

**Testimony of  
Cecil E. Roberts  
before the  
United States House of Representatives  
Committee on Education and Labor  
Subcommittee on Workforce Protections**

**June 20, 2019**

Good morning Chairwoman Adams; Ranking Member Byrne and the members of the Committee on Education and Labor in attendance today. My name is Cecil E. Roberts, International President of the United Mine Workers of America (“UMWA”). In that capacity I represent the largest unionized group of active and retired coal miners in North America. However, today Madam Chairman, I come before the members of this distinguished Committee as the representative of every coal miner in this nation, whether an active dues-paying member, a retiree of the UMWA or a coal miner who is working in the industry and has not yet joined the ranks of the Union. In short, I am here to be the voice of the miners who have risked their lives and health to energize and build this nation, no matter where they live and no matter their affiliation with organized labor.

The testimony I will present to this Committee today will outline, in great detail, the struggles that coal miners face every day in this country. These struggles exist for miners who are actively employed in the industry and those who have left the mines, whether they retire after years of hard work in dusty and dangerous conditions or they are forced from their jobs by occupational injury or illness. I will focus my testimony on the specific topic of this very important hearing: the effects of Coal Workers’ Pneumoconiosis (“CWP” or “Black Lung disease”) on the lives of America’s coal miners.

The purpose of this hearing is to discuss the resurgence in reported cases of Black Lung across the coalfields of the country. According to data from the Center for Disease Control (“CDC”), the National Institute for Occupational Safety and Health (“NIOSH”), the Mine Safety and Health Administration (“MSHA” or “Agency”) and a host of independent studies, the highest concentration of these historic increases in the disease are occurring in the central Appalachian Region of

the United States (attachments 1-4). This area includes all or parts of Kentucky, Ohio, Pennsylvania, Virginia and West Virginia.

I hope that this Committee will forgive me if I repeat myself in my testimony today. I ask at the outset for your indulgence if you hear me say something at this hearing that you have heard me say before. But the truth is, I cannot help but repeat myself. This is not the first time I have climbed the steps of the Capitol to speak on behalf of coal miners regarding the dangers of Black Lung disease. While the Union would agree that recent studies show there has been an alarming resurgence in the number of Black Lung cases, including the most severe form of the disease known as Progressive Massive Fibrosis (“PMF”), I have been here before to discuss that risk. The industry, and the Federal government have known for years of this resurgence. I have testified in the past about the failures of MSHA’s dust control rules and policies. I have testified before about the nefarious methods that operators have used to circumvent mandatory dust monitoring. The UMWA has recommended methods and ways of improving the sampling system and that might have helped head off this resurgence. But no action has been taken.

And so, I repeat myself. I repeat myself because I come here today not explain to you a new or unprecedented danger in the nation’s coalfields. We know this disease, we know what causes it, and we know how to prevent it. We do not lack information. What we lack today is the same thing we lacked all the other times I came to speak to Congress regarding the dangers of Black Lung: we lack the will to act.

Therefore, I do not apologize. I will never apologize for raising the uncomfortable truth that this government has all the data and the tools necessary to end the Black Lung epidemic in the nation’s coalfields, but has consistently failed to act. If you hear me say something that I already raised in May of 2003, the first time I testified before a Congressional Committee on this issue, consider it an indictment of this government’s failure to take seriously the known threat of Black Lung disease. Know that I repeat myself today because, since May 2003, over 18,000 miners have died in this country from Black Lung (attachment 5). And if Congress again fails to act, that number is expected to skyrocket in the coming decades. I will not stop repeating these truths until Congress listens. Until Congress passes legislation that requires MSHA to promulgate specific standards that protect

miners, and corrects the shortcomings of the current dust standards, nothing is going to change.

The Union would argue that the seeds of the recent wave of CWP were sown by the actions of Federal agencies and coal operators whose primary job is to protect the health and safety of the nation's miners. This epidemic was further propagated by medical and legal professionals that profited from the misery of those miners unfortunate enough to contract this horrible disease. The fact is Madam Chairman, CWP is a preventable occupational disease (attachment 6) that would have been eradicated from the industry years ago, but for the greed of the industry and the failings of those who are charged to protect the nation's miners.

### **The History of Black Lung in The United States**

It is important to understand the scope of this problem in a historical sense if we are to understand the situation we find ourselves facing today. The problem we are discussing has been plaguing the coal industry and has been a horrific reality for miners since the industry began large scale industrial mining in the mid-1800's. According to the research done by Nash Dunn (attachment 7), a Communications Specialist at North Carolina State University, more than 200,000 miners have died from Black Lung disease since the turn of the last century. A separate report *Undermining Safety: A Report on Coal Mine Safety* by Christopher W. Shaw (attachment 8), a policy analyst at the Center for Study of Responsive Law, claims, that historically "there were at least 365,000 deaths from pneumoconiosis (prior to the passage of the Coal Act of 1969), and a further 120,000 miners succumbed to the disease over the next thirty years." We should all take a moment and allow that number to sink in.

As we think about these numbers, we should not lose sight of what we are really talking about here. No matter what number you choose to accept, these miners were fathers and sons, mothers and daughters, they were grandmothers and grandfathers, aunts and uncles, they were part of a family and members of the community. These lives were cut short in the most gruesome way imaginable. These miners died struggling for their final breath, literally suffocating as a result of a preventable disease. Madam Chairman and members of the Committee, I submit to you that when it comes to protecting miners from exposure to coal mine dust, something has been very wrong for a very long time.

There are credible reports throughout history of doctors and mine operators extolling the benefits of breathing coal dust, noting the coughing experienced by miners would in fact clear their lungs. Much like evidence regarding the dangers of smoking cigarettes, industry and government downplayed the hazard of respirable coal dust. The coal industry was making profits and the victims were simply expendable. Despite evidence to the contrary and the efforts of the United Mine Workers, this type of thinking continued in this country through the 1960's.

It was not until the Farmington #9 Mine Disaster on November 20, 1968, where 78 miners were killed in a series of explosions, of which 19 miners remain entombed in the #9 mine today, that the Federal Government was finally forced to take action. To be honest Madam Chairman, had it not been for the fact that the #9 Disaster was the first mine explosion carried live on television across the nation and around the world, it is doubtful any substantive action would have resulted from even that tragic event. The American people were publicly outraged and called for Congress to take action. It is an unfortunate reality that miners in this country must die in large numbers, and the suffering of miners and their families must be shown on television, before anything is done to protect them from the hazards that this industry allows to exist.

I bring this up, Madam Chairman, because it was not until December of 1969 that President Richard Nixon reluctantly signed the Coal Mine Health and Safety Act ("Coal Act"). Included in the Coal Act was language limiting the amount of respirable coal mine dust permitted in the mine atmosphere. By that time, according to reports, hundreds of thousands of miners had died from Black Lung disease in the United States. These miners died alone, one at a time in the seclusion of their homes or hospital rooms. They were isolated from the world, only their families knew of their suffering. Industry leaders and the federal government turned a blind eye to that suffering. No television cameras chronicled their final, gasping moments.

The Coal Act was a monumental piece of legislation and I do not wish to diminish the protections it afforded miners. However, there were pieces of that legislation that were ripe for fraud and deception. The most obvious problem in that regard deals specifically with the important matter we are here to discuss today, the enforcement and policing of the Respirable Dust Sampling Program. To put it bluntly, the incidence of fraud on the part of the mine operators and lack of adequate

enforcement by MSHA has been a problem from the inception of the program. I understand that this statement may seem inflammatory to many people, however, I intend to demonstrate these facts through my testimony.

The initial problem with the dust sampling program was created when the Mine Safety and Health Administration promulgated a rule allowing the mine operators to run the program (attachment 9, Section 202 of the Coal Act). Despite the Union's objections and the vocal opposition of active miners, the routine sampling of miners was placed in the hands of mine management. In the eyes of the miners and their representatives, allowing the mine operators to administer the program doomed it from the beginning. These are the very same individuals who callously placed miners in excessively dusty areas of the mine with no regard for the long-term damage they were causing to their health.

Even in the earliest days of the sampling program it was common knowledge among miners that dust sampling by the mine operators was not being done in a manner that would reduce exposure to excessive respirable dust or enhance their health. The gravimetric sampling devices were often carried by company personnel in outby<sup>1</sup>, meaning less dusty, areas of the mine or hung in cleaner intake air entries.<sup>2</sup> This not only continued to place miners lives at risk, it further eroded the credibility of the program and the miners' faith in MSHA.

### **All White Center Tampering (AWC) Case**

While the Union suspected for many years that mine operators were tampering with the sampling devices and sending fraudulent data to the Agency in order to meet the requirements of the law, the first conclusive evidence of deception was uncovered in the late 1980's (attachment 10). The Agency became aware that more than 500 coal companies had tampered with dust samples at more than 850 operations. MSHA issued 4,710 citations and \$6.5 million in fines to coal operators.

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<sup>1</sup> Locations in mines are described by their position relative to the cutting face of the coal. If a miner is standing in the middle of the mine, halfway between the portal (entrance) and the face, the face is "inby" and the portal is "outby." If a miner is standing directly at the face, the entire mine behind him/her is "outby." Miners sometimes refer to "outby areas" when referring to areas far from the working face, where there is less dust.

<sup>2</sup>Intake air entries are the passageways in the mine where fresh air is pumped towards the face. Because these entries contain fresh air and are "upstream" from the face, they are less dusty.

In this case, the dust sampling cassettes used by the company to monitor miners' exposure were sent to MSHA as required by regulation for weighing and evaluation. During that testing MSHA technicians discovered the filters inside many of the cassettes all displayed a strange characteristic. The center of the filters were absent of dust, creating a "doughnut hole", almost like this area of the filter was new, despite being underground and operating in the mine atmosphere. It was determined at the time that the only possible way for this to occur would be if someone blew air through the cassette to dislodge and purge the dust from the filter. This phenomenon became known as the "Abnormal White Center" ("AWC") case and the tampering ended any shred of faith miners had in the program.

### **The Coal Mine Respirable Dust Task Group**

In May 1991, in the aftermath of the AWC case, the Honorable Lynn Martin, Secretary of Labor, directed MSHA to conduct a review of the Respirable Dust Sampling Program. In response to the Secretary's directive, the Agency created the *Coal Mine Respirable Dust Task Group* (Task Group) to review all aspects of the sampling program (attachment 11, pertinent excerpts from the Task Group). Notably, the Task Group did not include representatives from Labor, Industry, NIOSH or other interested parties connected to the mining industry. In essence, the Secretary was permitting the Agency that had failed to adequately protect miners from the deceptive actions by coal mine operators to investigate itself.

Despite the fact that they were given no formal role in the Task Group, miners and many mine health and safety experts expressed their concern that mine operators could not be trusted to administer the coal dust sampling program. They contended that, "there is simply too great an incentive to manipulate the program, and a lack of adequate MSHA oversight makes it far too easy for some operators to do so." These critics also, "urged that MSHA assume responsibility for the collection of all samples of the mine environment used for compliance determinations."

While the Task Group offered recommendations, most would prove to be superficial and therefore ineffective. As to the question of MSHA taking responsibility for all compliance sampling, the Task Group failed to even make a recommendation. They instead kicked the can down the road arguing that MSHA took strong action after operator abuse and that it would require the Agency to redirect significant resources towards that goal. Perhaps the most disingenuous

reason for the Task Groups refusal to make such a recommendation was that, “the future adoption of a program based on continuous fixed-site monitoring would significantly reduce the need for either the operator or MSHA to conduct periodic sampling.”

The Task Group then doubled down on its decision not to wrest control of the sampling program by stating, “The Task Group believes that the existing operator sampling program can provide adequate assurance that miners will not be exposed to unhealthful levels of respirable coal mine dust until continuous monitoring is feasible, if appropriate improvements are made in the program.” This was particularly absurd given the fact that the AWC case, among other incidents, proved that “adequate assurances” were not present. Further, the Task Group did not address the fact that the technology for continuous monitoring was still decades away. That meant that in light of the coal industry’s demonstrated circumvention of the respirable dust standards, the Task Group’s solution was a few more decades of operator-administered dust tests. In short, no change.

The Task Group failed in its primary mission to make practical and necessary recommendations that would protect coal miners from continued exposure to excessive respirable coal mine dust. Instead they made inconsequential recommendations that did not alter the worsening trajectory of the dust control program. Worse, they devalued the life of every miner in the country by not taking bold and decisive action. They determined the financial cost of providing protection for the miner was too high. This was an abdication of responsibility by a group made up of individuals working for the Agency charged by law to protect the health and safety of the nation’s miners.

### **Advisory Committee on the Elimination of Pneumoconiosis Among the Nation’s Coal Workers**

Five years later, the Advisory Committee on the Elimination of Pneumoconiosis among Coal Mine Workers (“Advisory Committee”) was established by the Honorable Robert B. Reich, Secretary of Labor, on January 31, 1995. The Committee was chartered to "make recommendations for improving the program to control respirable coal mine dust in underground and surface mines in the United States." The Committee was to "examine how to eradicate

pneumoconiosis through the control of coal mine respirable dust and the reduction of miners' exposure to achieve the purpose of the Federal Coal Mine Health and Safety Act of 1969 and the 1977 Mine Act amendments" and to "review information and experience in the United States and abroad concerning the prevention of pneumoconiosis among coal miners; the availability of current state-of-the-art engineering controls to prevent overexposure to respirable coal mine dust; and the existing strategies for monitoring of coal mine dust exposures." The Committee was charged to "make recommendations to the Secretary for improved standards, or other appropriate actions, on permissible exposure limits to eliminate black lung disease and silicosis; the means to control respirable coal mine dust levels; improved monitoring of respirable coal mine dust levels and the role of the miner in that monitoring; and the adequacy of the operator's current sampling program to determine the actual levels of dust concentrations to which miners are exposed."

Unlike the Task Group, the Advisory Committee appointees did not include employees of any government agency. Instead, the Committee consisted of five members from academia and the medical profession, two representing the interests of labor and two representing the interests of industry. The Advisory Committee did consult individuals from MSHA, NIOSH, the Pittsburgh Research Center (PRC) and other government agencies as necessary. However, none of those consulted were voting members of the Committee.

In 1996, the Advisory Committee completed its work and submitted a report to the Secretary of Labor (attachment 12, pertinent excerpts from the Advisory Committee report). The Union was generally pleased with the work of the Advisory Committee. Its members were able to identify many of the more difficult challenges inherent in the Respirable Dust Sampling Program without the encumbrance of self-examination that hampered the previous internal review. The Advisory Committee researched some of the more controversial issues surrounding the Respirable Dust Sampling Program and offered concrete recommendations to correct them.

It will be helpful to look at some of the Advisory Committee's recommendations, and review how MSHA has acted, or failed to act on them. In the Committee's first area of concern, members made recommendations regarding actual amount of dust present in mine atmosphere. Specifically, they advocated reducing the overall level of respirable dust permitted in the mine atmosphere, creating and enforcing separate Permissible Exposure Limit (PEL) for silica and coal



mine dust, and directing MSHA to seek input from NIOSH for advice on lowering the current silica exposure of miners. The Committee also recommended adjusting the PEL to take into consideration extended work weeks (recommendation 16a).

When the Advisory Committee issued its report in 1996, NIOSH recommended a standard of 1.0 mg/m<sup>3</sup> (milligrams per cubic meter of air) of respirable dust. NIOSH also recommended a 50 µg/m<sup>3</sup> (micrograms per cubic meter of air), PEL for silica. At the time, MSHA was enforcing a 2.0mg/m<sup>3</sup> respirable dust standard. The 2.0mg/m<sup>3</sup> was reduced if silica (quartz) was present in the mine atmosphere. There was (and is) no separate silica standard in the mining industry. It was not until 2014, 18 years later, that the Agency promulgated a new regulation that reduced the dust standard from 2.0mg/m<sup>3</sup> to 1.5mg/m<sup>3</sup> and accounted for extended work days and work weeks (attachment 13, Summary of 2014 Dust Rule). This was still higher by 0.5mg/m<sup>3</sup> than NIOSH recommended in 1996. The Agency has still not taken up the Committee recommendation to create a separate PEL for silica, nor has it lowered the exposure limit. MSHA continues to maintain the PEL for silica at 100µg/m<sup>3</sup>, twice the NIOSH recommended exposure limit. In 2018 OSHA established a reduced silica standard of 50µg/m<sup>3</sup>.

As noted above, the Advisory Committee recommended adjusting the PEL to consider extended work weeks. The Advisory Committee was concerned that, even at lower levels of exposure, more hours worked would result in dangerous levels of cumulative exposure. Today, there remains some question as to the actual exposure to respirable dust that miners receive at the 1.5mg/m<sup>3</sup> over a 12 or 14-hour shift. The Union has expressed its concern that such respirable dust exposure during longer shifts may exceed the standard set by Congress in the Mine Act.

In other recommendations, the Advisory Committee attempted to tackle the overriding issues of fraud and tampering inherent in the Respirable Dust Sampling Program. They also recommended ending operator control of the sampling process.

The Committee determined in recommendation 16c, by a unanimous vote, that they considered it, “a high priority that MSHA take full responsibility for all compliance sampling at a level which assures representative samples of respirable dust exposures under usual conditions of work. In this regard, MSHA should explore all possible means to secure adequate resources to achieve this end without adverse impact on the remainder of the Agency's resources and responsibilities.” Note that both industry representatives voted in favor of this recommendation (attachment 14, Committee votes).

In 16b, the Committee noted that there were methods available to MSHA to obtain necessary resources that would permit the Agency to conduct all compliance sampling and eliminate operator participation in that aspect of the Sampling Program. The Committee stated that it believed, "...that any MSHA resource constraints should be overcome by mine operator support for MSHA compliance sampling. The Committee recommends that to the degree that MSHA's resources cannot alone serve the objective identified, resource constraints should be overcome by mine operator funding for such incremental MSHA compliance sampling. One means for obtaining this support could be a reasonable and fair operator fee, based on hours worked, or other equivalent means designed to cover the costs of compliance sampling." The recommendation passed the Committee 8-0-1, the lone abstention was cast by a representative of industry. Significantly, one of the industry representatives voted in favor of this recommendation.

The Advisory Committee noted several times the importance of having representatives of the miners actively participate in all aspects of the Respirable Dust Sampling Program. In order to facilitate their input, the committee repeatedly recommended that miners be afforded the rights provided in Section 103(f) of the Mine Act (attachment 15). This would allow miners to receive compensation, at their regular rate of pay, while taking an active role in the Respirable Dust Sampling Program.

Unfortunately, these particular Advisory Committee recommendations, recommendations that the Union believes are key to affording miners the protections Congress intended, have never been acted on by MSHA. The Agency continues to argue that the recommendations are too expensive, too burdensome and will not result in substantial improvement in the Respirable Dust Sampling Program. MSHA argues, without support, that the recommendations offer no significant health benefits to miners. The Union vehemently disagrees with the Agency's decision regarding these recommendations and further argues that the Agency's logic for making such a decision is incorrect and detrimental to the health and safety of the nation's miners.

The Union believes that if the Agency imposed a mandatory fee for service on each operator to conduct all compliance sampling, while at the same time relieving the operator of the expense associated with performing this sampling under the current statute, both parties would benefit from the arrangement. MSHA could

then be certain that all the respirable dust sampling was done in accordance with the law and that all the samples were accurate. Mine operators would save valuable assets both in terms of manpower and money. Significantly, operators would no longer be tempted to submit fraudulent samples or tamper with sampling devices in order to comply with the law. One beneficiary of this system would be conscientious operators, who would know that their competitors could not gain a competitive advantage by gaming the system. However, the individuals who will benefit the most by eliminating the mine operator from the sampling equation is the miner. This action would further the initial objective of the Mine Act by better protecting the industry's most precious resource – the miner.

The Union would also encourage MSHA to accept the Advisory Committee's recommendation to afford the Representative of the Miners the right to participate fully in the Respirable Dust Sampling Program. The Agency should modify its interpretation of the Mine Act to allow miners to utilize Section 103(f) "Walk Around Rights" at all times, regardless of the reason a Representative of the Secretary is on mine property. That would include granting walkaround rights for the purpose of compliance sampling. The participation of miners at mining operation is critical to the overall success of Mine Act in general and the health and safety of the workers at the facility in particular.

Finally, Congress and MSHA need to carefully examine a problem the Union has recognized for decades and the Advisory Committee addressed in recommendation 19f. The Committee stated that it recognized, "the problem of miner representation and participation in the dust control programs at mines not represented by a recognized labor organization and recommends that MSHA target such mines for compliance sampling. MSHA targeting should be active in nature and should consider many factors including miner input, compliance history, and medical surveillance data. Given the seriousness of this problem, MSHA should immediately start auditing and appropriately targeting these types of operations." This has been a historic problem in the industry that cuts at the very heart of the Mine Act's ability to be applied equally at all mining operations. The nature of the industry and MSHA's inability to adequately police non-compliant operators creates a bifurcated enforcement system that does not afford equal protection for all miners. The safest mines are Union-represented operations, where workers have a legitimate voice on the job.

## Stanford Review

You do not have to simply take my word, or the word of the Advisory Committee, for the proposition that union represented mines are safer and more healthful than nonunion mines. The numbers bear that out, as shown in an article published by Stanford Law Professor Alison D. Morantz, entitled *Coal Mine Safety: Do Unions Make a Difference?* Vol. 66 Industrial and Labor Relations Review, No. 1 (2013) (attachment 16). Professor Morantz conducted a statistical analysis of injury reporting at underground, bituminous coal mines between 1993 and 2010. She researched both union and non-union mines to determine whether unionization reduced mine injuries or fatalities. The results of her inquiry were stark, but not surprising to those of us who work to improve miner health and safety every day.

Specifically, Professor Morantz found that unionization results in a “sizeable (more than 20%) and highly significant decline in traumatic injuries. . .” Similarly, she found “unionization is associated with an even larger (more than 50%) fall in fatal injuries . . .” That is, miners in union mines were far less likely to suffer traumatic or fatal injury. In analyzing this data, Professor Morantz concluded that traumatic and fatal injuries were the least prone to “reporting bias” therefore demonstrating “real” union safety effect in U.S. underground coal mines. While Professor Morantz was studying injuries (rather than occupational disease), I would argue that her findings are highly significant for the topic we are discussing today. First and foremost, the statistics show that union mines are safer than nonunion mines. Miners are less likely to die or suffer traumatic injury when they work in a union represented mine.

And the reason why this is the case is illustrated by the statistics regarding non-traumatic injuries. Specifically, while showing that union represented mines were far less likely to have fatal and traumatic injuries, the statistics also showed that union mines were “associated with a very sizeable (more than 25), robust, and statistically significant *increase* in non-traumatic injuries . . .” (emphasis in original). However, in explaining this counterintuitive result, Professor Morantz concluded that her findings lend “credence to claims that injury reporting practice differ significantly across union and nonunion mines.” Put simply – nonunion miners were not less likely to suffer non-traumatic injuries; they were just less likely to report them. They reported higher levels of fatal and traumatic injuries, because those sorts of injuries are harder to hide.

These findings demonstrate what any union miner already knows: union represented mines are safer because union miners feel empowered to actively participate in their own safety. Union miners report lower numbers of fatal and traumatic injury because union miners know they can refuse to perform unsafe acts and can demand that their employer follow the rules. Further, union miners are more likely to report non-traumatic injury because they know that if the company retaliates against them for reporting the injury, that their union brothers and sisters will have their back. Nonunion miners reasonably fear retaliation from operators. They cannot afford to insist that their employers follow the rules and they cannot risk reporting minor injuries.

There is no reason to believe that this dynamic is any different as it relates to respirable dust. Union miners will insist that their employers follow the laws and ventilation plans to control respirable dust. When union miners see a problem, they will speak up. Non-union miners do not have the support systems necessary to take that risk. Instead, they will silently suffer while they breathe in the coal and silica dust that will slowly kill them.

### **Louisville Courier Journal**

Following the issuance of the Task Group and Advisory Committee reports, The problems associated with the Respirable Dust Sampling Program continued. While this is not surprising, considering the fact that no action was taken to improve conditions in the mines, it is nonetheless disheartening. And the nation learned about it from a newspaper. Beginning on April 19, 1998, the *Louisville Courier Journal* (“*Courier Journal*”) published the results of a year-long investigative report into the problem. The newspaper printed a 5-part series, *Dust, Deception and Death; Why Black Lung Hasn’t Been Wiped Out* (attachment 17, relevant articles). I am sure many of you, especially those from the coalfield areas of northern Appalachia, are familiar with the reporting. But I believe it is important to revisit some of what the newspaper uncovered, to understand the depth of the problem miners have been dealing with for years. It is also critical that we realize the efforts to subvert the Respirable Dust Sampling Program by many operators and the inability of MSHA to adequately address these problems was not isolated to any particular area of the country, that it was not ended by the notoriety and MSHA fines that occurred as a result of the AWC case, and that it still occurs today.

The subheading for the first edition of the Journal story was, “*Cheating on coal-dust test widespread in nation’s mines.*” While that blaring indictment

naturally makes us think about the abhorrent actions of the coal companies, I would like to ask each member of this Committee to think about the people actually harmed. Think about the miners whose health was permanently ruined by this cheating.

Let me highlight one of those miners, whose experience was chronicled in the *Courier Journal*. After serving in the U.S. Army for 3 years, Leslie Blevins started his mining career in a low seam coal mine (36 inches) in 1972 at the age of 23. Blevins spent a lot of his 21 years in the mine operating a continuous mining machine, one of the dustiest jobs in any mine. It involved operating a massive piece of machinery designed to tear coal from the solid mine walls. For two years he was assigned to cut through solid rock in the mine, a common occurrence in many operations. The rock is much harder than coal and generates huge amounts of silica dust, which is much more toxic and damaging to the lungs. “Sometimes, I would have to shut the miner down and go in the fresh air and puke”, stated Blevins. “My boss would tell me to get back in.” But Blevins’ story gets worse. Blevins was operating a miner, an occupation MSHA requires to be sampled for respirable mine dust. When he was asked about the sampling practices at the mine Blevins stated, “There would be times when I took company samples and the foreman would turn off” the sampling machine. “Or I’d come out of the mine, and they’d say, ‘you took a sample today’ and I’d say, ‘I did? Where was it?’ and they’d say, ‘in the intake (clean air).’” The situation Mr. Blevins was subjected to is disgraceful. What is truly disgusting is that these same incidents still occur today.

Let me take a moment and explain exactly what, according to the *Courier Journal*, Mr. Blevins’ employer and other coal operators were doing to avoid their obligations to provide healthy work environments for their employees. MSHA’s dust program requires miners to be sampled on a routine basis while performing their normal duties at the mine. The sampling device was to be worn for 8 hours while the miner was in the mine. However, in an effort to have the company appear to be in compliance with the mine’s dust plan, many mine operators devised countless ways to game the system.

Miners were told that the dust samples, that were supposed to be used to give an honest assessment of the amount of dust in the mine’s atmosphere, must come out of the mine “clean”, or within permissible limits. So instead of wearing the devices and risk disciplinary action by the mine operator, the sampling devices were routinely hung in fresh air intakes, placed in other less dusty areas or placed in the miners’ lunch bucket. In one report in the *Courier Journal*, a miner remembers the only time he ever wore a dust sampling device. “I got a bad sample, and they told

me in front of everybody that I would be carrying that thing for the rest of my life if I didn't get a good sample. So, I took it in the next day and set it at the breaker box in clean air and got a good sample." There should be no doubt in anyone's mind that the message from mine management to this individual was not a single incident. These types of actions by coal operators are as old as the Dust Rule and are in fact still occurring today. There is no doubt in my mind, that if that miner had continued to bring out accurate samples that were not in compliance, he would have been fired.

In one particularly incredible scenario, miners at A.T. Massey Coal Company's Crystal Fuels mine took 45 dust samples at the mine face, the area where the solid coal is mined. Thirty-four of those samples, or 76 percent, contained just 0.1 mg of dust per cubic meter of air sampled. This is an outcome that by all accounts, including the opinions of experts with years of experience, is impossible to achieve. I would submit to this Committee that a miner working all day in intake air would not be able to attain such sampling results. And yet, the Union was unable to find any investigation or inquiry by MSHA questioning the validity of these sampling results. Let me put it bluntly: A.T. Massey obviously and transparently cheated on their dust sampling, but MSHA ignored these obvious "red flags."

Despite this evidence of rampant tampering, not to mention the 23-year-old recommendations of the Advisory Committee, coal operators are still charged with administering the Respirable Dust Sampling Program. As a result, MSHA must bear a major share of the blame for the current state of that Program. As I stated earlier, the seeds for the program's failure were apparent from the start, and those seeds have clearly taken root. Little has changed since the *Courier Journal* wrote its scathing report. The words of former Assistant Secretary for Mine Safety and Health Davitt McAteer at the time still ring very true. McAteer stated that, "Expecting operators to police themselves defies human nature...the system is broken." Recognizing that fact, McAteer was seeking to increase testing by federal inspectors and relying less on mine operator sampling. That idea, like so many other proposals, never came to fruition. Despite being able to concretely identify the shortcomings in the system, MSHA has done little to remedy the most blatant problems.

I realize that up to this point much of my testimony has focused on, what many would consider, the distant past. However, as I will point out, those sins of the past have never stopped plaguing the nation's coal miners.

## Previous Congressional Hearings

On July 13, 2010 and again on March 27, 2012, I came before the House Committee on Education and Labor and the House Committee on Education and the Workforce, respectively, to discuss the disaster at Massey Energy's Upper Big Branch Mine South ("Upper Big Branch" or "UBB") in Montcoal, Raleigh County, West Virginia (attachments 18-19). While the overriding context of that testimony dealt with the events leading up to the mine explosion and its aftermath, the information I submitted and the testimony I gave predicted, that if action was not taken by Congress and the Agency, we would witness the Black Lung crisis we are discussing today. The Union has been raising the concerns routinely for years. I have enclosed the past several years of the *UMW Journal* (attachments 20-29), the official publication of the Union, that chronicles the Union's continual attempts to bring these problems to the forefront of public debate. However, like so many other efforts to protect workers, the legitimate warnings about Black Lung the Union has raised have been ignored by industry, MSHA and Congress.

The conditions in the Upper Big Branch mine, specifically the amount of coal dust that exploded and killed 29 miners, presents a microcosm of the dust problem that has haunted the industry for almost two centuries. While the UBB disaster could still provide fodder for hundreds of Congressional hearings, what is important to the topic we are here to discuss today is that the thick layers of coal dust that filled the entries of the UBB were not restricted only to the mine surfaces. This respirable and deadly dust also lined the lungs of the workers at that operation, slowly but surely killing the miners. In my 2012 testimony, I specifically referred to the fact that autopsies performed on the miners at UBB showed the majority of those killed had some level of Black Lung Disease. This is true of some of the youngest miners who lost their lives in the disaster.

Further, the report issued by the Union after the disaster, *Industrial Homicide*, (attachment 30, relevant pages) stated, "The fact that miners worked in such a dusty atmosphere offers great insight into the prevalence of black lung disease in many of the miners killed in the disaster. Of the 24 miners, between the ages of 24 and 61 whose lungs could be examined during autopsy, 17 or 71 percent, showed some stage of black lung." With respect to the mining practices at UBB, the report noted that the practice of running the longwall shearer without the required water sprays amounted to, "...reckless disregard for the law...And over the long term, exposure



to uncontrolled coal mine dust greatly increases miners' chances of contracting black lung disease.”

Madam Chairman, the UBB disaster occurred on April 5, 2010. It is not ancient history. More importantly based on the information that is available, it is clear that this type of illegal activity on the part of many coal operators are accepted practices in the industry. There is a clear and uninterrupted pattern of behavior on the part of the coal industry that runs back to the earliest days of the Respirable Dust Sampling Program. Tragically, even the spotlight shone on the issue by martyrs of UBB could not put an end to the industry's reckless behavior.

### **National Public Radio and Center for Public Integrity**

In 2012, an investigation by National Public Radio (NPR) and the Center for Public Integrity (CPI) found that the Black Lung disease has spiked in the last decade, especially in portions of Kentucky, West Virginia and Virginia (attachment 31). NPR and CPI documented weak enforcement by federal regulators and cheating by mining companies involving the system that is supposed to limit exposure to coal mine dust. If you have heard this all before, you are not alone.

NPR followed up on the story in December of 2016 when it printed data obtained from Black Lung Clinics in Central Appalachia (attachment 32). The story demonstrates the correlation between the industry's and the government's failure to curb excessive exposure to coal dust and the effects on miners' health.

NPR reported that recent studies showed that the occurrence Black Lung disease among coal miners across the nation had skyrocketed beyond anything ever seen before in the industry. Younger, less experienced miners were contracting the disease at an earlier age, subjecting them to a shortened and debilitating existence until they ultimately succumb to the ravages of the illness.

NPR reported that data from Black Lung Clinics across Appalachia, studies from NIOSH, and information that they uncovered all came to the same conclusion: the occurrence of Black Lung and PMF was being diagnosed in unprecedented numbers across the region. Perhaps even more alarming, many of the individuals contracting the disease were younger miners with less than 20 years of mining experience.

The information obtained from eleven Black Lung Clinics in Pennsylvania, West Virginia, Virginia and Ohio discovered 962 cases of the disease from 2010 to 2015. This is nearly ten times the number of cases reported by NIOSH during those five years. NPR also stressed that the frequency rate could be even higher because some clinics had incomplete records and other clinics refused to provide information.

At long last, on April 23, 2014, MSHA, perhaps responding to public outcry generated by the earlier NPR reports and pressure from the UMWA, published a final rule titled “Lowering Miners’ Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors.” After decades of turning a blind eye, MSHA was finally taking some action on respirable dust. The rule became effective on August 1, 2014, and was phased in over a two-year period. It included a reduction in the concentration of respirable coal mine dust permitted in the mine atmosphere from 2mg/m<sup>3</sup> to 1.5 mg/m<sup>3</sup>, use of the personal dust monitor (PDM), required full shift sampling of specific designated occupations (DOs) and designated areas (DAs) and permitted MSHA to cite a mine operators for violating the law based on a single shift sample. The Rule did not include, nor did it contemplate, including the requirement for a separate, legally enforceable, PEL for silica.

At the time, the UMWA offered “qualified” support for the rule noting, “There are aspects of the rule the Union believes will help lower miners’ exposure to mine dust and reduce the chances they will contract black lung. However, there are other issues we believe MSHA should have included in the final rule to better protect miners.” The Union went on to state that, “The PDM is cutting edge technology, but MSHA did not require it be used to sample all miners.” and that “MSHA enforcement of the new rule will be critical to its ultimate success, which would be more likely had the Agency taken over the sampling procedures.” While the Union continues to stand by that assessment, we must face the unfortunate reality that operator fraud and tampering along with inadequate enforcement has once again doomed the respirable dust sampling program.

According to a report published in the September, 2018 edition of the *American Journal of Public Health*, one in every ten coal miners who have worked for at least 25 years in the industry has been identified as suffering from Black Lung disease (attachment 33). The situation in West Virginia, Kentucky and Virginia is much worse. NIOSH data has determined that one in five miners with two and a half decades mining experience in central Appalachia have contracted some level of the disease. NIOSH also noted that the number of miners diagnosed with

progressive massive fibrosis (PMF), the most severe form of the disease, will likely increase at the same rate in the coming years. To put this health crisis in perspective, the number of cases of Black Lung diagnosed through 2016 in West Virginia and Kentucky have increased over 16 percent compared to 1970. In Virginia, the same year comparison shows an increase of over 31 percent. Doctors from the National Institute for Occupational Safety and Health have described the incidence rates as nothing short of an epidemic.

### **Armstrong Coal Company**

Madam Chairman, in the event that any person on this Committee is inclined to think that coal industry changed after the tragedies I have discussed today, I would offer a review of a recent indictment of both the coal industry and MSHA. The case I am referring to came to a head just last year and is currently being prosecuted by the United States Attorney for the western District of Kentucky. A federal grand jury indicted nine officials from the Armstrong Coal Company on charges of conspiring to commit dust fraud. Those nine officials were Glendal “Buddy” Harison, the Manager of all of Armstrong’s western Kentucky Mines; Charles Barber, superintendent of the Parkway Mine; Brian Keith Casebier, Parkway Mine safety director; Steven Demoss, Parkway Mine assistant safety director; Billie Harold, Parkway Mine section chief; Ron Ivy, Kronos Mine safety director; John Ellis Scott, worked in the safety department at Parkway Mine; Dwight Fulkerson, Parkway Mine section chief and Jeremy Hackney, Parkway Mine section chief. The grand jury charged that each individual, “...knowingly and willingly altered the company’s required dust-sampling procedures, by circumventing the dust-sampling regulations, submitting false samples and making false statements on dust certification cards.” The fraud and deception occurred between January 1, 2013 and August 8, 2015, through the time frame when MSHA’s new dust rule was being implemented. The indictments were made public in July 2018. New charges related to the alleged fraud were added in February of this year (attachments 34-35).

While the Union is pleased the alleged perpetrators of these crimes were indicted, it is important to note that MSHA enforcement activity did not play a role in initiating this case. Rather, the miners at the operation who contracted Black Lung or were experiencing shortness of breath brought the damning information to the attention of the Huffington Post, resulting in an investigation by the Agency. Miners at the operation reported that the company officials at Armstrong used many of the

same tactics that other coal operators have used since the inception of the Respirable Dust Sampling Program. Dust pumps were hung in intake entries, company officials falsified tests on days the mine was not even operating, workers wearing dust sampling devices were removed from dusty areas or occupations and replaced by miners not wearing the devices. The devices were also wrapped in cloth to restrict dusty airflow into the pumps.

So, Madam Chairman and members of the Committee as we sit in this beautiful hearing room, breathing in clean fresh air, I am disappointed to report that nothing much has changed in the coal industry. There is a new respirable dust rule, there is a new Assistant Secretary at MSHA, there is new continuous dust monitoring devices in the nation's mines and the industry is still willfully, knowingly and with impunity causing the slow and horrific death of thousands of miners every year. The dollar they put into their pocket at the expense of these miners' lives is apparently worth the harm they are causing.

Allow me to repeat myself; after nearly two centuries of mining coal in the United States very little has changed.

Madam Chairman, it has been brought to my attention that at the conclusion of this panel, the Committee intends to hear from a representative of the mining industry and the Assistant Secretary for Mine Safety and Health Administration, Mr. Zatezalo. I cannot be certain about the exact details of the testimony they will be offering the Committee. However, based on my knowledge of this issue and from what I have read and seen in other sources, I can confidently speculate that their views will not align very closely with what I have stated today.

I am certain that industry will attempt to explain the continued occurrence of Black Lung disease among today's miners as a remnant of the past. The leftover casualties of a time before operators became enlightened, followed the letter of the law, and looked out for the health of the miner. There will be attempts to show this Committee that the industry has changed and only a few rogue operators are still placing the lives of miners at risk. I could not disagree more.

The failure of the Respirable Dust Sampling Program is apparent. There is no question that in order to gain a competitive advantage over a competitor or increase their profit margin, today's mine operators will resort to the same tactics the have

used for years to game the system. If left to their own devices and permitted to retain control of the sampling program, coal operators will continue to expose miners to excessive and deadly coal dust with no regard for the lives they are destroying.

The Mine Safety and Health Administration will attempt to demonstrate the success of the Respirable Dust Sampling Program by reciting the number of dust samples that have been taken and the percentage that are in compliance since the inception of the new dust rule. If I am not mistaken, those figures will reflect that between MSHA and mine operators 138,768 samples have been taken and that over 99 percent are below the Permissible Exposure Limit. The data will also show the average concentration of these samples are at a historic low of 0.61mg/m<sup>3</sup>. The Agency will attempt to paint the new sampling system as successful, based on this data. Unfortunately, this data has been removed from MSHA's web site.

From the prospective of the UMWA, based of years of experience and the history of the industry, we simply do not accept or trust the data being presented by the Agency. Unfortunately, the overwhelming evidence of tampering and fraud by coal operators and the lack of adequate oversight by MSHA leaves the Union no other choice but to dismiss this information as subjective and not scientifically sound. Given the history of what I have recounted today, what would give this Committee, or any reasonable observer, any confidence that the numbers cited by MSHA are accurate?

In the end, I believe both industry and MSHA will seek to delay any attempts to strengthen the protections afforded to miners though Congress or by rulemaking. They will request more time to establish whether the new rule is working sufficiently. Madam Chairman they may have more time for studies and information gathering, but the nation's miners do not. Additional time for miners under the present conditions is, simply put, additional time to contract Black Lung. Time is something miners do not have when it comes to protecting their health and safety.

It is not my intention to impugn the sincerity of the testimony any individual will present to this Committee, although I would not hesitate to question the factual basis for their remarks. I believe that MSHA honestly wants its Respirable Dust Sampling Program to work. But, the Union's views are clear on this matter. The Program does not work. We know why. We know ways to fix it. It is time to take action.

## **After the Diagnosis**

Madam Chairman, this is not the end of the problems created by the broken Respirable Dust Sampling Program that miners are forced to work under. To the contrary, for most miners who have contracted the disease, the difficult and deadly process is only just beginning. The reality of the situation for miners is that rather than accept the responsibility for their actions and seek to compensate disabled miners and mitigate the effect of the disease, coal operators and others do everything in their power to shirk that responsibility. It is not confined to dust sampling and Black Lung. If the Committee had time, I could fill the congressional record with stories of operators disclaiming responsibility for anything and everything that happens to miners they are charged to protect. But when it comes to Black Lung, it seems that the excuses and evasions never end. Operators will stop at nothing to avoid paying for Black Lung benefits. It's a sad situation that just keeps playing out over and over again.

There are countless stories of miners who have contracted the most severe form of Black Lung disease, PMF, but were unable to receive the benefits they were owed. These miners are examined by medical experts from the U.S. Department of Labor and their own doctor to confirm their worst fears only to see their employer contest their eligibility in administrative proceedings, sometimes for decades. The truth is that, almost without exception and despite overwhelming evidence supporting the miner, coal operators still refuse to recognize the miners' disability. The premise behind the operator's decision to deny benefits is simple: The delaying effort allows them to rely on time and money, two things most miners with the disease don't have. The morality of their actions is also simple: it is reprehensible.

The expense of pursuing the claim can cost the miner tens of thousands of dollars they simply do not have and most lawyers familiar with the Black Lung legal system know the return on their investment in time and research is meager at best. So, after an initial filing and a series of hearings before the administrative law judge, most miners cannot afford to continue the fight. The case is dropped, the company wins and the miner suffers in obscurity until the disease causes their lungs to fill with liquid and they drown.

Perhaps one reason the company wins so many Black Lung claims is a rule employed by the Department of Labor's Administrative Law Judges ("ALJs"), and the Benefits Review Board that oversees those ALJs, that denies benefits when the

evidence supporting and the evidence refuting a claimant's Black Lung diagnosis is equal. Under the adversarial system created to administer of the Black Lung Benefits Act, claimants and their former employers will each submit a certain number of x-ray readings, a certain number of spirometry and blood gas results, and a certain number of medical reports to prove their case. The miners will present evidence showing they have Black Lung and are disabled. Operators will present evidence showing they are not sick or are not disabled. As I will discuss later, the evidence presented by operators is sometimes inaccurate or downright fraudulent. Nonetheless, it is easy for an ALJ to look at the evidence, determine that all the doctors involved have equally impressive credentials, and decide the evidence is equal. And, finding the evidence is "in equipoise" those ALJs then deny the claim. In short, if an ALJ cannot or will not make up his or her mind about the existence of disabling Black Lung, the miner pays the price.

Madam Chairman, in the 115th Congress, H.R. 1912, was introduced by Representative Matt Cartwright and was entitled the "Black Lung Benefits Improvement Act." That bill would have, among other things, changed the Black Lung Benefits Act to state, "[i]n determining the validity of a claim under this title, an adjudicator who finds that the evidence is evenly balanced on an issue shall resolve any resulting doubt in the claimant's favor and find that the claimant has met the burden of persuasion on such issue." That change, and other changes contained in H.R. 1912 would have been significant improvements. I would like to thank Representative Cartwright, and the co-sponsors for their work on that bill. I would also like to thank Senator Robert Casey, Jr. and his co-sponsors, who introduced a similar bill in the Senate. Unfortunately, the bills were not passed and miners continue to suffer under the current system.

Under the current circumstances, should a miner have enough resources and find an attorney willing to accept and stick with their case to continue the fight for benefits, the employer's legal team relies on the passage of time to settle the case. Miners with PMF have a limited time left on this earth. Through court hearings, delays, appeals and any number of stalling tactics, the miners' time is slowly drained away as the case languishes in the system. Ultimately, the miner will suffocate and die. But, for the mine operator and his legal team, the case is over and no benefits are paid. It's a win no matter what the cost in human tragedy!

Unfortunately, the truth about these despicable tactics by mine operators and the law firms they hire with the profits from the miners' labor is that, they work.

## **A Special Place in Hell**

The intervention and deceitful dealings of the operators' lawyers, and in many instances the less than truthful medical personnel they hire to do the companies bidding, must also be taken into account. While miners, their lawyers and the UMWA have always suspected that an unethical and unholy alliance came together that would resort to whatever means necessary to defeat the miners' claims for benefits, the fact is, there is evidence to confirm our suspicions. It all came to light in a report issued by CPI (attachments 36-38).

The most notorious case concerns one of the largest legal firms representing coal companies, Jackson Kelly, PLLC and one of the most prestigious medical institutions in the nation, Johns Hopkins University Medical Center. The two institutions know each other well. They have worked together on Black Lung cases for decades. Their collaboration and interaction with coal operators around the country have been extremely damaging to miners seeking compensation for the illness that is ravaging their bodies and destroying their lives.

Jackson Kelly has spent nearly two centuries catering to the coal industry. This has made them the go-to law firm for the giants in the business. The firm's aggressive and ruthless approach to defending their coal industry clients is apparent, but a report by CPI raised serious ethical questions about the firm's tactics. In a very limited review of cases handled by Jackson Kelly, CPI found at least eleven cases that the firm was "...found to have withheld potentially relevant evidence [of Black Lung] and, in six cases, the firm offered to pay the claim rather than turn over documents as ordered by a judge." In one case in particular, a miner underwent a biopsy to determine if he was suffering from lung cancer. The tissue was examined by a pathologist and was ruled negative for the disease. However, without the knowledge of the miner, Jackson Kelly obtained the medical slides of the biopsy and sent it to two pathologist the firm had previously contracted to consult on Black Lung cases. Both reported that the tissue from the biopsy was likely complicated Black Lung disease. The report that definitively proved the miner had Black Lung, which only Jackson Kelly had, was suppressed, hidden away and never shared with the miner, his doctor or his attorney at trial. The miner's benefits were denied.

The report also discovered that, according to Jackson Kelly's own documents, the firm has a history of withholding evidence unfavorable to its clients and "shaped the opinions of its reviewing doctors by providing only what they wanted them to see." The firm claims that they are not required to disclose such information because



it is “attorney work product.” Meanwhile, as miners continued to suffer and die from the incurable effects of the disease, Jackson Kelly continued to defend the practice. In court filings, Counsel for the firm noted, “there is nothing wrong with its approach and that its proper role is to submit evidence most favorable to its clients.” In the end, truth be damned, miners are collateral damage in the industry and Jackson Kelly must win no matter what the cost.

Of course, Jackson Kelly, and other company lawyers, could not subvert the process on their own. They are lawyers, not doctors. Unfortunately, coal companies found willing allies in white lab coats. A small unit of radiologists in one of the nation’s most prestigious medical schools was willing to do the bidding of coal companies in their attempts to deny miners Black Lung claims for decades. For 40 years, medical professionals at Johns Hopkins Medical Center reviewed x-rays of miners suffering from Black Lung disease. Almost without exception these individuals, whose x-ray interpretations cost up to 10 times the rate typically paid for such services, have never diagnosed the most severe form of the disease, Massive Pulmonary Fibrosis.

To get the full picture of the impact that Johns Hopkin’s Black Lung program has had on miners across the country, you need only look at the work of one man who ran the operation for the hospital, Dr. Paul Wheeler. Wheeler, who retired after the story by CPI was printed, was considered by many to be a leading authority on lung disease. With a medical degree from Harvard University, and the prestige associated with Hopkin’s Medical Center, judges took his evaluations of patients as gospel. Some sided with the coal company’s medical professional because he [Wheeler] is, “...the best qualified radiologist” and stating their decisions were because of Wheeler’s testimony noting, “I defer to Dr. Wheeler’s interpretation because of his superior credentials.”

But, a deeper look into Wheeler’s expertise revealed some alarming problems. The Center’s reporting found that, “In more than 1,500 cases decided since 2000 in which Wheeler read at least one x-ray, he never found the severe form of the disease, Complicated Coal Workers’ Pneumoconiosis.” However, in more than 100 of the cases Wheeler determined to be negative, biopsies and autopsies provided indisputable evidence of Black Lung.

The doctor may have many reasons for his findings, beyond the fact that coal companies are the clients. His own words seem to indicate as much. For whatever reason, he believed miners do not have Black Lung and are being wrongfully

compensated. He stated, “They’re getting payment for a disease that they’re claiming is some other disease.” Wheeler generally blamed miners’ lung problems on tuberculosis or histoplasmosis (an illness caused by a fungus in bat and bird droppings). His arrogance, however, did not end there. He made it clear that despite what the law says, miners should be required to prove the existence of Black Lung. When confronted with his misinterpretation of the law, Wheeler’s contempt reached a new level when he stated, “I don’t care about the law.” Johns Hopkins was so embarrassed by the report of Dr. Wheeler’s actions that it terminated its Black Lung program.

The story by CPI was an enlightening look into the less than honorable and sometimes unethical levels coal operators and their surrogates will go to in order to win. Miners stand little chance of proving their case when the odds are so heavily stacked in favor of big business and bigger money. The tragedy lives on until the miner finally dies, but the “professionals” who oppose them go home to comfort and with another notch in their belt.

Madam Chairman and members of the Committee, there can be no doubt that miners continue to suffer from the inadequacies of a system that, at almost every turn, is stacked against them. They have known for years that the coal operators who employ them have cheated and scammed the system. They have witnessed the blatant fraud and outright lying by the operators whose objective has always been more production at any cost. I would defy anyone from the industry to bring facts to the table that shows otherwise. Industry officials of today may be more sophisticated and speak in nobler terms about the evolution of the industry and the concern that they have for the miners, but they have not moved far from the coal barons who preceded them. Their actions prove that profits continue to trump health and safety at every turn.

Likewise, we must all understand that MSHA’s incessant need to demonstrate success, in spite of facts to the contrary, leaves them with little recourse to correct their situation. This persistent need to prove that it is meeting the requirements of the Mine Act or that the rules it has promulgated are effective, even in the face of the fact and the testimony I have presented that proves otherwise, shows the disconnect between the Agency and its true mission. They must know the system, even as it exists today, is horribly broken, yet for whatever institutional reasons that may exist, they cannot and will not admit it. This inability to conduct a thorough and honest evaluation of its own failings and to take the necessary corrective action continues to cost miners their lives.

We must also find a way to curb the abuses miners suffer at the hands of some members of the legal and medical profession. There must be a stringent standard for those who present “expert” testimony and the admission of possible conflicts the presenter may have for arriving at their conclusions. Finally, we must also demand that all the facts be presented in these cases in order to be certain that the ultimate settlement is correct and based on the scientific evidence.

### **Black Lung Trust Fund**

Madam Chairman in January of 2017 the Department of Labor’s Office of Workers Compensation Programs proposed major changes in regulations that determine how the Black Lung Benefits Act (BLBA or the Act) is administered . Among other things, the Act, “provides for the payment of benefits to coal miners and certain of their surviving dependents on account of total disability or death due to coal workers’ pneumoconiosis. A miner who is entitled to benefits under the BLBA is also entitled to medical benefits.” The funding for these benefits is generated by a federal tax assessed on each ton of coal operators produce. That funding stream has been threatened in recent months because of the inaction of Congress to extend that tax.

At the time, the Union strenuously objected to the changes proposed by DOL because of the devastating effects they would have on the overall program and the resulting benefit reductions for disabled miners. The UMWA has carefully reviewed the Proposed Rule and is deeply concerned that in an effort to unilaterally reduce costs, they have lost sight of what is important – the health and wellbeing of the miners and their families. It is unclear when you examine the proposal if the DOL is looking out for the best interest of disabled miners or trying to save money for mine operators who are ultimately responsible for paying the medical bills of these individuals. This is a bad proposal.

The Union is convinced that the Proposed Rule would damage the Black Lung Program so severely that it would eventually become even more ineffective, leaving families in these coalfield communities impoverished, and miners disabled from this deadly disease without adequate medical care. While the DOL discussed how the cuts they are proposing will have little impact on the health care industry as a whole, they ignored the fact that small communities, where these services are offered, are

not reflective of large metropolitan areas of the country. The proposal appears to be aimed at reducing payment schedules to the point it forces providers in these areas to stop offering services that miners are entitled to under the BLBA.

For example, the Agency claims the average cuts to the program amount to approximately 7 percent of total benefits paid, but the decreases for some states are drastic. In Kentucky, for instance, inpatient hospital costs in 2014 were paid at 36 percent of total billing. Under the Proposed Rule those payments would be reduced to 26.5 percent of billing, a cut in benefit payments of almost \$1.3 million per year. In Florida, where many UMWA Members reside, the cuts would be even more severe, from 64 percent of total billing to less than 18 percent. The most glaring example of these draconian cuts are the payments made for outpatient hospital services, cuts that would affect every state in the program. The DOL is proposing reimbursement for these services at just 20 percent of current payments; a reduction of 72 percent.

The Union would suggest that instead of trying to determine how to reduce and perhaps eliminate these Black Lung benefits, the DOL could better spend its time correcting the deficiencies in the program. The most glaring defect is placing the burden on the Black Lung Trust Fund to cover the cost of benefits owed to disabled miners by coal operators who are unwilling or unable to pay for such benefits. This is unacceptable Madam Chairman. I submit to this Committee that any operator who cannot pay or refuses to pay these mandatory benefits should not be permitted to continue to mine coal and subject future workers to the hazards that exist in the mines they operate. If they are so financially strapped or callously indifferent to the suffering they have caused, they should be run out of the industry.

Should the actions planned by DOL become effective, miners and their families would be left to suffer and die without the necessary medical treatment and financial assistance they are entitled to receive. They would, once again, bear the brunt of the mine operators' refusal to accept their responsibility for perpetuating this disease, and be subjected to the government's lack of desire to require that the owners meet their obligations. This is an intolerable situation for everyone involved and should not be permitted to occur.

The changes contemplated by the DOL are not the only threat to the benefits miners are owed from the Black Lung Trust Fund (Trust Fund). December 18, 2018,

was a significant day in the lives of disabled coal miners and those who may contract Black Lung disease in the future. That date, established by Congress, as the day the excise tax placed on every ton of coal produced in the United States would be reduced by 55 percent. This tax is used by the federal government to provide the revenue necessary to operate the Trust Fund. Congress set this arbitrary deadline believing that Black Lung would be eradicated before the coal excise tax expired in 2018.

Prior to the expiration of the Coal Excise Tax, operators paid \$1.10 on coal produced underground and \$.55 on surface coal. According to the Congressional Budget Office (CBO), had the Tax been extended, the Trust Fund's current \$6 billion debt would have been reduced to \$4.5 billion by 2050. An increase of \$.25 per ton of coal would have eliminated the debt altogether. The CBO has determined that allowing the tax to expire, as Congress did in December, will allow the debt to explode and require a multimillion-dollar taxpayer bailout to prop up the Trust Fund (attachment 39).

The sad fact is, no matter how far we seem to come in this country, whether it is advances in science, technology, medicine or a host of other subjects, some things never seem to change. I suppose many industries deny the problems they cause, but the people who own and operate coal mines seem to be the worst. They all argue that they should be allowed to make as much money as possible on their investment without government interference. Then, when their actions cause major economic or health problems, they want the government to force taxpayers to bail them out. That is exactly what happened in the aftermath of the recession of 2008 and that is what coal operators are asking for now. They want to keep their profits private but socialize their losses. It is time Congress told these businesses they are responsible to pay, not the American taxpayer.

When Congress failed to pass appropriations legislation at the end of 2018, it also failed to take the simple and necessary action to sustain the Federal Black Lung Disability Trust Fund by changing an arbitrary date set nearly four decades ago. This is unconscionable.

Madam Chairman, Ranking Member Byrne and the members of the Committee there is much more that I could discuss regarding the ineffectiveness of MSHA's Respirable Dust Sampling Program and the misery that failure has caused

hundreds of thousands of miners and their families. However, I believe that the facts that have been laid out at this hearing and the facts that have been available in the public domain for decades are sufficient to demand action by this Committee and ultimately by the entire United States Congress. There is no longer an alternative and there can no longer be excuses. The carnage in the coalfields from this preventable disease must stop.

With that goal in mind I would like to make the following recommendations, on behalf of the nation's miners, as the starting point to correct this appalling abuse miners have faced for far too long.

- 1) Congress must take necessary action to require the federal Mine Safety and Health Administration assume the responsibility for conducting all respirable dust sampling used to ensure mine operators are in compliance with all aspects of the Respirable Dust Sampling Program. The standard must require that a Representative of the Secretary be present for all such sampling for the entire duration of the sampling process.
  - a) This can be accomplished either through immediate Congressional legislative action or by Congress directing MSHA to issue an emergency temporary standard meeting this requirement.
  - b) In an effort to pay for any additional financial burden this new sampling program would impose on MSHA, Congress must require the Agency to issue an emergency temporary standard that permits it to charge a fee for service or any other reasonable method to recover the cost associated with the program.
  - c) Congress must direct MSHA to move immediately after the issuance of these emergency standards to codify them into regulation by promulgating a permanent standard that accomplishes these goals.
- 2) Congress must take necessary action to require the federal Mine Safety and Health Administration promulgate an emergency temporary standard that creates a separate Permissible Exposure Limit for silica. The Standard must set the PEL at the current level recommended by the National Institute for Occupational Safety and Health.

- a) This can be accomplished either through immediate Congressional legislative action or by Congress directing MSHA to issue an emergency temporary standard meeting this requirement.
  - b) The emergency standard must require that the PEL for silica be separate and distinct from the Respirable Dust Standard and enforceable in accordance with all other standards established by the Agency.
  - c) MSHA must implement a sampling program for silica similar to the current Respirable Dust Sampling Program. MSHA must be responsible for conducting all respirable dust sampling used to ensure mine operators are in compliance with all aspects of the silica standard.
  - d) In an effort to pay for any additional financial burden this new sampling program would impose on MSHA, Congress must require the Agency to issue an emergency temporary standard that permits it to charge a fee for service or any other reasonable method to recover the cost associated with the program.
  - e) Congress must direct MSHA to move immediately after the issuance of these emergency standards to codify them into regulation by promulgating a permanent standard that accomplishes these goals.
- 3) Congress must take necessary action to require the federal Mine Safety and Health Administration promulgate an emergency temporary standard that expands the 103(f) “walk around” rights afforded miners. The standard must permit the Representative of the Miners the right to participate in all activity conducted by a Representative of the Secretary while on mine property or in any activity that directly impacts the health and safety of miners at the operation.
- a) This can be accomplished either through immediate Congressional legislative action or by Congress directing MSHA to issue an emergency temporary standard meeting this requirement.
  - b) This emergency temporary standard must require the mine operator to compensate all Representatives of the Miners who participate in such activity at their regular pay, including applicable overtime, for all such work performed.

- c) Congress must direct MSHA to move immediately after the issuance of these emergency standards to codify them into regulation by promulgating a permanent standard that accomplishes these goals.
- 4) Congress must take necessary action to require the federal Mine Safety and Health Administration to address the problem of miner representation and participation at mines not represented by a recognized labor organization and target such mines for compliance with all aspects of the Mine Act and all rules promulgated by the Agency to advance the safety and health of the miners. MSHA targeting should be active in nature, and include accident reporting, compliance history and patterns of noncompliance with all health and safety laws. Given the seriousness of the problem known to exist at these operations, MSHA should immediately start auditing and appropriately targeting these types of operations.
- a) This can be accomplished either through immediate Congressional legislative action or by Congress directing MSHA to issue an emergency temporary standard meeting this requirement.
  - b) Congress must direct MSHA to move immediately after the issuance of these emergency standards to codify them into regulation by promulgating a permanent standard that accomplishes these goals.
- 5) Congress must take immediate action to restore and increase the funding stream necessary to pay for benefits owed to coal miners from the Black Lung Disability Trust Fund. The increase must be sufficient to pay all disability and medical benefits, as well as retire the debt currently incurred by the Trust Fund. Payment of the debt must be completed in a reasonable and cost-effective time frame, not to exceed 30 years from the date of the legislation.

This legislation must contain language that does not permit companies who do not have the financial ability to pay for required benefits or refuse to pay required benefits to remain in business.

In the event current mine operators are in arrears in payments to any beneficiary for required benefits, for any reason, the legislation must



contain language that permits the Trust Fund to recover any assets it has expended to pay these benefits, either by garnishing the revenue of the mine operator or if necessary attaching the mine's assets and selling those assets to cover the debt.

Madam Chairman I would like to take this opportunity to thank you, Ranking Member Byrne and the entire Committee for allowing me the opportunity to testify at this extremely important hearing. The nation's miners are some of the hardest working, dedicated and patriotic people in this country. They have made great sacrifices to protect and energize the nation. They are willing to continue providing whatever is necessary to keep our nation strong and moving forward. They would simply request that their sacrifice be rewarded with a reasonable pension, not cut short because of Black Lung disease. Madam Chairman, the miners have waited for Congressional action far too long. Thank you.