Testimony of Linda Raisovich-Parsons
Representing the United Mine Workers of America
on the Proposed Rule for
Pattern of Violations
Arlington, VA
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Good Morning/Afternoon. My name is Linda Raisovich-Parsons and I am here today on behalf of the United Mine Workers of America. I appreciate the opportunity to address the UMWA's thoughts on the Proposed Rule for Pattern of Violations. The UMWA generally supports the rule as proposed by MSHA, however we have certain concerns about the proposal which I will discuss today. The Pattern of Violations enforcement tool has been in Section 104(e) of the Mine Act since 1977, yet MSHA's use of this tool has been virtually nonexistent until very recently. We encourage MSHA to maintain a POV procedure that is easy for the mining community to understand and for MSHA to enforce. The recent online tool for monitoring whether a mine meets the Pattern of Violation Criteria is a step in the right direction and will be a useful tool for the mining community to monitor their mine's POV score. We commend MSHA for this effort.

The UMWA agrees with elimination of the initial screening process and the written notice of a potential pattern of violations currently required under 104.3 of the code. Mine operators should have an ongoing awareness of their own health and safety practices and history of the day to day operation of their mine. It is not necessary for MSHA to forewarn them that they are in trouble and could have a potential pattern of violations forthcoming. Any mine operator should be fully aware of shortcomings in their health and safety program and be aware of the need for more resources and attention. The new POV web page criteria screening is a sufficient tool to permit the mine operator to monitor their own POV criteria history. Because the numbers on this web page are refreshed monthly, the industry can access up-to-date statistics for their operations, so there is no reason for the government to provide an advance warning. With the new POV web page, mine operators will be able to identify the specific areas where their problems lie through the criteria red flagged in their stats. For these reasons, the UMWA agrees with elimination of the written notice of a potential pattern of violations as proposed.

The UMWA also supports the Agency's removal of the current limitation that MSHA only consider "final" orders for purposes of a pattern of violations. The problem with the current system that limits a pattern of violations analysis to only final orders is that it can take years to resolve a contested citation. By the time such a citation becomes final, the conditions at the mine may bear no resemblance to what they were when the hazard was first cited. In the meantime, miners may be exposed to extraordinarily unsafe conditions by a repeated violator and the Agency is powerless to use this enforcement tool until those challenged citations become final. The incentive for the operator to challenge all S&S citations would be great in order to avoid a pattern of violations. In 1989 when the rule was originally proposed to only consider final orders the Union raised this concern. I personally testified in Denver, CO on November 8, 1989 predicting that if the Agency limited themselves to final orders, operators would be encouraged to challenge all citations and orders to simply avoid consideration for a pattern of violations. And now here we are twenty-two years after I made that prediction with a major backlog of cases before the Federal Mine Safety and Health Review Commission and the first mine to be placed on a POV only recently. I must have been psychic or perhaps just using common sense. If there is a loophole to avoid a pattern of violations, rest assured the industry will take full advantage.

Some may argue that the operators' due process would be compromised by allowing MSHA to consider non-final citations and orders for POV determinations. However, I care to differ. The plain language of the Mine Act does not require MSHA to consider only final citations and orders for it to use POV. Secondly, the Mine Act includes many sections that require an operator to immediately correct problems MSHA identifies without exhausting challenge procedures. Due process protections will still be available, just later in time. For example, a failure to abate order under Sec. 104(b) and an unwarrantable failure order under Sec. 104 (d) are issued on the basis of previous citations, whether or not those citations have been challenged. Likewise, an operator that disputes an inspector's determination as to whether an imminent danger exists must immediately comply with the imminent danger order and withdraw miners, though it still has the right to challenge MSHA's issuance of the order.

The Senate Committee gave a fairly extensive comparison between the "unwarrantable" and the POV provisions in the Legislative History of the Act. It explained that the violation

setting into motion the unwarranted failure sequence "must be of a significant and substantial nature and must be the result of the operator's 'unwarranted failure' to comply." In comparison, it pointed out "there is not requirement that the violations establishing the pattern offense be a result of the operator's 'unwarranted failure' only that they be of a 'significant and substantial' nature." The Senate Committee concluded its discussion by pointing out that "it is the Committee's intention that the Secretary or his authorized representative may have both enforcement tools available and that they can be used simultaneously if the situation warrants." If an operator's challenge to the underlying citations effectively blocks implementation of the POV, the Secretary cannot use both enforcement tools simultaneously as Congress intended.

Further, the courts reviewing due process issues balance the private interest of the party claiming a deprivation of due process against both the nature and importance of the government's interest and the risk of the government making a mistake when depriving due process and the consequences any such mistake would entail. When there is a compelling government interest at stake such as miners' health and safety as the Mine Act's first purpose unequivocally states, the courts find that an after-the-fact hearing satisfies due process. The UMWA believes that any due process concerns are adequately protected by the Federal Mine Safety and Health Review Commission and its judicial review procedures. If the challenged citations are later reduced to non S&S or vacated, then it could be considered as mitigating circumstances and the situation re-evaluated.

Lastly, we recognize that the legislative history granted the Secretary "broad discretion in establishing criteria for determining when a pattern of violations exists", however the UMWA believes that the Agency has gained sufficient experience over the 30 years since the Act first became law to now set criteria and still satisfy the discretion Congress reserved for the Secretary. We believe that absolute numbers should not control for the criteria. For example, the record for large mines should not be compared with the records of small mines or vice versa. The experiences of mines should be compared to those of comparable mines, and viewed according to comparable inspection hours when evaluating their health and safety record. The eight criteria listed in the proposed rule represent appropriate factors for MSHA to consider for purposes of POV but further explanation of how these criteria will be considered or weighted should be

established at the outset. There must also be an Agency commitment to apply the criteria in a consistent manner.

The Agency must also give consideration to circumstances which could create an unfairness in the health and safety record for any given mine. At union mines, a disproportionately high number of inspection hours are devoted to the large, unionized operations. At the union mines, miners' representatives routinely travel with the MSHA inspector and point out any violation that they may see and consequently union-represented mines are issued a disproportionately large number of citations compared to their non-union counterpart where miners are often intimidated and discouraged from pointing out violations. Further, the injury statistics are not a reliable gauge of health and safety at a mine because we have long known about chronic under reporting of accidents at many mines. Our union mines make sure that all accidents are reported and usually show a higher accident rate than our non-union counterparts because of the under reporting there. For this reason, we recommend that fatality rates should be weighted more heavily than injury rates. MSHA should also aggressively utilize its Part 50 audits to determine whether operators are maintaining records and reporting accidents and injuries as required. When under reporting is found, these mines should be targeted for closer scrutiny for a POV. Further when any information suggests that an operator is covering up violations in an effort to mislead MSHA, they should be given special focus. The impact inspections MSHA is currently conducting has brought to light what goes on behind the scenes when it is believed that MSHA is not looking. The flagrant violations of the law MSHA found at some of these mines should also be considered to give these mines special focus for a POV. Evidence such as what has been revealed in the Upper Big Branch Explosion investigation which indicates that advance notice of MSHA inspections were routinely provided by mine security and further that miners were intimidated and threatened if they made a safety complaint provides a clear picture of how these mines are operated. When such information comes to light, MSHA must give special consideration for these operations to be put on a Pattern of Violations.

I appreciate the opportunity to testify today and believe this regulatory change is critically important and necessary to restore to MSHA the powers Congress intended it to have in Section 104(e) of the Mine Act, but has been rendered ineffective by virtue of the restraints of existing regulations.