

**STATEMENT OF JONATHAN L. SNARE
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U.S. DEPARTMENT OF LABOR
BEFORE THE
COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
MAY 16, 2007**

Chairman Miller, Ranking Member McKeon, and Members of the Committee, I am pleased to appear before you today to affirm the commitment of the Office of the Solicitor to support and assist the Mine Safety and Health Administration (MSHA) in its efforts to improve and protect the health and safety of our nation's miners. We believe that MSHA and the attorneys in the Solicitor's Office must work hand-in-hand to carry out MSHA's enforcement and regulatory responsibilities.

Role of the Office of the Solicitor

The Office of the Solicitor, or "SOL" as we are known in the Department, has a long and distinguished record of providing high quality legal services to the Department of Labor and its client agencies. SOL is relatively unique among legal offices in federal agencies other than the Department of Justice (DOJ) because it has independent litigating authority under a number of federal statutes, including the Mine Act of 1977. Attorneys in our headquarters division and regional offices handle MSHA's enforcement litigation before the independent Federal Mine Safety and Health Review Commission (Commission) Administrative Law Judges (ALJs). Enforcement is our first priority and accounts for the majority of our efforts in support of the MSHA program. We prosecute and defend MSHA enforcement actions and whistleblower protection cases before the Commission, secure access to mines through injunctions when mine operators deny entry to MSHA's inspectors, and jointly refer criminal matters like the referral of the Aracoma violations to DOJ for investigation and possible criminal prosecution. SOL attorneys also assist MSHA by providing a broad range of legal guidance and advice on all aspects of our client's activities.

Regular Enforcement Responsibilities

Following the mining accidents last year and enactment of the MINER Act, SOL mobilized legal resources to assist MSHA in implementing the new legislation, while continuing to carry out regular enforcement responsibilities.

Litigating contested violations. In recent years, mine operators have contested an average of six percent of the total number of violations issued, which have ranged up to 135,000. All contested violations are handled by SOL attorneys or trained MSHA specialists. We expect that the historic contest rate of six percent will increase as a reaction to the increased civil penalties now being assessed and the full use of MSHA's enforcement tools as directed by Assistant Secretary Stickler.

Litigating whistleblower complaints. SOL and MSHA have continued to promptly address whistleblower cases—a high priority issue for DOL and MSHA. During Fiscal Year 2006, MSHA received 106 complaints. As of early May this year, MSHA has received 59 complaints. To ensure that whistleblower cases get the immediate attention they deserve, SOL and MSHA have established internal procedures that require a decision on whether or not to file the case with the Commission within 90 days of the complaint being filed with MSHA. Discharge cases are handled even faster. In appropriate cases, MSHA and SOL will work together to take the action necessary to seek temporary reinstatement of a miner allegedly discharged for engaging in protected safety activity within a month from the date the miner files a complaint.

Seeking injunctions to enforce withdrawal orders. We also give high priority to any case involving withdrawal orders issued by MSHA inspectors because they have found an imminent danger exists at the mine. While such cases are relatively rare, they can be complex (for example, cases involving expert testimony about mine ventilation plans). Although under the Mine Act, violations are corrected first before they are litigated, any enforcement action that stops production is vigorously contested before the judge. For the same reason, any case involving a failure to abate a violation, and thus issuance of a withdrawal order, also gets high priority and can result in an injunction action in District Court.

Going after delinquent mine operators. In addition to our priority enforcement cases, we are using innovative methods to go beyond the standard debt collection procedures in the Debt Collection Act to ensure that delinquent mine operators pay their civil penalties, including actions to enjoin operators from failing to pay civil penalties. Once the court issues an order, a recalcitrant operator can be held in contempt if he does not pay.

Support for Accident Investigations and Criminal Referrals

When fatal accidents occur, SOL attorneys are immediately notified and are prepared to give on-the-scene legal support to MSHA investigators. In major accidents like Sago, Aracoma, and Darby, we assign multiple attorneys to the investigation to ensure that the accident team has our full support and that eventual enforcement actions are backed up by solid evidence.

For example, during the Sago investigation, after two anonymous miners designated the United Mine Workers of America (UMWA) as a representative of miners at Sago, the operator refused to allow the UMWA representatives to participate in the underground accident investigation. SOL took immediate action to obtain an injunction in District Court and successfully defended the injunction in the Court of Appeals. SOL's injunction case was filed on the same day the operator denied the UMWA their participation rights and the Sago investigation proceeded without interruption with participation by the UMWA.

The Aracoma investigation is an example of a complex investigation involving both a criminal referral and the highest civil penalty against a coal mine operator in history.

SOL also plays a critical role in assisting MSHA to refer potential criminal violations of the Mine Act to DOJ whenever they are found. Referrals to DOJ are done by a letter signed jointly by career MSHA and SOL officials.

New Enforcement Developments

SOL works closely with MSHA to consider how best to employ new enforcement tools to protect the safety of American miners, such as the MINER Act's authority to issue citations for flagrant violations of mandatory safety and health standards.

SOL advised and assisted MSHA in the development of guidelines for determining when a violation should be designated as "flagrant" and assessed an appropriately high penalty. Citations for flagrant violations are particularly useful in instances where the mine operator has acted recklessly or habitually violated MSHA's mandatory standards and view penalties as the cost of doing business. SOL works closely with MSHA when an inspector identifies a violation appropriate for a flagrant designation to make sure that all the elements are satisfied. Flagrant violations can result in a penalty up to \$220, 000. We fully expect these cases to be litigated and we will defend them at the Commission and on appeal where necessary.

Under the MINER Act, new minimum penalties have been implemented by MSHA regarding accident notification and unwarrantable failures. We believe that mine operators will begin to contest citations as a reaction to these new minimum penalties.

Assistant Secretary Stickler's decision to utilize the pattern of violations provision in the Mine Act will also require careful planning and preparation to ensure that we can meet any legal challenge. Under this provision, MSHA can issue a withdrawal order requiring miners to exit the mine. Even though this provision has been in MSHA's arsenal for over 30 years, it has never been used. As Assistant Secretary Stickler notes in his testimony, he intends to systematically review the enforcement and safety records at all mines and take appropriate action where a pattern of violations is established. Once the power of this tool has been exercised, we expect that mine operators will vigorously contest more citations to avoid the potential of withdrawal orders based upon a notice of a pattern of violations.

Development and Defense of New Rules

SOL attorneys at headquarters provide legal support to MSHA's rulemaking efforts. The tragic events in early 2006, particularly the accidents at the Sago and Aracoma mines, led MSHA to conclude that a more integrated approach to mine emergency response and evacuation was necessary. This conclusion prompted the issuance of an Emergency Temporary Standard (ETS) to protect miners from the grave danger associated with mine emergencies and evacuations. In accordance with the Mine Act, the ETS was effective immediately upon publication in the *Federal Register* on March 9, 2006, and served as the proposed rule. This was the second ETS issued by this Administration out of only three in MSHA's nearly 30-year history. SOL worked closely with MSHA to develop the ETS and the subsequent final rule on Emergency Mine Evacuation. Our attorneys provided legal advice and counseling on all aspects of the rulemaking, including the "grave danger" finding, the regulatory text, and the preamble justification for the rule.

In addition to the larger, more intensive rulemakings including the update of the civil penalty regulations and the rules on seals and mine rescue mandated by the MINER Act, SOL has supported MSHA by providing legal guidance and advice on the review and approval of Emergency Response Plans, developing policy on implementing the Family Liaison Program, and chartering and providing legal support to the technical study panel that is reviewing the use of belt air and the composition and fire retardant properties of belt materials.

In assisting MSHA in achieving its objectives through the development and implementation of new rules, SOL is keenly focused on making sure that the requirements withstand legal challenges. The efforts are particularly important because of the likelihood that these rules will be challenged, as were two of MSHA's recent initiatives.

The first challenge was filed by the National Mining Association (NMA) to MSHA's final rule on emergency mine evacuations.

The second challenge was filed also by the NMA to MSHA's February 2007 Program Information Bulletin (PIB). This PIB stems from the MINER Act's requirement that underground coal mine operators adopt emergency response plans providing for sufficient supplies of post-accident breathable air. On May 7, 2007, we filed a motion to dismiss this challenge.

Both challenges were filed in the D.C. Circuit Court of Appeals and SOL will work tirelessly to defend MSHA's action in both cases. We are also proud of our successful defense earlier this year of MSHA's rulemaking that established new standards for diesel particulate matter (DPM) exposure in underground metal and non-metal mines. The DPM legal victory resolved many questions raised by the industry regarding the validity of MSHA's risk assessment and the appropriate surrogate for measuring DPM. SOL continues to assist MSHA with legal advice concerning implementation of the final DPM rule and is consulted, as necessary, on enforcement issues.

Conclusion

SOL continues to fully support MSHA and Assistant Secretary Stickler's clear message of strong enforcement. The Office of the Solicitor is also working with MSHA to ensure timely completion of the Congressional mandates in the MINER Act. The attorneys in our office take their responsibilities seriously and are proud to do their part in protecting America's workers.