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<p>16. Abstract (Limit: 200 words) The purpose of the hearing was to receive relevant comments and data on a joint MSHA and NIOSH notice concerning the accurate measurement of the average concentration of respirable dust to which each miner in the active workings of a coal mine is exposed to over a single shift. The notice, published in the Federal Register on February 18, 1994, announced a new finding that a single shift sample will, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift. This notice also announce the intent to rescind the 1971 finding. Comments received thus far centered on two issues. First, comments received reflect some confusion over the MSHA and NIOSH decision to rescind the 1971 notice of finding. MSHA and NIOSH have concluded that the statistical analysis and the 1971 finding itself were not germane to the Congressional intent. The analysis did not address the accuracy of a single full shift measurement in representing atmospheric conditions during the shift on which it was taken. The second issue concerns the accuracy of single full shift measurements.</p>				
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## **PUBLIC HEARING**

on the February 18, 1994

**Joint**

Department of Labor and

Department of Health and Human Services

Federal Register Notice Addressing

Mine Shift Atmospheric Conditions; Respirable Dust Sample

July 6, 1994

Morgantown, West Virginia

## **O P E N I N G   S T A T E M E N T**

Good morning. I am **Ronald Schell**, Chief of the Division of Health, Coal Mine Safety and Health, and I will be the moderator of this public hearing. On behalf of J. Davitt McAteer, the Assistant Secretary for the Mine Safety and Health Administration, and Dr. Linda Rosenstock, Director, National Institute for Occupational Safety and Health, I would like to take this opportunity to welcome you here today to this public hearing. This proceeding relates to the Mine Safety and Health Administration (MSHA) and the National Institute for Occupational Safety and Health's (NIOSH) February 18, 1994, notice addressing the joint finding by the Secretary of Labor and the Secretary of Health and Human Services that the **average concentration of respirable dust to which each miner in the active workings of a coal mine is exposed can be**

measured accurately over a single shift.

If you make a statement during the joint MSHA/NIOSH hearing this morning and also desire your statement to be considered as a comment on the unilateral MSHA notice, you do not have to repeat your testimony at the MSHA proceeding this afternoon. Simply state that you wish your testimony this morning to be considered as comments on both the joint MSHA/NIOSH notice and the unilateral MSHA notice, and we will ensure that the record of each proceeding includes the statement in its entirety.

In accordance with section 101 of the Mine Act and pursuant to the dictates of section 202(f) of the Act, MSHA and NIOSH have issued a notice that a single-shift sample will, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift. The notice solicited written public comments, and in response to requests from interested parties, the Agencies are holding this public hearing to receive further comment. MSHA and NIOSH will also allow additional time for the submission of post-hearing comments before considering all of the comments and testimony submitted to the Agencies and issuing any final notice in the Federal Register.

With me on the panel today from MSHA, on my right are: George Niewiadomski, Mine Safety and Health Specialist, Coal Mine Safety and

Health; **Thomas Tomb**, Chief, Dust Division, Pittsburgh Safety and Health Technology Center; **Jon Kogut**, Mathematical Statistician, Denver Safety and Health Technology Center; and **Heidi Strassler**, our legal counsel from the Department of Labor Solicitor's Office.

On my left, joining MSHA staff on the panel today from **NIOSH** are: **Nancy Bollinger**, Deputy Director, Division of Respiratory Disease Studies; **Larry Reed**, Assistant Director, Policy Development, Division of Standards Development and Technology Transfer; **Frank Hearl**, Chief, Environmental Investigations Branch, Division of Respiratory Disease Studies; and **Paul Hewett**, Industrial Hygienist, Division of Respiratory Disease Studies.

The purpose of this hearing is to receive relevant comments and data on the joint notice. The issues identified in the written comments received through May 20, 1994, were summarized in the June 6, 1994, Federal Register announcing this hearing.

It is the practice of this Agency that formal rules of evidence will not apply. Today's proceedings will be conducted in an informal manner and are scheduled to end at 12:00 p.m. Those of you who have notified MSHA in advance will be able to make your presentations first. Each person has been allotted 20 minutes for their presentation. Following those presentations, and

upon request, others who wish to have an opportunity to speak will be allowed up to 20 minutes to do so. During this proceeding, the hearing panel will be available to address questions from the speakers.

As the moderator, I may exercise discretion to exclude irrelevant or unduly repetitious material and questions.

A verbatim transcript of this hearing is being taken, and it will be made an official part of the rulemaking record. The hearing transcript, along with all of the comments that MSHA has received to date on the proposed finding will be available for review by the public. However, if you wish a personal copy of the hearing transcript, you should make your own arrangements with the Hawaii reporter.

The Agencies will also accept additional written comments and other appropriate data on the proposed finding from any interested party, including those who have not presented oral statements today. These written comments may be submitted to me during the course of this hearing or sent to the address listed in the hearing notice. All written comments and data submitted to MSHA will be included in the rulemaking record. If you wish to present any written statements or information for the record today, please clearly identify them to me. When you give them to me, I will identify them by title as being submitted

for the record. An attendance sheet will be circulating in the room today so that you may register your presence.

To allow for the submission of post-hearing comments and data, the record will remain open until **Friday, August 5, 1994.**

### **BACKGROUND**

By way of background, on February 18, 1994, the Secretary of Labor and the Secretary of Health and Human Services jointly published a notice in the Federal Register announcing a new finding that the average concentration of respirable dust to which each miner in the active workings of a coal mine is exposed can be accurately measured over a single shift in accordance with section 202(f)(2) of the Federal Mine Safety and Health Act of 1977. Based on this finding, the Secretaries are proposing to rescind the finding issued on July 17, 1971, and affirmed on February 23, 1972.

Concurrently, MSHA published a notice in the Federal Register announcing its intention to use both single, full-shift respirable dust measurements, and the average of multiple, full-shift respirable dust samples, to determine noncompliance and issue citations for violations of the respirable dust standard under the MSHA coal mine respirable dust program. This subject notice will be discussed at the proceeding this afternoon.

The comment periods for these notices were scheduled to close on April 19, 1994, but, in response to requests from the mining community for additional time in which to prepare their comments, MSHA extended the comment period to May 20, 1994.

## ISSUES

To date MSHA has received comments which can be summarized as addressing **two** issues.

### Issue (1):

Comments received to date have reflected some confusion over the MSHA and NIOSH decision to rescind the 1971 Notice of Finding which was affirmed in 1972. On July 17, 1971, a Notice of Finding under section 202(f)(2) of the Federal Coal Mine Health and Safety Act of 1969 was published by the Secretaries of the Interior and Health, Education, and Welfare. This finding was based on an analysis of mine operator dust sample results from 2,179 working sections in compliance with the dust standard. Specifically, the average concentration of all 10 full-shift samples submitted from each working section under the regulations in effect at the time (referred to as "basic samples") "... was compared with the average of the two most recently submitted samples..., then to the three most recently submitted samples, then to the four most recently

submitted samples, etc."

In discussing the results of these comparisons, the Secretaries stated that "...the average of the two most recently submitted samples of respirable dust was statistically equivalent to the average concentration of the current basic samples for each working section in only 9.6 percent of the comparisons." The finding concluded that "[a] single shift measurement of respirable dust would not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is continuously exposed."

MSHA and NIOSH have concluded that the statistical analysis and the 1971 Finding itself were not germane to the Congressional intent as stated in section 202(f) of the 1969 Act and its successor the Federal Mine Safety and Health Act of 1977.

On examination, it can be seen that the conclusion reached in the notice is not consistent with the title of the notice. Specifically, the title of the notice published in 1971 and affirmed in 1972 states the following: "Notice of Finding That Single Shift Measurements of Respirable Dust Will Not Accurately Represent Atmospheric Conditions During Such Shift". The conclusion reached in the notice states that: "...a single shift measurement would not, after applying valid statistical techniques, accurately represent the atmospheric

conditions to which the miner is continuously exposed". Section 202(f) specifies a finding focused on the "atmospheric conditions on such shift," not the "atmospheric conditions during which the miner is continuously exposed."

The analysis did not address the accuracy of a single full-shift measurement in representing atmospheric conditions during the shift on which it was taken.

**Issue (2):**

**Accuracy of Single Full-Shift Measurements**

The proposed joint finding is based on NIOSH and MSHA's position that a sample taken in accordance with the provisions of 30 CFR Parts 70, 71, and 90 accurately represents the full-shift, average atmospheric dust concentration at the location where the sample is collected. These regulatory provisions were designed to assure that measurements taken with approved sampling devices in a prescribed manner would meet a level of accuracy acceptable to the Secretaries.

At this time, we are open for discussion on these issues or any other relevant issues. We will begin with the following speakers in this order:

- (1) **Mr. James Weeks**, of the United Mine Workers of America.
- (2) **(Kevin Burns will phone OSRV with name of speaker)**, of the Cyprus AMAX Minerals Company.
- (3) **(Kevin Burns will phone OSRV with name of speaker)**, of the Rochester & Pittsburgh Coal Company.
- (4) *AMC - Ellis et al (white-out)*
- (5)
- (6)
- (7)

Anyone who has not previously requested to speak will be allocated time after the scheduled speakers. To ensure an accurate record, when you speak, please come to the podium and begin by clearly stating your name and organization. Also, as you give your testimony please speak loudly and clearly in order to facilitate the court reporter's job.

If you have extra copies of your statement, please provide them to the hearing panel and the reporter. If you have any written material in addition to

your statement, please submit it either during or immediately after the conclusion of your testimony today or submit it as part of the post-hearing comments. Thank you. We are now ready to proceed.