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Testimony before the  
Senate Committee on Health, Education, Labor and Pensions

Putting Safety First: Strengthening Enforcement and Creating a Culture of  
Compliance at Mines and Other Dangerous Workplaces

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Thank you for allowing us to address this Committee. As President of the United Mine Workers of America (“UMWA”), I represent the union that has been an unwavering advocate for miners’ health and safety for 120 years.

This Committee has played an important role in addressing employees’ health and safety. I would like to express my particular appreciation to the leadership of this Committee for your efforts directed at protecting and enhancing the health and safety of coal miners throughout the nation. Your continued attention is critical to dealing with the challenges that all too often prevent some miners from being able to go home safely at the end of their shift. After all, going to work, whether as a coal miner or other worker, should be a means for earning a paycheck and providing for your family, not a roll of the dice about whether you will live to see another day.

Yet, for too many American workers, the price of a job has been the employee’s life. Earlier this month 29 brave coal miners perished at Massey’s Upper Big Branch mine, and one more remains hospitalized as I prepared this statement. Our hearts and prayers go out to all the families who have lost their loved ones as well as with the family sitting by the hospital bed of the injured miner. We know the entire community has been devastated by this tragedy.

We also share the grief of the families of workers killed at the Tesoro Refinery days before the Upper Big Branch mine exploded, those missing after the gas rig fire just last week in the Gulf of Mexico, and the thousands of other workers killed in the last year due to atrocious health and safety conditions at work. Tomorrow is Workers’ Memorial Day to remember and honor those who have died from their work. We are glad to have this opportunity to discuss how our government can do a better job to protect our nation’s workers from unsafe and unhealthy work places.

Statistics from the mining industry offer dramatic proof that improved laws and regulations make a huge difference in workers’ safety. We recently celebrated the 40<sup>th</sup>

anniversary of the mining industry's key legislation, the Coal and Mine Acts. In the 40 years *before* that landmark legislation, an average of 809 miners were killed in coal mines each year; and in the 40 years since it was enacted an average of 83 miners were killed.

While these numbers prove beyond a doubt that strong laws make a huge difference, more must be done. We are here today to talk about what could and should be done to change a system that still allows miners and other workers to die *at* work or *from* their work, whether from preventable occupational illnesses or from avoidable work-site tragedies.

Today we were asked to focus on problems the government faces when dealing with employers that repeatedly fail or refuse to heed their duty to obey workplace safety laws and regulations. Unless operators do what the law requires of them, and do so each and every day - not just when a government inspector is physically on site, miners will continue to be exposed to needless hazards to their health and safety, too many will be injured, too many will be made sick, and too many will pay the ultimate price with their life.

These challenges have persisted for decades, if not longer. I have been here repeatedly, and my predecessors before me, to complain about the terrible conditions miners endure when operators don't follow the law and miners are killed as a result. I also have testified about problems that follow when there's an MSHA governed by industry executives.

I thank President Obama for naming an Assistant Secretary who is a coal miner and who knows the industry through the eyes of a miner. In fact, the President and Vice President have shown an unparalleled interest and commitment to the problems still plaguing mine safety, for which we are deeply appreciative.

Turning to the factors that adversely impact miners' health and safety, we must start by looking at the operators and their mines. First and foremost, it is every operator's responsibility to provide a safe and healthful workplace. Yet, we know corners are frequently cut, which means that miners' health and safety gets sacrificed.

**It is time to hold CEOs and corporate Boards of Directors accountable when the facts reveal systematic problems with health and safety compliance. It is not enough to issue fines or levy charges against low-level managers who violate the law when they are doing what their supervisors direct and expect. There is something dreadfully wrong when corporate executives are eager to speak about their productivity and profits, but reluctant to consider the cost to their workers.**

In the last ten years, 52 miners were killed working for Massey. This happened while Massey's CEO, Don Blankenship, has been paid millions upon millions each year; since 2003

Don Blankenship has been compensated by more than \$5 million each year, and he made over \$28 million in just one year! Last year he earned over \$17 million. These figures include significant “performance” awards and don’t even include the stock options he was also given. This is terribly wrong.

This brings me to the primary question we were asked to address today is: What can be done to prevent recalcitrant employers from violating the law and jeopardizing their employees’ health and safety?

While we appreciate and rely upon the work of MSHA personnel who inspect mines, review mining plans, and perform other critical functions dedicated to miners’ health and safety, MSHA can and should be more pro-active and effective in using all the enforcement tools Congress provided in the Mine Act. The enhanced penalty structure that came out of the 2006 MINER Act has been turned on its head by an industry challenging so many citations that cases are backlogged for years; its Pattern of Violation enforcement tool – in the law since the 1977 Act but untouched until a few years ago is burdened by a regulatory framework that completely frustrates Congress’s intent; and the opportunity to seek injunctive relief is a tool that has not been utilized, but is available and could offer the swift and effective relief needed when a mine demonstrates a pattern of unsafe conditions.

In the MINER Act, Congress directed that higher fines should apply to MSHA violations. However, since the higher penalties took effect, many operators including Massey, began routinely challenging MSHA citations and orders thereby clogging the adjudicative process and delaying the resolution of alleged violations. Yet, until there is a “final order,” the operator doesn’t have to pay a penny towards the fine. By way of example, Massey has been assessed with fines amounting to \$1.1 million since January 2009 for its alleged violations at Upper Big Branch; very little of these penalties have been paid because the company has filed “contests” and they remain caught up in the FMSHRC backlog.

Since the MINER Act took effect in 2006, the docket of the Federal Mine Safety and Health Review Commission (FMSHRC) has mushroomed. Its backlog is well over 16,000 cases, of which 9,000 new cases were added in FY 2009, alone; compare this to the 2,700 cases filed in FY 2006. Cases entering the system now will likely take at least two or three years to be resolved. The problem of delayed payments was a problem Congress tried to fix in 1977 in the Mine Act: “The Committee firmly believes that to effectively induce compliance, the penalty must be paid by the operator in reasonably close time proximity to the occurrence of the underlying violation.” Leg. Hist., Senate Report at 604. Unfortunately, the penalty scheme is broken again; not only is there delay in the payment of any assessments but the increased penalty structure Congress implemented through the MINER Act has not lead to the intended improvement in operator compliance.

The reality is that as it stands now, operators have every incentive to file contests and take appeals to the FMSHRC, because MSHA and the FMSHRC routinely compromise their fines to settle cases. Assessed penalties are reduced by about 47% when they are contested. We believe this system has to change: MSHA needs to do a better job supporting the citations its inspectors write by allowing inspectors to defend their work, and providing MSHA with help from the Solicitor's office so the Agency can determine which cases to pursue and which ones to settle, which should be decided based on the merits of a case, not expediency.

The delay in resolving MSHA litigation is important for a number of reasons, one of which pertains to the *amount* of fines an operator has to pay based on its "history of previous violations." Under the Mine Act, Congress directed MSHA to consider an operator's "history of previous violations" when figuring the fine for health and safety violations. MSHA's regulation (at 30 CFR Part 100) provides that when an operator engages in repeated violations of the same standard, penalties should increase. Yet, until there's a "final order," the citation is excluded from MSHA's calculations about the operator's history of violations; and MSHA's penalty structure considers only final orders from the preceding 15 months.

With operators like Massey routinely contesting their S&S citations, the increased penalties intended for repeat violations have been effectively eliminated. In other words, Congress's directive that MSHA consider the operator's history of previous violations no longer has any role in the enforcement scheme.

Another adverse effect of the litigation backlog arises with the "pattern of violation" (POV) tool that Congress gave MSHA in Section 104(e) of the Mine Act. Like with the history of violations provision, MSHA's regulation requires it to consider only "final" citations and orders. The POV mechanism was Congress's suggested means for dealing with habitual violators: after the Scotia mine exploded in 1976 and Congress enacted the Mine Act in 1977, it developed the POV language to allow MSHA to move against operators that have a lot of S&S violations and show little in the way of improved compliance, or operators that experience a worsening trend of S&S violations indicating a greater than normal risk of disaster. The legislative history shows Congress intended the POV criteria to be flexible, so that it could consider both quantitative and qualitative factors. However, the regulation MSHA finally promulgated in 1990 is unnecessarily complex. By having such a complex structure, MSHA tied itself up with bureaucratic hurdles that reduced the flexibility Congress clearly intended it to maintain. And as you know, MSHA didn't *ever* use the POV until after the 2006 disasters and it was called before Congress to answer about its lax enforcement efforts.

As written, the POV regulation requires MSHA to give the operator a written warning about its *potentially* being placed in the POV status before the POV will be implemented. Since

MSHA began using this tool after 2006, Massey mines have received 13 written warnings, more than a third of those issued nationwide.

The rationale for using a warning letter before imposing the POV status on a mine is that MSHA's primary goal for the POV is to achieve compliance with all applicable health and safety standards, not shut down mines. So long as the operator reduces its S&S violations within 90 days, it is freed of MSHA's more rigorous enforcement. MSHA's warning letters certainly get the operators' attention, and MSHA has generally been able to effect the requisite short-term corrections from operators so they are then freed of the POV threat.

Clearly MSHA should be able to exercise its POV enforcement authority more than it has chosen to do so far. The POV regulation is simply too complicated and bureaucratic. We believe MSHA should simplify its POV procedures so it can take swift action when the Agency observes chronic safety problems at an operation. We want MSHA to be able to use this tool to stop unsafe operators from continually placing miners in harm's way. When miners lives are what's at stake we believe it is far better to err on the side of protecting the miners, even if there is some possibility that MSHA might sometime close a mine when a lesser remedy might arguably be feasible. We would rather see MSHA shut all or part of a mine without having to go through such formal procedures, recognizing MSHA's decision to impose a POV would be subject to review at the FMSHRC.

Even though the goal of the POV provision is to reduce violations, the reality is that it is still too easy for a law-breaking operator to make some temporary fixes simply to escape the POV consequence without making the significant, systemic health and safety improvements necessary to turn an unsafe operation into a safe one. While we are not opposed to having MSHA first put operators on notice that conditions at their operation warrant a heightened level of attention and may lead to a POV absent quick and significant improvements, any operator that receives the warning notice should still be required to operate under the improved conditions for a prolonged period – long enough so that miners at the operation can see the difference and work under the improved conditions, which should then represent the new norm. If an operator gets a first warning letter, even if it then improves and avoids application of a POV, MSHA should have a system for watching the operation to ensure there have been systematic improvements, not just temporary fixes to get the government off its back.

We also note that while MSHA seems to consider only 24 months of history when looking at the POV criteria, unlike its regulation on fines there is nothing in the POV regulation that requires MSHA to limit its review to 24 months' worth of history at an operation when considering the heightened enforcement. We suggest the Agency has more flexibility than it has claimed and we encourage it to exercise its full range of discretion in this regard.

To make its enforcement tools more effective, we encourage MSHA to identify mines that would be subjected to higher penalties for repeat violations or for a “pattern,” and prepare to litigate those cases more quickly, with cooperation from the FMSHRC to give priority attention to these cases. Doing this would reduce some of the incentives operators now have for filing contests.

In addition to the POV issues discussed above, we understand MSHA has been reluctant to close a mine based on the number or type of violations or withdrawal orders; we believe it’s authority to do so should be clarified. The Agency should be more aggressive in moving to shut mines that are dangerous. If an operator makes only short-term, band-aid remedies despite systemic safety problems, MSHA should be able to move against it. To the extent there is any ambiguity about MSHA’s authority to close a mine, that uncertainty must be eliminated. MSHA should not have to wade through months or years of records of violations before moving to shut a dangerous mine.

Some other suggestions we support include requiring employers to pay their penalties into an escrow account, rather than waiting until the contest process is completed; eliminating the 15-month limit and expanding the look-back period for purposes of considering an operator’s history of violations; and hiring more ALJs at the FMSHRC, and staff within DOL to move cases more quickly and reduce the FMSHRC backlog.

There are also some new powers that would help MSHA to be more effective in ensuring miners have a safe and healthful place to work. We recommend expanding the Secretary’s subpoena power so that it resembles that in OSHA. This would give the Agency the authority to compel a witness to provide evidence as part of the routine enforcement scheme, instead of only as part of a post accident public hearing. We also believe it is important to improve the whistleblower protections to encourage miners who may know about dangers to come forward. The criminal provisions should be enhanced so that MSHA violations can be prosecuted as felonies, not only misdemeanors. Also, it should be clarified that the criminal penalties apply to those who contribute to unlawful conduct; in some cases it should not just be the front line supervisors who are held liable, but higher management should be accountable for corporate policies that put profits ahead of miners’ safety and health.

MSHA should also start factoring in the work of contractors that work on mine property when considering the safety record of the owner and operator. By treating the operator and its contractor as two separate entities, MSHA overlooks data that should reflect on the operator’s safety record.

We believe that investigations of the Upper Big Branch tragedy will show that safe mining practices were *not* followed at that operation and miners were being exposed to senseless

dangers. We already know that MSHA issued 515 citations and orders at the Upper Big Branch mine in 2009, and another 124 so far in 2010; moreover, the paper MSHA issued to Upper Big Branch reflects serious health and safety violations: 39% of the 2009 citations were for “significant and substantial” (“S&S”) violations. These violations are usually quite serious - the kind of violations that can contribute to mine fires, explosions and the deaths of coal miners. Even more troubling is the fact that MSHA issued 48 withdrawal orders at Upper Big Branch due to *repeated* S&S violations the operator knew or should have known constituted a hazard. These numbers far exceed industry norms.

For the Upper Big Branch investigation, we are encouraging MSHA to hold public hearings. Doing so would allow the government to subpoena witnesses, and would give it the right to question top management. We are convinced that the many problems that contributed to the explosion at Upper Big Branch did not develop at the foreman or mine supervisor level, but reflect corporate policies that should be heard in the open. Only by conducting an open hearing will miners, the public, and the families of those killed be able to learn what really happened.

Operators that invest in equipment and training to make a mine safer should not have to compete against those that refuse to make these needed investments. In the end it's miners who pay the price when operators do not adhere to what the law requires. But so long as there are good paying jobs in mining, there will be workers willing to take the work thinking and praying they will be the lucky ones. Working in America in the 21<sup>st</sup> Century should not require such a gamble. And unless operators start running their mines consistent with what the law requires, we will continue to witness miners dying.

The Union and coal miners hailed the passage of the MINER Act as the dawn of a new day to improving coal mine health and safety. We have seen some improvements, but we have a long way to go. MSHA should be given more enforcement tools to help it enforce the law. And the law should be strengthened further. Thank you for allowing us to address this Committee, and for your continued commitment to workers' health and safety.