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PROTECTING AMERICA'S WORKERS: REVIEWING MINE SAFETY POLICIES WITH STAKEHOLDERS

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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PROTECTING AMERICA'S WORKERS: REVIEWING MINE SAFETY POLICIES WITH STAKEHOLDERS

Wednesday, October 21, 2015
U.S. House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections
Washington, D.C.

The subcommittee met, pursuant to call, at 10:04 a.m., in Room 2261, Rayburn House Office Building. Hon. Tim Walberg [Chairman of the subcommittee] presiding.

Present: Representatives Walberg, Thompson, Rokita, Brat, Bishop, Stefanik, Wilson, Pocan, and DeSaulnier.

Also Present: Representatives Kline, Scott, Cartwright, and Courtney.

Staff Present: Andrew Banducci, Workforce Policy Counsel; Janelle Belland, Coalitions and Members Services Coordinator; Ed Gilroy, Director of Workforce Policy; Jessica Goodman, Legislative Assistant; Callie Harman, Legislative Assistant; Christie Herman, Professional Staff Member; Tyler Hernandez, Press Secretary; Nancy Locke, Chief Clerk; John Martin, Professional Staff Member; Dominique McKay, Deputy Press Secretary; Brian Newell, Communications Director; Krisann Pearce, General Counsel; Alissa Strawcutter, Deputy Clerk; Juliane Sullivan, Staff Director; Loren Sweatt, Senior Policy Advisor; Olivia Voslow, Staff Assistant; Joseph Wheeler, Professional Staff Member; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Christine Godinez, Minority Staff Assistant; Brian Kennedy, Minority General Counsel; Richard Miller, Minority Senior Labor Policy Advisor; Veronique Pluviose, Minority Civil Rights Counsel; Saloni Sharma, Minority Press Assistant; and Elizabeth Watson, Minority Director of Labor Policy.

Chairman WALBERG. Good morning. I decided to go with the flow here and have a new gavel this morning. Those of you at the table, you know what this is from a long wall scaling machine, and possibly a culprit in the past, but also something that is causing great opportunity in our coal mining industry as well. Forgive me if I use this today. I just have to make sure I release it ever so slowly with the weight that is in it.

A quorum being present, the Committee will come to order. Good morning. I would like to thank you all for joining us today and thank our witnesses for being here to continue a discussion on the health and safety of American workers.

Each day, men and women across this country work hard to earn a living and provide for their families. They deserve thanks for doing something they should do, but nevertheless thanks as well.

They also deserve the security and peace of mind that comes from knowing their workplaces are safe and effective policies are in place to protect them. That is true whether an individual works at a desk, behind a counter, or in a mine.

Two weeks ago we discussed the important role of the Occupational Safety and Health Administration and what it plays in that process in providing American workers the safe workplaces they deserve.

Earlier this year we heard from Assistant Secretary Joe Main, head of the Mine Safety and Health Administration, who discussed the work his agency is doing to help keep miners safe.

On each occasion, we urged the administration to hold bad actors accountable, as well as to work with employers and other stakeholders to identify gaps in safety and to implement responsible solutions. The goal is to prevent injuries and fatalities before they occur, and this responsible approach is the best way to achieve that goal.

Today, we will hear from a number of stakeholders in the mining industry, including operators and labor and safety experts. There have been significant changes in the mining industry over the last several years, including the way health and safety policies are enforced.

This hearing is an opportunity to hear what is working and what is not. As we all know, thousands of miners are employed by an industry that is vitally important to our nation's homes and businesses. I hope all levels of our governmental system hear that and acknowledge that.

We also know these men and women work in an environment that is extremely dangerous, where some of the most basic tasks can be life threatening. It is hard to imagine working in a place where the very air you breathe is hazardous to your health. That is just one of the many hazards miners face.

We have witnessed the deadly consequences that ensue when mine safety and health rules are not followed. Upper Big Branch is a painful reminder of what happened when bad actors put profit before safety, and a trial currently underway in West Virginia demonstrates the role our criminal justice system can play.

Upper Big Branch is also a painful reminder of what happens when mine safety and health rules are not properly enforced. As an independent report from National Institute for Occupational Safety and Health noted, and I quote, "If the Mine Safety and Health Administration had engaged in timely enforcement of the *Mine Act*, and applicable standards and regulations, it would have lessened the chances of and possibly could have prevented the UBB explosion."

In response, the agency has taken steps intended to improve safety, such as requiring the use of continuous personal dust monitors and proximity detectors, launching an impact inspection initiative, and changing the pattern of violations process.

We have repeatedly called on MSHA to do better, and while we have not agreed with each action it has taken, we are pleased the

agency is showing more of a commitment to using the tools it has to keep miners safe.

Unfortunately, along with reports of effective enforcement, I have also heard reports of inspectors being overly aggressive in their citation policy. With one inspector, the majority of citations were found to be in error by a court. We agree that oversight of mine safety is imperative to worker safety, but we also want to ensure mines can continue to successfully operate and provide good jobs and security for its workers.

We look forward to hearing from our witnesses on these and other actions MSHA has taken in recent years, understanding the state of the industry, seeing how current rules are not working, and discussing what we can do differently are vital to worker safety and job security.

That is why we have asked you all to join us today. Each of you offers a different and important perspective on the policies in place to protect America's miners. Your views and expertise will help us answer a number of important questions.

Are the policies that have been put in place in recent years working? If not, why not? Is enforcement more effective or less effective? Are there additional steps MSHA can take to strengthen protections?

Your testimonies will help us ensure enforcement and regulatory policies serve the best interests of miners and their families. Again, I thank you for joining us. We look forward to your testimony and continuing this important conversation on worker safety.

With that, I will now recognize our Ranking Member, Ms. Wilson, for her opening remarks.

[The statement of Chairman Walberg follows:]

Opening Statement of Rep. Tim Walberg (R-MI)
Chairman, Subcommittee on Workforce Protections
Hearing on "Protecting America's Workers: Reviewing Mine Safety Policies with Stakeholders"
October 21, 2015

Good morning. I'd like to thank you all for joining us today and thank our witnesses for being here to continue a discussion on the health and safety of American workers.

Each day men and women across the country work hard to earn a living and provide for their families. They deserve the security and peace of mind that come from knowing their workplaces are safe and effective policies are in place to protect them. That's true whether an individual works at a desk, behind a counter, or in a mine.

Two weeks ago, we discussed the important role the Occupational Safety and Health Administration plays in providing American workers the safe workplaces they deserve. And earlier this year, we heard from Assistant Secretary Joe Main, head of the Mine Safety and Health Administration, who discussed the work his agency is doing to help keep miners safe.

On each occasion, we urged the administration to hold bad actors accountable, as well as to work with employers and other stakeholders to identify gaps in safety and to implement responsible solutions. The goal is to prevent injuries and fatalities before they occur, and this responsible approach is the best way to achieve that goal.

Today, we will hear from a number of stakeholders in the mining industry, including operators, labor, and safety experts. There has been significant change in the mining industry over the last several years, including the way health and safety policies are enforced. This hearing is an opportunity to hear what's working and what isn't.

As we all know, thousands of miners are employed by an industry that is vitally important to our nation's homes and businesses. We also know that these men and women work in an environment that is extremely dangerous, where some of the most basic tasks can be life-threatening. It's hard to imagine working in a place where the very air you breathe is hazardous to your health, but that's just one of the many hazards miners face.

We have witnessed the deadly consequences that ensue when mine safety and health rules are not followed. Upper Big Branch is a painful reminder of what happens when bad actors put profit before safety, and a trial currently underway in West Virginia demonstrates the role our criminal justice system can play.

Upper Big Branch is also a painful reminder of what happens when mine safety and health rules are not properly enforced. As an independent report from the National Institute for Occupational Safety and Health noted, "If [the Mine Safety and Health Administration] had engaged in timely enforcement of the *Mine Act* and applicable

standards and regulations, it would have lessened the chances of – and possibly could have prevented – the UBB explosion."

In response, the agency has taken steps intended to improve safety, such as requiring the use of continuous personal dust monitors and proximity detectors, launching an "impact inspection" initiative, and changing the pattern of violations process. We have repeatedly called on MSHA to do better, and while we haven't agreed with each action it has taken, we are pleased the agency is showing more of a commitment to using the tools it has to keep miners safe.

Unfortunately, along with reports of effective enforcement, I have also heard reports of inspectors being overly aggressive in their citation policy. With one inspector, the majority of citations were found to be in error by a court. We agree that oversight of mine safety is imperative to worker safety, but we also want to ensure mines can continue to successfully operate and provide good jobs for its workers.

We look forward to hearing from our witnesses on these and other actions MSHA has taken in recent years. Understanding the state of the industry, seeing how current rules are or are not working, and discussing what we can do differently are vital to worker safety, and that is why we asked you all to join us today.

Each of you offers a different and important perspective on the policies in place to protect America's miners. Your views and expertise will help us answer a number of important questions: Are the policies that have been put in place in recent years working? If not, *why* not? Is enforcement more effective or less effective? Are there additional steps MSHA can take to strengthen protections?

Your testimony will help us ensure enforcement and regulatory policies serve the best interests of miners and their families. Again, thank you for joining us. We look forward to your testimony and to continuing this important conversation on worker safety. With that, I will now recognize Ranking Member Wilson for her opening remarks.

Ms. WILSON. Thank you, Mr. Chair. I want to thank you for holding this hearing and giving us the opportunity to discuss how we can better protect the health and safety of miners. Our Ranking Member Scott, I want to thank you also for being here.

When we discuss the health of miners, we must discuss finding ways to end black lung disease, and also to help those suffering from the disease secure the benefits they deserve.

I was moved by the story of Steve Day, a miner, featured in the Center for Public Integrity's Pulitzer Prize winning investigation into the black lung benefit system. After 35 years working in the coal mines and breathing in coal dust, Steve developed debilitating symptoms that made it impossible to perform even simple tasks. Instead, he was forced to spend his days sitting in a recliner next to the oxygen tank he relied on 24 hours a day.

He was not able to even lie down to sleep next to his wife. To do so would overwhelm his lungs and leave him feeling as if he were suffocating. His wife slept restlessly in a nearby bedroom, jumping out of bed when he gasped for air and pounding him on the back until he coughed. I can only imagine the sleepless nights his wife spent fearful that if she should close her eyes for only a moment, she would wake up to hear he was not breathing at all.

Steve represents the thousands of miners suffering from the debilitating disease that has killed 76,000 coal miners. Sadly, after years of decline, we have seen an alarming spike in the rate of black lung disease, including a ten-fold increase in the most severe forms of the disease.

Black lung disease is entirely preventable. MSHA's respirable dust rule will reduce miner exposure to coal dust. Starting February 2016, mine operators must use a continuous personal dust monitor. This tool will allow for real time exposure information and give operators the ability to make the necessary adjustments to cut exposure faster.

Beyond prevention, we must also ensure that miners who develop black lung disease get the benefits they deserve. Our Committee has not had a hearing on the *Black Lung Benefits Act* in almost 25 years. I am glad for this opportunity to hear from our witnesses about challenges faced by black lung claimants.

Steve Day's story underscores some of those challenges. Although he was clearly suffering from black lung, his former employer used biased medical reports that led to the denial of his benefits claim. Sadly, it was not until Steve died at 67 and an autopsy was performed that he was vindicated. According to experts, Steve suffered from one of the most severe cases of black lung they had ever seen.

Miners with black lung disease fighting for their lives should not also have to fight against unfair tactics that needlessly delay or deny deserved benefits. That is why we must pass the *Black Lung Benefits Improvement Act* to provide miners with assistance in securing medical evidence and obtaining legal representation.

Of course, we know that all mines are not coal mines. Today, we will also hear about safety issues in metal and non-metal mines. Last year, fatalities in metal/non-metal mines reached a seven year high. This reminds us that we must ensure that we have the tools we need to protect miners' safety.

As we discussed in our April hearing, the *Robert C. Byrd Mine Safety Protection Act* provides those much needed tools.

I want to thank our witnesses for being here today. I look forward to your testimony, and I yield back.

[The statement of Ms. Wilson follows:]

COMMITTEE ON
EDUCATION AND THE WORKFORCE
SUBCOMMITTEES
HEALTH, EMPLOYMENT, LABOR, AND PENSIONS
WORKFORCE PROTECTIONS - RANKING MEMBER

FREDERICA S. WILSON
CONGRESS OF THE UNITED STATES
24TH DISTRICT, FLORIDA

Opening Statement

Ranking Member Frederica S. Wilson
Workforce Protections Subcommittee Hearing

"Protecting America's Workers:
Reviewing Mine Safety Policies with Stakeholders."
Wednesday, October 21, 2015

Mr. Chairman, I want to thank you for holding this hearing and giving us an opportunity to discuss how we can better protect the health and safety of miners.

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He was unable to even lie down to sleep next to his wife. To do so would overwhelm his lungs and leave him feeling as if he was suffocating. His wife slept restlessly in a nearby bedroom, jumping out of bed when he gasped for air and pounding him on the back until he coughed. I can only imagine the sleepless nights his wife spent fearful that if she should close her eyes for only a moment, she would wake up to hear that he was not breathing at all.

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I want to thank our witnesses for being here today. I look forward to your testimony. I yield back.

Chairman WALBERG. I thank the gentlelady. Pursuant to Committee Rule 7(c), all subcommittee members will be permitted to submit written statements to be included in the permanent hearing record, and without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing to be submitted in the official hearing record.

It is now my pleasure to introduce today's witnesses. The first witness, Jeffery L. Kohler, Ph.D., is professor and the George H. and Ann B. Deike Endowed Chair of Mining Engineering at Penn State University. Good Big Ten school. Dr. Kohler recently retired from the National Institute for Occupational Safety and Health as the associate director for mining, Office of Mine Safety and Health Research.

Mr. Kohler teaches mining engineering courses and has conducted research in several areas, including electrical systems, materials handling, ventilation, quarry engineering, and mining methods. Welcome.

Steve Sanders is director for the Appalachian Citizens' Law Center (ACLC). Mr. Sanders founded ACLC, an organization representing coal miners and their families on issues of black lung and mine safety in 2001. Mr. Sanders has more than 20 years of experience as a public interest lawyer in eastern Kentucky.

Mr. Sanders has represented miners in whistleblower discrimination cases as well as black lung benefits cases. Welcome.

Ed Elliott is director of safety and health at the Rogers Group, and is testifying on behalf of the National Stone, Sand and Gravel Association. Mr. Elliott has been with Rogers Group in various safety positions since 1985. Mr. Elliott has earned numerous awards including the National Stone, Sand and Gravel Association Safety and Health Professional of the Year for 2002, to Aggregate Managers Magazine Ag Man of the Year for 2004, and Kentucky Crushed Stone Association Miner of the Year for 2014. Welcome.

Michael Wright is director of health, safety and environment at United Steelworkers. As a former United Steelworkers' member myself, welcome.

Mr. Wright has been with the Steelworkers since 1984. He served as a representative to the Bhopal accident investigation. Mr. Wright is often the Steelworkers' representative at regulatory and congressional hearings. Welcome.

Bruce Watzman is the senior vice president for regulatory affairs at the National Mining Association. Mr. Watzman has worked for the National Mining Association and its predecessor, the National Coal Association, since 1980.

Mr. Watzman was recently appointed as a member of the Mine Safety and Health Research Advisory Committee. I welcome you.

I will now ask our witnesses to stand, as is our requirement here, and raise your right hand.

[Witnesses sworn.]

Chairman WALBERG. Thank you. You may be seated. Let the record reflect our witnesses each answered in the affirmative and you may take your seats.

Before I recognize you to provide your testimony, let me briefly remind you of our lighting system, and I think most of you under-

stand that. It is a traffic light. As long as it is green, keep going in your five minutes of testimony. When it hits yellow, rush through or slow down, but to the point when it turns red, end your comments as soon as possible to give us an opportunity to ask the questions, probably to respond to what you wanted to say anyway.

Now for the first five minutes of testimony, I will recognize Dr. Jeffery Kohler.

TESTIMONY OF DR. JEFFERY L. KOHLER, PROFESSOR AND CHAIR OF MINING ENGINEERING, PENNSYLVANIA STATE UNIVERSITY, UNIVERSITY PARK, PA

Dr. KOHLER. Good morning, Mr. Chairman, and other distinguished members of the Committee. My name is Jeff Kohler, and I am a professor and chair of mining engineering at Penn State. I am pleased to be here today to provide a forward looking perspective on mine safety based on my experience of more than 40 years in mining, working in academia, government, and industry.

The global economy continues to be powered by mining and mine products. Examples include energy sources like coal, construction materials that utilize iron, copper, or aggregates, the rare earth minerals, pharmaceuticals, agricultural produce, and thousands of every day items that depend on mining.

The associated mining and processing operations are a significant driver for the economies of the producer countries, 15 percent of the U.S. and 25 percent of the global economy, for example.

Fundamental economic value and wealth are created in the transformation of materials from the earth's crust, and the welfare of the men and women who make this possible must be of the highest concern.

Remarkable gains in mine safety have been made over the years, but more remains to be done. The goal must be to eliminate fatalities and further reduce injuries. Indeed, many mining companies have committed to the goal of zero harm and are to be commended for taking actions to achieve it.

If we are to be successful on this journey to zero harm across all commodities and at all mines, what steps should be taken? We need to dispel the belief that compliance with regulations is sufficient to prevent adverse safety outcomes. Regulations provide an important base to define minimum performance but regulatory intervention alone will not do it.

Engineering interventions such as new technologies and design practices will contribute to improved safety, but alone will not take us to the goal.

Training, the third intervention of a triad, that has characterized the long-standing approach to improving mine safety, also will contribute to incremental gains. As with the other two intervention approaches, it has limitations.

Instead, we should recognize that safety performance is the result of a complex system of organizational, managerial, labor, and technical components, and we must manage it accordingly, and involve people from every part of the mining enterprise.

A framework for this is commonly known as "a health and safety management system," and such systems have been put into practice in other industries and countries. The National Mining Asso-

ciation, for example, has led the development of a comprehensive system for mining known as "CORESafety," and has developed materials to expedite implementation. Already, companies in the coal, metal/non-metal, and aggregate sectors have embraced CORESafety and its principles.

The journey to zero harm with this approach at its core will not happen overnight, and it will not be without its challenges. However, in my view, this approach represents a game changer that will enable a change in the safety culture and facilitate obtainment of the goal much as has happened elsewhere.

The in-place regulatory interventions will remain important as will enforcement of those regulations by well trained and equipped inspectors. Training interventions for everyone involved in mining will be as important as ever, but to be effective, we must bring our training practices and requirements into the twenty-first century.

As a start, the findings of a recent National Academies' study on improving self escape for mine workers offers important insights to improve the effectiveness of training in general.

The *Mine Act* brought new technologies into the mines, such as the communications and tracking systems in use throughout the coal industry, as well as the long awaited improvements in oxygen supply. The principles of human systems integration will allow future engineering interventions to be even more successful.

Occasionally, despite the best efforts of manufacturers, government, and industry, technology falls short. Such is the case with mobile refuge chambers. Miners and mine operators have no confidence that these units can be deployed and utilized to save lives during an emergency. Rather than continue a façade, we should move forward with a known and workable alternative, the in-place shelter. While not perfect nor universally applicable, it represents a superior alternative for a majority of miners.

Finally, I would like to underscore once more the importance of mining to this nation and the importance of mine workers' safety to mining. Also, I would note that research and the research products from the great mining schools in this country will help this vital industry to remain competitive and to achieve its goal of zero harm.

Thank you.

[The statement of Dr. Kohler follows:]

Good morning Mr. Chairman and other distinguished Members of the Committee. My name is Jeffery Kohler, and I am Professor and Chair of Mining Engineering at Penn State University. I am pleased to be here today to provide a forward-looking perspective on mine safety based on my experience of more than forty years in mining, working in academia, government, and industry.

The global economy continues to be powered by mining and mined products – examples include energy sources like coal, construction materials that utilize iron, copper, or aggregates, the rare earth minerals, pharmaceuticals, agricultural produce, and thousands of everyday items that depend on mined products. The associated mining and processing operations are a significant driver for the economies of the producer countries – 15% of the U.S. and 25% of global economy for example. Fundamental economic value and wealth are created in the transformation of materials from the Earth's crust, and the welfare of the men and women who make this possible must be of the highest concern.

Remarkable gains in mine safety have been made over the years, but more remains to be done. The goal must be to eliminate fatalities and further reduce injuries. Indeed, many mining companies have committed to the goal of zero harm, and are to be commended for taking actions to achieve the goal. If we are to be successful on this journey to zero harm across all commodities and at all mines, what steps should be taken?

We need to dispel the belief that compliance with regulations is sufficient to prevent adverse safety outcomes. Regulations provide an important base to define minimum performance, but regulatory interventions alone won't do it. Engineering interventions, such as new technologies and design practices will contribute to improve safety, but alone will not take us to the goal. Training, the third intervention of a triad that has characterized the long-standing approach to improving mine safety also will contribute to incremental gains in safety. But, as with the other two intervention approaches, it has limitations.

Instead, we should recognize that safety performance is the result of a complex system of organizational, managerial, labor, and technical components, and we must manage it accordingly and involve people from every part of the mining enterprise. A framework for this is commonly known as a Health and Safety Management System (HSMS), and such systems have been put into practice in other industries and countries. The National Mining Association has led the development of a comprehensive HSMS for mining, known as CORESafety; and has developed materials to expedite implementation. Already companies in the coal, metal/nonmetal, and stone/sand/gravel sectors have embraced CORESafety and its principles.

The journey to zero harm, with this approach at its core, will not happen overnight, and it will not be without its challenges. However, in my view, this approach represents a "game-changer" that will enable a change in the safety culture and facilitate attainment of the goal, much as has happened elsewhere.

The in-place regulatory interventions will remain important, as will the enforcement of those regulations by a well-trained and equipped inspectorate. Training interventions for everyone involved in mining will be as important as ever, but to be effective, we must bring our training practices and requirements into the 21st century. As a start, the findings of a recent National Academies study on improving self-escape for mineworkers offers important insights to improve the effectiveness of training in general.

The MINER Act brought new technologies into the mine, such as the communications and tracking systems in use throughout the coal industry and the long awaited improvements in oxygen supply. The principles of human systems integration will allow future engineering interventions to be even more successful. Occasionally, despite the best efforts of manufacturers, government, and industry, a technology falls short. Such is the case with mobile refuge

chambers. Miners and mine operators have no confidence that these units can be deployed and utilized to save lives during an emergency. Rather than continue the facade, we should move forward with a known and workable alternative – the in-place shelter. While not perfect, nor universally applicable, it represents a superior alternative for a majority of miners.

Finally, I'd like to underscore the importance of mining to this Nation and the importance of mineworker safety to mining. Also, I would note that research and the research products from the great mining schools in this country will help this vital industry to remain competitive and to achieve its goal of zero harm.

Thank you.

TESTIMONY OF STEPHEN A. SANDERS, DIRECTOR, APPALACHIAN CITIZENS' LAW CENTER, WHITESBURG, KY

Mr. SANDERS. Thank you, Chairman Walberg, Ranking Member Wilson, and the other members of the subcommittee. I appreciate your commitment to protect the health and safety of America's miners.

My name is Steve Sanders. I am an attorney, and I have been representing miners and widows in black lung benefits claims for over 25 years. I have also represented miners who were victims of discrimination for insisting on safe working conditions.

There are three points that I want to make today. First, black lung is a serious problem and it continues to disable miners and cause deaths. New data shows that the most serious form of coal workers' pneumoconiosis is present at an alarming rate.

MSHA's regulations reducing respirable dust levels and requiring continuous personal dust monitors and other measures to get accurate sampling of dust exposure are critical for protecting miners.

Additional safety measures encouraging miners to use their statutory rights as a miner's representative and to be protected from discrimination are needed.

Third, the black lung benefits program is a good program. It serves people well. But there are improvements needed to make it a fairer and more efficient program.

The continuous personal dust monitor is long overdue, and it is necessary to fulfill the promise made nearly 50 years ago in the 1969 *Mine Safety Act*, which said that the purpose of the law was to provide that working conditions in mines are sufficiently free of respirable coal mine dust to permit a miner to work during his entire working life without any disability from pneumoconiosis or occupation-related disease.

Coal workers' pneumoconiosis is preventable. It is caused by breathing minute dust particles, small invisible particles that get into the lung and destroy the lung tissue and cause fibrotic reactions. Some individuals develop a more complicated form of pneumoconiosis, sometimes known as progressive massive fibrosis.

Recent reports from NIOSH show that in the last 15 years, there has been an alarming rise in the incidence of progressive massive fibrosis, and the disease is at the highest level since the early 1970s.

The continuous personal dust monitor will allow miners to monitor their own exposure to dust. This is the continuous personal dust monitor if anyone wants to look at it (holds up device). It is designed so that it picks up the air where the miner is working and it can show on the monitor what the exposure is. Using that information, miners and management can prevent exposure to excess dust.

I also support MSHA's new requirement that dust sampling be done at no less than 80 percent of average production and that sampling be done for the full working shift, not just for eight hours.

As this dust monitor becomes a tool for miners to use to detect high levels of dust, it is important that miners use their statutory safety rights. It is important that MSHA strengthen the role of what is known as a "miner's representative," and MSHA assist

miners who feel they have been retaliated against for making safety complaints.

In my written testimony, I discuss the cases of Scott Howard and Reuben Shemwell. They illustrate how some coal companies try to discourage miners from making safety complaints, and how they retaliate against miners who do make complaints.

As the judge noted in Mr. Shemwell's case where the company sued him in state court after he had filed a protected mine safety complaint, "The primary effect of the civil suit was to discourage future complaints from other miners."

The coal communities often are small populations, and that word goes out, if you will, that the company has responded in a heavy-handed manner.

I also wanted to make a few comments about the black lung benefits program. It provides much needed financial support for disabled miners and widows, and it provides the miner with medical treatment for his respiratory condition, but there are areas that need to be improved.

The facts in the Gary Fox case showed that some companies cherry picked their evidence that they showed to the pulmonary experts, that they submit to judges, to support their defense of a claim. No family should have to endure what the Fox family suffered.

Any medical information that the coal company acquires concerning the miner's condition should be disclosed.

I see I am running out of time. But if I could just mention that the other part of the bill that I think is very important is a provision in there to assist miners in getting attorneys to represent them in these claims, because they are complex claims, and to assist miners in obtaining sophisticated medical evidence to support their claims.

Finally, there are unnecessary delays in processing these claims, and if the Committee could assist in seeing that backlog of claims pending at the Office of Administrative Law Judges was able to be processed in a more speedy way, it would be a great service to miners and their widows.

Thank you.

[The statement of Mr. Sanders follows:]

TESTIMONY OF STEPHEN A. SANDERS

BEFORE THE SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

UNITED STATES HOUSE OF REPRESENTATIVES

PROTECTING AMERICAS WORKERS: REVIEWING MINE SAFETY POLICIES WITH STAKEHOLDERS

OCTOBER 21, 2015

Chairman Walberg, Ranking Member Wilson and members of the subcommittee, thank you for allowing me to speak to you today regarding the health and safety of America's miners.

My name is Stephen A. Sanders. I am an attorney and I direct the Appalachian Citizens' Law Center, Inc., a non-profit law office in Whitesburg, Kentucky. The Law Center is based in Whitesburg in Letcher County, Kentucky, which is centrally located in the Appalachian coalfields.[1] We represent disabled miners afflicted with black lung disease and miners' widows whose husbands have died from the disease. We also represent miners who suffer workplace discrimination for making protected safety complaints.

[1] Whitesburg is in Letcher County, site of the 1976 Scotia Mine Disaster, which killed 26 miners and mine inspectors and led to the passage of the Federal Mine Safety and Health Act of 1977.

There are three points I will address in my testimony:

1. Black lung disease is a serious problem that continues to disable miners. New data shows the most serious form of coal workers' pneumoconiosis is present at an alarming rate. MSHA's new regulations reducing respirable dust levels and requiring Continuous Personal Dust Monitors are critical for protecting miners.
2. Additional safety measures encouraging miners to use their statutory rights as Miners Representative and to be protected from interference and discrimination are needed to protect miners; and
3. The black lung benefits program needs improvements to provide for fairness and the efficient adjudications of claims.

Black lung

I support MSHA's new regulations reducing the level of allowable respirable dust in coal mines and requiring the use of Continuous Personal Dust Monitors [CPDM]. These protections are long overdue and necessary to fulfill the Mine Safety Act's goal of entirely preventing black lung disease.[2] The disease is progressive and irreversible. It is also entirely preventable. MSHA's new regulations reducing the level of respirable dust and requiring CPDMs provide critical and necessary protections for miners.

For over twenty-five years I have represented coal miners and widows trying to obtain black lung benefits. Miners who are disabled by black lungs get short of breath doing any activity. They climb a set of stairs slowly and must stop to catch their breath. Their shortness of

[2] The purpose of the law is "to provide, to the greatest extent possible, that working conditions in each underground mine are sufficiently free of respirable coal mine dust concentrations in the mine atmosphere to permit a miner to work underground during his entire working life without incurring any disability from pneumoconiosis or other occupation-related disease." 30 USC 841(b).

breath makes them feel like they are smothering. Often they must use supplemental oxygen at home and if they go out they must take bottled oxygen with them. The disease is real. It causes serious health problems and premature death.

Coal Workers' Pneumoconiosis [CWP] is caused by breathing air containing minute dust particles – so small they are not visible. The dust collects in the lung and destroys the lung tissue. In some individuals CWP results in large areas of destroyed lung tissue which is called complicated pneumoconiosis or progressive massive fibrosis (PMF). The National Institute for Occupational Safety and Health (NIOSH) found that in the last fifteen years there has been an alarming rise in PMF and the prevalence of this disease is at the highest level since the early 1970's. [3] CWP is an irreversible and progressive lung disease. There can be rapid progression in CWP, even after exposure to dust ends.[4]

Miners may also develop chronic obstructive pulmonary disease [COPD] due to coal mine dust exposure and dust-related diffuse fibrosis. COPD causes irritation and damage to the airways and it may cause chronic bronchitis and emphysema, even where there is no x-ray evidence of CWP. Both coal workers' pneumoconiosis and COPD due to coal mine dust exposure are commonly called black lung.

The Continuous Personal Dust Monitors [CPDM] required by MSHA's new regulations will allow miners to monitor their own exposures, with the hope that they can prevent black lung.

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[3] Blackley D, Halldin C., Laney S. Resurgence of a Debilitating and Entirely Preventable Respiratory Disease among Working Coal Miners, Am J Respir Crit Care Med 2014; 190 (6): 708. NIOSH surveillance reports indicate that there is a 10-fold increase in the incidence of the most severe forms of black lung disease.

[4] Petsonk EL, Rose C, Cohen R. Coal Mine Dust Lung Disease: New Lessons from an Old Exposure. Am J Respir Crit Care Med 2013;187(11):1178-85.

Miners tell me all the time that the dust was thick in the mine where they worked. There were no dust monitors which could tell them whether the dust levels were safe and in compliance with the law. When dust sampling monitors were used, the results were not available until days or weeks later. In addition, miners frequently tell me that dust sampling devices were not placed where coal was actually mined but instead were put in the fresh air intake entry. CPDMs need to be put into use immediately. The CPDM gives miners the information to protect themselves from the dust that causes black lung.

Because CPDM monitoring data is immediately available to the miners and mine operators, the device will help ensure that dust levels are safe at every shift of work. The CPDM will provide miners with real time information about the level of respirable dust in the atmosphere. If there is too much respirable dust the miner can remove himself from that place and the mine operator can take action to correct the situation and reduce the level of dust. In addition to the reduced level for respirable dust and the use of the CPDM, the new MSHA rule also prevents other methods which have been use to manipulate the respirable dust rules. I support requiring MSHA's new requirement that dust sampling be done at no less than 80% of average production and sampling be done for the full working shift. These measures will help to prevent black lung by reducing miners' exposure to excessive respirable dust.

Some mistakenly believe that black lung disease, like many occupational diseases, is a thing of the past. That is absolutely not true. Black lung disease is still very much a problem. CWP was found in 71% of the Upper Big Branch victims during autopsies after the explosion. The West Virginia state medical examiners obtained sufficient lung tissue for postmortem

examination in 24 of the 29 victims, and 17 were noted to have pathologic findings of CWP.[5] The 17 miners whose lungs showed CWP ranged in age from 25 to 61 years, including five who had less than 10 years mining experience; nine had been miners for over 30 years. Of note, 16 of the 17 miners with CWP had started working after the modern dust limits were put into effect. All the evidence points to a resurgence of black lung: NIOSH data, MSHA data, even the Upper Big Branch autopsies.[6]

I know the devastation that black lung is causing, not just from the studies I cite here, but also from my clients. One of my clients, Wayne Ison, born in 1952, stopped working in 2003 after working in underground mining in eastern Kentucky for 27 years. He filed a claim for black lung and was determined to have clinical and legal pneumoconiosis in the form of interstitial pulmonary fibrosis. In 2012 Mr. Ison had a lung transplant due to his extensive lung damage.[7]

Another client, Rick Huff, who was born in 1965, worked as a roof bolter for 17 years.[8] Mr. Huff was seriously injured in a rock fall in 2000 and was not able to return to work. He has massive fibrosis with 3 cm nodules in his lungs as a result of his coal mine dust exposure. All of Mr. Ison's coal mining work and all of Mr. Huff's coal mining work occurred after the adoption of the 2 mg/m^3 standard.

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[5] *Upper Big Branch, Report to the Governor, Governor's Independent Investigation Panel*, McAteer and Associates, May, 2011, p. 32.

[6] Ellen Smith, Five Year Snap-Shot: The Terrible Numbers of Black Lung Disease, collecting data filed with MSHA by mine operators under 30 CFR §50.20 and finding 701 cases of black lung between October 1, 2010 and September 28, 2015. *Black Lung Special Report*, Mine Safety and Health News, October 15, 2015.

[7] See *Wayne Ison v. Enterprise Mining Company, Inc.*, BRB No. 14-0227 BLA (June 15, 2015).

[8] Mr. Huff's case is presently in litigation.

Mr. Huff said he often was required to install roof bolts in the return section. The fresh air blew past where the continuous miner was cutting coal to the area where Mr. Huff was working with the roof bolter. Consequently the air which was used to carry the dust away from the mining machine went to the area where Mr. Huff was working to support the mine roof. As he worked Mr. Huff breathed dust from drilling into the mine roof with the roof bolter and dust from the continuous miner.

There are thousands of miners just like Mr. Huff — often the youngest, ablest-bodied miners who are called upon to roof bolt in the very dustiest of conditions. These are the miners whose lives would be lengthened by the CPDM, giving them a real-time signal to know that "hey, that's too much dust for today, better move into fresh air."

Black lung kills. This terrible fact was why the 1969 Coal Mine Act required that the concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed be at "a level of personal exposure which will prevent new incidences of respiratory disease and the further development of such disease in any person." 30 U.S.C. § 842(d).

The Act was in response to the tragic disability and early deaths of miners who had developed crippling lung disease. Miners could not protect themselves from the insidious harm caused by the minute particles of respirable dust they were exposed to as they worked, and history had shown that the coal mining industry would not adopt a sufficiently protective dust standard on its own.

Under the Mine Act, the Secretary of Labor, through the Mine Safety and Health Administration, must promulgate standards to assure that miners won't suffer a material impairment of health even if exposed to coal mine dust their whole working life.

For many years the respirable dust standard was 2.0 mg/m^3. Extensive medical research has shown that this standard is not adequate to protect the respiratory system and the health of coal miners. The National Institute of Occupational Safety and Health [NIOSH], issued a Criteria Document in 1995, established this level should be 1.0 mg/m^3 average concentration for up to 10 hours per day during a 40-hour workweek. Moreover, NIOSH recommended that MSHA use single, full-shift samples to determine compliance with the exposure limit and that no upward adjustment in the limit be made to account for measurement uncertainties.

In 1999 MSHA stated in the Federal Register: "Respirable coal mine dust is one of the most serious occupational hazards in the mining industry. Long-term exposure to excessive levels of respirable coal mine dust can cause black lung and silicosis, which are both potentially disabling and can cause death."[9] While MSHA recognized the hazard, it did not act to reduce the level of respirable dust.

In 2008 I filed a petition for mandamus in the United States Court of Appeals asking the court to order the Secretary of Labor to perform the statutory duty and reduce the level of respirable dust so that miners did not develop pneumoconiosis.[10] The petition was dismissed but soon after the petition was dismissed MSHA began the process of making a rule to reduce

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[9] 64 FR 21519-01, 1999 WL 543989 (F.R.) Unified Agenda, April 26, 1999, Occupational Exposure To Coal Mine Dust (Lowering Exposure Limit).

[10] *In re Scott Howard v. Elaine Chao*, Case No. 08-5799, U.S. Court of Appeals for the Sixth Circuit.

miners' exposure to respirable dust. Nearly five years later, after several public hearings and a lengthy comment period, MSHA announced the final rule in April, 2014.[11]

The uncontroverted evidence establishes that there is an unacceptable risk of black lung. NIOSH regularly reviews x-rays to determine whether miners have CWP.[12] In the past 5 years, NIOSH reports show that miners have developed CWP at a greater rate than was previously believed true. NIOSH reported that a study in 2006 of 85 working coal miners in Letcher County, Kentucky found 12% had x-ray evidence of CWP; 1% had PMF; 7% had chronic bronchitis and 5% had emphysema.[13] A study of 68 miners in neighboring Knott County, Kentucky found 15% had x-ray evidence of CWP; 1% had PMF; 9% had chronic bronchitis and 7% had emphysema. This data shows that MSHA needed to reduce the level of exposure to respirable dust to protect miners from lung disease.

The NIOSH data was based on x-ray surveillance. The miners participated voluntarily, and many miners did not choose to participate. The data also did not take into account the miners who have obstructive impairment due to coal mine dust exposure but do not have x-ray evidence of pneumoconiosis.

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[11] 79 FR 24813.

[12] Attfield MD. Centers for Disease Control and Prevention. Current Intelligence Bulletin 64: *Coal Mine Dust Exposures and Associated Health Outcomes - A Review of Information Published Since 1995.* DHHS (NIOSH) Publication No. 2011–172; 2011 April.

[13] Attfield MD, Petsonk EL. *Advanced pneumoconiosis among working underground coal miners-- Eastern Kentucky and Southwestern Virginia, 2006. MMWR Morb. Mortal. Wkly. Rep.* 2007;56(26):652–655.

According to a recent NIOSH study, emphysema severity was significantly elevated in coal miners compared to non-miners.[14] Lead author and senior NIOSH scientist Eileen Kuempel said: "Based on our findings, exposure to respirable coal mine dust for a full working lifetime at the current 2 mg/m3 standard would increase the emphysema severity index by 99 points on average. This provides additional evidence of the need to reduce dust exposures to 1 mg/m3 or less as NIOSH has recommended."

The method of measuring respirable dust in coal mines has long been a source of concern. The measurement of respirable dust must provide the miner and mine operator with readily available real-time information as to dust levels in the working environment where the miner works. Using the Continuous Personal Dust Monitor will enable the miner to be sure that he is not exposed to excessive amounts of harmful dust.

Mine Safety

Miners work in dangerous conditions. Underground miners are in danger from roof falls and rib bursts. The air can be gassy and explosive. The equipment is powered with high voltage electricity. The work space is dark and it may be cramped, resulting in poor visibility.

Surface mines are also dangerous. In eastern Kentucky the strip mines are located on the tops and sides of mountains. The miners operate powerful heavy equipment, like bulldozers and end-loaders, on very steep hillsides. The rock trucks and coal trucks use gravel and dirt roads which descend down the hill precipitously. Surface miners work blasting the rock loose with powerful explosives.

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[14] Kuempel ED, Wheeler MW, Smith RJ, Vallyathan V, Green FH. *Contributions of dust exposure and cigarette smoking to emphysema severity in coal miners in the United States*. Am J Respir Crit Care Med 2009; 180(3):257-64.

These miners know they work in dangerous conditions. They have a special courage to perform their jobs in these conditions.

The miner should be the most precious resource in any strategy to improve mine safety in America and prevent future disasters. Miners know the conditions present in their mines, more so than inspectors and operators, and they can provide invaluable information to the federal regulators working to ensure their protection. Congress realized long ago that "mine safety and health will generally improve to the extent that miners themselves are aware of mining hazards and play an integral part in the enforcement of the mine safety and health standards."[15]

Miners should feel encouraged to report unsafe conditions without hesitation. However, recent mine disasters and scores of individual mining fatalities show that this is not happening frequently enough. Unfortunately, in too many mines, miners who complain about unsafe conditions are harassed, interfered with, or even discharged. Many miners feel that those who complain put a "target on their back". They aren't supported or protected. MSHA must do a better job of publicizing miners' safety rights under current law and increasing support of miners that exercise those rights.

Representatives of Miners are working miners that are selected by at least two other miners to represent them in safety and health matters at their mine.[16] Far too many miners aren't even aware that they can designate one of their co-workers as a Miner's Representative to travel with inspectors during inspections and receive copies of all citations, orders, and notices issued

[15] S. Rep. No. 95-181, 95th Cong. 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977

[16] 30 U.S.C. § 813(f).

to the operator. MSHA should encourage miners who become Miners' Representatives because of the valuable help the Miners Representative can provide in making the mine safer. This will require affirmative training of MSHA inspectors. In one mine in Western Kentucky where we worked with Miners Representatives who were trying to look out for the health and safety of their fellow miners, MSHA inspectors were unhelpful to the miners' efforts and tried in various ways to discourage or impede the Miners Representatives.

Even if miners have some understanding of their statutory rights, many will not exercise those rights for fear of retaliation. They lack confidence in MSHA's ability to protect them from retaliation and do not know where to turn for assistance otherwise. A miner who finds himself working in unsafe or unhealthy conditions usually is silent about the unsafe conditions and hopes that no harm occurs or he finds work at another mine.

As the CPDM becomes a tool for miners to use to detect high levels of respirable dust, it is important that miners know and use their statutory safety rights. With the CPDM, it is now even more important that MSHA strengthen the role of the Miners Representative and the protection available to miners who are retaliated against for insisting on their right to a safe working place. If the CPDM indicates a higher than acceptable level of respirable dust, miners must know that they can act on that information without interference, retaliation or harassment.

At my office we represent miners who have been discriminated against for being a Miners Representative or for complaining about unsafe conditions or practices. A few years ago we represented Scott Howard, a miner who was required to inspect the seals in an underground mine.[17] Seals are built to shut of old abandoned mines from current working areas because of the danger of gas or oxygen deficient air, and to assure adequate ventilation to the working area.

[17] *Howard v. Cumberland River Coal Co.*, No. KENT 2008-736-D, 2010 WL 3616453 (FMSHRC OALJ Aug. 13, 2010)

Mr. Howard repeatedly wrote in the preshift and onshift books about the poor condition of the seals but nothing was done. After the explosion at the Sago mine, MSHA held a series of public hearings on mine seals. Mr. Howard drove 3 hours to Lexington, Kentucky to attend the hearing. He showed the MSHA officials at the public hearing a video he had taken with his cell phone of the poor condition of the seals at his mine. Although Mr. Howard did not name the mine during the hearing, before he was home that night his superintendent knew he had shown a video of the mine at the MSHA hearing. Mr. Howard was issued a letter of reprimand, ostensibly for violating a company policy about taking photos on the mine property. An ALJ later found that the company had violated Mr. Howard's Section 105(c) rights in disciplining him.

This ruling in Mr. Howard's video case did not deter the company from its efforts to terminate Mr. Howard's employment. When the company attempted to discharge Mr. Howard later, after he was off work due to an injury, the Sixth Circuit Court of Appeals affirmed the ALJ's finding that the discharge was pretextual and in retaliation for Mr. Howard's exercise of his rights under Section 105(c).[18]

In another case we represented Reuben Shemwell. He was sued by Armstrong Coal Company in Kentucky state court solely because he filed a discrimination complaint with MSHA.[19] Armstrong Coal filed suit against Mr. Shemwell despite an earlier determination from an administrative law judge that "Shemwell's discrimination complaint [had] not been frivolously brought."[20] After Mr. Shemwell was sued in state court, he filed a second

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[18] *Cumberland River Coal Co. v. Federal Mine Safety and Health Review Com'n [Howard]*, 712 F.3d 311 (6th Cir. 2013).

[19] *Secretary of Labor, MSHA, on behalf of Reuben Shemwell v. Armstrong Coal Company, Inc. and Armstrong Fabricators, Inc.*, 35 FMSHRC 1865 (June 19, 2013)(ALJ).

[20] *See Secretary of Labor, MSHA, on behalf of Reuben Shemwell v. Armstrong Coal Company, Inc. and Armstrong Fabricators, Inc.*, 34 FMSHRC 1464 (June 21, 2012)(ALJ).

discrimination complaint with MSHA, alleging that the Kentucky lawsuit was solely in retaliation for filing his original discrimination complaint. The ALJ ruled that Armstrong Coal's civil suit was "both objectively baseless and motivated by the unlawful purpose of violating the anti-retaliation provisions of section 105(c)(1) [of the Mine Act] with impunity." *Id.* at 1883.

Mr. Shemwell's case illustrates how motivated some coal companies are to discourage miners from making safety complaints and how they retaliate to miners that do complain. As the ALJ noted, "the primary effect of the civil suit [was] to discourage future complaints" from other miners.

These companies' heavy-handed responses to concerns of their miners are not unique. The responses send a chilling message to the miners to be silent. The miner who does speak up risks retaliation—from assignments of undesirable work, to threats from management, and to outright discharge.

Congress' opening declaration in the Federal Mine Safety and Health Act of 1977 is that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner."[21] Miners should be encouraged to speak up for health and safety.

To meet Congress's goals under the Mine Act, miners need more robust and more frequent training of their statutory rights. To remedy the problems outlined above, MSHA must change not only the frequency of miners' statutory rights training, but also the quality of and methods by which miners receive such training.

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[21] 30 U.S.C. § 801 *et seq.* ("Mine Act").

MSHA requires statutory rights training for new miners. Even if new miners received the most dynamic statutory rights training, such knowledge fades over time. Statutory rights training should be part of the required annual refresher training.

There should also be changes in the methods by which miners receive statutory rights training, and the substance and quality of that training. Operators and management personnel should not be permitted to provide the required statutory rights training to miners. There is simply too great a conflict of interest to permit mine management to conduct statutory rights training. The training should encourage miners to understand their rights and the key role which Congress envisioned miners playing in regulation of the workplace and the particulars of how miners can most effectively and fairly exercise such rights in the face of operator obstinacy and wrongdoing. Miners should receive statutory rights training only from trainers who are independent of mine management, such as trainings provided by federal or state mine safety agencies.

While there has been a great improvement in the last two years, in MSHA's representation of miners who complain of retaliation and discrimination, some companies will go to great lengths to intimidate and isolate miners. In instances where miners become Miners Representatives under the Act, MSHA inspectors must be supportive of those miners.

Some mines obtain their own counsel in proceedings under Section 105(c). MSHA needs to provide substantive and timely responses to FOIA requests and provide more timely and complete disclosures of Section 105(c) investigation files to the miner and his counsel.

Black lung benefits

As I explained in my opening, our office frequently represents miners and widows who applied for black lung benefits. This program provides much needed financial support for miners

who are unable to work and their families and their survivors. It also pays for medical treatment for the miner's disabling respiratory and pulmonary condition.

To make a claim for black lung benefits, a miner applies to the District Office of the Department of Labor's Division of Coal Mine Workers Compensation. The claims examiner at the district office identifies the coal mine employer where the miner last worked for at least one year and that operator is responsible for payment of benefits if the miner is awarded. Both the miner and the operator have time to submit evidence to the claims examiner, then the claims examiner makes a decision to award or deny benefits. On average it will probably be 8 or 9 months before the claims examiner issues a decision.

After the claims examiner decision, either party may request a hearing. In my experience probably 98% of awards at the District Director level result in the coal company requesting a hearing with the Office of Administrative Law Judges (OALJ). If a hearing is requested the parties may develop additional evidence. It is common during this time to depose medical experts -- pulmonary specialists, radiologists or pathologists -- who have either examined the miner or reviewed x-rays, CT scans, tissue samples or reports from other doctors. Presently, if a hearing is requested, it will be 2 or 3 years after the case is referred to OALJ before the case is heard by an administrative law judge and likely another year before the ALJ issues a decision.

Either side can appeal from the ALJ decision to the Benefits Review Board. Companies generally appeal awards. Written arguments addressing the law and the facts are filed with the Board. An appeal to the Board takes a year to decide. The Board can affirm or reverse the ALJ. In some cases the Board will return the case to the ALJ for further findings or additional explanation, which results in an ALJ decision which can again be appealed to the Board. While

final decisions of the Board are reviewable in the U.S. Courts of Appeals, generally the Board decision is the last action in the case.

There are areas where the black lung benefits program needs improvement. One area of concern is the disclosure of medical evidence. The *Black Lung Benefits Improvement Act of 2015* (H.R. 3625) would help level the playing field for miners by requiring the disclosure of medical evidence. This rule would not only make the claims process more fair for disabled miners who need information about their health, but also would improve the quality of decisions in black lung benefits claims by increasing the likelihood that the most relevant information is available to the decision-maker.

The tragic case of Gary Fox as an example demonstrating the need to disclose medical evidence.[22] Mr. Fox developed progressive massive fibrosis, but did not know it. He applied for black lung benefits after a lung surgery. Some doctors said Mr. Fox's x-rays showed complicated pneumoconiosis but other doctors did not make that diagnosis. Lung tissue removed during the surgery was reviewed by at least two pathologists at the request of the lawyers who represented the responsible coal company. When these pathologists reported finding large lesions of pneumoconiosis, their reports were not shared, even with other pulmonary specialists who helped to prepare the coal company's defense. After the company succeeded in denying the claim, Mr. Fox continued to work as a miner and have more dust exposure. It was only when Mr. Fox filed a second claim for black lung benefits a few years later and retained a lawyer that the deception which had occurred in the first claim was discovered.

The rules need to be changed to ensure that no family has to endure what the Fox family has suffered. If a coal operator defending a black lung benefits claim requires a miner to submit

[22] *Fox v. Elk Run Coal Co.,* 739 F.3d 131 (4th Cir. 2014).

to a medical examination, the coal miner should receive a complete copy of the physician's report, including the physician's diagnoses, conclusions, and the results of any tests performed on the miner soon after the examination is complete. Any medical information concerning the miner's physical condition, regardless of whether the party intends to submit that information as evidence in the proceeding, should be disclosed.

It is often difficult for claimant to obtain representation in a black lung benefits claim. The legal and medical complexities faced when pursuing claims under the Act, and the fact that such claims often are in litigation for 5 years and often longer, and the miner cannot pay the lawyer and the miner's lawyer cannot recover a fee until the benefits award is final at the end of the litigation, discourages lawyers from representing miners. Another area of concern is the difficulty that miners have paying for pulmonary evaluations and other medically sophisticated evidence and depositions of medical experts.

The black lung benefits program is an adversarial system. An adversarial system only works to deliver justice when both parties to the dispute have equal resources. Too often miners do not have legal representation and, being disabled and not working, do not have the financial ability to pay for sophisticated medical testing to support their claim that they have been disabled due to black lung.

To correct this imbalance, H.R. 3625 authorizes progress payments to provide miners' attorneys with legal fees of up to $1,500 for work at the District Office level and up to $3,000 at the Administrative Law Judge level, for a total of up to $4,500, provided that the claimant prevails at such level. In addition, attorneys may seek reimbursement up to $1,500 for medical costs at each level. The legal fees and medical costs under this program would initially be paid from the Black Lung Disability Trust Fund; however, if the miner ultimately prevails in his or

her claim for benefits, the responsible coal operator would be required to reimburse the Trust Fund for the legal fees and costs that were paid. This provision is likely to encourage attorneys to represent miners on their claims and to enable miners to obtain the testing and medical opinion evidence needed to prove their case.

Processing black lung benefits claims has been slow. There is a backlog of cases pending before the Department of Labor's Office of Administrative Law Judges (OALJ). In part this is due to the shortage of ALJs. Whatever the cause, black lung cases languish for years. I have represented more than a few miners who died before the hearing was held on their claim. Congress should exercise its oversight authority to improve address this delay and help miners obtain a fair hearing in a timely manner.

Chairman WALBERG. Thank you, Mr. Sanders. Mr. Elliott, I recognize you for your five minutes of testimony.

TESTIMONY OF ED ELLIOTT, DIRECTOR OF SAFETY AND HEALTH, ROGERS GROUP, INC., VINCENNES, IN, TESTIFYING ON BEHALF OF THE NATIONAL STONE, SAND & GRAVEL ASSOCIATION

Mr. ELLIOTT. Thank you, Chairman Walberg, Ranking Member Wilson, and members of the Subcommittee on Workforce Protections.

My name is Ed Elliott. I am the Director of Safety and Health for Rogers Group, Inc. Today, I am pleased to testify on behalf of the National Stone, Sand & Gravel Association. Rogers Group is the largest privately owned crushed stone producer in the nation, providing construction grade aggregates, transportation, and infrastructure construction services in 11 states.

The shareholders and leadership of Rogers Group, Inc. are committed to the safety and well-being of their employees, neighbors, and communities.

The National Stone, Sand & Gravel Association is the world's largest mining association by product volume. NSSGA represents the crushed stone, sand and gravel industries, and its member companies produce more than 90 percent of crushed stone and 70 percent of the sand and gravel consumed annually in the United States.

The aggregate sector has a long history of commitment to becoming the safest and healthy as possible in the production of aggregates.

We collaborate with government agencies, most notably MSHA, with which NSSGA signed an alliance agreement for education and training 13 years ago. This has given birth to a number of effective compliance assistance programs such as safety alerts derived from MSHA injury data.

Also, we collaborated with MSHA on the development of an instructional video for MSHA inspector trainees on the operator perspective on compliance.

Nevertheless, we find many of MSHA's regulations overly burdensome without requisite benefits to health and safety. We believe the proposed civil penalties reform rule does not meet its stated goals and is likely to result in dramatic increases in penalty assessments.

Additionally, we are concerned that MSHA's regulatory agenda calls for a rule on crystalline silica to be proposed next April. We believe that an objective rendering of the relevant scientific evidence demonstrates that the current permissible exposure limit, if fully complied with and enforced, is protective of worker health.

MSHA is to be applauded for its good stakeholder outreach which has been ramped up in the past several years. Also, the agency has achieved important reductions in inconsistent enforcement by its inspectors, but improvements are still needed with ongoing vigilance by agency leadership.

Regrettably, however, we believe that MSHA enforcement efforts have not focused as much as they should on those conditions of highest risk, especially in today's resource challenged environment.

We believe that MSHA enforcement should focus on areas of greatest potential peril.

The dichotomy of more expansive enforcement simultaneous to operator success in continuing to reduce injuries and fatalities risk undercutting the cost for safety and health. It also jeopardizes the perception of MSHA as a genuine respected government entity working for the common good.

Many operators fear there is a bureaucratic push within the agency for inspectors to meet a quota of citations written. While agency leaders deny any quotas, it is difficult for operators to conclude anything else based on experience.

One excellent operator last year saw around half of all routine inspections result in zero citations. This makes sense because the operator has been diligent in investing time and capital into clearly meeting all of MSHA's standards.

However, what does not make sense, in 2015, inspectors have issued a significant increase in the number of citations simultaneous to the company having further improved its safety performance. Inspectors arrive saying in advance this will not be a zero citation inspection.

I hope you understand operators cannot help but wonder if a decision is based on the facts or on bureaucracy based pressure within the agency to boost the number of citations issued.

We believe that improvement would be achieved if MHSA would establish a pattern of compliance program. This would enable the inspectorate to grant some form of enforcement credit to operators for outstanding adherence to MSHA standards and keeping low rates of injuries.

We support further investment in compliance assistance as called for in the *Mine Act*. Quality training materials that demonstrate compliant practices should become an agency point of emphasis.

Also, we support revitalization of the agency's provision of quality compliance assistance to small mine operators.

Mr. Chairman, we stand ready to work with MSHA in a common sense approach to regulation and enforcement. Further, we urge that MSHA seek new and innovative ways to help us achieve our common goal of zero injuries in a way that the limited resources of the Federal Government can be targeted at the most serious hazards.

Thank you, and I will be happy to respond to any questions.

[The statement of Mr. Elliott follows:]

STATEMENT OF

ED ELLIOTT
DIRECTOR OF SAFETY & HEALTH
THE ROGERS GROUP, INC.

ON BEHALF OF

THE NATIONAL STONE, SAND & GRAVEL ASSOCIATION

BEFORE THE HOUSE EDUCATION & THE WORKFORCE SUBCOMMITTEE ON WORKFORCE PROTECTIONS

HEARING ON

"PROTECTING AMERICA'S WORKERS: REVIEWING MINE SAFETY POLICIES WITH STAKEHOLDERS"

OCTOBER 21, 2015

Thank you Chairman Walberg, ranking member Wilson, and members of the subcommittee on workforce protections. My name is Ed Elliott. I am the director of safety and health for Rogers Group, Inc. Today, I am pleased to testify on behalf of the National Stone, Sand & Gravel Association (NSSGA). My testimony will inform on our industry's demonstrated commitment to safety and health, and offer ideas to aid MSHA in its efforts to achieve zero injuries. One point of emphasis will be the importance of maintaining an appropriately collaborative relationship with MSHA that is critical to boosting compliance, as well as supporting aggregates operators' efforts to further reduce injuries.

Background

With over 1,800 employees, 70 stone quarries and 42 asphalt plants, Rogers Group is the largest privately owned crushed stone provider in the nation (the eighth largest overall), providing construction-grade aggregates and transportation and infrastructure construction services in 11 states. The shareholders and leadership of Rogers Group Inc., are committed to the safety and well-being of their employees, neighbors and communities. Our owners, the Rechter family, are strong proponents of safety and health as an integral part of their business philosophy. Past CEO, Don Williamson, was the first leader of the MSHA-NSSGA Alliance for education and training and spearheaded the NSSGA Safety Pledge. Jerry Geraghty, our current CEO, addressed the Joseph Holmes national safety association meeting in Indianapolis, and expanded the dialog on safety and health nationally. Our COO Darin Matson is an active member of the NSSGA/MSHA Technical Task Force and works to expand dialog with MSHA on many safety and health matters.

Rogers Group is a member of the National Stone, Sand & Gravel Association, the world's largest mining association by product volume. NSSGA represents the crushed stone, sand and gravel industries and its member companies produce more than 90 percent of the crushed stone and 70 percent of the sand and gravel consumed annually in the United States. The industry employs over 100,000 men and women. Our company, like many others in the industry, produces aggregates utilized for critical infrastructure projects including highways, bridges and mass transit, as well as environmental applications such as wastewater treatment, sewage control and drinking water facilities.

Industry's Demonstrated Commitment to Health and Safety

The aggregates industry has a long history of commitment to becoming the safest and healthiest possible in production of aggregates. We are very pleased this commitment has resulted in the safest stone, sand and gravel sector in history. Last year, our industry finished with an injury incidence rate of just 2.08 injuries per 200,000 hours worked. This was the 14th consecutive year in which our sector achieved a lower rate than in the previous year.

Unlike other sectors, the stone, sand and gravel sector rarely experiences multiple-fatality incidents. Not since the early stage of World War II has there been a disaster – defined as a multi-fatality incident with five or more victims - in an aggregates facility. Such are the distinctions between the risk profile of aggregates facilities and those in other sectors.

A number of factors have contributed to this success. The first is leadership. Since 2002, we have spearheaded an effort to enlist CEOs commitment to safety and health. Our Safety and Health Pledge program is the vehicle for this. I am pleased that more than 70 percent of our operator facilities are headed by a CEO who has signed the Safety and Health Pledge. And, we continue to work to achieve 100 percent. The pledge commits the signer to helping the industry reduce the injury rate.

Second, we collaborate with government agencies, most notably MSHA, with which NSSGA signed an Alliance agreement for education and training 13 years ago. This has given birth to a number of effective compliance assistance programs such as Safety Alerts derived from MSHA injury data. It resulted in clarification of the fall protection standard and we collaborated with MSHA on the development of an instructional video for MSHA inspector trainees on the operator perspective on compliance.

Additionally, our industry's CEOs meet periodically with MSHA's leadership to collaborate to reduce injuries, illnesses and fatalities. We remind them aggregates are not coal. and in these meetings we have made a number of recommendations, including:

- Focus enforcement on areas of highest risk.
- Address the behavior component of safety and health, not just a facility's physical conditions.

- Ensure that the metric for assessing MSHA's success includes the critical factor of safer and healthier workplaces - not just more enforcement.
- Provide aggregate-specific training for inspectors so that safety challenges from another sector don't inappropriately affect enforcement in the metal/non-metal sector.
- Improve communications among operators and inspectors to continue improving consistency in enforcement.

We acknowledge the agency's efforts to properly inform stakeholders of changes needed for compliance. Two such examples are the Rules to Live By initiative and planned enforcement ramp-up of the 56.57/5002 airborne contaminants standard.

At Secretary Main's request, we have assisted on key initiatives. We publicly supported MSHA's communication of the Rules to Live By fatality-prevention initiative. Also, we answered the Secretary's call to disseminate information about stepped up enforcement of 56/57.5002, and widely circulated our industry's Occupational Health Program for use to comply.

Regulation is Overly-Burdensome

Despite improvements in stakeholder outreach and collaboration, we find many of MSHA's regulations overly burdensome without requisite benefits to health and safety. We believe the proposed Civil Penalties Reform rule does not meet its stated goals. MSHA states that the proposed rule will increase consistency and reduce potential areas for dispute, but the proposal contains several confusing points that we believe will actually lead to more disputes.

The proposed rule seeks to change the scope of Part 100, such that it purports to apply to both the proposal of penalties by MSHA and the assessment of penalties by the Federal Mine Safety and Health Review Commission. Such a provision is beyond the scope of MSHA's authority, and amounts to unsound policy. This action would be contrary to the independence of the Federal Mine Safety and Health Review Commission as originally intended in the 1977 Mine Act.

Changes to "Negligence" in the proposed rule may have an adverse effect on an inspector's designation of "unwarrantable failure." Currently, an "unwarrantable failure" designation is accompanied by a negligence finding of either "high" or "reckless disregard." The proposed rule

would eliminate the "high" negligence designation, which would likely lead to an increase in "reckless disregard" findings in order to support an inspector's declaration of "unwarrantable failure." Accordingly, an increase in "reckless disregard" will increase penalties, increase the number of violations potentially considered for flagrant status, and could have civil liability consequences.

We believe the proposed rule is likely to result in dramatic increases in penalty assessments. Analyses of operator surveys comparing the penalty assessment for the same or similar citations have demonstrated that assessments will be between 50 and 80 percent higher under the proposed rule. It also would restrict the MSHA inspector's flexibility to accurately reflect circumstances with respect to operator and agency perspectives and it proposes restricting the rights of the operator to correct inadvertent errors by an inspector. The potential impact is troubling both for operator rights and economically, as the aggregates sector last year was assessed more than $12 million in MSHA penalties.

Additionally, we are concerned that the MSHA regulatory agenda calls for a rule on crystalline silica to be proposed next April. We believe that an objective rendering of the relevant scientific evidence demonstrates that the current permissible exposure limit, if fully complied with and enforced, is protective of worker health.

Enforcement Challenges Can Impede the Cause for Safety and Health

MSHA is to be applauded for its good stakeholder outreach, which has been ramped up in the past several years. Also, the agency has achieved important reductions in inconsistent enforcement by its inspectors, although improvements are still needed with ongoing vigilance by agency leadership.

Regrettably, however, we believe that MSHA enforcement efforts have not focused as much as they should on those conditions of highest risk, especially in today's resource-challenged environment. We believe that MSHA enforcement should focus on areas of greatest potential peril.

One illustration of the challenge is that penalty assessments for stone, sand and gravel operators are up 6 percent while our injury rates continue to fall. This dichotomy of more

citations and more expensive enforcement simultaneous to operators' success in continuing to reduce injuries and fatalities risks undercutting the cause for safety and health, as well as the perception of MSHA as a genuine and respected government entity working for the common good.

Ways in which we believe MSHA enforcement sometimes errs are:

1. MSHA inspectors at times cite conditions never before found to be hazardous.

2. MSHA inspectors cite violations, but over-write the alleged gravity, e.g., an inspector asserting that a rarely-used ladder in need of repair is "highly likely" to cause injury versus the more practical: "unlikely," or "reasonably likely."

3. MSHA inspectors cite violations, but over-write the alleged negligence, e.g., a guard fell off a piece of equipment earlier in the day, and it is said to constitute "high" negligence versus "low."

4. MSHA inspectors cite violations, but over-write by labeling it "significant & substantial" (i.e., the violation could reasonably be expected to cause an injury of a reasonably serious nature), when a piece of trash was blown by the wind to within 25 feet of an electrical installation.

Finally, many operators fear there is a bureaucratic push within the agency for inspectors to meet a quota of citations written. While agency leaders deny any quotas, it is difficult for operators to conclude anything else based on experience. One excellent operator last year saw around half of all routine inspections result in zero citations. This makes sense because the operator has been diligent in investing time and capital into clearly meeting all MSHA standards requirements. However, what does not make sense is in 2015, inspectors have issued a significant increase in the number of citations simultaneous to the company having further improved its safety performance. Inspectors arrive saying in advance 'this will not be a zero-citation inspection.'

As I hope you understand: operators cannot help but wonder if a decision on whether a violation actually exists is based on the Mine Act requirement or on some bureaucracy-based

pressure within the agency to boost the number of citations issued. This is hardly good for the operator sense of receiving a fair shake in MSHA's enforcement of safety standards.

Recommendations for More Effective Enforcement

We believe that improvement would be achieved if MSHA would establish a Pattern of Compliance Program, which enables the inspectorate to grant some form of enforcement credit to operators for outstanding adherence to MSHA standards, and keeping low rates of injuries. You have heard this idea from NSSGA before. It is anticipated that a pattern of compliance program would help the agency streamline and make more efficient the inspection process, thus freeing resources to be targeted at areas of greatest risk. Ideas for this include authorizing MSHA to:

- Develop guidelines for inspectors directing that they focus their inspection hours on most troubled operations, e.g., inspectors could only spend a limited amount of time inspecting operations with excellent compliance records....versus inspections at a good operation for an unduly long time; and,

- Allow inspectors to issue a notice in lieu of citation for a de minimis hazard, and / or elimination of a citation for immediate abatement.

We support further investment in compliance assistance as called for in the Mine Act. Quality training materials that demonstrate compliant practices should become an agency point of emphasis. Too many training materials are outdated, and in some cases are downright non-compliant. Yet, thousands of operations rely on MSHA for reliable compliance assistance. MSHA has taken steps in this direction, but we call on MSHA to invest significantly more in up-to-date training materials.

Also, we support revitalization of the agency's provision of quality compliance assistance materials to small mine operators. Indeed, it is the small mine operators who face the largest challenges in managing for safety, health and compliance. We regret that the Small Mines Office was closed, and folded into another division within MSHA.

Conclusion

NSSGA appreciates this opportunity to present ideas for updating the Government's role in regulating and enforcing for safety and health at stone, sand and gravel operations. We stand ready to work with MSHA in a common-sense approach to regulation and enforcement. Further, we urge that MSHA seek new and innovative ways to help us achieve our common goal of zero injuries in a way that the limited resources of the Federal government can be targeted at the most serious hazards. Thank you.

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Chairman WALBERG. Thank you. Mr. Wright, I recognize you now for your five minutes of testimony.

TESTIMONY OF MICHAEL J. WRIGHT, DIRECTOR OF HEALTH, SAFETY AND ENVIRONMENT, UNITED STEELWORKERS, PITTSBURGH, PA

Mr. WRIGHT. Thank you, Mr. Chairman, and thank you, Ranking Member Wilson, and other distinguished members of the subcommittee.

My name is Mike Wright. I am the Director of Health, Safety and Environment for the United Steelworkers. Our union represents 850,000 workers in a wide variety of industries, including the majority of unionized metal and non-metal miners in the United States and Canada. Altogether we represent more than 15,000 miners who work in about 138 mines in the U.S. We represent another 18,000 in Canada.

I have never worked as a miner personally and do not consider myself to be one, but I have done safety and health work in several dozen mines in the United States, Canada, Poland, and Russia. I am also a member of NIOSH's Mine Safety and Health Research Advisory Committee, and for what it is worth, my Part 48 training is updated.

MSHA's impact has been enormous, even if we take into account the decline in mining employment since 1977, the year the *Mine Act* was passed, the death rate from traumatic injury in our nation's mines has dropped by 77 percent. That number does not include the miners saved from lingering deaths from diseases like black lung and silicosis.

Of course, MSHA was not the sole cause of the decline. Technological change, mine safety research, mine operators themselves, mining unions, all played a part. MSHA was the driving force, the catalyst for all the good things that happened.

Even so, there is lots of room for improvement. We lost 45 miners in mine accidents last year, 25 so far this year. Let me offer a few suggestions for improving mine safety and health. Most importantly, there should be no backward steps. Every year there are proposals to exempt a particular group of mines from some set of legal requirements or to cut back on inspections and penalties, or to shift MSHA's resources away from enforcement toward voluntary programs, or to reward so-called "safe mines."

The problem is determining that a mine is truly safe and stays that way. Our union had some sad experience with this issue. On April 9, 1992, the Westray Coal Mine in Nova Scotia won the prestigious John T. Ryan Award given annually to the Canadian coal mine with the fewest injuries. Exactly one month later a methane and coal dust explosion killed all 26 miners underground at the time.

We were working at the time to bring the mine into our union, and although it never reopened, we continued to represent the families and the remaining miners through the long years of inquests and hearings, and that is the worse mining disaster in recent Canadian history.

Other proposals would disallow MSHA's citations for first violations, giving those mine operators a free pass to violate the law

until caught. Miners, of course, get no such free pass, and do not spring magically back to life the first time they are killed, like in some video game.

Others would give more weight to voluntary compliance. We are all for voluntary compliance, but the problem with voluntary compliance is not everybody volunteers. In fact, enforcement stimulates voluntary efforts. Reduce the one and you will reduce the other.

What about forward steps? Let me suggest a few. First, MSHA enforcement is based on a rule book of mandatory standards. Those standards are necessary but no effective corporate safety program relies on passive compliance with a rule book. Instead, good programs actively seek out and correct workplace hazards.

MSHA began preliminary work on a new safety and health program standard six years ago, but it has languished. No new regulation or initiative would have a greater positive impact on mine safety and health.

Second, MSHA should take a careful look at the effectiveness of its current Part 48 training programs. The problem is not so much the length of the training but the content and especially the methodology. Too often miner training, especially refresher training, consists of bored miners watching PowerPoints or videos from equally boring instructors without any real interaction or discussion of the safety problems they encounter on the job. A full scale review by MSHA including experts in adult education could lead to new guidance, regulation if necessary, and in the end, better trained miners.

Third, there should be greater collaboration between OSHA and MSHA. There are some hazards that overlap between the two agencies. We have seen too many examples where OSHA and MSHA go their separate ways and do not work together. That should change.

Finally, let me turn to what Congress could do. The *Mine Act* is a good law but it has a few key flaws which could be corrected. For example, MSHA should be given subpoena authority. That is enjoyed by OSHA and by other Federal agencies. MSHA needs that to conduct investigations.

Second, there should be a better way to collect uncollected fines. We think that could be done through withdrawal orders, but MSHA would need legislative authority to do that.

Finally, criminal penalties need to be increased. It is scandalous that the penalty for killing a miner through a willful violation of a standard is one year in prison. To give a counter example, the penalty for damaging a coral reef or for harassing a wild burro on Federal land is five years. What message does it send when the Federal Government values the serenity of a burro over the life of a miner.

These problems and others could be corrected by H.R. 1926, the *Robert C. Byrd Mine Safety Protection Act of 2015,* introduced by Representative Scott, the Ranking Member of the full Committee, and co-sponsored by Ranking Member Wilson, and many others. We urge its passage.

Thank you.

[The statement of Mr. Wright follows:]

Testimony of
Michael J. Wright
Director of Health, Safety and Environment
United Steelworkers
before the
House Committee on Education and the Workforce
Subcommittee on Workforce Protections
on
Protecting America's Workers: Reviewing Mine Safety Policies with Stakeholders

October 21, 2015
Washington, D.C.

Chairman Walberg, Ranking Member Wilson, distinguished members of the Subcommittee, thank you for the opportunity to testify this morning. My name is Mike Wright. I'm the Director of Health, Safety and Environment for the United Steelworkers. Our union represents 850,000 workers in the United States and Canada in steel, aluminum, other metals, forestry, paper, rubber, chemicals, oil and gas, general manufacturing and services. We are the largest manufacturing and extractive union in North America. We have members in every U.S. State and every Canadian Province and Territory. For the purposes of this hearing, we represent the majority of unionized metal and non-metal miners in the U.S. and Canada, in commodities including iron ore, copper, precious metals, trona, potash, limestone, marble, sand and gravel. We also represent workers in mineral processing facilities under MSHA's jurisdiction, such as alumina refineries and cement plants. All together, we represent more than 15,000 miners in the United States and 18,000 in Canada. I've never worked as a miner, and do not consider myself to be one, but I'm up-to-date on my MSHA Part 48 training, and I've done safety and health work in several dozen mines in the United States, Canada, Poland and Russia. I am also a member of NIOSH's Mine Safety and Health Research Advisory Committee.

MSHA's Impact

The breadth of our industries and the political jurisdictions in which we work forces me and my colleagues to be generalists. That can be a problem when dealing with highly technical issues specific to a particular operation. But it allows us to bring insights from one industry or jurisdiction to another industry or jurisdiction. And one such insight is this: the U.S. Mine Safety and Health Administration is one of the very best occupational safety and health regulatory and enforcement agencies in North America. Over the years we've had our differences with some MSHA policies and some enforcement actions – or lack of enforcement actions – but the overall impact of the

agency has been enormous. In 1977, the year the Mine Act was passed, 273 American miners lost their lives in mining accidents. In 2014, the number was 45. Some of the decrease can be attributed to a decline in mining employment, but even if we control for employment, the death rate from traumatic injury in our nation's mines has dropped by 77%. And that number does not include the miners saved from lingering deaths from diseases like black lung and silicosis.

Of course, MSHA was not the sole cause of the decline. Technological changes, mine safety research, mine operators themselves, and mining unions all played a part. But MSHA was the driving force, the most important instrument of change. Corporate safety directors have often told me and my colleagues, usually in private, that without MSHA – or for that matter OSHA – they wouldn't have a job and their company wouldn't have much of a safety program. Without MSHA we probably wouldn't have self-contained self-rescuers or refuge chambers; there would be less rock-dusting and more explosions in coal mines; less machine guarding and more amputations in surface metal mines; less dust control and more silicosis in sand mines and granite quarries. Over the 37 years of its existence this Agency has literally saved the lives of thousands of American workers.

No Backward Steps

Even so, there is plenty of room for improvement. The forty-five families of miners killed last year, and the 25 families of miners killed so far this year, can attest to that. Let me offer a few suggestions for improving mine safety and health.

Most importantly, there must be no backward steps. Every year there are proposals to exempt a particular group of mines from some set of legal requirements, or to cut back on inspections or penalties, or to shift MSHA's resources away from enforcement toward voluntary programs. But all the standards are meant to save lives. A safe mine should not fear an inspection, and the proper way to avoid penalties is to avoid violations.

For example, there is a recent proposal to establish a "Pattern of Compliance" program that is the inverse of MSHA's highly successful Pattern of Violations program. Mines with good safety records would then be exempt from some MSHA requirements. The problem is determining that a mine is truly safe and stays that way. Our union has some sad experience with this issue. On April 9, 1992 the Westray Coal Mine in Nova Scotia won the prestigious John T. Ryan award given annually to the Canadian coal mine with the fewest injuries. Exactly one month later a methane and coal dust explosion killed all 26 miners underground at the time. We had an active organizing campaign at the mine when it exploded. Although it never reopened, we continued to represent the families and the remaining miners through the long years of inquests and hearings.

Other proposals would disallow MSHA citations for first violations in some mines, giving those mine operators a free pass to violate the law until caught. Miners of course, get no such free pass and do not spring magically back to life the first time they are killed, like in some video game.

Others would give more weight to voluntary compliance. We are all for voluntary compliance. But the problem with voluntary compliance is that not everyone volunteers.

In fact, there is no real conflict between strong enforcement. Enforcement stimulates voluntary compliance; reduce enforcement, and you will reduce voluntary efforts.

Mine Safety and Health Programs

What about forward steps? Let me suggest some. MSHA enforcement is based on a rulebook of mandatory standards. Those standards are necessary, but no effective corporate safety program relies on passive compliance with a rulebook. Instead, good programs actively seek out and correct workplace hazards. MSHA began preliminary work on a Safety and Health Programs standard six years ago, but it has languished. No new regulation or initiative would have a greater positive impact on mine safety and health.

Let me add that the USW is surveying the effectiveness of current safety and health programs in our 138 U.S. mines under a grant from the Alpha Foundation for the Improvement of Mine Safety and Health, which was funded by the settlement agreement in the Upper Big Branch case. We should have a lot more to say on this issue in about a year.

Miner Training

Second, MSHA should take a careful look at the effectiveness of its current Part 46 and Part 48 training programs. The problem is not so much the length of the training, but its content and especially the methodology. I was lucky enough to receive competent initial and refresher Part 48 training through the Penn State Mining Program, but I've talked to dozens of miners who think the their training was worthless. That is especially true of the refresher training, which too often consists of bored miners watching PowerPoints or videos from equally bored instructors, without any real interaction or any discussion of the safety problems they actually encounter on the job. The USW has a large occupational safety and health training program administered by our Tony Mazzocchi Center. Last year our training programs included almost 20,000 workers and managers, mostly under OSHA's jurisdiction. We know a lot about effective adult education. Training is critical to mine safety and health, but the content has to be appropriate to the mine and the teaching methods have to be effective for adult learners. A full-scale review by MSHA, including outside experts in adult

education, could lead to new guidance, regulation if necessary, and in the end to better trained miners.

OSHA-MSHA Collaboration

Third, there needs to be stronger collaboration between OSHA and MSHA. The agencies should work together in both standards and enforcement. For example, OSHA has a strong standard protecting hazardous waste workers, the "Hazwoper" Standard (Hazardous Waste Operations and Emergency Response, 29 CFR 1910.120). Cement plants fall under MSHA's jurisdiction; cement kilns are sometimes used to incinerate hazardous waste, but the Hazwoper Standard does not apply. MSHA and OSHA could have addressed the issue jointly, but they did not.

An even more egregious example is Hazard Communication, the standard that requires labeling and safety data sheets for workplace chemicals. OSHA adopted its standard in 1984. It took MSHA 18 more years, although the two rules are virtually identical.

The recent situation is better. Joe Main at MSHA and David Michaels at OSHA often share information and ideas, and the two agencies are collaborating to a degree on silica, which is a serious concern for both. But much of that is based on a working relationship between the two Assistant Secretaries, and there is no guarantee that it will survive their leaving office. The collaboration should be institutionalized.

Reforming the Mine Act

Let me turn to what Congress could do. The Mine Act is a good law, but it has some key flaws.

- MSHA lacks subpoena authority to conduct inspections and investigations. This defect in the Mine Act has serious consequences. MSHA cannot compel the production or records other than those specifically required by the Act; it cannot compel witnesses to testify or be deposed or even to appear for questioning. In the MSHA's investigation of the 2010 Upper Big Branch disaster, MSHA had to work through the West Virginia mine safety agency, which does have subpoena power, to complete its investigation. Many states do not have mine safety agencies with subpoena power, including Nevada and Wyoming, both of which have substantial mining populations. In contrast, both the OSH Act and the Fair Labor Standards Act provide the Labor Department with the subpoena authority that MSHA lacks. In fact, even laws like the Popcorn Promotion, Research and Consumer Information Act include subpoena authority. It is outrageous that an agency whose mission is promoting popcorn has more authority than one charged with protecting miners from serious injury or death

- MSHA has $72 million in uncollected fines, representing between 10% and 25% of MSHA penalties. The U.S Attorney is authorized to sue scofflaws in federal court, but does so infrequently. Even where a lawsuit is filed, an operator can and frequently does shut down and reopen under a new name. This is fundamentally unfair to mine operators who play by the rules. MSHA needs the legislative authority to issue a withdrawal order if an operator does pay the fine pr at least enter into a payment plan in a reasonable time.

- Criminal penalties are an important deterrent to criminal behavior, and the Mine Act includes criminal penalties for knowing and willful violations of mine safety standards that cause the death of a miner. However that crime is only a misdemeanor, with a maximum penalty of one year in prison or a $250,000 fine. In a sentencing hearing for criminal violations that led to the death of six miners and three rescuers in the 2007 Crandall Canyon disaster, the federal judge expressed his outrage at "the miniscule amount provided by the criminal statute in this matter." In contrast, making a false statement under the Mine Act is punishable by five years in prison. Many environmental statutes provide for penalties of five years or greater. For example, five years is the penalty for damaging a coral reef or for "harassing a wild burro on federal land." What message does it send when the federal government values the serenity of a burro over the life of a miner?

These problems and others would be corrected by H.R. 1926, The Robert C. Byrd Mine Safety Protection Act of 2015, introduced by Representative Bobby Scott, the Ranking Member of the full Committee, and cosponsored by Ranking Member Wilson and many of the members of this Subcommittee. That bill would greatly improve the safety and health of our nation's miners. We urge its passage.

Chairman Walberg, Ranking Member Wilson, thank you again for the opportunity to testify this morning.

V: 1706 10/15/15

Chairman WALBERG. Thank you. I now recognize for five minutes of testimony, Mr. Watzman.

TESTIMONY OF BRUCE WATZMAN, SENIOR VICE PRESIDENT, REGULATORY AFFAIRS, NATIONAL MINING ASSOCIATION, WASHINGTON, D.C.

Mr. WATZMAN. Thank you, Mr. Chairman, Ranking Member Wilson, and members of the subcommittee. I appreciate the opportunity to be here.

In the time I have, I want to cover two areas, what we are doing voluntarily to drive safety performance improvement, and problems with MSHA that are impediments to improvement.

In 2011, after having concluded that the current pace of safety performance was not acceptable, NMA initiated CORESafety, a first of its kind safety and health management system designed specifically for U.S. mining, to take a more aggressive approach to improve performance.

At the heart of CORESafety is fatality prevention and risk management. CORESafety is not about saving miners after accidents. It is about identifying at risk conditions, practices, and behaviors that lead to accidents in order to prevent them, and it is making a difference.

In our view, risk based safety and health management systems are more likely to move safety performance to the next level. Experience shows that safe behavior does not occur in a vacuum. It is shaped by leadership and culture. These are characteristics that are taught and nurtured, not legislated or regulated. They are at the heart of CORESafety.

Beyond what the industry is doing voluntarily, we are long past the time of debating the need to reform MSHA, to modernize the agency in the manner in which it conducts its business.

Despite what some believe, impact inspections, rules to live by, and pattern of violations will not get us to zero fatalities. MSHA enforcement initiatives by focusing on conditions represents a reactive approach to safety that has had and will continue to have limited access.

We have an opportunity to drive further improvement but not in the enforcement environment that exists today. Today, the mining industry is undergoing fundamental change, but the agency is wedded to a model with diminishing returns. From 2010 through the end of 2014, the number of operating mines has declined precipitously.

Yet, during this period, MSHA's budget, including the request for this year, is at a 12 percent increase. The reduced number of mines provides an opportunity to re-evaluate how MSHA allocates its resources and how the resources are applied.

MSHA remains a fix to a model where today it is not uncommon for multiple inspectors to be on site every day. This is unnecessary and counterproductive, and as one might inspect, enforcement leads to adjudication, and this is the second area in need of reform, the broken citation conference process.

Another area in need of reform is MSHA's selective recognition of the incorporation of new technology. The *Miner Act* established within NIOSH the Office of Mine Safety and Health. The office is

responsible for research, development, and testing of new technologies and equipment designed to enhance mine safety and health.

While MSHA is not bound by NIOSH's recommendations, they in some respects have become the technical advisor to NIOSH. In this regard, we are concerned that MSHA in certain instances prematurely promulgates regulations that impose technology requirements in advance of NIOSH completing the necessary research.

An example will illustrate this. On September 15 of this year, MSHA issued a proposed rule to require operators of underground coal mines to equip certain pieces of equipment with what is known as proximity detection technology. While proven on an earlier category of equipment, this technology suffers from interference problems on the category of equipment covered by this proposed rule.

Despite this and despite the fact that NIOSH has not tested the technology, MSHA's proposed rule requires the wholesale application of this where practically every application is unique and most are untested.

Furthermore, this structure of the rule creates a huge disincentive for operators to apply the technology ahead of the rule.

Similarly, we continue to face problems relative to the new technology required by MSHA's final coal dust rule. The inability to differentiate between rock dust and coal dust particles gives rise to a conflict between the coal dust rule and the agency's enhanced rock dust requirements.

Additionally, the difference in sample compliance determinations using the current sampler and the new sampler continues to raise concerns, especially as the February 2016 date for the phase in of the second part of the rule looms.

Finally, it is time for MSHA to adopt the voluntary protection program for mining. Some will take this to mean that we are advocating an end to what is commonly referred to as the 4s and 2s, the statutory requirement for inspection of all mines.

Let me be clear. That is not what we are advocating. Rather, a VPP would provide MSHA the ability to shift its focus of exemplary mines, which it would determine, from an enforcement to a compliance assistance approach.

In closing, let me stress that to modernize and improve safety performance, we need to move beyond a model based strictly on enforcement. Enforcement is necessary, but we have to develop higher standards that engage employees and encourage cooperation.

CORESafety and the VPP program are positive steps that would move the industry in that direction.

Thank you.

[The statement of Mr. Watzman follows:]

Testimony of

Bruce Watzman

National Mining Association

Before the

Subcommittee on Workforce Protections

House Education and the Workforce Committee

October 21, 2015

Thank you Mr. Chairman, Ranking Member Wilson and members of the Subcommittee. I am Bruce Watzman, Senior Vice President of the National Mining Association (NMA). We appreciate this opportunity to testify and share our views on the impediments to improved safety performance in the U.S. mining industry.

As we have testified before, in 2007 NMA initiated an effort to examine the barriers to improved safety performance and to disseminate best-practice materials across the industry. This effort began with an examination of the industry's safety performance. While most people would agree that notable progress has been made over the last two decades to keep miners safe, the industry has not reached its goal of zero fatalities and injuries -- so more work needs to be done.

Our effort stemmed from one fact above all others: the current pace of safety performance was not acceptable. As a result, in 2011 NMA initiated an effort, **CORE**Safety® a first-of-its-kind safety and health management system designed specifically for U.S. mining to complement what has been accomplished and to challenge the industry to take a more aggressive approach to modernize and improve safety performance. At the heart of **CORE**Safety is fatality prevention and risk management. It is an ambitious new way of addressing safety concerns. **CORE**Safety is not about saving miners after accidents. It is about identifying at-risk conditions, practices and behaviors that habitually lead to accidents in order to prevent them and its making a difference.

In developing **CORE**Safety we studied the safety practices of companies and industries that have exemplary safety performance. Successful safety systems all have certain common elements. They are integrated into an effective management system, are supported and driven by senior management; involve their employees in the safety process; are reinforced by the organization's culture, and in return, support the culture. In our estimation these are the elements necessary to modernize health and safety in the U.S. mining industry. They are the elements of a new mine safety paradigm that we believe is needed to help us reach the higher plateau of safety performance I spoke of earlier.

I'm most pleased to report that several organizations including the Society of Mining, Metallurgy and Exploration, the Mining Practices Group of the American Society of Safety Engineers, World Coal Association and the International Safety Quality Management Association, have either endorsed or recognized through leadership awards **CORE**Safety as a cutting-edge approach for improving safety performance.

Today exemplary safety performers view adherence with regulatory requirements as the starting point, not as the finish line. They acknowledge the necessity of enforcement, but they also recognize the limitation of enforcement as a means to improve performance. While compliance with the law is required and important, this in and of itself will not improve safety performance. We have come to understand that the correlation between compliance and safety performance is not as strong as some believe.

To be effective, a safety system should be specifically designed to meet the unique needs of an organization. The design must consider the organization's culture, and its workforce. When designing a performance-based safety system it is important to remember that "one size does not fit all." The system must be proactive rather than reactive. It must be designed to help companies identify and address potential hazards to prevent them from evolving into situations that place miners in harm's way.

In this respect a proactive approach has advantages over proscriptive regulatory requirements that can inhibit the ability of companies to respond to health and safety issues in a timely and effective way. Often, the time spent dealing with bureaucratic requirements steals precious time that could be spent eliminating a barrier to safe performance. Enforcement is an important safety tool, but its ability to improve performance is limited. There are more effective ways to improve safety performance. Working with their employees NMA members have made significant progress since enactment of the Mine Act in 1969, acting within the enforcement regime that the Congress created. But, having worked under the Mine Act for the past 46 years the question that must be asked is, if enforcement alone is the solution, shouldn't the performance be better than it already is?

One key thing we have come to realize is that risk-based safety and health management systems are more likely to move safety performance to the next level. Experience shows that "safe behavior" does not occur in a vacuum, it is shaped by leadership and culture. These are characteristics that are taught and nurtured, not legislated.

If we are to break through the barriers to continuous performance improvement we must recognize the role of culture and behavior – not to punish individuals but to help them improve their work practices, to avoid creating situations that place themselves or fellow workers in dangerous situations. In this regard I am reminded of a comment offered by Mike Wright Director, Health, and Safety & Environment for the United Steel Workers. In 2011 testimony at a Mine Safety and Health Administration public meeting on safety and health management "programs" he stated:

> "Mostly we regulate safety and health through a rulebook. Since 1980, we've been collecting data on all fatalities that happen in the union. God help us, we've had more than 1,000. Not just in mining, but in all industries in the U.S. and Canada. In 2006 we took a random sample of those cases and analyzed them and asked a couple of questions: 'Was this fatality the direct result of a violation of an MSHA/OSHA or equivalent Canadian standard?' Astoundingly, in just about half the cases, the answer was no."

What does this tell us? That more of the same will drive performance improvement or that we need to modify how we think about and approach safety? What is required is to foster a culture of safety and prevention across the industry. In our view the strategies for improving performance must change. Last year 86 percent of the mines in our industry worked the entire year without a lost-time-accident. Enforcement contributed to this safety record but this did not occur solely as a result of MSHA's enforcement activities. However, while somewhat counter-intuitive, the rate of lost-time injuries may not be the most appropriate metric for us to discuss improvements in safety. A better question is: "What was the level of operational risk in each mine in the U.S. in 2015"? A mine can be in

compliance with MSHA regulations, as they are written, and still be at risk of a fatality. Only a more robust and consistent focus on risk will enable our country to answer that question, but that will not be possible with the current regulatory structure.

Mine operators who improve their safety performance year-after-year recognize the need to go beyond mere conformity with the law. They understand that regulations alone are not sufficient to drive continued improvement. It is time for all of us to recognize that culture, leadership, training and other organizational-behavioral factors significantly influence performance. To the extent operators fall short, regulators provide miners with a needed safety net but MSHA's actions will not result in zero fatalities.

Beyond what the industry is doing voluntarily we are long past the time of debating the need for MSHA to modernize and modify the manner in which it conducts business. Despite what some believe, impact inspections, Rules-to-Live-By and Pattern of Violations will not get us to zero fatalities. MSHA's enforcement initiatives, by focusing on conditions, represents a reactive approach to safety management that has had, and will continue to have, limited success.

We are not alone in making this observation. While the U.S. is a leader in many aspects of mining and mining technology there are others countries with better safety performance. In fact, if you examine the mine safety regulatory structure in all developing and developed mining countries worldwide, only one country, the U.S., continues to focus almost exclusively on a hazard-centered approach. Others have turned the corner and are focusing on risk-centered management systems as their primary focus.

We have an opportunity to drive further improvement but not in the enforcement environment that exists today. Today the mining industry is undergoing fundamental change but the agency remains wedded to a model with diminishing return. From 2010 through the end of 2014 the number of operating mines declined 18 percent yet during this period MSHA's budget, including this year's request, has increased 12 percent.

The reduced number of operating mines provides an opportunity to re-evaluate how MSHA allocates its resources and how the resources are applied. MSHA remains affixed to a model where today it is not uncommon for 4, 5 or 6 federal inspectors to be on-site every day. Not only is this unnecessary, it is counter-productive. Once on-site MSHA's presence requires operators to commit scarce resources to accompany inspectors during their compliance activities and let's be clear, compliance and safety are not synonymous.

As one might expect, enforcement leads to adjudication and this is a second area in need of reform. The adversarial adjudicatory system in place today serves no one's interests. Valuable resources are needlessly tied-up challenging unwarranted citations that are routinely lowered. What we find today however is that while the government's counsel will reduce the severity of a citation, because the citations were in error, they refuse to reduce the accompanying penalty. There is no basis for this as severity; gravity and negligence are all factors that, under the Part 100 regulations, are considerations in arriving at a penalty amount. Reducing one should result in a concurrent reduction in the other but the government's take-it-or-leave-it approach places operators in an untenable situation that again draws resources to non-safety-related activities. Regardless of the outcome of the penalty amount, operators must immediately abate the cited condition even though they often prove later to have no merit after time-consuming and expensive challenges.

Of equal importance is a citation conference process that remains broken. The unwillingness of supervisors to overturn erroneous citations results in both government and operator resources being fettered away needlessly. We have raised this issue repeatedly but unfortunately MSHA appears unwilling to address the root cause of this problem.

Another area in need of review is MSHA's selective recognition and incorporation of new technology. The Mine Improvement and New Emergency Response Act of 2006 (MINER Act) established within the National Institute for Occupational Safety and Health an Office of Mine Safety and Health to be administered by an Associate Director. The Office

is "responsible for research, development and testing of new technologies and equipment designed to enhance mine safety and health." While MSHA is not bound by NIOSH's work, the long-standing relationship of the two agencies has evolved into NIOSH becoming the technical advisor for MSHA. In this regard we are concerned that MSHA is, in some instances, prematurely promulgating regulations that impose technology requirements while in other instances they are denying operators the right to use proven technology even in the face of judicial decisions requiring them to do so.

Two examples illustrate this problem. On Sept. 15 MSHA issued a proposed rule to require operators of underground coal mine to equip certain pieces of equipment with what is known as proximity detection technology. While proximity technology was proven on an earlier category of equipment, the technology is not seamlessly transferable to the latest category of equipment contemplated by the proposed rule. One example: the technology has intermittent electrical interference that affects performance. More importantly, NIOSH has not yet begun any research on the classification of equipment in the proposed rule. Contrast that with the earlier equipment proximity rule where literally hundreds of pieces of equipment were equipped and tested by industry, equipment manufacturers and NIOSH research. This established a learning opportunity before a regulation was written.

MSHA's proposed rule will require the wholesale application of technology where practically every application is unique and most are still untested. Furthermore, the structure of the proposed rule has created a huge disincentive for operators to apply the technology ahead of the rule. This creates a barrier to further development of the technology.

Despite this and despite the fact that NIOSH has not tested the technology MSHA's proposal would impose unrealistic deadlines for operators to install and implement the technology and would punish early adapters by imposing harsh deadlines for system upgrades. This is neither warranted nor justified.

A second example involves the use of surveying equipment. Electronic surveying instruments became the standard for surveying starting in the 1980's. Acceptable mechanical surveying instruments are not manufactured any longer. There are no "permissible" electronic surveying instruments and thus the instruments cannot be used in underground coal mines in the locations where permissible electric equipment is required but where accurate surveying is critical. Operators are required to use obsolete equipment rather than equipment that is 8-10 times more accurate. Operators have petitioned under Section 101(c) of the Act to use electronic surveying equipment in lieu of permissible equipment under certain rather stringent conditions. MSHA denied those requests and Department of Labor Administrative Law Judges heard appeals of those denials and granted the petitions with some additional conditions. On appeal by MSHA the Assistant Secretary rejected the thoughtful decisions of the ALJs and imposed additional conditions that virtually preclude effective use of the electronic surveying instruments which provide an additional layer of protection for miners.

Similarly we continue to face problems relative to the new technology required by MSHA's final coal dust rule. The inability to differentiate between rock dust and coal dust particles gives rise to a conflict between this rule and the agency's enhanced rock dusting requirements. Additionally, the difference in sample concentration determinations using the current sampler and the new sampler continues to raise concerns for the industry, especially as the date for implementation of the 2nd phase of the final rule is looming.

These examples illustrate the many faces of MSHA with regard to new technology. On the one hand imposing requirements in advance of research and testing to ensure that the technology will work across many applications while on the other denying operators the right the use proven technology that will enhance miner safety.

Finally, it is time for MSHA to adopt a program for mine safety modeled on the very successful Voluntary Protection Program (VPP) administered by the MSHA's sister agency the Occupational Safety and Health

Administration (OSHA). The VPP allows those employers who meet stringent performance-based health and safety criteria to be removed from programmed inspection lists and OSHA will not issue citations for standards violations that are promptly corrected so long as the worksite continues to exceed the VPP standards. The VPP promotes a cooperative approach to workplace safety. Employee support and involvement is a prerequisite for acceptance into the VPP. Depending on which statistics you cite, companies who participate in the VPP program have safety performance that is 40-65 percent better than companies that do not participate.

Some will take this to mean that we are advocating an end to what is not commonly referred to as the 4's and 2's – the statutory requirement for inspections at all underground and surface mines. Let me be clear, we are not calling for an end to required inspection's, rather VPP is a mechanism for MSHA to shift their focus at recognized mines from an enforcement to a compliance assistance approach. Just as in the case for OSHA regulated VPP facilities MSHA should shift its resources and focus to higher-risk worksites. This will become an increasingly important consideration as MSHA is compelled to render resource allocation decisions in a time of budgetary limitations.

VPP does not relieve an employer from complying with all applicable federal regulatory requirements. All compliance standards and worksites remain subject to inspections generated by complaints, accidents or other significant events. Because VPP participants develop and implement systems to prevent employee injuries and illnesses, the average VPP worksite has a lost workday incidence rate at least 50 percent below the average for its industry. MSHA can and should do the same.

In closing let me stress that to modernize and improve safety performance, we need to move beyond a model based strictly on enforcement. Enforcement is necessary, particularly with regard to "bad actors," but to truly modernize mine safety we have to develop a performance structure based on a risk-based approach that establishes higher standards, engages employees, and encourages cooperation. **CORE**Safety and the

VPP process are positive steps that would move the industry in that direction.

Chairman WALBERG. Thank you. As I listened to each of you, it is interesting to think about the impact of mining. I jumped on a Great Lakes freighter at the Port of Monroe in my district this past Sunday night, watching the unloading of tons of coal into the hopper from a Great Lakes' 1,000-foot cargo ship headed up through the Detroit River, Lake Sinclair, Sinclair River, Lake Huron, St. Mary's River, to the Soo Locks.

All along the way, I saw either piles of aggregates, metallic, nonmetallic, piles for steel mills and power plants all along the way. All the results of the mining industry.

Each of you represent portions of that that we want to make sure works, so thank you for your testimony.

Let me welcome also to our Committee a distinguished colleague from Pennsylvania, Congressman Cartwright. Thank you for joining us. Without objection, Congressman Cartwright is permitted to participate in our hearing today. I certainly hear no objections. Also, it is a delight to welcome a good friend and colleague, Mr. Courtney, joining us today as well.

I recognize myself now for five minutes of questioning. Mr. Watzman, on September 26, the Committee requested MSHA provide information related to the mandatory operation of continuous personal dust monitors—we have evidence of one here in the room—in light of the potential for a new rock dust composition to prevent CPDMs from accurately reading coal dust in the atmosphere.

Just Monday of this week, we received a letter back from MSHA. I will place that letter into the record, without objection, hearing none.

[The information follows:]

U.S. Department of Labor

Mine Safety and Health Administration
201 12th Street South
Arlington, Virginia 22202-5452

OCT 19 2015

The Honorable Hal Rogers
Chairman
Committee on Appropriations

The Honorable John Kline
Chairman
Committee on Education and Workforce

The Honorable Tom Cole
Chairman
Subcommittee on Labor, Health and Human Services, Education and Related Agencies

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections

U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Rogers, Chairman Kline, Chairman Cole, and Chairman Walberg:

Thank you for your letter of September 21, 2015, regarding the Mine Safety and Health Administration's (MSHA's) final rule, *Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors* (79 FR 24814) (dust rule). In your letter, you express concern that MSHA, in issuing its final rule on respirable coal mine dust, did not sufficiently consider the ongoing examination of the composition of rock dust by the National Institute for Occupational Safety and Health (NIOSH), including whether possible changes in particle size and mix will affect test results. You also express concern that the increased sampling frequency and new sampling technology will increase the likelihood that mine operators will be cited for samples that are contaminated by rock dust but are otherwise compliant with the new coal mine dust standards.

We appreciate your support for our shared goal of better protecting miners' health. With tens of thousands of known deaths from pneumoconiosis, over $45 billion in compensation paid to miners and their families, and miners still getting the disease, actions are needed to end this unnecessary plague on miners. The purpose of the dust rule is to reduce miners' exposure to unhealthy coal mine dust to prevent the disease. The controls in place prior to the rule's implementation last year simply failed to protect miners from the horrific disease.

Regarding your concern that possible future changes in rock dust composition and particle size may affect operators' ability to comply with the dust rule, we note that the NIOSH research on particle size and mix is ongoing and has not concluded. MSHA is involved in that research, as a

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member of the on-going NIOSH Rock Dust Partnership. Any recommendation from NIOSH to change the particle size and mix of rock dust would require notice-and-comment rulemaking to revise MSHA's rock dusting standard before taking effect. This process would allow for thorough public participation and full consideration of any operator concerns, including the possible impact of new rock dusting standards on operators' ability to comply with the dust rule.

Regarding your second concern – that changes in sampling frequency and new sampling technology may increase the rate of incorrect citations – our experience to date is that these concerns will not be borne out. MSHA's analysis of over 41,000 samples from underground coal mines since the new rule took effect in August 2014 shows overwhelming compliance – approximately 98 percent of operators' underground coal mine dust samples were at or below the respirable dust standards. Operators' average concentrations for occupations with the greatest dust exposures are at a new record low of 0.65 milligrams per cubic meter of air (mg/m^3), which is far below the 1.5 mg/m^3 standard that will become effective on August 1, 2016. The dust controls that were used at these mines worked to control miners' exposures despite claims by some operators that compliance was not achievable.

In addition, this sampling was conducted with approved gravimetric sampling devices during normal production shifts. To comply with MSHA's existing rock dust standards, rock dusting would have occurred at various times during these normal production shifts. That dust exposures were nonetheless well below the respirable dust standards during this testing period indicates that the increased sampling frequency will not lead to a higher rate of contaminated sampling. Additionally, there is further evidence that rock dusting has not adversely affected sampling results. The average of respirable dust concentrations in occupations with the greatest exposure has dropped year-after-year since 2010 when the total incombustible content of rock dust increased 15 percent, from 65 to 80 percent.

To facilitate compliance, we implemented the final rule with phase-in periods. The first phase, which began on August 1, 2014, closed a number of loopholes to more accurately represent the respirable dust that miners were exposed to over the course of a shift. Phase II increases the amount of sampling to assure that protections from the unhealthy coal mine dust are in place. The existing bimonthly sampling only monitors the mine atmosphere for about five percent of miners' exposure, which is not sufficient to protect miners from the disease. Specifically, Phase II will add the Continuous Personal Dust Monitor (CPDM), a new state-of-the-art tool that went through years of research and testing before approval. The CPDM will allow miners and mine operators for the first time to monitor, in real time, miners' exposures to respirable dust. With this real-time information, miners and mine operators can make adjustments during the course of a shift to reduce exposures to coal mine dust. The gravimetric sampling device used since the 1969 Federal Coal Mine Health and Safety Act (Coal Act) has left miners working in unhealthy dust for days while the samples collected during a shift are analyzed; the use of the new CPDM will eliminate that delay. Collectively, these protections are critical to improving miners' health and preventing pneumoconiosis.

NIOSH's initial tests of the CPDM were conducted at mine sites that represented various areas of the country, types of mines, ventilation systems, and types of equipment, and subsequent testing continued to demonstrate that the CPDM can accurately and precisely measure respirable

coal mine dust in the mine environment.[1] Based on the results of these NIOSH studies, MSHA and NIOSH published a final rule in April 2010 that established the approval requirements for the CPDM (75 Fed. Reg. 17512).

The CPDM, like the existing gravimetric sampler, does not distinguish between the constituents of respirable dust measured at coal mines. The gravimetric sampler has collected coal mine dust in the same manner since the 1969 Coal Act, and the CPDM does not change this approach. As long as properly maintained dust controls are used, mine operators who will be required to use the CPDM for dust sampling should see no increase in the number of samples that exceed MSHA's dust standards due to the type of sampling device used.

Moreover, as explained above, the CPDM has the advantage of providing mine operators and miners with real-time sampling results. These real-time sampling results will enable them to identify problems, assess the effectiveness of dust controls in different mining conditions, and make adjustments to controls or mining systems. By taking immediate action to correct dust conditions, operators can better protect miners from overexposure to all respirable coal mine dust. NIOSH's in-mine tests with the CPDM sampled all mine dust, like the gravimetric sampler under the prior rule. The samples would have included rock dust. NIOSH studies that verify the performance of the CPDM in underground coal mine environments are enclosed.

Your second concern is also unfounded because the use of effective engineering controls in the outby areas of a mine also reduces the need for frequent rock dusting during production. Mine operators may use a variety of controls consisting of scrapers, conveyor belt alignment, air velocity, and water sprays during coal production to keep airborne coal dust to a minimum. Keeping dust levels down means less rock dust is needed. Even when rock dusting occurs during production, maintaining the dust concentration level in a mine is achievable using "best practices" to control dust. Based on MSHA's sampling data, the Agency does not believe that rock dusting has contributed to an increase in overexposures.

MSHA has offered assistance to operators leading up to and throughout the dust rule phase-in, and that assistance will continue. MSHA provided extensive assistance to mining industry stakeholders across the country in the implementation of the rule and has a standing offer to assist mine operators who may need additional compliance assistance or information on engineering controls[2]; one operator responded to our offer to provide in-mine assistance. I

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[1] See Volkwein, J.C., R.P. Vinson, L.J. McWilliams, D.P. Tuchman, and S.E. Mischler. June 2004. Performance of a New Personal Respirable Dust Monitor For Mine Use. CDC Report of Investigation 9663; Volkwein, J.C., R.P. Vinson, S.J. Page, L.J. McWilliams, G.J. Joy, S.E. Mischler , and D.P. Tuchman. September 2006. Laboratory and Field Performance of a Continously Measuring Personal Respirable Dust Monitor. U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, 2006, CDC Report of Investigations 9669; and Page, S., J. Volkwein, R. Vinson, G.Joy, S. Mischler, D. Tuchman, and L. McWilliams, 2008. Equivalency of a Personal Dust Monitor to the Current United States Coal Mine Respirable Dust Sampler. Journal of Environmental Monitoring. These studies are enclosed.

[2] Over an approximate 1½ year period since the final rule was published, MSHA has extended this offer of compliance assistance to the industry at every stakeholder outreach meeting on the dust rule, and at several additional stakeholder meetings held at the Agency's Arlington Headquarters (a total of 18 meetings).

would also urge that you have mine operators concerned about Phase II compliance contact MSHA so that we can assist them.

To assist mine operators in the implementation of the respirable dust rule and to address your concerns regarding rock dusting and the increased sampling frequency, MSHA, in collaboration with the mining industry, will conduct in-mine evaluations to identify and apply best practices for managing rock dusting and respirable dust sampling. MSHA will take appropriate action to address legitimate issues identified.

Again, it is critical that there be more frequent sampling of the mine atmosphere and more immediate awareness of the unhealthy dust, which the new CPDM offers, if miners are to be protected from developing pneumoconiosis. Miners deserve no less.

Thank you for your continued support in improving the safety and health of our Nation's miners.

Sincerely,

Joseph A. Main
Assistant Secretary of Labor for
Mine Safety and Health

Enclosures

Chairman WALBERG. MSHA states "The concerns expressed in the letter are unfounded." Mr. Watzman, I know you received a similar letter this week. Do you agree with MSHA's assessment of CPDM as it relates to changes to rock dust?

Mr. WATZMAN. We do not agree with the agency. We similarly have reached out to the agency to try to work cooperatively with them. We sought their participation in undertaking studies underground, looking at rock dust and coal dust, and the possible contamination of one by the other, and up to this point, the agency has not been willing to participate in a robust peer review study with all of the stakeholders.

We think it is a problem. We think it is something that needs to be studied, and hopefully that will occur before the February implementation date of the second phase of the rule where the CPDM is required.

Chairman WALBERG. What might be the reason for a problem in participating in that study?

Mr. WATZMAN. That is left best to be answered by MSHA. We do not know why. We are all seeking the same goal here and the same objective, and that is to protect miners, and to do it in an accurate manner. We do not know why MSHA has been resistant and not willing to participate with us.

Chairman WALBERG. Mr. Elliott, MSHA is a unique agency in that it is required to inspect all facilities under a regulatory arm, at least bi-annually. NSSGA members, your members, will see an MSHA inspector at least twice a year if not four times, if I am correct. As a safety and health professional, what do you think would improve the interaction between mine operators and MSHA?

Mr. ELLIOTT. That is a good question. When you look at the circumstances in many instances where an inspector comes on-site, they are looking—primarily focused on regulations and what violations they might be able to find.

I think by opening up a broader dialogue, as Mr. Wright talked about, looking at the overall safety and health program at a mine, that inspector could get a better idea of what is going on in the process of managing safety every day.

To your point about the inspector may come one, two days, three days, maybe even four days in a large mine, but the rest of the year, they are not there. They cannot regulate how those miners are going to act or the operator is going to act once they are not there.

I think just opening up a broader dialogue about safety as a whole versus just regulatory enforcement would be of great benefit coming from both sides.

Chairman WALBERG. A true partnership.

Mr. ELLIOTT. Yes, sir.

Chairman WALBERG. Dr. Kohler, you have extensive experience in this field, especially in the area of safety. You have been following the CPDM rock dust debate, I am certain. Can you provide additional insight about the concerns each party is expressing?

Dr. KOHLER. Yes, I can. First, the use of real-time monitoring devices represents a great opportunity to deal with a lot of occupational health problems that we could not deal with before. The advent of a technology like PDM we viewed 10 years ago, five years

ago, as being the single greatest opportunity to eliminate black lung because for the first time people would know in real time what the exposure was and they would be able to address that exposure.

More recently, that vision that I and others shared to do that has developed a problem, and that is a conflict with the rock dusting practice. A few years back in NIOSH's investigations they determined that the amount of rock dust being used was not protective and the amount needed to be increased.

Further, they determined that the existing standard for rock dust and the definition for rock dust also were in need of modification to make it more protective.

The end result of this is that there has been a tremendous increase in the amount of rock dusting and also rock dusting more extensively throughout the mine.

A few years back we looked at rock dust as a nuisance and we never really thought a lot about the impact of rock dust on something like a respirable dust sampling program. It turns out rock dust is a confounder. Rock dust shows up on the cassette in the PDM the same as coal dust does, and effectively wipes out the ability to know what the coal dust exposure is, which is the bad actor we are trying to deal with.

There are important reasons why this needs to be resolved and it is essential that we resolve it through additional testing/experimentation, and we make an informed decision about how to go forward with this important technology.

Chairman WALBERG. Thank you. My time is expired. I now recognize the Ranking Member, Ms. Wilson, for her five minutes.

Ms. WILSON. I yield to Mr. Scott.

Chairman WALBERG. Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I appreciate the Ranking Member asking me to be recognized first.

Mr. Sanders, the device beside you does real-time monitoring. How is that different from what is going on now and why is that important?

Mr. SANDERS. It is important, Mr. Scott; the real-time monitoring enables the miner and the mine management to know what the level of respirable dust is in the atmosphere where the miner is working.

I am not an expert on these devices but this clips to the miner's clothing and it actually takes in a sample of air.

Mr. SCOTT. How is that different from what is going on now?

Mr. SANDERS. What is going on now, the miner is generally not being able to get the real-time readout, that is, the information is collected but then it is later processed, and the information comes back days or even weeks later. The atmosphere is continually changing, they are moving forward or retreating in the mine. The information that comes back may indicate there was a violation but it does not help us to correct the problem to prevent the injuries.

Mr. SCOTT. Thank you. Mr. Sanders, the black lung benefits program is an adversarial system. In your testimony you talk about the fact that workers are not well represented. What specific proposals would you have to level the playing field so that workers could be better represented in this adversarial proceeding?

Mr. SANDERS. I think the legislation that has been proposed, the *Black Lung Benefits Improvement Act,* has a very good basis. What I think are the problems are partly that attorneys are deterred by the complexity, the need to develop sophisticated medical evidence with a client who has no resources to pay for that, and the attorney cannot be paid for his services by his client. Under the Federal black lung program, the attorney that represents the claimant gets a fee if the claimant is awarded benefits and if the award is upheld through appeals so the award is final.

In many of these cases, I would say the average is at least four years before you get to that point, and in many of the cases, they go on longer.

There was an article recently in the Charleston Gazette about a case that went on for 21 years. The attorney representing the miner in that claim gets no compensation unless the miner wins and the award is upheld.

The *Black Lung Benefits Improvement Act* created a way that an attorney could get a partial fee through the Trust Fund if they are successful at various stages in the proceedings, and then that payment from the Black Lung Disability Trust Fund would eventually be paid back by the operator if the award is upheld. It also provides for a payment for medical expenses incurred by the claimant to develop the kind of sophisticated evidence they need to prove their case.

Mr. SCOTT. Speaking of medical evidence, the Department of Labor has decided not to accept medical evidence from a particular physician whose diagnoses turn out to be somewhat questionable. If someone has been disadvantaged by bogus medical evidence, what can be done or what should be done in those cases?

Mr. SANDERS. In the particular case you are talking about, the Department of Labor determined that a particular radiologist's readings where he never read an x-ray to show complicated pneumoconiosis or progressive massive fibrosis despite many cases where miners died and their autopsies proved they had that condition. They said that any claimant whose claim turned on that doctor's reports would get another shot at it. I think that was a good result.

I think so much of this really is a battle of medical experts, so it is hard to know at what point does the expert simply become a fraud. It is hard to remedy that, other than good representation in the individual claim.

Mr. SCOTT. Thank you. Mr. Wright, you indicated the importance that safety inspectors have subpoena power. Why is that important?

Mr. WRIGHT. Because in doing especially a complicated investigation like Upper Big Branch, they need to be able to compel testimony and they need to be able to compel the production of documents which may not be documents that are normally required under the *Mine Act* but which are nevertheless relevant.

In the Upper Big Branch investigation in particular, since MSHA did not have subpoena authority, it had to work through the state agencies and really do its investigation through the state, which did have that subpoena power. That worked in West Virginia. It

would not work in Nevada, it would not work in Wyoming, where there is no such state power.

It makes a lot of sense to us that since OSHA has that kind of authority, since many other Federal agencies have that kind of authority—I think the example I used in my written testimony was the Federal agency charged with promoting the use of popcorn actually has subpoena authority. MSHA does not, and that should be corrected.

Mr. SCOTT. Thank you.

Chairman WALBERG. I thank the gentleman. I recognize now the gentleman from Indiana, Mr. Rokita.

Mr. ROKITA. Thank you, Chairman, I appreciate you organizing this hearing. I appreciate the witnesses' testimony this morning.

Mr. Sanders, are you familiar with the concept of a voluntary protection program as used in other agencies, not MSHA, but in other agencies?

Mr. SANDERS. No, I am not.

Mr. ROKITA. Thank you. Mr. Wright, are you familiar with the concept of a voluntary protection program as used in other agencies?

Mr. WRIGHT. Yes, very familiar.

Mr. ROKITA. Do you have positive things to say about such a program?

Mr. WRIGHT. I have positive and negative things.

Mr. ROKITA. Tell us the positive.

Mr. WRIGHT. I think a lot of companies want to be in the voluntary protection program in part because—this is OSHA now—in part because it frees them from routine OSHA inspections, but it also is kind of a badge of honor.

Mr. ROKITA. Creates good competition, higher level. I appreciate that.

Mr. WRIGHT. Yes. One of the things we like about it is that a company that is unionized cannot be in the VPP unless the union agrees. There is a pretty good check on that.

Mr. ROKITA. Right. Thank you, Mr. Wright. For the benefit of Mr. Sanders, I would like Mr. Watzman to go into some detail about the voluntary protection program. I have a bill that several of us in Congress are on that is trying to codify that as an eligible use across agencies, including MSHA.

I would like to know in particular more detail on how you think MSHA and therefore miners would benefit from using a VPP.

Mr. WATZMAN. Thank you for the question. We think it will work for MSHA. We think the experience in OSHA shows that it is transferrable to MSHA, and MSHA can structure the program, put in the proper safeguards, so that if a mine falls off the wall, as Mike talks about, and does not maintain a certain level of performance, they can be removed from the program.

Most importantly, we think it will give MSHA the ability to refocus how it allocates its resources and conducts its work. Right now, the inspection regime is very rigid. The *Mine Act* uses the phrase "in its entirety," and MSHA interprets "in its entirety" in the broadest sense possible.

There are areas of mines where hazards present themselves. There are other areas of mines where those hazards do not exist.

There are mines in this country that have existed for 30 or 40 years or more, where you travel down entries where rocks do not move. They have not moved in 30 years. Yet, MSHA commits the same resources inspecting that portion of the mine that they do where the hazards present themselves.

That is what we think that would afford the agency.

Mr. ROKITA. Thank you. In fact, the VPP companies that I have seen in different industries, to get to that standard, to be let go from some of the routine inspections that Mr. Wright kind of described, you have to get to even higher levels of compliance than you would normally. Is that correct?

Mr. WATZMAN. That is exactly right.

Mr. ROKITA. Thank you. Mr. Elliott, you talked about a pattern of compliance program. Is this the same as VPP or is this something different, or just as useful or another tool that could be in MSHA's tool box?

Mr. ELLIOTT. I think to your point, it is very similar and it would be a situation where if the mine could demonstrate compliance, as the VPP points to, then I think the similarities would be very close.

Mr. ROKITA. Anything else about a pattern of compliance program that works at the state level somewhere or any kind of model we might study further?

Mr. ELLIOTT. My experience has been in a number of states that they are more focused on coal. The crushed stone, sand and gravel is not the coal industry. When we look at those agencies that may come in and are supportive and helpful—I think the MSHA Small Mines Office was an example of that, where they went into the small operators and tried to help them understand compliance and tell them the ways they could be more efficient if they were more compliant.

I think those are the steps where MSHA was somewhat moving in that direction.

Mr. ROKITA. Thank you. I yield back.

Chairman WALBERG. I thank the gentleman. Now, reading my script here, I recognize my Ranking Member, Ms. Wilson.

Ms. WILSON. Thank you, Chair. Mr. Sanders, I want to commend you for your 25 years of commitment to representing coal miners and their survivors attempting to obtain black lung benefits.

Can you explain to us why it is often difficult for miners to find legal representation for black lung benefit cases? Why are we seeing a spike in new cases of black lung? How do you think the new respirable dust rule will affect this trend? People are dying.

Mr. SANDERS. Yes. I think it is difficult for miners and widows to find representation because of the complexity of the claims, the bureaucratic complexity, and sophistication of the medical evidence. We are talking about proving disability in a pulmonary system and cause of disability. Those are fairly complex questions and require—you really have to develop some knowledge about that.

In addition, because the claimant cannot pay their attorney, many attorneys do not want to take this kind of work on with the expectation that they are not going to get paid until the award is final, which may be several years from now. There is other legal work that you can do that you can get paid up front or you are going to get your fee soon after.

The amount of the fee is not that high. On an individual claim, it is based on your services. It is based on the amount of time you put into the case. It is not as if you are handling a large fee contingency type case.

With regard to—did you ask why are we seeing an increased number of cases of black lung? There is some speculation about that. My own opinion is that modern mining methods using continuous mining machines generate a great deal of really fine particulate, really fine coal dust and rock dust.

In eastern Kentucky, a lot of the coal seams that they are mining now are separated by bands of silica rock, so when a continuous miner operates, it cuts into both the coal and the rock, and the miners are exposed to that in the air.

I think years ago in eastern Kentucky a lot of the mining was done shooting the coal, and they were not creating this fine particulate matter, mixed coal and rock. I think that is part of the problem.

Another part of the problem could be miners are working longer shifts consecutively so there is not time for the dust to clear out of their lungs before they go back to work and are exposed again. That is another theory that is being looked at, I think.

Was there a third part to your question, Ms. Wilson? I am sorry.

Ms. WILSON. Yes, I wanted to know how the continuous personal dust monitors would help.

Mr. SANDERS. They could help a great deal because if you are using this and it has this digital readout area and you can look at that and you can see what the exposure is where you are working, then you can say I do not have good quality air, something needs to be done.

Mines use environmental controls to get good quality air into the areas where the miners are working. It could be a matter of changing the way the curtains are aligned or increasing the amount of air flow into that particular area. It would reduce the miners' exposure to excess respirable dust immediately.

Ms. WILSON. Mr. Watzman, you suggested that MSHA was not cooperating with the industry, and that you had some complaints about the continuous personal dust monitor and the possible interference caused by rock dust. Can you elaborate on that for me so I understand exactly what you mean?

Mr. WATZMAN. Yes, I can. Let me state first that we were involved in the development of the CPDM. We support it. We supported the development. We support its application and use.

We have to make sure that we are not substituting one problem for another. There is little confidence in the technology that is used today, the gravimetric sampler. We need to make sure the results from the CPDM are accurate, and that is what is lacking today.

When we are sampling, rock dust becomes entrained in the air, and the dust sampler is picking up both rock dust and inert dust, and we did a search and could not find any health studies that indicated any adverse health outcomes related to rock dust exposure.

Ms. WILSON. I do not want to run out of time. We have a letter from the Assistant Secretary of Labor for Mine Safety and Health, and he says he is working with you and in collaboration with the

mining industry to conduct in-mine evaluations to identify and apply best practices for managing rock dusting and dust sampling.

Mr. WATZMAN. We wish them well on that.

Ms. WILSON. Let's hope that is taking place and you have the opportunity to experience that.

Mr. WATZMAN. It may be taking place episodically at individual mines, but I can tell you that it is not taking place with the industry as a whole, to the degree that we conducted our own sampling and provided the results to the agency, and have yet to have a response from the agency in terms of meeting with us to discuss the results we presented.

Chairman WALBERG. The gentlelady's time is expired. We will move on.

Ms. WILSON. We do have a response. Perhaps it just has not gotten to you.

Chairman WALBERG. We look forward that all responses go to the right sources and we take appropriate action and save miners and an industry as well.

I now recognize the gentlelady from New York, Ms. Stefanik.

Ms. STEFANIK. Thank you, Mr. Chairman. This question is for Mr. Watzman and Dr. Kohler. When I visited Nyco Minerals in my District, which is one of the few mines in the world that produces wollastonite, a mineral with wide commercial use for ceramics, brakes, clutches, and plastics, it was clear to me that we need to do more to support the workers that help keep our nation's global competitive edge.

What can be done in your opinion to strike that intelligent balance between protecting these workers and making sure we do not curb further economic growth by stifling these companies with litigious regulations? I will start with you, Mr. Watzman.

Mr. WATZMAN. I think it goes back to what we have touched upon on so many occasions here, and that is creating a cooperative environment where we and the agency sit down and address problems rather than going to our respective corners.

Mining is a very tough business and it is a very challenging business today. I look at the coal industry where the number of mines since 2011 has dropped by 18 percent. The number of mines in this country has dropped overall in that same period by 4 percent. Yet, MSHA is getting more resources and is refusing to change the way they conduct their business.

I think we all honestly have to ask ourselves the question is the old model working. We have been under the *Mine Act* for 46 years. We have made phenomenal progress as an industry working with our workforce, working with regulators, but after 46 years of one model, should we not be better than we are?

That is really what drove us to CORESafety, to look outside the box, to look for a different model that is not enforcement oriented, but is proactive rather than reactive, identifying risks at the outset and engineering those to the degree you can out of the work environment to better protect our workers.

Ms. STEFANIK. Dr. Kohler?

Dr. KOHLER. I would say two things. First of all, I think that sitting down and talking, a partnership, is critical. The toughest problems we faced in mine safety and health in the past 15 years were

best solved when industry, organized labor, MSHA, NIOSH, manufacturers, all came together, rolled up their sleeves and tried to solve the problems. I think we have to have that kind of partnership.

Secondly, I fully support this idea of health and safety management systems, whether we call it CORESafety, which the NMA has rolled out, or implementation of VPP, I understand there are good and bad parts, there are good and bad actors.

It might be appropriate for an august body like the National Academies to actually resolve that question and provide guidance on how we can implement that fully.

Ms. STEFANIK. Thank you. My next question is for Mr. Elliott. Following up on concerns for maintaining worker safety, one mine safety group in my district raised concerns that workers have become increasingly concerned with being held personally liable for accidental non-compliance. It is my understanding and you shared today that over the last few years, the number of citations given at mines has increased greatly.

How do we ensure worker safety and maintain an appropriate oversight system while also reforming the current challenges with this burdensome citation policy?

Mr. ELLIOTT. That is a heck of a question. If I could do that, I would probably be in Congress.

Really, when we look at the circumstances around trying to look for people to come in this industry, it is tough today. It is hot, it is cold, it is dirty, it is muddy, all those things are involved.

Like Mr. Watzman said about the approach of the agency, from maybe many, many years ago, when the *Mine Act* first took effect, there was methods that were successful at that time.

I think today, we are in the twenty-first century, and we need to get greater efficiency to reach the root issues that are affecting the mining environment. Generations change. My generation is slowly but surely leaving the industry. Younger people are coming in who are more dynamic and more concerned about their safety.

I think the agency has to look at ways to change to meet the changing demographics of mining.

Ms. STEFANIK. Thank you very much. I yield back.

Chairman WALBERG. I thank the gentlelady. I now recognize the gentleman from Wisconsin, Mr. Pocan.

Mr. POCAN. Thank you, Mr. Chairman. Mr. Wright, I am going to go back to a question that Mr. Rokita asked you because I think you got cut off a little bit. You mentioned there were positives and negatives to the VPP. If there are any more positives you want to mention or any negatives, now is your chance.

Mr. WRIGHT. I would like to mention some of the negatives. The program started out, I think, very usefully, but in the last administration in particular, the metric for its success as the administration saw it was how many companies they could get into VPP. We saw company after company that really did not deserve to be there.

One of the things that sort of taught us that was we saw a lot of fatalities happening in VPP companies. We went back and looked at what caused the fatality, and it was really in some cases non-compliance with standards, and in other places, it was a real

failure to find and fix hazards that should have been obvious. Those companies should never have been in VPP.

In addition, we think what drives companies into VPP—what drives voluntary compliance in general—is a strong enforcement program. We generally supported the program, but we did not support and would not support taking resources away from enforcement and putting them into VPP.

Enforcement—there are just too many hazards out there. We see too many violations of law. Even with the 4s and 2s, we still see people dying in mines from hazards that went unrecognized, from hazards that may have been recognized by the company but they did nothing about it, and from things that may not be covered by the standards but are nevertheless very serious problems.

Enforcement is what drives voluntary compliance. We cannot cut that back. VPP might be fine but not at the expense of a strong enforcement program.

Mr. POCAN. Thank you. Mr. Watzman, you looked like you wanted to respond when Mr. Sanders was talking about why we are at levels back to the early 1970s with black lung. I just wanted to give you the chance. You had that look on your face.

Mr. WATZMAN. Well, I appreciate that opportunity. I have said before, there is a problem in the industry with black lung, but it is not the problem that has been characterized in the public domain. It is not the problem that has been characterized by the agency. It is a geographic problem in a small area.

What I do is I go back to the NIOSH x-ray surveillance program data. NIOSH conducts an x-ray surveillance program. They take their van around the country, and they examine miners who want to voluntarily participate. We wanted it to be mandatory, but it is still voluntary.

When I look at Utah, for example, they conducted 500 examinations. They expected the rate of black lung to be 4 percent, the rate was zero. In Illinois, they expected it to be 4 percent, it was one. In Indiana, they expected it to be 4 percent, it was one. In Maryland, they expected it to be three, and it was zero.

Mr. POCAN. Mr. Watzman, just for time reasons, that is the main point?

Mr. WATZMAN. It is not the problem that has been characterized is the point I want to make.

Mr. POCAN. I assume you would agree this is not a fair characterization either. In a recent phone call released during the criminal trial of former CEO of Massey Energy, Don Blankenship, he said that—these are his words—"Black lung is not an issue in this industry, that it is not worth the effort that they," meaning MSHA, "puts into it." I assume you do not agree with that statement.

Mr. WATZMAN. As I have said before, there is a problem but it is not the problem that has been characterized.

Mr. POCAN. You do not agree with that statement?

Mr. WATZMAN. I do not.

Mr. POCAN. Thank you. Mr. Wright, in the remaining very little time I have left, there has been some talk about removing stone quarries from coverage under the *Mine Act,* putting them under OSHA. We had a hearing recently on OSHA, they can inspect one site every 140 years, if they get around to everything.

Can you just talk a little bit about why that might be a problem?

Mr. WRIGHT. I will just give you one sentence, this is actually two sentences. Last year, we had 15 deaths. I am sorry. This year so far, we have had 15 deaths in metal and non-metal mines. Nine of them have been in stone, sand, and gravel.

Mr. POCAN. Thank you. I yield back.

Chairman WALBERG. I thank the gentleman. I recognize the gentleman from Pennsylvania, Mr. Thompson.

Mr. THOMPSON. Thank you, Chairman. I apologize for stepping out of the Committee meeting, but I was talking about coal while I was there.

Chairman WALBERG. Good for you.

Mr. THOMPSON. And the export of some great coal that I think is mined in Mr. Cartwright's district that we export.

Thanks for having this hearing. It is an incredibly important hearing for me personally. My grandfather was a coal miner, surface miner, but had black lung, diagnosed with black lung.

I will just put a plug in for advocacy when folks are trying to advocate for whatever they are pursuing from a Federal perspective, use your members of Congress as advocates as well when you are looking at programs like that.

Dr. Kohler, it is always great to have someone here from home, we are proud of your leadership and the work that you do at Penn State and for mining and preparing mining engineers.

The first question is for you. I apologize if this has been covered already. It has to do with the use of the refuge alternatives in the event that a miner cannot leave in an emergency. These alternatives are supplied with food, water, breathable air, and have been required since 2009. Based on NIOSH concerns, MSHA has issued a request for information related to the use of refuge chambers.

Can you discuss the concerns about refuge alternatives in underground coal mines?

Dr. KOHLER. Yes. The specific concern with respect to the mobile alternatives is in principle, it is a great idea, but given the spatial constraints in an underground coal mine, given the requirements, the time period in which they need to remain functional, given the complexity it takes to understand how to deploy these systems, and given a number of engineering problems that have surfaced over the last five or six years, it is clear that this technology, despite the best efforts of manufacturers, MSHA, NIOSH, and everyone else, is simply not making it. That is the reason why miners have no confidence in it at all.

We have better alternatives out there. We need to get on with that. While it is true that the in-place shelter, for example, will not work in every single mine, and in some cases, there are distance concerns, it would serve a majority of miners, unlike the current technology.

Mr. THOMPSON. Mining engineering obviously is a highly technical specialty and there is a great need for mining engineers in the United States. How can the industry and government attract students to that profession?

Dr. KOHLER. The greatest deterrent to students moving into the profession is the public image that the industry has. Most people

do not realize how modern mining has become and in most regards, environmentally sustainable, responsible from a safety and health perspective. Most people do not understand the value of mine products in the economy. They do not understand that 15 percent of our gross national product is tied to mining.

To the extent that the industry can do a better job of marketing itself, and we like to say, we do not often have to convince the kids to come into mining, it is their mothers that present the real challenge.

Mr. THOMPSON. Thank you. Mr. Watzman, over the last 10 years, the number of coal mines operating in the country obviously has been sharply reduced. We have sadly watched that occur, as really the coal industry has been under attack.

How many coal mine inspectors does MSHA currently employ, and what have the mine operators seen as a result of having fewer mines but the same number of inspectors.

I would also like you to reflect on—I have an MSHA unit in my district. They are great people. I have gone early morning's before they go out, so it is a real early start. Some of the things I have heard from the individuals in the coal mines is some of the new ones coming on just do not have practical experience. They have a great education.

Any reflection on how the experience as we have attrition have lost people who have actually worked in mining that have gone on to become inspectors, and now sometimes we do not have that practical experience today.

Mr. WATZMAN. Let me start with your first question. I do not know the exact number, but I believe MSHA has approximately 700, give or take a few, coal mine inspectors. That number has remained pretty constant for the last number of years, even though the number of coal mines has dropped precipitously.

What that means is you have a greater presence of MSHA inspectors at the mines that remain operating in those districts. Let's be clear. When MSHA is on-site, that involves management as well. That takes away from their normal safety activities because they accompany MSHA as they go through the mines.

There is a detrimental effect to a degree from the perspective of how companies manage safety at the operations.

As I said in my testimony, it is not uncommon today in some of the mines, especially in Appalachian, to have four, five, six MSHA inspectors on-site every day the mine is operating. That is a dramatic change from what we saw in the past.

You are right. As the generation has changed, inspectors who were better seasoned—this will change over time as this generation learns more about what they are doing—we are seeing things that were not cited in the past, that are being interpreted differently by this generation as they come out of the Academy. What they have learned is they have learned the book. That is what they follow. They follow 30 CFR. That is their gospel, if you will.

We have seen that dynamic change. Hopefully, with time, as these individuals become more experienced, we will see the pendulum swing more back towards the middle.

Chairman WALBERG. I thank the gentleman. The gentleman's time has expired. I now recognize, staying with Pennsylvania, the gentleman from Pennsylvania, Mr. Cartwright.

Mr. CARTWRIGHT. Thank you, Mr. Chairman. I thank you for having me here in the subcommittee. I also want to recognize Mr. Thompson, thank you for having me as well. Thank you also for sharing that, it was your grandfather that had black lung.

I have an awful lot of black lung sufferers and recipients in my District. We can argue about the prevalence level, you know, the amount of black lung that is out there, but nobody would disagree that we want to make the process fair, and thank you for nodding in agreement, Mr. Watzman. I appreciate that.

I am moving this microphone as far away as I can.

Chairman WALBERG. It may be black lung in the system. I am not sure.

Mr. CARTWRIGHT. Mr. Sanders, a Pulitzer Prize winning investigation by the Center for Public Integrity found that doctors at Johns Hopkins who were hired to help coal companies fight black lung disease——

Chairman WALBERG. I wish we were more accommodating to a member who joins this Committee. My apologies. We are not taking your time away for that.

Mr. CARTWRIGHT. Thank you. I appreciate that, Mr. Chairman. This Pulitzer Prize winning study found that doctors at Johns Hopkins in Baltimore who were hired to help coal companies fight against black lung claims have systematically misdiagnosed miners with black lung as having other non-compensable diseases, thus preventing those miners from accessing benefits.

It is not a funny situation. The report found that more than 1,500 black lung claims since the year 2000 were handled——

Chairman WALBERG. If you would like to join us up here, we have not had that problem. Let's try that. I know it can be irritating when you have that going in your own ear. This makes us wish for our new Committee chambers, right?

Mr. CARTWRIGHT. My first day and I get to be on the upper dais, pretty good.

Chairman WALBERG. This is a great subcommittee.

Mr. CARTWRIGHT. Thank you, Mr. Chair. We are talking about Johns Hopkins and how they had a doctor who misdiagnosed black lung disease. His name was Dr. Paul Wheeler. The investigation revealed that in more than 1,500 black lung claims since the year 2000, Wheeler had never once in more than 3,400 x-ray readings interpreted an x-ray as positive for complicated black lung, a condition that would presumptively entitle somebody to black lung benefits, but many other doctors in autopsy results revealed the presence of the disease.

In response to this Pulitzer Prize winning investigation, Johns Hopkins suspended the program to their credit.

My question to you is what should be done to remedy this situation for miners or their survivors? Mr. Sanders?

Mr. SANDERS. I think that the miners or survivors whose claims contained evidence from Dr. Wheeler or the other radiologists at Johns Hopkins should be reviewed. That is they should have an op-

portunity to have their case readjudicated without the questionable evidence.

Mr. CARTWRIGHT. Even more troubling to me, Dr. Wheeler was certified by NIOSH to classify lung x-ray readings. He had to pass a rigorous test and become a so-called "B Reader." You are familiar with that term?

Mr. SANDERS. Yes.

Mr. CARTWRIGHT. He had to be re-tested every four years, and he apparently read the x-rays correctly on the NIOSH test, but he chose to under read x-rays in litigation. What should be done about that?

Mr. SANDERS. That is a very difficult question. NIOSH has operated the B Reader program as a way of classifying x-rays in what is called the ILO system for pneumoconiosis for some time. It is supposed to provide us with a good quality reading, not just for evidence purposes in black lung benefits claims, but actually it is useful for epidemiological studies.

I think there needs to be some type of a quality assurance program, and NIOSH has to investigate questionable B Reader practices, and suspend or terminate the person's B Reader status as a result of their investigation. They have to have that authority.

Mr. CARTWRIGHT. That makes sense. Mr. Sanders, this investigative series also revealed something that was even maybe more disappointing. It showed that coal company lawyers withheld medical evidence from claimants and their counsel where evidence proved that the miners had black lung.

My question for you: is it true that coal companies have fought claims by cherry picking medical reports to support their defensive claims and withholding medical reports that would corroborate the presence of compensable black lung disease?

Mr. SANDERS. That is true. In the written materials, I discussed the case of Gary Fox, and if you look, it is a reported decision from the Court of Appeals. If you look at the facts of that case, it corroborates it, absolutely, not only did they withhold evidence from the adjudicator, but they cherry picked the evidence that they sent to pulmonary specialists. Then when they got the report from the pulmonary specialists, they submitted that as evidence. They really had skewed the record in Mr. Fox's case, and it has happened in other cases. Hopefully, it is not very common.

Mr. CARTWRIGHT. Mr. Sanders, the GAO, the Government Accountability Office, has reported that many black lung claimants are without the necessary medical and legal resources to secure benefits, and you have discussed that here today.

Given the adversarial nature of black lung proceedings, DOL says only 30 percent of miners have legal representative where they file a claim. The coal companies always have lawyers, do they not?

Mr. SANDERS. Yes, they do.

Mr. CARTWRIGHT. Why are so few miners represented by counsel? Are there obstacles beyond the ones you have already discussed to securing legal representation?

Mr. SANDERS. You know, there is a limited number of attorneys frankly that are willing to take these kinds of cases on. I am pretty

familiar with most of the ones that are in the region of the country that I live in. They are just not very many of us.

Mr. CARTWRIGHT. Let me ask you this. I filed—I am the author last month of the *Black Lung Benefits Improvement Act of 2015,* and I am proud to say I have original co-sponsors, Ranking Member Wilson and Representative Scott, on the bill. Are you familiar with that bill?

Mr. SANDERS. I am.

Mr. CARTWRIGHT. Do you believe it remedies many of the situations you and I have been discussing here today?

Mr. SANDERS. I do. Earlier, we talked particularly about representation, the opportunity for an attorney if they are representing a claimant to get compensation for their time during the course of the adjudication. I think that would be very helpful.

I think also the opportunity to get reimbursement for medical expenses so you could better develop the evidence that proved the claimant is entitled to black lung benefits. I think those are very important provisions.

Mr. CARTWRIGHT. I thank Mr. Sanders, and thank you, Mr. Chairman. I am sorry I broke your PA system. I yield back.

Chairman WALBERG. We will find an attorney.

Thank you for participating, and thank you to the panel, appreciate the work all of you do for the industry, for individuals, for the economy, and all that goes with it.

Now we have time for closing, and I recognize the Ranking Member, Ms. Wilson, for her closing comments.

Ms. WILSON. First of all, I would like to thank the witnesses for being here today. I would like to thank Chairman Walberg for holding this hearing. I appreciate the conversation from the members of the Committee.

This is very emotional for me. I just cannot even imagine, in fact, I am planning a trip to a mine, because I want to see. I am from Miami, Florida. I have never experienced this.

In the recent news, we have heard some questions about whether black lung disease is worth MSHA's efforts.

One cannot possibly look at the steep rise in the rates of the disease and conclude black lung is not worth MSHA's efforts. One cannot hear Steve Day's heart breaking story and stories of other men and women who have suffered from this incurable disease and conclude black lung is not worth MSHA's efforts.

One cannot think about Steve Day's widow and the thousands of widows she represents and conclude black lung is not worth MSHA's efforts.

Mining is one of the most dangerous jobs in America, and the men and women who take on this work deserve MSHA's reasoned efforts to protect them against this horrible disease. Black lung disease is man-made, and we have the power to end it.

More than a year after MSHA's new respirable dust standards went into effect, sampling results showed that coal operators are complying with the rule and miners are better protected. The upcoming phases of the rule do even more to protect miners.

Most coal operators are deeply committed to the health of their employees and recognize their responsibility to care for those former employees with the disease. Unfortunately, some coal opera-

tors refuse to live up to that responsibility, choosing instead to use the medical and legal system to deny miners their deserved benefits.

Steve Day's story brings to life the heart breaking consequences of unfair tactics designed to release coal mine operators of their responsibility to afflicted miners.

I thank the witnesses again today for being here and helping us better understand the obstacles claimants face in securing their benefits. We have to do better.

Mr. Chairman, I know that you are just as committed as I am to protecting miners' health. I hope we can find common ground and work to pass provisions in the *Black Lung Benefits Improvement Act.*

I also want to thank the witnesses for their discussion on the legislative reforms needed to improve the *Mine Act.* As mentioned during our April meeting, I hope we can work together on needed improvements to the *Mine Act.* Thank you, and I yield back.

Chairman WALBERG. I thank the gentlelady. I appreciate those remarks. I think we do certainly agree that this is an industry across the board, whether it be coal mining—I had the privilege of going down into underground mining operators on several occasions, including once with Mr. Main. In fact, we drove past his house, boyhood home, on the way to that mine. We saw families who have had their lives affected in a positive way from having mining operations there for generations, and a continuous operation.

We also have had the opportunity to meet miner families who have now lost their occupation. There is that challenge we have as well.

I have had the opportunity to be in surface mining operations in North Dakota, in the Upper Peninsula of Michigan, with coal, with metallic/non-metallic mines, also to be under the City of Detroit in its salt mines, a totally different operation, with gas powered Gators running around in that mine, not like you would find in a coal mine.

It is a diverse industry, and it is an industry that needs to work cooperatively with the regulator, but vice versa as well. There has to be a partnership. I do not know how in the world it can be moved forward in safety factors as well as the continuity needed for providing a secure industry without a partnership relationship, that a regulator looks to the best practices of the industry, and the industry makes sure its operations with as much as possible compliance from everyone in the industry, works together and to ferret out the bad actors, that thankfully are far and few between.

When we look back at the impact of Upper Big Branch, for instance, and now the industry that has taken over that and is struggling with the economy because of the challenges brought on by a bad actor, we need to make sure that we do not just step in with regulation, but we do it right.

That is what I think this testimony has given today from all sides of the ledger to help us as we move forward, but move forward with a purpose in mind, individuals, miners, families, and operators remain as the central focus for success in the industry, and

ultimately success for what they produce in the lives of the rest of us.

Thanks again for the Committee members, the staff, as well as those who have given testimony today for making this, I believe, a valuable hearing.

There being no further agenda for the Committee, with the bit in hand, I declare it adjourned.

[Additional submission by Mr. Watzman follows:]

[Additional submission by Ms. Wilson follows:]

BRUCE WATZMAN
Senior Vice President, Regulatory Affairs

October 28, 2015

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections
US House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515

The Honorable Frederica Wilson
Ranking Member
Subcommittee of Workforce Protections
US House of Representatives
2101 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman and Ranking Member Wilson:

Thank you for inviting me to participate in last week's hearing, "Protecting America's Workers: Reviewing Mine Safety Policies with Stakeholders." We look forward to working with you as the subcommittee continues to examine steps that can be taken to further protect the safety and health of our nation's mining workforce.

During the course of the hearing a question was asked relative to steps that could be taken to eradicate coal workers' pneumoconiosis (CWP). I was not afforded the opportunity to respond to this and want to be sure industry's views are part of the hearing record.

In order to understand what can be done, we first need a better understanding of the extent of the problem. Today there is significant disagreement over the percent of miner's afflicted by CWP and its geographic reach. From the perspective of approved benefit claims, approximately 15 percent of miners suffer from CWP. This includes miners deemed to be suffering from chronic obstructive pulmonary disease, which is associated with smoking rather than occupational exposure to respirable coal mine dust, but which is nevertheless included in the black lung statistics. From another perspective the incidence of CWP is far more limited.

Attached is a chart we prepared based on data from the National Institute for Occupational Safety and Health (NIOSH) Enhanced Surveillance Program. NIOSH's data documents that in most of the coal producing states the observed prevalence of disease is below the expected prevalence based upon: (1) analysis of the x-ray results for miners choosing to voluntarily participate in the program; and (2) analysis of the dust

samples collected by mine operators and Mine Safety and Health Administration inspectors. MSHA and supporters of the final dust rule characterize this problem as industry-wide, yet a closer examination of NIOSH's data, corroborated in NIOSH peer-reviewed publications, confirms that the heightened incidence of disease is a localized problem, confined to a small geographic region. Rather than address the cause supported by empirical evidence, MSHA choose to impose an unwarranted and unnecessary rule across the entire coal industry.

Following is a description of recommendations we provided to MSHA during consideration of the proposed rule, "Lowering Miner's Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors", 79 Fed. Reg. 24,814 (May 1, 2014). Our first recommendation is that all miners be required to participate in the surveillance program. Today approximately one-third voluntarily participate and this is insufficient to determine, with any degree of confidence, the prevalence of disease. The limited participation rate skews the data and does not provide a realistic appraisal of disease frequency across the entire coal mining workforce.

More importantly, this failure to require participation denies the miners themselves, their health care providers and their employer's critical information necessary to implement intervention actions, if warranted, during the miners' working career. While we continue to work to further reduce exposures in the work place, transferring miners to a less dusty environment has proven successful in preventing disease progression.

Additionally, NMA recommended that that those choosing to participate should be required to notify their employer when an x-ray or other testing indicates incidence of lung disease. By granting miners the option to choose if, or when, to notify their employer, current requirements (30 C.F.R. Part 90.3) do not protect miners' health.

In addition to establishing a mandatory surveillance program, we recommended that mine operators should be afforded the right to use administrative control and personal protective equipment once it is determined that engineering controls have been exhausted. These are industrial hygiene practices recognized in other occupational setting but, to the detriment of miner health, not in mining. As stated in our comments on the proposed rule:

> "... "hierarchy of controls" is an accepted industrial hygiene concept and an accepted safety and health practice, adopted by MSHA in other regulations and by OSHA. The protection strategy prefers engineering controls, if feasible, but recognizes administrative controls as acceptable, and reserves the use of respirators for circumstances where engineering and administrative controls are not feasible or able to provide the desired level of protection. The strategy's purpose is to produce health protection in a feasible and effective manner. MSHA's rejection of this time-tested strategy, except for permitting administrative controls for an unnecessarily

> limited period of time, is counterproductive to miners' health and should be revised to permit operators to utilize the entire suite of controls to protect miners' health."

Incredibly, none of these sensible recommendations were included in the final rule. As there is no one silver bullet to eradicate CWP, miners and mine operators must be afforded the right to utilize all tools if CWP is to be eliminated.

As noted previously, MSHA's failure to recognize and accept non-traditional controls, in addition to engineering controls, is a major flaw in the final rule and one that denies miners the protections afforded other workers.

In closing let me again thank you for providing the National Mining Association the opportunity to appear before the subcommittee on this important health issue. Our goal, like yours, is to enhance the safety and health of our nation's miners. We believe there are opportunities to do so but taking them requires abandoning traditional and outdated beliefs that are barriers to improvement. We look forward to continuing to work with you to identify and focus on these issues.

Sincerely,

Bruce Watzman

Enclosure

NIOSH Enhanced Coal Workers' Health Surveillance Program Survey Data by State

State	Number of Miners Examined	Observed Prevalence of Disease	Expected Prevalence of Disease
Alabama	617	2% (14) (>=1/0) 0% (0) (>=2/1) 0% (0) (PMF)	5% (29) (>=1/0) 1% (9) (>=2/1) 1% (6) (PMF)
Colorado	358	2% (6) (>=1/0) 0% (1) (>=2/1) 0% (1) (PMF)	3% (11) (>=1/0) 1% (3) (>=2/1) 1% (2) (PMF)
Illinois	544	1% (4) (>=1/0) 0% (0) (>=2/1) 0% (0) (PMF)	4% (24) (>=1/0) 1% (7) (>=2/1) 1% (4) (PMF)
Indiana	163	1% (1) (>=1/0) 0% (0) (>=2/1) 0% (0) (PMF)	4% (6) (>=1/0) 1% (2) (>=2/1) 1% (1) (PMF)
Kentucky	889	9% (80) (>=1/0) 3% (24) (>=2/1) 1% (13) (PMF)	4% (36) (>=1/0) 1% (10) (>=2/1) 1% (6) (PMF)
Maryland	32	0% (0) (>=1/0) 0% (0) (>=2/1) 0% (0) (PMF)	3% (1) (>=1/0) 0% (0) (>=2/1) 0% (0) (PMF)
New Mexico	29	0% (0) (>=1/0) 0% (0) (>=2/1) 0% (0) (PMF)	3% (1) (>=1/0) 0% (0) (>=2/1) 0% (0) (PMF)
Ohio	109	1% (1) (>=1/0) 0% (0) (>=2/1) 0% (0) (PMF)	6% (6) (>=1/0) 2% (2) (>=2/1) 1% (1) (PMF)

Pennsylvania	745	3% (21) (>=1/0) 1% (8) (>=2/1) 0% (3) (PMF)	5% (36) (>=1/0) 1% (11) (>=2/1) 1% (7) (PMF)
Tennessee	79	3% (2) (>=1/0) 1% (1) (>=2/1) 0% (0) (PMF)	4% (3) (>=1/0) 1% (1) (>=2/1) 0% (0) (PMF)
Utah	500	0% (2) (>=1/0) 0% (0) (>=2/1) 0% (0) (PMF)	4% (18) (>=1/0) 1% (5) (>=2/1) 1% (3) (PMF)
Virginia	649	8% (52) (>=1/0) 3% (20) (>=2/1) 1% (9) (PMF)	4% (27) (>=1/0) 1% (8) (>=2/1) 1% (4) (PMF)
West Virginia	1,990	5% (93) (>=1/0) 2% (42) (>=2/1) 1% (23) (PMF)	5% (93) (>=1/0) 1% (28) (>=2/1) 1% (17) (PMF)

U.S. Department of Labor

Mine Safety and Health Administration
201 12th Street South
Arlington, Virginia 22202-5452

OCT 30 2015

Mr. Bruce Watzman
National Mining Association
101 Constitution Avenue, NW
Suite 500 East
Washington, DC 20001

Dear Mr. Watzman:

Thank you for your letter of October 2, 2015, enclosing an updated PowerPoint (PPT) presentation you submitted previously that presents results of sampling conducted at an underground coal mine to examine the impact of rock dust on compliance sampling using both the new Continuous Personal Dust Monitor (CPDM) and the gravimetric sampler. Your PPT presentation showed that a mine operator conducted underground tests of CPDMs when exposed to airborne rock dust generated by a trickle duster in areas outby the working section. You believe that these results demonstrate that rock dusting significantly affects CPDM samples and that it will be impossible to comply with both the rock dust and respirable coal mine dust standards once the second phase of MSHA's respirable dust rule becomes effective on February 1, 2016.

The CPDM and the gravimetric sampler measure the same thing: total respirable mine dust of any type. This measurement includes any respirable rock dust in the sampled environment. The current rock dust standards have been in place since 2010. Sample results since that time, and especially over the last year, show that rock dust is not currently causing respirable dust compliance problems. It is not clear why sampling using a CPDM would be any different.

The gravimetric sampler has been used to collect respirable coal mine dust in the same manner since the Federal Coal Mine Health and Safety Act of 1969 (Coal Act), and the CPDM does not change this approach. As long as properly maintained dust controls are used, coal mine operators who will be required to use the CPDM for dust sampling should see no increase in the number of samples that exceed MSHA's dust standards due to the type of sampling device used.

The CPDM is a state-of-the-art tool that benefited from years of research and testing with the participation of industry before MSHA and NIOSH published in 2010 a final rule that established the approval requirements for such devices (75 Fed. Reg. 17512, Apr. 6, 2010). This final rule allowed for thorough public participation in the rulemaking process. In 2011, MSHA and NIOSH approved a commercial CPDM as meeting the requirements of 30 CFR Part 74.

You can now file your MSHA forms online at www.MSHA.gov. It's easy, it's fast, and it saves you money!

The CPDM will allow miners and mine operators for the first time to monitor, in real time, miners' exposures to respirable dust. With this real-time information, miners and mine operators can make adjustments during the course of a shift to reduce exposures to coal mine dust. The gravimetric sampling device used since the Coal Act has left miners working in unhealthy dust for days while the samples collected during a shift are analyzed; the use of the new CPDM will change that.

Your test results, which showed that CPDM measurements exceeded the respirable dust standard when no coal was being produced, confirms what we already know. As has been the case for years, any accurate dust sampler will measure the respirable portion of dust in the mine atmosphere. If a trickle rock duster is operated on and off for 30-minute cycles, sampling downwind of the trickle duster with a gravimetric sampling device will not show obvious spikes due to the intentional dispersion of respirable-sized rock dust particles. However, the CPDM will show these spikes in respirable dust concentrations. The CPDM has the advantage of providing mine operators and miners with real-time sampling results which will enable them to identify problems, assess the effectiveness of dust controls in mining conditions, and make adjustments to controls or mining systems. By taking immediate action to correct dust conditions, operators can better protect miners from overexposure to all respirable coal mine dust.

Your results seem to imply that miners would be assigned to continuously work in the immediate areas where rock dust is applied throughout their shifts. MSHA's experience is that mine operators do not apply rock dust under such conditions. MSHA does not believe that these results demonstrate actual sampling results under the rule, or that it would be impractical or impossible for operators to be in compliance with both the rock dust and respirable coal mine dust standards. Accordingly, your conclusion that your results support a prediction that MSHA will issue invalid citations after the February 1, 2016 effective date for Phase II of the respirable dust rule is unfounded.

You also state that in-mine testing demonstrates a lack of correlation between the CPDM and the gravimetric sampler with the CPDM results routinely higher than those of the gravimetric sampler. It is unclear whether your side-by-side sampling study to compare the CPDM and gravimetric sampler results met NIOSH's Accuracy Criterion[1] or any other rigorous testing standards. The testing on which MSHA relied in deciding to sample with CPDMs met the highest testing standards and demonstrated that the CPDM's results highly correlate with the results from gravimetric samplers.

NIOSH test results of the CPDM, which were peer-reviewed, have proven that the CPDM can accurately and precisely measure respirable coal mine dust in the mine environment, and that end-of-shift concentrations measured by the CPDM and the gravimetric sampler are statistically indistinguishable. NIOSH arrived at this conclusion from laboratory tests conducted in a dust chamber at the NIOSH Pittsburgh Research

[1] Kennedy, E.R., T.J. Fischbach, R. Song, P.M. Eller, and S.A. Shulman. 1995. Guidelines for Air Sampling and Analytical Method Development and Evaluation, NIOSH Publication No. 95-117.

Laboratory. The dust chamber provided a uniform atmosphere, which maintained control of the test variables, for comparing the CPDM and the gravimetric sample.

Tests conducted at mine sites similarly found that the CPDM accurately and precisely measures respirable coal dust. The NIOSH mine site tests included a variety of coal types, machine types, geographic locations, and seam heights. NIOSH collected 108 full-shift samples. Labor and industry contributed to the development of in-mine test protocols to determine if the CPDM was suitable for use in coal mines, durable for everyday mine use, and ergonomically acceptable to miners. In a 2008 study, NIOSH also reported additional data from 180 randomly-selected mechanized mining units (MMUs), which represented 20 percent of all MMUs in production at that time. The results indicated the suitability of the CPDM for in-mine use to assess respirable dust concentration defined in accordance with the personal sampler (gravimetric sampler).[2] It is unclear whether your side-by-side comparisons of end-of-shift concentrations measured by the CPDM and the gravimetric sampler were conducted under similar statistical rigor.

Your PPT presentation also indicates that a mine operator conducted underground tests of CPDMs under conditions that demonstrate an inability of CPDMs to provide accurate results in the presence of rock dusting. The conclusions drawn from this testing, however, are based on inaccurate assumptions about mine conditions. Accordingly, the results do not demonstrate any deficiency in the CPDM's sampling accuracy, even in the presence of rock dusting.

Specifically, testing was conducted on equipment operators at a producing coal mine where there had been no production on the section for a minimum of five hours prior to the crew's arrival, and the only dust in the mine atmosphere was rock dust that had been applied by the previous shift. All four operator full-shift samples showed spikes in dust readings prior to production beginning, but those spikes did not equate to an overexposure over the full shift. The data did not provide information on the amount of rock dust applied or how it was controlled to apply the needed amounts. All four end-of-shift samples measured less than the existing 2.0 milligrams per cubic meter of air (mg/m^3) standard and three of the four end-of-shift samples were less than the standard that will become effective on August 1, 2016. Similar results were reported for samples taken for the scoop operator and roof-bolter operator with both end-of-shift samples measuring less than 1.5 mg/m^3. However, respirable dust lingering in the atmosphere of a coal mine, especially on the working section, indicates poor ventilation. Similar to a methane detector that alerts a miner to the presence of excess methane, the spikes in

[2] See Volkwein, J.C., R.P. Vinson, L.J. McWilliams, D.P. Tuchman, and S.E. Mischler. June 2004. Performance of a New Personal Respirable Dust Monitor For Mine Use. CDC Report of Investigation 9663, page 5; Volkwein, J.C., R.P. Vinson, S.J. Page, L.J. McWilliams, G.J. Joy, S.E. Mischler , and D.P. Tuchman. September 2006, pages 2, 15, 16. Laboratory and Field Performance of a Continuously Measuring Personal Respirable Dust Monitor. CDC Report of Investigations 9669; and Page, S., J. Volkwein, R. Vinson, G. Joy, S. Mischler, D. Tuchman, and L. McWilliams, 2008. Equivalency of a Personal Dust Monitor to the Current United States Coal Mine Respirable Dust Sampler. Journal of Environmental Monitoring, 10(1) 96-101, pages 2, 6.

respirable dust detected by the CPDM inform the miner and the mine operator that adjustments to ventilation controls are necessary.

Based on our review of the information you presented, it appears that your test results demonstrate that mine operators and miners will benefit from using the CPDM because, unlike the gravimetric sampler, the CPDM has the advantage of providing the mine operators and miners with real-time sampling results. These real-time sampling results will enable them to identify problems and assess the effectiveness of dust controls in different mining conditions. If there is a short-term, high concentration of dust in the atmosphere, for example, as a result of rock dusting, the CPDM's real-time sampling results would allow a miner to reposition himself to avoid exposure to the high-dust concentration. Moreover, I recently observed dust controls in action controlling coal mine dust and was impressed by their efficiency. Using effective engineering controls to keep respirable coal mine dust to a minimum, which includes exercising care in the application of rock dust to limit the exposure of miners working downwind, will reduce or eliminate the potential impact of rock dust on respirable coal mine dust levels.

You also stated that the respirable dust rule's expanded consecutive shift sampling schedule, combined with the existing rock dusting requirements, will make it impractical, if not impossible, to comply with both regulations without contaminating the respirable dust samples. However, you provide no explanation for why sampling over 15 shifts would be any different than sampling over 5 shifts, as is required currently. To comply with MSHA's existing rock dust standards, rock dusting would have occurred at various times during normal production shifts. MSHA's analysis of over 41,000 samples from underground coal mines for the first year since the new rule took effect in August 2014 shows overwhelming compliance – approximately 98 percent of operator and MSHA-collected underground coal mine dust samples were at or below the respirable dust standards. Operators' average concentrations for occupations with the greatest dust exposures are at a record low of 0.65 milligrams per cubic meter of air (mg/m^3), which is far below the 1.5 mg/m^3 standard that will become effective on August 1, 2016. The dust controls that were used at these mines worked to control miners' exposures despite claims by some operators that compliance was not achievable. As rock dusting would have occurred during most or all of these shifts already, there is no reason you have articulated that would support an argument that sampling on more shifts would make any difference.

Furthermore, even the 2010 rule change requiring additional rock dusting did not adversely affect sampling results. In fact, the average of respirable dust concentrations in occupations with the greatest exposure has dropped year-after-year since 2010, when the total incombustible content of rock dust increased from 65 to 80 percent.

You also expressed concern regarding NIOSH research into rock dust composition and particle size that you believe may affect a mine operator's ability to comply with the dust rule. As you know, any change in MSHA's existing rock dust requirements would require public notice-and-comment rulemaking procedures. NIOSH research on particle size and mix is ongoing and has not concluded. MSHA is involved in that research with the ongoing NIOSH Rock Dust Partnership. Any recommendation from NIOSH to change the particle size and mix of rock dust does not constitute an industry

requirement unless MSHA adopted such a recommendation through public rulemaking. This process would allow for thorough public participation and full consideration of any operator concerns, including the possible impact of new rock dusting standards on operators' ability to comply with the dust rule.

At the House Subcommittee on Workforce Protections hearing on October 21, 2015, you stated that MSHA was not willing to work with industry on its concerns about the impact of rock dusting on dust sampling. This is simply not the case. As you know, MSHA has offered assistance to operators leading up to and throughout the dust rule phase-in, and that assistance will continue. In fact, MSHA provided extensive assistance to mining industry stakeholders across the country to ready them for the implementation of the rule and has made a standing offer to assist mine operators who may need additional compliance assistance or information on engineering controls. Over an approximate one and one-half year period since the final rule was published, MSHA has extended this offer of compliance assistance to the industry at every stakeholder outreach meeting on the dust rule, and at several additional stakeholder meetings held at the Agency's Arlington Headquarters -- a total of 18 meetings. Only one operator has responded thus far to our offer to provide in-mine assistance regarding rock dust concerns and sampling despite repeated offers from MSHA. I urge you to encourage mine operators concerned about compliance to contact MSHA so that we can assist them.

In addition, since extensive, controlled NIOSH research already has been conducted regarding the CPDM's equivalence to the gravimetric sampler in measuring total mine respirable dust, we do not agree that additional research is needed. Furthermore, as you have articulated no explanation as to how or why mine operators would or should rock dust differently over 15 shifts than they currently do over 5 shifts, it is unclear why research would be needed regarding that particular issue either. In short, MSHA does not believe you have offered reasons why operators that currently comply with both the rock dust standards and the respirable dust standards would be unable to comply when sampling more shifts using an equivalent sampling device.

Finally, I want to reiterate that the purpose of the dust rule is to reduce miners' exposure to unhealthy coal mine dust to prevent black lung disease, a chronic, irreversible occupational lung disease caused by the inhalation of dangerous levels of respirable coal mine dust by those working in coal mines. There are no specific treatments to cure the disease, and the chronic effects of the disease may progress even after miners are no longer exposed to respirable coal mine dust, resulting in increased disability and death. Other complications may follow, such as pulmonary and cardiac failure, that result in total disability and premature death.

Since 1969, more than 76,000 deaths have identified the disease as a cause or contributing factor, and, over $45 billion in federal compensation costs have been paid since 1970. Miners are still getting the disease, and in FY 2014, about 7,400 federal compensation claims were filed as a result of the disease. Since the late 1990s, the number of identified pneumoconiosis cases has doubled, with younger miners getting the disease. Of the autopsies conducted on the 29 miners who were killed at the Upper Big Branch mining disaster in 2010, lung tissue from 24 miners could be examined and

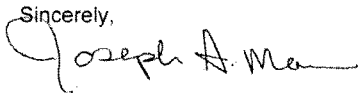
17 of the 24 (71 percent) had evidence of the disease. Five of those 17 miners had less than 10 years of coal mining experience. The autopsy findings of the Upper Big Branch miners are one more indicator that this disease is more widespread, despite MSHA having received only one Part 50 filing on the disease from the Upper Big Branch mine since January 2010.

Under the CDC/NIOSH Coal Workers' Health Surveillance Program, x-rays were conducted on 15,668 miners from 2010 to 2014. Of that number, 464 miners were found to have pneumoconiosis, with 90 of those having the most severe form of the disease. According to NIOSH, the program conducts surveillance on only 32 percent of our Nation's coal miners, so the number of cases of the disease is likely much higher. Also between October 1, 2010, and September 30, 2015, NIOSH notified 488 active coal miners on behalf of MSHA that they were eligible for Part 90 rights based on evidence of coal workers' pneumoconiosis from chest x-rays. Under Part 90, miners with the disease have the right to transfer to less dusty positions. MSHA's Part 50 data on the evidence of pneumoconiosis reported by mine operators show that they reported 701 cases from October 1, 2010, through September 30, 2015, from about 200 mines in nine states, including West Virginia, Virginia, Kentucky, Pennsylvania, Colorado, Alabama, Illinois, New Mexico, and Utah.

We need to continue our actions to end this unnecessary plague on coal miners. The purpose of the dust rule is to reduce miners' exposure to unhealthy coal mine dust to prevent the disease. The controls in place prior to the rule's implementation last year simply failed to protect miners from the horrific disease.

Thank you for your continued interest in improving the safety and health for our Nation's miners.

Sincerely,



Joseph A. Main
Assistant Secretary of Labor for
Mine Safety and Health

[Whereupon, at 11:45 a.m., the subcommittee was adjourned.]

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