TESTIMONY OF JOHN GALLICK

COMMENTS ON PROPOSED RULE ON WORKPLACE EXAMINATIONS

Good Morning. I am John Gallick. I appreciate the opportunity to provide some additional information on this proposed rule on workplace examination. I am Vice President-Safety of Alpha Natural Resources. Alpha' affiliates, as you know, operate a number of underground coal mines ranging in size from our large longwall operations to relatively small mines that depend on continuous miners to produce coal. We operate underground coal mines in Pennsylvania, West Virginia, Kentucky and Virginia.

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

I started working in the coal industry in 1972. I started out as a general inside laborer and began work in the safety department of then Bethlehem Mines in 1976. I have worked in various safety capacities since then, from the mine inspector level to my current position. I am certified ~~as an assistant mine foreman,~~ certified by the Commonwealth of Pennsylvania to perform mine examinations. I have a masters degree in safety from Indiana University of Pennsylvania. I also have an understanding of how rules are developed and applied once they are promulgated. I was involved as one of the industry representatives in negotiating the new Pennsylvania mine safety law that was adopted by Pennsylvania in 2008.

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

Examiners are not trained as inspectors. They are trained to recognize hazards from a practical real world standpoint. These hazards are generally conditions that can be observed and the examiner's duty is to determine whether the observed conditions such as coal float dust, roof etc rise to the level of a hazard. They are experienced miners who study for and take a comprehensive test.

They do not take 13 or 26 weeks, or whatever amount of training that inspectors receive so they will recognize all the potential violations in Part 75 of the code. Most are certified as examiners by state agencies, rather than MSHA, and those states often have differing requirements. None require the examination of the mine for violative conditions, as opposed to hazards. None require a mastery of 30 CFR Part 75, a mastery that even the most trained people in industry and agencies do not achieve.

This is not the first time that a proposed rule has sought to include identifying and recording noncompliance with mandatory safety and health standards during examinations. In 1996, a similar proposal was made pursuant to 30 C.F.R. § 75.364 to include noncompliance with mandatory safety and health standards. 61 Fed. Reg. 9764, 9806 (March 11, 1996). This proposal, however, drew considerable objection and was not adopted in the final rule. 61 Fed. Reg. at 9806.

At that time, MSHA stated:

> Most hazards are violations of mandatory standards. Requiring the examiner to look for all violations regardless of whether they involve a distinct hazard could distract the examiner from the more important aspects of the examination. 61 Fed. Reg. at 9806 (emphasis added).

MSHA concluded then that the existing standard was appropriate and best served the objective of giving examiners clear guidance for making effective examinations. 61 Fed. Reg. at 9806. It is interesting to note that the 1996 proposal would have limited the scope of the examination for non-compliance to situations that "could result in a hazardous condition." Such a limitation is not present in the current proposed rule. In fact, MSHA makes clear that a violation that does not pose a hazard to miners would have to be recorded and corrected and the corrective actions taken be recorded as well. 75 Fed. Reg. at 81167.

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

In the preamble, MSHA asserts that the top 10 standards cited by MSHA are "the types of violations that well-trained and qualified examiners can observe while conducting effective examinations." 75 Fed. Reg. at 81167. But an examination of those standards for underground coal indicates that few if any of the standards are clear cut as to their interpretation and application. In fact a number of the most frequently cited standards are clearly outside the types of examinations listed in this proposed standard.

Section 75.400, the most frequently cited standard, is a catchall. It has been our experience that the standard that is cited most frequently for an inadequate examination is Section 75.400. There is a wide range of conditions that fall within that standard: accumulations along conveyor belts, section spillage, 0-1/4 inch of oil on machinery, coal on a continuous miner, trash that has been assembled for removal from a mine, float coal dust, wooden pallets used to transport material into the mine, candy wrappers. One inspector once offered the theory at one of our mines that the paper bags full of rockdust sitting on a pallet was a violation of 30 C.F.R. § 75.400.

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

Similarly roof control and ventilation plans are very broad. Sections 75.202(a), 75.1725(a), 75.503 and 75.512 are broad general standards that involve an exercise in judgment without containing specific clear cut standards. A simple review of the requirements of 75.503 and 75.512 establish that these requirements would not be a part of any of the examinations listed in the proposed standard, yet an operator would have to train examiners on them or risk being penalized for not providing adequate training and examination requirements for certified examiners.

The preamble also refers to Section 75.403, the rockdusting standard, and this was not even in the top ten of violations cited and usually is a violation that requires actual sampling and is not something that is readily determined visually. Again, this standard is not something an examiner should be expected to report as a clear cut hazard or in the case of the proposal a clear cut violation. In most cases

examiners do report in general the need for someone to determine if additional rockdusting is needed but do not attempt in most cases to determine visually whether the area in question rises to a citation.

One of the other standards in the top ten is a violation of Section 75.1403. These are safeguards which are inspector-written and are strictly interpreted. Many safeguards fall well out of the observable examination arena as many safeguards involve equipment pre-ops etc. that have little or nothing to do with certified examinations. Safeguards are rules that provide significant fodder for legal analysis and dispute. Yet as the proposed rule is written you expect a mine examiner to parse the safeguards as they examine the mine.

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

With all due respect, you cannot reassure any of us who have experience with the actual MSHA inspections that the application of the rule will not be broader than those 10 standards or that is will not be interpreted to require additional tests or additional looking into boxes or the inspection of equipment. Inspectors, for example, cite roof bolts that are too widely spaced by a matter of inches. It is not difficult for one to believe that inspectors will cite operators for inadequate examinations because they did not meet bolt spacing. The rule does not specify such limitations and we have no reasonable expectation that it will be interpreted by inspectors in that fashion. As proposed, the rule would require examiners to look for all violative conditions even those that do not present a hazard but are violations of the mandatory standards. Part 75 is a comprehensive set of rules and we fully recognize that the potential exists that every citation written for a substantive rule will be evaluated for and in many cases will be accompanied by a citation for failure to perform an adequate examination.

The intent of this proposal may be well intentioned; the more information examiners supply to management the more pro-active actions management can take to correct issues before they become hazards. This intent however is not imbedded in the actual words of the proposed standards. Rather than providing a pro-active examination environment, the requirement to identify violations will

end up permitting inspectors to write many additional citations based on what is in the record books. It is clear that there will be inspectors who will issue citations based simply on what is in the books. We think such an approach to enforcement is antithetical to the purpose of examinations, identifying hazards and timely correcting them so that miners are not injured.

Make no mistake we think this rule should be pulled back. But if it moves forward there is another issue with the proposed standard that needs discussed. As I have stated this list needs culled down to the specific standards that the agency truly believes an examiner should be examining for - observable conditions that may if left uncorrected become a hazard. As noted earlier in my comments the preamble's general statements about the top cited standards or the rules to live standards doesn't narrow the scope of the MSHA inspectors' expectations for examiners. Every examiner will need training on all of Part 75, yet an operator will also be faced with trying to explain what an examiner can practically be expected to accomplish. The agency places both the operator and the examiner in an impossible position. Further, any citation for an inadequate exam issued regardless of the logic will become a required addition to all future examinations. An inspector citing a fire extinguisher missing a tag and not reported in the examination book, as an example, will require the operator of that mine and maybe that company, to re-train all examiners that this is now the new reality. It won't matter what is finally worked out in the legal system. Abatement times on an examination citation will not allow for anything but a quick training meeting with certified people and whatever was cited under an inadequate examination being added to examination requirements. I'd like to think that most inspectors will not cite as an inadequate examination relatively minor citations. It is incumbent upon the agency to write standards where hope is not part of the equation. If this standard is to go forward the agency must establish some specificity and logical examination standards that are directed at what an examiner is assigned to observe. We cannot ask an examiner to be potentially responsible for any and all requirements in Part 75. Failing to do so will result in confusion and frustration.

Now I'd like to spend a few minutes discussing the economic analysis. The economic analysis of this proposed rule does not take into account that a significant number of additional persons will be required to perform these examinations. On page 81171 of the proposed rule, it is estimated that a pre-shift examiner would take 30 extra minutes to perform his duty in a 3-hour window, a supplemental examiner 15 extra minutes to perform his examination, and a weekly

examiner 45 extra minutes to look for violations during each examination. We believe that significant numbers of examiners will have to be hired. We do not believe this will be easy or even feasible.

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

In addition we have reviewed the accident and injury reports that were posted on the single source page. We have a fundamental disagreement with MSHA's conclusion that the majority of the injuries would have been prevented by examinations that identified violations rather than hazards. In fact, a review of those reports indicates a number of things, none of which support the promulgation of the rule. They demonstrate a failure in some instances to recognize hazards, such as the failure to recognize the hazard from a drag fold (horseback) in the case of Sunrise Coal. Some involve citations where a hazard was identified but not properly addressed, such as in the case of Rosebud Mining. Some involve the failure to conduct an adequate examination for hazards, such as the case of Aracoma Coal. Some involve accidents in and around mining equipment that do not appear to involve situations where examinations were at issue, such as in the case of South Central Coal where a miner went inby roof support.

The cited accident reports and the fatality information included in the preamble of this rule is flawed as well in that the rule intends for the reader to believe if the top ten standards would have been found by examiners in the accident reports listed, the injuries would not have occurred. It is important to not only note but to emphasize that this statement is contradictory to the Root Cause Analysis prepared by MSHA in these accident reports. For instance, in a June 18 2008 report one of the root causes was the examiner not recognizing a hazardous condition or ignoring it. I can not see how looking for a violation would have eliminated any such an event.

On page 81167, the District Manager can require that examinations in other areas of the mine for violations of mandatory health and safety standards. This rule gives the operator no recourse or remedy if there is a disagreement with the District Manager's decision to add anything to be looked at or examined as he

chooses. Mines can be held hostage to this threat of enforcement or in some cases additional burdens placed on them by the District Manager for examinations.

We would urge the agency to reconsider this proposed rule and to act as it did in 1996 in not promulgating a new rule, especially one that fails to be sufficiently specific as to create the potential for undermining the existing system of examinations directed at hazards.

The industry along with MSHA prodding since 1996, has concentrated on improving pre-shift examinations and they have improved. However, this new requirement will leave many persons with questions as to what and when should we look at this or how in depth must the scope of our examinations go.

I believe this proposed standard should be withdrawn. However, if the Agency intends to continue with this standard then a number of significant changes must be included. The proposed standard must be much more specific as to what specifically an examiner is legally bound to examine. It cannot be so general as to imply that all of Part 75 is included. If the agency insists on going forward with this standard, I urge the Agency to develop specific observable conditions for which a report is necessary.

Finally, I request the agency if it determines that it intends to promulgate standards that change examiner standards, provide sufficient time for training and re-crafting of reporting books etc. Our affiliates alone have thousands of certified people all who will need trained. We must provide each of them the training that they need. The agency needs to provide the time to conduct the training.

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