

INVESTING IN MINE SAFETY: PREVENTING ANOTHER DISASTER

HEARING BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS UNITED STATES SENATE ONE HUNDRED ELEVENTH CONGRESS SECOND SESSION

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THURSDAY, MAY 20, 2010

U.S. SENATE,
SUBCOMMITTEE ON LABOR, HEALTH AND HUMAN
SERVICES, AND EDUCATION, AND RELATED AGENCIES,
COMMITTEE ON APPROPRIATIONS,
Washington, DC.

The subcommittee met at 2:05 p.m., in room SD-106, Dirksen Senate Office Building, Hon. Tom Harkin (chairman) presiding.
Present: Senators Harkin, Byrd, and Murray.

OPENING STATEMENT OF SENATOR TOM HARKIN

Senator HARKIN. The Labor, Health, Human Services, Education, and Related Agencies Appropriations Subcommittee will now come to order.

The tragic loss of 29 lives and the two serious injuries at the Upper Big Branch mine in West Virginia is what brings us together this afternoon. Our hearts and prayers go out to their families, coworkers, and friends.

As the son of a coal miner, I feel their loss.

While Upper Big Branch was the catalyst for this hearing, we understand that investigations into this disaster are under way, and we will not ask the witnesses to comment on anything that could hinder those investigations. What we will discuss is how we can improve the safety and health of our Nation's miners.

This subcommittee has taken the lead, over the past several years, in adding resources to the budgets of Federal agencies that are charged with this critical responsibility. Much of that credit belongs to Senator Byrd, who asked that we hold this hearing and will be joining us shortly. He is a true champion for West Virginia and coal miners everywhere.

Over the past 2 years, additional funding provided by this subcommittee has enabled the Mine Safety and Health Administration (MSHA), to conduct 100 percent of its required safety and health inspections for the only time in its history, resulting in record low fatality rates in the mining industry. In fact, in 2009, the number of fatalities in coal mines reached a low of 18. To put that in perspective, when my father was a coal miner in Iowa, there were more than 3,000 mining fatalities every year.

However, as the number of inspections went up, so did the number of citations. And, increasingly, mine operators have chosen to contest those citations rather than to pay them. In 2006, operators

contested roughly 7 percent of citations. Last year, they contested more than 25 percent.

As a result, the appeals process has become backlogged at the Federal Mine Safety and Health Review Commission (FMSHRC), a situation that enables repeat offenders to avoid paying penalties or being placed on “pattern of violations” status. That backlog needs to be reduced, and I’m here to say, it will be reduced.

Last year, at the request of Senator Byrd, this subcommittee funded the hiring of four new judges at the FMSHRC. In addition, last week, the Appropriations Committee marked up a supplemental spending bill that includes \$22 million to help the FMSHRC and the Department of Labor (DOL) process more cases and modernize its operations. We will discuss this in more detail later in this hearing.

We will also hear from the National Institute for Occupational Safety and Health (NIOSH) about the investments this subcommittee has made in research and technology, particularly regarding communications devices, the effectiveness of mine rescue chambers, and the state of research into methane gas explosions.

And we will explore how the funding can best help create the culture of safety that we need to protect our Nation’s miners.

These efforts go hand in hand with work I’m doing to improve mine safety on the authorizing side, as chairman of the HELP Committee. I held a mine safety hearing in that Committee 3 weeks ago and am working on legislation that will ensure that MSHA has the tools it needs to effectively enforce the law and keep our workplaces safe.

I will keep the record open for any opening statements by our Ranking Member, Senator Cochran. And we’ll go into our first panel.

Now, let me say, at the outset, that we have a vote at 2:30 p.m. I will have to recess the subcommittee at that time for several minutes while we go over to vote on the cloture vote. But, then we will come back and resume our hearing, shortly thereafter.

We have two panels today. For our first panel I’ll introduce all the witnesses, and then we’ll open it for statements our first panel. Mr. Joseph Main, has served as Assistant Secretary of Labor for Mine, Safety, and Health since October 2009. Mr. Main began working in the mines in 1967; in 1974 he began his career with the United Mine Workers of America (UMWA); in 1982 he was appointed the administrator of the UMWA Occupational Health and Safety Department—a position he held for 22 years.

Ms. Patricia Smith has served as the Solicitor of Labor (SOL) since March of this year. Prior to becoming the SOL, Ms. Smith was a New York State Commissioner of Labor. And prior to that, Ms. Smith served as chief of the Labor Bureau in the New York State Attorney General’s office, a position she held since 1999.

Dr. John Howard has served as the Director of NIOSH since July 2002. Prior to this, Dr. Howard was the chief of the Division of Occupational Safety and Health in the California Department of Industrial Relations.

Ms. Mary Lu Jordan has served as chairman of the FMSHRC since August 2009; also served as chairman of the FMSHRC from 1994 to 2001, and as a commissioner from 2001 to 2009.

So, we welcome all of you. I thank you all for your written statements. I've gone over those beforehand. But, what I'd like to ask first of all, all your statements will be made a part for the record in their entirety. I would ask if you could each, as we go in line, if you could sum up, in 5 or 6 minutes, the main thrust of your statement, I would appreciate that. And then we can get into a discussion.

So, Mr. Main, welcome I would say "back to the subcommittee," but I guess you appeared before my other Committee 3 weeks ago. So, welcome to this subcommittee. Please proceed, Mr. Main.

STATEMENT OF HON. JOSEPH A. MAIN, ASSISTANT SECRETARY OF LABOR FOR MINE SAFETY AND HEALTH, MINE SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR

Mr. MAIN. Thank you, Mr. Chairman.

Chairman Harkin and Vice Chairman Cochran, and members of the subcommittee, I want to thank you for the opportunity to appear before the subcommittee today and speak about the efforts that MSHA has made in the wake of the disaster at the Upper Big Branch mine.

I want, again, to express my deepest condolences to the families, the friends, and the coworkers of the 29 miners who perished in the Upper Big Branch mine on April 5. I have been having quite a few meetings with the families to understand what their concerns are. Our prayers are with them.

Some have said the Nation should expect and accept a certain number of fatalities every year in coal mining. We, at the DOL and MSHA, do not agree with that. And we believe that the tragedy at the Upper Big Branch mine did not have to happen.

Given that this is an appropriation hearing, I understand that we will be discussing an increase in MSHA's budget. But, I want to make very clear, however, the needs are more than money. No matter what resources the Congress is willing and able to appropriate, MSHA cannot be in every mine, every day, on every shift, nor should it be. It is the responsibility of mine operators to comply with the MINE Act and mandatory health and safety standards to avert injury, disease, and death. And only when we change the culture of safety throughout the mining industry, and all mine operators live up to their responsibilities, will all miners be safe.

The resources are critically important. The additional resources that the subcommittee appropriated for MSHA, in the wake of Sago, Darby, and Aracoma explosions and fires, made an important contribution to increasing mine safety in this country. And the additional inspectors hired meant that, for the first time in years, MSHA has been able to complete all its mandated inspections. The actions of this Congress are very important.

But, we need new resources, including new enforcement tools to leverage the improved inspection capability into a meaningful deterrent for operators, like Massey, that choose not to take their responsibility for the safety of its miners. Some of the new tools we intend to use are directed at creating incentives for operators to improve safety practices to prevent fatalities and injuries. Our goal is to create a system in which mine operators find and fix violations and abate hazardous conditions. We will propose a rule to reinstitute the requirement for preshift examinations for violations of

all mandatory health or safety standards. And we'll solicit information on requiring the use of comprehensive health and safety management programs.

Improving protection for whistleblowers would be an important tool in identifying dangerous practices and violations before fatalities and injuries occur. Miners must feel free to identify problems and insist that they be fixed, without fear of reprisal.

MSHA must also have subpoena power to obtain information for timely investigations. The rules and adjudicative procedures to compel operators to remedy hazards must be strengthened. These include redesigning the Pattern of Violations Program and reducing the backlog at the FMSHRC. We have begun the process of redesigning how the Pattern of Violations Programs will work in the future and making it more effective. We have asked the FMSHRC to expedite review of high priority cases that will help us establish pattern of violations status for chronic bad actors. We're also issuing new regulations to simplify the criteria for placing mines into the Pattern of Violation Program. In addition, we will address the backlog by making the citation process more objective and consistent and improving the conferencing system. My colleague, SOL, Patricia Smith, will describe other efforts that MSHA and her office are undertaking to improve the adjudication of cases before the FMSHRC.

We believe that these measures will have a positive effect on reducing the backlog. The President has committed to reducing the case backlog, and we appreciate that you share this priority.

We also appreciate that you recognize that, to the extent that funding is provided to increase the number of FMSHRC judges, additional resources are needed for DOL to effectively bring cases before these new judges. In providing those resources, it is important that the DOL have the flexibility to determine the optimal mix of SOL and MSHA staffing and sufficient time to train and deploy the new staff.

MSHA also needs the flexibility to ratchet up the power of our enforcement tools when we are dealing with the worst of the worst. As the laws stand now, we have limited civil and criminal tools to bring chronic scofflaws to justice. I am gratified that the Justice Department is pursuing a serious criminal investigation into the events that led to the Upper Big Branch mine disaster. We have learned, in the wake of the Upper Big Branch mine disaster, that our resources—our resource needs are not limited to our enforcement activities. MSHA needs additional tools to respond to mine emergencies, including funding for investigations, hearings, and public forums examining the Upper Big Branch disaster. This will likely be the most extensive and costliest investigation in the history of MSHA, and we need to ensure that it is done well and does not drain resources from other critical enforcement activities.

MSHA mine rescue teams must be equipped to respond quickly and effectively, when time is of the essence, in reaching possible survivors of a mine explosion, fire, or entrapment. I saw firsthand the need for better communications systems during the rescue at Upper Big Branch. MSHA also lacks the necessary inventory of portable testing equipment, such as gas chromatographs, to be able to examine a mine's atmosphere. MSHA must also strengthen

logistical emergency response capabilities in the Western United States.

Another issue is the need for MSHA to make organizational changes in southern West Virginia, an area with the highest concentration of underground coal mines in the Nation. MSHA is considering a plan to split district 4 into two separate management and administrative functions. Another critical need MSHA hopes to meet is human testing of refuge chambers that miners may need to rely on in an emergency, that was part of the new MINER Act.

PREPARED STATEMENT

In closing, I appreciate the steps that the Senate Appropriations Committee took last week in providing supplemental appropriations for mine safety, and look forward to working in the development of your regular appropriations bill. We owe it to our brave miners to do everything we can to ensure that they come home safely at the end of every shift.

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

Thank you.

[The statement follows:]

PREPARED STATEMENT OF JOSEPH A. MAIN

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

I would like to once again express my deepest condolences to the families, friends and co-workers of the 29 miners who perished in the Upper Big Branch (Upper Big Branch) mine on April 5, 2010, as well as the surviving miners. Our prayers are with all of them.

The Upper Big Branch mine explosion was the worst mining disaster since the creation of MSHA by the Federal Mine Safety and Health Act of 1977, and the deadliest mining disaster this Nation has experienced in nearly 40 years. This tragic event is a call to action. As the President said of the 29 miners who lost their lives on April 5, "we owe them more than prayers. We owe them action. We owe them accountability. We owe them an assurance that when they go to work every day, when they enter that dark mine, they are not alone. They ought to know that behind them there is a company that's doing what it takes to protect them, and a government that is looking out for their safety."

Every worker has a right to a safe and healthy workplace. And every worker has a right to go home at the end of his or her shift and to do so without a workplace injury or illness. Workplace fatalities—even in an industry like underground coal mining—are preventable. No one should die for a paycheck.

Some have said this Nation should expect and accept a certain number of fatalities every year in coal mining. The Department of Labor (DOL) and the MSHA could not disagree more strongly. Explosions in coal mines are preventable. The tragedy at the Upper Big Branch mine did not have to happen. It is the failure of mine operators to comply with the Mine Act and mandatory health and safety standards that can and does lead to injury, disease and death. We believe the history of repeated serious violations both at this mine and others throughout this country demonstrates that there are operations where mine management weighs the costs and benefits of complying with the law, rather than making responsibility for the safety and health of its miners their first priority. I welcome the opportunity to discuss with the subcommittee how we can work together to change this calculus.

EVENTS AT UPPER BIG BRANCH

First, I would like to share with you a short summary of what happened on April 5, 2010 at Performance Coal Company's Upper Big Branch Mine—South (Upper Big Branch) in Montcoal, West Virginia. The mine operator of Upper Big Branch is Massey Energy Company, whose CEO, Don Blankenship, will be testifying on the next panel. We know that there was a catastrophic explosion in the mine at a shift change at approximately 3 p.m. The explosion killed miners in and around two working sections of the mine and those traveling from the working sections at the end of their shifts.

In less than 3 hours, rescue teams were underground, responding to the disaster. Due to the extensive damage from the explosion, however, the rescue teams had a difficult time proceeding in the mine. Within 10 hours of the disaster, rescue teams had found 25 of the victims. Dangerous conditions in the mine delayed and hampered continuing rescue and recovery efforts. Mine rescue teams attempted to again enter the mine on April 7, 8, and 9. Each time they were forced to exit before the final four miners were found. Finally, on the evening of April 9, they were able to enter and found the final four miners. While we were able to recover all the victims, we are still working to ventilate the mine so that it is safe enough to enter the area of the explosion and conduct our physical investigation.

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

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

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

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

ENFORCEMENT AT UPPER BIG BRANCH AND MSHA'S CURRENT ENFORCEMENT TOOLS

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

MSHA's history in the Upper Big Branch mine also demonstrates the kind of heavy presence that a beefed-up inspector corps allows MSHA to have at a troublesome mine. MSHA engaged in a multi-year effort to use the tools we had available to force Massey Energy to comply with the law and turn around its extensive record of serious safety and health violations at the Upper Big Branch mine. From 2007 until today, MSHA has steadily increased its enforcement presence at Upper Big Branch mine. In 2007, MSHA inspectors were on-site at Upper Big Branch mine a total of 934 hours. In 2009, inspectors were on-site at the mine for a total of 1,854 hours.

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

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

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

In what is perhaps the most troubling statistic, in 2009, MSHA issued 48 withdrawal orders at the Upper Big Branch mine for repeated actions that violated safety and health rules. Massey failed to address these violations over and over again until a Federal mine inspector ordered it done. The mine’s rate for these kinds of violations is nearly 19 times the national rate.

NEEDED REFORMS AND RESOURCES

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

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

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

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

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

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

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

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

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

Next, we must improve the rules and adjudicative procedures to compel operators to remedy hazards. As you know, the President has committed to reducing the large and growing case backlog at the FMSHRC. The well-documented shortcomings of the current pattern of violations process and the unconscionable backlog of cases at the FMSHRC demonstrate that it is too easy for even the worst offenders to avoid the heightened enforcement status envisioned by Congress.

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

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

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

Even if an excessive contest strategy fails and a mine ends up in a "potential pattern of violations" status, an operator can almost always avoid the ultimate "pattern of violations" label with temporary improvements in safety. The current system allows an operator to avoid going into a pattern of violations status if the operator reduces its S&S violations rate by more than 30 percent within 90 days or brings it below the national average for mines of similar type and size. Upper Big Branch

mine did this in 2007 and avoided a pattern of violations status by reducing S&S violation rate by 30 percent, even though its number of S&S violations remained above the national average. The policies this administration inherited make it relatively easy for operators like Massey to avoid pattern of violations status. In fact, MSHA has been able to place only one mine into pattern of violations status since passage of the 1977 Mine Act, and that order was revoked when two of the violations on which it was based were thrown out through the contest process.

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

MSHA has already begun the process of redesigning how the pattern of violations program will work in the future and making the program more effective. We are asking the FMSHRC to expedite its review of cases whose adjudication to final order status is necessary to get bad actor operators into pattern of violation status. In addition, in our regulatory agenda, we announced that we will be issuing new regulations to simplify the criteria for placing mines into the pattern of violations program. There are fundamental challenges in the pattern of violations program that may need legislative fixes and I look forward to working with the Congress on developing those.

As it now stands, the backlog at the FMSHRC is a major impediment to the effective use of the pattern of violations program and to MSHA's ability generally to hold mine operators accountable for safety and health violations. As of May 5, 2010, there were approximately 16,000 cases and 89,000 violations pending before the FMSHRC in some phase of the penalty contest process. There are approximately \$209 million in contested fines pending. The average case takes more than 600 days to resolve from the time a violation is issued. I believe that we need regulatory, legislative, and budgetary action to solve this problem.

At a hearing before the House Education and Labor Committee on February 23 of this year, I outlined specific measures MSHA was considering to address the backlog problem. I do not believe that an increase in litigation alone can resolve the backlog problem. That's why we are moving to improve the cases we bring to the FMSHRC and how we handle them once they are there. We will make the citation process more objective and consistent by simplifying the citation and penalty determination process and improving related training, improving the conferencing system, making greater use of the "closeout" inspection meeting after mine inspections, continuing to develop training programs and materials to aid mine operators with compliance and pursuing corporate-wide holistic settlements that require operators to implement meaningful health and safety programs.

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

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

To the extent that funding is provided to increase the number of FMSHRC judges additional resources will be needed for SOL and MSHA to staff the litigation and litigation support to effectively bring cases before these new judges. For example, if resources were provided to immediately increase the number of judges at the FMSHRC to 26, then the SOL and MSHA would require roughly an additional \$26.6 million above the fiscal year 2010 appropriation and the President's 2011 budget request.

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

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

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

MSHA'S OPERATIONAL AND EMERGENCY RESPONSE NEEDS

Improving the health and safety of miners in light of both the lessons highlighted and the many questions raised by the Upper Big Branch disaster is not limited to the area of enforcement and legal reform. MSHA supports the provision of resources for a number of other needs critical to eliminating the most immediate risks to miners and for ensuring that MSHA can effectively respond to mine emergencies.

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

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

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

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

Another issue is the need for MSHA to make organizational changes in southern West Virginia to ensure its existing resources get optimal use in an area with the highest concentration of underground coal mines in the Nation. Coal mine safety in southern West Virginia is covered by MSHA's Coal Mine Safety and Health District 4. MSHA is considering a plan to split district 4 into two distinct districts with sepa-

rate management and administrative functions, and whether MSHA can better carry out its oversight of mine safety if it makes such a change. Of the Nation's 11 coal districts, district 4 has the most employees and the most significant workload with the smallest ratio of supervisory staff to line employees. Its workload is almost 50 percent higher than the next busiest district in many key indicators such as contested citations and plan approvals. In order for management to best be able to spot problem or potentially problematic mines and react responsively, it would seem that dividing this district into two districts of better manageable sizes would be the best approach.

Another critical need MSHA hopes to meet is testing of the refuge chambers miners rely upon if trapped underground in a mine emergency. When Congress passed the MINER Act in 2006 after the Sago disaster it required underground coal mines to install what are commonly referred to as refuge chambers, where miners would have available breathable air, food, and water until help could arrive from the surface. The implementation of this requirement was a significant improvement in mine safety. However, some of the more common commercially available units have not been tested for human survivability. Such testing for survivability in extreme conditions such as heat from geothermal sources or a fire is a high-priority need.

CONCLUSION

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

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

Senator HARKIN. Thank you very much, Mr. Main.

Now we'll turn to our Solicitor of Labor, Ms. Smith.

STATEMENT OF HON. M. PATRICIA SMITH, SOLICITOR OF LABOR, DEPARTMENT OF LABOR

Ms. SMITH. Chairman Harkin, thank you for inviting me here today to discuss a matter of great concern to me, which is the role of the Solicitor's office in holding mine operators accountable and the resources that my office needs to do that job effectively.

But, as Assistant Secretary Main testified, the problem is fundamentally a health and safety problem. Mine operators must do a better job of eliminating unsafe conditions in the first place. If MSHA inspectors can find violations, then mine operators should be able to find them also, and fix them before there are injuries and deaths.

Since the 2006 passage of the MINER Act, and since MSHA's penalties increased in 2007, as you noted, many mine operators have dramatically increased their rate of penalty contests and citation contests. Mine health and safety is poorly served when the system is overwhelmed by high contest rates and cases are not decided promptly. But, as Assistant Secretary Main said, the problem can't be fixed simply by litigating out of it; other reforms are needed as well.

I want to recognize and thank the subcommittee for their work last week in moving closer to supplemental funding for the DOL and the FMSHRC. We understand that a single judge can dispose of approximately 500 cases a year. Our own statistics show that, under the current litigation process, the DOL uses approximately 14 employees for each judge. That includes the Solicitor's office, attorneys, MSHA conference litigation representatives, and support staff. So, to the extent that the FMSHRC is funded for additional

judges, the SOL's office and MSHA will need a corresponding increase in resources.

If resources were provided to immediately increase the number of judges at the FMSHRC to 26, the SOL's office and MSHA would require, roughly, additionally, \$26.6 million above the fiscal year 2010 appropriation and the President's 2011 year budget request. With any supplemental appropriation, we would request the flexibility to adjust the ratio of Solicitor's attorneys, MSHA personnel, and support staff, based on the mix of cases before the FMSHRC. Also, hiring, training, and deploying attorneys and CLRs will require time. Ideally, we would like any new funds to be made available over a period of time. That will enable us to use the funds in the most efficient and cost effective way possible.

I've gone into greater detail in my written testimony regarding what goes into the case preparation and to explain why MSHA litigation is so resource intensive. But, to fix the backlog problem over the long run, we're going to need new tools, and I'd like to discuss a few of them.

First, I'd like to note that the FMSHRC published, in the Federal Register this morning, a proposed rule on simplified case proceedings. And I fully support the concept of simplifying the FMSHRC's adjudicatory proceedings. I believe that streamlining the process in appropriate cases will help the Solicitor's office and MSHA use their resources more efficiently to resolve cases more quickly.

In addition, we've supported a number of legislative reforms that would help improve the backlog and improve mine safety. Subpoena power in routine investigations in inspections is one reform that would greatly assist us. Another reform would clarify the proof needed to establish that a violation is significant and substantial. Under current FMSHRC case law, such a violation is difficult and resource intensive for us to prove. Still other reforms could provide financial disincentives for operators to contest cases by requiring them to put penalty amounts in escrow or to prepay or to pay pre-judgment interest on final penalty amounts.

We also support reforms in the pattern of violation process. MSHA's regulatory agenda includes a rulemaking to revise the way MSHA determines what's happening in pattern of violation cases.

In the meantime, we have begun to file motions to expedite cases before the FMSHRC. We hope that expediting appropriate cases will remove another incentive that operators have to contest violations. And, for the first time, we're working with MSHA to identify appropriate cases in which to file for injunctive relief against mines with a pattern of violations.

In addition, I support MSHA's plans to revise its penalty rules to simplify the categories on which penalties are based, such as the degree of operator negligence and the degree of gravity of the violation. By simplifying the penalty assessment process, we expect to see fewer issues on which MSHA and the operators can disagree and fewer contested citations.

And there are some things that SOL can do to provide incentives not to contest cases. Operators must be dissuaded from contesting citations simply because they believe they can get their penalties reduced. In appropriate cases, we therefore may ask for an increase

in penalties in litigation so that operators understand that there are significant disincentives for filing frivolous contests, especially in penalty cases.

I thank you for the opportunity to testify today.

Resources are an important part of the problem, but so are the other issues that I talked about.

[The statement follows:]

PREPARED STATEMENT OF M. PATRICIA SMITH

Chairman Harkin, Vice Chairman Cochran, and members of the subcommittee: Thank you for inviting me here today to discuss a matter of great concern to me: the role of the Solicitor's Office in holding accountable those mine operators who do not live up to their moral and legal responsibility to ensure mine workers' safety and health and the resources the Solicitor's Office (SOL) needs to carry out that role effectively.

This problem is, fundamentally, a safety and health problem. The Mine Safety and Health Administration (MSHA) cannot be present at every mine at all times, nor should it be. Mine operators are the ones on the front lines of safety and health efforts, and they must do a better job of eliminating unsafe conditions in the first place. If MSHA inspectors can find violations, then mine operators should be able to find them, too—and fix them before they produce worker injuries and illnesses.

As you've heard, MSHA has used the additional funding you've provided during the past several years to hire more inspectors, which has enabled the agency to perform 100 percent of its statutorily mandated inspections and to conduct spot inspections and special emphasis programs. With more inspections, MSHA has found more violations and issued more citations. It also has assessed higher penalties as a result of statutory and regulatory penalty increases. At the same time, however, many mine operators have dramatically increased their contest rates, which has resulted in delayed adjudications and mounting case backlogs.

As you know, the President has committed to reducing the large and growing case backlog at the Federal Mine Safety and Health Review Commission (FMSHRC). Miner safety and health is poorly served when the system is overwhelmed by high contest rates and cases are not decided promptly. Backlogs and delays impede justice and dilute the deterrent effect that Congress intended civil penalties to have. But while litigation may have created the backlog, it cannot, by itself, eliminate it. As Assistant Secretary of Labor for Mine, Safety, and Health, Joseph Main said, this problem can't be fixed simply by adding more money for lawyers, judges, and MSHA personnel to settle and litigate cases.

You asked me to provide information regarding resources needed to support the anticipated increase in the number of administrative law judges of the FMSHRC. According to the FMSHRC's fiscal year 2011 budget request, a single judge can dispose of approximately 500 cases a year. Our own statistics show that, under the current litigation process, the Solicitor's Office utilizes approximately seven attorneys for each judge—and that does not include resources that MSHA expends on FMSHRC cases using its conference litigation representatives (CLRs).

To the extent that the FMSHRC is funded for additional judges, the Solicitor's Office (SOL) and MSHA will need a corresponding increase in resources. For example, if resources were provided to immediately increase the number of judges at the FMSHRC to 26, then the SOL and MSHA would require roughly an additional \$26.6 million above the fiscal year 2010 appropriation and the President's 2011 budget request. With any supplemental appropriation, we would request that Congress provide us with the flexibility to adjust the ratio of SOL attorneys and support staff and MSHA CLRs and support staff based on the mix of cases before the FMSHRC.

While we would begin to use any new resources promptly, hiring, training, and deploying attorneys and CLRs will require time. Ideally, we would want any new funds to be made available over a period of time that will enable us to use the funds in the most efficient, cost-effective way possible, or to have an understanding that any down payment in a supplemental appropriation would be followed by the resources in the regular appropriation to address what is clearly a multi-year process. As we begin to implement improvements in the way we handle FMSHRC cases, which would be designed, at least in part, to achieve greater efficiencies, we would hope to need fewer resources.

Let me tell you a little about the process so that you can appreciate the workload involved.

Each FMSHRC case typically involves a number of citations issued to an operator during a single inspection or related inspections. Each contested citation must be litigated separately, including the violation itself, any special findings, and the proposed penalty. Our attorneys research and investigate each item and often find it is necessary to consult with MSHA inspectors and experts just to understand the unique worksites and the technologically complex processes that are at issue.

Our attorneys also prepare and file with the FMSHRC all necessary legal documents, including the petition, answers to notices of contest and motions. They also engage in settlement talks, discuss settlement offers with MSHA, and draft and file motions to approve settlements. Until a case has settled, however, our attorneys must still do all the things necessary to prepare for trial, including identifying, locating, interviewing, and evaluating witnesses—including expert witnesses—as well as obtaining and analyzing ventilation or roof control plans, mine maps, dust samples, inspector notes, and photographs.

Discovery—which takes place outside of court and generally without the involvement of a judge—can be especially time-consuming. A judge’s order setting discovery deadlines may take the judge a few minutes to prepare, but conducting the actual discovery—preparing interrogatories, requests for production of documents, and requests for admissions, responding to operator requests, and preparing for and defending depositions—can take weeks and sometimes months. Depositions themselves usually require costly, time-consuming travel.

Of course trial preparation—drafting pretrial motions, preparing witnesses, negotiating with opposing counsel—is also resource intensive, and actual trials can last days and usually involve travel. Some trials require even larger amounts of time. For example, recently we went to trial on a case in which we litigated 29 separate significant and substantial violations in an attempt to establish that a Massey mine—the Tiller Mine—should be put on a pattern of violations. Six attorneys have worked more than 1,000 hours on that case, and more work may be required once a decision is issued.

In addition to their own caseloads, SOL attorneys train CLRs and supervise their cases. We train MSHA inspectors in subjects such as evidence and courtroom procedures. And we analyze, in advance, all cases in which MSHA is considering individual agent liability, a “flagrant” designation, or a pattern of violations designation.

More judges may, of course, be part of the backlog solution, but only if they are accompanied by more CLRs and SOL attorneys—and only if we have enough time to train and deploy them. To fix the backlog problem over the long run, we will need other tools as well. I’d like to discuss a few of them:

—*Simplified Commission Proceedings.*—I support fully the concept of simplifying the Commission’s adjudicatory proceedings, which Chairman Jordan mentioned.

Streamlining the process in appropriate cases can help reduce the backlog by resolving them quickly and efficiently.

—*Legislative Reforms.*—We support a number of legislative reforms that could help reduce the backlog and improve mine safety and health. Subpoena power in routine investigations and inspections is one reform that would allow us more easily to obtain the evidence we need to resolve cases quickly. Another reform could clarify the proof needed to establish that a violation is “significant and substantial.” Under current FMSHRC case law, such a violation is difficult and resource-intensive for us to prove. Still other reforms could provide financial disincentives for operators to contest cases by requiring them to put penalty amounts in escrow while their cases are pending, or to pay pre-judgment interest on final penalty amounts.

—*Revise the Pattern-of-Violations (POV) Process.*—MSHA’s Spring Regulatory Agenda includes a rulemaking to revise the way MSHA determines whether an operator has committed a pattern of violations. The proposed rule would reduce the current incentive for operators to contest violations in order to avoid final orders that count toward a pattern of violations. MSHA also is considering revising its internal policies for identifying operators for a potential pattern. SOL will work with MSHA to craft these new rules and policies. We also believe that legislative changes to the POV process may be necessary to make it more useful as a tool to address problem behavior in a more timely way, and look forward to exploring those changes with the Congress.

—*Develop Better Cases.*—Good evidence, of course, is the key to strong cases. For example, recently we worked with MSHA to issue guidance that encourages inspectors to use cameras wherever possible to document violations. Common-sense steps like this can help reduce the number of facts at issue and lead to faster case resolutions.

—*Simplify Penalties.*—SOL is planning to help MSHA revise its penalty rules so that the categories on which penalties are based—such as the degree of operator

negligence and the gravity of the violation—are simpler. By simplifying the penalty assessment process, we expect to see fewer issues on which MSHA and operators can disagree, and fewer contested citations.

—*Provide Incentives Not To Contest Cases.*—Operators must be dissuaded from contesting citations simply because they believe they can get their penalties reduced. In some cases we therefore may ask for an increase in the penalties so that operators understand that there are significant disincentives to filing frivolous contests, especially in serious cases.

Thank you for the opportunity to testify here today. The time is, indeed, right for reform. But for reform to be truly effective and achieve long-term case control, we must pursue a multi-pronged approach. Resources are an important prong, but administrative, regulatory and legislative reforms are essential for long-term solutions. I look forward to taking your questions.

Senator HARKIN. Thank you very much, Ms. Smith.

Now we'll turn to Dr. Howard.

Dr. Howard.

STATEMENT OF JOHN HOWARD, M.D., DIRECTOR, NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, CENTERS FOR DISEASE CONTROL AND PREVENTION, DEPARTMENT OF HEALTH AND HUMAN SERVICES

Dr. HOWARD. Thank you very much, Mr. Chairman.

On behalf of everyone who works at NIOSH, we'd also like to express our condolences to the families of the miners who died in the Upper Big Branch disaster, and to all other mining families who have lost, tragically, their loved ones.

These tragic losses underscores the importance of preventing mine disasters, which is the ultimate goal of NIOSH's mine safety and health research. Since passage of the MINER Act in 2006, NIOSH has focused efforts in several different research areas, including coal dust explosion prevention, sealed area explosion prevention, belt fire prevention, deep cover retreat mining safety, improving communications and tracking capabilities, refuge alternatives during disasters, and improving respiratory protective equipment.

But, a critical success factor in moving research from the laboratory to the mines is the ability to attract commercialization of the new technology. Mining, as an industrial enterprise, is a small economic market. Without regulatory incentives, the future commercialization of a new technology is often difficult and uncertain.

An example of a successful commercialization of new technologies is the personal dust monitor (PDM). In 2006, NIOSH published an influential document, entitled "Laboratory and Field Performance of a Continuously Measuring Personal Respirable Dust Monitor." NIOSH showed the monitor to be mine worthy, accurate, and a reliable realtime monitor that can provide miners and management with a powerful tool to prevent the overexposure of miners to respirable coal dust. The PDM has the potential to be used both for compliance and respirable dust sampling, and as an engineering control tool.

A vital step in getting the PDM into daily use to protect miners through commercialization, though, was the initiation of a Federal regulation making permissible NIOSH and MSHA certification of the PDM for use as a compliance sampler in underground mines.

Another promising technology that has the potential to save miners' lives from coal dust explosions, in an era when finer and more explosive dusts are being generated by modern mining methods, is

the coal dust explosability meter (CDM), which would provide the mining industry with a means to accurately assess the hazard of coal dust explosability in realtime. NIOSH just prepared for publication a report called "Recommendations for a New Rock Dusting Standard to Prevent Coal Dust Explosions in Intake Airways." NIOSH recommends a new standard, requiring that the total incombustible dust content by 80 percent in the intake airways of bituminous coal mines. NIOSH has based its recommendation on, one, explosion temperature thermodynamic limit models for coal and rock dust mixtures; two, extensive in mine coal dust particle size surveys; and, three, multiple explosion experiments at the Lake Lynn Laboratory.

NIOSH has been aggressively pursuing commercialization of the CDM. Attempts to commercialize the CDM suffer from a lack of sufficient interest to support its manufacture because of the small market problem. The recent tragic events at the Upper Big Branch mine, however, have renewed interest in this technology. NIOSH has found a manufacturer with broad experience in commercialization of field instruments, and expects that the CDM will be commercially available in 2011.

The MINER Act also established requirements for postaction communications and tracking. In response, NIOSH established, with its domestic and international partners, a comprehensive strategy and research program to develop new and enhanced existing communications and tracking technologies for postaccident applications in underground mines, a strategy designed to deliver improved postaccident functionality within the MINER Act timeframe while facilitating ongoing improvements to these platforms. The private sector developed additional technologies in parallel with NIOSH's efforts.

In 2006, virtually no MSHA approved communication systems that met the intent of the MINER Act were commercially available. Today, there are a suite of postaccident communications and tracking technologies commercially available.

While none of these are perfect, these technologies, when used individually or in combination, have significantly improved postaccident functionality for mine workers.

PREPARED STATEMENT

NIOSH has also made progress in the area of sealed area explosion prevention, through design practices and technology applications. For example, under the technology development mandate of the MINER Act, NIOSH developed and demonstrated a system to extract nitrogen gas from the mine atmosphere and inject it into a sealed area to render it inert or extinguish a fire. This compact system, designed for easy transport in coal mines, is now commercially available.

NIOSH continues to work diligently to protect the safety and health of mine workers and thanks this subcommittee for their support.

Thank you very much.
[The statement follows:]

PREPARED STATEMENT OF JOHN HOWARD

INTRODUCTION

Good afternoon, Mr. Chairman and other distinguished members of the subcommittee. My name is John Howard, and I am the Director of the National Institute for Occupational Safety and Health (NIOSH), part of the Centers for Disease Control and Prevention, within the Department of Health and Human Services (HHS). I am accompanied by Dr. Jeffery Kohler, NIOSH Associate Director of Mine Safety and Health Research and Director of the Office of Mine Safety and Health Research (OMSHR), which was permanently established by the Mine Improvement and New Emergency Response (MINER) Act of 2006.

The goal of NIOSH's OMSHR is the elimination of mining fatalities, injuries, and illnesses through research and prevention. Collaborations with its stakeholders, which encompass industry, labor, and Government, provide a knowledgeable and diverse foundation for formulating a relevant research portfolio that addresses the most pressing mine safety and health issues of our time. So, Mr. Chairman, you can imagine the anguish and frustration that OMSHR, its partners, and I experienced when the disheartening news of the Upper Big Branch Mine explosion broke on April 5. While the specific causes of this latest tragedy will not be known until the Mine Safety and Health Administration (MSHA) completes its investigation, this explosion already serves as a poignant reminder of the need to maintain a focus on the prevention of mine disasters through research and safety interventions.

A review of mine disasters over the last decade, including those at the Sago mine, the Darby mine, and at Crandall Canyon, reveals that no two mine disasters are identical. With most mine disasters, a number of precipitating factors occur concurrently to create conditions to cause a calamity. Some of these factors are within human control even if others are not. To consider simultaneously all permutations of factors that may contribute to a mine disaster is impractical; however, we know that eliminating one of the factors may prevent or at least mitigate the effects of a catastrophe. For example, a mine explosion requires a fuel source (such as methane or coal dust), a minimum concentration of oxygen to support combustion, an explosive mixture of the fuel with air, and an ignition source. All contributing factors do not have to be eliminated to prevent an explosion. In fact, an explosion can be avoided if any single factor is removed. The key to preventing catastrophes is to identify and eliminate the controllable common thread through technology and engineering interventions.

I will now present an overview of NIOSH's on-going research and accomplishments that primarily relate the mandates of the MINER Act and disaster prevention. Since I have begun to address the topic of mine catastrophes, I will start with an overview of our disaster prevention projects, then move on to disaster response.

DISASTER PREVENTION

Coal Dust Explosion Prevention.—NIOSH will soon complete an important report on the explosion hazard implications of finer dusts that modern mining methods generate. This report of investigation, called "Recommendations for a New Rock Dusting Standard to Prevent Coal Dust Explosions in Intake Airways," recommends revision to the current minimum requirement of 65 percent for incombustible content in dusts found in intake airways. The report is in the final stages of review.

NIOSH is aggressively pursuing commercialization of the Coal Dust Explosibility Meter (CDEM). The CDEM provides the mining industry with a means to assess accurately and in real time the hazard of coal mine dust explosibility. Recent mine disasters have renewed interest in this technology, and NIOSH has found a manufacturing partner with broad experience in the manufacture and marketing of field instruments. The CDEM will be commercially available next year.

Sealed Area Explosion Prevention.—The 2006 explosions at the Sago and Darby mines were due to the existence of explosive atmospheres within sealed areas of underground coal mines. Preventing this condition from occurring is a priority under the technology development mandate of the MINER Act, so NIOSH developed and demonstrated a system to extract nitrogen gas from the mine atmosphere and inject it into a sealed area to render it inert or extinguish a fire. This compact system, designed for easy transport in coal mines, is now commercially available.

Improving Coal Mine Seals.—In 2007, NIOSH released an influential Information Circular called "Explosion Pressure Design Criteria for New Seals in U.S. Coal Mines," that established a scientific basis for upgrading the design requirements for seals in underground coal mines. Since that publication, NIOSH has engaged in further research, including cooperative research with the Naval Research Laboratories and the U.S. Army Corps of Engineers, to improve methods for evaluating seal de-

signs. When completed, this research will provide a sound engineering foundation and enhanced tools to evaluate seal designs to ensure they will provide adequate protection to miners.

Belt Fire Prevention.—As directed by section 11(A) of the MINER Act, NIOSH initiated research in response to the report, “Technical Study Panel on the Utilization of Belt Air and the Composition and Fire Retardant Properties of Belt Materials in Underground Coal Mining.” This research has included full-scale testing of belt materials to validate the Belt Evaluation Laboratory Test (BELT) as a means of evaluating the fire resistance of belt materials. Research is continuing to evaluate the efficacy of current standards for water-based suppression systems as well as alternative systems used to control fires over the range of belt air velocities. The research is also investigating new approaches in early detection of belt fires and improvements to mine fire modeling software to assess the potential impact of a fire on escape routes. NIOSH is communicating results of this work directly to MSHA and to mining stakeholders through industry conferences and publications.

Mine Atmospheric Monitoring.—Continuous monitoring of gas concentrations in sealed and active gob areas (mined out areas made up of caved in rock) would allow mine operators to identify changing conditions that indicate developing gas explosion or spontaneous combustion hazards. However, monitoring these areas with conventional electronic systems can introduce an ignition source to this potentially hazardous area of a mine. To address this problem, NIOSH procured a monitoring system, used in approximately 50 coal mines internationally, that continuously draws air samples from the mine through a network of tubing to a gas analyzer on the surface. NIOSH is currently demonstrating this “tube bundle system” at a longwall coal mine to serve multiple research goals including:

- assessing combustible and toxic gas concentrations in real-time in the active areas of the mine;
- monitoring for developing spontaneous combustion hazards in the active longwall gob to validate modeling software developed by NIOSH; and
- documenting the mixing of gasses in a mine gob after completion of the longwall panel to improve ventilation design models.

The tube bundle system also has the potential to remain in operation during response to certain mine emergency events without increased risk to rescuers.

Ground Control Study of Deep Cover Retreat Mining.—NIOSH conducted, in collaboration with the University of Utah and West Virginia University, a study of the recovery of coal pillars through retreat room and pillar mining practices in underground coal mines at depths greater than 1,500 feet. This study was of special interest following the tragedy that occurred at the Crandall Canyon Mine. NIOSH has investigated the safety implications of retreat room and pillar mining practices, with emphasis on the impact of full or partial pillar extraction mining and has developed recommendations and research requirements for addressing the safety issues of ground control under these mining conditions. At NIOSH’s request, MSHA is reviewing this study, and NIOSH expects that the study will soon be completed.

DISASTER RESPONSE

Contracts and Grants Program.—As mandated in section 6 of the MINER Act, NIOSH established a contracts and grants program that funds the development and adaptation of safety technologies for mining applications. Under this program, NIOSH has funded 29 proposals. This year NIOSH received an additional 38 proposals, which are undergoing technical review. Awards for the most meritorious proposals are expected this fiscal year. In addition, NIOSH established a contracts program for mine ventilation research and capacity building to expand the number of trained professionals which work in this area. The contracts are designed to support research, exploratory development, testing, or evaluations of innovations and new technologies to improve mine health and/or safety in the area of mine ventilation. NIOSH has awarded seven 5-year contracts for ventilation research to universities throughout the United States.

In addition, NIOSH established an Inter-Agency Working Group to provide a formal means for Federal Government agencies to share technology that can be applied to mining safety. The working group includes representatives from NIOSH, MSHA, the National Aeronautics and Space Administration (NASA), the Naval Research Lab, the U.S. Army Engineering and Research Center, Sandia National Laboratory, and a number of additional research labs or offices within the Departments of Defense, Energy, and Homeland Security.

The NIOSH Contracts and Grants Program can be divided into three primary areas as defined by the MINER Act: communications and tracking, refuge alternatives, and self-contained self-rescuers.

Communications and Tracking.—The MINER Act established requirements for postaccident communications and tracking and charged NIOSH with developing and improving mine safety technologies. Furthermore, each coal mine was required to submit an emergency response plan, which incorporates postaccident communications and tracking, to MSHA within 3 years of the enactment date. In 2006, virtually no MSHA-approved communications and tracking systems that met the intent of the MINER Act were commercially available.

In response NIOSH established with its domestic and international partners a comprehensive strategy and research program to develop new, and enhance existing, communications and tracking technologies for postaccident applications in underground coal mines. This strategy is designed to deliver improved postaccident functionality within the MINER Act timeframe, while facilitating continuous improvements to these platforms. The private sector developed additional technologies in parallel with NIOSH's efforts.

NIOSH categorizes its communications research into two major areas—Primary Systems and Secondary Systems. Primary Systems operate in conventional radio bands, use small antennas that permit wearable transceivers with long battery life, and provide sufficient throughput for routine, daily mine communications. Secondary Systems operate in nonconventional frequency bands, use large antennas that are best suited for fixed or portable applications, and do not have sufficient throughput for everyday mine communications. Thus, Secondary Systems are primarily intended for emergency use.

Primary Systems include leaky-feeder systems, which use perforated coaxial cables to carry radio signals, and node-based communications, which employ a network of nodes using a digital format. Becker/Pillar and Innovative Wireless/L3, respectively, developed the systems under NIOSH contracts. The node-based system serves a dual purpose of communications and tracking. Both leaky-feeder and node-based systems have been installed, tested, and demonstrated in underground mines and are now MSHA-approved and commercially available.

Primary Systems require an in-mine infrastructure that is inherently vulnerable, so their survival after a catastrophic event depends on redundant communications paths. In nonproduction areas of a mine, direct paths to the surface are accessible only via shafts and boreholes. These alternative paths are not readily available within working sections; therefore, in-mine redundancy of communications pathways, although less effective, must be used.

Secondary Systems include medium-frequency systems, which use the metallic structures within the mine to transmit signal, and through-the-earth systems, which exploit wireless options. These systems require minimal infrastructure and thus have better chances for survival after an emergency event. A NIOSH contract awarded to Kutta/U.S. Army produced a medium-frequency system, while contracts awarded to Lockheed Martin, E-Spectrum, Alartek, Teledyne Brown Engineering, Stolar, and Ultra Electronics are directed toward the development of through-the-earth systems.

A Secondary System cannot support routine mine communications because of limited throughput. Though it does not provide wide-area coverage, it provides an alternative communications path out of the mine (i.e., it substitutes for a borehole in a working section). Ideally, a Secondary System provides a backup, emergency channel for a Primary Communications System.

The medium-frequency system has been successfully tested and is in the MSHA approval process. Through-the-earth systems are still in the development stage. Although successful preliminary testing has occurred, the principal challenge is designing a system that can support two-way communications at power levels that are low enough to meet MSHA approval requirements. Despite the technological obstacles, NIOSH will continue to support advances in these critical technology areas.

NIOSH is planning to perform long-term, targeted research to address information gaps in communications and tracking. Identified gap areas include the safety issues of distributed and isolated batteries in communication and tracking systems, performance measurement and estimation techniques, compatibility considerations, and electromagnetic signal propagation in mining environments.

Refuge Alternatives.—In response to MINER Act mandates, NIOSH has successfully conducted extensive research into the utility, practicality, survivability, and cost of various refuge alternatives in an underground coal environment. This research, through both in-house and contract efforts, included field tests of approved and commercially available refuge chambers. Sharing information is an important part of the response to the MINER Act; thus a NIOSH–MSHA Working Group was established to facilitate the flow of information and to enhance NIOSH research efforts. NIOSH prepared a report detailing the results of this research and providing specific recommendations that could inform the regulatory process on refuge alter-

natives. In December 2007 NIOSH delivered the report to the Secretary of Labor, the Secretary of HHS, the Senate Committee on Health, Education, Labor, and Pensions, and the House Committee on Education and the Workforce.

NIOSH has also addressed the training issues associated with refuge alternatives and has developed individual training products on topics such as the decisionmaking process of when to use a refuge chamber, operational guidelines for instructional materials, and how to use a refuge chamber. Significant work is needed in the area of expectations training, and NIOSH has a first module nearly completed in this area.

State and Federal efforts resulted in the introduction of refuge chambers throughout the underground coal industry. However, alternatives to chambers such as an in-place shelter were left largely untouched and a range of chamber operational questions remain unknown. As a result, mineworker confidence in these chambers is low, and the value of this potentially lifesaving technology remains undetermined.

NIOSH has evaluated international best practices in self-escape and mine rescue operations to identify opportunities to improve U.S. mine preparedness. NIOSH researchers identified the value of introducing improved realism in mine rescue training and the importance of behavioral health issues in preparing miners and rescuers for response to an emergency. Researchers identified the need to improve training facilities and to use more standardized training and procedures in order to improve the ability of teams from different mines to work together during emergencies. NIOSH has communicated these findings at a number of industry events and worked directly with mine rescue teams to initiate change.

Self-contained Self-rescuers.—The NIOSH research and evaluation program for self-contained self-rescuers (SCSRs) addresses new technology, standards for certification, training, and testing of mine-deployed SCSR.

New Escape Respirator Technology.—NIOSH awarded a contract to Technical Products, Inc. (TPI) in February 2007 to design and fabricate an oxygen-supplying SCSR with “piggy-back” technology to allow a trapped or escaping miner to replenish his oxygen supply while underground. The new SCSR design includes a docking port mechanism that allows the user to plug in additional oxygen units without opening the breathing circuit to the potentially poisonous atmosphere. The docking port requires that a second oxygen unit be plugged in before the valve can be repositioned to the alternate port. In addition to this docking capability, the escape respirator employs a new chemical technology for removing carbon dioxide from the exhaled breath. This new chemical technology will facilitate lower breathing effort by the user and be more capable of withstanding the rigors (shock, vibration, and rough handling) encountered in daily use. Other innovative materials and design features make the new escape respirator easier to manufacture and more comfortable to wear and use.

Under the same contract, TPI also developed a new technology filter self-rescue respirator for use in carbon monoxide atmospheres. The new filter self-rescue technology uses a catalytic process to remove carbon monoxide, resulting in longer protection from a smaller filter than current filter self-rescue technology. The new filter self-rescue respirator can be docked with the escape respirator to provide protection in atmospheres where the only hazard is carbon monoxide.

The designer and manufacturer of the new respirator technologies is expected to apply for NIOSH certification. In addition to the contract work on the docking escape respirator system, NIOSH has been working to increase awareness of other escape respirator technologies commercially available and used in other countries.

Standards for Certification Evaluation and Testing.—On December 10, 2008, NIOSH published in the Federal Register a proposed regulation for certification, evaluation, and testing of closed-circuit escape respirators. The proposed regulation would replace current certification evaluation and test requirements identified in 42 Code of Federal Regulations, part 84. The proposed regulation would enable state-of-the-art technology for both test and performance of escape respirators. In 2009, NIOSH held two public meetings to discuss the proposed regulation and opened a docket to enable interested parties to provide comment. NIOSH is currently reviewing the comments submitted to the docket and expects to submit a final rule this fiscal year.

User Training for SCSRs.—NIOSH conducted a research project to evaluate the effectiveness of SCSR user training programs developed by NIOSH in collaboration with MSHA. In 2009, NIOSH worked with 11 mines and 2 mine training centers to conduct the training effectiveness evaluation on 461 miners. NIOSH and MSHA are now analyzing the training effectiveness evaluation and expect to complete the analysis this year.

Testing of SCSRs.—In 2007, NIOSH redesigned the Long-Term Field Evaluation (LTFE) Program for SCSRs to change the focus from a research program to a res-

pirator certification audit program. The LTFE Program redesign includes a valid sampling strategy to select SCSRs from mines for testing, uses defined evaluation performance criteria with a documented test protocol, and incorporates a procedure for conducting follow-through actions based on evaluation results. The redesigned protocol was peer-reviewed and discussed at two public meetings prior to implementation. NIOSH also established an open comment docket for stakeholder comments.

In May 2009 NIOSH launched the redesigned LTFE, starting with the collection of SCSRs from mines following a random sampling plan using the MSHA SCSR inventory. As of March 2010, NIOSH had collected 259 SCSRs from 153 mines, and had tested 173 SCSRs following the redesigned protocol. Collected and tested SCSRs represent respirators from each of the four models currently used in mining operations. Following the new protocol and performance criteria, one respirator model exhibited the same test failure on two respirators. The failures are under investigation to identify the cause and to determine corrective actions.

Although this hearing is focusing on disaster prevention, everyday mine workers face a risk of injury or occupational illness. Advances in engineering and training interventions, developed in partnership with labor, industry, and Government, have made significant reductions to nonfatal and fatal traumatic injuries. Yet more still needs to be done to approach a zero harm goal. NIOSH has a balanced research portfolio to address injuries in areas including ground control, electrical safety, and materials handling. In addition to developing solutions to specific problems, NIOSH is examining the advantages and limitations of additional approaches such as improving the safety culture and employing risk assessment methods.

Occupational exposures to noise and respirable dusts can result in unacceptable health outcomes for workers. For example, more than 70,000 coal miners have died with black lung disease over the past 40 years. NIOSH has a major research focus on the development of engineering controls to reduce exposures to dusts and noise, and has successfully developed and introduced many of these into the mines. Perhaps the most significant event, however, is the successful implementation of the personal dust monitor—a technology that will, for the first time ever, allow mineworkers to know their exposure to coal dust in real time, then enabling operators to make changes to the engineering controls that can reduce miners' exposure. I would like to conclude by summarizing our work on this life-saving technology.

Personal Dust Monitor (PDM).—In 2006, NIOSH published an influential document entitled, "Laboratory and Field Performance of a Continuously Measuring Personal Respirable Dust Monitor." This document proves the personal dust monitor (PDM) to be a mine-worthy, accurate, and reliable real-time dust monitor that can provide miners and mine management with a powerful tool to prevent the overexposure of underground coal miners to respirable dust. The dust monitor is built into the miner's cap lamp system and provides real-time dust exposure data. The PDM has the potential to be used for compliance respirable dust sampling and as an engineering control tool. Significant progress has been made on advancing PDM technology into underground coal mines in the United States. Key developments are as follows:

- NIOSH and MSHA jointly developed 30 CFR part 74—Certification of Continuous Personal Dust Monitors. This regulation enables NIOSH and MSHA to certify PDMs for use as a compliance sampler in underground coal mines. The effective date of this regulation is June 7, 2010. NIOSH and MSHA expect to receive soon a request from the manufacturer to certify the PDM for U.S. mine compliance sampling.
- MSHA is modifying how coal mine dust is sampled under 30 CFR parts 70, 71, and 90, covering, respectively, dust sampling procedures, dust control plans, and special sampling for miners with evidence of black lung. NIOSH has been providing significant technical assistance on the appropriate application of the new PDM technology in underground coal mines.
- The Personal Dust Monitor Management System software package was recently developed and tested. A June 2010 release is anticipated. This software collects, secures, and stores PDM data in an easily accessible data base and can produce reports in a variety of formats based on the needs of the end user.

In July 2009, the PDM commercial manufacturer, Thermo Scientific, began commercial sale of the PDM. From an initial production run of 122 units, 81 were sold to mining companies and are currently in use. Thermo Scientific has received orders for an additional 100 units from mining companies and is building the units. NIOSH researchers are also tracking the performance of these units around the United States.

CONCLUSION

In closing, NIOSH continues to work diligently to protect the safety and health of mine workers. The most recent mine disaster underscores the relevance of past NIOSH work and continued need for further safety and health research. NIOSH has made significant improvements in the areas of communication and tracking, oxygen supply, and refuge alternatives. Moreover, NIOSH's safety and health research program is addressing the critical areas identified by our customers and stakeholders, and through research, development, demonstration, and diffusion activities, NIOSH is enabling a shift to a prospective harm reduction culture in the mining industry. I appreciate the opportunity to present NIOSH's work to you and thank you for your continued support. I am pleased to answer any questions you may have.

Senator HARKIN. Thank you, Dr. Howard.

Now we turn to Ms. Jordan.

STATEMENT OF MARY LU JORDAN, CHAIRMAN, FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, WASHINGTON, DC

Ms. JORDAN. Thank you for the opportunity to testify on the backlog currently facing the FMSHRC.

The need to eliminate this backlog has taken on even more crucial significance since the tragic explosion at the Upper Big Branch mine on April 5. All of us at the FMSHRC are profoundly saddened by the deaths of the miners there, and our thoughts are with their families, friends, and the surviving miners.

The FMSHRC currently has more than 16,000 pending cases at the judge level. This is a marked departure from our historical caseload figures. During the 4 years from fiscal year 2002 through 2005, the annual caseload ranged from approximately 1,300 to 1,500 cases. In comparison, during the subsequent 4 years, the caseload climbed from 2,700 to more than 14,000.

Due to the backlog, the age of the cases that the FMSHRC decides has increased. For example, in fiscal year 2008, 72 percent of the cases were decided by administrative law judges within 1 year, 23 percent were decided within 1 to 2 years, and 5 percent of the cases were more than 2 years old by the time they were issued.

So far, in fiscal year 2010, cases under 1 year of age constituted only 20 percent of the dispositions, 62 percent were from 1 to 2 years old, and 13 percent of the decided cases were more than 2 years old. We expect this lengthening trend to continue as long as an extensive case backlog remains.

The current backlog has significant ramifications. Several important enforcement provisions of the MINE Act depend upon the determination of an operator's history of violations. That history is based on violations that are final, which occurs only at the completion of the FMSHRC's review process. Thus, if case decisions are delayed, MSHA's ability to effectively enforce the Act is inhibited.

We have, pursuant to our \$10.3 million budget appropriation for fiscal year 2010, added four new administrative law judges to our previous roster of 10. We also added four new law clerks to assist the judges. If funding remains just at this 2010 level, we predict a case backlog of approximately 18,200 cases by the end of the fiscal year. The President's 2011 budget request of \$13.1 million would allow us to add 4 more judges, for a total of 18, and would permit us to stem the growth in the backlog.

As you know, the President has committed to reducing the backlog. There are different ways to meet this goal. For example, immediately increasing the number of administrative law judges to 26

would cost roughly an additional \$5.3 million above the fiscal year 2010 appropriation and the President's 2011 budget. At this level, we estimate that, assuming our current case intake level remains constant, we could reduce the number of FMSHRC cases—number of cases in the FMSHRC's backlog—to less than 9,200 within 3 years.

If supplemental funding is provided, we recognize that we would need to hire new judges quickly. Yet, at the same time, if and when the backlog is reduced to an acceptable level, we may not need as many judges. We have identified two methods to achieve these goals. First, we have formally requested the Office of Personnel Management to ask other agencies to temporarily loan administrative law judges to us. Second, we plan to recruit senior administrative law judges, judges who have retired from Federal service, to work for the FMSHRC for a limited period of time.

In addition to increased staffing, we're examining our entire case adjudication system to determine how we can streamline procedures. On April 27, the FMSHRC published an amendment to its procedural rules. It requires the parties to submit a draft settlement order with their motion, and requires almost all of these submissions to be filed electronically.

Today the Federal Register published our proposed rule initiating the simplified procedures process, similar to the one in effect at the Occupational Safety and Health Review Commission. Parties whose cases are placed in this track would be subject to mandatory exchange of information and early prehearing conferences.

PREPARED STATEMENT

Finally, it's important to note that both the significant increase in the numbers of FMSHRC judges, as well as some of the changes we are proposing in our administrative and rulemaking areas, will impact MSHA and the SOL. We are committed to working cooperatively with them to ensure that adjudication under the MINE Act may once again proceed swiftly.

Over the years, this subcommittee has played a key role in ensuring that we receive sufficient funds to protect miner safety. I look forward to working with you to identify the resources needed to address the backlog. And thank you, once again, for this opportunity to testify on the issue.

[The statement follows:]

PREPARED STATEMENT OF MARY LU JORDAN

Chairman Harkin, Senator Cochran, and members of the subcommittee: Thank you for the opportunity to testify on the case backlog currently facing the Federal Mine Safety and Health Review Commission (FMSHRC). My name is Mary Lu Jordan, and I am Chairman of the FMSHRC. On behalf of the FMSHRC, I want to thank the subcommittee for its interest in identifying the resources needed to ensure the speedy adjudication of mine safety cases by eliminating the FMSHRC's current case backlog.

Of course the need to eliminate the backlog has taken on even more crucial significance since the tragic explosion at the Upper Big Branch mine on April 5, 2010. All of us at the FMSHRC are profoundly saddened by the deaths of the miners there, and our thoughts are with their families, friends, and the surviving miners.

FMSHRC is an independent adjudicatory agency that provides administrative trial and appellate review of legal disputes arising under the Federal Mine Safety and Health Act of 1977 (Mine Act). The FMSHRC's administrative law judges decide cases at the trial level. The five-member FMSHRC provides administrative appellate

review. Currently, we have a full complement of commissioners, as our fifth member, Patrick Nakamura, was sworn in at the beginning of this month.

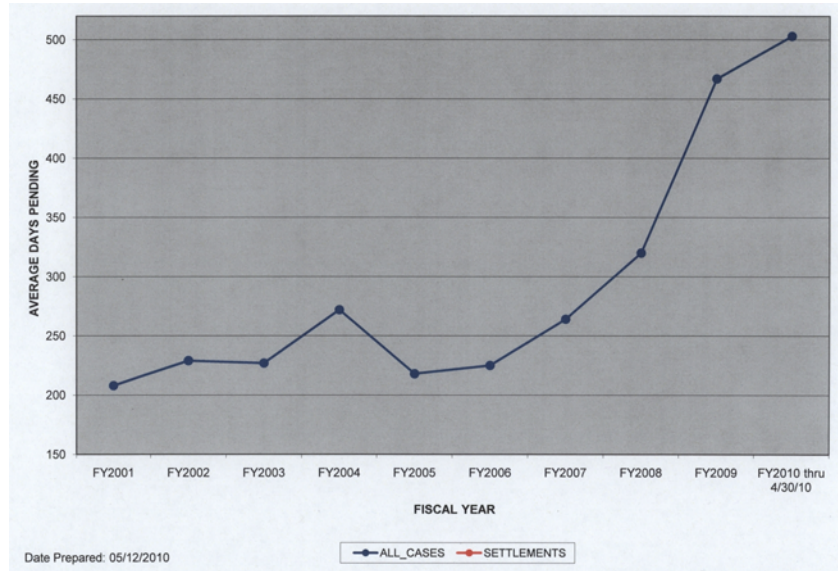
The majority of cases that come before the FMSHRC involve civil penalties proposed by the Department of Labor's Mine Safety and Health Administration (MSHA) to be assessed against mine operators. The FMSHRC's administrative law judges are responsible for deciding whether the alleged violations of the Mine Act or a mandatory safety or health standard or regulation issued by MSHA occurred, as well as the appropriateness of the proposed penalties. To determine the penalty, the judges must make findings on a number of issues, including the seriousness of the violation and the negligence of the operator. Other types of cases heard by the FMSHRC's administrative law judges include contests of MSHA orders to close a mine for health or safety reasons, miners' charges of discrimination based on their complaints regarding health or safety, and miners' requests for compensation after being idled by a mine closure order.

Since the day I became Chairman of the FMSHRC, again, last August, I have been working with my staff to address our case backlog. As of April 30 of this year, we had a backlog of 16,580 cases. (As I mentioned previously, most of these are penalty contests, although approximately 20 percent of them are contests of underlying citations, which typically are stayed and then consolidated with the related penalty cases). In that backlog of pending cases are 9,650 cases (58 percent) under 1 year of age, 5,346 cases (32 percent) that are 1–2 years of age, and 1,584 cases (nearly 10 percent) older 2 years of age. This significant case backlog is a marked departure from our historical caseload figures.

For example, during the 4 years from fiscal year 2002 through fiscal year 2005, the annual caseload ranged from approximately 1,300 to 1,500 cases. In comparison, during the subsequent 4 years, from fiscal year 2006 through fiscal year 2009, the caseload climbed from approximately 2,700 to more than 14,000 cases.

A comparison of new case filings during these same two time periods is also very instructive. From fiscal year 2002 to fiscal year 2005, the annual number of cases filed showed only a minimal increase, going from about 2,100 to 2,400 new cases per year. The figures after that paint a completely different picture, with case filings going from 3,300 new cases in fiscal year 2006 up to approximately 9,200 new cases in fiscal year 2009.

Due to the backlog, the age of cases that the FMSHRC decides has increased. For example, in fiscal year 2008, 72 percent of the cases were decided by administrative law judges within 1 year, 23 percent were decided within 1–2 years, and 5 percent of the cases were more than 2 years old by the time they were issued. In fiscal year 2010 (as of April 30), cases under 1 year of age constituted 25 percent of decided Commission cases, 62 percent were from 1–2 years old, and 13 percent of decided cases were older than 2 years. We expect this lengthening trend to continue as long as an extensive case backlog remains. The attached graph shows the dramatic increase in the average number of days it took our judges to dispose of cases between fiscal year 2001 and the first 7 months of fiscal year 2010.



Moreover, our judges' dockets have increased dramatically. We assigned more cases, which moved the bulk of the backlogged cases to our judges' desks. From fiscal year 2004 to fiscal year 2008, each judge's docket averaged 176 cases. That number jumped to 366 cases in fiscal year 2009. As of April 30, 2010 (before our new judges were hired), the number of cases assigned to each judge was, on average, 601.

The FMSHRC's current case backlog has significant ramifications. When Congress passed the Mine Act, it expressed concern that the penalty provisions of the Act cannot operate as an effective deterrent if there is an unduly long period of time between the violation and the payment of a penalty. The legislative history of the Mine Act emphasizes that "... [t]o be effective and to induce compliance, civil penalties, once proposed, must be assessed and collected with reasonable promptness and efficiency." S. Rep. No. 95-181, at 43 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977, at 631 (1978).

Furthermore, an issue frequently raised since the explosion in West Virginia is that several important enforcement provisions of the Mine Act depend upon a determination of an operator's history of violations. Penalties are calculated based, in part, on the operator's history of violations. Moreover, MSHA's ability to issue a withdrawal order because of a pattern of violations under section 105(e) of the Mine Act is not applicable under MSHA's regulations, 30 CFR 104.3(b), until a violation becomes "final" which occurs only at the completion of the FMSHRC's review process. Thus, if case decisions are delayed, MSHA's ability to effectively enforce the act is inhibited.

In addition, Congress intended that the case processing mechanism operate efficiently so that operators who dispute MSHA's interpretation of a standard may obtain a speedy resolution. With a large and growing backlog of cases at the FMSHRC, operators often do not know in a timely manner whether their practices comply with mandatory safety or health standards or violate them.

Today, I want to update you on steps we have taken to reduce this backlog, and on the work that remains to be done. Mindful of the recent mine disaster, we are determined to speed up our case processing to afford prompt, effective adjudication to the parties who appear before us.

In terms of our actions to date, we have, pursuant to our \$10.358 million budget appropriation for fiscal year 2010, added 4 new administrative law judges to our previous roster of 10 judges. Three have already joined the FMSHRC and the fourth will arrive next week. Under that appropriation, we also added four new law clerks to our current staff of five clerks to assist our judges.

If our funding remains at this level with this staffing (14 judges, 9 law clerks, and 9 legal assistants) for the rest of fiscal year 2010, we project a case backlog of approximately 18,200 cases by the end of this fiscal year. Thus, this level of funding would permit the backlog to grow. However, the President's 2011 budget request of \$13.105 million, representing a 27 percent increase over our fiscal year 2010 appropriation, would stem the growth in the backlog, once the new judges are trained and gain experience under the Mine Act. We would be able to add four more judges, which would bring our total to 18. We also could hire nine additional law clerks so that each judge would have the assistance of a law clerk, and each judge would share an administrative assistant with another judge.

As you know, the President has committed to reducing the backlog. There are different ways to meet this goal. For example, immediately increasing the number of administrative law judges to 26 would cost roughly an additional \$5.3 million above the fiscal year 2010 appropriation and the President's 2011 budget. At this level, we estimate that, assuming our current case intake levels remain constant, we could reduce the number of cases in the FMSHRC's backlog to less than 9,200 within 3 years. Additionally, policy and process changes under consideration by the Commission—some of which I will discuss later—could allow us to more quickly reduce the backlog and case processing time.

If supplemental funding is provided, we recognize that we would need to hire new judges quickly. Yet at the same time, if and when the backlog is reduced to an acceptable level, we may not need as many judges. We have identified two methods to achieve these goals: first, we have formally requested the Office of Personnel Management to ask other agencies to temporarily loan administrative law judges to us. As of right now, the Office of Personnel Management has approved three judges who could work for us on a temporary and intermittent basis. Second, we would recruit senior administrative law judges—judges who have retired from Federal service—to work for the FMSHRC for a limited period of time.

In addition, we are mindful of the training needs of new judges, particularly those with no Mine Act experience. To that end, we have initiated a training program in which our senior judges assist the newly hired judges in learning about FMSHRC case adjudication and procedures. Also, by expanding the number of law clerks, we will provide additional support for our judges.

But more resources are only part of the answer. In addition to increased staffing, we are continuing to examine our entire case adjudication system to determine how we can streamline procedures via administrative and rulemaking changes.

For instance, because more than 90 percent of FMSHRC cases are ultimately settled, we have looked at ways to make that process more efficient, as much of the FMSHRC's resources are used to process settlement motions and issue orders approving settlement. Until recently, the parties filed a motion to approve settlement, but the FMSHRC's judges drafted the settlement order in each settled case. On April 27, 2010, the FMSHRC published an amendment to its procedural rules requiring the parties to submit a draft settlement order with their motion to approve settlement. 75 Fed. Reg. 21987. Furthermore, the rule requires almost all of these submissions to be filed electronically. These changes should reduce the resources expended by the FMSHRC judges in resolving settlement motions.

We are also initiating a "simplified procedures" process similar to the one in effect at the Occupational Safety and Health Review Commission. The rules for cases placed on this track, which would be the simpler cases the FMSHRC receives, would provide for mandatory early disclosure of information and documents by the parties, and early prehearing conferences with a judge. Additionally, discovery and post-trial briefs would be severely limited, and interlocutory review is abolished. We submitted this proposed rule to the Federal Register on May 11, 2010 for notice and comment.

In fiscal year 2008, the FMSHRC instituted a new electronic case tracking system, which allows us to more efficiently track the various stages of each case that we receive. Another ongoing project involves the electronic filing of cases and case documents. The FMSHRC is currently reviewing requirements for the electronic filing process to determine the best approach for implementing such a system. One of our commissioners is currently leading the project team working on this endeavor. The team's initial work has been to visit and survey other adjudicative agencies which have electronic filing systems in place in order to gather information about how long it would take to institute such a system and the costs involved.

Finally, it is important to note that both a significant increase in the number of FMSHRC judges (with the concomitant increase in the number of cases decided) and some of the changes we are proposing in our administrative and rulemaking arenas will impact MSHA and the Office of the Solicitor. We are committed to working co-

operatively with them to ensure that adjudication under the Mine Act may, once again, proceed swiftly.

We will continue to explore modifications to our procedural rules and case management procedures that might enable cases to move more quickly through the FMSHRC. We are committed to examining any and all ideas that can assist in adjudicating cases more rapidly.

Over the years this subcommittee has played a key role in ensuring that we receive sufficient funds to protect miner safety. I look forward to working with you to remedy the problem of our case backlog and in identifying the resources needed to address it and thank you once again for this opportunity to testify on this issue.

Senator HARKIN. Thank you very much, Ms. Jordan.

Well, I note that the first bells have rung for the vote. I will wait until the second set well, a little bit before I recess.

I did want to, thank you all for your testimonies and for all of the good work that you all do in your various capacities.

But, I want to get to the heart of something here, Mr. Main and Ms. Smith. It just seems to me, from all I have read and the info that our committee's looked at, that, under the current system, there seems to be every incentive for an operator to challenge just about every citation issued. They can take advantage of the long delays, put off paying any fines well into the future. Often these fines are substantially reduced, as a result of the contest process, even when the violations are fully supported by the evidence.

So, what can we do? What would you suggest to this subcommittee that we have to do, legislatively? Now, we can put additional money into hiring more judges, but I'm not certain that's going to do the job. They're just going to have more cases filed. I have two questions.

One question, Mr. Main, for you. We saw the increase in the number of citations in the last few years, and the backlog. Why is that happening? Why are we getting more and more citations? I thought mines were getting safer. I thought we had new technologies. And yet, it seems we're getting more violations, more citations.

And, Ms. Smith, if you could follow up on that, what should we do here to break that trend, rather than just hiring more judges? Is there something, legislatively, that we need to do?

So, Mr. Main, why this huge increase in citations?

Mr. MAIN. Thank you, Mr. Chairman.

When I became the Assistant Secretary in October, that was a question that I raised, myself, and started looking into the history of the application of the MINE Act. And if you look at the progress of enforcement following the new MINER Act and other regulations and other activity that took place, which was the funding of additional inspectors that increased, I think, increases by about 20 percent of the number of inspectors on the ground, I think that had some impact with the additional inspections that took place.

But, I also was really bothered by the fact that, you know, there was an increase of violations being cited. And I took a look at the a benchmark, to try to figure out why, because I heard the concerns about consistency and, you know, the new inspections and or new inspectors. I took a look at the statistics to see, are we citing actual violations? And what I found was that, on an average in 2008, 2009, it's about 175,000 violations were issued to the mining industry. And less than one half of 1 percent, in the last year I looked at, of the violations that were issued were vacated, which

is almost nothing. So, that meant that, basically, at least what had been through that process, those violations were violations.

And I think, before we get into the type of violations, we have to stop there and say, "We've got a problem here. And what we need to do is have the mining industry take ownership of these mines, beef up their safety departments, get in there and start inspecting these mines and correcting these conditions."

And if you fast forward to the Upper Big Branch mine, with the number of violations that we were finding in the Upper Big Branch mine last year, I think that was the solution to the problem was for the mine operator to hire up their safety staff and get in there and get these violations cleaned up.

So, I'm bothered by the number, and I think the number's pretty solid.

Senator HARKIN. Before I turn to you, Ms. Smith, then, obviously, there are some mines that are very safe?

Mr. MAIN. Yes.

Senator HARKIN. Hardly ever get violations, hardly ever have any accidents. Well, I hate to get in the position of saying, "A coal mine is a coal mine is coal mine." Obviously, they differ, in terms of shaft sizes and depths and horizontal runs and a lot of different factors that go into that. But, you would think that we would have some standards based upon the success of certain mines, and make that applicable to all the mines.

Mr. MAIN. I believe that mines that have a better safety management program have a better safety culture, have a better safety record. And believe that mines that lack those, don't. If we look at Upper Big Branch last year we find that it had 48 unwarrantable failure orders issued—the most in the country. There are mines that operated last year with no unwarrantable failure violations issued. So, I think that you have to question the safety management programs that are in some of these mines.

Senator HARKIN. Okay. So, Ms. Smith, what should we be doing, what can we do?

Ms. SMITH. Well, Senator, I think that the answer to your question is a combination of administrative, regulatory, and legislative fixes. And on the legislative side, what we have to do is, basically, remove the penalties, I mean the incentives, to contest the penalties and the citations.

One of the things that we would propose is prejudgment interest, because some operators will contest because they want the time value of money, and it delays the payment of the money; we need to reduce that. Some operators will contest because it delays the final order.

And the history of a mine operator's citations is relevant to a number of things. It's relevant to the future penalties, because that's one of the things that go into the penalties. It's also relevant to pattern of violations. So, we have to look at the final order issue and see if we can take away that incentive.

So, I think, ultimately, it's taking away the incentives to contest that will help reduce it, and those are two legislative things.

But, again, they have to be done along with regulatory fixes, along with administrative fixes. There is just no silver bullet to fix this backlog problem.

Senator HARKIN. Well, we probably thought, when we passed the MINER Act, that we had taken care of a lot of this stuff. And now it just keeps happening, and even worse.

Ms. SMITH. I think that, you know, this is something about the law of unintended consequences. We're now going to get a second chance to look at that and try to fix that.

Senator HARKIN. Well, I can guarantee you, we are going to take a look at it. And we are going to do something to fix it. We just need to know, from the experts, just what course of action you think we ought to take.

Now, I see we're on the second bell, so—Dr. Howard, Ms. Jordan—I'm going to recess the subcommittee now, and go over and vote. And I will return, hopefully within the next 10 to 15 minutes.

We'll stand in recess for just a few minutes.

The subcommittee will resume its sitting.

We have been joined by the individual that I have admired so much for his leadership in so many areas, especially this Appropriations Committee, and his leadership in fighting so hard for our miners in this country. I can say this without any hesitation whatsoever. No one has done more for miners in this country than Senator Robert C. Byrd, of West Virginia. No one. And it's just an honor to have him here today, because I know how deeply Senator Byrd cares about his people in West Virginia, and how he cares about miners everywhere. I've often said that I have such a great affinity for him because we both have coal miner's blood in our veins, and we care very deeply about it.

And so, it's just a great honor to have you here, Senator Byrd. And I will yield to you for whatever statement and questions you might have for this panel.

STATEMENT OF SENATOR ROBERT C. BYRD

Senator BYRD. Thank you, Mr. Chairman.

I very much appreciate your holding this hearing. You and your staff, Senator, have been very gracious in accommodating my request for supplemental funding and for this oversight hearing in the wake of the terrible tragedy that took the lives of 29 coal miners in the coal fields of southern West Virginia.

Nearly 2 months after that horrific explosion, I am perplexed—let me spell that—P-E-R-P-L-E-X-E-D—perplexed as to how such a tragedy on such a scale could happen, given the significant increases in funding and in manpower for the MSHA that have been provided by this subcommittee.

Congress has authorized the most aggressive miner protection laws in the history of the world—history of the universe. But, such laws aren't worth a dime if the enforcement agency is not vigorous about demanding safety in the mines.

These laws are also jeopardized when the miners themselves are not incorporated into the heart of the inspection and enforcement process, as Congress intended for them to be. Now's the time—long past the time—to cast off the fears, the cronyism, and other encumbrances that have shackled coal miners and MSHA in the past.

Assistant Secretary Main and his team at the MSHA still have much to explain regarding this tragedy at Upper Big Branch that happened on their watch their watch. I don't believe it was because

of a lack of funding. I don't believe that MSHA lacked—L-A-C-K-E-D—lacked enforcement authorities. I don't believe that.

Massey Energy officials, who bear the ultimate, final responsibility for the health and safety of their workers, still have much to explain to the country and to the families of the miners who perished. I cannot fathom how an American business could practice such disgraceful health and safety policies while at the same time boasting about its commitment to safety of its workers. I can't understand that.

The Upper Big Branch mine had an alarming record of withdrawal orders. Now, where on Earth—where was the commensurate effort to improve safety and health? Where was it?

Presently, there are several ongoing investigations, including an ongoing criminal investigation an ongoing criminal investigation. Perhaps, so just maybe these will provide some solace and comfort to the families who are looking for accountability.

PREPARED STATEMENT

Let us also hope that his hearing will provide information on the Government and company officials who should be held accountable and lead us to some additional steps that may be taken to avoid such horrific, such terrible loss of life in the future.

[The statement follows:]

PREPARED STATEMENT OF SENATOR ROBERT C. BYRD

Mr. Chairman, I very much appreciate your holding this hearing. You and your staff have been very gracious in accommodating my requests for supplemental funding and for this oversight hearing, in the wake of the terrible tragedy that took the lives of 29 miners in the coal fields of southern West Virginia.

Nearly 2 months after that horrific explosion, I am perplexed as to how such a tragedy, on such a scale, could happen, given the significant increases in funding and manpower for the Mine Safety and Health Administration (MSHA), which have been provided by this subcommittee.

In recent weeks, MSHA has announced so-called inspection blitzes. MSHA has announced new rules concerning preshift examinations and pattern violators, and has displayed a new-found willingness to use injunctive relief to close dangerous mines. It is tragic that miners had to perish in order to precipitate such enforcement. The Congress has authorized the most aggressive miner protection laws in the history of the world, but such laws are useless if the enforcement agency is not vigorous about demanding safety in the mines.

These laws are also jeopardized when the miners themselves are not incorporated into the heart of the inspection and enforcement process—as Congress has intended them to be. Now is the time—in fact, long past the time—to cast off the fears, cynicism, and other encumbrances that have shackled coal miners and MSHA in the past.

Assistant Secretary Main, and his team at MSHA, still have much to explain regarding this tragedy at Upper Big Branch (UBB) mine, which happened on their watch. I do not believe it was because of a lack of funding. I do not believe that MSHA lacked enforcement authorities.

Massey Energy officials, who bear the ultimate responsibility for the health and safety of their workers, still have much to explain to the country and to the families of the miners who perished.

I cannot fathom how an American business could practice such disgraceful health and safety policies while simultaneously boasting about its commitment to the safety of its workers.

The UBB mine had an alarming record of withdrawal orders—where was the commensurate effort to improve safety and health?

Presently there are several ongoing investigations, including an ongoing criminal investigation. Perhaps these will provide some solace to the families who are looking for accountability. Let us also hope that this hearing will provide information on the Government and company officials who should be held accountable, and lead us to

some additional steps which may be taken to avoid such horrific loss of life in the future.

Senator HARKIN. Senator Byrd, thank you very much for a very profound statement, one that really gets to the nub of why we're here.

I had opened with some questions earlier, for Mr. Main and Ms. Smith. If you want to pose some questions, Mr. Chairman, I would yield to you for any questions you might have for Mr. Main.

Senator BYRD. Thank you, Mr. Chairman.

Yes, my first question is addressed to Assistant Secretary Main—M-A-I-N. Given the disturbing safety record—and I mean disturbing safety record—and the reputation of this particular mine, why oh, why, oh, why did MSHA wait until after the tragedy to launch an inspection blitz at coal mines with a history I mean, a history of pattern violations?

Senator HARKIN. Mr. Main.

Mr. MAIN. Senator, that's a fair question, I think, from this body. I think, for those to understand why we did the blitzes we did is to make sure darn sure we had no other Big Branches that existed.

Senator BYRD. Can you understand him?

Senator HARKIN. I'm trying to listen.

Say that again, Mr. Main.

Mr. MAIN. I think that is a very fair question to be asked of us. And I can report why we did what we did, in terms of the blitzes, to make sure there were no other Upper Big Branches that existed with regard to conditions that pose those kind of threats.

Senator HARKIN. Again, let me just emphasize. Senator Byrd's question asked, Why did you wait until after this tragedy to launch this blitz of inspections, especially in a mine that had a pattern and a history of violations?

Mr. MAIN. As we examine what we did, we're going to take a look, to figure out what we did or didn't do. I think that what was happening on the ground in West Virginia with the enforcement folks that were there, they were using the tools that they had been using constantly over the years, and a tool that has been somewhat useful, to a great degree, to help fix some of these problems; that's the 104(d) closure orders. And as the record reflects, that mine did receive the most closure orders of any mine in the United States last year. And, you know, there's a question, I think, on all of our minds, you know, What else could we have done there?

In retrospect, you know, I think that the—there would have been more enforcement tools that were used, without anybody's—without any question, at that mine. And having learned the lessons that we have from that experience, we don't want to do anything to ever repeat them again. And I think that we're struggling right now to figure out what tools we can grab out of the toolbag and create. And one of those is this 108 closure order—injunctive order that we're looking at to move forward. It's been in the MINE Act, I think, since 1969, and never used—and trying to find tools like that.

We had the pattern of violations that—when we looked at it, it was basically a broken system. That law was passed by Congress after Scotia, in 1977. There hasn't been one single mine ever put on the pattern of violations, except for one mine, for a short period

of time—and went to court and got off. That signals that we have shortcomings.

Senator BYRD. Mr. Main.

Mr. MAIN. Yes, sir.

Senator BYRD. Why did MSHA wait until after the tragedy to launch an inspection blitz at mines that had a history of pattern violations?

Mr. MAIN. Senator, the only thing I can say is that the agency didn't do it. That's something we have to take a look at and figure out—you know, that's something we'll look at and try to figure out what we did or didn't do.

Senator BYRD. Assistant Secretary Main and Solicitor Smith, aside from the health and safety laws, what unconventional remedies exist to deal with a rogue—R-O-G-U-E—rogue mining company that has a reputation for flouting in other words, waving its nose at the law? You want to answer that?

Ms. SMITH. Senator, I would suggest that the criminal laws may be where your answer lies. And I know that we have been looking very carefully, and working with the U.S. Attorney, to see what can happen in that regard. Aside from the health and safety laws that you mentioned, I think that we really do have to look at the penal law.

Senator BYRD. Mr. Main, I'd like to get your comment on that. Why—let me ask you again—why—aside from the health and safety laws, what unconventional remedies exist to deal with a rogue mining company that has a reputation for flouting the law?

Mr. MAIN. In terms of dealing with a rogue operator and using the tools that we have at our disposal as a Federal agency, you know, there are tools that we are constantly developing, now, to do that. One is these blitz inspections. We're looking at—and I don't know if you'd call it "unconventional," but it's never been used before but—injunctive relief to go after and shut down mines that have records like Upper Big Branch, that we will be shortly proceeding in court with. We are looking at ratcheting up all the current tools that we have in our toolbox, to use those more effectively.

I'll tell you a little story that's bothersome here. In the midst of the Upper Big Branch tragedy, we had calls from miners from three mines that got, apparently—I wouldn't say "miners," they were anonymous calls; I should clarify that—they got so fed up with the conditions that they were working in that they called MSHA. Two of them came in on March 25. One came in after Upper Big Branch. And miners complained about illegal practices, illegal mining systems, illegal ventilation, and coal dust in the mines that wasn't taken care of. We sent inspectors to those mines on the afternoon shift. And people should expect a bit more of this. About 8 o'clock in the evening, we went to two of the mines, captured the phones, went underground, and found illegal conditions that are unbelievable in the 21st century.

We are changing our tactics. We figure that some of these companies have us figured out pretty well, and we've got to change our tactics and do things unconventionally, to be able to go in and catch these mines when they're violating the law. This was a Massey these were three Massey Energy mines. And these were

three Massey Energy mines where the conduct that we found could not be considered any more that outlawish.

We have to change the way we do business. We have to get some new standards in place. We have to go after those who are operating like this. That's the reason subpoena power, in terms of something we're pursuing, is important. We have to give these miners a voice. Some of them are scared to death to speak out about conditions they're stuck in. Having tools like that, we believe, are necessary to fix this problem.

And I would point out, Mr. Chairman—I don't know if I did—one of these complaints occurred after the Upper Big Branch disaster.

Senator HARKIN. I will have a follow-up question, after the Chairman finishes, regarding why miners can't feel more free, as whistleblowers, to make these kind of calls.

Senator BYRD. In his testimony, Mr. Secretary, Mr. Blankenship states that MSHA certified the Upper Big Branch mine to be in good condition—quote/unquote, “good condition”—prior to the April 5 explosion. Mr. Blankenship says, “MSHA officials forced—F-O-R-C-E-D—forced Massey engineers to accept an unsafe ventilation plan, and suggests that MSHA is trying to cover up its mistake in a secret investigation. Now, this sounds like someone is trying to blame your agency for the death of 29 miners. How do you respond?

Mr. MAIN. Thank you, Senator.

The first thing I'm going to say is that MSHA does not run—or did not run—the Upper Big Branch mine; Massey Energy did. They designed it. They hired the people. They conducted whatever examinations that they decided to conduct, whether that was in compliance with the law or not. But, they were the ones that operated the mine.

With regard to us declaring this mine—certifying this mine as safe or good, MSHA does not certify mines as safe or good. So, I have no clue what the basis of that argument is. There is no doubt in my mind that the conditions in that mine were not good. And both our agency and others who take a look at this would take great issue with.

As far as the ventilation plan is concerned, MSHA doesn't design ventilation plans for mines. The process is that the mine operator drafts the plan, submits it to MSHA for approval. MSHA approves or disapproves the plan.

And let me comment on that statement about the conditions, starting back in September, where MSHA had some so called “influence” over the crafting of Upper Big Branch's ventilation plan. I want to walk through just a few issues that happened, to help set the record straight here, and give some understanding of what we're talking about.

On September 1, 2009, an inspector went into the Upper Big Branch mine, went back into the longwall area and found that the company was in the midst of a major air change. Under the law, when you make a major air change, you evacuate all the miners out of the mine. In this case, they had miners working on the longwall and other sections of the mine. The inspector also found that the air was reversed on this brandnew longwall that they were putting into place. That meant it was going in the wrong direction

and was not being ventilated. There was an airshaft that was put in on the back side of that longwall that was delivering about 400,000 cubic feet of air, but for some reason, the mining company couldn't figure out how to make that air work to ventilate that longwall face. This was a mine that was not being operated legally, endangering miners and—I would say, gravely endangering miners in functioning that way. And the inspector did what the inspector should have done: issued a closure order on the mine and ordered every miner out of that mine until they fixed it.

Under our process, MSHA has the tools; they find a violation, they issue the appropriate enforcement action. And whether that is a citation or a withdrawn order, MSHA orders the violation it to be corrected. The company decides how they're going to correct it, MSHA does not. But, they have to correct it to satisfy the order.

In January 2010, MSHA goes back into the same longwall and finds that the headgate entry that ventilate not only this longwall, but a return off of another section, had deteriorated to the point it wasn't travelable. The reason it deteriorated is, the company didn't maintain the entry. It's that simple. And what happened was, the air course that was coming off of a second section that was required by law to be traveled, couldn't be traveled. MSHA issued, appropriately, an order on that mine, and ordered the mine to cease that activity until the conditions were fixed.

This again placed the miners in grave danger in this mine, in my opinion. The mine operator was required to fix it. And the mine operator had to come up with its own options to fix the problem.

But, these are the kind of conditions that we're finding. It's—and if the—if Massey or any other company asked MSHA to back off of an enforcement action because they don't like it, MSHA's not going to do that; we're going to enforce the law.

Senator HARKIN. Mr. Main, we'll have Mr. Blankenship on the next panel. I'm sure we'll get into that. I ask you to stay here during that period of time, after this panel is done to try to get to the bottom of this.

I want to recognize Senator Murray.

Mr. MAIN. Okay.

Senator MURRAY. Mr. Chairman, thank you very much for having this hearing. I appreciate it.

And, Ms. Smith, if I could start with you. You noted, in your testimony, that changes to pattern of violations process may be necessary to make it more useful as a tool to address problem behavior in a more timely way. I wanted to ask you if you believe that mine operators have taken advantage of the current pattern of violations process.

Ms. SMITH. Well, I think that one of the incentives for the incredibly high increase in the contest rate we've seen is that under the current pattern of violation standards, until there is a final order, a violation doesn't count against a pattern of violations. And we have seen, you know, a number of operators have avoided a pattern of violations because they have orders that are not final.

Senator MURRAY. So, is there something we can do to change it so that this is taken seriously by mine operators?

Ms. SMITH. MSHA is proposing regulatory changes, and we are working with the subcommittee to look at statutory changes, also.

Senator MURRAY. Okay. I look forward to seeing those.

Ms. Jordan, in your testimony, you said that in 2008 your case backlog increased by 72 percent, and that, in fiscal year 2010, cases under 1 year of age constituted 25 percent of all cases decided by the FMSHRC; 62 percent were 1 to 2 years old; and 13 percent of decided cases were more than 2 years old. Is there pressure on administrative law judges to close cases, due to the backlog?

Ms. JORDAN. Well, our judges—our productivity—we do keep records of how many cases are disposed of. I think that the judges are aware of the backlog, and I—the judges are very hard working and conscientious. I don't think there's pressure to not do a thorough job with what they need to do. But, they're you know, it's sort of balancing that those factors. There's a backlog, but—and judges—we are taking steps to, you know, bring on assistants for the judges, clerks, and, of course, bringing on more judges.

Senator MURRAY. But, people are looking whether you have a backlog or not. And—

Ms. JORDAN. Right. We also recently implemented a procedural change that would help speed things along and make it smoother for the judges. The majority of the cases get disposed of by means of settlement. The parties reach a settlement and they file a motion to approve the settlement with the FMSHRC.

Senator MURRAY. So, over time, I would assume that means fewer fines?

Ms. JORDAN. That—no, not necessarily. I mean, it—the parties reach a settlement and they file it with the FMSHRC. The FMSHRC judges review that settlement, and they are free to accept it or reject it. If they feel that it doesn't comply with the statutory criteria or if there's a departure from the amount of settlement that was originally proposed, the judge may, and sometimes does, ask—rejects the settlement and asks for an explanation, "Why has the Secretary accepted—you know, if they initially proposed a certain amount and now they're settling the case at a different amount, what explains that difference?" and then has required the parties to come forward and explain that.

We recently—until recently, our judges, though, has to draft the order that got issued, approving that settlement. And we've eliminated that step. We've now required the parties to file a draft order with their motion, and to do that electronically. And we hope that, you know, that change will help expedite some of these cases, too.

Senator MURRAY. Okay.

Mr. Main, Mr. Blankenship is known to believe that Massey Energy mines have been disproportionately targeted for mine inspections and MSHA citations. Does MSHA disproportionately target mines or issue citation frivolously?

Mr. MAIN. Senator, I don't think so. And I think that whenever you look at some of the conditions that are being cited and I just gave the recent example of three mines from which we have received anonymous complaints MSHA went in on the afternoon shift, captured the phones so they couldn't call underground, and found the kind of conditions described in the complaint. Those are the kind of things that mean that we have to spend more time at mines like that.

Senator MURRAY. What kind of violations have you found at Upper Big Branch?

Mr. MAIN. You know, I think there have been a range of violations. Of the ones we've talked about probably the most have been on the ventilation standards. Two of them I just talked about, which was finding the mine inadequately ventilated during inspections. There have been violations over combustible materials, which is coal that could cause fires and coal dust that could cause explosions. I think one of the things that we're concerned about, in this particular case, was excess coal dust in this mine—and we're going to check that out, as part of the investigation. But, these are the kind of conditions you worry about.

Senator MURRAY. Okay. Well, Mr. Blankenship said in his testimony that the changes recommended in the violation plan made the mine less safe. Can you speak to us about why the Upper Big Branch was made to update its ventilation system? You talked through that a minute ago. I was trying to follow it. If you could do that again.

Mr. MAIN. Yes, Senator. I—from—I'm going to say this in the context that we're still in the process of doing the investigation of the mine, and it's going to be some time before we get all these facts together.

But, in terms of some critical issues that I have looked at, in terms of some of the paper that was issued at the mine, to try to get a handle on that, we found that on September 1, for example, when an inspector went into the mine and found that they were making a major air change, with miners underground; you don't do that. That's a violation of the law that exposes miners to dangers, when you're moving air around. They found that in the section the—one group of miners was working the air actually reversed, it wasn't going in its proper direction.

Senator MURRAY. So, the ventilation wasn't working correctly.

Mr. MAIN. It was not working. I think, to the extent that—in that case, if it's going the wrong direction, it is just absolutely not working.

And those are the kind of things that I think tend to make the agency concerned. And when you find that kind of attitude about safety, MSHA is going to be spending more time there.

And I think if you look, historically, at that mine, the inspection time was doubled from 2007 to 2009. I wasn't here as Assistant Secretary at the time, but I think when looking back, there was a reason for that. And the conditions we cited were reflecting a reason the agency needed to be in there more.

Senator MURRAY. Okay. All right. Thank you very much.

And thank you, Mr. Chairman.

Senator HARKIN. Thank you, I just had one follow-up for Ms. Jordan. As you know, we just passed out of this subcommittee, last week, a supplemental appropriations bill. In that there is \$3.8 million in funding for the FMSHRC. Now, I know that bill still has to pass the Senate. We hope to do that next week. Then we will get together with the House. But, sometime, probably within the next few weeks, that bill will be law. I think I can assure you that the money will be there.

My point in bringing this up is that it seems to me there may be two ways that you can approach using this money. You can hire fewer staff and stretch it out for a longer period of time, or can hire more staff right now and hope that there'll be more money later on. I would hope that you would pursue the second course of action. You need personnel now. We are committed to making sure that the FMSHRC gets the funding that it needs. And we'll work to retain this funding in fiscal year 2011, by going somewhat over the President's request. So, I hope I've made myself clear on that.

Ms. JORDAN. You have. Thank you, Senator.

We, I agree with that approach. That, and we've been looking at just such an approach that would give us the flexibility, you know, to be aggressive in bringing on as much staff as we can.

Senator HARKIN. Very quickly, Dr. Howard, can you tell me, what's happened to the Lake Lynn experimental mine and why it hasn't been reopened.

Dr. HOWARD. Yes, Senator. I can answer the first part of the question. The Lake Lynn experimental mine, as you know, is an international research for safety and health. And certainly in terms of dust and gas explosion research, there really is no other laboratory in the world that can do that kind of research, in addition to in-mine rescue equipment research and ventilation studies, et cetera. So, every day that goes by without us having access to that mine is a day that we certainly are upset about.

The Centers for Disease Control and Prevention and the Department of Health and Human Services are doing the best job they can, in terms of real property acquisition of the mine. As you know, there was a roof fall, recently, that blocked the entrance. We've been trying to work through that issue.

We'd like to express our appreciation to you and the rest of the subcommittee for the interest in reopening that mine. It's a difficult property acquisition. I'm not an expert in buildings and facilities in the Government, but it's not your usual surface acquisition.

We hope that we can activate the standstill agreement and reopen the lease of the mine and get back in there, perhaps excavate another portal, so that we can work around the area that the roof has fallen.

Senator HARKIN. Well, I believe we have information on what it would cost to do that. But, you might want to follow up and give us an up-to-date estimate on what is required to reopen that mine.

Dr. HOWARD. Will do.

Senator HARKIN. I thank you very much.

I thank this entire panel. Thank you all very much, for being here. Thank you for your testimony and you can all be dismissed.

We'll call our second panel up.

Senator HARKIN. We welcome our second panel.

Mr. Don L. Blankenship has served as the chairman, president, and chief executive officer of the Massey Energy Company, since November of 2000. He joined a Massey subsidiary in 1982, earned his accounting degree from Marshall University in Huntington, West Virginia.

Our second panel witness is Mr. Cecil E. Roberts. He served as president of the UMWA for the past 12 years. Prior to serving as president of the UMWA, Mr. Roberts spent 13 years as vice presi-

dent. Mr. Roberts received his degree from West Virginia Technical College in 1987, and, of course, has testified before this subcommittee several times over the years. And we welcome you back here to this subcommittee.

Mr. Blankenship and Mr. Roberts, your testimony will be made a part of the record in its entirety. And if you could sum up the main points in 5 or 7 minutes or so, we would sure appreciate it, so we could get into a discussion.

Mr. Blankenship, we'll start with you. Welcome, again, to the subcommittee. And please proceed.

STATEMENT OF DON L. BLANKENSHIP, CHAIRMAN AND CEO, MASSEY ENERGY COMPANY, RICHMOND, VIRGINIA

Mr. BLANKENSHIP. Thank you, Mr. Chairman. I appreciate the opportunity to appear before the subcommittee this afternoon and to discuss the Upper Big Branch accident.

No words can adequately describe the tragedy of April 5. I visited, personally, despite media reports, with most of the wives, children, parents, and family members of Massey who lost their lives. In these meetings, I extended to them my deepest sympathies and committed to do whatever I needed to do to attend to their needs, the needs of their—those who had lost their loved ones. I personally heard their expressions of grief and saw, in the eyes, unspeakable sorrow that they had. It's too late to bring back those that we lost, but we must do everything we can to find out what happened and to do our best to keep it from happening again.

Massey strongly supports the principle that the investigation at Upper Big Branch must be independent, honest, and aggressive. Transparency is an important element of the process.

Senator BYRD. Mr. Blankenship, would you speak a little louder?

Mr. BLANKENSHIP. Yes, sir.

Senator BYRD. And clearly, into the microphone.

Mr. BLANKENSHIP. I will pull it up here and try to help that.

What I was saying is, that transparency is an important element of the process of the investigation. Massey Energy has joined with other stakeholders, including UMWA, in calling on MSHA to conduct this investigation through a public hearing, rather than through closed door sessions.

Today, I want to address Massey's overall commitment to safety, discuss our interactions with MSHA regarding inspections and appeals, and discuss ways that we can work together with MSHA to make mine safety and accident investigations more transparent.

Let me state for the record, Massey does not place profits over safety. We never have and we never will. Period. From the day I became a member of Massey's leadership team, 20 years ago, I have made safety the number one priority. The result has been a 90 percent reduction in lost-time accidents, which has been better, often dramatically better, than industry average in 17 of the last 19 years. Our safety innovations have been adopted by our competitors and been praised by MSHA. In fact, last year, MSHA honored Massey with an unprecedented three Sentinels of Safety awards, the highest safety award in the mining industry.

Next, I want to talk about the issue of citations and appeals. First and foremost, abatement is mandatory. Even if a citation is

appealed, any deficiency must be corrected immediately. For most citations, the condition is corrected the same day. At Massey, we always fix the problem, even if we disagree with the punishment. Massey does not, quote, “game the system,” as some have insisted. Rather, we are exercising our right to due process under the system that Congress has put in place.

We do not benefit from a system in which appeals are backlogged for months or years. And we urge Congress to appropriate the necessary resources that are necessary to make the appeal process work safely and quickly.

At the Upper Big Branch mine, we work together with MSHA to address citations and to ensure that the mine remains safe. Between April and October 2009, 47 D orders, which are the most serious violations, were recorded at Upper Big Branch. That presented a challenge that we would not tolerate at Massey and did not ignore. In response, Massey convened a hazard elimination committee comprised of top managers, and reduced these violations about 80 percent. In fact, MSHA held its quarterly closeout meeting a few days prior to the explosion and determined that there was no major issues and that the mine was in good condition. Let me repeat, to make it clear, that, just days before the April 5 explosion, MSHA agreed that the Upper Big Branch mine had no major outstanding safety issues, and found the mine to be in good condition.

At Upper Big Branch, we complied with MSHA safety orders even when we strenuously disagreed with them. In particular, we disagreed with MSHA’s ventilation plan for the Upper Big Branch mine. Against the advice of experts, MSHA required several changes, since September 2009, that made the ventilation plan much more complex. This change significantly reduced the volume of fresh air to the face of the longwall mining operation. Our engineers resisted making the changes in one instance, to the point of shutting down production for 2 days, before being forced to agree to MSHA’s changes. We opposed the changes because our engineers believed they made the ventilation system less effective, not because they were more costly or because they interfered with production.

We do not know whether the ventilation system played a role in the explosion. And we do not know whether the modifications to that system, demanded by MSHA, played any role in the explosion. But, our disagreement with MSHA over the ventilation plan highlights what we believe is a fundamental flaw in the way this accident is being investigated. It is simply this: We do not think that MSHA should be permitted to investigate itself behind closed doors. How likely is it that MSHA will point the finger at themselves, if the evidence gathered in confidential interviews suggests that the actions their actions—contributed to the explosion? How do we know, if we don’t see the evidence and if MSHA investigates in secrecy?

Other safety agencies don’t work that way. After an aircraft accident, the independent National Transportation Safety Board conducts its investigation in public. They look at both the airline operator and the Federal regulator. That is why we have called for open, public, and transparent investigations at Upper Big Branch.

PREPARED STATEMENT

In conclusion, Mr. Chairman, Massey Energy continues to mourn the loss of our miners. We are caring for the families who lost their loved ones. And we are determined to find out what happened.

At the same time, we all need to recognize the importance of the coal industry to the economy and to the security of the United States. Coal is an abundant, affordable, and reliable source of energy that reduces our dependence on foreign oil. Pointing fingers and hurling accusations does not change that vital role that coal plays in America's energy future. This is a time for industry leaders and the regulatory agencies to work together so that America's coal miners can be safe and can provide the energy that our Nation relies on.

I'll be happy to answer your questions, whenever you're ready.
[The statement follows:]

PREPARED STATEMENT OF DON L. BLANKENSHIP

Mr. Chairman, I appreciate the opportunity to appear before the subcommittee this afternoon to discuss the Upper Big Branch (Upper Big Branch) accident that took the lives of 29 valued Massey members. April 5 was one of the worst days of my life and in Massey Energy's history. But the grief we have felt since that day pales in comparison to the pain and loss endured by the family members who lost their husbands, brothers, sons, and grandsons that day. I was with the families in the week following the tragedy, and I have gained a profound respect for their faith and their love and commitment to the miners lost in the accident.

I have pledged that Massey Energy will do everything that is humanly possible to learn the cause of the explosion so that we can take every measure to prevent this type of accident from happening again. Massey is cooperating fully with State and Federal investigators and is conducting its own investigation into the accident as well so we can discover the truth. Furthermore, Massey Energy has joined with other stakeholders, including the United Mine Workers, in calling on MSHA to conduct its investigation of the Upper Big Branch mine explosion in the full sunlight of day, in front of the families of the miners, the mining community, and the American public.

Today, I want to address Massey's overall commitment to safety, discuss our interactions with MSHA regarding both inspections and appeals, and discuss ways that we can work together with MSHA to make mine safety and accident investigations more transparent.

From the day I became a member of Massey's leadership team 20 years ago, I have made safety my number one priority. I felt that other safety programs were too reliant on slogans and signs. So I designated safety as S-1: Safety First.

Massey has long been an innovator of safety enhancements and has introduced many safety practices that have later been adopted throughout the mining industry in the United States and around the world. Since the establishment of our S-1 safety program, the innovation has increased. The following is a chronology of just a few of these Massey innovations:

- 1993.—Massey mandates the use of reflective clothing; Massey mandates use of metatarsal work boots for mining operations.
- 1994.—Massey implements seat belt policy for all mining equipment.
- 1995.—Massey designs, develops, and implements ATRS flapper pads for roof bolters; Massey replaces ladders on large trucks with steps to reduce falls.
- 1996.—Massey requires the use of strobe lights on underground vehicles.
- 1999.—Massey installs lights on all belt line feeders; Massey adds submarine safety package on stockpile dozers and loaders.
- 2000.—Massey requires the use of reflective tape on all surface vehicles.
- 2002.—Massey adds submarine safety package on highwall excavators and shovels; Massey implements continuous miner radio remote safety precautions.
- 2003.—Massey installs safety cameras on surface haulage trucks.
- 2005.—Massey begins development of continuous miner proximity protection device.
- 2007.—Massey develops self-contained foam fire-fighting car.

Our next round of continuous miners will be the first in the world to have proximity devices on them that will shut down equipment if a coal miner is too close

to them to be safe. And, we are near completion of a new hard hat design that we believe will be adopted by the entire coal industry.

Today, Massey Energy's safety program has more than 120 rules and equipment enhancements that exceed legal requirements. The result has been a 90 percent reduction in our lost time accident rate, which has been better—often dramatically better—than the industry average for 17 of the last 19 years. Our safety innovations have been adopted by our competitors and have been praised by MSHA. In fact, just last fall, MSHA honored Massey Energy with three Sentinels of Safety awards, the highest safety honor in the mining industry. No other mining company has ever matched that accomplishment.

So let me state for the record—Massey does not place profits over safety. We never have, and we never will.

No coal company can succeed over the long term without a total commitment to safety and a significant investment in necessary training, equipment and personnel. We strive to remain an industry leader in safety by developing new technologies and employing effective training programs to reduce accidents and improve safety for all of the hard-working men and women of Massey Energy.

Next, I want to talk about the issue of citations and appeals. Massey's approach to safety is simple. First and foremost, abatement is mandatory. If MSHA identifies a safety violation and issues a citation, abatement is also mandatory. That means that even if the company appeals the citation, the equipment at issue, or the area of the mine in question, does not operate until that cited hazard is fixed. The large majority of violations are corrected the same day, often immediately. For those that require more time to correct, a deadline is given by the inspector. The company has no choice in the matter, and must follow the direction of the inspector. This is process established by Congress in law.

We do appeal many of the citations, not to avoid correcting a problem, but because we disagree with the inspector's judgment or because we believe that a proposed penalty is unfair. The right to a fair hearing before a neutral factfinder is fundamental to our system, and Congress has guaranteed that coal mine operators, just like every other business and every individual share the right to due process of law. That means trial first, and punishment later, not the other way around. Since Congress made fundamental changes in the system in 2006, Massey's rate of appeals have been consistent with industry average. Just as important, through adjudications and settlements, the final penalties imposed are nearly 40 percent less than what MSHA proposed—a sure sign that our appeals are not frivolous nor are they taken for purposes of delay.

So as you can see, Massey Energy does not “game the system,” as some have insisted. Rather, we are exercising our rights to due process under the system that Congress has put in place. We do not benefit from a system in which appeals are backlogged for months or years and we urge Congress to appropriate the resources necessary to make the appeal process work fairly and expeditiously.

At the Upper Big Branch mine, we worked together with MSHA to address citations and ensure that the mine remained safe. Between April and October 2009, 47 D orders, which are the most serious violations, were recorded at Upper Big Branch. That presented a challenge that we would not tolerate and did not ignore. In response, Massey convened a Hazard Elimination Committee comprised of top managers and reduced these violations by 80 percent. In fact, MSHA held its quarterly close-out meeting a few days prior to the explosion, and determined that there were no major issues and that the mine was in “good condition.” Let me repeat that to make it clear. Just days before the April 5 explosion, MSHA certified that the Upper Big Branch mine had no outstanding major safety issues. It found the mine to be in “good condition.”

At Upper Big Branch, we complied with MSHA safety orders even when we strenuously disagreed with them and believed them to be detrimental to the health and safety of the mine. In particular, we disagreed with MSHA's ventilation plan for Upper Big Branch mine. Against the advice of our own experts, MSHA required several changes since September 2009 that made the ventilation plan significantly more complex. This change in ventilation significantly reduced the volume of fresh air to the face of the longwall mining operation during this period. Our engineers resisted making the changes, in one instance to the point of shutting down production for 2 days, before agreeing to MSHA's ventilation plan changes. We opposed the changes because our own engineers believed they made the mine less safe, not because they were more costly or because they interfered with production.

We do not know whether the ventilation system played a role in the explosion, and we do not know whether the modifications to that system demanded by MSHA played a role in the explosion.

But our disagreement with MSHA over the ventilation plan highlights what we believe is a fundamental flaw in the way the investigation of this accident is to be investigated. It is simply this: We do not think that MSHA should be able to investigate itself behind closed doors. How likely is MSHA to point the finger at itself if the evidence gathered in confidential interviews suggests that its actions contributed to the explosion? How do we know we'll see all the evidence, or if all alternatives are aggressively explored if MSHA can investigate in secrecy?

Other safety agencies don't work that way. After an aircraft accident, the independent National Transportation Safety Board conducts the investigation in public. They look at both the airline operator as well as the Federal regulator—in this case the Federal Aviation Administration. That is why we have called for an open, public, and transparent investigation into the Upper Big Branch mine accident.

In conclusion, Mr. Chairman, Massey Energy continues to mourn the loss of our miners. We are caring for the families of those who lost their lives. And we are determined to find out what happened and make sure that it cannot happen again. I would be happy to answer any questions at this time.



Status of Upper Big Branch





- **The investigation is ongoing**
 - MSHA, West Virginia and Massey inspection teams are working to determine the cause of the accident
- **We are committed to a full, transparent investigation into the UBB explosion**
- **We are committed to the Massey families impacted by the UBB explosion and will do everything we can to support those affected by this tragedy**
- **Something went terribly wrong at UBB – but the source has not been identified**
 - We do not yet know what caused the explosion
 - Accusations that we are indifferent to safety could not be more wrong

1



History of Safety Excellence



- Massey puts the safety of its members first
- The amount of time lost to accidents at Massey Energy has bested the industry average for 17 of the last 19 years
- Massey's Non-Fatal Days Lost rate has shown constant improvement and is far better than the industry average. At the end of March 2010, our YTD NFDL rate was 0.79
- Since 2005, Massey has spent more than \$45M on underground safety innovations – above and beyond the regulatory requirements
- In 2009, MSHA awarded Massey Energy three Sentinels of Safety Awards – the most ever received by a company in a single year
- Record of innovation and leadership

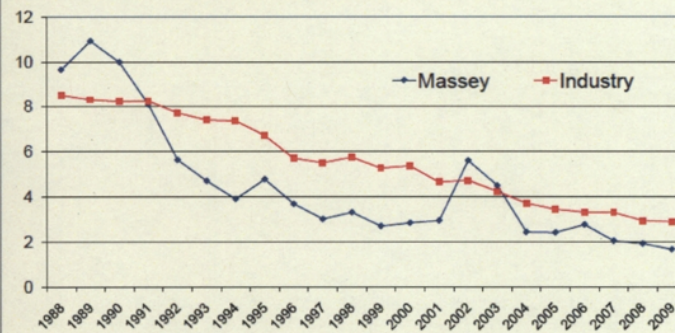
2



NFDL Rates of Massey vs. Industry



- NFDL is the industry standard safety metric because it measures actual safety track records



3

3



A Record of Innovation

- Massey has led the industry in safety innovations

Problem	Massey Innovation	Outcome
Accidents caused by low visibility in mines	First to mandate use of reflective clothing	Became mining industry standard, expanded to other industries
Risk to dozer operators from underground voids	Developed "submarine kits" to protect/sustain operator in case of fall	Kits now legally required. No stockpile dozer fatalities since widespread adoption
Risk to roof bolters from falling roof rock during drilling operation	Developed flapper for TRS of roof bolting machine; deflects loose/falling roof*	Other mining companies have begun adopting technology

* Massey developed in partnership with Fletcher

4



Why is MSHA Opposed to Transparency?

- MSHA was focused on safety at UBB. But were they focused on the right factors?
 - MSHA disregarded our serious safety concerns related to '09 ventilation changes required by MSHA
 - Our UBB Hazard Elimination Committee had reduced MSHA violations by 80% - we are committed to safe mines
 - Days before UBB explosion, MSHA certified UBB to be in "good condition," with no outstanding major safety issues
- MSHA is a conflicted party. Is it reasonable to expect them to ask important/difficult questions and pursue answers thoroughly/objectively?
- What assurance do we have that all critical, lifesaving information will be disclosed to the public?

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Senator HARKIN. Thank you very much, Mr. Blankenship.
 And we'll turn to Mr. Roberts. Again, please proceed. If you could sum up in 5 to 7 minutes or so, I'd appreciate it.

**STATEMENT OF CECIL E. ROBERTS, INTERNATIONAL PRESIDENT,
UNITED MINE WORKERS OF AMERICA, FAIRFAX, VIRGINIA**

Mr. ROBERTS. Thank you very much, Mr. Chairman.

First of all, let me express the gratitude of the coal miners and this Nation for the work that this subcommittee has done in the past and the support that you have provided MSHA and others to protect the Nation's coal miners. We owe you a great deal of gratitude.

And to my friend and coalminers' friend, Senator Robert C. Byrd, I want to say thank you for more than 40 years of standing up for coalminers. But, I want to pay particular tribute to the fact that we just recently celebrated the 40th anniversary of the 1969 Coal Mine Health and Safety Act. And for those who believe that laws don't work, I want to point out something, if I may. The 40 years before the passage of the 1969 Coal Mine Health and Safety Act, 32,000 plus coalminers died in the Nation's mines—32,000 plus. Since the passage of the Act, 40 years ago, 3,200 plus miners have died. So, there's been a savings of 29,000 lives because Congress saw fit to act in 1969, and Congress saw fit to act again in 1977, and Congress acted again in 2006.

So, we stand here today to thank Congress for standing up for the coal miners of this Nation to protect them when they go to work. There's not a coal miner in this country that doesn't have a right to go out that door with their dinner bucket, and kiss their wife goodbye, and their children goodbye, and say, "I'll see you in about 9 or 10 hours." That's not unreasonable to expect.

I would also like to say that we mourn the loss of those 29 coal miners at Upper Big Branch. They were Don Blankenship's employees. They were my friends. I knew a number of these people. I was raised with their families, lived right among them. And as—four of these miners who died were from Cabin Creek, where I was raised. So, we've looked into their eyes also, we've seen the tears of these people's eyes.

But, there's another 23 miners we should mention right here today. There's been 23 other coal miners that have died in Massey mines in the past 10 years. At the time of the Upper Big Branch explosion, Massey Energy had the worst fatality rate in the industry. This is before the Upper Big Branch explosion. So, now, we have 52 miners that have been lost at Massey Energy in 10 years. This is unacceptable. I think that the fact that other Massey Energy mines have been inspected, since this explosion and before this explosion, in close proximity of that time, and been determined to be unsafe—and, quite frankly, one of the upper leaders of MSHA declared that this was pitiful, that these mines were in terrible condition. So, it's not just what happened at Upper Big Branch. We've got 23 other miners who died before the Upper Big Branch explosion. We've got the 29 miners who died the day of the explosion. And as we gather here right now, the real question for all of us, whether we're in Congress, whether we're leading this company, whether we're leading this union, How are we going to protect every single coal miner working at Massey Energy, and for that matter, across this Nation?

When I testified previously at one of the other committees, I said that 95 percent of the CEOs and companies in this Nation try to

do the right thing. They put a lot of money into protecting their workers. They have inspections. And they have criteria for working in those mines. And I will tell you, as Don Blankenship is sitting beside me, these other CEOs would not have put up with this for 5 minutes. Someone would have done something about this.

You asked me and the subcommittee asked, appropriately, before, and it asked MSHA before and it asked MSHA the last time I was here, Why didn't you shut these mines down? I think that's a proper question.

The other question I'd like to pose is, Why didn't Don Blankenship shut this coal mine down? We don't have to question his authority. He runs this place. He could have walked up there and said, "This mine is shut down. This mine's not going to operate another minute until we correct these problems."

So, we can ask MSHA this. And MSHA's got a lot of explaining to do with this with respect to this, also.

PREPARED STATEMENT

But, the laws are written by Congress here. Those laws are supposed to be obeyed by this industry. Those laws are supposed to be enforced by MSHA. And then those people who do not protect the miners and follow those laws, they should be punished, up to and including jail. And I don't think it should be just the section foreman working down at Upper Big Branch. There is pattern here that's running completely through this mining industry with respect to Massey Energy. And I'm saying the same thing here today that I said previously, and I say it publicly: I believe that.

Thank you for your time, Mr. Chairman.

[The statement follows:]

PREPARED STATEMENT OF CECIL E. ROBERTS

Thank you for giving us this opportunity to testify before this Appropriations subcommittee. As President of the United Mine Workers of America (UMWA), I represent the union that has been an unwavering advocate for miners' health and safety for 120 years.

This subcommittee plays an important role in ensuring miners' health and safety; adequate funding of the different Government agencies that contribute to miners' health and safety is essential to protecting our Nation's miners. We certainly appreciate your leadership in asking whether the various agencies with such responsibilities have sufficient funding, and whether additional resources are needed to protect miners.

We suggest there are three separate, but related issues to consider about Government support: manpower; materials and equipment; and research and development. For each of these, there are current needs that would benefit from additional support. We are pleased to have this chance to share our thoughts about what the Government can do to better help protect our Nation's workers from unsafe and unhealthy work places.

Before I speak to the main topic, however, I wish to take a moment to remember the 29 miners killed last month at Massey's Upper Big Branch (Upper Big Branch) mine, as well as the miner who remains hospitalized. Our hearts and prayers go out to all their families. Even though that mine was nonunion, all miners mourn when one of our own is killed working in a mine; our entire community has been devastated by this horrific tragedy.

We believe that investigations of the Upper Big Branch tragedy will show that safe mining practices were not followed at that operation and miners were being exposed to senseless dangers. We already know that MSHA issued 515 citations and orders at the Upper Big Branch mine in 2009, and another 124 so far in 2010; moreover, the paper MSHA issued to Upper Big Branch reflects serious health and safety violations: 39 percent of the 2009 citations were for "significant and substantial" (S&S) violations. These violations are usually quite serious—the kind of violations

that can contribute to mine fires, explosions and the deaths of coal miners. Even more troubling is the fact that for the Upper Big Branch mine, in calendar year 2009 MSHA issued 48 withdrawal orders pursuant to section 104(d)(2) of the Mine Act for S&S violations the operator knew or should have known constituted a hazard; as well as a section 107(a) withdrawal order for an imminent danger. These numbers far exceed industry norms. We are disturbed that these conditions were allowed to develop and continue and believe that a consistent and aggressive enforcement scheme is necessary to protect the Nation's miners. For in the end it's miners who pay the price when operators do not adhere to what the law requires. Unless operators operate mines consistent with legal requirements, we will continue to witness miners dying.

To address some of the present shortcomings we urge the Government to provide support in the form of additional staffing in the key agencies, as well as for the purchasing of up-to-date equipment to better support miners' health and safety.

MANPOWER

We believe there is a need for increased staffing at MSHA, within the Department of Labor Solicitor's Office (SOL), at the Federal Mine Safety and Health Review Commission (FMSHRC), and at NIOSH for the Government to have a more effective mine health and safety program.

Over the last few months, there has been an important and much-needed focus on the huge backlog of cases at the FMSHRC. We firmly believe that this backlog has served to undermine some of the changes Congress directed in the MINER Act of 2006. This pertains directly to the Appropriations process insofar as more FMSHRC judges are needed to reduce the backlog, which, in turn, is needed to restore the enhanced penalty structure Congress designed through the MINER Act. While we are pleased that \$22 million of additional funding was included in the supplemental budget bill that the Appropriations Committee recently passed to address these needs, the backlog will persist for many years unless the increased budget levels continue to support staff increases at the FMSHRC, MSHA, and the DOL's SOL.

The FMSHRC backlog has arisen since passage of the MINER Act in 2006, and the related increase in Mine Act penalties: for 2006, MSHA assessed about \$35 million in penalties, while for 2009 assessed penalties rose to about \$141 million. With the increase in penalties, the number and rate of contested cases also jumped. For each of the 5 years immediately before the MINER Act (2000–2005), only 5–7 percent of coal mine civil penalties lead to cases being contested before the FMSHRC, whereas for the last 3 years (2007–2009), the rate increased to 18 percent, 30 percent and 31 percent, respectively.

Why is this important? Because without a meaningful structure for imposing and collecting the penalties, the congressional goal of increasing fines for Mine Act violations has not been realized. In fact, the higher penalty structure is being subverted by (a) the huge rate of contests that operators now file, overwhelming the Government's ability to deal with its caseload, and (b) MSHA's practice of reducing assessments when operators contest them.

When operators contest the citations and penalties, there is a delay to their finality. This delay prevents MSHA from imposing the enhanced penalties that apply for repeat violations, or from placing an operator with numerous violations on a "pattern of violations." Thus, while the higher penalty structure was designed to motivate operators to not have repeat violations, operators have been able to avoid them by delaying a final order that would show the repeat violation. Likewise, MSHA's powerful "pattern of violations" enforcement tool becomes frustrated when citations are caught up in the FMSHRC's backlog. MSHA's determination that a mine has a "pattern of violations" carries much more serious consequences, and a mine must have an inspection free of S&S violations in order to get off of the "pattern."

In short, having a significant delay in the resolution of alleged violations diminishes MSHA's ability to use its full arsenal of its enforcement tools. Yet, many of the violations caught up in the contest process are quite serious—the kind of violations that contribute to mine fires, explosions, and the deaths of coal miners.

Another problem follows when operators challenge MSHA citations and proposed penalty assessments, and they routinely see their penalties reduced. This occurs both at the MSHA "conference" as well as after a case is referred to litigation. Reductions often occur at conferences when the mine inspector who issued the citation does not attend the conference to explain the reason for the citations, leaving the conferencing officer with no first-hand knowledge of the conditions cited. The operators, on the other hand, regularly send their representatives to conferences to dispute the validity and gravity of the citations that were issued. As a result, conferencing officers frequently reduce or abate citations. We encourage MSHA to provide

a better means for the inspectors to be able to support their citations, preferably with the inspector participating, too. We think it would also be helpful if an attorney from the SOL would be assigned to work with conferencing officers to help them identify the litigation strengths and weaknesses before any adjustments would be made. This would require additional staffing at both MSHA and within the SOL.

While the FMSHRC has had certain time-lines for processing its cases, those no longer bear any relationship to reality. However, getting timely resolution of these disputes is critical to miners' health and safety. One possible help would be for the FMSHRC to adopt procedures like the OSHA Review Commission's "Simplified Proceedings;" in our testimony before the House Committee on Education and Labor in February of this year, the Union supported having the FMSHRC determine whether using such procedures would be appropriate for mine safety cases. We are unaware of any progress the FMSHRC may have made in this regard since that February hearing.

MSHA has indicated a more aggressive rulemaking agenda, which we support. However, such rulemaking efforts will likely require additional staffing, too.

To be most effective, we also believe MSHA needs to expand its cadre of in-house specialists. MSHA employs experts in such critical issues as ventilation, electrical systems, roof control, and ground control. The specialists review mine plans operators submit for MSHA approval before operators can implement their mining plans. These experts are also needed to defend MSHA citations when operators challenge them, as well as to investigate accidents. It is essential that MSHA fully staff and train its specialists to ensure the Agency keeps pace with industry advancements. In addition, with recent and anticipated retirements of MSHA's specialists, the Agency must attract and train additional specialists to maintain its in-house expertise. It takes time for MSHA specialists to be able to perform the full range of required tasks, so this is an area that requires on-going support.

We further recommend that MSHA affirmatively and repeatedly educate workers and management alike about the miners' right to work safely: the Mine Act includes strong worker protections, but we know all too well that miners, especially nonunion miners, do not exercise these rights. Some simply do not know or understand them, but many more are too intimidated to speak up. As information widely disclosed since the Upper Big Branch disaster has demonstrated, miners become accustomed to accepting the status quo: work or go home, just don't rock the boat. In the coalfields, good paying jobs are treasured and workers are hesitant to voice safety complaints for fear of getting discovered. Under the current law, the operator performs mine safety training and annual re-training, but for miners' rights training that we recommend be added, it is imperative that MSHA do the training. In particular, we suggest that MSHA educate miners—hourly and management—and no less often than yearly: about the miners' rights to work safely; to withdraw when conditions are dangerous; and to phone the Government (even anonymously) about conditions, as well as about the criminal penalties that can attach if an operator interferes with the miners' exercise of these safety rights.

I am attaching a letter I submitted to the Senate HELP Committee earlier this month, in which I explain some of the many areas requiring additional Agency attention to improve miners' health and safety. Some of the proposed changes will require legislative action while others can be accomplished through rulemaking or internal policy. Regardless of the procedure by which the various changes can be made, many will require additional MSHA personnel to effect the needed improvements.

NIOSH

In connection with our recommendations, below, for additional support for research and development, we believe it will be necessary to fund additional personnel for NIOSH to continue the valuable work it offers to the mining industry. Because of the very small customer base for the mining industry, NIOSH performs critical research and development for the technological advancements that improve miners' health and safety.

While we are not presently aware of the particular personnel needs of NIOSH, we feel it is essential to miners' health and safety that NIOSH be well-funded.

EQUIPMENT

It is essential that MSHA have equipment to enforce the laws and regulations governing miners' health and safety, as well as the best equipment available to respond to mine emergencies. It currently falls short on both fronts.

Lake Lynn, is an MSHA facility near Pittsburgh that is used for testing mining equipment. However, it has been shut down for some time due to structural damage

of the roof that occurred while blast-testing seals to meet the criteria of the MINER Act. This facility is a great resource to miners for testing new technologies; it is also a great training facility for mine rescue team members. Without the Lake Lynn facility, the mining industry tests products at various mine sites. However, that is not satisfactory and we nearly lost a Jim Walters operation in Alabama to a mine fire while doing a test for a mine sealant. It could have resulted in loss of lives and a mine shutdown. Therefore, we urge an allocation of funds to reopen the Lake Lynn facility.

The UMWA training center in Pennsylvania is another valuable facility for miners that is deserving of the Government's financial support. This center offers invaluable training for new miners, underground electrical training, and mine rescue teams.

Another valuable tool for enhanced training lies with the virtual reality training system. We urge an allocation of funding for the purchase of this state-of-the-art technology that allows miners to experience and respond to real hazards in a safe and controlled setting. For example, it can show miners how best to escape a mine disaster, as well as how to respond to underground rib and roof stability problems. This technology would be especially helpful for mine rescue teams, but all miners would benefit from its use.

MSHA would benefit from additional funding for improved communications and training within the Agency. For inspector training, technical support, and improved emergency response, MSHA must be able to communicate with its own staff quickly and efficiently. We understand additional funding is needed to bring the Agency's equipment up to today's standards.

We also support the creation and funding of another mine emergency operations center, to be located in the Midwest. At the present, such centers are located in the East (near Pittsburgh, Pennsylvania and Beckley, West Virginia) and the West (Provo, Utah). However, if there were a mining disaster in the Midwest, where mining activities have been increasing, MSHA does not have equipment in reasonable proximity to respond quickly.

Other equipment that would help MSHA better enforce existing laws and regulations as well as to best respond to mine emergencies include:

- Coal Dust Explosibility Meters.*—This is a portable device that quickly measures coal and rock dust mixtures to determine whether they are in the explosive range. As it now stands, samples an inspector collects are sent away and take about 2 weeks to process. For example, it was only after the Upper Big Branch mine explosion that we learned the mine had an impermissible coal and rock dust mixture shortly before the explosion. Having immediate information about the combustible content in a mine could prevent future explosions.
- Mine Rescue Robots.*—MSHA has at least one such robot, but more would be helpful for emergency responsiveness. These robots operate remotely and can go where it may be unsafe for rescuers to travel. The robot can provide real time data as well as video to help plan a rescue effort. We understand that the cost for each one is approximately \$265,000.

RESEARCH AND DEVELOPMENT

Under both the Mine Act of 1977 and the MINER Act of 2006, Congress anticipated that NIOSH would provide critical research and development of technology and materials for the mining industry. It must be fully funded to continually improve and enhance miners' health and safety.

Along with MSHA, industry, and union representatives, NIOSH developed proximity detection technology that is expected to dramatically improve safety around the huge mining equipment that is used both underground and on the surface. Before the Upper Big Branch disaster, MSHA determined that about 20 percent of the fatal accidents in the last 5 years could have been prevented through use of proximity detection equipment.

NIOSH also developed a collapsible drill steel enclosure that reduces roof bolting noise levels and also captures float coal dust to reduce its adverse health hazards, as well as a mobile manipulator that can lift and maneuver loads of up to 600 pounds.

We need NIOSH to help develop the next generation of self-contained self-rescuers, the units miners carry for whenever a mine emergency disturbs the underground atmosphere turning the air toxic. Today, miners are unable to speak with each other while wearing a SCSR, yet they cannot live if they take even a breath or two of the postdisaster poisonous air. There is also a pressing need for research directed at the development of tamper-proof machine-mounted methane monitors (also called "sniffers") that will automatically cut the power to a machine if the

sniffer is blocked, bridged or in any other way preventing proper methane readings; these are needed to warn miners of excessive concentrations of methane.

In short, NIOSH's research and development efforts are essential to advancing miners' health and safety.

CONCLUSION

We rely on the Government to enforce the mine health and safety laws and regulations to protect miners' health and safety. The Government needs to have adequate resources to do so efficiently and effectively. It also must have up-to-date equipment that is physically proximate to be accessible in the event of mine emergencies. Additional resources are needed to accomplish these goals, and we appreciate your help realizing them. Thank you for allowing us to address this subcommittee, and for your continued commitment to workers' health and safety.

Senator HARKIN. Thank you Mr. Roberts.

I will yield, for opening questions, to Senator Byrd.

Senator BYRD. Mr. Blankenship, do I have your attention?

Mr. BLANKENSHIP. Yes, sir.

Senator BYRD. Do I?

Mr. BLANKENSHIP. Yes, sir.

Senator BYRD. We have all heard, or we've all read, about the number of times that Massey mines have been cited—C-I-T-E-D—cited for safety violations in the past months plural—M-O-N-T-H-S. And we all know of the recent carnage at Massey's Upper Big Branch mine. Twenty-nine men are now dead dead dead simply because they went to work that morning.

I'm also concerned about the Massey record—R-E-C-O-R-D. Apparently, these safety violations are nothing new—nothing new. According to MHSA figures, during a 10 year period—1995 to 2006—Massey mines had a total of 1998 injuries and 24 deaths—24 deaths. Massey Mines were cited for 31,000—I'm going to repeat that. Massey mines were cited for 31,000 violations. This means that, on the average during that 10 year period, a miner was seriously injured every other day. There were 10 safety violations every day—every single day at Massey mines. Let me add an exclamation point there. And I'll say again, there were 10 safety violations every day at Massey mines. And this is clear—I mean, as clear as the noonday sun in its cloudless sky—every day at Massey mines. And this is a clear record. A blatant—B-L-A-T-A-N-T—blatant disregard for the welfare and the safety of Massey miners. Shame.

Would you care to comment?

Mr. BLANKENSHIP. Yes, Senator. First of all, we take violations extremely seriously. The criteria, after the MINER Act, greatly changed on violations, as I think everyone understands. As I said, in my opening statement and in my submitted testimony, I've reduced the accident at rates Massey by 90 percent during my tenure as chairman.

At Upper Big Branch, we didn't sit idly by. And once we recognized how many violations we were having, we formed a hazard elimination committee, and reduced citations at Upper Big Branch by nearly 80 percent.

We've worked very hard with MSHA, and very hard in our own company, to find ways to make miners safer. We have more than 120 rules and policies at Massey that exceed the law. We've been the, if you will, most significant innovator of new technology, including everything as simple as reflective clothing to as com-

plicated as the fact that this year we will buy the first —the miners with proximity devices on them. We're developing new helmets to make it safer. We've led the industry in safety innovation, and we have made every attempt to deal with the violations—and continue to do so, and will continue to do so because we believe in eliminating hazards for our coal miners.

Senator BYRD. Mr. Roberts, would you like to respond?

Mr. ROBERTS. Yeah, let me thank you, Senator, for the opportunity.

The effort to reduce the number of violations and make the Upper Big Branch mine safer, if you look at the first quarter of 2010, and take the number of violations that were issued in the first quarter, after Mr. Blankenship says he assigned this specialty team, they were on a pace—if you take the numbers that they were issued, the violations they were issued in the first quarter, and project them out for a year, 500 violations. Now, I would suggest that that's not a record that anyone should come in here and say they're proud of.

The other thing is, they were also shut down, I believe, seven times for serious violations in that first quarter. That projects out being shut down by MSHA, the agency charged with enforcing the laws that Congress passed, 28 times.

And then, I would just like to add a human element to this, if I might. There is evidence there that miners were scared to death. There was a young man named Josh Knapper—I know his family—25 years old. He wrote a letter to his mother, his fiancée, and his baby, and said, "If I die, I want you to know I love you." Now, that's the kind of letter people used to write going to Vietnam. And that's the kind of letter people write today, going off to war in the Mid East, in Afghanistan and Iraq. That is not the kind of letter you're supposed to write going to work with your dinner bucket.

Senator BYRD. Mr. Blankenship, miners have rights under the law to walk away from an unsafe work environment. But, there are some people who say that the miners are afraid of losing their jobs, so don't rock the boat. How often do Massey miners request transfers because of safety concerns? Let me ask that question again. How often do Massey miners request transfer—because of safety concerns?

Mr. BLANKENSHIP. I don't know that we keep a statistic on requested transfers. I can tell you that we did a survey, I believe in February of this year, where we anonymously asked our people if they felt safe on the job, and whether they thought Massey's S1, which is our name for our safety program, made them safer than at competitor mines. And, anonymously, 93 percent confirmed that they felt not just as safe, but safer.

I can tell you that we take very quick action on individuals that violate our safety rules as we become aware of them. We discharge more people for failing drug tests and safety than we do for anything else. So, we're constantly trying to enforce upon people how important we consider violations, how important we consider safety. We've invested tens of millions of dollars beyond the law. We have our own safety manual that exceeds MSHA's standards on safety requirements. We're the leader in the industry.

Our people should not feel afraid. They have an 1-800 line that they can call anonymously. We encourage them, through posters and communication, that, if they have an issue, let us know. You'll always have, out of 7,000 members, people that perhaps don't come forward, and should. But, we think we have as good a safety program, in that regard, as anyone in the industry.

Senator BYRD. Mr. Blankenship, how many Upper Big Branch miners requested to be transferred because of safety concerns, prior to the April 5 explosion?

Mr. BLANKENSHIP. Again, I don't know of any statistic that we have on how many people requested transfer out of Upper Big Branch. And I don't particularly know that anyone transferred, or asked for a transfer, for safety reasons. They may have. Most of our requested transfers relate to being closer to home. But, I don't know of anyone, personally, that asked for a transfer for safety reasons. But, there may well have been some.

Senator BYRD. How would you handle those requests?

Mr. BLANKENSHIP. Well, the first thing I would be interested in, if I had a request that came to my attention, that someone wanted a transfer for safety reasons, would be trying to figure out what safety concern they had that would encourage them or cause them to make such a request. And then, of course, to try to correct that, as well as accommodating anyone that feels unsafe in our coal mines.

I would say, to the group, that we had 29 miners perish in this accident that had a combined 400 and some years of experience, and they would not put themselves, knowingly, at risk, in my opinion. Two of them were engineers. Several of them had worked at this mine for 10 or 14 years, and were very experienced and very well-qualified longwall miners. And I don't believe that they would've put themselves at risk, knowingly.

Senator BYRD. Mr. Roberts, would you care to comment?

Mr. ROBERTS. The one thing I can say is, I've never met a Massey miner, or heard of a Massey miner, that withdrew themselves for cause of safety. I find that, in and of itself, somewhat ironic.

The one thing that we encourage Congress to consider is to make it a criminal violation for any supervisor or any management person who interferes with a person's individual right to withdraw himself from what position that they feel is unsafe. That's something that we desperately need, because it's our opinion that miners are very much concerned. We know that people there, at this mine, were worried about being killed, being injured. And I think that the record will reflect that when this investigation is completed.

Senator BYRD. In Mr. Main's testimony, he—the Assistant Secretary cites—C-I-T-E-S—recent anonymous complaints that prompted MSHA inspections at three Massey mines in West Virginia. Inspectors found illegal practices that required withdrawal orders to be issued because of inadequate air movement, with the potential for explosions; blocked escape ways; insufficient mine examinations by the operator; and roof fall hazards. Now, what happened to the Massey officials who allowed these dangerous and illegal practices to exist?

Mr. BLANKENSHIP. You know, I think Mr. Main was referring to some events at one of our mines where people had called in, about 1 month before the April 5 tragedy. And, in answer to what happened to them, all nine individuals, who were felt to be aware of and participating in the improver activity, were discharged, and as was the one individual that was cited by MSHA, post the April 5 accident.

I can say only that when you have 7,000 people, as is the case with a lot of companies, you can't keep track of all of them. But, we make our very best effort, when we hire people, to make sure we're hiring people who will produce safely. It includes drug testing; it includes criminal checks; it includes everything as simple as being able to read, to being nonsmokers. So, a big part of our safety program is trying to make sure we've got well-qualified, well-meaning people who can behave safely in a coal mine. But, sometimes that doesn't work out.

But, in answer to your question, all nine of those individuals were discharged immediately.

Senator BYRD. Why were MSHA inspections necessary to correct these?

Mr. BLANKENSHIP. Again, as is the case with Mr. Main, I and others can't be at the mine every day. So, there are violations.

I do think that that incident, which occurred about a month before the April 5 tragedy, indicates that some people do call in. This—as I understand it from Mr. Main, and did not know for sure that that was the case, these people did call in that they felt unsafe, or that improper practices were being conducted, which demonstrates that they will call the 1-800 hotline, or be whistleblowers.

And, as I said, we took immediate and decisive action.

Senator BYRD. Mr. Roberts, do you want to comment?

Mr. ROBERTS. Yes. I think there's a distinction that—to be drawn here. The question that you asked Mr. Blankenship previously was how many miners had withdrawn themselves. That means, you say to your foreman, "I think I'm in a dangerous position here, and I want a different place to work." That's individual withdrawal rights.

I said I had never heard of a Massey miner exercising that right. Mr. Blankenship, said he didn't know. That is different than someone picking up a telephone anonymously—obviously, they're calling because their name will not be revealed and reporting a serious situation at their particular mine, at the Massey Energy Company.

I think there were three different mines that MSHA actually went into; one or two of those was before Upper Big Branch. And I think they investigated some mines after Upper Big Branch, and found serious violations, also.

So, there's a distinction here. It's not the same thing. When someone calls anonymously, no one knows who they are. When someone withdraws themselves, everybody knows who they are.

And the question you asked Mr. Blankenship, and asked me, was, How often is this exercised? I know of no miner ever exercising that right at Massey, and he has not—he does not have the information, or he doesn't know of any miner that ever withdrew himself at Massey.

Senator HARKIN. Mr. Blankenship, you say that Massey does not place profits over safety, never have, never will. That's what you said in your statement. But, in a memo from you, dated October 19, 2005, you told your company's deep mine superintendents that running coal is the top priority in the mines. Here's the quote, "If any of you have been asked by your group presidents, your supervisors, engineers, or anyone else to do anything other than run coal—i.e., build overcasts, do construction jobs, or whatever—you need to ignore them and run coal. This memo is necessary only because we seem not to understand that the coal pays the bills," end quote. Doesn't sound like putting safety first to me.

Mr. BLANKENSHIP. Yeah. I think that that's true if you read it in the sense that—but, people at Massey know that S1 is—safety is job one. That memo was the product of a situation where construction work that wasn't needed for 5 years, to turn off other sections and so forth, was being done at a time that it didn't need to be done.

And, in fact, I encourage our coal production people to produce coal, because, so long as they're working in the job that they routinely do, they're more likely to be able to do it safely. When you put people, who work in the face of coal mines and mining coal, into the business of shooting and taking down overcasts and doing other work that's not normal to them, they're more likely to get injured than if they do their normal work.

That memo was quickly and poorly drafted and sent out. A few days later, we sent out a corrected memo to make sure no one misunderstood it. And, as you might imagine, in my 20 years at Massey, I've probably written and received hundreds of thousands of memos. But, I'm confident that our safety culture, S1, and our belief in safety, and so forth, far overshadows any single letter that was written at a time when were having people do construction work that was not necessary for a long period of time, and were idling production to do so.

Senator HARKIN. After the deaths of two miners in 2006 at the Massey controlled Aracoma mine in West Virginia, Aracoma agreed to plead guilty to a series of criminal violations that hampered miners trying to evacuate the mine after a fire had started—after the deaths of those two miners. In the plea agreement, Aracoma officials agreed with prosecutors that the company, quote, "Recklessly failed to replace the stoppings or to provide additional ventilation controls," end quote, to protect the primary escape tunnel. Again, it just doesn't sound to me like putting safety first.

Mr. BLANKENSHIP. Well, again, we do everything we can to get all 7,000 of our people to put safety first. And, in that same plea agreement, everyone agreed—in fact, the plea agreement makes clear—that Massey Energy, nor any of Massey's executives or anyone, had any knowledge of the stopping being left out. I had done everything that I knew I could do, in advance of that fire, by pointing out that we—you know, we needed to make sure that everything was safe.

Obviously, a stopping appears to—at least appears—I think it's fairly certainly it was left out, and it did violate the escape way. But, certainly, none of that plea agreement says that Massey ex-

ecutives or myself knew about it; in fact, it says the opposite; that we clearly did not know about it.

Senator HARKIN. Mr. Blankenship, you mentioned the MSHA awards, the three Sentinels of Safety awards, that MSHA gave you last fall, if I'm not mistaken. But, I understand that none of these awards were for an underground coal mine, and your three recognized sites represent less than 2 percent of Massey Energy operations. So, I think it is a stretch to say that MSHA praised your safety record, when Upper Big Branch mine had, what, 48 withdrawal orders?

Mr. BLANKENSHIP. Yes. At about that same time we were having those citations, slash, violations, as far as it representing only 2 or 3 percent of our workforce, I don't know that any single mine represents more than 3 or 3½ percent of our workforce. So, those are individual mines, Sentinels of Safety Awards, and it would never represent a large portion of the workforce.

Senator HARKIN. But, they were for your aboveground mines.

Mr. BLANKENSHIP. Yes. They were—I think they were primarily for preparation plants and maybe also a surface mine.

Senator HARKIN. Well, I'm going to ask both of you this question. Now, we know that there are mines that have great safety records, very rarely have an accident, and, when they do have an accident, it's usually because of an individual who has, maybe, not followed the correct order or direction.

But, why can't we take those mines, that have these excellent safety records and a culture of safety, and why doesn't Massey incorporate those into your mines? I mean, you would think that—if I was in business, in a hazardous business like coal mining, and I had other mines, maybe that weren't even—were not in my operation, were not in my company, but they had excellent safety records, and didn't have any problems, you'd think I'd want to adopt that.

Mr. BLANKENSHIP. Well—

Senator HARKIN. And do you ever do that? Do you ever look what other mines are doing and say, "They have a great safety record, maybe that's what we ought to be doing?"

Mr. BLANKENSHIP. We're right on target with that. We volunteered, to the National Mining Association (NMA), that we would make our S1 Safety is Job One package, which has 120 rules that exceed MSHA's rules, available on the Internet to everyone in the mining industry. And we did that.

We also use good performing mines as templates to look at bad performing mines. Upper Big Branch had, like, a 5.8 NFDL rate in 2009. And this focus we put on it, as a result of our measurement and understanding of processes at the upper Massey level, brought that accident rate to zero in the first quarter of 2010, before this tragedy. So, we do use best practices. In fact, our S1 program is the accumulation of best practices that we've learned at well performing mines.

Senator HARKIN. Mr. Blankenship, I've been around long enough to know that you can have all kinds of fine things on paper, but unless they're actually executed on a daily basis, they don't mean much. You can have all kinds of fancy things on paper, but you said something earlier, to a question that Senator Byrd asked, and

I wrote this down. "We can't be at the mine daily." Neither MSHA or you can't be at the mine daily.

I understand that. MSHA can't have an inspector in every shaft, in every mine, every minute of the day. You can't be there, either. That's why you have to have safety things set up that are self-perpetuating. You also need to have a system whereby, if a miner sees a violation, that miner, with all the protections that they have, can blow the whistle.

Mr. BLANKENSHIP. And I couldn't agree more. In fact——

Senator HARKIN. Well—do you have a setup for a miner who sees a violation, that has complete anonymity, that they can report that violation without any fear of retribution whatsoever?

Mr. BLANKENSHIP. Yes, we have an 1-800 number that they can call in anonymously. We tell our people——

Senator HARKIN. And where do they go to a phone to call that 1-800 number?

Mr. BLANKENSHIP [continuing]. They can call it from anywhere. I mean, they can call it from their home, they can call it——

Senator HARKIN. Yeah. And then you can trace that and find out where that call came from.

Mr. BLANKENSHIP. Well, I mean, I don't know that we can trace it. I don't know what we've got on there. But, the main thing is that our people are told, constantly, that they should never work unsafe. They sign a piece of paper, when they come to work for us, that they will neither work unsafe, nor participate in safety violations. I think we're doing pretty well, in that regard, by evidence of reducing from 8.0 to 0.79 NFDL rates.

We have tragedy on our hands, but we don't know why it happened. I believe there are things that the industry and MSHA need to do to greatly reduce the chance that would happen again. But, the idea that Massey or Massey's management or the great majority of Massey—you know, there's always somebody out there that does not care about safety is—untrue.

Senator HARKIN. Mr. Roberts?

Mr. ROBERTS. I'd just like to point out a couple of things, if I might.

One is that, not only have we experienced these 52 fatalities, this horrendous situation at Upper Big Branch, this is the second disaster in 4 years at a Massey operation. And, quite frankly, I don't think too many companies are out there looking to copy what's going on at Massey and implementing that at their operations.

The awards that Don talked about in his testimony, the Sentinel of Safety, it's true that MSHA awards that, but I think that's awarded jointly with the NMA, if I'm not mistaken.

I want to speak to something that we've become aware of. And we raised this with Mr. Blankenship at his shareholders meeting, earlier this week. We have witnesses and people who work at Massey who tell us that, when you get when you get injured at Massey, or when you get to the emergency room, someone from human resources meets you there.

And we've got one young man who had his finger cut off, and the person from human resources said to this young man, who, incidentally, worked at Upper Big Branch, "You don't have to take time

off here. You can come back to work, and we'll give you light duty. And that way we don't report this."

We also have evidence that they have at least one individual, that we know of, that has three broken bones in his back, and he's working at Massey. So, that's not a lost time accident at Massey.

So, I think their statistics are borderline fraudulent here, when you're paying people who are hurt, and would be off any other coal mine in this Nation, and taking time off from work and getting workers comp or S&A benefits, and you're paying those people to come to work and say, "Look what I've done."

And I think there's another important thing here, I—that is troublesome to us, is—in Mr. Blankenship's package that he has with the company, he gets a bonus for reducing lost time accidents. So, we take company money and we pay someone who's injured to come to work, and then Don gets a bonus because he reduced lost time accidents, then he gets an award from MSHA for this.

Mr. BLANKENSHIP. Can I address that a little bit?

Senator HARKIN. Mr. Blankenship, you should have a chance to respond to that.

Mr. BLANKENSHIP. Yeah. Contrary to what Cecil says, people in the industry copy us all the time. In fact, I'm interested, sometimes, in seeing, on television, how widely spread the straps are. The reflect— or, the flappers on roof boulders that protect the roof boulder more than he would otherwise be protected, are Massey inventions that are everywhere. Red zones around highwall miners are everywhere. We've led the charge on proximity devices that we think will be everywhere.

Many of the 120 rules that we've put in place—one of the most important being submarine kits that allow a dozer that falls down in a coal pile and gets covered up to be able to have lights and communication and breathing apparatuses—is a Massey invention that we know has saved lives, that's been adopted, not only by many other coal companies, but, in fact, by the Government itself.

So, we've done many, many things that have been followed-up on by others. It's very common for companies to have light duty work. A guy that's going to get 60 percent of his pay to stay home, who has the tip of his finger cutoff, may choose that he wants to work as a dispatcher or something that he can productively do, rather than stay home. We don't require that. We can't require that. The law prohibits requiring that. But, in fact, we make that opportunity available to people who would want to choose to do that.

I suspect and believe that many companies do that. I don't think it's a bad practice, so long as the guy can fully perform the job that's available for him.

Senator HARKIN. Is your mine organized? Is it represented by a labor union?

Mr. BLANKENSHIP. We have very few union represented employees. We have probably 100, 120. This particular mine, at Upper Big Branch, was a former Peabody Union coal mine, that twice voted not to be represented by the mine workers. Many of the people there were still—you know, were former UMWA workers, but they weren't— had not chosen to be members of the union at this time.

Senator HARKIN. I guess the one thing that just keeps nagging at me—I hear what you say about safety and all the things you're

telling me, and I don't have an intimate knowledge of that, obviously; but then, when I wrote down here, 52 miners died at Massey mines, 23 before the explosion, 29 in the explosion, 52 over 10 years, highest in the industry—I'm trying to square these two things.

Mr. BLANKENSHIP. Well, the only thing that I can say is that, once you add the 29 in, it's a bad record. I feel terrible about it. I don't know, yet, what happened. When you look at the 23 we had, look at the difficult conditions—underground conditions, and so forth—that we work in central Appalachia, we're about average, if you look at the number of fatalities. We're a big producer, so absolute numbers, when you're producing 40 million tons a year, tend to get big, even with your best efforts.

But, any fatality is unacceptable to us. There's not been a single fatality that we've not tried to make an improvement. We've had highwalls and surface mines fall on people; we've set up red zones with cones to prevent it. We've had people that were killed by a—you know, a piece of metal flap flipping up as they were running a car, and it would stab them; we've put doors on there to keep that from happening. We've had people that were—we've had several, as the industry has, fatalities where a miner operator is positioned in the—on the right side of the miner, and we've put up, without being required by law, \$2 million a year worth of larger roof bolt plates, called "pizza pans," and we're the only people that I know that do that routinely to protect that miner.

Cecil frequently calls that "writing law or a policy in a coal miner's blood." We don't believe in that. But, we do believe in learning from accidents, and trying to do better. And that's what we intend to do at Upper Big Branch. And, as this investigation proceeds, that's my biggest objective.

Senator HARKIN. I'll have one last question, after I yield to Senator Byrd, and it's going to involve your comment about this open investigation by MSHA. So, I will return to that after I recognize Senator Byrd.

Mr. BLANKENSHIP. Thank you.

Senator BYRD. Mr. Blankenship, why, why, why so many fatalities at Massey mines?

Mr. BLANKENSHIP. As I was alluding to earlier, we are probably about average, 23 at Massey, with, you know—I don't know the exact number, but call it 400 million tons during that period of time, would be the equivalent of, say, 50 across the industry, which is probably not far off the average. But, the issue, of course, is that mining in central Appalachia, mining in deep mines, mining in areas that we mine in, it's a real challenge. We meet that challenge as best as we're humanly capable of doing, and will continue to do so. We have 120 rules in place that exceed the law. We have invented, for another example, the ability to retrieve equipment from out from under a supportive roof, like a remote control miner, by being able to reactivate the tram remotely, which is another Massey invention.

I could carry on here for hours about Massey inventions, trying to deal with the hazards of coal mining, believing that we have to engineer the risks out. And we have to work together with the Gov-

ernment and the company to find more opportunities to engineer the risks out of mining.

Senator BYRD. Mr. Blankenship, Massey is not average. Massey is not average.

Cecil, would you like to comment?

Mr. ROBERTS. I've heard Don use this ". . . 23 fatalities in 10 years . . ." this is before Upper Big Branch— as "about the industry average." And, for the life of me, I can't come up with another coal company that's had 23 miners in 10 years die. And then he takes the amount of production and says that's how he gets to that.

I think we have to look at the number of people who have been killed at a particular company, as opposed to saying, "Well, I mine x amount of tons, and I figured out some way to make that the average." That's not the average. That's unusual, it's unacceptable, and I wish Don would come to that conclusion, that we have to do better than this, and he has to do better than this.

And then to have this terrible explosion take place at Upper Big Branch, on top of this—this is the worst fatality rate in the industry, either way you look at it. Either before the explosion or after the explosion, it's the worst. And I've just—have trouble with his calculations, here, that somehow this is the average. This isn't the average. This is deplorable, is what it is. It's not average, and it's not acceptable.

Senator BYRD. Mr. Blankenship, I helped to write the laws, in 1969, 1977, and 2006, so I've been around awhile. Let me say it again. I helped to write the laws, in 1969, 1977, and 2006, to improve safety in our coal mines. The responsibility to comply with those laws is yours, Mr. Blankenship.

How do you reconcile your assertion that safety is number one at Massey with the fact that your mine has had 48 withdrawal orders, too many violations, and 52 deaths?

Mr. BLANKENSHIP. I can tell you it's not an assertion. We work very hard to make safety job one at Massey. The violations that occurred in, essentially, the first half of 2009, when they came to the management's attention, we put two safety specialists at the mine. We formed a five person hazard elimination group, which also has two MSHA people, former MSHA people involved in it. We've met with MSHA to go over how we might proceed, in terms of all Massey hazards across the company. We worked very hard to deal with the violations at that coal mine, as we do at the other coal mines.

We've spent tens of millions of dollars beyond the laws that you passed. I'm very appreciative of the laws that you have passed. I know these coal miners. I still interact with them. I'm probably the only major company CEO that still lives in the heart of them. I live at Sprigg, in Mingo County, West Virginia. I play basketball with them. I know their families. I looked them in the eye, on the night that we had to give them the bad news. I don't want to do it again. There's nothing that I can be accused of or nothing you can do to me that will make me want more than the feeling of having to inform family members of such a tragedy, to want to avoid it again.

And I can assure you, despite what you read in the media many times, that Massey is very serious about dealing with safety violations and improving safety.

Senator BYRD. Senator Harkin, thank you.

Senator HARKIN. Thank you, Senator Byrd.

Senator BYRD. You have something else?

Senator HARKIN. Yes, I just have one more.

You talk about the mine—that MSHA said the mine was in, quote, “good condition.” But, Mr. Main said that there is no such designation.

Mr. BLANKENSHIP. Yeah, I was, oh, you’re looking—I was stricken by the word “certified.” I would agree with Mr. Main, that they probably don’t have a quote, “certification” of a good mine. But, it is reported to me, and I think people will testify that, on the close-out inspection, that MSHA thought that the mine had this—inspectors onsite and the management onsite agreed that the mine had been “fixed,” if you will, that the problems had been addressed, and they were appreciative of all the focus and effort that we had put into it.

I had met with Mr. Main, I believe, in February 2010, just a couple of months before the accident, and asked the question of, “What—is there anything we need to focus on, any big problem that you want us to deal with?” I think that we all thought that we had moved this mine forward. I don’t know, yet, because I don’t know what happened, whether the violations, and the nature of violations, and so forth, contributed. So, we’re anxious to find out.

Senator HARKIN. Now, one more time, Mr. Main also said that MSHA does not provide for plans for ventilation. They don’t do that. Yet, you seemed to indicate, in your testimony, that MSHA provided some kind of plans for changing the ventilation system. So, then I want to get this straight. Did they provide you—did MSHA provide you with a planned ventilation system?

Mr. BLANKENSHIP. I think that most people in the industry would agree that MSHA only approves the plan they want. An easy way of example for you, one of the things that Congress has allowed is scrubbers on continuous miners, which we all agree and as far as I know, no one disagrees with—the filters in—on continuous miners are an important part of holding down breathable dust. Yet, MSHA will not approve the use of 63 of our continuous miner scrubbers. So, therefore, we’re not running them. That’s not our plan, that’s not our wish. We fully disagree with it. We’ve talked to them about it for a long time. We went public with the fact that they won’t let us run the scrubbers. I offer that as evidence that they won’t approve our ventilation plans. They force us to ventilate backward by not approving the plans. We prefer to ventilate on blowing air systems, they prefer that we ventilate on the exhausting air systems. The mines are not ventilated, nor are the scrubbers run, because MSHA won’t allow it.

Senator HARKIN. Now you’re in an area I don’t know anything about, obviously.

Mr. BLANKENSHIP. Yes, I understand.

Senator HARKIN. I don’t understand all—

Mr. BLANKENSHIP. And I apologize for that, but I—

Senator HARKIN. That’s okay. All I’m saying is, What do other mines do? I mean, you’re not a loner. We’ve got a lot of coal mines out there.

Mr. Roberts, are you familiar with ventilation systems?

Mr. ROBERTS. Somewhat. I'd let me try to pick up on where I think Don was going, here. But, there're two different issues.

The scrubbers—those scrubbers are placed on continuous miners to remove the dust from the atmosphere. That's a health issue. That is so miners will not breathe excessive amounts of dust, and helps control the dust. Okay? It's not necessarily a safety issue that might that would lead to an explosion. That's two different things. The scrubbers, I would say, are for health purposes.

Now, with respect to ventilation, every operator in the United States that has a coal mine, or wants to open a coal mine, has to submit a plan to ventilate that mine, to MSHA. MSHA either approves that plan or disapproves that plan.

I don't know what Mr. Blankenship means when he says, "MSHA made us change our ventilation plan." And I'm still unclear about that. Those plans are the responsibility of the operators, and they're either approved or disapproved.

Now, with respect—we shouldn't complicate this with the dust controls. That may very well be a legitimate debate, with respect to controlling the breathable dust. That's separate, distinct from ventilating the mine to keep float coal dust away, and also keeping methane out of the face. So, when he says, "They made us change the ventilation plan," I'm still unclear exactly what he means now, and it's a little bit unclear of what he meant the other day. But, that's what—the way the process works. He submits a plan—not necessarily him, but his engineers. And maybe MSHA disapproved of a particular plan they submitted, but MSHA doesn't come up with the plan.

Mr. BLANKENSHIP. You know, I——

Senator HARKIN. Well, again——

Mr. Blankenship.

Mr. BLANKENSHIP. I consider that a play on words.

First of all, the scrubbers can be a safety issue, because they will suck the methane out of the face, as well. But, I'm not pointing out the scrubbers as equivalent to the ventilation change. But, because it's a much simpler issue, and one that makes it clear that we don't decide what we can do, because we would run the scrubbers. We have, for my working lifetime at Massey, and they won't let us run them. So——

Senator HARKIN. I just don't understand that. But, there are other I keep coming back to this point—there are other mines——

Mr. BLANKENSHIP. There are——

Senator HARKIN [continuing]. Just as deep as yours, just as big as yours, and they run ventilation systems, and I've never heard any problems about this.

Mr. BLANKENSHIP. Well, you——

Senator HARKIN. So——

Mr. BLANKENSHIP [continuing]. You could hear of problems if we don't allow the top industry people to have a major—a more major role in ventilating the coal mines. One of the big issues is whether you have EP points, or you don't. And I don't want to—I know that I could get too technical.

But, the bottom line is that we're—when we submit the plan that we think is best for the ventilation of a room-and-pillar mine or a

longwall, they deny it until we submit what they would like for us to have. And many times, it is not the plan that we prefer to have.

Senator HARKIN. I'll follow up on that with questions for you, but also with with—MSHA also, on that.

Mr. BLANKENSHIP. Thank you.

Senator HARKIN. I will send written questions, to get that fleshed out a little bit more.

My last question, basically, is this; and that is, you talked about MSHA, you sort of alluded to the fact that they're investigating themselves, here, as pertains to this ventilation system. You mention that, and you say you don't know whether that played a role in the explosion—none of us know that yet—you don't know. But, you allude to the fact that MSHA cannot be trusted to do this investigation, because they are kind of investigating themselves. Would you like to elaborate more on that? And, I'm going to ask Mr. Roberts, also. Are you saying that there should be a separate entity, other than MSHA, to do this investigation? And is there one that is qualified, in terms of mining safety, to do this kind of investigation?

Mr. BLANKENSHIP. I think the qualifications would be very difficult, and I don't know that I have a particular entity in mind. But, you have situations, for example, where the NIOSH branch, that was represented up here today, seems not to agree with MSHA, for example, on the scrubs. But MSHA has that rule in place. I think that we need—as we are doing at Massey, by the way—go through the entire process of how our safety is set up, whether there's any, you know, validity at all to these accusations that people are afraid to call, whether there's any validity at all that we are understaffed. We're going through that entire independent review of our safety—our board is—as a way to make sure that we're right. We believe we're totally right, in terms of how we're structured and how we manage our safety department. I think MSHA needs to do that same thing. And I think companies that have a disagreement with MSHA about ventilation and scrubs, and so forth, need an appeal mechanism, where they can go and say, "Look, this is what we want to do and this is what they want to do. Give us a chance to do it the way we think is best." So, I think there's room for that.

And I don't know, in answer to your question, who exactly would be qualified to oversee this investigation. But, certainly we think it's in the best interest of the coal miner, the ones that I live among, to get a true, independent assessment of what happened here.

Senator HARKIN. Mr. Roberts, do you have any thoughts?

Mr. ROBERTS. We—actually, I knew if we stood here—stayed here long enough, there might be something we would somewhat agree with. We—the UMWA asked MSHA and the DOL to conduct this hearing publicly. And the reason we felt that was so important was, number one, MSHA does not have subpoena powers in these closed hearings. So, what that means is, if they ask Don to testify, or they ask me to testify, I can either come or I can say, "No, I don't want to." In a public hearing, the law gives MSHA the power to subpoena me, or subpoena Don, or anybody else they want to.

In these private hearings, the miners' representative which, by the way, we are the miners' representative at Upper Big Branch, because the law is different for investigations and safety representatives than it is for representing people in collective bargaining—we have been asked, by miners at Upper Big Branch, to represent them in this investigation. In this investigation, we will not be allowed the union will not be allowed—to be in the room when witnesses are being interviewed. And we think that's not a good thing. We don't think it's a good thing for anyone. The families are not allowed to be in the room when these witnesses are being interviewed. If we have a public hearing, the families can be there, the miners' representative can be there, and anyone who would like to be could be there.

Now, we've been told that the reason that they have decided to close these hearings is because of the Department of Justice's investigation. They have FBI agents—a lot of FBI agents in southern West Virginia, and I applaud that. But, I don't really see how having a public hearing, where whatever Massey Energy did, or whatever MSHA did, or whatever the State government did, could be considered, and we could learn from that, and we could learn immediately.

The problem we've got here is none of us are going to see this evidence for a year. None of us are going to see what the witnesses said. But, I do want to step up, right now, and say I have full confidence in the Secretary of Labor, Hilda Solis. I think she was a fine appointment. And Joe Main worked for us for 30 years. And I said, in another hearing, that, before this is all over, people will be coming in here and saying, "Joe Main is too tough on us." And I know that will happen, because he's aggressive, he has dedicated his entire life to protecting coal miners. And he will do that here. He will probably run the most thorough investigation we've ever seen. But I do think it's wrong to have this hearing in private, and all of us try to figure out traipse behind to figure out what happened. And, you know, I've got strong feelings about—and I've expressed them here today—but, I do think everyone's got a right to defend themselves. And I wouldn't deny that right to anyone. But, we're not doing that here, we're in a situation where this is going to be an investigation, and we're going to be part of it. We're going to go in the mine, when it opens, our people will, and we'll see what happened, with respect to where the explosion traveled, how much damage it did. We'll all try to come to an opinion with respect to that.

But, trying to do that in isolation of knowing what the witnesses said, at the time this mine—right before it exploded there were miners who, I know personally, had to run out of this mine, and barely got out. We talked about the Davis family losing three family members. Tommy Davis, Cory Davis' dad he was in that mine and was running out and it blew him down. So, that family could have been hit with four family members, here, and perhaps five. There's a fifth young man in there that was the son of Timmy Davis. So, this could have been even worse than it was.

But, we don't know—we've talked to people. Look, we talked to about 90 people here. But, we haven't—we're not going to be privy to these witnesses getting up on the stand. And MSHA—they're not

going to be subpoenaed. They don't have to come, and they don't have to talk. And I think that we need these people to be sworn in and everyone tell what they know, so we can get to the bottom of this and everybody know what happened here so there won't be any doubts about what anyone did here.

Senator HARKIN. Thank you very much.

I know Senator Byrd had one last question.

Senator BYRD. Thank you, Mr. Chairman.

Mr. Blankenship, according to the news media, a major source of the gas buildup at the Upper Big Branch mine, may have come from a coal shaft that had never been properly sealed. According to one article, quote, "Rags and garbage were used to create a poor man's sealant"—S-E-A-L-A-N-T "which allowed methane to permeate the mine, displacing much needed oxygen."

Mr. BLANKENSHIP. I've seen that same report, followed up on it. As best I can figure out, it's not the case of the hole, or the shaft, you're speaking of was a hole that was for the purpose of transporting coal from a mine above it that was no longer in use. And it was filled with coal and rock, and inspected by MSHA. And, as I understand, it was fine. There were, to my understanding at this point and I want to be careful not to rule out any source of the methane this early—it's my understanding that it's highly unlikely that that hole, which was sealed with coal and rock, would have played any role in this explosion.

Senator BYRD. What other irregular ventilation is allowed at Massey mines?

Mr. BLANKENSHIP. Well, I don't know of any irregular regulation. We ventilate our mines as best we know how, to the extent that MSHA will allow us to ventilate that way. And then we do our best to, in concert with MSHA, come up with safe and healthy ventilation plans.

Our mines, as you know, Senator, in central Appalachia, are different than they are in Pennsylvania. We have a lot of—a lot more overmining and undermining, and we have to be worried about positive and negative pressures of the air, drawing bad air out of other mines. And we prefer, as I said earlier, blowing ventilation on our miner sections. And we certainly prefer running our scrubbers. And we believe that there are many things that can be done to improve, or lessen, I should say, the likelihood of this type of thing happening again. And, in many cases, there are things that we can't do. We need to do a better job regulating gas wells in these regions. We need to do a better job of mapping, which was one of the events at Q Creek. There're a lot of things that need to be done that can only be done, if you will, by the Government or the regulatory agencies.

But, as far as that hole, in particular, I don't think that it contributed to the explosion. But, that'll be part of the investigation.

Senator BYRD. Mr. Blankenship, what recordkeeping system exists to corroborate your testimony?

Mr. BLANKENSHIP. I don't know which piece of my testimony you're referring to, but let me say that when I saw the rate of violations that were occurring in 2008, post the new MINER Act and so forth, we enacted an effort to really well measure what our violations were. And we had a very difficult time, using the combina-

tion of our data internally and the MSHA Web site, figuring out what our violation count was. It took us a good time—a good amount of time to figure that out so we could apply the resources in the right place to reduce violations. And we did that.

But the records on NFDL rates, the records on the what we've done on safety innovation and the 120 rules—and so forth—are all there for reviewing, if and when that is, you know, appropriate.

Senator BYRD. Mr. Chairman, I want to thank Mr. Roberts and Mr. Blankenship for their testimony.

Mr. BLANKENSHIP. Thank you, Senator.

Mr. ROBERTS. Thank you.

Senator HARKIN. I join you, also, in thanking you both for being here.

And, you know, we all know that mining is a dangerous occupation. Anytime you go below the ground and you're dealing with explosives, you're dealing with all of the things that face miners, it is a hazardous occupation. But, that's why, over the years, we've tried to do everything we can to put policies in place to lessen that, to make it so that—like Mr. Roberts said, so that people don't write letters saying, "Well, I hope I see you tonight."

Perhaps you can't get 100 percent assurance, but you can get 99 percent. And we've got to do everything we can to make sure that miners are protected from these kinds of tragedies.

So, we'll look at what we need to do at MSHA, what we need to do legislatively, here to address this. We are, of course, like you, anxious to see the outcome of the investigation.

I am going to talk to the SOL about what both of you said in open proceedings and the issuing of subpoenas in open, which you can't do in private. I will talk to the SOL about that and try to get that input, also.

But, I just well—I feel like Senator Byrd, we just can't keep coming back here all the time, and having something happen to miners. We just can't keep doing this. I mean, I've only been here 25 years. And it just seems like, about every 5 years, we've got something—we've got to come back here, miners have died. They've died in tragic accidents. And we say, "Well, we're going to fix it." And then something like this happens, the worst one in 40 years. With all of the modern technology we have, with all of the knowledge we've accumulated over the years as to safety precautions that need to be taken, with all that, 29 miners lose their life.

I just don't want—we just don't want to keep coming back to this. We have to get in place, for miners, safety measures that they can rely on. And that's really the basis of what we're trying to do here.

So, I appreciate your testimony. But, this subcommittee will not rest until we change some of these processes and procedures, and look at what we need to do to make sure that this accident, this kind of tragedy, doesn't happen again.

I don't doubt, for a minute, Mr. Blankenship—I don't doubt, for one minute, that you feel badly about what happened, that you don't care about your people. Of course you do. And so does Mr. Roberts. I've known Cecil for many years. I know how deeply he cares about the people he represents, the UMWA.

ADDITIONAL COMMITTEE QUESTIONS

Sometimes, caring is not enough. I know you care. I don't doubt that for a minute. But, it's looking at the policies and procedures that— what is implemented. It's a culture of safety, and when you have hazardous conditions like that, of making sure that everyone understands that safety must come first. It must come first. Not how much coal you've produced. I understand you've got to make money. And I understand we need the coal for energy. We all know that. But, in this kind of a thing, safety has to be the first thing that comes first.

And, like I said, I know you care, I know Cecil cares, and we all do. But, we've got to change something here to make sure it doesn't happen again.

Thank you both for being here.

Mr. ROBERTS. Thank you.

Mr. BLANKENSHIP. Thank you.

[The following questions were not asked at the hearing, but were submitted to the Department for response subsequent to the hearing:]

QUESTIONS SUBMITTED TO HON. JOSEPH A. MAIN

QUESTIONS SUBMITTED BY SENATOR TOM HARKIN

Question. Mr. Main, I applaud the blitz inspections that you ordered last month. As you've said, inspectors can't be in all parts of every mine, every day, on every shift, so the Mine Safety and Health Administration (MSHA) must be smart about how it implements its inspection activities. How many additional "blitz inspections" will you conduct under your current budget and the 2011 budget request?

Answer. From April 19–23, 2010, MSHA conducted impact inspections ("blitz inspections") at 57 targeted underground coal mines whose history of underground conditions indicated a significant number of violations related to methane accumulations, ventilation practices, rock dust applications, and inadequate mine examinations. Unlike the statutory inspections that are conducted of the mine in its entirety, MSHA focused on conditions associated with an explosion, i.e., methane, mine ventilation, and rock dusting, and captured the phones to prevent advance notification of MSHA enforcement presence at the mine. MSHA issued 1,454 citations, closure orders and safeguards to those 57 coal mines. MSHA also conducted impact inspections at other coal mines and expanded impact inspections to include metal and nonmetal mines with violation histories indicating hazardous conditions where injury or death could result from ground control, fire protection, safe access, or explosives storage. During the period of May 3 through 6, MSHA issued 534 citations and orders to 15 metal and nonmetal mines.

MSHA intends to conduct additional blitz inspections during the remainder of this fiscal year and in fiscal year 2011 on an as-needed basis.

In addition to focusing on mines with violations that indicate a history of particular conditions, future blitz inspections will also be conducted in tandem with MSHA's pattern of violations program. MSHA is currently working on reforms to the administrative guidance on the pattern of violations screening criteria to better reflect the intent of the act. These changes can be implemented prior to the completion of current rulemaking and any possible legislative reforms. I have directed MSHA staff to evaluate how we can enhance the pattern of violations program with use of blitz inspections to broaden the net on problem mines and noncompliant operators.

We are currently in the formative stages of planning and have not yet determined the scope of these inspections, the specific number we plan to conduct, the resources necessary to support these efforts, and how to utilize blitz inspections within our budget request for 2011 while continuing to ensure that we complete all regular mine inspections.

Question. Mr. Main, I have been working with the Department of Labor (DOL) on the issue of worker injury under-reporting in the context of the Occupational Safety and Health Administration. As a result, DOL is now doing additional work to better understand research that points to a potential undercount of worker inju-

ries as reported by employers. Can you shed some light on this issue in the mining industry and actions MSHA is taking or considering to ensure that injury counts obtained by operators are reliable and fully representative of the incidence of injuries in the industry?

Answer. MSHA requires mine operators and mining contractors to report all injuries and occupational illnesses which result in death, days away from work, or days of restricted work activity. MSHA inspectors periodically conduct audits to ensure that the information submitted to MSHA is complete and accurate. These audits include a review of mine files; interviews with management, miners, and representatives of miners; and a comparison of reported injuries with workers compensation records when they are available.

MSHA recognizes that some mine operators under-report injuries and occupational illnesses. What we don't know is the extent of under-reporting. One of the challenges to fully understanding the problem and identifying under-reporting is that our audit program is conducted by inspectors, and an increase in our audits would redirect resources from the other critical work of regular mine inspections. We have particular concerns about the completeness and accuracy of reporting by mining contractors. Under current regulations, contractors do not report on a mine-by-mine basis, making the data they provide less useful and less amenable to a meaningful audit. Contractors perform considerable work in the mining industry and information on man-hours worked is necessary to determine the rate of injuries, illnesses, and deaths by contractors.

However, we are not waiting for legislation to attack this problem. To better understand the scope of the problem of under-reporting, DOL is launching a study of injury and illness reporting by the mining industry, which will lead to a better understanding of the problem, and ultimately to better injury and illness data. The study is being funded through the Departmental Management Evaluation Fund.

MSHA will use the findings of this study to ascertain the degree to which operators and contractors currently report injuries and illnesses and determine the need for additional training, audits, and enforcement. Improving reporting of injuries will have a direct, positive impact on worker safety. In the interim, MSHA will continue to conduct part 50 audits and take enforcement actions whenever appropriate.

Question. Would you please provide more details on the better operational and emergency response needs that you have identified for additional investments? Please explain the specific needs and associated costs.

Answer. MSHA has performed a detailed assessment of the gaps in mine emergency response, including the response of mine operators and Federal and State governments. Several critical areas need to be improved to increase the probability of successfully rescuing miners during a mine emergency. MSHA provides specialized mine emergency response equipment and mine rescue teams to assist in mine emergencies. The equipment that MSHA provides includes an Incident Command Vehicle, Mobile Gas Chromatography Laboratory, Miner Location System, Communication Vehicle, Mine Rescue Robots, etc. Investments in technology and equipment will improve our capabilities and allow us to locate equipment in geographically diverse areas, significantly improving response time. Since actions in the first few hours of a rescue can dramatically improve the chance of a successful outcome, we are proposing to establish equipped trailers with basic first-response equipment in each of our 11 coal district offices and to establish caches of additional supplies in 2 field locations. We are also proposing to establish capabilities to analyze mine gases in 4 geographically dispersed locations. The total cost of this equipment is estimated at \$700,000.

In order to improve coverage, we are also proposing to add one equipped mobile gas laboratory and mobile engineering office in Denver, Colorado or Price, Utah. Currently, this equipment must be transported from the eastern stations. This would dramatically improve the response time to many mines in the Western United States. The total cost is estimated at \$700,000.

Continuous, secure, and rapid voice and data communications is critical from initial deployment to a mine emergency until the operation concludes. Communication between responders, rescue teams, and district and headquarters offices need to be constantly maintained, so that the best available expertise can be applied as rapidly as possible, and decisions are made considering all available data. Many mining operations are in remote areas where cellular phone coverage is not available, and radio communication is challenging due to extreme topographic conditions. Further, communication must be secure to prevent the dissemination of misinformation to the families of trapped miners and the public at large. We are proposing fully equipped communication vehicles for the eastern and Western United States, with secure communications, including phones, radios, networking capabilities, teleconferencing, etc. The total cost is estimated at \$1,075,000.

We are also proposing maintenance and upgrades to our existing Mine Emergency Operations fleet. This includes the Command Vehicle, Engineering Trailer, an electrical generator power supply vehicle, a trailer for mine rescue robot storage and transport, replacement of obsolete mine emergency operations computers, etc. The total cost is estimated at \$705,000.

I held a national mine emergency response conference with the mining industry on May 11, 2010 to address gaps in Government, industry, and mine rescue team response. Since it takes hours to transport MSHA mine emergency equipment when an emergency strikes, the need for the mining industry to quickly provide additional mine emergency resources to fill the gaps was addressed at the conference.

Question. Also, please describe how MSHA has utilized its increased appropriation over the past 3 years for these purposes in terms of specific upgrades and expenditures.

Answer. MSHA's appropriations increases were used for the following: In fiscal year 2007, MSHA purchased Self-Contained Self Rescuers (SCSRs) for \$200,000 and two mine emergency trucks for approximately \$560,000. In fiscal year 2008 and early fiscal year 2009, MSHA expended \$485,000 to purchase Mine Emergency Unit equipment, including SCSRs, Biopacks, multigas detectors, radios, and cap lamps, for the Pittsburgh, Beckley, and Price rescue stations. The purchase upgraded outdated equipment and replaced consumables to meet the critical need to have supplies available wherever the MSHA coal mine rescue team may suddenly be asked to deploy. In fiscal year 2009 MSHA purchased seismic equipment including: a truck designed to carry seismic equipment, system recorder, software, and a computer for use during mine emergency response. MSHA let a contract to re-write the system software so that it would be usable with new operating systems. Cost for upgrades in fiscal year 2009 totaled \$302,000.

Question. For each of the past 5 years (including the current year to-date,) how much funding has been allocated from DOL using the authority provided in MSHA's appropriation to spend funds on the costs of mine rescue and survival operations in the event of a major disaster?

Answer. MSHA has not received any funding from DOL under the cited authority in the last 5 years.

REVIEWERS NOTE: MSHA's appropriation language states ". . . and any funds available to the Department of Labor may be used with the approval of the Secretary, to provide for the costs of mine rescue and survival operations in the event of a major disaster."

Question. How has MSHA utilized the authority provided in the appropriations bill to promote health and safety education and training in the mining community through cooperative programs with States, industry, and safety associations?

Answer. MSHA promotes health and safety education through a variety of cooperative programs. The MSHA State Grants Program provides funds to assist States in mine safety-related activities as provided in section 503 of the Mine Act. In fiscal years 2008, 2009, and 2010, MSHA's annual award to States in the program was \$8,441,000. The State grant provides health and safety training in 49 States and the Navajo nation. Annually, the grantees provide training to approximately 225,000 miners. This training includes new miner and annual refresher training as well as specialty topics including mine rescue training.

The Brookwood-Sago Mine Safety grant provides funds for targeted educational and training programs and materials exclusively developed for mine emergency preparedness. Since fiscal year 2007, \$500,000 annually has been made available for these grants.

MSHA assists the Joseph A. Holmes Safety Association, a nonprofit association created in 1916, to promote health and safety in the mining industry, by providing technical assistance in coordinating efforts through grass roots safety and health programs and activities to the mining community. The organization is comprised of representatives from mine management and labor, State and Federal Government, academia, and vendors. This program recognizes exemplary safety records both corporately and individually and presents nationally recognized awards.

Question. How much funding would be used under the 2010 appropriation and 2011 request for this purpose?

Answer. MSHA's State Grant Program will provide \$8,441,000 in grants to the States in fiscal year 2010. The fiscal year 2011 request continues this amount for State grants. In addition, MSHA will provide \$500,000 in Brookwood-Sago grants in fiscal year 2010, and is requesting the same amount for fiscal year 2011.

Question. How will these activities specifically help miners report safety and health problems without fear of reprisal?

Answer. A major issue for MSHA is to ensure all miners are aware of their rights afforded to them under the Mine Act and have the opportunity to exercise those

rights without fear of reprisal. Upon my confirmation, I began a review of miners' rights protection programs carried out by MSHA to improve those. Our activities in this area have included improving inspectors' response to health and safety complaints, speeding up investigation and action on discrimination complaints filed by miners, and providing improved training to miners on their rights and protections afforded by the Mine Act. Currently, MSHA is in the process of updating existing Miners' Rights materials and developing new online content as well as a Miners' Rights DVD. These materials will be distributed to all grantees for inclusion in their training. As with previous initiatives, we will ask the grantees to utilize these materials in support of the Department's new strategic plan, including the "Voice in the Workplace" outcome goal. Since the grantees provide training for a large number of miners, we are confident that the Miners' Rights training conducted by the grantees will provide miners with a better understanding of their rights and protections. We are also making these materials available to miners and operators and will be distributing copies to other instructors and organizations who conduct miner training. We will continue to look at innovative ways to educate miners on their rights using MSHA-developed materials, including through our grantees.

Question. Lastly, the 2010 appropriations bill encouraged MSHA to consider a comprehensive review of safety and health programs. Please describe the actions taken and planned for this review.

Answer. The agency continues to review health and safety programs. To date in fiscal year 2010, personnel from MSHA's Educational Field Services (EFS) made 3,692 visits to mines, facilities, and training centers. Their main focus is to observe work practices, review, and evaluate training plans and programs and monitor instructors, making recommendations for improving miner health and safety. Also, to ensure MSHA-approved instructors are providing our miners with quality training, the EFS personnel and contractors hired to specifically evaluate MSHA-approved instructors have evaluated more than 776 instructors this fiscal year.

Also, this fiscal year the Small Mines Office (SMO), which focuses on mines with 5 or fewer people, has helped 1,600 small operators develop and maintain a safety and health program. During each SMO visit, specialists use a safety and health audit to show the most cited standards at their type of mining operation. The field specialists assist mine operators at mine sites to identify conditions that are out of compliance or those conditions or practices that require maintenance or management controls to ensure compliance. In addition, they explain miners' rights to the operators. In the fiscal year 2011 budget, MSHA plans to redeploy the work of the small mines office to its district offices to provide better geographic coverage and increased efficiencies in providing these services to small mines.

To ensure operators are providing effective training MSHA will continue evaluating instructors and training programs.

Question. MSHA has the authority to retain up to \$1,000,000 in fees collected for the approval and certification of equipment and use the fees for the same purposes. How much was collected under this authority last year?

Answer. MSHA collected a total of \$1,125,000 in fees during fiscal year 2009. Of the total, MSHA retained \$1,000,000 and used these fees for mine equipment certification and approval. MSHA returned the remaining \$125,000 to the Treasury.

Question. Could additional fee collection help support more timely approval and certification of mine equipment, without depressing interest in research and development in this field? If so, what would be an appropriate level for 2011?

Answer. An expanded budget authority to retain fees could allow MSHA to further reduce the current backlog of approval applications and expedite the process for the approval and certification of equipment and materials. The additional authority could support infrastructure improvements and state-of-the-art testing of equipment to more efficiently conduct approval testing and quality control auditing of equipment and materials. The subcommittee may consider increasing the level of retained fee collections to \$1,500,000 for fiscal year 2011.

Question. Please indicate the current status of MSHA recommendations contained in DOL Inspector General reports over the past 4 years. For any open recommendations, please explain why they are not yet closed.

Answer. The following is the status of MSHA recommendations contained in DOL Inspector General reports over the past 4 years.

Report 05-08-003-06-001—Crandall Canyon Mine

(Total 9 recommendations: 6 closed, 3 open)

Rec. Establish explicit criteria and guidance for assessing the quality of and potential safety risk associated with, proposed plans.

MSHA has worked closely with the National Institute for Occupational Safety and Health (NIOSH) in the past to formulate a pillar recovery risk factor checklist. A

study, which has been completed contains specific recommendations concerning the mining of barrier pillars, splitting pillars at deep cover, burst assessments, etc. In conjunction with the study, NIOSH has also revised the Analysis of Retreat Mining Pillar Stability (ARMPS) software, which will affect the MSHA evaluation of certain aspects of deep cover pillar plans. While MSHA has been briefed on certain aspects of the study and the changes to ARMPS, explicit criteria and guidance for assessing proposed plans have not been formalized due to the lack of a final NIOSH report.

NIOSH presented a workshop on the new ARMPS software to Roof Control Division (RCD) personnel and Coal Mine Safety and Health (CMS&H) Roof Control Supervisors at the MSHA Academy. This allowed both MSHA enforcement and Technical Support personnel a final opportunity to comment on the new ARMPS software prior to its release. In our opinion, it is an improvement over the current version, especially in the area of deep cover pillar retreat mining. Once the new ARMPS software is released, the RCD will be in a position to establish/update criteria for assessing the potential safety risk associated with proposed mining plans. The projected completion date for the issuance of MSHA guidance is 60 days after the release of the new ARMPS software and the NIOSH report to Congress.

Rec. Issue policy and guidance on the use of computer models, including appropriateness of input values and use of model results.

MSHA has worked closely with West Virginia University (WVU) on computer model guidance and issued a Program Information Bulletin, "Precautions for the Use of the Analysis of Retreat Mining Pillar Stability (ARMPS) Computer Program" (PIB P08-08). WVU is nearing completion on their project to develop guidelines for the use of LAMODEL (LAMODEL is software used for calculating stresses and displacements in coal mines). The end result of this WVU project will be the publication of a user's manual and a workbook for LAMODEL. The projected completion date for MSHA's policy/guidance is 60 days after the issuance of WVU's user's manual and workbook for LAMODEL. (Projected completion: July 30, 2010.)

Rec. Establish a Memorandum of Understanding with the Bureau of Land Management to share inspection or other information on mine conditions affecting safety.

MSHA did enter into a Memorandum of Understanding (MOU) with the Bureau of Land Management (BLM) April 8, 2008, to share inspection or other information on mine conditions affecting safety. As recommended by the OIG, MSHA has contacted BLM officials to discuss potential revisions to the MOU. Areas under discussion include extending the MOU to include surface coal mines and to address areas of mutual concerns such as subsidence monitoring, coal bed methane, ground control, etc. (Projected completion: August 31, 2010.)

Report 05-09-002-06-901—American Coal Company

(Total 5 recommendations: 2 closed, 3 open)

Rec. Establish a written plan for eliminating the current backlog of overdue mine plan reviews and maintaining timely reviews in the future.

MSHA took corrective actions to address backlogged mine plan reviews and maintain a timely review process. Additional guidance and staffing plan were issued to districts through CMS&H Memo No. HQ-09-048-A (ORM-8). "Complaints Received from American Coal Company Complaint #1: Timely Mine Plan Approval." Data summarizing the status of backlogged plan reviews (reduced by 78 percent as of February 2010) was provided to the OIG for their review.

Rec. Issue a written policy or, if necessary, pursue legislation to establish the basis for and circumstances under which inspectors are not required to comply with tracking requirements of ERPs during an inspection.

The General Inspection Handbook and the Hazard Condition Complaint Handbook (and related HCC database) will be revised to include the requirement that inspectors document in their notes compliance with CMS&H Memo No. HQ-09-049-A (ORM-8). (Projected completion: September 30, 2010.)

Rec. Issue written guidance to its inspectors and to mine operators, consistent with existing laws and regulations that clarify its policy regarding the proper evaluation of a bleeder system.

MSHA has developed and drafted guidance (multiple Program Policy Letters (PPLs)) on "Effective Bleeder Systems." Because of their technical nature, they are undergoing extensive Agency review. (Projected completion: July 30, 2010.)

Report 05-08-002-06-001—Chargeable Fatalities

(Total 7 recommendations: 3 closed, 4 open)

Rec. Develop and implement a standard protocol for first responders.

Rec. Establish and require a standard investigative protocol for all reported fatalities.

Rec. Require that a chargeability determination be made only at the conclusion of a complete investigation and considering all pertinent and available evidence.

Rec. Establish a system to assure that all facts and information used to reach a chargeability decision are supported by documentation.

MSHA implemented corrective actions to address the above recommendations. The written protocols were also formally incorporated into a revision of MSHA's Accident/Illness Investigations Procedures Handbook. Issuance of the Handbook was delayed in order to incorporate additional revisions resulting from a change in the issuance of orders under sections 103(j) and (k) of the Mine Act, as well as formal bargaining with the National Council of Field Labor Locals (NCFLL). (Projected completion for issuance of the revised AI Handbook: July 30, 2010.)

Report 05-08-001-06-001—Underground Inspection Mandate

(Total 7 recommendations: 6 closed, 1 open)

Rec. Ensure policies and procedures are developed for calculating the regular safety and health inspection completion rate and ensuring the inspection data used is correct.

MSHA implemented corrective action to address the above recommendation. The written protocol will also be formally incorporated into a revision of the Program Policy Manual (PPM), (Volume I, section 103, Inspections, Investigations, and Recordkeeping). (Projected completion: September 30, 2010.)

Report 05-06-006-06-01—Hazardous Condition Complaint Program

(Total 13 recommendations: 10 closed, 3 open)

Rec. Ensure that the expectations of timeliness for completing evaluations of hazardous condition complaints under the Mine Act, 30 CFR 43, and MSHA policy are consistent and quantified in specific terms (e.g., number of hours).

Rec. Ensure that the expectation of timeliness for beginning inspections of "imminent danger" allegations is quantified in specific terms (e.g., number of hours), and the subsequent inspections are started within those specific timeframes.

A protocol has been developed to address the timeliness of both the evaluation of hazardous condition complaints and the investigation of imminent danger allegations. This written draft policy is currently under management review. Once finalized, it will be incorporated into the Hazardous Condition Complaint (HCC) Handbook. (Projected completion: September 30, 2010.)

Rec. Ensure inspector notes receive appropriate supervisory review.

MSHA implemented corrective actions to address the above recommendation. The written protocol will be incorporated into a revision of the HCC Handbook. (Projected completion: September 30, 2010.)

Question. This subcommittee has supported the work of the Office of Accountability, which provides oversight and examination of MSHA enforcement programs to ensure that its policies, procedures, handbooks and guidance are being consistently applied. What have been the major findings of the Accountability Office's audit activities and have the corrective actions that have been implemented to address these findings resulted in expected improvements?

Answer. MSHA provided a report on the work and findings of the Office of Accountability and the corrective actions taken to the subcommittee in March 2010. A copy of that report is attached.

Question. How much funding is planned to be allocated to this office under the 2011 budget request and how many audits would be supported at this resource level?

Answer. The Office of Accountability is located in the Program Administration budget activity. MSHA plans to allocate approximately \$600,000 in fiscal year 2011 for this office. MSHA is currently evaluating the restructuring of the agency accountability audit functions to assure that targeted areas are effectively audited.

At this resource level, the Office of Accountability expects to conduct 24 accountability audits during fiscal year 2011.

Question. For each of the past 5 years, please provide the number of technical specialists by type available for duty.

Answer. MSHA has a wide variety of specialists, and each is a distinct discipline. Even between Coal, Metal and Nonmetal (MNM) and Technical Support, the work to be performed is very different. For this reason, we have reported the number of specialists for each of these programs separately. As of May 31, 2010, MSHA has the following positions in the Coal program:

COAL SPECIALIST POSITIONS

	Amount
Underground:	
Electrical	59
Health	56
Roof control	51
Special investigation	17
Ventilation	54
Surface: Impoundment	21
Total, coal specialist positions	258

MSHA is unable break down the number of underground coal specialists by expertise for past fiscal years, but can provide the following totals for underground and surface impoundment specialists for prior years:

	Underground specialists	Surface specialists (impoundment)
9/30/2009	213	
9/30/2008	176	14
9/30/2007	160	13
9/30/2006	156	14

Metal and Nonmetal had specialists in the following positions as of September 30 of each of the following fiscal years:

METAL AND NONMETAL SPECIALIST POSITIONS

	2006	2007	2008	2009	2010 ¹
Safety	6	6	7	7	6
Health	6	6	6	6	4
Industrial hygienist	3	3	1	2	3
Total	15	15	14	15	13

¹ As of May 31, 2010.

Technical Support had the following positions split between its Approval and Certification Center and Pittsburgh Safety and Health Training Center, as of September 30 of each year:

TECHNICAL SUPPORT TECHNICAL SPECIALISTS

	2006	2007	2008	2009	2010 ¹
Electrical engineers	21	22	20	22	22
Electronic technicians	1	1	1	1	1
Mechanical engineers	15	15	14	15	15
Mining engineers	20	19	17	16	18
Industrial engineers	2	2	2	2	2
General engineers	30	28	29	32	31
Civil engineers	19	19	19	19	19
Chemical engineers	1	1	1	1	1
Fire protection engineers	2	2	2	3	2
Engineering technicians	20	18	18	20	18
Physical scientists	12	10	11	12	12
Physicists	1	1	1	1	1
Physical science technicians	7	7	7	7	7
Chemists	7	7	6	4	4
Geologists	3	3	3	3	3
Mine safety and health specialists	4	4	4	3	3
Industrial hygienists	5	5	5	5	5

TECHNICAL SUPPORT TECHNICAL SPECIALISTS—Continued

	2006	2007	2008	2009	2010 ¹
Mining equipment compliance specialists	5	5	5	5	5
Total	175	169	165	171	169

¹ As of May 31, 2010.

Question. How does MSHA ensure that such staff are available in sufficient number and with appropriate skills and support to carry out their important functions?

Answer. The District Manager determines the need, area of expertise and projected workload on an annual basis and then works with the Administrator, Deputy Administrator, and Management Officer on the skill sets and needs, justifications, and budget allocations for additional personnel. The program area consults with the Budget Office and once approved at the Administrator level, the program area submits the justification to the Office of the Assistant Secretary for filling a new position and/or backfilling another position. Once the approval is received from the Assistant Secretary, MSHA begins the process for filling the vacancy.

In MNM, each district is approved for one specialist of each of the three types (Safety, Health, and Industrial Hygienist). For example, the Rocky Mountain and North Central Districts do not currently have Industrial Hygienists working full time on this work, but assign specialist work as an ancillary duty to qualified employees currently performing other functions. An annual health conference is conducted for review, education and planning.

In Coal, districts submit justifications for requests to hire directly to headquarters. Justifications include the rationale for the need, i.e. backfill due to attrition and ratios of the number of mines, mechanized mining units (MMUs), etc., to inspector or specialist. Headquarters reviews the justification and approves or rejects. Most often, specialist positions are filled from within the current inspector ranks; therefore, they are already seasoned journeymen inspectors. Vacancies specify the discipline or expertise that the district is seeking. Occasionally, most often when seeking an engineer, a vacancy is advertised to the “outside”, that is a non-MSHA employee.

Question. What level of support for such positions is provided in the current budget and under the 2011 budget request?

Answer. MSHA’s fiscal year 2010 budget includes funding for the current staffing as well as 4 specialist vacancies in Coal, 6 vacancies in MNM, and 12 in Technical Support. The fiscal year 2011 budget request contains the same amount of funding. The total number of specialists in the proposed fiscal year 2011 budget are 262 specialists in Coal, 18 in MNM, and 181 in Technical Support.

Question. Lastly, what are MSHA’s policies and procedures for completing review of mining plans, such as ventilation and roof control plans, which afford the highest level of safety and health for miners?

Answer. Mining plans, submitted by operators, are evaluated and approved on a mine-by-mine basis and take into consideration the specific conditions at the mine. Each Coal Mine Safety and Health district utilizes a checklist and other guidance materials, including Program Information Letters (PIL) and PPLs, which are used to review plans to ensure all safety and health issues are addressed before plan approval. The checklist provides the reviewer with the most updated list of factors that must be considered on a mine-by-mine basis in determining whether a mine plan, once implemented, will protect the health and safety of miners. If a District Manager finds that the proposed plan is deficient, the checklist is used to note the specific deficiencies in the operator’s plan submission when a rejection letter is sent to the mine operator. The current checklist is used during 6-month reviews of all mining plans to ensure that any new statutory/regulatory requirement is added to the plan (or any new guidance is considered by the District Manager in light of mine-specific conditions) and to address plan adequacy and citation history. Plans that involve special reviews, such as roof control plans that are complex due to unusual geological conditions, receive additional review during the approval process. For such roof control plans, the operator must submit plans with additional provisions and/or data/information with the plan or any amendments. MSHA’s Directorate of Technical Support, Roof Control Division also provides analytical analysis to assist the District Manager in determining the adequacy of all complex and/or nontypical plan approvals and amendments.

For Metal and Nonmetal mines, Escape and Evacuation Plans are reviewed twice annually by the district offices, as required by 30 CFR § 57.11053. Ventilation Plans

are required to be updated annually by the mine operator. Each district office reviews the plans on an annual basis as required by 30 CFR § 57.8520.

Question. How are technical disputes with mine operators related to submitted plans resolved?

Answer. In those situations where MSHA can no longer accept a provision of an approved plan, cannot approve a provision in a new plan, or cannot approve a proposed change to an approved plan, MSHA representatives will discuss the identified plan deficiency with the mine operator in an effort to gain consensus promptly on a modification to the provision so that the plan can be approved by MSHA and implemented by the operator. However, if the mine operator is unwilling to make plan modifications that MSHA believes necessary after a full and fair consideration to provide the requisite level of miner protection, and the operator adopts a deficient mine plan and/or evidences an intent to mine in accordance with an unacceptable plan provision, MSHA will issue a citation for a violation of the Mine Act. Unless the operator evidences bad faith in conducting mining operations without an approved plan, such violations generally are cited under section 104(a) of the Mine Act, and they do not involve unwarrantable failure findings.

The following several paragraphs show how the three situations described above are handled.

When MSHA determines that a plan provision is no longer adequate, the following plan approval revocation procedures are followed:

- The District Manager provides written notification to the operator stating that changes are needed in the plan, identifies the reason(s) such changes are needed, affords the operator an opportunity to meet with District personnel to discuss any proposed changes, and sets a reasonable period of time for the operator to submit revised plan provisions to the District.
- If the operator fails to timely make modifications sufficient to address the District Manager's concerns (or through District and operator discussions the differences concerning the plan cannot be resolved and the operator does not re-submit a revised plan), a second written notification is sent from the District Manager to the operator. The purpose of this notification is to inform the operator that the District continues to be unable to approve existing plan provisions for reasons identified in the notification, specify a time by which suitable plan provisions must be submitted by the operator to the District, and notify the operator that after such time approval of the existing plan will be revoked and the operator will be without the required approved plan. Operating after the revocation date is a violation of the standard that permits operation of a mine only pursuant to an approved plan.
- If the parties reach impasse after good-faith discussion, MSHA issues a citation, which the operator may contest before an Administrative Law Judge (ALJ) of the Federal Mine Safety and Health Review Commission (FMSHRC). The operator can request an expedited hearing. The ALJ makes a decision based on evidence provided, either requiring the operator to submit a revised plan for MSHA approval or finding unreasonable the District Manager's decision to refuse to approve the plan as submitted. Prior to resolution by the FMSHRC, the operator can abate the citation and continue to mine by adopting and mining in accordance with a plan that contains provisions that MSHA has identified as being necessary to achieve the appropriate level of miner protection.
- With this approach, there is no need to operate in violation of the mine's approved plan, and the violation would be "technical" in nature.

In the case of an operator-proposed change to an existing approved mine plan, if approval of the change is denied, the operator could notify the MSHA District that, as of a certain date, the mine's existing approved plan is no longer adopted by the operator, and that the operator intends to adopt the proposed change which is not approved. On that date, a section 104(a) citation would be issued for the operator's failure to have and adopt an approved plan, and the operator may contest the citation before a FMSHRC ALJ. Abatement would be achieved by the operator promptly adopting the provisions of the most recently approved plan for the mine. Again, there need not be any changes made in the actual mining procedures, and the violation would be "technical" in nature.

The case of a new mine plan with a provision that cannot be approved would be handled in a similar manner. The operator would indicate that mining operations will begin on a particular date, using the plan that contains the provision which is not approved. On the date indicated for starting operations, a citation would be issued for failure to adopt and follow an approved plan, as required by the applicable standard, and the operator may contest the citation before a FMSHRC ALJ. Abatement would be achieved by the operator promptly adopting provisions that satisfy MSHA's previously documented concerns.

Under each of these circumstances, once a citation is issued, the operator has the right to contest the violation and to present evidence to an ALJ regarding the reasons why the disputed plan provision should have been approved. Likewise, MSHA would present its reasons for revoking or denying approval.

Question. According to information from DOL, roughly 95 percent of MSHA citations over the past 4 years have been or are expected to be upheld without change, including those that have gone to a hearing before the FMSHRC. And, Mr. Main indicated in his testimony that less than one-half of 1 percent of citations are vacated. However, both Mr. Main and Ms. Smith indicated that steps are being taken to make the citation process more objective and consistent, and address simplification of the penalty rules, which should result in fewer contested citations. Would you both describe the steps taken and/or planned and the funding required to support these activities?

Answer. The steps MSHA is taking and/or plans include the following:

- Ensuring consistency among inspectors is one of MSHA's priorities. Currently, a new MSHA inspector must participate in extensive classroom training for up to 18 months as well as in on-the-job training with a journeyman inspector before the inspector can begin unsupervised inspection duties. MSHA is auditing inspector performance to improve quality and consistency. Following confirmation of Assistant Secretary Main, MSHA initiated a training program for all supervisors that includes "law, regulation, and policy," "citation and order writing," and "field activity review." That training program assures that MSHA journeyman inspectors are properly overseeing on-the-job training of new inspectors.

In addition, MSHA has recently undertaken a distance learning initiative to provide additional training to entry-level and journey-level inspectors. This type of training allows MSHA to deliver more training at a low cost to inspectors. MSHA currently has 18 distance-learning training programs available for coal mine inspectors. One example is the recently released "Rules to Live By" course. "Rules to Live By" training focuses on 24 frequently cited standards (11 in coal mining and 13 in metal/nonmetal mining) associated with conditions that commonly cause or contribute to fatal accidents in the mining industry. Over time, the distance-learning initiative will result in improved consistency in enforcement.

MSHA will continue to review its inspector training programs, and where necessary, adjust or expand training for improved consistency. In addition, MSHA is evaluating the citation writing process to improve simplicity and clarity, and to establish a method to locate and correct any errors in the citations that cause operators to file hearing requests with the FMSHRC.

- MSHA is in the process of revising the MSHA conferencing process with mine operators following issuance of citations and orders but prior to the actual contesting of the citation. Under the current system utilized by most MSHA districts, the MSHA district conferences are not held to resolve disputes until after the penalty is contested which then requires approval by the FMSHRC. These settlements add to the backlog of cases pending before the FMSHRC. By holding the conferences prior to the contesting facts in dispute the violations can be immediately resolved and settled.

- MSHA plans to revise its criteria for a proposed assessment of civil penalties. Simplifying and clarifying the procedures for the citation process and the assessment of civil penalties should eliminate some of the areas of dispute when a citation is issued, which should in turn reduce the number of contested citations.

The civil penalty regulations were last revised in 2007, and adjusted for inflation in 2008. MSHA will be evaluating proposed penalties to assure that they are a sufficient deterrent for operators who fail to comply with safety and health requirements. In most of the contested cases before the FMSHRC, the issue is not whether a violation occurred. Instead the dispute is over the gravity of the violation, the degree of mine operator negligence, and other factors. Currently, when writing a citation a mine inspector determines:

- Among five categories the likelihood of injury from the violation;
- Among four categories the severity of an injury if one occurred;
- The number of persons affected by the hazardous condition;
- Whether the violation is significant and substantial; and
- Among five categories the operator's degree of negligence.

Once a citation is issued, MSHA issues a proposed assessed penalty. MSHA's existing civil penalty regulations involve assigning specified penalty points to a violation using various tables that set forth the penalty criteria in the Mine Act. The total points are then converted into a dollar amount using a penalty conver-

sion table. Penalties increase more significantly for large mine operators, operators with a history of repeated violations of the same standard, and for operators whose violations involve high degrees of negligence or gravity. MSHA's rulemaking process will consider how to simplify the procedures regarding the issuing of citations and the assignment of penalty points. MSHA has included this rulemaking on the Department's spring regulatory agenda and plans to issue a proposed rule in January 2011.

MSHA does not anticipate requiring additional funding for these activities.

Question. During the hearing, both Mr. Blankenship and President Roberts raised concerns about how the accident investigation is to be conducted. I would like the Department's rationale for how it's planning to conduct this investigation. How will the Department ensure that this investigation is comprehensive and open and gets to the bottom of what caused this accident as quickly as possible, so we can avoid another mine accident?

Answer. The investigation of the Upper Big Branch (Upper Big Branch) mine accident is being conducted as a coordinated investigation of MSHA and two investigative teams from the State of West Virginia. The planning of the investigative process was driven by a commitment to learn what caused the accident, to transparency and openness, and to ensure that the investigation does not impede the ongoing criminal investigation of the U.S. Department of Justice.

The coordinated Government investigation will use all Federal and State enforcement tools that are available, including subpoenas. A Federal-State accident investigation team will conduct a physical inspection of the underground portions of the mine (with representatives of the miners and the mining company), collect documents and other physical evidence from Performance Coal Company and other interested persons, and conduct interviews of witnesses with knowledge of relevant facts. In order to facilitate the interviews, the State of West Virginia has agreed to issue subpoenas, and, actually, has issued a few subpoenas in cases where they were found it to be necessary. MSHA also intends to hold an unprecedented series of public hearings that will build on the information that is learned from initial investigative activities. One hearing is designed to be a fact-finding hearing; another will explore the technical aspects of the theory or theories surrounding the explosion; a third hearing will be a public forum that offers surviving family members the opportunity to express their thoughts; and a fourth hearing will be a town hall meeting designed to promote the exchange of ideas on how to create a "culture of safety" at mining operations, and gather recommendations for the future. Together, these activities will constitute the most comprehensive and open investigation in the history of MSHA, and MSHA will publish a detailed report of the investigative findings.

While both Mr. Blankenship and Mr. Roberts raised concerns about the exclusion of their own organizations from the Government-only initial interviews, the implication that MSHA will be able to hide possible malfeasance on its part by excluding the general public ignores the presence and participation of the independent West Virginia investigators at the interviews. Members of both West Virginia investigative teams are present at all interviews and are given the opportunity to, and in fact do, question witnesses extensively.

Question. Further, how will the internal review be thorough and objective, so MSHA and others understand what needs to be corrected at MSHA in terms of its adherence to its own policies and procedures?

Answer. Consistent with its historical policy and practice, MSHA has formed an Internal Review (IR) Team to examine the agency's own actions before the explosion. The IR Team, which is separate from the Accident Investigation Team, will collect relevant documents and information, conduct interviews of various witnesses, and will publish its findings, conclusions, and recommendations.

Question. Last, how much funding is needed to ensure that the investigation and internal review is thorough, objective, and open?

Answer. MSHA estimates it will need approximately \$4,500,000 to conduct a thorough review of the events at the Upper Big Branch mine disaster. This reflects the estimated total cost for the MSHA-conducted Accident Investigation, Internal Review, and public hearings. A recent comparable investigation (Sago) cost approximately \$1,000,000 for the accident investigation and internal review. The Upper Big Branch investigation will be on a significantly larger scale with a greater number of staff detailed to both the investigation and internal review. In addition, the accident investigation will consist of an initial investigation followed by a series of public hearings, which will require significant preparation and will address broader issues such as the reluctance of miners to come forward and report hazardous conditions at their mines.

Additionally, \$1,000,000 is necessary for the potential independent investigation and critical review of MSHA processes conducted by the National Science Foundation or similarly esteemed organization.

Question. How many mines have records of violations similar in number to the Upper Big Branch mine, and how many have a history of frustrating MSHA efforts to enforce compliance?

Answer. There are 29 mines that have more Significant and Substantial (S&S) citations and orders than Upper Big Branch during fiscal year 2009–fiscal year 2010 (as of June 3, 2010). Of these 29, 4 are Massey Energy Company mines. Some of these mines are much larger mines with more mining sections, producing more tons of coal and employing many more miners than Upper Big Branch.

Question. What is MSHA doing immediately to address these mines?

Answer. MSHA conducted impact inspections of coal mines whose history of underground conditions indicated a significant number of violations related to methane accumulations, ventilation practices, rock dust applications, and inadequate mine examinations. MSHA issued 1,454 citations, orders, and safeguards to 57 coal mines during the week of April 19 through 23, 2010. Since then, we have conducted additional impact inspections at both coal and metal/nonmetal mines, and we plan to continue to target mines with compliance problems. In six Kentucky mines where MSHA conducted impact inspections, MSHA found ventilation and dust violations that affected entire mines and consequently issued closure orders that required the mines to be closed until the violations were abated.

As I mentioned in my May 20, 2010 testimony before the subcommittee, MSHA is endeavoring to become less predictable with our inspections. Modeled after MSHA's special respirable dust emphasis inspections at underground coal mines, MSHA will be conducting more inspections during the off-shifts and increasing inspector presence at mines with multiple mechanized mining units. Where evidence warrants, enforcement personnel are "capturing the phones" during subsequent impact inspections and increasing our effectiveness by preventing operators from giving advance notice of our inspection activities. MSHA is also launching legal actions against mine operators that provide advance notice of inspections, such as the recent case involving two Kentucky coal mines.

MSHA also plans additional "blitz inspections" during the remainder of this fiscal year and in fiscal year 2011. We are currently evaluating selection criteria for mines warranting targeted enforcement beginning in July 2010.

In concert with DOL attorneys, we have identified mines with large numbers of contested violations for which we have requested expedited hearings before the FMSHRC and will request additional hearings when we find mines that would meet the criteria for being placed on a statutory "pattern of violations" absent the lack of final orders from the FMSHRC.

MSHA is currently providing technical assistance to Congress on amending the Pattern of Violation standard contained in the Mine Act and has announced plans to revise the Pattern of Violations regulations and screening criteria. MSHA will carefully craft these regulations and screening criteria to eliminate the existing flaws that allow mine operators to avoid the stricter sanctions by tying up serious violations in litigation.

Question. According to news media, MSHA negotiated an agreement with Massey Energy in 2006 to waive filing deadlines for contesting citations. Is there any truth to that?

Answer. The Department's Office of the Solicitor (SOL) negotiated an agreement with Massey Energy in 2006 not to oppose Massey's motions to reopen cases under certain conditions. Attached are the September 2006 informal agreement and the May 2009 letter rescinding the agreement. Operators can contest citations, they can contest the penalties assessed at a later time because of those violations, or they can contest both. SOL entered into the agreement in 2006 to try to reduce the number of pre-penalty contests (i.e., contests of underlying citations issued before a penalty was assessed). At the time SOL entered into the agreement, Massey was filing a large number of frivolous pre-penalty contests so that, if it subsequently neglected to file timely contests of the penalties themselves, but won the pre-penalty contest of the underlying citation, MSHA would not be able to collect the associated penalty.

To reduce the filing of so many pre-penalty contests, and the resulting burden of having to litigate the underlying violation in each case, SOL agreed not to oppose mistake- or inadvertence-based requests to reopen penalties that Massey neglected to timely contest if (1) the reopening request was filed within a reasonable time, not to exceed a year, and (2) MSHA would not be prejudiced by reopening.

At the time the agreement was entered into, SOL did not oppose, and the FMSHRC granted, the majority of reopening requests. In practice, the agreement did not significantly alter the requirements for reopening previously applied by

MSHA and the Commission. The agreement did not purport to, and could not, restrict the FMSHRC's application of existing rules and case law to reopening requests.

A search of SOL records establishes that, during the time the agreement was in effect, SOL opposed Massey reopening requests at approximately the same rate it opposed other reopening requests. Specifically, SOL opposed four reopening requests and decided not to oppose seven. As to reopening requests pertaining to the Upper Big Branch mine, SOL opposed three reopening requests and declined to oppose none.

Over the following 2 years, Massey started using the agreement for purposes beyond what it was intended and tried to claim that there was a blanket agreement to not object to reopening requests. The agreement clearly had outlived its intended purpose, and Massey's attorneys were misapplying it. Accordingly, SOL formally rescinded the agreement.

**INFORMAL AGREEMENT BETWEEN DINSMORE & SHOHL ATTORNEYS AND
DEPARTMENT OF LABOR -- MSHA -- ATTORNEYS REGARDING MATTERS
INVOLVING MASSEY ENERGY COMPANY SUBSIDIARIES**

SEPTEMBER 13, 2006

This memorializes an agreement reached by Dinsmore & Shohl attorneys and Department of Labor -- MSHA -- attorneys regarding matters involving Massey Energy Company subsidiaries. This agreement is informal and is entered into in an effort by the parties to proceed with the filing of and discovery for existing as well as future cases brought on behalf of Massey Energy Company subsidiaries by Dinsmore & Shohl attorneys.

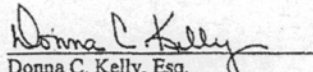
As long as the terms and conditions of this agreement are followed by the parties, Massey Energy Company subsidiaries agree to refrain from filing Notices of Contest on 104(a) Significant and Substantial citations until the proposed penalty is assessed unless there is something particular to be immediately addressed with an individual citation. The Secretary of Labor agrees that in the event a Massey Energy subsidiary fails to timely return MSHA Form 1000-179 or inadvertently pays a penalty it intended to contest, the solicitor will not object to the Company's motion to reopen the matter as long as the motion to reopen is filed within a reasonable time of the Company learning of its mistake or inadvertence, there is no prejudice to the Secretary by the delay and the motion to reopen is not filed more than one year after the proposed assessment has become a final order of the Commission. Nothing herein is intended, nor should it be construed, to interfere with the Commission's full and complete consideration of any motion to reopen a matter.

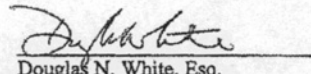
In addition, the parties agree to conduct all discovery with mutually agreeable timeframes and will be flexible in agreeing to extending timeframes for serving and responding to discovery. Any agreements to extend the response due dates to written discovery will be handled on a case-by-case basis and will be confirmed in writing (including e-mail).

Discovery in currently pending contest cases involving 104(a) citations, including discovery that has already been served, will be stayed pending consolidation of these cases with the corresponding civil penalty cases. This means that discovery that has already been served by either party in these cases will not need to be responded to until consolidation of the contest case with the civil penalty case as long as the civil penalties are assessed in a reasonable amount of time. However, informal discovery and negotiation may continue during this stay period, if agreed to in individual matters.

To resolve the pending Notices of Contest cases without further litigation, the parties agree that the Company may request a settlement conference on each citation/order pending at the time of this agreement that it wishes to attempt to settle. In order to avoid a significant number of conferences being requested at the same time, the Company agrees to submit conference requests for no more than ten citations per week. The settlement conference will address each citation/order which the operator wishes to attempt to settle. No attorney will attend such conferences except in circumstances where attorneys for both MSHA and the

Company may be asked by the Conference Officer to participate. For each matter successfully resolved at the settlement conference, the Company will move to dismiss any associated Notice of Contest it filed. For any 104(a) citations/orders which the Company does not request a settlement conference, and for any citation/order which the settlement conference did not result in settlement, the mine operator will agree to a stay of the contest proceeding pending consolidation with the proposed civil penalty proceeding. The mine operator agrees to file with the Commission appropriate motions, including motions to consolidate, in order to consolidate all contest proceedings with the related civil penalty proceeding. As part of this agreement the Secretary agrees to permit conferencing of citations where an Informal Conference was requested prior to the date of this agreement but was denied because a Notice of Contest had been filed with the Commission.


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May 13, 2009

Donna C. Kelly
Dinsmore & Shohl, LLP
P.O. Box 11887
Charleston, WV 25339

Re: Rescinding of Informal Agreement Involving Massey Energy Company
Subsidiaries (Dated September 13, 2006)

Dear Ms. Kelly:

This is to notify you that our office is hereby rescinding and withdrawing from the terms of the agreement that you and I signed and dated September 13, 2006 (Copy Attached). We are taking this action partly because several of the terms of the agreement are now obsolete and unnecessary. Also, we believe that the agreement has been used by your clients too frequently merely to fail to provide adequate reason for a failure to contest the proposal of a civil penalty.

As you know, this agreement was beneficial to both your clients and to MSHA at the time it was negotiated, but subsequent events have made those benefits less obvious to the government. For one thing, the Commission has dealt with the tactic of an operator's filing unnecessary pre-penalty notices of contest by appropriately staying all action in those matters until they can be joined with a civil penalty docket. Unless the operator can show a true need for an expedited proceeding, we never could see any rationale for that particular tactic, since it merely clogs the administrative litigation process without simplifying or resolving any issues. Still, we continue to receive vastly more such pre-penalty contests from clients represented by your firm than from any other entity. The fact that your clients have minimized the filing of such actions for routine Section 104(a) "S&S" violations has been somewhat of a relief for our office and for the Commission, but we still see far more pre-penalty contests than appear to be justified by law or logic. Since the Commission has devised a reasonable approach to these cases, these contests are not as large a burden on us as they were at the time we signed this agreement.

Another aspect of the agreement that has been rendered moot by subsequent events is the provision (fifth paragraph) for resolving pre-penalty contests that were pending at that time. The passage of time has rendered this provision essentially moot.

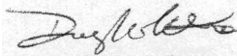
The provision for agreeing to conduct discovery under mutually agreeable time frames (third paragraph) embodies a practice that we and our opposing counsel have been using for quite some time --- and will continue to do so --- without the need for this written agreement.

The provision in the second paragraph of the agreement, related to our agreeing not to object to Massey's filing of a motion to reopen a final order has, in our opinion, been used too often to avoid providing valid reasons for the company's failure to file a timely contest of a proposed penalty. The agreement itself has even been cited to the Commission, in operators' motions to set aside final orders when operators failed to file a timely contest. It is our position that any operator seeking to set aside such a final order must also provide adequate specific reasons for its failure to properly contest the penalty, and this agreement has been used too frequently by operators as a basis for their position that a final order should be set aside. We do not agree with this use of the agreement, and the continued existence of the agreement is not beneficial to our interests in such matters.

Accordingly, as of today, May 13, 2009, we are withdrawing from, and rescinding our agreement to, the terms set out in the September 13, 2006 document, and the provisions of that agreement are no longer binding on us.

Thank you for your attention to this matter.

Yours truly,



Douglas N. White
Associate Regional Solicitor
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Boulevard
22nd Floor West
Arlington, VA 22209-2247

Question. Were other operators offered similar waivers? Please list the number of exemptions granted and deadlines waived annually.

Answer. SOL does not have authority to grant exemptions or waive deadlines. Only the FMSHRC can decide whether to allow an operator to reopen a case. SOL offered no other operators a similar agreement not to oppose reopening in certain specified circumstances.

Question. Why is MSHA not issuing an Emergency Temporary Standard to expedite its rule-making agenda?

Answer. MSHA has not ruled out the use of Emergency Temporary Standards (ETS). The Mine Act allows MSHA to issue an ETS when the Secretary determines that miners are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, or to other hazards, and that an emergency standard is necessary to protect miners from that danger. MSHA can only issue an ETS for health and safety standards promulgated under section 101 of the Mine Act. Because the regulation concerning Pattern of Violations is not a mandatory safety or health standard, this is not among the possible areas where an ETS would be implemented.

Question. Why is MSHA unwilling to revisit the screening criteria for pattern violators outside of the formal rulemaking process?

Answer. MSHA is not unwilling to revisit the screening criteria for pattern violators outside of the formal rulemaking process. Prior to the Upper Big Branch mine

disaster, MSHA was working on new screening criteria within the current regulations. Following the mine disaster, Congress requested that the Office of the Inspector General (OIG) review the pattern of violation screening criteria and report recommendations. Realizing that the pattern of violation system was broken, MSHA pledged to work with the OIG to evaluate the screening criteria to make improvements. MSHA is also currently providing technical assistance on legislation affecting the pattern of violation standard contained in section 104(e) of the Mine Act which could lead to possible amendments of the statute. With that in mind, along with plans by MSHA to revise the pattern of violation standards, MSHA will continue to work on new screening criteria.

Question. The National Institute for Occupational Safety and Health (NIOSH) has studied the most severe mine explosions to identify ignition locations and sources. NIOSH linked many fatalities to nonpermissible electrical equipment located in intake air courses. What is MSHA doing to address this and other issues raised by NIOSH?

Answer. MSHA is interested in this research and the potential to increase protection to miners from explosions involving nonpermissible equipment. MSHA is reviewing the results to determine what improvements can be pursued.

Question. MSHA and NIOSH are investigating an activation problem with the SR-100, which is an emergency breathing device that has been recalled. What is the status of the joint investigation?

Answer. On April 30, 2009, NIOSH, MSHA, and the CSE Corporation (CSE), the manufacturer of the SR-100, met to discuss progress on the investigation. CSE advised that the engineering company could not replicate the leak, but suspected the threaded connection between the valve and the cylinder body on the start-up oxygen cylinders could be the cause of the problem. They suspected that the application of the sealant on the threads was irregular on cylinders that leaked, which would be a Quality Assurance (QA) problem on received cylinders from Afrox (a South African company). The QA problem that Afrox may have is a manufacturer's final inspection and test process issue. Also, CSE's incoming inspection QA process may have to be improved to identify the cylinder defects prior to final assembly. NIOSH and MSHA told CSE that because the root cause cannot be identified, and since the problem cannot be confined to any particular subset of the population of start-up cylinders, the problem could potentially be found in any start-up cylinder in the field. We requested CSE to issue a second User Notice, notifying the industry about this, and also requested CSE to maintain their voluntary stop-sale, which has continued since the issuance of the February User Notice. When CSE has a solution, they will be allowed to return to production. Units in the field will need to be addressed either by a retrofit or replacement program.

Question. How many breathing units are affected?

Answer. There are approximately 80,000–90,000 CSE SCSRs in the field and a total of approximately 190,000 SCSRs from all manufactures in the field, according to records in the MSI IA SCSR database.

Question. What is MSHA doing to notify miners?

Answer. CSE issued the second User Notice the beginning of May. The MSHA Web site, www.dol.gov/MSHA, includes information on all User Notices and a training notice regarding the Manual Start of chemical SCSRs. All User Notices have been distributed to all underground coal mines. MSHA Inspectors are checking to see that miners have been notified at mines and have been trained in the manual start procedures.

Question. How is MSHA ensuring that operators address the problem?

Answer. MSHA and NIOSH jointly conducted conference calls with the key National Mining Association (NMA), Bituminous Coal Operators Association (BCOA), and United Mine Workers of America (UMWA) representatives to update the investigation. Inspectors have been instructed to check that miners have been informed about the CSE SCSR problem and that they have been trained in the manual start procedure. MSHA CMS&H and Technical Support have drafted one Procedure Instruction Letter (PIL) and two Program Information Bulletins (PIB). One PIB relates to the second User Notice distributed by CSE, disseminating the information across the industry. The second PIB clarifies PPL requirements for mine operator testing of SCSRs with a 1 percent sample, and reiterates procedures to follow when problems are discovered with any SCSR in the field. CSE is exploring retrofit options that potentially would have to be provided for all SR-100 SCSRs in the field. CSE has a second engineering company exploring the use of a CAT scan to determine the distribution of sealant along threaded connections. Weekly progress reports are being provided to NIOSH and MSHA.

Question. What is the plan and timeline for reorganizing MSHA District 4 into two districts?

Answer. Recently, we provided information to the Congress that included a proposal for \$1,048,000 to begin the reorganization and subsequent build-out of a new District office. MSHA has been working with the General Services Administration (GSA) to identify potential locations to house the new facility in the vicinity of the existing Pineville, West Virginia field office. If supplemental funding is provided, MSHA estimates the entire process of opening a new District office will take between 16–24 months, depending on our ability to find a suitable pre-existing structure that meets space requirements. Absent that, GSA would enter into a lease agreement for a build-to-suit facility. This would push the occupancy timeline of the District's permanent home out to approximately 24 months. MSHA plans to hire between 16–18 personnel to staff the District Office. There will be no increase to the Coal activity's PTE ceiling; these positions will be realigned from other Coal districts where mining activity has decreased. In order to be fully staffed and operational prior to a permanent building being ready for occupancy, MSHA will secure temporary space to house employees.

Question. Assistant Secretary Main, please describe any irregularities that MSHA has found on the fan charts for the Upper Big Branch mine?

Answer. The accident investigation into the Upper Big Branch mine disaster is still ongoing. Matters such as these and how they relate to other evidence in the investigation are being examined by the investigation. Once that is concluded, we will be able to report on the findings.

Question. I request that you or Dr. Howard describe whether there are more advanced and tamper-proof technologies for mine fan record-keeping?

Answer. The current 30 CFR 75.312 regulation requires the measurement and recording of the mine fan pressure and examination of the fan each day. In most cases, the fan pressure is measured by a mechanical recorder with a paper chart on it. Some mines utilize a computerized system using the mine's Atmospheric Monitoring System and routing the information to a centralized facility. Computerized monitoring systems provide the opportunity for data to be electronically transmitted and stored.

Question. How can we ensure that records are accurate, and that MSHA receives the accurate information in time to intervene promptly on behalf of miners?

Answer. Fan charts have been used for years, but other methods could be utilized. A system that would download data at a secure data collection location may provide additional information. Expanding the use of mine-wide atmospheric monitoring that would constantly monitor and identify changes in air pressures and quality such as methane, carbon monoxide, and oxygen levels at strategic locations in the mine that could trigger alerts to miners would improve miners' safety.

Question. How can advanced technology and computerized records improve this process?

Answer. Advanced technologies can improve mine safety in a number of ways. As noted, the use of mine-wide atmospheric monitoring systems can provide immediate information on problems that can lead to mine explosions. Technologies that monitor the mine atmosphere at strategic locations that can detect levels of methane, carbon monoxide, oxygen deficiencies, loss of ventilation pressures, reversal of air directions, and provide warning before they endanger miners can be implemented. These are sound preventative measures that can help protect miners.

To help speed-up mine rescue efforts during an emergency, mine-wide atmospheric monitoring can be accomplished with a tube bundle system. In a tube bundle system, plastic sampling tubing is placed in strategic underground sampling locations, such as section return regulators and bleeder evaluation points, and is extended to a location on the surface of the mine. Sampling pumps located on the surface of the mine draw the air samples to monitoring and recording equipment. A similar method has long been used successfully by MSHA to sample mine atmospheres remotely after a mine fire or explosion. A tube bundle system has also been used extensively in Australian mines.

LAKE LYNN EXPERIMENTAL LABORATORY

Question. Review the estimates for getting Lake Lynn reopened and to provide an updated estimate to the subcommittee.

Answer. The estimated cost of repairs to the Lake Lynn Experimental Laboratory is \$12 million pending availability of appropriations. The following provides an outline of the timeline and schedule of repairs for the Lake Lynn Experimental Laboratory based on the successful acquisition of property by December 30, 2010:

—*December 2010.*—Acquisition of Lake Lynn facility is pending approval.

—*January 2011.*—Design phase for construction and repairs begins assuming the Centers for Disease Control and Prevention acquires purchase of Lake Lynn.

—*June 2011–2013.*—Quick entry repairs completed to enable temporary access through existing primary access route, until construction of the two new entry portals is complete. When the new portals are operational, the temporary access route will be decommissioned because of the poor quality of the roof rock in the area of that route. Construction of new portals is complete, providing full access to the mine, pending availability of appropriations.

QUESTIONS SUBMITTED TO JOHN HOWARD

QUESTIONS SUBMITTED BY SENATOR THAD COCHRAN

COAL DUST EXPLOSIBILITY METER (CDEM)

Question. The goal of the National Institute for Occupational Safety and Health's (NIOSH) Office of Mine Safety and Health Research is the prevention and elimination of mining fatalities, injuries, and illnesses through research and safety interventions.

NIOSH is currently pursuing commercialization of the CDEM, which is a portable device that will provide the mining industry with a means to assess accurately and in real time the hazard of coal mine dust explosibility. As it now stands, an inspector collects samples that are sent away and take 2 weeks to process. CDEM will not be commercially available until next year.

NIOSH has also conducted research into the utility, practicality, survivability, and cost of refuge alternatives in an underground coal environment. State and Federal efforts resulted in the introduction of refuge chambers throughout the underground coal industry. However, alternatives to chambers such as an in-place shelter were left largely untouched and a range of chamber operational questions remain unknown.

It my understanding that we only learned after the Upper Big Branch mine explosion that the mine had an impermissible coal and rock dust mixture shortly before the explosion. Could real-time information on the hazard have played a role in potentially preventing this explosion and future explosions?

Answer. The ratio of coal and rock dust mixtures in underground coal mines provides insight into the explosibility hazard in a mine. Historically, samples of the dust mixture were collected and then sent to a laboratory for analysis, which required days or weeks for results to be obtained. NIOSH believes that reducing this analysis time would greatly improve the mining industry's ability to avoid potential explosion hazards. Therefore, NIOSH conducted a research study to develop a device capable of evaluating the ratio of coal and rock dust mixtures and the explosibility hazard in real-time. NIOSH achieved its research goals by developing the CDEM, which provides the same information as historical methods but within minutes of collecting the samples. Thus, the CDEM allows mine operators to know immediately if they must add more rock dust to maintain an inert mixture of rock to coal dust to avoid an explosion hazard. Similar to the past development of the methanometer, which allowed mine operators real-time knowledge of methane levels, the CDEM is expected to reduce the risk of explosions by allowing operators to identify and mitigate explosion risks at significantly earlier time points.

Question. Would additional Federal resources allow for the commercialization of the CDEM sooner than the next year?

Answer. NIOSH recognizes the significant benefits that the CDEM would provide to the underground coal mining industry by allowing explosion hazards to be identified and mitigated at earlier time points. As such, NIOSH has used its allocated funds efficaciously to assist in the commercialization of this device. Therefore, any additional Federal resources would have minimal impact on the timeframe for when this device becomes available to the public. However, a significant barrier to the commercialization of this device still exists. At the May 20, 2010, Mine Safety hearing, Dr. Howard indicated that the primary barrier to commercialization is the lack of a regulatory driver, given the small market share that the United States underground coal mining industry represents to potential manufacturers.

Question. What can be done to increase mineworker confidence in refuge chambers, and to address the issue that the value of this potentially lifesaving technology remains undetermined?

Answer. NIOSH conducted a number of in-house and contract research efforts in response to the mandates in the MINER Act and for preparation of the report to Congress. Specific in-house studies addressed such issues as the moving of refuge chambers located on active sections, the economic aspects of refuge chambers and in-place shelters, explosion pressure requirements, location, food and water require-

ments, interior space requirements, training needs, and simulated occupancy testing of the systems for providing breathable air. These data, coupled with feedback regarding refuge chambers already in use, have identified several critical gaps. These gaps, which remain a concern, involve the effectiveness of individual components of the technology and the ability of refuge chambers to function as advertised by the manufacturers. Therefore, NIOSH believes that the greatest impediment to increased mineworker confidence in refuge chambers relates to significant technology concerns rather than a perception issue within the industry. Until these functional issues are evaluated through a comprehensive research project, and the problems identified are addressed by the manufacturers, increased mineworker confidence may continue to be a concern. NIOSH is developing a research project to examine the major barriers to using refuge chambers and potential improvements to the technologies currently being used. The issues addressed may include, but will not be limited to, communications, heat and atmosphere management, scrubbing or purging of carbon monoxide, explosion resistance, movement and utilization, testing and approval processes, and training.

QUESTIONS SUBMITTED BY SENATOR ROBERT C. BYRD

MINE SAFETY AND HEALTH ADMINISTRATION

Question. National Institute for Occupational Safety and Health (NIOSH) has studied the most severe mine explosions to identify ignition locations and sources. NIOSH linked many fatalities to nonpermissible electrical equipment located in intake air courses. What is MSHA doing to address this and other issues raised by NIOSH?

Answer. NIOSH has informed Mine Safety and Health Administration (MSHA) that NIOSH is available to discuss the implications of the research referenced in this question.

INVESTIGATION OF THE SR-100

Question. MSHA and NIOSH are investigating an activation problem with the SR-100, which is an emergency breathing device that has been recalled. What is the status of the joint investigation? How many breathing units are affected? What is MSHA doing to notify miners? How is MSHA ensuring that operators address the problem?

Answer. NIOSH has played an active role in the investigation of the activation problem with the SR-100 in coordination with MSHA and the manufacturer. NIOSH, MSHA, and the manufacturer of the product in question (CSE Corporation) have met on several occasions to discuss the activation problem. At this time, the manufacturer believes that it has identified the source of the problem as being the sealant on the threads of the connection between the valve and the cylinder body on the start-up oxygen cylinders. Meanwhile, the manufacturer has not been able to identify a subset of its units with this particular problem, nor has the manufacturer identified the root cause of the problem in the manufacturing or QA process. The manufacture has stopped production and sale until the problem is resolved. NIOSH has issued several notices for users, including miners, on this problem. The most recent of these is the Respirator User Notice on the CSE SR-100 Self-Contained Self-Rescuer activation problem issued on October 20, 2010. In this notice, NIOSH and MSHA inform users of the actions they are taking to randomly sample and test SR-100 respirators from mines to determine the prevalence of the problem in field-deployed units. Once this investigation is complete, the agencies will decide what further actions may be necessary. More recently, NIOSH has identified an additional problem with opening some of the CSE SR-100 units, and NIOSH and MSHA are investigating this problem. NIOSH is currently developing training materials for mine workers that will explain how to determine if their SR-100 unit is functioning, and what they should do in the event that their unit fails to provide oxygen.

UBB MINE

Question. Please describe any irregularities that MSHA has found on the fan charts for the Upper Big Branch mine? I request that you or Dr. Howard describe whether there are more advanced and tamper-proof technologies for mine fan record-keeping? How can we ensure that records are accurate, and that MSHA receives the accurate information in time to intervene promptly on behalf of miners? How can advanced technology and computerized records improve this process?

Answer. NIOSH believes that mine-wide atmospheric monitoring is an advanced technology that may improve safety in that the information provided may be used in real-time to mitigate explosion hazards. These technologies may be used to identify changes in methane, ventilation parameters such as pressure and velocity, carbon monoxide levels, etc. throughout the mine. This data has great potential for detection of hazards that may otherwise go undetected.

LETTER FROM PATTON BOGGS LLP

Washington, DC, November 12, 2010.

Hon. TOM HARKIN,
Chairman, Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, Committee on Appropriations, Room 131, Dirksen Senate Office Building, Washington, D.C. 20510-6025.

Hon. THAD COCHRAN,
Ranking Member, Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, Committee on Appropriations, Room 131, Dirksen Senate Office Building, Washington, D.C. 20510-6025.

DEAR CHAIRMAN HARKIN AND RANKING MEMBER COCHRAN: I write on behalf of my client, Massey Energy Company ("Massey" or the "Company"), in response to certain questions posed by Senator Cochran and the late Senator Robert Byrd of West Virginia. Provided below is my best effort, in consultation with Massey, to answer those questions as thoroughly as possible in the hopes that it will be of assistance to your committee in its important work exploring the issue of mine safety in this country. If after you have had an opportunity to review our responses below, there is any further information that you need, we will make best efforts to assist you.

For the sake of clarity and convenience, we have set out the questions and answers together.

Senator Byrd Question Number One. You said that you have strongly resolved to do everything possible to prevent this type of incident from happening again, and we want to take you at your word. Nevertheless, after its 2006 mine disaster, the Aracoma Alma #1 Mine still, in 2007, received 100 withdrawal orders for unwarrantable failures to comply with the Mine Act, and 11 withdrawal orders for failures to abate cited violations in a timely manner. Additionally, you currently have several other underground mines in or near West Virginia that are already on track this year to have as many withdrawal orders as the Upper Big Branch Mine had last year. What specific actions will you take to reverse these trends and prevent further injuries, illnesses, or deaths? In this regard, I am referring to mines receiving repeated 104(d)(2) withdrawal orders so far this year, in the following quantities:

Spartan Mining—Road Fork #51—22 orders
 Freedom Energy Mining—Mine #1—32 orders
 Inman Energy—Randolph Mine—11 orders

Massey's Response:

The tragedy on April 5, 2010 at Performance Coal Company's Upper Big Branch ("UBB") mine deeply affected everyone at Massey; obviously, the greatest and most tragic impact was felt by the twenty-nine families who lost loved ones. In the face of this disaster, Massey has worked tirelessly to determine the cause of this accident and has redoubled its efforts to ensure to the extent humanly possible that nothing like it ever happens again. Apart from joining the Mine Safety and Health Administration ("MSHA") and the West Virginia Office of Miners' Health, Safety and Training ("WVOMHST") in the current underground investigation of the UBB mine, Massey has reevaluated its safety practices and implemented an even more demanding set of safety measures in all of its mines. Provided below is a summary of these changes.

Since Senator Byrd's question mentions the 2006 Aracoma accident, it is important to mention briefly the numerous safety measures instituted by Massey immediately afterward. Because that incident involved an underground fire, Massey specifically improved its methods of fire prevention and control; for instance, Massey retrained dispatchers and atmospheric monitoring system operators, including the dispatcher on duty at the time of the Aracoma fire. The mine's dispatchers are now trained in safe haulage related to ventilation systems, firefighting, and emergency evacuation. Massey also installed at Aracoma state of the art sprinkler fire-suppression systems that far exceed state and Federal requirements. In addition, Aracoma

now has: (i) new fire hoses with permanent water connection and improved access; (ii) thermal imaging devices; (iii) updated training of its mine rescue teams; (iv) a mobile firefighting trailer loaded with specialized firefighting equipment; (v) a mobile smoke room training unit to train miners for difficult mine fire evacuations; and (vi) enhanced quality assurance testing of all self-contained self rescue (“SCSR”) devices. In 2007, Massey even unveiled an innovation in the field of mine safety: a self-contained foam fire-fighting mine car. The 2007 withdrawal orders referenced in Senator Byrd’s question were more a reflection of MSHA’s heightened scrutiny of Aracoma in the wake of that accident than of conditions at the mine, and the validity of those orders is currently in contest. Indeed, in the same year that MSHA issued those withdrawal orders, Aracoma ranked among the very safest mines in the nation with a remarkable 0.00 nonfatal days lost (“NFDL”) incidence rate in 2007. Honoring that exceptional accomplishment, on May 9, 2008, the Joseph A. Holmes Safety Association presented Aracoma’s Alma and Hernshaw mines with prestigious national Pacesetter Awards for outstanding safety achievement. Aracoma also earned Massey Energy Company’s 2007 Bradbury Safety Award, an annual award recognizing Massey’s safest mining operation. This stark contrast between the withdrawal orders and contemporaneous safety awards is powerful proof that MSHA’s subjective enforcement actions do not always accurately reflect the safety condition of a mine.

With respect to UBB, Massey already had instituted a number of safety measures before the accident. As a result of an increase in MSHA citations and orders at mines like UBB and Spartan Mining’s Road Fork #51 mine, Massey created the Hazard Elimination Committee in 2009. The committee is composed of experts who review all citations, identify related problems, order all necessary corrective measures, and then work to prevent any similar lapses at either the mine in question or any other Massey mine. More globally, the Hazard Elimination Committee carefully reviews mines with a history of withdrawal orders and institutes corrective actions designed to ensure the safety of Massey’s employees (whom Massey refers to as “members”). Since the UBB accident, Massey separated and expanded the committee into more specialized units and also instituted Hazard Elimination Committees at the resource group level, which allows for real time solutions. The number of people on the committee also has grown from 20 to 50, ensuring that the Hazard Elimination Committee has the resources to fulfill its mandate. Going forward, Massey sees these committees as critical to creating a unified response to any systemic issues.

Besides the Hazard Elimination Committees, Massey also has instituted a more robust internal audit program that closely mirrors MSHA’s level of oversight. The Company now has multiple full-time mine rescue/audit teams to improve compliance through comprehensive auditing. Each team includes a specialist assigned to a specific area of focus, including ventilation, section operations, electrical operations, conveyor systems (belts), mapping, and administrative compliance. The audits entail, among other things, an inspection of track haulage ways, escapeways, life lines, section ventilation, accumulations of combustible materials, and roof support. The audit culminates in a report—supported with photographic documentation—that lists all necessary corrective measures and provides a deadline for correction of the problem, not unlike that which MSHA or a state agency might require. These working groups are founded upon the principle, which Massey fully embraces, that the Company, and not its regulators, bear primary responsibility for ensuring a safe and lawful working environment.

The impact of the Hazard Elimination Committees and the new audit procedures already has been felt. In fact, each of the three mines mentioned in Senator Byrd’s question have received significant attention from the Hazard Elimination Committee in 2010; for example, Freedom Energy’s Mine #1 has been the subject of two recent comprehensive mine audits, which resulted in subsequent remedial measures. Provided below, is a sample of the safety-related changes that have resulted from Massey’s new programs:

- In response to violations issued for the installation of man doors without proper signs in each adjacent entry, Massey now requires that doors or stoppings be shipped to the mine for installation with all necessary components bundled together, including the required signage. This requirement should eliminate the potential for installation of an item before other necessary components have been shipped by the supplier, or received by Massey.
- Massey routinely distributes company-wide information regarding certain violation trends. Massey frequently sends out notes to the resource groups, with the number of violations issued for repeated hazards, such as unsealed stoppings, insufficient air flow at the end of line curtains, water over the ball of the track

rail, or the accumulation of combustible materials. These communications sharpen members' focus on specific problem areas.

- Each week, Massey develops a new ventilation training quiz and sends it to every underground foreman or examiner. These quizzes are used to train and instruct members on all applicable regulations. The 31 tests issued to date have included working mine map problems, multiple choice quizzes and word puzzles that require members to familiarize themselves with Massey's stringent "S-1 P-2" (i.e. safety first, production second) guidelines.
- The Hazard Elimination Committee terminated a previous practice in which mine sites would purchase 16 foot fly boards. These boards, from which ventilation check curtains are hung, had been used throughout the company. During an audit, it was apparent that the 16 foot fly boards inadequately facilitated back up curtain coverage across the 20 foot wide entries. Massey now requires the installation of two ten-foot boards. In combination with the Company's required 20,000 cfm of air flow at the last open crosscut (11,000 cfm *more* than required by law), Massey has reduced the number of air flow violations.

Because the UBB mine is currently subject to an MSHA closure order that prohibits Massey from operating underground, it is currently impossible to institute the above safety measures like Massey successfully implemented after the Aracoma accident. Massey nevertheless has recently implemented a number of safety measures at other mines. Specifically, Massey has amended its safety protocols to include the following:

- A minimum air flow of 20,000 cfm is required at the last open break on all sections.
- Freshwater and dewatering lines in belt entries must be hung from roofs to avoid damage.
- Section roof bolters shall be equipped with a Bantam-type rockduster and roof bolt operators shall rockdust each cut upon completion of bolting.
- When stoppings are built and completed, the individual who builds the stopping will note its integrity by initialing and dating the stopping.
- Escapeways shall be traveled twice per week (even though once per week is the legal requirement). The examiner will carry a device for scaling roof and ribs and lifeline accessories, such as spheres, cones, hangers, reflectors, lifeline splices, and mandoor and escapeway signs.
- Each fireboss is required to leave a colored ribbon after his examination; this ribbon is replaced with a different color by the next fireboss, confirming that checks are made.
- Miners will be provided with a new style of metacarpal glove that is more comfortable and that provides superior hand and finger protection. Metatarsal gloves were created by Massey years ago and have been enhanced several times.
- Massey produced video training tapes covering the following subjects: (i) electrical hazards/lock-out surface and underground; (ii) surface haulage safety; (iii) roofbolter dust collection system maintenance; and (iv) continuous miner, roof bolter, and general underground hazard training.
- Mines will now perform: (i) internal rock dust sampling for incombustible content; (ii) systematic gas chromatograph analysis of internal ventilation air course gases, which is more accurate and comprehensive than that provided by the industry standard handheld units; (iii) real time testing of member exposure to respirable dust through the operation of personal dust monitors (nearly 30 units). Massey will use the dust monitors proactively with a time study to determine dust sources and to train members on best practices.

To underscore the above commitment to safety, Massey took the extraordinary step of idling all of its mines on October 29, 2010 for a company-wide safety retraining initiative.

Massey used this unique opportunity to review and tighten safety procedures at each of its mines. Massey's Chairman and CEO, Don Blankenship, traveled to three mines during this stand down, including Freedom Energy Mining's Mine #1, and helped to educate members on the need to follow safety protocols at each mine. Undertaking such broad-scale training with the support of the entire company is a testament to Massey's commitment to safety and a signal to its members that S-1, safety first, is the top priority.

*Senator Byrd Question Number Three.*¹ Does it not undermine your commitment to safety as "job 1" when Massey offers bonus packages that are based 75 percent on productivity (i.e. number of feet per shift, number of tons per man-hour, reduction of cash costs per ton) and only 25 percent on safe performance? It is my under-

¹We were instructed by counsel for the committee to disregard the second question posed by Senator Byrd.

standing that Massey also has a company policy that enables it to offer incentive awards to any of its employees. Have any of your employees received a bonus or award for achieving a given performance goal related to productivity, without also having achieved a performance goal on safety? Do you offer your coal miners or other employees awards, bonuses, or other supplemental compensation, based on their productivity?

Response:

Massey has a number of different bonus structures for its employees, each of which incorporates a safety component and none of which undermine the Company's commitment to safety. The bonus framework incorporates safety through clear, cognizable benchmarks that require low nonfatal days lost and lost time accidents. These incentives apply to all members, from a company president to an engineer to a roof bolt operator. For supervisors, the safety bonus is typically tied to the overall safety of the members under their care. Other members are rewarded based upon a formula that accounts for their own safety, their section's safety, and the whole mine's safety, thereby encouraging safety both individually and collectively.

The Company understands that it is both improper and counterproductive to sacrifice safety in an attempt to increase coal production. Indeed, we absolutely reject the premise that the goals of safety and productivity compete with one another. The maxim "a safe mine is a productive mine" is a common refrain among Massey members or, put differently, a successful 51 Program is essential to an effective P-2 Program. Consequently, Massey standardizes its mining practices and provides detailed process guidelines for routine mining procedures. Massey recognized long ago that process management is essential to mine safety and that accidents often result from process exceptions. The goal is to perform every job correctly the first time and every time thereafter. Accordingly, Massey's "S-1 P2" programs are grounded upon the principle that mines are more productive and more profitable when management follows a documented regimen of safe mining practices. So while it is true, as mentioned in Senator Byrd's question, that 75 percent of some employees' bonus structure might be tied to cash costs per foot, production feet per shift, and linear feet per man hour, safety plays a critical role in determining if the bonus is met. As a result, members cannot meet their production goals and maximize their bonus by ignoring safety.

Apart from the above bonus structure, Massey's safety compliance and ethics program is enhanced through its pioneering and award-winning "Raymond" safety incentive program. Under the Raymond program, points are awarded to individuals, working teams, and specific mines for safe and ethical conduct, and those points may then be redeemed from a prize catalog that includes sporting goods, clothing, tools, electronics, toys, and other items. All underground members from the super-intendent level and below are eligible to participate in the program. The Raymond incentive program has been recognized nationally for its creativity and effectiveness in promoting a culture of safety and compliance, winning the 2006 and 2007 Promotional Products Association International's Golden Pyramid Award for Employee Incentives, and the 2005 Incentive Marketing Association's Circle of Excellence award for Most Outstanding Incentive Program in the nation.

Whether applied to the newest member or the most experienced president, Massey's bonus structures explicitly emphasize safety. Although Massey is confident that the current system does not undermine the Company's commitment to safety, the bonus criteria are not static, but rather are subject to change from year to year as Massey continually reevaluates its programs to ensure that they reflect the principles of safety first and performance second.

Senator Byrd Question Number Four. You testified that the Upper Big Branch Mine was formerly operated by Peabody Energy. According to the Energy Information Administration, the productivity of Central Appalachian coal mines has declined 33 percent over the past decade. Major coal-mining companies (such as Peabody) have increasingly sold off their Central Appalachian mines. This is perhaps due to perceptions that increased risks and related costs outweigh diminished production values. Meanwhile, Massey has acquired many cast-off properties and coal leases, and roughly tripled the amount of reserves it controls during the past twenty years. For instance, it is my understanding that while other coal companies have gone bankrupt or left the region, Massey has acquired, rehabilitated, and resumed production at older mines, including nonproducing property in which blocks of coal had been left un-mined by the previous operator. You stated that your goal is to engineer the risks out of mining in Central Appalachia, but you also repeatedly acknowledged the difficult underground geologic conditions and risk factors of many mines in Central Appalachia today. The Upper Big Branch Mine Disaster presents the question as to whether Massey can sufficiently engineer the safety risks out of the difficult mining conditions in Central Appalachia. How do you respond to that

question? Considering the nature of your acquisitions and operations, and your remarks about management of risks, and in light of the UBB tragedy, what process will Massey use to re-evaluate its previous assumptions and its abilities to engineer safety into its Central Appalachian underground coal mines?

Massey's Response:

Mining coal is an inherently dangerous business and has been so since coal was first discovered in West Virginia by John Peter Salley in 1742. Digging through rock thousands of feet underground in dynamic conditions with large elaborate machinery entails a certain amount of risk. As recently as 1968, these risks led to the deaths of over 150 West Virginia coal miners and resulted in a staggering number of non-fatal accidents. Needless to say, the risks associated with coal mining have decreased significantly as technology and training have improved over time. Although Massey is acutely aware of the perils associated with mining, it is nevertheless optimistic about the future of safe mining in Central Appalachia in light of the dramatic technological progress that has occurred over the last twenty years. Indeed, Massey has been at the forefront of the research and technological innovation that has advanced the cause of safety; set forth below are some examples of Massey's contribution:

- Proximity devices for underground continuous miners: These devices stop a continuous miner when a member comes dangerously close to the equipment. The Company believes this eventually will be adopted into law. Massey helped conceive the idea and is also pursuing the use of proximity devices on other mobile equipment.
- First-aid sled for underground operations: These sleds are equipped with a complete set of first aid supplies. They can be moved underground with mining operations easily so that they are readily available in an emergency.
- Protective covers for highwall miners: Due to the proximity of the highwall miner machine to highwalls, Massey installed these covers to protect miners from unexpected highwall failures.
- Canopies and NASCAR netting for underground mantrips: Although not required by law, Massey equipped its mantrips with canopies and netting to protect its miners from falling rock while traveling underground.
- Underground forklifts for material handling: These specially adapted forklifts assist miners in the movement of supplies underground. Combined with the required vendor palletizing of bulk supplies, the forklifts have greatly reduced back strains and other injuries.
- Automated Temporary Roof Support ("ATRS") Flappers: Massey developed retractable folding extensions for the Automated Temporary Roof Support in order to expand the supported roof area during the roof bolting process. The flappers reduce the likelihood that loose rock or coal will roll onto an operator's feet or legs, thus providing an operator with a larger "safe" area to perform.
- Thermal Imaging: Massey utilizes thermal imaging to detect defective circuit breakers or connections before they can start fires, explosions or otherwise harm Massey members.
- Underground maintenance vehicles: Massey developed these all-in-one units, which include a crane, to assist with maintenance and repairs to underground equipment.
- Protective Clothing: Beginning in 1993, Massey required the use of reflective clothing and metatarsal work boots for all mining operations. The industry and much of the world subsequently adopted both of these safety advances.
- Vehicle safety: Out of a concern for the safety of those working around mining vehicles, Massey implemented a seat belt policy for all mining equipment, required the use of strobe lights on underground vehicles, and required the use of reflective tape on all surface vehicles.
- Foam fire-fighting car: As mentioned in the answer to Senator Byrd's first question, Massey developed a self-contained foam firefighting car as one of the many safety-related responses to the Aracoma accident in 2006.
- Submarine kits: Dozers working near stockpiles are equipped with "submarine kits" that protect dozer operators if the dozer slips into voids in the stockpile. This device has been adopted throughout the industry and has saved lives.
- Cameras on large equipment: Large surface mining equipment has been equipped with cameras that address driver blind spots, keeping miners in smaller surface equipment safe.

Although Massey clearly understands its obligation to provide a safe working environment for its members in Central Appalachia, MSHA likewise has a duty to ensure underground safety. It is for this reason that Massey continues to be perplexed by some Federal regulatory actions that strike the Company as insufficient or, in some extreme instances, just plain wrong. One such example is MSHA's position

with respect to scrubbers, which are essentially dust collectors that help to minimize coal dust that threatens miners' lungs and that could potentially precipitate an explosion. Scrubbers are akin to a vacuum cleaner, drawing in dirty air created during the continuous mining process, passing that air through a filter, and eventually releasing the filtered air back into the mine. This is essential technology that has been widely used since the 1980s, making mines objectively safer over the last three decades. In fact, one study by the National Institute of Occupational Safety and Health indicated that turning off scrubbers could increase by as much as 12 times the level of respirable coal dust. In the face of this scientific data and despite industry-wide support, however, MSHA demanded that Massey and other Central Appalachian mines in District 4, including UBB, idle their scrubbers. As a result, almost half of Massey's continuous mining equipment has been forced to run without using the technology best adapted to remove harmful coal dust from the air. Repeated efforts by Massey to open a dialogue with MSHA on this subject have been met with intransigence.

This issue is particularly sensitive to Massey because the company believes that prohibiting scrubbers at UBB exacerbated MSHA's complicated ventilation plan for the mine. A properly ventilated mine requires the careful synchronization of various underground mechanisms; altering one aspect of a mine improperly can disrupt the environment in potentially harmful ways. As a result of MSHA's order to turn off scrubbers, Massey was compelled to alter UBB's ventilation system, further complicating MSHA's already unnecessarily complex ventilation plan for the mine and increasing respirable coal dust at UBB.

Despite the above challenges, Massey continues to remain optimistic about the future of coal mining in Central Appalachia. Since 1742, there has been a steady march towards safer mines in West Virginia. Sometimes progress is frustratingly slow, yet the advance over time is undeniable. The Company, therefore, remains committed to Central Appalachia in the firm belief that future technological advancements will invariably lead to safer mines.

Background to Senator Cochran's Questions. A recent preliminary report to President Obama on the mine disaster found that the Upper Big Branch mine experienced a significant spike in safety violations in 2009. The Mine Safety and Health Administration (MSHA) issued 515 citations and orders at the mine in 2009 and another 124 (as of the time of the report) in 2010. MSHA issued fines for these violations of nearly \$1.1 million, though most of the fines are being contested by Massey. The citations MSHA has issued at Upper Big Branch have not only been more numerous than average, they have also been more serious. Over 39 percent of citations issued at Upper Big Branch in 2009 were for "significant and substantial" (S &S) violations. In what is perhaps the most troubling statistic, in 2009, MSHA issued 48 withdrawal orders at the Upper Big Branch Mine for repeated "significant and substantial" violations that the mine operator either knew, or should have known, constituted a hazard. The mine's rate for these kinds of violations is nearly 19 times the national rate.

Senator Cochran Question Number One. Are you aware that a recent preliminary report submitted to President Obama by the Mine Safety and Health Administration found that Massey mine's rate for repeated serious violations was 19 times higher than the nation average?

Massey's Response:

Massey is aware of the preliminary report that apparently was hastily prepared and provided to President Obama on April 16, 2010. Although it is true that UBB experienced an increase in the number of withdrawal orders under Section 104(d) of the Mine Act ("D orders") in 2009, the report does not fairly account for the circumstances contributing to these orders, nor does MSHA fairly acknowledge the sharp decrease in citations in late 2009 and 2010, after Massey redoubled its efforts at UBB. Provided below is the factual background that places these violations in the proper context.

The increase in overall citations and orders at UBB in 2009 is largely a product of increased government oversight of the mine as well as a higher level of coal production. It is well settled that there is a direct correlation between MSHA inspection hours, the volume of production and the number of citations that a mine receives. As MSHA recognized in its preliminary report: "In 2007, MSHA spent 135 days inspecting the mine. By 2009 inspectors were at the mine 180 days." This 33 percent spike is the equivalent of an extra month and a half at the mine. At the same time, the longwall returned to UBB from Logan's Fork, resulting in extra production and the development of additional sections for the next longwall panel. The confluence of more inspectors, longer and more frequent inspections, and increased production was, therefore, likely to result in additional citations.

Apart from increased production and inspection, the ill-conceived ventilation plan changes imposed by MSHA also contributed to the increased number of violations and orders. These arose not because the Company refused to comply with the new standards, but because it was difficult to comply with the new complex ventilation scheme, which complicated the routing of the returns, prevented the use of belt air in the face, required the maintenance of stoppings inby the longwall, and wasted intake air on the longwall tailgate. In fact, a review indicates that 53 percent of the “D orders” for ventilation and 24 percent of ventilation violations received at UBB in 2009 and 2010 were caused directly from the complex ventilation scheme mandated by MSHA.²

Despite these clearly identifiable precipitating factors, Massey was still concerned about the number of violations and sought to reduce them. The Company responded by installing two full-time safety directors at UBB in late September 2009. The additional safety presence, along with Massey’s Hazard Elimination program, dramatically reduced the pace of citations issued at UBB. Indeed, although there were 47 “D orders” issued at UBB between April and mid-October 2009, MSHA wrote only seven from mid-October 2009 to April 2010, thus demonstrating the substantial progress made by the company during this period of time.

In evaluating the above circumstances it is also important to note why the Company contested many of the citations and orders issued in 2009 and 2010. Massey believes in good faith that these violations and orders, in whole or in part, lacked validity and/or failed to account for mitigating circumstances. Indeed, many of those referenced in the report are not final orders and will not become final until the review and adjudication process is complete. Based on past experience, we expect that many of these violations will be completely vacated during the Mine Safety and Health Review Commission process; for others, the severity of the offense will be reduced appropriately as mitigating circumstances are explained and considered by neutral factfinders.

We hasten to add that while there are mitigating circumstances that explain the elevated enforcements at UBB, the Company cannot, and will not, simply ignore “D Orders” or become complacent as to the potential seriousness of a pattern of increased violations. Accordingly, and as described above, Massey established its Hazard Elimination Program at UBB (and throughout the Company) before the UBB accident to reduce both hazards and violations. The efficacy of the committee on UBB is evident from the precipitous drop in “D Orders” during the course of 2009 and into 2010. Massey believes that these measures as well as the others mentioned previously will result in a further decrease in the number of orders and citations company wide.

Senator Cochran Question Number Two. Given this high rate of serious violations, can you please tell us what percentage the Upper Big Branch mine contested of its ‘significant and substantial’ citations serious violation citations for 2007, 2008, 2009, and 2010?

Massey’s Response:

Massey does not keep statistics reflecting the number of Significant and Substantial (S&S) violations received at UBB that were contested through the Mine Safety and Health Review Commission process. The chart below identifies the percentage of violations that were S&S at UBB for the years 2006, 2007, 2008 and 2009.

Year	S&S violations/ UBB	District 4 average	National average
2006	47.9	40.7	38.2
2007	36.7	33.3	36.0
2008	42.1	36.1	31.9
2009	39.7	38.7	33.6

As you can see, the rate at UBB was slightly greater than the District 4 and national averages; this is easily explained, however, by UBB’s age, size, amount of producing sections, and number of employees, all of which are also proportionately higher than the national average.

²The data with respect to orders shows: (i) 55 “D orders” were written from 2009 through March 31, 2010; (ii) 34 of 55 “D orders” (62 percent) were issued under 30 §C.F.R. 575.300, which is generally the ventilation section of the law; (iii) 17 of those 34 were for ‘true’ ventilation issues; and (iv) 9 of those 17 orders were direct results of the unfamiliar and complex ventilation scheme. The data with regard to the violations shows that 220 total violations were issued under 30 §C.F.R. 575.300; of those violations, 100 (45 percent) were for ‘true’ ventilation issues; and 24 of those 100 were due to the MSHA-mandated ventilation plans.

It is important to note that a statistic that quantifies the number of S&S violations contested would be rudimentary because such violations typically involve a higher fine than most. Industry-wide, the percentage of violations contested quantified by the amount of money at stake is significantly higher than the simple percentage of violations contested overall. According to statistics available on MSHA's website (www.msha.gov), the national average of all violations contested in 2009 was 27.1 percent, but the percentage of penalty dollars contested was 66.6 percent. Plainly, there is a direct correlation between the amount of a fine and the likelihood that it will be contested.

Furthermore, contesting an S&S violation does not necessarily mean that a mine operator challenges the fact that it was significant and substantial. There are a number of different factual issues that an operator may contest, all of which are highly subjective and directly affect the amount of the fine. *See* 30 §C.F.R. 5100.3(e). For example, the number of people potentially affected by the hazard is a frequent point of contention between mine operators and MSHA. As part of the penalty calculations, a hazard that MSHA believes would affect 10 miners increases the penalty points by 18, while a hazard that affects only one miner (though still one miner too many) raises the penalty by one point. *Id.* This seventeen point differential has the potential to raise a single fine by over \$45,000. *See* 30 §C.F.R. 5100.3(g).

Other factors that go to the "gravity" of the offense and that are frequently litigated include the degree of negligence, whether the hazard was potentially fatal, and the likelihood that an injury or illness would occur. With regard to the likelihood of an accident occurring, by determining that an injury was "highly likely" to occur as opposed to "reasonably likely," the penalty points are increased by ten. *Id.*

Above all, it is important to remember that statistics show that 40 percent of all appealed MSHA safety violations are later determined to be excessive or flatly wrong. Indeed, MSHA's initial violations are now routinely inflated as a position of advocacy. Consequently, it would be unfair to draw any negative inferences from Massey's decision to challenge MSHA's issuance of these highly subjective citations and orders. To the contrary, the remarkably high frequency of fine reductions or outright dismissals through the settlement and adjudication process demonstrate that these appeals are neither frivolous, taken for the purpose of delay, nor intended to overwhelm the appellate process.

Senator Cochran Question Number Three. Did the Upper Big Branch mine contest large numbers of "significant and substantial" violations to avoid "potential pattern of violation" status since the Mine Safety and Health Administration uses only final orders to establish a pattern of violations?

Massey's Response:

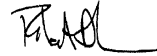
In each instance, many factors—many of these the product of legal analysis and advice—inform the decision whether to appeal a particular citation. To the extent that this question seeks information that asks the Company to forfeit both the attorney-client privilege and the protections of the work product doctrine, we cannot respond. That being said, Massey challenges citations solely on their merits (or lack of merit). It does not challenge S&S citations simply to prevent its mines from being placed into "potential pattern of violation" status. As described in more detail above, there are myriad reasons for contesting an S&S violation, not the least of which is that it is an inherently subjective process. The results of the adjudicative and settlement process speak for themselves and forcefully refute the suggestion that appeals are taken for the purpose of delay or to avoid a "pattern of violations": Almost half of all citations are vacated or reduced during the Mine Safety and Health Review Commission process.

It is also important to emphasize that Massey, like all mine operators, must abate every S&S violation, regardless of whether the Company plans to mount a challenge. A notice of contest, therefore, *never* results in the continuance of a potentially unsafe practice. By the time a contest is resolved, often more than a year from the issuance of the citation, the allegedly hazardous condition has been fixed and all that is in dispute is the validity of the violation and the severity of the fine. Simply put, Massey *never* exposes its members to any harm by contesting these violations.

We reiterate that Massey is happy to assist your committee in its inquiry into the tragedy at UBB and mine safety in general. Massey believes that the committee's full engagement will lead to a greater appreciation of the unique challenges faced by the coal industry and, we hope, lead to a safer environment in which to harvest

coal, which presently accounts for 45 percent of the country's energy. If you have any further questions please do not hesitate to contact me.

Sincerely,



ROBERT D. LUSKIN.

CONCLUSION OF HEARING

Senator HARKIN. The subcommittee is recessed.

[Whereupon, at 4:50 p.m., Thursday, May 20, the hearing was concluded, and the subcommittee was recessed, to reconvene subject to the call of the Chair.]

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