, I think that would be also a  
25 good idea.

1           And I think the rule is important. One  
2 aspect I'd like to briefly speak on is I think the rule  
3 is important, because, as MSHA notes, that they believe  
4 that it would decrease the amount of exposure to  
5 respirable dusts for miners; and, as we've recently seen  
6 in news reports, you know, black lung is not a disease of  
7 the past; it's very much a disease that miners are  
8 suffering and dying from, as the autopsies of 75 percent  
9 of the miners that were killed in the Upper Big Branch  
10 explosion indicated that they suffered from coal workers'  
11 pneumoconiosis.

12           So I do imply to MSHA, I think noting these  
13 types of exposure violations, whether -- you know,  
14 however that they're occurring in mining, whether, you  
15 know, it's an inoperable dust collector on a roof bolter  
16 or whatever it may be. Although those might not be  
17 immediate hazards to a miner, I think over time, I think  
18 this will decrease the amount of exposure that miners  
19 have and lessen the likelihood that they develop black  
20 lung disease over the course of their working life.

21           You know, one final thing in the rule, you  
22 know, Scott mentioned beefing up whistle-blower  
23 protections, and I know you noted that it was outside the  
24 scope of this rulemaking. I don't think that it is. I  
25 mean, I think MSHA could look at this rule, you know, and

1 wonder is there potential here for mine examiners to be  
2 discriminated against. You know, because they do have  
3 heightened responsibilities with that. I mean, I think  
4 there should be some increased training for mine  
5 examiners as part of this rule, but, also, you know, you  
6 don't want this to -- you don't want a situation to occur  
7 where there's a pretext for terminating a mine examiner  
8 because he missed a single violation, and the company  
9 using that as a pretext to get rid of the guy.

10           So, you know, maybe what MSHA should look at  
11 is there a way that we could add a whistle-blower  
12 protection to this rule to protect mine examiners, and,  
13 especially, hourly workers. I mean, I've noted in some  
14 of the comments to MSHA on this rule, some of the  
15 companies have been fairly critical of their hourly guys,  
16 essentially questioning whether they would have the  
17 loyalty or the persistence of a salaried employee. So, I  
18 mean, it's clear there's a potential for a problem there  
19 in terms of the hourly workers that also do mine  
20 examination or mine examination duties.

21           You know, again, I would like to support the  
22 rule in addition to those suggested additions to the  
23 rule. I am in support of the rule. I think it -- it  
24 really crystallizes and it's a much simpler process now  
25 for mine examiners if they're only looking for violations

1 as opposed to trying to determine exactly what a hazard  
2 is and whether a hazard is present.

3           And I think examiners will have, you know, a  
4 much more straightforward task, and any violation that  
5 they see, then they can record it and it can be  
6 corrected. So, I do think that this rule, you know,  
7 moves towards what the Coal Act, and, then, subsequently,  
8 what the Mine Act intended in terms of mine examinations,  
9 and that's all the comments I have at the moment. I'll  
10 be glad to take any questions.

11           MODERATOR SILVEY: Thank you.

12           I'd just like to make a few comments. The  
13 first being, first of all, thank you for your comments.

14           And, for everybody, the way the Proposed Rule  
15 is drafted, it would require that violations be recorded  
16 and it would require that the -- and posted, and those  
17 violations would -- that would be -- the mines would be  
18 available for the miners to review.

19           I would take into consideration, because we  
20 had heard that before, your suggestion that miners be a  
21 part of the quarterly review process when the operators  
22 are reviewing mine examiners. And I don't have anything  
23 further. Thank you.

24           MR. ADDINGTON: Thanks.

25           MODERATOR SILVEY: Our next speaker is Sam

1 Petsonk.

2 MR. PETSONK: My name is Sam Petsonk, and I'm  
3 a law student at Washington & Lee University in  
4 Lexington, Virginia. I have a couple of observations and  
5 recommendations regarding the examination rule.

6 I suppose I'd also like to ask for a  
7 clarification about, before I begin, about the posting  
8 requirement and that's at Section 363.

9 Have you amended that section to require that  
10 violations be posted?

11 MODERATOR SILVEY: Right.

12 MR. PETSONK: Have you amended it that way,  
13 to be recorded? There's a distinction between recording  
14 and posting?

15 MODERATOR SILVEY: No. I understand.  
16 Record, right, yes.

17 MR. PETSONK: Okay. So, would you be able,  
18 before I begin my remarks, to clarify whether it's the  
19 intent to interpret the guidance, does the Agency intend  
20 to issue guidance or any ...

21 MODERATOR SILVEY: No.

22 MR. PETSONK: ... appropriate information  
23 bulletins, or suggest that they should be posted?

24 MODERATOR SILVEY: No, no.

25 MR. PETSONK: No, you don't.

1 MODERATOR SILVEY: That's the recording.

2 MR. PETSONK: Okay. I just wanted to clarify  
3 that point.

4 So, my comments stand and my recommendations  
5 would focus on two aspects of the proposal. First, on  
6 the correction in recording of violations. It seems that  
7 the proposal makes a requirement of posting the  
8 violation, or posting a communicating notice, in some  
9 fashion to miners.

10 MODERATOR SILVEY: Let me stop you right  
11 there, because we've got to get it straight.

12 In my humble opinion, when I say a posting, I  
13 meant posted at the mine sites so the miners could see  
14 it, and I still mean posting in that sense.

15 Is that your understanding of posting? What  
16 are you meaning?

17 MR. PETSONK: As in dangering-off the  
18 section.

19 MODERATOR SILVEY: Oh, no.

20 MR. PETSONK: Nothing along those lines.  
21 There would be no visible representation.

22 And I understand that for many electrical  
23 violations, so it may not -- it's probably not feasible,  
24 so I understood why that wouldn't have been included in  
25 the proposal.

1                   MODERATOR SILVEY: Exactly. Not dangering-  
2 off. The dangering-off goes to the hazardous conditions  
3 for dangering-off.

4                   MR. PETSONK: Right. So, you know, I  
5 appreciate the intent that you expressed to, preventive  
6 intent. And this is a part of MSHA's effort to identify  
7 oversight of the development of risks into greater  
8 hazards, and would suggest in the recommendation on this  
9 point is acknowledging the difficulty of physically  
10 posting or dangering-off certain violations that may not  
11 be -- may not be visible and may not be identifiable as  
12 such.

13                   I would offer the recommendation that Section  
14 363 in the Proposed Amendments, that there be a  
15 requirement that the identified violations, as well as an  
16 amendment that would require that hazards identified  
17 under the current rule, both the violations and the  
18 hazards be communicated verbally to all miners who would  
19 be working on the affected section.

20                   And this is a recommendation that arises  
21 from -- obviously, pre-shift exams have been cited in  
22 disasters going back into the '80s, that they're not just  
23 in the MSHA's internal reviews and reports, special  
24 reports, on these disasters, there's been a  
25 recommendation not only that there was a deficiency in

1 the content of the examination, but in the process by  
2 which the examinations were conducted, or not conducted  
3 in many cases, contributing violations in disasters, and  
4 also in the -- MSHA included a table of preventable non-  
5 fatal accidents as part of the documentation for this  
6 proposed ruling.

7           Many of those accidents involve pre-shift  
8 examinations that didn't merely omit the identification  
9 of a violation or condition that could be a hazard, but  
10 the examination wasn't, many times not conducted at all  
11 or the -- or was incompletely conducted. So, those  
12 recommendations regarding the portion of the rule that  
13 addresses a correction in recording violations under  
14 Section C, Part 75, Section 363 would be to add a  
15 requirement that examiners verbally communicate the  
16 hazards and violations identified, verbally communicate  
17 those to all miners who are working on the affected  
18 section.

19           There are three benefits -- first of all,  
20 Congress embraced this in the recently proposed Robert C.  
21 Byrd Mine Work Place Safety and Health Act of 2011 in  
22 their attempts to reform the pre-shift examinations.  
23 This is what Congress had focused on, a verbal  
24 requirement, verbal communication requirement, in  
25 attempts not just to address the concern about the

1 inadequate content of the pre-shift exams, but also this  
2 procedural defect that -- that MSHA has dealt with over a  
3 very long period of time.

4           So, the benefits of verbal communication  
5 include making miners safer by providing better awareness  
6 of the risks that are on a section. Even if you were to  
7 take your -- as I understood, you may have been  
8 describing of a posting like you would post a variance in  
9 a bathhouse type of -- I wasn't sure if you were  
10 referring, when you said posting. Even if you were to  
11 view the proposal as requiring some type of notice or  
12 announcement ...

13           MODERATOR SILVEY: I was referring to actual  
14 posting.

15           MR. PETSONK: Yes.

16           MODERATOR SILVEY: The answer is that right  
17 now, the violations are required to be posted. And I  
18 literally mean taking this piece of paper and putting it  
19 up, posting it.

20           MR. PETSONK: Right.

21           MODERATOR SILVEY: That's what I meant by it.

22           MR. PETSONK: So, the difference here would  
23 be with a verbal communication requirements, all miners  
24 on an affected section, you know, it wouldn't involve  
25 having -- miners having to review any documentation as

1 they're going in the mines. This would be a verbal  
2 communication requirement, and all the miners, not just,  
3 you know, miners who may be a couple miners working on a  
4 part of a section would be able to see danger statements  
5 on, if you had a particular hazard posted, or a  
6 particular hazard dangered-off.

7           The advantage of the verbal communication  
8 requirements, all miners on a shift, is that every miner  
9 who was working on this section, not just in a particular  
10 area, they would be apprised of the hazard.

11           You know, this has been a problem in several  
12 of the mine disasters, you know, where, say, in the  
13 Brookwood mine disaster, many times miners come back into  
14 an area not aware of the condition with a battery or a  
15 scoop or something that was in existence at the beginning  
16 of the shift, you know, and could have been identified as  
17 a hazard and communicated to all the miners and this type  
18 of verbal communication at the outset of the shift would  
19 have the effect of apprising these miners, and, perhaps,  
20 helping them to avoid needlessly compounding a risky  
21 situation by going back in and placing themselves at  
22 risk, so it would make miners safer by providing better  
23 knowledge.

24           The second thing of this type of verbal  
25 communication proposal would be you would facilitate the

1 non-misreporting of violations. Right now, you know,  
2 maybe there are two miners working in a section and they  
3 see a violation. If that violation is called into MSHA,  
4 and an inspection, you know, a 103(d) inspection I guess  
5 it would be, you know, a result. It may be apparent to  
6 the operator who had called in, you know, if only a  
7 certain few miners are working in the section on the  
8 affected area. And, so, this type of verbal  
9 communication with miners, if it were required to be --  
10 if the hazardous condition is required to be communicated  
11 to all miners on the whole section, it may increase the  
12 ability of any one miner to report anonymously without  
13 being -- without it being so easily determined by the  
14 operator who had filed a complaint.

15           And, thirdly, it seems that MSHA's  
16 enforcement process would be improved by -- would be  
17 assisted by the requirement to verbally communicate the  
18 hazard, and, you know, often, MSHA inspectors face  
19 difficulty in, you know, you may be surely aware of  
20 backing up assessments, the gravity of negligence.

21           Even just establishing a violation of Section  
22 360, Part 75, is a difficult -- can be a difficult thing  
23 to do. But if there were a requirement that the hazard  
24 and violation be verbally communicated, it would seem  
25 that an MSHA inspector could ascertain, could establish

1 non-compliance by asking miners: "What hazards were you  
2 notified of at the beginning of your shift," and any  
3 hazards that the inspector had observed, you know, that  
4 the miners didn't convey to the inspector that they had  
5 received notice about that would support any assessment  
6 of gravity or negligence, or even just the issuance of a  
7 citation.

8           So, there seems to be benefits directly to  
9 miners in their attempts to avoid hazards. There seems  
10 to be benefits to supporting the anonymous reporting of  
11 violations, and also to MSHA's enforcement process.  
12 You've got more testimony. You have probably an easier  
13 time establishing a violation of Section 360, and, also  
14 an easier time just defending the assessments of gravity  
15 and negligence, which can be a difficult process before  
16 the Commission.

17           And, then, the other two recommendations  
18 relating to another aspect of the proposal, the quarterly  
19 review. I support the idea that miners' representatives  
20 should participate in these quarterly reviews with  
21 management and the examiners, and that they should have  
22 access to the secure book, to the computer system, that  
23 records the results of the examination.

24           And I would also suggest that at issue in  
25 many of the multiple fatality incidents that have

1 involved incomplete pre-shift examinations, the results  
2 then contributing to citation written, or at least a  
3 company citation written for incomplete 90-day fire  
4 drills. And that if you're going to do a quarterly  
5 review process, and either considering involving more  
6 miners in that review, apart from just the examiner,  
7 maybe a way to do that, if it seemed feasible to include  
8 miners in the quarterly review conference, may be another  
9 way to share that information about recent violation  
10 issues with the work force throughout the mine will be to  
11 incorporate this -- review this type of a review into  
12 Part 75, Section 1504, which would be the fire drill, you  
13 know, requirement, and this would be a part of it,  
14 instead of just starting rescuers and doing some  
15 evacuation exercises. You know, this type of quarterly  
16 review with miners could occur in that session.

17           So, anyhow, to summarize my three  
18 recommendations, the first pertaining to correction of  
19 violation hazards would be verbal communication, as was  
20 included in both the Senate and House Bills, and Bill  
21 Number 153, and the Senate Bill 153, and House Bill 1579,  
22 112th Congress, verbal communication to all miners who  
23 are working on an affected section.

24           And in these two recommendations also to --  
25 that would be, I suppose, be an amendment to Section 363.

1 And these two additional amendments 363, requiring  
2 participation of miners' representatives and the  
3 inclusion of a quarterly review of violation history.  
4 That's a part of 1504 fire drill for all miners, so that  
5 that information be shared with scheduled laborers and  
6 workers, that's posted with the examiners.

7 So these are my recommendations and I'll  
8 provide you more background on the way that these  
9 recommendations have presented -- would have been applied  
10 and included in some of the recent mine disasters to  
11 provide some illustrations for the record.

12 MODERATOR SILVEY: Thank you.

13 MR. PETSONK: Thank you.

14 MODERATOR SILVEY: Is there anybody else who  
15 wishes to speak?

16 Did either Mr. Bissett or Mr. Moss come in?

17 If nobody else wishes to speak, then I'm  
18 going to tentatively bring this hearing to a close,  
19 knowing that if, before we leave, anybody else shows up,  
20 then we will -- we can reopen the hearing.

21 Again, I would like to say that the Mine  
22 Safety and Health Administration appreciates your  
23 participation in this public hearing. I want to thank  
24 everybody who made a presentation, and, as well as those  
25 who did not present, but who attended the hearing,

1 because that suggests to us people who attend a hearing,  
2 but may not make a presentation, that suggests to us that  
3 you have interest in this rule and we appreciate that.

4 I want to emphasize that all comments must be  
5 received by August 1, 2011. MSHA will take your comments  
6 and concerns into consideration in developing a final  
7 rule. I want to encourage all of you to continue to  
8 participate in this rulemaking and all other MSHA  
9 rulemakings.

10 This public hearing is concluded. Thank you  
11 very much.

12 (Off the record.)

13 (On the record.)

14 MODERATOR SILVEY: Good afternoon. Again, I  
15 am Patricia W. Silvey and with me, Gregory Fetty with  
16 Coal Mine Safety and Health, and Kevin Burns with  
17 Educational Policy Development.

18 I would like to reopen the Mine Safety and  
19 Health Administration's record on the Proposed Rule on  
20 Examinations of Work Areas in Underground Coal Mines for  
21 Violations of Mandatory Safety or Health Standards.

22 And continuing on with the testimony, we now  
23 have Bill Bissett with the Kentucky Coal Association.

24 MR. BISSETT: Thank you, ma'am. It's an  
25 honor to be here today and thank you for the opportunity

1 to give these remarks.

2 My name is Bill Bissett. I'm President of  
3 the Kentucky Coal Association. KCA is the state's  
4 leading organization dedicating to advancing the  
5 interests of the coal industry across Kentucky.

6 KCA's member companies are drawn from  
7 throughout Eastern and Western Kentucky, from underground  
8 as well as surface producers. This diversity enriches  
9 the Association and allows it to build consensus, as we  
10 work to resolve the complex problems facing the 21<sup>st</sup>  
11 Century coal industry.

12 Now, more than ever, the KCA is critical to  
13 maintain the visibility of Kentucky's coal industry, and,  
14 thereby, the economy of the Commonwealth. These comments  
15 are submitted by Kentucky Coal Association in response to  
16 the Proposed Rule announced by MSHA in the Federal  
17 Register on December 27, 2010. The announcement provides  
18 for comments from interested parties on the Proposed Rule  
19 entitled, "Examinations of Work Areas in Underground Coal  
20 Mines for Violations of Mandatory Health or Safety  
21 Standards."

22 Examinations are the mine operator's  
23 fundamental tool for assessing the overall safety  
24 condition of the mine. During the pre-shift examination,  
25 which includes all areas where miners are scheduled to

1 work and travel during the shift, the examiner focuses on  
2 discovering both existing and developing hazards, such as  
3 methane accumulation, bad roof, and water accumulation,  
4 and determining the effectiveness of the mine ventilation  
5 system. The examination has proven to be particularly  
6 effective in the discovery and correction of hazardous  
7 conditions and practices before they lead to injuries or  
8 fatalities. Because conditions in the underground mining  
9 environment can change rapidly, recurring examinations  
10 are necessary to ensure the safety of the miners  
11 underground. A timely pre-shift examination for  
12 hazardous conditions ensures the safety of the  
13 environment on a routine basis.

14 On-shift supplemental and weekly examinations  
15 are equally as important in assessing the overall safety  
16 condition of the mine. Historically, these examinations  
17 have been a primary means of determining the  
18 effectiveness of an underground coal mining operation,  
19 and of detecting hazardous conditions and practices.

20 Considering the speed at which the  
21 underground conditions can change, examinations are  
22 necessary to detect and allow time for correcting  
23 developing hazards, such as methane gas, ventilation  
24 deficiencies, roof and rib, and other commonly occurring  
25 hazards that build up over time in the mine.

1           The fact that mines may be somewhat safer  
2 today than they were in the past does not change the fact  
3 that these hazards still exist. Miners and operators  
4 must be vigilant in dealing with methane accumulation,  
5 roof and rib deterioration and water accumulation, as  
6 well as other hazards. Technological advances that  
7 enhance safety, such as atmospheric monitoring systems,  
8 communications and tracking systems, refuge chambers,  
9 additional SCSRs, gas detecting equipment, etc.,  
10 supplement the proper use of examinations.

11           We believe that examinations are crucial to  
12 the safe operation of coal mines and that examiners  
13 should not be deterred in their quest to discover hazards  
14 by searching for violations of mandatory health or safety  
15 standards unless they are, in fact, obvious hazardous  
16 conditions. To add this burden to mine examiners pre-  
17 shift, on-shift, supplemental and weekly, will  
18 undoubtedly interfere with the most important task at  
19 hand, which is determining if the mine or work area is  
20 safe for the miners. This is simply too large a  
21 responsibility to place on the examiner.

22           It is our belief that most hazards are  
23 violations of mandatory health or safety standards to  
24 start with. In most cases, such as the examination of  
25 conveyor belts, return entries, seals, idle sections and

1 outby areas of the mine, the examiner is often an hourly  
2 employee. The hourly employee typically receives  
3 extensive training to perform his or her job; however,  
4 the employee is not adequately trained, or paid, to  
5 perform the job of the MSHA inspector, "to look for all  
6 violations regardless of whether they involve a distinct  
7 hazard."

8           For example, a coalmining inspector, or CMI,  
9 receives extensive training over the course of one full  
10 year, in excess of 2,000 hours. The CMI training course  
11 involves a combination of classroom training and hands-on  
12 training, mentored by trained experienced CMIs in actual  
13 field inspection conditions. The CMI trainee's training  
14 over the course of one year is structured to train the  
15 CMI to identify all hazards and all violations. Upon  
16 completion of the training course, the new CMI will be  
17 fully trained to travel into the mine to scrutinize an  
18 hourly pre-shift examiner's judgment as to what  
19 constitutes a violation of the standard.

20           MSHA is present in most coalmines every day  
21 and there is no need to make inspectors out of examiners.  
22 Would MSHA eliminate inspectors by requiring the operator  
23 to perform inspections? Not likely. It is obvious that  
24 the intent is to hold the operator accountable for  
25 violations that should have been seen during the

1 examination. There are also state agencies in most  
2 states that coal is mined that inspect the mine in  
3 addition to MSHA. These inspections are almost  
4 constantly occurring; yet, mine conditions still change,  
5 which sometimes result in hazardous conditions.  
6 Requiring more inspections is not the answer.

7           There are already measures in the law for  
8 MSHA to deal with these situations where an operator  
9 failed to correct hazardous conditions or knowingly  
10 allowed violations to continue. This Proposed Rule is  
11 unnecessary.

12           In conclusion, we believe that the Proposed  
13 Rule is not only unnecessary, but will likely lead to a  
14 diminishment of safety for the miners for all the above  
15 reasons. We believe that MSHA has failed to consider the  
16 aspects of performing examinations for violations of  
17 mandatory health or safety standards and grossly  
18 underestimated the amount of time it will take to add  
19 examination for violations of mandatory health or safety  
20 standards, as well as the costs associated that the  
21 operator will incur.

22           Would you like to move on to the POV?

23           MODERATOR SILVEY: No.

24           MR. BISSETT: Okay.

25           MODERATOR SILVEY: I've got a few comments

1 and we have heard comments similar to yours during this  
2 rulemaking.

3 And what I would like to ask you, you  
4 represent the Kentucky Coal Association, and in so doing,  
5 and it is a fair question to ask of you, but I don't  
6 know, I want you to give me the answer in light of your  
7 experience.

8 I don't know whether you've ever -- you can  
9 represent the Coal Association without having operated a  
10 mine, and I don't know whether you've worked -- operated  
11 a mine or not, because I'm going to ask you a question in  
12 terms of how practically you do something.

13 So, have you done that, operated a mine?

14 MR. BISSETT: My comments today here are  
15 representative of the Association and its member  
16 companies.

17 MODERATOR SILVEY: Okay. But I want to ask  
18 you a question within the context of your experience.  
19 That's why I'm asking you this, not to put you on the  
20 spot.

21 MR. BISSETT: I understand.

22 MODERATOR SILVEY: Okay. So, I'll ask you  
23 the question.

24 You represent your member companies. I  
25 assume, and I'm going to have to make some assumption

1 because you didn't answer my question directly when I  
2 asked you had you operated a mine.

3 MR. BISSETT: That is correct.

4 MODERATOR SILVEY: Well, have you?

5 MR. BISSETT: I have not.

6 MODERATOR SILVEY: Okay. Then, if you can  
7 maybe get the answer to this and provide it to us in the  
8 record before the record closes, because what I have done  
9 is try here.

10 MR. BISSETT: Uh-huh.

11 MODERATOR SILVEY: And that's why I said I  
12 wasn't trying to put you on the spot, to people who have  
13 operated a mine. Sometimes we have mine operators come  
14 in who either are running a mine now or have done so, and  
15 I would ask them.

16 Obviously, you have to comply with the pre-  
17 shift before, I can take the existing pre-shift, the  
18 supplemental and on-shift and weekly requirements as they  
19 are now. But I would assume, and, now, I'm going to make  
20 an assumption here, that sometime during the shift, or  
21 maybe it could be during the maintenance shift, that you  
22 have people working on the operations.

23 Let's say hypothetically you represent these  
24 operators, but if it were one of your operators, that  
25 they have people who go into the mine and examine for

1 violations of mandatory health or safety standards at  
2 some point during the day. I would assume that you don't  
3 wait until the MSHA inspector comes to find all these  
4 violations of health or safety standards. And what I was  
5 going to ask you is could you tell me how it's done at a  
6 particular mine? I don't care which mine it is.

7 MR. BISSETT: Sure.

8 MODERATOR SILVEY: Just take a mine and give  
9 me an example of how that's done. So if you could do  
10 that.

11 MR. BISSETT: I prefer to stick to my  
12 testimony that I've already drafted for these comments.  
13 We may increase maybe our comments or add these questions  
14 that you're having at this time.

15 MODERATOR SILVEY: Okay ...

16 MR. BISSETT: I was informed that I simply  
17 was going to relay testimony this morning.

18 MODERATOR SILVEY: I'm sorry?

19 MR. BISSETT: I was informed that we were  
20 only relaying testimony this morning, that this would not  
21 be a cross-examination.

22 MODERATOR SILVEY: It's not cross-  
23 examination. I'm just asking you a question. I do this  
24 of anybody who comes up. This is not cross-examination.

25 MR. BISSETT: I see.

1                   MODERATOR SILVEY: I'm asking you this to  
2 more help, more clarify, the testimony.

3                   MR. BISSETT: I think the testimony is very  
4 clear and I'd like to stand by where it is.

5                   MODERATOR SILVEY: I understand that, but I'm  
6 still asking you ...

7                   MR. BISSETT: Sure.

8                   MODERATOR SILVEY: ...if you would, if you  
9 could answer this question and provide the answer in the  
10 record, supplement your testimony with the answer to this  
11 question.

12                   MR. BISSETT: I would want to speak to my  
13 member companies and make sure I was representing  
14 their ...

15                   MODERATOR SILVEY: Okay, all right.

16                   MR. BISSETT: ... representing their stance  
17 on this issue precisely, rather than just giving my  
18 opinion.

19                   MODERATOR SILVEY: Okay. But just so it's  
20 clear, all I'm saying to you, that I assume your member  
21 companies at some point they have somebody, and I don't  
22 know who that person is, whether they are safety and  
23 health people, or somebody who goes around and examines  
24 the mine, looks at, finding out if there are violations  
25 of mandatory health or safety standards, to correct them,

1 at some point. I would assume that.

2 MR. BISSETT: Is there a question there,  
3 ma'am, I'm sorry?

4 MODERATOR SILVEY: Huh?

5 MR. BISSETT: Is there a question in that?

6 MODERATOR SILVEY: Yes. I want to ask if you  
7 would tell me how that's done. Give me an example of a  
8 mine and if you would tell me how that mine does it.

9 MR. BISSETT: I would prefer to stay to  
10 my testimony, as I stated earlier, ma'am. Thank you.

11 MODERATOR SILVEY: Well, then, so I take it  
12 then that you do not examine -- the mines you represent  
13 don't examine violations of health or safety standards?

14 MR. BISSETT: I'm going to stay with my  
15 testimony, ma'am, as I said I would earlier, and then I'd  
16 like to continue on to the POV studies.

17 MODERATOR SILVEY: No. I would like it, if  
18 possible, now, if you would -- you represent the Kentucky  
19 Coal Association.

20 MR. BISSETT: Yes, ma'am.

21 MODERATOR SILVEY: So I would like it if you  
22 would go to your member companies and ask that question.  
23 And, then, if you want to submit a comment back to us and  
24 say that they have no answer to that question, then you  
25 do that. Because I have gotten some testimony in the

1 record from companies who have answered that question,  
2 so, if you would do that.

3           And, as an example of what I'm saying, I'm  
4 sure that you would -- and, see, I don't even know what  
5 I'm sure, because I don't know where that -- the point,  
6 and I see that in my opening statement this morning, the  
7 point, one of the reasons MSHA did this rule is  
8 that -- you're saying that the rule is unnecessary ...

9           MR. BISSETT: Uh-huh.

10           MODERATOR SILVEY: ... and that MSHA should,  
11 I assume, stick with the existing rule, but there are  
12 some things that are violations of mandatory health or  
13 safety standards.

14           Let's take one. Let me take an example of  
15 something that might be a ventilation violation. It may  
16 not rise to the level of a hazardous condition; it may  
17 not, but, then, you get that ventilation violation and  
18 you get a methane violation with it; you get a little  
19 accumulation of methane, maybe not even a lot. Maybe  
20 that doesn't rise to the level of a hazardous condition,  
21 but, then, you get -- and I'm trying to figure out a  
22 third thing, maybe an ignition source.

23           Yeah, you've got low coal dumps. That, in  
24 and of itself may not rise to the level of a hazardous  
25 condition, but all the violations, when taken together,

1 they may rise to the level of a hazardous condition. And  
2 that's one of the reasons that MSHA wanted violations of  
3 mandatory health or safety standards corrected. So, the  
4 best way that we could get to fully -- I know you keep  
5 saying you're sticking with your testimony, but the best  
6 way that we can fully understand your testimony is for us  
7 to understand the impact that you're saying your  
8 testimony has been having on the operators that you  
9 represent, and that was why I was asking you this  
10 question.

11           You also said that you thought we grossly  
12 underestimated cost. Well, I cannot take -- I would ask  
13 that if you would provide the specifics in support of  
14 your statement that we grossly underestimated cost; if  
15 you think we underestimated the hours to examine or the  
16 cost of the examiners, or whatever the parameters were  
17 that we used in the development of the cost, if you would  
18 provide to us how you think we grossly underestimated  
19 costs, that would be appreciated, too.

20           MR. BISSETT: Understood.

21           MODERATOR SILVEY: Okay. All right. Thank  
22 you.

23           So, then, if -- but I would appreciate it, it  
24 would be much appreciated, the Agency would appreciate  
25 it, if you could supplement your comments with

1 information on the questions that we asked, those two  
2 questions.

3           If nobody else wishes to make a presentation  
4 then, I want to say, again, say that the Mine Safety and  
5 Health Administration appreciates your participation at  
6 this public hearing.

7           I want to emphasize that any additional  
8 comments must be received by August 1, 2011. We will  
9 take your comments into consideration in developing the  
10 final rule. I encourage you to continue to participate  
11 in this rulemaking and other MSHA rulemaking.

12           The public hearing is now concluded. Thank  
13 you very much.

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REPORTER'S CERTIFICATE

CASE TITLE: Examinations of Work Areas  
HEARING DATE: July 12, 2011  
LOCATION: Hazard, Kentucky

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: July 12, 2011

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