

STATEMENT OF
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BEFORE THE
COMMITTEE ON EDUCATION AND LABOR
UNITED STATES HOUSE OF REPRESENTATIVES

JULY 13, 2010

Mr. Chairman, Mr. Ranking Member, and Members of the Committee:

I appreciate the opportunity to appear here today on behalf of the U.S. Department of Labor, Mine Safety and Health Administration (MSHA), and on behalf of Secretary of Labor Hilda Solis, to discuss the Miner Safety and Health Act of 2010. Secretary Solis has been a great supporter of MSHA's mission and a champion of greater protections for all workers. I am also pleased to join the Solicitor of Labor, Patricia Smith, and Assistant Secretary David Michaels, who I have worked with closely these past months. Both are powerful advocates for stronger safeguards to protect the health and safety of all workers and for holding employers accountable.

When I took on the mission of leading MSHA as the Assistant Secretary I did so with a clear purpose in mind -- to implement and enforce the nation's mine safety laws in order to improve health and safety conditions in the nation's mines and enable miners to go to work, do their job, and return home to their families each and every day free of injury, illness or death. That is what my administration is about.

I must acknowledge why we are here. We would not be discussing sweeping improvements to the Mine Act if it were not for the 29 miners who lost their lives at the Upper Big Branch (UBB) Mine. Since the disaster, I have met with the families of the victims of that tragedy on several occasions. My prayers go out to the families and their loved ones. I believe I speak for everyone here when I express my hope that we will all remember their profound loss as we move forward in making reforms that will save other mining families, other mining communities, from experiencing their grief.

We saw in living detail how committed these families are to protecting their brethren from going through this kind of tragedy again when they testified at this Committee's field hearing in Beckley. They bravely told me and this Committee how the mining industry and our mine safety system had failed them. I want Eddie Cook, Gary Quarles, Alice Peters, Steve Morgan, Clay Mullins, and Goose Stewart to know that their pleas for change did not fall on deaf ears.

When the Secretary and I met with the President shortly after the Upper Big Branch explosion, he made clear his personal commitment and that of the Administration to honor the victims of this disaster by ensuring justice is served on their behalf and that an accident of this magnitude never happens again. He told the nation "we owe [those who perished in the UBB disaster] 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."

To ensure that justice is done on their behalf, I have directed MSHA to conduct a thorough and comprehensive investigation into what caused the explosion on April 5th. I am pleased to report that this investigation is well underway. MSHA investigators have conducted more than 100 interviews with Massey employees and MSHA personnel. In addition, our investigative team has finally been able to reenter the mine safely and our physical investigation of the mine is ongoing.

This investigation will be the most open and transparent in MSHA's history. We will be holding a number of public hearings, enabling unprecedented public participation in the investigation. Moreover, MSHA is conducting its investigation in a manner designed to avoid any interference in the Justice Department's criminal investigation.

Today's hearing is a critical step forward in making good on the President's promise that this Administration would take action to prevent future mine accidents. The Secretary and I applaud the work of Congressman Miller, Chairwoman Woolsey, Congressman Rahall and their Senate colleagues in drafting this bill, as well as the hard work of their staffs. I personally appreciate the opportunity that all of you gave me to have worked so closely with you on this legislation. It closes some critical gaps in the Mine Act and establishes strong new protections for miners. I am proud to tell you that this Administration fully endorses the Committee's efforts to move this legislation this year and we look forward to working with you on this legislation as it moves through the legislative process.

This bill rests on a solid foundation of principles. Those principles are:

- that every worker is entitled to come home from work safely at the end of a shift;
- that fatalities, injuries and illnesses can be prevented when employers institute and follow safety plans, prevent hazards, and protect workers, even in dangerous industries like mining; and,
- that the best role MSHA can play is to enforce mine operators' obligation to take responsibility for the safety and health of their workers.

The tragic explosion at the Upper Big Branch mine revealed that the nation's mine safety laws are not serving these principles the way they should. The Miner Safety and Health Act of 2010 will bring those principles back to the forefront, and put the health and safety of miners first.

I believe this bill really will change the culture of safety in the mining industry. It does not simply fix a particular hazard or practice that caused the last disaster, as has often been the pattern in mine safety reform. Instead, it gives MSHA the tools it needs either to make mine operators live up to their legal and moral responsibility to provide a safe and healthful workplace for all miners, or to step in with effective enforcement when operators refuse to live up to this responsibility and endanger miners.

While Solicitor Smith and I look forward to discussing many aspects of the bill, I would like to discuss a few particular provisions I believe will, if enacted, save lives, help prevent mine explosions, help ensure that miners have a meaningful and protected voice about their own health and safety at work, and bring problem mine operators into compliance with the law.

Among the most important provisions of this bill is its replacement of the Mine Act's pattern of violations (POV) provision. The bill would make the POV system a meaningful tool in MSHA's arsenal. When I first appeared before this Committee in February to testify about the backlog of contested cases pending before the Federal Mine Safety and Health Review Commission, one of the areas I identified for needed reform was MSHA's current pattern of violations process. The Mine Act's POV provision was intended to provide MSHA a powerful tool to deal with mine operators who demonstrated, through continued significant and substantial health or safety violations, a disregard for the health and safety of miners. Instead, the POV provision is an empty vessel – it has never been successfully implemented against a mine operator in the history of the Mine Act - and is broken by all accounts, including MSHA's.

I have been working on POV reform since shortly after my confirmation. Last winter, and well before the explosion at Upper Big Branch, MSHA put its planned reform of pattern of violations regulations on its Spring Regulatory Agenda. This legislation will expedite that needed reform.

Under current regulations, establishing an operator's pattern of violations simply takes too long and exposes miners to risk when MSHA should be acting. MSHA can only act after an operator has a number of violations that have become final orders of the Commission. Given the current backlog of Commission cases, MSHA is pursuing pattern violators years after the violations occurred. The Miner Safety and Health Act of 2010 fixes this problem by eliminating the final order requirement and directing MSHA to identify mines with a pattern of recurring accidents, injuries, illnesses or citations or orders for safety or health violations that indicate an elevated risk to miners. This change

will allow MSHA to use this enhanced enforcement tool looking at more recent violations and events rather than ones that are years old. The bill still provides that operators can seek an expedited review of withdrawal orders issued under the pattern process, but it does not require cases to work their way through the system before MSHA can act. I believe this bill will save lives and prevent injuries by enabling MSHA to act quickly to enforce compliance with the Mine Act at operations with high levels of violations.

The bill also makes the Mine Act's pattern provisions more remedial than current law and more focused on forcing a change in the safety culture of mines that fail to establish a commitment to miner safety and health. Under this bill, if MSHA determines that a mine has a pattern of recurring citations, MSHA is authorized to require the operator to take particular actions tailored to the risks to which miners have been exposed, including additional training for miners, establishing a health and safety management program, and designating certified safety personnel at the mine to address the mine's health and safety problems. The bill also increases the number of workplace inspections for mines in pattern status and authorizes MSHA to directly communicate with a POV mine's workforce about conditions at the mine and the rights of miners under the Act.

Under the new POV program, MSHA will have an open and transparent system for choosing mines that need to be put into POV status. The data that MSHA uses to evaluate the appropriateness of putting a mine on POV status will be available for the public to review and the criteria will be direct and comprehensible. I believe many mine operators will take advantage of this openness and transparency to monitor their own

performance and change their ways before they put their miners into danger. Those mine operators should know whether their lack of compliance will necessitate putting them on POV status, before that happens, and they will be able to improve conditions at their mines before MSHA must step in to assist in remediating the conditions at the mine.

I strongly believe that a safe mine requires the active involvement of miners who are informed about safety and health issues as well as their rights under the Act to demand a safe workplace. I have met with many mine operators, and those operators with the strongest safety and health cultures would agree that the participation and involvement of miners in safety and health is a key component of their safety records. However, the powerful testimony at the Committee's Beckley field hearing underscored that there are operators who fail or refuse to embrace this view.

Miners that testified at the hearing made clear that that some miners are often afraid to speak up about conditions at their mines. Even when miners know of threats to their own safety and the safety of their fellow miners, they face a significant risk of losing their jobs, sacrificing pay, or suffering other negative consequences if they come forward.

No one knows the conditions in the mines better than the miners themselves. Just as a traffic cop cannot be on every street corner catching every speeding car, MSHA inspectors cannot be in every mine, finding every hazard every day of the week. It is absolutely crucial that miners bring dangerous conditions to mine operators' and MSHA's attention before those conditions cause injuries, illnesses, or even fatalities.

This bill establishes important protections for miners when they exercise their rights under the Mine Act. The Mine Act has long protected from retaliation miners who

come forward to report safety hazards. We have heard loud and clear, however, that those protections are simply inadequate and that miners lack faith and belief in the current system. The Miner Safety and Health Act of 2010 makes dramatic changes in this area and gives MSHA the tools it needs to protect miners who come forward. The bill:

- Makes explicit the right of all miners to refuse to perform work they reasonably believe to be unsafe;
- Creates a fairer and faster process to get miners their jobs back if they are discriminated against for coming forward to complain about safety or health issues;
- Eliminates the financial disincentive for miners to report safety hazards that might result in the mine being shut down so the hazards can be fixed by guaranteeing miners pay during all safety-related shut downs. No one should have to choose between a paycheck and protecting him or herself; and,
- Substantially increases penalties for mine operators who retaliate against miners who report safety hazards.

MSHA will work hard to vigorously enforce these new protections. Part of this reform is to ensure that miners are aware of their rights. This bill makes strides in that direction. It requires that miners receive annual refresher training on their rights, including the right to report hazardous conditions, receive training, participate in mine inspections through a representative of miners, and refuse to work in hazardous conditions.

The bill also includes several important provisions to require mine operators to find dangerous conditions in their mines before they hurt or kill miners and to take action to fix them. The Labor Department's Spring 2010 Regulatory Agenda announced our intention to use new tools to detect and prevent hazards to workers. Generally, DOL announced its intent to move towards a broad strategy that requires employers to understand that the burden is on them to obey the law before they are visited by DOL. We call this compliance strategy "Plan/Prevent/Protect." The provision on the pre-shift review of mine conditions advances this strategy.

The Mine Act mandates operator pre-shift examinations for such hazards or violations of mandatory health or safety standards as the Secretary requires. These examinations are a critical component of an effective safety and health program for underground mines. In the ever-changing mine environment, it is critical that hazardous conditions and violations be recognized and abated quickly. The provision in the bill is designed to ensure that all hazards and violations are communicated effectively so that they can be abated before anyone is hurt or killed by them. The result should be a reduced risk of injury, illness and death and should lead to fewer citations for safety and health violations during MSHA inspections of underground mines.

The legislation will also help MSHA and SOL enforce the law successfully after inspectors cite a serious violation by clarifying the meaning of a significant and substantial (S&S) violation. My colleague, the Solicitor, will talk about this important provision in more detail. Let me just say that since the early 1980's, the meaning of an S&S violation under the Mine Act has been unreasonably restricted by a Commission interpretation of the law that is not consistent with Congressional intent or with

protecting the safety and health of miners. The bill corrects this problem by expressly defining an S&S violation as one with a reasonable possibility of resulting in a miner's injury, illness or death.

I will share an example of how the Commission's interpretation of the law restricts MSHA from doing its job. In the recent hearing to put Massey's Tiller Mine on a pattern of violations, the Secretary needed to establish that a certain number of Massey's violations were S&S in order to prevail. Although the Commission judge has not yet issued a written decision, he announced from the bench that the Secretary did not prevail. The judge ruled that it is not a "significant and substantial" violation of mine safety regulations to operate a piece of equipment with an impermissible opening into an enclosed electrical component in a gassy mine where combustible coal dust could be present. The judge interpreted the governing caselaw to require MSHA to show that the equipment have an existing source of electrical sparks within the enclosed electrical component before the violation could be considered "significant and substantial." This is clearly wrong, imposing an inappropriate standard that puts miners at risk and defies common sense. The Mine Act is intended to protect miners, not expose them to needless risk before MSHA is allowed to effectively act. It does no good to penalize an operator with an S&S violation after miners have died in an explosion. This is an example of why the law needs to be changed and why Congress needs to ensure that when a mine operator allows miners to be exposed to serious hazards the law treats it as a serious violation.

Now I would like to mention a preventive measure the bill adds that modernizes existing standards. The provision in the bill to expedite the process of improving atmospheric monitoring in mines will make operators, MSHA, state agencies and mine

emergency teams better prepared for mine emergencies. Specifically, the provision requires the National Institute for Occupational Safety and Health to advance the research in how to better monitor the atmosphere in mines for the deadly threats of methane and other dangerous gases. The Secretary then plans to engage in rulemaking in response to NIOSH recommendations. We anticipate that ultimately we will be able to have real-time monitoring of a mine's atmosphere during a mine emergency.

In addition, in day-to-day operations, mine operators would know when their miners are being put in peril as a result of a build up of dangerous gases. It will then be incumbent upon operators to determine the cause of the build up and to plan how to effectively fix the problem. The bottom line is that better atmospheric monitoring will prevent deadly explosions, fires, injuries, and fatalities and speed the rescue of miners in the event of emergency.

The bill will also prevent disastrous explosions by updating the rock dust standards. The bill not only mandates that operators increase the amount of incombustible dust present in airways – the established method of suppressing the threat of combustible coal dust – but it also establishes a framework for operators to better monitor the explosibility of the dust present in their mines. Just as better atmospheric monitoring mandated by this bill will give operators the information they need to plan how to prevent methane and gas explosions, better monitoring of explosive coal dust will give operators the information they need to plan how to prevent a build up of coal dust that results in devastating propagation of explosions.

As I mentioned at the outset, this bill includes important new tools to allow MSHA to step in and act quickly to protect miners at risk. The Solicitor will talk about

the most important of these – enhanced power for MSHA to seek an injunction. I would like to highlight several other provisions. First, the bill gives MSHA the authority to revoke mine safety plans based on material changes in the mine conditions or if the original plan was based on inaccurate information. This means that MSHA does not have to sit on the sidelines when it sees that conditions in the mine do not match the conditions described in the mine plans for roof control, ventilation and emergency response.

In addition, under this bill, MSHA will play an increased role in ensuring the competence of those personnel in mines whose jobs are so critical to maintaining a safe workplace that the law requires them to be certified as qualified. The bill's certification provisions will allow MSHA and the states to reinstate accountability in mine safety and health. The bill requires recertification of certified personnel to ensure their skills are up to date, as well as a means to revoke a certification if someone in a certified safety position fails to carry out his or her responsibilities. MSHA will work with states to assure those who have positions of responsibility that are certified or qualified are doing their job, and that they lose their certification if they fail to carry out their responsibilities. MSHA will step in where gaps exist in state laws and certifications to ensure that those who perform certified or qualified safety jobs are qualified safety professionals. I pledge to work closely with my counterparts in the states to create a seamless certification system.

Another important means of protecting miners at risk is through adequate and appropriate training. Too often the rush to produce as much coal as possible means cutting corners when it comes to training miners properly. If there is a serious accident

or fatality, MSHA's ability to cite violations does not necessarily address the root problem. The ability to ensure miners have the training they need will improve working conditions and save lives.

Finally, I would like to comment on a new tool given to the Justice Department in this bill. The bill will increase criminal penalties for giving advance notice of an MSHA inspection. I am sure many were shocked to hear the testimony at the Beckley field hearing about how common it is for mine operators to have advance notice of MSHA's inspections. This is a serious problem. MSHA recently took enforcement action against two Ben Bennett mines in Kentucky, Manalapan Mining Company's RB #5 Mine and Left Fork Mining Company's Mine #1, when agency inspectors caught the company tipping off the mine as the inspectors arrived. At other mines MSHA has attempted to prevent the advance notice by capturing mine phones to keep mining personnel from tipping off the underground mining operations. Another example is the Tiller Mine, a Massey operation in Virginia that MSHA recently tried, unsuccessfully, to make the first mine ever placed on a pattern of violations. According to a report in the Washington Post, miners at the surface routinely alert underground miners that a federal inspector is headed underground. Clearly, my inspectors cannot conduct effective inspections if unscrupulous mine operators know that the inspector is on the way and make quick and short-lived fixes to hazards that put miners at risk just to avoid enforcement actions. This bill attacks the problem by making it a serious crime to give advance notice of an MSHA inspection. Our whole enforcement system relies upon fair and accurate inspections – this provision will enhance the integrity of that system. This is also another reason why MSHA needs the power to use subpoenas provided under this bill. Some mine owners

who operate their mines in violation of health and safety laws when MSHA inspectors are not present, and use unlawful tactics to get tipped off about pending inspections, should know that under this bill, we will be able to more effectively investigate and expose these unsafe and illegal practices which endanger miners.

My colleague, Assistant Secretary Michaels, will discuss this significant aspect of the legislation in more detail, but I would like to express the Administration's strong support for including provisions from the Protecting America's Workers Act in this bill. All workers, regardless of where they work – underground in a mine, out in the ocean on an oil rig, or in a factory on the land – deserve a safe and healthful workplace.

I had the privilege of working with Senator Robert C. Byrd throughout my career. Without a doubt, coal miners never had a better friend than Senator Byrd. He fought with his legendary tenacity to keep them safe and protect them from black lung disease. I can think of no better way to honor his memory and the memory of the 29 miners who perished at the Upper Big Branch mine than to prevent another disaster. This bill is our best chance to accomplish this goal. I look forward to working with the Committee as the bill moves forward. I am happy to answer your questions.