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MODERNIZING MINE SAFETY

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION
AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

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MODERNIZING MINE SAFETY

Wednesday, May 4, 2011
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and the Workforce
Washington, DC

The subcommittee met, pursuant to call, at 10:03 a.m., in Room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Kline, Rokita, Bucshon, Gowdy, Ross, Kelly, Woolsey, Payne, Kucinich, and Miller.

Staff present: Andrew Banducci, Professional Staff Member; Katherine Bathgate, Press Assistant; Casey Buboltz, Coalitions and Member Services Coordinator; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Legislative Assistant; Barrett Karr, Staff Director; Ryan Kearney, Legislative Assistant; Brian Newell, Press Secretary; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Ken Serafin, Workforce Policy Counsel; Linda Stevens, Chief Clerk/Assistant to the General Counsel; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Professional Staff Member; Joseph Wheeler, Professional Staff Member; Aaron Albright, Minority Communications Director for Labor; Tylease Alli, Minority Hearing Clerk; Daniel Brown, Minority Staff Assistant; Jody Calemine, Minority Staff Director; Brian Levin, Minority New Media Press Assistant; Jerrica Mathis, Minority Legislative Fellow, Labor; Richard Miller, Minority Senior Labor Policy Advisor; Megan O'Reilly, Minority General Counsel; Julie Peller, Minority Deputy Staff Director; and Michele Varnhagen, Minority Chief Policy Advisor and Labor Policy Director.

Chairman WALBERG. Good morning. A quorum being present, the subcommittee will come to order. We welcome to the subcommittee each of you.

This is our second opportunity in the 112th Congress to examine the safety of America's miners. The loss of life last month in Idaho—in an Idaho silver mine as well as the mining tragedy at Upper Big Branch are reminders of the need to remain vigilant in our efforts to promote mine safety.

Over the last year, the Mine Safety and Health Administration has proposed a number of changes to mine safety, enforcement. Changes include reestablishing pre-shift examinations for safety and health violations and a new emergency rock dusting standard. The administration has also proposed significant changes to the

regulations that govern when a mine is deemed to be in a patter of violation.

While it has often failed exercising all the enforcement tools at its disposal, MSHA is to be commended for taking action. In fact, just last month, the administration, for the first time in its 40-year history, placed two mines in pattern of violations status. Additionally, due to the work of the committee and dedicated journalists, the public is finally able to take a look at internal audits that reveal more information about MSHA's enforcement procedures.

There is still a number of questions surrounding MSHA's recent proposals. And we hope to get some answers today. Most importantly, we want to determine whether these changes will produce the safety results we hope to achieve. That is why the testimony from today's witnesses is so important.

Our witnesses have more than 100 years of combined mine safety experience and the professional expertise and personal knowledge will help inform Congress about the current state of mine safety enforcement, whether MSHA, in their opinion, is on the right track and what other tools are needed to safeguard the health and well-being of miners.

We also plan to review whether there are examples of federal laws or regulations hindering proactive efforts on the job site that may lead to better safety conditions. Washington cannot have all the answers. I can't believe I made that statement, Mr. Chairman. [Laughter.]

But I truly believe that. And may I reiterate? Washington cannot have all the answers, and it should not stand in the way of an employer's effort to go above and beyond the law in providing a safe work environment. Punishment is important, but putting punishment before prevention is not in the best interests of America's workers.

As Mr. Roberts has noted in the past, most of the mining industry does the right thing. Let us ensure federal policies hold bad actors accountable and partner with the good actors on behalf of worker safety.

An example of this kind of collaborative effort is the successful development and deployment of coal dust explosibility meters, or CDM. The device developed by the Federal National Institute for Occupational Safety and Health takes real-time samples of rock dust to help determine its combustibility. Previously, MSHA laboratories could take weeks to examine a rock dust sample. Now miners have a useful tool on-site that immediately enhances safety.

Advancing strong mine safety protections is a goal that we all share and one we must all work to achieve. Miners work under extreme conditions to provide the natural resources our nation needs. And they deserve our support.

Policy makers, enforcement officials and mine operators each play an important role in helping to ensure miners go home to their families at the end of their shift. As I noted at our last mine safety hearing, workers safety is best advanced when we work together. And I hope we are capable of doing so.

At this time, I would like to recognize my colleague from California, Lynn Woolsey, the senior Democratic member of the subcommittee, for opening remarks.

[The statement of Mr. Walberg follows:]

Prepared Statement of Hon. Tim Walberg, Chairman, Subcommittee on Workforce Protections

Good morning, and welcome to the Subcommittee on Workforce Protections. This is our second opportunity in the 112th Congress to examine the safety of America's miners. The loss of life last month in an Idaho silver mine, as well as the mining tragedy at Upper Big Branch, are reminders of the need to remain vigilant in our efforts to promote mine safety.

Over the last year, the Mine Safety and Health Administration has proposed a number of changes to mine safety enforcement. Changes include reestablishing preshift examinations for safety and health violations and a new emergency rock dusting standard. The administration has also proposed significant changes to the regulations that govern when a mine is deemed to be in a "pattern of violations."

While it has often failed exercising all the enforcement tools at its disposal, MSHA is to be commended for taking action. In fact, just last month the administration—for the first time in its 40 year history—placed two mines in "pattern of violations" status. Additionally, due to the work of the committee and dedicated journalists, the public is finally able to take a look at internal audits that reveal more information about MSHA's enforcement procedures.

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Advancing strong mine safety protections is a goal that we all share and one we must all work to achieve. Miners work under extreme conditions to provide the natural resources our nation needs, and they deserve our support. Policy makers, enforcement officials, and mine operators each play an important role in helping to ensure miners go home to their families at the end of their shift. As I noted at our last mine safety hearing, worker safety is best advanced when we work together, and I know we are capable of doing so.

At this time, I would like to recognize my colleague from California, Mrs. Woolsey, the senior Democrat member of the Subcommittee, for her opening remarks.

Ms. WOOLSEY. Thank you, Mr. Chairman. And thank you for convening this very important hearing.

It has been 13 months since the Upper Big Branch disaster, yet Congress has failed to act on repeated requests from the Mine Safety and Health Administration, from MSHA. Miners and their families have asked also. And they want us to modernize the Mine Safety Act.

MSHA has repeatedly asked our assistance because they need better tools to protect all miners. They need changes to a dysfunctional pattern of violations provision, stronger sanctions to penalize

mine operators, operators who provide advanced notice of inspection, and basics like subpoena authority.

Following MSHA's March 3rd testimony, which outlined the need and justification for legislation to modernize the Mine Act, Mr. Miller, Mr. Rahall and I reintroduced comprehensive mine safety legislation on April the 15th. It largely mirrors the Robert C. Byrd Mine Safety Protection Act that was brought to the floor last year. And it contains the reforms that MSHA has requested.

One year ago on May 24th in Beckley, West Virginia, this committee heard from the governor of West Virginia and the families of miners who were killed at Massey's Upper Big Branch mine. Gary Quarles, a miner who lost his son, testified that it was common for Massey Energy to provide advanced notice of the inspections to miners underground. Under the current Mine Act, that is classified as criminal misdemeanor. Misdemeanors tend to receive scant attention from prosecutors. In fact, not one advanced notice violation has been criminally prosecuted since 1977, even though MSHA inspectors have had to seize phones at mines to prevent tipoffs.

MSHA has secured injunctions, but the obstruction of justice continues because there is so little consequence to flaunting the law. We look forward to hearing from our witnesses on whether they support strengthening this provision.

We would also like to hear whether our witnesses think miners who raise concerns about safety are adequately protected against retaliation under existing law. In Beckley, we learned that miners were fearful of making safety complaints because it was made very clear to them that their jobs would be on the line if they did.

Alice Peters, whose son-in-law, Edward Dean Jones, was killed in that explosion, testified that he complained at least seven times about ventilation problems. But his supervisors told him that he would lose his job if he caused the mine to stop production.

He was trapped. His son had cystic fibrosis, and he needed the job for health insurance.

Of course, retaliation is not confined to West Virginia. In 2007, a miner in Kentucky showed video of leaking underground seals to MSHA. It took 3 years of litigation, hundreds of thousands of dollars in attorney fees just to get the operator to pull the disciplinary letter from the employee's file.

We will be asking our witnesses whether MSHA should reform the badly broken pattern of violations process to provide for timely sanctions when any mine operator, whether it is coal, metal or stone, chronically violates mine safety standards. Or should miners continue to be endangered while serial recidivists appeal citations for years on end before MSHA can act?

Finally, Mr. Chairman, we would like to learn if the coal industry is adopting modern technologies such as coal dust explosivity meters to help prevent disasters, and whether Congress needs to take action, as we did in the MINER Act, to speed the modernization of mine safety and bring that Act into the 21st century.

I look forward to hearing from each of our witnesses. What a great panel we have. Thank you.

Thank you, Mr. Chairman.

[The statement of Ms. Woolsey follows:]

Prepared Statement of Hon. Lynn C. Woolsey, Ranking Minority Member, Subcommittee on Workforce Protections

Mr. Chairman, thank you for convening this important hearing. It has been 13 months since the Upper Big Branch disaster, yet Congress has failed to act on repeated requests from the Mine Safety and Health Administration (MSHA), miners and their families to modernize the Mine Act.

MSHA has repeatedly asked for our assistance to provide them with better tools to protect all miners. They need reforms to a dysfunctional Pattern of Violations provision. They need stronger sanctions to penalize mine operators who provide advance notice. And they need basics like subpoena authority.

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Finally, we would like to learn if the coal industry is adopting modern technology such as coal dust explosivity meters to help prevent disasters, and whether Congress needs to take action, as we did in the MINER Act, to speed the modernization of mine safety.

I look forward to hearing from each of our witnesses today. Thank you.

Chairman WALBERG. I thank you.

Pursuant to committee rule 7-C, all members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow questions for the record, statements and extraneous material referenced during the hearing to be submitted for the official record.

It is now my pleasure to introduce our distinguished witness, Louis Griesemer—and I hope I pronounced that right.

Did I? Am I close? Okay, thank you.

Louis Griesemer is president and CEO of Springfield Underground, Incorporated. Mr. Griesemer has more than 30 years of experience in aggregate industry. After earning his engineering degree from Washington University in St. Louis, he began working

full-time for his family's aggregate business as safety director and mine planner. Mr. Griesemer is a past chairman of the National Sand, Stone, Gravel Association's board of directors. Mr. Griesemer is testifying today on behalf of National Stone, Sand and Gravel Association.

Mark Ellis is president of the Industrial Minerals Association, North America, which is the principle trade association representing the industrial minerals industry in North America. Mr. Ellis has unique experiencing having served as an attorney with the Federal Mine Safety and Health Review Commission and as a senior policy adviser to the assistant secretary of labor at MSHA. Mr. Ellis is a graduate of the University of Denver College of Law and its College of Business Administration.

Cecil Roberts, Jr. is president of the United Mine Workers of America. Mr. Roberts held a variety of jobs within the coal mines of West Virginia before becoming a full-time union activist. He was appointed to serve as a member of the West Virginia University Institute for Labor Studies and Research Advisory Board in 1996. Mr. Roberts graduated from West Virginia Technical College and in 1997 received an honorary doctorate in humanities from West Virginia University of Technology.

Anthony Bumbico is vice president of safety with Arch Coal, Incorporated, one of the largest coal producers in the United States. Mr. Bumbico directs the health and safety functions for each of Arch's subsidiary companies, which operate in six states and employs over 4,700 individuals. Mr. Bumbico was an underground coal miner for 7 years. Mr. Bumbico is testifying on behalf of the National Mining Association.

And I welcome each of you.

We will start with Mr. Griesemer.

Thank you for being part of our witness panel.

STATEMENT OF LOUIS A. GRIESEMER, PRESIDENT, SPRINGFIELD UNDERGROUND, INC., TESTIFYING ON BEHALF OF NATIONAL STONE, SAND & GRAVEL ASSOCIATION

Mr. GRIESEMER. Thank you, Chairman Walberg, Ranking Member Woolsey and members of the subcommittee for inviting me to testify on behalf of the National Stone, Sand and Gravel Association on worker safety and health. Also, we gratefully acknowledge this committee's work of last summer and the work of dedicated staff to focus mine safety reform on areas of greatest risk.

I am Louis Griesemer, president of Springfield Underground in Springfield, Missouri. Springfield Underground was established by my father in 1946. I myself am an MSHA-certified safety trainer and got my start in the aggregates business in our safety department. I know our employees personally. They are committed to their work. And they are committed to safety on the job.

The National Stone, Sand and Gravel Association represents the fresh stone, sand and gravel or construction aggregates industries. Its member companies produce more than 90 percent of the crushed stone and more than 70 percent of the sand and gravel consumed annually in the United States. There are 10,000 aggregates operations in the United States. And 70 percent of the nation's counties are home to an aggregates operation.

The crushed stone, sand and gravel industry has long been committed to the safest and most helpful possible production of aggregates. This has resulted in the safest period in our sector's history. This was the 10th year in a row in which our sector achieved a lower injury rate than in the prior year. Our workplace safety enhancements have come from constant efforts to train and remind employees of dangers they need to avoid.

However, it seems that MSHA is not so focused. We believe that MSHA should work more with us on programs that help instill employees' genuine respect for the precautions that MSHA and the companies require to ensure they return home safe every night. Our industry CEOs have met several times with MSHA's leadership in an effort to work collaboratively to reduce injuries, illnesses and fatalities.

Of increasing frustration to NSSGA members, however, is what the aggregates industry believes is inconsistent and unpredictable enforcement. A review of data shows that while injury rates continue to fall, there has been a substantial increase in citations labeled significant and substantial. It is only sensible to ask why is this happening and how can this be fair. We believe a more enlightened approach would be more effective in achieving positive results.

The issuance of citations for each apparent discrepancy, no matter how unlikely it would ever contribute to a hazard, heightens frustration and inhibits collaboration. After all, only 3 years ago did the agency for the first time complete 100 percent of the annual two inspections of surface and four inspection of underground facilities mandated in the act. This was well after our industry had begun its decade-long string of yearly reductions in injury rates.

So for some, the two inspections for surface and four for underground operations may be appropriate. But for others, it may not be the best use of resources.

This is especially true, we believe, given the severe budgetary constraints on the Federal Government and the ongoing economic slow-down. Moreover, if MSHA's resources are limited or reduced, we contend that a reduction in the number of inspections is preferable to reductions in compliance assistance, training and other areas that are helping industry improve safety. We would be pleased to work with MSHA and representatives of miners to update approaches to regulation and enforcement of mine safety.

Furthermore, a specific point, we believe that modernization would be achieved if MSHA would establish a pattern of compliance program, which would give some form of credit to operators for outstanding adherence to MSHA standards and keeping low injury rates. It is anticipated that this would help the agency streamline and improve the efficiency of the inspection process, thus freeing resources to be targeted at areas of greatest risk.

Ideas for this include providing credit for excellent compliance so that future citation assessments can see financial costs mitigated, allowing inspectors to issue a notice in lieu of citation for diminimus standard and/or elimination of citation if immediate abatement is accomplished by the operator and developing guidelines for inspectors directing that they focus their inspection hours on the most troubled operations. And if MSHA is interested in safe-

ty and health management systems, as reflected in the impending June rulemaking proposal on this matter, then perhaps MSHA could at least provide an incentive to operators, especially small ones, by granting credits against other enforcement actions such as reduced civil penalties in the manner described above for abatement credits. We respectfully urge, in the effort to modernize mine safety, that more be done in the area of assisting operators in compliance, allowing optimal resources to be focused on the areas of greatest risk.

Thank you. That concludes my statement. And I would be happy to respond to any questions.

[The statement of Mr. Griesemer follows:]

Prepared Statement of Louis Griesemer, on Behalf of the National Stone, Sand & Gravel Association

Thank you Chairman Walberg, Ranking Member Woolsey and Members of the Subcommittee for inviting me to testify on behalf of the National Stone, Sand & Gravel Association (NSSGA) on worker safety and health. Also, we gratefully acknowledge this committee's work of last summer and the work of dedicated staff to focus mine safety reform on areas of greatest risk.

I am Louis Griesemer, president of Springfield Underground in Springfield, Mo. Springfield Underground was established by my father in 1946. My whole career has been with Springfield Underground. I, myself, am an MSHA-certified safety trainer and got my start in the aggregates business in our safety department. I know our employees personally. They are committed to their work and they are committed to safety on the job. We are proud of the accomplishments of our team and we look forward to improving steadily.

MSHA is integral to our operations. We are continually in the process of examining and maintaining our operations for compliance. Training of employees is an essential part of the process. My company has long been committed to worker safety, health and training. It is part of our commitment to all who work for us. Today, I am also the NSSGA co-chair of the MSHA-NSSGA Alliance, which has worked for a decade to establish useful training and education materials to enhance safety and health.

Aggregates Industry

The National Stone, Sand & Gravel Association represents the crushed stone, sand and gravel—or construction aggregates—industries. Its member companies produce more than 90 percent of the crushed stone and more than 70 percent of the sand and gravel consumed annually in the United States. There are more than 10,000 construction aggregate operations nationwide. Almost every congressional district is home to a crushed stone, sand or gravel operation. Proximity to market is critical due to high transportation costs, so 70 percent of our nation's counties include an aggregates operation. Of particular relevance to this hearing, 70 percent of NSSGA members are considered small businesses.

Industry's Demonstrated Commitment to Health and Safety

The crushed stone, sand and gravel industry has long been committed to the safest and most healthful possible production of aggregates. We're very pleased that this commitment to safety and health has resulted in the safest period in our sector's history. In fact, last year, we finished with an injury incidence rate of just 2.33 injuries per 200,000 hours worked. This was the 10th year in a row in which our sector achieved a lower injury rate than in the prior year. Also, this was the 19th of the last 20 years of consecutive rate reductions.

Addressing the Causes of Accidents, Injuries and Illnesses

Our workplace safety enhancements have come from constant efforts to train and remind employees of dangers they need to avoid. Just as in construction and manufacturing industries, primary dangers stem from the movement of heavy equipment. Employees must be constantly vigilant.

Not only do injury rates continue to decline in our segment of the industry, fatal accidents also continue to decline. Last year there were about 30,000 fatalities in automobile accidents on the Nation's highways. Comparatively, there were 23 fatal accidents at metal nonmetal mines; there were five fatalities among aggregates op-

erator employees. While every fatal accident is a tragedy, we believe this reflects a remarkable level of safety controls at these workplaces.

As to what has been primary to our success, I would say that it has been a constant industry-wide effort to impress upon employees the importance of keeping their wits about them in the workplace, and not taking shortcuts. In spite of such training and reminders, there are still problems with employee compliance. No less than half of the fatal accidents last year were a result of employees' disregarding the most fundamental precautions around heavy equipment.

However, it seems that enforcement by MSHA is focused on everything but employee personal responsibility and precautions. We wish that MSHA would work with us more on programs that help instill in employees genuine respect for the precautions that MSHA and the companies require.

Year in and year out, MSHA inspections focus on a wide variety of things, many of which cannot be shown to have a material bearing on accidents or accident prevention—things such as adequacy of machine guards in inaccessible areas, fire extinguisher inspections on spare fire extinguishers, electrical ground testing on office equipment, the condition of the outer jackets of low voltage electrical cables, and so on. It is not that such things are unimportant. It is just that the most prevalent hazards are elsewhere. As long as human nature leads employees to believe they can take risks without consequences, we will, unfortunately, continue to experience serious accidents.

In any event, we in the stone, sand and gravel industry are committed to doing our part in this regard, and we believe that we continue to make substantial progress because of our efforts. A number of factors have contributed to this success. The first is leadership. Since 2002, we have spearheaded an effort to enlist CEOs committed to safety and health. Our industry-wide Safety Pledge program is the vehicle for this. I am pleased that more than 70 percent of our operator facilities, which account for more than 90 percent of industry employees, are headed by a CEO who has personally signed the Safety Pledge.

Safety Collaboration with Government

We have a record of collaborating with government agencies, most notably MSHA, with which NSSGA signed an alliance agreement. This has given birth to a number of effective compliance assistance programs such as Safety Alerts derived from MSHA injury data. Furthermore, we collaborated with MSHA on the development of the "Safety Pro in a Box" program in which we culled excellent training resources from the Mine Academy and made them available free of charge to aggregates operators.

Our industry's CEOs have met several times with MSHA's leadership to offer to work collaboratively to reduce injuries, illnesses and fatalities. In these meetings, we made a number of recommendations, including:

- Focusing enforcement on areas of highest risk;
- Improving communications between operators and inspectors to improve consistency in enforcement;
- Addressing the behavior component on safety and health, not just conditions;
- Ensuring that the metric for assessing MSHA's success is focused on demonstrable safety accomplishment—rather than continual escalation of enforcement (which has certainly been the trend), and
- Providing aggregates-specific training for inspectors so that safety challenges from another sector don't inappropriately affect enforcement in the metal/non-metal sector.

On the second point—concerning improved communications—we appreciate it when the agency properly and timely informs stakeholders of intended areas of enforcement concentration and actions advised for compliance. Two such examples are the Rules to Live By initiative, and planned enforcement ramp-up of the 56/57.5002 airborne contaminants standard.

At Assistant Secretary Main's request, we have lent assistance on key initiatives. We supported the "Rules to Live By" fatality-prevention program. We also answered Mr. Main's call to disseminate information about stepped-up enforcement of 56/57.5002, the airborne contaminants standard, and widely circulated our industry's Occupational Health Program for compliance assistance.

In other instances, agency interaction with industry has been absent. A variety of enforcement initiatives were begun without notice and without stakeholder consultation. An example is truck scales. They are built by the manufacturers with rub rails, not guardrails. Suddenly, MSHA is enforcing a requirement for guardrails at virtually every scale in the country elevated more than 16 inches off the ground. As a result, many operators were caught by surprise and found themselves being cited for things that MSHA had always deemed compliant in the past.

Regulatory Burden

Returning to MSHA, we do believe that the agency has become unduly reliant on trying to add regulations that, in our view, are not likely to make material contributions to enhancing safety and health, but rather will increase bureaucracy, administration and paperwork cost for companies. We cannot regulate our way to zero injuries.

Furthermore, MSHA should not add regulations that only increase opportunities for duplicate citations with respect to "paperwork" compliance obligations that already exist. The agency is preparing to propose a rule likely to mandate the use of "Safety and Health Management Systems" (SHMS), on top of the standards mandated by the Mine Act. This one-size-fits-all approach to rulemaking may also produce a one-size-fits-all rule for the largest to the smallest operators for managing their operations. Yet, operators need flexibility to tailor their efforts at hazard and risk reduction and legal compliance to the specific size and complexity of their facilities. Unless done properly, this could significantly add compliance burden with little or no benefit to safety and health. Companies need to be able to focus on employee safety reminders and training in the field, not paperwork, and not more citations to be dealt with to no good safety or health advantage.

Regulation by Policy

Another concern is the issue of fair notice with respect to MSHA enforcement initiatives. The fact is that many MSHA requirements are coming at us without the type of rulemaking we think is required. As indicated above, MSHA has increasingly adopted novel enforcement policies without giving the industry advance warning or advice. The operator only learns of the changed interpretation once the operator is issued a citation by an inspector, often an inspector who found no fault with the identical condition previously.

Earlier, I mentioned the example of guardrails for truck scales (which involve no small expense incidentally for questionable safety advantage, if any). Another notable example has to do with issues of fall protection and safe access for mobile equipment. Operators purchase large haul trucks, for example, that are fully fitted out with ladders and other means of access by the manufacturers. However, MSHA is now saying that the equipment as manufactured is not safe and must be retrofitted by the operator.

No other federal law requires such changes to the equipment when it is used in any other industry as far as we know. In mining, many operators have found themselves receiving citations from MSHA requiring them to retrofit their equipment even though they have had no prior notice, and even though it is perfectly lawful for the equipment manufacturers to sell the equipment configured just as they manufacture it without the features demanded by MSHA. Needless to say, not only have mine operators not had fair notice, they are caught completely in the middle on these types of issues. Changes in requirements should come only through notice and comment rulemaking, not unilateral policy changes or "guidance" by MSHA.

Enforcement Issues

Of increasing frustration to NSSGA members is what the aggregates industry believes is inconsistent and unpredictable enforcement. Sometimes it appears that we must pay a heavy price for speaking up and seeking fairness. MSHA is training inspectors and then auditing them in the field, but the result seems to be heavier, not fairer, enforcement.

The problem is further complicated. With MSHA's problems in cross-training inspectors in the various sectors of its jurisdiction (pointed out in dozens of recently issued Accountability Office audit reports from 2008-10), the agency recently decided to increase reliance on accountability teams to double-check inspector performance. This, too, was often followed by harsher enforcement.

It seems clear to us that focus on "accountability in enforcement" has resulted in not more balanced enforcement, but rather increased numbers and severity of citations written by MSHA for fear that an inspector might be found to have missed opportunities for alleging violations (for example, if too few citations had been issued at the initial inspection). This comes in the form of follow-up inspections by another group of inspectors, which might include the original inspector, area supervisor and someone from district office, or from another district. Again, I must stress that, while all this is going on, our industry quietly and steadily proceeds on its own to become safer and safer. A review of data shows that while injury rates continue to fall, there has been a substantial increase in citations labeled—Significant & Substantial.' It is only sensible to ask, why is this happening and how can it be fair?

The agency should improve its means of training inspectors on both recognition of hazards, and on the burdens imposed by inappropriate enforcement, including

undue escalation in penalty assessments. After all, every elevated finding in a citation by an inspector converts to substantial dollar increases when penalties are proposed. For example, a single change in finding in a single citation could raise a $2,000 penalty for that citation to $10,000.

Penalty assessments for stone, sand and gravel operators are up more than double the levels from the period before the 2006 Miner Act; yet, in this time, our injury rates have continued to fall. The rates are falling because of good safety management, not civil penalties. This dichotomy—of more citations and more expensive enforcement despite excellent industry accomplishments—risks undercutting the cause for safety and health as well as the perception of MSHA as a respected government entity working for the common good.

Ways in Which MSHA Enforcement Can Get it Wrong

1. MSHA inspectors cite conditions that are not hazardous.
2. MSHA inspectors cite violations, but over-write the gravity, e.g., an inspector asserting that a ladder in need of minor repair is "highly likely" to cause injury versus the more practical: "unlikely," or "reasonably likely."
3. MSHA inspectors cite violations, but over-write the negligence, e.g., a guard fell off a piece of equipment earlier in the day, and it is said to constitute "high" negligence versus "low."
4. MSHA inspectors cite violations, but over-write by labeling them "significant & substantial" (that is, the violation could reasonably be expected to cause an injury of a reasonably serious nature). One such citation was issued for a piece of trash that was blown by the wind to within 25 feet of an electrical installation.
5. MSHA inspectors demand abatement that is either unnecessary or inappropriate, which leads to increased costs that are in no way justified and typically cannot be recouped if the enforcement turns out to be wrong. For example, at one operator's plant, an inspector demanded that—due to an alleged fire hazard—expensive changes be made to a surge tunnel because of an ostensible fear of belt slippage. The citation was ultimately vacated, but not before the company was forced to squander $10, 000 in unnecessary abatements.
6. MSHA inspectors issue threats about future enforcement if the operator does not divulge every single bit of information an inspector is seeking, including sometimes information from company records that are not part of MSHA compliance.
7. MSHA is very often unwilling to correct an inappropriate citation until just before a hearing so that the agency does not incur a judicial loss concerning a standard deemed important for the agency's future enforcement.
8. There is often a sense of threat from inspectors when they refuse discussion.

Ideas for Improving MSHA Regulation of Safety & Health in the Future

We believe that there could be a more enlightened approach to encouraging and assisting mine operators in their efforts to secure worker safety other than issuance of citations for each apparent discrepancy, no matter how unlikely that it would ever contribute to a hazard. We contend that the agency should be free to focus its enforcement resources on areas and operations posing the greatest risk. We believe that consideration should be given to the issue of whether mandatory minimum inspections twice a year for surface facilities or four times a year for underground are indispensible.

After all: only three years ago did the agency for the first time complete 100 percent of the mandated two inspections of surface, and four inspections of underground facilities mentioned in the Act. This was well after our industry had begun its decade-long string of annual reductions in injury rates. So, for some, the two inspections for surface and four for underground operations may be appropriate, but for others it may not be the best use of resources.

I think this is especially the case given the severe budgetary constraints on the Federal government.

Moreover, if MSHA's resources are limited or reduced, we prefer a reduction in the number of inspections rather than reductions in compliance assistance, training and other areas that are helping industry improve safety.

We believe there is often an excessive concentration of enforcement on the mine operator with no emphasis on contributions to violations from other parties, including individual employees when they act contrary to training and instructions, and independent contractors that are realistically outside the mine operator's control. We believe that MSHA could take stronger actions to help induce employee and contractor cooperation with mine operators on achievement of safety and compliance.

For the future as well as now, we support further investment in compliance assistance by MSHA. For instance, we support the continued utilization of the very

successful Small Mine Office, as it has been structured. We also encourage new cooperative initiatives.

Behavior-based safety is a widely accepted concept instructing that all who are on a worksite hold some degree of responsibility for their own safety and health and the safety and health of others on the property. In fact, there is no way our industry would have achieved the reductions in injuries in the past ten years had it not been for company-wide programs aimed at safer work. Any expert in workplace health and safety would support this. And, our laws and enforcement should recognize this, as well.

NSSGA would be pleased to play a central role in working to achieve the most enlightened regulations and enforcement possible under our existing mine safety and health law. There is precedent for this. In 1997, NSSGA member companies joined forces with miners' representatives and MSHA to develop a key training regulation so that all stone, sand and gravel workers would obtain critical training. This resulted in training mandates much more appropriate to the stone, sand and gravel industry. In the same manner, we would be pleased to work with MSHA and representatives of miners to update approaches to regulation and enforcement of mine safety and health generally.

Furthermore, a specific point: we believe that modernization would be achieved if MSHA would establish a Pattern of Compliance Program, which would give some form of credit to operators for outstanding adherence to MSHA standards and keeping low rates of injuries. It is anticipated that this would help the agency streamline and make more efficient the inspection process, thus freeing resources to be targeted at areas of greatest risk. Ideas for this include:

- Providing credit for excellent compliance so that future citation assessments received can see financial costs mitigated (for example, increase the good-faith credit from 10 percent back up to 30 percent for timely abatement);
- Allowing inspectors to issue a notice in lieu of citation for a de minimis hazard, and/or elimination of citation if immediate abatement is accomplished by the operator;
- Developing guidelines for inspectors directing that they focus their inspection hours on the most troubled operations (for example, inspectors could only spend a limited amount of time inspecting operations with excellent compliance record versus camping out at a good operation for an unduly long time);
- And if MSHA is interested in Safety and Health Management Systems, as reflected in the impending June rulemaking proposal on this matter, then perhaps MSHA could at least provide an incentive to operators, especially small ones, by granting credits against other enforcement actions, such as reduced civil penalties, in the manner described above for abatement credits.

Conclusion

NSSGA appreciates this opportunity to present new ideas for enhancing worker health and safety. We respectfully urge that more be done in the area of assisting operators in compliance, allowing optimal resources to be focused on the areas of greatest risk. Thank you.

Chairman WALBERG. Thank you.

Now, Mr. Ellis?

STATEMENT OF MARK G. ELLIS, PRESIDENT, INDUSTRIAL MINERALS ASSOCIATION—NORTH AMERICA

Mr. ELLIS. Chairman Walberg, Ranking Member Woolsey and members of the subcommittee——

Chairman WALBERG. Turn your mike on, please.

Mr. ELLIS. Thank you. Chairman Walberg, Ranking Member Woolsey, members of the subcommittee, I am Mark Ellis, president of the Industrial Minerals Association, North America, also known as IMA-NA. IMA-NA represents companies that extract and process a vital and beneficial group of raw materials known as industrial minerals. Industrial minerals are the fee stocks for many of the products we take for granted such as glass, ceramics, plastics, paper and building products. It is the unique chemical and physical properties imparted by these minerals which make them valuable.

Mr. Chairman, thank you for inviting the industrial minerals industry to testify today. Our sector often is forgotten in the attention paid to other more familiar mined products. In many ways, the low profile of our industry is a testament to our ability to extract and process minerals using safe and responsible methods.

My message to you today is three-fold. First, the safety of America's miners is the paramount responsibility of all who work in the mining industry. Second, I ask that we all spend some time today rethinking what initiatives will modernize mine safety. Finally, please recognize that not all mining is the same.

The industrial minerals industry is proud of our contributions to reducing both the number and, more importantly, the rate of mining-related deaths, injuries and illnesses. But let us not lose sight of the fact that the measure of our success is the safety and health of the mining workforce. There is absolutely nothing more important than sending miners home safe and healthy at the end of each day.

Mr. Chairman, if I were to ask you what the leading cause of injury is in the industrial minerals industry, what would you guess? Explosions, lung disease, falling rocks, or mobile equipment? In fact, ergonomic or musculoskeletal injuries represent 87% of the injuries in our industry. I can't say that the industrial minerals industry has eliminated all non-ergonomic hazards in the workplace, just as I can't say we have eliminated all unsafe behaviors. But our injury statistics are telling us something, and we are responding to that message. We want to address what is injuring our miners. So what have we done?

We have partnered with the National Institute for Occupational Safety and Health, supported its research, and provided a variety of products to address ergonomic hazards in the mining industry. Our companies are responding. They are evaluating their workplaces for ergonomic hazards. They are training their mine personnel to eliminate unsafe behaviors. And they are installing controls. And they are preventing injuries, all without a single legislative or regulatory action.

Yet another example of proactivity are member companies that mine and process 99 percent pure crystal and silica have developed a voluntary occupational health program that goes far beyond regulatory requirements, represents thousands of hours of work by dedicated professionals and, no doubt, is the primary cause for the virtual elimination of silicosis, the world's oldest occupational disease, from their workplaces.

The companies do this, not because the law requires it, but because it is the right thing to do. This leads me to my second point, Mr. Chairman.

It is time to rethink the types of initiatives that will modernize mine safety. We acknowledge that there have been recent preventable tragedies in the mining industry that only stand to highlight the need for continued vigilance. However, we believe that the mining industry is not in need of legislative reform and that the Mine Safety and Health Administration already has the statutory and regulatory authority it needs to compel compliance with the law by recalcitrant mine operators.

This has been demonstrated recently by MSHA's utilization of its injunctive relief authority and its decision to finally begin placing mines on a pattern of violations status. MSHA should focus its resources and the power it already possesses where they are needed most.

IMA-NA urges Congress and the Department of Labor to leverage the existing safety programs currently being utilized by the mining industry. We believe that America's miners would benefit greatly by implementing a program based on public-private partnerships, for instance, a program similar to OSHA's Voluntary Protection Program, and that doing so would be a more efficient use of MSHA's resources.

It is important to note that not all mining is the same. The nonmetallic minerals sector of the mining industry simply does not present the same degree of hazard as other sectors. No fatality is acceptable, but we note that between 2003 and 2009, our fatality rate averaged nearly 80% less than the sector with the highest rate. We also should be noted that the nonmetal sector in the past has achieved the universally pursued goal of zero fatalities, most recently in 2006.

In conclusion, modernizing mine safety is an ongoing activity, and the best results are achieved through collaboration between industry and government. Regulatory compliance and reasonable enforcement still is necessary. However, the measure of our success is not the number or the severity of the enforcement actions taken against mine operators, but the safety and health of the mining workforce. We also need to be prepared to recognize and acknowledge superior mine safety performance as readily as we condemn unacceptable performance.

Thank you.

[The statement of Mr. Ellis follows:]

Prepared Statement of Mark G. Ellis, President, Industrial Minerals Association—North America

Chairman Walberg, Ranking Member Woolsey, and Members of the Subcommittee: I am Mark Ellis, president of the Industrial Minerals Association—North America, also known as IMA-NA. I also serve as president of the National Industrial Sand Association (NISA) and executive director of the International Diatomite Producers Association (IDPA), two minerals trade associations that also are members of IMA-NA. I have more than 30 years experience addressing mine safety and health matters.

IMA-NA represents companies that extract and process a vital and beneficial group of raw materials known as industrial minerals. Industrial minerals are the feed stocks for many of the products we take for granted, such as glass, ceramics, plastics, paper, and building products. It is the unique chemical and physical properties imparted by these minerals that make them valuable. Minerals represented by IMA-NA include ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, kaolin, magnesia, mica, soda ash, talc, wollastonite and a variety of other minerals. IMA-NA mineral sections typically represent 75-100% of the North American production of these industrial minerals.

Mr. Chairman, thank you for inviting the industrial minerals industry to testify today. Our sector often is forgotten in the attention paid to other, more familiar, mined products. In many ways, the low-profile of our industry is a testament to our ability to extract and process minerals using safe and responsible methods.

My message to you today is fourfold. First, the safety of America's miners is the paramount responsibility of all who work in the mining industry. Second, I ask that we all spend some time today rethinking what initiatives will modernize mine safety. Third, embracing technological innovation will modernize mine safety. Finally, please recognize that not all mining is the same.

Safety Is The Paramount Responsibility

The industrial minerals industry is proud of our contributions to reducing both the number and, more importantly, the rate of mining-related deaths, injuries, and illnesses. But let us not lose sight of the fact that the measure of our success is the safety and health of the mining workforce. There is absolutely nothing more important than sending miners home safe and healthy at the end of each day.

Mining presents risks unique to minerals extraction and processing that must be recognized and taken seriously, and anyone who does not affirmatively and proactively minimize these risks has no business operating mines. But the people you encounter in the mining industry generally are good, ethical individuals, who are dedicated to the protection of those who work in our mines and processing facilities. In fact, we commend all those who seek to drive fatality and injury rates to zero, including the U.S. Congress, employees at the Mine Safety and Health Administration (MSHA) and the National Institute for Occupational Safety and Health (NIOSH), other government officials, labor unions, mining communities and families, mine management, health and safety professionals, the media, and last but not least the miners themselves.

In the 33+ years since passage of the Federal Mine Safety and Health Act of 1977, the mining industry (and here I am referring collectively to the mining industry as a whole) has made significant gains in reducing both the number, and more importantly, the rate of mining-related deaths, injuries and illnesses. The industrial minerals industry is proud of our contributions to this effort and the successes together we have achieved. But let us not lose sight of the fact that the measure of our success is not the number or severity of the enforcement actions taken against mine operators, but the safety and health of the mining workforce.

Mr. Chairman, if I were to ask you what the leading cause of injury is in the industrial minerals industry, what would be your guess? Explosions, lung disease, falling rocks, or mobile equipment accidents? In fact, ergonomic or musculoskeletal injuries from slips, lifting, repetitive movement and the like represent 87% of the injuries in our industry.

A basic tenet of the safety profession is to first identify the hazard. I can't say that the industrial minerals industry has eliminated all non-ergonomic hazards in the workplace, just as I can't say we've eliminated all unsafe behaviors, but our injury statistics are telling us something and we are responding to that message. We want to address what is injuring our miners. So what have we done?

IMA-NA formed and ergonomics task force in 2005. We partnered with the National Institute for Occupational Safety and Health (NIOSH), supported its research, and produced a variety of products to address ergonomic hazards in the mining industry. Our companies are responding, they are evaluating their workplaces for ergonomic hazards, they are training mine personnel to eliminate unsafe behaviors, they are installing controls, and they are preventing injuries; all without a single legislative or regulatory action.

Our industry has not been timid in its embrace of public-private partnerships. We have formed another partnership with NIOSH and MSHA to address dust control because minimizing the hazards associated with exposure to respirable dust is a major priority for our companies. This particular effort will culminate shortly in the publication by NIOSH of a definitive resource document filled with information to help the minerals industry to manage dust control intelligently.

And not insignificantly, we also have maintained an Alliance with MSHA that has been enormously successful in achieving substantive results "beyond compliance" and which has improved the already outstanding safety programs of our membership. A few examples of the successes achieved through this alliance merit attention. Each year we identify and honor best-in-class companies in the industrial minerals industry for their safety performance. This includes not only companies with the best overall safety performance, but individual mining operations that operate without injuries in excess of 200,000 continuous work hours. We also generate and provide an analysis of safety performance at each company covering each of their individual operations. The goal here is to ensure that senior company executives know not only how their company and its constituent units are performing on the safety front, but how they compare to companies of similar size. Finally, I'd like to highlight that IMA-NA and MSHA jointly developed "A Practical Guide to an Occupational Health Program for Respirable Crystalline Silica." The model program is based largely on material developed by MSHA and the National Industrial Sand Association. The NISA voluntary occupational health program goes far beyond regulatory requirements, represents thousands of hours of work by dedicated professionals, and no doubt is the primary cause for the virtual elimination of silicosis (the world's oldest occupational disease) from their workplaces. The companies did this, not because the law requires it, but because it is the right thing to do. IMA-NA

thanks Assistant Secretary Main and his dedicated colleagues at MSHA for their continuing contributions to this Alliance.

Rethinking What Initiatives Will Modernize Mine Safety

This leads me to my second point. Mr. Chairman, it is time to rethink what types of initiatives will modernize mine safety. We acknowledge that there have been recent preventable tragedies in the mining industry that only stand to highlight the need for continued vigilance. However, the overall safety performance of the mining industry may be a surprise to some. For instance between 2002 and 2009, the fatality rate decreased by 49%, and the total injury rate decreased by 32%. Further, the mining industry compares quite favorably to other business and industrial sectors. In 2009, the total injury rate was 3.2 for the mining industry as a whole (based on the number of injuries per 200,000 hours worked). This rate is half that of many other business and industrial sectors. In fact, the mining industry's collective injury rates are below the 3.9 average for business and industry as a whole.

We believe that the mining industry is not in need of legislative reform, and that MSHA already has the statutory and regulatory authority it needs to compel compliance with the law by recalcitrant mine operators. This has been demonstrated recently by MSHA's utilization of its injunctive relief authority and its decision finally to begin placing mines on a "pattern of violations" status.

Today's approach to safety relies on such concepts as "behavior based safety." Threats and intimidation have been proven to be ineffective in getting "buy-in" on safety. And "buy-in" is what is needed because what really matters is how people act when no one is watching.

The mining industry has made considerable advancements in the development of safe processes and controls, and any efforts to improve mine safety should recognize the level of sophistication in modern mine safety management.

Mr. Chairman, IMA-NA believes that the best solutions to protect the lives of miners emerge from joint public-private partnerships as opposed to over-reliance on "command-and-control" regulatory schemes. It is human nature to take greater ownership in something that you helped to create, and collaborative programs are destined to "get-things-right" from the outset as everyone has played a role in their creation.

MSHA should focus its resources and the powers it already possesses where they are needed most.

As members of this subcommittee likely are aware, MSHA's statutory mandate covers a mining industry workforce of about 350,000 miners working at fewer than 15,000 mining operations. By contrast, OSHA's statutory mandate covers the construction, agriculture and maritime sectors, and general industry, with in excess of 130 million employees working at millions of workplaces. And both MSHA and OSHA seek to fulfill their statutory mandates with roughly the same number of federal employees. One reason it takes so many MSHA inspectors to fulfill the agency's statutory mandate is that the Mine Act requires each underground mine to be inspected in its entirety four times per year and each surface mine to be inspected in its entirety two times per year. At some larger mines, that MSHA inspector presence can become almost a continuing presence. And these periodic inspections are mandated regardless of whether the mine demonstrates an exemplary safety performance or an unacceptable one. While these mandatory federal inspections without doubt have contributed in some measure to the steady improvement in mine safety performance, strict adherence to the mandate has prevented MSHA from reallocating scarce inspector resources where they are needed most.

IMA-NA urges Congress and the Department of Labor to leverage the existing safety programs currently being utilized by the mining industry. We believe that America's miners would benefit greatly by implementing a program based on public-private partnerships, for instance a program similar to OSHA's Voluntary Protection Program (VPP), and that doing so would be a more efficient use of MSHA's resources. Since OSHA launched the VPP in 1982, more than 2,000 worksites have been approved for VPP status. VPP sites must demonstrate an effective safety and health program and operations must meet performance-based criteria for safety and health. Because this program is intended to promote a cooperative approach to workplace safety, the support of employees is a prerequisite for acceptance into the program. Worksites accepted into VPP are exempt from programmed inspections, but are subject to inspections generated by complaints, accidents, and other significant events. The program has generated impressive results, with the average VPP worksite having injury/illness rates that are approximately 50% lower than industry averages.

Instituting programs such as this will allow MSHA to hold out the success of VPP participants to the rest of industry as examples of the benefits that can be derived

from successful safety and health programs. Recognizing resource limitations at MSHA, a VPP-type program would be a fiscally responsible way to help promote safety and health success stories, while at the same time improving efficiency by freeing the agency to focus its scarce inspection resources on those companies and operations that truly merit attention and need assistance to help strengthen their programs.

Embracing Technological Innovation Will Modernize Mine Safety

Mr. Chairman, I would be remiss if I did not at least touch on the subject of technological innovation when discussing modernizing mine safety. This committee is to be commended for the technology-forcing provisions included in the MINER Act. While some intractable challenges do not lend themselves to technical solutions, solutions that work or offer promise should be embraced.

I have one example that utilizes the controlled use of compressed air to clean "take home" dust from a miner's work clothes. The technology was developed in collaboration between an IMA-NA member company, that company's workforce, and NIOSH. In essence, the technology involves a clothes-cleaning booth that whisks the dust from the clothing and safely discharges it from the work environment. It has potential application at both MSHA- and OSHA-regulated work sites, but both agencies currently have regulations on their books addressing the use of compressed air that restrict the introduction of this technology. Both agencies have expressed interest in the technology informally, with MSHA approving its use in a limited number of instances under its petition for modification procedures. However, a rulemaking of general application is the preferred method to make this innovative technology more readily available, thereby reducing workers' exposure to potentially harmful respirable dust.

Another example of cutting-edge technology involves the apparatus I have in front of me on the witness table. The so-called "Helmet-CAM" uses a hardhat-mounted video camera to capture a video of tasks performed by a mobile worker throughout the workday with the worker's respirable dust exposure also displayed in real time on the video to better identify areas or tasks of high exposure. Combining these two different forms of information together allows for the identification of key processes and/or tasks that significantly impact a worker's personal dust exposure. Once areas of high respirable dust exposure are determined, work practices or control technology can be developed to address the potential overexposure. The work practices or control technology then can be re-evaluated to determine its effectiveness in reducing the worker's dust exposure. This technology also is the result of a collaborative effort between an IMA-NA member company, that company's workforce, and NIOSH.

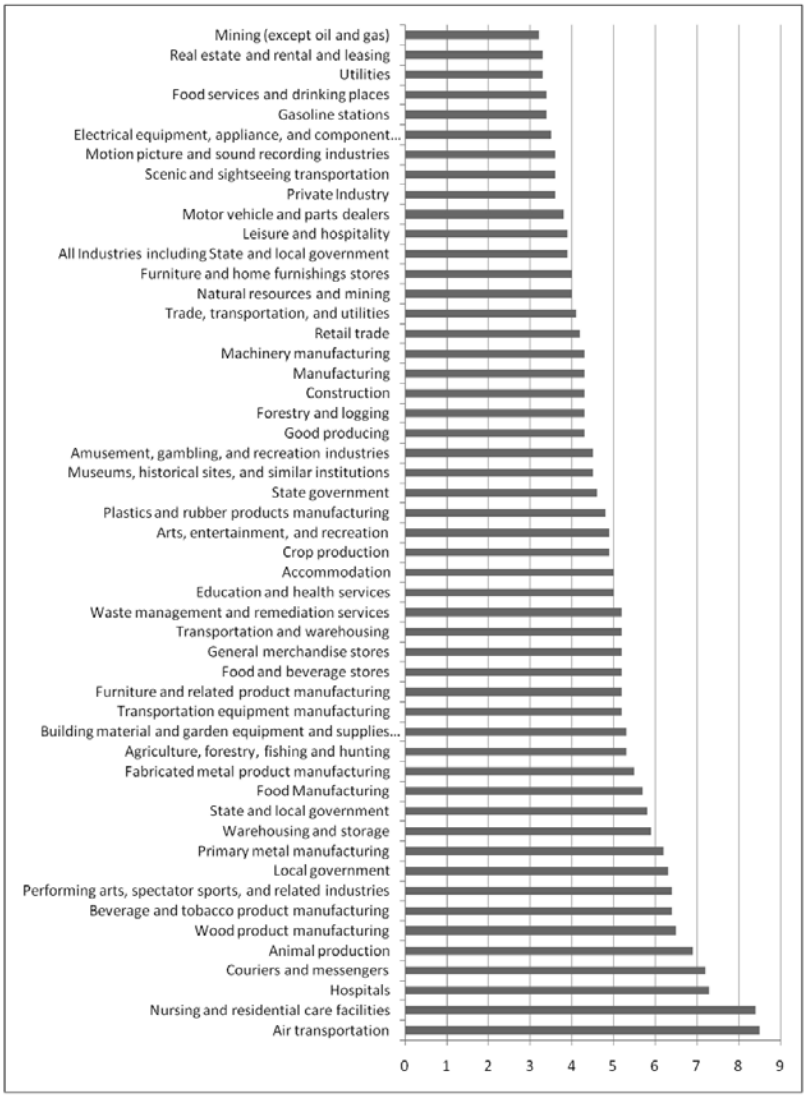
Not All Mining Is The Same

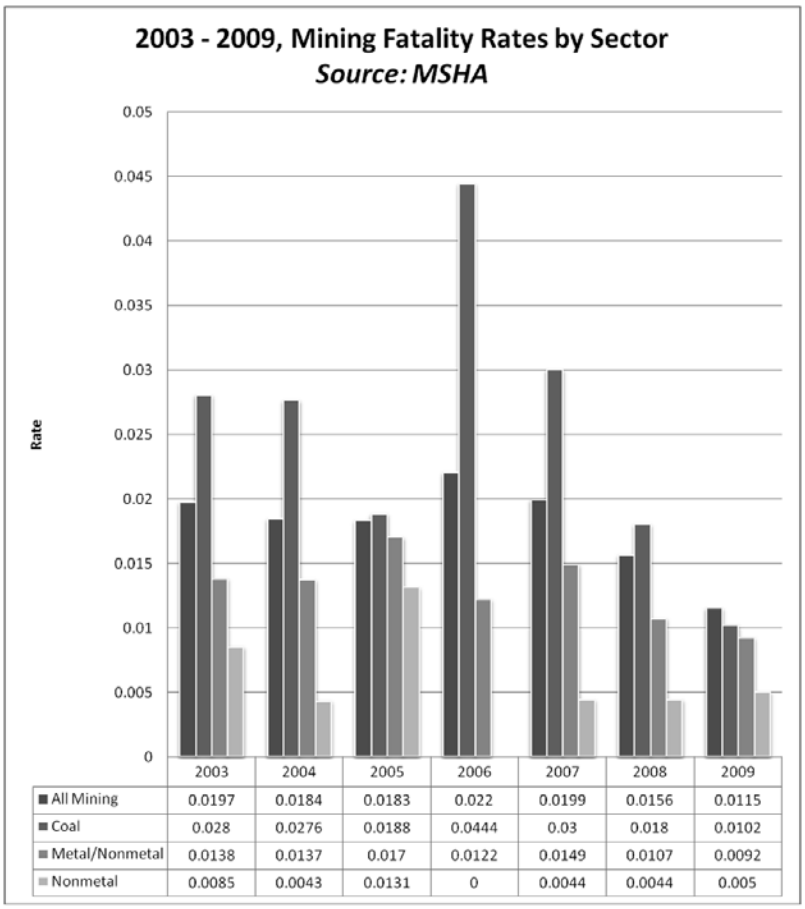
It is important to note that not all mining is the same. The nonmetallic minerals sector of the mining industry simply does not present the same degree of hazard as other sectors. No fatality is acceptable, but we note that between 2003 and 2009 our fatality rate averaged nearly 80% less than the sector with the highest rate. It also should be noted that the nonmetal sector in the past has achieved the universally pursued goal of zero fatalities, most recently in 2006. To maximize advances toward our common objective of safe and healthy miners, the focus of any reform, legislative or otherwise, must focus on what is needed most and where the greatest benefit can be realized. The same easily can be said of enforcement and compliance assistance.

Conclusion

Modernizing mine safety is an ongoing activity and the best results are achieved through collaboration between industry and government. Regulatory compliance and reasonable enforcement still are necessary. However, the measure of our success is not the number or severity of the enforcement actions taken against mine operators, but the safety and health of the mining workforce. We also need to be prepared to recognize and acknowledge superior mine safety performance as readily as we condemn unacceptable performance.

2009 Total Incident Rates, Select Industries: *Source: Bureau of Labor Statistics*





	2003	2004	2005	2006	2007	2008	2009
All Mining	0.0197	0.0184	0.0183	0.022	0.0199	0.0156	0.0115
Coal	0.028	0.0276	0.0188	0.0444	0.03	0.018	0.0102
Metal/Nonmetal	0.0138	0.0137	0.017	0.0122	0.0149	0.0107	0.0092
Nonmetal	0.0085	0.0043	0.0131	0	0.0044	0.0044	0.005

Chairman WALBERG. Thank you, Mr. Ellis.

Mr. Roberts, welcome.

STATEMENT OF CECIL EDWARD ROBERTS, JR., PRESIDENT, UNITED MINE WORKERS OF AMERICA (UMWA)

Mr. ROBERTS. Well, thank you for having us here today. I appreciate this opportunity to speak on behalf of the coal miners that we represent and, quite frankly, many of the coal miners and other miners across this country we don't represent.

I am also here today not only as the president of United Mine Workers, but I am also the chairman of the Health and Safety Committee for the AFL-CIO. And I will be speaking, and in some of my prepared remarks address nonmetal mining as well as coal mining.

I think for 100 years, we had no laws in this country, for a lack of a better way of saying it. It wasn't until 1969 that Congress acted and passed laws with enforcement actions by the govern-

ment. And that was in 1969 after a terrible tragedy up at the Farmington Number Nine mine in West Virginia. We still go there every year to honor those who perished, 19 of which are still entombed in that mine.

The tragedy was of such horrific nature, all of the miners could not be recovered. The Congress saw fit at that time, and I think the nation demanded, that Congress act to protect the coal miners of this nation. And the question would be, well, does legislation protect coal miners. And I think that is a resounding yes.

I think the statistics are very clear with respect to that. If you look at the 40 years prior to the passage of the 1969 Act, 32,000 miners died in this nation's mines, coal miners. Forty years after the passage of the act, less than 3,200. We averaged 800 fatalities a year prior to the passage of the 1969 Act. And we have obviously done so much better.

We passed revisions to the 1969 Act in 1977 that brought in metal and nonmetal for the same kinds of protections that we afforded coal miners in 1969. And the results were exactly the same. We had a two-thirds reduction in the number of fatalities in metal and nonmetal.

So it is almost impossible for anyone to argue that Congress acting has not helped protect coal miners and all miners in the United States of America and continues to do so every single day. We also know that we never recognized black lung, pneumoconiosis, as an occupational disease that was compensable in this nation until 1969. And we also know that 70,000 coal miners have perished in the last 40 years from this terrible disease.

So I think the statistics tell us that good laws passed by Congress, laws obeyed and laws enforced have saved many, many coal miners and other miners' lives in this country. You can't debate that. It is impossible for anyone to argue against that. That is the truth.

Some will say, "Well, things are so much better now." Laws are not written for the people who work hard and try to do the right thing.

You are absolutely right, Mr. Chairman. I have said before the United States Senate as well as the United States House of Representatives that I believe that somewhere between 90 and 95 percent of the coal industry is trying very hard to do the right thing. And I would assume that that goes for all of the mining industry.

But we have to understand there are people out there who are not doing the right thing. And we cannot ignore that fact.

And just yesterday, after 29 miners died a year ago at Massey Energy's Upper Big Branch mine—by the way, I lost friends in that. I lost neighbors in that. I have lost people I knew all my life, played ball with and/or their kids or their grandkids. So that hit home personally for some of us at the United Mine Workers of America.

Just yesterday, at the Randolph mine, just yesterday, Mr. Chairman—this happened yesterday. MSHA did an impact inspection at Massey's Randolph mine and issued 20 withdrawal orders, miners up into the face without controlling the dust, dust everywhere, two different pieces of equipment operating in the same location, all of

this in complete violation of the laws that this Congress has written to protect coal miners.

If we do not have strong enforcement of the laws that Congress writes, Congress should not write laws because they are useless if they are not protecting the coal miners in this nation. And I applaud what MSHA has done with the impact inspections.

The other thing we do—Mr. Chairman and members of the subcommittee, need to do a couple things. I think Congress should be given a lot of credit for what they did in 2006. The one thing that I can report to you today that if the Sago mine disaster had occurred yesterday, we would have had one fatality instead of 12 because of the actions that Congress took in 2006.

You took the actions to say that shelters have to be in mines. At the time the 2006 legislation was being debated, many in the industry said, well, we can't comply with this. It won't work. It costs too much money. But I can tell you there is a shelter in every single coal mine in the United States or its equivalent.

And one of the things that we did find from the Upper Big Branch explosion, the shelter that was in place there withstood the explosion. Water accumulated, and it did not destroy that shelter. And many of the people in the industry came here and said, well, you know what is going to happen. If you put these shelters in the mines, they are going to be destroyed in explosions. The miners won't have any place to go.

And unfortunately, the Upper Big Branch miners had no place to go. They were killed almost instantly. And if they had had the opportunity to live for 15 minutes, they could have saved their lives by making their way to one of these shelters. So I applaud the actions of Congress for the actions they have taken in 1969 and 1977, in 2006. And I look forward to following the action Congress takes in the future. Thank you.

[The statement of Mr. Roberts follows:]

Cecil E. Roberts, President
United Mine Workers of America
Testimony before the
House Committee on Education and the Workforce,
Subcommittee on Workforce Protections on
Modernizing Mine Safety
Wednesday, May 4, 2011
Hearing Room 2175
Rayburn House Office Building
Washington, D.C.

Thank you for inviting me to address the House Committee on Education and the Workforce, Subcommittee on Workforce Protections about this critical issue. I am President of the United Mine Workers of America (UMWA) that has been an unwavering advocate for miners' health and safety for over 121 years. I also serve as the Chairman of the AFL-CIO Committee on Safety and Health and wish to address non-coal mining issues this morning, as well. I am pleased to have this opportunity to speak about the compelling health and safety challenges that our nation's miners continue to confront, even in this 21st century.

If we look at the history of mining in this country, one thing is clear: when Congress acts, miners' lives are saved. The numbers are stark. Shortly after 78 miners died at Farmington, West Virginia in 1968, Congress enacted the Coal Act in 1969. The legislation was then expanded to other mining industries and renamed the Mine Act in 1977. Since the Coal Act was passed, fatalities in coal mining decreased dramatically: over 300 coal miners died in 1968, the year before the Coal Act was enacted, but fewer than 100 miners perished in any single year over the last 25 years. For the 40 years immediately *before* Congress passed the Coal Act about 32,000 coal miners were killed on the job, while in the 40 years *after* it became law only 10% that number -- about 3,200 -- were killed. This was still far too many, but a significantly lower number.

For non-coal mining, the numbers are also compelling. In the 34 years immediately *before* Congress passed the Mine Act, and thereby extended MSHA protections to non-coal miners for the first time, there were 6,079 metal/non-metal miners killed on the job. In the 34 years *after* Congress passed the Mine Act in 1977, fewer than a third -- 1,881 miners -- died.

And it has been 30 years since more than 100 metal/non-metal miners were killed in a single year. In 2010, there were 23 fatalities in metal and non-metal mines.

From this information it is fair to say that both the 1969 Coal Act and the 1977 Mine Act have saved the lives of many thousands of miners. Yet, too many miners continue to get sick from their mining jobs, and too many still get killed.

From NIOSH reports, we know that well over 70,000 coal miners have died from black lung disease over the last 40 years, and over 10,000 miners died from coal workers' pneumoconiosis during this last decade, from 2000-2010.

Respiratory hazards are not just an issue in coal mines. Non-coal miners are also working among fine dust particles that require proper ventilation and controls to prevent lung disease. Substances of particular concern are diesel emissions, silica and asbestos-like fibers that are suspected to cause mesothelioma among iron ore miners.

Miners in non-coal mines are exposed to many other hazards that are similar to coal mines, as well. For example, they experience falls of material and cave-ins. Pete Marek, a silver miner working at the Lucky Friday mine in Idaho, was killed just a few weeks ago when the mine roof collapsed. Injuries for coal and metal/non-metal miners alike are commonly caused by uneven ground, a lack of guarding on machines, falls, electrical hazards and mobile equipment accidents.

I would like to address some of the important improvements that Congress made after the several multi-fatal coal-mining tragedies of 2006: Sago, Aracoma and Darby. You may recall that in January 2006 at the Sago mine in West Virginia, 12 miners died. Eleven of them perished while they waited to be rescued, huddled behind ineffective curtains in a valiant effort to try to prevent the poisonous mine atmosphere from killing them.

When the Sago disaster struck, that mine had no underground shelters to protect the miners who survived the initial explosion. This was despite the fact that the 1977 Mine Act authorized MSHA to require such protective shelters. At that time, shelters simply were not then part of the established industry practice.

Yet, in the 2006 MINER Act, Congress paved the way for shelters to be placed in underground coal mines. As a result of that law Congress passed after the 2006 disasters, coal mines finally have such shelters or shelter alternatives in place.

In fact, we have learned that despite the tremendous explosive forces that rocked the Upper Big Branch mine last April, a shelter near the explosion remained intact and *could have* sheltered miners *if* they had survived the explosion. That Strata shelter was under water for weeks, and yet it remained dry, sealed and pressurized. Had that shelter been at the Sago mine in January 2006, those 11 miners who died from the poisonous atmosphere would still be with us today. Without Congress advancing the issue in the 2006 MINER Act, we still would not have shelters underground.

Likewise, tracking and communications' technology and equipment is now far more advanced than it was before 2006. Again through the MINER Act, Congress required significant improvements. While many coal operators were then heard to say it "couldn't be done," or the costs were too high to allow them to remain in business, Congress acknowledged that these changes were appropriate and demanded that the industry implement the improvements. By legislating these changes, there was a flurry of imaginative and creative work done to develop practical equipment that could survive the harsh mine environment. These challenges are significant, but so is the value of our working miners!

We appreciate that operators are now spending more money on equipment and technology to make the mine environment safer for miners than they did before the MINER Act. However, more is needed. We need to do more to protect miners from disasters occurring in the first place, and to better protect their health in the long run.

One example where practice has not kept pace with technology concerns rock dust samples. The mine environment can become extremely explosive, and incombustible rock dust is required to minimize the explosiveness in case there is an ignition source. However, rock dust samples are not now completed in a timely fashion, even though much better equipment is available that could return immediate information.

The current protocol provides for rock dust samples to be sent to MSHA's Mount Hope lab, where the Agency uses antiquated equipment to test the samples. It generally takes 2-3 weeks for the Mount Hope lab to return the results. Indeed, at Upper Big Branch, samples taken *before* the April 5 explosion showed that the mine had inadequate rock dust – but those sample results were not reported until *after* the disaster.

There is a better system, and it is available today. NIOSH has developed the coal dust explosibility meter (cdem), a hand-held device that provides instantaneous results of the incombustible content. However, without a requirement that the cdem be used, there simply is no market for the equipment. Therefore, the cdem is not in use in this country. We are left to wonder whether having the rock dust sample results in real time would have averted the Upper Big Branch disaster.

Another way to modernize safety practices involves proximity detectors. On February 1, 2010, MSHA requested information regarding the use of proximity detection systems and whether their use would reduce the risk of accidents where mobile equipment pins, crushes, or strikes miners in underground mines and, if so, how? MSHA also requested information to determine if the Agency should consider regulatory action and, if so, what type of regulatory action would be appropriate. This should not even be debatable.

As of March 2011, the mining industry experienced 33 fatal crushing or pinning accidents since 1984 that involved the operation of remote control continuous mining machines. Although remote control continuous mining machines have the highest incidence rate, similar accidents have been recorded on other types of mining machines, as well. Miners continue to be killed by mining equipment even though we have MSHA-approved proximity devices available today. Nothing has been put into place to further prevent these types of deaths. While better and newer equipment and technology already exists, manufacturers are not manufacturing it and operators are not purchasing it, because operators are not required to use it.

The personal dust monitor (pdm) is another tool that by now has been proven, tested and approved. We know that when this device is utilized it will help reduce or even prevent further deaths from the dreaded disease of black lung. Currently miners do not use pdms. They have to wait weeks to know if they were over-exposed to breathable dust. By then it is too late to

take action to correct the problem. The pdm is a device capable of measuring dust giving real time data to miners so they can take immediate action to reduce their exposure to the harmful respirable dust that causes black lung.

The same thing goes for atmospheric monitoring behind sealed areas. Coal mines in Australia now monitor the underground coal mine atmosphere using monitoring equipment designed for areas behind seals. That equipment should be used here, too.

We are currently in the midst of an MSHA rulemaking on respirable dust exposure and how the pdm will be used, and we expect to see a proposed MSHA rule on how proximity detection equipment will be required to protect miners from preventable deaths. We hope that industry does not impose roadblocks or seek delays to prevent these two major changes from being adopted as soon as possible. History shows us that the mining industry generally resists laws and regulations that will cost more money or affect how operators produce the mining products. Operators complain that these protections are not proven, or state they are too expensive. It is our hope that today's industry recognizes the need for these changes and will join us to make these changes as soon as possible.

There is no doubt that legislation this body enacts makes a huge difference in preserving and advancing miners' health and safety. The 2006 MINER Act made critical improvements for post-accident rescue and recovery concerns. But the disaster at Upper Big Branch, as well as all the other deaths and illnesses that continue to plague the mining industry, make clear that Congress must do more to help protect miners. Operators should be required to make better efforts to prevent injuries and illnesses in the first place. After all, the mining industry has shown time and again that it is not very effective at self-policing!

In addition to needing more -- and more up-to-date -- equipment, MSHA's enforcement tools should also be modernized. For example, MSHA's criminal penalties have been so insignificant that they have not served to deter unlawful conduct. In order to allow inspectors to observe actual mining practices, Congress mandated that MSHA's periodic inspections be conducted on an unannounced, surprise basis. Therefore, it has been against the law for anyone to give advance notice of MSHA inspections. Yet, as we have learned from the Upper Big Branch investigation and the indictment the Assistant US Attorney issued against

Hughie Elbert Stover, the head of security for Performance Coal Company, Mr. Stover regularly and continually used signals to give advance notice of MSHA inspections. Miners from Upper Big Branch have also reported that they were directed to and did change their mining practices, making short-term adjustments only when they learned that government inspectors were coming to a section to inspect. If MSHA doesn't observe a violation, it won't write the citation, and with deliberate efforts to conceal unlawful mining practices, there is no question that miners' health and safety is jeopardized.

The evidence of advance notice of safety inspections is not limited to Upper Big Branch, but found in many operations. Indeed, MSHA's recent tactic of taking control of the communications' systems when inspectors travel to some operations has shown that the advance notice is not uncommon: the kind and extent of violations found when the communications are taken over exceed those MSHA had previously discovered. Clearly, the existing penalties are ineffective, and should be increased to help effect compliance.

We support MSHA's high impact inspections, which focus extra resources on rogue operators. We also support the Agency's efforts to provide education and compliance support as it has been doing, such as its updated web-based violations' reports showing each operation's violations history so any operator can quickly learn if it is vulnerable to the consequential Pattern of Violations program. However, we firmly believe that the existing enforcement provisions, specifically including the four and two mandatory inspections for underground and surface mines must remain intact.

Other areas where the Mine Act should be updated concern its whistleblower protections, and accident investigation procedures. The Mine Act was one of the first to provide anti-discrimination protections. Yet these provisions are now inferior to recent and more-protective whistleblower provisions included in other statutes. For example, the Consumer Product and Safety Improvement Act that Congress passed in 2008 provides a 180 day statute of limitations, as does the 2010 Patient Protection and Affordable Care Act. Miners under the Mine Act now have only 60 days to file a discrimination charge. This window should be lengthened to give miners a better chance to pursue actions when they suffer discrimination for exercising their health and safety rights.

The compensation provisions in Section 111 of the Mine Act should also be expanded. As it now stands, miners can collect no more than one week's worth of wages when an operator's violations compel MSHA to shut down the mine. As alternative work is all but non-existent in many coal field communities, miners need better protections. Too often miners have to make the choice between putting food on the table and protecting their own safety. By expanding the compensation provisions, miners' health and safety would be better protected.

As for accident investigations, we believe that procedures should be changed to include those most affected: the miners and family members of miners killed. Miners' representatives should be fully included in accident investigations as they have important knowledge to contribute. Yet during accident investigations, MSHA has restricted the role of designated miners' representatives. We urge that miners' representatives be given full participation rights in all aspects of an accident investigation.

We also believe that MSHA must have the power to subpoena witnesses, rather than rely on voluntary interviews. The subpoena power should encompass inspections as well as accident investigations to ensure that miners can speak freely with government investigators.

We also believe that multi-fatal accidents under MSHA's jurisdiction should be investigated in the open. The government has claimed that its on-going criminal investigation justifies its exclusion of miners' representatives and family members from its on-going Upper Big Branch investigation. Yet, the government's investigation of the BP explosion a few weeks after the Upper Big Branch disaster involved public hearings, even though a criminal investigation was also then in process.

Finally, I wish to address the scope of MSHA's jurisdiction. I know many sand and gravel operators, in particular, have lobbied to have that industry moved from the jurisdiction of MSHA to that of OSHA. The AFL-CIO Committee on Safety and Health has long opposed that. The Mine Act is more protective and more prescriptive than is the OSH Act. It has served to save miners' lives, including those in the sand and gravel industry. Indeed, of the 16 fatalities in metal and non-metal mines in 2009, five -- 31% -- were in sand and gravel mines.

Sixty-six percent of fatalities in metal and nonmetal mines in 2010 were miners with less than 5 years of experience in their jobs; for 2009 that number was at 69%. With the anticipated retirement of the baby-boom generation, many mines will be replacing a quarter to a half of their workers over the next few years. New miners in all portions of the mining industry, including sand and gravel, deserve the better protections that the Mine Act provides: they need the new miner training, the routine inspections, and coverage by safety and health standards.

Again, we thank you for the chance to appear before this Subcommittee, and appreciate your interest and concern for miners' health and safety.

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Chairman WALBERG. Thank you, Mr. Roberts.

Mr. Bumbico, welcome.

STATEMENT OF ANTHONY S. BUMBICO, VICE PRESIDENT, SAFETY, ARCH COAL, INC., TESTIFYING ON BEHALF OF THE NATIONAL MINING ASSOCIATION

Mr. BUMBICO. Mr. Chairman, members of the subcommittee, thank you for the opportunity to testify. I am Tony Bumbico, vice president of safety for Arch Coal. I am appearing today on behalf of the National Mining Association and as a representative of Arch.

Arch is our nation's second largest coal company with operations in six states. We have 4,700 employees at our underground and

surface mines. In 2010, we mined over 160 million tons of coal while achieving the lowest injury rate among our nation's diversified coal producers. While we are proud, we are not satisfied. Injuries still occur at our operations, and we won't be satisfied until we reach zero injuries.

I began my career in 1974 as an underground miner. I was a member of the United Mine Workers of America and later elected to a position on the union's executive board. For the last 25 years, I have performed various management functions during which I have always been dedicated to promoting health and safety.

During my career, the coal industry has made significant progress. But the industry can and must continue to improve its safety performance. In the time I have, I want to talk about the efforts underway at NMA to modernize mine safety and about the specific efforts underway at Arch.

In 2007, NMA initiated an effort to identify barriers to safe performance and to disseminate best practice materials. This effort began with an examination of the industry's safety performance. NMA has studied companies with exemplary safety performance and identified certain common elements.

Effective safety processes tend to be performance-based, integrated into a comprehensive management system. They are supported by senior management and encourage employee involvement. In NMA's estimation, these are the elements necessary to modernize health and safety in the U.S. mining industry.

Leadership and culture are the characteristics that have guided Arch's effort to modernize safety. These characteristics have had a positive impact on safety throughout the mining industry. At Arch, safety is a core value. Our goal is to reach the perfect zero.

Historically, Arch's safety performance has been solid. In 2010, for example, our total incident rate, which measures lost time and medical injuries, improved to 1.1. That represents a 76 percent improvement since 1998. We didn't achieve this level of performance overnight.

Our safety process, when I arrived at Arch in 2004, began with the requirement that each operation meet minimum corporate standards. These standards were set forth as safety principles incorporated in division safety plans adopted by each operation.

In 2004, we implemented a continuous safety improvement process to focus on identifying and closing measurable gaps in safety performance. That same year, we also started conducting cross-operational safety audits where we have people from different operations evaluate the core safety processes at their sister mines.

In 2006, not satisfied with our pace of improvement, we adopted behavior-based safety as the vehicle to drive our safety performance to the next level. Every Arch operation has implemented a BBS process using steering teams to support their improvement efforts. The steering teams develop a list of critical behaviors with the potential to contribute to injuries. These critical behaviors serve as the basis for a peer-to-peer safety observation process.

In a nutshell, BBS is a no-name, no-blame process that moves beyond the use of injury trends to identify safety performance. BBS is about encouraging employees to avoid exposing themselves to risk and sharing information about the exposures they encounter.

It teaches miners about the concept of safety. Understanding the concept of safety improves the miners' ability to recognizes risks, respond appropriately and helps to build an effective safety culture.

It has been 5 years since we implemented BBS, and we are seeing positive trends. Out total incident rate has improved 57 percent. Exposures have been reduced by over 120,000 peer-to-peer safety observations. And over 3,100 specific barriers to safe performance have been identified and eliminated.

BBS has helped our employees understand the concept of safety. But it is not the only tool available to modernize mine safety. We have come to recognize that modernizing mine safety requires leadership, culture, training and involvement, characteristics that don't result from writing more safety rules or enforcing them more stringently.

Mr. Chairman, in my written testimony I will also discuss applications of voluntary protection program to modernizing mine safety. But in the interest of time, I will defer on that issue.

In closing, I think it is critical that we all recognize that to improve safety performance, we need to move beyond the model based strictly on enforcement. Enforcement is necessary, particularly with bad actors. But to truly modernize mine safety, we have to develop performance structures that engage all stakeholders in problem-solving manner.

Thank you for the opportunity to testify. I will be happy to answer your questions.

[The statement of Mr. Bumbico follows:]

Prepared Statement of Anthony S. Bumbico, Vice President of Safety, Arch Coal, Inc., on behalf of the National Mining Association

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to testify. I am Tony Bumbico, Vice President of Safety for Arch Coal, Inc. (Arch). I am appearing today on behalf of the National Mining Association (NMA) and as a representative of Arch.

Arch Coal is our nation's second largest coal company with operations in six (6) states. We have 4700 employees at our underground and surface coal mines, preparation plants and ancillary facilities in Colorado, Kentucky, Utah, Virginia, West Virginia, and Wyoming. In 2010 the Arch Coal subsidiaries mined over 160 million tons of coal that was shipped to domestic power plants in 39 states for electric generation and to international customers on four continents.

The coal produced by our subsidiaries represents 15% of domestic production and 7% of the coal used for domestic energy generation. We are proud of the fact that our operations accomplished this while achieving the lowest reportable injury rates among our nation's diversified coal producers. While we're proud of this accomplishment, we are not satisfied. Injuries still occur at our operations. As a company we have more to accomplish and will not be satisfied until we reach our goal of zero injuries.

I began my career in 1974 as an underground coal miner in West Virginia. I was a member of the United Mine Workers of America, and was later elected to a position on the International Union's Executive Board, a position I held for six years. Following my tenure with the UMWA, I worked the next 25 years in various safety, human resources, and operations positions in the coal industry. While I've worn many different hats, I've always dedicated my career to promoting health and safety. During my career, the coal industry has made significant progress in this area. I'm a firm believer, however, that the industry can and must continue to improve its safety performance.

Before talking about Arch's specific efforts to modernize safety, I'd like to talk more broadly about the efforts to improve safety performance that are underway at the National Mining Association.

In 2007, NMA initiated an effort to examine the barriers to improved safety performance and to disseminate best-practice materials across the industry. This effort began with an examination of the industry's safety performance. While most people

would agree that notable progress has been made over the last two decades, the industry has not reached its goal of zero fatalities and injuries. Moreover, it appears that the reduction in fatalities has reached a plateau.

Improving safety performance at our current pace is not acceptable. As a result, NMA has initiated an effort that will complement what's been accomplished and challenge the industry to take a more aggressive path to modernize and improve safety performance.

NMA has studied, and continues to study, the safety practices of companies and industries from around the world that have exemplary safety performance. Successful safety processes all have certain common elements. They are integrated into an effective management system, are supported by senior management; involve their employees in the safety process; are reinforced by the organization's culture, and in return, support the culture.

These elements are common to successful safety and health processes across all industries. In NMA's estimation, these are the elements necessary to modernize health and safety in the U.S. mining industry.

Exemplary safety performers view adherence with regulatory requirements as the starting point, not as the finish. They recognize the limitation of enforcement as a means to improve performance. While compliance with the law is necessary and important, there are more effective ways to improve safety performance.

To be effective, a safety system should be specifically designed to meet the unique needs of an organization. The design must consider the organization's culture, and its workforce. When designing a performance-based safety system it's important to remember that "one size does not fit all."

In many respects overly proscriptive regulatory requirements can inhibit the ability of companies to respond proactively to health and safety issues. Often, the time spent dealing with bureaucratic requirements steals precious time that could be spent eliminating a barrier to safe performance. Enforcement is an important safety tool, but its ability to improve performance is limited. Quite simply, there are more effective ways to improve safety performance.

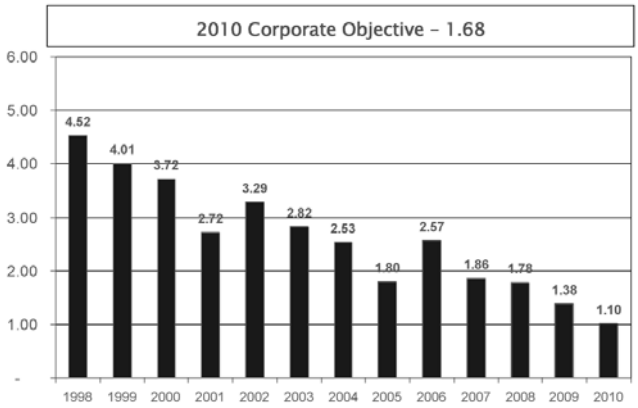
One key thing we've come to realize is that risk-based safety and health management systems that involve employees are more likely to move safety performance to the next level. Experience shows that "safe behavior" doesn't occur in a vacuum, it's shaped by leadership and culture. These are characteristics that are taught and nurtured, not legislated.

Arch Coal's Safety Process

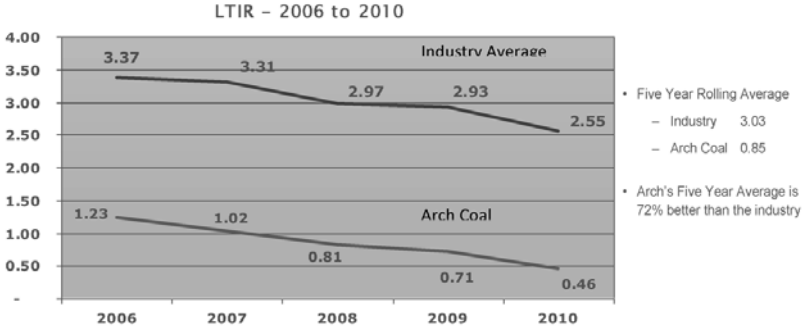
Leadership and culture are the characteristics that have guided Arch's efforts to modernize safety. We've had some success developing a strong safety culture by applying the concepts of leadership, employee involvement, and problem-solving to health and safety issues.

At Arch, safety is a core value. It's integral to who we are. Our goal is to reach the Perfect Zero and we think this goal is achievable. Historically, Arch's safety performance has been solid. In 2010, our Total Incident Rate, which measures Lost Time and Medical Injuries improved to 1.10. That represents a 76% improvement since 1998. Over time, the Arch mines have performed well below the industry average. In fact, our five-year average is 72% better than the coal industry average. (Safety performance charts are attached.)

Arch Coal, Inc.
Total Incident Rate 1998 – 2010



Lost Time Rate – Comparator Group
All Mines - 2010



(Note: An incident rate is a means of normalizing injury rates so that different size organizations can be compared. It is calculated by multiplying the number of incidents times 200,000 hours and dividing that number by the hours worked by employees at that site. The 200,000 hours in the calculation represents the number of hours 100 people normally work in the course of a year).

We didn't achieve this level of performance overnight. Our safety process was constructed in layers. The building blocks were put in place over time. I'll take a few minutes to discuss each of these components. They include:

- Division Safety Plans
- Cross Operational Audits
- Safety Improvement Process
- Behavioral Based Safety Process

Division Safety Plans

When I arrived at Arch seven years ago, they had a solid safety foundation in place. The center piece of their process was a requirement that each operation meet minimum corporate safety standards. These standards were set forth as safety principles. These principles were incorporated in Division Safety Plans adopted by each operation. Over time, our operations have built on that foundation.

For example, each Arch operation must actively demonstrate a strong visible management commitment to safety; a working safety policy with a goal of Zero Injuries; and integrate their safety process into their organization. They must also establish line organization responsibility for safety; establish challenging safety goals and objectives; and require high standards of safety performance.

Each Arch operation must also employ supportive safety professionals; conduct comprehensive injury/incident investigations; and provide employees ongoing safety training. Other examples of our core principles include progressive motivation; effective two-way communication; and comprehensive safety audits.

Safety Improvement Plans (SIP)

In 2004, Arch implemented a continuous safety improvement process. This is a systems-based, goal-oriented process that follows an annual cycle. It focuses our operations on identifying and closing measurable gaps in safety performance. The SIP process focuses on measurable results.

Every year, each Arch operation develops a Safety Improvement Plan (SIP). Our operations analyze key safety performance metrics and establish between three and five improvement targets. Each SIP identifies what types of improvement interventions they plan to implement to achieve their targets. Our corporate safety professionals visit with them at the beginning and mid-way through each year to discuss their strategies and progress. At the end of the year, we evaluate what they've accomplished and start the process all over again.

Cross Operational Safety Audits

We also started conducting cross operational safety audits in 2004. Our cross operational audits supplement the safety audit process already in place at each operation. The concept is really quite simple. We take people from Mines A, B, & C and go to Mine D to evaluate its safety process. We use the audit to evaluate the health of a mine's Division Safety Plan; Safety Improvement Plan; and Behavior-Based Safety Process. We also use the audit to review their core safety processes.

Our Cross Operational Audits are not intended to be "wall-to-wall" inspections. They are designed to obtain a "snapshot" of how the mine solves health and safety problems, and to evaluate what their employees know about health, safety, and injury prevention.

Arch conducts four to five cross-operational safety audits per year. We attempt to emphasize constructive feedback. One of our primary objectives is to identify and share best practices. In addition, our Cross Operational Audit Process helps us to maintain our health and safety standards. It also serves as an employee development vehicle; and encourages employee involvement. Most importantly, it helps Arch visibly demonstrate its commitment to safety.

Other Key Safety Processes

I won't go into as much detail, but I'll mention a few other processes we've implemented to maintain our focus on continually improving safety performance, to address specific risks, and to build our safety culture.

Arch holds an annual safety summit for key managers, safety professionals and hourly employees active in our safety process. This event has grown to include nearly 100 internal safety leaders. This is our annual opportunity to recognize safety accomplishments and establish new performance objectives.

We also sponsor annual safety workshops to provide developmental opportunities for our safety professionals. In addition, we have designed and implemented specific health and safety processes to address performance issues related to contractor safety; emergency preparedness; crisis communications; and explosives safety.

Behavior-Based Safety (BBS)

The processes I've mentioned were all in place by 2006. They'd helped us improve, but we weren't satisfied. We felt we were having too many injuries and that our safety performance had reached a plateau. In fact our Total Incident Rate increased from 1.80 in 2005 to 2.57 in 2006.

As a company, we believed that one injury was one too many and we were confident we could improve. That's why we decided to adopt a Behavior Based Safety (BBS) process. It's the vehicle we chose to drive our safety performance to the next level.

Since 2006, every Arch operation has implemented a BBS process. BBS is a safety improvement process that starts with analyzing the "safe" and "at-risk" behaviors involved in the daily tasks employees perform. Each Arch site has assigned a Management Sponsor, appointed a Facilitator, and established a Steering Team to support their BBS process.

The Steering Team normally consists of hourly employees. It starts by developing a list of "critical behaviors" with the potential to contribute to safety related incidents. This list of "critical behaviors" serves as the basis for a peer-to-peer safety observation process.

The Steering Team trains observers on how to use the critical behavior checklists to identify exposures that may lead to injuries. The observers provide their peers with feedback on whether behaviors are "safe" or "at-risk." The data gathered dur-

ing the observation process is entered into tracking software to help identify "at-risk" trends and barriers to safe performance. This trend information is used to solve safety problems, identify improvement opportunities, and remove barriers to safe performance.

The BBS process implemented by Arch was designed by Behavioral Science Technology, Inc. (BST). While there are other BBS processes available, we chose BST because it was a systems-based improvement process that focused on the entire organization's leadership and culture.

Arch initiated the BBS process at our mines by conducting a comprehensive organizational assessment. The assessment analyzed key organizational dimensions that predict safety performance. The leadership team at each of our mines also participated in an evaluation and coaching process. Training was conducted to teach supervisors how to support the process, and employees were trained in data collection and problem-solving techniques.

The Arch operations have effectively implemented BBS. Now our focus is on sustaining the processes. We're attempting to do this by integrating BBS into our traditional safety process and our culture. We're also taking every opportunity to demonstrate visible safety leadership.

In a nutshell, BBS moves beyond the use of injury trends to measure safety performance and identify improvement opportunities. Injury trends are not predictive. They don't necessarily reflect the risks employees are exposed to because people are often lucky. They take shortcuts and get away with it. This leads to complacency. Before you know it they assume they can take the shortcut and not get hurt because (as the refrain goes) "we've always done it that way before."

Instead of relying solely on injury trends as the primary safety indicator, BBS focuses on identifying and reducing "at risk behaviors" and reinforcing "safe behaviors." The process helps to identify risk-related exposures and barriers to safe performance that can potentially cause injury. Basically, employees are encouraged to not take the chance of exposing themselves to risk, and to share information about the exposures they encounter.

Is Arch's BBS process working? We think so. It's been five years since we started this process and we're seeing positive trends in a number of key areas.

- Our Total Incident Rate has improved 57% from 2.57 in 2006 to 1.10 in 2010.
- Exposures have been reduced by 119,477 peer-to-peer safety observations.
- Safe behaviors are being reinforced by our 2,714 trained observers.
- Over 3,160 specific barriers to safe performance have been identified and eliminated.
- Our safety culture has been strengthened by making contact with 151,498 employees during the observation process.
- Our BBS Facilitators and Steering Team members have developed into a new core of safety leaders.

Ultimately BBS has made our safety culture and process stronger. It has helped by involving more employees in the safety process; improved communication flow within our organization; and upgrading the problem-solving skills of our employees. Here's what some of our facilitators said at a recent meeting about the BBS process:

- The process involves the workforce and empowers them to be self-directed in improving safety.
- The process holds employees accountable for their own safety performance.
- BBS empowers people to change in a positive way.
- BBS provides a format for structured problem-solving that can be applied to all areas, not just safety.

The Concept of Safety

Arch's BBS process is working because it teaches miners about the "concept of safety." Most major mine operators know the critical competencies miners need to reduce the risk of injury or illness. Miners need training in basic health and safety regulations, the technical skills they need to do their job, and emergency/escape preparedness skills. Most major mining companies address these competencies fairly well.

In my opinion, the biggest challenge we face in the mining industry is helping miners to understand the "concept of safety" and integrate them into an effective safety culture. Effective safety performance requires two key things. You have to improve the ability of miners to recognize and respond appropriately to hazards; and you have to convince them your company is serious about safety.

Understanding the concept of safety improves a miner's ability to recognize risks and respond appropriately. This is made more complex because mines aren't assembly lines. They are dynamic ever-changing environments with conditions and risks

that change rapidly. Miners have to be able to safely adapt to a changing environment.

What this means is that—unlike a controlled environment—you can't rely on rote learning techniques or prescriptive safety rules to ensure safe performance. That's why writing more safety rules and enforcing them more stringently is not an effective way to improve safety performance in coal mines.

You have to provide miners with higher level analytical and problem-solving skills. In terms of hazards, miners need to be capable of thinking at a conceptual level. They need to have the ability to recognize new exposures as conditions change. Safe miners are effective risk identifiers, decision-makers, and problem solvers. Involvement in BBS has helped our employees improve these skills. By focusing our employees on critical behaviors, BBS is increasing their understanding of the "concept of safety."

I'd like to turn to baseball to illustrate this point. Ted Williams was one of the most prolific hitters in baseball. He once said that * * *

"A hitter just can't go up there and swing. He's got to think. Listen (he said) when I played I knew the parks, the mounds, the batter's box, the backgrounds. I studied the pitcher. I knew what was going on at the plate. It used to kill me to strike out, but when I struck out I knew what got me and what I was going to do about it."

Ted Williams was an effective hitter because he understood the "concept" of hitting. He understood the mental, as well as the physical, aspects of his trade. Ted Williams understood the critical behaviors that contributed to his success on the baseball field. That's why he was a master of his craft.

BBS is helping our employees "master" the concept of safety. A master is one who has superior skill or knowledge. An individual or team with the knowledge and skills to solve problems and creatively eliminate barriers to safe performance. Regulations don't develop masters. Masters are shaped by leadership, culture, training and involvement.

Voluntary Protection Program

We have found that performance-oriented, systems-based safety processes that involve employees help drive safety performance. Along this same line of thought, we believe safety performance would also be enhanced if MSHA adopted a program for mine safety modeled on the very successful Voluntary Protection Program (VPP) administered by the Occupational Safety and Health Administration (OSHA). The VPP, created in 1982, allows those employers who meet performance-based health and safety criteria to be removed from programmed inspection lists. OSHA will not issue citations for standards violations that are promptly corrected so long as the worksite continues to exceed the VPP standards. The VPP promotes a cooperative approach to workplace safety. Employee support and involvement is a prerequisite for acceptance into the VPP.

It's important to note that the VPP complements OSHA's enforcement activity, it does not replace it. MSHA could tailor a program in the same manner. VPP allows OSHA to focus its inspection resources on higher-risk worksites and would permit MSHA to do the same. This will become an increasingly important consideration as OSHA and MSHA alike are compelled to render resource allocation decisions in a time of budgetary limitations.

Once a worksite is accepted into the VPP program, it must prepare a self-evaluation annually to be submitted to OSHA along with injury and health rates. All compliance standards and worksites remain subject to OSHA inspections generated by complaints, accidents or other significant events. Because VPP participants develop and implement systems to prevent employee injuries and illnesses, the average VPP worksite has a lost workday incidence rate at least 50 percent below the average for its industry.

Since its inception, the VPP has steadily expanded the number of worksites participating in the program. They are located in every state and cover more than one million employees. In addition, since 1992, states have started their own VPP programs. Today hundreds of worksites participate in State VPP programs. In 1997, recognition of the program's success resulted in it being expanded to allow federal worksites to participate.

To improve and modernize mine safety, we need to operate more effectively. To improve safety performance, we need to move beyond a model based strictly on enforcement. Enforcement is necessary, particularly with regard to "bad actors," but to truly modernize mine safety we have to develop performance structures that engage all stakeholders in a problem-solving manner.

Performance structures based on risk-based approaches that establish higher standards, engage employees, and encourage cooperation simply make sense. If

MSHA were to adopt a VPP-type process it would move the industry in that direction.

Closing

Mr. Chairman, thank you for the opportunity to testify. I would be happy to answer any questions.

Chairman WALBERG. I thank each of you for your testimony. And now we will move to questions from the panel here. And I look forward to beginning.

Mr. Griesemer, in your written testimony you cite examples of MSHA inspectors lacking consistency in their citation process. I personally heard many illustrations and examples of how an inspector will write a violation for something that another inspector said was acceptable only months prior. I also hear of inspections that result in high numbers of citations that go on to be found to have no merit.

You suggest that this problem of inconsistency may stem from cross-training inspectors in various sectors of jurisdiction. Do you believe the inconsistencies found in this citation process result from inspectors inserting a great deal of subjectivity to the citation process rather than using objective standards?

Mr. GRIESEMER. Mr. Chairman, I believe that there is an effort by MSHA to be consistent. But I believe there is a—let me give you a couple of examples. I just had a couple citations a week ago at our Open Pit plant in Joplin, Missouri. And I think they pretty much illustrate some of the issues that small operators like myself are dealing with.

And one of these citations is justifiable. One of our stockpile truck drivers dismounted his machine after setting the parking brake, left the machine unattended for a couple of minutes and then came back. Under the rules to live by, we are now very focused on chocking wheels for heavy equipment like that. And what he did was not appropriate.

But this is a shifting standard. I think we could say 10 years ago, that that may not have been a citation. But today, we are focused on power and haulage, which is responsible for, I think, last year, it was seven deaths and injuries. So we have to raise the bar.

And I am in agreement with that. The problem is I went out to that plant in the fall and instructed our miners that this is an initiative. This is something we have to—we have to comply with. We supplied the wheel chocks. We supplied the training. But it is still one of those patterns, those patterns of behavior that have to be adjusted.

That was a 7-year employee stockpile truck driver doing his job and making that decision as to whether he was going to be off that truck long enough to chock the wheels. This resulted in a citation that is a significant and substantial citation with possibility of a fatality being highly likely.

An instance of what will be a contested violation is we were cited on a maintenance truck that was located at the plant. The backup alarm on it was not—could not be heard above the surrounding noise levels. This maintenance truck had a backup alarm, but the inspector decided it couldn't—it wasn't loud enough.

We took that back to the shop and determined that that backup alarm was above the 85 decibel levels that would require hearing protection. I don't know where to go with that kind of a citation because everybody is correct in that instance. It couldn't be heard above the ambient noise levels, but then you are going to require the operators to wear hearing protection. You are not going to hear the backup alarm.

Chairman WALBERG. Cover against it? Yes.

Mr. GRIESEMER. So these are specific examples. This happened on April 26th of this year. These are the things that the small operators are having to deal with and trying to comply with this type of enforcement, which we feel like is not necessarily appropriate for our type of operations.

We would need more help. We would suggest that rather than spending the resources on more inspections and heavy-handed enforcement, that more assistance be given to small operators so that we can change the behavior of our employees when there is this kind of raising of the bar of what is expected as far as safe behavior.

Chairman WALBERG. I appreciate that.

Mr. Ellis, in your written testimony, you discuss use of technology, I think, that is laying in front of you here. Maybe you could describe that and describe why that isn't receiving wide usage.

Mr. ELLIS. I would be pleased to, Mr. Chairman.

Chairman WALBERG. And you have a short period of time here, but do the best you can.

Mr. ELLIS. Understood. This device was developed in concert between one of our member companies, their workforce and the National Institute for Occupational Safety and Health. These are producers of crystalline silica, which is a potential cause of silicosis, a deadly or disabling lung disease.

What this device does is it combines two different technologies and merges them together. There is a video camera that is mounted to that hard hat. And the wearer of the hard hat then can show everything he is looking at or working on.

Also involved in here is a sampling device that extracts respirable dust of a certain size, 10 micrometers or less. And that is fed into a particle counter, which then measures what that miner's exposure is.

And so, as this person is wearing this device, eventually the two technologies are merged that produce a video in real-time that shows what the miner is doing as well as what his respirable dust exposure is. And it is particularly well-suited for people that do a variety of tasks around a mine, like somebody involved in maintenance where they are checking here and then they are moving off to another location. We can identify where high exposures are and then look at trying to modify either work practices or institute control technologies to control those exposures.

Chairman WALBERG. Okay. Well, I wish I had more time to question, but I have got to abide by my own rules, at least to a point here.

So I will turn the questioning over now to the gentlelady from California, Ranking Member Woolsey.

Ms. WOOLSEY. Thank you, Mr. Chairman. We can go around again, you know.

Mr. Roberts laid it out. Safety laws and regulations have made a difference. And workforces are safer because of OSHA and MSHA, period.

Mr. Bumbico, you supported it in your testimony. You said virtually the same thing. And I really respect that.

So the question is how do we look at where we were 40 years ago, where do we need to be now. And what does modernizing mean? Because we are not in the 21st century. Ergonomics, who even knew the word 40 years ago when we started with this whole thing? So we have a lot of work to do.

And it is very clear that employers—let us assume every employer here and most employers do the right thing. So the question is what are we going to do to protect the workers at the work sites where there are what we call bad actors that repeat and repeat and continue to do the same things over and over.

Because you see, when we have voluntary compliance, voluntary safety, then the companies that play by the rules voluntarily spend more money to take care of their workers. It is not a level playing field then for the competition. The guys who don't do it, everything is cheaper for them. So that is not right for you, either. So the question is what do we do.

And so, I am going to ask you first, Cecil. What is your response to the industry arguments that counting citations instead of final orders unfairly deprives them of due process?

Mr. ROBERTS. I think that speaks directly to the Pattern of Violations. If you go back to 1989, the UMWA was concerned about this. And I think there is testimony on record here that we suggested that if you only use final orders, which means that this entire process has taken place on appeals—and we know there are 19,000 cases backed up as we speak. So let us think about that for a moment.

And I hate to continue using Upper Big Branch as an example, but the violations that Upper Big Branch had on appeal, some of which are setting at the Review Commision now, and they had not been finally adjudicated and they may not have been for another year and assume that the mine had not had the terrible tragedy that it did. But we would still be trying to adjudicate some of those citations. And the very first thing that most in the public and most in Congress said immediately upon the explosion was, why didn't the government close down this operation.

The way the system is working right now is that, if you can't get under a Pattern of Violations until the final order is issued, you would have had a problem in 2008. The final orders might have been adjudicated in 2010. You may have corrected the problem by 2010, but people were in jeopardy in 2008. The system simply isn't working.

Ms. WOOLSEY. They died.

Mr. ROBERTS. And I think we have to decide do we want to protect the nation's coal miners, or do we want to have an opportunity for the appeal process and fairness to the coal industry itself? I think we have to come down on the side of protecting the coal min-

ers. I think if we had Upper Big Branch to do over, everyone around here would agree with that.

Ms. WOOLSEY. So, Mr. Bumbico——

Mr. BUMBICO. Bumbico.

Ms. WOOLSEY. Bumbico?

Mr. BUMBICO. Yes.

Ms. WOOLSEY. Okay, let us keep going with this. What does NMA have—what are their thoughts on proposals to enable MSHA to place bad actors on POVs? Or do they think the status quo works?

Mr. BUMBICO. We agree with the concept of Pattern of Violation and the need to ferret out operators that aren't playing by the rules. I think what we disagree is the method with which MSHA would propose to go about enforcing that.

Ms. WOOLSEY. So how would you go about it?

Mr. BUMBICO. With regard to the final orders, I think I would call to the subcommittee's attention the fact that 20 percent of the S&S violations that are contested end up getting modified. And if you look at more elevated orders like 104-Ds, that over 30 percent get modified. In addition, I think that what you are seeing within the industry right now is an influx of a lot of new inspectors. And in a recent survey——

Ms. WOOLSEY. Well, you have got all that, the training and all that. We don't fund MSHA, so what are we going to do? I mean, if I were you, I would be sitting there saying, "Get us the best inspectors we can, train them, and make sure they are out there. And we will support that investment."

Mr. BUMBICO. I think the biggest fault that we had with the previous way the Pattern of Violation was operated is that the type of changes that MSHA was requesting weren't the type of process changes that would lead to long-term safety improvement.

Ms. WOOLSEY. Well——

Mr. BUMBICO. They were safety awareness programs that might be a quick fix and lead to a short-term result. But in terms of long-term, continuous improvement, they weren't insisting on those type of changes.

Ms. WOOLSEY. On short-term. But we are talking about the long-term Patterns of Violations that are going to eventually end up in a very serious situation like Massey. And that is what we are going—we are going after the bad actors first.

Chairman WALBERG. Thank you. Gentlelady's time is expired.

We will move on to the chairman of the full committee, the gentleman from Minnesota.

Mr. KLINE. Thank you, Mr. Chairman.

Thank you to all the witnesses for your testimony.

Mr. Bumbico, sort of picking up the general theme here, it seems to me that the industry was pretty supportive of the Miner Act in 2006. And Mr. Roberts has indicated the union's support of that legislation.

And yet, I am pretty sure that the industry has not been that supportive of Best Miner—or the Miner Safety and Health Act. Can you kind of explain why that is, why support of one and what is the problem with the others, as we are looking at what we might do in this committee and the full committee and Congress in light

of the Upper Big Branch tragedy? What are your concerns? What is the difference?

Mr. BUMBICO. I think the difference is that in 2006, there was a pretty equal playing field and a lot of give and take on the various stakeholders. And in the most recent attempt to look at legislation, there were a number of companies that attempted to enter into discussions, but we weren't able to satisfy the concerns we had.

And some of the concerns we had were, one, there were a number of items that were in that bill that, in effect, could have been done anyway by MSHA. And, in fact, if you look at the rock dust standard, if you look at the pattern of violation, there were a number of things there that MSHA has moved forward on without the need for legislation.

In addition to that, there were some provisions in that bill, such as the changing definition of S&S citations, that would have made it extremely difficult for any violation not to have been an S&S. So those were issues that kind of hung up the process.

I think, you know, the biggest concern that we have is that the average front line supervisor right now has over 300 pages of regulations in the code of regulations that they have to deal with on a day-to-day basis. I think we would be better served to try to improve the way that they understand and deal with what is on the books now than creating additional legislation.

Mr. KLINE. Okay, thank you. I am going to stay with you, Mr. Bumbico, for another question, kind of shifting and thinking about how different countries have different approaches. And Australia, for example, has a very different approach that I assume that you are familiar with in their risk management. Can you explain for all of us here the differences and what you like or don't like about those differences?

Mr. BUMBICO. Well, the fundamental difference is the difference between prescriptive regulations and a requirement that an operator look at the major risks and hazards that they have and come up with ways of dealing with them. Under the Australian model, those mining companies are charged with evaluating their major risks and coming up with procedures, processes that they put in place to deal with them without as much prescriptive regulation on the part of government.

In the U.S., we have very detailed, prescriptive regulations that they deal with things one, two, three, four progression. And the problem with that is that when you look at a coal mine, a coal mine is a very dynamic, changing environment. And if you focus strictly on prescriptive ways to deal with safety, you kind of lull people into the suspicion that if they do a, b and c, that d is automatically going to result.

I think what we have to get to here in this country is moving the conceptual skills of people, from the safety standpoint, to a higher level. We have to help miners become better problem solvers, risk identifiers so that they can deal with the changing environment that they deal with in an underground and a surface coal mine.

Mr. KLINE. So in Australia, for example, the mine operator identifies a risk, assesses a risk and develops a program to address them. And then who oversees that?

Mr. BUMBICO. They have oversight from the government, but it is more oversight on what they put in place to determine whether they are—you know, whether they are complying with that.

Mr. KLINE. Okay, thank you.

I was going to go to Mr. Griesemer and talk about agri-mining and training, but in compliance with the chairman's rules and my ever-desperate hope that we will all comply by the lighting system, I will yield back.

Chairman WALBERG. Thank you for the continuing mentoring, Mr. Chairman. I appreciate it.

Now we will go to the——

Mr. KLINE. [Off mike.] Mr. Miller——

Chairman WALBERG [continuing]. The gentleman from California, Mr. Miller.

Mr. MILLER. Thank you very much, Mr. Chairman. And thank you for having this hearing.

Mr. Bumbico, in response to Chairman Kline's question, your difference in last year's legislation and before is that you say that MSHA has the authority to do this, so you don't—do you support their effort to go to citations versus final order?

Mr. BUMBICO. No, I don't.

Mr. MILLER. Do you support their rock dust changes?

Mr. BUMBICO. Yes, I believe that there is pretty much a consensus within the industry that what they have done from a rock dust standard standpoint is a good thing.

Mr. MILLER. What would you do about whistleblowers?

Mr. BUMBICO. Whistleblowers, I believe, at this point have adequate protection under the existing law.

Mr. MILLER. What happened to the person that you fired for showing the video of the leaking water seals?

Mr. BUMBICO. I think——

Mr. MILLER. Was that retaliation against a whistleblower?

Mr. BUMBICO. I think you are mischaracterizing what occurred there.

Mr. MILLER. You characterize it for me.

Mr. BUMBICO. Sure. One, I am not going to talk into great detail because that issue is currently matter of civil litigation. But I will say this: The individual questioned took a video camera underground and did a tape of seals that were leaking. Instead of calling that to the attention of mine management or instead of calling MSHA and complaining about the problem, he took the videotape and brought it to a public hearing to show it. And then after the fact——

Mr. MILLER. So he never addressed it prior—he never addressed this prior with you, the company?

Mr. BUMBICO [continuing]. The issue was dealt with. No. The individual questioned——

Mr. MILLER. I don't think that is what the record shows.

Mr. BUMBICO [continuing]. In fact, was not fired, as you characterized it, for the action in question. He was laid off in a reduction in force pursuant to the——

Mr. MILLER. So what is your—what is your position——

Mr. BUMBICO [continuing]. Terms of the labor agreement that he was working under.

Mr. MILLER. What is your position on whistleblowers?

Mr. BUMBICO. I believe whistleblowers should have a protective status under the—under the law. And I believe that they have adequate protection as it is.

Mr. MILLER. So you don't have a problem with that in the legislation?

Mr. BUMBICO. I had a problem with the way it was characterized in the legislation for the supplemental Miner Act.

Mr. MILLER. But you believe, as a matter of law, they should be protected?

Mr. BUMBICO. I do.

Mr. MILLER. Okay. You have an internal, what did you call it, BBC. Is that——

Mr. BUMBICO. Behavior-based safety.

Mr. MILLER. BBS. And that is an internal corporate policy?

Mr. BUMBICO. That is correct.

Mr. MILLER. And in your testimony, your measurements of that for us are that the—what you call the total incident rate from 1998 to 2010 and the lost time rate has been on the overall decline, overall, that you had some ups and downs, but basically on the decline. Is that correct?

Mr. BUMBICO. That is correct.

Mr. MILLER. So how does that sit with an average of about 1,500 citations a year? Where do these two things—what is one telling us and the other is telling us?

Mr. BUMBICO. I am not sure what you are asking.

Mr. MILLER. Well, and you have the safety program that is, in theory, on the decline, by your measurements. And yet, you have been cited violations from 2005 to 2010 and running maybe the same rate this year of about 1,500 citations a year.

Mr. BUMBICO. Well, I think as you look at the increased inspector presence that we have had at our operation since 2006, the number of inspector shifts have gone up about 20 percent at our mines, as they have at most other mines. And to put that number in context, our violations per inspection day still only average less than .5, which, by industry standards, is very strong.

Mr. MILLER. But at the end of the year, you end up with about 1,500——

Mr. BUMBICO. I would also mention—I would also mention the——

Mr. MILLER. At the end of the year—let me just finish my sentence—you end up with about 1,500 violations.

Mr. BUMBICO. And over 4,100 inspector shifts.

Mr. MILLER. So what are those 1,500 violations telling you as a company?

Mr. BUMBICO. I think you have to look at each——

Mr. MILLER. That they are all wrong, or the workers' fault? What are they telling you?

Mr. BUMBICO. Well, in many cases, they are not correlated with safety issues. And I can give you a couple of examples, if you would like.

Mr. MILLER. Well——

Mr. BUMBICO. We had a number of violations that were——

Mr. MILLER. In many instances, they are correlated with safety. They are about ventilation. They are about rock dust. They are about the conditions in the mine. And we can argue it either way.

I am just trying to determine when you look at—you have your indicators and you say this is a safe operation. It ought to be—essentially, everybody ought to adopt this in the industry. And yet, you still have—and those are either because, what, the inspectors aren't skilled enough or it is the workers' fault? I mean, I am just trying to determine how we measure the workplace.

Mr. BUMBICO. We also look at violations as indicators of safety performance. But we take it a step further. We look at whether there was an underlying safety issue related to the violation.

In one instance, we had a new inspector that came into our Mount Laurel mine. And he had an issue with the location of an AMS sensor, atmospheric monitoring system sensor. He had them move it a couple of feet in by. And this was a system that had been used by MSHA as a model of how to design the system in the past. And not only did he issue a violation for that one belt head, but he also issued it for every belt in the mine.

Mr. MILLER. Now, I love the fact—I mean, I appreciate you love——

Mr. BUMBICO. So in many cases——

Mr. MILLER [continuing]. The question is——

Mr. BUMBICO. The manner in which they are enforcing the regulation——

Mr. MILLER. What does the body of 1,500 citations tell you? You can pick one out. I will pick one out. Let us just look at them and ask the question what does that tell you. Is that consistent with your safety program? Is it inconsistent? Does that tell you about modifications that have to take place? Or is it good enough?

Mr. BUMBICO. It is an indicator that we need to look to see if there is an underlying problem. That is how we deal with it.

Mr. MILLER. Thank you.

Chairman WALBERG. The gentleman's time is expired.

Ms. WOOLSEY. Mr. Chairman? Mr. Chairman?

Chairman WALBERG. Yes?

Ms. WOOLSEY. I would like to enter into the record, with unanimous consent, the Charles Scott Howard decision, the discrimination proceedings regarding the whistleblower issue we were just talking about. And, quote, in it, "Besides Howard, at least one other pre-shift examiner had brought the leaking seals to the attention of management."

[The information follows:]

Prepared Statement of Tony Oppegard, Attorney for Charles Scott Howard

Attached are 27 entries from the preshift examination book at the Band Mill No. 2 mine operated by Cumberland River Coal Company (Eolia, Letcher County, Kentucky), which are signed by Charles Scott Howard and which document hazardous conditions that Mr. Howard found at the mine seals ("leaking water", "cracked", etc.) during his daily preshift examinations.

These preshift exam reports cover the period of April 19—May 24, 2007. You will note that each exam report completed by Mr. Howard was countersigned by a mine foreman for CRCC, which indicates that the foreman had reviewed Mr. Howard's findings.

Mr. Howard testified at his 105(c) safety discrimination trial on December 17, 2008, that in addition to documenting the unsafe condition of the mine seals on numerous occasions in the preshift exam book, he had also informed several CRCC foremen of these unsafe conditions. Those foremen were John Scarbro, Terry Mullins, Bob Kilbourne, Ronnie Adams, Steve Sturgill, James Turner and Eddie Niece (Transcript @ 420).

The attached preshift exam reports, as well as the cited testimony of Mr. Howard—which was not rebutted at trial—clearly contradict the testimony of Anthony Bumbico of Arch Coal at the May 4, 2011 hearing "Modernizing Mine Safety" before the House Subcommittee on Workforce Protections. At that hearing, Mr. Bumbico falsely testified that Mr. Howard had shown the video of the leaking seals at the MSHA public hearing on July 12, 2007, without first informing Cumberland River Coal Company of the problems with the seals. Of course, that allegation is utterly untrue.

It should also be noted that John Scarbro, the superintendent of the Band Mill No. 2 mine, admitted at the 105(c) trial that Mr. Howard had told him that the mine seals needed to be repaired (Transcript @ 51). That occurred months prior to Mr. Howard showing the video at the MSHA public hearing.

Finally, given Mr. Scarbro's admission that the mine seals were leaking for a period of 3½ months before they were fully repaired at the end of May, 2007 (Transcript @ 54), it is clear that upper level mine management for CRCC was well aware of the hazardous condition of the seals for a substantial period of time long before Mr. Howard showed the video on July 12, 2007. Mr. Bumbico's implication that CRCC was somehow blindsided by Mr. Howard's presentation at the public hearing has no basis in reality.

We would appreciate if you would enter this correspondence in the official hearing record so that Mr. Bumbico's inaccurate testimony does not go unchallenged. Please also note Mr. Howard's support for the mine safety bill that you have introduced. The bill's protections accorded to miners who speak out for safety on the job are vitally needed.

Thank you for your consideration and for your vigorous work on behalf of miners' safety & health.

STARTed 4-18-07

SEALS

~~Examination of Emergency Escapeways and Facilities;~~

~~Smokers' Articles; Fire~~ Doors

Finished 5-1-07

Company CRCC

Mine Band Mill II

Section

Location Eolia Letcher KY
Post Office County State

Form 6-1331
(March 1970)

Budget Bureau No. 42-R1589
Approval expires 9-30-71

When this book is completed it shall be retained at the mine for a period of one year after the date of the last entry in the book, regardless of change of ownership. When a mine is temporarily closed or abandoned, the operator shall retain this book in a safe place during the period of closure or for a period of one year after the mine is abandoned. Do Not mail this book to the Bureau of Mines.

Use Indelible Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

B.P. 29.82

Emergency Escape Facilities and Escapeways Examined (Weekly)

Date	Location	Hazards Noted	Action Taken	Examiner
1. Transport Seal	4-18-07	3rd Shift pre-shift		
2. #12	leaking water	20.8 SO_2		O 2 CH_4
3. #13	leaking water	20.8 SO_2		O SCH_4
4. #14	leaking water	20.8 SO_2		O SCH_4
5. #15	leaking water	20.8 SO_2		O SCH_4
6. #16	leaking water	20.8 SO_2		O SCH_4
7. #17	leaking water	20.8 SO_2		O SCH_4
8. #18	leaking water	20.8 SO_2		O SCH_4
9. #19	[illegible]	none observed (SW) 20.8 SO_2		O SCH_4
10. #20	[illegible]	none observed (SW) 20.8 SO_2		O SCH_4
11. Time of exposure 8:00 pm to 11:00 pm belts down at this				
12. time also.				
13.		A-376-86		
14. positive air flow at seals; water in water traps; gas				
15. check valves closed;				

Searches for Smokers' Articles (Weekly)

Date	Location	Violations Observed	Action Taken	Examiner
1.				
2.				
3.				
4.				
5.				
6.				
7.				

Examinations of Fire Doors (Monthly)

Date	Doors Examined	Hazards Noted	Action Taken	Examiner
1.				
2.				
3.				
4.				
5.				

Bobby Williams — Fireboss

A-190-81 — Certificate No.

Superintendent or Assistant

Use Indelible Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

B.P. 30.09

Emergency Escape Facilities and Escapeways Examined (Weekly)

	Date	Location	Hazards Noted	Action Taken	Examiner
1.	Fourth Seal	4-19-07	3rd Stop pushed		
2.	#2 leaking water		20.8 CO_2		0 CH_4
3.	#3 leaking water; right hand "post" cross cracked		20.8 CO_2		0 CH_4
4.	#4 leaking water; chimney cracked		20.8 CO_2		0 CH_4
5.	#5 leaking water, about 2½' from left, cracked at top		20.8 CO_2		0 CH_4
6.	#6 leaking water		20.8 CO_2		0 CH_4
7.	#7 leaking water; crack in top left post, camp and chimney		20.8 CO_2		0 CH_4
8.	#8 leaking water; brow right hand cross cracked		20.8 CO_2		0 CH_4
9.					
10.	#9	none observed	20.8 CO_2		0 CH_4
11.	#20	none observed	20.8 CO_2		0 CH_4

12. positive air flow at Seals; water in water traps; gas check
13. valves closed, time of examination 8:00 p.m. 6/1/06 both
14. done at this time also.
15. A37686

Searches for Smokers' Articles (Weekly)

	Date	Location	Violations Observed	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					
6.					
7.					

Examinations of Fire Doors (Monthly)

	Date	System Examined	Hazards Noted	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					

Mine Foreman—Mine Manager

A86-05
Certificate No.

Superintendent or Assistant

Use Indelible Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

B.P. 3023

Emergency Escape Facilities and Escapeways Examined (Weekly)

Date	Location	Hazards Noted	Action Taken	Examiner
1. Fourth Seal	4-20-07	3rd Shift	positive	
2. #12	leaking water		20.8 EO_2	0 EH_4
3. #13	leaking water; left & right upper corner cracked		20.8 EO_2	0 EH_4
4. #14	leaking water; chimney cracked		20.8 EO_2	0 EH_4
5. #15	leaking water; cracked at top toward left corner		20.8 EO_2	0 EH_4
6. #16	leaking water		20.8 EO_2	0 EH_4
7. #17	leaking water; upper left hand corner & chimney cracked		20.8 EO_2	0 EH_4
8. #18	leaking water; lower right hand corner leaky.		20.8 EO_2	0 EH_4
9.				
10. #19	NONE OBSERVED		20.8 EO_2	0 EH_4
11. #20	NONE OBSERVED		20.8 EO_2	0 EH_4

12. positive air flow at seals; water in water traps; gas check
13. valves closed; test of rams 8:00 a.m. & 1:00 p.m. both done
14. at this time &c.
15. A 37686

Searches for Smokers' Articles (Weekly)

Date	Location	Violations Observed	Action Taken	Examiner
1.				
2.				
3.				
4.				
5.				
6.				
7.				

Examinations of Fire Doors (Monthly)

Date	System Examined	Hazards Noted	Action Taken	Examiner
1.				
2.				
3.				
4.				
5.				

[illegible] A 19231 Certificate No.

Signature of Mine Foreman or Assistant

Use Indelible Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

B.P. 30.23

Emergency Escape Facilities and Escapeways Examined (Weekly)

	Date	Location	Hazards Noted	Action Taken	Examiner
1.	Transfer Seals	4-23-07	2nd Shift pre-shift		
2.	"12- leaking water; right upper corner cracked 20.8% O_2 0% CH_4				
3.	"13- leaking water; left & right upper corner cracked 20.8% O_2 0% CH_4				
4.	"14- leaking water; chimney cracked 20.8% O_2 0% CH_4				
5.	"15- leaking water; cracked towards upper left corner.				
6.	"16- leaking water.				
7.	"17- leaking water; upper left corner & chimney cracked.				
8.	"18- leaking water; lower right corner cracked.				
9.	positive air flow at seals; water in water traps; gas				
10.	check valves closed.				
11.	#19 none observed 20.8% O_2 0% CH_4				
12.	"20 none observed 20.8% O_2 0% CH_4				
13.	Time of exams 12:00pm to 2:10pm belts down				
14.	at this time abs.				
15.				A-376-86	

Searches for Smokers' Articles (Weekly)

	Date	Location	Violations Observed	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					
6.					
7.					

Examinations of Fire Doors (Monthly)

	Date	System Examined	Hazards Noted	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					

Bobby Kilbourn — Mine Foreman—Mine Manager

A19271 — Certificate No.

Superintendent or Assistant

Use Indelible Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

B.P. 30.20

Emergency Escape Facilities and Escapeways Examined (Weekly)

	Date	Location	Hazards Noted	Action Taken	Examiner
1.	Jacqfork Seals	4-23-07	3rd Shift	pre shift	
2.	#12		bating water, right upp. corner cracked	20.8 O_2	0 CH_4
3.	#13		bating water, left & right upp. corn. cracked	20.8 O_2	0 CH_4
4.	#14		bating water, chunning cracks	20.8 O_2	0 CH_4
5.	#15		bating water, cracked towards upper left corn.	20.8 O_2	0 CH_4
6.	#16		bating water	20.8 O_2	0 CH_4
7.	#17		bating water, upper left corner & chunning cracks	20.8 O_2	0 CH_4
8.	#18		bating water, lower right corner cracks	20.8 O_2	0 CH_4
9.					
10.	#19	None observed		20.8 O_2	0 CH_4
11.	#20	None observed		20.8 O_2	0 CH_4
12.	positive air flow at seals; water in water trap; gaskets & valves				
13.	checked; time of exam 8:00 p.m. to 11:00 p.m. belt stopped at this				
14.	time also.				
15.				A-37686	

Searches for Smokers' Articles (Weekly)

	Date	Location	Violations Observed	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					
6.					
7.					

Examinations of Fire Doors (Monthly)

	Date	System Examined	Hazards Noted	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					

John Kilbourn — Mine Foreman—Mine Manager

A-12281 — Certificate No.

Superintendent or Assistant

Smokers' Articles; Fire Doors

B.P. 30.15

Emergency Escape Facilities and Escapeways Examined (Weekly)

	Date	Location	Hazards Noted	Action Taken	Examiner
1.	Monday Sept	9-24-07	3 Bad Shift prev shift		
2.	12	leaking, water; right upper corner cracked		20.8 CO_2	O Sill
3.	13	leaking, water; left right upper corner cracked		20.8 CO_2	O Sill
4.	14	leaking, water; chimney cracked		20.8 CO_2	O Sill
5.	15	leaking, water; cracked towards upper left corner		20.8 CO_2	O Sill
6.	16	leaking, water;		20.8 CO_2	O Sill
7.	17	leaking, water; upper left corner + chimney cracked		20.8 CO_2	O Sill
8.	18	leaking, water; lower right corner cracked		20.8 CO_2	O Sill
9.					~~O Sill~~
10.	19	None observed		20.8 CO_2	O Sill
11.	20	None observed		20.8 CO_2	O Sill
12.	positive air flow at seals; walls & roofs, tarps, ventilation				
13.	valves closed; time process 8:00p to 11:00p, belt				
14.	down at the time.				
15.				A-376-86	

Searches for Smokers' Articles (Weekly)

	Date	Location	Violations Observed	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					
6.					
7.					

Examinations of Fire Doors (Monthly)

	Date	System Examined	Hazards Noted	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					

Bobby Kilbourn — Mine Foreman—Mine Manager

A 19281 — Certificate No.

Superintendent or Assistant

Pencil or Ink

Smokers' Articles; Fire Doors

BP. 30.03

Emergency Escape Facilities and Escapeways Examined (Weekly)

Date	Location	Hazards Noted	Action Taken	Examiner
1. Jacofski Seals	4-25-07	2nd Shift	fresh air	
2. #12 leaking water; right upper corner cracked	20.8 SO2	OS (D)		
3. #13 leaking water; left/right upper corner cracked	20.8 SO2	OS (D)		
4. #14 leaking water; and chimney cracked	20.8 SO2	OS (D)		
5. #15 cracked towards left corner	20.8 SO2	OS (D)		
6. #16 leaking water	20.8 SO2	OS (D)		
7. #17 leaking water; upper left corner & chimney cracked	20.8 SO2	OS (D)		
8. #18 leaking water; lower right corner leaking	20.8 SO2	OS (D)		
9. water ~~so~~ leaks have slowed down substantially				
10. #19 none observed	20.8 SO2	OS (D)		
11. #20 none observed	20.8 SO2	OS (D)		
12. positive air flow at seals; water in water traps; gas check valves				
13. closed; time of examination (D) p.m. to 2:14 p.m. bolts done at this time also				
14.				
15.				

Searches for Smokers' Articles (Weekly)

Date	Location	Violations Observed	Action Taken	Examiner
1.				
2.				
3.				
4.				
5.				
6.				
7.				

Examinations of Fire Doors (Monthly)

Date	System Examined	Hazards Noted	Action Taken	Examiner
1.				
2.				
3.				
4.				
5.				

Mine Foreman—Mine Manager

A86-05
Certificate No.

Superintendent or Assistant

Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

B.P. 30.03

Emergency Escape Facilities and Escapeways Examined (Weekly)

	Date	Location	Hazards Noted	Action Taken	Examiner
1.		Crawford Seam	4-25-07	3rd Shift	pushup
2.		#12	leaking water; right upper corner cracked		20 8 20, 0 8 AM
3.		#13	leaking water; left & right upper corner cracked		20 8 20, 0 8 AM
4.		#14	leaking water, timing cracked		20 8 20, 0 8 AM
5.		#15	cracked towards left corner		20 8 20, 0 8 AM
6.		#16	leaking water; ~~upper left corner cracked~~ (CTN)		20 8 20, 0 8 AM
7.		#17	leaking water; upper left corner & timing cracked		20 8 20, 0 8 AM
8.		#18	leaking water; lower ~~left~~ right corner cracked		20 8 20, 0 8 AM
9.					
10.		#19	none observed		20 8 20, 0 8 AM
11.		#20	none observed		20 8 20, 0 8 AM

12. positive air flow at seal; water in water traps; gas check
13. valve closed; time of exam 8:00 a.m. to 11:00 a.m. bells dead
14. at this time.
15. Chl A-376-86

Searches for Smokers' Articles (Weekly)

	Date	Location	Violations Observed	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					
6.					
7.					

Examinations of Fire Doors (Monthly)

	Date	System Examined	Hazards Noted	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					

Mine Foreman—Mine Manager

A86-05
Certificate No.

Superintendent or Assistant

Use Indelible Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

B.P. 30.00

Emergency Escape Facilities and Escapeways Examined (Weekly)

	Date	Location	Hazards Noted	Action Taken	Examiner
1.	Transfer Sub	4-26-07	2nd Cuff pump lift		
2.	#2 leaking water; right upper corner cracked		20.8% O_2	0.5% CO_2	
3.	#3 left & right upper corners cracked		20.8% O_2	0.5% CO_2	
4.	#4 leaking water and chaining cracked		20.8% O_2	0.5% CO_2	
5.	#5 cracked towards upper left corner		20.8% O_2	0.5% CO_2	
6.	#6 leaking water		20.8% O_2	0.5% CO_2	
7.	#7 leaking water; upper left corner & chaining cracked			20.8% O_2	0.5% CO_2
8.	#8 leaking water; lower right corner leaking		20.8% O_2	0.5% CO_2	
9.					
10.	#9 none found		20.8% O_2	0.5% CO_2	
11.	#10 none found		20.8% O_2	0.5% CO_2	
12.	positive air flow at sub; water in water trap; gas check				
13.	valve closed; time of exam 12:00p & 2:00p bells done at				
14.	this time				
15.			A-376.86		

Searches for Smokers' Articles (Weekly)

	Date	Location	Violations Observed	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					
6.					
7.					

Examinations of Fire Doors (Monthly)

	Date	System Examined	Hazards Noted	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					

Assistant Mine Manager

A-86-05
Certificate No.

Superintendent or Assistant

Pencil or Ink

Emergency Escapeways and Fastenings; Smokers' Articles; Fire Doors

B.P. 29.88

Emergency Escape Facilities and Escapeways Examined (Weekly)

	Date	Location	Hazards Noted	Action Taken	Examiner
1.	Joseph Seals	4-28-07	3rd Shift pre-shift		
2.	"12		leaking water, right upper corner cracked	208 EO	O EW
3.	"13		upper left & right corner cracked	208 EO	O EW
4.	"14		leaking water & chimney cracked	208 EO	O EW
5.	"15		cracked towards upper left corner	208 EO	O EW
6.	"16		leaking water	208 EO	O EW
7.	"17		leaking water; upper left corner & chimney cracked	208 EO	O EW
8.	"18		leaking water; lower left hand corner cracked	208 EO	O EW
9.					
10.	"19		were closed	208 EO	O EW
11.	"20		were closed	208 EO	O EW
12.	positive airflow at seals, water in water traps, gas				
13.	check valves closed, time of exams 8:00 to 11:00				
14.	belts dry at this time also.				
15.				A-376-88	

Searches for Smokers' Articles (Weekly)

	Date	Location	Violations Observed	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					
6.					
7.					

Examinations of Fire Doors (Monthly)

	Date	System Examined	Hazards Noted	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					

Mine Foreman / Mine Manager: John Kilbourne

Certificate No.: A-19281

Superintendent or Assistant

Use Indelible Pencil or Ink

EXAMINATIONS OF EMERGENCY ESCAPEWAYS AND FACILITIES; Smokers' Articles; Fire Doors

B.P. 30.00

Emergency Escape Facilities and Escapeways Examined (Weekly)

	Date	Location	Hazards Noted	Action Taken	Examiner
1.	Jacoyfak Seals 4-27-07		2nd Shift	pass off	
2.	#12 leaking water; right upper corner cracked			20.8 O_2	OS/Wy
3.	#13 left + right upper corner cracked.			20.8 O_2	OS/Wy
4.	#14 leaking water; chimney cracked			20.8 O_2	OS/Wy
5.	#15 cracked timbers upper left corner.			20.8 O_2	OS/Wy
6.	#16 leaking water			20.8 O_2	OS/Wy
7.	#17 leaking water; upper left corner + chimney cracked			20.8 O_2	OS/Wy
8.	#18 leaking water; lower right hand corner leaking.				
9.					
10.	#19 none observed			20.8 O_2	OS/Wy
11.	#20 none observed			20.8 O_2	OS/Wy
12.	positive air flow at seals, water in water traps; gas				
13.	check valves closed.				
14.				A-376-86	
15.					

Searches for Smokers' Articles (Weekly)

	Date	Location	Violations Observed	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					
6.					
7.					

Examinations of Fire Doors (Monthly)

	Date	System Examined	Hazards Noted	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					

Bobby Kilbourn — Mine Foreman-Mine Manager

A192-71 — Certificate No.

Superintendent or Assistant

Use Indelible Pencil or Ink

~~Examination of Emergency Escape Ways and Facilities~~; Stoppings and Artificial Fire Doors

B.P. 30.15

~~Emergency Escape Facilities and Escapeways Required (Weekly)~~

	Date	Location	Hazards Noted	Action Taken	Examiner
1.	Jacobak Seals 4-30-07		3rd Shift	3rd Shift	
2.	#12			20.8 O_2	O.K.
3.	#13		leaking water	20.8 O_2	O.K.
4.	#14		leaking water	20.8 O_2	O.K.
5.	#15		leaking water	20.8 O_2	O.K.
6.	#16		leaking water	20.8 O_2	O.K.
7.	#17		leaking water	20.8 O_2	O.K.
8.	#18		leaking water	20.8 O_2	O.K.
9.					
10.	#19		none observed	20.8 O_2	O.K.
11.	#20		none observed	20.8 O_2	O.K.

Cracks the same

12. positive air flow at seals; water in water traps,
13. gas check valves closed; time of exam 8:00 to 11:00,
14. belts done at this time also.
15. A-37686

~~Examination of Previous Articles (Weekly)~~

	Date	Location	Violations Observed	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					
6.					
7.					

~~Examination of Fire Doors (Monthly)~~

	Date	System Examined	Hazards Noted	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					

Mine Foreman—Mine Manager

A86-05
Certificate No.

Superintendent or Assistant

Pencil or Ink

[redacted]

[redacted]

1. WATER TRAPS FULL 5-1-07 2ND
2. GAS TUBE CLOSED
3. POSITIVE AIR FLOW ALL SEALS
4. BP 38.09
5. 12 LEAKING WATER CH4 0% O2 20.8%
6. 13 LEAKING WATER 0% 20.8%
7. 14 LEAKING WATER 0% 20.8%
8. 15 LEAKING WATER 0% 20.8%
9. 16 LEAKING WATER 0% 20.8% TIME 12:00 TO 2:00 PM
10. 17 LEAKING WATER 0% 20.8% Phillip R. Boone A-2587
11. 18 LEAKING WATER 0% 20.8%
12. 19 PORE OBS. 0% 20.8%
13. 20 NONE OBS. 0% 20.8%
14.
15.

Searches for Smokers' Articles (Weekly)

Date	Location	Violations Observed	Action Taken	Examiner
1. Pacific Seals	5-1-07	3rd Shift prevailing	P.P. 30.06	
2. 12 leaking water			20.8% O_2	0% CH_4
3. 13 leaking water			20.8% O_2	0% CH_4
4. 14 leaking water		Cracks the same	20.8% O_2	0% CH_4
5. 15 leaking water			20.8% O_2	0% CH_4
6. 16 leaking water			20.8% O_2	0% CH_4
7. 17 leaking water			20.8% O_2	0% CH_4
8. 18 leaking water			20.8% O_2	0% CH_4

Examinations of Fire Doors (Monthly)

Date	System Examined	Hazards Noted	Action Taken	Examiner
1.		A-376-88		
2. 19	none observed		20.8% O_2	0% CH_4
3. 20	none observed		20.8% O_2	0% CH_4

4. positive air flow at seals; water in water traps; gas check valve.
5. closed; time / from 8:00 p. to 11:00 p. holiday. At this time a/c.

Mine Foreman or Mine Manager: [signature] Certificate No.: A86-05 Superintendent or Assistant: [signature]

SEALS
5-2-07

~~Examination of Emergency Escapeways and Facilities~~

~~Smokers' Articles; Fire Doors~~

finished 5-15-07

Company CRCC

Mine BANDMILL II

Section SEALS

Location EOLIA LETCHER KY
Post Office County State

Form 6-1331
(March 1970)

Budget Bureau No. 42-R1589
Approval Expires 9-30-71

When this book is completed it shall be retained at the mine for a period of one year after the date of the last entry in the book, regardless of change of ownership. When a mine is temporarily closed or abandoned, the operator shall retain this book in a safe place during the period of closure for a period of one year after the mine is abandoned. **Do not** mail this book to the Bureau of Mines.

Use Indelible Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

BP. 30.12

Emergency Escape Facilities and Escapeways Examined (Weekly)

Date	Location	Hazards Noted	Action Taken	Examiner
1. Fourth Seal	5-2-07		3 PO Stops posted	
2. 12	leaking water		20.8 % O_2	O ECW
3. 13	leaking water		20.8 % O_2	O ECW
4. 14	leaking water	crack one	20.8 % O_2	O ECW
5. 15	leaking water	this same	20.8 % O_2	O ECW
6. 16	leaking water		20.8 % O_2	O ECW
7. 17	leaking water		20.8 % O_2	O ECW
8. 18	leaking water		20.8 % O_2	O ECW
9.				
10. 19	more steam		20.8 % O_2	O ECW
11. 20	more steam		20.8 % O_2	O ECW
12. positive air flow at seal; water in water traps;				
13. gas check valves closed; time of exams 8:00 p to				
14. 11:00 p belt stopped at this time also				
15.				A-57688

Searches for Smokers' Articles (Weekly)

Date	Location	Violations Observed	Action Taken	Examiner
1.				
2.				
3.				
4.				
5.				
6.				
7.				

Examinations of Fire Doors (Monthly)

Date	System Examined	Hazards Noted	Action Taken	Examiner
1.				
2.				
3.				
4.				
5.				

Bobby Kilhoun — Mine Foreman – Mine Manager

A-19285 — Certificate No.

Superintendent or Assistant

Use Indelible Pencil or Ink

~~Examinations of Emergency Escapeways and Facilities~~; Smokers' articles; Fire Doors

B.P. 3015

~~Emergency~~ Escape Facilities and ~~Escapeways~~ Examined (Weekly)

Date	Location	Hazards Noted	Action Taken	Examiner
1. Inaccessible Seals	5-3-07	3rd Shift positive		
2. #12 leaking water,			20.8 ΣO_2	O Ellis
3. #13 leaking water,		coached the same.	20.8 ΣO_2	O Ellis
4. #14 leaking water,			20.8 ΣO_2	O Ellis
5. #15 leaking water,			20.8 ΣO_2	O Ellis
6. #16 leaking water,			20.8 ΣO_2	O Ellis
7. #17 leaking water,			20.8 ΣO_2	O Ellis
8. #18 leaking water; crack at lower left corner hole in top of seal about 4 ft. from left corner.			20.8 ΣO_2	O Ellis
9.				
10. #19	None observed		20.8 ΣO_2	O Ellis
11. #20	none observed		20.8 ΣO_2	O Ellis
12. positive air flow at Seals; water in water traps; gas check				
13. valve checked; time of exam 8:00 p & 11:00 p both days at				
14. the times also				
15.			A-37688	

~~Inspection for Smokers'~~ Articles (Weekly)

Date	Location	Violations Observed	Action Taken	Examiner
1.				
2.				
3.				
4.				
5.				
6.				
7.				

Examinations of ~~Fire Doors (Monthly)~~

Date	System Examined	Hazards Noted	Action Taken	Examiner
1.				
2.				
3.				
4.				
5.				

Bobby Gilbreath — Foreman—Mine Manager

A194-31 — Certificate No.

Superintendent or Assistant

Use Indelible Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

B.P. 30.26

Emergency Escape Facilities and Escapeways Examined (Weekly)

Date	Location	Hazards Noted	Action Taken	Examiner
1. Trace for Seals	5-7-07	3rd Shift per shift		
2. 12 leaks, water, right corner cracked			20.8 O_2	OEW
3. 13 leaks, water, left & right corner cracked			20.8 O_2	OEW
4. 14 leaks, water, left corner & chimney cracked			20.8 O_2	OEW
5. 15 baking, water, left side cracked			20.8 O_2	OEW
6. 16 baking, water			20.8 O_2	OEW
7. 17 baking, water, left side & chimney cracked			20.8 O_2	OEW
8. 18 baking, water, right side cracked			20.8 O_2	OEW
9.				
10. 19 none found			20.8 O_2	OEW
11. 20 none found			20.8 O_2	OEW
12. positive air flow at seals, water in water traps, gas check				
13. valves closed, time of exams 8:00 to 11:00 pm belts down				
14. at this time abs.				
15.				

Searches for Smokers' Articles (Weekly)

Date	Location	Violations Observed	Action Taken	Examiner
1.				
2.				
3.				
4.				
5.				
6.				
7.				

Examinations of Fire Doors (Monthly)

Date	System Examined	Hazards Noted	Action Taken	Examiner
1.				
2.				
3.				
4.				
5.				

A 86.05

Superintendent or Assistant

Use Indelible Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

B.P. 3217

Emergency Escape Facilities and Escapeways Examined (Weekly)

	Date	Location	Hazards Noted	Action Taken	Examiner
1.	Pacific Seal	5-8-07	3rd Shift passing		
2.	#12 leaking water; right corner cracked			20.8 CO_2	0 CO_2
3.	#13 leaking water; left & right corner cracked			20.8 CO_2	0 CO_2
4.	#14 leaking water, left corner & chimney cracked			20.8 CO_2	0 CO_2
5.	#15 leaking water, left corner cracked			20.8 CO_2	0 CO_2
6.	#16 leaking water,			20.8 CO_2	0 CO_2
7.	#17 leaking water, left side cracked			20.8 CO_2	0 CO_2
8.	#18 leaking water, left side cracked			20.8 CO_2	0 CO_2
9.					
10.	#19 none observed			20.8 CO_2	0 CO_2
11.	#20 none observed			20.8 CO_2	0 CO_2
12.	positive air flow at seal; water in water trap; gas check valve				
13.	closed; time of examination 8:00 to 11:00 pm. Left down at				
14.	this time also.				
15.				A-376-86	

Searches for Smokers' Articles (Weekly)

	Date	Location	Violations Observed	Action Taken	Examiner
1.					
2.	Had men Plaster on Seals Above water Line				
3.	And Around Ribs				
4.				Bobby Kilbourn A192-81 - 5-8-07	
5.					
6.					
7.					

Examinations of Fire Doors (Monthly)

	Date	System Examined	Hazards Noted	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					

Bobby Kilbourn A192-81

Use Indelible Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

B.P. 30.09

Emergency Escape Facilities and Escapeways Examined (Weekly)

Date	Location	Hazards Noted	Action Taken	Examiner
Daylight	5-9-07	3rd Shift pushoff		
#2	leaking water;	right corner cracked	20.8 EO_2	O EW
#3	leaking water;	left & right corner cracked	20.8 EO_2	O EW
#4	leaking water;	left corner & chaining cracked	20.8 EO_2	O EW
#5	leaking water;	left side cracked	20.8 EO_2	O EW
#6	leaking water;		20.8 EO_2	O EW
#7	leaking water;	left side cracked	20.8 EO_2	O EW
#8	leaking water;	right side cracked	20.8 EO_2	O EW
#9	none observed		20.8 EO_2	O EW
#20	none observed		20.8 EO_2	O EW

positive air flow at Seals; water in water traps; gas check valves closed, times of exams 8:00 pm to 11:00 pm belts down at this time also.

A-376-86

Searches for Smokers' Articles (Weekly)

Date	Location	Violations Observed	Action Taken	Examiner

Examinations of Fire Doors (Monthly)

Date	System Examined	Hazards Noted	Action Taken	Examiner

A86-05

Use Indelible Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

B.R. 30.09

Emergency Escape Facilities and Escapeways Examined (Weekly)

Date	Location	Hazards Noted	Action Taken	Examiner
Lancefield Seals 5-11-07		3rd Shift [illegible]		
4/2	leaking water	CSM	20.8 CO_2	0 CO_2
4/3	leaking water	CSM	20.8 CO_2	0 CO_2
4/4	leaking water	BK	20.8 CO_2	0 CO_2
4/5	leaking water	BK	20.8 CO_2	0 CO_2
4/6	leaking water	BK	20.8 CO_2	0 CO_2
4/7	leaking water	BK	20.8 CO_2	0 CO_2
4/8	leaking water	BK	20.8 CO_2	0 CO_2
4/9	man cleaned	CSM	20.8 CO_2	0 CO_2
4/20	man cleaned	CSM	20.8 CO_2	0 CO_2

First of every 8:00 p & 11:00 p belts are at the top of [illegible]

CW 8-27-86

Searches for Smokers' Articles (Weekly)

Date	Location	Violations Observed	Action Taken	Examiner

Examinations of Fire Doors (Monthly)

Date	System Examined	Hazards Noted	Action Taken	Examiner

[illegible] AA2-81

Certificate No.

Superintendent or Assistant

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

B.R 30.29

Emergency Escape Facilities and Escapeways Examined (Weekly)

Date	Location	Hazards Noted	Action Taken	Examiner
Weekly Exam	S-14-07	3rd floor left prestifs		
12	heater, water, right inner cracked		20.8 CO_2	0 CO
13	heater, water; left corner cracked		20.8 CO_2	0 CO
14	heater, water, left corner + chimney cracked		20.8 CO_2	0 CO
15	heater, water; left side cracked		20.8 CO_2	0 CO
16	heater, water		20.8 CO_2	0 CO
17	heater, water; left side cracked		20.8 CO_2	0 CO
18	heater, water; right side cracked.		20.8 CO_2	0 CO
19	none observed		20.8 CO_2	0 CO
20	none observed		20.8 CO_2	0 CO

positive air flow at safety gas check valves closed; water in water traps; time of exams 8:00 p.m. to 10:30 p.m. belts down at this time also.

A-37686

Searches for Smokers' Articles (Weekly)

Date	Location	Violations Observed	Action Taken	Examiner

Examinations of Fire Doors (Monthly)

Date	System Examined	Hazards Noted	Action Taken	Examiner

Alex Kilbourne A19281

SEALS
5-15-07

~~Examination of Emergency Escapeways and Facilities~~;

~~Smokers' Articles; Fire Doors~~

Finished 5-31-07

Company CRCC

Mine BANDMILL II

Section SEALS

Location Eolia LETCHER KY
Post Office County State

Form 6-1331
(March 1970)

Budget Bureau No. 42-R1589
Approval expires 9-30-71

When this book is completed it shall be retained at the mine for a period of one year after the date of the last entry in the book, regardless of change of ownership. When a mine is temporarily closed or abandoned, the operator shall retain this book in a safe place during the period of closure or for a period of one year after the mine is abandoned. Do Not mail this book to the Bureau of Mines.

Use Indelible Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors B.P. 30.12

Emergency Escape Facilities and Escapeways Examined (Weekly)

	Date	Location	Hazards Noted	Action Taken	Examiner
1.	Escape Seals	5-15-07	3rd Shift pre-shift		
2.	4/2	mine closed		20.8 CO_2 0 CH_4	
3.	4/3	mine closed		20.8 CO_2 0 CH_4	
4.	4/4	leaking water		20.8 CO_2 0 CH_4	
5.	4/5	mine closed		20.8 CO_2 0 CH_4	
6.	4/6	mine closed		20.8 CO_2 0 CH_4	
7.	4/7	leaking water		20.8 CO_2 0 CH_4	
8.	4/8	leaking water, pright comm cracked		20.8 CO_2 0 CH_4	
9.					
10.	4/9	mine closed		20.8 CO_2 0 CH_4	
11.	4/10	mine closed		20.8 CO_2 0 CH_4	
12.	positive air flow at seals; water in water traps;				
13.	gas check valves closed; time of exams 8:00 p.m. to				
14.	11:00 p.m. belt dust at tin tom abov				
15.					
16.				A376-86	

Searches for Smokers' Articles (Weekly)

	Date	Location	Violations Observed	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					
6.					
7.					

Examinations of Fire Doors (Monthly)

	Date	System Examined	Hazards Noted	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					

Gary Kilbourn
Mine Manager

A192-81
Certificate No.

Superintendent or Assistant

Use Indelible Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

B.P. 30.15

Emergency Escape Facilities and Escapeways Examined (Weekly)

	Date	Location	Hazards Noted	Action Taken	Examiner
1.	Trapefork Seals	5-16-07	3rd Shift	positive	
2.	#12			$20.8\ CO_2$	$0\ CO_4$
3.	#13			$20.8\ CO_2$	$0\ CO_4$
4.	#14			$20.8\ CO_2$	$0\ CO_4$
5.	#15			$20.8\ CO_2$	$0\ CO_4$
6.	#16			$20.8\ CO_2$	$0\ CO_4$
7.	#17		leaking water	$20.8\ CO_2$	$0\ CO_4$
8.	#18		leaking water	$20.8\ CO_2$	$0\ CO_4$
9.					
10.	#19			$20.8\ CO_2$	$0\ CO_4$
11.	#20			$20.8\ CO_2$	$0\ CO_4$

12. positive air flow at seals; water in water trap; gas
13. deck valve closed; time of exam 8:00 to 11:00
14. belts down at this time also.
15. A376-86

Searches for Smokers' Articles (Weekly)

	Date	Location	Violations Observed	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					
6.					
7.					

Examinations of Fire Doors (Monthly)

	Date	System Examined	Hazards Noted	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					

Terry Mullins A86-05

Use Indelible Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

B.P. 30.26

Emergency Escape Facilities and Escapeways Examined (Weekly)

	Date	Location	Hazards Noted	Action Taken	Examiner
1.	Forefork Seals	5-17-07	gas	Shift	Preshift
2.	#12		more observed	$20.8\ \%O_2$	$0\ \%CH_4$
3.	#13		more observed	$20.8\ \%O_2$	$0\ \%CH_4$
4.	#14		more observed	$20.8\ \%O_2$	$0\ \%CH_4$
5.	#15		more observed	$20.8\ \%O_2$	$0\ \%CH_4$
6.	#16		more observed	$20.8\ \%O_2$	$0\ \%CH_4$
7.	#17		~~[illegible]~~; left commencing	$20.8\ \%O_2$	$0\ \%CH_4$
8.	#18		leaking water; right commencing	$20.8\ \%O_2$	$0\ \%CH_4$
9.					
10.	#19		more observed	$20.8\ \%O_2$	$0\ \%CH_4$
11.	#20		more observed	$20.8\ \%O_2$	$0\ \%CH_4$
12.	positive air flow at seals; water in water traps; gas				
13.	check valves closed; time of exam 8:00 a.m. to 11:00 p.m.				
14.	belts down at this time also.				
15.				A.378-86	

Searches for Smokers' Articles (Weekly)

	Date	Location	Violations Observed	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					
6.					
7.					

Examinations of Fire Doors (Monthly)

	Date	System Examined	Hazards Noted	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					

Bobby Kilbourne A.9721

Use Indelible Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

B.P. 30.32

Emergency Escape Facilities and Escapeways Examined (Weekly)

	Date	Location	Hazards Noted	Action Taken	Examiner
1.	Forward Seals	3-18-07	3rd Stright prestiffs		
2.	12			20.8 O_2	0 CO_2
3.	13			20.8 O_2	0 CO_2
4.	14			20.8 O_2	0 CO_2
5.	15			20.8 O_2	0 CO_2
6.	16			20.8 O_2	0 CO_2
7.	17		cracked left corner	20.8 O_2	0 CO_2
8.	18		bolts with; cracked right corner	20.8 O_2	0 CO_2
9.					
10.	19			20.8 O_2	0 CO_2
11.	20			20.8 O_2	0 CO_2
12.			positive air flow at Sub; water in water trap;		
13.			gas check valves closed, time 1 exam 8:00 p.m. to		
14.			11:00 p.m. bolts done at this time ok.		
15.					
16.				A-326-86	

Searches for Smokers' Articles (Weekly)

	Date	Location	Violations Observed	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					
6.					
7.					

Examinations of Fire Doors (Monthly)

	Date	System Examined	Hazards Noted	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					

A80-05

Use Indelible Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

B.P. 3026

Emergency Escape Facilities and Escapeways Examined (Weekly)

	Date	Location	Hazards Noted	Action Taken	Examiner
1.	Freefalk ☆	5-21-07	3rd Shift	notified	
2.	"12		none observed	20.8 O_2	0 CO_2
3.	"13		none observed	20.8 O_2	0 CO_2
4.	"14		none observed	20.8 O_2	0 CO_2
5.	"15		none observed	20.8 O_2	0 CO_2
6.	"16		none observed	20.8 O_2	0 CO_2
7.	"17		cracked in left corner	20.8 O_2	0 CO_2
8.	"18		cracked in right corner	20.8 O_2	0 CO_2
9.					
10.	"19		none observed	20.8 O_2	0 CO_2
11.	"20		none observed	20.8 O_2	0 CO_2
12.	Positive air flow at Sub;				
13.	gas checks		valves closed;	time from 8:00 pm	
14.	to 11:00 pm		belts down at	this time also.	
15.					
16.				A-37688	

Searches for Smokers' Articles (Weekly)

	Date	Location	Violations Observed	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					
6.					
7.					

Examinations of Fire Doors (Monthly)

	Date	System Examined	Hazards Noted	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					

Allen Kilbourn A-192-81 Guy Miller A8808

Use Indelible Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

B.P. 30.47

Emergency Escape Facilities and Escapeways Examined (Weekly)

	Date	Location	Hazards Noted	Action Taken	Examiner
1.	Transport Seals	5-23-07	3rd Shift	no lifts	
2.	#2	none observed		$20.8\%O_2$	$0\ \%CO_2$
3.	#3	none observed		$20.8\%O_2$	$0\ \%CO_2$
4.	#4	none observed		$20.8\%O_2$	$0\ \%CO_2$
5.	#5	none observed		$20.8\%O_2$	$0\ \%CO_2$
6.	#6	none observed		$20.8\%O_2$	$0\ \%CO_2$
7.	#7	crack in left corner		$20.8\%O_2$	$0\ \%CO_2$
8.	#8	crack in right corner		$20.8\%O_2$	$0\ \%CO_2$
9.					
10.	#19	none observed		$20.8\%O_2$	$0\ \%CO_2$
11.	#20	none observed		$20.8\%O_2$	$0\ \%CO_2$
12.	positive air flow at seals; water in water traps				
13.	gas check valves closed				
14.	6 1100 gas bells down & tree trees abs.				
15.					

A37688

Searches for Smokers' Articles (Weekly)

	Date	Location	Violations Observed	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					
6.					
7.					

Examinations of Fire Doors (Monthly)

	Date	System Examined	Hazards Noted	Action Taken	Examiner
1.					
2.					
3.					
4.					
5.					

A19281

Use Indelible Pencil or Ink

Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors

B.P. 30.41

Emergency Escape Facilities and Escapeways Examined (Weekly)

	Date	Location	Hazards Noted	Action Taken	Examiner
1.	Airlock Seal	5-24-07	2nd Shift	on shift	
2.	#12	none observed	20.8 O_2	0 CH_4	
3.	#13	none observed	20.8 O_2	0 CH_4	
4.	#14	none observed	20.8 O_2	0 CH_4	
5.	#15	none observed	20.8 O_2	0 CH_4	
6.	#16	none observed	20.8 O_2	0 CH_4	
7.	#17	cracked in left corner	20.8 O_2	0 CH_4	
8.	#18	cracked in right corner	20.8 O_2	0 CH_4	
9.	#19	none observed	20.8 O_2	0 CH_4	
10.	#20	none observed	20.8 O_2	0 CH_4	
11.	positive air flow at seals; water in water traps;				
12.	gas check valves closed;				
13.					
14.					
15.					

A-376-88

Searches for Smokers' Articles (Weekly)

	Date	Location	Violations Observed			Action Taken	Examiner
	5-28-07	Seals	CH_4	O_2	B.P. 30.52		
1.	12	none obs	0	20.8			
2.	13	none obs	0	20.8			
3.	14	none obs	0	20.8			
4.	15	none obs	0	20.8			
5.	16	none obs	0	20.8			
6.	17	none obs	0	20.8			
7.	18	none obs	0	20.8			
8.	19	none obs	0	20.8			
9.	20	none obs	0	20.8			

Examinations of Fire Doors (Monthly)

	Date	System Examined	Hazards Noted	Action Taken	Examiner
1.	20	none obs	0	20.8	
2.	positive Air Flow				
3.	gas tubes closed				
4.	water traps full				
5.	Time: 800-1100pm				

A-211-92

A-192-81

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

August 13, 2010

CHARLES SCOTT HOWARD,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 2008-736-D
v.	:	BARB CD 2007-11
	:	
	:	
CUMBERLAND RIVER COAL COMPANY,	:	Mine ID 15-18705
Respondent	:	Band Mill No. 2 Mine

DECISION

Appearances: Tony Oppegard, Esq., Lexington, Kentucky, and Wes Addington, Esq., Appalachian Citizens Law Center, Whitesburg, Kentucky, for Complainant; Timothy M. Biddle, Esq., and Willa B. Perlmutter, Esq., Crowell & Moring LLP, Washington, D.C., for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by Charles Scott Howard against Cumberland River Coal Company, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c). A trial was held in Whitesburg, Kentucky. For the reasons set forth below, I find that the Complainant was discriminated against because he engaged in activities protected by the Act.

Background

On April 20, 2007, Charles Scott Howard, an employee of Cumberland River Coal Company, took video footage of seals at Cumberland's Band Mill No. 2 Mine. A few months later, on July 12, the video was shown as part of Howard's testimony at a Mine Safety and Health Administration (MSHA) public hearing regarding an emergency temporary standard on mine seals. Almost immediately after the video was shown, MSHA inspectors visited the Band Mill No. 2 Mine. One day later, MSHA issued a citation to the company for an alleged failure to conduct a preshift examination of the seals prior to beginning work. On July 19, a second citation was issued for Cumberland's alleged failure to maintain the seals. On July 27, a written warning of disciplinary action was given to Howard for taking a non-permissible video camera underground.

Averring that the written warning was given to him for engaging in activity protected

under the Act, Howard filed a discrimination complaint with MSHA, under section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), on August 3, 2007.[1] On February 12, 2008, MSHA informed him that, on the basis of a review of the information gathered during its investigation, "MSHA has determined that the facts disclosed during the investigation do not constitute a violation of Section [*sic*] 105(c)." On March 19, 2008, Howard then instituted this proceeding with the Commission, under section 105(c)(3), 30 U.S.C. § 815(c)(3).[2]

Cumberland maintains that the written warning of disciplinary action was not an adverse action and, even if it were, it was issued solely because Howard created an unsafe condition, in violation of company policy, and not because he engaged in protected activity. I find that the warning was issued as the result of Howard's protected activity, that the warning was an adverse action and that the company's claim that it was issued only because he violated company policy is a pretext.

Findings of Fact

Cumberland River Coal Company, a division of Arch Coal, operates the Band Mill No. 2 Mine in Letcher County, Kentucky. Howard was employed by Cumberland as a "beltman" at the mine. His job responsibilities included performing preshift examinations of the beltlines and seals for hazardous conditions. (Tr. 419.) During the performance of his duties in March and April 2007, Howard noted in the examination book that numerous seals at Band Mill were "leaking water." (Comp. Ex. 8.) Howard also expressed his concern over the conditions of the seals to many mine foremen including John Scarbro, Terry Mullins, Bob Kilbourne, Ronnie Adams, and James Turner. (Tr. 420.)

Besides Howard, at least one other preshift examiner had brought the leaking seals to the attention of management. (Tr. 118.) As the water that had built up behind the seals subsided, Cumberland began to repair them. (Tr. 120.) This included a method known as "block-bonding" (plastering) over the leaks. (Tr. 478.) The repair process lasted approximately two to three months. (Tr. 120.)

On April 20, 2007, Howard took video footage of a number of seals at the mine. (Tr. 423, 445, 470.) Management had not given him permission to take a camera underground.

---

[1] Section 105(c)(2) provides, in pertinent part, that: "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

[2] Section 105(c)(3) provides, in pertinent part, that: "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission . . . ."

On May 22, 2007, MSHA published Sealing of Abandoned Areas, 72 Fed. Reg. 28798 (2007). A public hearing regarding this rule was held on July 12, 2007, in Lexington, Kentucky. Howard testified at the hearing and, as part of his testimony, showed the video with the audio off. (Tr. 41-43.) He did not tell the audience that the video was of the Band Mill mine. Up until this point, Howard had never shown the video to anyone other than his lawyer. (Tr. 467.)

Ronnie Biggerstaff, the Manager of Safety at Lone Mountain Processing, another facility owned by Arch Coal, attended the MSHA hearing. He observed Howard's testimony and witnessed the video of seals displaying water seepage. (Tr. 43.) Biggerstaff suspected that the video was of seals in a Cumberland River mine. (Tr. 44.)

After seeing the video, Biggerstaff called his manager at Lone Mountain, Thurman Holcomb. (Tr. 44.) Holcomb had formerly been the General Manger at Cumberland River. (Tr. 44.) Biggerstaff informed Holcomb of the video he witnessed at the public hearing and anticipated that it would probably be on the evening news. (Tr. 44-45, 47.) In response, Holcomb called the current General Manager of Cumberland River, Gaither Frazier. (Tr. 58.) Frazier left a management meeting to take Holcomb's phone call. (Tr. 58.) When he returned to the meeting, Frazier informed the other members of management that he had been advised that Howard had shown a video of leaking seals at the MSHA public hearing. (Tr. 59.) As a result, they realized that "MSHA and the state" would be coming to the property. (Tr. 59.)

Approximately thirty minutes after this phone call, MSHA inspectors arrived at the mine. (Tr. 61.) Scarbro, Superintendent at the Band Mill mine, went underground with the inspectors to check on the seals. (Tr. 61.) State and federal inspectors were frequently at the mine in the following weeks. Between July 12 and July 27 inspectors were on the property during 16 different shifts. (Tr. 66-67.) On July 13, an MSHA inspector issued Citation No. 6665554 for an alleged failure to perform preshift examinations of the seals in violation of section 75.360(b)(5), 30 C.F.R. § 75.360(b)(5). (Comp. Ex. 3.) Additionally, Citation No. 7502210 was issued by MSHA on July 19, for an alleged failure to maintain the seals for their intended purpose in violation of section 75.333(h), 30 C.F.R. § 75.333(h). (Comp. Ex. 4.)

The day after the public hearing, July 13, Frazier spoke with Scarbro, Valerie Lee, Human Resources Manager, and Leroy Mullins, Safety Manager, about disciplining Howard. (Tr. 72, 484.) Consequently, on July 27, Howard was issued a written warning of disciplinary action. The letter, which serves to put an employee on notice of the potential of further discipline, was placed in Howard's personnel file. (Tr. 485.) After one year, July 27, 2008, the letter was removed. (Tr. 232, 485.) The disciplinary letter stated:

> On April 20, 2007 you potentially created an unsafe work environment at the Band Mill # 2 mine by using a non permissible [*sic*] video camera underground. This action is not only an unsafe mining practice, but it is a violation of company policy to take photos or video tape at any active site on company property

> without the prior written approval from the General Manager.
>
> Based on your disregard for safety precautions in a potentially hazardous situation, and violation of company policy you are hereby given a written warning of disciplinary action.

(Comp. Ex. 7.)

Cumberland's policy on photography was initially established in an e-mail authored by Holcomb. The e-mail was sent to Cumberland management personnel on August 25, 2004.[3] Approximately one year later, a letter regarding the photography policy was distributed to Cumberland employees in their pay envelopes. It stated: "No one is allowed to take photos or shoot video on any of the active sites on company property without prior, written approval from the General Manager." (Comp. Ex. 6.)

Despite Cumberland's dissemination of its policy on photography, the totality of the testimony by both employees and managers was that the photography policy was not enforced during the period relevant to this proceeding.[4] Both employees and managers testified that photographs were taken on Cumberland property and that some were even publically posted or otherwise circulated. No employee or manager testified that he or she had received written permission from the General Manager, before taking a photograph. No employee or manager, other than Howard, was disciplined for violating this policy.

Photographs taken by managers

Numerous managers for Cumberland testified that they had taken photographs without the written consent of the General Manager. Scarbro took photographs underground, using a

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[3] The e-mail stated, in pertinent part:

> In response to a recent fatality in the area, we should establish a policy regarding video or photography on the property. Effective immediately, no one is allowed to take photos or shoot video on any of the active sites on company property without **written** approval from the General Manager. In eastern Kentucky recently an employee decided to video a pillar fall underground, and he was fatally injured when the roof collapsed.

(Comp. Ex. 5.)

[4] The relevant period for this proceeding begins at the creation of the photography policy (August 25, 2004) until the issuance of the disciplinary letter for a violation of the policy on July 27, 2007.

non-permissible camera, four or five times. (Tr. 76, 79.) Although he believed that he had permission to take photographs underground, it was not written permission. (Tr. 79, 90.) Several photos were taken beyond the last open cross cut. (Tr. 91-92, 96-97, Comp. Ex. 9.) Photography beyond the last open cross cut with a non-permissible camera is against MSHA regulations. (Tr. 93.)

Keith Pinson, Load Out Plant Manager at the Preparation Load Out Facility, took photographs on Cumberland property 40 to 50 times without written permission. (Tr. 308, 310.) Lee also took photographs on company property and three were published in the mine newsletter, *Miner News,* Vol. III, No. 1. (Comp. Ex. 15 at p. CRCC 0605, Tr. 190.) She did not have written permission to take the photos. (Tr. 191.)

Mullins took about 16 photographs at various times in various location at the mine. (Comp. Ex. 18, Tr. 292-296.) Mullins had verbal rather than written approval. (Tr. 269-272.) Danny Webb, Mine Manager at Blue Ridge Surface and Highwall Miners for Cumberland River, took about 12 photographs, during the relevant period, without written permission. (Tr. 302-306.)

Holcomb was the General Manager at Band Mill from August 2004 to August 2006. (Tr. 326.) During that time he asked managers to take photographs for business related purposes. (Tr. 334-35.) According to him, managers had implied permission to take photographs and cameras were provided by the company. (Tr. 346.) He also claimed to have issued and denied permission slips in response to employees' requests to take photographs, although the only one he could remember was for Mike Yates, the Belt Portal manager. (Tr. 336, 344-45.) It turned out, however, that the incidence with Yates occurred after Howard was disciplined and a year after Holcomb had moved on to Lone Mountain. (Tr. 501.)

Photographs taken by employees

Employees of Cumberland also testified that they had taken photographs on company property without the written consent of the General Manager. For example, at Lee's request, Catina Ridings, Payroll and Human Resources Clerk, took about 20 photographs with a company camera at an awards banquet held on Cumberland property. (Tr. 141, 156.) On another occasion Pinson asked Ridings to take pictures at a retirement celebration. (Tr. 142.) The photographs were taken in the parking lot, and later published in the company newsletter. (Tr. 142-43.) She did not have written permission from the General Manager, but instead had verbal permission from her immediate boss. (Tr. 154-55.)

Terry Price, Maintenance Planner, testified that he took photographs on company property from July 2005 to July 2007. (Tr. 364, 367.). Since a camera was issued to him and taking photographs was an important part of his job, he did not believe that the policy applied to him. (Tr. 374.)

Further Findings of Fact and Conclusions of Law

Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act."

In order to establish a *prima facie* case of discrimination under section 105(c)(1), a complaining miner must show: (1) That he engaged in protected activity; and (2) That the adverse action he complains of was motivated at least partially by that activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

Protected Activity

Cumberland does not "dispute that [Howard] showing the video o[r] participating in the MSHA hearing was protected activity." (Tr. 26.) Instead, Cumberland maintains that the Mine Act does not protect Howard's act of videotaping underground without the General Manager's permission. (Resp. Br. at 15.) Cumberland alleges that "[t]here is a difference between communicating a complaint about an allegedly hazardous condition, which is a protected activity, and merely taking a picture of it, which is not." (Resp. Br. at 15.) Cumberland further asserts that Howard did not make the video to ensure that the leaks were fixed, because he did not show it to MSHA or the company until long after they had been repaired. (Resp. Br. at 16.)

As the courts have noted, the purpose of the Mine Act is "to protect the health and safety of miners." *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982). The anti-discrimination provision is to be interpreted expansively to effect this purpose. *See Brock on behalf of Parker v. Metric Constructors, Inc.*, 766 F.2d 469, 472 (11th Cir. 1985); *Sec'y of Labor on behalf of Keene v. Mullins*, 888 F.2d 1448, 1452 (D.C. Cir 1989). Accordingly, I find that Howard's videotaping of the condition of the seals was protected activity.

The video camera was the method Howard used to document his safety concerns. He then used the videotape to communicate those concerns to MSHA and the public at a hearing on that very topic. Cumberland's assertion that it is protected activity to observe an unsafe condition and tell someone about it, but not protected activity to take a picture of it and show it unless one has the written permission of the General Manager is disingenuous. While the failure to obtain written permission may have provided an independent basis for disciplining Howard, it does not remove his videotaping of leaking seals from being protected activity, anymore than his not wearing a hard hat while taking the video would make the videotaping unprotected. The company does not argue that videotaping can never be protected activity, only that it is not if done without written permission.

Nor is the operator's argument that Howard was not engaging in protected activity when he videotaped the leaking seals, because he did not show it to anyone, other than his attorney, until three months later, persuasive. He had already notified mine authorities of his concerns about the seals when he recorded his observations in the preshift book and spoken to his supervisors. It would make little sense for him to subsequently videotape the leaking seals if he did not still have those concerns and believe that they were not being addressed.

Consequently, I conclude that Howard engaged in protected activity when he made the videotape and when he showed the videotape at the MSHA hearing.

Adverse Action

The Commission has held that an adverse action is an act of commission or omission by the operator subjecting the affected miner to discipline or to a detriment in his employment relationship. *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984). Cumberland maintains that Howard suffered no adverse action when he was given the written warning of disciplinary action and it was placed in his personnel file. I find that the written warning of disciplinary action was adverse.

Cumberland's position is based on the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). In that case, the court held that for an action to be adverse under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3, the complainant "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[5] *Id.* at 68 (citations omitted).

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[5] Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), states that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has

Based on this, the company maintains that Howard suffered no adverse consequence because the letter in his file did not deter him from making further discrimination claims.

Interestingly, the Complainant also cites the case in support of his claim. In describing actions that were *not* materially adverse, the court said that "[a]n employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Id.* Howard argues that the letter was not such a petty slight or minor annoyance.

At the outset, it should be noted that it is not clear whether *Burlington Northern* even applies to section 105(c) cases. The Sixth Circuit Court of Appeals specifically declined to find that the case applied to the Mine Act, holding that such "[a] fundamental change in Mine Act jurisprudence . . . ought first to be considered by the Secretary and the Commission, neither of whom is an active litigant here." *Pendley v. FMSHRC*, 601 F.3d 417, 428-29 (6th Cir. 2010). The Secretary is not a litigant in this proceeding either.

However, it is not necessary to decide whether the *Burlington Northern* definition of adverse action applies to Mine Act cases. I find that the warning of disciplinary action was adverse both under existing law or under the Supreme Court's definition.

The disciplinary letter was a discrete act of discipline, issued for an alleged violation of Cumberland's policy on photography. The issuance of a letter, rather than a verbal warning, is a more severe form of discipline at Band Mill.[6] (Tr. 485.) It served to put Howard on notice that further action could be taken. (Tr. 485.) It wasn't until one year later that the letter was removed from his personnel file. Therefore, the letter had potential consequences that remained long after its issuance.

A reasonable miner, in a similar situation, might well be apprehensive about exercising protected rights under Section 105(c) for fear of future more severe disciplinary action. The letter could have had a potential chilling effect on further documentation of hazardous conditions by Howard or by other miners aware of the disciplinary action. Thus, the fact that Howard apparently was not deterred does not mean that the action was not adverse. Accordingly, I

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fn. 5 (continued)

> opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

[6] The company has a three step disciplinary process–verbal warning, written warning or discharge. (Tr. 484.)

conclude that the issuance of the disciplinary letter was an adverse action.

Motivated by Protected Activity

The pertinent question in this case is whether the "adverse action" was motivated in any part by protected activity. The Commission has recognized that direct evidence of motivation is rarely encountered; more often, the only available evidence is indirect. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Commission has identified several circumstantial indicia of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and adverse action. *Id.*

Cumberland learned that Howard had shown a videotape of leaking seals in the Band Mill mine at a public hearing on seals held by MSHA on July 12. The next day, Scarbro, Frazier, Lee and Mullins began having discussions about disciplining him. (Tr. 72.) At that time, no one in management had seen the video or talked to Howard about it. (Tr. 74-75, 484.) Obviously, they were reacting to the fact that the mine's leaking seals were going to be in the news and that MSHA had already been to the mine to inspect the seals. They did not even know for sure that Howard was the one who had taken the videotape; all they knew was that he had shown it.

It is apparent that, almost immediately after gaining knowledge of the videotape showing, management decided to discipline Howard. The fact that they did not actually issue the letter until two weeks later because they were discussing the exact type of discipline and clearing the language in the letter with counsel does not diminish the close coincidence in time between the protected activity and the adverse action. Further, there can be little doubt that as a result of their displeasure with Howard's actions that subjected the mine to MSHA and public scrutiny, management decided to respond by disciplining him. Consequently, I have no trouble concluding that, at a minimum, the issuance of the written warning of discipline was motivated, in part, by Howard's protected activities.

The Operator's Affirmative Defense

Cumberland River has failed to show that no protected activity occurred or that the adverse action was in not motivated by the protected activity. It has attempted to show, however, that it also was motivated by the Howard's violation of the camera policy and would have taken the adverse action for that unprotected activity alone. I find that it has failed to establish that assertion.

In *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982), the Commission enunciated several indica of legitimate non-discriminatory reasons for an employer's adverse action. These include evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules

or practices forbidding the conduct in question. *Id.* The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley*, 4 FMSHRC at 993. The Commission has held that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

I find that enforcement of the video policy with Howard was a pretext for disciplining him for his protected activities. Although the camera policy stated that *no one* could take photos or shoot videos *without the prior, written approval of the General Manager*, it is well established that other employees of Cumberland routinely failed to abide by the photography policy.[7] Some of the violations of the policy were open and obvious. Scarbro even admitted to taking photographs, with a non-permissible camera, beyond the last open cross cut (in violation of MSHA regulations).[8] Additionally, other members of the managerial staff routinely failed to abide by the policy or instruct employees to abide by the policy. Indeed, prior to Howard, there is no evidence that anyone had ever complied with the policy, much less been disciplined for not following it.

The company argues that the managers who violated the policy had implied permission to take photographs. Yet the written policy contains no exceptions. If all of the managers and employees who testified about taking pictures had implied permission to take photographs then there really was no policy. It is obvious that the only reason the company decided to enforce the policy with Howard was to contrive a basis for disciplining him that ostensibly did not involve his protected activities.

Conclusion

Charles Scott Howard, while performing his job as a preshift examiner, made numerous entries in the preshift examination book about leaking seals in the Band Mill No. 2 Mine. When action had not been taken to his satisfaction to correct the situation, he made a videotape of the leaking seals. Three months later he showed the videotape at an MSHA public hearing on improving seals in mines. When the company learned of his protected activities, it decided to discipline him. As a result, a written warning of disciplinary action was placed in his file for

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[7] The same policy memo provided that cell phones could not be used on the job, but if they had to be used, employees had to "clear the call with his or her *immediate supervisor*." (Comp Ex. 6.) (emphasis added.) It is apparent that the company was aware of how to provide for exceptions in the photography policy if that was the intention.

[8] Howard's videotape was not made beyond the last open cross cut and, therefore, he was not in an area of the mine where permissible equipment was required. (Tr. 283-84.)

failing to get the written permission of the general manager before making the videotape and for using a non-permissible camera in the mine. As the photography policy had never been adhered to or enforced prior to its use with Howard, it clearly was used by the company to cover its disciplining of him for engaging in protected activity. Consequently, I conclude that Howard was discriminated against for engaging in protected activities in violation of section 105(c) of the Act.

Order

Having determined that Howard was discriminated against unlawfully, it follows that he is entitled to the relief sought in his complaint. Accordingly, it is **ORDERED** that the Respondent:

1. **Expunge** from Howard's personnel file all references to the unlawful issuance of the written warning of disciplinary action, and to expunge such references from any other records maintained by the company.[9]

2. **Reimburse** Howard for all reasonable and related economic losses or expenses incurred in the institution and litigation of this case, including reasonable attorney's fees.

3. **Post** this decision at all of its mining properties in Letcher County, Kentucky, in conspicuous, unobstructed places where notices to employees are customarily posted, for a period of 60 days.

The parties are **ORDERED TO CONFER** within **21 days** of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts that the Respondent will undertake to carry out the remedies set out above. If an agreement is reached, it shall be submitted with **30 days** of the date of this decision.

If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within **30 days** of the date of this decision. For those areas involving monetary damages on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. If a further hearing is required on the remedial aspects of this case, the parties should so state.

In accordance with Commission Rule 44(b), 29 C.F.R. § 2700.44(b), a copy of this

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[9] The letter itself was removed from Howard's file one year after its issuance. (Tr. 231-32.) However, there also may be pending lawsuits between Howard and the company which reference the letter. (Tr. 243.) As long as those lawsuits, if any, are pending, the company may maintain references to the letter in its litigation files.

decision will be sent to the Regional Solicitor having responsibility for the Commonwealth of Kentucky so that the Secretary may take the actions required by that rule.

The judge, or his duly appointed successor, retains jurisdiction in this matter until the specific remedies to which Howard is entitled are resolved and finalized. Accordingly, **this decision will not become final** until an order granting specific relief and awarding monetary damages has been entered.

T. Todd Hodgdon
Senior Administrative Law Judge

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/rps

Chairman WALBERG. Without objection.

Do we have a copy?

Ms. WOOLSEY. Yes, there you go.

Chairman WALBERG. Okay, thank you.

We will now move to the gentleman from Indiana, Mr. Rokita.

Mr. ROKITA. Thank you, Mr. Chairman. I appreciate you having this hearing and the Committee's continued interest in this subject matter.

I also want to thank the witnesses.

My first question goes to Mr. Ellis. Regarding modernizing mine safety, your testimony concluded by stating that, "The measure of success is not the number or severity of the enforcement actions

taken against mine operators, but the safety and health of the mining workforce." True?

Mr. ELLIS. Correct.

Mr. ROKITA. Given your background and experience with MSHA and the review commission, can you explain how, briefly, how the inspectors are evaluated, number one? And I would like to know if there is a quota for violations. I have several constituents in the district that tell me stories. But you could probably put some light on it. And then, is it ever acceptable or even conceivable for an inspector to have no citations from an inspection?

Mr. ELLIS. Let us go last question first.

Mr. ROKITA. Yes, it is conceivable that an inspector can go through an inspection and issue no citations. I mean, as has been discussed earlier, enforcement sometimes is a reflection of what the safety performance is at the company. But more than anything else, it focuses in on unsafe conditions.

And that inspector may find that there are no unsafe conditions at that mine. And therefore, you would end up with a clean inspection.

Mr. ROKITA. Quick follow up—does that happen in practice?

Mr. ELLIS. No, as a matter of fact. It is in most situations that second set of eyes from MSHA finds something. And in some cases, they find more than one thing. Could I ask you to repeat the second part of your question or the first part?

Mr. ROKITA. Sure. How inspectors are genuinely evaluated. You know, what makes a good inspector at MSHA?

Mr. ELLIS. Well, I mean, inspectors ideally have 5 years of experience in industry before they come into the inspectorate force. And then they go through training at the Mine Health and Safety Academy in Beckley, West Virginia for a couple of years.

And then they move out into the field and work out in the field as inspectors. And, you know, it is a process where they move around to different operations so they get exposed to different types of conditions and different types of mines.

Mr. ROKITA. In your experience now, do you have any idea what percentage of MSHA inspectors actually have 5 years of experience in the industry?

Mr. ELLIS. I don't know, but I know that when I was at the agency—and it is still on the cusp of it—is that MSHA has a very senior workforce. A lot of the inspectors are of retirement age and they are retiring. And the agency is actively trying to recruit to backfill those positions.

And so, there is a culture shift that is going on with people that have had substantial experience in the industry and substantial experience as inspectors that are leaving. And we are having new people come in. And there is a learning curve there.

Mr. ROKITA. Thank you very much.

Let me switch over to Mr. Griesemer for—did I pronounce that right? I apologize. Thank you—kind of a follow up to that same line of questioning, quote, unquote—"the second set of eyes."

I am getting reports that one inspector will go in to a place of business and pass over something, just to make the example simple. Something hangs on the wall or something hangs on a piece of equipment. And no report that anything was a problem. A sec-

ond inspector comes by, weeks or months later, "Oh, well, that has to be moved. That is not right," or whatever the situation is.

The company then spends a good deal of money making that correction. Now, for the third inspection, it is the first inspector coming by again. "Why did you move that? Put that back." So the nonuniformity in the inspection procedure, in the policies seems to be an issue.

One area you believe MSHA could improve is its training inspectors in the specific requirements of your industry. I think that was your testimony. Can you explain how aggregates maybe are different from other segments of the industry?

And is this a problem in the inspection process? Do we have inspectors going to different segments of the industry? And could that be contributing to what I just explained? And I am sorry, I have given you little time to respond.

Mr. GRIESEMER. I would say, yes, it is all of that. I think the increased frequency of inspections actually contributes to that somewhat in that we are now seeing 100 percent of our twos and fours in the aggregates sector.

And in this down economy, I have to say a lot of us small producers aren't even running 12 months a year. So it is particularly a burden for an inspector to come back.

Nothing changes in 6 months in our operations compared to, like, an active—another mine, a larger mine. We may only have six or seven employees at a surface operation. And the number of inspections that they come in and they do to rotate inspectors. So there is this a new set of eyes and ears every time.

Mr. ROKITA. And that is good or bad?

And I yield back.

Chairman WALBERG. Thank you.

Mr. GRIESEMER. We think the resources could be better used elsewhere.

Mr. ROKITA. Thank you.

Chairman WALBERG. Turn now to the gentleman from New Jersey, Mr. Payne.

Mr. PAYNE. Thank you very much. And I am glad that we are having this hearing.

As you know, several years ago, I did go down to a mine. And I really have to commend workers in the mines for the challenge that they have. And I think they are very honorable and hard-working people.

It kind of amazes me, though, that I find that sometimes the mine owners have sort of a kind of a lackadaisical attitude about the protection of these hard-working Americans who really put their lives on the line.

I just have a question. And, as a matter of fact, believe it or not, around the world—and I have traveled to South Africa where the mine workers really were very active, even in the anti-Apartheid work, even in Zambia. The miners protested, where the Chinese are really running the mines and have armed guards. And they protested. And the mine owners even listened to them.

And, of course, what we saw in Chile. So it seems I still get an uncomfortable feeling about the attitude, it seems, cavalier attitude

of mine owners for these people who really jeopardize their lives so much.

Let me just ask you, Mr. Roberts, about 2 weeks ago, the Robert C. Byrd Mine Safety Protection Act was refiled. It will strengthen criminal penalties, improve protection for miners' rights and modernize use of technology to prevent explosions in coal mines. How should Congress go about modernizing mine safety, in your opinion? And does this bill take the proper approach?

Mr. ROBERTS. Thank you for the question. And I don't mean to be critical of anything that has been raised here today. But when we look at the situation that exists as we gather here today—and we know that 70,000 coal miners have died from pneumoconiosis in the last 40 years. And 10,000 of those died in the last decade.

We know that we have seen an explosion, the worst disaster that we have seen in 40 years just a year ago when 29 miners lost their lives. We know in 2006 that we had a terrible explosion at Sago. A couple weeks later, miners were caught in a fire and died at Aracoma.

And then we saw nine miners die, six instantly, at Crandall Canyon, and three trying valiantly to rescue them in 2007. And whether or not the most important thing that we should be talking about is did somebody write a citation that was consistent or inconsistent seems to not be speaking to the fact that—we know there is a coal mine right now, right now that I just raised that might explode and would have exploded had MSHA not been there. That seems to be a much greater problem, from my perspective, than perhaps someone feeling they got treated poorly.

And I apologize if that sounds harsh. I don't mean for it to come across that way. But all you have to do is meet some of these families and talk to them and some these miners, too. What is the most important thing we could do? Well, we could modernize what we are doing, as a government.

Let me give you a perfect example of that. The way we test the explosibility of coal dust, for example. You may have read this. MSHA took a sample from the Upper Big Branch mine. And the way they test those now, they send them to a lab in Mount Hope, West Virginia.

They took a sample at Upper Big Branch before the explosion. Ten days after the explosion, sample came back, and it was way out of line. In fact, it was 80 percent explosible, I guess is the word, that they used. So that told everyone, once the sample came back, well, something should be done here.

Quite frankly, those of you that know anything about coal mining and have been in a coal mine know you can just about look and see that. If you have got coal dust all over the mine, that is like gun powder. That is like gun powder. And it is more explosive than methane. Methane ignites. Methane explodes. Then it ignites the coal dust.

You cannot have an explosion like you had at Upper Big Branch without being totally and completely out of compliance. And all the evidence suggests that. So we have had the samples come back. So we need to modernize this.

Inspectors need to be armed with the ability to know what is in the atmosphere immediately and the explosive range of the coal

dust that is there, whether there is enough rock dust on it. And MSHA has taken actions to try to increase those standards. But we need to act and act quickly and modernize the tools that MSHA has to determine these factors and to be able to deal with those when they find them.

We should be about the business, I think, of making sure that we are not here next week or next year talking about this mine exploded in West Virginia or Kentucky and what do we need to do about it. And let us be honest about it. There has never been a law passed here, except one time, and that was 1977, and that was revisions to the 1969 Act.

We would never passed the 1969 Act if we hadn't had those coal miners die at Farmington. We would have never acted in 2006 if we hadn't had those miners die at Sago and Aracoma and then Darby. What has prompted every action by this Congress—not this particular Congress, but Congress itself—has been a terrible tragedy. And I think we can do better than that.

Chairman WALBERG. Thank you, Mr. Roberts.

The time is expired. And I am glad I concurred with you in some of my opening statements on that. And I think we all agree. It is how we get to that point is the question.

I turn now to the gentleman from Pennsylvania, Mr. Kelly?

Mr. KELLY. Thank you, Mr. Chairman.

And all the witnesses, we do appreciate you being here.

I come from the private sector. I am an automobile dealer. And I think we all would agree that our main concern is making sure that whatever line of work you are in, you are doing, it is safe. And I think the danger when we have some of these hearings is that we get a polarization between those that operate a business versus those that work in these businesses.

And coming from a situation where it is very important for my workers to be safe because that ensures my ability to stay in business—and when I look at this, I have been through several mines myself. And I have friends that have been from Western Pennsylvania. There is an inherent risk for going underground and working in these situations. I agree with that. I don't think there is any question about that.

Then the question becomes then, okay, can you legislate safety? Can you legislate common sense? Can you legislate practical purposes that make sense for everybody?

And I think the difficulty that we have, on this side of it, is how do you come up with a situation—there is a term in the military. It is called SLOJ, just s, l, o, j. It is a sudden loss of judgment where people walk into the tail rotor of a helicopter.

Now, you could come up with the law says, don't walk within an area where the helicopter is parked. There are certain things, like chocking the tires on that truck, that are very important. In my business, you are supposed to wear a hard hat and safety glasses when they are working on the underside of a car. Nobody does it. That is the rule, but nobody does it.

And let me ask you. Because I have watched this. And I have been through OSHA inspections myself. And some of it gets to the point of it is like a traffic violation. Well, it would be called a traffic violation, maybe one for speeding, where you were going 25 in a

15-mile zone or you were going 85 in a 50-mile zone. There is a big difference.

Tell me about some of the citations, Mr. Griesemer. Because I have friends who were cited. And my problem with all this is there is no remedial purpose to this. When they do an inspection, to sit down where you say, you know, we found some problems. We think you need to address them. I mean, leaving the lid off a garbage container, to me, doesn't have the same consequences as maybe the coal dust would be.

The distance of a fluorescent light from the top of a desk maybe doesn't have the same consequences of not having a safety room for people to go to. So if you could just walk us through what one of the inspections are. And do you even have the opportunity to fix what they found was wrong? And it is the inconsistency of the inspections, I think, that makes it very difficult come up with a policy that makes sense for all of us.

Mr. GRIESEMER. Thank you, Congressman. I agree exactly with what you are saying. I have been doing this for over 30 years. There has been a big change in the way inspections have been performed in those—in that period of time. We used to have inspectors come out to the plant and they would actually give safety talks to our people, which we welcomed.

And there was more compliance assistance in the early years than there is today. And the emphasis has changed in the last few years to enforcement. I see it. They write it up. And there is a penalty assessed.

It is a prescriptive—somebody had mentioned that before—a prescriptive solution. I think we have to go—we have to engage everybody. We have got the CEOs, the middle managers engaged. We also have to engage the workers because we have to have their hearts and minds about safety as well.

And I think we are not emphasizing enough there because we are needing—the small operators are going to have to have some assistance. MSHA is talking about closing the small mines office. And it is the compliance assistance that is going away. And it is the enforcement that is being emphasized over and over again.

I just agree with you. I think it is the wrong way to go. The instance of my truck driver not chocking the wheels, I think you could use that as an example of we had provided the chocks. We had provided the training. The company had done everything except anticipate and tell him specifically, you get off that truck for 1 minute, you have to chock the wheels.

We want them to think about that themselves. You have to have the worker engaged in safety before those things will happen.

Mr. KELLY. Okay.

Mr. Roberts, do you have an opportunity to sit down, then, with management and go over common concerns and then come up with common answers or solutions to it? Because I think, really, best practices are usually the result of, not only those that own the mines, but those that work in the mines. Does that opportunity exist? Because I think that would be invaluable to everyone.

Mr. ROBERTS. It certainly does exist, particularly at unionized operations. There is a process in the contract itself that is called the labor/management positive change process where those kinds of

issues are dealt with. Unionized mines have safety committees that work very closely with management.

But the truth is that many of the mines in this country are non-union, and the workers are unrepresented. And it is management who dictates or decides what the health and safety operations will look like and what the policies will be. So, yes, at unionized mines there is an opportunity for this kind of dialogue. We do engage in it.

In fact, we not only engage in it at the local level, at the mine level. We do it at the national level also.

Mr. KELLY. Okay, thanks. Appreciate it.

Mr. Chairman, thank you.

Chairman WALBERG. Gentleman's time is expired.

Now we move to the gentleman from South Carolina, Mr. Gowdy.

Mr. GOWDY. Thank you, Mr. Chairman. I want to thank you and Chairman Kline for having this important hearing.

I also want to thank the witnesses for informing those of us who are not as familiar with these issues and for your professionalism and civility towards one another as you testify.

Mr. Chairman, I was particularly interested in the gentleman from Indiana, Mr. Rokita's, line of questioning. And I would yield to him such time as I may have.

Mr. ROKITA. Thank you. And I thank the gentleman from South Carolina, a good friend and certainly a gentleman in every respect.

Continuing on with my questioning of Mr. Ellis, please. In your capacity as president of the National Industrial Sand Association, are you following MSHA's regulatory agenda proposal to further regulate crystalline silica?

Mr. ELLIS. Yes.

Mr. ROKITA. Okay. Can you explain what companies are currently doing to prevent exposure to the silica? And do you believe a further reduction in the permissible exposure limit can be achieved?

Mr. ELLIS. Let me start out by saying crystalline silica is a technical name given to a substance that we are all familiar with, quartz or sand. And that is the substance we are talking about.

But when it is in respirable size, it is potentially harmful to the human lung. And it causes disease. It causes silicosis.

And everybody should appreciate that it is a preventable disease. So it is something that needs to be taken seriously. We can prevent that disease.

The rulemaking that is being considered right now conceivably would look at whether we lower the level from what it currently is to whether or not we need to add additional provisions to the law to capture overexposures and eliminate them. So, yes, we are watching that rule very carefully.

Mr. ROKITA. Okay, thank you.

And switching over to Mr. Bumbico, I appreciate your testimony. Using a little bit of my time, is there anything you want to add to Congressman Miller's line of questioning? Or do you feel like that was fully answered?

Mr. BUMBICO. I think what I would like to add is that it is very possible, very probable that the indicators we are looking at as to what is safe and what is not safe are the wrong indicators. You

know, prior to the disasters that occurred in 2006, the industry was very comfortable because the number of injuries had been trending down, the number of fatalities trending down. And I think that is what caused those disasters that proceeded to be such a shock because we were thinking that progress was being made.

In my estimation, we are looking at the wrong thing. Looking at injuries, looking at regulatory compliance is looking backwards. And what we need to be doing is looking forwards. We need to be teaching people how to identify exposures, how to identify risks and how to deal with them.

Mr. ROKITA. Thank you.

Mr. MILLER. Will the gentleman yield?

Mr. ROKITA. Yes.

Mr. MILLER. Yes, thank you.

On that point, I mean, that is—I was trying to get to this point, to some extent, maybe not exactly as you said. But I represent a lot of heavy industry, oil refiners, chemical industry, steel mills and others. And we have seen in this committee, and we saw the tragedies of British Petroleum at Texas City where all this concentration was on trips and falls as opposed to processes and how you are doing your job and what is it you should be thinking of when you have this specific job to do, whether it is shutting down a vessel, reworking a turnaround.

And I think we are moving in that—in that direction. And, you know, I don't want to say that it is just a matter of trips and falls in the mines.

But the real question is what is the—what is the Pattern of work and what is the patter of safety considerations for this project that we have in this vein, this type of mine, this operation, what have we done ahead of that. And what we are seeing is where industry is starting to adopt that, and many have, that it does seem to change the consciousness of everybody involved from the management to the worker in the sense that maybe we need additional resources or protections.

Mr. ROKITA. Thank you. Reclaiming my time.

Mr. MILLER. Thank you.

Mr. ROKITA. And assuming you asked a question, real quick, please.

Mr. BUMBICO. Can I respond to that?

Mr. ROKITA. Yes.

Mr. BUMBICO. I think the process I am talking about has to take place on two levels. You have to do a risk assessment at a major hazard level to look at what might cause an explosion and a fire and also take that down to the employee level so that lesser risks could be dealt with, too. And the two merge into one culture, if it is done effectively.

Mr. ROKITA. And then finally, Mr. Bumbico, the industry supported the Miner Act of 2006. That was before my time, but I understand that to be the case. But you did not support the S Miner Act and most recently, the Miner Safety and Health Act. Can you explain why industry has taken two different positions on mine safety, in less than a minute?

Mr. BUMBICO. I don't see this as taking two different positions. I think the positions have been consistent. I think in the case of

the Miner Act, the parties were able to get together and determine what the underlying changes needed to be. That wasn't the case with the supplemental Miner Act.

As I mentioned earlier, there were a number of things that were in the S Miner Act that could have been done anyway by MSHA that didn't require a new legislation to enact them. At the same time, there were some provisions in there, like the definition of what was a serious and substantial violation, that would have fundamentally changed enforcement and made it very, very difficult for the industry to comply.

Mr. ROKITA. I thank you.

I thank the witnesses.

Again, I yield, Chairman.

Chairman WALBERG. I thank the gentleman.

And I also would like to, again, thank our witnesses for taking the time to testify before the subcommittee today. It has been enlightening for us. And I appreciate the perspective that has come across the spectrum and the questioning coming from the committee.

And so, now I would take time to recognize the ranking member, the gentlelady from California, Ms. Woolsey.

Ms. WOOLSEY. Thank you, Mr. Chairman.

We were hoping for a second round of questions. So I will yield 1 minute to Congressman Payne and 1 minute to Congressman Miller, if they want to say——

Mr. PAYNE. Well, just very quickly, maybe, Mr. Roberts, the characterization of the difference between the Miner Act and why the industry opposed it. What do you think about the S Miner? Was it such a radical—or was it the company wanted to write the act? Or what is the deal?

Mr. ROBERTS. I don't see it that way at all. And, in fact, we supported that. We also support the Robert C. Byrd Act also.

Mr. PAYNE. All right. Great.

Ms. WOOLSEY. One minute? Okay, thank you.

Thank you, Mr. Chairman.

All this business about blaming the workers. For heaven's sakes, I was a human resources director for 10 years of a high-tech manufacturing company. It was so clear to me. Now, that is not coal mining. It is not, you know, rock mining. I know there is a difference.

But the difference is that we knew, as employers, as the bosses, that it was our job to put together safety policies that our employees followed. If they didn't follow it, we had disciplinary programs in place. Because if you don't follow the safety rules and you are going to risk your life and anybody else's, that is a disciplinary problem.

And we also had really—it doesn't sound like it when I am going on and on like this. But we had really good employee/employer relations. That makes a difference. We had a safety committee. We had 800 employees, so it is not like we had 12 people.

And, you know, you can do it. And you cannot blame the worker. You can't blame the worker when the worker—we had suggestion boxes. If the person that had those seals knew about the water seals or anything close to it couldn't get through their manager or

through their bosses, they would have put it in the suggestion box. Somebody would have heard it and cared about it.

So, you know, if you want to modernize, then these industries have to join the 21st century and work with their employees. And you want partnerships? It is the employer/employee partnership.

So, Mr. Chairman, thank you. We have built a foundation through numerous hearings and several Congresses for overdue mine safety reform legislation.

And last year under Chairman Miller's leadership, we brought reform legislation to the floor following consultation with the Upper Big Branch miners and their families and the mining industry, academics, state mine safety regulators, the inspector general and many, many others. It is not like we did this in a vacuum.

Regrettably, opponents of the bill argued that it was premature to act before the investigations had been completed at Upper Big Branch. Well, this is a misleading argument because after conducting its investigation for over a year, MSHA persuasively argues that it knows enough about the accidents to justify making immediate changes to the Mine Act.

So we can keep throwing challenges in the way, or we can prevent future accidents. That is up to us. I agree with Mr. Roberts. We can keep talking about this until another accident happens, or we can act on it.

And I want to act on it with you, Mr. Chairman. Thank you very much.

Chairman WALBERG. I thank the gentlelady. And I would certainly concur that we want to act—that we want to act appropriately. We want to act with reason. And we want to act with common sense, though that may not be so common anymore in the world today.

We want to certainly not blame workers unnecessarily. We would not—we don't want to blame the employers and the mine owners, the operators unnecessarily, either. We want to encourage—and I give credit to workers for good sense and for good experience that can expand our capabilities of moving forward in this area.

And I think that is the reason for hearings like this and hearings that I would assure you with all good intentions of moving forward in the appropriate fashion, to make sure that, number one, we have a safe workplace for our—for our mine workers, but we also have a workplace for our mine workers that will go on with some security and that we will encourage that honorable profession to continue for as long as we need the product.

I certainly remember my experience as a United Steel worker working at U.S. Steel South Works, Southside of Chicago. I certainly understand the impact of having union and management work together. I certainly understand the frustrations that were there at times.

I certainly understand being a—being a steel worker working on a mobile platform or working on the platform related to the to the—to the steel heat itself and having the experience of coming back to a plant, fortunately, after having left it during a shift and not seeing the locker room there anymore because the heat had burned through the furnace and gone into the sewage system. That was not as a result of lack of regulation.

That was not as a result of a desire to cut corners by the company. That was certainly not the result of union workers desiring that lack of safety to take place. And fortunately, no life was lost because it was between shifts. It was operator error, clearly, at that point. How we protect against that goes with good regulation, good training and, again, common sense and care taken by employee and employer.

So our purpose is to move that direction. I appreciate the testimony we have heard today. I appreciate seeing technology that can be used to foster improvement in the health and safety of our workers. And we certainly, as a subcommittee and ultimately as a full committee, want to deal with that in appropriate fashion. I know that there is further opportunity for giving input.

That has been left open at the beginning of this hearing here for further information to be shared. This subcommittee is open to that and want to have that as part of our record. So having said that, there being no further business, the committee stands adjourned.

[Questions for the record and their responses follow:]

U.S. CONGRESS,
Washington, DC, May 13, 2011.

Hon. TIM WALBERG, *Chairman,*
Subcommittee on Workforce Protections, Committee on Education and the Workforce, 2181 Rayburn House Office Building, Washington, DC.

DEAR CHAIRMAN WALBERG: As part of the hearing record, we ask that you seek written clarification from a witness, Anthony Bumbico of Arch Coal, about statements that he made during the "Modernizing Mine Safety" hearing on Wednesday, May 4, 2011.

Witnesses before the Committee have the duty to provide truthful testimony, and the Committee must take care to ensure the integrity of its proceedings and the accuracy of the record we collect. For these reasons, Mr. Bumbico's testimony, on behalf of both Arch Coal and the National Mining Association, is of concern.

Specifically, Mr. Bumbico's testimony appears to be contradicted by a final decision and order of the Federal Mine Safety and Health Review Commission (FMSHRC) regarding unlawful retaliation against Charles Scott Howard, an employee of Arch Coal's subsidiary, Cumberland River Coal Company (CRCC), following his multiple disclosures to management, and subsequent release of a videotape that documented a number of seals leaking water at the company's Band Mill No. 2 mine in Letcher County, Kentucky, at an MSHA public hearing.

Defective seals present a potentially lethal risk for miners because if they break, they could lead to flooding and inundation. Pursuant to §303(d)(1) of the Mine Act, the preshift examiner must "examine seals * * * to determine whether they are functioning properly" and must note any violations of law or hazardous conditions in the preshift examination report. It is a requirement that mine management must countersign each pre-shift examination report, which provides acknowledgement that management has read the preshift examination report.

Below is the transcript of the relevant questions and answers from the May 4 hearing:

> "Mr. MILLER. What happened to the person that you fired for showing the video of the leaking water seals?
>
> Mr. BUMBICO. I think——
>
> Mr.MILLER. Was that retaliation against a whistleblower?
>
> Mr. BUMBICO. I think you are mischaracterizing what occurred there.
>
> Mr. MILLER. You characterize it for me.
>
> Mr. BUMBICO. Sure. One, I am not going to talk into great detail because that issue is currently matter of civil litigation. But I will say this: The individual questioned took a video camera underground and did a tape of seals that were leaking. Instead of calling that to the attention of mine management or instead of calling MSHA and complaining about the problem, he took the videotape and brought it to a public hearing to show it. And then after the fact——
>
> Mr. MILLER. So he never addressed it prior—he never addressed this prior with you, the company?

Mr. BUMBICO [continuing]. The issue was dealt with. No. The individual questioned——

Mr. MILLER. I don't think that is what the record shows."

Indeed, there is substantial evidence which contradicts the underlined portion of Mr. Bumbico's testimony.

1. The August 13, 2010, FMSHRC decision in Charles Scott Howard v. Cumberland River Coal Company[1] stated that Mr. Howard notified management on many occasions, as did others, about the leaking seals. The opinion states: "During the performance of his duties in March and April 2007, Howard noted in the examination book that numerous seals at Band Mill were 'leaking water.' Howard also expressed his concern over the condition of the seals to many mine foremen, including John Scarbro, Terry Mullins, Bob Kilbourne, Ronnie Adams and James Turner."

2. Also according to documents included in the hearing record, in his capacity as a preshift examiner, Mr. Howard documented in the preshift examination book on 11 separate occasions that the seals were leaking, as well as the fact that parts of the seals were cracked. John Scarbro, the mine superintendent, admitted under oath during the FMSHRC trial that Mr. Howard had informed management of the leaking seals within the mine. The trial transcript, which is a public document, states:[2]

Mr. OPPEGARD (attorney for Mr. Howard): "Now, prior to Mr. Howard showing the video at a public hearing, he had been documenting in the preshift book that you had seals in the Band Mill Number Two Mine that were leaking water, had he not?"

Mr. SCARBRO (Mine Superintendent): "Yes sir."

Mr. OPPEGARD (attorney for Mr. Howard): "And in fact, Mr. Howard had told you that those seals needed to be repaired, did he not?"

Mr. SCARBRO: "Yes sir."

As I previously stated, witnesses before our Committee have a duty to provide truthful testimony. Given the questionable testimony provided by Mr. Bumbico, its inconsistency with other official records, and its relevance to oversight as well as pending and future legislation, we ask that you submit these questions to Mr. Bumbico in order to clarify the record:

1. Prior to videotaping the leaking mine seals, did Mr. Howard call the leaking seals to the attention of management? Yes or no?

2. Did John Scarbro, the mine superintendent, receive notification of the leaking seals? Yes or no?

3. FMSHRC's August 10, 2010, Decision and Order in Charles Scott Howard v.Cumberland River Coal Company stated that management personnel including Terry Mullins, Bob Kilbourne, Ronnie Adams and James Turner were also notified of leaking seals by Mr. Howard. Is this statement correct? Yes or No?

4. Is your testimony factually correct that Mr. Howard, "instead of calling that to the attention of mine management or instead of calling MSHA and complaining about the problem, he took the video tape and brought it to a public hearing to show it." Yes or no?

5. Did Arch or its subsidiary CRCC, appeal the FMSHRC August 10, 2010,

Decision and Order in this discrimination proceeding? If not, is this judgment final?

This Committee has the obligation to maintain the integrity of its proceedings. If there is any question about the reliability of testimony, whether due to potential conflicts or otherwise, the Committee should give serious consideration to the administration of oaths to witnesses prior to their testimony.

Thank you in advance for ensuring the witness's answers to the above questions are included in the hearing record.

Sincerely,

GEORGE MILLER, *Senior Democratic Member, Committee on Education and the Workforce.*

LYNN WOOLSEY, *Senior Democratic Member, Subcommittee on Workforce Protections.*

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[1] Docket # KENT 2008-736-D

[2] Trial Transcript, December 16, 2008, pp. 51

1 City Place Drive, Suite 300
St. Louis, Mo. 63141

June 6, 2011

Representative Tim Walberg
Chairman, Subcommittee on Workforce Protection
Committee on Education and the Workforce
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, D.C. 20515-6100

Dear Chairman Walberg:

This responds to your letter dated May 18, 2011 regarding the Subcommittee on Workforce Protection hearing on "Modernizing Mine Safety," which was held on May 4, 2011. As you know from our informal discussion before the hearing began, as well as my testimony during the hearing, I was pleased and honored to have been invited to testify before the Subcommittee. In particular, having spent over 36 years working in the coal mining industry (including starting out as a rank-and-file underground coal miner and in later years being elected to the Executive Board of the United Mine Workers of America, before moving on, for the last 25 years, to various management positions), I thought it would be especially useful for the Subcommittee to hear from someone like myself who has not only been both a labor and management representative, but also someone whose career has been totally devoted to improving the safety and health of coal miners.

I hope you and your colleagues found what I had to say to be helpful. However, I was disappointed to be questioned on details of an employee-management dispute extraneous to the substance of my testimony and unrelated to the purpose of the hearing as I understood it. Moreover, I was surprised by the controversy that developed over the misinterpretation of my responses to the inquiries regarding that now almost 4-year old employment matter. More importantly, I feel that my character was impugned by the statements in the May 13 letter (that precipitated your correspondence to me) that witnesses testifying before the Subcommittee have "the duty to provide truthful testimony," and if there is any question about that, then the Subcommittee "should give serious consideration to the administration of oaths to witnesses. . ." Mr. Chairman, over my almost four decades of working in the coal mining industry, I have not been a stranger to controversy or contentious issues, however, one who volunteers to testify before a Congressional Committee should not expect to be subjected to such cross-examination.

Having told you my reactions to what happened, I will respond to the questions in your letter, but before doing so, allow me to make sure that my prepared testimony is clearly understood. To boil that down to its essence, I want to say that safety and health conditions in the coal mining industry have improved exponentially in the years I have worked in the

industry—and not just as a result of the Federal Mine Safety and Health Act of 1977 (which surely is deserving of credit), but also because of safety and health risk-based management programs put into place by mining companies that achieve results far beyond baseline compliance with federal and state rules and regulations.

Such programs are designed to involve everyone from newly hired miners to senior officers in identifying, correcting, and taking responsibility for such risks. Mining companies develop these programs not because they have to, but because it is the right thing to do—especially when you think about the fact that most mines are located in small rural areas where salaried management and hourly personnel not only live in the same communities, but are often friends and family members.

With regard to the questions submitted by Representatives Miller and Woolsey, they all relate to Representative Miller's questions about whistleblower protection, an issue to which he turned after I told him that I supported MSHA's emergency temporary standard on rock dusting. According to the Subcommittee's archived video of the hearing, Representative Miller asked me: "What would you do about whistleblowers?" I replied: "Whistleblowers, I believe at this point have adequate protection under the existing law." Mr. Miller then asked me: "What happened to the person that you fired for showing the video of the leaking water seals? Is that retaliation against the whistleblowers [sic]?" I replied "I think you are mischaracterizing what occurred there," when Mr. Miller interrupted my response and said, "You characterize it for me."

I specifically replied that I could not speak in "great detail" about this because it was in litigation, but for your information and that of the Subcommittee, despite Representative Miller's assertion to the contrary, I did not fire anyone. However, the person to whom Mr. Miller was referring is Charles Scott Howard, a Cumberland River Coal Company ("CRCC") employee, who, in April 2007, videotaped leaking water seals in CRCC's Band Mill No. 2 Mine (CRCC is a business unit of Arch Coal). My understanding is that video was never made known to CRCC management, until more than two months after videotaping the leaks, Mr. Howard showed the video footage as part of his testimony at an MSHA public hearing. Mr. Howard subsequently received a disciplinary warning letter from CRCC for violating the company rule prohibiting videotaping on mine property without the written permission of a general manager. I have no personal knowledge of Mr. Howard's videotaping, the disciplinary warning letter, or the subsequent proceedings related to the disciplinary warning letter. I was not involved in the related administrative hearings before the Federal Mine Safety and Health Review Commission ("FMSHRC"). The outcome of those hearings as contained in the decision of Administrative Law Judge ("ALJ") Hodgdon is a matter of record.

Because of my limited knowledge of the Howard case, in order to adequately reply to your letter, I have inquired about the situation so that I can respond to the questions submitted by Representatives Miller and Woolsey to the best of my ability. And what I have learned, in essence, is that what this controversy seems to be all about is not that CRCC management failed to respond to a reported problem about leaking seals; rather it was about a video camera being carried underground and video footage being taken without the knowledge of management. Furthermore, the problematic seals were corrected well before the MSHA public hearing; thus, the conditions documented by Mr. Howard's videotape did not reflect the seal conditions at the time of the hearing

With this as background, the questions and my responses are set forth below.

1) **Prior to videotaping the leaking mine seals, did Mr. Howard call the leaking seals to the attention of management? Yes or no?**

Yes. Mr. Howard recorded the leaking seals in the Band Mill No. 2 Mine examination book in the course of his duties as a pre-shift examiner. As you may know, pre-shift examinations of key areas of underground coal mines are required to be made pursuant to 30 C.F.R. §75.360. This rule also mandates that a record of these examinations must be kept by mine management, and those records are required to be countersigned by the mine foreman (or equivalent mine official) by the end of that foreman's shift. My understanding is that the seals in question were built in 2006 to isolate a low-lying mined-out area of the mine. A very heavy rain (over three and a half inches) on April 16 and 17, 2007 apparently caused water to build up behind the seals because the water traps in the seals were not able to drain such a heavy volume of water through the seals. As the water built up behind the seals, some of them began to leak water at locations along block seams and where they were tied into the coal ribs. The leaking seals were first brought to the attention of mine management by a pre-shift examiner (other than Mr. Howard) who discovered the leaks in a regular pre-shift inspection. Although the leaks could not be stopped immediately because of the depth of the water behind the seals, CRCC promptly commenced inspections and worked with Kentucky state mine officials to devise a plan for regularly monitoring the leaking seals. The details of CRCC's responsive actions are documented in the rulemaking comments submitted on MSHA's emergency temporary standard on "Sealing of Abandoned Areas," (RIN 1219-AS2) by Gaither Frazier, President of CRCC, to MSHA in September, 2007. Mr. Frazier's explanation is attached for the convenience of the Subcommittee. *See* Letter from Gaither Frazier to Patricia Silvey, Director, MSHA Office of Standards, Regulations, and Variances (Sept. 14, 2007).

2) **Did John Scarbro, the mine superintendent, receive notification of the leaking seals? Yes or no?**

Yes. John Scarbro, the mine superintendant, received notification of the leaking seals from a number of pre-shift examiners, including Mr. Howard, as described in the response to Question 1.

3) **FMSHRC's August 10, 2010 Decision and Order in *Charles Scott Howard v. Cumberland River Coal Company* stated that management personnel including Terry Mullins, Bob Kilbourne, Ronnie Adams and James Turner were also notified of leaking seals by Mr. Howard. Is this statement correct? Yes or no?**

   I do not have any personal knowledge of whether Mr. Howard notified Terry Mullins, Bob Kilbourne, Ronnie Adams, and James Turner of the leaking seals. In the FMSHRC hearing, Mr. Howard testified that he notified those gentlemen. Because Mr. Howard offered this testimony for the first time at the hearing, neither Arch nor CRCC had independently verified whether he had in fact done so. Thus, I have insufficient personal knowledge to answer this question, but I do not dispute the trial record.

4) **Is your testimony factually correct that Mr. Howard, "instead of calling that to the attention of mine management or instead of calling MSHA and complaining about the problem, he took the videotape and brought it to a public hearing to show it." Yes or no?**

   Having reviewed the archived video of the hearing, it appears my response to Representative Miller's question (that I characterize Mr. Howard's taking a video of the leaking seals) may have been misinterpreted. What I was trying to say was that although Mr. Howard, in his capacity as a pre-shift examiner, recorded the leaking seals, he never notified CRCC management that he had taken a video camera underground, or that he had taken a video of the leaking seals. In other words, he never called "that" (i.e., taking the video camera underground) to the attention of mine management.

   To be absolutely clear, my statement about Mr. Howard's failure to notify mine management and MSHA relates to his concealment of the videotape, and not the leaking seals, which CRCC already knew about, had monitored and had repaired by May 18, 2007, about seven weeks before Mr. Howard showed the videotape at the MSHA hearing. Indeed, although both the CRCC management and MSHA were aware of the leaking seals, neither became aware of the videotape until Mr. Howard revealed it at the MSHA hearing nearly three months after he recorded it.

5) **Did Arch or its subsidiary CRCC, appeal to the FMSHRC August 10, 2010 Decision and Order in this discrimination proceeding? If not, is this judgment final?**

   Neither Arch nor CRCC appealed the August 10, 2010 Decision and Order to the FMSHRC. The case was settled with respect to fees and costs in lieu of filing an appeal. The judgment is therefore final.

As I explained at the hearing, I limited my discussion of Mr. Howard's employment status at that time because it was the subject of civil litigation. I clarified, however, that Mr. Howard was never terminated in connection with the videotaping incident. Having now checked further, I have learned that the warning letter remained in Mr. Howard's personnel file for one year before it was removed, on the company's own initiative and pursuant to company policy, approximately six months before the hearing before ALJ Hodgdon. In fact, ALJ Hodgdon's opinion recognizes that. *See, Charles Scott Howard v. Cumberland River Coal Company*, 32 FMSHRC 983, 985 (Aug. 2010) (ALJ).

Although I have no personal knowledge of these events, I hope that ALJ Hodgdon's opinion (which is already in the record) and Mr. Frazier's letter will clarify them for the Subcommittee.

Thank you again for inviting me to testify before the Subcommittee. I was pleased and proud to share the accomplishments of Arch employees and also their efforts to modernize the safety of the mines where they work. As the Subcommittee is aware, modernizing mine safety will require not only compliance with federal and state mine safety and health legal requirements, but also the kind of focused fact-finding and problem solving I described.

Mr. Chairman, I hope this letter clarifies and corrects the record.

Sincerely,

Anthony S. Bumbico

Anthony S. Bumbico

Vice President, Safety

Attachment

CRCC
CUMBERLAND RIVER COAL CO.

Cumberland River Coal Company
PO Drawer 109
Appalachia, VA 24216
(276) 679-4814

September 14, 2007

Mine Safety & Health Administration
Ms. Patricia W. Silvey, Director
Office of Standards, Regulations and Variances
1100 Wilson Boulevard, Room 2350
Arlington, Virginia 22209-3939

RE: RIN 1219-A52 Sealing of Abandoned Areas

Dear Ms. Silvey:

These comments are submitted by Cumberland River Coal Company (CRCC) with respect to the notice posted by MSHA in the Federal Register on May 22, 2007 announcing an Emergency Temporary Standard entitled "Sealing of Abandoned Areas of Underground Coal Mines," which contains revisions to 30 CFR Part 75.

Introduction

On July 12, 2007 in Lexington, Kentucky at an MSHA public hearing for the ETS, representatives of the Appalachian Citizens Law Center of Prestonsburg, Kentucky presented a video of what was identified as the Band Mill #2 mine. Although this was not disclosed during the presentation, the Band Mill #2 mine is operated by Cumberland River Coal Company. The video showed 7 (seven) underground mine seals. Two of the seals had water coming out of 4-inch water traps, which are required to be placed in the seals to remove water that may collect behind them. The video showed that several seals had a small amount of water seeping from between mortar joints and from around the coal/seal interface.

No other information was provided to the audience about this situation except that the video was taken on April 20, 2007.

The presentation made by the Appalachian Citizens Law did not provide all of the facts and circumstances surrounding the events at the Band Mill Mine. As a result, we are compelled to provide an accurate record of what transpired at the mine and the action take by mine management to deal with this issue in a prompt, safe manner.

Sealing the 1 Right Area

Mining began, in the now sealed area, on the 1 Right sub main at the Band Mill, Trace Fork mine in August 2004. Final mining of the 1 Right area and successive panels was completed in November 2005. By the end of 2005, this area was sealed under an approved MSHA plan utilizing Omega block seals.

After the events at the Sago Mine in West Virginia, some questions arose concerning the use of Omega blocks in mine seals. Prior to any requirements by regulatory agencies, Cumberland River Coal Company took the initiative and worked with MSHA personnel to develop a plan to install Mitchell Barrett seals in front of the existing Omega block seals. These new seals were completed in July 2006, and were examined by both State and Federal inspectors while under construction and upon completion. The existing water traps located in Omega seals #12 and #18 were extended through the new solid block structures. No problems with these seals were ever noted from this time until April of 2007 by mine management or any regulatory agency.

Condition Found and Action Taken

A storm event occurred in the area on April 16, 2007. Total precipitation was recorded at 3.61 inches of rainfall. Between April 16 and April 17, water began collecting behind the seals. This volume exceeded the capacity of the two four-inch water traps located in seals #12 and #18.

On April 17, the seals began seeping water along a few of the concrete block joints. This condition was found and noted by a mine examiner during his normal preshift inspection. Upon notification to Company representatives of this condition, the mine managers and workers representatives immediately went underground to evaluate the mine's condition. A determination was made that the seals posed no immediate safety concern to the persons working underground. Meetings were held with each shift to convey to the miners what was found at the seals and the actions that were being taken to correct the condition. At that time, mine management began inspecting these structures at least three to five times daily. Water elevation behind the seals was monitored and documented daily. The mine atmosphere around the seals was monitored and no methane or low oxygen conditions were found at any time. No structural problems were noted that would have compromised the integrity of the seals. Federal and state regulatory authorities were notified of these conditions and they also made observations of the structures during this time.

Each day as the water level subsided, affording an opportunity to effectively take action, additional sealant was applied to the mine seals along the block joints and the coal rib interfaces. On May 18, 2007, the area behind the seals had drained and the seals stopped seeping water. At that time, each structure was completely resealed.

It is worth noting that these seals are positioned in a low area of the mine. The water impounded behind the seals reached a maximum level of 44 inches at its greatest depth and the overall seal height is approximately 90 inches. The 44 inches of water represents less than 2 psi of hydrostatic pressure on the seals. The water traps are constructed at an elevation above the mine floor that require 10 inches of water build up before they will discharge at all. Additionally, the water accumulation behind the seals never presented any unsafe hazards to the active mine areas.

Closing

CRCC appreciates the opportunity to provide you with additional facts and essential information to further understand the events at the Band Mill Mine. We share your desire to provide a safe and healthy workplace for our miners. For the year of 2006, the employees of the Band Mill Mine worked 178,000 "man hours" without an MSHA reportable injury. This mine was awarded the 2006 Sentinels of Safety Award in the large mine underground category by the Mine Safety and Health Administration for their safety performance.

We appreciate the opportunity to comment on this important subject. Please contact me if you have any questions.

Sincerely,

Gaither Frazier, President
Cumberland River Coal Company

[Whereupon, at 11:30 a.m., the subcommittee was adjourned.]

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