

**STATEMENT OF
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U.S. DEPARTMENT OF LABOR
BEFORE THE
COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS
UNITED STATES SENATE**

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Chairman Harkin, Ranking Member Enzi, Members of the Committee, I want to thank you for inviting us here today. I wish I were here under different circumstances.

Let me first express my deepest condolences to the families, friends and co-workers of the 29 miners who perished in the Upper Big Branch Mine on April 5, 2010, and offer my wishes for a speedy recovery to the surviving miner who remains under medical care. Our prayers are with all of them.

But as the President said, “we owe them more than prayers. We owe them action. We owe them accountability. We owe them an assurance that when they go to work every day, when they enter that dark mine, they are not alone. They ought to know that behind them there is a company that’s doing what it takes to protect them, and a government that is looking out for their safety.”

Every worker has a right to a safe and healthy workplace. And every worker has a right to go home at the end of his or her shift and to do so without a workplace injury or

illness. Workplace fatalities – even in an industry like underground coal mining – are preventable. No one should die for a paycheck.

I also want to remind the Committee that we do not just face a mine safety crisis in this country; we face a workplace safety crisis. Fourteen workers lose their lives every day in this country, just doing their jobs. Dr. David Michaels, Assistant Secretary of Labor for the Occupational Safety and Health Administration, will be testifying later this afternoon and will describe important measures that need to be taken to ensure the safety of all American workers.

Throughout the media coverage of the Upper Big Branch tragedy, many commentators have implied that we should expect and accept a certain number of fatalities every year in coal mining. The Department of Labor and the Mine Safety and Health Administration (MSHA) could not disagree more strongly. Fatalities in coal mines are preventable. Explosions in coal mines are preventable. The tragedy at the Upper Big Branch mine did not have to happen. That is why I am so grateful to be here with you to discuss how we can make President Obama's promise a reality.

Events at the Upper Big Branch Mine

First, I would like to share with you a short summary of what happened on April 5, 2010 at Performance Coal Company's Upper Big Branch Mine-South (UBB) in Montcoal, West Virginia. The mine operator of UBB is Massey Energy Company.

We know there was a catastrophic explosion that triggered carbon monoxide alarms at the mine at 3:02 pm, indicating this was the likely time of the explosion that killed 29 miners and put two survivors in the hospital. Initial reports indicate that the explosion was massive.

The accident investigation team will evaluate all aspects of this accident and identify the cause of the disaster. Based upon initial reports from the mine rescue teams, the most extensive damage appears to have occurred in and near active working sections of the mine. The rescue teams reported mining equipment severely damaged in these areas. Every miner working in this area was believed to have been killed instantly.

While the cause of this specific explosion is still being determined, most mine explosions are caused by the combustion of accumulations of methane, which may combine with combustible coal dust mixed with air. Historically, blasts of this magnitude have involved propagation from coal dust.

The explosion at the Upper Big Branch Mine occurred at or around the time of a shift change. It killed miners in and around two working sections of the mine. It also killed and injured miners who we believe were traveling from the working sections at the end of their shift.

At approximately 3:27 pm, MSHA records indicate the company alerted MSHA and the West Virginia Department of Miners' Health, Safety and Training of the explosion. Immediately, over 20 mine emergency rescue teams from Massey, other coal companies in the region, the state, and MSHA responded to the disaster, with the first rescue teams

going underground at approximately 5:30pm. Due to the extensive damage from the explosion, the rescue teams reportedly had to proceed more than a mile on foot to reach the working section.

Within 10 hours of the explosion, rescue teams had found 18 victims in the Upper Big Branch Mine, in addition to the 7 dead and 2 injured miners evacuated by fellow miners immediately following the explosion. Rescue efforts continued in the early morning hours of April 6, but were suspended when rescuers reported encountering heavy smoke, methane, and carbon monoxide. Rescuers started drilling boreholes to clear the air inside the mine before the rescue teams reentered the mine.

Mine rescue teams made additional efforts to enter the mine early in the morning of Wednesday, April 7, the night of Thursday, April 8, and early in the morning of Friday, April 9. Each time they were forced to exit before the final four miners were found. Finally, on the evening of April 9, the final four miners were found -- three in the longwall 22 section, and one in the longwall headgate area. A total of 29 miners died as a result of the explosion, and one remains hospitalized. From the time of the explosion until the last missing miner was located, the rescue effort lasted 104 hours.

These tragic events followed a years-long effort by MSHA to use the tools we had available to force Massey Energy to comply with the law and turn around its extensive record of serious safety and health violations at the Upper Big Branch Mine. From 2007 until today, MSHA has steadily increased its enforcement presence at Upper Big Branch

Mine. In 2007, MSHA inspectors were on-site at Upper Big Branch mine a total of 934 hours. In 2009, inspectors were on-site at the mine for a total of 1,854 hours.

During all those hours of inspections, MSHA found and issued an increasing number of citations for “significant and substantial” (“S&S”) violations of the Mine Act, including an alarming number of citations and orders requiring miners to be withdrawn from the mine. In December 2007, MSHA informed the mine it could be placed into “pattern of violations” status if it did not take steps to reduce its significant and substantial violations. If implemented, pattern of violations status would have given MSHA a powerful enforcement tool, enabling the agency to order the withdrawal of miners from any area with S&S violations until such violations were fixed. However, the mine operator was able to successfully avert these consequences by reducing the levels of serious violations thereby avoiding being classified in a “pattern of violations” status.

Upper Big Branch mine again experienced a significant spike in safety violations in 2009. MSHA issued 515 citations and orders at the mine in 2009 and another 124 to date in 2010. MSHA issued fines for these violations of nearly \$1.1 million; though, most of those fines are being contested by Massey.

The citations MSHA has issued at Upper Big Branch have not only been more numerous than average, they have also been more serious. Over 39% of citations issued at Upper Big Branch in 2009 were for S&S violations. In some prior years, the S&S rate at Upper Big Branch has been 10-12% higher than the national average.

In what is perhaps the most troubling statistic, in 2009, MSHA issued 48 withdrawal orders at the Upper Big Branch Mine for repeated actions that could significantly and substantially contribute to a hazard that the operator knew or should have known violated safety and health rules. Massey failed to address these violations over and over again until a federal mine inspector ordered it done. The mine's rate for these kinds of violations is nearly 19 times the national rate.

Despite the 515 citations and orders issued at Upper Big Branch in 2009, three other Massey mines had more citations. The Department of Labor is in litigation to establish that one of these, the Tiller #1 Mine operated by Massey's Knox Creek Coal Corporation, is a pattern violator. If MSHA prevails in the litigation, Knox Creek will be the first mine to be placed on pattern of violations status since the passage of the Mine Act.

MSHA's Current Tools for Holding Mine Operators Accountable

Following my confirmation as Assistant Secretary of Labor for Mine Safety and Health, I began evaluating MSHA's enforcement program to identify areas in need of improvement. Among those identified was the need for mine operators to take more responsibility for the high number of violations being cited at mines across the country, increasing mine operator inspection requirements and reforming the "pattern of violations" program.

In the days since the Upper Big Branch mine explosion, we have spent a considerable amount of time at MSHA reviewing the tools available to MSHA to enforce the law, the weaknesses in those tools, and how we think those tools should be changed. I would like to start by describing the tools we have available.

Federal law places the responsibility for compliance with safety and health standards on mine operators. MSHA is charged with the promulgation and enforcement of those standards. Under the Mine Act, MSHA inspects all underground mines at least four times annually and all surface operations at least twice annually. The Act requires inspectors to cite all violations they observe. MSHA also investigates all fatal accidents and miner complaints of hazardous conditions or discrimination.

When faced with a mine with a seriously deficient safety record like the Upper Big Branch mine, MSHA has limited tools to hold bad actors accountable and to try to force them to change their behavior. For example, MSHA can withdraw miners from a mine or a section of a mine, if an inspector finds a condition which presents an “imminent danger.” The withdrawal order is in effect only until the hazard is abated. Since 2000, MSHA issued five imminent danger orders at the Upper Big Branch mine, with the last one coming in 2009.

MSHA also has the authority to require abatement of all cited violations. If a mine operator fails to abate a violation within the time prescribed by MSHA, MSHA can withdraw miners from the affected portion of the mine until the operator corrects the

condition and MSHA ensures that the hazard no longer exists. Since 2000, MSHA issued 17 of these withdrawal orders at the Upper Big Branch mine, including four in 2009 and one in 2010.

MSHA can hold operators who engage in actions that could significantly and substantially contribute to a hazard that they knew or should have known violated safety and health rules to a more rigorous enforcement regime. If MSHA finds repeated violations of this type, known as “unwarrantable failures,” it can immediately issue orders withdrawing miners from the affected area of the mine until MSHA determines that the violation is abated. Since 2000, MSHA has issued 17 withdrawal orders under Section 104(d)(1) of the Mine Act based on unwarrantable failures, and 67 withdrawal orders for repeated similar violations under Section 104(d)(2) of the Act at the Upper Big Branch mine.

Finally, MSHA has the authority to place a mine into a “pattern of violations” category based on a number of criteria including the number of serious violations within a 24 month timeframe. If a mine ultimately ends up in a “pattern of violations” status, MSHA can issue withdrawal orders for every serious violation until each violation is fixed. The Upper Big Branch mine was placed into a “potential pattern of violations” category in 2007, but quickly reduced its serious violations by more than 30% to avoid ending up in an actual pattern of violations status.

Were it not for a computer error in the screening process, the mine could have been placed into potential pattern of violations status in October of 2009, when the last pattern of violations review for this mine took place.¹

Upon notification of being in potential pattern of violations status, the mine then would have been given 90 days to reduce its S&S violations by 30 percent, or to reduce its level of S&S violations to below the industry average for mines of similar type and size. From October through December 2009, the Upper Big Branch Mine dramatically reduced its level of S&S violations - by nearly 65 percent. For this reason, even had there been no computer programming error, the mine would not, under MSHA's current rules, have been in a pattern of violations status at the time of the explosion.

Weaknesses in MSHA's Current Tools

When I accepted President Obama's appointment to lead MSHA, I had a number of goals and reforms in mind for the agency. The most important of these goals was to shift the current enforcement model for mine safety and health to one that is consistent with the intent of the Mine Act – a model in which all mine operators take primary responsibility for ensuring compliance with safety and health standards. While tough enforcement is critical to having safer mines, MSHA cannot be in every mine, every day on every shift. That is why miners are safest when employers take responsibility for preventing violations and hazards, not when MSHA cites them.

¹ MSHA will be modifying the pattern of violations screening process and revising and confirming the accuracy of the programming and query system used going forward.

But MSHA's current toolbox of enforcement measures is not well stocked to encourage prevention. While many mine operators and other employers in dangerous industries have a culture of safety, driven by the recognition they are responsible for safeguarding their workers' safety and health, others choose a different approach. They choose to take advantage of the fact that MSHA cannot be looking over their shoulders at every minute of every day to monitor their behavior. They make a calculated decision about how and if they should comply with mine safety and health laws, weighing the likelihood they will be caught against the consequence if they should. This is the "catch-me-if-you-can" approach to safety and health in action.

The "catch-me-if-you-can" model of workplace safety and health appears to have been at work at Upper Big Branch. The company that owns this mine, Massey Energy, has a troubling record when it comes to protecting its workers. In Calendar Year 2009, MSHA assessed nearly 10,985 citations and orders against Massey Energy. Systemic safety problems are not limited to the Upper Big Branch mine, to Massey Energy, or to the mining industry. Indeed, the "catch-me-if-you-can" approach to compliance appears in all types of American workplaces. My colleague, Dr. David Michaels, will shortly testify about how OSHA is dealing with this phenomenon in the non-mining sector.

At MSHA, our "pattern of violations" program should be one of our most serious and effective tools for holding bad actors accountable. But MSHA's experience at the Upper Big Branch mine demonstrates the program's limitations under current procedures.

Massey Energy employed a popular tactic at Upper Big Branch used by mines with troubling safety records to avoid potential pattern of violations status. Massey Energy contested large numbers of their significant and substantial citations. In Calendar Year 2009, the Massey Energy Company was assessed penalties that totaled in excess of \$13.5 million, and contested \$10.5 million of those penalties, or 78 percent. MSHA uses only final orders to establish a pattern of violations. It takes more than 600 days for the average contested citation to reach the “final order” stage from the day the citation is written. The delay is due largely to a more than 16,000 case backlog at the independent Federal Mine Safety and Health Review Commission (FMSHRC).

Even where the violation is obvious, operators have a huge incentive to contest the violation. A contest blocks MSHA from using the violation – even the obvious ones – to put the mine into a potential pattern of violations for an average 500 days after the case has been contested. For operators with troubling safety records, that may amount to 500 days without having to worry about being put into a “pattern of violations” status. In fact, the Upper Big Branch mine contested the majority of its serious violation citations. From 2007 to 2009, the mine contested 77% of its S&S violations.

Even when the excessive contest strategy fails and a mine ends up in a “potential pattern of violations” status, it can almost always avoid the ultimate “pattern of violations” label with temporary improvements in safety. The current system allows an operator to avoid going into pattern of violation status if the operator reduces its S&S violations by more than 30% within 90 days. Upper Big Branch mine did this in 2007 and avoided pattern of

violations status, even though the number of S&S violations remained above the national average. The policies this Administration inherited make it relatively easy for operators like Massey to avoid pattern of violations status. In fact, MSHA has been able to place only one mine into pattern of violations status, and that order was revoked when one of the violations on which it was based was thrown out through the contest process.

As you can see, the current rules and procedures make it far too easy for mines to avoid the one robust tool MSHA has for really cracking down on recalcitrant operators.

Improving MSHA's Tools: Areas for Reform

The weaknesses in even our strongest tools are clearer in the wake of the Upper Big Branch tragedy. The path we need to be on to strengthen those tools is clearer, too. Undoubtedly, as we learn more about what happened at Upper Big Branch, we will have more and better ideas about how to change our practices, regulations and law. For now, I would like to outline some of the steps we are taking already and those we would like to recommend.

Plan/Prevent/Protect Regulations. Secretary Solis is committed to changing the “catch-me-if-you-can” approach everywhere it exists. That’s why our regulatory agenda, which we made public just yesterday, is focused on regulations that will require companies to take responsibility to find and fix problems *before* they are discovered by the Department’s worker protection agencies. To achieve this goal, we need a system that encourages employers to engage in planning and control of hazards. This kind of

planning, coupled with enforcement, will result in actual protection of workers or what we call the “plan/prevent/protect” system.

At MSHA, we announced that we are moving forward to solicit information on requiring use of a comprehensive health and safety management program. In addition, we will be proposing a rule to reinstitute the pre-shift examinations in areas of mines where miners work or travel for violations of mandatory safety and health standards. The 1969 Coal Mine Health and Safety Act (and the Mine Act) provides that such inspections may be required, and the requirement had been contained in MSHA’s regulations until they were changed in 1992. We believe that these measures will help prevent hazardous conditions from ever existing and threatening workers.

Pattern of Violations. We know that even with these new measures in place it is too easy for mine operators to evade responsibility and too hard for the government to hold bad actors accountable. We must find new ways to compel chronic violators to protect the health and safety of their workers. The “pattern of violations” tool was placed in the Mine Act in 1977 to achieve that very goal.

As I noted in my February 23, 2010, testimony before the House Committee on Education and Labor, the current criteria used for determining that an operator has a potential pattern of violations include a mine’s history of S&S violations of a particular standard, history of S&S violations related to a particular hazard, and history of S&S violations caused by an unwarrantable failure to comply with health and safety standards.

Under current regulations, MSHA only considers violations that have become final orders of the FMSHRC. Citations and orders that are under contest, no matter how egregious, are not considered in establishing that a mine has a potential pattern of violations. Once a potential pattern is found, an operator has a notice period to reduce the number of S&S violations at its mine. If the operator fails to reduce the number of violations, only then are they placed in pattern of violations status. By the time the current process is over, mine operators are being considered for pattern of violations status based on violations that, in many cases, were written years ago.

We realize the current “pattern of violations” program is broken and must be fixed. That is why in our regulatory agenda we announced that we will be issuing new regulations to simplify the criteria for placing mines into the “pattern of violations” program. We are looking into what other changes in the regulations or statute are necessary to streamline the “pattern of violations” program and make it more effective, including strengthening the conditions for operators being removed from “pattern of violations” status. We will consider what notice period, if any, is appropriate, and how the use of health and safety management programs for operators with these kinds of serious violations can play a role in improving the pattern of violations system. Meanwhile, right now we are in the process of reviewing pending cases of operators with significant numbers of S&S citations in order to expedite appropriate cases.

In addition, we are considering greater use of other authorities for stopping scofflaw mine operators more quickly, such as the existing authority under the Mine Act to seek

permanent or temporary injunctive relief. The Mine Act empowers the Secretary to obtain an injunction in federal court against a mine operator she believes is engaged in a “pattern of violations” of the Mine Act. Though it has been a part of the Act for years, we do not believe any Administration has ever attempted to use the provision. Because we do not believe that the Mine Act requires a federal court to have final orders in hand from FMSHRC in order to issue an injunction against an operator with a pattern of violations, bringing this existing tool into the Department’s arsenal will enable it to bypass the backlog of cases awaiting final orders from FMSHRC and permit it to take swift action against mine operators who are chronic lawbreakers.

Injunctive relief obtained directly from a federal court would combine strong enforcement with immediate safety measures. This relief could be used to require court-ordered, company-funded, full-time monitoring of problem mines, or the implementation of a comprehensive mine or corporate-wide health and safety plans. Most important, it could be used to shut down mines until they can assure compliance with the law. MSHA could take direct action through the courts.

FMSHRC Backlog. While the backlog at FMSHRC adversely impacts the use of MSHA’s current “pattern of violations” process, more fundamentally it has severely reduced the deterrent value that penalties were meant to have. There are more than 16,000 cases pending before FMSHRC, including \$209 million in contested fines. The average case takes more than 600 days to resolve from the time it is issued. I believe that we need budgetary, regulatory, and legislative action to solve this problem.

The budgetary actions needed would include building on the Administration's proposed 27% increase in FMSHRC's budget this year to provide sufficient personnel to quickly resolve disputes.

MSHA's planned regulatory actions include improving the use of effective mine safety and health management programs by all mine operators. The best way to resolve the backlog problem looking forward is for mine operators to take full responsibility for compliance with the Mine Act and mandatory health and safety standards issued under it. They must take measures to ensure safer and healthier mines that, under rigorous and complete inspections, receive fewer citations and orders from MSHA because there are fewer violations to cite. This will require operators to more fully inspect their own mines for violations.

Helpful legislative actions could include requiring mine operators to put significant penalty amounts, as well as penalties associated with more serious violations, into escrow or providing for pre-judgment interest. If operators have to put aside penalty amounts during the contest period or know that they will have to pay interest if a penalty is ultimately imposed, they will be less likely to contest cases just for the sake of delay. The current system provides a financial benefit for delaying tactics.

In testimony before the U.S. House of Representatives on February 23, 2010, I outlined specific measures MSHA was considering to address the backlog problem. They

included making the citation process more objective and consistent by simplifying the citation and penalty determination process and improving related training, improving the conferencing system, making greater use of the “closeout” inspection meeting after mine inspections, continuing to develop training programs and materials to aid mine operators with compliance, and corporate-wide holistic settlements that require operators to implement meaningful health and safety programs.

Enhanced investigative and law enforcement tools. MSHA and federal prosecutors need more tools to investigate and punish wrongdoing. Gaps in MSHA’s legal tools undermine the deterrent effect of its investigative powers. MSHA should have the authority to issue subpoenas to require companies and individuals to turn over documents promptly when needed. Moreover, MSHA’s criminal penalties must be enhanced so that the threat of jail is real for the most egregious violators. “Knowing” violations of key safety laws should be felonies, not misdemeanors.

Empowering miners. No one knows what goes on in a mine, including what safety corners are being cut, better than the miners. They must have a voice in the workplace if we want to know about hazards before they cause death and injury. Empowering miners to protect themselves will give them that voice. Too many miners are afraid of losing their jobs or facing other forms of retaliation for raising valid safety concerns to MSHA.

We believe that additional measures would give miners the courage and confidence to come forward when necessary. For example, the statute should be amended to enhance

protections for miners from retaliation when they do come forward. Miners should be assured of pay and should not have to wait months to get it while a withdrawal order is in effect. They should not have to balance the risk to their paycheck with the risk to their lives. We look forward to working with the Committee on strengthening whistleblower protections for the nation's miners.

As the preliminary report Secretary Solis and I provided to the President noted, this is not an exhaustive list. We should build on recent improvements in the transparency of MSHA data, so that before an accident occurs, miners and the public can easily use MSHA reports and data to identify companies that must improve their safety practices.

Other critical steps, for example, could address particular conditions, such as improving control of mine gases, rules to ensure sufficient rock dusting, and improving mine emergency response. We are reviewing the full range of our legal and regulatory authority, as well as possible management reforms, and will continue to do so as we move forward with the investigation to determine how to ensure that another disaster like the explosion at the Upper Big Branch mine does not happen again.

Conclusion

At 3:02pm on April 5, 2010, an explosion occurred at the Upper Big Branch mine and took the lives of 29 miners. Any loss of innocent life of this magnitude is a profound tragedy. But making this event even more tragic is the fact that, as history has shown us, mine disasters are preventable.

I had the opportunity to watch the mine rescue teams and MSHA personnel coordinating the response and the search for survivors. I had the honor of meeting with the families of the miners as they waited for news about their loved ones. They showed an unbelievable level of courage and composure even when they knew they were facing difficult odds.

We know the kinds of events that lead to explosions in coal mines, and we know the actions that can be taken to prevent them. There are specific techniques that a mine operator can employ to reduce the levels of combustible materials such as methane and coal dust. But equally important is an operator's commitment to a culture of safety centered around protecting the health and safety of his or her workers, rather than simply avoiding a citation or a fine.

MSHA has assembled a dedicated team of professional investigators that will look into every aspect of this accident. We will work closely with state officials. During our investigation, we will honor our commitment to transparency and openness, and we will make the results of our investigation fully public at its conclusion. At that time, we will present you, the President, the families, and the American people with a formal report on our findings.

We take every incident that results in injury or loss of life seriously and personally. But due to the limits of the current authority given to MSHA, and the efforts companies like Massey will take to escape enhanced enforcement, we think it necessary to examine the

statutes, regulations and policies on the books and ask ourselves what more we can do to ensure the health and safety of America's miners. These men and women work hard every day to ensure that we have the electricity we need to light our homes, power our industries, and ensure our national security. We owe it to them to do everything we can to make sure that every miner – and every worker – comes home safely at the end of every shift.

I look forward to continuing work with this Committee and would be happy to answer any of your questions.