

STATEMENT OF
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U.S. DEPARTMENT OF LABOR
BEFORE THE
COMMITTEE ON APPROPRIATIONS, SUBCOMMITTEE ON
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Chairman Harkin, Vice-Chairman Cochran, and Members of the Subcommittee,

Thank you for the opportunity to appear as a witness before this Committee and speak to you about the efforts of the Mine Safety and Health Administration (MSHA) to protect the health and safety of the Nation's miners. I am joined today by Solicitor of Labor Patricia Smith, who will be testifying about the role of the office of the Solicitor of Labor (SOL) in enforcing the Nation's mine safety and health laws, and in particular about the backlog of cases pending before the Federal Mine Safety and Health Review Commission ("Commission").

I would like to once again 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, as well as the surviving miners. Our prayers are with all of them.

The Upper Big Branch mine explosion was the worst mining disaster since the creation of MSHA by the Federal Mine Safety and Health Act of 1977, and the deadliest mining disaster this Nation has experienced in nearly forty years. This tragic event is a call to action. As the President said of the 29 miners who lost their lives on April 5, "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.

Some have said this Nation 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. Explosions in coal mines are preventable. The tragedy at the Upper Big Branch mine did not have to happen. It is the failure of mine operators to comply with the Mine Act and mandatory health and safety standards that can and does lead to injury, disease and death. We believe the history of repeated serious violations both at this mine and others throughout this country demonstrates that there are operations where mine management weighs the costs and benefits of complying with the law, rather than making responsibility for the safety and health of its miners their first priority. I welcome the opportunity to discuss with the Committee how we can work together to change this calculus.

Events at Upper Big Branch

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, whose CEO, Don Blankenship, will be testifying on the next panel. We know that there was a catastrophic explosion in the mine at a shift change at approximately 3pm. The explosion killed miners in and around two working sections of the mine and those traveling from the working sections at the end of their shifts.

In less than three hours, rescue teams were underground, responding to the disaster. Due to the extensive damage from the explosion, however, the rescue teams had a difficult time proceeding in the mine. Within 10 hours of the disaster, rescue teams had found 25 of the

victims. Dangerous conditions in the mine delayed and hampered continuing rescue and recovery efforts. Mine rescue teams attempted to again enter the mine on April 7, 8 and 9. Each time they were forced to exit before the final four miners were found. Finally, on the evening of April 9, they were able to enter and found the final four miners. While we were able to recover all the victims, we are still working to ventilate the mine so that it is safe enough to enter the area of the explosion and conduct our physical investigation.

While the cause of this specific explosion is still being determined, most mine explosions are caused by accumulations of methane, which can combine with combustible coal dust mixed with air. Historically, blasts of this magnitude have involved propagation from coal dust that becomes suspended in the air following an initial blast.

I understand that this is an Appropriations hearing and we will be discussing an increase in MSHA's budget, but the needs are more than money. No matter what level of resources the Committee is willing and able to appropriate for MSHA, MSHA cannot be in every mine, every day, on every shift. Nor should it. It is the mine operator's responsibility to provide a safe mine and to protect its miners whether an MSHA inspector is standing in that mine or not. Only when we change the culture of safety in the mining industry – and when all mine operators live up to their responsibilities – will all miners be safe.

That is not to say that resources – both legal and fiscal – are not important. They are critically important. MSHA must have the resources and tools it needs to support its efforts to hold accountable mine operators who are not living up to their moral and legal responsibility to maintain a safe mine.

The additional resources that this Committee appropriated for MSHA in the wake of the Sago and Darby explosions and the Aracoma fire made an important contribution to increasing mine safety. The additional inspectors that MSHA has hired since 2006 has meant that for the first time in years MSHA has been able to complete all its mandated inspections. We are finding more violations and requiring mine operators to abate them.

Enforcement at Upper Big Branch and MSHA's Current Enforcement Tools

Since the Upper Big Branch disaster we have taken a new look at how we use our resources and tools and we are trying to use them as creatively, efficiently, and effectively as possible. For example, between April 19 and April 23, MSHA conducted blitz inspections at underground coal mines with a history of significant and/or repeat violations of safety standards involving mine ventilation, methane, failure to conduct or adequately document examinations, and/or rock dusting. As a result, through use of enforcement tools that permit MSHA to close the areas of mines affected by particular hazards, we required six underground mines in Kentucky to suspend production until the violations were corrected. At those six mines, MSHA issued 238 citations, 55 orders and one safeguard. At the mines we blitzed nationwide, MSHA issued 1,339 citations, 109 orders, and 6 safeguards. Finally, we have sued two of the six Kentucky mines for illegally providing advance notice of MSHA inspectors' presence at the mine.

MSHA's history in the Upper Big Branch mine also demonstrates the kind of heavy presence that a beefed up inspector corps allows MSHA to have at a troublesome mine. MSHA engaged in a multi-year effort 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 a "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, Massey 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; although 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 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.

Needed Reforms and Resources

As you can see, MSHA is doing what Congress instructed it to do with the post-Sago increase in resources. It is inspecting mines and issuing citations for the violations it finds. When I came on the job in October, I made a commitment to do it better, more forcefully, and smarter. As I mentioned earlier, however, citations and orders alone will not solve the problems that we face. We need resources – both legal and fiscal – to leverage those citations and orders into a meaningful deterrent for operators like Massey that choose not to take responsibility for the safety of its miners.

Now, I would like to share with the Committee what we are doing to make our enforcement efforts as effective as possible and what Congress can do to support those efforts and remove existing obstacles.

First, I believe that we must create incentives for operators to improve safety practices to prevent fatalities and injuries. To achieve this goal, we need a system in which mine operators have programs and procedures in place to fix violations and abate hazardous conditions. Our spring regulatory agenda is focused on regulations that will require companies to take responsibility to find and fix problems before they are discovered by MSHA.

Thus, we will be proposing a rule to reinstitute the requirement for pre-shift examinations for violations of mandatory safety and health standards in areas of underground coal mines where miners work or travel. I have been telling the mining industry since I became Assistant Secretary of Labor for MSHA that they must take more responsibility for the safety and health of the miners at their mines. That starts with fulfilling their responsibility to inspect their mines to make sure they are operating in compliance with the mine safety and health laws and regulations.

In addition, we announced that we are moving forward to solicit information on requiring the use of a comprehensive health and safety management program in the mining industry. We believe that these measures will help prevent unsafe and unhealthy conditions from threatening workers.

Next, we must improve our ability to identify dangerous practices and violations before fatalities and injuries occur. MSHA is not (and cannot be) in every mine, every day, on every shift. That is why it is so important for workers to have a voice in raising concerns with their employer or reporting conditions to MSHA without fear of reprisal, and for MSHA to have more tools to deal with mine operators who engage in "catch me if you can" tactics. Just last month, concerned individuals demonstrated the importance of the role of workers and the public in addressing safety concerns, when they notified MSHA inspectors in three separate anonymous complaints about hazardous conditions at three Massey-owned coal mines in West Virginia. Especially troubling is that one of the complaints came just days after the explosion at Upper Big Branch Mine. At one mine, the anonymous complaint reported that Massey was unlawfully running two continuous miners on a single split of air, violating its MSHA-approved mining plan by removing more coal than authorized, and failing to report several face methane ignitions (small explosions) to MSHA. Another anonymous complaint at a different mine reported water

blocking an escapeway used to evacuate the mine in emergencies. When MSHA made unexpected inspections in the evening, and in two cases captured the mine phones preventing calls underground to warn of the inspection, inspectors found a number of illegal mining practices. Those included: mining of coal several feet beyond legal limits; mining without air movement to prevent mine explosions and exposure to dust levels that can cause black lung; inadequate rock dusting, which is a critical protective measure to prevent coal dust explosions; blocking of miner escapeways by accumulated water; inadequate mine examinations by the mine operator; and mine roof conditions exposing miners to roof fall hazards. Following each investigation, MSHA issued several closure orders requiring the withdrawal of miners from designated areas of those mines until the hazards were abated and it issued multiple citations for serious violations.

Clearly, laws protecting miners who want to come forward need to be strengthened. While someone came forward in these three cases, too many others will not or cannot out of fear of endangering their jobs and their families' livelihoods. A number of current and former Massey employees have publicly stated that miners at Upper Big Branch who reported hazards to the company or MSHA risked losing their jobs, sacrificing pay, or suffering other adverse actions. While we will thoroughly investigate these troubling claims, we also need to examine how we can change the law to put these fears to rest.

Miners must feel free to identify problems and insist they be fixed without fear of reprisal. MSHA must have the tools it needs to obtain information for timely investigations when miners report hazardous conditions, as well as the tools to protect miners who are discriminated against for reporting such conditions or otherwise exercising their rights under the Mine Act. MSHA must also have increased tools to respond to the "catch me if you can" mine operators who blatantly disobey the law, exposing miners to injury, illness and death when they think or know MSHA will not be there.

Next, we must improve the rules and adjudicative procedures to compel operators to remedy hazards. As you know, the President has committed to reducing the large and growing case backlog at the Federal Mine Safety and Health Review Commission. The well-documented

shortcomings of the current pattern of violations process and the unconscionable backlog of cases at the Commission demonstrate that it is too easy for even the worst offenders to avoid the heightened enforcement status envisioned by Congress.

Following my confirmation as Assistant Secretary of Labor for Mine Safety and Health, fixing the pattern of violations program became a top priority. Since the Upper Big Branch disaster, we have spent a considerable amount of time at MSHA reviewing pattern of violations, as well as the other tools available to MSHA to enforce the law. It has become clear to me that we need bold action by both MSHA and the Congress to solve this problem.

The pattern of violations program has received a great deal of attention in the aftermath of the Upper Big Branch disaster. MSHA has the authority to place a mine into a “pattern of violations” category, which under current policy is based on a number of criteria including the number of serious violations the operator has amassed within a 24-month timeframe. If a mine ends up in a “pattern of violations” status, MSHA can issue withdrawal orders for every serious violation until each violation is fixed. The “pattern of violations” program should be one of MSHA’s most serious and effective tools for holding bad actors, like Massey Energy, accountable, but it is not. 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 received proposed 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 Commission.

Even if an excessive contest strategy fails and a mine ends up in a “potential pattern of violations” status, an operator 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 a pattern of violations status if the operator reduces its S&S violations rate by more than 30% within 90 days or brings it below the national average for mines of similar type and size. Upper Big Branch mine did this in 2007 and avoided a pattern of violations status by reducing S&S violation rate by 30%, even though its 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 since passage of the 1977 Mine Act, and that order was revoked when two of the violations on which it was based were thrown out through the contest process.

We realize the current pattern of violations program is broken and must be fixed. As I said, we believe that there are two components to fixing the problem: (1) redesigning the program, and (2) reducing the Commission backlog. I believe that both MSHA and the Congress have a role to play in addressing each component.

MSHA has already begun the process of redesigning how the pattern of violations program will work in the future and making the program more effective. We are asking the Commission to expedite its review of cases whose adjudication to final order status is necessary to get bad actor operators into pattern of violation status. In addition, 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. There are fundamental challenges in the pattern of violations program that may need legislative fixes and I look forward to working with the Congress on developing those.

As it now stands, the backlog at the Commission is a major impediment to the effective use of the pattern of violations program and to MSHA's ability generally to hold mine operators accountable for safety and health violations. As of May 5, 2010, there were approximately 16,000 cases and 89,000 violations pending before the Commission in some phase of the penalty contest process. There are approximately \$209 million in contested fines pending. The average

case takes more than 600 days to resolve from the time a violation is issued. I believe that we need regulatory, legislative, and budgetary action to solve this problem.

At a hearing before the House Education and Labor Committee on February 23rd of this year, I outlined specific measures MSHA was considering to address the backlog problem. I do not believe that an increase in litigation alone can resolve the backlog problem. That's why we are moving to improve the cases we bring to the Commission and how we handle them once they are there. We will make 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 pursuing corporate-wide holistic settlements that require operators to implement meaningful health and safety programs.

In addition, we look forward to working with Congress to change the incentives for mine operators to contest violations, such as requiring mine operators to put significant penalty amounts in escrow or to impose pre-judgment interest on penalties. We also hope that the Commission and Congress will consider ways to simplify the Commission's processes. We also hope that these changes will slow down the rate of cases going into the Commission's pipeline.

As long as it exists, the backlog diminishes the system of protections the Mine Act was designed to provide. It is an incentive for the "business as usual" attitude among operators who chose to contest violations as a cost of doing business instead of taking a proactive and responsible role in making their mines safer. The perception that a penalty can be delayed or settled on highly favorable terms because of the huge caseload at the Commission encourages behavior that will cause the backlog to grow.

To the extent that funding is provided to increase the number of Commission judges additional resources will be needed for SOL and MSHA to staff the litigation and litigation support to effectively bring cases before these new judges. For example, if resources were provided to immediately increase the number of judges at the Commission to 26, then the

Solicitor's Office and MSHA would require roughly an additional \$26.6 million above the FY 2010 appropriation and the President's 2011 Budget request.

While we believe an approach that tries only to litigate our way out of the backlog would be unworkable, combined with additional reforms, more resources for taking cases to trial would both reduce the backlog and enhance the effectiveness and implementation of other reforms. In providing those resources, it is important that the Department have the flexibility to determine the optimal mix of SOL and MSHA staffing to scale up Commission litigation and case resolution and to adjust to changes in the mix of cases before the Commission. And in order for the Department to use new resources most effectively, we must be given enough time to train and deploy any new staff.

MSHA also needs the flexibility to ratchet up the power of our enforcement tools when we are dealing with the worst of the worst. As the law stands now, we have limited civil and criminal tools to bring chronic scofflaws to justice. I am gratified to know that the Justice Department is pursuing a serious criminal investigation into the events that led to the Upper Big Branch mine disaster. However this isolated criminal investigation, which is still in its early stages, should not fool us into thinking that the Mine Act's criminal and significant civil penalties are sufficient.

Stronger civil and criminal penalties are needed to make sure that mine operators are not allowed to knowingly or persistently put the lives of miners at risk. These penalties should extend to individuals at all levels of management who make decisions about the safety of miners. Making these kinds of changes will serve as a powerful deterrent against making decisions that put miners at risk. I look forward to working with the Congress on developing these ideas.

MSHA's Operational and Emergency Response Needs

Improving the health and safety of miners in light of both the lessons highlighted and the many questions raised by the Upper Big Branch disaster is not limited to the area of enforcement and legal reform. MSHA supports the provision of resources for a number of other needs critical

to eliminating the most immediate risks to miners and for ensuring that MSHA can effectively respond to mine emergencies.

One immediate need is to find out what happened at Upper Big Branch. We need to know what happened in that mine on April 5, but we also need to understand in the broadest sense how this could have occurred. We anticipate the investigations, hearings and public forums examining the Upper Big Branch disaster and the surrounding circumstances will be the most extensive and the costliest investigation in the history of MSHA. The Accident Investigation team is gathering evidence in advance of public hearings to examine the cause or causes of the explosion. MSHA will also conduct a public forum for family members to offer their thoughts about the explosion, the response, the investigation, and potential reforms, as well as a town hall-style meeting to exchange ideas about health and safety at mining operations and to gather recommendations. In addition, MSHA will conduct an internal review and will have that internal review independently evaluated by a team selected by the National Institute for Occupational Safety and Health. MSHA needs to be able to provide the resources for all these activities without negatively impacting its ability to continue its regular enforcement activities, like its statutory inspections.

MSHA needs better capabilities in responding effectively in mine emergencies, particularly when miners are trapped underground, and has identified some important needs. MSHA and mine rescue teams must be equipped to respond as quickly and effectively as possible when time is of the essence in reaching possible survivors of a mine explosion, fire or entrapment. I have participated in numerous mine emergency responses in the time I have worked in the mining industry. The Upper Big Branch disaster was my first as Assistant Secretary. I was at MSHA's mobile operations center at the Upper Big Branch mine, and saw first-hand the need for better communications systems to coordinate rescue efforts and exchange information and data while in the field. As in this case, mine rescues often occur in rural areas where cellular service does not work and time is of the essence in securing communication between the command center, the mine, and areas where boreholes are being drilled in an effort to contact trapped miners or improve air ventilation. MSHA also lacks the necessary inventory of portable testing equipment such as gas chromatographs, used to process air readings from a

mine during an emergency, and the ability to transfer copies of mine maps and other technical data.

MSHA supports funding for placing caches of essential equipment at all of the coal districts along with first response teams to further improve MSHA's response time to emergencies. MSHA also sees a strong need to strengthen our logistical emergency response capabilities in the Western United States at our Price, Utah and Denver, Colorado facilities with better vehicles and communication and other equipment.

There is more to be done regarding MSHA's mine emergency response capability. The American people expect the government to be responsive and effective in such emergencies, and, as I described above, the most recent tragedy revealed some areas where MSHA needs additional resources in order meet that expectation.

Another issue is the need for MSHA to make organizational changes in Southern West Virginia to ensure its existing resources get optimal use in an area with the highest concentration of underground coal mines in the Nation. Coal mine safety in Southern West Virginia is covered by MSHA's Coal Mine Safety and Health District 4. MSHA is considering a plan to split District 4 into two distinct districts with separate management and administrative functions, and whether MSHA can better carry out its oversight of mine safety if it makes such a change. Of the Nation's 11 coal districts, District 4 has the most employees and the most significant workload with the smallest ratio of supervisory staff to line employees. Its workload is almost 50% higher than the next busiest District in many key indicators such as contested citations and plan approvals. In order for management to best be able to spot problem or potentially problematic mines and react responsively, it would seem that dividing this District into two districts of better manageable sizes would be the best approach.

Another critical need MSHA hopes to meet is testing of the refuge chambers miners rely upon if trapped underground in a mine emergency. When Congress passed the MINER Act in 2006 after the Sago disaster it required underground coal mines to install what are commonly referred to as refuge chambers, where miners would have available breathable air, food and

water until help could arrive from the surface. The implementation of this requirement was a significant improvement in mine safety. However, some of the more common commercially available units have not been tested for human survivability. Such testing for survivability in extreme conditions such as heat from geothermal sources or a fire is a high priority need.

Conclusion

I appreciate the action that the Senate Appropriations Committee took last week in providing supplemental appropriations and I look forward to working in the development of your regular appropriations bill to ensure that we keep the President's promise to have the federal government do everything it can to improve worker safety. Our nation's brave miners go to work every day to provide electricity to our homes and our businesses. We owe it to them to do everything we can to ensure that every miner – and every worker – comes home safely at the end of every shift.

Again, I appreciate the opportunity to appear here today, and look forward to working with the Subcommittee.