

UNITED STATES OF AMERICA
DEPARTMENT OF LABOR
MINE SAFETY AND HEALTH ADMINISTRATION

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PUBLIC HEARING

IN THE MATTER OF:	:
	:
LOWERING MINERS' EXPOSURE	: DOCKET NO.
TO RESPIRABLE CRYSTALLINE	: MSHA-2023-0001
SILICA AND IMPROVING	:
RESPIRATORY PROTECTION	: RIN 1219-AB36
PROPOSED RULE	:
	:
	:

Monday,
August 21, 2023

Denver Federal Center Building 25
Lecture Hall (Room 1866)
West 6th Avenue and Kipling Street
Denver, Colorado

The above-entitled matter came on for hearing pursuant to notice at 9:00 a.m. MDT, Patricia Silvey, Deputy Assistant Secretary for Operations, MSHA, moderating.

PRESENT

PATRICIA SILVEY, Deputy Assistant Secretary for
Operations, Mine Safety and Health
Administration, Department of Labor

TIMOTHY WATKINS, Deputy Administrator for Mine
Safety and Health Enforcement, Department of
Labor

MARSHALL ENOS, Regulatory Specialist, Office of
Standards, Department of Labor

ROBERT KAHN, Attorney Advisor, Office of the
Solicitor, Department of Labor

BRAD MANTEL, Office of the Solicitor, Department
of Labor

BINGXIN YU, Chief, Economics Division, Standards
Office, Mine Safety and Health Administration,
Department of Labor

P-R-O-C-E-E-D-I-N-G-S

9:03 a.m.

1
2
3 MS. SILVEY: My name is Patricia W. Silvey. I am
4 the Deputy Assistant Secretary for Operations at the Mine
5 Safety and Health Administration, U.S. Department of
6 Labor. I will be the moderator of this public hearing.

7 This is the last public hearing that MSHA is
8 holding to gather testimony, written comment, and other
9 documentary evidence on its proposal, lowering miners'
10 exposure to respirable crystalline silica and improving
11 respiratory protection. On behalf of Christopher
12 Williamson, Assistant Secretary of Labor for MSHA, I'd
13 like to welcome all of you to this public hearing. Let me
14 introduce the other members of the MSHA panel.

15 To my right, Timothy Watkins, Deputy
16 Administrator, Mine Safety and Health Enforcement. To his
17 right, Marshall Enos, Office of Standards, Regulatory
18 Specialist. And to his right, Robert Kahn, Attorney
19 Advisor, Office of Solicitor. To my left, Bing Yu, the
20 chief economist in the Standards office. And to her left,
21 Brad Mantel who is with the Solicitor's Office, Office of
22 the Solicitor.

23 As explained in the proposal, crystalline silica,
24 most commonly known as quartz. But you will hear me refer
25 to it as silica mostly. It's found in many types of rock,

1 including granite, sandstone, limestone, and shale.

2 As a result, mining operations often expose
3 miners to respirable crystalline silica. Small particles
4 of silica can be inhaled and reach the alveolar region of
5 the lungs, the lower area, where they can accumulate and
6 cause disease. Exposure to silica can cause miners to
7 suffer from chronic, irreversible, and potentially
8 disabling or fatal diseases, including lung diseases like
9 silicosis, progressive massive fibrosis, emphysema, and
10 lung cancer as well as kidney disease.

11 To better protect the health and safety of the
12 nation's miners, MSHA determined the Agency's silica
13 standard, including respiratory protection requirements
14 must be approved for miners. In the preamble, MSHA
15 requests comments on 43 questions, and I underscore 43
16 questions. Make sure you look at each and every one,
17 covering various aspects of the proposal.

18 For example, they cover such things as health
19 effects, preliminary risk analysis, technological
20 feasibility, preliminary regulatory impact analysis, and
21 initial regulatory flexibility analysis, and other issues.
22 We attempted to be descriptive in the questions and ask
23 that in your responses, please be specific and provide
24 your rationale and supporting information and date. Now
25 I'd like to provide an overview of MSHA's proposal.

1 MSHA proposes to set the permissible exposure
2 limit or PEL for respirable crystalline silica at 50
3 micrograms per cubic meter of air for a full shift
4 exposure calculated as an eight-hour time-weighted average
5 for all miners, coal and metal/non-metal. The proposed PEL
6 is consistent with the recommended exposure limit of the
7 National Institute for Occupational Safety and Health, or
8 NIOSH, as well as the 2016 standard for the Occupational
9 Safety and Health Administration for general industry,
10 maritime and construction. The proposal will also
11 establish an action level of 25 micrograms per cubic meter
12 of air for a full shift exposure, calculated as an eight-
13 hour time-weighted average.

14 To meet the proposed PEL, mine operators would
15 have to implement engineering controls, followed by
16 administrative controls in cases where supplemental
17 protection is needed. On to the proposal, use of
18 respirators would be required on a temporary non-routine
19 basis. MSHA's proposal would require exposure monitoring,
20 sampling and quantitative, qualitative evaluations and
21 corrective actions when miner's exposures exceed the
22 proposed PEL.

23 Mine operators would be required to perform a
24 baseline sampling for each miner who is or may reasonably
25 be expected to be exposed to respirable crystalline

1 silica. If the baseline sample and another sample or
2 objective data indicate that miner exposures are below the
3 proposed action level, then no additional sampling would
4 be required. If miner exposures are at or above the
5 proposed action level but at or below the proposed PEL,
6 operators would be required to conduct periodic sampling.

7 Operators would stop sampling when two
8 consecutive sampling results show that miners' exposures
9 are below the proposed action level. Mine operators would
10 be required to immediately take corrective action when a
11 miner's exposure is above the proposed PEL. Once
12 corrective action have been taken, operators would be
13 required to conduct sampling to determine if the
14 corrective action is affected and take additional
15 corrective action until sampling indicate exposures are
16 below the proposed PEL.

17 Under the proposal, mine operators would also be
18 required to evaluate every six months any changes in
19 production, processes, engineering, or administrative
20 controls or other factors that may result in new or
21 increased silica exposures and to make a record of the
22 evaluation. In other words, that provision is no different
23 than what is required under the existing standards. As
24 mentioned earlier, operators would be required to use
25 respiratory protection as a temporary measure.

1 Miners must use respirators when working in
2 concentrations of silica above the proposed PEL while
3 controls are being developed and implemented or where it
4 is necessary by the nature of the work involved. And by
5 that, I mean, for example, if a miner happens to be
6 working in a confined space. MSHA proposes to incorporate
7 by reference a voluntary consensus standard, ASTM F 3387-
8 19 entitled Standard Practices for Respiratory Protection.

9 Under the proposal, operators of metal and non-
10 metal mines would be required to provide periodic medical
11 examinations for miners, including chest x-rays,
12 spirometry, symptom assessment, and occupational history
13 at no cost to the miner. This includes the overview, but
14 as many of you know MSHA held its first hearing on this
15 proposed rule on August 3rd in Arlington, Virginia and a
16 second hearing on August 10th in Beckley, West Virginia.
17 We received a number of comments from a variety of
18 stakeholders, including labor, industry, trade
19 associations and public health organizations.

20 These stakeholders address many of the provisions
21 in the proposal: comment period, compliance date, sampling
22 protocols, hierarchy of controls, respiratory protection,
23 and medical surveillance. I'm sure that we will hear
24 testimony from you today on these and other aspects of the
25 proposal. With respect to the comments received on the

1 comment period, MSHA received comments both to extend and
2 not to extend the comment period.

3 After reviewing the comments, MSHA decided to
4 extend the comment period until September 11th, 2023 in
5 order to provide all interested parties an additional 15
6 days to develop and submit comments on the proposal. The
7 notice extending the comment period was published in the
8 Federal Register on August 14. Please submit your comments
9 by midnight Eastern Time, Monday, September 11, 2023.

10 At this time, I'd like to reiterate some
11 information from the proposed rule in order to clarify
12 some points specifically applicable to coal miners. On the
13 MSHA's existing coal mine respirable dust standards, there
14 is no separate standard for silica or quartz. I mentioned
15 earlier I was going to generally refer to it as silica.

16 As such, MSHA cannot issue a citation for
17 overexposure to silica but rather addresses any respirable
18 coal dust sample with over 5 percent quartz by reducing
19 the coal mine dust standard. The proposed rule sets a
20 separate PEL for silica. Under this proposal for the first
21 time, MSHA would be able to issue citations for
22 overexposure to the proposed silica PEL.

23 Further, if an operator's sample is above the
24 proposed PEL, the mine operator would be required to take
25 immediate corrective actions to reduce miners' exposure to

1 below the PEL, make the record of the overexposure which
2 would have to be posted and made available to miners'
3 representatives and re-sampled to ensure that the
4 corrective action is effective and that miners' exposures
5 are, in fact, reduced to at or below the PEL. And if the
6 miners' exposures exceed the PEL, MSHA would issue a
7 citation. MSHA has received comment on the recordkeeping
8 requirement.

9 Some commenters recommend that exposure records
10 be kept for longer than two years. At this point in the
11 rulemaking process, MSHA is considering to require that
12 when an operator's sample is over the PEL, that operator
13 send the record of that overexposure to the MSHA district
14 manager. This exposure data will allow MSHA to immediately
15 take appropriate enforcement action and provide any
16 necessary compliance assistance to operators.

17 This proposal would address requirements for mine
18 operator samples. It does not change the way in which MSHA
19 conducts its sampling. MSHA sampling under the proposal
20 would remain the same.

21 At the two earlier hearings, we received comment
22 and testimony on respiratory protection. Some commenters
23 supported more expanded use of respirators. Others opposed
24 the use of respirators, noting some of the challenges that
25 we listed in the proposal.

1 And some commenters asked the Agency to define
2 temporary use. That is, for how long would a miner wear a
3 respirator under the proposal. The proposal would require
4 that the operator provide affected miners a respirator in
5 the case of an overexposure and that respirators be worn
6 for temporary, non-routine use.

7 MSHA intends that temporary use would mean for a
8 limited period of time. That is for a relative short time
9 period. I cannot precisely define temporary as that would
10 depend upon the facts and circumstances surrounding the
11 overexposures as I'm sure some of you would understand.

12 I want to take a moment now to clarify the
13 proposed respiratory requirements as they would apply to
14 coal mining. Under MSHA's existing standards in the case
15 of a respiratory coal dust overexposure, operators must
16 provide miners with respiratory protection. Miners do not
17 have to wear the respirator.

18 Under this proposal, for both metal and non-
19 metal, metal/non-metal and coal miners, in case of an
20 overexposure, operators would have to provide, and miners
21 would have to use, and that is wear, respirators for
22 temporary and non-routine use while engineering controls
23 are being developed and implemented. One final point, at
24 both hearings, we heard testimony from miners and miners'
25 advocacy groups criticizing the operators' dust sampling

1 program -- respirable coal dust sampling program. Let me
2 be clear.

3 Commenters stated that operators commit fraud,
4 cheat, manipulate samples and retaliate against miners in
5 connection with dust sampling. I am requesting all
6 commenters who provided these comments and others who may
7 be here today or who may read this opening statement to
8 provide specific evidence of fraud in the coal dust
9 sampling program. This evidence could include dates of
10 sampling, names of mines, type of manipulation or fraud
11 and any other information and data to support your claim.

12 As I stated at the public hearing on 3 August in
13 Arlington, MSHA investigates every hazard complaint. In
14 addition, if MSHA has evidence of operator fraud with
15 respect to dust sampling, MSHA takes appropriate
16 enforcement action. As mentioned earlier, this is the last
17 of three public hearings.

18 The public hearings are to provide to you,
19 stakeholders and interested parties, an opportunity to
20 present oral statements, written comment and any other
21 information on the proposal. Today's hearing will be
22 conducted in an informal manner. We are here to take your
23 testimony.

24 We will take all your testimony into
25 consideration as we finalize the silica proposal. Speakers

1 and other attendees may present information for the
2 record. If you have not already done so, please sign the
3 attendance sheet as you were entering this room so we may
4 have an accurate record of your attendance.

5 MSHA has posted verbatim transcripts of the
6 Arlington, Virginia and the Beckley, West Virginia hearing
7 at MSHA.gov and regulations.gov. MSHA will make available
8 a verbatim transcript of this public hearing in
9 approximately five days. And this transcript will also be
10 posted on the same website, MSHA.gov and regulations.gov.

11 If you have a copy of your testimony, please give
12 it to the court reporter so it can be appended to the
13 hearing transcript. Once all preregistered speakers have
14 spoken, we will open the floor to see if any of you wish
15 to speak. If you are here in person, raise your hand.

16 And for those of you who are participating
17 online, just use the hand icon on your computer. And for
18 those of you who are online presenters, when it's your
19 time, I know you know this. I'm telling you stuff you
20 already know.

21 Unmute yourself to present your testimony. At
22 this time, we will start with our first speaker. And I'm
23 asking all speakers to please spell your name, first and
24 last name, when you start your presentation so that the
25 court reporter can have an accurate record. And also, if

1 you wish a copy of the transcript, you can make
2 arrangements directly with the court reporter. At this
3 point, we will have our first speaker who is DJ Schmutz,
4 MSHA Safety Service, Inc.

5 MR. SCHMUTZ: Thank you, Pat, for that
6 introduction. DJ, D-J, Schmutz, S-C-H-M-U-T-Z. I just have
7 a brief bit of housekeeping real quick.

8 First, I want to ask, is the purpose of this
9 meeting to have constructive and civil dialogue in order
10 to better improve the standard for health and safety of
11 miners? It's probably a rhetorical question. Do you have
12 any intention of showing any aggression or retribution to
13 those who openly contribute and share contrary expertise
14 differing from what's already written in the proposal?

15 I only ask because we were audited by EFS again
16 immediately following my visit to Arlington and where I
17 spoke about concerns about the proposed standard. To give
18 context, I'll share in the 2.5 years we've been doing
19 training, we have been audited more than 14 times. We have
20 well documented the positive feedback we've received each
21 time from EFS and from our clients.

22 We support EFS in auditing us because we believe
23 training is important and we hold ourselves at MSHA Safety
24 Services to a high standard to provide engaging,
25 knowledge-based training. Guess how many times we've been

1 audited compared to other organizations. I called the
2 local state grant training program in my area to see how
3 many times they've been audited the past five years.

4 The answer is zero. My concern is that even
5 though we are regularly and thoroughly audited, we were
6 again audited in our training immediately following my
7 comments in Arlington. EFS showed up and said, quote, I
8 was told I had to be here and I had other things planned,
9 end quote.

10 I want to confirm as professionals working
11 through the appropriate channels that you have no
12 intention in trying to intimidate us or inflict
13 retribution upon my comments. So that's the end of that
14 comment, right. I'm going to jump to the silica standard
15 now.

16 I want to introduce myself again. My name is DJ
17 Schmutz. I'm the Director of Operations for MSHA Safety
18 Services, Inc. We're a training, safety and IH company
19 focused in the mining space.

20 Our role at MSHA is to elevate the industry
21 through quality training and support. We are blessed to
22 work with over 250 companies across the U.S. to help them
23 understand their exposures, provide quality training and
24 help their miners go home safe to their families every
25 single day. I'm not getting paid to be here.

1 I made that point in Arlington. I'm not paid to
2 be here again at this Denver hearing. I am here to support
3 the small mines across the United of America that may or
4 may not know we're having these discussions but that this
5 is going to directly affect them.

6 And these are the mining companies that will be
7 directly affected by this standard more so than any other
8 group. The proposed standard will dramatically increase
9 industrial hygiene costs for companies. As a company, we
10 will see an increased demand for our services, right?

11 This is a net positive for us. But why am I here?
12 Because it's going to have a net negative effect on mining
13 and infrastructure of the United States. And that affects
14 all of us.

15 As part of these discussions over the past couple
16 of weeks, we've heard testimony, testimony about coal
17 leading to black lung and silicosis. And we heard some
18 testimony about 30 year olds getting advanced stages of
19 silicosis. Doctors have added their expertise.

20 I'm sure we'll hear some about that today, about
21 the growing concern in the Appalachian region. Unions have
22 defended their members. Environmental groups have
23 expressed their concern and shared support, right, for the
24 standard being in place.

25 These are all worthwhile conversations. I'm not

1 detracting from that at all. But nobody still is talking
2 about the majority of mining which is metal/non-metal and
3 those with less than 100 employees.

4 I have found no conclusive data that metal or
5 non-metal mines have lots of leading cases, cases leading
6 to silicosis. No one is citing testimonies of doctors with
7 these case studies, right? We're not talking about
8 metal/non-metal.

9 All these hearings have been directed to coal. No
10 one is talking about the volcanic region in the northwest
11 United States which has a super high silica concentration
12 yet minimal to no cases of silicosis. No one is talking
13 about FRAC sand being mined in Texas and Wyoming with no
14 real cases of silicosis.

15 How do these mines compare to others across the
16 United States? Let's talk numbers for a couple of minutes.
17 All these numbers were pulled directly from the proposed
18 standard, by the way.

19 Small mines, those with less than 100 employees,
20 make up 98 percent of all metal/non-metal mines in the
21 United States, 98 percent. Compare that to coal, right?
22 Coal is less than 9 percent of the mines in the United
23 States.

24 All these testimonies about silicosis have been
25 from 9 percent of the mines in the United States. What is

1 this actually going to do? Over the past three weeks, I've
2 been talking to small minute operators, drilling
3 companies, and contractors.

4 And the question is, is this even going to affect
5 contractors? There's no language at all in there that the
6 current standard addresses contractors. About what the
7 standards are going to do and how to comply, what issues
8 they've had in the past with silicosis.

9 The answers are all variations of the same thing.
10 They've never had issues. Complying with the new standards
11 is going to be detrimental to their operations in the U.S.

12 And some of these mines are the only mine in the
13 80- to 100-mile radius of where they live. In Arlington, I
14 addressed some comments about infrastructure, right? When
15 you have one mine in an 80- or 100-mile radius that
16 supports all the infrastructure, sand and gravel
17 operations for your cement plants for whatever, what's
18 that going to do to costs, to just people in that area,
19 let alone the mining community.

20 I do have to correct a statement I made in
21 Arlington as it was inaccurate. I said that this would be
22 three to four times -- cost will be three to four times
23 higher for operators of an MSHA estimated. I was wrong. I
24 apologize for that.

25 I estimate it'll be at least ten times the cost

1 for these small mine operators versus what MSHA said. And
2 that is just direct cost, right? I'm not even going to go
3 into indirect costs, what that's going to cost for them.

4 According to the proposed standard, the average
5 size mine in the United States does 3.8 million dollars in
6 annual revenue per mine with roughly 12 percent profit
7 margin. Their expenses are going to be well over 10
8 percent of the profits. And not that really matters,
9 right?

10 But that's the ability to provide new safety
11 equipment and new equipment with increased HEPA
12 filtration, capacity, you know all of these other safety
13 events we've talked about. We just had -- unfortunately
14 last week, we just had two more fatalities in mining. This
15 is going to be one of our worst years for fatalities in
16 mining in a long time.

17 And I think that money can be better served going
18 towards some of those direct hazards that we're seeing
19 right now. In the proposed rule, MSHA noted that this will
20 affect small mines more than any other mining group
21 because they don't have the infrastructure in place in
22 their current status for dust control, right? I'm talking
23 about engineering controls which this standard is written
24 directly for engineering controls, right?

25 We're talking transfer points. We're talking dust

1 control methods, right? In the proposal, it said that
2 these small mines are going to have the hardest time
3 meeting these new standards.

4 Some of these other direct costs, right, are
5 going to be HEPA filtrations for cabs. Some of them may
6 not even have those. They'll have to do aftermarket
7 filters for cabs, transfer point control, belt controls,
8 holding water, wetting roads, IH sampling quarterly for
9 almost every SEG at the mine.

10 In the proposal, you estimate that about 40
11 percent of the mine sites and jobs across the U.S. will be
12 over the new action limit. I don't think that's accurate.
13 According to my sampling data, my thousands of sampling
14 point data, it's going to be closer to 75 percent of all
15 jobs will have to be sampled quarterly and most employees.

16 And the question is for a lot of these small
17 mines, they don't have any engineering controls for
18 transfer point. How much does a dust control system cost
19 from a transfer point? I'm not going to answer that
20 question.

21 But then we can go to indirect costs, right?
22 Almost no profit for the operators, that doesn't matter,
23 right, because safety has no bounds. But ultimately, it's
24 going to be easier for a lot of operators to shut down
25 than to comply with the new standard, right?

1 A couple of citations and they will shut down.
2 And so what's that going to do, right? We still have our
3 infrastructure needs. We're going to be buying -- instead
4 of buying locally, we're going to be buying from
5 metropolitan areas and we're going to be outsourcing from
6 other countries which don't have any safety controls in
7 place.

8 You're buying gravel and aggregates and stuff
9 from Mexico or China, right? We know what happens in those
10 places. We have issues hiring new miners, right?

11 We already have a net negative amount of miners,
12 have need for new miners. Who wants to go work at a mine
13 site when you have to get a chest x-ray before starting
14 work? A couple operators brought this up.

15 Mining companies across the U.S. are already
16 thousands of miners short with no end in sight. What are
17 we saying to those potential future employees, you're
18 going to die doing this job, so we got to get some
19 pictures of your lungs, when those operators have never,
20 ever had anybody get a case of silicosis that work for
21 them. When we take a holistic look at mining in general,
22 in coal, almost everybody knows somebody that has black
23 lung, especially from the Appalachian region.

24 Outside of that region, we don't know anybody
25 with silicosis in the metal/non-metal mining industries.

1 I'll give you for an instance. I lived in an area of the
2 country where you have the largest natural deposits of
3 trona or soda ash.

4 They've been mining in some of those mines for
5 over 70 years, right, well before MSHA came into
6 existence. These mines get cited for respirable dust
7 pretty frequently and for silica exposure. They are dusty.
8 They can definitely probably do better. Not really
9 pertinent in this conversation.

10 How many cases of silicosis you think they've had
11 over the years? Zero. And they've had well over 10,000
12 miners roll through there. And I'm going to estimate it's
13 probably going to be closer to 20 or 25,000 minutes rolled
14 through there in 70 years of those large mines.

15 I recognize this isn't empirical data in its
16 current form. I'm getting personal experience and
17 testimony to work with over 270 sites across the U.S.
18 Guess what I found when I was researching cases of
19 silicosis and mining the U.S. outside of coal.

20 Nothing, no data anywhere except for calculated
21 data based on exposures in other countries. There are
22 reports, calculations, but no modern data to see where
23 we're really at. When writing and implementing these
24 standards, broad sweeping strokes are not the answer.

25 We have to look at all aspects of what the

1 standard is going to do, little to no benefit for the
2 metal/non-metal mining space. Why would we risk the
3 critical infrastructure in the U.S. and all these little
4 mines that are providing quality jobs for many in small
5 towns across America? What would have the greatest effect
6 is let's put a standard in place for coal looks like PEL
7 60.

8 We're all on board with that except for maybe
9 some of those coal guys. And let's keep the current
10 standard where it's at. Let's enforce it like we've been
11 doing for the past two and a half years, right, with
12 impact inspections and other things.

13 The risk is not there for metal/non-metal.
14 Exposures are higher than you think. And then your data
15 shows exposures are higher and cases are still almost
16 nonexistent. We're ready for the standard to stay where it
17 is in metal/non-metal. Thank you.

18 MS. SILVEY: Thank you. I have a few comments and
19 I have a few questions.

20 MR. SCHMUTZ: Okay.

21 MS. SILVEY: First, I'm going to ask you a
22 question. This is just a threshold question, and I'm going
23 to go through some specific comment --

24 MR. SCHMUTZ: Okay.

25 MS. SILVEY: -- and some more questions. Do you

1 support the PEL of 50? That's a yes or no answer.

2 MR. SCHMUTZ: Yes.

3 MS. SILVEY: Okay. All right. So that -- okay. I
4 got my answer. Let me move on.

5 MR. SCHMUTZ: Okay.

6 MS. SILVEY: I'm going to go back to how you
7 started, to when you started.

8 MR. SCHMUTZ: Okay.

9 MS. SILVEY: I have no idea why you were audited
10 by EFS. That's news to me. Do you know anything about
11 that? Now, that's an organization under MSHA. But I have
12 no idea. I would say that there's no nexus to your
13 speaking at the Arlington public -- I would say that, I
14 could be dead wrong -- at the Arlington public hearing --

15 (Simultaneous speaking.)

16 MR. SCHMUTZ: Okay. When they showed up --

17 MS. SILVEY: -- and you being audited.

18 MR. SCHMUTZ: When they showed up, they said, I
19 have other plans for today. But I was told I had to be
20 here to audit you guys.

21 MS. SILVEY: That may be what they said. I'm
22 saying to you I would think that there was no nexus. But
23 I'm going to go back and look into that. What date were
24 you audited?

25 MR. SCHMUTZ: Let's see. It was on Wednesday, the

1 Wednesday following the Arlington speaking.

2 MS. SILVEY: Okay. Arlington here was on --

3 MR. SCHMUTZ: That would've been in the 9th,
4 August 9th.

5 MS. SILVEY: Yeah, because it was on a Thursday.

6 MR. SCHMUTZ: Yeah, the 3rd, yeah.

7 MS. SILVEY: And so who exactly -- well, let's
8 talk. I'll talk --

9 MR. SCHMUTZ: We'll talk offline.

10 MS. SILVEY: -- offline about that because I don't
11 want to put anybody on the. But I'm thinking that there
12 was no nexus. But --

13 MR. SCHMUTZ: It was entirely too suspicious to
14 not make a corollary relationship on my side.

15 MS. SILVEY: I hear you, in your mind. And so
16 we've gotten comments on both sides supporting this
17 proposal and totally -- not totally because you just said
18 you support the PEL. And that was going to lead into --

19 (Simultaneous speaking.)

20 MS. SILVEY: That was on me to -- that's right.
21 You said it. One of my other comments for metal/non-metal.
22 It just so happens we look at overexposures to the extent
23 that our inspectors get to a particular mine, metal/non-
24 metal mine, or a particular coal mine.

25 We look at the overexposures every week. And this

1 past week, and I'm talking metal/non-metal now. And I'm
2 talking for everybody in here who represents the
3 metal/non-metal industry because quite honestly that's
4 where our regulatory economic analysis show some of the
5 greatest benefits.

6 And I say that the numbers speak for themselves.
7 But we saw exposure at one mine. I'm not calling the names
8 of any mines. That's not, I don't have to do that. But we
9 saw exposures in excess of 500 microgram of silica. That's
10 a lot.

11 MR. SCHMUTZ: That's a lot.

12 MS. SILVEY: And you agree.

13 MR. SCHMUTZ: Yeah.

14 MS. SILVEY: And something has to be done.

15 MR. SCHMUTZ: Let's hold them to 100 micrograms.
16 That's what I'm saying. Let's hold them to the current
17 standard, right? They're over the current standard.

18 MS. SILVEY: You said you supported 50.

19 MR. SCHMUTZ: I said that.

20 MS. SILVEY: I got you to say that. So that's on
21 the record. You reported that. Everybody in this room
22 heard that. So let's move on.

23 Now my next question, when we talk about -- see,
24 that's the thing rulemaking is as opposed to, for example,
25 an adjudicatory item. Rulemaking is a rule of general

1 applicability. It applies to all my operators equally. And
2 so when you talk about some, some operators out there may
3 fit into the category that you proffered to me, to our
4 panel.

5 And for those, then if their exposures are under
6 25, they won't have anything further to do. Or as you
7 said, the one operator, some of the mining operations, you
8 represented, that took thousands and thousands of samples
9 and had no silicosis. What I do want to ask is, if you
10 would submit some of your data to us, some of your cost
11 estimates if you could. At one point, you said that 75
12 percent of all -- you estimate that under our proposal 75
13 percent of all jobs would have to be sampled.

14 MR. SCHMUTZ: Correct. And that goes back to my
15 comments in Arlington. Remember when I talked about the
16 job descriptions you guys were sampling, the SEGs that you
17 all were sampling. Our haul truck drivers, not conveyor
18 belt operators, right, which have an overexposure of 11.2
19 percent compared to the 2.2 percent.

20 MS. SILVEY: Okay. Well, if you would submit this
21 data so we can compare to what we have. But I would like
22 you to review the health effects as well as the risk
23 assessment in support of this rule. And that talks indeed
24 about why we are doing this rule of general applicability.

25 It does talk about the health effects of silica.

1 And if one were to ask me, that operator had that in
2 excess of 500 micrograms, that's almost akin to an acute
3 exposure. I mean, you need to take that miner out of that
4 right away.

5 MR. SCHMUTZ: Agreed.

6 MS. SILVEY: So --

7 MR. SCHMUTZ: I'm not going to argue with that.

8 MS. SILVEY: And when you started, you said it
9 would dramatically increase the industrial hygiene cost.
10 Now you're saying that was good for you because you were
11 in that vision.

12 MR. SCHMUTZ: Yeah.

13 MS. SILVEY: But in all of your comments where you
14 said you believe that the proposal would directly increase
15 cost, we would like it if you would submit specifics.

16 MR. SCHMUTZ: We have been submitting specifics.

17 MS. SILVEY: I say to people who are providing
18 comment and testimony. We take general comments and
19 testimony. But the more specific you are with your
20 rationale and supporting data, that will be more useful to
21 us.

22 And I hope that if some people have seen some of
23 MSHA's proposal as follows, some of MSHA's rulemaking and
24 have seen some of their proposals, how we started out with
25 the proposal and how we ended up with the final rule. You

1 would indeed see that rulemaking is meant to be what
2 rulemaking is meant to be. And that is to take into
3 consideration notice and comment. And that's exactly why
4 we are here today.

5 MR. SCHMUTZ: That's what we hope for in this
6 process, right, that you will take into consideration
7 because we're working with mine operators across the U.S.
8 to make quality comments with actual data, what this is
9 going to cost them so that they can get that in there and
10 you guys can take that into consideration.

11 MS. SILVEY: And I said my last statement so I can
12 disabuse. In the hope of disabusing you from your -- and
13 you did ask for an answer from me of your rhetorical
14 comment of how you started. And I knew you meant that with
15 some sarcasm, and that's kind of how I took it.

16 And that's fine. But we do want specifics where
17 you talked about the conclusions that you think the
18 impact. If you would give us specifics relative to those
19 impacts.

20 MR. SCHMUTZ: That's the plan.

21 MS. SILVEY: Do you have anything?

22 MR. WATKINS: I've just got one clarifying
23 question. Maybe I missed the nexus. You mentioned that 75
24 percent of the samples you expect to be --

25 MR. SCHMUTZ: Above the action level.

1 MR. WATKINS: -- above the action level?

2 MR. SCHMUTZ: Correct.

3 MR. WATKINS: Above the action level or above the
4 PEL?

5 MR. SCHMUTZ: Above the action level.

6 MR. WATKINS: Okay. What percentage do you think
7 would be above the PEL?

8 MR. SCHMUTZ: The beginning, when it first rolls
9 out, or afterwards, right? Probably 35 to 40 percent above
10 the PEL.

11 MR. WATKINS: Okay. But yet, you say there's no
12 evidence of the need to have a rule change?

13 MR. SCHMUTZ: Show me the cases of silica because
14 we work with 270 mine sites. I know of three people who've
15 had silicosis. Two work in the coal mines and one worked
16 at a silica mine that has an issue with overexposures,
17 right?

18 You talk about overexposures. They have issues
19 with that. And we've been working with them for years to
20 get their exposures down which they've done. And they've
21 had a case. That's all that I know of.

22 MR. WATKINS: Okay. Thank you.

23 MS. SILVEY: Anybody else? Okay. Thank you.

24 MR. SCHMUTZ: Thank you. Thank you for your time.

25 MS. SILVEY: Our next speaker is Lee Travis,

1 Vulcan Materials. Our next speaker I'm told is virtual.

2 Lee Travis, Vulcan Materials.

3 MR. TRAVIS: Yes, ma'am. And can everyone hear me?

4 MR. WATKINS: Yes.

5 MR. TRAVIS: Again, my name is Lee, L-E-E, Travis,
6 T-R-A-V-I-S. Good morning to the panel. I am speaking here
7 today on behalf of the National Stone, Sand & Gravel
8 Association, of which I am a member of the Occupational
9 Health and Safety Committee. I am the manager of
10 Occupational Health Services for Vulcan Materials Company,
11 where I am responsible for all aspects of Vulcan's
12 occupational health program. I have a master's degree in
13 public health and industrial hygiene, 25 years of
14 experience and a board-certified safety professional.

15 I'd like to first thank you for the opportunity
16 to share our industry's comments, and I also want the
17 community and administration to know that they're
18 participating in an important political -- and the
19 importance of protecting our miners from the hazards of
20 the private sector.

21 The NSSGA and its members look forward to
22 participating via written comment on the proposed rule.
23 But directly, the industry group felt that certain
24 concerns would be best shared through the hearing process.
25 It is understood that MSHA has developed the proposed

1 rule, as Assistant Secretary Chris Williamson recently
2 stated at the last stakeholders meeting, in consideration
3 of both OSHA's promulgated respirable crystalline silica
4 rules and the existing industry standards overall.

5 In review of the proposed rule, the NSSGA also
6 considers the existing legislation mentioned as well as
7 industrial hygiene, or IH, best practices and guidelines
8 and realistic feasibility of workplace practices within
9 the industry. I would like to address two main subjects
10 today in brief.

11 Quantitative exposure monitoring and medical
12 surveillance. So let's begin with quantitative exposure
13 monitoring, and specifically baseline sampling. According
14 to the proposed rule, baseline sampling is required to be
15 completed for any miners reasonably expected to be exposed
16 to respirable silica at any level within 300 days of the
17 final rule's publication.

18 Vulcan Materials Company currently has 242 mines
19 with approximately 6,000 production employees serving 22
20 states, the District of Columbia, and the U.S. Virgin
21 Islands. We've been conducting industrial hygiene sampling
22 since 1980. We've collected tens of thousands of samples
23 across all of our mining locations and characterized those
24 exposures for the different jobs and similar exposure
25 groups at our facilities.

1 As written, the proposed baseline sampling
2 language would create the requirement to collect an
3 additional 6,000 samples within nine months of the rule's
4 promulgation, which will create an extreme time constraint
5 to getting the sampling completed. The mining industry,
6 along with Vulcan, will struggle to meet this requirement.
7 Vulcan has an established occupational health and
8 industrial hygiene program and we do not currently have
9 the staff or the industrial hygiene sampling equipment to
10 comply with the proposed language. Other member companies
11 with limited resources will face an extreme burden to
12 comply.

13 And if there's not enough qualified and trained
14 professionals to conduct the sampling, the exposure
15 sampling, and not enough of them will have the sampling
16 equipment currently in the market. In addition, the
17 sampling media and lab capacity to do the number of
18 proposed analyses is limited, and turnaround times for
19 media and sampling results are going to be delayed.

20 Based on our sampling experience, the proposed
21 baseline sampling requirement is not necessary for our
22 operations. We already have the objective exposure data to
23 properly characterize our employee exposures in accordance
24 with the accepted industrial hygiene practices to ensure
25 miners are protected. Being able to use this objective

1 data in lieu of additional baseline sampling will allow
2 Vulcan, along with other member companies that already
3 have baseline data, to continue to focus on areas of
4 potential concern versus selecting baseline data for
5 concerns that have been previously objectively identified.

6 So in summary, of the comments on baseline
7 sampling, the baseline sampling requirement in the
8 proposed rule is unnecessary to protect miners' health in
9 a company that already characterized exposures, and in
10 fact distracts time and sampling resources from miners and
11 SEGs for which the existing data suggest that the sampling
12 should be corrected.

13 In addition, allowing companies to use their
14 existing objective exposure data collected, categorized in
15 similar exposure groups, or SEGs, will allow for realistic
16 monitoring programs where true risk is identified and can
17 be properly controlled rather than a one-size-fits-all-
18 approach to sampling that diverts limited resources. For
19 reference, the American Industrial Hygiene Association
20 strategy for assessing and managing occupational exposures
21 outlines and strongly emphasizes the accepted best
22 practices of establishing SEGs.

23 OSHA established the use of SEGs in their Table 1
24 for the construction industry respirable silica rule.
25 Table 1 lists 18 common construction tasks and equipment

1 used where there is increased potential exposure to
2 silica. The table describes the engineering controls, work
3 practices, and respiratory protection necessary for each
4 task. The tasks listed are specific, and if a company can
5 fully and properly implement the exposure controls listed,
6 then they are not required to determine the silica
7 exposure for the employees who did the task.

8 However, if the exposure controls are not
9 followed for the particular task, then industrial sampling
10 is required. The table was data proven by NIOSH and OSHA
11 to be effective at consistently protecting the worker
12 below the proposed -- or below OSHA's established action
13 limit.

14 However, if the exposure, an example of such an
15 SEG in our industry would include haul truck(phonetic)
16 operators, loader operators, and control room operators
17 where the cabin or room is protected, by specified
18 engineering controls, that are proven to reduce exposure
19 to respirable silica. For members of the mining community,
20 who do not already have objective baseline exposure data,
21 adopting language similar to OSHA's respirable silica rule
22 baseline requirements should be strongly considered. As
23 referenced, OSHA requires the employer to asses the
24 exposure of the employee who is or may reasonably be
25 expected to be exposed to respirable crystalline silica at

1 or above the action level by establishing a marker, i.e.
2 an action level, for when baseline sampling is required.

3 This will accomplish the goal that MSHA and the
4 industry have for protecting miners without the unneeded
5 burden of sampling miners that have no reasonable
6 expectation of being overexposed to respirable silica.
7 There are several concerns with the proposed baseline
8 sampling overall and NSSGA plans to provide written
9 comment to those.

10 But for the initial time we have today, the NSSGA
11 would like to recommend the consideration of the
12 following: the use of more specified language when
13 identifying miners who will participate in baseline
14 monitoring to those at actual or potential risk for
15 exposure above the action level, similar to OSHA's rules.

16 More specific language that defines the use of
17 similar exposure groups, consideration of either a Table 1
18 or more specific language around tasks associated with
19 specific engineering controls to be included into the
20 rule, and the use of past sampling data outside of the
21 prior year as an example of objective data to meet the
22 baseline exposure requirements.

23 Moving on to the medical surveillance, risk-based
24 programs. Vulcan continues to address modern health
25 through our ongoing medical surveillance program and,

1 based on previous experiences, there are concerns with the
2 MSHA proposal related to medical surveillance.

3 The proposed language specifies that medical
4 surveillance be conducted within 30 days of hire. Since
5 the pandemic, this has been extremely difficult to achieve
6 due to clinics routinely being understaffed and qualified
7 personnel to administer the tests. As examples, when
8 prospective miners are sent to the clinics, they may wait
9 for extended periods of time only to be turned away
10 because a qualified technician is not there that day, and
11 in some instances, those prospective miners are asked to
12 drive long distances to reach a clinic that can perform
13 the tests.

14 In rural areas, where many mining operations are
15 located, occupational medical clinics aren't capable of
16 administering the required testing or maintaining staff
17 with required certifications. In addition to getting the
18 proper testing completed, whenever the testing is
19 completed, the interpretation of those results poses
20 another obstacle for mine operators.

21 Under the proposed rule, operators will have to
22 contract with quality B readers who are in short supply.
23 By asking mine operators to test every new hire regardless
24 of job duties and potential exposure to respirable silica
25 will put undue stress on an otherwise struggling

1 occupational medical clinic system. The 30-day requirement
2 for medical surveillance testing for all new miners is
3 just not feasible in the current environment and will cost
4 compliance issues outside the mine operator's control.

5 Consideration should be given to aligning medical
6 surveillance programs on a risk-based approach that
7 accepts existing legislation that has been established as
8 protective to the workforce.

9 In summary, the requirements to provide medical
10 surveillance should be risk-based. As it's in the OSHA
11 standard, mine operators should only be required to offer
12 medical surveillance to miners who are exposed to silica
13 like the OSHA standard which requires that medical
14 surveillance be offered to those exposed to the action
15 level 30 or more days a year. Also, mine operators need
16 more time within which to offer the medical surveillance.
17 Thirty days is not practical for reasons I mentioned
18 before.

19 As with the recommendations put forth regarding
20 sampling, this approach would also serve to better
21 allocate limited resources toward miners who need it most.

22 In closing , NSSGA and its members look forward
23 to continue support MSHA in the development of this key
24 legislative rule. We appreciate the time given to here to
25 initially discuss concerns over monitoring and medical

1 surveillance and we look forward to participating in the
2 written comments activities . As always, we're also
3 available for queries, conversations, and other
4 information we can provide. Again, thank you very much for
5 your time today.

6 MS. SILVEY: Okay. Thank you. I just have one
7 comment of you, a question. And I sort of made -- you may
8 have said it and I may have missed it. But with respect to
9 your comments on the baseline sampling, not necessary to
10 protect miner's health.

11 And yet, you talk about how much sampling that
12 you all do conduct. And maybe you provided it, but did you
13 provide an alternative in lieu of --

14 MR. TRAVIS: I'm sorry, Pat. You cut out at the
15 very beginning. Can you repeat that?

16 MS. SILVEY: Did you provide an alternative in
17 lieu of baseline sampling? Did you, during your testimony,
18 provide an alternative to us in lieu of doing baseline
19 sampling? You said it was not necessary.

20 MR. TRAVIS: Yes, ma'am. That's, I guess, the
21 specific context of allowing prior sampling data in as an
22 example of objective data. Currently, the examples given
23 in the preamble exclude prior sampling data outside of the
24 year prior; so we're saying allow mine operators that have
25 been doing the right thing before and sampling their

1 employees to be able to include their objective data and
2 their past sampling results as an example of objective
3 data which is completely in line with what is accepted by
4 OSHA and, I guess, as an example of objective data and the
5 current OSHA regulations --

6 (Simultaneous speaking.)

7 MS. SILVEY: And so what do you all use right now?
8 I gather that you have a medical surveillance program. You
9 do a lot of sampling. What do you all use for your
10 baseline sample now?

11 MR. TRAVIS: Well, again, like I said, Vulcan's
12 been conducting industrial hygiene sampling since 1980, so
13 we've collected enough data to where we can categorize
14 those exposures into similar exposure groups. And then we
15 use statistical analysis to further analyze that data to
16 see where they fit in to exposure categories and then
17 design sampling programs around that.

18 So, the use of SEGs is -- another a big reason
19 why we're a proponent for metal nonmetal in general to be
20 able to use SEGs so that you can focus that sampling
21 effort where it truly needs -- where the risks truly would
22 be for a mine operator. So, in baseline sampling you would
23 -- in our experience, we have a list of jobs that, based
24 on our extensive sampling experience, have a potential to
25 be over-exposed, so when we make an acquisition or we open

1 a new mine and we go to work, we will collect the data on
2 those specific jobs and tasks to make sure that they fall
3 in line with our SEGs that we've created for the rest of
4 the company and go from there. Does that answer your
5 question?

6 MS. SILVEY: Sort of. But I'd ask you to end your
7 -- I'd ask you a question that, to provide to us specific
8 clarifying comments of your comments as to exactly how you
9 perform baseline sampling now. What do you use? And I
10 gather you use some kind of statistical grouping.

11 I understand what you're saying. But I'm asking
12 you to please provide exactly how you know what your
13 baseline sampling is for all of your mines. And maybe you
14 just know it by occupation. Maybe that's what you're
15 telling me. But if you would do that.

16 MR. TRAVIS: Yes, ma'am.

17 MS. SILVEY: Okay.

18 MR. TRAVIS: Yes, ma'am.

19 MS. SILVEY: Thank you. Thank you. Our next
20 speaker is Richard Brown, Sorptive Minerals Institute.

21 MR. BROWN: I have a presentation that should pop
22 up here in a moment.

23 Would you back that up to slide 1?

24 MS. SILVEY: Are we ready?

25 MR. BROWN: That is slide 1. All we need to do is

1 remove the view of myself and other people that are
2 listening in from the screen so everybody can see it.

3 There we go.

4 Good morning. I'm Richard Brown, and I am here on
5 behalf of the Sorptive Minerals Institute or SMI. I'm
6 pleased to have this opportunity today to present SMI's
7 comments on MSHA's proposed rulemaking on lowering miner's
8 exposure to respirable crystalline silica and improving
9 respiratory protection. Next slide.

10 SMI is the national trade association
11 representing the manufacturers and marketers of products
12 made from absorbent or sorptive clay minerals. Founded in
13 1970, SMI represents an industry whose products are made
14 from absorbent or sorptive clay minerals and are used
15 daily by millions of people around the world and thousands
16 of commercial, industrial, and consumer applications such
17 as cat litter, animal feed additives, cosmetics, and
18 environmental sealants to name but a few. Importantly, SMI
19 also serves as the scientific research arm of the sorptive
20 clay industry. Next slide.

21 Through its technical committee, SMI has been
22 heavily involved in science-based crystalline silica
23 research since 1988. Focusing on understanding the nature
24 and health effects of the silica species in the sorptive
25 clays mined and sold by SMI member companies. Throughout

1 this time, SMI has freely shared its research in public
2 scientific conferences in the U.S., Germany, the
3 Netherlands, and South Africa.

4 In 1999, this research led to issuance of a safe
5 use determination or SUD by the California Office of
6 Health Hazard Assessment under Proposition 65 for
7 exposures to airborne respirable crystalline silica from
8 sorptive mineral-based pet litter. In 2008, SMI published
9 two companion research papers in the peer reviewed
10 international journal, Inhalation Toxicology. The first
11 paper discussed the results of in vivo testing conducted
12 by the Fraunhofer Institute in Hanover, Germany, while the
13 second was a detailed study characterizing the physical
14 and chemical nature of the samples used in those studies.

15 While neither paper has been referenced by MSHA,
16 both are important to MSHA's rulemaking process. Next
17 slide. In partnership with the National Center for Earth
18 and Environmental Nanotechnology Infrastructure at
19 Virginia Tech, known as NANO-EARTH, SMI has continued its
20 research focused on defining the physical chemical
21 characteristics of quartz from sorptive clays. This had
22 generated unpublished research in 2010, 2017, 2018, and
23 2020 which is now in preparation for publication in a peer
24 reviewed scientific journal. Next slide.

25 My testimony today will focus on the unique

1 characteristics of crystalline silica in sorptive clays
2 and how those well-documented unique characteristics
3 impact its potential toxicity and potential for adverse
4 health effects for those who work with these materials. In
5 the proposed rule, MSHA cites OSHA's 2013 review of the
6 literature of health effects of occupational exposure to
7 respirable crystalline silica and acknowledges the
8 important role that the surface of crystalline silica
9 particles plays in producing disease, noting that, and I
10 quote, any factor that influences or modifies these
11 physical characteristics may alter the toxicity of
12 respirable crystalline silica, close quote. Despite this,
13 MSHA has not addressed this subject in its proposed rule.

14 In order to make a proper rulemaking
15 determination, MSHA must address and fully consider the
16 issue of the surface characteristics of the crystalline
17 silica it intends to regulate and how they relate to
18 silica toxicology. With this in mind, the primary purpose
19 of this presentation is to discuss the unique nature of
20 the crystalline silica and sorptive clays and the critical
21 role played by the surface of quartz in sorptive clays in
22 determining toxicology. Next slide. Silica contained in
23 sorptive clays may be present as opal, an amorphous or
24 non-crystalline silica hydrate, or as the crystalline
25 silica polymorph quartz.

1 Opal and other amorphous forms of silica are
2 appropriately not covered by MSHA's proposed rule. This is
3 consistent with the long recognized absence of health risk
4 associated with exposure to amorphous silica. However, a
5 portion of the quartz present in sorptive clays is of
6 respirable size and will be subject to MSHA's proposed
7 rule.

8 It is MSHA's inclusion of respirable quartz and
9 sorptive clays that is of specific concern to SMI. Next
10 slide. Recognizing that many of you may not have a
11 familiarity with geology or mineralogy, I hope you will
12 bear with me while I provide a little background. First,
13 crystalline silica and sorptive clays occurs only in the
14 form of quartz.

15 Most commonly, the quartz in sorptive clays form
16 authigenically, that is, along with clay and other
17 accessory minerals by in situ precipitation of volcanic
18 ash that fell into and was dissolved by salty water. An
19 example of this is the formation of the bentonite clay
20 found in Wyoming. Alternatively, quartz may be residual or
21 left over from in situ weathering of parent rock by
22 hydrothermal groundwater in the process of forming clay.

23 Or it may be detrital, having been washed in from
24 a distant location and co-deposited with volcanic ash
25 which was later altered to clay. Regardless of origin,

1 however, the quartz in sorptive clays used in our industry
2 is geologically ancient. Having been in intimate contact
3 with the clay in which it occurs for about 10 million to
4 110 million years depending upon the deposit. Next slide.

5 Because sorptive clays are destroyed by
6 temperatures over about 500 degrees Centigrade or 930
7 degrees Fahrenheit, we can be absolutely certain that the
8 crystalline silica they contain has never been subjected
9 to the very high temperatures that are required to create
10 Cristobalite or Tridymite. Regardless of origin, the
11 quartz in sorptive clays is different in a critical
12 respect from the forms of crystalline silica that cause
13 respiratory disease and which MSHA proposes to regulate.
14 The surface of the quartz grains in sorptive clays has
15 been in chemical equilibrium with the clay matrix in which
16 the quartz resides from the time the clay rock was formed
17 many millions of years ago until it was removed from the
18 ground to be processed into clay products.

19 The quartz grains in sorptive clays are precluded
20 by amorphous and crystalline aluminosilica from the matrix
21 in which they reside. The inclusion may also consist of
22 adventitious metal ions, especially aluminum, magnesium,
23 and iron. Next slide. Could you go back a slide? Thank
24 you.

25 The concept of occlusion of quartz and quartz

1 surfaces by aluminosilicates has been proposed in several
2 studies not referenced by MSHA. In 1996, Odom studied the
3 physical and chemical nature of quartz particles in
4 powdered and granular clay products as well as dust samples
5 collected in duplicate with MSHA sampling. From four
6 sodium bentonite plants in Wyoming and South Dakota, three
7 calcium bentonite plants in Oklahoma, Alabama, and
8 Mississippi, two Fuller's Earth plants in Illinois and
9 Tennessee, and one Ball Clay plant in Kentucky.

10 And used scanning electron microscope or SEM with
11 energy dispersing spectroscopy, EDS, in his study. He
12 reported that no free silica minerals that he observed in
13 any of the samples using these methods initially. Only
14 after the dust samples were digested in hot acid using
15 NIOSH Method 7106 to remove what he termed clay
16 encapsulation was the presence of the quartz confirmed in
17 all of the dust samples. Gocmez et al. in 2001 used x-ray
18 diffraction or XRD and SEM to determine the difference
19 between naturally occurring quartz in ball clays and
20 freshly ground quartz.

21 They found that no free silica particles can be
22 identified by SEM and ball clays and that all quartz
23 particles in ball clays were enclosed by Kaolinite clay
24 particles. They also found surface microstructure and
25 crystallinity index of the two materials was sufficiently

1 different to cause them to conclude freshly ground quartz
2 is not representative of all types of quartz in nature.
3 Wendlandt et al. in 2007 analyzed hundreds of quartz
4 grains from bentonite and found that coatings of the clay
5 mineral montmorillonite on these grains were ubiquitous on
6 all the grains.

7 The coatings covered the entire surface of the
8 grains regardless of grain size. And the coatings were
9 resistant to removal using chemical dispersants, acids, or
10 industrial processing. And the authors concluded in this
11 study that clay coating had the potential to mitigate
12 quartz toxicity in the lung. Next slide.

13 In unpublished research conducted for SMI,
14 Hochella and Muryama of Virginia Tech, 2010, found
15 occluded quartz from bentonite to be composed of multiple
16 minute silicon dioxide crystals which as a group were
17 occluded by amorphous silicate and minor amounts of
18 calcium, magnesium, and iron. This slide shows a pair of
19 extraordinary transmission electron microscope
20 photomicrographs of a representative quartz particle from
21 bentonite. The chemical nature of the core and exterior of
22 the particle is determined by EDS, is also shown
23 confirming that the core is quartz and the exterior
24 material surrounding it is aluminosilicate.

25 In the dark field image on the right, the quartz

1 core or the particle can clearly be seen along with its
2 surrounding aluminosilicate occlusion. Next slide. The
3 transmission electron microscope photomicrographs on this
4 slide show a portion of the occluded surface of a single
5 quartz particle from bentonite. The high resolution TEM
6 photomicrograph on the right clearly shows the highly
7 crystalline quartz core in the amorphous aluminosilicate
8 clay layer near the particle surface.

9 The observable lattice fringes in the core are
10 indicative of specific crystal planes of the core
11 material. Critically, Hochella and Muryama confirm that
12 the aluminosilicate surface is connected to the quartz
13 core at an atomic level and is not merely a coating but
14 actually chemically and physically an intrinsic part of
15 the quartz particle itself. They also show that the quartz
16 core is not exposed but rather completely occluded by the
17 aluminum silicate surface material. Next slide.

18 This point bears reemphasis. For sorptive clays,
19 the aluminosilicate occlusion is chemically and physically
20 an intrinsic part of the quartz particle itself. And the
21 quartz core of the particle is completely enveloped by the
22 aluminosilicate occlusion. Next slide.

23 More recently, in research being prepared for
24 publication, Berti, 2017 and 2018, evaluated numerous
25 quartz grains from four different bentonite deposits in

1 Wyoming. This included the quartz from bentonite reported
2 in Creutzenberg et al., 2008, and Miles, et al., 2008,
3 which I had previously mentioned, neither of which was
4 referenced by MSHA. These deposits spanned a distance of
5 250 miles and a geologic time frame of about three million
6 years.

7 Berti used TEM coupled with EDS to create color
8 maps of quartz grains which clearly show a location of
9 atoms of different elements. In the slide, red dots
10 represent silicon atoms and green dots represent aluminum
11 atoms. Here we can clearly see areas of high concentration
12 of silicon atoms representing the silicon dioxide of a
13 quartz core of these particles.

14 The areas with high concentrations of aluminum
15 represent aluminosilicate, indicating the location of the
16 aluminosilicate occlusion layer. It should be understood
17 that these micrographs are two dimensional slices of three
18 dimensional particles, and so do not represent in and of
19 themselves the entirety of the particle. Next slide.

20 In 2020, Cantando, also doing research for SMI,
21 using the same methods as Berti, evaluated the crushed
22 DQ12 quartz used by Creutzenberg et al. in their 2008 rat
23 installation study. This color EDS map shows only the high
24 concentrations of silicon atoms present in this DQ12
25 particle indicative quartz. No aluminum atoms are shown

1 because none were found. Next slide.

2 There are three crystalline silica polymorphs
3 known to cause human health hazard. Non-occluded fractured
4 quartz, Cristobalite, and Tridymite. These offending
5 species occur as single crystal particles having a high
6 degree of crystallinity and with a pure silicon dioxide
7 surface. When fractured, they have high energy surfaces
8 capable of generating free radicals.

9 These surfaces are produced by specific
10 industrial circumstances such as sandblasting and
11 crushing, cutting, and grinding stone and concrete which
12 fractures and breaks the silica particles into respirable
13 size. Next slide. The SEM photomicrographs in this slide
14 illustrate the obvious morphological differences between
15 naturally occurring geologically ancient occluded quartz
16 from bentonite, commercially manufactured DQ12 and Min-U-
17 Sil 5 quartz used in toxicology studies, and the
18 occupationally generated quartz from a South African gold
19 mine. The sharply angular nature and clean surfaces of the
20 manufactured and occupationally generated quartz can
21 clearly be seen on the right.

22 This contrasts dramatically with a highly
23 irregular aluminosilicate covered surface of the quartz
24 from bentonite seen on the left. Next slide. The TEM EDS
25 color map shown in this slide clearly illustrates the

1 difference between quartz from bentonite and DQ12 crushed
2 quartz used by Creutzenberg et al. in 2008 rat study. The
3 lack of any aluminosilicate occlusion atoms on the DQ12
4 crushed quarts compared to the very obvious
5 aluminosilicate layer of occlusion atoms on the quartz
6 from bentonite distinguishes these materials as uniquely
7 different.

8 This very fundamental difference must be
9 recognized by MSHA as it finalizes its crystalline silica
10 rulemaking. Next slide. The stability of the occluded
11 surfaces of a quartz from bentonite was evaluated as part
12 of the Creutzenberg study. The instilled DQ12 and occluded
13 quartz were recaptured from rat lungs at the end of the
14 90-day test period and cleaned the biological materials
15 using low temperature plasma ashing.

16 These SEM photomicrographs show the morphology of
17 the crushed DQ12 reference quartz and the occluded quartz
18 from bentonite before, on the left side, and after, on the
19 right side, installation. No significant morphological
20 changes occurred in either material. Particle diameter
21 distribution and particle mass distribution were also
22 determined with no significant differences noted for
23 either material.

24 This shows that the occluded surface on quartz
25 from bentonite clay remained intact throughout the 90-day

1 test period while inside rat lungs and in contact with
2 lung fluids. Next slide.

3 In its proposed rule, MSHA cites only one study
4 by Castranova et al., 1996, where the toxicity of freshly
5 fractured silica or alpha quartz was compared to that of
6 aged fractured silica in a rat installation or inhalation
7 study. Here, the quartz was jet milled and then stored for
8 two months to create the age fraction while freshly milled
9 quartz was then used for the freshly fractured fraction.

10 The authors found that the freshly fractured
11 silica caused a much greater toxic inflammatory pulmonary
12 reaction than did the aged silica, although the two-month
13 old aged silica still retains significant toxicity. Next
14 slide. Numerous other studies exist dating back at least
15 into the early 1990s that show the effect of aging on the
16 toxicity of fractured silica. All of these studies show a
17 decline in toxicity over a relatively short period of time
18 towards the aged silica, periods of time of days, weeks,
19 months, even years.

20 None of the studies cited here use fractured
21 silica older than a few months, however. Next slide. When
22 it comes to crystalline silica, aged is a very relative
23 term. In citing a paper by Soutar et al., 2004, that was
24 used by OSHA in its 2016 rulemaking, and in agreeing with
25 OSHA's conclusion, MSHA acknowledges that aged quartz

1 derived from dirt bands in coal scenes and accompanied by
2 clay minerals does not have the same toxic potential of
3 freshly fractured quartz from massive sandstone in a
4 Scottish coal mine. Next slide.

5 MS. SILVEY: Before you leave that page --

6 MR. BROWN: Certainly.

7 MS. SILVEY: -- that's page 21. It's that last
8 bullet. I'm assuming instead of log term, that was
9 supposed to be long term.

10 MR. BROWN: I apologize for the typographical
11 error.

12 MS. SILVEY: Is that right?

13 MR. BROWN: Yes.

14 MS. SILVEY: I just want to make sure.

15 MR. BROWN: Yes.

16 MS. SILVEY: And then, since I've already
17 interrupted you and we have all your slides to put in the
18 record. And I get your point. Is there any way you think
19 you can summarize?

20 MR. BROWN: If you would permit me, there are
21 several important points to come up, all covering -- all
22 specifically covering the concept of what it is about
23 crystalline silica particles that actually creates the
24 underlying hazard that MSHA has not addressed.

25 MS. SILVEY: Okay. I'm just going to say or if you

1 could go directly to those, if you don't mind.

2 MS. McMAHON: Ms. Silvey? I don't know if you all
3 can hear me. I'm sorry to interrupt. Can you hear me, Ms.
4 Silvey?

5 MS. SILVEY: I do. You are who?

6 MS. McMAHON: I'm Kate McMahon. I'm also
7 registered. I'm counsel to SMI. I'm registered as number
8 nine. But I will forego my time and in fact was planning
9 on doing that anyway to make sure that Mr. Brown has
10 enough time to address this.

11 We have done our very level best to succinctly
12 summarize the perfectly important science behind our
13 analysis.

14 MS. SILVEY: I understand. I hear you. Okay. I
15 hear you. So you will yield your time you are saying?

16 MS. McMAHON: I will yield my time to Mr. Brown,
17 that's right.

18 MS. SILVEY: Okay. All right.

19 MS. McMAHON: I think it's important that you all
20 have the opportunity to hear this. I know it's, I know
21 it's pretty in the weeds science, but it's critically
22 important to the evaluation that MSHA's gonna do with this
23 clay material that is extremely different than the quartz
24 that the Agency's been looking at.

25 MS. SILVEY: If you would, I still would ask if

1 you could find a track to get to those points that you
2 said are important points.

3 I think I know what you are saying already. But
4 if you would, I would allow you to get to those if you
5 could --

6 MR. BROWN: I will attempt to be --

7 MS. SILVEY: Thank you.

8 MR. BROWN: -- a bit more succinct, yes. So the
9 quartz particles and sorptive clays are geologically
10 ancient, having been created 10 to 110 million years ago
11 when the clay in which they reside was formed.

12 These particles have surfaces that have not been
13 fractured and have been in chemical equilibrium with the
14 clay since it formed.

15 For the purpose of regulation under the proposed
16 rules, MSHA must acknowledge the unique geologically
17 ancient surface of the quartz in sorptive clays and
18 segregate this quartz from the freshly fractured and
19 extremely young aged silica, which it likely proposes to
20 regulate. The distinction in the time frame is simply too
21 significant to be ignored.

22 Next slide. A number of important studies for
23 assessing health effects to exposure to occluded quartz in
24 the sorptive clay industry were not considered by MSHA.

25 For example in Geh, et al., 2006, human

1 fibroblasts were exposed in vitro to relatively high
2 concentrations of bentonite containing varying level of
3 quartz, with the difference in the presence and types of
4 transition metals. And the authors found only very low
5 level of genotoxicity.

6 The findings of the recent animal study like
7 Creutzenberg, et al., were consistent with those of Geh.

8 Next slide. So speaking to the toxicity of
9 occluded quartz, this study by Creutzenberg, in this study
10 the installation study in the rats found that quartz with
11 occluded surfaces was substantially less toxic to rats,
12 after intratracheal instillation with follow-up up to 90
13 days, than DQ12 crushed quartz. A significant effort was
14 made to extract the quartz from bentonite so that the
15 surface characteristics were not modified and could be
16 compared directly with the DQ12.

17 This study provided sound evidence that
18 cytotoxicity and inflammation were significantly less
19 severe in animals dosed with occluded quartz from
20 bentonite when compared to DQ12.

21 The graphs of key indicator tests shown here
22 revealed that the DQ12, the red line, induced persistent,
23 highly progressive and inflammatory responses and
24 significant tissue damage over the 90-day test period,
25 while the response to occluded quartz at the same dose,

1 the green line, was modest, non-progressive and not
2 significantly above the saline control group, the blue
3 line.

4 The results show that despite the very high dose
5 used to guaranty an inflammatory response, the response
6 from occluded quartz is much different and far less potent
7 than that of crushed DQ12 quartz and much more similar to
8 the saline control.

9 It is important to note that the DQ12 used in
10 this stud was crushed 30 years before it was instilled in
11 animals. This is far older than the aged quartz used in
12 the study cited by MSHA or by OSHA.

13 So we can only speculate based upon the data
14 provided in the studies that I have cited before by OSHA
15 if MSHA and OSHA's aged and freshly fractured quartz had
16 been tested here, the response in each of these key
17 indicator tests would likely have been far greater than
18 that for the 30-year-old DQ12.

19 This is the real time frame of reference in which
20 the response to the geologically ancient occluded quartz
21 must be viewed.

22 Next slide. In 2023, this year, the review of
23 published animal testing research done by Poland, et al.,
24 and apparently not considered by MSHA, found that
25 respirable crystalline silica, RCS, and synthetic

1 amorphous silica, SAS, can cause very similar short-term
2 or acute pulmonary inflammatory responses while long-term
3 chronic pathological outcomes for these materials are very
4 different.

5 The graph on the left plots severe inflammatory
6 biomarkers following test animal inhalation of respirable
7 crystalline silica and shows the inflammatory response was
8 highly progressive throughout the test group.

9 The graph on the right plots the same biomarkers
10 following test animal inhalation of synthetic amorphous
11 silica and shows that after the expected initial
12 inflammatory response, the inflammation proceeded to
13 resolve through the rest of the test period and was
14 decidedly non-progressive.

15 It is of particular note that Poland's biomarker
16 profiles for both the respirable crystalline silica and
17 synthetic amorphous silica, are nearly identical to the
18 biomarker response profiles obtained by Creutzenberg for
19 DQ12, cross-quartz and occluded quartz from bentonite.

20 The biomarkers for both the synthetic amorphous
21 silica and the occluded quartz from bentonite resolved to
22 near baseline levels although this happened more quickly
23 within about three days for the quartz from bentonite.

24 Poland stated that this differential response
25 shows that the persistence of inflammation beyond the

1 initial response to silica deposition is a critical factor
2 in the development of pathologies which could indicate
3 health impairment. And they suggested that the level of
4 inflammation at the end of the subacute exposure in the
5 absence of tissue pathologies is a relatively poor
6 predictor of chronic target organ toxicity and that the
7 resolution of cellular inflammatory response should be
8 considered in any evaluation of toxicity.

9 They stated that taking such an acute endpoint
10 without incorporating resolution may lead to a false sense
11 of equivalency between particles that induce a transient
12 cellular response that rapidly resolves and that which
13 causes lung pathology.

14 This could be concerning where such acute potency
15 estimates are used for grouping as it may result in
16 materials with similar acute yet very different
17 inflammatory profiles over time being labeled as
18 equivalent.

19 These findings have direct bearing on MSHA's
20 determination of the appropriateness of regulating quartz
21 from sorptive clays in the same fashion as the freshly
22 fractured and aged silica it intends to regulate.

23 Next slide. Worker exposure in the sorptive clay
24 industry has not been extensively studied due to the lack
25 of observed health effects in the industry.

1 A NIOSH representative cohort study by Waxweiler
2 in 1988 studied worker mortality at a sorptive clay mine
3 and processing facility in South Georgia. They found a
4 significant deficit of non-malignant respiratory disease
5 and no excess non-malignant respiratory disease regardless
6 of presumed dust level and induced latency period or
7 duration of employment. In other words, they found
8 nothing.

9 Several reviews of worker exposures to
10 crystalline silica have also recognized the lack of
11 silicosis risk amongst clay workers with exposure to clay
12 dust, including exposures to Fullers earth, bentonite,
13 montmorillonite and Attapulgate. And SMI will provide
14 these studies to MSHA as part of its written comments.

15 Next slide. So why is crystalline silica a health
16 hazard? MSHA has cited a large number of studies which
17 document significant adverse effects on humans after
18 exposure to crystalline silica in industrial settings.

19 Despite noting that surface characteristics play
20 an important role in how crystalline silica causes tissue
21 damage and that any factor that influences or modifies
22 these characteristics may alter the toxicity of respirable
23 crystalline silica by affecting the mechanistic process,
24 MSHA has only referenced two of the hundreds of papers
25 that have been published on this subject over the past 50

1 years. And MSHA has not used the findings it has cited to
2 provide guidance so the type of crystalline silica that is
3 the true cause of the human health hazard can be
4 specifically regulated.

5 Next slide. Many researchers have published on
6 the relationship between the surface characteristics of
7 crystalline silica particles and particle toxicology over
8 the past 50 years. One particularly well-known and
9 prolific researcher in this area, Bice Fubini from the
10 University of Turin Italy has published at least 40 papers
11 on this subject since 1987, none of which have been cited
12 by MSHA.

13 MS. SILVEY: Excuse me, sir. I see where you have
14 a number of studies. I have a copy of the presentation.
15 And we are going to look at those. And that's why I was
16 asking earlier. And we have --

17 MR. BROWN: Let me jump if I may --

18 MS. SILVEY: Yes, please. I ask again.

19 MR. BROWN: So Fubini has been an important
20 researcher in this field studying the effect of surface
21 characteristics on toxicology for crystalline silica for a
22 long time. And MSHA needs to look at that research to get
23 a better understanding of what that relationship is.

24 A student of Fubini who about seven years ago
25 started publishing and had published previously as a co-

1 author with Fubini, Christina Pavan also at the University
2 of Turin, has published some extraordinarily important
3 research recently that I will briefly tell you about
4 because it is critical that MSHA incorporate this --
5 understand and incorporate this --

6 MS. SILVEY: We will look at your entire
7 presentation.

8 MR. BROWN: I understand that.

9 MS. SILVEY: I promise you that.

10 MR. BROWN: I understand that. But this is
11 critical.

12 MS. SILVEY: Okay. If you could --

13 MR. BROWN: And this is the focus.

14 MS. SILVEY: If you could expedite.

15 MR. BROWN: I will do that.

16 MS. SILVEY: Thank you.

17 MR. BROWN: So in 2000 --

18 MS. McMAHON: Ms. Silvey. I'm sorry. I just want
19 to recognize that the slides and the studies are going to
20 be in the record, of course. But Mr. Brown is here and
21 flew to Denver to be able to talk to you and explain based
22 on his extensive knowledge what he's found.

23 We are trying our best to succinctly but
24 importantly provide that information to you. It does seem
25 a little bit -- but the fact that it takes some time to

1 explain, I don't think means it should be given short
2 shrift.

3 MR. BROWN: Could you move forward to Slide 33?
4 There we go.

5 So in 2019, Pavan published a -- Pavan authored a
6 paper reporting on the findings of the workshop on silica
7 toxicity that had been held that year. She was the lead
8 author of a group of 17 researchers in this field who were
9 co-authors.

10 The workshop concluded that the pathogenic
11 activity of silica was variable and dependent on the
12 physical and chemical features of the particles. That
13 crystallinity and the capacity to generate free radicals
14 are now recognized and relevant features to silica
15 toxicity. That the surface of particles plays an

16 important role in silica toxicity. And then while
17 surface chemical features such as the presence of silanols
18 and siloxanes, two particular features, and the
19 configuration of the silica surface can trigger toxic
20 responses, yet still that point was not clearly
21 understood.

22 Next slide. So this paper is particularly
23 important for MSHA to take notice of because of the
24 reference section attached to it. In that reference
25 section, there are 66 papers that are focused on this

1 topic by 60 lead authors.

2 And MSHA has only cited two of the papers that
3 fall in that reference section, and one is the IARC 1997
4 monograph.

5 So at a minimum MSHA must evaluate this body of
6 research and use it to help guide its crystalline silica
7 rulemaking. This research is fundamental to understanding
8 why the hazard even exists and what causes the hazard that
9 we're so focused on outcomes for.

10 Next slide. In 2020, Pavan in the first of what
11 other researchers in this area actually called seminal
12 papers presented results that revealed the critical
13 toxicological role played by a new family of silanols they
14 termed nearly free silanols or NFS's. Importantly, they
15 showed that the localized density of these silanols and
16 not their total amount or average density was what
17 determined the toxic activity of silica dusts.

18 They stated that surface NFS emerged as the
19 elusive element that reconciles the enigmatic inflammatory
20 responses observed with both crystalline silica and some
21 amorphous silica in several experimental studies.

22 Next slide. They found that both crystalline and
23 amorphous silica exist as part of a continuum of forms
24 having variable toxicity but that it was all dependent
25 upon the presence of these surface NFS's.

1 Next slide. Now that brings us to 2023 and a
2 paper that was published in January of this year by Pavan.
3 Pavan was able to demonstrate that differences in crystal
4 packing of the crystalline silica polymorphs creates
5 different silanol networks on particle surfaces, which are
6 characterized by different amounts of NFS's.

7 Of critical importance, they showed that overall
8 the specific family of NFS's is responsible for the
9 membranolytic activity of all crystalline silica
10 polymorphs.

11 Next slide. Importantly, they found that the
12 amount of NFS's present on silica particles could be
13 modulated by thermal treatments. And this allowed them to
14 establish and confirm that silica membranolytic activity
15 was positively correlated with the concentration of NFS's
16 for all crystalline silica polymorphs.

17 So they have suggested that membranolytic
18 activity is NFS mediated for all silica polymorphs. And
19 they concluded their findings -- they concluded that their
20 findings contributed to the molecular understanding of the
21 toxicity mechanism for silica-based minerals and might be
22 helpful for predicting and controlling the hazard
23 associated to quartz and cristobalite, which are included
24 in the IARC classification of human carcinogens.

25 This is why this is so critical and so

1 fundamental because it now explains the causative agent
2 for what we see long after as the human health hazard.
3 This is where it starts. This recognition of this is
4 fundamental to the proper regulation of the offending
5 materials.

6 Next slide. Next slide. To summarize,
7 geologically ancient occluded quartz from sorptive clays
8 is demonstrably different from freshly fractured quartz
9 and MSHA's aged quartz that are known to cause health
10 hazards.

11 Physically, it has an inseparable aluminosilicate
12 surface. Chemically, the surface is not crystalline silica
13 dioxide but aluminosilicate. Toxicologically, it is
14 significantly less toxic than crushed referenced quartz,
15 which is far older than MSHA's -- the crushed reference
16 quartz that we use, which was far older than MSHA's aged
17 or freshly fractured quartz, and it does not produce
18 progressive disease.

19 MSHA currently regulates other silica species
20 such as opal differently than quartz. Based upon this
21 precedent and the substantial differences between occluded
22 quartz from sorptive clays and fractured quartz that is
23 known to cause human health hazards, occluded quartz from
24 sorptive clays should be treated similarly to the
25 treatment of amorphous silica rather than crystalline

1 silica.

2 There simply is not scientific support for
3 regulating quartz from sorptive clays in the same fashion
4 as the crystalline silica MSHA is correctly concerned
5 about and is proposing to regulate.

6 Next slide. The Sorptive Minerals Institute
7 thanks MSHA for this opportunity to present testimony on
8 MSHA's proposed rule on lowering miners' exposure to
9 respirable crystalline silica and improving respiratory
10 protection.

11 A list of references that are important to the
12 understanding of the role of the surface characteristics
13 of crystalline silica particles and what they play in
14 determining their toxicology, which MSHA has not cited,
15 will be provided in SMI's written comments.

16 That concludes my remarks, and I would welcome
17 any questions that you might have.

18 MS. SILVEY: Sorry. Let me ask you something. For
19 whom does Pavan work?

20 MR. BROWN: She is a professor at the University
21 of Turin in Italy.

22 MS. SILVEY: The university of what?

23 MR. BROWN: Turin, T-U-R-I-N, in Italy.

24 MS. SILVEY: Well, even professors, I know this,
25 sometimes they do research for something or something or

1 some.

2 MR. BROWN: So Dr. Fubini and Dr. Pavan to the
3 best of my knowledge are independent researchers. And they
4 maintain that independence because both of them are
5 working in a field that is to them critically important.
6 And they are doing fundamental work to elicit what the
7 important characteristics are that lead to toxicology for
8 quartz.

9 MS. SILVEY: Okay.

10 MR. BROWN: They are not related to any company --

11 MS. SILVEY: Okay.

12 MR. BROWN: -- at all.

13 MS. SILVEY: Okay. And the only other thing I have
14 to ask you is so with respect to your conclusion, how did
15 OSHA, in its 2016 rule, treat occluded quartz from
16 sorptive clays?

17 MR. BROWN: OSHA?

18 MS. SILVEY: Yes.

19 MR. BROWN: After hearing virtually all of what I
20 presented today not the more recent --

21 (Simultaneous speaking.)

22 MS. SILVEY: I understand. They couldn't have. It
23 was 2016. Right.

24 MR. BROWN: And they found that they did not have
25 information that said that quartz from sorptive clays

1 should be regulated in the same fashion that other quartz
2 was being regulated. And they excluded sorptive clays from
3 the lower PEL and the lower action limit.

4 MS. SILVEY: Okay. So they excluded from the
5 action level but not from the PEL.

6 MR. BROWN: No, they excluded us --

7 MS. McMAHON: No.

8 MR. BROWN: They excluded us from both the PEL --
9 the lowered PEL and the lowered action limit. So the
10 sorptive clay industry remains under the original PEL and
11 the original action limit that OSHA had.

12 MS. SILVEY: Yeah, I didn't clarify that.

13 (Simultaneous speaking.)

14 MS. SILVEY: I understand.

15 MS. McMAHON: -- they've been exempted from the
16 whole silica standard that OSHA promulgated in 2016, not
17 just the action level and the PEL but the entire standard
18 itself.

19 MS. SILVEY: Okay. And anyway, I was just asking
20 you because I can find that out in any event.

21 MR. BROWN: Of course.

22 MS. SILVEY: And I should have known that but
23 since you were here, I thought I would ask you. Okay. All
24 right. Thank you. That's all I had.

25 MR. BROWN: Would anyone else have any questions?

1 MS. SILVEY: No. Okay. Should we take a break?
2 Everybody who wants a break, raise your hand. We are going
3 to take a break. Ten minutes, back in 10 minutes.

4 (Whereupon, the above-entitled matter went off
5 the record at 10:52 a.m. and resumed at 11:08 a.m.)

6 MS. SILVEY: At this time, we will resume the Mine
7 Safety and Health Administration public hearing on the
8 proposed silica rule. Our next speaker is John Ulizio,
9 National Stone, Sand and Gravel. And as long as I've known
10 him, I might have mispronounced your name so forgive me.
11 So John? I think he was -- was he speaking virtually?

12 PARTICIPANT: Virtually, yes.

13 MS. SILVEY: Speaking virtually. Okay. If John is
14 not online, at this point, we will proceed to the next
15 speaker and maybe come back to him. The next speaker is
16 Everett Burgess, Granite Construction, and he is in
17 person.

18 MR. BURGESS: In person. Good morning, Ms. Silvey.
19 Panel.

20 MS. SILVEY: Good morning, sir.

21 MR. BURGESS: I just have a few brief comments to
22 make.

23 MS. SILVEY: Take your time.

24 MR. BURGESS: Thank you. My name is Everett, E-V-
25 E-R-E-T-T, Burgess, B-U-R-G-E-S-S.

1 I am a miner. I have been involved in mining all
2 of my adult life. First, as an exploration drill helper,
3 equipment operator and for the last 35 years a mine safety
4 professional.

5 Protecting the health and safety of the miner is
6 paramount. Not only for MSHA but for the mine operators as
7 well. Reducing miners' exposure to respirable silica is a
8 worthwhile effort that we can all agree upon.

9 Not too many would disagree that the current PEL
10 is potentially too high and can be effectively lowered as
11 OSHA has done. With that in mind, though, we find the
12 proposed rule from MSHA for respirable silica to be
13 overreaching and burdensome to excess.

14 First off, and I know it's been said, metal non-
15 metal mines are not coal mines. There are huge differences
16 in the commodities that we mine as well as the methods and
17 the mining hazards that are presented. So that's pretty
18 basic.

19 So the other thing in your proposal is that each
20 miner that could potentially be exposed, which is every
21 miner, really, has to be monitored within the first six
22 months. That comes with a huge financial cost of time,
23 resources, and can be prohibitive especially to a small
24 mine.

25 Why wouldn't we do that by the job title or the

1 task that they perform to consider who needs to be
2 monitored? Many jobs or tasks have little to no exposure
3 like wet plant operators, equipment operators and those
4 kinds of things.

5 Also, and it's been mentioned, that the lab
6 capacity is limited and with this timeline that's going to
7 be an issue. Why no Table 1 like OSHA uses? Many jobs or
8 tasks, again, have little to no exposure and modern
9 equipment with enclosed cabs, climate controlled
10 filtration, offer adequate protection when they're
11 properly maintained. Those could be listed in Table 1.

12 MSHA has the accumulated data to know and should
13 know where those exposure levels are, where those
14 potentials are and where they do and do not exist as we
15 do.

16 Not allowing previous sampling data older than 12
17 months, so many companies such as mine, and I've heard it
18 before too, have a lot of historical data from sampling
19 over many years with that historical knowledge of exposure
20 levels for different jobs, equipment, locations, et
21 cetera. And we currently use this information in our
22 decision-making on where to focus our resources for our
23 monitoring. Again, MSHA has been monitoring as well. They
24 know where that's at.

25 Miner rotation not being an acceptable

1 administrative control. Reduction of exposure time has
2 always been an important and effective means of exposure
3 control. We talk about hearing all of these things,
4 rotating people in and out and reducing that time that
5 they spend in a potentially hazardous atmosphere.

6 Semi-annual evaluation. It's another expensive
7 burden that takes time and effort from important tasks of
8 everyday implementation of safety and health programs. To
9 add to that, it is rare for our mining and processing to
10 change. We do the same thing over and over day in and day
11 out, even annual evaluations might be too much if you're
12 not making changes, which we generally do not.

13 Recordkeeping. You have a silica control program,
14 corrective action plans, lab results, medical records, et
15 cetera, et cetera, et cetera. All of this takes time and
16 resources to complete and maintain. It can be cost
17 prohibitive especially, again, for the small operators.

18 Posting these records for 31 days also incurs
19 some time and effort and exposes the operators to
20 citations and civil penalties for making simple mistakes,
21 I forgot to put this up, you know, whatever the case may
22 be.

23 Respiratory protection. Prohibition of the use of
24 N95 respirators. N95 respirators are an effective means to
25 safely and comfortably filter dust particles. I think we

1 were even told it filters viruses, too, not quite, but I
2 think so.

3 Where engineering controls are infeasible or
4 ineffective, proper respirators should be allowed as long
5 as they have the appropriate protection factor as OSHA
6 does in their Table 1 and so on.

7 The requirement for full face -- and my
8 understanding is that if you must wear a respirator during
9 the time that the engineering controls are being put in
10 place, being implemented, that you must wear a full face
11 or half mask HEPA P100 for the full shift regardless of
12 your exposure potential. Shouldn't that be changed if
13 they're not being exposed at the time, only for dusty
14 work? I may be wrong, but that's the way I read it.

15 Individuals wearing such respirators for such
16 long periods are at health risk issues such as heat
17 illness, dermatological issues and fatigue. Wearing a
18 respirator all day is tough.

19 Medical surveillance. Providing all miners with
20 medical exams is cost prohibitive and unnecessary. Now it
21 says those potentially exposed to silica, but then they
22 pretty much say everybody can be potentially exposed to
23 silica so it's all miners.

24 Allowing only NIOSH certified clinics to conduct
25 medical exams, why is that? There are a very limited

1 number of these facilities, and they are simply not
2 available in many parts of the country, especially rural
3 areas where most mining takes place.

4 As a contractor, this is another question, and I
5 heard somebody else bring it up before, as a contractor
6 performs work on mine sites only periodically, we'll work
7 on Part 48 sites, occasionally, right? Employees will be
8 placed on medical surveillance even when they are
9 intermittently, rarely working at the mine and therefore
10 defined as miners? How does that work for us, for the
11 contractors that might perform work on mine sites. It is
12 not really defined in the proposal.

13 Following OSHA's lead only miners shown to have
14 prolonged exposure over the action level or who must use
15 respiratory protection for extended periods honestly
16 should be the candidates for the medical surveillance.

17 So there was one other thing that I caught in
18 there. And I'm going to quote from your sampling methods.
19 MSHA proposes to incorporate by reference ISO 7708:1995,
20 which is the international consensus standard that defines
21 sampling conventions for particle size fractions used in
22 assessing possible health effects of airborne particles in
23 the workplace and ambient environment.

24 Mine operators could use any type of sampling
25 device they wish for respirable crystalline silica

1 sampling as long as it is designed to meet the
2 characteristics for respirable particle size selective
3 samplers that conform to ISO 7708:1995 standard and, where
4 appropriate, meets MSHA permissibility requirements. But
5 then MSHA goes on to state that only cyclone type samplers
6 would meet MSHA's specifications for collecting samples.

7 There are certain issues with cyclone type
8 samplers. The primary issue is if the sampler becomes
9 inverted, the rejected material from the catch pod may be
10 deposited back onto the filter media providing falsely
11 elevated silica exposure level during analysis.

12 Miners may perform many tasks during their shift
13 and some of which may cause movement of the sampler,
14 including that inversion. This disruption is unlikely to
15 be noted or reported by the miner.

16 Over the past several years, my company has been
17 using the PPI, parallel particle impactor, type samplers
18 without any issues and without concern of the sampler
19 being inverted and contaminating the sample.

20 There is no reason to believe that this
21 technology is inadequate. In fact, the question has been
22 raised to OSHA regarding the use of the PPIs, which meet
23 ISO 7708:1995 standard, and OSHA's response is this, and I
24 quote.

25 "In its final rule for respirable crystalline

1 silica, OSHA noted in addition to cyclone samplers,
2 personal impactors are available for use at flow rates
3 from 2 to 8 liters per minute that have been shown to
4 conform closely to the ISO/CEN convention. Therefore, a
5 PPI, or any sampling device that meets the ISO/CEN
6 particle size selective criteria for respirable dust
7 samplers would be acceptable for respirable crystalline
8 silica sampling by employers, even if it is not mentioned
9 as an acceptable sample in Appendix A to the silica
10 standards."

11 They work better. And we don't have to worry
12 about them being inverted.

13 I work for a large company, Granite Construction,
14 where we adopted the OSHA rule on respirable crystalline
15 silica when it was implemented a few years ago. We adopted
16 that rule across the board at our OSHA regulated
17 construction sites, at our asphalt and concrete plants as
18 well as our MSHA regulated mine sites. We're already
19 onboard.

20 Why not have MSHA's rule more closely aligned
21 with OSHA's rule thereby reducing confusion for those of
22 us who must comply with both of them?

23 While Granite has good resources, they are not
24 unlimited. And we have found that keeping up with the
25 current OSHA rule can be challenging at times, even with

1 the great assistance of our insurance carrier.

2 This proposed rule adds even more restrictive and
3 costly layers of regulation going beyond OSHA's rule and
4 will create a much greater degree of burden, both
5 financial and in resources, resources and finances that
6 many operators simply cannot obtain and will effectively
7 kill our ability to conduct business.

8 Additionally, the 45 day, now 60 day, thank you
9 for the 15 more days, comment period for such a large and
10 intricate proposed rule -- I've heard a lot of that today
11 -- is completely too brief a time to study, I think, and
12 digest and prepare appropriate and well-informed comments.
13 We would respectfully request an additional 60 days to the
14 comment period. Thank you.

15 MS. SILVEY: Thank you. I have a few. I am
16 figuring them out.

17 MR. BURGESS: Okay.

18 MS. SILVEY: So let me first go to Table 1. That's
19 not where I was going to start. And you've got some
20 construction sites to which you have in place Table 1.

21 MR. BURGESS: Yes, ma'am.

22 MS. SILVEY: And you said you have some concrete
23 plants. Are those your only mines, concrete plants?

24 MR. BURGESS: Yeah, we have a few concrete batch
25 plants that we use on construction sites for primarily

1 white paving, like roadways, yeah.

2 MS. SILVEY: I guess, what I was going to ask you,
3 the first question I'm going to ask you is on your
4 construction sites, where you have Table 1 in place, now
5 you said to me you have adopted Table 1 at both OSHA and
6 MSHA.

7 MR. BURGESS: Yes. We've adopted the OSHA
8 standard.

9 MS. SILVEY: OSHA, that's right, the OSHA
10 standard. Okay.

11 MR. BURGESS: Yes, yes.

12 MS. SILVEY: But let's say -- let's talk about
13 OSHA Table 1.

14 MR. BURGESS: Mm-hmm.

15 MS. SILVEY: How much sampling do you do there?

16 MR. BURGESS: At our mine sites or at the OSHA
17 sites?

18 MS. SILVEY: No, at your -- at the construction
19 sites.

20 MR. BURGESS: So we try to -- because the
21 construction sites move, right, they finish the job.

22 MS. SILVEY: I know.

23 MR. BURGESS: They move on.

24 MS. SILVEY: I know that.

25 MR. BURGESS: We try to schedule those. And we

1 work with our insurance carrier, who provides an
2 industrial hygienist to come out and assist us. I couldn't
3 say exactly how much, but we try to hit each type of work,
4 like, every other year and sometimes every year depending
5 upon where we are at and what we have going.

6 It's really difficult to schedule those things,
7 you know, unless it's a project that's ongoing, right?

8 Our mine sites, however is we do some of our
9 internal, and we do -- our insurance carrier comes out
10 every other year, right? So they do -- and then every
11 other year sampling.

12 MS. SILVEY: Every other what?

13 MR. BURGESS: Year.

14 MS. SILVEY: Okay.

15 MR. BURGESS: We have a lot of sites. And so it's
16 really hard to keep up with that.

17 MS. SILVEY: Okay. I'm intrigued by Table 1.

18 MR. BURGESS: Mm-hmm.

19 MS. SILVEY: That's why I asked you how much
20 sampling do you do because honestly I don't have to tell
21 you that if you are in compliance with Table 1 then
22 there's the presumption that you are in compliance with
23 the PEL.

24 MR. BURGESS: For those activities that are listed
25 in Table 1, yes.

1 MS. SILVEY: For those activities, right, I should
2 have added for those activities.

3 MR. BURGESS: Yes, ma'am.

4 MS. SILVEY: Now take a metal non-metal site and
5 take the title of a miner who is a laborer, a mobile
6 miner. They've got some mobile miner. And they may do five
7 or six tasks in one day.

8 MR. BURGESS: That's true.

9 MS. SILVEY: And one of those tasks may be
10 grinding, which may be a task under Table 1 or some other
11 -- give me another one, another one under Table 1. But
12 then they may go off and do another two that are not under
13 Table 1.

14 MR. BURGESS: Mm-hmm.

15 MS. SILVEY: It's very likely at a metal mine/non-
16 metal mine that that would happen.

17 MR. BURGESS: For a laborer, yes, ma'am.

18 MS. SILVEY: Laborer.

19 MR. BURGESS: Mm-hmm.

20 MS. SILVEY: Right. So I guess I'm just throwing
21 that out there. And I'm wondering how that would
22 logistically work. That's what I'm saying.

23 MR. BURGESS: For a laborer, it would be very
24 difficult. However, for an equipment operator, it wouldn't
25 be so difficult. For a plant operator, it would not be so

1 difficult because they are inside of a confined area,
2 filtration, climate control.

3 MS. SILVEY: You took -- that's a good segue to my
4 next point. Some of our high exposures have been, as you
5 said, with those equipment operators -- operating what?

6 Some of them have been -- you know why? But now
7 you did -- I did add on, I wrote down the equipment
8 operators. But you added the most significant point,
9 property maintained.

10 MR. BURGESS: Yes, ma'am.

11 MS. SILVEY: We found though where some of the
12 highest exposures, they were not properly maintained. They
13 had leaking valves, name some of those things they had.

14 MR. WATKINS: You got seals, gaskets --

15 MS. SILVEY: Seals.

16 MR. BURGESS: Yeah, door seals and such.

17 MS. SILVEY: And they had seals pushing out then.

18 And we had some of the high silica exposures with those.

19 Now theoretically, if you had those under Table 1 --

20 MR. BURGESS: Mm-hmm.

21 MS. SILVEY: -- I'm just saying that would be the
22 presumption that they would be miners in that category
23 would be under the PEL. So I am just -- all I'm doing is
24 suggesting to you what we're finding -- and I'm talking
25 about now it was our inspectors. And obviously you all

1 know -- I know some of you absolutely know because you
2 probably get tired of seeing us. You know the frequency
3 with which we come out to the mine sites.

4 MR. BURGESS: Mm-hmm.

5 MS. SILVEY: So I just -- I kind of put that out
6 there for everybody to think about.

7 MR. BURGESS: We are required under other
8 regulations to maintain those things as well, correct?

9 MS. SILVEY: That's true. But, you know, the point
10 that I am making is that they are not maintained.

11 MR. BURGESS: That's another citation.

12 MS. SILVEY: Under another standard.

13 MR. BURGESS: That's a different area.

14 MS. SILVEY: Under another standard, you are
15 required to maintain.

16 MR. BURGESS: That's right.

17 MS. SILVEY: That's absolutely true. Under the
18 medical surveillance program, and I've heard this from a
19 number of people, it would be cost prohibitive. Would you
20 be specific in terms of giving us some of the -- at least
21 if you can't give us the grand total of all the costs that
22 are associated with the medical surveillance program, some
23 of the costs that you see that would make it cost
24 prohibitive?

25 MR. BURGESS: Currently, we do not perform

1 physicals on everybody.

2 MS. SILVEY: Yeah, but if you would provide that,
3 I'm saying, in your --

4 MR. BURGESS: Oh, I would have to go look that up
5 and see what it costs, but I do know there is substantial
6 costs associated with it.

7 MS. SILVEY: Yeah. But see that's what I am
8 telling everybody. When you say cost prohibitive and give
9 it to me as a conclusionary statement, I would like for us
10 to look at it. And it is to be persuasive to us, if you
11 would be specific and provide specific data or specific
12 information to back it up, even if it is only one aspect
13 of the cost for the medical surveillance. That's all I'm
14 asking.

15 MR. BURGESS: Okay.

16 MS. SILVEY: And I understand what you were
17 talking about with respect to the sampler. And, you know,
18 I've got to do a little side bar here.

19 And I thought -- I just want to make sure that --
20 but I think I know what you were talking about. You said
21 not enough NIOSH facilities. We do not require NIOSH
22 approved facilities just so everybody -- under the
23 proposal. So everybody understands that. But I think maybe
24 you were referring to the NIOSH B readers who have to read
25 the x-rays.

1 MR. BURGESS: And there may be an issue with that
2 as well.

3 MS. SILVEY: And maybe you were talking about
4 there is not enough NIOSH B readers, NIOSH approved B
5 readers.

6 MR. BURGESS: I don't know for certain, but, yeah,
7 it could be. But I would think there is probably not one
8 of them in every clinic as well.

9 MS. SILVEY: Yeah, I said, maybe that's your
10 reference because I heard not enough NIOSH facilities, but
11 I think that because the proposed rule doesn't require
12 NIOSH approved facilities, but it does --

13 MR. BURGESS: I understand.

14 MS. SILVEY: -- require that the x-ray be read by
15 a NIOSH B read -- approved B reader.

16 MR. BURGESS: That may be where the --

17 MS. SILVEY: That may be what your reference was
18 to. And also you mentioned about the lab capacity. So the
19 same question I asked on the cost for the medical
20 surveillance. If you could provide specifics when you say
21 there is not enough lab capacity to do it within this
22 timeline, to do all your sampling.

23 MR. BURGESS: My thoughts there were that every
24 mine in the country would be submitting samples all at
25 once, and right now it takes several weeks to get your

1 samples analyzed. I can't imagine --

2 MS. SILVEY: I know, but see you were telling me
3 things that you were thinking. And I could say to you, I'm
4 thinking that this is going to happen. But I'm asking you
5 for us to take it into consideration, as we design a final
6 rule, if you could provide specifics. And if everybody and
7 anybody in here has the same comment or the same concern,
8 I ask you the same thing.

9 And remember now, this rule requires that you
10 sample not every miner, but a representative sample, a
11 fraction, a representative, same thing, a representative
12 fraction of miners who may reasonably be expected to be
13 exposed to silica. So it's a representative fraction of
14 the miners who are performing that same task, generally
15 that same task so you know that. Anybody have any --

16 MR. WATKINS: No. Are you going to mention --

17 MS. SILVEY: Okay. That's all I have. Thank you.
18 Thank you.

19 MR. BURGESS: Did you want a copy of this?

20 MS. SILVEY: Yes. Thank you. He'll have more after
21 --

22 MR. BURGESS: Thank you very much.

23 MS. SILVEY: Thank you. Our next speaker is Ryan
24 Langton, PCA, also known as Portland Cement.

25 MR. LANGTON: Good morning.

1 MS. SILVEY: Good morning.

2 MR. LANGTON: Thanks for being here. My name is
3 Ryan, R-Y-A-N, Langton, L-A-N-G-T-O-N. And it's still
4 morning, right, so good morning.

5 Good morning. My name is Ryan Langton, and I'm
6 speaking here today on behalf of the Portland Cement
7 Association, of which I am a current member and past chair
8 for the Occupational Health and Safety Committee.

9 I am also the Director of Health and Safety for
10 Cement operations at CEMEX. I am a certified industrial
11 hygienist and a certified safety professional and have
12 worked in health and safety in the construction materials
13 and mining industry for nearly 20 years.

14 I would like to first thank you all for the
15 opportunity to share with the administration our
16 industry's open comments and would also like to
17 congratulate the administration on the development of this
18 anticipated and important proposed rule. We all agree on
19 the importance of purposefully protecting our mining
20 workforces from the hazards of respirable silica.

21 The PCA and its members look forward to
22 participating via written comment on the proposed rule,
23 but directly the industry group felt that certain concerns
24 would be best shared early through the hearing process.

25 We understand that MSHA has developed the

1 proposed rule as Assistant Secretary Chris Williamson
2 recently stated at the last stakeholder meeting, in
3 consideration of OSHA's promulgated respirable silica rule
4 and the existing MSHA standard.

5 In reviewing the proposed rule, PCA also
6 considers the existing standards mentioned as well as
7 industrial hygiene, best practices and guidelines and
8 realistic feasibility of workplace practices within the
9 industry.

10 I would like to address four main subjects today
11 in brief. First, the timeline for commenting and
12 implementation issues, secondly, on quantitative exposure
13 monitoring, thirdly, medical surveillance and then lastly
14 on personal protective equipment.

15 With regard to the timeline issues while OSHA's
16 respirable silica rules were not implemented for the
17 mining community, PCA members must comply with the OSHA
18 requirements because cement terminals are subject to
19 general industry standards. Some members also use them as
20 best practice references in mining operations.

21 When OSHA first proposed its respirable silica
22 rule in 2013, the administration allowed five months of
23 comment period plus three weeks of public hearings. This
24 was followed by a 47-day extension.

25 When MSHA proposed its respirable coal dust rule,

1 the initial comment period was October 19, 2010 through
2 February 28, 2011. MSHA gave two extensions and the
3 comments were due on May 31, 2011.

4 PCA recognizes that comments from both general
5 industry silica rule and coal dust rule lend themselves to
6 addressing some comments during MSHA's rulemaking process.
7 PCA and its members also believe important differences
8 exist from the OSHA rules, in particular to merit careful
9 comparison and review.

10 Additionally, there are certainly companies in
11 the mining industry not familiar with the OSHA rules and
12 will therefore have a steep learning and review period.

13 PCA and its members believe that the 45-day
14 comment period and the 15-day extension that was offered
15 on August 10th is insufficient for the industry to gather,
16 vet, then review data, compile results and then
17 communicate comments back to MSHA.

18 PCA requests that the review and comment period
19 be extended another 45 days to align more with past
20 rulemaking review periods.

21 Speaking of full compliance requirements, when
22 OSHA issued its respirable silica standards, the agency
23 allowed an extended and phased-in two year period for
24 general compliance with all provisions, except medical
25 surveillance, which was based on exposure level. OSHA gave

1 more time for industry to comply with the medical
2 surveillance provision.

3 Another example of a regulation phased into
4 compliance is the enacted beryllium standard which allowed
5 a year and a half implementation and an additional two
6 years for implementing engineering controls.

7 Even MSHA's respirable coal mine dust rule
8 allowed for a phased approach and an 18-month
9 implementation period for revised monitoring and sampling
10 programs with the reduced standard effective 24 months
11 after the effective date.

12 MSHA has proposed 300 days to complete baseline
13 sampling in the silica proposal. This may not be feasible
14 for many operators when we consider how many operators
15 there are and how many sites each operator actively works.

16 For instance, within CEMEX, there are over 50
17 active MSHA regulated sites. And as the proposal currently
18 stands, our interpretation is that we will complete
19 baselines that involve two different sampling days for
20 each site.

21 We also rent equipment as many other companies do
22 and will have to compete for equipment, media,
23 professional resources and timely analysis from the labs.

24 From experience, we saw such equipment challenges
25 and analysis delays after the final OSHA silica standard

1 was implemented. PCA and its members recommend that MSHA
2 consider similar phase-in timelines with both the OSHA
3 silica rule and the MSHA coal dust rule.

4 With regards to quantitative exposure monitoring,
5 according to the proposed rule, baseline sampling is
6 required to be completed for any miner who is reasonably
7 expected to be exposed to respirable silica at any level.

8 Language in OSHA's respirable silica rule
9 requires the employer to assess the exposure of each
10 employee who is or may reasonably be expected to be
11 exposed to respirable silica at or above the action level.

12 The substantial language difference is important
13 in that accepted IH practice recognizes creating similar
14 exposure groups that specify individuals who may be at
15 risk for exposure and those who are not at risk. It calls
16 for exposure monitoring that focuses on health risks for
17 an individual.

18 For reference, the American Industrial Hygiene
19 Association's strategy for assessing and managing
20 occupational exposures outlines these accepted best
21 practices.

22 Some SEGs are included in OSHA's Table 1 for the
23 construction sector's silica rule for job positions or
24 tasks that when prescriptive engineering controls are in
25 place, where data proven by NIOSH and OSHA to be

1 consistently effective at protecting the worker below the
2 action level.

3 An example of such, an SEG in the cement industry
4 would be haul truck operators and control room operators
5 where the cabin or room is protected by specified
6 engineering controls that would be checked by MSHA's
7 inspectors.

8 In addition, miners may work at multiple job
9 positions or tasks throughout a shift or work week. Along
10 these lines, PCA would recommend consideration of firstly
11 including a subparagraph in 60.12 or other appropriate
12 location that allows similar exposure groups to be used
13 while conducting baseline sampling.

14 PCA will draft language for consideration and
15 submit during the public comment period.

16 Secondly, inserting guidance into Subparagraph
17 60.11 or other appropriate location that is like OSHA's
18 Table 1 to assist mine operators and MSHA field inspectors
19 in choosing feasible and consistent engineering controls.

20 Let's talk about objective data. The proposed
21 rule lists sources for objective data that can supplement
22 baseline sampling and be used to comply with the exposure
23 monitoring provision.

24 PCA strongly supports including these alternative
25 methods to achieve compliance with baseline and other

1 types of sampling. Many members implement existing
2 monitoring programs using this valuable data, which has
3 helped the industry understand where overexposures are and
4 where PPE may be necessary.

5 Currently, as the proposed rule reads, only
6 internal monitoring conducted within the last 12 months
7 meets the definition of objective data. PCA supports the
8 use of past monitoring results beyond the 12 months
9 conducted by operators and also supports the use of
10 objective data from industry-wide surveys to assist
11 operators in complying with the baseline sampling
12 requirements.

13 Specifically, PCA is planning an inhalation
14 exposure survey to detect the level of respirable
15 crystalline silica among similar exposure groups of cement
16 manufacturing employees and will submit the results to
17 MSHA either as part of our public comment or after the
18 publication of the final rule in the Federal Register.

19 Medical surveillance, risk-based programs, unlike
20 that which is included in OSHA's respirable silica
21 standard, the beryllium standard and other similar
22 standards that include medical surveillance such as the
23 one established for lead, MSHA's proposed does not tie
24 medical surveillance to exposure risk.

25 All these listed OSHA rules initiate medical

1 surveillance when the worker is or is reasonably expected
2 to be exposed at or above the action level for more than
3 30 days in a year.

4 This is consistent with sound science and is
5 significantly more manageable than requiring medical
6 evaluations for all miners regardless of identified
7 exposure risk levels.

8 PCA requests that consideration be given to
9 aligning medical surveillance programs with a risk-based
10 approach. PCA will elaborate on this issue in its
11 comments.

12 Finally, personal protective equipment. NIOSH has
13 long been the gold standard for identification of and
14 recommendations for respiratory protection. MSHA
15 references NIOSH's documents in the Agency's inspector
16 guides, existing regulations and in the proposed rule.

17 The current edition of the NIOSH Pocket Guide to
18 Chemical Hazards Section for respirable crystalline silica
19 identifies the recommended respiratory protection to be
20 any particulate respirator equipped with an N95, R95 or
21 P95 filter including N95, R95 and P95 filtering face
22 pieces, except quarter mask respirators. The following
23 filters may be used N99, R99, P99, N100, R100, P100.

24 MSHA's proposed rule allows only the 100 series
25 filters. This is a change to the surface mining industry

1 that uses N95s consistently and constantly as advised by
2 NIOSH for many years.

3 MSHA states it believes air purifying respirators
4 with the highest efficiency NIOSH classifications for
5 particulate protection are most suitable in protecting
6 miners from occupational exposure to respirable
7 crystalline silica.

8 According to NIOSH, N95 respirators protect
9 surface miner's health. PCA therefore respectfully
10 requests that the requirement for use of high efficiency
11 filters be revised to allow for NIOSH recommended
12 respirators based on the published NIOSH studies and
13 recommendations to date that recognize proper protection
14 and support the continued use of the N95 filters.

15 In closing, I reiterate that PCA and its members
16 look forward to continuing to assist MSHA in developing
17 this key rule. We appreciate the time given here to
18 discuss our initial concerns about time frame, monitoring,
19 medical surveillance and PPE and look forward to
20 participating by submitting written comments.

21 Finally, given the extensive and complicated
22 nature of the proposed rule, we need more time in the
23 comment period to provide meaningful and valuable
24 feedback. And we again respectfully urge the Agency to
25 extend the comment period by another 45 days.

1 As always, we are available for queries,
2 conversations and any information we can provide. Thank
3 you very much for your time.

4 MS. SILVEY: I just want to say, as I've said to
5 others, that, you know, you all are sampling a
6 representative fraction under this proposed rule, not
7 everybody, not every miner. I'm just reiterating that, the
8 sample requirement is for a representative fraction.

9 But then I want to go to Table 1. I know some of
10 your operations. And I would like it, when you all give
11 your additional comments for the record, that you would
12 provide an example of how Table 1 would operate real time
13 at one of your facilities.

14 And I should have asked that for the National
15 Stone, Sand, and Gravel Association, too, if your member
16 is still listening to the hearing. And I think it was
17 Vulcan Materials who is also a member of the National
18 Stone, Sand, and Gravel. So, Vulcan Materials, Lee Travis.

19 But I'm asking, if anybody representing the
20 National Stone, Sand, and Gravel Association is listening,
21 that when you all send in the comment, we would like Table
22 1.

23 Then, the mining industry, it's a little
24 different from the construction industry, as you all know.
25 And we would like, MSHA would like you to provide us with

1 information and data on how, in Table 1, how you perceive
2 that a Table 1-type situation would operate in real time
3 at one of your facilities, one or more of your plants at
4 your mines.

5 For all of those who are suggesting that we
6 include Table 1, if you would do that? Because, as you
7 know, what happens under Table 1, if you are doing that
8 particular task, the employee, but the employee has to be
9 doing that particular task, and the employer has those
10 specified controls in place and/or respiratory protection,
11 if necessary, then there is a presumption that the
12 employer is under the PEL.

13 But we would like it if you would provide us how
14 you think Table 1 would operate in the mining setting. If
15 you could do that for us, we would appreciate it.

16 We understand what you're saying with respect to
17 medical surveillance and all your other comments. We
18 understood.

19 Okay. Thank you.

20 The next speaker is Jeremy Hua, National Jewish
21 Health.

22 And Jeremy is here, and you know, I had told
23 somebody she would be here, Dr. Cecile Rose, but give her
24 our best --

25 MR. HUA: Will do.

1 MS. SILVEY: -- when you go back to National
2 Jewish Health.

3 MR. HUA: Thank you for the opportunity to speak
4 here today.

5 My name is Jeremy Hua, J-E-R-E-M-Y H-U-A. I am an
6 occupational lung doctor and faculty member in the
7 Department of Medicine at National Jewish Health in
8 Denver, Colorado.

9 In this position, I evaluate and treat miners
10 with severe lung disease from exposure to mine dust. I'm
11 also a doctor for the Miners Clinic Program at National
12 Jewish Health, which is a medical screening program funded
13 by the U.S. Health Resources and Services Administration.
14 Our program has clinics in Colorado, Arizona, and Wyoming.

15 Besides medical screening, the Miners Clinic
16 helps educate miners about their lung disease and counsel
17 miners about federal benefits programs.

18 The Medical Director at the Miners Clinic, Dr.
19 Cecile Rose, spelled C-E-C-I-L-[E] R-O-S-E, has been a
20 leader in protecting miners for over three decades. She's,
21 unfortunately, unable to be at this hearing. However, I
22 speak today on behalf of Dr. Rose and all of the Miners
23 Clinic team, three of whom are here with me today.

24 I also speak on behalf of the thousands of miners
25 who have undergone medical screening in the Miners Clinic

1 Program over the last two decades, especially those who
2 have died from silica-related diseases.

3 We'll be submitting more extensive written
4 comments detailing our responses to the MSHA Silica Rule
5 proposal, but I would like to highlight a few specific
6 points.

7 First, we support the proposed Silica Permissible
8 Exposure Limit of 50 micrograms per cubic meter, which
9 aligns with the OSHA's 2016 Silica Standard and the NIOSH
10 recommended limits.

11 The higher PEL of 100 micrograms placed workers
12 at greater risk for preventable and irreversible illness.
13 A lower PEL will help assure that American miners are
14 better protected from devastating diseases.

15 Second, the proposed rule falls short by not
16 specifying how long mine operators are given to implement
17 corrective action if mine samplings shows levels above the
18 PEL. There needs to be explicit guidance on the timeline
19 that operators have to reduce silica dust to safer levels
20 before mandating the reduce or stop production and/or face
21 penalties. Leaving the duration and the penalties
22 unspecified provides little incentive for mine operators
23 to protect the health of the miners they employ.

24 Third, much has already been said about
25 respirators. And I would like to reiterate concerns

1 highlighted by other clinicians with experience caring for
2 miners, along with international organizations, such as
3 the American Thoracic Society, who have provided testimony
4 during these hearings.

5 We know and agree that engineering controls are
6 substantially more effective than personal protective
7 equipment for protecting miners from silica dust exposure.
8 Requiring that miners continue to breathe dusty air for an
9 unspecified length of time with nothing but a respirator
10 is irresponsible.

11 I am not a miner, but I was an intensive care
12 unit doctor throughout the COVID pandemic. And I cannot
13 stress how personally difficult it was for my colleagues
14 and for myself to wear a respirator through a single
15 workday, even though we worked in well-lit, quiet, air-
16 conditioned hospitals, spending much of our time sitting
17 at computers or evaluating patients.

18 I urge anyone who believes that miners are
19 adequately protected as long as they are given a
20 respirator to try it out themselves. Try wearing a
21 respirator in the summer heat, such as today, while just
22 pulling your weeds in your backyard, let alone while
23 working in a mine for an 8- to 12-hour shift. Respirators
24 should not be relied on, especially for "temporary and
25 non-routine work" for unspecified lengths of time.

1 Fourth, we applaud efforts to provide medical
2 surveillance for metal and non-metal miners. That would
3 more closely align with current screening guidelines for
4 coal miners.

5 The medical science suggests that miners exposed
6 to silica should be provided medical screening due to the
7 potential for rapid progression of silicosis. Screening
8 should be similar to that provided through the NIOSH Coal
9 Workers Health Surveillance Program for Coal Miners. Metal
10 and non-metal miners should not be treated differently.

11 And finally, to that point, there have been
12 questions raised by groups at these hearings about how
13 scientific literature focused on metal and non-metal
14 miners does not highlight an increased risk for silicosis,
15 unlike Appalachian coal miners, for example.

16 But I would remind all of the stakeholders that
17 one of the reasons NIOSH and other research groups have
18 been able to detect rising rates of severe lung disease in
19 coal miners is because of programs like the Coal Workers
20 Health Surveillance Program and other federally-funded
21 medical screening clinics.

22 We have a saying in the medical field, which is,
23 if you don't take a temperature, you can't find a fever.
24 Without these data, we are blind and we are almost
25 certainly failing to detect the real disease burden and

1 impact on the health of metal and non-metal miners.

2 Over the more than two decades of the Miners
3 Clinic Program at National Jewish Health, thousands of
4 miners have volunteered to undergo medical screening,
5 including hundreds of metal and non-metal miners. A recent
6 review of our clinic data shows that chest x-rays detected
7 pneumoconiosis or dust-related lung disease in a quarter -
8 - I'll repeat that -- chest x-rays detected pneumoconiosis
9 or dust-related lung disease in a quarter of the metal and
10 non-metal miners in our screening clinic. And our clinic
11 represents only a small sample of workers in the metal and
12 non-metal industry.

13 But without widespread, regular, high-quality
14 medical screening and analysis of the findings, it is
15 impossible to know how many metal and non-metal miners
16 have irreversible, work-related lung disease.
17 Accountability is important.

18 And using the data to help provide a safe haven
19 for those who have developed lung disease is essential
20 with medical removal protection options similar to Part 90
21 status for coal miners.

22 And to that end, I would ask one final thing. For
23 those of you who may oppose these measures, please imagine
24 your son or your daughter, or your sister or your brother.
25 Imagine them walking out the front door tomorrow morning

1 for their first day of work as a miner. And ask yourself
2 whether you would find their risk for irreversible,
3 lifelong lung disease acceptable.

4 Thank you for the opportunity to speak here
5 today.

6 MS. SILVEY: Yes. You trailed off at the end of
7 your last statement. And what did you say?

8 MR. HUA: I will just say, ask yourself whether
9 you find their risk for irreversible, lifelong lung
10 disease acceptable.

11 MS. SILVEY: Thank you.

12 MR. HUA: Thank you.

13 MS. SILVEY: I want to just clarify two points.

14 And by the way, I've said this in other hearings.
15 I would like to say that we appreciate the work of the
16 National Jewish Health with respect to the Coal Miner X-
17 ray Surveillance Program, and as I like to add, the
18 healthcare, generally, that's provided to miners, coal
19 miners, because sometimes that's the only healthcare they
20 get -- from your program.

21 MR. HUA: Thank you for those comments, and I say
22 thank you --

23 MS. SILVEY: And we do appreciate that.

24 With respect to corrective action -- and that's
25 an important point in this rule -- note there are two

1 kinds of corrective action.

2 One with respect to the operator sampling
3 program. And if the operator happens to sample, and that
4 sample result is above the PEL, the operator has to take
5 immediate corrective action.

6 Now, the proposed rule doesn't specify what
7 "immediate" is, but, as I said at another hearing,
8 "immediate" would take all the same meaning it has in
9 Webster's Dictionary. And, I mean, if something is
10 immediate, it means it has a certain urgency to it,
11 immediacy to it.

12 And I would say that a lot of reasonable
13 operators know that, if they take a sample, and the sample
14 comes back above the PEL, that they need to take immediate
15 corrective action to get that exposure below the PEL. And
16 that is develop and implement additional engineering
17 controls to do that. And that corrective action needs to
18 be immediate.

19 Now, there's another kind of corrective action if
20 the MSHA inspector happens to come. We're talking two
21 different corrective actions. And if our inspector happens
22 to take an MSHA sample, and that sample comes back above
23 the PEL, then the inspector issues a citation and gives a
24 reasonable time for abatement, in accordance with the
25 statute.

1 And that reasonable time for abatement, and I was
2 saying at another hearing, I can't say precisely what that
3 time is. That depends on the facts and circumstances and
4 conditions of that mine, of that situation. But what I can
5 say is that, if it were a situation like that one we saw
6 last week in excess of 500 micrograms of silica, the
7 inspector is not going to give a long time for abatement,
8 is he -- or she?

9 MR. HUA: No.

10 MS. SILVEY: No. So, that's what I can say. And
11 I'd like to make sure everybody understands those two
12 different types.

13 And I did clarify in my opening statement that,
14 when the inspector comes in, and the operator is also
15 required on the operator sample to record that
16 overexposure, and that if the MSHA inspector looks at that
17 record, that MSHA inspector can issue a citation, based on
18 that overexposure.

19 So, I just kind of wanted to make sure those two
20 things were clear. Okay.

21 MR. HUA: Thank you, Ms. Silvey.

22 MS. SILVEY: Okay. Thank you.

23 And next on our list, we have Kathryn McMahon,
24 virtual, with Conn Maciel Carey -- I assume a law firm.
25 But she spoke earlier and said that she had ceded her

1 time, unless there was anything else you wanted to say.

2 Okay. And our next speaker will be Marshal
3 Cummings, United Steel Workers.

4 MR. CUMMINGS: Good morning.

5 My name is Marshal Cummings, M-A-R-S-H-A-L C-U-M-
6 M-I-N-G-S. I'm with the United Steel Workers, Local 13214.
7 I'm a Chief Steward, a Safety Committeeman, Miners' Rep,
8 as well as, recently, having completed the train-the-
9 trainer course put on by MSHA and paid for by my local
10 union.

11 My most important titles, however, are husband
12 and father. I work at a trona mine in southwest Wyoming. I
13 was supposed to present with another Miners' Rep from my
14 Local, but out of fear of retaliation, as well as
15 frustration, he decided not to testify today.

16 Thank you for the privilege to speak today.

17 Being the predominant labor union in North
18 American metal and non-metal mining, representing
19 approximately 20,000 miners in the United States, the
20 United Steel Workers appreciate the work that MSHA has
21 done to develop a proposed rule on silica to reduce our
22 exposure.

23 Our union is supportive of the proposed rule for
24 miners who are, or may be reasonably expected to be,
25 exposed to respirable silica, and we believe the rule can

1 be improved upon. However, we should not let perfection
2 stand in the way of progress, as all miners need this rule
3 now.

4 I worked in trona for 17 years. My first day of
5 work in a trona mine was five days before I walked at high
6 school graduation. I worked at my current employer for 13
7 years -- two years underground, 11 years on the surface.

8 I was first notified that I was exposed to high
9 levels of silica while working underground cleaning belt
10 spillage on a scoop in 2011. I never heard a level of
11 exposure, nor am I aware of any practice limiting
12 exposures today.

13 I've been in the service since 2012. I worked in
14 a coal-fired powerhouse to supply steam to various plants,
15 as well as generating electricity, for the last 11 years.

16 Coal dust revealed itself to be an issue early in
17 my powerhouse career. I expressed my concerns to the
18 immediate supervisor, hoping this would take care of the
19 issue. It did not. I exploited this concern up the
20 corporate ladder, and still no improvements.

21 Coal dust became such a concern to my coworkers
22 and myself, on multiple occasions we stopped the job and
23 every crew member placed their locks on the system in
24 solidarity, refusing to expose ourselves to this hazard.

25 The MSHA hotline has been called several times,

1 and high negligence as well as S&S citations have been
2 given, but, then, reduced after the company fought them.

3 These violations resulted in a root-cause
4 analysis meeting. At the conclusion of this meeting, the
5 union was of the understanding considerable resources
6 would be put into the dust issue; procedures would be
7 written and expected to be followed when extreme dust
8 presented itself, as well as existing dust suppression
9 that had been neglected to be maintained and made a
10 priority.

11 Myself and the union brothers had alerted MSHA of
12 the issue, resulting in the citations, and volunteered to
13 compose a presentation on the hazards of coal dust and
14 deliver it to all employees in our Department. That's
15 what's on the screen.

16 Only two frontline leaders and one representative
17 from Safety have sat in on this presentation. No one above
18 that on the company's side has.

19 When I delivered this presentation, I had videos
20 of hazards we have encountered. In order to embed them in
21 the presentation, I posted them on a private YouTube
22 channel.

23 After the Safety representative, who I believe
24 has good intentions, brought the hazards up to management,
25 he was instructed to make me take the videos off YouTube

1 or I could face discipline up to termination. Nothing from
2 management on the hazards identified.

3 If we could flip through these really quick, I'll
4 tell you when to stop.

5 So, next. Keep going.

6 Next. This is me demonstrating that
7 pneumoconiosis, like the gentleman spoke before me, is on
8 the rise. We should be more strict now that we have more
9 knowledge.

10 Keep going, please. Next slide.

11 This is talking about pneumoconiosis.

12 Next slide. This is where I want it to be.

13 The union has put on a sticker campaign to raise
14 awareness and let employees know who are new to the area
15 that there's a real danger, not only respirable, but
16 explosive. These are the stickers that the union paid for
17 and we handed out. I've handed out about 400 of them, and
18 hopefully, I can get the rest to pass them out to
19 everybody.

20 This has not solved the issue, nor brought
21 significant improvement. Last Monday night, extreme dust
22 again presented itself, due to lack of suppression and
23 collection. Again, a coworker shut the job down and
24 alerted MSHA of the conditions.

25 The MSHA inspector conveyed to my union brother

1 that, due to there being no float dust standard and the
2 fact that he didn't specify it was a safety and health
3 issue or an explosive issue, he couldn't issue any
4 citations. This investigation is ongoing,

5 Under direction from union leadership, we are
6 encouraged to work with the company on not only this, but
7 all matters concerning safety and health before escalating
8 to the MSHA hotline.

9 How long can we in good conscience expect to
10 expose our union brothers and sisters to this health and
11 safety issue? The answer is: no longer.

12 After 11 years of working with the company and
13 getting nowhere, as Chief Steward, I filed two grievances
14 that are displayed on the PowerPoint now.

15 This is the first one that is a grievance that
16 stemmed from a study that the company put on, where
17 employees working in the cold pressure are exposed to 150
18 micrograms per cubic meter of respirable silica. And since
19 there's nothing really I can do about it, this is the
20 avenue that we're taking now.

21 If we can go to the next slide, please?

22 Next slide again.

23 Next slide, please.

24 Next slide, please.

25 Next slide, please.

1 This is a video of coffee creamer on the right
2 that's just a puff that explodes. I don't think it will
3 play.

4 Go to the next slide, please.

5 Next slide, please.

6 This is the slide where in my original
7 presentation I had embedded the YouTube videos that I was
8 instructed to take down. You can only watch them if you're
9 on the company internet because I posted them in a file on
10 there. If you would like to see them, I do have them saved
11 after.

12 Next slide, please.

13 This is the only hazard I could -- or the only
14 standard I could find, and I couldn't find it until I did
15 the train-the-trainer class with representatives from
16 MSHA. One of the instructors showed me this. So, I put it
17 into the presentation.

18 In the videos, you can see that there is an
19 ignition source and there is definitely the potential to
20 have multiple fatalities at our place.

21 Next slide, please.

22 This is the second grievance I was talking about.
23 It's a sample that was conducted by the company that
24 reveals that, at the bottom right in the table is either
25 an explosive go or no-go. The explosive was a go. But

1 since we're in metal/non-metal trona, there is not the
2 same standards that coal has. So, MSHA's hands are tied
3 and we'll see where the grievance process goes this way.

4 To get my hands on these two samples, I drafted a
5 Request for Information and I had difficulties getting
6 them from us. I had to request once. The deadline wasn't
7 met. I had to get union leadership involved. My union
8 president went up there and said, "How far do we have to
9 go to get this?" HR, then, responded that we can see what
10 we're exposed to. So, that's I contracted these.

11 Like I said, both requests had exceeded the dates
12 on the request to be handed to us. I asked for the MSHA-
13 approved plan going forward. That's to keep our workers
14 safe. They have lapsed on both deadlines that I requested,
15 and instead of trying to go through the National Labor
16 Relations Board, I had union leadership; he's meeting with
17 HR trying to discuss it, and hopefully, we can get
18 involved with a plan to go forward.

19 I went over the grievances.

20 The explosive environment is due to the lack of
21 suppression and collection. There is not enough PPE in the
22 world that will save any of us from an explosion that is a
23 potential hazard.

24 The second grievance, like I said, is pertaining
25 to silica that is over 150 micrograms per cubic meter,

1 three times the proposed limit that we are discussing
2 today.

3 If companies will not provide miners with a safe
4 working environment, I hope and expect MSHA will.

5 My union excused me from work today; paid my
6 wages, and is reimbursing me for 12 hours of drive time,
7 as well as a hotel room for my family and me, just so I
8 could give you my testimony today. I hope that speaks
9 volumes as to the stance the United Steel Workers has
10 taken on this issue.

11 In my PowerPoint presentation, I briefly flipped
12 through a slide pertaining to a hierarchy of controls that
13 was shown.

14 Will you go to the next slide, please?

15 I'm sure you're all familiar with it. Not only am
16 I here presenting my reasons for why we need to implement
17 this new standard, I'm asking we do it through the
18 hierarchy of controls.

19 In today's America companies will not do what is
20 best for its employees' safety and health. They will only
21 do the minimum required of that and which has least
22 affected their bottom line. If it's cheaper to buy
23 everyone a mask and fit-test them once a year, they will
24 do just that.

25 I'm here asking that we do this the right way.

1 PPE is one way to reduce exposure, but we must not race to
2 the bottom of the hierarchy. We must not rely on PPE. That
3 is the least effective of all the controls available to
4 us. We all know not everyone is going to wear a
5 cumbersome, hot, invasive mask, like the doctor just spoke
6 to.

7 There are technologies available to us that would
8 drastically reduce our workers' risk and exposure to
9 silica in America. We must act now to set the standards
10 that will most protect our workers immediately, as well as
11 far into the future.

12 I have shown you the steps we have taken with the
13 support of the United Steel Workers -- over a decade of
14 work. We've tried and tried to keep our health and safety
15 of the utmost importance.

16 The Miners Act of 1977 states, "Congress declares
17 that the first priority and concern of all in the coal or
18 other mining industry must be the health and safety of its
19 most precious resource -- the miner."

20 At the beginning of my presentation, I was
21 establishing my credibility by listing my titles. I ended
22 with my most important being husband and father.

23 Saturday, I watched my oldest of three play his
24 first football game. It was one of the proudest moments of
25 my life. I work with him on my days off, just the two of

1 us on the field. I had an undefeated state champion
2 season. I would love to be able to do that with his
3 children someday, but it may be too late for me.

4 My exposure to respirable dust may have already
5 taken from my later health in life. My grandfather just
6 last month hiked up a canyon he was responsible for his
7 Forest Service agent duties on his 90th birthday. It may
8 be too late for me to follow in his footsteps.

9 Silica may cause silicosis in a matter of days.
10 It is a carcinogen. Silica is a silent and invisible
11 killer.

12 Unless we protect our miners with strong
13 provisions through a medical surveillance program, we will
14 not know the damage that we've already been handed.

15 I've displayed all I've done in this fight for
16 miners' health and safety.

17 Aw, I just messed it up.

18 Anyways, all the work I've done has not reached
19 an acceptable place for me. With the stroke of a pen, all
20 of you can do that for us.

21 In closing, our union thanks MSHA for considering
22 these and other comments on the need for a new respirable
23 silica standard. We urge MSHA to act quickly to propose
24 its standard to protect all miners.

25 Thank you for your time.

1 MS. SILVEY: Thank you.

2 And we did hear from the Steel Workers in
3 Beckley.

4 I just have a couple of comments.

5 That 150 micrograms, and you said nothing you can
6 do about that. But there is a PEL in metal/non-metal of
7 about 100 micrograms. So, did MSHA know about it? Was that
8 communicated to MSHA, that exposure of 150 micrograms?

9 MR. CUMMINGS: I have not communicated that MSHA
10 because the person who has been championing the fight,
11 that didn't come today, did, and I'm unaware of where that
12 has ended up as far as any citations issued or anything
13 along those lines.

14 MS. SILVEY: Okay. So, you don't know about
15 whether MSHA knows about that?

16 MR. CUMMINGS: All I know -- I don't know if MSHA
17 knows. I know that the company said, before they take
18 another sample, they would like to implement some sort of
19 collection and suppression or other controls --

20 MS. SILVEY: Yes.

21 MR. CUMMINGS: -- to try to get us under control.

22 MS. SILVEY: Okay. Okay. We'll follow up on that.

23 The second thing I was just going to ask you, and
24 I mean, I probably shouldn't; if you want to respond, you
25 can. Have you had any x-ray?

1 MR. CUMMINGS: When I first got hired on, I got an
2 x-ray, but we've gone away from that. We had an x-ray
3 machine at Medcor which is onsite, and I'm not sure if
4 it's cost or what has led to that no longer being in
5 practice where I work--

6 MS. SILVEY: So, you haven't had it, not since you
7 first were hired? Okay.

8 MR. CUMMINGS: No.

9 MS. SILVEY: Okay. Thank you. Thank you.

10 MR. CUMMINGS: Thank you.

11 MS. SILVEY: Okay.

12 Our next speaker is Brandon Crum, virtual, United
13 Medical Group.

14 Is Brandon Crum --

15 MR. CRUM: I am here. Can you guys hear me?

16 MS. SILVEY: Yes.

17 MR. CRUM: My name is Dr. Brandon Crum, B-R-A-N-D-
18 O-N C-R-U-M. And I'm a Board-certified radiologist, a
19 certified B Reader here in a clinic in eastern Kentucky,
20 in Pike County, which is right on the border between
21 Kentucky, Virginia and West Virginia, which most people
22 would say it is central Appalachia, which is one of the
23 worst areas of black lung that we're seeing right now, not
24 only in the United States, but maybe in the world.

25 To give you a little bit of background of who I

1 am, I was a fourth-generation miner. Not by choice, I got
2 into some trouble when I was 14. My daddy was the boss, so
3 he put me to work on the outside picking rock, and then, I
4 worked all the summers and the weekends and holidays until
5 I was about 21 years old. But everybody on my mother's
6 side and my dad's side were all miners.

7 The clinic here in eastern Kentucky is a primary
8 care clinic, but we do a really large amount of black lung
9 evaluation. We have imaged and evaluated thousands of
10 miners over the last decade. And in 2016, this is the
11 clinic that was evaluated and released a report of 60
12 cases of complicated black lung at this single clinic in
13 2016 over about an 18-month period.

14 To kind of put that in perspective, in the decade
15 of the nineties, there was only about 31 cases of
16 complicated black lung that had been reported for the
17 entire decade. So, the 60 cases in 18 months at this one
18 clinic was a significant amount of black lung that we saw
19 here.

20 Since that time, we are right at 700 cases of
21 complicated black lung here at this clinic. It's not a
22 medical group, and that's individuals that have been
23 imaged at this facility. Not that I read in other states.
24 So, it is a large amount of complicated black lung that we
25 have seen here in central Appalachia.

1 On top of that, we released a study just a few
2 months ago that showed over 30 percent of our miners
3 continue to progress and worsen after they had left dust
4 exposure and after they had stopped working, which is a
5 significant research project that was held up for some
6 time (audio interference) secondary to COVID.

7 And on top of that, I have just reviewed an
8 accumulated data from 2022 at this clinic, and that data
9 will just be heard publicly right now in this instance.

10 And there was a very special group of individuals
11 of miners in this last year. And it was a group or a
12 cohort of 877 individuals, which is a sizable number of
13 miners, and almost all of them had mined coal in central
14 Appalachia. Now, these were not only underground miners,
15 but these were also surface miners, especially things like
16 highwall drillers, individuals that worked preparation
17 plants, around crushers. So, there was a mix of both
18 underground and surface varieties of these individuals.

19 We also were able to obtain probably the most
20 complete dataset of miners that we have ever performed at
21 this clinic. And we are probably one of, if not the
22 biggest clinic, to evaluate Appalachian miners in the
23 world.

24 Out of those 877 men, we found 191 cases of
25 complicated black lung. To put that in kind of perspective

1 for people who may not know, complicated is the worst form
2 of black lung, and most people would consider that the
3 worst, most aggressive occupational lung disease in the
4 world. That was roughly, about a 22 percent complicated
5 rate, which was unheard of, and it's still shocking to
6 have that much complicated disease.

7 We broke that down even further. And our
8 complicated disease is broken down into A, B, or C
9 complicated. And what that means is that is the size of
10 one or all the pulmonary masses in the lungs or the
11 fibrotic masses that add up to certain measurements with
12 in the lung.

13 So, A is kind of their least severe; Bs are in
14 the middle, and C is the most severe. And B and C are
15 masses of pure fibrosis which are over 5 centimeters in
16 size, or as big as the entire right upper lung.

17 Of those 191 individuals, 82, or approximately 43
18 percent, were B and C complicated disease, meaning they
19 were not just A. They were the most advanced forms of the
20 complicated disease that we saw.

21 We broke that down even further and evaluated
22 those 191. And of those 191, we had about 23 that had
23 already been evaluated for transplant evaluation. Those 23
24 individuals have either been evaluated by transplant
25 facilities and were denied or were not candidates, or in

1 the transplant process, as we speak, or they have already
2 been transplanted. That is a massive amount of individuals
3 that have been transplanted or in the transplant
4 evaluation, as we speak. Currently.

5 Some of the age groups for these complicated
6 disease on the As, Bs, and Cs, all of our youngest
7 individuals were in their younger 40s. They were diagnosed
8 with this disease, and that's when they were imaged at
9 this clinic. So, they were probably complicated at least
10 years before that. Usually, we were dealing with 44- and
11 42- and 46-year-olds who were our youngest individuals
12 measured in these three levels of complicated black lung.

13 Being from central Appalachia, we can talk about
14 all the numbers and percentages, and I think all of those
15 are very, very important. And I applaud MSHA for their
16 effort to address the silica component of this disease.
17 And without a doubt, the silica is a major one of the
18 contributing factors in the severity of this disease that
19 we're seeing.

20 But there is more of a personal -- and I think
21 the young man that had the courage to come up and talk
22 just before me speaks of that courage and speaks of that
23 importance, to talk about the family and how it affects
24 the young.

25 You know, our younger miners in their 40s and 30s

1 have a lot of family that, unfortunately, are hindered or
2 affected by this disease. We have a significant amount of
3 children. We have our older miners that are raising their
4 grandchildren that are significantly affected by this
5 disease in central Appalachia on top of poor communities
6 in general.

7 These effects on family, we see a lot of
8 individuals that do not go on to college. They do not go
9 away from this area to better themselves and better their
10 communities, because they stay home and they take care of
11 the affected men with this disease. And I think that is a
12 ripple that affects generations, or has affected
13 generations, in this area. So, there is a major family and
14 social component to this disease if you add it on to just
15 the statistics and the number that we talk about.

16 Having said all that, I seem to disagree with
17 most of my colleagues in the black lung field, and that is
18 for mask usage. And I would like to address that. The men
19 that I evaluate, and especially the men that are still
20 working, I recommend to them to wear a mask. And I
21 recommend for them to wear a mask even within normal PELs.

22 So, it is, in my opinion, we should use every
23 aspect that we have to ensure a safe environment for these
24 men, including engineering controls and mask usages,
25 especially when they are out of compliance with the silica

1 standards. But I would go as far as to recommend routine
2 mask usage on our highest-risk individuals.

3 And our highest-risk individuals, as demonstrated
4 over the last eight years in this clinic, underground are
5 our continuous miner operators, our pinner men or roof
6 bolters, and our haulage individuals, such as shuttle
7 haulers, pigs, or anybody behind or around that miner.

8 On the surface, our highest-risk individuals are
9 going to be our high wall drill operators, our auger men,
10 our thin-seam miners. And anybody that's around crushing
11 mechanisms are our highest-risk factors.

12 And I know. I was in the mines. I was on the
13 table. I know these masks are not great to wear. They can
14 be uncomfortable. They can be hard to breathe through. But
15 I can guarantee you they are not as hard to breathe
16 through as complicated B and C black lung.

17 So, I would urge that additional, and let me make
18 this comment: properly functioning respiratory protection.
19 I think those masks need to be evaluated if we're going to
20 ask them to wear them and make sure they are properly
21 functioning for these men when they do decide to wear
22 them.

23 In closing, I would be cautious on allowing
24 operators to sample themselves. If I had all the widows
25 and all the family members of the black lung patients that

1 are suffering from this disease that have went to
2 transplant or have died from it, and I told them I was
3 leaving it up to the operators to take care of them, I
4 think that would be a very sad group of individuals for me
5 to say that, and there would be little hope in their eyes
6 if that statement was given to them.

7 I would also like to advance a little bit on
8 health maintenance. That has been discussed today. I've
9 listened to the whole thing today, and the only time that
10 I got to listen to the whole program, but I can tell you
11 100 percent that the health monitoring and the protection
12 and the health surveillance has been a large asset to our
13 population. Screening individuals, checking chest x-rays,
14 checking pulmonary function tests, without a doubt, in my
15 experience over the last decade has saved people's lives.

16 We have found people that have complicated
17 disease. We have found people at a higher risk for the
18 disease. We have either got them out of the dust or we
19 have got them to a safer level of dust. And without a
20 doubt, a health-saving proposition is to implement the
21 health maintenance.

22 We're in a very rural clinic here in eastern
23 Kentucky. We had no problem teaching people to do that
24 kind of testing, and we had no problem reading it and
25 getting it out to the individuals with that kind of

1 testing even.

2 In closing, I think the gentleman said it the
3 best. It's the decisions we make -- we should make as if
4 that is our children or our grandchildren going down into
5 these mines or working on the surface. And I think if we
6 do that, then that's the best possible outcomes that we
7 could, hopefully, generate from it.

8 There's a nice picture of MSHA's mission
9 statement on the website: it's got a miner walking down
10 the road with those two kids and they're holding his hand
11 and we've got an arm around one of them. And
12 unfortunately, those fathers of those kids, we are losing
13 way too many of them here in central Appalachia. And the
14 same problems that are affecting us will, inevitably,
15 spread to the rest of the country if we do not maintain
16 these safe working conditions.

17 I appreciate you all's time and I appreciate you
18 all listening to me. Thank you very much.

19 MS. SILVEY: Thank you.

20 And I have one question before you go. And your
21 comment that you made relative to why you wouldn't -- I
22 can't repeat exactly what you said, but it was something
23 about you wouldn't leave something to operator sampling.
24 Could you tell me the basis of that comment?

25 MR. CRUM: Well, I think we can just look at the

1 evidence in central Appalachia here over the last two to
2 three decades and the rates of complicated black lung and
3 the rates of deaths and the rates of transplants. It would
4 be hard group to look and see that they had a good enough
5 record to put the trust in our men and our families for
6 that kind of job or task.

7 MS. SILVEY: Okay. Because I want to reiterate to
8 everybody that this rule -- I mean, this is a silica rule.
9 And so, this is not a coal dust rule. You all know that.
10 It is coal dust to the extent that -- and I explained all
11 that. But MSHA's sampling program will not change. So, I
12 want to underscore that to everybody.

13 Thank you very much.

14 MR. CRUM: Thank you.

15 MS. SILVEY: Our next commenter is Wes Addington,
16 Appalachian Citizens' Law Center, and he's virtual.

17 Wes Addington?

18 MR. ADDINGTON: Yes. Can you hear me?

19 MS. SILVEY: Okay. Yes.

20 MR. ADDINGTON: Can you see me?

21 MS. SILVEY: Yes, we can see you.

22 MR. ADDINGTON: Okay. Thank you.

23 My name is Wes Addington. That's W-E-S A-D-D-I-N-
24 G-T-O-N. I'm the Executive Director of Appalachian
25 Citizens' Law Center, based here in Whitesburg, Kentucky.

1 For over 22 years, our organization has
2 represented coal miners and their families on mining
3 safety and health issues, including cases for working
4 miners that have been diagnosed with black lung, and for
5 miners' wives' and victims' claims after they had left the
6 industry.

7 ACLC will be providing specific written comments
8 before the comment period is over. However, today, I would
9 like to focus, more generally, on three things, one of
10 which Dr. Crum just covered pretty extensively, so I won't
11 have to use as much time.

12 And, No. 1, What is MSHA's mandate here and the
13 history of black lung disease in the United States and how
14 close were we to eradicating the most advanced forms of
15 it.

16 No. 2, where are we today in the growing amount
17 of disease the coal miners and their families are facing?

18 And, No. 3, MSHA's proposed rule and what the
19 agency says it will do in response to current and future
20 coal miners and the amount of dust that they will have to
21 breathe.

22 So, No. 1, what is MSHA's mandate here? Well, the
23 Secretary of Labor made six standards which most
24 adequately assure on the basis of the best available
25 evidence that no miner will suffer material impairment of

1 health or functional capacity, even if such miner is
2 regularly exposure to the hazards for having dealt with by
3 such standards for the period of his working life.

4 The law clearly requires that a schedule must be
5 cited, producing the average concentration of respirable
6 dust in the mine atmosphere during each shift for each
7 miner in the act of working is exposed to a level of
8 personal exposure which will prevent new incidences of
9 respiratory disease, and to further develop such disease
10 in any person.

11 The purpose of the law -- and I did not see this
12 anywhere in the materials with the rule -- the purpose of
13 the law is to provide to the greatest extent possible that
14 working conditions in these underground miners are
15 sufficiently free of respirable coal mining dust
16 concentrations in the mining atmospheres to permit a miner
17 to work underground during his entire working life without
18 incurring any disability from pneumoconiosis or other
19 occupation-related disease.

20 So, in the face of high rates of black lung
21 disease in the 1960s and early '70s, where did those
22 mandates get us? Well, by the 1990s, the United States of
23 America almost entirely eradicated the worse form of the
24 disease, complicated black lung or progressive massive
25 fibrosis.

1 And as Dr. Crum noted, during the entirety of the
2 1990s, the Mine Office's Coal Worker Health Surveillance
3 Program only identified 31 cases of progressive massive
4 fibrosis nationwide. And the cases of simple
5 pneumoconiosis were also very drastically reduced.

6 So, it comes to the second part of my comments.
7 So, where are we today? Well, Dr. Crum has kind of laid
8 out a good bit of it, especially here in central
9 Appalachia.

10 Over the last few years, complaints and
11 individual complainants in West Virginia have diagnosed
12 hundreds and hundreds of miners with complicated
13 pneumoconiosis. Researchers have now actually said we're
14 the epicenter of one of the largest industrial medicine
15 disasters that the United States has ever seen. And it
16 also said, "We can think of no other disease in the
17 workplace in United States in which this would be
18 considered acceptable."

19 And those comments were made right around the
20 time that Dr. Crum described identifying the 60 cases of
21 complicated pneumoconiosis years ago in his clinic. And
22 so, he just laid out for you in the past year information
23 that I just find it's saddening; it's infuriating; it's
24 unbelievable in the year 2023 that this can be happening
25 in the United States of America.

1 Miners in Category B and Category C
2 pneumoconiosis, you know, we're talking about one-third of
3 their lung is affected and it's just one big area of
4 disease.

5 We know that in the 1990s we almost never heard
6 of it. It was rare. It's unbelievable. It's, frankly,
7 unbelievable.

8 So, No. 3, what does MSHA say the proposed rule
9 will do to respond to the out of control problem, but
10 that's totally preventable by wearing masks. Well, a
11 preliminary risk analysis of the rule is that it will
12 reduce coal miners' risk of death due to exposure to
13 silica by 1.7 percent. That's only 63 deaths that are
14 avoided over a 60-year period.

15 And what that means, according to the MSHA data
16 that's in the preliminary risk analysis, is that many
17 thousands of deaths won't be avoided. MSHA's numbers are
18 2,202 deaths. So, essentially, the rule will allow,
19 according to MSHA's own data, at least 97 percent of these
20 deaths to continue to occur.

21 And this minimal reduction in death in the
22 disease isn't even in the same universe of MSHA's mandate
23 to make it so, underground mines are sufficiently free of
24 several coal mine dust concentrations in the mine
25 atmosphere to permit a group of miners to work underground

1 during years of their entire working life without
2 incurring any disability from pneumoconiosis or any other
3 occupation-related disease, much less the disease so
4 severe that it causes death.

5 And as we know, by definition, complicated
6 pneumoconiosis, progressive massive fibrosis diagnosis
7 means that the miner is totally disabled due to the
8 disease or that the miner's death was due to
9 pneumoconiosis -- right in the law by definition.

10 So, I was looking back at some of my comments
11 during the 2011 hearing on the coal dust rule in
12 Prestonsburg, and at that point, I was giving the examples
13 of the very worst cases, you know, the coal miners that we
14 had with complicated black lung, trying to make the point
15 that, with how much dust these miners are breathing, it's
16 so necessary because not only are they developing disease,
17 they're developing very serious disease. And here are a
18 couple of examples we had in our office.

19 If I did that same thing today, we would be here
20 all day because those numbers are in the triple digits
21 just in my little, nonprofit organization.

22 So, you can hear the urgency in Dr. Crum's voice,
23 based on his comments. I hope you hear the urgency in my
24 voice. But I can tell you it doesn't compare to anything
25 of what these miners and their families are going through

1 here in these communities. They're dying and these are
2 very difficult deaths. They breathe a little less, and a
3 little less, and a little less until that's the end, and
4 the family has to watch that happen.

5 And to say that we're only going to reduce deaths
6 over a 60-year period by a few percentage points, it's
7 just unacceptable.

8 And just to end here, the sampling like Sam
9 Petsonk mentioned during the hearing in Beckley, there's
10 no really routine sampling set up, operators doing
11 baseline sampling, if that passes muster, they get to
12 decide if they want to do any more sampling, and kind of
13 getting to Ms. Silvey's request about cheating on dust
14 sampling.

15 While the hearing was going on today, I just
16 pulled up the Courier Journal's story back in 1998 when I
17 was in college, it's a quarter of a century ago. And they
18 interviewed 250 miners, and nearly every miner of that
19 story said the cheating on dust case is common. And I can
20 tell you our clients would say the same thing on the
21 Appalachia. The comments from the miners, effectively,
22 show how common it is. I mean, this is well-known.

23 And I know you want specifics, and my office has
24 tried to provide those in our written comments, in
25 addition to what is public knowledge already.

1 One thing I noticed, when this occurred in our
2 story, one of the miners I represented died from black
3 lungs and others are now currently disabled due to it. So,
4 you know, this cheating has very serious implications. And
5 anything we've learned over the years, it is we cannot
6 trust the entire industry to regulate itself, to test
7 itself, and to keep miners out of dusts.

8 And the numbers that Dr. Crum has stated are so
9 beyond the PEL that, certainly, MSHA can't just rely on
10 the industry to provide that routine sampling, if they
11 decide to do it.

12 And I'll just close to say that, you know, based
13 on some of the things I've read from the other hearings,
14 some of the things I've heard today, it really seems like
15 this rule really needs to be bifurcated or coupled between
16 coal and metal/non-metal. It just seems that the way it's
17 currently constructed, you're addressing a lot of issues
18 in metal/non-metal, while the real benefit to coal miners
19 and the crisis that they're currently facing here in this
20 part of the country is just not sufficient.

21 So, like I said, we will provide additional
22 written comments before the comment period is up.

23 But thank you for allowing me to speak.

24 MS. SILVEY: Okay. Thank you.

25 One of the things I want to say, I think this is

1 the second time I've heard about the benefits ascribed to
2 the reduction in lives prevented for coal miners. But let
3 me say that this rule goes through a review process, as
4 all government rules do.

5 And we issued a coal dust rule in August of 2014
6 that fully took effect in 2016. In that, where we wrote
7 the PEL and did a number of -- got rid of averaging and
8 gave a new definition for normal production, and there are
9 a number of things in that improved dust rule. In that
10 improved dust rule, we also computed benefits.

11 So, therefore, when we did this rule, as we go
12 through two of the same organizations for reviewing, we do
13 not -- you cannot -- let me put it this way: you've got a
14 certain amount of -- you cannot double-count. You cannot
15 count the benefits twice.

16 And so, that's why the benefits for the reduction
17 in the deaths ascribed to that, those are projected
18 deaths. Our best estimates for the coal miners were fewer
19 than, as you all see, than the ones for metal/non-metal
20 mines. But I wanted to make that clarifying point.

21 And at this point, is there anybody -- that being
22 everybody on the list -- I'm told we have Michael Parris.
23 Is this right? Are you speaking?

24 MR. PARRIS: Briefly.

25 MS. SILVEY: Is it Parris?

1 MR. PARRIS: It is.

2 MS. SILVEY: Okay.

3 MR. PARRIS: My name is Michael Parris, M-I-C-H-A-
4 E-L P-A-R-R-I-S.

5 Thank you very much for the opportunity to be
6 here today and to provide these comments.

7 I've submitted written comments late Friday
8 evening. I'm not going to read this into the record, much
9 to the benefit of everybody here. I'll be brief, some
10 quick points.

11 I believe that the agency should also include in
12 the rule an upper action level. In other words, once a
13 company receives a sample result that's above the PEL,
14 sufficiently above the PEL, that they have to withdraw
15 miners at that point. Whereas, under the current rule, if
16 MSHA issues a citation, there is still not a withdrawal
17 requirement unless the agency also issues either a (b) or
18 a 104(d) citation or order.

19 And, for instance, you were talking recently or
20 this morning about the miner that received a 500-milligram
21 exposure --

22 MS. SILVEY: Microgram.

23 MR. PARRIS: Microgram. Excuse me. Yes.

24 I would argue that an operator who received a
25 sample result at that level should be required to withdraw

1 the miners from the affected area until the corrections
2 can be made without having to wait for MSHA to issue a
3 104(d) or a (b) order. There should be an obligation
4 immediately to withdraw miners, and then, whatever
5 corrective measures are required.

6 I would not set it at 500 milligrams. I would set
7 it at 100 milligrams for the purpose being that, for one
8 thing, I don't know how easily the agency could sustain a
9 104(d) citation issued at 100 milligrams, while, on the
10 other hand, under the new regulatory regime, an operator
11 who receives a 100-milligram exposure reading will have
12 done so, ostensibly, after already having done baseline
13 sampling and the additional operator-required sampling,
14 which, if they had received measurements up to the 100
15 point, they will have already, supposedly, implemented
16 additional controls or perhaps administrative control,
17 whatever, and yet, still are reaching to the 100-milligram
18 level.

19 All of the increases in black lung, and possibly
20 even silicosis, have been observed under a testing regime
21 that was established as a 100-microgram PEL. If, under the
22 new standard, you're still receiving samples that are 100
23 micrograms or above, then you really should stop what
24 you're doing and figure out exactly why that is occurring,
25 without miners having to work in that environment and

1 potentially be exposed to even greater concentrations that
2 are undetected because the excursions are so brief in
3 time.

4 So, that's the first point. I think that you
5 should make an upper action level of 100 micrograms.
6 That's low, and my expectation would be that that would be
7 very controversial, but I would think that it's a better
8 idea to go ahead and write that into the rule than have to
9 race into court every time you issue a 104(d) citation or
10 order, and run the risk of having the court issue a ruling
11 on the standard that you published.

12 That 100 microgram is not an unwarrantable
13 failure to comply with the standard or 200 or 300 or 400.
14 Once you start getting those kinds of rules from the
15 Commission or from Commission ALJs, it's going to become
16 very difficult for you guys to enforce withdrawal orders
17 at levels below whatever the court has decided.

18 Whereas, you can avoid all that controversy
19 simply by writing an upper level into the rule. And when
20 operators are dissatisfied with the basis for that, they
21 have -- what? -- 60 days to go to court to challenge the
22 rule. But, even then, under the severability provisions,
23 they still retain its authority to issue 104(d), 104(b)
24 orders, as appropriate, based on the evidence that the
25 inspector observes at the time. So, in my opinion, you

1 would be making your enforcement job much simpler to
2 simply put an upper level into the standards themselves.

3 In regard to how the silica rule is going to be
4 applied to contractors, I'm concerned that contractor
5 employees could end up slipping through the cracks here;
6 and that, if a mine hires contractors for a specific job
7 at a regulated operation, frequently, contractors are
8 engaged for jobs that take five days or less in order to
9 perform. And consequently, the only training that is
10 required, once they come onto the mine site, is hazard
11 training. And hazard training, typically, covers way more
12 hazard training.

13 That could be inadequate, and operators would
14 tend to require their contractors who come in to obey the
15 law, but I don't know that operators, when they bring
16 contractors in, go the extra mile and confirm that the
17 contractor employees aren't somebody that they just fired
18 three weeks ago or a month ago, or didn't hire, for
19 whatever reasons.

20 And there has to be some way of assuring that
21 contractor employees who come into an operation and work
22 for less than five days have actually had the training
23 that they need and are actually aware of what their rights
24 are and what the risks are that are associated with the
25 location where they're going to be working and the job

1 that they're going to be doing while there.

2 So far as the surveillance program is concerned,
3 30 days is a pretty short fuse on a new-hire. I've worked
4 in labor employment law since 2000 or so. And one thing
5 that I have observed among industrial worksites is that
6 these jobs aren't for everybody and they can have epic
7 levels of employee turnover.

8 That's why many of these facilities and employers
9 have a probation period. You know, you work for 90 days.
10 Even if you are subject to a collective bargaining
11 agreement, if you violate particular work rules, or
12 whatever, then you can be fired immediately on the spot.
13 You're gone.

14 And so, you can have, within the first 90 days of
15 hiring a group of employees, you could have quite a few of
16 those employees simply not be appropriate for working in
17 the high-risk occupation in a dangerous field like mining.

18 It's not for everybody. You really have to be a
19 fairly mature employee to walk into any mining operation
20 and work responsibly. Because, if you don't, then your
21 irresponsible or inattentive can hurt your fellow workers.
22 And so, there is a certain segment of employee who simply
23 isn't ready for that. And so, typically, they will wash
24 out fairly quickly in the mining environment, whether they
25 just lack the diligence, or whatever, to work safely.

1 So, if mines and other operations are required to
2 make the extent of scheduling and having medical
3 surveillance for employees who simply are going to wash
4 out within 60 or 90 days, then that's really -- it clogs
5 up the surveillance system, for one thing; plus, you
6 schedule miners for surveillance, and then, by the time
7 the surveillance exams are being done, they're not there
8 anymore or they don't show up for the exam.

9 I would recommend that the time period for
10 performing the initial medical surveillance would be
11 better at 90 or 120 days. Because, that way, you're doing
12 medical surveillance on people who are going to be working
13 within the conditions for an extended period and you're
14 not imposing upon operators the obligation to perform
15 medical surveillance on employees who simply aren't ready
16 for the responsibilities that attend working in these kind
17 of conditions.

18 And that's it.

19 MS. SILVEY: I don't think we got the organization
20 you represent.

21 MR. PARRIS: I don't represent any organization.

22 MS. SILVEY: I figured you were going to say that,
23 but --

24 MR. PARRIS: No, I don't. I mean --

25 MS. SILVEY: Oh, okay. All right.

1 MR. PARRIS: I haven't worked in -- I've worked in
2 --

3 MS. SILVEY: So, anyway, your comments are your
4 own?

5 MR. PARRIS: Oh, they are my own.

6 MS. SILVEY: Okay.

7 MR. PARRIS: Exactly.

8 MS. SILVEY: That's fine. Thank you.

9 Okay. Well, I would like to say one thing. And
10 that is that, in the mining community, as you all know,
11 there are contractors and there are contractors, but the
12 contractors that we generally refer to as "independent
13 contractors" with a legal ID number, Part 45 -- I call
14 them "Part 45 independent contractors" -- they are, under
15 the Mine Act, they can also be operators and carry with
16 them the same responsibilities as operators --
17 responsibilities for training and whatever
18 responsibilities that operators have, these independent
19 contractors can be.

20 And some operators hire them to do specialty
21 work. I always like to say explosives and blasting. Some
22 hire them to do the mining, the production work, but they
23 are, in the definition of operating, the Mine Act, they
24 are operators.

25 And in appropriate cases, enforcement actions, we

1 have cited both the site mine operator -- S-I-T-E, site --
2 as well as the independent contractors as an operator.

3 You refer to -- but there are other contractors
4 who come in and they may be delivering something. They may
5 be on the mine site for one or two days, three days, or
6 something. And those are the contractors I think you were
7 talking about when you gave your example.

8 MR. PARRIS: Actually, no --

9 MS. SILVEY: Those are the ones that have to have
10 hazard training.

11 But I want to, before everybody leaves, I want to
12 get it in the record that the Part 45 independent
13 contractors with a legal identification number are
14 considered operators under the Mine Act.

15 That's all. Thank you.

16 MR. PARRIS: Thank you.

17 MS. SILVEY: Our next commenter is -- I think he
18 is here -- Peter Gould, Squire Patton Boggs.

19 MR. GOULD: Ms. Silvey, am I the last one or are
20 there others?

21 MS. SILVEY: I don't know.

22 MR. GOULD: Okay. On the list, though?

23 MS. SILVEY: We don't -- well, I don't know.

24 MR. GOULD: Okay.

25 MS. SILVEY: Do you want to speak now?

1 MR. GOULD: You know what? I'm going to yield my
2 time, out of respect for everybody else. So, I'll let some
3 others speak, if they would prefer.

4 MS. SILVEY: Okay. That's up to you.

5 MR. GOULD: Many of my comments have already been
6 shared, and I'll submit them in writing.

7 MS. SILVEY: Okay.

8 MR. GOULD: But thank you.

9 MS. SILVEY: All right. Is there anybody else in
10 the room who wishes to speak? Anybody online?

11 Well, that answers your question. You were the
12 last one. I mean, I couldn't tell, because I always ask,
13 "Is there anybody else in the room who wishes to speak?"

14 So, okay. Going once, twice. If nobody else,
15 either in this room or online, wishes to speak, then I am
16 going to conclude this hearing.

17 But before I do so, I will say to everybody that
18 MSHA appreciates very much your participation in this
19 hearing today, and for those of you who participated in
20 the prior two hearings. On behalf of Assistant Secretary
21 Williamson, we want you to know that we take a sign of
22 your participation here, that reflects your interest in
23 this important rulemaking.

24 And it is an important rulemaking. And as we go
25 forward, as we said earlier, the comment period closes

1 September 11th, and we look forward to those who promised
2 that they would supplement their oral testimony with
3 written comments.

4 And for those of you who have not given us any
5 written comments yet, but we look forward to receiving
6 those prior on September 11th or prior to September 11th.

7 Where we have asked for more specific
8 information, and that it be supported with rationale for
9 your position, I want to underscore that. And please
10 provide that, if you will. That type of information is
11 very important to us, as we move forward with the
12 rulemaking.

13 All information will be posted on MSHA's website,
14 msha.gov, and regulations.gov.

15 And the transcript of today's hearing will be
16 posted in about five days, as we said earlier.

17 So, we thank you on behalf of the panel here with
18 me today. We all thank you, and we hope you have a great
19 rest of the day. Thank you very much.

20 This concludes the public hearing.

21 (Whereupon, the above-entitled matter went off
22 the record at 1:02 p.m.)
23
24
25

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This is to certify that the foregoing transcript

In the matter of: Lowering Miners' Exposure to
Respirable Crystalline Silica

Before: US DOL MSHA

Date: 08-21-23

Place: Denver, Colorado

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