REPUBLICAN VIEWS
H.R. 5663, THE ROBERT C. BYRD MINER SAFETY AND HEALTH ACT OF 2010

Introduction

On April 5, 2010, an underground explosion at the Upper Big Branch Mine in Montcoal, West Virginia killed 29 coal miners and thrust the dangers of mining into the national spotlight. The tragedy at Upper Big Branch was devastating, and all Americans joined the families, the state of West Virginia and the communities in and around Montcoal in mourning their incalcuable loss.

In the wake of this tragedy, Congress once again turned its attention to the issue of mine safety. The Upper Big Branch explosion forced policymakers to focus not only on the efficacy of our nation's mine safety laws and regulations, but also on the manner in which the federal agency responsible for implementing and enforcing those laws and regulations – the Mine Safety and Health Administration (MSHA) – is fulfilling its obligations. While numerous investigations into the Upper Big Branch accident have yet to provide any conclusive findings, preliminary reviews have exposed serious deficiencies in the law and its enforcement. Republicans and Democrats alike have sought to address those deficiencies with the shared intent of improving mine safety and better protecting the Americans who work in this inherently dangerous industry.

Despite its good intentions, H.R. 5663 unfortunately falls short in its effort to provide focused reforms that will improve mine safety. The bill reflects a heavy-handed approach more focused on punishing mine operators than addressing identifiable opportunities to prevent mining accidents in the first place. Moreover, the bill drifts far afield of its stated purpose by including provisions wholly unrelated to mining or mine safety. For reasons only the Majority can explain, H.R. 5663 also includes wholesale changes to the Occupational Safety and Health (OSH) Act.[1] While the inclusion of these unrelated provisions is troubling in and of itself, the implications of the specific proposed policies are of far greater concern. These too appear premised on the notion of imposing punishment rather than improving workplace safety. Also of concern is the speed with which the majority insists on proceeding – refusing to wait for the results of multiple ongoing investigations. For these reasons, Committee Republicans are united in their opposition to this legislation and urge that it be rejected by the House of Representatives in favor of focused, well-informed mine safety reforms.

Legislative History

The issues relating to mine safety are not new to the Members of this Committee. During the 109th Congress, the House passed the Mine Improvement and New Emergency Response Act of 2006 (the MINER Act),[2] which was signed into law on June 15, 2006 and included the most

[1] 29 U.S.C. §§ 651, et seq.
[2] P.L. 109-236.

significant reforms to the federal Mine Safety and Health Act of 1977[3] in more than a generation. Chief among them were new requirements that mine operators adopt emergency response plans, install post-accident breathable air and directional lifelines, and improve worker training and communications.

Essential to the enactment of the MINER Act was the bipartisan manner in which it was developed. Members of both parties worked with industry and worker representatives to fashion a bill all parties agreed would materially improve mine safety.

The Committee again considered mine safety legislation during the 110th Congress, but with far different results. In 2007, the Committee considered H.R. 2768, the Supplemental Mine Improvement and New Emergency Response Act (S-MINER). The bill, developed solely by the panel's Democrats without accepting any meaningful stakeholder input, sought to impose any number of new regulatory requirements with respect to mine seals, belt air, refuge chambers, and communications. Not only were these new requirements unworkable, many would have had the perverse effect of undoing the progress in mine safety brought about by the aforementioned MINER Act. The S-MINER Act was considered and approved by the House on January 16, 2008; it was never considered in the Senate.

Committee Republicans believe lessons can be drawn from these contrasting processes and outcomes. In the case of the MINER Act, an open, bipartisan process produced a consensus product that passed both chambers of Congress and was ultimately signed into law. Mine safety improved as a result. In the case of the S-MINER Act, a closed, partisan process produced an unworkable product that could not advance beyond the House of Representatives. It did nothing to improve mine safety. Unfortunately, the Majority has elected to pursue the latter path for H.R. 5663; Committee Republicans expect the result will be the same.

Deficiencies in the Current Mining Regulatory System

In assessing the policy implications of H.R. 5663, it is instructive to consider current strengths and weaknesses in federal mine safety oversight and regulation, which is primarily administered by MSHA.

The Mine Safety and Health Review Commission Case Backlog

When MSHA issues citations for violations of mining safety laws, mine operators are permitted to contest the violations if they believe the citations were issued in error. In recent years, this process appears to have broken down due, at least in part, to an increase in the number of contested citations at the Mine Safety and Health Review Commission (MSHRC).

The series of events that led to the increase were examined in a Committee hearing on February 23, 2010. One reason behind the increase in contested citations is the MINER Act's

[3] *See* Federal Mine Safety and Health Act, P.L. 91-173 (December 30, 1969), codified at 30 U.S.C. §§ 801, *et seq*. The legislation was originally known as the Federal Coal Mine Health and Safety Act of 1969, but in 1977 was amended and its name changed to the Federal Mine Safety and Health Act of 1977.

increased penalties for all violations, which resulted in higher costs and increased incentives for mine operators to challenge penalties because of those costs. Further, MSHA came under fire for failing to perform all statutorily required inspections. In response, MSHA removed its representatives that had been working in the conference process used to resolve violations, and transferred them to inspection duties. Also, on February 4, 2008 and March 27, 2009, MSHA issued Procedure Instruction Letters (PIL) that reduced the ability of mine operators to use the conference process to address citations, which had previously been successful in resolving many disputed citations.

Witnesses at the Committee's February 23, 2010 hearing suggested this breakdown in the conference process was a contributing factor to the MSHRC backlog.

> On March 27, 2009, MSHA published a new model for conferences. Rather than conducting an informal conference prior to receiving an assessment and filing with the Commission, the new system requires the operator to wait until an assessment is received and file after the enforcement action in question is docketed. Now all conferences will take place only after civil penalties are proposed and timely contested. This means that an operator eager to avoid litigation through the conference process must contest the citation, file a written request for a conference within 10 days, wait for a period of at least four to six weeks, receive the proposed penalty assessment, contest the penalty within 30 days of receipt and then have a conference within 90-days, unless an extension is requested (usually by MSHA).[4]

At the same hearing, the top MSHA official committed to reestablishing the conference process:

> After a review of the conferencing process it appears that the best approach is to hold the MSHA health and safety conference, if requested by the mine operator, prior to MSHA issuing a proposed penalty assessment, and provide the mine operator with an estimated penalty amount based on the standard assessment formula. The MSHA field conferencing and litigation representatives (CLRs) and potentially other personnel would review the facts of the violation and the inspector's determination of negligence, likeliness of occurrence, etc., as before. The resolution of these cases does not require Commission approval unless they are later contested. MSHA will implement this change through policy.[5]

To date, however, MSHA has not made the promised changes to the conference process and the backlog of contested citations remains.

Finally, as discussed in greater detail below, MSHA has in recent years attempted a more vigorous use of the "pattern of violations" (POV) system to target mine operators that habitually

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[4] *See*, Testimony of Bruce Watzman, Committee on Education and Labor Hearing, "Reducing the Growing Backlog of Contested Mine Safety Cases," February 23, 2010.

[5] *See,* Testimony of Assistant Secretary Joe Main, Committee on Education and Labor Hearing, "Reducing the Growing Backlog of Contested Mine Safety Cases," February 23, 2010.

fail to meet their obligations under the Act. This placed increasing pressure on mine operators to remove and clear as many citations as possible to avoid POV status, which entails significantly increased oversight and cost. This confluence of policy changes – increased penalties, fewer conferences, and higher scrutiny of a mine operator's violation history – contributed to the backlog.

Pattern of Violations Policy

After several multi-fatality mining accidents in 2006 and the Crandall Canyon incident in 2007, MSHA renewed its efforts to place mines in POV status by issuing criteria for making POV determinations and notifying certain mines of their potential POV status.

Under current rules, if a mine operator's citation history meets specific criteria, MSHA can place the mine in POV status. Once there, any additional citations issued automatically trigger an increase in monetary penalties. In addition, a mine in POV status is subject to more inspections and MSHA inspectors can issue orders to shut down the mine more readily. To emerge from POV status, a mine must demonstrate a 30 percent reduction in serious and substantial violations of mine safety laws over a 90-day period.[6]

MSHA only considers "final" orders issued by the MSHRC in determining whether to put a mine in POV status. Citations in the process of being contested are not included in that determination. This has led critics to charge that mine operators are purposefully contesting more citations to avoid "final" decisions and thus possibly triggering a POV designation.

However, a closer look at the agency's own actions reveal systemic problems experienced by MSHA in attempting to enforce existing POV rules. For example, the agency announced on April 14, 2010 that a computer error in the fall of 2009 prevented Upper Big Branch from designation as a potential POV mine.

Further, the U.S. Department of Labor's Office of Inspector General (OIG) issued an Alert Memorandum on June 23, 2010 calling for immediate corrective action in the wake of revelations that an internal MSHA policy had limited the number of mines identified for potential POV status because of resource limitations, ignoring legitimate safety concerns.[7] The OIG is currently conducting its own investigation into the POV system and is expected to provide recommendations in September.

Notably, it seems clear changes to the POV system could have occurred prior to the Upper Big Branch fatalities had MSHA revised its own "Pattern of Violations Screening Criteria" guidelines.[8] Changes to this document do not require legislative action, and months before the Upper Big Branch explosion, Assistant Secretary Main acknowledged the POV system is in need of improvement.

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[6] http://www.msha.gov/POV/POVScreeningCriteria.pdf.

[7] *See* Alert Memorandum: MSHA Set Limits on the Number of Potential Pattern of Violation Mines to be Monitored Report No. 05-10-004-06-001, June 23, 2010.

[8] http://www.msha.gov/POV/POVScreeningCriteria.pdf.

> It is important that we remove the incentive for operators with repeated S&S [Significant and Substantial] safety violations at their mine to contest violations simply to delay enforcement. Delay in addressing S&S hazardous conditions puts miners at risk, is at odds with the purpose of the Mine Act and mission of MSHA, and is unacceptable. MSHA is considering a review of the pattern of violation process to determine whether our current approach is the best one for providing timely protection for miners working at mines with high levels of S&S violations.[9]

To date, no mine has ever been placed in POV status. Reevaluating the POV system was included on MSHA's most recent semi-annual regulatory agenda, released approximately three weeks after the Upper Big Branch mine explosion.[10] However, the agency has not yet announced any proposed changes to the current system, nor has it completed an analysis of mine safety records to identify potential POV status mines since September 2009.

Additional Statutory and Regulatory Weaknesses

In recent months, additional deficiencies at MSHA and within current law have been identified through the Upper Big Branch investigations, the OIG's investigative work, and the Committee's oversight activities. Lawmakers and agency officials agree MSHA is hamstrung by current limitations on its ability to be granted subpoena power for accident investigations. Further, MSHA needs to ensure mine inspectors receive adequate training to identify mining hazards – a responsibility on which it is currently falling short, as described in a March 30, 2010, OIG report.[11] Finally, an update of safety and health standards is necessary to improve the safety of miners.

Republican Views

Committee Republicans are committed to improving mine safety, a goal that cannot be achieved without first knowing whether mine operators are complying with current laws and whether federal authorities are fully enforcing those laws. Republicans believe certain areas of improvement have been identified and are widely understood; those areas for reform were addressed in the Republican Substitute offered during the Committee's consideration of H.R. 5663.

A Flawed Process Has Produced a Flawed Bill

As noted previously, Congress has a proven history of bipartisanship to improve mine safety. The MINER Act, signed into law in 2006, serves as an example of how divergent views and interests can be accommodated when Members set aside partisanship in the name of

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[9] *See*, Testimony of Assistant Secretary Joe Main, Committee on Education and Labor Hearing, "Reducing the Growing Backlog of Contested Mine Safety Cases," February 23, 2010.
[10] *See, Federal Register*, April 28, 2010.
[11] *See*, "Journeyman Mine Inspectors Do Not Receive Required Periodic Retraining," Department of Labor, Inspector General Office of Audit, March 30, 2010. Report Number 05-10-001-06-001.

workplace safety. The S-MINER Act, on the other hand, stands in stark contrast to that model. In that case, the shared goal of improving mine safety fell victim to partisan politics, a dynamic that ultimately doomed that effort to failure.

Unfortunately, in the case of H.R. 5663, the Majority elected to follow a path strikingly similar to that which led to the demise of the S-MINER Act three years ago. Rather than engaging Committee Republicans in a meaningful way at the outset of the legislative process, Committee Democrats instead elected to craft H.R. 5663 in a purely partisan manner. Exemplifying this exclusionary process, Committee Republicans were provided a final draft of the legislation less than twelve hours before the Committee met to consider the bill, severely limiting the opportunity for Republicans to evaluate and respond to several significant, last-minute changes. The result, not surprisingly, is a legislative product that reflects a single, narrow point of view; one focused on imposing punishment rather than improving mine safety.

Committee Republicans are also concerned by the haste with which H.R. 5663 is being advanced. No less than three separate investigations – at both the state and federal levels – are currently underway to examine the circumstances that led to the tragic loss of life at the Upper Big Branch mine. The results of those investigations are not yet available.

In addition, the OIG is reviewing – at Congress' request – a number of serious questions raised in connection with MSHA's enforcement of its own mine safety regulations and protocols, some of which may have relevance to the Upper Big Branch investigations. The OIG's investigation is also not concluded.

Finally, less than two months ago, the Committee on Education and Labor was granted by the full House the extraordinary power of deposition authority in order to assess whether mine safety laws are being properly obeyed and enforced. That investigative effort, like every other initiated in response to Upper Big Branch, is also still ongoing.

With so many agencies and so many resources being devoted to examining the circumstances that contributed to the Upper Big Branch tragedy, one cannot help but ask why the Majority is insisting on rushing such an expansive piece of legislation. Committee Republicans believe miners would be better served by focusing our legislative efforts on those areas we know would improve mine safety, while waiting to consider more far-reaching proposals until the conclusion of the various investigations, when all parties can carefully consider the information and recommendations of those inquiries.

Democrats Focus on Punishment Instead of Prevention

H.R. 5663 is replete with increased civil and criminal penalties, lower standards of liability, and expansive new whistleblower provisions. Republicans believe punishing bad actors is important. However, we also believe working in a proactive manner to prevent injuries and fatalities before they occur is far more important.

Penalties

In testimony received by this Committee on July 13, 2010, Mr. Cecil Roberts, President of the United Mine Workers of America (UMWA), said that "most of this industry – and I have said as high as 95 percent – do the right thing."[12] Yet the Majority proposes substantial increases in civil fines, up to $2,000,000 in certain cases, and harsh new criminal penalties that include up to 20 years imprisonment for violations of the law. These penalties would apply to all mine operators affected by the legislation's new penalty framework, including many of the 95 percent that, according to Mr. Roberts, "do the right thing."

In addition to increasing monetary penalties, the Majority alters the underlying penalty structure, making it more punitive and easier for "good" operators to be unjustly penalized. For example, H.R. 5663 would impose pre-order interest on a violation, the calculation of which starts at the time an operator contests a citation. While apparently intended to reduce the caseload at the MSHRC, this new fee to exercise due process rights would be imposed on operators that contest citations in good faith, significantly increasing the costs of such challenges. Further, these interest amounts on higher base level penalties will likely be compounded through no fault of the operator because of the extended length of time it takes to resolve a case from a contest to final order.[13] Again, for those mines included in H.R. 5663's new penalty rubric, the 95 percent of operators that "do the right thing" would be penalized for exercising their rights in good faith.

Standard of Liability

H.R. 5663 lowers the standard of liability applicable to many civil and criminal penalties contained in both the mining and occupational safety sections of the bill (Titles III and VII). Specifically, the legislation would replace the current "willful" standard with a "knowing" requirement for violations of mandatory health or safety standards. This change would significantly lower the level of intent required to prove violations, thereby exposing mine operators, businesses, corporate officers, agents and employees to increased liability and endless litigation.

The bill contains no statutory definition of "knowingly," nor does it provide an explanation or indication of how the "knowing" intent level for penalties under both OSHA and MSHA is to be determined or limited. At the legislative hearing on H.R. 5663 on July 13, 2010, one of the witnesses summarized some of the concerns associated with using a "knowing" standard, especially in relation to criminal sanctions:

> Such a change would upend decades of OSHA law—dating to the passage of the OSH Act in 1970 and introduce tremendous uncertainty, further guaranteeing substantial increases in contested cases. While the "knowing" standard is used in environmental statutes, it has not been the standard for OSHA criminal

[12] *See,* Testimony of Cecil Roberts, Committee on Education and Labor Hearing, "H.R. 5663, the Mine Safety and Health Act of 2010," July 13, 2010.

[13] The average number of days it took to dispose of these cases increased from 178 days in FY 2006 to 401 days in FY 2009. *See*, Testimony of Mary Lu Jordan, Committee on Education and Labor Hearing, "Reducing the Growing Backlog of Contested Mine Safety Cases," February 23, 2010.

culpability. In environmental law, the term "knowing" has come to be associated with a low level of intent, almost akin to a strict liability standard where the party in question has to know only that a given activity was taking place, not that there was a violation occurring or that environmental laws were being broken. As there is no further definition in the bill of this standard, employers (and OSHA inspectors) will be left to guess what this means and when it should apply. This is a prescription for utter confusion and legal challenges that will be costly to both the employer and the agency.

Further, imposing criminal liability on any "an officer or director" is equally troublesome. The CWS [Coalition for Workplace Safety] believes this proposal will result in a witch hunt to hold officers or directors responsible. Expanding criminal liability to any officer or director will make corporate personnel unduly subject to prosecution even if they generally have no involvement in day to day operations. All of these terms are vague and ambiguous as to who would fall within these categories. These terms are also vague as to how they would be applied in the legal process; do they apply only to the corporate entity or other legal entities such as partnerships? Does this mean that any limited partner or director would now be subject to potential criminal prosecution? How would responsibility be determined? None of these changes will improve workplace safety and health, and actually, this new requirement, if adopted, could result in adverse impacts as corporate employees would now fear that any decision they could make on the jobsite could subject them to prosecution; a safety director or E, H & S employee could be faced with the reality that every one of their decisions would be micromanaged, potentially by employees who have little or no expertise in safety and health. This will create a chilling effect on these employees trying to simply do their job, or even taking these jobs. Furthermore, these are the people that should get those jobs—the ones that care enough and know what should be done, but do not want to be exposed to criminal liability because of the actions of an employee they could not control. This could create uncertainty on the jobsite with a net reduction of workplace safety and health.[14]

Application of this new, lower standard of intent to virtually all employees and officers of a business is a monumental shift in workplace safety policy, a stance all the more extreme given that individuals face up to 20 years imprisonment under a standard akin to strict liability, where individuals lack willful intent or a "bad purpose" in their actions or knowledge.

Committee Republicans believe that such punitive measures will likely stifle, rather than support, efforts to improve safety programs and expose individuals to severe criminal penalties without sufficient intent to do harm.

Expansion of Whistleblower Protections

[14] *See*, Testimony of Jonathan L. Snare, Esq., Committee on Education and Labor Hearing, "H.R. 5663, the Miner Safety and Health Act of 2010," July 13, 2010. Mr. Snare's comments appear to have equal relevance to the bill's proposed changes to mine safety laws.

Committee Republicans believe the whistleblower expansion proposed by the Majority is not necessary, nor will it accomplish its stated purpose of improving safety. Whistleblowers already receive significant protections under existing mining and occupational safety laws, including the ability to anonymously report safety violations – and rightfully so. But H.R. 5663 appears to treat whistleblowers as the only line of defense against safety violations, using valid whistleblower protections as an opening to insert vast new litigation opportunities.

An example of current legal protections against retaliation for publicly voicing safety concerns can be found in Section 105(c) of the Mine Safety and Health Act of 1977. Under that provision, mine operators cannot retaliate against miners for making safety complaints. This provision was exercised recently in a case involving a miner who publicly spoke out against safety practices and was terminated by the mine operator for alleged safety violations. The Labor Secretary prevailed on a motion for temporary reinstatement of the miner, suggesting that current laws are effectively protecting employees who voice safety-related concerns and raising a serious question as to the need for an expansion.[15] Further, because of a last-minute amendment that excludes certain classes of mines from the requirements of H.R. 5663, workers at those mines would not be able to avail themselves of the Majority's new whistleblower protections. It stands to reason that all miners should have the same protection to report safety violations free from retribution; if miners in non-coal/gassy mines are sufficiently protected by current law – and Republicans believe they are protected thanks to the existing statute – miners in coal/gassy mines are also well-protected by these laws.

Significant protections are also provided under existing occupational safety laws, specifically located at Section 11(c) of the Occupational Health and Safety Act, 29 U.S.C. Section 660. In hearings before the Subcommittee on Workforce Protections, one witness testified that current law works and questioned the need for an expansion to whistleblower protections under the OSHA statute:

> I am unaware of any empirical data supporting the assertion that the current statute fails to protect occupational safety and health whistleblowers. Indeed, my concern is that this assumption is supported by nothing more than cherry-picked anecdotes or conclusory assertions that occupational safety and health OSH whistleblowers do not "win often enough."[16]

The testimony further illustrated that expanding protected whistleblower activity may not increase the win rate for aggrieved workers filing whistleblower claims:

> In fact, although [the Majority's legislation] apparently posits access to the federal courts as a panacea for OSH whistleblowers, there is no reason to believe the

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[15] The miner involved, Ricky Lee Campbell, was allegedly terminated by Marfork Coal Co. after voicing various safety concerns. In a press release commenting on the successful motion for temporary reinstatement, the Assistant Secretary of Labor for Mine Safety and Health stated that, "The law is clear in its protections toward miners whose actions may lead to retaliation." *See,* MSHA Press Release issued on June 17, 2010, at http://www.msha.gov/MEDIA/PRESS/2010/NR100617.asp

[16] *See,* Testimony of Lloyd Chinn, Committee on Education and Labor, Subcommittee on Workforce Protections Hearing, "Whistleblower and Victim's Rights Provisions of H.R. 2067, the Protecting America's Workers Act," April 28, 2010.

> "win" rate there will be any better than before OSHA. Indeed, in every administrative forum and court system in which I've practiced as an employment lawyer, it has been well understood that, in the aggregate, employment litigation plaintiffs lose more often than they win. This state of affairs is not, in my opinion, because of any particular bias in any of these court or administrative systems against plaintiffs; rather, it is simply because in the context of a particular employment statute, there is some substantial number of meritless claims filed.[17]

At the core of these proposed reforms is a fundamental concern whether expanding whistleblower protections will lead to increased safety of workers. Testimony received by the Committee suggests it will not:

> ...one would expect (all other things being equal) that inadequate OSH whistleblower protections have led to a less-safe workplace. But Bureau of Labor Statistics data support no such conclusion. According to BLS, both nonfatal injuries as well as fatalities in the workplace have continually declined over the past decade.[18]

Despite the evidence of adequate whistleblower protections, H.R. 5663 significantly expands such protections under mining and occupational safety laws for questionable reasons. For example, the Majority's bill would create expansive new investigation and hearing procedures applicable to whistleblower complaints, increase attorney fee awards, and give whistleblowers the ability to file suit in federal court if they do not receive an administrative decision within 90 days. Given this relatively short timeframe, it appears reasonable to conclude that such deadlines are likely to be missed, resulting in more federal court litigation which will only serve to raise costs and delay justice. Republicans believe there should be a more proactive approach to increase worker safety that does not rely on such litigious measures.

H.R 5663 Includes OSHA Provisions Wholly Unrelated to Mine Safety

While the title of H.R. 5663 suggests it is intended to address mine safety only, Committee Republicans believe the scope of the bill goes far beyond its stated purpose. In doing so, the bill threatens to negatively affect virtually every business in the country. Specifically, Title VII of H.R. 5663 includes dramatic changes to the Occupational Safety and Health Act. Essentially, this title seeks to import into H.R. 5663 entire sections of H.R. 2067, the Protecting America's Workers Act ("PAWA"), a bill focused on an area of law completely unrelated to mining safety. Some of the OSH Act changes are similar to the provisions discussed above. For example, the bill's OSH Act provisions adopt a "knowing" liability standard, increase criminal and civil penalties, and expand protections for whistleblowers. Other changes are unique to the OSH Act title, including the requirement of a mandatory abatement of alleged safety hazards without regard to due process and inclusion of impacted employees or their family members in various legal proceedings. At this point, the Majority has not exempted any industry from this section of the legislation.

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[17] Ibid.
[18] Ibid.

During consideration of the bill, Committee Republicans expressed repeated concerns about the far-reaching consequences of the proposed changes to the OSH Act, noting the amendments envisioned in H.R. 5663 reach almost every private-sector employer and worker in this country. Unfortunately, none of the provisions directly promote workplace safety, but again focus only on punishment in the aftermath of an accident.

Standard of Liability

As discussed previously, H.R. 5663 changes the OSH Act's legal standard from "willful" to "knowing," a dramatic policy change, the ramifications of which are not fully known. As noted in testimony received by the Committee, such a change could have troubling consequences.

> The expected modifications to PAWA's increase in criminal penalties would change the level of intent necessary for criminal penalties from the current "willful" to "knowing." Such a change would upend decades of OSHA law—dating to the passage of the act in 1970 and introduce tremendous uncertainty, further guaranteeing substantial increases in contested cases. While the "knowing" standard is used in EPA law, it has not been the standard for OSHA criminal culpability. As there is no further definition in the bill of this standard, employers (and OSHA inspectors) will be left to guess what this means and when it should apply. This is a prescription for utter confusion and legal challenges that will be costly to both the employer and the agency.[19]

Penalties

Committee Republicans are also concerned by the manner and extent to which H.R. 5663 would increase penalties and fines assessed under the OSH Act. Not only are the monetary increases proposed by the bill significant, these penalties would automatically increase every four years to account for inflation. We are also troubled by the bill's so-called "look back" provision, which would effectively permit the Secretary of Labor to review an employer's past history of OSHA violations and impose significant new penalties if the Secretary judges that history to have caused or contributed to an employee's death, despite the fact that past violations would already have been penalized and adjudicated. Committee Republicans share the view that penalties should be retained in statute as a deterrent to policies or practices that might put workers at risk. Moreover, we are willing to consider whether the fines and penalties currently provided for in the OSH Act are sufficient. However, we believe the changes proposed in H.R. 5663 to be punitive in nature, ignoring recent history which has shown a decline in workplace illness and injury rates in conjunction with a compliance-based approach to workplace safety.

Expansion of Whistleblower Protections

Committee Republicans are also troubled by the fact that H.R. 5663 seeks to expand whistleblower protections under the OSH Act. As with the proposed whistleblower protection

[19] *See*, Testimony of Jonathan L. Snare, Esq., Committee on Education and Labor Hearing, "H.R. 5663, the Miner Safety and Health Act of 2010," July 13, 2010.

expansions under the mining provisions of the legislation, we are unaware of any compelling evidence suggesting such an expanded legal framework is necessary. Indeed, current statistics point to the opposite conclusion. In 2008, according to statistics provided by OSHA, the agency received 1,388 whistleblower complaints (commonly referred to as "11(c) cases,") for the section of the OSH Act under which they are brought. Seventy-six percent of those cases were without merit (withdrawn or dismissed), and the remainder were settled or litigated.[20] In 2009, OSHA statistics revealed 1205 cases; of those, 76 percent again were without merit (dismissed or withdrawn) and the remainder were settled or litigated.[21] Committee Republicans believe these figures give credence to the notion that the current system of investigating and adjudicating OSHA whistleblower complaints is adequate.

Mandatory Abatement Without Due Process

Committee Republicans are concerned by the inclusion in H.R. 5663 of a new, prompt abatement provision that requires costly and disruptive changes be made in the workplace before disputes over the validity of the citations are resolved. The Majority attempts to draw a parallel to the mining industry and its long adhered-to practice of abatement, while adjudication of a contested citation is pending. However, expert testimony provided to the Committee on this point disputes this notion.

> This provision will reduce or eliminate the ability of an employer to challenge a citation through the OSHRC administrative process by requiring immediate abatement. Immediate abatement is already available through the emergency shutdown mechanism when OSHA identifies an imminent hazard. This provision will also eliminate one source of leverage that OSHA and the Solicitor's Office can use to resolve cases by settling appropriate cases with the requirement of immediate abatement imposed.
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> The signaled modification to this mandatory abatement provision which would substitute an employer's ability to suspend abatement while contesting the citation with a higher burden of proof akin to what is required for securing a temporary injunction is simply unjustified and an outrageous trampling of due process rights. Abatement is more than just protecting against a hazard; it is part of accepting responsibility for the violation. Mandating abatement before allowing the employer to exhaust their adjudicative process would be like asking a criminal or civil defendant to pay a fine or serve a sentence before the trial is held.
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> In addition, this provision will eliminate OSHA and the Solicitor's Office prosecutorial discretion in handling these contested cases. This provision strikes me as unduly punitive and makes it much more difficult for employers,

[20] *See*, Committee on Education and Labor, Subcommittee on Workforce Protections Hearing, "Whistleblower and Victim's Rights Provisions of H.R. 2067, the Protecting America's Workers Act," April 28, 2010. Item 3, Record Submission, Department of Labor Statistics and Outcomes on Whistleblower Cases filed with OSHA, Fiscal Year 2008.

[21] *See*, Committee on Education and Labor, Subcommittee on Workforce Protections Hearing, "Whistleblower and Victim's Rights Provisions of H.R. 2067, the Protecting America's Workers Act," April 28, 2010. Item 4, Record Submission, OSHA's Actions on 11(c) Cases Completed in Fiscal Year 2009.

particularly smaller employers who lack resources, to challenge certain citations which they may believe in good faith are incorrect or improperly imposed by the agency in the first place. By making it harder to settle cases this will increase the rate of contest cases.[22]

The mandatory abatement provision, like much of the bill, is merely punitive in nature; its disregard for due process exposes the Majority's predilection for imposing punishment rather than proactively enhancing workplace safety.

Amendments Offered in Committee

Given the expansive and unwieldy nature of the underlying measure, Committee Republicans sought to refocus the measure on the most pressing and well-understood mine safety issues. Committee Republicans offered the following amendments.

Republican Substitute

The Republican substitute would improve mine safety by empowering MSHA and holding the agency accountable, identifying and punishing bad actors, and modernizing mine safety standards. Republicans would provide MSHA the tools it needs and has sought in Congressional hearings – a responsive pattern of violation system and subpoena power for accident investigations. The Republican substitute also mandates that MSHA inspect mines at irregular hours, creates an independent investigation panel to assess MSHA's activities before and during an accident, mandates additional inspector training, and reestablishes the conference process. Further, the substitute requires penalties if the MSHRC determines a frivolous contest had been brought. Finally, the Republican substitute modernizes mine safety standards – provisions that would work to improve the safety of all miners. A summary of the Republican substitute follows.

Enhanced Enforcement

PATTERN OF VIOLATIONS

The Republican substitute utilizes the Safe Performance Index (SPI)[23] to draw a bright line for placing perpetually unsafe mines in a pattern of violations. If a mine operator falls below the identified threshold on the SPI, that operator would be placed in POV status and required to submit a comprehensive remediation plan to MSHA explaining how the mine operator intends to improve safety to get out of POV status. While in POV status, a mine would be subject to spot inspections.[24] Such inspections, to take place at irregular hours, would focus MSHA's inspectors on the hazardous areas of a mine where greater oversight is needed most.

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[22] *See*, Testimony of Jonathan L. Snare, Esq., Committee on Education and Labor Hearing, "H.R. 5663, the Miner Safety and Health Act of 2010," July 13, 2010.

[23] The Safe Performance Index is a matrix created by Dr. Larry Greyson to model mine safety. This was discussed at the Committee's July 13, 2010 legislative hearing on H.R. 5663.

[24] 30 U.S.C. § 813, Spot Inspections, provides in relevant part: (i) Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time

When the Secretary determines that a mine operator has an adequately improved SPI and has met all the requirements of the remediation plan, the mine shall be notified that it has been removed from POV status.

INCREASED FINES AND PENALTIES

The Republican substitute increases penalties for violations of the Act to include sharp monetary penalties coupled with significant jail time, in those instances where a mine operator's conduct warrants such punishment.

ADVANCED NOTICE OF INSPECTION PENALTIES

The Republican substitute ensures that anyone providing advance notice of an inspection can only do so at the behest of an inspector to facilitate that inspection. Anyone who provides advance notice of an inspection with the intent of interfering with that inspection would be subject to a fine of $50,000 and up to five years imprisonment.

SUBPOENA POWER

MSHA has continually cited the need for easier access to subpoena power to carry out its duties during a mine investigation. The Republican substitute provides MSHA the appropriate authority to subpoena relevant documents during an investigation and ensures that Rule 45 of the Federal Rules of Civil Procedure guide the agency's actions in this area.

STRENGTHENED INSPECTION AUTHORITY

The Republican substitute requires inspectors to perform inspections at irregular hours. Currently, MSHA is required to inspect underground mines four times per year and surface mines two times per year, an important safety and enforcement tool. The substitute requires that 30 percent of mandated inspections take place on evening and weekend shifts.

PENALTY FOR FRIVOLOUS CONTESTS

The 17,000 case backlog at the MSHRC can be attributed to many actions over the last four years. Industry critics argue that some mine operators contest citations in order to "game the system" and delay the payment of penalties or the inclusion in a potential POV status. Under

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during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this subsection, "liberation of excessive quantities of methane or other explosive gases" shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period. When the Secretary finds that a coal or other mine liberates more than five hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 10 working days at irregular intervals. When the Secretary finds that a coal or other mine liberates more than two hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 15 working days at irregular intervals.

the Republican substitute, if the Commission determines a contest is frivolous it may assess an additional penalty, thereby targeting the few operators who may be engaging in dilatory adjudication.

Improved Statutory Processes

Independent Accident Investigations

While MSHA is well-equipped in both expertise and technology to investigate accidents there are questions about the agency's objectivity when examining its own conduct. The Republican substitute creates an independent investigation panel charged with investigating MSHA's actions in the wake of serious mining accidents.

Designation of Miner Representative

The Republican substitute requires miners to designate a representative upon employment; information that will be kept on file by the mine operator in the event that miner is entrapped or otherwise prevented from action on his own behalf. This ensures the miner's wishes are represented and insulates family members from having to determine who is the "next of kin" in distressing situations.

Reestablishment of Conference Process for Contests

Previous actions by MSHA suspended the conference process for resolving contested citations, a major contributing factor to the overwhelming case backlog at the MSHRC. The Republican substitute reinstates and improves the conference process while making it a statutory requirement.

Modernizing Mine Safety Standards

Rock Dust Standards

The Republican substitute implements a new rock dusting standard, which as proposed by NIOSH and reflected in the Republican substitute, will decrease the explosivity of coal dust in mine intakes. Further, NIOSH has developed a real-time coal dust explosivity meter (CDEM). The substitute encourages the use of the NIOSH developed CDEM to test the expolisvity of the coal dust/rock dust mixture to ensure no explosive hazard exists.

Personal Dust Monitors

The UMWA and industry agreed to personal dust monitor protocols in a white paper dated April 4, 2008. The Republican substitute requires the Secretary to issue a standard based on the recommendations of this joint labor-industry task force.

RISK ANALYSIS PILOT PROGRAM

The Republican substitute requires NIOSH to conduct a survey of international mining practices with respect to incident planning with a particular focus on Australia's risk assessment approach. NIOSH will publish these protocols and work with mine operators to utilize the risk assessment tool to improve mine safety.

TRAINING REQUIREMENT

Currently, MSHA's inspectors are required to undergo two weeks of training every two years and one week of specified training every year. Earlier this year, the Inspector General determined that more than 50 percent of the inspectors interviewed had not undergone the required retraining.[25] The Republican substitute corrects the training deficiency identified in the IG report by increasing mandatory training requirements.

Studies

STUDY REGARDING ESTABLISHMENT OF A TECHNICAL DISPUTES PANEL

The Republican substitute calls for a study to examine the issues involved in technical mine operation disputes and determines whether a technical disputes panel could facilitate and expedite the resolution of these disputes. Further, the study will include recommendations about the role such a panel would play in conjunction with the MSHRC.

GAO STUDY ON TRANSFER OF AUTHORITY OF NIOSH TO DOL

NIOSH was designed to research the many safety and health issues facing our nation's workers. Given the inherent relationship between NIOSH and the Department of Labor, questions have arisen about the placement of NIOSH outside the purview of the Secretary of Labor. The substitute requires the General Accountability Office (GAO) to study the merits of moving NIOSH within the Department and report to Congress if such a move would improve worker safety and health.

The Republican substitute was defeated on a party line vote of 30 to 17.

Amendment to Strike Title VII of the Underlying Bill

Rep. McMorris Rodgers (R-WA) offered an amendment to strike Title VII of the legislation. This amendment would have removed the expansive and unwarranted amendments to the Occupational Safety and Health Act. Committee Republicans support proactive safety measures that prevent workplace illness and injury. The punitive nature of Title VII of the bill does nothing to improve safety, only implementing harsh penalties after an accident or injury has occurred.

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[25] *See,* "Journeyman Mine Inspectors Do Not Receive Required Periodic Retraining," Department of Labor, Inspector General Office of Audit, March 30, 2010. Report Number 05-10-001-06-001.

More than 230 organizations supported Rep. McMorris Rodgers' position that Title VII was inappropriate public policy.

> The members of the Coalition for Workplace Safety are committed to seeking and advocating for new ways to continually improve safety in the workplace. Unfortunately, our position as expressed at the July 13 hearing has not changed and we maintain our strong belief that H.R. 5663, as introduced, will not improve safety but will instead create greater cost, litigation and hamper job creation. We urge the committee to not approve this bill.[26]

This amendment was defeated on a party line vote of 30 to 17.

Amendment to Delete the Adoption of a "Knowing" Intent Standard

Rep. Tom Price (R-GA) offered an amendment to strike the "knowing" intent standard that would apply to violations in both the mining and occupational safety sections of the bill (Titles III and VII). Specifically, the amendment would have removed provisions that are unduly vague and punitive, are not likely to yield improvements in mine and workplace safety, and would result in an unwarranted increase in liability and litigation applicable to a broad range of mine operators, businesses, corporate officers, agents and employees.

The amendment was defeated on a party line vote of 30 to 17.

Conclusion

As a matter of public policy, H.R. 5663 falls well short of its stated purpose -- improving the safety and health of American miners. It creates a system that fails to protect surface miners and certain metal/nonmetal miners – as acknowledged by the President,[27] the Majority party in Congress,[28] and the Assistant Secretary of Labor for Mine Safety and Health.[29] As the Majority's own Committee report notes, "In the last decade, over 600 miners have been killed while working in coal and metal/non-metal mines, including 190 underground coal miners." Clearly, the risks to miners are not limited solely to the underground coal/gassy mines affected by this legislation. If, as asserted by the Majority, the POV system is broken, it must be repaired for all mines, not just coal mines. If the backlog at the Mine Safety and Health Review Commission is broken, it must be repaired for all mine operators, not just coal mine operators. Compounding the inexplicable establishment of a dual system of mine safety, is the fact that at its core, H.R. 5663 fails to focus on those issues all parties to this debate agree are in need of attention.

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[26] Letter on file with the Committee.

[27] "This isn't just about a single mine. It's about all of our mines." See Remarks by the President on Mine Safety, April 15, 2010 available at www.whitehouse.gov.

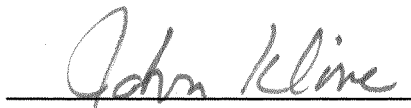
[28] "Chairman Miller has said this backlog is unreasonable and harms the safety of American miners," *Democrats to crack down on mining firms that avoid safety penalties. The Hill.* April 8, 2010.

[29] "As I have said repeatedly, the current system is broken. As I have said on many occasions, we need to fix the pattern of violation system." Assistant Secretary Joe Main, Hearing on "H.R. 5663, Mine Safety and Health Act" July 13, 2010.

Instead, H.R. 5663 reflects a heavy-handed approach more focused on punishing mine operators than addressing identifiable solutions to prevent mining accidents in the first place.

H.R. 5663 also fails because it includes provisions wholly unrelated to mining or mine safety. In terms of workers' safety, the bill's wholesale changes to the Occupational Safety and Health Act are perhaps best described as "subtraction by addition," as they make federal workplace safety law less navigable and mining reforms less focused in a bill ostensibly intended to improve mine safety. As with so much of the bill, these provisions appear premised on the notion of imposing punishment rather than improving workplace safety.

Republicans have always held to the tenet that one workplace death is one too many. We also believe proactive safety policies that are practiced everyday will bring workers home to their families at the end of every shift. As such, we will continue to seek policy changes that result in real improvements in worker safety and health and we will resist those proposals predicated solely on imposing punishment after the fact. It is with these guiding principles in mind that we urge our colleagues to reject H.R. 5663 when it reaches the floor of the House of Representatives in favor of a more targeted, thoughtful, and informed approach to miner safety.



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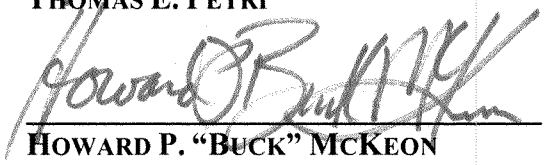
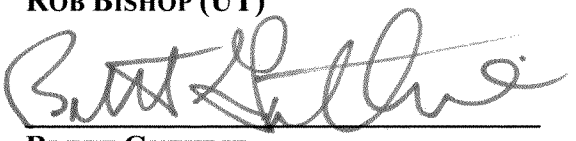


HOWARD P. "BUCK" MCKEON

ROB BISHOP (UT)



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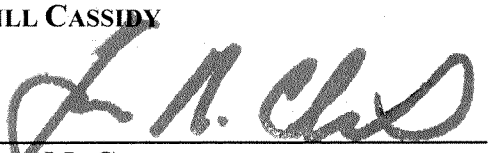

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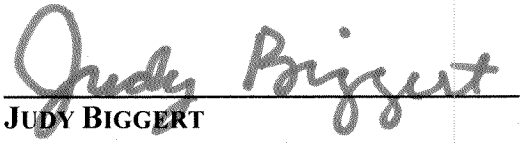

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