

TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
PATTERN OF VIOLATIONS)

Pages: 1 through 52
Place: Hazard, Kentucky
Date: July 12, 2011

ANTHONY & ASSOCIATES, INC.
770.590.7570

ANTHONY & ASSOCIATES, INC.
770.590.7570

IN THE MINE SAFETY AND HEALTH ADMINISTRATION

IN THE MATTER OF:)
)
PATTERN OF VIOLATIONS)

Hazard, Kentucky

Tuesday
July 12, 2011

APPEARANCES

MSHA Panel: PATRICIA W. SILVEY, JAY MATTOS

Speakers:

WES ADDINGTON, Appalachian Citizens Law Center
TONY OPPEGARD, Attorney, Lexington, Kentucky
BILL BISSETT, President, Kentucky Coal Association

P R O C E E D I N G S

(10:00 a.m.)

1
2
3 MODERATOR SILVEY: Again, good morning. My
4 name is Patricia W. Silvey. I'm the Deputy Assistant
5 Secretary for Operations for the Mine Safety and Health
6 Administration, and I will be the moderator of this
7 public hearing on MSHA's Proposed Rule on Pattern of
8 Violations.

9 On behalf of Assistant Secretary of Labor for
10 Mine Safety and Health, Joseph A. Main, I would like to
11 welcome all of you here today. I'd like to introduce the
12 other member of my panel, who is Jay Mattos, and he is
13 Chair of the Pattern of Violations Rulemaking Committee.

14 In response to requests from the public, MSHA
15 is holding public hearings on its Pattern of Violations
16 Proposed Rule. This is the fifth hearing on the
17 proposal; and, as you know, these hearings are being held
18 in tandem with the hearing on the Proposed Rule on
19 Examinations. The other hearings were in Denver,
20 Colorado; in Charleston, West Virginia; in Birmingham,
21 Alabama, and at our headquarters in Arlington, Virginia.

22 Transcripts of the hearings are posted on
23 MSHA's website.

24 The purpose of this hearing is to receive
25 information from the public that will help MSHA evaluate

1 the requirements in the proposal and produce a final rule
2 that will improve health and safety conditions at mines.

3 As most of you know, the hearings will be
4 conducted in an informal manner. Formal Rules of
5 Evidence will not apply.

6 The hearing panel may ask questions of the
7 speakers and the speakers may ask questions of the panel.
8 Speakers and other attendees may present information to
9 the court reporter for inclusion in the rulemaking
10 record.

11 MSHA will accept written comments and other
12 information for the record from any interested party,
13 including those not presenting oral statements. We ask
14 that everyone sign the attendance sheet.

15 MSHA is proposing to revise the Agency's
16 existing regulation on Pattern of Violations, and it
17 applies, as you know, to all mines, coal and metal and
18 nonmetal mines, surface and underground. MSHA determined
19 that the existing Pattern of Violations regulation does
20 not adequately achieve the intent of the Federal Mine
21 Safety and Health Act of 1977, or the Mine Act.

22 Congress included the Pattern of Violations
23 provision in the Mine Act, so that operators would manage
24 safety and health conditions at mines and find and fix
25 the root causes of Significant and Substantial, or S&S,

1 violations to protect the safety and health of miners.

2 Congress intended that MSHA use the Pattern
3 of Violations provision to address operators who have
4 demonstrated a disregard for the safety and health of
5 miners. MSHA intended that the proposal would simplify
6 the existing Pattern of Violations criteria, improve
7 consistency in applying the Pattern of Violations
8 criteria, and more adequately achieve the statutory
9 intent.

10 The proposal would also encourage chronic
11 violators to comply with the Mine Act and MSHA's safety
12 and health standards. MSHA requested comments from the
13 mining community on all aspects of the Proposed Rule and
14 is particularly interested in comments that address
15 alternatives to key provisions in the proposal.

16 MSHA asks that commenters be specific in
17 their comments and submit detailed rationale and
18 supporting documentation for any suggested alternative.
19 The Proposed Rule included general criteria and provided
20 that the specific criteria used in MSHA's review to
21 identify mines with a pattern of S&S violations would be
22 posted on the Agency's website.

23 In the Preamble to the proposal, MSHA
24 requested suggestions on how the Agency should obtain
25 comments from mine operators and miners during the

1 development of and periodic revision to the specific POV
2 criteria.

3 MSHA also requested comments on the best
4 methods for notifying mine operators and the mining
5 public of changes to these specific criteria. In the
6 public Hearing Notice, MSHA refined its position and
7 clarified its proposal and stated that any change to the
8 specific criteria would be available to the public for
9 comments, via posting on the Agency's website, before
10 MSHA uses it, to review a mine for a Pattern of
11 Violations.

12 MSHA plans to review and respond to the
13 comments, revise as appropriate, the specific criteria
14 and post the Agency's response and any revised specific
15 criteria on the Agency's website. MSHA requests comments
16 on this proposed approach to obtaining an input into
17 revisions to the specific Pattern of Violations criteria.

18 MSHA also requested comments on the burden
19 that monitoring a mine's compliance record against the
20 proposed Pattern of Violations specific criteria using
21 the Agency's website would place on mine operators. And,
22 as some of you know, MSHA has developed a web tool to
23 make it easier for mine operators, or quite frankly, mine
24 operators, miners, or any members of the public to
25 monitor a mine operator's compliance.

1 With this web tool, all a person would have
2 to do is go in, pull up the web tool, on MSHA's website,
3 put in a mine identification number, and, so, that tool
4 would then populate that mine and let one know how close
5 or how far away that mine is from the specific Pattern of
6 Violations criteria.

7 And I'd ask Jay right now, at some point
8 earlier, I know we had gotten a lot of hits on that
9 website. Do you know now about how many?

10 MR. MATTOS: I think about a thousand a
11 month.

12 MODERATOR SILVEY: A thousand a month. So,
13 people are, indeed, using that web tool. And at some of
14 the other public hearings, we were told that people found
15 it useful, and, quite honestly, they have a few other
16 comments to say about it, too. So, you know, obviously,
17 anybody can read the transcripts up to now, or the
18 comments, for that matter, to see what people had to say
19 about the web tool.

20 Under the proposal, to be considered as a
21 mitigating circumstance, the Proposed Rule would provide
22 that an operator may submit a written safety and health
23 management program to the District Manager for approval.
24 MSHA would review the program to determine whether the
25 program's parameters would result in meaningful,

1 measurable, and significant reductions in S&S violations.

2 And I would also, I guess I turn to Jay, for
3 the mines that have been noticed -- that have been
4 provided PPOV notices, most of them have submitted --
5 under the existing procedures -- we call it Progressive
6 Action Programs, but they have submitted them, all of
7 them have submitted them, and most of them have met their
8 times -- Is that right? And, so, they have, indeed,
9 reduced their S&S violations then and whatever the other
10 parameters were for the specific criteria.

11 MSHA would like to clarify that the Agency
12 did not intend that the safety and health management
13 programs referenced in the Pattern of Violations proposal
14 be the same as that referenced in the Agency's rulemaking
15 on comprehensive safety and health management programs.
16 Some people got the two confused. But the comprehensive
17 safety and health management program rulemaking has not
18 yet gotten to the Proposed Rule stage, and those were two
19 different concepts.

20 MSHA would consider a safety and health
21 management program under the POV rulemaking as a
22 mitigating circumstance when it (1) includes measurable
23 benchmarks for abating specific violations that could
24 lead to a Pattern of Violations at that specific mine;
25 and (2) when it addresses hazardous conditions at that

1 mine.

2 MSHA requested detailed information and data
3 on cost, benefits, and feasibility of implementing the
4 proposed POV Rule. MSHA requested specific comments on
5 its estimates of the numbers of mines affected, which are
6 likely to vary from year-to-year.

7 As you address the proposed provisions,
8 either in your testimony or in your written comments,
9 again, please be as specific as possible, as we cannot
10 sufficiently evaluate general comments. You may submit
11 comments following this public hearing. They must be
12 received or postmarked by August 1, 2011.

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

18 We will now begin today's testimony. If you
19 have a copy of your presentation, please provide a copy
20 to the court reporter and to the MSHA panel, if you have
21 a copy. Please begin clearly by stating your name and
22 organization and spelling your name for the court
23 reporter to make sure that we have an accurate record.

24 Our first speaker today is -- and our first
25 speaker, I believe is also Bill Bissett with the Kentucky

1 Coal Association. And, if he's not here, is Mr. Moss
2 here, David Moss, also with the Kentucky Coal
3 Association?

4 Okay. Having heard neither Bill Bissett nor
5 David Moss, our next speakers will be Charles Scott
6 Howard and Leonard Joseph, representing Cumberland River
7 Coal Company.

8 MR. MATTOS: Scott is not going to testify.

9 MODERATOR SILVEY: Okay.

10 MR. MATTOS: Leonard had some thing come up
11 this morning and couldn't make it.

12 MODERATOR SILVEY: Okay. Then, our next
13 speaker will be Wes Addington, Appalachian Citizens Law
14 Center.

15 MR. ADDINGTON: My name is Wes Addington.
16 I'm an attorney with the Appalachian Citizens Law Center.
17 We're a non-profit law firm that represents working
18 miners on issues of mine safety and health.

19 I had previously submitted written comments
20 on the Proposed Rule on Pattern of Violations, and I
21 would like to add a few additional comments to my earlier
22 remarks.

23 The Law Center really applauds MSHA's work on
24 this Proposed Rule. I do believe that it's long, long,
25 overdue. For decades, MSHA has failed miserably to

1 implement the '77 Act and the Pattern of Violations
2 provision of Section 104(e).

3 Actually, the Agency took steps when they
4 promulgated the current rule, which made it much, much,
5 more difficult to place a mine on a Pattern of
6 Violations, and, then, that's why there were, you know,
7 after 33 years, there were no mines ever put on a Pattern
8 of Violations.

9 I mean, essentially this Act was passed the
10 year that I was born. And up until this year, MSHA has
11 never used this authority, and that's a real travesty to
12 miners. It's a great provision of the law. It doesn't
13 seek to punish mine operators. It seeks to go after the
14 worst of the worst, the most chronic violators. And the
15 fact that, you know, it's just now being addressed is
16 disappointing. However, I am very encouraged that it is
17 finally being addressed. And I think MSHA is taking,
18 specifically, taking the right steps to currently correct
19 the problems with the current regulation.

20 Specifically, we support the Section 104.2
21 pattern, criteria -- the proposed rule on Section 104.2
22 Pattern of Violations criteria. I think the combination
23 of the current Sections of 104.2 and 104.3, you know,
24 simplifies the rule and makes it much easier to
25 implement.

1 I think the most important portion of that is
2 the elimination of the current requirement in 104.3(b)
3 that only citations and orders that have become final are
4 used to identify the mine's Pattern of Violations status.
5 I mean, that current rule is just fully unworkable. It's
6 unreasonable in its current form. It, basically,
7 protects the most chronic violators.

8 You know, because I've noted in my written
9 comments that MSHA had said that on average a contested
10 violation takes 518 days to become final. Well, since
11 then, I've also seen data that says the average
12 unwarrantable failure violation takes currently about 841
13 days from issuance to final order to become final.

14 I'll note that the mine at the Upper Big
15 Branch Mine, I believe had 48 unwarrantable failure
16 orders in 2009. Well, 841 days is a ridiculous amount of
17 time to wait for MSHA to address immediate dangers. I
18 think that the current rule would allow MSHA to evaluate
19 mines in a timely way, so as not to, you know, punish
20 mines for their activities years ago.

21 But, actually, look at what they're doing
22 currently, and, if they're -- you know, if they have 48
23 unwarrantable failures, they can take action immediately
24 to protect those miners, because, obviously, that can be
25 taken as a serious, serious, problem in that mine.

1 You know -- and as I noted in my written
2 comments, the argument that there's a -- by the industry,
3 that there's a due process issue by not requiring that
4 the citations be final orders. It's really a ridiculous
5 argument. It's not a serious argument. It's just an
6 argument used to avoid implementation of the '77 Act.
7 The data shows that only about 3 percent -- in coal
8 mining, only about 3 percent of citations are vacated or
9 withdrawn, and that's the data from fiscal year 2009 and
10 2010.

11 Well, as I used in an example in my written
12 comments, the Ruby Energy Mine amassed 584 S&S violations
13 within a 24-month screening period. And that criteria at
14 that time was only 20 S&S violations. To think that if
15 the -- if the percentage of withdrawing or vacating
16 citations is only 3 percent, well, 3 percent of 584 would
17 never get them down to 20, not even close. Even if the
18 S&S reduction rate, which I believe I've seen some stats,
19 you know, may be around 15 percent from reducing an S&S
20 violation down to a non-S&S violation. I mean, it's not
21 even in the same ballpark.

22 And, you know, obviously, the -- and I know
23 the -- you noted in your opening remarks that a number of
24 these PPOV listed mines had improved their safety record
25 after being listed on the PPOV list. Well, you know, a

1 mine that has 584 S&S citations in 2 years, there
2 shouldn't be any additional hand-holding and working with
3 them to try to reduce their amount of serious violations.
4 They should reduce it. I mean, that's just a matter of
5 fact. They're endangering miners currently, and it has
6 to be addressed immediately. It can't be done over, you
7 know, over a process of the period of time for them to
8 change the culture. I mean, that culture needs to be
9 either changed immediately or miners shouldn't be placed
10 in that kind of danger.

11 You know, that same mine incredibly had 78
12 elevated actions, which are you have the 104(b), 104(d),
13 107(a) types of orders and the screening criteria at that
14 time was only two. So, under MSHA's PPOV screening
15 criteria, you know, if a mine had more than two elevated
16 actions within a two-year period, well, then, they would
17 qualify under that particular criteria.

18 To think that those 78 actions need to become
19 final before MSHA is allowed to take action is
20 unconscionable, honestly. That's not what the '77 Act
21 intended. That's not what Congress was working to
22 prevent, another situation like Scotia, where, you know,
23 violation after violation is amass. Even if they're
24 corrected, after a while, the underlying culture of
25 ignoring safety and health until you're caught and forced

1 to correct those, I mean, that's what Congress is trying
2 to avoid, was an attempt to stop that kind of activity
3 going forward.

4 You know -- and like I said, MSHA really
5 didn't take any action on that until now, and I'm glad
6 they're finally doing it. And dropping the requirement
7 that a citation and order had to become final to be
8 considered for a Pattern of Violation is a major step in
9 the right direction.

10 I mean, other areas of daily life, average
11 citizens don't get that benefit of the doubt. I mean,
12 they don't get -- you know, if I drive 30 miles an hour
13 over the speed limit and get a speeding ticket every day
14 of my life, I don't get 781 days before -- or if it took
15 that long, if our process took that long, I wouldn't get
16 that long to continue to violate the law. What if I got
17 a DUI every month and those didn't come up for trial for
18 781 days, do you think any judge in America would allow
19 me to continue to get those repeatedly without taking
20 some action against my right to drive. It's unbelievable
21 that you would argue that we should, you know, just wait
22 this out and see what happens, when the data says what
23 happens is the vast, vast, majority of these citations
24 are upheld. The industry really doesn't have a
25 legitimate argument that that's somehow a due process

1 issue against them.

2 We also support the increase in the frequency
3 of MSHA's review of a mine for Pattern of Violations at
4 least twice per year. As I noted in my written comments,
5 I really think that MSHA could devise a system in which
6 much of that review could be done essentially in real
7 time, you know, whether it's weekly or even daily review,
8 in which, you know, a computer program could essentially
9 identify mines that are right on a pattern status with
10 real time data.

11 For example, after an inspection, and then
12 any other additional factors that are taken into
13 consideration as to whether they are placed on a pattern
14 could then be -- that could essentially cause that
15 process to begin. I don't think that's an unreasonable
16 burden upon the Agency to do it that way. I mean -- and
17 that, again, fits within the idea that if we have chronic
18 violators, the miners that are working in those mines are
19 being in danger every day that they're going to work.
20 It's an immediate emergency issue, and I think the review
21 system could be nimble enough, especially when you're
22 talking just about, you know, raw numbers, that if a
23 mine, you know, has a certain number of S&S violations,
24 if they have a certain number of elevated actions, that
25 that kind of data, you know, could be ran in real time.

1 MSHA could be alerted when a mine exceeds those criteria
2 and if there's any other more subjective criteria, it's
3 taken into consideration. MSHA could do that as the need
4 arises.

5 And, on that same issue, I think the -- I
6 have looked at the web tool that you currently have for
7 the PPOV system. I think that could be improved.
8 Currently, I think you can only search by the MSHA ID
9 number to look at those mines. It would be nice and I
10 don't think it's unreasonable to think that MSHA couldn't
11 devise a search tool in which you could search for mines
12 that have exceeded the specific criteria or multiple
13 criteria. And, essentially, so any individual, any miner
14 working at that mine to look and see how close their
15 operation is to a pattern status or how far away they are
16 from that status. I think it could be improved in that
17 way.

18 You know, I think -- and I think also this
19 twice yearly review, obviously -- and, I mean, it's not
20 going to apply to most operators, so it's not like the
21 Agency would really -- if they could devise a way to
22 review a lot of this data in real time, it's not like
23 this is going to affect the vast majority of operators.
24 So, I don't think it would add a lot of -- it would
25 require a lot of extra resources for MSHA to do this. I

1 think a lot of it can be automated.

2 As to Section 104.3 the Issuance of Notice,
3 you know, we do support the releasing of any records as
4 to a potential Pattern of Violation. I mean, that's not
5 in the statute; that's not in the Mine Act. That's
6 something that the Agency conjured up, I'm sure, at the
7 insistence of the industry, which has made it much more
8 difficult to ever put a mine on a Pattern of Violations.

9 You know, the complaint I have with language
10 in the Mine Act, you know, really mandates MSHA to notify
11 the operator whenever the Pattern of Violations exists,
12 not, you know, continuously warn them that one may exist
13 in the future, that they're headed down the wrong path,
14 etc. Mine operators are sophisticated business people.
15 They know what's happening in their own mines. They know
16 how many elevated actions they have. They know how many
17 S&S violations they have. They know if their mine is a
18 problem mine, if it's a chronic violator.

19 I think this rule goes a long way to end this
20 sort of handholding, and, really preventing mines from
21 ever being subjected to a Pattern of Violations scrutiny.
22 The whole idea behind that provision is once a mine is
23 placed on a pattern, then the actions that result from
24 that, and the sort of hammer that MSHA has in the Pattern
25 of Violations section, changes the culture of the mine.

1 If they don't change, then they're not going to operate.
2 They'll get withdrawal order after withdrawal order.

3 And, I think this reference to potential,
4 this idea that these citations should only be final, all
5 it does is just prevent that stricter scrutiny of the
6 most chronic violators. And I really don't understand
7 why, you know, the vast majority of the industry wouldn't
8 be for this rule. If they're not -- because, like I
9 said, it's not going to affect, you know, good operators.
10 It's only going to affect the worst of the worst, and
11 those are the mines where disasters happen. Those are
12 the mines that give the entire industry a bad name.

13 You know, I would note that as the -- as MSHA
14 has sort of stated that they do appreciate the comments,
15 but they also appreciate, you know, the attendees of
16 these public hearings. And I would like to note that
17 although there's been some comments submitted by industry
18 opposing this rule and also opposing the examination
19 rule, we're here in Hazard today and there's not any coal
20 operators in attendance, and there's not anyone from the
21 industry here opposing the rule. There's not anyone
22 sitting in the audience from the industry it appears, so
23 I think some of this opposition is really token
24 oppositions, the general opposition to any rulemaking.
25 So, I think it's a good rule. I think MSHA should

1 implement it essentially as it's written, other than the
2 few additional changes that I think are needed.

3 And that essentially wraps up my comments. I
4 think this rule would go a long way towards finally
5 addressing the worst of the worst and those chronic
6 violators in the coal industry and go a long ways towards
7 protecting the miners that are currently working in those
8 mines. And that's the most important part of all of
9 this, is the, you know, the miners that have to work in
10 these kind of conditions. MSHA should be protecting them
11 and I think this rule goes a long way towards doing that.
12 Thank you.

13 MODERATOR SILVEY: Thank you. I have a
14 couple comments and maybe a question.

15 On your two major comments, being MSHA's
16 proposal to remember the requirement that beyond the
17 final orders, the use of all the final orders in the
18 Agency's review of a mine for a Pattern of Violations,
19 and on the proposed Pattern of Violations process, the
20 PPOV process, the existing PPOV process we're not re-
21 proposing. You proposed to eliminate that, too. We've
22 got opposing comments, as I'm sure all of you know, on
23 those two, and you referenced that in your testimony.

24 We've got opposing comments on those two
25 provisions. And to rephrase maybe what you said, you

1 thought that the existing final order provision was
2 unworkable, unreasonable, and it protects chronic
3 violators. And we heard from them that it -- and you
4 made a reference to the Mine Act and to Scotia, which we
5 did in the Proposed Rule in the printout; and we've got
6 opposing comments that said it deprives -- that the
7 persons and organizations who oppose that portion, that
8 part of the proposal said that deprives them of their
9 Constitutional rights and that they said -- I think in
10 response to our reference to the '77 Mine Act, they said
11 that the Mine Act doesn't trump the Constitution.

12 I would only ask you, and not to put you on
13 the spot, but if you wanted to answer now or to, you
14 know, submit supplemental comments before August 1st, I
15 will ask you when you said that the arguments who
16 opposed, those who opposed this are not serious
17 arguments. I would ask you if you have any additional
18 specific, for lack of a better word, arguments to make in
19 support of your position. Which is, I might add for
20 everybody here, which is MSHA's position, too.

21 MR. ADDINGTON: Yeah. The reason I say it's
22 not serious is if operators that were contesting, you
23 know -- you know, a lot of these operators are
24 contesting virtually every citation that they're getting.
25 If they were serious that they believe this was a true

1 due process issue, which is that ultimately they could be
2 shown to be correct and that placing them on a Pattern of
3 Violations was unwarranted, because all the citations and
4 violations that MSHA noted somehow turned out to be
5 incorrect and they should never been on the Pattern of
6 Violations at all, if they were serious in that argument,
7 we wouldn't have the kind of data that we're seeing. I
8 mean, you can't make that argument with the kind of data
9 that currently exists on these contested citations.

10 If the Commission were overturning, you know,
11 50 percent of citations, you know, if they were being
12 withdrawn or vacated, if, you know, a high percentage of
13 S&S citations were being downgraded to non-S&S, you might
14 have a due process issue there. When it's 3 percent of
15 withdrawn or vacated, that's not even statistically --
16 it's negligible.

17 You know, you have to have a situation where
18 an operator was essentially one violation over the
19 criteria, and 3 percent -- you know, essentially, they
20 have to be one violation over the criteria, and then
21 there'd be a theory of, you know a 3 in 100 shot of
22 having that over -- it's just not -- it's not going to
23 happen. I say this Ruby Energy, they had 584. The
24 criteria was 20. You know, they would have had to have
25 500-and-what-65 of those either downgraded or overturned

1 to fit below the criteria.

2 I mean, it's just not -- and the thing is, if
3 they're really concerned about the -- and it would be an
4 outlying case in which with the statistics that we have
5 now, it would be an outlying instance where a mine would
6 qualify for a Pattern of Violations and one citation or
7 two citations are ultimately overturned and that would
8 bring them back under the criteria. That would be a
9 complete outlier. I mean, I'm not a statistician, but I
10 think there can be an analysis that says essentially the
11 odds of that happening are very, very, small.

12 MSHA can deal with that under their criteria
13 proposals. I mean, that's what I was talking about, the
14 subjective part of that, and they can take that kind of
15 instance into consideration. And I don't think, frankly,
16 I don't think courts would look at that as a due process
17 issue. There's lots -- I mean, I think currently MSHA
18 takes actions. There's plenty of ways under the Mine Act
19 that MSHA can take a current action without waiting for
20 the underlying issue to make its way through the court
21 system before they take an action. I don't think
22 operators, especially as the law is written, are entitled
23 to some, you know, date in court on every single citation
24 that they get when it comes to assessing whether they
25 qualify for a Pattern of Violations. That's not the

1 intent of the pattern status, you know, immediate
2 situations, you know. And that's part of the -- it's
3 part of the reason that they're contesting all of these
4 is they know that it avoids the stats.

5 MR. MATTOS: Wes, one of the comments we're
6 receiving from a lot of folks involves they're suggesting
7 that we should have a specific Pattern of Violations for
8 any criteria in the rule itself, rather than publishing
9 what the criteria are; and then we've added a provision
10 in their behalf of notice of comments type procedure in
11 place, but you didn't speak to that.

12 Do you have any thoughts on that?

13 MR. ADDINGTON: Yeah. I didn't address that.

14 I think MSHA adequately could do it either
15 way and I haven't really taken a strong position on that.
16 I think the way it's currently written will work just
17 fine. I think it gives the Agency the flexibility to
18 adjust the criteria to -- this is really in 33 years the
19 first time MSHA is going through this. I think the
20 current way the Proposed Rule is written would allow MSHA
21 the flexibility to make sure that they're doing what the
22 Act intended and that is to sort of snag the most chronic
23 violators, the violators that get citation after citation
24 and violation after violation, and, you know, just
25 abating them, you know, when they're essentially required

1 to, but just keep the same, and they're really not
2 improving conditions in their mine.

3 I think the current framework, the way the
4 current rule is written, I think it allows MSHA the
5 flexibility to make sure they're snagging those people
6 and snagging, you know, essentially snagging the right
7 ones, and if they're not snagging the worst of the worst,
8 they can then amend that, I think, you know, through
9 internal criteria.

10 I think if they're, you know, the industry is
11 worried that they're snagging too many, you can also
12 adjust to that. I think, you know, there's just a lot of
13 problems with publishing that as part of a rule, because
14 then, as we've seen with the current rule, it can make
15 the whole system unworkable and never used. I think that
16 you have to hear on the -- I mean it's a remedial
17 statute. You have to err on the side of miners on this
18 issue. You have to err on the side of their health and
19 safety and protection, not -- and not have a situation
20 like we currently have where a mine -- the Agency cannot
21 jump through all the hoops that are required to ever
22 place, even the worst violator on a pattern. So,
23 frankly, I think the current rules as written works just
24 fine.

25 MR. MATTOS: Thank you.

1 MODERATOR SILVEY: Okay, thank you.

2 Our next speaker is Tony Oppegard with
3 Appalachian Citizens Law Center.

4 MR. OPPEGARD: I want to thank the panel for
5 giving me the opportunity to speak. And, Pat, I'm not
6 with Appalachian Citizens Law Center.

7 MODERATOR SILVEY: I stand corrected.

8 MR. OPPEGARD: I'm just an attorney in
9 private practice representing miners and their families
10 in safety-related issues.

11 Now, back in April, I did submit comments
12 with Wes in conjunction with Appalachian Citizens Law
13 Center, and we stand by those comments.

14 To give some context to my comments, I just
15 want to comment briefly on my experience. I've been
16 involved with safety issues under the Mine Act for more
17 than 30 years and I've represented coal miners in 105(c)
18 cases for about 25 years. I worked for MSHA for about
19 2-1/2 years at headquarters, and I was the prosecutor of
20 mine safety violators for the State of Kentucky for about
21 4-1/2 years in the early 2000s, and, as part of that,
22 I've investigated accidents, investigated disasters.

23 The last five years I've been representing
24 families of miners in wrongful death cases. So, that's
25 the context in which I'm going to make these forthcoming

1 statements, and I'm going to probably go -- not probably,
2 I'm definitely going to make some comments that are
3 outside the scope of the rule, but I hope you'll bear
4 with me, because, again, I think this needs to be made in
5 some context.

6 Where I want to start with is I've read the
7 transcripts of the prior public hearings having to do
8 with the Pattern of Violations Rule and I've read a lot
9 of the comments, not all of them, but a lot of them, that
10 industry has submitted. Because we're in Kentucky and my
11 focus is representing miners primarily in Eastern
12 Kentucky in non-union mines, I want to read in something
13 from the comments of the Kentucky Coal Association, Bill
14 Bissett, President. This is how he answers comments.

15 "MSHA's new Proposed Rule on POV moves
16 everyone in the wrong direction. It creates a further
17 exacerbating opinion that the Administration in
18 Washington, D.C. is trying to slowly bankrupt the
19 Appalachian coal industry by adding additional
20 regulations."

21 Now, seriously, that's the coal industry's
22 position that the POV Rule is an attempt to bankrupt the
23 coal industry. It's an irresponsible comment. It's
24 inflammatory. It's nonsense. And I think that needs to
25 be pointed out. And because of these types of comments,

1 I want to comment on what I view the direction in which
2 the Obama Administration, under the leadership of Joe
3 Main, is taking things with regard to mine safety, and
4 I'll make these brief before I get on to the POV Rule
5 specifically.

6 I've got four instances in which I want to
7 give credit to Joe Main, credit to MSHA and the Obama
8 Administration for the way that MSHA is being run these
9 days. First of all, has to do with miners' rights.
10 There is an emphasis on miners' rights now that has not
11 been seen in decades in D.C., and, specifically, with
12 regard to temporary reinstatement for coal miners who've
13 been fired from their jobs for complaining about safety
14 or refusing to work in unsafe conditions.

15 Now, Scott Howard, who testified in the
16 previous Work Place Examinations Hearing earlier this
17 morning, it's four years ago today that he testified in
18 front of an MSHA panel, including Pat Silvey, on the
19 Proposed Mine Seal Regulation. It was an emergency
20 temporary standard, because of the Kentucky Darby
21 disaster and the Sago disaster, which involved faulty
22 construction of seals.

23 At that hearing, Scott had the audacity to
24 show a video of seals in the mine where he worked,
25 without identifying that mine, there were spewing water

1 leaking, an obvious safety hazard. And we stated on the
2 record at that time that that was a protected activity
3 and we expected Scott to be protected by MSHA if he
4 suffered any type of discrimination or discipline.

5 Not surprisingly, about two weeks later, he
6 was disciplined by his employer for showing that video at
7 the MSHA Public Hearing. And, to MSHA's shame, MSHA did
8 not accept that case for prosecution. But that was a
9 different administration. That was the Bush
10 Administration, where miners' rights was a dirty word, or
11 a dirty phrase. And that was a case that MSHA should
12 have taken.

13 Wes Addington and I took the case,
14 represented Scott, and we won that case in front of an
15 Administrative Law Judge. The case was not appealed. It
16 was a no-brainer, a decision for the ALJ. He had no
17 problem in finding that Scott was discriminated against
18 for having testified at this MSHA Public Hearing.

19 The point I want to make is what that has
20 caused Scott is four years of litigation and four years
21 of problems. It was four years ago today he testified.
22 We've been in litigation the last four years with this
23 same company. Five discrimination cases, and he was
24 fired May 16th of this year. That's the fifth case.

25 And times have changed. MSHA, within 11 days

1 after Scott filed that discrimination complaint, MSHA had
2 filed an Application for Temporary Reinstatement. It's
3 probably the fast, not probably, it is the fastest that
4 MSHA ever, in its history, has filed an Application for
5 Temporary Reinstatement on behalf of a miner. So, we now
6 have Scott back on the payroll. And that's the way it's
7 supposed to be done and that is the emphasis on miners'
8 rights, which Joe Main is placing. It's not an attempt
9 to bankrupt the coal industry in Eastern Kentucky.

10 Now, the second place where I want to praise
11 Joe Main and MSHA is for the respirable dust rule, long,
12 long, overdue. Someone is finally doing something about
13 it, or trying to do something about it.

14 The third is on the use of Section 108(a)(2)
15 under the Mine Act. This is the most, the two most
16 effective, or the most powerful enforcement tools that
17 MSHA has in its toolbox, is Section 108(a)(2) where they
18 can go into federal court and seek an injunction against
19 an operator who has a Pattern of Violations that
20 jeopardizes miners' health and safety. Never been used.
21 Never. 1977 it's been in the law. Thirty-three years,
22 never been used until Joe Main came into office, and now
23 it's been used against Freedom Energy in Pike County,
24 Kentucky, and used successfully.

25 In part, it was never used because of the

1 Solicitor's Office in D.C. being afraid of its own
2 shadow, being afraid to take on the coal industry, and
3 being afraid that if we go in front of a federal judge,
4 we're going to lose because we haven't put this mine on a
5 Pattern of Violations, therefore, we can't use Section
6 108(a)(2).

7 I never looked at it that way, never thought
8 that was the right way to look at it. And, indeed, when
9 MSHA finally had the guts to use it and go in front of a
10 federal judge, and that issue was presented, MSHA won.
11 Judge Supar said, "No, you don't have to be on a Pattern
12 of Violations to seek an injunction under 108(a)(2)."

13 And, then, finally we have the POV Rule.
14 This is a fourth example. It's never been used, as Wes
15 said, in 33 years. I don't think we should lose sight of
16 the fact that there's a human context to all of this.
17 Scotia is right up the road; it's the next county,
18 neighboring on Perry County here, Letcher County.
19 Twenty-six miners and mine inspectors killed in twin
20 explosions, March 1976. That's why there is a POV Rule.
21 Because Congress looked at what happened at Scotia and
22 said, "This is outrageous." You have a mine with
23 repeated violations over and over again. They get cited;
24 they have to abate it. Next time MSHA does that, the
25 same thing, cited, abated.

1 But nothing ever changes. We need a stronger
2 enforcement tool. So they put the POV in the Section
3 104(e) of the law, and they also put in the injunction
4 Section 108(a)(2). But 33 years later, neither one of
5 them has ever been used. MSHA's two most powerful
6 enforcement tools are laying idle in their toolbox. It's
7 unacceptable. And Joe Main has changed that. So instead
8 of being praised for that, for finally doing what the law
9 says to do, you have the Kentucky Coal Association
10 saying, "They're trying to bankrupt us."

11 The Senate Committee who passed the Mine Act
12 and commented on it in the legislative history never
13 could have anticipated -- they would have been amazed if
14 they were all around today. "It's 2011 and no one has
15 ever used this law that we gave you. It's sat idle all
16 these years." I think they would not only be dismayed,
17 they'd be disgusted.

18 Now, turning to the POV itself, I just want
19 to read the critical portion of the law. "Section
20 104(e)(1): If an operator has a Pattern of Violations of
21 mandatory health or safety standards in the coal or other
22 mine, which are of such nature as could have
23 significantly and substantially contributed to the cause
24 and effect of coal or other mine health or safety
25 hazards, he shall be given written notice that such

1 pattern exists."

2 Legally, the term shall is mandatory, it's
3 not discretionary. Courts over and over again have held
4 that shall, "He shall be given written notice that such
5 pattern exists." As Wes said, the plain language of the
6 statute supports the POV Rule with regard to not giving a
7 notice or written warning.

8 I think it's important to point out what that
9 statute doesn't say. It doesn't say, "Send the coal
10 operator a warning letter and say you've been a bad boy
11 and if you don't become a better boy, then maybe we're
12 going to take some action two years down the road." It
13 doesn't talk about a written warning.

14 Now, MSHA has the authority in the regulatory
15 process to "fill in gaps" in the statute, but MSHA does
16 not have the authority to do something in direct
17 contravention of what a statute says they have to do. In
18 other words, they can't disobey the statute. They can't
19 -- if the statute says you have to inspect all
20 underground coal mines four times a year, MSHA can't
21 issue a reg saying, "We're going to inspect them two
22 times a year." That violates a statute.

23 In my view, the regulation that says we have
24 to send out a written warning to coal operators when we
25 think they may have a Pattern of Violations, violates the

1 statute. A lawsuit should have been filed when that
2 regulation was implemented; and my belief is if a lawsuit
3 had been filed, that regulation never would have
4 withstood scrutiny; that the plain language of the Act, a
5 court would have said it violates the plain language of
6 the Act, and would have struck down that regulation.

7 Now, what's the result? Since the early '90s
8 we've had this written warning. The result is that no
9 one has ever been placed on a pattern. And I think it
10 was an intentional cynical attempt by the Bush
11 Administration, the first Bush Administration, to help
12 coal operators, to ensure that no coal operator was ever
13 put on a Pattern of Violations. That's exactly what it
14 accomplished. That regulation was a gift to coal
15 operators, an undeserved gift to outlaws, knowing that if
16 we put this in, none of them are ever going to be put on
17 a Pattern of Violations.

18 Now, finally, we have someone doing the right
19 thing, saying this written warning never should have been
20 promulgated and wanting to delete it, and you have the
21 coal industry whining about it.

22 Now, they want "transparency." Every
23 operator who submitted comments, they all use the same
24 buzzer, "We need transparency." Why? As Wes said, no
25 good coal operator has anything to fear about the POV

1 Rule. It's the outlaws who are going to be affected by
2 it. And this is a rule that should have been used dozens
3 and dozens of times since 1977. Upper Big Branch should
4 have been placed on a Pattern of Violations, and Sago
5 should have been placed on a Pattern of Violations.
6 Aracoma should have been placed on a Pattern of
7 Violations.

8 I represent four of the widows and the sole
9 survivor of the Kentucky Darby Disaster. They should
10 have been placed on a Pattern of Violations. They had
11 something like 30 accumulations violations, and you all
12 know what I'm talking about. Accumulations is just a
13 failure to clean up your mine, to clean along your belt
14 lines. It means you're too sorry and you care so little
15 for the health and safety of your employees that you
16 can't get a guy with a shovel to shovel along the belt
17 line. That's where an accumulations violation is. They
18 had about 30 of them. They should have been on a Pattern
19 of Violations.

20 Had Upper Big branch been placed on a
21 pattern, or had MSHA gone to court under Section
22 108(a)(2), maybe we'd have all these 29 miners who were
23 killed, maybe they'd still be alive. And the same with
24 Kentucky Darby.

25 And I've seen families how disasters tear

1 apart families and damage families forever. It's not
2 something that goes away in a year or two. It destroys
3 families. And isn't that what the Pattern of Violations
4 Rule is all about, is to prevent disasters. But, yet,
5 you have these irresponsible comments from the Kentucky
6 Coal Association that what you're really trying to do is
7 bankrupt the coal industry. No, I think the rule is
8 trying to prevent disasters and trying to prevent having
9 widows and orphans.

10 The other point about the POV is what I think
11 Wes addressed very articulately about final orders and I
12 don't need to go into that in any great detail. But the
13 due process argument, I think it's a red herring.

14 And, Jay, you asked a question of Wes. I
15 would just refer you to Representative Miller's comments,
16 and I think it covered very thoroughly why the due
17 process argument that's been raised by industry doesn't
18 have a leg to stand on. It's a very good synopsis of why
19 that's a faulty argument.

20 And, again, I want to re-emphasize what
21 Representative Miller put in his comments about the 841
22 days that it takes for the issuance of an unwarrantable
23 failure citation to become a final order. And, again,
24 that's about 2-1/2 years. And, it's not realistic to
25 think that you can't count unwarrantable failures that

1 take 2-1/2 years to litigate. You can't take them into
2 consideration when placing a company on a Pattern of
3 Violations.

4 Again, to re-emphasize what Wes said that the
5 Pattern of Violations is for the worst of the worst; it's
6 the outlaw operators who have that to fear. And I read
7 the comments by some former MSHA inspector, I don't
8 remember his name, but who now works for industry, who
9 was bemoaning the fact that, you know, a Pattern of
10 Violations is a "death penalty" for operators. He said,
11 "We used to sit around the MSHA office and talk about how
12 if we put someone on a pattern that," you know, "It was a
13 death penalty that would ruin their business, basically."

14 Well, first of all, you can get off the
15 pattern. Once you're on, you can get off. It may be
16 hard to get off, but it's not impossible like all these
17 industry commenters are saying, that it's impossible to
18 go 90 days without an S&S violation. No, it isn't
19 impossible. Because if you look at the data, plenty of
20 operators go 90 days without an S&S violation, if you
21 have a commitment to safety.

22 If you know you're on a pattern, why should
23 you get any S&S violations in the next 90 days? Do
24 things right. The operators that have to worry about
25 this law are those who don't care about health and safety

1 of their miners, who are willing to play Russian roulette
2 with their miners' health and safety. And those
3 operators do exist.

4 I had a coal miner call me a couple weeks ago
5 and tell me that in the mine where he's working, the ATRS
6 doesn't reach the top. So what do they have the guy
7 doing? He's standing on the pod; they raise it; he's 2
8 or 3 feet from the roof, trying to put in a bolt, where
9 all he has to protect himself is his hard hat. There's
10 no shield over him; there's no ATRS; and they've been
11 doing that for three shifts. Those are the kind of
12 operators who don't care about miners. All they care
13 about is getting the coal out of the ground, and those
14 operators very easily could have been killed, and they're
15 playing Russian roulette with their lives. "Just do it
16 for a few more days until we get in lower coal and then
17 you'll be okay," instead of doing things the right way.

18 Those are the type of operators that have to
19 worry about being placed on a pattern, not your good
20 operator. No operator with any decency would put a miner
21 in that situation, knowing that that person is risking
22 their life; that if the roof falls, he's probably going
23 to be killed or seriously injured.

24 I want to read one other comment from the
25 Kentucky Coal Association, and Mr. Bissett said, "Under

1 this new Proposed Rule," that's the POV Rule, "MSHA
2 inspectors would be given the power to shut down entire
3 or parts of an operation at his/her own discretion. An
4 inspector could concoct enough citations or orders to
5 meet the criteria and establish a Pattern of Violations."

6 Again, irresponsible, reckless, nonsensical,
7 delusional comment. He honestly thinks an MSHA inspector
8 is going to concoct violations with the specific purpose
9 of placing that mine on a pattern. That's absurd. Do
10 inspectors make mistakes? Yes. Do we have inspectors
11 who are concocting violations because they don't like an
12 operator? I think it's hard to believe. Has it ever
13 happened? Who knows. But enough that you could put a
14 mine on a Pattern of Violations? It's ridiculous.
15 That's these types of irresponsible comments from the
16 coal industry.

17 Kentucky Coal Industry, by the way, has never
18 seen a safety regulation that it liked, ever. Every
19 single safety regulation that MSHA or the State of
20 Kentucky has ever proposed in the last 40 years, the
21 Kentucky Coal Association has opposed. It doesn't matter
22 how basic it is. We ought to landmark Mine Safety Law
23 passed in Kentucky in 2007. The industry opposed every
24 provision in it, including a seal provision. They didn't
25 even want a company to have to certify that a seal was

1 properly built. That was too radical of an idea for
2 them.

3 So, you take two examples in Mr. Bissett's
4 comments: (1) that MSHA inspectors are going to concoct
5 violations that don't really exist; and number (2)
6 they're doing it to bankrupt the coal industry. It's
7 part of the industry's mindset that they teach their
8 employees -- and Scott can tell you this -- that "the
9 inspector is your enemy, MSHA is your enemy. MSHA is not
10 here to protect your health and safety. MSHA is here to
11 shut your mine down and take your job so that your kids
12 will starve." That's what miners hear. That's what
13 they're taught, "When an inspector comes on the job, he's
14 your enemy." And these are the kinds of people that
15 we're getting comments from.

16 I also read the comments, a very long thing
17 from Mr. Bumbico from Arch, the same company that's
18 discriminated against Scott for the last four years and
19 fired him, who says they have -- they're safety
20 conscious, but it's only on paper.

21 And I know in the first comments, Scott's
22 comment about potato salad -- I know it went over your
23 head, Pat, you probably don't know what he was talking
24 about -- but at the seal hearing in 2007, July of 2007,
25 after the Kentucky Darby widows had to summon up the

1 courage to talk about why they thought this rule was a
2 good rule, the then President of the Kentucky Coal
3 Association, Bill Caylor, got up and started complaining
4 about how every time there's a coal miner who gets
5 killed, it's on the front page of the news, but what
6 about the thousand people in the United States who die of
7 bad potato salad every year, that's what Scott was
8 talking about. It's that lack of sensitivity that the
9 Coal Association brings to their comments.

10 So, in summary, Joe Main and MSHA are doing
11 what they're supposed to do by this rule. This rule
12 should have been in place a long time ago, and kudos to
13 the Agency for finally doing the right thing.

14 You asked Wes, Jay, about whether the
15 criteria should be in the rule or whether, you know, it
16 can be policy. I probably look at it a little
17 differently. I think the criteria should be in the rule.
18 And the reason I think it should is specifically because
19 the next Republican Administration that gets in, if it's
20 not in the rule, they're going to change it to where a
21 POV is a worthless regulation again. It's exactly what's
22 going to happen. So, I think it should be in the rule so
23 that, you know, you're either going to have to rescind
24 that rule; they're going to have to go to Congress for
25 relief, rather than just doing something through policy.

1 And, again, I think the two major points I
2 want to make is, Number 1, we shouldn't have the written
3 warning. There's no place in the rule for it. It
4 violates the -- it violates the statute. Number 2, the
5 due process arguments that industry are making are red
6 herrings, that this regulation will withstand judicial
7 scrutiny on a due process argument.

8 And, again, I think the whole purpose of the
9 rule is to prevent disasters, and not just disasters, but
10 miners from dying, one at a time, which is how most
11 miners die in this country, is one at a time. A few
12 people know about it, and a few people read about it.

13 But I think this rule will prevent, help
14 prevent, those deaths, and that's what the Mine Act is
15 supposed to be all about. The Mine Act doesn't talk
16 about coal production. The Coal Association talks about
17 coal production, but the Mine Act doesn't. It's an Act
18 to protect the health and safety of miners. It doesn't
19 have as a goal that we produce X amount of tons of coal
20 per year.

21 So, I fully support this regulation and I
22 hope that MSHA will stick by it. And if industry wants
23 to challenge it in court, then I think the government
24 attorneys are up to that challenge.

25 Thank you.

1 MODERATOR SILVEY: Thank you. I'd just like
2 to make one comment.

3 As you noted, Tony, at the beginning of your
4 comments that your statement with respect to the miners'
5 rights, the respirable dust rule and Section 108(a)(2)
6 are beyond the scope of this ruling, so I'd just like to
7 note that for the record.

8 Thank you.

9 Our next person is Sam Petsowk with the
10 Appalachian Citizens Law Center.

11 Does anybody else wish to make -- provide
12 testimony? Does anybody else wish to provide any
13 testimony?

14 If nobody else wishes to make a presentation,
15 then I would like to say on behalf of the Mine Safety and
16 Health Administration that we appreciate your
17 participation at this Public Hearing. I want to thank
18 everyone who has made presentations. And, as you've
19 heard me say a lot of times, for those of you who did not
20 present, but who attended the hearing, I want to say that
21 we appreciate that, because that says to us that you have
22 an interest in this rulemaking, and we appreciate your
23 interest.

24 I want to emphasize that all comments must be
25 received by MSHA by August 1, 2011. MSHA will take your

1 comments and your concerns into consideration as we draft
2 the final rule.

3 I want to encourage all of you to participate
4 throughout the rest of this rulemaking and in all MSHA
5 rulemakings.

6 This Public Hearing is concluded. Thank you
7 very much.

8 (Off the record.)

9 (On the record.)

10 MODERATOR SILVEY: Again, my name is Patricia
11 W. Silvey. And with me is Jay Mattos, who is Chair of
12 the Rulemaking Committee on MSHA's Proposed Rule on
13 Pattern of Violations.

14 I'd like to reopen the rulemaking record for
15 the public hearings on the Agency's Proposed Rule on
16 Pattern of Violations. And, at this point, we have Bill
17 Bissett with the Kentucky Coal Association.

18 MR. BISSETT: Thank you. It's an honor to be
19 here today and to share these comments on behalf of the
20 Kentucky Coal Association.

21 The KCA would like to submit these comments
22 to the Mine Safety Health Administration regarding its
23 Proposed Rule for the Pattern of Violations, POV, under
24 30 C.F.R. Part 104.

25 In the current system established by

1 Congress, the POV process can only be established after a
2 citation order has been adjudicated and a potential
3 Pattern of Violations is affirmed.

4 The current process will be changed to allow
5 for a mine operator to be found guilty of a specific MSHA
6 violation before he or she has a chance for due process.
7 This lack of appeal would give MSHA absolute power that
8 creates a horrific legal quandary.

9 Under this new Proposed Rule, MSHA inspectors
10 will be given the power to shut down an entire, or parts
11 of, an operation at his or her discretion. An inspector
12 can concoct enough citations or orders to meet the
13 criteria and establish a "Pattern of Violations."

14 After an operation uses its appeals process,
15 and an administrative law judge vacates a previous
16 citation or order, the company is still being punished as
17 having a previous status of POV. In essence, the company
18 is treated as a guilty defendant before a final judgment
19 is issued.

20 Another damaging aspect of this Proposed Rule
21 is deleting the requirement for an operation to receive
22 written notice of MSHA's consideration that it might be
23 placed on POV status. Currently, if an operation does
24 receive a letter stating MSHA has perceived a
25 determination that it is under consideration to be placed

1 on POV status, that operation then can evaluate and
2 correct those designated citations. No prior
3 notification would further eliminate an element of
4 transparency by MSHA. Let me repeat that sentence, "No
5 prior notification would further eliminate an element of
6 transparency by MSHA."

7 Unchecked federal authority will create a
8 heightened level of uncertainty throughout the mining
9 community. Under the Proposed Rule, an operation that is
10 placed on POV status will find no mechanism in place that
11 allows them to dispute MSHA's findings. Furthermore, a
12 90-day window is created in which any inspector that
13 might find any Significant and Substantial S&S violation
14 within that time frame can, or will, issue an Order of
15 Withdrawal for all individuals in a designated area and
16 order cessation of operations at that time.

17 In the current regulatory mindset of MSHA
18 inspectors, it is regarded that all mine inspectors view
19 most violations as S&S, regardless of the situation.
20 Hence, the likelihood that any operation could go 90 days
21 without an S&S violation is highly unlikely.

22 The Kentucky coal industry always sees a need
23 for improvement, but that commitment also needs a high
24 degree of transparency from the regulatory agencies that
25 monitor all activities. The Fifth Amendment under the

1 United States Constitution defines a level of checks and
2 balances and this Proposed Rule is viewed as an
3 encroachment on those individual and property rights.

4 This level of security afforded by the
5 Constitution is sometimes regarded as an alienable right.
6 The due process afforded to every individual would be
7 greatly diminished under this Proposed Rule. The current
8 POV Rule allows for mediation during the process, and to
9 do away with that would empower the Executive Branch with
10 unchecked power. This is unacceptable.

11 In conclusion, the mining community does
12 believe that more power should be allotted to the
13 Department of Labor. The laws and regulations set forth
14 by the United States Congress are sufficient to maintain
15 and regulate all coal mining in the United States.

16 Coal mining had an unfortunate tragedy in
17 2010, but industry experts state that MSHA already
18 possesses the power to shut down a mine if an imminent
19 danger is deemed present. And the current backlog of
20 cases currently being adjudicated is a greater hindrance
21 versus MSHA needing additional executive powers.

22 In Kentucky, we currently have more than
23 18,000 miners employed in our industry; and for every 1
24 job, 3 others are created indirectly. The coal industry
25 in Appalachia has been drastically hampered by the

1 federal regulatory uncertainty created during the last
2 three years by the Environmental Protection Agency.

3 Coal mining permits have been trickling
4 through, but most are still caught in a regulatory black
5 hole, which stifles production. Ultimately, our goal is
6 a continued level of cooperation between the industry
7 employees and those regulators at the state and federal
8 level.

9 MSHA's new Proposed Rule on POV moves
10 everyone in the wrong direction. It creates a further
11 exacerbating opinion that the Administration in
12 Washington, D.C. is trying to slowly bankrupt the
13 Appalachian coal industry by adding additional
14 regulations. KCA believes this new rule is a major step
15 in the wrong direction.

16 Thank you.

17 MODERATOR SILVEY: I have a few -- thank you.
18 I have a few comments.

19 First of all, let me say that your comments
20 relative to the Environmental Protection Agency -- and
21 I'm sure you would agree with that, too -- are beyond the
22 scope of this rulemaking, so I just want the record to
23 show that those comments are beyond the scope of this,
24 MSHA's Proposed Rule on Pattern of Violations.

25 Second of all, you mentioned the transparency

1 by MSHA. And with respect to transparency, MSHA intended
2 to advance the concept of transparency in this Proposed
3 Rule and in that I want to make two points. One being
4 that with respect to the specific criteria that the
5 Agency would use to review a mine for a pattern, that
6 specific criteria, and in the Public Hearing Notice we
7 refined the process some, if you recall the Public
8 Hearing Notice.

9 That specific criteria would be posted on the
10 Agency's website. And we said that before we made any
11 change to that criteria, we would put it on the Agency's
12 website; take comments from the mining public; review the
13 comments; respond to the comments; then, revise the
14 criteria as appropriate; and post any revised criteria on
15 the website.

16 Now, one of the reasons I said that was this
17 specific criteria is what MSHA uses, what MSHA used to
18 come up with this web tool that the Agency has posted on
19 its website right now, that mine operators can go into
20 this web tool and can determine if, according to that
21 specific criteria, they may be approaching the boundaries
22 of a Pattern of Violations, and they could come into MSHA
23 under a provision in the -- under the existing
24 procedures, as well as in the Proposed Rule, as a
25 mitigating circumstance. They could come into -- with a

1 corrective action program. That's what we called it in
2 the existing procedures and under the Proposed Rule is a
3 safety and health management program to improve the
4 conditions that gave rise to the pattern.

5 What are your thoughts on that procedure?

6 MR. BISSETT: Ma'am, I just stated my
7 testimony that I've read today, because I think that best
8 represents the interests of my member companies.

9 MODERATOR SILVEY: Well, have you looked at
10 the web tool? Have you, any of your operators, do you
11 know -- let me ask you, have you used the web tool?

12 MR. BISSETT: Ma'am, I'm going to refer to my
13 testimony that I read today and stay with that.

14 MODERATOR SILVEY: Well, let me ask you this,
15 then, all right. Just like I asked you for the purpose
16 of your testimony being as useful to us as it could be --
17 okay -- and in terms of you to try conforming your
18 testimony to making it the most useful to us, if you
19 could, if you wanted to ask some of your member companies
20 have they used the web tool, and what do they think of
21 the provision of what we put in the Public Hearing Notice
22 about if we make -- I'm sorry; let me rephrase that.

23 Have they used the web tool, and what do they
24 think about using it to determine whether they may be
25 approaching a Pattern of Violations, and, therefore,

1 whether they might come into MSHA for a mitigating
2 circumstance. If you would just ask them that.

3 MR. BISSETT: I'd be happy to carry that.

4 MODERATOR SILVEY: And if you have any answer
5 to that, if you would provide it to us before the record
6 closes. Okay, thank you very much.

7 Okay. If there are -- if nobody else wishes
8 to make a presentation, I want to say again that the Mine
9 Safety and Health Administration appreciates your
10 participation at this public hearing.

11 I want to emphasize that all comments must be
12 received by August 1st, 2011. MSHA will take your
13 comments and your concerns into consideration in
14 developing a final rule.

15 This public hearing is now concluded. Thank
16 you very much.

17

18

19

20

21

22

23

24

25

REPORTER'S CERTIFICATE

CASE TITLE: Patterns of Violations
HEARING DATE: July 12, 2011
LOCATION: Hazard, Kentucky

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

Date: July 12, 2011

ANTHONY & ASSOCIATES, INC.


EVELYN KELLY
(Official Reporter)

ANTHONY & ASSOCIATES, INC.
770.590.7570

ANTHONY & ASSOCIATES, INC.
770.590.7570