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CRITERIA AND PROCEDURES FOR PROPOSED
ASSESSMENT OF CIVIL PENALTIES (PART 100)

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Public Hearing

Denver, Colorado

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Panel Members: Sheila McConnell

Jay Mattos

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(The provided Submissions are attached to the transcript.)

P R O C E E D I N G S

MS. McCONNELL: My name is Sheila McConnell. I'm the acting director of the Office of Standards, Regulations, and Variances of the Mine Safety and Health Administration. And I will be the moderator of this public hearing on MSHA's proposed rule on criteria and procedures for assessment of civil penalties.

On behalf of the Assistant Secretary of Labor for MSHA, Joseph A. Main, I would like to welcome you all here today, and I would also like to introduce the other members of our panel.

On my left is Jay Mattos, Director of Office of Assessments, Accountability, Special Enforcement, and Investigation. Jay is the chair of the civil penalties rule making committee.

On my right is Anthony Jones, Office of Solicitor, MSHA Division.

MSHA published a civil penalty proposed rule in the Federal Register on July 31st, and in response to requests from the public is holding two public hearings to receive testimony on it. This is the second of four public hearings on the proposed rule. The first was held on December 4th at MSHA's headquarters in Arlington, Virginia.

1 MSHA also plans to hold two additional
2 hearings in January. These hearings will be in
3 Chicago and Birmingham. MSHA will also extend the
4 post-hearing comment period until mid-February.

5 The date of the hearing and post-hearing
6 comment period will be announced in the federal
7 register within the next few weeks.

8 The purpose of this hearing is to receive
9 information from the public that will help MSHA
10 evaluate the proposed changes and develop a final
11 rule that will improve health and safety conditions
12 at mines.

13 MSHA's hearings are conducted in an
14 informal manner. Formal rules of evidence do not
15 apply. The hearing panel may ask questions of the
16 speakers, and the speakers may ask questions of the
17 panel.

18 Speakers and other attendees may present
19 information to the court reporter for inclusion in
20 the rule making record.

21 MSHA will accept written comments and other
22 information for the record from any interested party,
23 including those not presenting oral statements.

24 For the benefit of the court reporter, we
25 ask that you please state your name and your

1 organization before you provide us your -- your oral
2 -- for those who are speaking, your oral statements.

3 Before I discuss the provisions of the
4 proposed rule, I would like to give you a short
5 overview of the civil penalty process.

6 Section 104 of the Federal Mine Safety and
7 Health Act of 1977, commonly known as the Mine Act,
8 requires MSHA to issue citations or orders to mine
9 operators for any violations of a mandatory safety or
10 health standard, rule, order, or regulation
11 promulgated under the Mine Act.

12 On issuing a citation or order, the
13 Secretary's authorized representative, the
14 inspectors, specify the time for the violation to be
15 abated.

16 I want to begin by reiterating the
17 definition of several terms that we use throughout
18 the rule that will not change.

19 Significant and substantial, or S and S,
20 will continue to mean a violation that is reasonably
21 likely to result in a reasonably serious injury or
22 illness. The inspector makes the S and S
23 determination at the time the citation is issued.

24 Unwarrantable failure continues to mean
25 aggravated conduct constituting more than ordinary

1 negligence by a mine operator.

2 Reckless disregard continues to mean
3 conduct exhibiting the absence of the slightest
4 degree of care.

5 No negligence continues to mean that the
6 operator exercised diligence and could not have known
7 of the condition or practice.

8 MSHA is proposing to group low, moderate,
9 and high negligence into a single category,
10 negligence.

11 Under the Mine Act, MSHA proposes penalties
12 and the Federal Mine Safety and Health Review
13 Commission, which I will refer to as "the Commission"
14 from now on, assesses penalties.

15 Under MSHA's existing rule, a proposed
16 penalty that is not contested within 30 days of
17 receipt becomes a final order of the Commission and
18 is not subject to review by any court or agency.

19 The Mine Act requires MSHA and the
20 Commission to consider six criteria in proposing and
21 assessing civil penalties. The appropriateness of
22 the penalty to the size of the business, the
23 operator's history of previous violations, whether
24 the operator was negligent, the gravity of the
25 violation, the operator's good faith in abating the

1 condition, and the effect of the penalty on the
2 operator's ability to continue in business. The
3 first five criteria apply to determine the penalty
4 amount.

5 The last criteria and the effect of the
6 penalty on the operator's ability to continue in
7 business is applied when requested by the mine
8 operator after the penalty's proposed.

9 The operator must send in supporting
10 documentation that the operator believes that the
11 penalty would negligibly affect the company's ability
12 to continue in business. MSHA will review this
13 information and may adjust the penalty.

14 MSHA's proposal to amend the evaluation
15 factors for determining regular formula penalties is
16 structured to encourage operators to be more
17 accountable and proactive in addressing safety and
18 health conditions at mines.

19 MSHA was guided by three key principles in
20 developing the proposed rule. First, improvement in
21 consistency, objectivity, and efficiency in how
22 inspectors write citations and orders by reducing the
23 number of decisions inspectors have to make, which
24 could lead to fewer areas of dispute and earlier
25 resolution of enforcement issues.

1 Two, greater emphasis on the more serious
2 safety and health conditions.

3 And, three, openness and transparency in
4 the application of the agency's regular formal
5 penalty criteria.

6 The proposal does not change the process
7 that inspectors use to issue citations. Under the
8 proposal, MSHA would make factual determinations with
9 respect to safety and health violations and issue
10 citations and orders just as they do now.

11 The proposed rule would reduce the maximum
12 number of penalty points that could be assigned from
13 208, under the existing rule, to 100.

14 The existing minimum penalty of \$112 and
15 the maximum penalty of \$70,000 for non-flagrant
16 violations would not change. Also, the maximum
17 penalty of 242,000 for flagrant violations would not
18 change.

19 MSHA's civil penalty regulation provides
20 two methods for proposing civil penalties: Regular
21 formula assessments and special assessments.

22 The regular assessment method under which
23 MSHA applies the civil penalty formula to each
24 violation provides an appropriate proposed penalty
25 for most violations.

1 The special assessment method in which MSHA
2 manually applies the penalty criteria is not affected
3 by this proposal.

4 This proposed rule involves changes to
5 MSHA's regular assessment penalty formula, including
6 a change to the citation order form, MSHA Form
7 7000-3.

8 Using the regular assessment formula under
9 the proposed rule, total penalties proposed by MSHA
10 and the distribution of the penalty amount by mine
11 size would remain generally the same as under the
12 existing rule. However, we expect that the total
13 penalty amounts for small metal and nonmetal mines
14 would decrease.

15 Minimum penalties for unwarrantable failure
16 violations would increase, provide a greater
17 deterrent for mine operators who allow these
18 violations to occur.

19 At this point, I would like to reiterate
20 some of the specific changes that were included in
21 the proposed rule.

22 First, MSHA is proposing to change how an
23 operator's overall violations history would be
24 determined and to increase the relative weight of the
25 violation history criterion as a percentage of total

1 penalty points in recognition of the importance of
2 the need for operators to prevent violations from
3 occurring and recurring.

4 We provided you copies out front of a
5 visual that depicts the percentage of each criterion
6 under the existing rule as compared to the
7 projections of the percentage under the proposed
8 rule.

9 Under the proposed rule, MSHA would assign
10 zero points when a mine has 10 or fewer inspection
11 days or fewer than 10 violations over the 15 months
12 prior to the issuance of the citation or order.

13 This provision would benefit small mines
14 and result in a more equitable impact of the
15 violations per inspection day formula on small
16 metal/nonmetal mines.

17 The proposal would revise the negligence
18 criteria to increase accountability for operators who
19 either knew or should have known of safety and health
20 hazards at the mine.

21 The proposed rule would restructure the
22 point table for the proposed category to reflect an
23 increase in the relative weight of the negligence
24 criterion.

25 MSHA believes that this proposed change

1 would result in penalties that appropriately reflect
2 actions under the control of operators that have a
3 direct impact on miner safety and health.

4 The proposal would reduce the negligence
5 criterion's five categories to three.

6 Under the proposal, the definition of
7 negligence would be revised to mean that the operator
8 knew or should have known about the condition or
9 practice.

10 The proposed rule would remove mitigating
11 circumstances from the definition of negligence.

12 Some commenters have expressed concern that
13 reducing the categories of negligence would result in
14 violations being placed in a higher category and
15 result in higher penalties.

16 In our projection of proposed penalties,
17 MSHA did not make this assumption. As stated
18 earlier, MSHA assumed that low, moderate, and high
19 negligence determinations would fall in the
20 negligence category.

21 The proposed provision would retain the
22 three gravity factors in the existing rule:
23 Likelihood of the occurrence, severity of injury or
24 illness if the event were to occur, persons
25 potentially affected, but would reduce the number of

1 subcategories associated with each factors.

2 Similar to the agency's proposed changes to
3 the negligence criterion, the proposal would simplify
4 the gravity criterion by decreasing the subcategories
5 for each of the factors of gravity.

6 Likelihood: The proposal reduced the
7 existing five categories of likelihood of the
8 occurrence of the event against which a standard is
9 directed to three: unlikely, reasonably likely, or
10 occurred.

11 Some commenters have expressed concern that
12 reducing the subcategories of gravity would result in
13 violations being placed in a higher category and will
14 result in higher penalties.

15 MSHA is proposing to group no likelihood
16 and unlikely and assign zero points to unlikely.

17 Commenters objected to the removal of the
18 existing no likelihood category; however, as
19 discussed in the preamble to the proposal, the
20 existing categories of no likelihood and unlikely
21 would be combined to improve objectivity and
22 consistency of enforcement.

23 Also to improve consistency, the proposal
24 would eliminate the highly likely category.

25 MSHA also wishes to clarify that the

1 proposed definition of occurred should read as a
2 condition or practice cited has caused an event that
3 has resulted in injury or illness.

4 Severity: The proposal would reduce the
5 four existing categories of severity of injury or
6 illness to three: No lost workdays, lost workdays or
7 restricted duty, or fatal.

8 The definitions of categories would not
9 change. The proposed rule would eliminate the
10 existing permanently disabling category, which is
11 often difficult to anticipate.

12 The proposal would change the person
13 affected aspect of the gravity criterion. Under the
14 proposal, 11 categories were reduced to 2: No
15 persons affected or persons affected.

16 As stated in the proposed rule, MSHA would
17 like to emphasize that simplification will enable
18 MSHA to be more consistent in citations. MSHA will
19 emphasize the proposed changes in future inspector
20 training, and the rule was structured to have minimal
21 changes in overall penalties.

22 The proposal does place an increased
23 emphasis on operators who continue to allow
24 violations to occur.

25 Like the existing rule, the proposal would

1 provide for a 10 percent reduction in the penalty
2 amount of a regular assessment where the operator
3 abates the violation within the time set by the
4 inspector.

5 In an effort to provide for increased
6 operator focus on prevention of safety and health,
7 MSHA is considering an alternative that would
8 recognize both prompt operator abatement for safety
9 and health hazards, as well as prompt payment of
10 proposed penalties.

11 Consistent with the statute and the prior
12 civil penalty regulation, this alternative would
13 provide an additional 20 percent good-faith reduction
14 in proposed penalty when neither the penalty nor the
15 violation is contested and the penalty is paid before
16 it becomes a final order of the commission.

17 Under this alternative, operators that
18 promptly abate safety and health hazards and promptly
19 pay the penalties associated with the violations
20 would be eligible for up to 30 percent overall
21 good-faith reduction in the amount of penalties.

22 Commenters questioned whether they would
23 lose the additional 20 percent good-faith reduction
24 if they participated in the pre-assessment
25 conference.

1 Commenters also expressed concern that MSHA
2 is trying to induce operators to not contest
3 violations.

4 I would like to emphasize that the 20
5 percent good-faith reduction in penalty is not
6 affected by requests for a pre-assessment conference
7 on violations.

8 In addition, I would like to clarify that
9 if an operator receives 20 citations and wishes to
10 abate and pay 10 of them, the operator could do so
11 and contest the remaining 10 citations.

12 MSHA is proposing to increase the minimal
13 penalties of unwarrantable failure citations and
14 orders by 50 percent to provide greater deterrence
15 for operators to allow these types of violations to
16 occur.

17 The proposed rule would hold operators
18 accountable for their actions as well as encourage
19 more diligent compliance.

20 Under the proposal, the minimum penalty for
21 any citation or order issued under Section 104(d)(1)
22 of the Mine Act would be \$3,000, and the minimum
23 penalty for orders under 104(d)(2) would be \$6,000.

24 Several commenters have stated that the 50
25 percent increase in penalty is not necessary, stating

1 that initiatives such as Rules to Live By and impact
2 inspections have worked.

3 In the preamble to the proposal, MSHA
4 offered alternatives related to the scope and
5 applicability of the rule.

6 To enhance consistency and predictability
7 in the assessment of civil penalties, MSHA seeks
8 comment on two alternatives that would address the
9 applicability of the proposed civil penalty formula
10 when the Commission assesses civil penalties.

11 MSHA's first proposed alternative would be
12 to modify the scope and applicability of MSHA civil
13 penalty regulation so that it would govern both
14 MSHA's proposal and the Commission's assessment of
15 the civil penalty.

16 The existing rule applies only to proposed
17 penalties. This alternative would require the
18 administrative law judge, or the ALJ, to apply the
19 penalty formulas to the facts found by the ALJ when
20 assessing civil penalties according to the six
21 statutory criteria.

22 Under this alternative, if the Secretary
23 meets his burden to prove the facts alleged, the
24 formula would be used to assess the penalty.

25 If the Secretary does not meet his burden

1 of proof on the facts, the judge would apply the
2 civil penalty formula to the adjudicated facts to
3 arrive at the assessment.

4 MSHA's second proposed alternative is
5 similar to the first, but would give the Commission
6 more flexibility to depart from the civil penalty
7 formula in appropriate cases.

8 Finally, MSHA did not prepare a separate
9 regulatory economic analysis for the proposed rule,
10 rather the analysis was presented in the preamble.

11 MSHA requests comments on all estimates of
12 costs and benefits presented in the preamble and on
13 the data and assumption the agency used to develop
14 estimates.

15 MSHA solicits comments that address
16 alternatives to the proposed history, negligence, and
17 gravity criterion, the 20 percent good-faith penalty
18 reduction, and unwarrantable failure provisions, and
19 how your suggested alternatives would improve
20 objectivity and consistency in enforcement.

21 Commenters are requested to be specific in
22 their comments and submit detailed rationale and
23 supporting documentation for any suggested
24 alternative.

25 Again, I reiterate, MSHA believes that

1 reducing the number of negligent categories and
2 reducing the subcategories for each of the factors of
3 gravity would decrease inspector subjectivity,
4 improve objectivity and consistency in the evaluation
5 of negligence, and will result in fewer areas of
6 disagreement, thereby facilitating resolution of
7 enforcement issues.

8 As you address the proposed provisions,
9 either in your testimony or in your written comments,
10 again, please be as specific as possible.

11 You may submit comments following this
12 public hearing through the close of the comment
13 period that will probably end in mid-February.

14 MSHA will make available a verbatim
15 transcript of this public hearing approximately two
16 weeks after the completion of the hearing. You may
17 review the transcript on MSHA's website at
18 www.MSHA.gov or on regulations.gov.

19 Okay. So we'll now begin today's
20 testimony. If you have a copy of the presentation,
21 please provide a copy to the court reporter and to
22 the MSHA panel.

23 Please, again, clearly state your name and
24 organization and spelling of your name for the court
25 reporter to make sure that we have an accurate

1 record.

2 Again, we ask that everyone please sign in
3 if you wish to speak, and if you haven't done so,
4 take a moment to do so now.

5 So our first speaker of today is Mark
6 Savit, Jackson Lewis.

7 MR. SAVIT: I thought I was second.

8 MS. McCONNELL: Let me explain our
9 procedure.

10 MS. THIGPEN: That's awkward.

11 MS. McCONNELL: No. I apologize.

12 Mr. Savit made his request earlier before
13 today. And you will now be number five. I
14 apologize. All the other speakers prior to you had
15 already previously made a request to speak. And we
16 have one more.

17 MR. SAVIT: Has everyone picked up a copy
18 of the PowerPoint?

19 MS. McCONNELL: Yes. There's a copy of the
20 PowerPoint.

21 I have a copy.

22 MR. MATTOS: Mark, that's the same as this
23 one?

24 MS. McCONNELL: Did you make changes since
25 last night?

1 MR. SAVIT: Since last night? No, I did
2 not make changes since last night.

3 Thank you very much. I appreciate the
4 opportunity to speak. Let me try and figure out how
5 to run the PowerPoint. I've provided a copy of the
6 PowerPoint to the panel.

7 And here we go. And there it is.

8 MS. McCONNELL: Very good.

9 MR. SAVIT: So I, for the record, will
10 reflect that the panel is turning its back on me at
11 the start.

12 MR. MATTOS: My back is back here.

13 MR. SAVIT: No. I understand. I very much
14 appreciate the opportunity --

15 MS. McCONNELL: Giving you our full
16 attention.

17 MR. SAVIT: -- to present this morning on
18 this extremely important topic.

19 And since we've given you a copy of the
20 PowerPoint, and we've obviously provided extra copies
21 to anyone who wants it, I don't feel like I need to
22 read everything on the PowerPoint, but I do want to
23 make some comments on the things that we've -- we've
24 pointed out, and I want to concentrate on another
25 area of it.

1 We represent a group of companies that have
2 organized themselves into what is called the
3 Coalition for MSHA Fairness.

4 I know my partner, Henry Chajet, spoke on
5 behalf of the Coalition in Washington, D.C., and I
6 don't want to -- I don't also want to reiterate
7 everything he said. So I want to get -- to make sure
8 we get to areas that are a little bit different.

9 Look at that (indicating). I actually
10 figured out how to run it.

11 The biggest problem we have with this is --
12 well, the first problem we have with the proposal is
13 we -- we don't understand where the problem is.

14 The number of contests has gone down by
15 quite a bit. In fact, if I'm not mistaken, the
16 current number of contests has gone down by about 25
17 percent in the last three years and continues to --
18 and continues to drop.

19 This year -- or in the last year we have
20 the full statistics for, there's a smaller percentage
21 of the smaller number of citations being contested.
22 So when you take into account the drop in citations
23 being written and the drop in percentage, you end up
24 with a very substantial drop in the number of
25 contests.

1 The preamble makes much of the idea that
2 this is needed to eliminate the -- the backlog of
3 contests, and, in fact, we -- we -- we disagree with
4 that. But -- but, in fact, that backlog is already
5 going away on its own, and there's no need to change
6 the rule just for that.

7 Second of all, I understand, and I take
8 with -- I take seriously MSHA's announced objective
9 of trying to make the rule more objective and
10 increase consistency.

11 But what's happened here is not -- not a
12 change that will increase consistency because it will
13 make things more consistent. It just makes the
14 categories bigger.

15 So the -- the idea if you had a target with
16 five rings on it, and you make the target have only
17 three rings, more people are going to hit the
18 bull's-eye, even though the shots are no more
19 accurate than they were at the five-ring target; the
20 bull's-eye's just bigger.

21 And so what we have done here is compressed
22 these categories into one -- one larger category and
23 taken away the fine distinctions. The differences
24 among inspectors and the differences in the way these
25 things are viewed will remain, but the categories

1 will disappear. So things will appear to be more
2 consistent when, in fact, they really aren't.

3 And, finally, the proposed -- the proposal
4 with regard to the Commission -- I know there's been
5 an awful lot of comments on that.

6 But I think it's fair to say and summarize
7 that the statute -- the statute expressly places the
8 authority to assess penalties in the Commission. And
9 there is no way in which a rule making by MSHA can
10 change the statute.

11 It would take a statutory change for MSHA
12 to be able to impose conditions on the independence
13 of the condition -- the Commission, given the
14 language of the statute.

15 I don't know that I need to belabor that a
16 lot because a number of other people, including a
17 number of former commissioners and the current
18 Commission, have weighed in on that issue in ways
19 that are probably beyond anything that I could -- I
20 could say.

21 We've reiterated what MSHA has said in
22 terms of what it was to do, and I don't think any of
23 those goals are -- I don't think there's much
24 objection to any of those goals. I think the goals
25 stated are -- are goals that ought to be looked at in

1 terms of the way the penalty provisions work.

2 The problem is that once you actually start
3 to look at the way those proposals work, it doesn't
4 really -- it doesn't really do much. And I'm running
5 through these slides a little bit quickly because
6 there's no need to reiterate what you've already
7 said.

8 We -- also, my first point was, with regard
9 to consistent improvement in the enforcement data --
10 and I'm using MSHA's -- MSHA's numbers to show that
11 MSHA's made much in the past of that improvement,
12 but, yet, in the preamble to the rule, seems to take
13 a different position.

14 The question is, what's really going to
15 happen in terms of whether or not MSHA will
16 accomplish the goals that it says that it's going to
17 accomplish.

18 And as I said in -- in the summary, I think
19 it's going to -- every indication we have is that the
20 proposed rule will have the opposite of the effect
21 that MSHA seeks to find.

22 First of all, the last large increase in
23 litigation was -- the last large increase in
24 litigation came when the -- when the penalty rules
25 were changed to eliminate the single penalty

1 assessment and raise penalties, and that increased
2 litigation by a tremendous amount.

3 Once you start eliminating categories and
4 combining categories and changing the way in which
5 the citations are classified, everyone is going to
6 want to go back out there and relitigate all those
7 questions.

8 Even though MSHA is going to say it has
9 said it doesn't want to change any definitions, the
10 fact is that the ratings on the citations will
11 change. Everybody is going to want to try and -- and
12 relitigate a bunch of that -- of those issues.

13 And, frankly, between what the current low
14 negligence, for example, and the current high
15 negligence, for example, mean to an operator and to
16 the way in which penalties are considered, with
17 combining all of those, I am sure there's going to be
18 litigation on the edges of all those categories where
19 before there wouldn't have been, because we're now at
20 a point where we pretty much understand what low
21 negligence and high negligence mean.

22 And just as we get from a litigation
23 standpoint where we understand that, the game is
24 going to change. The rules are changing. The
25 categories are changing.

1 And lawyers -- speaking as a lawyer,
2 lawyers, just like surgeons are -- are rumored to
3 like to do operations because they're surgeons,
4 lawyers like to litigate because they're lawyers.

5 But -- but the issue is going to be that
6 questions will arise as to each of the new criteria.
7 Those will all have to be litigated, and they will
8 all have to be decided. So there will be nothing but
9 an increase in litigation once -- if the current rule
10 goes through.

11 We did go through the -- the -- I
12 appreciate Ms. McConnell's reading of what is going
13 to happen. We've shown that on a slide just to show
14 exactly how we understand this will work.

15 And I want to ask a question of the panel:
16 I understand you to say that the definition of
17 occurred will be that the violation is like -- has
18 caused an event which has resulted?

19 MS. McCONNELL: I'll repeat it. We were
20 going to add some clarity to this. It's going to be
21 a condition or practice cited that has caused an
22 event that has resulted in an injury or illness.

23 MR. SAVIT: And that, if I'm not mistaken,
24 is a change from the printed . . .

25 MS. McCONNELL: Yes.

1 MR. SAVIT: Is there going to be an
2 amendment issued?

3 MS. McCONNELL: We're --

4 MR. SAVIT: Amended rule making --

5 MS. McCONNELL: We're going to have some
6 clarifying language in our notice.

7 MR. SAVIT: Okay. So when -- because
8 currently all of our comments are geared towards the
9 language that was in the preamble.

10 MR. MATTOS: And -- and this is a result of
11 our hearing last week where we --

12 MR. SAVIT: Okay.

13 MS. McCONNELL: Henry -- Mr. Chajet --

14 MR. SAVIT: Henry.

15 MS. McCONNELL: -- well, he -- it was
16 during his testimony that it came to our attention.

17 MR. SAVIT: Right. It was a significant
18 issue, and it changes our analysis somewhat.

19 MR. MATTOS: Yes. Pat and Henry had a
20 lively discussion on that point, and she actually
21 pointed out to Henry, she said, Come up here and look
22 at Jay's Federal Register. He's already crossed that
23 out. And so -- so --

24 MS. McCONNELL: You'll see how that debate
25 went back and forth.

1 MR. SAVIT: I -- I -- I heard from
2 Mr. Chajet that it went back and forth, but I didn't
3 know that MSHA had already made a change. And I --

4 MS. McCONNELL: We acknowledge that
5 there --

6 MR. SAVIT: Okay.

7 MS. McCONNELL: -- was not clear -- we
8 acknowledge that that was not clear.

9 MR. SAVIT: Okay.

10 Here's the problem we have: Once again, as
11 we summarize in the slide, the -- the problem -- the
12 basic problem we have is the way in which the
13 categories are combined and the way in which the
14 points compare to the old point scale
15 disproportionally raises penalties on operators with
16 the best records rather than those with the worst
17 records. And we have some numerical analysis on that
18 which I am going to get to in a minute.

19 The second point, as I said in the
20 beginning as well, the citation writing process gets
21 simpler for inspectors. It doesn't really do
22 anything in terms of decreasing inconsistency -- real
23 inconsistency or objectivity. It just makes the
24 target so big that now what shots that would have
25 been off target are now in the bull's-eye.

1 The other thing is -- and I know that MSHA
2 has rerun their assessment process with the new
3 rules, and says that the amount will go down.

4 We've done a bunch of that with a bunch of
5 people we represent, and we have not found a single
6 instance where it goes down.

7 But I -- I will show you a couple places
8 where it could go down. But I -- but it -- but we
9 can't simulate a result that makes the total penalty
10 go down.

11 It's possible that the reason that -- and I
12 haven't looked at the data set in detail yet, but we
13 certainly will before -- before we submit our written
14 comments, and we'll do an independent analysis of
15 that.

16 It's possible that the majority of the
17 reduction or whatever the -- the reduction that MSHA
18 claims will happen or the -- what -- what brings
19 everything back to roughly even has to do only with
20 very small non-coal mines.

21 And if that's the case, then virtually all
22 of the larger companies -- anybody who has more than
23 10 inspection days or more than 10 citations will get
24 a significant increase.

25 It may be that if you look at the entire

1 total, the bulk of the reduction comes from those who
2 did not have 10 or more inspection days and didn't
3 have 10 or more citations. I -- I haven't looked at
4 the total days yet, but I -- we -- we will do that
5 analysis.

6 As I said before, once you start redefining
7 and combining and adopting what we will characterize
8 as all or nothing categories, you're either negligent
9 or you're not, I believe -- I think it's inevitable
10 that -- that litigation will increase.

11 Here's the guts of what I wanted to talk
12 about as opposed to what Mr. Chajet talked about: We
13 did a fair amount of numerical analysis. So what we
14 did was we looked at how -- what the points assigned
15 to the various levels of, in this case, history of
16 previous violations did in relation to the old rule
17 so that for -- and I'll give you a great example of
18 this.

19 But what you can see in the chart is that
20 the mines with the best history of previous
21 violations get the most increase compared to the --
22 to the old rule.

23 And -- and the way we did that is -- and
24 the illustration is that there are 208 points in this
25 current universe of points. There are 100 points in

1 the -- in the new proposed universe of points.

2 A number of -- for instance, the very
3 bottom categories got one point under the old rule
4 and get one point under the new rule.

5 The problem is that one point under the new
6 rule -- under the old rule was a little less than 1/2
7 a percent and one point under the new rule is 1
8 percent. So one point under the new rule is worth
9 twice as much as it was under the old rule.

10 So a company that had the best record and
11 got one point is really getting 100 percent more
12 penalty than it got under the old rule when it also
13 got one point. Right? You can't keep the points the
14 same, reduce the universe by half, and expect
15 everything to stay the same.

16 So when we compared the points assigned
17 under the new rule to the points assigned under the
18 old rule and corrected for the difference in total
19 points, then we came up with a differential increase
20 between the two rules.

21 And what we found was that the increase,
22 for instance, on a history of previous violations is
23 much, much higher for those companies at the bottom
24 of the scale than it is at the top of the scale.

25 And -- and so while we can agree that a

1 rule -- a proposed new rule ought to increase
2 emphasis on history of previous violations, it ought
3 to increase emphasis on the mines with the most
4 severe, or the worst history of previous violations,
5 rather than differentially increasing it the most for
6 the mines with the best history of violations. And
7 that theme continues throughout.

8 When our -- our written comments will have
9 a lot more of this analysis in it. But for the
10 purpose of this -- of this testimony, we've shown a
11 couple of different illustrations.

12 And when you look at the way -- the way we
13 did the numerical analysis, for instances, this one
14 is regarding history of previous violations. This
15 one is regarding history of repeat violations.

16 There's no consistency between the two
17 approaches. And, once again, the difference between
18 the new rule's treatment of history of repeat
19 violations and the old rule decreases as the
20 operator's history of repeat violations gets worse
21 rather than as it gets better.

22 So the -- the -- the relative increase
23 between the new rule and the old rule for operators
24 with the best records is higher than it is for
25 operators with the worst records.

1 It would have -- it would have made
2 somewhat more sense if all of the treatments were the
3 same.

4 But when you look at the treatment of
5 repeats, it is wildly different than the treatment of
6 history of violations, which is wildly different than
7 the treatment of -- which is the -- the way in which
8 the rule looked at these different categories is
9 different from category to category. But all of
10 them, roughly, penalize the operators with the best
11 records relatively more than the operators with the
12 worst records.

13 And this is probably the best example.
14 This is the way -- if you look at the old point
15 systems assigned to negligence is the blue line. So
16 you have none is the first bullet where everything
17 meets at the bottom.

18 The next bullet would be low negligence.
19 And that, as -- as Ms. McConnell mentioned, is
20 grouped with negligence, and you can see that the
21 increase in percentage of total penalty points is the
22 greatest with regard to low negligence.

23 It increases again from moderate negligence
24 to negligent, but it decreases from high negligence
25 to negligence.

1 So if all the high negligence citations
2 were moved back down to negligent and all of the low
3 negligence citations were moved up to negligent,
4 there are two things you can -- there's one thing you
5 see on the chart, and one other thing that I think
6 Jay and -- or Mr. Mattos and Ms. McConnell would
7 agree on.

8 But the first thing you'll see is that the
9 increase for low negligence to negligent is much
10 greater than the decrease from high negligence to
11 negligent. So that if you bring them all back to the
12 middle, it's still a net increase.

13 Second of all, if I'm not mistaken, there
14 are more low negligent citations than there are high
15 negligent citations.

16 So if you take a percentage of low
17 negligent citations as being something like 6
18 percent, and you take a percentage of high negligence
19 citations as being something like 2 percent of the
20 total citations, the net reduction from high
21 negligence is offset by the increase from low
22 negligence.

23 And the ironic part of this is -- and we --
24 we go into a lot of discussion of this -- we will in
25 our written comments.

1 But the ironic part of this is that it
2 penalizes those operators who try as hard as they can
3 to eliminate citations but don't completely succeed
4 the same as it treats operators who don't try as hard
5 as they can and don't completely succeed.

6 In other words, you're either not negligent
7 or you're negligent. If you go to great lengths to
8 try to reduce citations but some slip through the
9 cracks despite your best effort, you're as negligent
10 as somebody who does a lot less. In fact, you're as
11 negligent as somebody who was, under the old rule,
12 highly negligent.

13 The elimination of mitigating factors
14 eliminates the incentive to engage in programs to try
15 and reduce citations unless you can make them 100
16 percent successful. So the incentive to try is gone.

17 It's ironic to me that identical citations
18 that would have been rated low negligence and high
19 negligence under the old system will get the same
20 penalty under the new system. Otherwise identical
21 citation. I mean, you have to concede that's true,
22 even if all the highly negligent citations go back
23 down to the no.

24 And there's -- there's a real question
25 about whether that's going to happen or not in terms

1 of the inspectors here.

2 So that's -- to me, this is the heart of
3 the increase, and it's the heart of the problem with
4 regard to the way in which the -- the points have
5 been allocated.

6 We now have a little bit of a different
7 definition. So we -- we actually address the
8 existing language, and I don't want to -- I don't
9 want to belabor that because, obviously, you're
10 changing it, and we'll get some notice of that.

11 And the same thing in terms of occurred, we
12 want to make sure that we address the language with
13 you guys.

14 What we then did was we ran simulations
15 ourselves, and we will, in our written comments,
16 include six or seven different companies and probably
17 15 or 20 mines by the time we get to the written
18 comments.

19 But let's go through one mine, and this is
20 an actual mine that we looked at. I'm not going to
21 tell you which one it is, but it's a real mine. It's
22 all of a year's worth of citations for them. This is
23 a mine with a relatively -- it's an underground mine.
24 It has a relatively good record.

25 And so we've moved -- as you can see, we've

1 moved all of the low negligence up to -- up to
2 negligent. They had no high negligence, so there's
3 no reduction for that.

4 And then we did three different scenarios.
5 We moved all of the citations that were originally
6 marked unlikely to reasonably likely. I understand
7 that may not happen, but we tried one -- one
8 simulation like that.

9 And what you see is that their penalty
10 burden went from \$18,000, roughly, to almost \$68,000.
11 And I believe that's a 30 percent good-faith
12 reduction, even if they paid them all. So it would
13 go down to 47,000.

14 And we thought, well, maybe that's too
15 aggressive in terms of the way inspectors would mark
16 citations. So we tried it again with the 50 percent
17 of the unlikely citations moved to reasonably likely.

18 And what you'll see in the second
19 simulation is, obviously, the old total of \$18,384
20 stayed the same. This -- in this simulation, it
21 rises to \$54,000 -- roughly \$54,300, and is reduced
22 by the 30 percent to \$38,000.

23 And then we said, well, maybe even that is
24 too aggressive. Maybe all of the inspectors will
25 mark all the unlikely, unlikely just like they used

1 to. They won't move any -- any up to reasonably
2 likely. So we -- we did it with no change to
3 unlikely.

4 And what you'll see is that the penalties
5 went up from \$18,000 to \$41,000, and with the 30
6 percent reduction, it went back down to about
7 \$29,000.

8 And we used that mine's real history of
9 violations, and let me just say, this is a mine that
10 doesn't have a very bad history of violations, and it
11 doesn't have a very significant history of repeat
12 violations.

13 But because the point totals increases
14 relative to the old rule are so much higher for the
15 folks with good records than it -- it -- it skews
16 everything off.

17 Frankly, their -- the difference in
18 assessment would have been lower if their history of
19 violations was higher.

20 In other words, in terms of a multiple of
21 the original assessment would have actually gone down
22 if their history of violations was worse. So this is
23 part of the anomaly that's been created.

24 The other thing that happens is that if you
25 get past the 10 inspection days and the 10 citations,

1 if you look, the differential treatment of small,
2 medium, and large mines is a little bit weird.

3 Because of the way in which the size
4 criterion is treated, you'll see the small mine with
5 the good record ends up with a tenfold increase in
6 penalties.

7 The midsize mine ends up with a ninefold
8 increase in penalties.

9 And the large mine ends up with a threefold
10 increase in penalties.

11 Which doesn't seem to make sense in terms
12 of the statutory criterion about taking size into
13 consideration. It's just the way in which the points
14 were assigned again with regard to size criteria.

15 And we will submit our numerical analysis
16 on that with our written comments.

17 In other words, it appears to us, based on
18 the way in which the -- the regulation was proposed
19 and the way in which the point changes were proposed,
20 that the regulation will actually have the opposite
21 effect of the one intended.

22 I -- I doubt I would be here saying the
23 things I'm saying if our analysis indicated that it
24 would accomplish the objectives that are intended in
25 the preamble.

1 Despite the fact that we think there's no
2 need for a new rule because contests are going down.
3 Litigation is dropping. Everybody is starting to
4 learn the roadmap to the old criteria. In spite of
5 that fact, I don't think we need a new rule, and our
6 members don't think we need a new rule.

7 But if -- if -- but based on the way in
8 which the points were allocated, the problem is that
9 the rule doesn't -- doesn't accomplish the objectives
10 that it says that it intends to accomplish, and
11 that's the biggest problem we have.

12 So we don't see a problem -- and we also
13 see that the points -- the way in which points have
14 been done lead us to the opposite effect than the one
15 that MSHA says it would like to accomplish.

16 And we -- we very much look forward to
17 working with MSHA in this. We look forward to doing
18 a more detailed analysis and a more fulsome analysis.
19 We look forward to doing a detailed analysis of the
20 MSHA data set as well as -- and we will be submitting
21 more detailed written comments.

22 But for the purposes of this part of the
23 rule making process, we wanted to highlight a few of
24 the things that we thought were the most significant.

25 And if the panel or MSHA would like to see

1 the rest of the numerical analysis before we submit
2 all our formal written comments, I'm more than happy
3 to provide it and go over it with you in whatever --
4 whatever format or context we're allowed to discuss
5 with you, we'll be more than happy to discuss it with
6 you.

7 And I'm open to questions.

8 Thanks very much.

9 MS. McCONNELL: Mr. Savit, thank you for
10 your comments, and thank you for your presentation.

11 I would like to reiterate a few things from
12 your slides before I ask if there's any questions
13 from the panel.

14 One of the assumptions we have in terms of
15 negligence: I would like to reiterate that we are
16 projecting that high negligence would not become a
17 reckless disregard. That we would only be seeing
18 low, medium -- low, moderate, and high merged in
19 together.

20 Another point I would like to make clear is
21 that, as you -- your third example, there is no -- or
22 unlikely would be assigned zero points. Under the
23 proposed rule, that is our projection as well.

24 We do not see unlikely going into
25 reasonably likely -- or we're not projecting that.

1 And the last point of clarification I'd
2 like to make is that one of -- one of your slides you
3 have that -- MSHA stated goals. I just want to make
4 sure to reduce the quantity of litigated citation and
5 orders -- I would like to reiterate that MSHA stated
6 in its proposal that one of its goals would be --
7 from the new categories that we believe would result
8 in fewer areas of disagreement and earlier resolution
9 of enforcement issues.

10 MR. SAVIT: But as you saw, we did one
11 simulation with all the unlikely staying --

12 MS. McCONNELL: Yes, I did see that. That
13 was closer to our projections --

14 MR. SAVIT: We did not -- and our
15 simulations has all of the high negligence moving to
16 negligence and none of it moving to reckless
17 disregard.

18 MS. McCONNELL: And I appreciate that. I
19 do appreciate that. The examples of high -- of
20 negligence did not go into reckless disregard.

21 So, again, if -- I would say that it would
22 be good if you could support your examples with more
23 specific information and data in terms of how you
24 arrived at some of your conclusions, and that would
25 be helpful for us in terms of evaluating our

1 proposal.

2 With that, I'm going to look to Jay.

3 Jay, do you have any questions for Mr. --

4 MR. MATTOS: I do.

5 So thanks, Mark.

6 MR. SAVIT: Not surprisingly.

7 MR. MATTOS: I appreciate the comments.

8 And I'm really interested in that the negligence
9 piece or low negligence and high negligence and the
10 impact the low negligence has and more of an impact
11 there.

12 What we are promising to do is to -- for
13 any data that's submitted, we're going to pore over
14 that data. Show us that. We have economists and
15 analysts and people who will be able to take a look
16 at -- and -- and nothing's off the table here. That
17 the data sets and models that are provided to us, we
18 will definitely -- we will do a lot of work in going
19 over those to see what we can learn from the
20 comments.

21 MR. SAVIT: Let us know what format you
22 want this in, and we will get it to you in whatever
23 format you want.

24 Our law firm does a tremendous amount of
25 work on office and federal contract compliance

1 programs, and we have in-house statisticians and data
2 analysts, and we use our in-house staff to do this.
3 But they are -- they're not lawyers. They're
4 statisticians and data analysts, and we work with
5 them.

6 So I can get you the data that they used.
7 I can tell you the methodology. I -- I'm more than
8 happy to share it.

9 MR. MATTOS: And we would need that, yeah.

10 MR. SAVIT: And, frankly, if MSHA thinks
11 that our methodology is wrong for one reason or
12 another, we'd like to know.

13 MR. MATTOS: And what -- we would invite
14 you all -- everybody to take a look at our data
15 model. It's out there on the -- you know, the
16 website, and it's every citation -- current model is
17 every citation assessed in calendar year '13, and is
18 reassessed using this proposed rule.

19 And we want -- likewise, shoot holes in our
20 assumptions, which you've eloquently done here.

21 MR. SAVIT: We tried --

22 MR. MATTOS: You know, we'll see when we
23 look at all the data models.

24 MR. SAVIT: We'll see when we look at all
25 the data models.

1 MR. MATTOS: That's why we're here. We --
2 you know, this is --

3 MR. SAVIT: And I -- and I can't tell you
4 how much I appreciate -- I appreciated the -- the --
5 the vigorous dialogue between Ms. Silvey and
6 Mr. Chajet. I appreciate the fact that MSHA wants to
7 undertake this kind of give and take.

8 I wonder whether or not moving to a
9 negotiated rule making might be a better idea in this
10 context, because there's so many differences in the
11 data, and it's so iterative that maybe the best thing
12 to do would be to pull back the proposal and -- and
13 try and put it in as a negotiated rule making or some
14 other approach.

15 But we are poles apart in terms of how
16 we're looking at this data, and I -- I'm still
17 struggling to figure out what the differences are.

18 MS. McCONNELL: Right. And the more you
19 provide more clarity, we have too -- because we are
20 too struggling.

21 MR. MATTOS: The one distinction I would
22 like to make, though -- it's not a question. We did
23 not go into this rule making to reduce the contest
24 rate. That wasn't one of the stated goals. We are
25 saying we would like to have fewer areas of dispute.

1 When I first came to MSHA -- that was in
2 the '80s -- I heard about consistency being a
3 problem. And this -- we -- we're still hearing about
4 consistency being a problem.

5 And what we're trying to do with this
6 proposal is to take some of the burden -- we're
7 asking our inspectors right now to make an evaluation
8 if an injury were to occur, would it be a lost work
9 day or restricted duties, permanently disabling, or
10 fatal.

11 Permanent -- that's asking a lot of them.
12 Is it going to be permanently disabling, this
13 hypothetical injury, or is going to be a fatal
14 injury? And so the number of people affected has
15 always been a bone of contention. And, you know, is
16 it two? Was it eight?

17 We're trying -- so we're trying to give the
18 inspectors a break here and get them to be -- have a
19 more objective, less subjective evaluation of the
20 conditions. And negligence is a perfect example.
21 We'll do some more negligence or high negligence.
22 And, you know -- and that's -- that's what we were
23 really trying to --

24 MR. SAVIT: That's so central, though, on
25 our side to rewarding the efforts of those who are

1 trying the hardest. And eliminating that -- those
2 mitigating circumstances, in our view, guts the --
3 the -- the incentive to try harder.

4 MR. MATTOS: And -- and we're hearing that
5 loud and clear. And -- but we need to take a look at
6 that, what those impacts are.

7 But I just want to -- there is one -- after
8 the hearing last week, or was it before? -- it was
9 last week -- I took a look at the Commission
10 decisions, the ALJ orders from last year, and we had
11 close to 5,000 citations where the negligence was
12 modified as a result of settlements or judge's orders
13 or whatever from the Commission.

14 98 percent of those where the negligence
15 was modified, was modified from low, medium, high to
16 low, medium, high. One of those three to one of
17 these three.

18 So we have a lot of dispute going on
19 between those -- among those three areas -- those
20 three levels of negligence.

21 And one of our hopes here was -- well,
22 let's try not to have that -- that's the --

23 MR. SAVIT: I understand. But I'd submit
24 to you that -- and we can all look at the same 5,000
25 cases, but I would submit to you that the majority of

1 the modifications are downward.

2 MR. MATTOS: Oh, I understand that.

3 Absolutely. Right.

4 MR. SAVIT: And that's -- once you make it
5 all negligent, that downward modification doesn't
6 count.

7 MR. MATTOS: And that's where we need to
8 come together and look at the data and say, Okay,
9 what -- is there something here?

10 MR. SAVIT: I mean, that -- that's the
11 example I'm giving you about making the bull's-eye
12 bigger.

13 MR. MATTOS: Right. I like that analogy.
14 That's a good analogy. That's a good analogy. We're
15 look forward to looking at your data. What -- we'd
16 really need like everyone to take a look at ours and
17 really shoot holes in it --

18 MR. SAVIT: More than happy to share data
19 in whatever form you want.

20 MR. MATTOS: And we'll talk and get that
21 done.

22 MR. JONES: I just have one quick question
23 for you.

24 You mentioned your concerns about the pace
25 involving the Commission and their ability to

1 independently assess penalties.

2 We cite a lot of cases in the preamble
3 where we lay out where we think we have the authority
4 to do that.

5 It would be extremely helpful for us if you
6 could read those cases and give us your view about
7 whether those cases support or -- or oppose what
8 we're trying to do, in your official written
9 comments.

10 MR. SAVIT: Those will be in our written
11 comments. I felt that for oral comments, that wasn't
12 the -- what I really wanted to concentrate on today
13 because I really wanted to concentrate on the
14 numerical analysis, because I think a lot of other
15 people are going to address legal issues.

16 And we certainly will read them, and we
17 certainly will comment on them in our written
18 comments. But I -- I tend to defer to Mr. McCord's
19 comments and Mr. Duffy's comments on -- with respect
20 to their -- on the -- on the Commission's
21 independent --

22 MR. JONES: Thank you.

23 MR. SAVIT: Thanks very much.

24 MS. McCONNELL: Thank you.

25 Our next speaker is Peter Gould, Squire,

1 Patton, Boggs.

2 Mr. Gould, do you happen to have a copy of
3 your testimony?

4 MR. GOULD: I don't, but I can bring it by
5 after my testimony, or I'd be happy to send it in.

6 MS. McCONNELL: Okay.

7 MR. SAVIT: Do you want me to take down the
8 PowerPoint?

9 MR. GOULD: I'm not planning to use
10 Mr. Savit's PowerPoint, so that would be helpful.

11 MR. SAVIT: Let me -- I can turn it off.

12 MS. McCONNELL: Okay.

13 MR. SAVIT: Let's see. I've got to go on
14 the other side here.

15 MS. McCONNELL: Your thumb drive is in the
16 back.

17 MR. SAVIT: Yeah.

18 MR. MATTOS: Does anybody else need the
19 computer?

20 We can move that so you don't have to --

21 MS. McCONNELL: There you go.

22 Thank you.

23 MR. GOULD: Can you hear me okay?

24 MS. McCONNELL: Yes, I can.

25 MR. GOULD: I have a little bit of

1 laryngitis. I have --

2 MS. McCONNELL: How about people in the
3 back of the room?

4 I haven't heard complaints yet.

5 MR. GOULD: Just ask me to speak up if you
6 can't hear.

7 Good morning. My name is Peter S. Gould,
8 spelled G-O-U-L-D.

9 I'm honored to speak before you today on
10 behalf of Tata Chemicals Limited and the Coalition of
11 Associated Mine Operators and Industrial
12 Manufacturers concerned about MSHA's proposed rule to
13 amend the criteria and procedures for assessment of
14 civil penalties under MSHA's Part 100 rules.

15 During the last speaker, the panel
16 mentioned that there have already been some changes
17 to what was initially printed in the Federal Register
18 this past summer. I'm going to address the rule,
19 just out of an abundance of caution and for
20 consistency, the proposed rule that is as it was
21 printed.

22 We share MSHA's goal to improve the
23 objectivity, consistency, and efficiency of the
24 penalty proposal process under Part 100; however, we
25 believe that MSHA's proposed rule will detrimentally

1 impact those goals.

2 My brief testimony today will focus on
3 three primary concerns regarding MSHA's proposal.

4 Number one, MSHA's proposal to strike the
5 Commission's ability to assess civil money penalties
6 on a de novo basis will violate the Mine Act's clear
7 delegation of authority to the Commission, which MSHA
8 has no authority to amend.

9 The proposal's justification is also devoid
10 of reason.

11 MSHA claims that operators are motivated to
12 contest a citation or order all the way through trial
13 because even if they lose on every point of law, they
14 might score a penalty reduction. This contention is
15 essentially divorced from reality.

16 Number two, MSHA's proposal to amend Part
17 100.3(b) by striking or collapsing key categories
18 under the negligence and gravity criteria will lead
19 to an increased challenge rate and increased
20 litigation before the Commission.

21 Number three, MSHA's proposal will
22 dis-incentivize promoting behavior by striking
23 current Part 100 credit from mitigating circumstances
24 under the negligence criteria.

25 Accordingly, we respectfully suggest that

1 MSHA withdraw the proposed rule in its entirety and
2 rethink it.

3 The proposed rule would violate the Mine
4 Act. Perhaps the most disturbing element of the
5 propose rule is MSHA's attempt to rewrite provisions
6 of the Mine Act that combine -- that provide the
7 Commission, not MSHA, with undisputed congressionally
8 granted authority to independently assess penalties
9 without agency interference.

10 Section 110(i) of the Mine Act, or 30 USC
11 Section 820(i), Congress vests in the Commission,
12 quote, authority to assess all civil penalties
13 provided in the Act.

14 The Act then provides six criteria that
15 Commission judges must consider when assessing civil
16 money penalties. Just two subsections later, the Act
17 then provides the Commission unambiguous authority to
18 approve, modify, or reject a settlement proposal,
19 including civil money penalties, quote, proposed by
20 MSHA.

21 The Secretary possesses no independent
22 right to interfere with the Commission's delegated
23 authority.

24 The mine's delegation of penalty assessment
25 power to the Commission represents a, quote, marvel

1 of congressional clarity, to borrow an expression
2 from the DC circuit's 2011 performance coal petition.

3 Both the Commission and the Secretary have
4 relied on the unambiguous authority to administer
5 their independent responsibilities for decades until
6 now.

7 MSHA's proposal would upend the Mine Act's
8 split authority scheme, and the Commission's
9 independent assessment of authority. It would
10 require Commission judges to assess MSHA's proposed
11 penalties if MSHA carries its burden of proof on fact
12 of violation.

13 Quite simply, MSHA possesses no authority
14 through rule making to require Commission judges to
15 do anything. The agency should well understand that
16 even MSHA cannot exercise jurisdiction over the
17 Commission. That authority lies with congress and
18 congress alone, as our nation's constitutional
19 framers intended.

20 MSHA should quickly abandon its attack on
21 the Mine Act split enforcement scheme. Doing so now
22 will avoid inevitable litigation over this very clear
23 issue and conserve huge amounts of agency and
24 industry resources that would be spent litigating an
25 issue all but certain to result in a striking down of

1 that portion of the proposed rule.

2 But MSHA should also abandon this proposal
3 because the rationale behind it is flawed. MSHA
4 argues that it is concerned that mine operators hold
5 perceptions that a lower penalty can be obtained by
6 bringing a penalty contest before the Commission
7 because the Commission is not required to follow
8 MSHA's penalty regulations.

9 It then cites data explaining that since
10 2008 there has been a 15 percent reduction rate in
11 the assessed penalties and citations and orders that
12 were decided without modification. Meaning these are
13 cases where the operator contested and lost on every
14 single issue.

15 This contention smells bad even in theory.
16 After all, rare is the operator who takes a case all
17 the way through trial on a hunch that an ALJ might
18 cut them a break on the penalty, even if they lose on
19 every single issue.

20 But it's even worse when you plug in the
21 data. For calendar year 2013 alone, during the worst
22 year on record for adjusted citations and orders,
23 MSHA explains that 414 citations and orders were
24 decided in DOL's favor at trial without modification.

25 For these contests, the assessed penalties

1 dropped by 18 percent from the amount proposed from
2 seven hundred -- seven hundred thousand -- excuse me.
3 I'm just going to use general numbers. -- 7,000 --
4 \$700,000 to approximately \$575,000.

5 So if you're scoring at home -- these are
6 MSHA's number, by the way, not mine. If you're
7 scoring at home, that's a sum total reduction of
8 approximately \$127,000.

9 Divide that number by the 414 citations,
10 and the average decrease, after going all the way
11 through trial, is only \$307.50 per citation or order.

12 No matter how an operator chooses to
13 contest the penalty, the data confirms what common
14 sense infers. No one bears the expense to prepare
15 for and go to trial on the off chance of achieving a
16 \$307.50 reduction in the assessed penalty on a
17 citation or order. You go to trial to win on the
18 merits.

19 I can count on one or maybe two hands the
20 number of times I've been asked to represent an
21 operator in a citation or order contest solely, or
22 even primarily, because the proposed assessment was
23 deemed too high. The economics don't work.

24 Even if a small operator chooses to contest
25 a citation or order on his own without bearing the

1 cost of outside counsel, the cost and lost revenue or
2 any other metric for spending time on a case and away
3 from important business function would far exceed the
4 value of a measly \$307.50 reduction.

5 MSHA's policy justification supporting this
6 proposal, just like its legal justification, is
7 simply devoid of reason.

8 Two, the policy will lead to more, not
9 less, litigation. MSHA correctly notes in the
10 preamble that between 2010 about 2013 regularly
11 assessed violations fell by 26 percent, and the
12 percentage of contests decreased by 6 percent.

13 That's a victory by both MSHA and the
14 regulated community and one that they deserve credit
15 for, even if the industry contracted by at least .5
16 percent, as MSHA states in the preamble.

17 That victory indicates that MSHA's Part 100
18 rules as they exist now and an informal conference
19 resolution process are working.

20 This proposal will undo that great work by
21 orders of magnitude. I use the term will with
22 confidence based on more than a decade of practicing
23 in environmental and safety and health law with and
24 before dozens -- dozens of agencies and commissions,
25 both prior to and after the 2008 Part 100 rule

1 changes went into effect.

2 This is so for at least two reasons:

3 First, MSHA proposes to collapse the Part 100
4 criteria for negligence and gravity in an effort to
5 simplify the process and, quote, place -- place an
6 increased emphasis on the more serious hazards.

7 MSHA believes that doing so will result in
8 fewer areas of disagreement and, therefore, less
9 litigation and result in earlier resolution of
10 enforcement issues.

11 In reality, however, MSHA's proposal
12 eliminates tools in the inspector's toolbox to make
13 accurate, or more accurate, decisions regarding an
14 operator's level of liability in the event that, in
15 fact, a violation isn't found.

16 It does so by eliminating the current low
17 negligence, moderate negligence, and high negligence
18 categories and collapsing that fewer behavior or
19 culpability into one new blanket -- bucket of, quote,
20 negligence.

21 Similarly, with respect to gravity, MSHA
22 proposes to eliminate the no likelihood and highly
23 likely category to create a three-tiered system that
24 includes only unlikely, reasonably likely, and
25 occurred.

1 Let's put aside the fact that MSHA's new
2 proposed definition of occurred under the gravity
3 proposal would, in fair conduct, where no accident
4 actually occurred (sic).

5 Even without the linguistic trick, MSHA's
6 proposal defies the agency's stated goal to increase
7 objectivity, consistency, and transparency.

8 By whittling down the negligence gravity
9 analysis to the bone, inspectors will no longer have
10 five well-defined categories to aid their analysis.
11 Instead, they'll will be forced to cram the
12 proverbial square peg into the round hole where
13 behavior does not fit.

14 The results, based on my own experience
15 litigating or resolving thousands of citations and
16 orders, will lead to increased challenges of bad
17 paper with inaccurately and unfairly proposed
18 assessments attached.

19 MSHA seems to admit as much -- as much in
20 the preamble. On Page 44502 of the proposal, the
21 agency concludes, in a rather conservative estimate,
22 in my opinion, that negligence points per citation
23 will rise from 30 percent of the total penalty to 39
24 percent. That seems hard to believe.

25 After all, by eliminating low, moderate,

1 and high negligence categories and collapsing them to
2 one, MSHA is eliminating an analytical tool at the
3 inspector's disposal that attempts to appropriately
4 capture liability.

5 The proposal would eventually force
6 inspectors to make one of two decisions: Either
7 label conduct as reckless disregard and force the
8 inspector to write 104(d) paper where he or she
9 wouldn't have previously, or categorize an alleged
10 violation as negligent.

11 Again, having reviewed and advised mine
12 operators on the cost and benefits of conferencing
13 and/or contesting thousands of citations, I have
14 observed inspector-issued no negligence citations are
15 virtual unicorns. We really want to believe in them,
16 but they don't exist. I refer MSHA to its own data
17 sets on this point.

18 This problem is further exacerbated by
19 MSHA's decision to propose striking the current Part
20 100 credit from mitigating circumstances, which I
21 will discuss more fully in a moment.

22 Part 100 criteria for negligence, as they
23 exist now, are not complicated. The rules provide
24 inspectors a roadmap to properly assess liability for
25 an alleged violation with appropriate nuances to

1 account for mitigating factors and real world
2 conditions.

3 By striking these nuances, MSHA will
4 prevent the inspectors from appropriately analyzing
5 circumstances surrounding violative conditions.

6 Striking these categories will also deny
7 operators and enforcement personnel important tools
8 to resolve citations and orders before a contest
9 reaches trial. These tools in the toolbox are
10 important and should not be scrapped on a mere
11 assumption that a simplified negligence construct
12 would reduce conflict.

13 Operators will not likely sit idly by and
14 accept this scenario, nor should they. They will
15 properly exercise their rights and challenge
16 improperly written or ambiguous paper.

17 If MSHA is truly committed to further
18 reducing the challenge backlog and litigation over
19 enforcement action that do not warrant the fight, the
20 agency will withdraw this effort.

21 The same argument applies to MSHA's
22 proposal to collapse the gravity subcategories under
23 likely from five categories to three.

24 Less analytical tools for the inspector
25 will again lead to less -- excuse me -- will again

1 lead to more, not less, disagreement with mine
2 operators. The result will be an increased challenge
3 rate and needless litigation.

4 Moreover, Tata and its associated operators
5 are very concerned that MSHA's post-change to the
6 gravity criteria will not only result in a higher
7 rate of S and S citations, but will also unwind or
8 call into question more than 30 years of commission
9 case law interpreting the meaning of an S and S
10 violation.

11 In other words, and contrary to MSHA's
12 stated purpose for the rule making, MSHA's proposed
13 rules, again, will increase litigation here by
14 forcing operators to relitigate currently settled law
15 in order to get clarity from the courts, thereby
16 complicating and not simplifying the penalty
17 criteria.

18 I would also like to incorporate by
19 reference several questions raised by federal
20 commenters -- sorry -- fellow commenters, the United
21 States Associates on the effect of the proposed rule,
22 the answers to which Tata and its fellow associated
23 operators feel irrelevant and critically important
24 for all operators.

25 One, what effect will the new format of

1 citation documentation have on the rate of S and S
2 issuances?

3 Two, how will the new and limited
4 negligence designated affect the issuance of 104(d)
5 citations and order as the categories -- categories
6 -- categorization of flagrant violations?

7 Three, how will the elimination of the
8 highly likely gravity classification impact the
9 criteria for designated -- designating a violation as
10 an imminent danger under Section 107(a) of the Mine
11 Act.

12 Clarification of this question is crucial.
13 As you know, Section 107(a) orders are reportable to
14 the SCC by the public -- publicly traded companies.

15 Four, how will MSHA's existing informal
16 pre-assessment conferences be affected by the 20
17 percent good-faith penalty reduction for not
18 contesting the assessment for violation?

19 Ms. McConnell, I know that you addressed
20 this earlier today. So thank you.

21 Five, will requesting the informal
22 pre-assessment conference remove an operator from
23 eligibility for the proposed additional 20 percent
24 good-faith -- good-faith penalty reduction?

25 Again, thank you for that.

1 My third point, the proposal
2 dis-incentivizes safety-promoting behavior. Our last
3 speaker referenced this in some detail, and I'm going
4 to add to that discussion.

5 MSHA's proposal to consolidate the
6 negligence criterion carries an additional insidious
7 ramification. It will dis-incentivize
8 safety-promoting behavior by eliminating the existing
9 credit for mitigating circumstances under low or
10 moderate negligence categories.

11 Under the current Part 100 rules, due
12 recognition is given to mitigating circumstances
13 which explain the operator's conduct in minimizing or
14 eliminating a hazardous condition.

15 MSHA's proposal strikes this language
16 without discussion or analysis. This is troubling
17 for a number of reasons.

18 First, MSHA's proposed revision upends the
19 conscious policy decision the agency made in 1982.
20 There and then MSHA added the existing credit for
21 mitigating circumstances in the final rule by
22 responding to commenters concerned, quote, that due
23 consideration be given to all factors bearing on the
24 operator's negligence, end quote, including
25 mitigating circumstances that might reduce liability

1 for good cause.

2 I'm going to quote MSHA's explanation for
3 this policy for the record because I think it's
4 critically important.

5 MSHA has developed these categories of
6 negligence, which include mitigating circumstances,
7 to allow the inspector the flexibility to consider
8 all of the facts and circumstances surrounding a
9 violative condition or practice.

10 The agency goes on to say, mitigating
11 circumstances may include, but are not limited to,
12 actions which an operator has taken to prevent,
13 correct, or limit exposure to a violative condition
14 or practice.

15 An operator's action could be taken into
16 consideration to the extent that it directly relates
17 to the specific violation cited.

18 In making decisions with respect to the
19 nature or existence of a mitigating circumstance,
20 inspectors will exercise independent judgment based
21 on the circumstances surrounding the violation.

22 MSHA believes that this allows flexibility
23 to assess the degree of negligence within the context
24 of the individual facts and circumstances of any
25 particular situation, end quote.

1 I'm going to repeat that last statement
2 from MSHA in the last rule making. MSHA believes
3 that this allows flexibility to assess the degree of
4 negligence within the context of the individual facts
5 and circumstances of any particular situation.

6 MSHA's decision to credit operators for
7 safety-promoting behavior by recognizing mitigating
8 circumstances is not an accident. This is a policy
9 choice that must be respected.

10 If MSHA wants to reverse that choice, it
11 must do so after offering a complete justification.
12 But the agency may not ignore the policy choice and
13 set it aside as inconvenient or unimportant. Doing
14 so after a thorough underlying rule making represents
15 an arbitrary and capricious action that violates
16 basic Warren Book law.

17 More fundamentally, however, we are
18 concerned that striking the mitigating circumstances
19 language will send a terrible signal to the mining
20 community that MSHA does not care whether you
21 proactively work to eliminate hazardous conditions,
22 and that this really is not about making mines safer.
23 We all know that not to be true.

24 As the panel is well aware, the Mine Act is
25 a strict liability statute. If a violative

1 conditions exists, an inspector must cite it.

2 Operators, obviously, have an incentive to
3 avoid this liability altogether by investing in a
4 robust safety and health program, but even the most
5 robust program may experience a breakdown from time
6 to time. Humans are not perfect after all.

7 But here, by removing the mitigating
8 circumstances credit, MSHA is signaling to the mining
9 community that it doesn't care. We're going to take
10 you to the woodshed anyway.

11 This is no way to incentivize proactive
12 investment in safety and health.

13 Respectably, Tata and its president suggest
14 that MSHA rethink this misguided approach rather than
15 striking at the heart of a positive existing policy
16 that encourages investment in safety-promoting
17 behavior.

18 The agency should instead consider
19 additional collaborative tools that award and
20 encourage operator for a, quote, pattern of
21 compliance, to borrow a thoughtful moniker used by
22 Mr. Casper of NSSGA in Arlington last week.

23 I will conclude with one final point: In
24 the preamble to this proposal, MSHA reasons that Part
25 100 amendments are necessary to improve objectivity,

1 consistency, and efficiency in the civil penalty
2 assessment process. By doing so, the agency reasons,
3 MSHA will reduce areas of disagreement and earlier
4 resolution of enforcement issues.

5 The latter goal is a noble one that the
6 mining community shares, but the proposed rule will
7 not achieve that goal. Quite the contrary. The
8 proposal will lead to enhanced, unnecessary conflict
9 over penalties that are far too high.

10 Why?

11 Because MSHA will have eliminated critical
12 decision-making tools that inspectors need in order
13 to make a reasoned, logical, and accurate informing
14 decision, one that operators will be reluctant to
15 challenge.

16 Why?

17 Because the inspector got it right. We
18 recognize that in some cases inspectors may not
19 understand how to properly utilize the tools MSHA
20 provided back in 1982, and sometimes inspectors, just
21 like the rest of us, make mistakes.

22 But eliminating tools that allow inspectors
23 to evaluate the totality of the circumstances
24 surrounding an alleged violation is not an option.

25 MSHA industry and, in fact, our public

1 would be better served by just properly training the
2 inspectors to write citations under the existing Part
3 100. This alone will reduce contests.

4 Tata and its fellow operators appreciate
5 the opportunity to present their views on the merits
6 of this proposal, and we look forward to answering
7 any questions you might have.

8 Thank you.

9 MS. McCONNELL: Thank you, Mr. Gould.

10 I have a few comments I'd like to make:
11 First, regarding your comments on the Commission,
12 they are in line with or similar to what we've
13 previously heard from other comments.

14 Two -- and I don't know if I wrote this
15 down correctly -- but I want to make sure it's
16 understood that MSHA did not engage in rule making
17 because we assumed there was a motivation to contest
18 citations.

19 We engaged in this rule making -- I'm going
20 to -- and I'm repeating myself -- this is the
21 increasing consistency and objectivity and fewer
22 areas of disagreement and earlier resolutions of
23 enforcement issues.

24 Three, your comments on negligence and our
25 criteria of proposed categories are similar to what

1 we have heard.

2 And, again, I ask, and we ask, MSHA asks
3 for specific data that supports your conclusion.
4 That's the only way we can make an informed decision
5 at the end of the day.

6 And, last, regarding the unicorns. I
7 believe they do exist. Maybe not many. But I will
8 turn to Jay on that one.

9 And with that, Jay, if you have any
10 questions for Mr. Gould, go ahead.

11 MR. MATTOS: Thank you for your comments.

12 MR. GOULD: You're welcome.

13 MR. MATTOS: Very interesting.

14 And I think I just have an observation.
15 We've received a lot of comments -- many comments
16 saying that we need mitigating circumstances. We
17 need to address mitigating circumstances. But most
18 of the comments have been, Get rid of that. We need
19 to keep the low, medium, high reckless,
20 non-negligence piece.

21 And my question is, is there an alternative
22 to what we currently have -- you know, citing my --as
23 I stated earlier, the 98 percent that -- that are
24 contested, the negligence is changed to low, medium,
25 high -- low, medium, high, is there some other way to

1 handle that mitigating circumstance different from
2 the way we're currently doing it that's a better
3 approach than what we have come up with in this
4 proposal?

5 It's just a -- it would be nice to throw it
6 all out or keep it all. Is there something in the
7 middle there? I don't know the answer to that I'm
8 asking if there are.

9 MR. GOULD: I -- I'm sure there is. The
10 last presenter suggested a neg/reg process might be
11 appropriate here. And we could certainly -- at least
12 the community on whose behalf I speak today certainly
13 could propose something like that in its -- in its
14 follow-up comments.

15 But -- but I don't think that -- I don't
16 think that the breakdown is in the mitigating -- if
17 there's a perceived break down in -- in how these
18 categories are applied, you know, across industries,
19 across sectors, and across the country, I don't think
20 there's a breakdown in -- in -- in what one, perhaps,
21 industry member thinks versus a member of, you know,
22 the Secretary's AR pool.

23 I think that we all eventually get there in
24 -- in -- in a negotiated way in nearly all cases.
25 But I think that sometimes there has to be some

1 fine-tuning.

2 I'll give you an example: I've heard
3 directly from a local area supervisor, whose name I
4 won't mention, that he directs all of his inspectors
5 to issue everything as high negligence and then work
6 down from there.

7 That's -- that's just not acceptable. You
8 assess the negligence as it is. And the -- the --
9 the burden is on the Secretary to show why the
10 negligence is high. Not say the negligence is high;
11 Operator, show me why it shouldn't be.

12 And -- and I think therein lies the
13 problem, and it's nothing that some training can't
14 fix.

15 MR. MATTOS: That's easy to say. We've
16 been -- we've been trying that for a long time.

17 MR. GOULD: Well, we've been trying too,
18 but I think we're seeing better progress now than we
19 have in the past.

20 MR. MATTOS: Yeah.

21 MR. GOULD: And -- and -- and let me
22 address the unicorns. I'm not saying they don't
23 exist. They're virtually nonexistent. It's very
24 rare to see. And I'd love to see MSHA's data on
25 this: How many inspectors issue a no negligent --

1 not the reductions, the low negligence after some
2 discourse or contest, but a pure no-negligence
3 citations rarely, if ever, happens.

4 MR. MATTOS: Be happy to provide those.

5 MR. GOULD: I would love to see those.

6 Thank you.

7 MS. McCONNELL: And I just want to just
8 reiterate about training. We do think -- MSHA does
9 believe training is an important tool, and inspectors
10 will be trained on whatever outcome comes of this
11 rule-making activity.

12 MR. MATTOS: One other observation, just
13 real quick before we move on.

14 The -- the other negligence factors -- and
15 talking about consistency -- but before I do that,
16 earlier resolution is where we're trying to get.
17 That's one of the stated purposes of this rule.

18 And if we can come to earlier resolution
19 before there's a contest or, you know, during the
20 Part 100 health and safety conferences, that is -- I
21 think everybody believes that's a better thing than
22 having to go through litigations.

23 But -- but the statistics on negligence,
24 our metal/nonmetal inspectors issue high negligence
25 citations at a higher rate than our coal inspectors

1 do. They all get the same training.

2 So the example of a field office supervisor
3 saying negotiate down from high -- start with high
4 and go down, I mean, those are the kinds of things
5 that we're trying to get more consistency --

6 MS. McCONNELL: Exactly.

7 MR. MATTOS: -- and training is part of the
8 solution. It is.

9 But we're hoping that there is another part
10 of the solution with the proposal here. So, you
11 know, any -- any help we can get from you folks is --

12 MR. GOULD: Absolutely. And I was
13 specifically referring to a metal/nonmetal local area
14 supervisor --

15 MR. MATTOS: I suspected you were.

16 MR. GOULD: -- when I made that comment.

17 Training is important from MSHA's
18 perspective. Every -- every -- I won't say every.
19 But a vast majority of investigation reports cite an
20 operator's failure to train as a root cause of an
21 accident. And I think training is equally incumbent
22 on both the regulated industry and the regulators.

23 I'm going to make one final point about
24 data: A lot of what I've discussed in my testimony
25 today was anecdotal and subject -- things that come

1 to me subject to attorney/client privilege.

2 I get a call from an operator, for example,
3 who says, Should I contest this? I referenced that I
4 can count on, you know, two hands, maybe, the number
5 of times I've said -- I've heard, We need to contest
6 this, the penalty's too high.

7 Well, is the paper good otherwise?

8 Oh, yeah. Looks great, but the penalty's
9 too high.

10 It's just -- in my experience, it just
11 doesn't happen. Unfortunately that's not data that
12 we have to provide to you. We don't track it. It's
13 -- it's just not available.

14 So on -- on some -- some of the stuff,
15 you're unfortunately, or fortunately, just going to
16 have to just rely on -- on those operators and -- and
17 their representatives who are in -- in these
18 discussions every day, both with each other and with
19 the agency and the Solicitor's Office.

20 MS. McCONNELL: Thank you.

21 Anthony, did you have anything?

22 MR. JONES: No.

23 MS. McCONNELL: Okay. Thank you,
24 Mr. Gould, again for your comments. They're
25 appreciated.

1 Our next speaker is Joshua Schultz, Law
2 Office of Adele Abrams.

3 MR. SCHULTZ: Thank you.

4 I have copies of my statement here for you.

5 MR. MATTOS: Thank you.

6 MR. SCHULTZ: Good morning, and thank you
7 for taking the time to hear my statement.

8 My name is Josh Schultz, and I'm honored to
9 present these comments on MSHA's proposed rule to
10 modify the civil penalty criteria in 30CFR, Part 17 100.

11 I'm a mine safety professional and an
12 attorney testifying on behalf of the Law Office of
13 Adele Abrams.

14 The Law Office of Adele Abrams is a
15 ten-attorney firm with offices in Denver, Charleston,
16 West Virginia, and the Washington, D.C. area. We
17 represent clients in litigation before the Federal
18 Mine Safety and Health Review Commission, as well as
19 provide consulting and training services to mines and
20 MSHA regulated independent contractors.

21 Although we appreciate the intent of the
22 proposed civil penalty rule, the Law Office of Adele
23 Abrams believes the rule will increase penalties and
24 exacerbate litigation without any commensurate safety
25 and health benefits.

1 One of our issues with the proposed rule
2 was the definition of occurred. In discussion with
3 the previous speaker, you did address this.

4 And from your previous statement, am I to
5 understand that the language which includes the words
6 "could have resulted in an injury or illness," will
7 be removed from the definition of occurred?

8 MR. JONES: Yes.

9 MR. SCHULTZ: Okay.

10 MS. McCONNELL: Well, the last part will
11 remain. An injury that occurred could have resulted
12 has been removed --

13 MR. SCHULTZ: The could have resulted --

14 MS. McCONNELL: Right.

15 MR. SCHULTZ: -- language that could --

16 MS. McCONNELL: The could have resulted is
17 removed.

18 MR. SCHULTZ: Okay. Thank you.

19 We also oppose the realignment of the
20 designation from five categories to three. By
21 removing the existing -- existing negligence
22 designations of low negligence and high negligence,
23 MSHA is proposing that mitigation is no longer a
24 defense and would not be considered during the
25 penalty assessment.

1 Currently, MSHA citations allow our
2 inspectors to determine operator negligence based on
3 the amount of mitigating circumstances surrounding
4 each issue.

5 Adopting the proposed civil penalty rules,
6 the new negligence designation would not only place a
7 greater emphasis on negligence when determining the
8 penalty assessment, but would also disregard
9 mitigation and group a wide range of conditions under
10 the umbrella of negligence.

11 This could result in the exclusion of
12 mitigating circumstances at commission hearings,
13 which would interfere with operator due process
14 rights.

15 We foresee that attorneys for the Secretary
16 may move to exclude mitigating evidence as
17 irrelevant.

18 MSHA's intent to ignore relevant mitigating
19 facts when determining penalty assessments and
20 negligence will lead to steep increases in penalties
21 for mine operators and difficulty settling formal and
22 informal citations after issuance.

23 Given the proposed rule in its current
24 state, MSHA would no longer accept mitigation
25 provided by operators as justification for penalty

1 reduction.

2 A negligence modification for citation
3 documentation would be largely unavailable. This is
4 unacceptable and would adversely affect all members
5 of the mining industry.

6 In our written submission, we included an
7 Appendix A, a comparison of citation penalties under
8 the current rule and the proposed rule.

9 If these example citations, which were from
10 one docket with one metal/nonmetal operator -- if
11 these citations are converted to the more severe
12 designation, which we believe the proposed rule
13 warrants, the \$27,206 in penalties under the current
14 criteria would rise to \$210,000 under the proposed
15 criteria. 772 percent increase for a docket with
16 only Section 104(a), the regularly assessed citations
17 on metal/nonmetal mines.

18 Additionally, the Law Office of Adele
19 Abrams strongly opposes the proposed civil penalty
20 rule attempts to govern the Mine Safety and Health
21 Review Commission by restricting the authority of the
22 Commission and its ALJs and binding them to the
23 penalty assessment determined by MSHA.

24 The Commission was created to be
25 independent of the Department of Labor in the 1977

1 Mine Act and specifically to remain an unbiased
2 third-party decision maker for disputes between
3 operators and MSHA.

4 When I talk to my clients and they ask me
5 if the judge who will hear their case works for MSHA,
6 it's very important for me to stress that they are
7 part of an independent agency, and they are separate
8 from the -- from the Mine Safety and Health
9 Administration. This element of the proposed rule
10 restricts that independence.

11 MSHA's own conference litigation
12 representatives and attorneys do not adhere to the
13 penalty assessments determined by MSHA during penalty
14 -- during settlement negotiations.

15 But the agency is now attempting to require
16 the Commission to adhere to these assessments. We
17 would request that the Commission and its judges
18 retain de novo penalty authority and maintain that
19 MSHA lacks authority to alter, by a regulation, the
20 statutory criteria.

21 In conclusion, we have a few questions
22 which were left unanswered by MSHA in the civil
23 penalty rule. First, how the new limited negligence
24 designations affect the issuance of 104(d) citations
25 and orders and the categorization of flagrant

1 violations.

2 Previously 104(d) citations were issued as
3 high negligence. Will citations categorized simply
4 as negligent be eligible for 104(d) citations?

5 Additionally, in light of the elimination
6 of the highly likely designation, how will the
7 reduced gravity options affect issuance of imminent
8 danger orders under Section 107(a) of the Mine Act?

9 And my final question you already
10 addressed, but I would like to confirm that operators
11 who utilize MSHA's existing informal preexisting --
12 or I'm sorry -- informal pre-assessment conferences
13 would be eligible for the 20 percent reduction on
14 good faith for not contesting the violation or the
15 assessment.

16 Thank you for your time and your
17 consideration.

18 MS. McCONNELL: Mr. Schultz, thank you very
19 much for your comments. I just have -- I don't have
20 any questions. I do have just a few points that I'd
21 like to make.

22 In your example, like some of our other
23 commenters, you have made an assumption that MSHA did
24 not project -- and that would be that under the
25 proposed rule -- something that was currently

1 assigned as a high negligence, using our current
2 form, would move into reckless disregard.

3 That is not something we projected.

4 And, similarly, with likelihood, reasonably
5 likely moving into an occurred, that's something --
6 category, that's something MSHA did not project.

7 And in your second row, unlikely is
8 currently issued. Would not -- we did not project it
9 would move into reasonably likely.

10 And I believe I addressed the issue on
11 informal pre-assessment conferences.

12 Am I --

13 MR. SCHULTZ: Yes. I was just asking you
14 to confirm.

15 MS. McCONNELL: Did you mentioned that?

16 Yeah. And that's confirmed, yes.

17 MR. SCHULTZ: Okay.

18 MS. McCONNELL: With that, I'm going to
19 hand it off to Jay, who may have some questions, and
20 he'll address your 104.

21 MR. MATTOS: The 104(d), the unwarrantable
22 failure of citations orders and the imminent danger
23 orders, our intent is to keep it as close to what it
24 is now as we possibly can. And it's -- and we don't
25 want to change the definition of imminent danger. We

1 don't want to change the definition of unwarrantable
2 failure.

3 Having said that, we do have to address the
4 specifics on how inspectors would be trained to issue
5 unwarrantable failure violations or citations and
6 imminent danger orders. And we do need to flesh that
7 out, and we have not done so yet.

8 MR. SCHULTZ: Okay. Well, that --

9 MR. MATTOS: We -- we welcome comments on
10 how we would flesh that out.

11 MR. SCHULTZ: Okay. Thank you.

12 MR. JONES: Nothing.

13 MS. McCONNELL: I thank you again.

14 MR. SCHULTZ: Thank you for your time.

15 MS. McCONNELL: You're welcome.

16 Our next speaker is Jason W. Hardin, Fabian
17 Law.

18 MS. McCONNELL: You have a presentation?

19 MR. HARDIN: Well, actually, no, I don't.
20 It's just kind of my notes.

21 MS. McCONNELL: Oh, okay.

22 MR. HARDIN: And I can get you something
23 afterwards, if you'd like.

24 MS. McCONNELL: No, that's fine. We'll go
25 with these.

1 Okay.

2 MR. HARDIN: Thank you.

3 Okay. My name is Jason Hardin. I'm very
4 honored to speak with you today. I'm an attorney in
5 private practice at Fabian & Clendnin, a law firm
6 located in Salt Lake City, Utah.

7 Over the past several years I've
8 represented numerous coal and metal/nonmetal mine
9 operators in Utah, Colorado, Kentucky, Illinois,
10 Ohio, and West Virginia in a variety of contests and
11 civil penalties proceedings before the Federal Mine
12 Safety and Health Review Commission.

13 I've actively participated in settling
14 thousands of citations and orders issued by MSHA
15 inspectors for multiple districts and multiple field
16 offices within those districts.

17 I also have tried over 75 different cases
18 before several administrative law judges and have
19 participated in the appeals of multiple cases before
20 the Federal Mine Safety and Health Review Commission.

21 In resolving these proceedings, I have
22 worked with numerous MSHA inspectors, several
23 conference litigation representatives, several MSHA
24 technical advisors, numerous attorneys from different
25 regional and branch offices of the Office of the

1 Solicitor, and numerous administrative law judges.

2 Overall, my combined experience with MSHA
3 and the Commission has given me insight into the past
4 and current operations and practices of MSHA in
5 regard to issuing citations and orders, assessing
6 penalties, and later resolving a variety of disputes
7 as either part of the informal settlement negotiation
8 process or formal contest for civil penalty
9 proceedings.

10 Based on this experience, I have numerous
11 comments and questions in regard to the proposed rule
12 and the criterion procedure for assessment of civil
13 penalties.

14 To be clear, I'm not here today testifying
15 on behalf of any particular mine operator, but I have
16 been and will continue to be assisting multiple mine
17 operators in preparing formal written comments
18 regarding the proposed rule which will be filed
19 before the deadline of the comment period.

20 At the outside, I have several general
21 comments to the proposed rule. First, the regular
22 assessment mechanism does not appear to me to be
23 broken. Certainly not to any extent warranting the
24 massive overhaul that is set forth in the proposed
25 rule.

1 Much of the existing regular assessment
2 criteria have been in place for over 30 years. This
3 means that MSHA, the Commission, and its ALJs, the
4 various courts of appeal, and the industry all have
5 had many years to interpret and apply the existing
6 criteria.

7 This has given a level -- a level of
8 predictability and certainty that, for the most part,
9 will disappear if the proposed rule is adopted,
10 largely because of the complete revamping of the
11 negligence and gravity criteria.

12 Second, certainly there remains areas of
13 common disagreement and confusion in the existing
14 penalty rules.

15 But, unfortunately, in my opinion, the
16 proposed rule does not even touch two of the most
17 vague and, thus, contentious areas, specifically
18 MSHA's special assessment program and the ill-defined
19 flagrant criteria.

20 The proposed rule repeatedly claims that it
21 is intended to provide increased emphasis on more
22 serious hazards. Yet these two tools that supposedly
23 are limited to more serious hazards and conduct are
24 not even mentioned or considered.

25 Third, the proposed rule also repeatedly

1 claims that the goal of the new Part 100 are to
2 simplify the criteria and rule to increase
3 objectivity and clarity in the citation order
4 process, to improve consistency in the application of
5 the criterion, and, implicitly, to reduce the number
6 of contested violations.

7 Said another way, MSHA appears to want to
8 minimize areas of disagreement, speed up the process,
9 and get mine operators to accept proposed penalties
10 and pay them quicker.

11 Regardless of the merits of these goals,
12 the proposed rule gets there by sacrificing accuracy,
13 fairness, and due process for hope for consistency
14 and objectivity.

15 From the perspective of someone who
16 represents mine operators every day, I can tell you
17 that the stated goals and method of achieving them
18 are misguided, at least in part.

19 Mine operators, as has been said here today
20 and elsewhere, do not contest proposed penalties to
21 save money. Mine operators contest penalties and the
22 underlying citations and orders as written and
23 assessed because they believe the violations are
24 inaccurate, wrong, or represent poor policy choices.

25 I -- I also can assure you that

1 inconsistent enforcement exists and is widespread.
2 I've seen it, and I see it every day. Different
3 inspectors in the same or different field offices and
4 districts in the same -- same or different field
5 offices or districts often cite the same or similar
6 conduct or conditions differently.

7 Why is this the case?

8 Is it because the existing rules are not
9 subject to being understood or because of inadequate
10 training, oversight, and feedback?

11 Or is it because of different levels of
12 inspector experience?

13 I'm not sure of the answer to this
14 question, but I can tell you that I often see dockets
15 where within the docket there will be 15 violations.
16 And I -- I -- I find the violations that are similar
17 from different inspectors, and I'll often play them
18 against each other because the inspectors have cited
19 them differently.

20 So if the proposed rule is aimed at --
21 aimed at correcting that conduct, I think it would be
22 better aimed at training for the inspectors and
23 consistent enforcement. Maybe they train the
24 district managers, assistant district managers, and
25 field office supervisors.

1 It's not -- the answer is not simply to
2 simplify the criteria so that the inspectors can get
3 it right, particularly because there's definitely not
4 a lack of guidance on the criteria that's been
5 developed over the last 30 years.

6 Further, the proposed rule and its criteria
7 contain much less specificity than the existing Part
8 100.

9 Rather than decreasing contests and
10 streamlining the process, I predict the contests
11 actually will increase in the short and long term if
12 the proposed rule is adopted, particularly because
13 large swaths of varying conduct will be lumped
14 together under the new broader negligence and gravity
15 definitions.

16 And I'll discuss this in a little more
17 detail later.

18 Fourth, I question whether the proposed
19 rule in general furthers the expressly stated first
20 priority of the Mine Act, to protect the health and
21 safety of its most precious resource, the miner.

22 The Mine Act penalty system should assist
23 in promoting miner safety and health by deterring
24 conditions or conduct that lead to injuries or
25 illnesses.

1 But the fundamental issue created by the
2 proposed rule is this: How will the proposed
3 broader, more vague, more all-encompassing negligence
4 and gravity criteria affect miner safety and health?

5 Importantly, the various negligence and
6 gravity designations and the details set forth in
7 Section 8 of a violation put mine operators on notice
8 of what the condition or conduct is at issue.

9 More specificity in the designations and
10 explanations, not less, allows mine operators first
11 to properly and quickly abate the violations, and
12 second, to take better, more meaningful actions in
13 the future to prevent or avoid such conditions or
14 practices on a going-forward basis.

15 By modifying the system to lump large
16 swaths of varying conduct under the broader, more
17 encompassing negligence and gravity criteria,
18 inspectors will have less reason or requirement to
19 detail the cited conditions in a violation. Meaning
20 operators will have less information to abate the
21 violation and less information to prevent recurrence
22 in the future.

23 I suggest that more accuracy and more
24 specificity in the various criteria, and not less,
25 better promotes miner safety and health.

1 I also have some specific points that I
2 would like to make in addition to these general ones.

3 First, there are many problems with the
4 proposed negligence criteria, as has been discussed
5 here and last week.

6 Again, the first priority of the Mine Act
7 is to protect the health and safety of the miner.
8 The proposed negligence criteria, however, undermines
9 the miner safety and health for the first time ever
10 removing all flexibility from the points that could
11 be allocated, as well as removing all consideration
12 of mitigating circumstances as has been discussed
13 here today.

14 In the regulations in existence under the
15 Coal Act in the 1970s, there were also three
16 categories: no negligence, negligence, and gross
17 negligence. But even then, the points scheduled for
18 negligence varied between 1 and 12 points, and for
19 gross between 13 and 25 points.

20 There was a sliding scale that allowed MSHA
21 and its inspectors to account for the varying levels
22 of negligence that could be encountered.

23 And the first -- final rule following
24 passage of the Mine Act kept three levels of
25 negligence and the flexible point scale, but the

1 points were adjusted, I believe, 1 to 20 for ordinary
2 negligence, and 21 to 25 for gross negligence. That
3 was in May 1978.

4 And that final rule defined ordinary
5 negligence more like what you usually see in the
6 civil context. Quote, the operator failed to
7 exercise reasonable care either to prevent or to
8 correct the conditions or practices which caused the
9 violation and which were known or should have been
10 known to exist.

11 No negligence was defined at that time in
12 1978 as the operator could not have reasonably known
13 of the violations or under the circumstances -- or
14 under the circumstances had taken reasonable
15 precautions to prevent the violation.

16 A few years later, MSHA's final rule
17 regarding penalties, in May of 1982, created the five
18 existing categories of negligence today. In doing
19 so, MSHA stated in the preamble, in developing these
20 categories, MSHA has responded to the concerns of
21 commenters that further clarification of the
22 allocation of negligence points was necessary and
23 that due consideration be given to all factors
24 bearing on the operator's negligence.

25 In other words, more specificity and

1 objective guidance was needed so that the conduct
2 related designations would be more accurate. Which
3 is what remains important to the industry and general
4 public today and which, again, I believe better
5 promotes miner safety and health.

6 Of even more significance, MSHA also stated
7 in the 1982 preamble that MSHA had developed these
8 categories of negligence to allow the inspectors the
9 flexibility to consider all the facts and
10 circumstances surrounding a violative condition or
11 practice.

12 And I believe some of this was quoted
13 earlier, so I'll skip to the point; is that they also
14 said an inspector may determine that negligence
15 involved is low or moderate where there is a
16 reasonable likelihood of a reasonably serious injury
17 occurring from the condition or practice because the
18 operator, although negligent, has taken measurable
19 steps to prevent the violation or protect miners from
20 exposure to the hazard.

21 The mitigating circumstances may include,
22 but are not limited to, actions which an operator has
23 taken to prevent, correct, or limit exposure to a
24 violative condition or practice.

25 In other words, MSHA, in 1982, consciously

1 recognized that factoring in mitigating circumstances
2 was consistent with the accepted definition of
3 negligence and also would promote miner safety and
4 health because mine operators would be encouraged and
5 incentivized to, quote, take measurable steps to
6 prevent the violation or protect miners from the
7 exposure to the hazard, end quote.

8 The proposed rule now, however, lumps
9 massive amounts of varying conduct together under the
10 label "negligence," and assigns the same number of
11 points for all such conduct regardless of the
12 circumstances. There's not even a sliding scale of
13 points as there was in 1978 or 1982.

14 The proposed rules negligence criteria have
15 virtually no flexibility, simply assigning zero
16 points for no negligence, 15 points for negligent
17 conduct and 30 points for reckless disregard.

18 Further, the proposed rule defines
19 negligent conduct solely on what the operator knew or
20 should have known. There does not appear to be any
21 consideration of any exercise, or lack thereof, of
22 reasonable care in preventing or correcting the
23 conditions or practices.

24 In this way, I believe the definition is
25 contrary to the normal usage and common meaning of

1 negligent conduct.

2 And by removing all consideration of
3 mitigating circumstances from the negligence criteria
4 in the proposed rule, MSHA, as others have said, is
5 undermining miner safety and health by removing the
6 independence to take measurable steps to prevent the
7 violation or protect miners from exposure to a
8 hazard.

9 I -- I suggest that MSHA continue to
10 encourage mitigation to improve miner safety and
11 health.

12 Additionally, in response to your questions
13 earlier after the last speaker about mitigating
14 circumstances and possibly earlier resolution of
15 disputes, I will say that my experience has been that
16 many inspectors, often in their notes, will say that
17 there were no mitigating circumstances presented by
18 the mine operator at the time citations and orders
19 were issued.

20 Later, CLR's attorneys and technical
21 advisors refused to acknowledge or downplay
22 mitigating circumstances that are offered by
23 operators at the time. They often do so by claiming
24 that the mitigating circumstances have been
25 manufactured after the fact and should have been

1 presented at the time the citation was issued.

2 This practice and attitude hinders earlier
3 resolution of negligence-related disputes because it
4 ignores reality.

5 Often, the mine personnel accompanying an
6 inspector are safety personnel or management who have
7 no firsthand or even secondhand knowledge of the
8 condition or practices being cited. As a result,
9 they couldn't offer a mitigating circumstance at that
10 time if they wanted to.

11 Further, it takes time for an operator to
12 conduct its own investigation into what happened.
13 And their immediate focus is on abatement, not
14 defending their own conduct.

15 Thus, operators should not be punished for
16 delayed presentation of mitigating circumstances. I
17 think this is a practical reality that, if addressed
18 by MSHA through policy and training, could result in
19 earlier resolution of many disputes before penalties
20 are even proposed.

21 In addition, the proposed rule maintains
22 the restrictive definition of not negligent, where
23 the operator exercised diligence and could not have
24 known of the violative condition or practice.

25 But because the new definition of negligent

1 now does not even account for diligence or any
2 efforts at all and uses the phrase simply should have
3 -- known or should have known, versus could have
4 known, which is referenced in not negligent, there
5 would -- there would be a gray area between not
6 negligent conduct and negligent conduct moving
7 forward.

8 And by lumping together low, moderate, and
9 high negligence under the new negligence category,
10 MSHA will be greatly increasing the penalties for the
11 less severe or less egregious conduct.

12 I have analyzed several citations that I --
13 types of citations that I have typically seen and
14 have applied the proposed criteria: I've found that
15 it greatly inflates the penalties for the less severe
16 conduct, not the more serious or more severe conduct.

17 For instance, changing routes and rip
18 conditions and violations under 30CFR75.202(a). I
19 have seen many of these over the years, and these
20 types of situations often occur unexpectedly because
21 of changing geologic conditions in a mine. And they
22 often occur without the knowledge of the operator and
23 between regular examination period that's required
24 under the regulations.

25 Thus, we often see the citations written as

1 either low or moderate negligence with reasonably
2 likely lost workdays, S and S, and affecting one
3 person.

4 I actually believe most of these should be
5 no negligence, but that's another -- that's another
6 issue. Let's just assume that today they're low and
7 moderate and that those are in -- held up before an
8 ALJ or with MSHA.

9 Applying the new criteria, those -- those
10 citations would always be designated as negligent.
11 If you apply the -- the same criteria for the
12 reasonably likely lost workdays, one person, and the
13 -- and the various mine sizes -- I applied the same
14 mine size criteria for a couple of my mines -- it
15 yielded a 250 percent increase to those citations
16 that previously were cited as low, and over a 60
17 percent increase to those that were previously cited
18 as moderate.

19 So in this way, the proposed rule would
20 massively inflate the penalties for the less
21 egregious conduct by the operator. Which I believe
22 you said the focus on the proposed rule was so that
23 it would focus on the more severe and more egregious
24 conduct.

25 Finally, an issue that I have not yet heard

1 addressed, and I believe requires clarification, is
2 -- is whether there can or will be unwarrantable
3 failures for violations that are only designated as
4 negligent, not reckless disregard under the new
5 rules.

6 Second, the proposed definition of reason
7 -- of reasonably likely runs counter to the
8 Commission's 30-year-old definition of reasonably
9 likely and the test for significant and substantial
10 designation.

11 The proposed rule changes the definition of
12 reasonably likely to be, quote, a condition or
13 practice that is likely to cause an event that could
14 result in an injury or illness.

15 The Mine Act, as you know, does not contain
16 a definition of reasonably likely or significant and
17 substantial.

18 But in 1981, at National Gypsum, the
19 Commission determined that citations and orders are
20 properly designated as S and S, quote, if based upon
21 the particular facts surrounding the violation there
22 exists a reasonable likelihood that the hazard
23 contributed to will result in an injury or illness of
24 a reasonably serious nature.

25 The proposed change from will result to

1 could result is significant. It would blur the
2 distinction between hazards that generate a likely
3 risk of a serious injury and hazards that generate
4 only a very possible risk of serious injury.

5 And despite your stated intent earlier
6 today, the current unlikely violations would not be
7 folded into the new reasonably likely definitions.

8 I feel certain that in practice, and over
9 time, the proposed definition would result in many
10 previous violations that were designated as unlikely
11 being designated as reasonably likely in S and S,
12 which, in turn, would lead to much higher penalties
13 and the potential for more severe enforcement action
14 like unwarrantable failures or POV.

15 Certainly this proposed change will lead to
16 significant confusion and more contests, not less, in
17 the future.

18 Further, by shifting away from the
19 Commission's established test for S and S designation
20 to a definition set forth in a regulation, the
21 proposed rule could make the S and S criteria a term
22 that is defined and changed by each political
23 administration, which, in turn, could decrease miner
24 safety and health.

25 Further, the Mine Act uses the phrase,

1 quote, significantly and substantially contribute to
2 the cause and effect of a coal and other mine safety
3 or health hazard, end quote.

4 I personally believe that the proposed
5 phrase, quote, could result in an injury or illness,
6 end quote, as set forth in your proposed rule, is
7 contrary to the plain meaning of this statutory
8 phrase.

9 In the end, there is simply no reason to
10 change the longstanding S and S test.

11 My third point, and it's one that I'm not
12 going to go into great detail because you received a
13 lot of comments on, is that MSHA cannot bind the
14 Commission to Part 100, but should bind its own CLRs
15 and attorneys to Part 100 during prehearing
16 settlement negotiations.

17 Unquestionably, the Mine Act expressly
18 delegates the Commission, the Secretary, the
19 authority to assess -- to assess all civil penalties.

20 The Act delegates to the Secretary only the
21 authority to, quote, propose civil penalties, end
22 quote.

23 As a result, if MSHA attempts to bind the
24 Commission to Part 100, thereby removing or severely
25 limiting the authority to assess penalties, MSHA will

1 be violating the Mine Act.

2 You have received many comments already on
3 this subject and, again, I do not want to belabor the
4 point. But I would add that the Commission and its
5 ALJs often set penalties that appear to me to be
6 arbitrary.

7 The Commission has no criteria or guidance
8 similar to Part 100 to assist its ALJs in setting
9 penalty amounts. So oftentimes, after trial, the
10 paper reductions may be made, and under Part 100, it
11 would result in a 60 or 70 percent reduction, but an
12 ALJ might only reduce it by 20 or 30 percent.

13 So would I like to see more consistency in
14 that? Absolutely.

15 I actually think some ALJs are left
16 guessing as to how to turn this six statutory
17 criteria into the appropriate penalty amount. What's
18 the calculation? How do you add those six up and get
19 a penalty?

20 But I also am convinced, and I -- I think
21 there's maybe a trend towards ALJs looking for
22 guidance in Part 100 but not being bound to it.

23 And I would say that just because there --
24 there may be inconsistency in ALJ opinions does not
25 mean that MSHA should or can dictate what the

1 Commission must do or what criteria it must follow.

2 Instead, the Commission is bound by the
3 Mine Act, the Constitution, and the rules of not
4 setting arbitrary penalties.

5 Further, the Commission is an adjudicated
6 body of evidentiary hearings and ensures that mine
7 operators are afforded due process and other
8 constitutional protections.

9 If MSHA seeks to remove or limit the
10 authority of the Commission to assess penalties,
11 this, in turn, could remove or limit the Commission's
12 ability to evaluate or effectively resolve due
13 process or constitutional issues.

14 So while MSHA cannot and should not attempt
15 to control the Commission's assessment process, it
16 can and should control its own CLR's and attorneys.

17 During the civil penalty and settlement
18 discussion, MSHA will often agree to modify the paper
19 to actively reflect what should have been the
20 corrective evaluation at the time the citations were
21 issued.

22 Again, I reference when operators bring
23 forth mitigating circumstances and documents to show
24 that effect of which the inspector was unaware during
25 a conferencing procedure. But if it happens to be

1 later, after a penalty has been assessed, MSHA will
2 only agree to reduce the penalties by a 20 or 30
3 percent maximum.

4 Almost always, however, applying Part 100
5 would result in a greater reduction, 60 or 70
6 percent.

7 This system encourages inspectors to issue
8 inflated, exaggerated paper, if not encouraging,
9 condoning, to issue inflated, exaggerated paper after
10 which MSHA can agree to modify the paper to what it
11 should have been in the first place, but keep much of
12 the inflated penalty.

13 And this happens when there clearly was a
14 mistake by an inspector in applying the criteria.
15 The results is the operators are forced into choosing
16 spending considerable time, effort, and money taking
17 the case through a contest and possibly hearing or
18 simply taking the changed paper and the -- and the
19 moderately reduced penalty.

20 In the end, I encourage MSHA to reconsider
21 the proposed rule and withdraw it completely or at
22 least modify it considerably.

23 If the goal is to streamline the process
24 that results in fewer areas of disagreement and
25 contest, I suggest more and better training of MSHA's

1 district managers, assistant district managers, field
2 office supervisors, and inspectors and more
3 consistent paper and enforcement by them.

4 I also suggest that you get feedback --
5 that somehow feedback makes it back to the ground to
6 the people writing the paper because I know that
7 there are times in settlement or at trial the
8 inspectors who wrote the paper aren't even told about
9 what occurs there and what the final paper is.

10 I mean, I've -- I've had points where we've
11 -- I've been in trials where after the fact an
12 inspector's come up and talked to -- to me and my
13 client and said, If I had known those facts at the
14 time I issued it, I would have made the paper this.

15 Now, that wasn't said under oath, but he
16 tells us that -- that was back at the trial. He
17 goes, But no one ever told me, and the first time I
18 heard about it was when they told me I needed to come
19 and testify at trial.

20 So I suggest a better feedback loop for the
21 system as well.

22 Thank you.

23 I'm happy to answer any questions.

24 MS. McCONNELL: Thank you, Mr. Hardin. I
25 appreciate your comments.

1 I don't -- I have a question. You've taken
2 a very historical review of our -- going back to the
3 1969 Coal Act.

4 MR. HARDIN: Sure.

5 MS. McCONNELL: Knowing our goals as we
6 stated in our preamble, what would you suggest that
7 MSHA do?

8 MR. HARDIN: Well, if you're talking about
9 with respect to negligence, I think it's a -- it's a
10 tough question. I mean, if you go back -- and I have
11 looked and read the old preamble and the old rule and
12 I've looked at, and it's interesting.

13 When it first began, you know, they looked
14 to the term of negligence as used in the civil realm.

15 But it's -- that could be suggestive, and
16 it can really vary because conduct -- determining
17 what conduct is reasonable under the circumstances
18 can vary greatly, particularly within a mine where
19 there's a lot of different things going on, and it's
20 very technical and -- and there's a lot of things
21 happening.

22 And so what do you do?

23 I mean, you can't train -- can you train
24 all the inspectors to subjectively, when they look at
25 things, issue the same -- the same citations? I

1 don't know. But I think that that's something that
2 MSHA has struggled with for 30 or 40 years.

3 But the trend that I see, and I see in this
4 proposed rule, to me is a disturbing one. And this
5 is why it's disturbing, is that you started off with
6 -- and I'm a civil practitioner as well. You started
7 off with basically what the rule is in the civil
8 criteria and the subjectivity in a sliding scale of
9 points. And there were lots of options for -- for
10 the assessment office and the inspector. And you've
11 now progressed to the proposed rule, which basically
12 is, there is no flexibility.

13 And it's, like, well, we've now learned
14 that there's, you know -- reasonable minds can differ
15 on some of these issues, so we're going to take away
16 any kind of discretion, and we're just going to say,
17 you've got to force it into a box.

18 And I think what will happen if
19 the proposed rule is -- is followed, is that
20 basically -- you know, you'll basically have no
21 conduct that's not negligent because most inspectors,
22 as I've met them and discussed with them, if there's
23 a violation, they think there was negligence
24 involved. So it will be a rarity when there's a
25 conduct that's no negligence.

1 So -- so then you'll be left with, does it
2 rise to the reckless disregard? And that will be the
3 only question. And if there is not reckless
4 disregard, everything else is just put into
5 negligence.

6 And I ask you, how does that better mine
7 safety? Right.

8 I mean, I -- again, I'm not just paying lip
9 service to it. I mean it. And I've seen it in
10 action. I think that the more specificity -- the
11 more you can tell an operator, what did you do wrong,
12 and why did you do it wrong, the better they can
13 prevent it in the future.

14 And if you streamline the negligence
15 criteria such that -- that an inspector, to meet it,
16 can write, you know, a real simple sentence of, you
17 know, loose rip; operator should have -- knew or
18 should have known, period. That's the only thing he
19 puts in his notes; how -- how does that do anything
20 to help prevent conduct in the future? Right.

21 I mean, what if -- what if --

22 MS. McCONNELL: So is the issue what they
23 -- how they define the negligence, or is it the
24 categories that they select?

25 MR. HARDIN: Well, it can be the category.

1 I mean, it's both. I mean, it's a combination.

2 I mean, the thing that I like about the
3 current rule and that we kind of know about is you
4 have low, moderate, and high, and you have the
5 mitigating circumstances where you have one or more.

6 And people kind of understand what
7 mitigating circumstance is for. Did it occur
8 recently? Had it been flagged? Somebody knew about
9 it, and they were going to come and scrape it down
10 later.

11 Those are facts that, again -- you know,
12 the operator is trying to prevent it from being a
13 hazard.

14 And so, you know, by -- by labeling it as
15 low, moderate, or negligent and providing that kind
16 of detail, either on site or verbally or in the
17 citation or notes, it puts the operator on notice,
18 and it puts them on notice of how they can correct
19 it.

20 I just think that where you're going is --
21 and I understand -- I mean, I've seen it. Trust me.
22 I mean, I've seen the inspectors. They apply it
23 differently. I don't know why.

24 Sometimes I question why that it's applied
25 differently, and I -- I can find some trends at times

1 in a certain district where they're applying a
2 definition or a practice that I think they've been
3 told apply.

4 But, in general, I've seen differing
5 opinions. And the question is how do you grapple
6 with that? I would just continue with it.

7 Because the -- the overall goal is to
8 protect miner safety and health, and I think the
9 specificity better does that than dumbing it down to
10 everything is negligent.

11 MS. McCONNELL: Okay. Well, I don't have
12 any other comments.

13 MR. MATTOS: I have one -- or it's a
14 question. So -- and this goes back to my question
15 after Mr. Gould's comments.

16 What if we -- we want to get to more
17 specificity rather than less, and how do we get to
18 more accurate -- accuracy and more specificity if we
19 modified the citation and order form and our penalty
20 structure to ask a question, Has the operator taken
21 measurable steps to prevent this condition or
22 practice?

23 Or better yet, What -- what steps has the
24 operator taken to prevent this? And that's
25 documented on the citation form.

1 Now, you're getting to some of the comments
2 you made on the -- having it documented, not just in
3 the notes, but actually on the form --

4 MR. HARDIN: Right.

5 MR. MATTOS: -- and having to ask that
6 question of whoever is accompanying the inspector,
7 and then taking that into consideration in assessing
8 the civil penalty.

9 MR. HARDIN: And that's -- that's an
10 interesting possibility.

11 Again, I think in practice, the practical
12 reality is that that question, if it's out there,
13 should we answer -- the question is when is it going
14 realistically to be answered? Is it realistically
15 going to be answered by the underground? By the
16 person who's accompanying the inspector to answer?
17 Likely not.

18 Is it going to be answered when the
19 inspector comes out on the surface and conferences
20 with, you know, management on the surface? Maybe.
21 But it depends on what else is going on at the mine.

22 I mean, you know, mines are -- they can be
23 really busy places. And it may be like, Fine. Give
24 us a citation, we'll get it to you later. You know,
25 I've seen that happen.

1 And -- and the question is, I think in that
2 situation, whether the criteria stays the same or
3 whether it's changed and has something like you're
4 talking about, operators need to have a reasonable
5 amount of time, whether it's a day or two or a couple
6 days or a week, to at least provide the mitigating
7 circumstances.

8 Because I just tell you, I -- I truly don't
9 think -- and I -- one of the things I do when I train
10 operators is, to the extent you can, give them
11 mitigating circumstances right then and that will
12 avoid it. But it's just not feasible.

13 I mean, the fact is that they're trying to
14 run a mine. And particularly if a citation or an
15 order's shut down a belt or something, their main
16 concern is, we've got to get the belt back up and
17 running. We've got to get operating. It's not
18 about, hey, let me defend my conduct. Right?

19 And so I would say you've got to make sure
20 that even if you put that question on there, that,
21 you know, the inspector gave you nothing. You know,
22 I asked, and they gave me nothing. It needs to be,
23 you know, give them a reasonable amount of time to
24 supplement.

25 Now, maybe they can -- maybe they -- as a

1 matter of policy, you can say they have a week or
2 something or more to come back and give it to them
3 and the more closely related in time, the better.
4 You know, that would be -- that's fine as well.

5 But I think that you can't just require
6 them to give it to them right then and there.

7 So that's my point.

8 MR. MATTOS: Thank you.

9 MS. McCONNELL: Anything else?

10 MR. JONES: Mr. Hardin, thank you for your
11 testimony.

12 My question is, how do you think your
13 day-to-day work of negotiating settlements would be
14 affected by these proposed changes?

15 MR. HARDIN: You know, I don't know. I
16 mean, short term, it would probably go up. I mean, I
17 certainly think it's going to take -- and that's one
18 of the issues that I raised at the very beginning, is
19 that you've got 30 years under -- under the --
20 largely, the current criteria and understanding.

21 And so my job really, today, is, I get
22 stuff and the facts don't really seem to mesh with
23 what the current criteria is.

24 But I think this will lead to, What is the
25 criteria? You're going to have, certainly, a lot of

1 issues of those that I think will come out in the
2 first few years. Now, what will happen after that,
3 it's anybody's guess.

4 I -- you know, I, personally -- I mean,
5 reading the thing, I think, Wow, this is going to
6 create a lot of work. So, you know.

7 But I think that would happen -- that
8 probably happened after the last rule and probably
9 happened after the last rule on the penalties in
10 1982. The question is long term, I don't know.

11 MS. McCONNELL: Thank you, sir.

12 MR. HARDIN: Thank you.

13 MS. McCONNELL: Our next speaker is
14 Ms. Suzanne Thigpen of Orica?

15 MS. THIGPEN: Orica (pronouncing).

16 MS. McCONNELL: Orica USA, IME?

17 MS. THIGPEN: Yes. Yes. Well, and -- and
18 I'll get to that.

19 MS. McCONNELL: Do you have a copy of your
20 testimony?

21 MS. THIGPEN: No, I don't.

22 MS. McCONNELL: Okay.

23 MS. THIGPEN: All right.

24 MS. McCONNELL: And you are joining --

25 MS. THIGPEN: Yes. And this is Lewis

1 Greig. I was going to introduce both of us.

2 Thank you.

3 Thanks for the opportunity to speak to you
4 today. I am Suzanne Thigpen. That's S-U-Z-A-N-N-E
5 T-H-I-G-P-E-N. I am general counsel for Orica, North
6 America. That's O-R-I-C-A.

7 And Lewis is our -- Lewis Greig is
8 L-E-W-I-S, G-R-E-I-G, and he is the compliance to --
9 North American compliance director.

10 So Orica manufactures industry explosive
11 products and services for mining customers throughout
12 the United States. And, actually, we do it globally,
13 but we're just here as -- for the U.S.

14 On any workday, employees of Orica in the
15 United States work at no less than 50 mine sites.
16 And when you consider Orica's associated companies --
17 we have many joint venture companies -- we're at no
18 less than 100 mine sites on a daily basis.

19 Orica's a member of the Institute of the
20 Makers of Explosives, the IME, who have testified
21 before you all as well, and supplies products and
22 services to many members of the National Stone and
23 Sand and Gravel Association, and we are -- we are
24 also members of the NSSGA.

25 Okay. So mining and drilling with

1 explosives material is hazardous work. Ensuring the
2 safety of all miners and the general public is an
3 important duty, both for ourselves and for MSHA.

4 We pride ourselves in our high safety
5 standards, and -- and we do have a very strong safety
6 record.

7 While we appreciate the role and the
8 authority that MSHA has to ensure the safety of
9 miners and the public, we do not believe the proposed
10 changes to MSHA's civil penalties structure furthers
11 that goal.

12 I will be -- just like everyone else, but
13 much shorter, I review three primary concerns to the
14 proposed changes. That seems to be the magic number.

15 The one that's unique to us, as compared to
16 the former speakers, is MSHA's implementation of the
17 criteria procedures for assessment in civil
18 penalties, along with the single contractor
19 identification system to determine civil penalty
20 assessment on independent contractors is
21 unnecessarily burdensome on Orica and other similarly
22 situated independent contractors.

23 The single contractor ID systems leads to
24 companies incurring more violation points, more
25 frequently and in a shorter amount of time.

1 So Orica works on, like I said before, up
2 to 50 mine sites every day, and all of our operations
3 report up to one contractor ID, as compared to mining
4 operations which are assigned one contractor ID for
5 each mine site.

6 Orica is inspected under its single
7 contractor ID system at multiple mine sites
8 throughout the year. A rough estimate is that we
9 undergo 40 inspections a year, which is much higher
10 than what we estimate to be the two inspections per
11 year conducted for each single mine site.
12 Unfortunately, this puts Orica and other independent
13 contractors at a disadvantage.

14 Because we undergo such a great number of
15 inspections, we're more likely to accrue a greater
16 number violations under our contractor ID as compared
17 to mining operations. As a result, we endure
18 increased penalties over time.

19 And we'll -- we will have under -- even --
20 as now, and under the new system, even more -- we'll
21 have heightened penalties as repeat offenders or
22 based on a history of offenses.

23 We suggest implementing a system under
24 which independent contractors can be assigned
25 contractor IDs on a site or a regional basis.

1 For instance, we're very heavily regulated.
2 I think you all can figure that out. But we'd like
3 to think our primary regulator is ATF, and the ATF
4 reviews us and licenses us on a site-by-site level.
5 And we think that -- and they also audit us on a
6 site-by-site level, and we get assessments on that
7 level as well.

8 Changing the contractor ID system will
9 still support MSHA's desire to increase penalties for
10 repeat offenders, while also providing a fair system
11 -- system for independent contractors.

12 And so just looking at the proposal here,
13 we do think repeat offenders should have a higher
14 assessment, but we also think that we're being
15 unnecessarily penalized because we're just under a
16 different -- different sort of accruing system than
17 the rest of the mine -- the mine operators.

18 Okay. Second, the proposed reduction
19 categories for consideration of the negligent
20 criteria increases the likelihood that most citations
21 will be bumped -- will just be lumped in, dumped in
22 to the category of negligence or worse, that
23 citations could be that class -- that would be
24 classified as medium or high negligence, will be
25 classified as reckless.

1 And I do note that you -- that is not the
2 assumption of the Commission.

3 So Orica does not agree with reduction in
4 categories to determine degrees of negligence.

5 Over the last two years the industry and
6 MSHA have worked together to reduce the level of
7 inconsistency in disagreements regarding the criteria
8 for negligent classifications.

9 We believe this increased training and
10 resulting consistency of MSHA inspectors is a primary
11 reason that MSHA case backlog has decreased in recent
12 years. We want to continue this trend.

13 We believe that increased training of MSHA
14 personnel is and remains a better way to ensure
15 consistent application of the current negligent
16 standards.

17 And much like the prior speaker, we
18 actually desire more specificity, not less.

19 The proposed changes to the regulations is
20 not necessary to reach the stated goal of consistency
21 of objectivity. And like the prior speaker just
22 said, it -- it, in fact, doesn't do that at all.

23 It sort of takes -- takes it off the table.
24 You're not more consistent. You're just lumping
25 everything into one basket.

1 The scope of the negligence category is
2 much too broad and encompasses a broad variety of
3 conduct. The behavior of operators with a high
4 degree of negligence will be lumped with a low degree
5 of negligence. This does not seem fair and does not
6 promote safety.

7 We are concerned, given the lack of
8 distinction in the negligence category inspectors may
9 be more -- may be more inclined to categorize the
10 conduct that would have been considered moderate or
11 high negligence as reckless.

12 This is especially true for or industry
13 based on the limited training experience received by
14 MSHA inspectors on explosives use, controls, and
15 industry practice.

16 And I do think that this is a big deal, and
17 I do think this is going to happen. Because when you
18 have -- an inspector's going to go out, and they're
19 going to say, Well, this one, you know, is kind of
20 low negligence. And by relative standards, gosh,
21 what this -- what this mine operator did over here
22 looks much, much worse.

23 It's going to -- they're not going to feel
24 comfortable on a personal level lumping that into one
25 category. It's going to make -- because they're

1 going to see the degree of behavior that's being
2 lumped into one category. They're going to want to
3 distinguish that. That is human nature.

4 And so, again, we think -- we like the
5 categories as they are now. We really think training
6 and -- and trying to get -- consistency is only going
7 to come from training. So -- consistency in -- in
8 the application.

9 The new classifications will lead to more
10 subjectivity, not less. Again, the industry and MSHA
11 have worked together to alleviate inconsistency in
12 the penalty standards throughout -- through
13 additional training.

14 And then, again, I'm concerned that changes
15 will alter three decades of precedent that now
16 provides certainty in the inspection and review
17 process.

18 Most importantly, the changes do not
19 support safety. Fewer classifications and a lack of
20 incentive to challenge a violation will likely
21 discourage, not encourage, operators in taking steps
22 towards safety since those steps would be meaningless
23 in determining the penalties.

24 So, you know, if you're not going -- if --
25 if there's no way to limit my degree of negligence

1 and that's meaningless, you know, to the inspector,
2 then why am I trying?

3 The failure of the three-tiered system to
4 take account of mitigating factors will discourage
5 mitigation of a possible safety issues and will fail
6 to give credit to operators that have taken these
7 steps. This is directly in contrast with the
8 mandated MSHA.

9 We encourage MSHA to be aware that the
10 classification of reckless disregard in comparison
11 the high negligence will impose additional
12 liabilities on workers given that there are a number
13 of states in which the classification can trigger an
14 exemption from workers' compensation, which, in turn,
15 may expose operators to increase in civil litigation.

16 Finally, MSHA will lose transparency.
17 Neither it nor the public will be able to assess
18 operator conduct or progress towards safety on an
19 aggravated basis if everything's just lumped into a
20 negligent standard with no degree of -- of grading.

21 We recommend keeping the current
22 classification system with credit for mitigating
23 factors and continue training for MSHA personnel to
24 ensure consistent advocacy. The civil penalty
25 system needs to maintain its emphasis on mitigating

1 behaviors.

2 The third and final point: The proposed
3 criteria for procedures for assessments for civil
4 penalties do not encourage safe conduct. It is
5 disappointing that Section 100.3(f) provides only a
6 10 percent reduction on a penalty amount where the
7 operator abates the violation, but offers a 20
8 percent good-faith reduction only when neither the
9 penalty nor the violation is contested. This is
10 disappointing and shows the priorities of the
11 proposed rule are askew.

12 The new good-faith reduction can be read as
13 either requiring the operator to pay for due process
14 or penalizing operators who request due process.
15 Either way, it is not an appropriate credit mechanism
16 for regulations that are intended to support worker
17 and public safety.

18 In addition, it fails to consider that many
19 operators contest citations for reasons that are not
20 related to the monetary impact of the penalty.
21 That's not -- I can't think of one that we've
22 contested that -- that were concerned about -- about
23 the amount of the penalty. So that echoes some of
24 what you've heard here.

25 Namely, the disadvantage -- we are

1 concerned about the disadvantage that stems from the
2 single contractor ID system. That we're going to
3 have this. This is going to be a citation that's
4 just going the accrue, and it's going to exacerbate
5 further penalties down the line.

6 Another reason was, we're concerned about
7 our reputation. We're going to contest citations
8 that we think are wrong because we -- we are a safe
9 operator, and we want to be seen as a safe operator.

10 And maybe a third is that the citation
11 might actually be wrong. And I think that's, really,
12 I think the -- the -- I can say that when I talked to
13 the guys in the field and have a citation that we
14 contest.

15 MSHA should remove the pay for due process
16 proposal or at least reduce the penalty for being
17 heard. MSHA should provide greater economic
18 incentives and penalty credits for implementation of
19 mitigating measures, best practices, and/or clean
20 inspection processes.

21 That's all I have to say.

22 Thank you.

23 MS. McCONNELL: You're welcome.

24 MS. THIGPEN: He was just here in case you
25 have any questions.

1 MS. McCONNELL: Oh, okay. Well, I want to
2 thank you for your testimony and in coming here
3 today.

4 And you're right, the two individuals --
5 and I -- I don't have the names -- did come and
6 testify last week, and they did testify regarding the
7 single contract identification issue.

8 I believe that issue cannot be -- it's out
9 of scope -- the issue that you're raising in terms of
10 how you're assigned an ID is out of the scope of this
11 rule making. But we hear your testimony. We've
12 heard twice, and we understand your concern. And I
13 just wanted to let that -- let you know that.

14 A lot of the other points were already --
15 as you mentioned, have been raised. And we hear --
16 we hear your comments on that as well.

17 I don't have any questions, and I don't
18 have any other remarks for you today.

19 Jay?

20 MR. MATTOS: It was IME.

21 MS. THIGPEN: Yeah, IME. You're right.

22 MS. McCONNELL: I -- I knew it was IME. I
23 didn't know the name, but I can find the names for
24 you.

25 MS. THIGPEN: It was probably Jeff Kratz

1 and Cynthia --

2 MS. McCONNELL: It was Jeff Kratz and --

3 and Cynthia Hilton, exactly. Exactly.

4 MR. GREIG: Well, this proposed legislation
5 will simply exacerbate the single contractor ID,
6 which we've already see as a huge challenge. I mean,
7 it's a battle we fight daily. So this is just going
8 to further compound that, in our opinion.

9 MR. MATTOS: Yeah. I mentioned last week
10 that there were two -- the contractor ID issue,
11 particularly as it relates to you alls -- your and
12 your competitors, is one that we've been wrestling
13 with for a while now.

14 But under the Part 100 proposal and the
15 currents existing rule, contractors -- the contractor
16 -- the overarching contractor ID is analogous to our
17 controlling company ID for size purposes -- the size
18 of the business.

19 MS. THIGPEN: Right.

20 MR. MATTOS: And -- and you correctly noted
21 that for history purposes, it differs --

22 MS. THIGPEN: Yes.

23 MR. MATTOS: -- a little bit from. And --
24 and there are a couple of issues there. We don't
25 inspect independent contractors as -- or track it as

1 we do mine sites. We get some information.

2 And there's another related rule, the legal
3 ID rule, where we don't have a requirement to obtain
4 as much information from the contractors as we do
5 from the mine operators.

6 There are a variety of issues.

7 But -- but thank you. The comments are
8 good, and we do need to consider the independent
9 contractor issue in Part 100, and we have through the
10 point schedule. But we will -- taking these comments
11 we can -- yeah.

12 Thank you.

13 MS. THIGPEN: Thank you.

14 MS. McCONNELL: Thank you.

15 Anthony?

16 MR. JONES: No.

17 MS. McCONNELL: Okay. Thank you again for
18 your comments and your testimony.

19 At this time I would like to take a break.

20 First, I would like to ask if there's any
21 -- anyone in the audience that would like to speak.

22 (No response.)

23 MS. McCONNELL: Okay. Then I would like to
24 take a 30-minute break. At that time we will
25 reconvene to see if there are any other speakers who

1 would like to testify.

2 (A recess was taken from 11:28 a.m. until
3 11:59 a.m.)

4 MS. McCONNELL: Okay. At this time I would
5 like to reconvene our hearing.

6 MSHA's, Mine Safety and Health
7 Administration public hearing on proposed rule
8 addressing civil penalties has been reconvened.

9 I would like to --

10 (There was an interruption at the door.)

11 MS. McCONNELL: That could be a speaker at
12 the door right now.

13 I'd like to open the floor to anyone who
14 would like to speak.

15 (No response.)

16 MS. McCONNELL: Therefore, since no one has
17 indicated they would like to make a statement, I
18 would like -- I close the hearing.

19 And on behalf of Assistant Secretary Joseph
20 A. Main, we appreciate the people who have come to
21 the public hearing today, and we also appreciate the
22 people have come and may not have spoken.

23 At this point -- at this point we conclude
24 the hearing.

25 Thank you very much.

WHEREUPON, the within proceedings were concluded at the approximate hour of 12:00 p.m. on the 9th day of December, 2014.

* * * * *

REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
 COUNTY OF ADAMS)

I, SHAUNA T. DIETEL, Registered Professional Reporter and Notary Public, State of Colorado, do hereby certify that the said proceedings were taken in machine shorthand by me at the time and place aforesaid and was thereafter reduced to typewritten form; that the foregoing is a true transcript of the proceedings had.

I further certify that I am not employed by, related to, nor of counsel for any of the parties herein.

IN WITNESS WHEREOF, I have affixed my signature and seal this 17th day of December, 2014.

My commission expires October 6, 2017.

_____ Reading and Signing was requested.

_____ Reading and Signing was waived.

 XXX Reading and Signing is not required.

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Shauna T. Dietel, RPR
Shauna T. Dietel
Registered Professional Reporter

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Testimony of Josh Schultz, Esq., MSP, on behalf of the Law Office of Adele Abrams, P.C.

December 9, 2014 MSHA Public Hearing in Denver, Co.

Criteria and Procedures for Assessment of Civil Penalties RIN 1219-AB72

My name is Josh Schultz, and I am honored to present these comments on MSHA's proposed rule to modify the civil penalty criteria in 30 CFR Part 100. I am a Mine Safety Professional and an attorney testifying on behalf of the Law Office of Adele Abrams, PC.

The Law Office of Adele Abrams, PC. is a 10-attorney firm with offices in Denver; Charleston, WV; and the Washington, D.C. area. We represent clients in litigation before the Federal Mine Safety and Health Review Commission as well as provide consulting and training services to mines and MSHA-regulated independent contractors.

Although we appreciate the intent of the proposed Civil Penalty Rule, the Law Office of Adele Abrams believes the rule will increase penalties and exacerbate litigation without any commensurate safety and health benefits.

Specifically, we believe the language of the proposed rule will have the effect of increasing the severity of citations and greatly impact penalties. For example, the rule proposes significant changes to the definition of likelihood. The proposed rule defines "occurred" under likelihood as "Condition or practice cited has caused an event that has resulted or could have resulted in an injury or illness." The words "could have resulted in an injury or illness" may be easily applied to many conditions previously cited under a lower designation where no injury occurred.

We oppose the realignment of the negligence designation from five categories to three. By removing the existing negligence designations of "Low Negligence" and "High Negligence," MSHA is proposing that mitigation is no longer a defense and would not be considered during penalty assessment. Currently, MSHA's citations allow for inspectors to determine operator negligence based on the amount of mitigating circumstances surrounding each issuance. Adopting the proposed Civil Penalty rule's new negligence designation would not only place a greater emphasis on negligence when determining the penalty assessment, but it would also disregard mitigation and group a wide range of conditions under the umbrella of "Negligent." This could also result in exclusion of mitigation evidence at Commission hearings, which interferes with operators' due process rights.

MSHA's intent to ignore relevant mitigating facts when determining penalty assessments and negligence will lead to steep increases in penalties for mine operators and difficulty settling formal and informal contests of citations after issuance. Given the proposed rule in its current state, MSHA would no longer accept mitigation provided by operators as justification for penalty reductions, and negligence modifications to citation documentation would be largely unavailable. This is unacceptable and would adversely affect all members of the mining industry.

In our written submission, we include Appendix A, a comparison of citation penalties under the current rule and the proposed rule. If these example citations are converted to the more severe designations which we believe the proposed rule warrants, the \$27,206 in penalties under the current criteria would rise to \$210,000 under the proposed criteria -- a 772% increase for a docket with only Section 104a, regularly assessed, citations at a metal/nonmetal mine.

The Law Office of Adele Abrams strongly opposes the proposed Civil Penalty rule's attempt to govern the Federal Mine Safety and Health Review Commission by restricting the authority of Commission, and the Administrative Law Judges, and binding them to the penalty assessments determined by MSHA. The Commission was created to be independent of the Department of Labor, in the 1977 Mine Act, specifically to remain an unbiased third-party decision maker for disputes between operators and MSHA. When our clients ask us if the Judge who will hear their case works for MSHA, we always stress that the Judges of the Review work for an independent agency. This element of the proposed rule restricts that independence.

MSHA's own Conference Litigation Representatives and Attorneys do not adhere to the penalty assessments determined by MSHA during settlement negotiations, but the agency is now attempting to require the Commission to adhere to these assessments. We request the commission and its judges retain de novo penalty authority, and maintains that MSHA lacks authority to alter via regulation the statutory criteria.

Additionally, we request further guidance from MSHA on the following questions, left unanswered by MSHA in the proposed Civil Penalty rule:

- How will the new, and limited, negligence designations affect the issuance of 104(d) citations and orders, and the categorization of flagrant violations;
- In light of the elimination of the "highly likely" designation, how will the reduced gravity options affect issuance of "imminent danger" orders under Section 107(a) of the Mine Act; and
- Will operators who utilize MSHA's existing informal, pre-assessment, conferences be eligible for the 20% "good faith" penalty reduction for not contesting the "assessment or violation"?

Thank you for your time and consideration.

Law Office of Adele L. Abrams, P.C.
Public Comment for MSHA Proposed Rule on the Criteria and
Procedures for Assessment of Civil Penalties

Citation Background	As Currently Issued	Under Proposed Rule Converted to Equivalent Designations	Under Proposed Rule Converted to More Severe Designations
Citation issued as: 1. High Negligence; 2. Reasonably Likely; 3. Lost Workdays; and 4. One (1) Person Affected	Mine Points: 5 Controllor Points: 4 History Points: 25 Repeat Violation Points: 16 Negligence Points: 35 <i>High Negligence</i> Likelihood Points: 30 <i>Reasonably Likely</i> Severity Points: 5 <i>Lost Work Days or Restricted Duty</i> Affected Person Points: 1 Total Points: 121	Mine Points: 1 Controllor Points: 1 History Points: 16 Repeat Violation Points: 8 Negligence Points: 15 <i>Negligent</i> Likelihood Points: 14 <i>Reasonably Likely</i> Severity Points: 5 <i>Lost Workdays</i> Affected Person Points: 1 Total Points: 61	Mine Points: 1 Controllor Points: 1 History Points: 16 Repeat Violation Points: 8 Negligence Points: 30 <i>Reckless Disregard</i> Likelihood Points: 25 <i>Occurred</i> Severity Points: 5 <i>Lost Workday</i> Affected Person Points: 1 Total Points: 87
TOTAL PENALTY:	\$14,743.00	\$10,000.00	\$70,000.00
Citation issued as: 1. Low Negligence; 2. Unlikely; 3. Fatal; and 4. One (1) Person Affected	Mine Points: 5 Controllor Points: 4 History Points: 25 Repeat Violation Points: 17 Negligence Points: 10 <i>Low Negligence</i> Likelihood Points: 10 <i>Unlikely</i> Severity Points: 20 <i>Fatal</i> Affected Person Points: 1 Total Points: 92	Mine Points: 1 Controllor Points: 1 History Points: 16 Repeat Violation Points: 9 Negligence Points: 15 <i>Negligent</i> Likelihood Points: 0 <i>Unlikely</i> Severity Points: 10 <i>Fatal</i> Affected Person Points: 1 Total Points: 53	Mine Points: 1 Controllor Points: 1 History Points: 16 Repeat Violation Points: 9 Negligence Points: 15 <i>Negligent</i> Likelihood Points: 14 <i>Reasonably Likely</i> Severity Points: 10 <i>Fatal</i> Affected Person Points: 1 Total Points: 67
TOTAL PENALTY:	\$1,449.00	\$3000.00	\$40,000.00

Law Office of Adele L. Abrams, P.C.
**Public Comment for MSHA Proposed Rule on the Criteria and
Procedures for Assessment of Civil Penalties**

Citation Background	As Currently Issued	Under Proposed Rule Converted to Equivalent Designations	Under Proposed Rule Converted to More Severe Designations
Citation issued as: 1. Moderate Negligence; 2. Highly Likely; 3. Fatal; and 4. One (1) Person Affected	Mine Points: 5 Controller Points: 4 History Points: 25 Repeat Violation Points: 0 Negligence Points: 20 <i>Moderate Negligence</i> Likelihood Points: 40 <i>Highly Likely</i> Severity Points: 20 <i>Fatal</i> Affected Person Points: 1 Total Points: 115	Mine Points: 1 Controller Points: 1 History Points: 16 Repeat Violation Points: 0 Negligence Points: 15 <i>Negligent</i> Likelihood Points: 14 <i>Reasonably Likely</i> Severity Points: 10 <i>Fatal</i> Affected Person Points: 1 Total Points: 58	Mine Points: 1 Controller Points: 1 History Points: 16 Repeat Violation Points: 0 Negligence Points: 15 <i>Negligent</i> Likelihood Points: 25 <i>Occurred</i> Severity Points: 10 <i>Fatal</i> Affected Person Points: 1 Total Points: 69
TOTAL PENALTY:	\$9,122.00	\$7,000.00	\$50,000.00
Citation issued as: 1. Moderate Negligence; 2. Reasonably Likely; 3. Permanently Disabling; and 4. One (1) Person Affected	Mine Points: 5 Controller Points: 4 History Points: 25 Repeat Violation Points: 0 Negligence Points: 20 <i>Moderate Negligence</i> Likelihood Points: 30 <i>Reasonably Likely</i> Severity Points: 10 <i>Permanently Disabling</i> Affected Person Points: 1 Total Points: 95	Mine Points: 1 Controller Points: 1 History Points: 16 Repeat Violation Points: 0 Negligence Points: 15 <i>Negligent</i> Likelihood Points: 14 <i>Reasonably Likely</i> Severity Points: 5 <i>Lost Work Days or Restricted Duty</i> Affected Person Points: 1 Total Points: 53	Mine Points: 1 Controller Points: 1 History Points: 16 Repeat Violation Points: 0 Negligence Points: 15 <i>Negligent</i> Likelihood Points: 25 <i>Occurred</i> Severity Points: 10 <i>Fatal</i> Affected Person Points: 1 Total Points: 69
TOTAL PENALTY:	\$1,892.00	\$3,000.00	\$50,000.00



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*The Safety and Health Law Team Comments
on MSHA's Proposed Civil Penalty Rule*

Mark Savit | Denver
Henry Chajet | DC

December, 2014

Coalition For MSHA Fairness

Where Is The Problem?

- MSHA has not identified a problem with the existing rule
 - *The Proposed Rule is a solution in search of a problem*
- The proposed changes will confuse the enforcement system and increase penalties without any supporting data
 - *The Proposed Rule collapses citation description categories and will lead to inspectors increasing severity and fault allegations*
- The Proposal would strip away the Commission's authority
 - *The Proposed Rule advocates eliminating Congressionally created independent assessment of penalties for MSHA alleged violations*

MSHA's Description of the Proposed Rule

- **MSHA:** “simplify . . . criteria and increase the relative weight of those criteria that reflect the seriousness of the operator’s conduct: negligence, history of violations, and the severity aspect of gravity”
- **Operator’s history of violations:** Revise the way violation history is determined to result in a more equitable impact on small metal/nonmetal mines and increase the relative weight of violation history as a percentage of total penalty points
- **Negligence of the operator:** Reduce its five descriptive categories to three and increase the relative weight of Negligence

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MSHA's Description of the Proposed Rule

- **Gravity of the violation:** Reduce the number of categories for the three aspects of Gravity Likelihood of Occurrence, Severity of Injury or Illness, and Persons Affected – and increase the relative weight of Severity as a percentage of total penalty points
- **Reduced emphasis on business size** as a percentage of total penalty points that can be assessed.
- **Minimum and Maximum Penalty Amounts:** The existing minimum penalty of \$112 and the maximum penalty of \$70,000 for non-flagrant violations would not change. However, minimum penalties for unwarrantable failure violations would increase.
- **Increase Minimum 104(d)(1) & 104(d)(2) Penalties** by 50% to \$3,000.00 and \$6,000.00 respectively.

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MSHA'S Additional Proposals

● Prompt Abatement:

- Retain the current 10% credit for prompt abatement
- Add an additional 20% credit that would be awarded only if:
 - Neither the citation nor the penalty is contested and
 - The penalty is paid before it becomes a final order of the Commission (within 30 days of the assessment)
- *The 20% credit only reduces the monetary penalty.*
 - *It does nothing to alter the citation allegations such as S&S or negligence level.*

MSHA's Additional Proposals

● Scope and Application of Part 100

- Two alternatives that would restrict the Commission's independent role in setting penalties
 - Proposal 1: Commission is bound by the proposed penalty if MSHA meets its burden of proof on "penalty related facts" regarding all six statutory penalty criteria
 - Proposal 2: Commission ALJs may depart from the proposed penalty (up or down) "when justified" along the lines of departures from the federal criminal sentencing guidelines.
 - Like the federal courts, an ALJ would compare the results from the civil penalty formula against any mitigating or aggravating circumstances not considered by the Secretary. ALJs can assess a different penalty based upon their written findings, so long as the ALJs takes MSHA's penalty regulations and policy statements into account.

Enforcement Data Consistent Improvement

All Mine Safety and Health

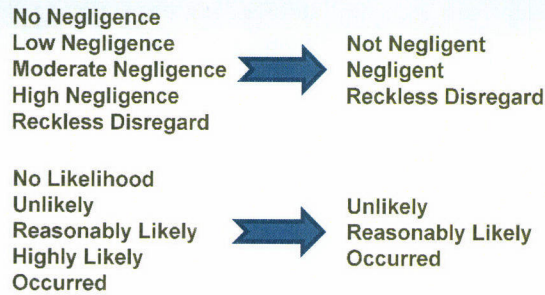
	CY						
	2007	2008	2009	2010	2011	2012	2013
Number of Mines	14,871	14,907	14,631	14,283	14,176	14,093	13,761
Number of Miners	378,123	392,746	355,720	361,176	381,209	387,878	374,522
Fatalities	67	53	35	71	37	36	41
Fatal Injury Rate ¹	.0199	.0156	.0119	.0234	.0114	.0110	.0129
All Injury Rate ¹	3.43	3.25	3.01	2.81	2.73	2.56	2.47
Total Mining Area Inspection Hours/Mine ²	44	56	59	63	62	61	59
Citations and Orders Issued ³	144,074	173,551	173,088	170,110	156,476	139,072	118,619
S&S Citations and Orders (%)	29%	28%	30%	32%	29%	27%	27%
Dollar Amount Assessed (Millions) ⁴	130.0	143.6	137.4	163.3	161.3	122.6	91.6

What Are MSHA's Stated Goals? What Are The Actual Effects?

- Reduce the quantity of litigated citations/orders
 - *Make it harder for Operators to challenge citations/orders ?*
- Simplification of the citation writing process
 - *Make it easier for Inspectors to issue citations/orders ?*
- More clarity & transparency for penalty assessment criteria
 - *Reduce categories of violation allegations, moving towards an opaque and "all or nothing" enforcement scheme ?*
- Encourage operators to be more "proactive and accountable" in addressing safety and health hazards
 - *Further distance penalties from safety and health protection ?*

What Is The Main Outcome?

- Compressed penalty criteria, which are more subjective and unclear



- Our data analysis assumes categories will trend towards the middle
 - Low & High → Negligent; Unlikely & Highly Likely → Reasonably Likely
- Revised categories will lead to increased penalties

Will the Proposal Achieve Its Stated Goals?

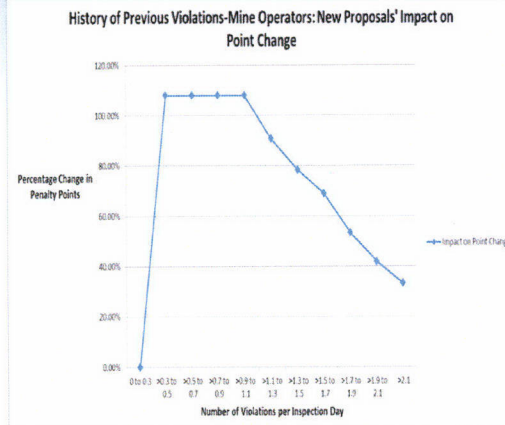
- In a word, No.
 1. The Proposed Rule will have a more severe effect on operators with "good" compliance records than those with worse records, which is contrary to MSHA's goals.
 2. The citation writing process will be simpler for inspectors, but lax training will remain, resulting in increased inconsistencies and distancing citations further from S&H performance.
 3. Despite MSHA's claims, there will be a significant increase in penalties for each operator based on our analysis of mine citation and penalty records reported on the MSHA web site.

Will the Proposal Achieve Its Stated Goals?

4. Litigation spiked when the last changes were made to part 100 and has been dropping steadily since.
 - a) Re-defining critical criteria (i.e. negligence and likelihood) will inevitably lead to increased litigation.
 - b) Combining criteria within negligence, likelihood and severity categories will produce increased subjectivity, making the categories murkier, not clearer.
 - c) Adoption of these opaque, "all or nothing" categories will be interpreted against, not in favor of the operator, increasing severity, negligence and likelihood findings.
 - d) Weaker S&S criteria coupled with POV inclusion of issued citations/orders increase the downstream S&S consequences.

History of Violations (VPID)

- Operators with good VPID records would see a 108% increase in penalty points
- Operators already at the maximum VPID rate would see a 33% increase in penalty points.
- Our best operators will take the biggest hit



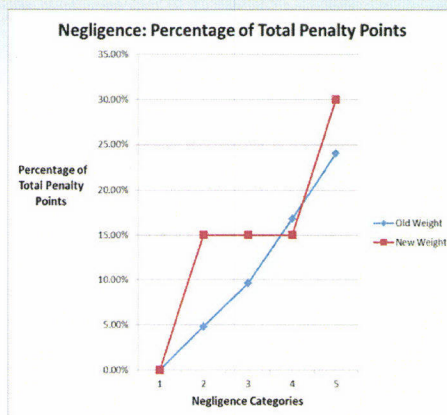
History of Repeat Citations

- Operators with a low history of repeat citations suffer the largest increase in emphasis
- Operators with a high history of repeat citations see the smallest increase in emphasis



Negligence

- MSHA's proposal raises the penalties for citations now designated as low or moderate negligence
- The proposal is unclear regarding the treatment of the existing high negligence category
 - Could be "negligent"
 - Could be "reckless disregard"



All Mitigating Circumstances Are Removed From Consideration!

Likelihood – Broad Definitions

- The proposed definition of Unlikely and Reasonably Likely are not reasonable, and are open to wide interpretation
 - *“Condition or practice cited has little or no likelihood of causing an event that could result in an injury or illness”*
 - *“Condition or practice cited is likely to cause an event that could result in an injury or illness”*
- Replaces concepts of reasonableness and plausible, with pure conjecture limited only by an inspector’s imagination
 - MSHA and the Solicitor’s Office have previously complained that the definition of S&S is “complicated and difficult to prove.”
 - The Solicitor’s Office believes S&S citations will increase.
 - See July 13, 2010 Testimony of Solicitor Patricia Smith before House Committee on Education and Labor

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“Likely” Equals “Occurred”

- The proposed definition of Occurred contorts the plain meaning of the word:
 - *“Condition or practice cited has caused an event that has resulted or could result in an injury or illness”*
- Replaces a term rooted in plain English with a speculative definition, limited only by an inspector’s imagination
 - No reference to an objective or reasonable standard
 - Proposed Rule fails to identify any temporal or proximate nexus between the cited condition and the possible injury/illness.

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Likelihood – Broad Definitions

- The proposed definitions of Reasonably Likely (RL) and Occurred are so broad that virtually all citations can be designated as RL or Occurred.
- Our analysis examined an operator that received 24 citations in 2014 and made the following assumptions:
 - No contested citations
 - Three different scenarios for existing Unlikely and RL designations
 - All existing Unlikely designations become RL
 - Half of the existing Unlikely designations become RL
 - None of the existing Unlikely designations become RL

Citation Comparison – 100% UL → RL

Type Action	Proposed Penalty	Proposed Good Faith Discount Applied	Existing Proposed Assessment	Proposed Negligence	Current Negligence	Proposed Likelihood	Current Likelihood	Proposed Injury or Illness Expected	Existing Injury or Illness Expected
104(a)	\$2,500.00	\$1,750.00	\$243.00	Negligent	Moderate	RL	Unlikely	Fatal	Fatal
104(a)	\$2,000.00	\$1,400.00	\$138.00	Negligent	Moderate	RL	Unlikely	LWD or RD	LWD or RD
104(a)	\$1,200.00	\$840.00	\$100.00	Negligent	Moderate	RL	Unlikely	LWD or RD	LWD or RD
104(a)	\$2,500.00	\$1,750.00	\$1,203.00	Negligent	Moderate	RL	RL	Fatal	Fatal
104(a)	\$1,200.00	\$840.00	\$100.00	Negligent	Moderate	RL	Unlikely	LWD or RD	LWD or RD
104(a)	\$1,200.00	\$840.00	\$100.00	Negligent	Moderate	RL	Unlikely	LWD or RD	LWD or RD
104(a)	\$1,200.00	\$840.00	\$100.00	Negligent	Moderate	RL	Unlikely	LWD or RD	LWD or RD
104(a)	\$7,000.00	\$4,900.00	\$3,143.00	Negligent	Moderate	RL	RL	Fatal	Fatal
104(a)	\$7,000.00	\$4,900.00	\$2,901.00	Negligent	Moderate	RL	RL	Fatal	Fatal
104(a)	\$1,200.00	\$840.00	\$100.00	Negligent	Moderate	RL	Unlikely	LWD or RD	LWD or RD
104(a)	\$3,500.00	\$2,450.00	\$285.00	Negligent	Moderate	RL	Unlikely	Fatal	Fatal
104(a)	\$1,200.00	\$840.00	\$100.00	Negligent	Moderate	RL	Unlikely	LWD or RD	LWD or RD
104(a)	\$7,000.00	\$4,900.00	\$3,143.00	Negligent	Moderate	RL	RL	Fatal	Fatal
104(a)	\$7,000.00	\$4,900.00	\$3,143.00	Negligent	Moderate	RL	RL	Fatal	Fatal
104(a)	\$1,200.00	\$840.00	\$100.00	Negligent	Moderate	RL	Unlikely	LWD or RD	LWD or RD
104(a)	\$1,200.00	\$840.00	\$100.00	Negligent	Moderate	RL	Unlikely	LWD or RD	LWD or RD
104(a)	\$1,200.00	\$840.00	\$100.00	Negligent	Moderate	RL	Unlikely	LWD or RD	LWD or RD
104(a)	\$2,500.00	\$1,750.00	\$243.00	Negligent	Moderate	RL	Unlikely	Fatal	Fatal
104(a)	\$1,600.00	\$1,120.00	\$100.00	Negligent	Low	RL	Unlikely	LWD or RD	LWD or RD
104(a)	\$4,000.00	\$2,800.00	\$1,203.00	Negligent	Moderate	RL	RL	LWD or RD	LWD or RD
104(a)	\$1,600.00	\$1,120.00	\$100.00	Negligent	Moderate	RL	Unlikely	LWD or RD	LWD or RD
104(a)	\$3,500.00	\$2,450.00	\$1,412.00	Negligent	Moderate	RL	RL	Fatal	Fatal
104(a)	\$3,500.00	\$2,450.00	\$127.00	Negligent	Low	RL	Unlikely	Fatal	Fatal
104(a)	\$1,800.00	\$1,260.00	\$100.00	Negligent	Moderate	RL	Unlikely	LWD or RD	LWD or RD
Summary	\$67,800.00	\$47,460.00	\$18,384.00	All Neg.	2 Low Neg.	All are RL	7 are RL	No Significant Change	

Citation Comparison – 50% UL → RL

Type Action	Proposed Penalty	Proposed Good Faith Discount Applied	Existing Proposed Assessment	Proposed Negligence	Current Negligence	Proposed Likelihood	Current Likelihood	Proposed Injury or Illness Expected	Existing Injury or Illness Expected
104(a)	\$300.00	\$210.00	\$243.00	Negligent	Moderate	Unlikely	Unlikely	Fatal	Fatal
104(a)	\$250.00	\$175.00	\$138.00	Negligent	Moderate	Unlikely	Unlikely	LWD or RD	LWD or RD
104(a)	\$124.00	\$86.00	\$100.00	Negligent	Moderate	Unlikely	Unlikely	LWD or RD	LWD or RD
104(a)	\$2,500.00	\$1,750.00	\$1,203.00	Negligent	Moderate	RL	RL	Fatal	Fatal
104(a)	\$124.00	\$86.00	\$100.00	Negligent	Moderate	Unlikely	Unlikely	LWD or RD	LWD or RD
104(a)	\$124.00	\$86.00	\$100.00	Negligent	Moderate	Unlikely	Unlikely	LWD or RD	LWD or RD
104(a)	\$124.00	\$86.00	\$100.00	Negligent	Moderate	Unlikely	Unlikely	LWD or RD	LWD or RD
104(a)	\$7,000.00	\$4,900.00	\$3,143.00	Negligent	Moderate	RL	RL	Fatal	Fatal
104(a)	\$7,000.00	\$4,900.00	\$2,901.00	Negligent	Moderate	RL	RL	Fatal	Fatal
104(a)	\$124.00	\$86.00	\$100.00	Negligent	Moderate	Unlikely	Unlikely	LWD or RD	LWD or RD
104(a)	\$400.00	\$280.00	\$285.00	Negligent	Moderate	Unlikely	Unlikely	Fatal	Fatal
104(a)	\$124.00	\$86.00	\$100.00	Negligent	Moderate	Unlikely	Unlikely	LWD or RD	LWD or RD
104(a)	\$7,000.00	\$4,900.00	\$3,143.00	Negligent	Moderate	RL	RL	Fatal	Fatal
104(a)	\$7,000.00	\$4,900.00	\$3,143.00	Negligent	Moderate	RL	RL	Fatal	Fatal
104(a)	\$1,200.00	\$840.00	\$100.00	Negligent	Moderate	RL	Unlikely	LWD or RD	LWD or RD
104(a)	\$1,200.00	\$840.00	\$100.00	Negligent	Moderate	RL	Unlikely	LWD or RD	LWD or RD
104(a)	\$1,200.00	\$840.00	\$100.00	Negligent	Moderate	RL	Unlikely	LWD or RD	LWD or RD
104(a)	\$2,500.00	\$1,750.00	\$243.00	Negligent	Moderate	RL	Unlikely	Fatal	Fatal
104(a)	\$1,600.00	\$1,120.00	\$100.00	Negligent	Low	RL	Unlikely	LWD or RD	LWD or RD
104(a)	\$4,000.00	\$2,800.00	\$1,203.00	Negligent	Moderate	RL	RL	LWD or RD	LWD or RD
104(a)	\$1,600.00	\$1,120.00	\$100.00	Negligent	Moderate	RL	Unlikely	LWD or RD	LWD or RD
104(a)	\$3,500.00	\$2,450.00	\$1,412.00	Negligent	Moderate	RL	RL	Fatal	Fatal
104(a)	\$3,500.00	\$2,450.00	\$127.00	Negligent	Low	RL	Unlikely	Fatal	Fatal
104(a)	\$1,800.00	\$1,260.00	\$100.00	Negligent	Moderate	RL	Unlikely	LWD or RD	LWD or RD
Summary	\$54,294.00	\$38,001.00	\$18,384.00	All Neg.	2 Low Neg.	15 are RL	7 are RL	No Significant Change	9

Citation Comparison – No UL Change

Type Action	Proposed Penalty	Proposed Good Faith Discount Applied	Existing Proposed Assessment	Proposed Negligence	Current Negligence	Proposed Likelihood	Current Likelihood	Proposed Injury or Illness Expected	Existing Injury or Illness Expected
104(a)	\$300.00	\$210.00	\$243.00	Negligent	Moderate	Unlikely	Unlikely	Fatal	Fatal
104(a)	\$250.00	\$175.00	\$138.00	Negligent	Moderate	Unlikely	Unlikely	LWD or RD	LWD or RD
104(a)	\$124.00	\$86.00	\$100.00	Negligent	Moderate	Unlikely	Unlikely	LWD or RD	LWD or RD
104(a)	\$2,500.00	\$1,750.00	\$1,203.00	Negligent	Moderate	RL	RL	Fatal	Fatal
104(a)	\$124.00	\$86.00	\$100.00	Negligent	Moderate	Unlikely	Unlikely	LWD or RD	LWD or RD
104(a)	\$124.00	\$86.00	\$100.00	Negligent	Moderate	Unlikely	Unlikely	LWD or RD	LWD or RD
104(a)	\$124.00	\$86.00	\$100.00	Negligent	Moderate	Unlikely	Unlikely	LWD or RD	LWD or RD
104(a)	\$7,000.00	\$4,900.00	\$3,143.00	Negligent	Moderate	RL	RL	Fatal	Fatal
104(a)	\$7,000.00	\$4,900.00	\$2,901.00	Negligent	Moderate	RL	RL	Fatal	Fatal
104(a)	\$124.00	\$86.00	\$100.00	Negligent	Moderate	Unlikely	Unlikely	LWD or RD	LWD or RD
104(a)	\$400.00	\$280.00	\$285.00	Negligent	Moderate	Unlikely	Unlikely	Fatal	Fatal
104(a)	\$124.00	\$86.00	\$100.00	Negligent	Moderate	Unlikely	Unlikely	LWD or RD	LWD or RD
104(a)	\$7,000.00	\$4,900.00	\$3,143.00	Negligent	Moderate	RL	RL	Fatal	Fatal
104(a)	\$7,000.00	\$4,900.00	\$3,143.00	Negligent	Moderate	RL	RL	Fatal	Fatal
104(a)	\$124.00	\$86.00	\$100.00	Negligent	Moderate	Unlikely	Unlikely	LWD or RD	LWD or RD
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104(a)	\$175.00	\$122.00	\$100.00	Negligent	Low	Unlikely	Unlikely	LWD or RD	LWD or RD
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104(a)	\$175.00	\$122.00	\$100.00	Negligent	Moderate	Unlikely	Unlikely	LWD or RD	LWD or RD
104(a)	\$3,500.00	\$2,450.00	\$1,412.00	Negligent	Moderate	RL	RL	Fatal	Fatal
104(a)	\$400.00	\$280.00	\$127.00	Negligent	Low	Unlikely	Unlikely	Fatal	Fatal
104(a)	\$200.00	\$140.00	\$100.00	Negligent	Moderate	Unlikely	Unlikely	LWD or RD	LWD or RD
Summary	\$41,316.00	\$28,913.00	\$18,384.00	All Neg.	2 Low Neg.	7 are RL	7 are RL	No Significant Change	0

Result - Massive Penalty Increases Across the Industry

- A small underground mine receiving 104(a) citations during three inspections in 2014 would see a ten-fold increase (\$2,500 to \$25,000) in penalties.
- A mid-sized surface MNM mine receiving 104(a) citations during two inspections in 2014 would see a nine-fold increase (\$1,800 to \$17,500) in penalties.
- A large surface MNM mine receiving 104(a) citations during three inspections in 2014 would see a three-fold increase (\$93,500 to \$284,000) in penalties.

Proposal Exemplifies the Law of Unintended Consequences

- Proposed Rule will have the opposite effect MSHA desires
- It will impliedly discourage voluntary safety and health efforts by eliminating the penalty system “reward” for conduct that was “low” negligence, or cited events that were unlikely to result in serious injury.
 - Almost all negligence is treated the same
 - “Possible” has replaced Probable in the analysis of Likelihood
 - “Possible” has encroached on the meaning of Occurred
 - The new definitions of “Reasonably Likely” and “Occurred” would allow for greater subjectivity regarding the inspector’s perceived connection between a cited condition and a prospective injury.

Conclusion

- MSHA has not shown the Proposed Rule is predicated on an identified problem, or a product of data-driven analysis
- Our data analysis indicates the effect of the Proposed Rule will be contrary to MSHA's objectives.

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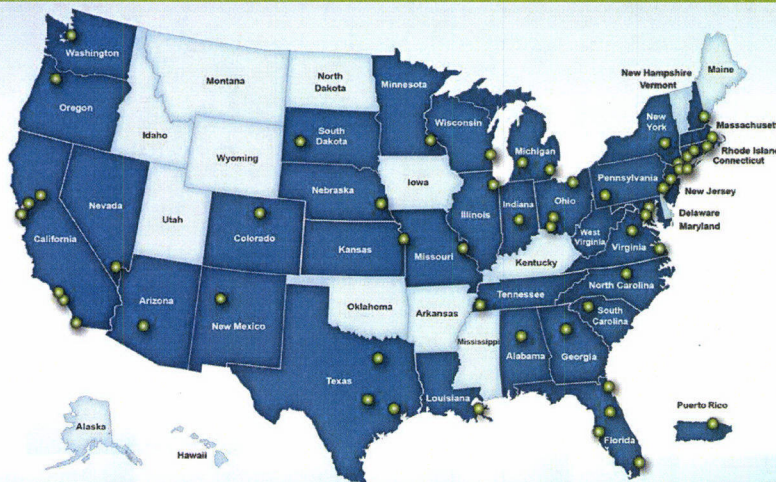


- U.S. News - Best Lawyers® "Best Law Firms" named Jackson Lewis the 2014 "Law Firm of the Year" in the Litigation-Labor and Employment category
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