

**Public Hearing before the  
Mine Safety and Health Administration, U.S. Department of Labor  
Proposed Rule to Protect Miners from Exposure to Asbestos**  
(70 *Federal Register* (145): 43950-43989)

Statement of  
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October 20, 2005

Good day. My name is Celeste Monforton and I am a research associate in the Department of Environmental and Occupational Health at the George Washington University School of Public Health and Health Services. From January 1991 until December 2001, I was employed by the U.S. Department of Labor at the Occupational Health and Safety Administration (1991-1995) and the Mine Safety and Health Administration (MSHA) (1996-2001). I offer my testimony as a private citizen. I am not being compensated in any way by any organization, corporation, group or individual to appear here today. I have no economic interest in the outcome of this rulemaking.

On a personal note, I would like to thank the career MSHA employees who are involved in this rulemaking, and in the agency's other efforts to protect miners from exposure to asbestos. While I was at MSHA, I witnessed first-hand your commitment to the mission of the agency, and your efforts to promulgate protective standards for workers. I appreciate that fact that you face significant political obstacles from within your own agency, the Department of Labor, and the Office of Management and Budget, and endure substantial pressure from other groups who seek to preserve the status quo. I also understand and recognize that other health hazards faced by miners, such as diesel particulate matter, coal mine dust and crystalline silica, must also be addressed by MSHA, and given the agency's limited resources, this rulemaking on asbestos may not be the highest priority. For that reason, I recommend the following:

MSHA should:

- (1) expedite this limited scope rulemaking and issue a final rule by March 30, 2006; and
- (2) incorporate into this limited scope rule OSHA's 1926.1101 to protect miners and contractors from asbestos-containing building materials and equipment; and
- (3) commit publicly to propose, by March 30, 2007, a comprehensive asbestos rule which incorporates the latest scientific information on the health effects of respirable fibers and state-of-the-art analytical methods.

It has been more than three years since MSHA published its advanced notice of proposed rulemaking on controlling and measuring asbestos<sup>1</sup> and held its public hearings. It is a sad commentary, but exposes the truthful reality: the current regulatory system is inefficient and incapable of responding in a timely manner to protect workers from occupational health hazards. In some cases, whole generations of workers have been exposed to disabling and deadly hazards while employers, industry trade associations and their lawyers debate with regulators. When I studied MSHA's current proposal on asbestos, I kept returning to the same question: Given the current reality of the regulatory system, what can be done expeditiously to strengthen MSHA's enforcement tools in order to protect asbestos-exposed mine workers? I elaborate below on my recommendations.

### **(1) Expedite a Limited Scope Final Rule and Issue it by March 30, 2006**

In at least 11 instances, MSHA indicates that this rulemaking is limited in scope, with the primary objective of establishing a permissible exposure limit (PEL) that is equivalent to the Occupational Safety and Health Administration's PEL. The proposed sections 56.5001 (b)(1)-(3); 57.5001(b)(1)-(3); and 71.702(a)-(c) will accomplish this objective.

I agree with MSHA's decision to propose this minor rule. I urge the agency, however, to expedite the process to ensure that it is in effect by March 30, 2006 (that is, about 120 days after the close of the post-hearing comment period.) I consider this a first step, and one that is tremendously important and necessary to ensure miners' health is better protected. I note that representatives of the mining industry expressed no objections to this approach, recommending in 2002 that

“...MSHA reduce the PEL to 0.1 fiber per cubic centimeter of air for the currently regulated asbestos minerals -- chrysotile, amosite, crocidolite, actinolite-asbestos, tremolite-asbestos and anthophyllite-asbestos -- and other amphiboles in their asbestiform habit – for example, winchite-asbestos, richterite-asbestos, et cetera – and erionite-asbestos. The short-term limit for these same asbestiform minerals should be set at 1.0 fiber per cc for a 30 minute sampling duration to be consistent with OSHA.”<sup>2</sup>

I urge MSHA to put this limited scope asbestos rule on the fastest, fast-track available, taking full advantage of the mining industry's support for the change. I recommend, however, that MSHA include all mining operations (including underground coal mines) in the regulation. Meaning no disrespect to the geology experts with whom MSHA consulted, the agency should not tie its own hands. If there was an instance in which underground coal miners were at risk of exposure to asbestos, the agency should have

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<sup>1</sup> 67 *Federal Register*: 15134 (March 29, 2002).

<sup>2</sup> Testimony of Mr. Kelly Bailey, NSSGA's chairman on its IH Subcommittee, Occupational Health Program Task Force at MSHA's Public Hearing, Charlottesville, Virginia, June 20, 2002.

the enforcement tools (i.e., the 0.1 fiber/cc 8-hour TWA PEL) it needs to protect coal miners' health.

## **(2) Incorporate OSHA's 1926.1101 in a Limited Scope Rule and Issue it by March 30, 2006**

In the preamble to this proposed rule, MSHA describes several reprehensible instances where mine workers were exposed to asbestos-containing building material (ACBM) during maintenance and repair activities. In one case, MSHA reports that the company officials knew the ACBM was present, yet they still allowed their workers to remove the material without proper methods, protection, or training. Moreover, MSHA only became aware of the situation because of a miner, who was brave and bold enough to notify MSHA. By the time MSHA learned of the hazard and got to the site, it was impossible to detect any airborne asbestos on the property. How is it that today, more than a century after the health risks of asbestos were documented,<sup>3</sup> some mine operators would knowingly expose workers to ACBM and not take any precautions?

I see it this way: first, employers realize there is little chance they will get caught. If nobody's watching, some will take short-cuts and risk the health and lives of their employees. Second, employers understand that most workers will not complain to MSHA for fear of losing their jobs or being discriminated against in some other way. And third, they know that MSHA does not have a regulation on the books to protect workers from asbestos-containing material. These factors combined give unscrupulous mine operators all the incentive they need to cut corners and place their workers at significant risk.

MSHA needs a regulation to specifically address demolition or salvage of structures where asbestos is present; removal or encapsulation of ACBM; and construction, alteration, repair, maintenance or renovation of structures or equipment that contain asbestos. MSHA should incorporate the appropriate provisions of 29 CFR 1926.1101<sup>4</sup> to its limited scope final rule and promulgate it no later than 120 days after the post-hearing comment period. I cannot imagine that responsible mine operators would object to extending these protections to workers employed at mining operations. I suspect that the vast majority of firms, when faced with situations where ACBM has to be removed, already comply with the provisions of OSHA's standard, or they hire a qualified asbestos-abatement contractor to ensure the job is done properly and safely. Formally incorporating OSHA's 1926.1101 into MSHA's limited scope rule is necessary, however, for those irresponsible mine operators who will only take precautions when compelled to do so because there is a regulation on the books.

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<sup>3</sup> Annual Report of the Chief Inspector of Factories and Workshops for the Year 1898. London: H.M. Stationery Office, as reported in Castleman BI, *Asbestos Medical and Legal Aspects, Fifth Edition*, Aspen Publishers, 2005.

<sup>4</sup> These include provisions for a competent person; exposure assessment and monitoring; methods of compliance; respiratory protection; hygiene facilities and practices; signs and warning labels; and waste disposal.

### **(3) Commit Publicly to Issue a Notice of Proposed Rulemaking on a Comprehensive Asbestos Health Standard by March 30, 2007**

The recommendations offered above are meant to capture some “low-hanging fruit,” and frankly, it should have been done years ago. Adopting a 0.1 fiber/cc 8-hour TWA PEL and incorporating the OSHA 1926.1101 standard will not be onerous for the mining industry, and it will be ludicrous (legally and politically) for mine operators to object to these changes. These two recommendations are designed to provide the nation’s miners with some of the same health protections afforded to all other workers in this country. **MSHA should finalize these provisions by March 30, 2006.** They are not controversial and are long overdue.

While the MSHA staff completes work on the limited scope rule, I urge the Assistant Secretary of Labor for Mine Safety and Health (or Acting Assistant Secretary) to commit to proposing a comprehensive asbestos standard which incorporates the latest scientific information on the health effects of respirable fibers and state-of-the-art analytical methods. In the preamble to the current proposed rule, MSHA concedes the many issues that are not addressed by this limited scope rule. These include issues as fundamental as the definition of “asbestos,” pros and cons of different analytical methods, the use of bulk sampling for hazard screening, among many others. As noted above, I agree with MSHA’s proposal to issue this preliminary rule which is limited in scope, however, these other issues **MUST** be addressed in a follow-up rulemaking. These issues include:

**(1) *Definition of asbestos.*** There is substantial evidence that respirable fibers not currently classified as “asbestos” are associated with significant adverse health effects. As NIOSH noted in its June 2002 comments to MSHA, any durable inhalable fibers with characteristics similar to asbestos should be considered potentially harmful. NIOSH further states that there was

“no scientifically valid health evidence to exclude from a health standard [so-called] cleavage fragments from the nonfibrous analogs of asbestos minerals if they meet the microscopic definition of a fiber.”<sup>5</sup>

There is a wealth of new information on the adverse health effects of durable respirable fibers. MSHA should work in collaboration with scientists at USGS, EPA, ATSDR, NIOSH and other federal agencies to develop an appropriate definition of the hazard, secure the assistance from these agencies to develop an updated risk assessment for occupational exposure to the hazard, and set an appropriate permissible exposure limit and short-term exposure limit.

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<sup>5</sup> Comments of the National Institute for Occupational Safety and Health on the Mine Safety and Health Administration’s Advanced Notice of Proposed Rulemaking on Measuring and Controlling Asbestos Exposure, June 27, 2002.

**(2) Provisions of a Comprehensive Health Standard.** As MSHA considers the content of a comprehensive health standard to protect mine workers from exposure to naturally-occurring asbestos, I encourage the staff to take this approach: Review in detail the cases in which such exposures occurred, and ask what enforcement tools did you need (and perhaps did not have) to ensure that workers were protected? Here are a few provisions to consider:

***(a) Use of bulk samples to assess presence of the hazard***

If a bulk sample of ore (or processed product) collected in a portion of the mine property where miners are working or are likely to be working contain more than 0.1 percent of the regulated material (as defined by the comprehensive standard) then the mine operator must have a written plan in place to control effectively workers' exposure to respirable dust and fibers.

***(b) Use of any federally-approved analytical method to determine the presence of the hazard***

If MSHA suspects that asbestos-containing ore is present on a mine property, MSHA has the authority to use any variety of federally-approved analytical methods to confirm or refute its concern for miners' health. The purpose of this provision is to help MSHA determine whether the hazard is present at the mine. A follow-up step, if necessary, would be assessing the work practices to determine whether miners are likely to be exposed to the hazard (e.g., is heavy equipment disturbing the material and causing it to become airborne) or conducting air monitoring.

***(c) Written plan to control respirable dust and fibers***

In some instances, as specified by the standard, mine operators will be required to develop and implement a written, mine-specific plan which describes the work practices (e.g., water application to control dust) or engineering controls (e.g., environmentally-controlled cabs on equipment) used to control respirable dust and fibers on the mine property. The control plan must address all facets of ore extraction, processing, loading, shipping and waste-product handling and describe how exposure to respirable dust and fibers will be controlled. If a mine operator fails to follow their own written plan, a citation will be issued and a series of worker and public notifications will commence.

***(d) Designation and training of competent person***

In some instances, as specified by the standard, mine operators will be required to designate a competent person(s) who has received appropriate training and is capable of identifying asbestos (as defined by the comprehensive standard) hazard at the mine, and having the necessary authority to ensure compliance with the written control plan.

***(e) Respiratory protection program***

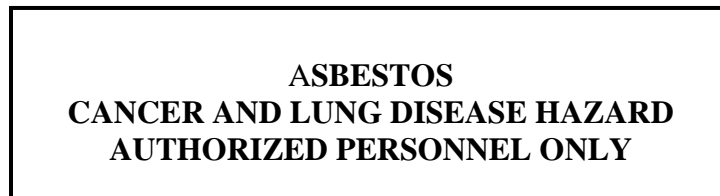
Provisions for respiratory protection should incorporate fully OSHA's 1910.134 standard which took effect in April 1998.

***(f) Hygiene facilities, protective clothing and decontamination***

In some instances, as specified by the standard, mine operators will be required to provide protective clothing (e.g., disposable coveralls, foot coverings) for miners, and to provide decontamination areas and hygiene areas to ensure that asbestos-contaminated clothing or equipment are not transported from the mine property.

***(g) Signs and warning labels***

In some instances, as specified by the standard, warning signs will be required to be placed in locations to protect miners, contractors and others entering the mine property to avoid the area or take proper precautions. The signs must read:



***(h) Medical surveillance and medical examinations***

In some instances, as specified by the standard, mine operators will be required to implement a medical surveillance and examination program which is comparable to the provisions of OSHA's 1926.1101(m).

Before I conclude my remarks, I have several additional comments. First, I encourage MSHA to create a scientific repository of asbestos samples collected during all future enforcement and compliance assistance visits. These bulk samples and filter cassettes should be made available for public health research purposes to scientists from federal agencies (e.g., USGS, NIOSH, EPA) to continue to build a knowledge base about all forms of respirable fibers present at the nation's mining operations. This repository could become a valuable resource for scientists who are examining new health effects

data, comparing sample results by different analytical methods (e.g., PLM, PCM, SEM, TEM), or verifying new analytical techniques. This information may prove invaluable to MSHA, OSHA and NIOSH in future rulemakings on this occupational hazard.

Second, I was bewildered by one portion of MSHA's preamble to this proposed rule. I cannot conclude my remarks without exposing its absurdity. The text specifically suggests that another tragedy like the one caused by W.R. Grace, beginning in Libby, Montana and now spread to communities across the nation, would not occur today. MSHA states:

“if a mine's ore contained significant amounts of asbestos-like minerals, there is a strong likelihood of potential liability risks, both from customers and workers, and the possibility that the mine's product would be commercially unmarketable. Such market forces are likely to compel mining companies of all sizes to sample the ore for the presence of hazardous fibrous minerals before purchasing or developing the mine site. In our view, these commercial reasons make it unlikely that a new Libby-like mining condition would arise in the future.”<sup>6</sup>

Yet, in the very same MSHA document, just a few short pages later, the agency describes the inability of pure market forces to protect workers' health. In one case, a customer purchased product from a wollastonite mine. They sent a sample of the material to an independent lab for analysis, and tremolite asbestos was found in the product. When MSHA learned of the matter, it conducted sampling at the mine and

“found concentrations in the mill exceeded 2.0 fiber/cc as measured by PCM...[and] over half of the exposures in the mill exceeded 0.1 fiber/cc of asbestos.”<sup>7</sup>

MSHA goes on to describe what the agency and the mine operator did to address the situation, and concludes that

“this case study demonstrates successful cooperation to protect the health of miners.”<sup>7</sup>

The incongruity of these two passages is striking. On one hand, MSHA is trying to convince us of the effectiveness of market forces<sup>8</sup>, while on the other, the agency's own experience illustrates that the economic theory does not match reality in today's workplaces. When the hazard is microscopic and the adverse health effects do not emerge for decades after the exposure (and many years after the employer-worker

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<sup>6</sup> 70 *Federal Register* (145): 43952

<sup>7</sup> 70 *Federal Register* (145): 43961

<sup>8</sup> I hope that MSHA officials did not insert this language, but rather it was added at the insistence of the Small Business Administration or the Office of Management and Budget.

relationship has ceased) it is foolish to rely on economic theories to protect workers' health. Past and present experience tells us the same.

In conclusion, I support MSHA's proposal to issue this limited scope rule which will provide mine workers some of the same protections against asbestos exposure granted to all other workers in this country. The agency must acknowledge and act, however, to address the significant limitations in the current definition of asbestos and the toxicologically irrational industry demand for "discriminatory fiber counting."

Specifically, MSHA should:

- (1) expedite this limited scope rulemaking and issue a final rule by March 30, 2006; and
- (2) incorporate into this limited scope rule OSHA's 1926.1101 to protect miners and contractors from asbestosis-containing building materials (ACBM) and equipment; and
- (3) commit publicly to propose, by March 30, 2007, a comprehensive asbestos rule which incorporates the latest scientific information on the health effects of respirable fibers and state-of-the-art analytical methods.

Thank you for providing this opportunity to comment on MSHA's proposed rule.