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Testimony before the
House Committee on Education and Labor on
**REDUCING THE GROWING BACKLOG OF CONTESTED MINE
SAFETY CASES**
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Hearing Room 2175
Rayburn House Office Building
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Thank you for this opportunity to appear before your 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 a significant role in advancing miners’ health and safety. I would like to express my appreciation to the leadership of this Committee for your efforts to protect and enhance the health and safety of all miners. Your continued oversight is critical to ensuring miners will go home safely at the end of their shift each and every day.

Today we are focusing on the difficulties confronting the Federal Mine Health and Safety Review Commission and the serious backlog of cases before the Commission. Neither the increased caseload, nor the Commission’s growing backlog, shows any signs of abating. In fact, unless immediate and significant remedial action is taken to address this problem, the Commission’s backlog will render meaningless many of the reforms Congress clearly intended to address with its passage of the MINER Act. This is because the higher penalty structure was intended to make penalties more meaningful, not just a cost of doing business.

So what do we do to correct this problem? If Congress wants to realize the full benefits that it intended with the enhanced penalty structure in the 2006 MINER Act, then the system must be re-aligned so that operators are not rewarded for routinely contesting citations and penalties, and the Commission must be adequately funded so that it can handle its caseload on a timely basis.

Since passage of the 2006 MINER Act, and the modified penalty structure it imposed for violations of Mine Health and Safety laws, the penalties MSHA assesses has increased significantly. Indeed, for 2006, MSHA assessed about \$35 million in penalties, while for 2009 assessed penalties rose to about \$141 million.

At the same time that the amount of assessed penalties increased, so did both the number and the rate of contested cases. Most of the increase is attributable to the coal industry, as opposed to metal/non-metal: for each of the five years immediately before the MINER Act

(2000-2005), only 5-7% of coal mine civil penalties lead to cases being contested before the Commission, whereas for the last three years (2007-2009), the rate has dramatically increased to 18%, 30% and 31%, respectively. While an increase in contested cases was anticipated based on the MSHA's improved enforcement and the higher penalty structure the MINER Act required, the scale of that increase exceeded those expectations.

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. However, those increased protections are being subverted by the huge contested rate that has overwhelmed the government's ability to deal with its caseload, and MSHA's practice of reducing assessments when operators contest them. While operators are entitled to their due process, we cannot accept the status quo whereby some operators continue to abuse the system such that the government is not able to effectively carry out the directives of the MINER Act. As it stands, miners' health and safety is adversely affected by the operators' high contested rates and the related backlog of cases at the Commission.

The existing system rewards operators that file contests. While this is not a new development, with the new and higher penalty structure, operators have increasingly availed themselves of the contest procedure as a means of reducing the costs attributable to their mine health and safety violations. This happens in many ways. One example is that when contested citations are tied up in the Commission backlog, there is delay to the enhanced penalties that are supposed to apply for repeat violations. While the intent was to motivate operators to NOT have repeat violations, instead they are able to avoid the higher penalties by delaying a final order that would show the repeat violation. Likewise, this Administration's willingness to utilize - for the first time - MSHA's powerful "pattern of violations" enforcement tool becomes frustrated when citations are caught up in the Commission's backlog. MSHA's determination that a mine has a "pattern of violations" carries much more serious consequences, and a mine must have an inspection free of S & S (significant and substantial) violations in order to get off of the "pattern." Again, having delay in the resolution of alleged violations diminishes MSHA's ability to use the full panoply of its enforcement tools. You must also recognize that many of these violations are quite serious - the kind of violations that have contributed to mine fires, explosions and the deaths of coal miners.

If MSHA would identify mines that might be subjected to higher penalties for repeat violations or for a "pattern," and the Commission would move these cases more quickly through a priority system, some of these incentives would be reduced. This, we would encourage.

Another problem is that when operators challenge MSHA citations and proposed penalty assessments, they routinely get their penalties reduced. This can occur at the MSHA "conference," as well as once a case is referred to litigation. And it's not because the citations were not valid in the first place, as some operators claim. Instead, the reductions generally occur because the mine inspector who issued the citation rarely can attend the conference to explain the

reason for the citations, leaving the conferencing officer with no first-hand knowledge of the conditions cited. The operators, on the other hand, regularly send their representatives to conferences to dispute the validity and gravity of the citations that were issued. As a result, conferencing officers frequently reduce or abate citations. That the underlying citations are generally valid is supported by trial results: for penalties related to S & S and unwarrantable failure citations - the two most common categories - that were litigated before a Commission ALJ in FY 2009, only 4-11% were dismissed or withdrawn.

If MSHA will re-instate the conference system it previously utilized, as we understand it is considering, we would encourage it to provide a better means for the inspectors to be able to support their citations, preferably with the inspector participating, too. We think it would also be helpful if an attorney from the Solicitor's Office would be assigned to work with conferencing officers to help them identify the litigation strengths and weaknesses before any adjustments would be made. Finally, to the extent there are agreements made at the conference level, it would be essential that any matters resolved at conference then be deemed fully and finally resolved. Settlement motions should be jointly submitted to the ALJs, instead of just by the Solicitor's office.

For cases not resolved at conference, penalties have often been further reduced: not only will the Solicitor's office offer to reduce the penalties in order to settle, but the Commission ALJs frequently reduce the proposed penalties. It is extraordinarily rare for an MSHA attorney to seek, or a Commission Judge to impose, penalties higher than MSHA's Office of Assessments initially recommend. Yet there is no reason why this shouldn't also occur when the facts support a higher assessment. This should happen when, for example, it turns out that more miners were actually exposed to the hazard, or the gravity was higher than the inspector initially indicated on the citation.

We have previously expressed concerns about the ability of mine operators to abuse the conference system, and our concerns about operator abuse have been validated insofar as the data shows that many operators request a conference for virtually every citation MSHA issues. And why shouldn't they? There is nothing to defer or penalize operators for doing so. In fact, internal company documents the Senate HELP Committee obtained during its investigation into the Crandall Canyon disaster established that Murray Energy purposely pursued such a strategy. From the contested rates of other operators, we believe that other companies are employing this same tactic, too. Accordingly, we supported MSHA's decision in early 2008 to stop routinely conferencing citations until after it assesses the penalty. Even without regular pre-penalty conferences, just some operators' action of routinely contesting citations and penalties constitutes the largest portion of the Commission's backlog.

As of August 2009, there were 688 penalty contests that have been pending for at least three (3) years, 877 penalty contests pending for between two (2) and three (3) years, 19,864 penalty contests pending for one (1) to two (2) years, and 42,122 that were filed within one year.

The Commission backlog has increased rapidly over the last few years. As the Commission's 2007-2012 Strategic Plan noted: the legislative and regulatory changes of the MINER Act were expected to increase the Commission's caseload. When that Strategic Plan was prepared, the Commission had already experienced a "dramatic rise in the number of contest cases,...and expect[ed] that its workload will increase significantly from prior years, thus making it more challenging to attain the Commission's goal of timely adjudication." Regrettably, although the increased caseload was both expected and realized, until this year the Commission did not attempt to increase its cadre of ALJs to handle its growing workload. While the Commission has had certain time-lines for processing its cases, those no longer bear any relationship to reality. However, getting timely resolution of these disputes is critical to miners' health and safety. One possible tool would be to adopt procedures like the OSHA Review Commission's "Simplified Proceedings;" we support having the Commission determine whether using such procedures would be appropriate for mine safety cases.

To address the immediate problem, many more Administrative Law Judges will be needed, along with support staff to maximize their efficiency. We are pleased that the FY10 budget included funding for 4 more ALJs, and that the President's FY 11 budget seeks funding for 18 ALJs. However, we firmly believe that still more will be needed to arrest and reverse the problem. Thus, we would recommend that the additional ALJs (and staff) be brought on as soon as possible through a supplemental authorization so the problem doesn't get much worse and completely out of hand.

Finally, with the increased rate of contested cases, MSHA also faces new challenges: it will need additional staff to prepare and defend its cases, both at conferences and at administrative hearings.

We applaud the significantly reduced rate of fatal accidents in the mining industry that distinguished 2009 from other recent years, as well as our more distant mining history. We also support the Obama administration's MSHA that is focusing on enhancing enforcement to reduce the accident rate even further. We now urge you to work with us to ensure that the enhanced penalty structure Congress provided in the MINER Act of 2006 is not frustrated, but utilized to further improve miners' health and safety.

Thank you for allowing us to address this important issue, and for your continued commitment to miners' health and safety.