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July 12, 2010

Hon. George Miller, Chairman
Committee on Education and Labor
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515

Re: Miner Safety and Health Act of 2010

Dear Chairman Miller:

We are writing regarding the Miner Safety and Health Act of 2010. As attorneys at the Appalachian Citizens' Law Center we regularly advise and represent miners in the eastern Kentucky area on safety and health matters, including complaints of discrimination in retaliation for making safety complaints. We also represent miners on claims for black lung benefits. The proposed bill contains many substantial improvements to the present law. We overwhelmingly support the bill. However, there are a few areas where we would like to see improvements. In this letter we will specifically explain our support for certain provisions of the bill and ask for a few additional changes.

Independent Accident Investigations

Section 101(b)(2) of the bill requires an independent investigation of all mine accidents involving the death of three or more miners, conducted by team appointed by the Secretary of Health and Human Services and chaired by a NIOSH representative. The provision does not require public hearings; it leaves that decision to the hearing panel. For many years MSHA has had the authority to hold public hearings but it has not used that authority. We support this section and would like to see the panel directed to hold a hearing unless there is a compelling reason not to hold a public hearing.

Subpoena Authority

Section 102 explicitly grants to the Secretary power to issue subpoenas for the attendance and testimony of witnesses and the production of information. This provision is overdue as subpoena power is currently only available if a public hearing is called. For far too long accident

investigations have been seriously hindered because investigators must rely upon voluntary interviews.

Designation of Miner Representative

We support extending the right to designate a miners' representative to relatives of trapped miners and to miners unable to work due to a mine accident. This is a sensible provision that protects the right to designate a miners' representative for miners that are trapped or injured. Miners in the most vulnerable situations shouldn't have to relinquish any of their rights under the Act because they are involved in a mine accident.

We also believe that Section 103 should require each mine to have non-management representatives of miners and that a miners' representative ***must*** travel with MSHA inspectors during each inspection. Upon being designated as the miners' representative, the individual miner should receive one hour additional training in miner's rights from MSHA.

Conflict of Interest in the Representation of Miners

We support amending current Section 103(a) to prohibit an attorney from representing or purporting to represent both an operator and any other individual during an inspection, investigation or litigation, unless the individual knowingly and voluntarily waives all actual conflicts of interest resulting from the representation. Too often an attorney will purport to represent both the operator and hourly miners without clear indication that the hourly miners have waived any conflict of interest that may exist. The result is miners can be advised and directed based upon the best interest of the operator rather than upon their own individual interest. Allowing this scenario to continue only invites miner intimidation during inspections, investigations and litigation under the Act.

Pattern of Recurring Noncompliance or Accidents

We support the overhaul of the Pattern of Violations provision in the Mine Act. In response to the Scotia Mine Disaster in Letcher County, Kentucky, which killed 23 miners and 3 mine inspectors in 1976, Congress sought to address chronic and repeat violators and prevent operators from continually piling up citations for dangerous conditions. The result was section 104(e) of the Mine Act which substantially increased the penalties for any operator that has a "pattern of violations."[1] The Legislative history reveals that Congress believed the "pattern of violations" provision would be a strong enforcement tool to go after the worst violators:

> Section [104(e)] provides a new sanction which requires the issuance of a withdrawal order to an operator who has an established pattern of health and safety violations which are of such a nature as could significantly and substantially contribute to the cause and effect of mine health and safety hazards. The need for such a provision was forcefully demonstrated during the investigation by the Subcommittee on Labor of the Scotia mine disaster…. That

[1] 30 U.S.C. § 814(e).

> investigation showed that the Scotia mine, as well as other mines, had an inspection history of recurrent violations, some of which were tragically related to the disasters, which the existing enforcement scheme was unable to address. The Committee's intention is to provide an effective enforcement tool to protect miners when the operator demonstrates his disregard for the health and safety of miners through an established pattern of violations.[2]

They also believed it would send a strong signal:

> The Committee believes that this additional sequence and closure sanction is necessary to deal with continuing violations of the Act's standards. The Committee views the [104(e)(1)] notice as indicating to both the mine operator and the Secretary that there exists at that mine a serious safety and health management problem, one which permits continued violations of safety and health standards. *The existence of such a pattern, should signal to both the operator and the Secretary that there is a need to restore the mine to effective safe and healthful conditions and that the mere abatement of violations as they are cited is insufficient.*[3](emphasis added).

Finally, they felt the provision provided flexibility, so a rigid standard wouldn't constrain the agency's use of the provision:

> It is the Committee's intention to grant the Secretary in Section [104(e)(4)] broad discretion in establishing criteria for determining when a pattern of violations exists…. The Committee intends that the criteria make clear that a pattern may be established by violations of different standards, as well as by violations of a particular standards. Moreover… pattern does not necessarily mean a prescribed number of violations of predetermined standards…. As experience with this provision increases, the Secretary may find it necessary to modify the criteria, and the Committee intends that the Secretary continually evaluate the criteria, for this purpose.

Yet, thirty-three (33) years and more than a dozen mine disasters later, MSHA apparently has never issued a "pattern of violations" under the Mine Act. Thus, we support the proposed changes to the "Pattern" provision. We believe that requiring a remediation plan, quarterly benchmarks, added inspections, training, and reporting is a logical and fair framework for both holding chronic violators accountable and significantly improving health and safety conditions in these problem mines.

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[2] S. Rep. No. 95-181, 95th Cong. 1st Sess. 36 (1977).

[3] S. Rep. No. 95-181, 95th Cong. 1st Sess. 36 (1977).

Injunctive Authority

We support allowing the Secretary to seek injunctive relief for "a course of conduct that in the judgment of the Secretary constitutes a continuing hazard to the health or safety of miners, including violations of this Act or of mandatory health and safety standards or regulations under this Act." This provision can be used to stop an operator from allowing conditions to continuously deteriorate and close a mine before a mine disaster occurs. For example, the proposed provision might prevent a mine disaster like the one at Scotia, where the mine operated with continuing hazards that eventually led to two explosions and 26 deaths. Under the proposed provision, an injunction could be sought and granted in such a case, and miners could be withdrawn from the mine.

Civil Penalties

We support the increased civil penalties, including increased penalties for "Pattern" violators and for retaliation. These increases will help discourage repeated violations and discourage retaliation against miners that engage in protected activity. As the Senate Committee noted in 1977, "the civil penalty is one of the most effective mechanisms for insuring lasting and meaningful compliance with the law…. To be successful in the objective of including effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance. "[4]

Criminal Penalties

We support the increases in current criminal penalties in Section 303. For far too long, no genuine deterrent was available for those that knowingly engage in conduct that results in serious safety or health violations and endangers miners. Additionally, we welcome the new criminal penalty in 303(b) for those who retaliate against informants as a significant deterrent against such actions. In turn, this will empower miners to raise safety and health issues at their mines with a decreased fear of reprisal.

However, we implore that in addition to representatives of the Secretary and law enforcement officers, it should also be illegal in 303(b) to retaliate against a person for providing information to a State agency charged with administering State laws relating to coal mine health and safety. This prevents, for example, the inconsistency of criminalizing retaliation against a miner for providing information to a federal mining inspector but not to a state mining inspector. Finally, we fully support the criminal penalties in Section 303 (c)(1) for giving an advance notice of an inspection. Our office often hears from miners about companies that avoid citations on the working section because they receive advance notice that an inspector is on the mine property and are then able to stop production and/or rectify illegal conditions before the inspector arrives.

[4] S. Rep. No. 95-181, 95th Cong. 1st Sess. 36 (1977).

Withdrawal Orders Following Failure to Pay

We emphatically support proposed Section 110(l)(2), which allows the Secretary to issue a withdrawal order to mines that do not pay their civil penalties within 180 days. As the Senate Committee noted in 1977, "to be effective and to induce compliance, civil penalties, once proposed, must be assessed and collected with reasonable promptness and efficiency."[5]

Our office produced a study in 2006 detailing the staggering number of unpaid fines in Kentucky.[6] We found:

> In a review of underground coal mines in Kentucky, MSHA has allowed mines to operate unimpeded for years while accumulating millions of dollars in unpaid fines. Of Kentucky's 297 underground coal mines that MSHA lists in some stage of activity, or not "abandoned," ninety-seven, or approximately one-third, have years in which they paid little to none of the fines MSHA imposed. In the years reviewed since 1995, these mines have over 18,000 unpaid citations (over 8,000 of which were "significant and substantial") totaling over $4.1 million in unpaid fines. Fourteen mines have paid only 10 to 35 percent of MSHA's penalties. Thirty mines have paid less than 10 percent of the fines due and the remaining fifty-three mines have paid nothing.

Proposed Section 110(l)(2) would put an end to what has been essentially a voluntary system of fine payment and collection. No longer would undercapitalized operations be allowed to operate for years and eventually close without ever paying any of their delinquent fines. These operations have boldly ignored the law and rendered meaningless one of the most important enforcement tools for ensuring the safety of America's miners.

Protection from Retaliation

Section 401 amends Section 105(c), adding to current protections for miners from retaliation. We enthusiastically support many of the additional protections including more time in which to file a complaint, a more sensible burden of proof for the miner, and logically allowing a miner to recoup his costs and expenses if he prevails in his claim. Too often, miners are unaware of the current statutory filing period and it expires before they file their claim.[7] A

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[5] S. Rep. No. 95-181, 95th Cong. 1st Sess. 36 (1977).

[6] We have attached a copy of the study to this letter. See "U.S. is Reducing Safety Penalties for Mine Flaws," *The New York Times*, March 2, 2006, pg. A1.

[7] For example, a 180 day filing period would avoid a situation like in Fulmer v. Mettiki Coal Corp, where the miner's claim was dismissed although he asserted that he visited MSHA within 60 days, but was not informed of the time limit for filing. Disturbingly in this case, further appointments with MSHA were rescheduled until Fulmer was finally asked if his discrimination investigation could be "put off until after hunting season and the holidays." See http://www.fmshrc.gov/decisions/alj/yk2007-52.pdf.

180-day filing period is reasonable and would prevent the dismissal of otherwise valid discrimination claims.

However, we are concerned that the proposed Section 105(c) as written would not protect miners from retaliation in cases where an operator mistakenly believes that the miner filed a complaint or engaged in protected activity. The Federal Mine Safety and Health Review Commission ("Commission") has long held that adverse action taken against a miner because of the **mistaken suspicion or belief** that the miner had engaged in protected activity nonetheless violates §105(c). Moses v. Whitley Development Corporation, 4 FMSHRC 1475 (1982). This protection should continue in any new mine safety legislation.

We support the proposed Section 105(c)(B), which would codify long-standing Commission precedent that protects a miner from discharge or other forms of discrimination for refusing to perform a job assignment that the miner reasonably and in good faith believes to be unsafe. Gilbert v. Federal Mine Safety & Health Review Commission, 866 F.2d 1433 (D.C. Cir. 1989); Simpson v. Federal Mine Safety & Health Review Commission, 842 F.2d 453 (D.C. Cir. 1988); Secretary of Labor on behalf of Robinette v. United Castle Coal Co., supra; Secretary of Labor on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126 (1982).

The Commission has previously explained the meaning and purpose of the good faith requirement as follows:

> "Good faith belief simply means honest belief that a hazard exists. The basic purpose of this requirement is to remove from the Act's protection work refusals involving fraud or other forms of deception [such as] lying about the existence of an alleged hazard, deliberately causing one, or otherwise acting in bad fath..." Robinette at 810.

The burden of proving good faith rests with the complaining miner. However, the miner need not demonstrate an absence of bad faith. Gilbert v. Federal Mine Safety & Health Review Commission, supra; Secretary of Labor on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993 (1983). In considering whether a miner's fear was reasonable, the perception of a safety hazard must be viewed from the miner's perspective at the time of the work refusal. Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529 (1983); Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982).

To be accorded the protection of the Act, the miner need not objectively prove that an actual hazard existed. Secretary of Labor on behalf of Hogan & Ventura v. Emerald Mines Corp., 8 FMSHRC 1066 (1986); Secretary of Labor on behalf of Cooley v. Ottawa Silica Co., 6 FMSHRC 516 (1984); Liggett Industries, Inc. v. Federal Mine Safety & Health Review Commission, 923 F.2d 150 (10th Cir. 1991). Nor must the miner prove a violation of a mandatory safety standard. Secretary of Labor on behalf of Robinette v. United Castle Coal Co., supra. In fact, the Commission has stressed that the miner's perception of a safety hazard need only be a reasonable one:

> "[T]he 'reasonable person' standard...lends itself to the interpretation that there is only one reasonable perception of any given hazard - that of the 'reasonable person'. But the reasonable person is never there. Clearly reasonable minds can differ, particularly in a mine setting where conditions for observation and reaction will not be clinically aseptic." Robinette at 812, n.15.

When reasonably possible, a miner refusing unsafe work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator, his belief in the safety or health hazard at issue. Simpson v. Federal Mine Safety & Health Review Commission, supra; Gilbert v. Federal Mine Safety & Health Review Commission, supra; Secretary of Labor on behalf of Dunmire & Estle v. Northern Coal Co., supra.[8]

The Commission has emphasized that it's "purpose is promoting safety, and [it] will evaluate communication issues in a common sense, not legalistic, manner. Simple, brief communication will suffice..." Secretary of Labor on behalf of Dunmire & Estle at 134. According to the Commission, the key to evaluating communication issues is what the "plain meaning of [the words] would convey to any reasonable miner". Id.[9]

Pre-Shift Review of Mine Conditions

We support amending Section 303(d) of the Act to direct implementation of a program to ensure that every miner entering the mine is made aware of the current conditions of the mine, including hazardous conditions, health or safety violations, and the general conditions of the miner's assigned working area. Our office hears complaints from miners that hazardous conditions are too frequently not communicated to the oncoming shift of miners entering the mine. We also support the verbal communication requirement to the oncoming agent (e.g. mine foremen or mine examiners) of the mine's condition, including hazardous conditions or violations of the Act. Although this should be standard practice at every mine, miners still lose their lives due to a lack of communication, between shifts, of hazardous conditions in the mine.

Technology Related to Respirable Dust

Section 504 of the bill requires the Secretary to promulgate regulations within two years, requiring operators "to provide coal miners with the maximum feasible protection from respirable dust, including coal and silica dust, through environmental controls." We are concerned that this section is vague and unenforceable. The words "maximum feasible" are

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[8] The Commission has stated that "[i]f possible, the communication should ordinarily be made before the work refusal, but depending on circumstances, may also be made reasonably soon after the refusal". Northern Coal Co. at 133.

[9] Even where it is reasonably possible for the miner to communicate his safety concerns to the operator, unusual circumstances - such as **futility** - may excuse a failure to communicate. Northern Coal Co. at 133; Simpson at 459-460.

subject to a fact-intensive determination. We prefer an objective standard.

Black lung is not a disease of the past; it continues to be a serious problem for miners. It causes disability and death. The disease is also latent and progressive. The harmful dust is minute and may be invisible. Consequently younger miners may not believe that are endangering their health when they work in excessive dust. Black lung is also preventable – if the excessive respirable dust is eliminated the disease will be eliminated. X-ray surveillance is showing an increase in simple coal workers' pneumoconiosis and in progressive massive fibrosis. In 1995 NIOSH issued a Recommended Standard advising the respirable dust limits in coal mines be reduced to 1 mg/cubic meter. This bill should require nothing less than the 1995 Recommended Standard. We suggest that the language be changed and that within one year after enactment the Secretary be required to promulgate final regulations that require operators to reduce respirable dust to no more than 1 mg/cubic meter and to further require that operators provide coal miners with the maximum feasible protection from respirable dust.

Refresher Training on Miner Rights and Responsibilities

Section 505 adds an hour of miners' rights training to the yearly refresher training already required. This is certainly welcomed and long overdue. Congress envisioned a robust program to train the nation's miners in the duties of their occupations, which includes thorough training of miners as to their statutory rights. But, the present program has systemic shortcomings.[10] The result is that a large number of miners do not have a thorough understanding of their statutory rights and as a consequence they are unable to exercise such rights.

Training miners as to their statutory rights is an integral part of the Mine Act's requirements for health and safety training. For example, for new underground miners:

> Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device and use of respiratory devices, hazard recognition, escapeways, walk around training, emergency procedures, basic ventilation, basic roof control, electrical hazards, first aid, and the health and safety aspects of the task to which he will be assigned.[11] (emphasis

[10] The portion of our letter regarding miners' rights training was a part of a Petition for Rulemaking submitted to MSHA in 2008. We asked MSHA to increase the frequency and quality of miners' rights training as they are able under their rulemaking authority. MSHA denied the Petition in full. For example, in response to a request that all miners be provided with a copy of MSHA's "A Guide To Miners' Rights and Responsibilities Under the Federal Mine Safety and Health Act of 1977," the agency stated that the handbook "is available to miners on MSHA's website." April 8, 2008 Letter from Acting Assistant Secretary, Richard E. Stickler. Anyone who had ever viewed MSHA's complicated website would understand that this was essentially non-responsive. As of today's letter, access to information on miners' rights isn't noted on MSHA's homepage, despite the inclusion of over 130 other topic headings.

[11] 30 U.S.C. § 825(a)(1).

added).

Similarly, for new surface miners,

> Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device where appropriate and use of respiratory devices where appropriate, hazard recognition, emergency procedures, electrical hazards, first aid, walk around training and the health and safety aspects of the task to which he will be assigned.[12] (emphasis added).

However, the Mine Act did not require miners' rights training during miners' annual refresher training. Thus, MSHA requires statutory rights training primarily only for new miners. This obviously presents a problem, because even if new miners received the most dynamic statutory rights training, such knowledge fades over time. A miner may not need to exercise his or her statutory rights until several years into a mining career. At that juncture, if such miners have had relevant training only at the outset of their careers, they often do not know their statutory rights well and cannot protect themselves. An obvious solution to this dilemma is to require statutory rights training in annual refresher training. Thankfully, the proposed amendment to Section 115(a)(3) cures this significant failure to require any follow-up miners' rights training by requiring it during annual refresher training.

In passing the Mine Act, Congress realized that miners must play a crucial role in maintaining a safe and healthy workplace:

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.[13]

Because miners know the day-to-day work conditions as well as or better than anyone, obviously they should be encouraged to insist on maintaining a safe and healthy workplace. They are in a unique position to monitor workplace conditions when inspectors are absent. However, in our experience many miners do not know that they can, under the law, voice concerns about workplace health and safety, refuse to perform unsafe work, review and give input to many aspects of an operator's plans for mining, or speak with MSHA inspectors and investigators without retaliation. Many miners do not realize that they may designate a representative to perform numerous functions under the Mine Act, and that such a representative need not necessarily be affiliated with a labor union.

We also applaud the proposed change in the methods by which miners receive statutory rights training. Operators and management personnel should not be permitted to provide any of the required statutory rights training to miners. There is simply too great a conflict of interest to

[12] 30 U.S.C. § 825(a)(2).
[13] S. Rep. No. 95-181, 95th Cong. 1st Sess. 36 (1977)

permit mine operators to conduct statutory rights training. Operators have incentive to downplay the expansiveness and importance of these rights, the key role which Congress envisioned miners playing in regulation of the workplace, and the particulars of how miners can most effectively and fairly exercise such rights in the face of operator obstinacy and wrongdoing. Instead, miners should receive statutory rights training only from trainers who are independent of mine operators and Section 505 provides this necessary independence.

The additional training is necessary to inform miners of their statutory rights under the Act, which include, but are not limited to:

- Protection against discrimination for exercising any rights under the Mine Act
- How-to's of naming a miners' representative for the various functions a representative can serve under the Mine Act and its implementing regulations
- Participation in inspections
- Reporting and notifying inspectors of violations and imminent dangers, and requesting inspections
- Pay for being idled by withdrawal order
- Contesting enforcement actions
- Participation in investigations where dangerous conditions cannot be corrected with existing technology
- Review of imminent danger orders
- Participation in cases before Federal Mine Safety Health Review Commission that affect the miner
- Part 48 training rights, including:
    - Training during working hours
    - Pay while receiving training
    - Receiving training records from operator
    - Protection from discrimination and loss of pay for lack of training
    - Review of all types of Part 48 training plans
- Free examinations to ascertain exposure to toxic materials or harmful agents
- Request of Department of Health and Human Services to study/research substance in mine environment for toxicity, or whether physical agents/equipment within mine are dangerous
- Availability of chest x-rays free of charge, including explanation of intervals when such x-rays are to be made available
- Transfer to less dusty atmosphere upon black lung diagnosis
- Review and comment upon/objection to proposed standards, including legal challenges to proposed standards
- Request to modify application of a certain safety standard at a mine, and participation in MSHA's decision when operator requests such a modification
- Right to access information (recordings, findings, reports, citations, notices, orders, etc.) within MSHA and Department of Health and Human Resources
- Observation of operator's monitoring of miner's exposure to toxics and other harmful agents, and access to records of exposure and information about operator abatement in cases of overexposure

- Access to operator's accident records and reports
- Notice of MSHA proposed civil penalty levied against operator
- Operator posting of MSHA orders, citations, notices, etc., as well as receipt of same by miners' representative
- Review of roof control plan and instruction in revision to such plan
- Review of mine map illustrating roof falls
- Notification of and instruction on escape from area where ground failure prevents travel out of the section through the tailgate side of a longwall section
- Review of records of examinations and reports (pre-shift examinations, weekly examinations for hazardous conditions, weekly ventilation examinations, daily reports of mine foremen and assistant mine foremen)
- Review of records of electrical examinations and maps showing stationary electrical installations
- Review of underground mine maps
- Operator's notification of submission of new ventilation plan or revision to existing ventilation plan, review of existing ventilation plan, comment upon proposed ventilation plan and any proposed revisions, and instruction from operator on ventilation plan's provisions
- Review of records of examination of main mine fan
- Review of records of examination of methane monitors
- Review of records of torque/tension tests for roof bolts
- Review of records of tests of ATRS roof support/structural capacity
- Special instruction when rehabilitating areas with unsupported roof
- Operator posting of escapeway maps and notification of changes to escapeways
- Participation in escapeway drills
- Posting and explanation of procedures to follow when mining into inaccessible areas
- Review of records of diesel equipment fire suppression systems, fuel transportation units, and underground fuel storage facilities, as well as records of maintenance of diesel equipment and training records of those operating diesel equipment
- Review and comment upon emergency response plans
- Any other rights set forth in either statute or regulation

This additional training will highlight to miners that they are expected to exercise their statutory rights. A more informed and empowered miner workforce would decrease the odds that conditions in a mine could deteriorate to the point that a mine disaster could occur.

Authority to Mandate Additional Training

We support amending Section 115 of the Act to allow the Secretary to order additional training if a serious or fatal accident has occurred at the mine, the mine's accident and injury rates , citations or withdrawal orders are above average and if it would benefit the health and safety of miners at the mine. This is a common sense provision that allows training to be mandated when safety or health deficiencies have been proven at the mine.

Black Lung Medical Reports

Section 603 is a needed addition to the black lung benefits claims practice. Coal mine operators who are named as the responsible operator on a black lung claim (and the operator's insurance carrier) by law are allowed to require the miner to submit to two pulmonary evaluations performed by doctors of the operator's choosing. Such evaluations typically consist of obtaining a patient history, conducting a physical examination, and obtaining a pulmonary function test, an x-ray and an arterial blood gas test. In some cases operators defending against a claim have sent miners to be evaluated and have either not obtained a written report from the examining physician (after no doubt being informed verbally and deciding for litigation reasons not to have the report submitted in writing) or have obtained a report but not provided the complete report to the miner. The miner should be informed as to the complete results of the evaluation and the diagnoses and conclusions of the examining physician.

Thank you for your consideration of our comments. If we can answer any questions or provide further information please contact us. We truly appreciate your efforts on behalf of working and disabled miners and their families.

Sincerely,

Stephen A. Sanders
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cc: Hon. John Kline, Ranking Member

FOR IMMEDIATE RELEASE:
January 26, 2006

MSHA Fails to Collect Millions in Fines

SCORES OF KENTUCKY UNDERGROUND COAL MINES IGNORE CIVIL PENALTIES

by: Wes Addington

David G. Dye, the acting administrator of the Mine Safety and Health Administration (MSHA), testified before the U.S. Senate Subcommittee on Labor, Health and Human Services, and Education on Monday, January 23, 2005. Dye subsequently walked out of the hearing despite Sen. Arlen Specter's request for him to stay to listen to additional testimony and answer follow-up questions.

During the hearing, Dye noted that from 2000 to 2005, total citations and orders at coal mines increased by 18 percent and "significant and substantial" citations and orders increased by 11 percent. A "significant and substantial" violation is one that is reasonably likely to result in a serious injury. MSHA issued a press release following the hearing trumpeting Dye's comments about "MSHA's aggressive enforcement record."

However, issuing citations is only half of the enforcement procedure under federal law. The system of penalty assessment and collection is the other half. Federal regulations instruct that any mine that violates a mandatory health or safety regulation "shall be assessed a civil penalty." The regulations further explain that the purpose of these fines is not as punishment, but "to maximize the incentives for mine operators to prevent and correct hazardous conditions." Additionally, a purpose of the civil penalty regulations is "to assure the prompt and efficient processing and collection of penalties."

In a review of underground coal mines in Kentucky, MSHA has allowed mines to operate unimpeded for years while accumulating millions of dollars in unpaid fines. Of Kentucky's 297 underground coal mines that MSHA lists in some stage of activity, or not "abandoned," ninety-seven, or approximately one-third, have years in which they paid little to none of the fines MSHA imposed.* In the years reviewed since 1995, these mines have over 18,000 unpaid citations (over 8,000 of which were "significant and substantial") totaling over $4.1 million in unpaid fines. Fourteen mines have paid only 10 to 35 percent of MSHA's penalties. Thirty mines have paid less than 10 percent of the fines due and the remaining fifty-three mines have paid nothing.

In order to tout an "aggressive enforcement record," MSHA must collect fines on unpaid citations. Congress has long agreed. In their 1977 report leading to the passage of the current Federal Mine Safety and Health Act, the United States Senate "firmly believe[d] that the civil penalty is one of the most effective mechanisms for insuring lasting and meaningful compliance with the law." The Senate was "disturbed" by the lax enforcement of the civil penalty system and

concluded that "the assessment and [collection of] civil penalties. . . have resulted in penalties which are much too low, and paid much too long after the underlying violation to effectively induce meaningful operator compliance."

Unfortunately, nearly thirty years after the Senate's report and the 1977 Act, the payment of fines assessed by MSHA is still essentially voluntary. Otherwise, Kentucky coal mines would not be allowed to operate year after year, accumulating hundreds of unpaid "significant and substantial"citations. This problem is compounded because Kentucky mine safety regulators do not currently levy fines in conjunction with citations issued at the state level.

The Senate was correct. In order "to effectively induce compliance, the penalty must be paid by the operator in reasonably close time proximity to the occurrence of the underlying violation." Allowing penalty assessments to remain unpaid for over a decade is not reasonable. It's unacceptable.

MSHA's failure to enforce their penalties for safety violations not only endangers coal miners, but their own personnel. MSHA inspectors not only have to inspect the nation's safest mines, but also the nation's most dangerous ones. It's a thankless job. Every day, inspectors travel underground to spot unsafe conditions and issue citations and orders, and in turn, save miners' lives. Yet, after all of the work and risk from inspectors in each district office, MSHA Headquarters in Arlington, Va., allows thousands of citations to go unpaid. It's a slap in the face to coal miners and coal mine inspectors, not an "aggressive enforcement record."

Wes Addington is an attorney at the Appalachian Citizens Law Center's Mine Safety Project in Prestonsburg, Kentucky, and an Equal Justice Works Fellow.

# # #

* Because of the sheer volume of unpaid citations I encountered, only Kentucky underground coal mines that are currently listed as "active," "temporarily idled," "intermittent," currently "non-producing," or "new mine" were reviewed. There are also over 300 surface or "strip" mines and 150 coal facilities in Kentucky currently in these five stages that were not reviewed.

Over 12,000 Kentucky mines are currently listed as abandoned and were not reviewed. Some of these mines are truly abandoned but others could reopen at anytime. For example, an underground mine that has never paid any civil penalties, was operating in 2005, changed ownership, and is currently listed as abandoned.

This review did not take into account other states' coal mines, nor any of the non-coal mines that MSHA regulates in their metal/non-metal division. Currently there are 141 non-coal mines operating in Kentucky.

The review's sample only included mines that had a year or years in which they paid little or none of MSHA's fines. Thus, this is not an exhaustive review of unpaid citations in Kentucky's underground mines. Finally, MSHA's online Data Retrieval System only lists citations since 1995.