

TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
PATTERN OF VIOLATIONS)

Pages: 1 through 43

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IN THE MINE SAFETY AND HEALTH ADMINISTRATION

IN THE MATTER OF:)
)
PATTERN OF VIOLATIONS)

Arlington, Virginia

Wednesday
June 15, 2011

APPEARANCES

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

Speakers:

JOSEPH CASPER
Vice President of Safety
National Stone, Sand & Gravel Association

LINDA RAISOVICH-PARSONS
United Mine Workers of America

JOSH NELSON
Campaign Manager
CREDO Action

P R O C E E D I N G S

(9:30 a.m.)

MODERATOR SILVEY: Again, good morning.

My name is Patricia W. Silvey. I'm the Deputy Assistant Secretary for Operations for the Mine Safety and Health Administration. I will be the Moderator of this public hearing on MSHA's Proposed Rule on Pattern of Violations.

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

I would like to introduce the members of the MSHA panel. To my left, Jay Mattos, who is the Chair of the Pattern of Violations Rulemaking Committee; to my right, Cherie Hutchison, Regulatory Specialist in MSHA's Standards Office; and to her right, Anthony Jones, who is with the Department of Labor, Office of the Solicitor. And I'd also like to introduce David Hershfield who is in the audience, who assisted as economist on this project.

In response to requests from the public, MSHA is holding public hearings on its Pattern of Violations proposed rule. This is the fourth public hearing on this proposal. The earlier hearings were in Denver, Colorado, June 2nd; Charleston, West Virginia, June 7th; Birmingham, Alabama, June 9th; and in response to a

1 request from the public, MSHA will hold an additional
2 hearing in Hazard, Kentucky, on Tuesday, July 12th. We
3 will be putting a notice in the Federal Register
4 announcing the hearing.

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

9 As most of you know, the hearing will be
10 conducted in an informal manner. Formal Rules of
11 Evidence will not apply.

12 The hearing panel may ask questions of the
13 speakers. Speakers may ask questions of the panel.
14 Speakers and other attendees may present information to
15 the court reporter for inclusion in the rulemaking
16 record.

17 MSHA will accept written comments and other
18 appropriate information for the record from any
19 interested party, including those not presenting oral
20 statements.

21 MSHA is proposing to revise the Agency's
22 existing regulation on Pattern of Violations, which
23 applies to all mines, coal, and metal and non-metal,
24 surface and underground. MSHA determined that the
25 existing Pattern of Violations regulation does not

1 adequately achieve the intent of the Federal Mine Safety
2 and Health Act of 1977, or the Mine Act.

3 Congress included the Pattern of Violations
4 provision in the Mine Act so that operators would manage
5 safety and health conditions at mines and find and fix
6 the root causes of Significant and Substantial, or S&S,
7 violations to protect the safety and health of miners.

8 Congress intended that MSHA use the Pattern of
9 Violations provision to address operators who have
10 demonstrated a disregard for the safety and health of
11 miners. MSHA intended that the proposal would simplify
12 the existing Pattern of Violations criteria, improve
13 consistency in applying the Pattern of Violations
14 criteria, and more adequately achieve the statutory
15 intent.

16 The proposal would also encourage chronic
17 violators to comply with the Mine Act and MSHA's safety
18 and health standards. MSHA requests comments from the
19 mining community on all aspects of the proposed rule and
20 is particularly interested in comments that address
21 alternatives to key provisions in the proposal.

22 MSHA asked that commenters be specific in their
23 comments and submit detailed rationale and supporting
24 documentation for suggested alternatives.

25 The proposed rule included general criteria and

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

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

8 MSHA also requests comments on the best methods
9 for notifying operators and the mining public of changes
10 to these specific criteria.

11 In the public hearing notice, MSHA clarified
12 its proposal and moved its position a little further and
13 stated that any change to the specific criteria would be
14 made available to the public for comment, via posting on
15 the Agency's website, before MSHA uses it to review a
16 mine for a Pattern of Violations.

17 MSHA further stated that it planned to review
18 and respond to comments, revise as appropriate the
19 specific criteria, and post the Agency's response and any
20 revised specific criteria on the Agency's website. MSHA
21 asked for comments on this proposed approach to obtaining
22 public input into revisions to the specific Pattern of
23 Violations criteria. And I know that most of you know,
24 at least some of you know, that we have received a lot of
25 comment on the original proposal and then on the Agency's

1 proposed approach to the specific criteria that was
2 included in the public hearing notice.

3 MSHA also requested comments on the burden
4 that monitoring a mine's compliance record against the
5 proposed specific Pattern of Violations specific criteria
6 using the Agency's website would place on mine operators.
7 And as some of you know, I know you do, MSHA has
8 developed a web tool to make it easier for mine operators
9 to monitor their own compliance, and MSHA did that in the
10 interest of transparency and so that operators could --
11 you can take this web tool and an operator can put in his
12 or her mine ID number, and it populates the web tool and
13 shows an operator how an operator is with respect to the
14 specific criteria that's now posted on our website.

15 And from some of the other public hearings, I
16 did hear from members of the public that they found the
17 web tool very useful, and we can tell that it's being
18 used a lot. At some point, I asked you about how many?
19 Did you remember how many people had used it?

20 MR. MATTOS: It was about 800 a week.

21 MODERATOR SILVEY: Eight hundred a week. So
22 people are, and the operators are indeed using it; and as
23 I said, they did say they found it very useful.

24 Under the proposal, to be considered as a
25 mitigating circumstance, the proposed rule would provide

1 that an operator may submit a written safety and health
2 management program to the District Manager for approval.
3 MSHA would review the program to determine whether the
4 program's parameters would result in meaningful,
5 measurable, and significant reductions in S&S violations.

6 At this point, MSHA would like to clarify that
7 the Agency did not intend that the safety and health
8 management programs referenced in the proposal be the
9 same as those referenced in the Agency's rulemaking on
10 comprehensive safety and health management programs, and
11 in effect, the rulemaking on which we had three public
12 meetings last fall. The comprehensive safety and health
13 management program rulemaking has not gotten to the
14 proposed rule stage.

15 Rather, what MSHA intended was MSHA would
16 consider a safety and health management program as a
17 mitigating circumstance under the Pattern of Violations
18 proposal when it (1) includes measurable benchmarks for
19 abating specific violations that could lead to a Pattern
20 of Violations at a specific mine, and (2) addresses the
21 hazardous conditions at that mine.

22 In effect, if an operator were monitoring using
23 the web tool to monitor his or her safety performance and
24 saw that they were approaching the statistics in the
25 Pattern of Violations specific criteria, they could

1 create a safety and health program aimed at the types of
2 violations that they were seeing that would give rise to
3 the Pattern of Violations and come into MSHA with that
4 program before the operator would be placed on a Pattern
5 of Violations. They would come in with a program for
6 reducing S&S violations and the other types of criteria
7 that are included in the specific criteria that MSHA uses
8 to review a mine for a pattern.

9 And so far under the existing rule, mine
10 operators indeed who were notified of a potential Pattern
11 of Violations have come into the Agency with, under the
12 existing rule, a corrective action plan. That's the
13 terminology I think it's called, a corrective action, and
14 they have indeed made significant improvements in safety
15 and health violations and other parameters in the
16 criteria. They've made improvements at their mines.

17 MSHA requested detailed information and data on
18 the cost, benefits, and feasibility of implementing the
19 proposed provisions. MSHA requested specific comments on
20 its estimates of numbers of mines affected, which are
21 likely to vary from year-to-year.

22 As you address the proposed provisions, either
23 in your testimony today or in your written comments,
24 please be as specific as possible. We cannot
25 sufficiently evaluate general comments. You may submit

1 comments following this public hearing. Comments must be
2 received or postmarked by August 1st, and comments may be
3 submitted by any method identified in the proposed rule.

4 MSHA will make available a verbatim transcript
5 of this public hearing approximately two weeks after the
6 completion of the hearing. You may view the transcripts
7 of all the public hearings on MSHA's website,
8 www.msha.gov and on www.regulations.gov.

9 We will now begin today's testimony. If you
10 have a hard copy of your presentation, please provide it
11 to the court reporter. Please begin by clearly stating
12 your name and organization and spelling your name for the
13 court reporter to make sure that we have an accurate
14 record.

15 Our first speaker today is Joseph Casper with
16 the National Stone, Sand & Gravel Association.

17 MR. CASPER: Good morning.

18 MODERATOR SILVEY: Good morning.

19 MR. CASPER: My name is Joseph Casper --
20 C-A-S-P-E-R, of the National Stone, Sand & Gravel
21 Association.

22 NSSGA very much appreciates this opportunity to
23 comment on the proposal on revising the Pattern of
24 Violations rule. We provide the following comments.

25 We believe -- and this is an application off of

1 written comments that we submitted in April.

2 We believe that this program should be
3 carefully crafted so that it targets those operators that
4 repeatedly fail to live up to their obligations to
5 provide miners with a safe place to work.

6 NSSGA is concerned that there are several
7 significant gaps in the proposed rule. Currently, it's
8 impossible for commenters to thoroughly understand and
9 assess the proposal. Therefore, NSSGA requests that MSHA
10 re-propose the rule to address these gaps and allow
11 operators a fair opportunity to comment on the fully
12 proposed POV program as a whole.

13 Following is a summation of some of our key
14 concerns.

15 The POV criteria should be specified in the
16 rule. MSHA proposes to list its specific criteria for
17 POV status on the MSHA website but has not included
18 specific criteria for selection of operators. NSSGA
19 believes that the specific criteria to be used should be
20 detailed in the proposal.

21 Also, it is essential that the criteria not be
22 a moving target, especially if operators are expected to
23 monitor their own performance in order to avoid POV
24 status and have that be the only way for the operators to
25 know exactly where they stand with the Agency as far as

1 POV action possibly is concerned.

2 Second, the POV criteria should be clear and
3 easy to access. NSSGA agrees with MSHA's data goal to
4 provide clear, transparent, and accessible POV criteria;
5 however, we were struck that the proposal deletes the
6 current provision in POV allowing for notification of
7 proposed POV status.

8 Third, POV status should only result from
9 repeated violations. As MSHA noted in the proposal,
10 Congress intended for the POV program to apply to mine
11 operators with a record of repeated S&S citations of
12 violations, who have not responded to the Agency's other
13 enforcement efforts. We're concerned that the proposed
14 rule does not adequately reflect the legislative intent
15 that POV is intended for circumstances of repeated
16 violations by unresponsive operators.

17 Rather, MSHA's screening criteria are based on
18 multiple violations. Thus, under the current proposal,
19 it's our understanding that a facility can be placed on
20 POV status as a result of a single inspection with
21 multiple citations, or as a result of one or two
22 inspections with POV citations followed by one inspection
23 with a high number of citations.

24 This is clearly not the Congressional intent
25 for the POV rule tool, and a revision of the rule should

1 squarely address this problem.

2 Under the current rule and screening criteria,
3 a single inspection with multiple citations can place a
4 mine under status. However, a facility is not currently
5 placed under full POV status unless it fails to improve
6 its performance over time.

7 If there is no potential POV status under the
8 proposed rule, we see the problem as being that it may be
9 difficult, if not impossible, for an operator to
10 determine if it is threatened with POV status. It is
11 difficult to comment on exactly how the criteria should
12 reflect the need to address repeated violations, as
13 opposed to multiple violations, without knowing what
14 specific criteria MSHA proposes to apply.

15 Fourth, if POV status is not based on final
16 orders, punitive elements violate due process rights.
17 NSSGA understands MSHA's preference to base POV status on
18 citations and orders issued as opposed to final orders
19 because there can be a significant delay in the final
20 determination of a citation or order challenged by an
21 operator. This delay hampers MSHA's ability to use POV
22 as a timely tool.

23 However, it is essential to note that if
24 actions are to be based on non-final orders, they need
25 not be punitive in nature without violating the

1 operator's due process rights. The Fourteenth Amendment
2 prohibits the Federal Government from depriving citizens
3 of liberty or property without due process of law, and
4 this means that actions that are punitive cannot be taken
5 without appropriate access to review.

6 This does not mean that MSHA can take no
7 actions prior to a final order. Certainly, it can take
8 actions designed to protect miners from harm, and it
9 certainly has the discretion to increase the level of
10 scrutiny of a mine operation with repeated citations or
11 orders.

12 Fifth, if POV status is based on citations
13 subsequently vacated, POV status must be terminated.

14 The proposed rule calls for terminating POV
15 status only if an inspection of the entire mine reveals
16 no S&S citations. However, because the proposal calls
17 for basing POV status on non-final orders, POV status
18 must also be terminated, it seems to us, if citations or
19 orders upon which the status is based are subsequently
20 reversed or reduced in severity.

21 Finally, remedial plans should not be confused
22 with comprehensive safety and health management system
23 programs. MSHA indicates in the Preamble that a mine
24 operator finding that a mine is at risk of POV status may
25 submit a written safety and health management program to

1 MSHA for approval, and that such a program may serve as a
2 mitigating circumstance that may help the operator avoid
3 POV status.

4 NSSGA does not object to the concept of a mine
5 operator working with MSHA to develop a remedial plan to
6 address problems that could lead to POV. However, NSSGA
7 is concerned that the language in the Preamble may
8 suggest that MSHA will require comprehensive safety and
9 health management systems that go beyond the particular
10 concerns underlying the potential POV status.

11 We support safety and health management systems
12 used and have testified so last fall here at MSHA.
13 However, we don't believe that a safety and health
14 management system should be mandated for the entire
15 operation if the basis for POV status is much more
16 limited than being operation-wide.

17 In summation, the proposed rule stands, it
18 seems to us, as a positive effort toward developing a
19 program that will be transparent and effective in
20 allowing the Agency to go after operators that aren't
21 committed to safety and health and compliance. However,
22 we believe that more work needs to be done. MSHA should
23 re-propose the rule and include specific criteria that it
24 plans to use as a basis for determining which operations
25 are placed on a pattern.

1 In particular, reasonable cost estimates cannot
2 be performed without an understanding of those specific
3 criteria. Also a determination of an operator's POV
4 status must be based solely on those citations that are
5 fully adjudicated.

6 This closes our comments, and we appreciate the
7 opportunity to provide to you our feedback.

8 MODERATOR SILVEY: Thank you. I have a few
9 comments and a few questions.

10 As you stated, the proposal should not be a
11 moving target. So I'd like to ask your response to the
12 approach that was proffered in the public hearing notice;
13 that is, that the specific criteria, as everybody knows,
14 the specific criteria that we use today to review a mine
15 for a Pattern of Violations is on the website. Then
16 subsequent to putting it on the website, we developed
17 this web tool whereby a mine operator could monitor his
18 or her performance against that specific criteria.

19 Now, in the public hearing notice, we said
20 before we change that criteria, that specific criteria,
21 assuming that a year from now we were going to review a
22 mine for a pattern, before we made a change to it, we
23 would post it on the website. We would take comments
24 from the public. We would then evaluate the comments and
25 respond to the comments, post our response; and if we

1 revised that specific criteria in response to some of the
2 comments we got, then we would post the specific
3 criteria.

4 I mean, what's your response to that approach?
5 I guess I say that because at one point, you said they
6 should -- mine operators should know what the specific
7 criteria are, and we -- and it was with that in mind,
8 that we intended that operators, indeed, and the public
9 know what the specific criteria are.

10 MR. CASPER: Right.

11 MODERATOR SILVEY: But what is your response to
12 that approach?

13 MR. CASPER: We will develop a formal response
14 that I can provide you, and I can shortly after.

15 MODERATOR SILVEY: Okay.

16 MR. CASPER: That can be very helpful, and the
17 explanation is very helpful, and it's more clear to us
18 than it was when it was first put on the site.

19 MODERATOR SILVEY: Yeah.

20 MR. CASPER: So, thank you.

21 MODERATOR SILVEY: The other thing I want -- I
22 do want and I made some statement about it. I said at
23 one of the other public hearings a little bit jokingly,
24 but maybe not so jokingly, that we got to change the name
25 of this comprehensive safety and health management

1 program because people are confusing it with safety and
2 health management systems, indeed, that rulemaking that
3 we started but we have not advanced beyond the
4 preliminary stages of that rulemaking as all of you know.

5 We took -- we had public meetings and took
6 input into the public before we even started to develop a
7 proposed rule, which is what many of you have told us for
8 so many years. So in any event, we -- the safety and
9 health management program provision, that would be a part
10 of a mitigating circumstance, where an operator could
11 come into MSHA as a mitigating circumstance, if the
12 operator felt like they were approaching a Pattern of
13 Violations, what they would do is develop a program aimed
14 at the specific conditions at the mine, the types of
15 violations -- I don't know, whatever they are, you know,
16 haulage violations or guarding violations or whatever
17 type, the types of violations at the mine giving rise to
18 the -- to leading to the pattern.

19 So we said that they could come in with a
20 program, whatever kind of program we want to call it,
21 corrective program, aimed at addressing those conditions.
22 So, you know, I want to sort of, kind of hope that people
23 see what we were talking about in doing that; and in many
24 ways, that could -- not in many ways. That does. That
25 provides a remedial approach. That provides an

1 opportunity for the operator to remediate the conditions
2 at the mind.

3 MR. CASPER: Thank you. We appreciate that
4 kind of clarification, and to the extent that that kind
5 of program can be specific to the operation --

6 MODERATOR SILVEY: Right.

7 MR. CASPER: -- we think that would be very
8 helpful.

9 And to be candid, our concern on the safety and
10 health management system proposal, to the extent that we
11 had any basis for comment, was a fear that something
12 might come down in a one size fits all kind of approach,
13 the likes of which we think risks undercutting the cause
14 for managing effectively and successfully for safety and
15 health. So thank you for that clarification.

16 MODERATOR SILVEY: Yeah, those were two
17 different -- we didn't intend that, but we have gotten
18 comments. So, you know, obviously that was -- there may
19 have been some confusion.

20 MR. CASPER: Got you.

21 MODERATOR SILVEY: Right.

22 MR. CASPER: Thank you.

23 MODERATOR SILVEY: I don't have any others.

24 Do you have any?

25 MR. MATTOS: I just have one.

1 MODERATOR SILVEY: Okay.

2 MR. MATTOS: Joe --

3 MR. CASPER: Yes.

4 MR. MATTOS: -- just -- I just want to make
5 sure I understand the distinction between repeat --
6 repeated violations and multiple violations.

7 MR. CASPER: Well, we saw it that you had to
8 have repeated violations of the same standard in the
9 traditional POV approach, and we thought that that ought
10 to be the basis for going forward, as opposed to not
11 having a focus just on repeated violations. Because then
12 it's a different kind of POV program than it was in the
13 past.

14 MR. MATTOS: Okay. I think -- I thought that's
15 where you --

16 MR. CASPER: Yeah.

17 MR. MATTOS: I just wanted to make sure.

18 MR. CASPER: Yeah.

19 MR. JONES: Have you or your members used the
20 POV web tool?

21 MR. CASPER: I have looked it. I don't know
22 that the members have.

23 MR. JONES: What is your opinion of the web
24 tool?

25 MR. CASPER: It looked helpful, but I'll tell

1 you, I -- the basis of it -- the basis of the success is
2 going to be based in part on it having completely
3 accurate information and the database --

4 MODERATOR SILVEY: I think we heard from some
5 of your members who had used it.

6 MR. CASPER: -- having accurate information.
7 We've had challenges with that in the past in terms of
8 database control. So accuracy is critical, but the tool
9 itself -- and I sat at the run through -- was impressive
10 and it was smooth and user friendly.

11 It is a concern to us, however, that -- for an
12 operator to have to check that, I guess monthly according
13 to the proposal, still the claim of five minutes to do
14 that monthly is overly optimistic. I think given what an
15 operator has to juggle in terms of checking for POV
16 status, it would necessitate spending more than five
17 minutes time, not that the tool isn't friendly. It seems
18 to be a user-friendly tool and worked fine in the run
19 through, but that is a concern of ours.

20 MODERATOR SILVEY: Yeah, we did hear from
21 members who have used it.

22 MR. CASPER: Okay. Good.

23 MODERATOR SILVEY: Okay. Thank you very much.

24 MR. CASPER: Thank you.

25 MODERATOR SILVEY: Our next person will be

1 Linda Raisovich-Parsons with the United Mine Workers.

2 MS. RAISOVICH-PARSONS: Good morning.

3 MODERATOR SILVEY: Good morning.

4 MS. RAISOVICH-PARSONS: My name is Linda
5 Raisovich-Parsons, and I'm here today on behalf of the
6 United Mine Workers of America. I appreciate the
7 opportunity to address the UMWA's thoughts on the
8 proposed rule for Pattern of Violations.

9 The UMWA generally supports the rule as
10 proposed by MSHA. However, we have certain concerns
11 about the proposal, which I will discuss today.

12 The Pattern of Violations enforcement tool has
13 been at Section 104(e) of the Mine Act since 1977; yet,
14 MSHA's use of this tool has been virtually nonexistent
15 until very recently. We encourage MSHA to maintain the
16 POV procedure that is easy for the mining community to
17 understand and for MSHA to enforce.

18 The recent online tool for monitoring whether a
19 mine meets the Pattern of Violations criteria is a step
20 in the right direction and will be a useful tool for the
21 mining community to monitor their mine's POV score. We
22 commend MSHA for this effort.

23 UMWA agrees with the elimination of the initial
24 screening process and the written notice of a potential
25 Pattern of Violations currently required under 104.3 of

1 the Code. Mine operators should have an ongoing
2 awareness of their own health and safety practices and
3 history of the day-to-day operations of their mine. It's
4 not necessary for MSHA to forewarn them that they are in
5 trouble and could have a potential Pattern of Violations
6 forthcoming. Any mine operator should be fully aware of
7 shortcomings in their health and safety program and be
8 aware of the need for more resources and attention.

9 The new POV webpage criteria screening is a
10 sufficient tool to permit the mine operator to monitor
11 their own POV criteria history. Because the numbers on
12 this webpage are refreshed monthly, the industry can
13 access up-to-date statistics for their operations. So
14 there's no reason for the Government to provide an
15 advanced warning.

16 With the new POV webpage, mine operators will
17 be able to identify the specific areas where their
18 problems lie from the criteria red-flagged in their
19 stats. For this reason, the UMWA agrees with the
20 elimination of the written notice of a potential Pattern
21 of Violations, as proposed.

22 The UMWA also supports the Agency's removal of
23 the current limitation that MSHA only consider final
24 orders for purposes of a Pattern of Violations. The
25 problem with the current system that limits the Pattern

1 of Violations analysis to only final orders is that it
2 could take years to resolve a contested citation. By the
3 time such citation becomes final, the conditions at the
4 mine may bear no resemblance to what they were when the
5 hazard was first cited. In the meantime, miners may have
6 been exposed to extraordinarily unsafe conditions by a
7 repeated violator, and the Agency is powerless to use
8 this enforcement tool until those challenged citations
9 become final.

10 The incentive for the operator to challenge all
11 S&S citations would be great in order to avoid at Pattern
12 of Violations. In 1989, when the rule was originally
13 proposed to only consider final orders, the Union raised
14 this concern. I personally testified in Denver,
15 Colorado, on November 8, 1989, predicting that if the
16 Agency limited themselves to final orders, that operators
17 would be encouraged to challenge all citations and orders
18 to simply avoid consideration for a Pattern of
19 Violations.

20 And now here we are, 22 years after I made that
21 prediction, with a major backlog of cases before the
22 Federal Mine Safety and Health Review Commission and the
23 first mine to be placed on a POV only recently. I must
24 have been psychic or perhaps just using common sense. If
25 there is a loophole to avoid a Pattern of Violations,

1 rest assured the industry will take full advantage.

2 Some may argue that the operator's due process
3 would be compromised by allowing MSHA to consider non-
4 final citations and orders for POV determinations.
5 However, I care to differ. The plain language of the
6 Mine Act does not require MSHA to consider only final
7 citations and orders for it to use POV.

8 Secondly, the Mine Act includes many sections
9 that require an operator to immediately correct problems
10 MSHA identifies without exhausting challenge procedures.
11 Due process protections will still be available, just
12 later in time.

13 For example, a failure to abate an order under
14 Section 104(b) and an unwarrantable failure under Section
15 104(d) are issued on the basis of previous citations,
16 whether or not those citations have been challenged.

17 Likewise, an operator that disputes an
18 inspector's determination as to whether an imminent
19 danger exists, must immediately comply with the imminent
20 danger order and withdraw miners, though it still has the
21 right to challenge MSHA's issuance of the order.

22 The Senate Committee gave a fairly extensive
23 comparison between the unwarrantable and the POV
24 provisions in the legislative history of the Act. It
25 explained that the violation setting into motion for the

1 unwarrantable failure sequence "must be of Significant
2 and Substantial nature and be the result of the
3 operator's unwarrantable failure to comply."

4 In comparison, it pointed out there is not a
5 requirement that the violations establishing the Pattern
6 of Violations be the result of the operator's
7 unwarrantable failure, only that they be of Significant
8 and Substantial nature.

9 The Senate Committee concluded its discussion
10 by pointing out that it is the Committee's intention that
11 the Secretary or his authorized representative may have
12 both enforcement tools available and that they be used
13 simultaneously if the situation warrants.

14 If an operator's challenge to the underlying
15 citations effectively blocks implementation of the POV,
16 the Secretary cannot use both enforcement tools
17 simultaneously as Congress intended.

18 Further, the Court is reviewing due process
19 issues to balance the private interest of the party,
20 claiming a deprivation of due process against both the
21 nature and importance of the Government's interest and
22 the risk of the Government making a mistake when
23 depriving due process and the consequences any such
24 mistake would entail.

25 When there is a compelling Government interest

1 at stake, such as miner's health and safety, as the Mine
2 Act's first purpose states, the Court finds that an
3 after-the-fact hearing satisfies due process. The UMWA
4 believes that any due process concerns are adequately
5 protected by the Federal Mine Safety and Health Review
6 Commission and its judicial review procedures.

7 If the challenged citations are later reduced
8 to non-S&S or vacated, then it could be considered as
9 mitigating circumstances and the situation reevaluated.

10 Lastly, we recognize that the legislative
11 history granted the Secretary broad discretion in
12 establishing criteria for determining when a Pattern of
13 Violations exists. However, the UMWA believes that the
14 Agency has gained sufficient experience over the 30 years
15 since the Act first became law to now set the criteria
16 and still satisfy the discretion Congress reserved for
17 the Secretary.

18 We believe that absolute numbers should not
19 control for the criteria. For example, the record for
20 large mines should not be compared with the record of
21 small mines, or vice versa. The experience of mines
22 should be compared to those of comparable mines and
23 viewed according to comparable inspection hours when
24 evaluating their health and safety records.

25 The eight criteria listed in the proposed rule

1 represent appropriate factors for MSHA to consider for
2 purposes of POV, but further explanation of how these
3 criteria will be considered or weighted should be
4 established at the outset. There must also be an Agency
5 commitment to apply the criteria in a consistent manner.
6 The Agency must also give consideration to circumstances,
7 which could create an unfairness in the health and safety
8 record for any given mine.

9 At union mines, a disproportionately higher
10 number of inspection hours are devoted to large unionized
11 operations. At the union mines, a miners' representative
12 routinely travels with a MSHA inspector and points out
13 any violations that they may see and consequently union
14 represented mines are issued a disproportionately larger
15 number of citations compared to their non-union
16 counterparts where miners are often intimidated and
17 discouraged from pointing out violations.

18 Further, the injury statistics are not a
19 reliable gauge of health and safety at a mine because we
20 have long known about chronic underreporting of accidents
21 at many mines. Our union mines make sure that all
22 accidents are reported and usually show a higher accident
23 rate than our non-union counterparts because of the
24 underreporting.

25 For this reason, we recommend that the fatality

1 rates should be weighted more heavily than injury rates.
2 MSHA should also aggressively utilize its Part 50 audits
3 to determine whether operators are maintaining records
4 and reporting accidents and injuries as required. When
5 underreporting is found, these miners should be targeted
6 -- these mines should be targeted for closer scrutiny for
7 a POV.

8 Further, when any information suggests that an
9 operator is covering up violations in an effort to
10 mislead MSHA, they should be given special focus. The
11 impact inspections MSHA is currently conducting has
12 brought to light what goes on behind the scenes when it
13 is believed that MSHA is not looking. The flagrant
14 violations of the law MSHA found at some of these mines
15 should be considered to give these mines special focus
16 for a POV.

17 Evidence such as what has been revealed in the
18 Upper Big Branch explosion and investigation which
19 indicates that advance notice of MSHA inspectors were
20 routinely provided by non-security and further that
21 miners were intimidated and threatened if they made a
22 safety complaint, provides a clear picture of how these
23 mines are operated.

24 When such information comes to light, MSHA must
25 give special consideration for these operations to be put

1 on a Pattern of Violations.

2 I appreciate the opportunity to testify today
3 and believe these regulatory changes are critically
4 important and necessary to restore to MSHA the powers
5 Congress intended it to have in Section 104(e) of the
6 Mine Act, but has been rendered ineffective by virtue of
7 restraints of existing regulations.

8 MODERATOR SILVEY: Thank you.

9 MS. RAISOVICH-PARSONS: Do you have any
10 questions?

11 MODERATOR SILVEY: Yeah, I just have one. With
12 respect to your specific -- your comment about the
13 criteria, you said the eight criteria are appropriate
14 factors but what was your comment? But did --

15 MS. RAISOVICH-PARSONS: Our concern is you're
16 given the flexibility to change that criteria; but as you
17 stated, when you answered the previous gentleman's
18 question, if that is, you know, if that's put out there
19 for the public to have some input into it, that's fine.

20 MODERATOR SILVEY: Okay.

21 MS. RAISOVICH-PARSONS: But, you know, for the
22 Secretary to just change the criteria, I don't think it's
23 fair to the mining community, and I don't think it's fair
24 to the operators or the miners, not to --

25 MODERATOR SILVEY: Okay.

1 MS. RAISOVICH-PARSONS: -- have the opportunity
2 to have some input into that.

3 MODERATOR SILVEY: Okay. But if the specific
4 criteria is put out, like I said --

5 MS. RAISOVICH-PARSONS: Right.

6 MODERATOR SILVEY: -- posted on the website --

7 MS. RAISOVICH-PARSONS: Like the rulemaking.

8 MODERATOR SILVEY: -- we will take comment.

9 Okay. Okay. That's all I had.

10 Did you have anything?

11 MR. MATTOS: No.

12 MODERATOR SILVEY: Okay. Thank you.

13 The next speaker is Josh Nelson with CREDO.

14 MR. NELSON: Good morning.

15 MR. MATTOS: Good morning.

16 MODERATOR SILVEY: Good morning.

17 MR. NELSON: My name is Josh Nelson. That's
18 N-E-L-S-O-N. I'm a Campaign Manager with CREDO Action.

19 This proposal will change the way the Mine
20 Safety and Health Administration identifies mines that
21 demonstrate a pattern of serious violations.

22 The Agency would like to take citations that
23 are under appeal into account in such considerations
24 since appeals can take years to resolve. In the time
25 that an appealed citation remains unresolved, miners are

1 subjected to dangerous working conditions that can result
2 in injury or death.

3 I wanted to take just a second to respond to
4 something that Mr. Casper said in previous testimony. He
5 indicated that this rule would make it difficult for
6 operators to know if they're in danger of reaching POV
7 status. There's a really simple solution to that.
8 Operators that follow all safety rules will not have this
9 problem. So it's a really simple way to solve that
10 problem.

11 Further, this information, as has been
12 mentioned, is readily available on MSHA's website within
13 the web tool.

14 Coal Association lobbyist, Chris Hamilton,
15 argued at a hearing last week that taking pending
16 citations into account violates fundamental principles of
17 fairness. I'd say the opposite is true. Coal miners
18 deserve every protection possible. Not taking viable
19 steps to reduce workplace injuries and deaths would
20 violate principles of fairness.

21 Taking all citations into account when
22 determining which mines are guilty of a Pattern of
23 Violations will reduce workplace injuries and save lives.
24 MSHA should move forward with this proposal immediately,
25 despite the objections of the coal industry.

1 Here's the bottom line. No other industry or
2 profession in the world could get away with such a dismal
3 record of following the rules. If a doctor was caught
4 breaking the rules multiple times, and it caused patients
5 to die, she would lose her license to practice medicine.
6 If a lawyer disregarded the rules governing his
7 profession and violated them over and over again, he
8 would be disbarred and would no longer be allowed to
9 practice law. If anyone in this room got three or four
10 speeding tickets in a short period of time, putting the
11 lives of others at risk, we'd lose our driver's license
12 and no longer be allowed behind the wheel of a car.

13 Why should the coal industry be held to a
14 different standard? The only adequate answer to this
15 question is that it shouldn't. Mines that have
16 established a pattern of safety violations should be shut
17 down immediately and coal companies that own multiple
18 mines with poor safety records should no longer be
19 allowed to mine coal. This is how it works in other
20 industries, and it is far past the time that the American
21 coal industry enter the 21st Century and start looking
22 out for the welfare of its employees.

23 Thank you for your time.

24 MODERATOR SILVEY: Thank you.

25 Those are all the persons and organizations who

1 have signed up.

2 Is there anybody else who wishes to comment?

3 Anybody else who wishes to comment?

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

8 I want to thank everybody who made
9 presentations, and I want to also thank those who did not
10 make presentations but who attended the hearing because
11 that suggests to us that you have an interest in the
12 rulemaking, and we appreciate that.

13 I want to emphasize that all comments, as I
14 said earlier, now must be received or postmarked by a new
15 date of August 1, 2011.

16 MSHA will take your comments and your concerns
17 into consideration in developing the final rule; and as I
18 mentioned earlier, we will have another public hearing on
19 July 12th in Hazard, Kentucky. I encourage all of you to
20 continue to participate throughout this rulemaking
21 process and in all other MSHA rulemakings. Thank you.

22 The hearing is now concluded. Thank you very
23 much.

24 (Whereupon, at 10:15 a.m., the hearing in the
25 above-entitled matter was concluded.)

REPORTER'S CERTIFICATE

CASE TITLE: Patterns of Violations
HEARING DATE: June 15, 2011
LOCATION: Arlington, Virginia

I hereby certify that the proceedings and evidence are contained fully and accurately on the audio and notes reported by me at the hearing in the above case before the Department of Labor, Mine Safety and Health Administration.

Date: June 15, 2011

ANTHONY & ASSOCIATES, INC.


TIMOTHY J. ATKINSON, JR. (ma)
(Official Reporter)